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**Question 6-4: Should offensive language remain a criminal offence? If so, in what circumstances?**

## Introduction

State and territory laws which prohibit the use of offensive, indecent, obscene or disorderly language in or near a public place (‘offensive language crimes’) should be repealed. In the alternative, offensive language and conduct crimes should be narrowed in scope so that they contain aggravating elements which the prosecution must prove beyond reasonable doubt, such as the intention to provoke physical violence; or the incitement of others to commit physical violence towards persons or property. The reasons which ground these submissions are set out below.[1]

## Background Information

## What are offensive language crimes?

Consistent with the ALRC Discussion Paper,[2] I defineoffensive language crimes as those laws in Australian states and territories which prohibit the use of offensive, obscene, objectionable, indecent, profane, threatening, abusive or insulting language, either in, near, or within hearing from a public place.[3] These provisions generally target verbal speech, while written signs and displays (such as a person wearing a t-shirt, or displaying a sign, with a swear word on it)[4] are punished under offensive conduct offences.[5]

A table of current offensive language crimes and their punishments is provided below. Although often characterised as ‘minor’ public order offences, these crimes attract punishments of up to six months imprisonment in the Northern Territory (‘NT’) and Queensland.[6] Offensive and obscene laws have existed in various forms in NSW since the mid-19th century,[7] and similar laws were subsequently adopted by the Australian colonies.

More specific provisions, limited to contexts such as on public transport,[8] also prohibit offensive and disorderly conduct.[9] Some of these sections overlap. For example, a fine of $110 or a penalty notice amounting to $400 can be issued by an ‘authorised officer’[10] for the use of offensive language ‘in or on a public passenger vehicle or train or in a public under thePassenger Transport Regulation 2007 (NSW); [11] while the use of offensive language ‘in or near, or within hearing from, a public place or a school’, contrary to the Summary Offences Act 1988 (NSW), can be punished with a fine of $660 or a Criminal Infringement Notice (‘CIN’) of $500.[12] There appears to be no logical justification for the inconsistency of these fine and penalty notice amounts.

### What does ‘offensive’ mean?

The adjectives ‘offensive’, ‘obscene’ and so on are not defined in legislation, nor do statutory lists itemise which words are prohibited. Instead, unclear common law definitions of these adjectives have been developed in case law, many of which rely on dictionary definitions.[13] The most commonly cited definition of ‘offensive’ in the context of offensive language and behaviour crimes is that provided in the Supreme Court of Victoria caseWorcester v Smith, where O’Bryan J defined offensive as ‘such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person’.[14] In considering the perspective of the reasonable person, a magistrate (or police officer) must also have regard to contemporary community standards, and the context in which the words were used.[15]

**Table 1: Offensive language crimes across Australia**

|  |  |  |  |
| --- | --- | --- | --- |
| **Jurisdiction** | **Words punishable** | **Location** | **Punishment** |
| **ACT** | Riotous, indecent, offensive or insulting behaviour | In, near, or within the view or hearing of a person in, a public place | $1 000[16] |
| **NSW** | Offensive language | In or near, or within hearing from, a public place or a school | $660 fine or a $500 CIN[17] |
| **NT** | Profane, indecent, obscene, threatening, abusive or objectionable words, offending, or causing substantial annoyance to a person | In or within the hearing or view of any person in any road, street, thoroughfare or public place | $2 000, six months imprisonment, or CINs of $144 (profane, indecent or obscene words); $288 (threatening, abusive or objectionable words, offending or causing substantial annoyance); or $432 (obscene language)[18] |
| **Queensland** | Offensive, obscene, indecent or abusive language | The person’s behaviour must interfere, or be likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public | $1 100, six months imprisonment, or police may issue a CIN of $126.15 or $378.45 if within licensed premises[19] |
| **SA** | Offensive, threatening, abusive or insulting, indecent or profane language | In a public place or a police station (profane or indecent words are punishable if audible from such a place, which is audible from a public place or neighboring or adjoining occupied premises, or the person intends to offend or insult any person) | $1 250 or three months imprisonment (for offensive, threatening, abusive or insulting language) or $250 (indecent or profane language)[20] |
| **Tasmania** | Profane, indecent, obscene, offensive, or blasphemous language; or threatening, abusive, or insulting words | In any public place, or within the hearing of any person in that place | Three penalty units or three months imprisonment[21] |
| **Victoria** | Profane, indecent or obscene language; or threatening, abusive or insulting words | In or near a public place or within the view or hearing of any person being or passing therein or thereon | 1st offence: 10 penalty units or two months imprisonment; 2nd offence: 15 penalty units or three months imprisonment; 3rd or subsequent offence: 25 penalty units or six months imprisonment. Police may also issue a CIN of $317.14[22] |
| **WA** | Insulting, offensive or threatening language | In a public place; or in the sight or hearing of any person in a public place; or in a police station or lock-up | $6 000 or a CIN of $500[23] |

