

'YOU'RE NOT WELCOME HERE': POLICE MOVE-ON POWERS AND DISCRIMINATION LAW

TAMARA WALSH* AND MONICA TAYLOR**

I INTRODUCTION

Police move-on powers exist in most Australian States and Territories. They enable police to issue a direction to individuals and groups to move away from a certain public place for a certain period of time, in circumstances where they are about to commit an offence, are creating an obstruction, or are causing 'anxiety' to those around them. These powers are generally justified by police and government as being necessary to enable public spaces to be 'enjoyed peacefully by everyone' and to act as an alternative to arrest in circumstances where the situation could be effectively diffused without charges being laid.¹

Whilst there have been few empirical investigations undertaken on the topic of move-on powers, those that have, have invariably found that certain groups are more adversely affected by the exercise of police move-on powers than others.² As Robert Reiner has said:

In a society which is divided on class, ethnicity, gender and other dimensions of inequality, the impact of laws even if they are formulated and enforced quite impartially and universalistically will reproduce those social divisions.³

Empirical research has also demonstrated that the use of move-on powers does not result in fewer arrests for public space offences, despite police claims to the contrary.

The most significant investigation of the use of police move-on powers in Australia was conducted by the New South Wales Ombudsman in 1999.

* LLB, BSW (Hons1), PhD. Lecturer in Law, TC Beirne School of Law, University of Queensland.

** BA, LLB. Coordinator of the Queensland Public Interest Law Clearing House Inc. Homeless Persons' Legal Clinic, Brisbane. The authors wish to thank students from the TC Beirne School of Law, University of Queensland, for their research work throughout the course of this project: Megan Breen, Aroshana de Saram, Lindsay Nicholson, Hillary Nye, Marianna O'Gorman and Davina Wadley. The substantial report in which the results of this research are analysed, *No Where to Go: The Impact of Police Move-On Powers on Homeless People in Queensland*, 2006, is available at <www.rips.asn.au> at 14 May 2007.

1 Judy Spence MP, 'Move-on Powers for all Public Spaces in Queensland' (Press Release, 21 April 2006); Judy Spence MP, 'Police Move-on Directions Explained' (Paper presented at the ALP Forum, 22 March 2006); Russell Cooper MP, *Queensland Parliamentary Hansard*, 19 November 1997, 4393.

2 See generally New South Wales Ombudsman, *Policing Public Safety*, 1999; Paul Spooner, 'Moving in the Wrong Direction: An Analysis of Police Move-on Powers in Queensland' (2001) 20(1) *Youth Studies Australia* 27.

3 Robert Reiner, *The Politics of the Police* (2nd ed, 1992) 3.

Combining statistical evidence and data obtained through interviews and focus groups, the report concluded that young people and Indigenous people are more likely to be moved on than other community members. Indeed, of the 14 455 move-on directions issued over the one year review period, 22 per cent were issued to Indigenous people (an over-representation of 11 times) and just over half were issued to young people aged 14 to 19 years.⁴ The New South Wales Ombudsman also noted that in a number of instances, the move-on power was being used to deal with behaviours associated with homelessness, such as begging and sleeping out.⁵ Further, it was found that as the use of the move-on power increased in frequency, so did the number of charges for public space offences.⁶

Similarly, in his study on the use of move-on powers amongst young people in Queensland, Paul Spooner found that Indigenous young people were significantly more likely to be moved on than non-Indigenous young people.⁷

In addition to these empirical findings, there is a significant body of anecdotal evidence from service providers and peak bodies suggesting that young people, Indigenous people and people who are homeless are more likely to be moved on than other community members.⁸ A number of government inquiries and reports have found such observations to be reliable, and have expressed grave concerns regarding the introduction, retention or expansion of move-on powers on this basis.⁹

The differential impact of police move-on powers on certain vulnerable groups would appear to represent a serious human rights violation, however, Australia does not have a Bill of Rights and therefore vulnerable people are not entitled to the types of protection that one might afford. The only recourse such persons might have is through anti-discrimination legislation; indeed, the right to freedom from discrimination (under certain circumstances) is one of the only statutory rights Australians have the benefit of.¹⁰

4 See New South Wales Ombudsman, above n 2, 225, 227-28.

5 Ibid 252, 258-59.

6 Ibid 238.

7 Spooner, above n 2, 30.

8 ACT Council of Social Service, *Comment on the Standing Committee on Legal Affairs' Inquiry into Police Powers and Crowd Control* (2005); Victorian Aboriginal Legal Service Co-operative Ltd, *Submission to Crime Prevention Victoria in response to: 'A Good Night for All' – Options for Improving Safety and Amenity in Inner City Entertainment Precincts Discussion Paper* (3 May 2005); Monica Taylor, 'Moving-On Homelessness: The Impact of Police Move-On Powers in Public Space' (2006) 19(1) *Parity* 60; Rights in Public Space Action Group ('RIPS'), 'Beattie Shoots Labor in the Foot: Legislation Introducing Statewide Move-on Powers Condemned By Community Legal Groups' (Press Release, 21 April 2006).

9 See, eg. Queensland Criminal Justice Commission, *Report on a Review of Police Powers in Queensland Volume III* (1993) 650; Parliamentary Criminal Justice Committee, Parliament of Queensland, *Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I-III* (1994) 284; Australian Capital Territory Community Law Reform Committee, *Street Offences*, Report No 15 (1997) 24.

10 The right to administrative justice or procedural fairness in the course of executive decision-making may be an exception, although recent history has shown that even this right is capable of being trumped; see *Corrective Services Act 2006* (Qld) ss 17, 71 which explicitly remove from prisoners the right to judicial review of transfer and classification decisions.

This paper will analyse recent trends in police powers and practices related to move-on, and will examine the differences between the move-on powers that exist in the various Australian jurisdictions. It will report on the results of an empirical study undertaken in inner-city Brisbane which examined the impact of police move-on powers on people who are homeless. It will then examine whether the powers themselves, or their enforcement against certain groups, might amount to a contravention of anti-discrimination law.

II TRENDS IN POLICING: THE CRIMINALISATION OF HOMELESSNESS

Police regularly request people to move away from particular places, or to abstain from engaging in certain activities. Sometimes, these orders are given in an informal manner, in the course of their 'beat' duties, without resort to any particular legislative power.¹¹ Statistics on just how frequently such informal directions are given are unavailable, however empirical research conducted amongst people experiencing poverty in Queensland in 2006 suggested that police officers often direct people in public space to do certain things, or to refrain from engaging in certain activities, without resort to any particular police power.¹² In that study, respondents alleged that they regularly received a range of informal directions from police; for example, some respondents were ordered not to sleep in certain places, not to return to certain areas of the city, and even not to wear particular items of clothing in the city.¹³

On other occasions, police officers make use of their formal powers to issue move-on directions, as a means of giving the order some 'teeth' and ensuring that it is complied with.¹⁴ In Queensland, the key provisions are ss 46, 47 and 48 of the *Police Powers and Responsibilities Act 2000* (Qld). They state (inter alia):

46 When power applies to behaviour

- (1) A police officer may exercise a power under section 48 in relation to a person at or near a regulated place if a police officer reasonably suspects the person's behaviour is or has been –
 - (a) causing anxiety to a person entering, at or leaving the place, reasonably arising in all the circumstances; or
 - (b) interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place; or
 - (c) disorderly, indecent, offensive, or threatening to someone entering, at or leaving the place; or
 - (d) disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place ...

11 Spooner, above n 2, 27; New South Wales Ombudsman, above n 2, 241. For a reflective examination of this, see Reiner, above n 3, 107-09.

12 See Tamara Walsh, *No Vagrancy: An Examination of the Impact of the Criminal Justice System on People Living in Poverty in Queensland* (2007).

13 Ibid.

14 See Spooner, above n 2; NSW Ombudsman, above n 2, 241.

47 When power applies to a person's presence

- (1) A police officer may exercise a power under section 48 in relation to a person at or near a regulated place if a police officer reasonably suspects the person's presence is or has been –
 - (a) causing anxiety to a person entering, at, or leaving the place, reasonably arising in all the circumstances; or
 - (b) interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place; or
 - (c) disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place ...

48 Direction may be given to person

- (1) A police officer may give to a person or group of persons doing a relevant act any direction that is reasonable in the circumstances.
- (2) However, a police officer must not give a direction under subsection (1) that interferes with a person's right of peaceful assembly unless it is reasonably necessary in the interests of –
 - (a) public safety; or
 - (b) public order; or
 - (c) the protection of the rights and freedoms of other persons.
- (3) Without limiting subsection (1), a direction may require a person to do 1 of the following –
 - (a) leave the regulated place and not return or be within the regulated place within a stated reasonable time of not more than 24 hours;
 - (b) leave a stated part of the regulated place and not return or be within the stated part of the regulated place within a stated reasonable time of not more than 24 hours;
 - (c) move from a particular location at or near the regulated place for a stated reasonable distance, in a stated direction, and not return or be within the stated distance from the place within a stated reasonable time of not more than 24 hours.
- (4) The police officer must tell the person or group of persons the reasons for giving the direction.

Recent research suggests that move-on powers are frequently used by police in tandem with other police powers; particularly their powers to conduct a personal search and to seize certain items of property.¹⁵ A move-on direction is often accompanied by an arrest for obstructing or assaulting police, public nuisance, or failing to follow the direction.¹⁶

In April 2006, the Queensland Police Minister announced the tabling of a Bill in Parliament to expand move-on powers to all public places in Queensland.¹⁷ At that time, under the *Police Powers and Responsibilities Act 2000* (Qld), police

15 Walsh, above n 12.

16 Ibid.

17 See Spence, 'Move-on Powers for all Public Spaces in Queensland', above n 1.

officers could only issue move-on directions at specified locations: shops, malls, childcare centres, preschools, schools, licensed premises, railway stations, ATMs and other 'notified areas' which were those areas that local councils had applied to have added to the list, and had been approved by the Minister.¹⁸ An application from the Brisbane City Council in early 2006 to add significantly to Brisbane's existing notified areas sparked the reforms. The Ministerial approval process was perceived by those involved to be inordinately bureaucratic and time consuming, with its requirements for community consultation, acceptance of external submissions and cumbersome report writing. It seemed easier for all concerned if the process was abolished, and so it was, without any formal community consultation.¹⁹ This is despite the fact that the approval process was incorporated into the legislation in the first instance as a deliberate safeguard for public space users.²⁰

At the time, it was generally agreed amongst those working in the community and community legal sectors that the expansion of move-on powers throughout Queensland would result in an increase in the number of marginalised public space users being moved away from areas frequented by them, and subsequently that more marginalised people would be liable to be charged with failing to follow a police direction.²¹ Further, this expansion of the move-on powers represented the latest in a growing trend towards the broadening of police powers generally in Queensland. In 2003, police powers to search individuals suspected of being in possession of volatile substances, and to seize items used for volatile substance misuse, were expanded.²² In 2003, the offence of 'public nuisance' was introduced, which effectively made it unlawful to engage in any conduct that could possibly be construed as annoying or undesirable; indeed, people charged with this new offence have included those who were waving their arms around in public, shouting in public, and even vomiting in public.²³ In 2006, the powers of police to search both persons and vehicles without a warrant in cases of

18 See *Police Powers and Responsibilities Act 2000* (Qld) sch 4; *Police Powers and Responsibilities Regulation 2000* (Qld) pt 2, now repealed.

19 Notably, despite the fact that the majority of public submissions received in relation to the Brisbane City Council application were opposed to the proposed expansion of the move-on powers, the Minister provided her approval; see Jennifer Dudley, 'Move-on laws to go ahead', *Courier Mail*, (Brisbane), 21 November 2005, 5.

20 Indeed, in its review on police powers prior to the introduction of the move-on power, the Criminal Justice Commission recommended against a general move-on power (see Queensland Criminal Justice Commission, above n 9, 649). The Parliamentary Criminal Justice Committee also recommended against a general move-on power, but supported the introduction of a restricted power that could only be used under certain circumstances and in certain places (see Queensland Criminal Justice Committee, above n 9, 285-86).

21 See, eg. Taylor, above n 8; RIPS, above n 8. It should be noted, however, that one community service provider spoke out in support of police move-on powers on the basis that they allow for violent and threatening behaviour perpetrated on people who are homeless to be curbed. This hints at the level of disagreement that exists amongst homeless people themselves on the topic of move-on powers, a theme which emerged from the study reported on here.

22 *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld).

23 *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld); see Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24(1) *University of Queensland Law Journal* 123.

suspected wilful damage were increased.²⁴ Empirical research over the past three years has shown that people experiencing homelessness are more likely than other members of the population to be impacted by these laws.²⁵

Of course, the prolific nature of the ‘tough on crime, tough on the causes of crime’ approach to law and order is well-documented,²⁶ and the associated trend towards increasing police powers on the street is clearly observable at an international level. For example, in the UK, police were given the power to make ‘anti-social behaviour orders’ (‘ASBOs’) in 1999, to deter anti-social behaviour and to prevent its escalation into more serious criminal behaviour.²⁷ These orders can be given to anyone over the age of 10 who acts in ‘a manner that caused, or was likely to cause, harassment, alarm or distress to one or more persons’. As is often the case with police move-on powers, the Home Office claims that ASBOs were designed to complement existing police powers to deal with ‘undesirable’ behaviour; that they were not intended to act as a criminal penalty but rather to prevent offences from being committed.²⁸ Yet, it is well-established that ASBOs are more likely to be issued to disadvantaged people, particularly those who are young and/or homeless, and are ultimately likely to eventuate in charges being laid.²⁹

Further, in the US, the National Law Centre on Homelessness and Poverty recently observed that the number of city ordinances targeted at reducing loitering, sleeping and sitting in public spaces has increased by up to 14 per cent since 2002.³⁰ This is despite the fact that some US courts have found such laws to contravene homeless persons’ Eighth Amendment right to be free from cruel and unusual punishment; courts have reasoned that if a homeless person is sleeping outside because they have no other shelter to retreat to, arresting them for such conduct is a serious violation of their civil rights.³¹ Further, US courts have found such laws to be in violation of the due process clause of the Fourteenth

24 *Police Powers and Responsibilities and Other Legislation Amendment Act 2006* (Qld) ss 5, 6, 7.

25 See Walsh, above n 23; Tamara Walsh, ‘Won’t Pay or can’t Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland’ (2005) 17(2) *Current Issues in Criminal Justice* 217; Legal Aid Queensland, *Homelessness and Street Offences Project: Final Report* (2005).

26 See Robert Reiner, ‘Crime and Control in Britain’ (2000) 34 *Sociology* 71 in the UK; Michael Tonry and David Farrington (eds), *Building a Safer Society: Strategic Approaches to Crime Prevention* (1995) in the US; Russell Hogg and David Brown, *Rethinking Law and Order* (1998) in Australia.

27 *Crime and Disorder Act 1998* (UK); *Anti-social Behaviour Act 2003* (UK); *Criminal Justice Act 2003* (UK).

28 Siobhan Campbell, *A Review of Anti-social Behaviour Orders: Home Office Research Study 236* (2002).

29 See Lesley McAra and Susan McVie, ‘The Usual Suspects? Street-life, Young People and the Police’ (2005) 5(1) *Criminal Justice*, 5, 11; Stuart MacDonald, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of “Anti-social Behaviour”’ (2006) 69(2) *Modern Law Review* 183, 201; Andrew Ashworth, John Gardner, Rod Morgan, Tony Smith, Andrew von Hirsch and Martin Wasik, ‘Neighbouring on the Oppressive: The Government’s “Anti-Social Behaviour Order” Proposals’ (1998) 16(1) *Criminal Justice* 7.