## The Criminalisation of Swearing

Offensive language crimes have long targeted words perceived as ‘disgusting’, ‘unmentionable’ or ‘distasteful’ according to the dictates of those in positions of relative power (be they journalists, judges, politicians, or other commentators preoccupied with maintaining ‘standards of civility’).[24] In colonial Australia, swear words such as ‘whore’, ‘bugger’, ‘bloody’ and ‘bastard’ were considered unutterable in public, particularly in the presence of women and children.[25] Currently, and in the past few decades, police primarily target two ‘four-letter words’: ‘fuck’ and ‘cunt’.[26] Accordingly, offensive language crimes have come to be known as ‘swearing’ or ‘anti-swearing’ laws.[27]

## Reasons for repeal or amendment of offensive language crimes

In this part, I outline the reasons why I believe that offensive language crimes should repealed or limited in scope. To summarise, these reasons include:

* Indigenous Australians are disproportionately policed for, and charged with, offensive language and conduct crimes
* Swear words are ubiquitous in everyday language and popular culture
* Swear words cause minimal (if any) harm
* Swear words are a readily available, and harmless means for Indigenous Australians to reject State authority over their lives where few other tools are available
* Whether words are considered taboo is culturally, socially, and individually relative
* Indigenous Australians have been identified as having distinct attitudes in relation to the offensiveness of words compared to non-Indigenous Australians
* Courts are reluctant to consider cultural differences and social explanations for a defendant’s offensive language, such as poverty, homelessness, intoxication and strained Indigenous-police relations
* The punishment of swear words is influenced by irrational reactions of disgust
* Offensive language crimes rely on hypothetical legal fictions such as ‘community standards’ and ‘the reasonable person’
* It is impossible to obtain a neutral, objective standpoint on whether language is offensive
* Offensive language provisions are characterised by indeterminacy and a consequent risk of inconsistent application
* These laws put police in a position of conflict: they often act as victim, enforcer and ‘judge’
* Other criminal offences are available to target specific areas of insult, the incitement of violence, or intimidation
* Police have other ‘street sweeping’ tools (such as move-on powers) to control or contain disruptive or disorderly words.

## 1. The Overrepresentation of Indigenous Australians for offensive language and conduct crimes

### Indigenous children proceeded against for offensive language and conduct

Indigenous Australians have long been,[28] and continue to be (see below), overrepresented as recipients of offensive language charges and CINs.[29] This is despite the relatively minimal harm (if any) caused by ‘fleeting expletives’ uttered in or near a public space and the ubiquitous use of swear words in public. According to the NSW Bureau of Crime Statistics, from 1 April 2016 to 31 March 2017, Indigenous juveniles comprised 31% (33) of all juveniles (108) in NSW proceeded against to court for the crime of using offensive language. Indigenous juveniles comprised 15% (25) of all juveniles (151) in NSW proceeded against other than to court (for example, by way of youth conference, a warning, an infringement notice or a caution) for offensive language. Indigenous juveniles represented 39% (38) of all juveniles (98) proceeded against to court for offensive conduct; and also 25% (59) of all juveniles (240) proceeded against other than to court for offensive conduct. Indigenous juveniles are highly likely to plead guilty for offensive language and conduct: making up 55% (61) of all guilty pleas (112) for offensive language and 53% (132) of all guilty pleas (252) for offensive conduct in NSW. Yet Indigenous Australians comprise 3% of the NSW population.[30] This means that Indigenous children are vastly overrepresented in actions and proceedings for offensive language and conduct in NSW; and are more likely than non-Indigenous children to end up in court, and also to plead guilty, for offensive language and offensive conduct.[31]