30 The National Coalition for the Homeless and the National Law Centre, ‘A Dream Denied: The Criminalization of Homelessness in US Cities’ (2006) 9.

31 See, eg, *Pottinger v Miami* 810 F Supp 1551 (1992).

Amendment for being unconstitutionally vague.³² The US Supreme Court has held that a law is unconstitutional due to vagueness if it does not give a person sufficient notice of prohibited conduct and encourages arbitrary police enforcement. Arguably, many US laws similar to the Queensland move-on power are unconstitutional under this reasoning.³³

The trend both in Australia and overseas is towards police powers being continually expanded. This provides extraordinary scope for 'police culture to shape police practice'³⁴ and allows for the 'dominant conceptions of public order' to be enforced,³⁵ even if that ultimately results in the criminalisation of certain disadvantaged groups.

III MOVE-ON POWERS IN AUSTRALIA

Formal move-on powers, and their equivalents, exist in all Australian States and Territories, with the exception of Victoria.³⁶ While each of the powers has a different name, their purpose is the same: to allow police to issue enforceable directions to persons (both individuals and groups) in public places to move away, or 'disperse', from a particular area. Yet, the antecedent circumstances required before the power can be used, the degree of discretion provided to police officers, and the types of directions that can be given, vary between jurisdictions. Ultimately, the various powers differ on three key bases: the degree of seriousness of conduct required before the power can be used, including whether a person's mere presence is sufficient to justify the use of the power; the nature of the direction that may be given; and the consequences of contravening the order, including the maximum penalty that can be imposed for contravention, whether a defence of reasonable excuse is available, and whether any additional safeguards against arbitrariness exist.

A Nature of Conduct that can Trigger a Move-on Direction

There is a broad spectrum of conduct that can trigger the use of move-on powers across Australia. At the most restrictive end of this spectrum, the Australian Capital Territory move-on power can only be used by police when a person has engaged, or is likely to engage, in violent conduct in a public place.

32 See, eg, *Papachristou v City of Jacksonville* 405 US 156 (1972); *Ledford v State* 652 So 2d 1254 (Fla Dist Ct App, 1995).

33 See Helen Hershkoff and Adam Cohen, 'Begging to Differ: The First Amendment and the Right to Beg' (1991) 104 *Harvard Law Review* 896; Donald Baker, "'Anti-Homeless' Legislation: Unconstitutional Efforts to Punish the Homeless' (1990-1991) 45 *University of Miami Law Review* 417; Maria Foscarinis, 'Homelessness, Litigation and Law Reform Strategies: A United States Perspective' (2004) 10(2) *Australian Journal of Human Rights* 105.

34 Reiner, above n 3, 107-08.

35 *Ibid* 2.

36 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 14 (power to give reasonable directions in public places); *Police Powers and Responsibilities Act 2000* (Qld) pt 5 (power to give a direction to move-on); *Summary Offences Act 1953* (SA) s 18 (power to give an order to move-on or disperse); *Police Act 1892* (WA) s 50 (power to order suspects and others to move-on); *Summary Offences Act* (NT) s 47A (powers to direct a person to cease loitering); *Police Offences Act 1935* (Tas) s 15B (power to disperse); *Crime Prevention Powers Act 1998* (ACT) s 4 (move-on power).

At the middle of the spectrum sit South Australia, Western Australia and Tasmania, where a move-on direction can be given in circumstances where an offence has been or is likely to be committed, or where the safety of a person in the vicinity is threatened, but also where a person is causing an obstruction and where a breach of the peace is likely to occur. At the most permissive end of the spectrum, police in New South Wales, Queensland and the Northern Territory can issue a move-on direction in an extremely wide range of circumstances, including where a person's mere presence could cause anxiety to another person, or interfere with another's 'reasonable enjoyment' of the space. Further, in New South Wales, the powers are explicitly stated to apply to persons who are reasonably believed to be unlawfully supplying or purchasing a prohibited drug (or are intending to do so).³⁷ And in Queensland, the power is said specifically to apply to persons reasonably suspected of soliciting for prostitution.³⁸

B The Kinds of Directions That Can Be Given

Some jurisdictions specify that only certain move-on options are available to police officers. While most jurisdictions provide a general power to order people to move away from or leave a particular area, cease loitering, or disperse,³⁹ some prescribe an amount of time that a person can be moved away from an area for. In Queensland and Western Australia, a person can be moved away from an area for up to 24 hours,⁴⁰ while in the Australian Capital Territory, a person can only be moved away from an area for a maximum of six hours.⁴¹ In Tasmania, a minimum period of four hours is prescribed.⁴²

In addition to this, some jurisdictions specify the nature of the direction that may be given. For example, in New South Wales, any direction given must be reasonable in the circumstances to achieve a particular legislative aim, that is, to reduce or eliminate the obstruction, harassment, intimidation or fear, or to prevent the person from supplying or obtaining a prohibited drug.⁴³ In Queensland, the legislation states that the direction must be reasonable in the circumstances, but provides no further guidance apart from some (non-binding) examples in the notes.⁴⁴

37 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197(1)(d) and (e).

38 It has been observed that police officers in NSW move-on persons suspected of soliciting for prostitution as well as suspected clients, despite the lack of an explicit power to do so; NSW Ombudsman, above n 2, 269.

39 *Summary Offences Act 1953* (SA) s 18(1); *Police Act 1892* (WA) s 50(2)(a); *Summary Offences Act* (NT) s 47A(1); *Police Offences Act 1935* (Tas) s 15B(1); *Crime Prevention Powers Act 1998* (ACT) s 4(2).

40 *Police Powers and Responsibilities Act 2000* (Qld) s 48(3); *Police Act 1892* (WA) s 50(2)(b).

41 *Crime Prevention Powers Act 1998* (ACT) s 4(3)(b).

42 *Police Offences Act 1935* (Tas) s 15B(1).

43 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 198(1).

44 *Police Powers and Responsibilities Act 2000* (Qld) s 48(1).

C Consequences of Contravening a Direction

Penalties for contravention of a move-on direction differ widely between jurisdictions, ranging from a maximum fine of \$200⁴⁵ to a maximum fine of \$12 000 or 12 months imprisonment.⁴⁶ In most jurisdictions, a defence of reasonable excuse is available to persons who fail to comply with a move-on direction.⁴⁷ In others, the legislation specifically states that the powers can not be used in certain circumstances, for example to disperse protests, demonstrations or other organised assemblies,⁴⁸ or otherwise where fundamental rights such as free speech⁴⁹ or peaceful assembly⁵⁰ would be contravened.

The New South Wales power, while broad in scope, contains the most protections for public space users. For example, the Act explicitly states that if a person ceases to engage in the conduct that attracted the direction in the first place, they are not guilty of failing to comply with the direction if they do not move-on.⁵¹ Further, in both New South Wales⁵² and Queensland,⁵³ police officers are required to provide the person or group with reasons for giving the direction. The Western Australia power contains an additional safeguard: that the direction must be given to the person in writing, in an approved form.⁵⁴

IV THE USE OF POLICE MOVE-ON POWERS IN BRISBANE, QUEENSLAND: AN EMPIRICAL STUDY

To investigate the current impact of move-on powers on people experiencing homelessness, and the potential impact of their expansion, the Brisbane Homeless Persons' Legal Clinic, a project of the Queensland Public Interest Law Clearing House Inc. ('the Clinic'), and the TC Beirne School of Law at the

45 In Tasmania (see *Police Offences Act 1935* (Tas) s 15B(2) and *Penalty Units and Other Penalties Act 1987* (Tas) s 4 for the definition of 'penalty unit') and the ACT (see *Crime Prevention Powers Act 1998* (ACT) s 4(4) and the *Legislation Act 2001* (ACT) s 133 for the definition of 'penalty unit'). In NSW, the maximum fine amount is \$220 (*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199(1) and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17 for the definition of 'penalty unit').

46 In Western Australia (*Police Act 1892* (WA) s 50(6)). Other jurisdictions lie in between: the maximum penalty in Queensland is a \$3000 fine (*Police Powers and Responsibilities Act 2000* (Qld) s 445 and *Penalties and Sentences Act 1992* (Qld) s 5 for the definition of 'penalty unit'), the maximum penalty in South Australia is a \$1250 fine or three months imprisonment (*Summary Offences Act 1953* (SA) s 18(2)), and the maximum penalty in the Northern Territory is a \$2000 fine, six months imprisonment, or both (*Summary Offences Act* (NT) s 47A(2)).

47 NSW (*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199(1)), Western Australia (*Police Act 1892* (WA) s 50(6)) and the ACT (*Crime Prevention Powers Act 1998* (ACT) s 4(4)) all have a reasonable excuse defence. In the Northern Territory, the 'defence' is framed differently – a person can only be issued with a move-on direction where they have failed to 'give a satisfactory account of himself [sic] when requested to do so' (*Summary Offences Act* (NT) s 47A(1)).

48 See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 200; *Police Powers and Responsibilities Act 2000* (Qld) s 48(2); *Crime Prevention Powers Act 1998* (ACT) s 4(5).

49 *Crime Prevention Powers Act 1998* (ACT) s 4(5).

50 *Police Powers and Responsibilities Act 2000* (Qld) s 39(2).

51 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199(2).

52 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 201(1)(c).

53 *Police Powers and Responsibilities Act 2000* (Qld) s 48(4).

54 *Police Act 1892* (WA) s 50(5)(a).

University of Queensland, collaborated to design a research project that would collect and examine the views and experiences of marginalised public space users on the use of police move-on powers in inner-city Brisbane.

A survey of people accessing several key homelessness services in Brisbane's inner-city was undertaken in early 2006. The survey instrument contained questions of a demographic nature, as well as a number of open-ended questions regarding respondents' experiences with and reflections on move-on powers. Both qualitative and quantitative data was yielded.

The survey was administered by six law students from the University of Queensland, as well as the Clinic coordinator. They attended 11 of Brisbane's largest homelessness services over a 12 week period and invited those homeless persons present at the service to participate; a response rate of around 80 per cent was achieved.⁵⁵

A Results

A total of 132 responses were obtained. Of these, 81 per cent of respondents were male, 17 per cent were female and 2 per cent did not indicate their gender. Around one quarter (23 per cent) of the respondents identified as Indigenous, including 23 male respondents and eight female respondents. Respondents were most likely to be aged between 25 and 45 years (45 per cent). A further 21 per cent were aged between 46 and 55. Eleven respondents (8 per cent) were aged between 56 and 65 years, and 23 per cent (n=30) of respondents were young people (aged 24 years or younger). Only one respondent said they were aged less than 16 years, and only one respondent said they were 65 years of age or older.

The majority (85 per cent) of respondents were either homeless or at risk of homelessness.⁵⁶ These respondents were most likely to be sleeping rough (33 per cent) or in a boarding house (23 per cent); a further 8 per cent were living in emergency hostels, 8 per cent were living rent-free with friends, 7 per cent were living in a squat, and 6 per cent reported their housing situation to be 'other' than these.⁵⁷ Of the remaining 15 per cent of respondents, 8 per cent were living in private rental accommodation and 7 per cent were living in public housing.

Of the 132 people surveyed, 101 (77 per cent) reported that they had been moved on by police within the last six months. Those who were sleeping rough, living in squats or living with friends rent-free were most likely to have been asked to move-on: around 90 per cent of these respondents reported that they had been moved on within the last six months. Around two thirds of those living in boarding houses and public housing reported that they had been moved on in the

55 Unfortunately, the response rate cannot be more accurately stated, owing to the 'accidental' nature of the sampling method used, and the necessary informality of interactions with potential participants at the services.

56 That is, according to the most widely accepted definition of homelessness in Australia, the Chamberlain and MacKenzie definition of homelessness; see especially Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27(4) *Australian Journal of Social Issues* 274; Chris Chamberlain and David MacKenzie, 'Counting the Homeless 2001', (Research Paper No 2050.0, Australian Bureau of Statistics, 2003) 11-12.

57 Examples included living in a hotel/motel or caravan.

last six months, and around half of those living in emergency hostels and private accommodation said they had been moved on in the last six months.

Of the 30 respondents aged 24 years and under, 29 reported that they had been moved on in the last six months; the remaining respondent had been in prison for the last six months, and so could not possibly have been moved on during that time. Almost half of the young people surveyed (45 per cent) stated that they were sleeping rough or in a squat at the time they were asked to move-on. A smaller proportion (24 per cent) were living in a boarding house or staying rent free with their friends (14 per cent). One young person was living with her parents, two young people were living in public housing and another two were in private rental situations. Young people actually living on the streets were therefore subject to move-on directions more often than those who resided in some form of accommodation.

When asked of the circumstances in which they were moved on, 78 per cent of respondents reported that their behaviour at the time was innocuous. Respondents were most likely to report that they were sitting or waiting (36 per cent) or sleeping/camping out (16 per cent) when they were moved on. Others stated that they were simply standing or walking (14 per cent) or 'doing nothing' (7 per cent) at the time. Only 21 per cent of respondents who reported being moved on said that they were engaging in behaviour that may legitimately have attracted police attention. Some (13 per cent) said that they were drinking alcohol at the time, but not engaging in disorderly or disruptive behaviour. A few (3 per cent) said they were chroming or taking drugs; 3 per cent said they were selling books, magazines or other merchandise; and 2 per cent said they were begging. Three per cent of respondents said they were engaging in unruly behaviour (for example, being noisy, playing football) at the time they were moved on, but *none* of the respondents reported that they were engaging in any violent or threatening conduct.

Table 1: Behaviours antecedent to the issuing of a move-on direction amongst respondents who had been moved on in the last six months (n=101)

Nature of behaviour	Frequency (per cent)
Innocuous behaviour	78 per cent
<i>Sitting/waiting</i>	36 per cent
<i>Sleeping/camping out</i>	16 per cent
<i>Standing/walking</i>	14 per cent
<i>Doing nothing</i>	7 per cent
<i>Other</i>	5 per cent
Behaviour that might attract police attention but was not disorderly or disruptive	21 per cent
<i>Drinking alcohol</i>	13 per cent
<i>Taking drugs or chroming</i>	3 per cent
<i>Selling merchandise</i>	3 per cent
<i>Begging</i>	2 per cent
Behaviour that was unruly but not violent or threatening	3 per cent

Respondents were also asked for details regarding the nature of the direction that was issued to them. When asked where they were moved on to, the vast majority of respondents (86 per cent) said they were not directed to go to any particular place. Around 10 per cent of those who had been moved on stated that they were directed to move to a particular place, usually another park, street or suburb. Notably, many of these areas were, at the time, other notified areas from which the person may have been moved on from. Two respondents (2 per cent) were told to ‘go home’, one (1 per cent) was directed to a welfare service and two (2 per cent) did not answer the question.

Of some concern is the fact that nine respondents reported that they were told to move away from a particular area for a period of time that exceeded the statutory limit of 24 hours. They were told either not to come back at all, or to stay away for a couple of days, a week or a month. While these nine respondents comprise only 9 per cent of those who reported being moved on in the last six months, only 48 respondents answered this particular question; thus, a total of 19 per cent of those who answered the question reported that the direction they received did not comply with the legislated time limits.