### Indigenous adults proceeded against for offensive language and conduct

In the year from 1 April 2016 to 31 March 2017, Indigenous adults comprised 21% (223) of all adults (1054) in NSW proceeded against to court for using offensive language. Indigenous adults also comprised 15% (257) of all adults (1716) in NSW proceeded against other than to court for offensive language (by way of criminal infringement notice or infringement notice). In that year, Indigenous adults comprised 19% (242) of all adults (1279) proceeded against to court for offensive conduct, and 8% (246) of all adults (2918) proceeded against for offensive conduct. While not so grossly overrepresented as Indigenous children, Indigenous Adults ate nonetheless significantly overrepresented in offensive language and conduct proceedings when compared to their population in NSW (3%), and are also much more likely than non-Indigenous adults to have their offensive language or conduct charges brought by police to court. Indigenous adults made up 34% (402) of all guilty pleas (1179) for offensive language, and 31% (1258) of all guilty pleas (4101) for offensive conduct in NSW. Even more concerning are the statistics in relation to imprisonment for offensive conduct. Between 1 April 2016 and 31 March 2017, Indigenous Australians comprised 46% (34) of all (74) sentences of imprisonment handed down in NSW courts for offensive conduct.[32]

These statistics demonstrate that police, prosecutorial agencies and the courts have not heed the message from the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’) that:

It is surely time that police learnt to ignore mere abuse, let alone simple 'bad language' ... many words that were once considered bad language have become commonplace and are in general use amongst police no less than amongst other people … Charges about language just become part of an oppressive mechanism of control of Aboriginals.[33]

The above empirical findings support earlier quantitative studies on this topic. In 1999, the Aboriginal Justice Advisory Council found that on average, Indigenous people were 15 times more likely to be prosecuted for offensive language or conduct than the rest of the NSW population.[34] The most common outcome for Indigenous people appearing on offensive language or conduct charges was to be sentenced after pleading guilty.[35] Indigenous persons were much less likely to defend their charges, and police frequently employed the strategy of charging defendants with offensive language in combination with one or more other crimes against, or affecting, police officers (colloquially known as the ‘trifecta’ or the ‘hamburger with the lot’; a combination of the offences of offensive language/conduct, resist arrest, hinder police and/or assault police).[36] Research conducted by Tamara Walsh, a Queensland academic in law and social justice, has shown that Indigenous people, people experiencing psychiatric, mental or cognitive impairment, and homelessness, were disproportionately represented amongst those charged with public nuisance-type offences.[37]

These statistics are alarming, and yet unsurprising for those familiar with the history of overpolicing and disproportionate punishment of Indigenous Australians for public order crimes, especially in relation to offensive language and conduct. Police play a pivotal role in the overrepresentation of Indigenous persons, particularly juveniles, in the criminal justice system for offensive language and behaviour crimes.[38] One reason for this is the preoccupation of modern policing with the use of public space, which renders those who more reliant on public space for socialising—youth, the ‘working class’ and many Indigenous persons—‘peculiarly subject to the policing gaze, regulation and coercion’.[39] Another is police officers’ inclination to punish those perceived to challenge to ‘their authority’ in public space by swearing at police.[40]

## 2. Resistance of neo-colonial control

Aside from the fact that swear words are ubiquitous amongst both Indigenous and non-Indigenous Australians (discussed below), it is clear that Indigenous Australians often use swear words to reject authority, or in an attempt to reassert control over their lives.[41] For many Indigenous Australians, swearing is a verbal, readily-available means of resistance to, and rejection of, power asserted over their lives by police. According to anthropologist and Indigenous scholar Marcia Langton, Aboriginal people swore at police to demonstrate a view that police had ‘no right or authority’ over Aboriginal lives; to voice a belief that the criminal justice system was ‘illegitimate and oppressive’; and to challenge the authority of those who dispensed its ‘justice’.  Through this ‘linguistic code’, Aboriginal people could ‘overcome fear of police brutality at the time of confrontation, laugh at their oppressors and exercise their own legal method by using swear words which portray the police and their legal culture as grotesque’. [42]