The reported rate of compliance with move-on orders was reasonably high. Most respondents (71 per cent) reported that they complied with the direction. A further 12 per cent said they acted in a compliant manner, but in fact did not move-on as directed, presumably because the situation diffused. Only six (6 per cent) of respondents reported that they openly opposed the move-on direction. Of these, two said they argued with the police officer about the direction but were not charged; one said he was taken to the police station but later released; two said they were charged for failing to follow the direction; and one claimed he was assaulted by the police officer. Seven per cent of respondents who had been

moved on in the last six months were unable to recall what happened after the direction was issued.

When asked what they thought about move-on powers, 66 per cent of respondents said they should not exist because they were applied in an unfair or discriminatory manner. However, a substantial proportion of respondents (27 per cent) said that they favoured the existence of move-on powers, and supported their use to protect public space users' safety and security (including their own). Four per cent of respondents said they saw no problem with the powers; two per cent of respondents said they were not necessarily opposed to their existence, but that they should be used less or their use should be reviewed; and two per cent did not answer the question.

Respondents made some revealing qualitative remarks regarding the use of police move-on powers. The key theme borne out in these comments was 'discrimination'; many respondents reported feeling discriminated against by police in the use of their move-on powers. One young person said, 'I am doing nothing wrong and I am told to move-on. Someone else may be messing about and we all get in trouble'. Another respondent said 'People get moved on depending on who they are'.

Indigenous respondents in particular raised this as an issue. One said: 'As soon as police see that I am black, they think I am a threat to them'. Another said 'People who are dressed up do drugs and drink worse than black people, and we get told to move-on. It's a stereotype thing'. Still another said 'It's the way they look at you. If you're dark with a bag you get picked out of the crowd'. Indeed, a young Sri Lankan respondent agreed: 'The police said "you're not welcome here". The [Fortitude] Valley police are a huge problem – racist – they pick on black people, including me. I'm not Aboriginal but I have dark skin'.

Other respondents alleged that the level of police discrimination against them constituted harassment. One young respondent said: 'I feel like I can't go anywhere or do anything'. Another young person stated that after being woken up and moved-on about four times in one night, 'I have to walk around for ages trying to find somewhere else safe enough to get back to sleep. Police abuse their rights and took away ours'. One respondent remarked 'When they [the police] have nothing else to do, they come up to us and say if we are there next time they will arrest us'. An Indigenous respondent said 'I see the police every day. I just want to go down to Musgrave Park and gather with the black people and all I see is police. It's as if they have nothing better to do ... they should go arrest criminals'.

Respondents commonly expressed their despair at the level of police discrimination perpetrated against them. One Indigenous respondent said: 'They got the uniform, they got the law, we got no law anymore'. Another respondent remarked 'We are running out of space – there is not enough space, no where to go. That's why a lot of homeless people end up in detention'. Along similar lines, one respondent said 'They should come up with ideas as to where we can go instead of just making us move-on. It makes matters worse – we can get moved on from place to place ... some cops chase you around'. Yet another respondent said 'They make me feel less of a citizen. I can't hang around my own state – my

own Brisbane. If we can't live here, where are we supposed to go? We can't afford to move'.

Perhaps most poignant was this remark: 'We have no money, no food, no nothing. Let the Ministers and the police experience that for one day to get a dose of reality'.

B Summary of Findings

This piece of empirical research suggests high levels of police harassment and interference in the lives of people experiencing homelessness, particularly those who are young and/or Indigenous. While the limits of self-report studies must be acknowledged (including the possibility that respondents may be reluctant to admit to engaging in unlawful activity), it is of serious concern that the research suggests that, at times, police use their move-on powers in a manner which breaches the legislation.

Yet, it seems that a substantial proportion of people experiencing homelessness support the existence of the powers in principle; a number of homeless respondents to this survey noted that the powers can be used to protect, as well as to pursue, them. This finding is consistent with past research which suggests that people experiencing homelessness are more likely to be victims of crime than perpetrators, and are therefore just as in need of the protections that the law affords as other 'legitimate' public space users.⁵⁸

What is, perhaps, of most concern is that many respondents reported being discriminated against by police on the basis of particular (immutable) attributes such as age and race. The remainder of this article will discuss the extent to which respondents' allegations of police discrimination in the use of their move-on powers are valid, in a legal sense.

V MOVE-ON AND ANTI-DISCRIMINATION LAW

A Applicability of Anti-discrimination Law to the Policing of People Experiencing Homelessness

It seems clear that move-on powers have a substantial impact on certain vulnerable groups, particularly homeless people, young people and Indigenous people. Yet it is often difficult to prove that a police officer's use of their move-on power was unlawful in any individual circumstance. Of course, as noted above, the research results demonstrate that, on some occasions at least, police officers' use of the power is in clear breach of the provisions, for example, where individuals are directed to move away from a certain area for a period longer than 24 hours, and when a police officer fails to provide the person with reasons for the move-on direction. However, in circumstances where a move-on direction is issued on the basis of stereotyped views regarding what a person *might* do, a police officer may still be capable of maintaining that they were acting in accordance with the legislation, due to the broad and vague manner in which the

58 See Tamara Walsh, 'The Overruled Underclass: The Impact of the Law on Queensland's Homeless People' (2005) 28(1) *University of New South Wales Law Journal* 122, 139.

powers have been framed. The ensuing discussion seeks to examine whether discrimination law may offer such individuals an avenue for recourse.

In Australia, not all 'discrimination' is unlawful. In order to found a claim of unlawful discrimination, the differential treatment alleged must be held to be 'because of' a characteristic (or 'attribute') that is protected under the legislation, and it must occur in the course of a 'protected activity' (including the provision of goods and services, education and employment settings).

Homelessness is not a protected attribute under discrimination law in any jurisdiction in Australia.⁵⁹ However, both age and race are protected under generic anti-discrimination Acts in all Australian States and Territories⁶⁰ and at the federal level in separate Acts.⁶¹ A claim of discrimination may well be capable of being made on the basis of these protected attributes. The question then becomes: Is 'policing' a protected area of activity?

The applicability of anti-discrimination law in the context of policing was considered in the recent case of *Budd v State of New South Wales*.⁶² In that case, the applicant alleged that she had been treated less favourably on the basis of her psychiatric disability by police officers in the course of their criminal investigations. The New South Wales Anti-Discrimination Tribunal, and the Supreme Court on appeal, found it necessary to determine whether the police officers in question were in fact providing Ms Budd with a 'service' within the meaning of the *Anti-Discrimination Act 1977* (NSW). Following the reasoning of the New South Wales Supreme Court in *Commissioner of Police, NSW Police Service v Estate of Russell*,⁶³ both the tribunal and the court held that a 'service' is not being rendered to a person who is the subject of a criminal investigation by police unless and until that person is arrested. At that point, the police officers are 'charged with a public duty to provide ... police services by way of the protection of [his/her] person from injury or death, and the protection of [his/her] property from damage'.⁶⁴

These cases draw a seemingly arbitrary line in the sand regarding when a person subject to the exercise of police powers is entitled to the protection of anti-discrimination law.⁶⁵ On the basis of this reasoning, it would seem that a person who is asked to move-on by a police officer is not receiving a 'service' from that officer, and thus the exercise of the power is free from the scrutiny of

59 Although, some have lobbied for its inclusion: see, eg, Bella Stagoll and Philip Lynch, 'Promoting Equality: Homeless Persons and Discrimination – submission regarding discrimination on the ground of social status' (Research Paper, Homeless Persons Legal Clinic, 2002).

60 See, eg, *Anti-Discrimination Act 1977* (NSW) ss 7, 49ZYA; *Equal Opportunity Act 1995* (Vic) s 6(a), (i); *Anti-Discrimination Act 1991* (Qld) s 7(f),(g); *Equal Opportunity Act 1984* (SA) ss 51, 85A; *Equal Opportunity Act 1984* (WA) ss 36, 66V; *Anti-Discrimination Act* (NT) s 19(a), (d); *Anti-Discrimination Act 1998* (Tas) s 16(a), (b); *Discrimination Act 1991* (ACT) s 7(h), (l).

61 *Racial Discrimination Act 1975* (Cth); *Age Discrimination Act 2004* (Cth).

62 [2006] NSWADT 14; [2006] NSWSC 1266.

63 [2001] NSWSC 745.

64 [2001] NSWSC 745, [44].

65 See Alana Fraser and Ben Fogarty, 'Restricted Application of NSW Disability Discrimination Laws to Police Services' (2006) 44(8) *Law Society Journal* 70.

anti-discrimination law, unless and until that person objects to the direction, and is subsequently arrested for failing to follow the direction or some other offence.

This substantially restricts the ability of the law to protect members of the public from discriminatory police practices. However, in Queensland at least, the situation is remedied by s 101 of the *Anti-Discrimination Act 1991* (Qld), which makes the ‘administration of government laws and programs’ a protected area of activity. The section states that a person who ‘performs any function or exercises any power under State law’ or ‘has responsibility for the administration of a State law’ must not discriminate in the performance of that function, the exercise of that power or the carrying out of that responsibility. This must certainly include police officers acting in the course of their duties under legislation such as the *Police Powers and Responsibilities Act 2000* (Qld), particularly in light of the fact that one of the express purposes of that Act is to ensure fairness to, and protect the rights of, persons against whom police officers exercise their powers.⁶⁶

The final question that must be addressed is whether the applicable tests for discrimination under the legislation are met.⁶⁷ A claim could be made under either direct discrimination or indirect discrimination. Direct discrimination is made out where a person is treated less favourably on the basis of a protected attribute within a protected area of activity. Indirect discrimination aims to address laws and practices that are not discriminatory on their face, but do result in differential treatment in practice: that is, it recognises that laws and practices can be discriminatory in substance, but not in form.⁶⁸ As Dawson and Toohey JJ said in *Waters v Public Transport Corporation*:

Both direct and indirect discrimination ... entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.⁶⁹

Thus, ‘discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different’.⁷⁰

Generally speaking, there are three elements that must be addressed when making a claim of indirect discrimination: that the discriminator has imposed a condition or requirement; that the condition or requirement is not reasonable in the circumstances; and that a substantially higher proportion of persons with a protected attribute will be unable to comply, or will be disadvantaged, as a

66 Section 5(e).

67 Of course, another protected attribute that might be applicable when arguing discrimination in the context of move-on powers is impairment; that is, it is quite probable that people with cognitive or psychiatric impairment are more likely to be moved on than those without. This ground is not discussed here as the empirical research did not seek or yield any relevant information on this subject. This is an area in which further research is needed.

68 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [202] (Gummow, Hayne and Heydon JJ).

69 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392.

70 *Waters v Public Transport Corporation* (1992) 173 CLR 349, 402 (McHugh J). See also *Regents of the University of California v Bakke* 438 US 265, 407 (1978).

result.⁷¹ There are some slight variations between the provisions in different Acts/jurisdictions. For example, some Acts require that an aggrieved person also establish that they did not comply, or were unable to comply with the condition.⁷² Also, the *Racial Discrimination Act 1975* (Cth) frames the third element very broadly: instead of disadvantage or differential operation, a complainant must merely show that the requirement has the effect of nullifying or impairing 'any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'.⁷³

The following analysis will examine how a claim of direct or indirect discrimination might be made against the existence or use of police move-on powers. While the Queensland provisions will be the focus of this analysis, many of the findings may be generalised to move-on powers (and indeed other police powers) in other Australian jurisdictions.

B The Enforcement of Move-on and Direct Discrimination

On its face, legislation creating move-on powers is not directly discriminatory; the provisions do not purport to treat some groups differently from others, rather, any person engaging in relevant behaviour is (technically) liable to be moved on. However, it might be argued that the practical enforcement by police of move-on powers against certain persons constitutes direct discrimination.

In order to make out a claim of unlawful direct discrimination, it must be shown that a police officer moved the person on 'because of' their race or their age. The issue of causation has been discussed widely throughout the case law and judges have often disagreed on the applicable test. The use of the 'but for' test has generally been rejected in favour of global assessments as to whether a 'sufficient causal nexus' exists, and whether the discriminatory treatment was 'on the basis of' or 'on the ground of' the protected attribute.⁷⁴ One consideration related to causation that is well-established is that subjective intention or motive is irrelevant.⁷⁵

71 See *Disability Discrimination Act 1992* (Cth) s 6; *Age Discrimination Act 2004* (Cth) s 15(1); *Anti-Discrimination Act 1991* (Qld) s 11; *Anti-Discrimination Act 1998* (Tas) s 15; *Discrimination Act 1991* (ACT) s 8(1)(b).

72 See *Disability Discrimination Act 1992* (Cth) s 6(c); *Racial Discrimination Act 1975* (Cth) s 9(1A)(b); *Anti-Discrimination Act 1977* (NSW) ss 24(1)(b), 38B(1)(b), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b); *Equal Opportunity Act 1984* (WA) ss 8(2)(c), 9(2)(c), 10(2)(c); *Equal Opportunity Act 1995* (Vic) s 9(1)(a); *Equal Opportunity Act 1984* (SA) s 29(2).

73 Section 9(1A)(c).

74 See *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [13]-[14] (Gleeson CJ), [166] (McHugh and Kirby JJ), [236] (Gummow, Hayne and Heydon JJ). See also *MacLeod v State of Victoria* (1986) EOC 92-178; *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8, 33. Under s 10(4) of the *Anti-Discrimination Act 1991* (Qld), the protected attribute must be the 'substantial' reason for the discrimination; under s 18 the *Racial Discrimination Act 1975* (Cth) race must be only 'one' reason for the discrimination; and under s 16 of the *Age Discrimination Act 2004* (Cth), age must be the 'dominant' reason for discrimination.

75 See especially *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [160] (McHugh and Kirby JJ).

Evidentiary issues are paramount in discrimination cases; often times, the determination of a case is based on which version of events the fact-finder prefers, based on their own judgment regarding witnesses' credibility.⁷⁶ Thus, much of the difficulty in demonstrating direct discrimination by a police officer in the exercise of their move-on powers against an Indigenous or young public space user will lie in proving the causal connection.

One way of establishing causation would be to prove that the person was not engaging in any 'relevant conduct' that would attract the application of the provisions; this would go some way towards proving that the person was indeed moved on because of who they are rather than what they were doing. Of course, in so doing, one would be proving that the move-on provisions were in fact breached in the circumstances. The added benefit of establishing unlawful discrimination, in addition to breach, is the opportunity to have the discriminatory conduct explicitly acknowledged by the court, and the capacity to obtain a substantive remedy.⁷⁷

Under s 46 of Queensland's *Police Powers and Responsibilities Act 2000* (Qld), causation could be established by proving that the person moved on was not *behaving* in a manner that would:

- (a) cause anxiety to a person entering, at or leaving a public place;
- (b) interfere with trade or business by for example obstructing, hindering or impeding someone entering, at or leaving a public place;
- (c) amount to disorderly, indecent, offensive or threatening conduct; or
- (d) disrupt the peaceable and orderly conduct of an event or gathering.

Under s 47, causation could be established by proving that the police officer could not reasonably have suspected that the person's *presence* was or had been:

- (a) causing anxiety to a person entering, at or leaving a public place,
- (b) interfering with trade or business by obstructing, hindering or impeding someone entering, at or leaving a public place; or
- (c) disrupting the peaceable and orderly conduct of an event or gathering.

The results of the empirical research reported on here demonstrate that many marginalised public space users are of the view that Indigenous people, at least, are directly discriminated against in the use of police move-on powers. Many Indigenous respondents, and non-Indigenous respondents, in this empirical study recounted experiences where either themselves or their Indigenous acquaintances had been moved on in circumstances that did not appear to fulfil the legislative requirements. Also, a number of respondents commented that clear identification with a particular youth subculture (for example, dressing like a 'goth') could attract police attention and ultimately result in a move-on direction being issued.

76 See especially Pelma Rajapakse, 'An Analysis of the Methods of Proof in Direct Discrimination Cases in Australia' (1998) 20 *University of Queensland Law Journal* 90. See also Deb Tyler and Patricia Easteal, 'The Credibility Gap: Sexual Harassment in the Tribunals' (1998) 23 *Alternative Law Journal* 211.

77 It was held in *Commissioner of Police, NSW Police Service v Estate of Russell* [2001] NSWSC 745 that the Crown is vicariously liable for the discriminatory actions of a police officer, so a substantial award of damages, for example, might be available.

Further, the results revealed the disproportionate use of move-on powers against young people, with almost all of those surveyed reporting that they had been moved on in the last six months.

Similar results were yielded by the research conducted by the New South Wales Ombudsman and Spooner. For example, the New South Wales Ombudsman observed that many move-on directions given to young people are issued more on the basis of who they are than what they are doing.⁷⁸ In their submission to the review, the Blue Mountains Community Legal Centre stated: 'The decision of police officers to move young people on is often not linked to any wrong doing or incivility of young people but to the stereotypes and prejudices held by police officers'.⁷⁹ It was also noted by the New South Wales Ombudsman that move-on directions are significantly more likely to be issued in districts with high Indigenous populations.⁸⁰ Spooner reported many instances of young people being moved on in Queensland when their behaviour did not reasonably seem to meet the legislative requirements; indeed 36 of the 38 respondents surveyed in his study said that they believed the move-on direction issued to them was unfair.⁸¹ Further, half of those surveyed reported that they were known to police prior to being moved on; Spooner suggests that this may indicate the targeting of certain young people on the basis that they are 'troublemakers', rather than the behaviour they were actually engaging in at the time.⁸²

Thus, it seems that the use of move-on powers by police may amount to direct discrimination in circumstances where it can be proved that the direction was based on the stereotyping of young and/or Indigenous persons, rather than in response to the behaviour the individual was engaging in at the time the direction was issued.

C Move-on Laws and Indirect Discrimination

Whilst move-on legislation does not discriminate against any particular groups on its face, it might be indirectly discriminatory.

In order to establish a claim of indirect discrimination, it must first be shown that a provision imposes a condition or a requirement that is not reasonable in the circumstances. As noted above, s 46 of the *Police Powers and Responsibilities Act 2000* (Qld) states that a person may be moved on if a police officer reasonably suspects that the person is engaging in relevant *behaviour*. The requirement being imposed here is that persons in public spaces must behave in a manner that would not reasonably be considered capable of causing anxiety;

78 Spooner, above n 2, 30 and NSW Ombudsman, above n 2, 229.

79 NSW Ombudsman, above n 2, 255. However, it seems that some police officers attribute this to community perceptions and expectations – the NSW Ombudsman Report quotes a police commander as saying '[The community] would consider the Vienna Boys Choir a gang if they were in jeans, T-shirts and standing outside the shopping area' (NSW Ombudsman, above n 2, 250). See also Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (2nd ed, 2002) 249.

80 NSW Ombudsman, above n 2, 235-38.

81 Spooner, above n 2, 30.

82 Spooner, above n 2, 30. A similar finding was made by the NSW Ombudsman, above n 2, 260.

unnecessarily obstructive of a place of business; disorderly, indecent, offensive or threatening; or disruptive of an event, entertainment or gathering.

The requirement imposed by s 46 would appear, at first glance, to be reasonable. It is well-established that maintaining public order, safety and health is a legitimate end towards which a law might be directed.⁸³ However, anti-discrimination legislation requires that the condition or requirement be reasonable in the circumstances. In order for a law regulating the use of public space to be considered reasonable, it must recognise the inequalities that exist amongst public space users.⁸⁴ Not every person present in public space is there by choice; some people frequent, or indeed reside, in public space under practical constraint. As a result, they may engage in certain behaviour in public that the majority of persons have the luxury of conducting in private, outside the purview of public space law. Homeless people, for example, are forced to live out their lives in public because they have no private space to retreat to.⁸⁵ Marginally housed persons, such as those living in shelters, hostels or boarding houses, frequent public spaces as a means of escaping the confines of their sub-standard accommodation.⁸⁶ Indigenous people often occupy public spaces because they have a cultural or spiritual connection to the particular place and/or because it is a historic meeting place where they congregate with members of their kin.⁸⁷ And for young people, public space may be a haven from abuse, or the only place in which they feel they have the privacy and freedom to engage in identity formation and test boundaries.⁸⁸ Thus, a provision that requires behaviour in a public space to be of a certain standard might well be considered unreasonable if it wrongly assumes that all public space users have a private space to engage in activities that are considered socially unacceptable.

A different requirement is imposed by s 47. This provision allows police officers to ask a person to move-on if they reasonably suspect that the person's mere *presence* has been or is causing anxiety to another person, interfering with trade or business, or disrupting an event or gathering. The requirement imposed

83 *Coleman v Power* (2004) 220 CLR 1, 32 (Gleeson CJ), 33 (McHugh J), 98-99 (Kirby J), 112-14 (Callinan J) 122, 127 (Heydon J).

84 See generally Jeremy Waldron, 'Homelessness and Community' (2000) 50 *University of Toronto Law Journal* 371; Tamara Walsh "'Waltzing Matilda" One Hundred Years Later: Interactions between Homeless Persons and the Criminal Justice System in Queensland' (2003) 25(1) *Sydney Law Review* 75.

85 Philip Lynch, 'Begging for Change: Homelessness and the Law' (2002) 26 *Melbourne University Law Review* 690; Cassandra Goldie, 'Living in Public Space: A Human Rights Wasteland?' (2002) 27(6) *Alternative Law Journal* 277; Tamara Walsh, 'Who is the "Public" in "Public Space"?: A Queensland Perspective on Poverty, Homelessness and Vagrancy' (2004) 29(2) *Alternative Law Journal* 81; Walsh, above n 25.

86 See Monique du Briard, *Public Space, Public Rights: A Report by Caxton Legal Centre* (2003).

87 Goldie, above n 85; Paul Memmott, Stephen Long, Catherine Chambers, 'Categories of Indigenous 'Homeless' People and Good Practice Responses to their Needs' (Positioning Paper, Australian Housing and Urban Research Institute, 2003).

88 Phil Crane and Mike Dee, 'Young People, Public Space and New Urbanism' (2001) 20(1) *Youth Studies Australia* 11; David Malcolm, 'Young People, Culture and the Law' (1999) 18(4) *Youth Studies Australia* 29; Neile Robinson, 'Rights of Passage: Insights and Experience from a Youth Project in a Large Shopping Mall' (1999) 18(4) *Youth Studies Australia* 22.

here is that people in public spaces ensure that their presence will not have such an effect.

It is impossible to see how such a requirement could be considered reasonable. The section essentially requires people to control not only their behaviour, but the perceptions that community members and police officers have regarding them. Stereotyped views of young and Indigenous people, fuelled particularly by inaccurate media representations and law and order politics, can result in feelings of apprehension devoid of any basis in fact.⁸⁹ For example, it is well-established that the risk that 'gangs' of youths pose to community safety is grossly exaggerated; rather, young people tend to congregate in groups for their own personal and emotional security.⁹⁰ Similarly, Indigenous people are often the subject of inaccurate, negative stereotypes associated with criminality, even though the reality is that an Indigenous person's entry into the criminal justice system is most often the result of an arrest for a minor summary offence.⁹¹ Requiring young people and Indigenous people to avoid arousing unfounded fears within community members in order to avoid police attention must certainly be considered unreasonable.

Finally, to make out a claim of indirect discrimination, it must be determined whether a substantially higher proportion of persons with the protected attribute will be unable to comply, or will be disadvantaged, as a result of the requirement so imposed. This requires a comparison to be made between the affected group and a 'base' group, termed 'the comparator'. The relevant comparator in this case would be those who are present in public places. Thus, the capacity of young and Indigenous people to comply with the order, must be compared with the capacity of other public space users to so comply.

It might certainly be argued that young and Indigenous public space users are less likely to be able to comply with a requirement not to behave in a certain manner in public space. As noted above, many young and Indigenous people occupy public spaces not as a matter of choice, but as a result of necessity. In

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- 89 See generally Paula Grogan, 'Out of Order? The Increasing Regulation of Young People in Public Space' (2006) 19(1) *Parity* 85; Phil Crane, 'Whose Views? Whose Interests? The Absence of Young People's Voices in Mainstream Media Reports' in Judith Bessant and Richard Hil (eds), *Youth, Crime and the Media: Media Representations of and Reactions to Young People in Relation to Law and Order* (1997) 93; Richard Hil and Glenn Dawes, 'The "Thin White Line": Juvenile Crime, Racialised Narrative and Vigilantism: A North Queensland Study' (2000) 11(3) *Current Issues in Criminal Justice* 308; Chris Cunneen, 'Ethnic Minority Youth and Juvenile Justice: Beyond the Stereotype of Ethnic Youth Gangs' in Carmel Guerra and Rob White (eds), *Ethnic Minority Youth in Australia: Challenges and Myths* (1995) 111, 113; Wendy Shaw, 'Ways of whiteness: harlemising Sydney's Aboriginal Redfern' (2000) 38(3) *Australian Geographical Studies* 291. See also Chris Cunneen and Terry Libesman, *Indigenous People and the Law* (1995); Russell Hogg and David Brown, *Rethinking Law and Order* (1998) 18-44.
- 90 See Phil Crane, 'Young People and Public Space: Developing Inclusive Policy and Practice' (2000) 1 *Scottish Youth Issues Journal* 105; Rob White, 'Cleaning up the Streets: Cultural Resistance, Coercive Force and Social Inequality' (2006) 19(1) *Parity* 88. See generally Rob White, *No Space of their Own: Young People and Social Control in Australia* (1990).
- 91 See Chris Cunneen, 'Zero Tolerance Policing: How will it Affect Indigenous Communities?' (1999) 4(19) *Indigenous Law Bulletin* 7; Robyn Lincoln and Paul Wilson, 'Aboriginal Criminal Justice: Background and Foreground' in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000). See generally Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (2001).

particular, Indigenous people occupy certain public spaces as a result of their strong cultural and spiritual connection to the land. Young people often occupy public spaces as they have no other place in which to socialise. Also, they may be more likely to engage in sub-criminal, trivial nuisance behaviour as a result of their unique life-stage. This might result in young persons' behaviour being subject to a higher level of scrutiny and, as Cunneen and White have argued, resultant 'frustration and unease' may 'boil over' in police-youth interactions.⁹² Further, the fact that young people are often (sometimes wrongly) perceived as 'trouble makers' might make it more difficult for them to comply with an order to refrain from 'causing anxiety' to some members of the public.⁹³

Thus, it may indeed be possible to argue that move-on legislation is indirectly discriminatory against Indigenous and young public space users: such laws impose a requirement which may be considered unreasonable when their individual circumstances are considered.

VI CONCLUSIONS AND RECOMMENDATIONS

It seems, therefore, that a claim of either direct or indirect discrimination may be available against the enforcement or form of move-on provisions, in circumstances where they result in differential treatment of young or Indigenous people. However, in addition to the disproportionate numbers of young and Indigenous people subject to Queensland's move-on powers, this study demonstrated that a high number of homeless people who are not young or Indigenous are being moved on for reasons that do not satisfy ss 46 or 47 of the *Police Powers and Responsibilities Act 2000* (Qld). Arguably, such persons are being moved-on 'because of' their homelessness, particularly in situations where they are moved-on whilst asleep in a public place, literally with nowhere else to go. Reforming anti-discrimination legislation to make homelessness a protected attribute, and to include policing as a protected area of activity, would go a significant way towards preventing homeless people from being unlawfully discriminated against by police officers in public space.

Move-on laws (and indeed other public space laws) must recognise the inequalities that exist between different users of public space. One way in which this has been done in some jurisdictions is by making a statutory defence of reasonable excuse available to avoid prosecution for non-compliance. If this were replicated in Queensland, marginalised public space users who might otherwise have come within the section would be capable of defending their charge on the basis that their behaviour was directly related to factors outside their control.⁹⁴

Yet, while a reform of this nature would be welcome, it would fail to address the level of surveillance and interference in the lives of marginalised public space users which move-on powers facilitate. Past research, as well as the study

92 Cunneen and White, above n 79, 261.

93 Grogan, above n 89; Campbell, above n 28, 2.

94 A defence of reasonable excuse is also lacking in the Tasmanian and South Australian move-on laws: see *Summary Offences Act 1953* (SA) s 18 (power to give an order to move-on or disperse); *Police Offences Act 1935* (Tas) s 15B (power to disperse).

reported on here, suggests that the majority of those who are asked to move-on by police do comply with the direction. Indeed, it has been found that it is the most disadvantaged public space users, such as young people and Indigenous people, who are least likely to oppose a move-on direction.⁹⁵ Tighter controls, therefore, are needed to ensure that move-on powers are only used in situations where the safety and security of members of the public is threatened, rather than as a 'street sweeping' device. In Queensland, this might be done by including a requirement to this effect in the legislation, or by replicating the New South Wales provision which states that once a person desists from the behaviour that attracted the direction, the person cannot be taken to have failed to comply with the direction.

Certainly, a person's mere presence should not be capable of forming the basis of a move-on direction. The concept of 'reasonable suspicion' is stretched beyond its limits when police are asked to assess whether someone's appearance is likely to arouse fear in another person. Such an assessment allows for the stereotyped perceptions of certain groups to form the basis for their treatment by the criminal law, rather than their actions. On that basis, any legislative move-on power ought to be limited to behaviour; in Queensland, this could easily be achieved by the repeal of s 47 of the *Police Powers and Responsibilities Act 2000* (Qld).

Of grave concern is the psychological impact of move-on laws on vulnerable people in our society. When used in a discriminatory fashion, move-on powers send a powerful message of social exclusion to the people being moved-on. Many survey respondents expressed frustration with the extent to which they are moved-on; some more than four times per day. Underlying the use of move-on powers are entrenched feelings of despair and social dislocation which serve as a painful reminder to some people that they are 'not welcome here'.

That some homeless people support move-on powers indicates that there is a role for the powers to assist in protecting the safety of all people, particularly homeless and vulnerable people, in public space. However, using move-on laws to rid our public spaces of the diversity of our community is not what the legislature ever intended, and is a shameful indictment on us all.

[P]olicing must discriminate. The challenge is to ensure that such discrimination is legitimate. Discrimination based on stereotypes, general categories and statistical probabilities would not achieve this.⁹⁶

95 NSW Ombudsman, above n 2, 231.

96 Lisa Maher, David Dixon, Wendy Swift and Tram Nguyen, *Anh Hai: Young Asian Background People's Perceptions and Experiences of Policing* (1997) 55.