## 3. Cultural differences in attitudes towards swearing

Whether words are considered taboo is culturally, socially, and individually relative.[43] Perceptions of offensiveness shift according to gender, age, cultural and individual biases.[44] Many Indigenous Australians have been identified as having distinct attitudes in relation to the offensiveness of words compared to non-Indigenous Australians. Anthropological and linguistic studies have documented a liberal use of ‘four-letter words’ by Indigenous Australians, where such use is not associated with shame or stigma.[45] Langton has recognised that what is considered offensive or ‘swearing’ for many Indigenous communities is that which is forbidden by Indigenous Law, such as ‘swearing to certain kinds of “poison relations”—in-laws, or a sister swearing in front of a brother’.[46] Swear words, although English in origin, have developed a unique polysemous meaning for Indigenous Australians ‘relying for much of their cultural content on traditional Aboriginal ways of looking at the world’.[47] For many Indigenous people, swearing constitutes, alongside fighting, ‘appropriate rule-governed behaviour’ and functions as a resolution-processing and social-ordering device derived from traditional Aboriginal cultural patterns.[48] As Langton writes:

For Aboriginal people, swearing and fighting are still familiar features of life. There are well known rules, or at least. the individuals Involved manipulate the action according to certain well known and approved formulae. In daily discourse, swearing is subject to social rules, so that Individuals who choose swearing as one of a number of discourse strategies will know that they may swear jokingly to certain people and in certain contexts, and yet by swearing aggressively to others will know that the likelihood of precipitating a fight is high. Thus, fighting also proceeds according to rules and is usually precipitated deliberately by public accusation and insult involving aggressive swearing.[49]

Linguist Diana Eades has similarly stated:

Simply put, what is widely considered to be obscene language in many sectors of mainstream Australian society is less likely to be offensive in Aboriginal societies. Swearing, like fighting, is considered to be a normal part of Aboriginal social interaction, and in particular a necessary part of settling disputes.[50]

This research supports the view that punishing Indigenous people for swearing is effectively penalising them for words used in ‘routine, everyday communication’.[51] Further, offensive language laws are largely interpreted in a way that incorporates the norms of an imagined white Australia, and fails to recognise cultural divergence from these norms.[52] As I examine below, the legal doctrine in relation to offensive language and conduct crimes leaves little room to recognise cultural, social and individual differences in relation to offensive language and conduct, including differences between Indigenous and non-Indigenous Australians in relation to the perceived offensiveness, and the different pragmatic functions, of swear words.

### Case study: Del Vecchio v Couchy

The Queensland Court of Appeal case Del Vecchio v Couchy illustrates key issues that judges can encounter when attempting to attain an objective view of whether language is offensive or insulting.[53] The facts of that case were that at approximately 4am on 21 September 2000, in inner-city Brisbane, an intoxicated, homeless, disoriented Indigenous woman, Melissa Jane Couchy (‘Couchy’), was approached by a male police officer, Sergeant McGahey. McGahey asked Couchy if she wanted to go to ‘the compound’—a nearby shelter. Couchy replied, ‘Sarge, the Compound is for fucking dogs.’ A nearby female police officer then asked Couchy to state her full name and address. Couchy replied, ‘You fucking cunt’.[54] Couchy was arrested for using insulting words in a public place,[55] and on 7 December 2000 was sentenced in Brisbane Magistrates Court to three weeks imprisonment.[56] The District Court of Queensland dismissed Couchy’s appeal against conviction, but reduced her sentence to seven days.[57] Couchy’s subsequent appeal to the Queensland Court of Appeal was dismissed, as was her application for special leave to appeal to the High Court of Australia.[58]

Couchy’s case is not unusual: as the statistics above demonstrate, she was much more likely than a non-Indigenous Australian to be charged with an offensive language crime.[59] Further, Couchy was homeless, a status that made her especially visible in public spaces.[60] These aspects of her identity and social situation subjected her to a greater degree of intervention in her everyday activities.[61] Another notable feature of Couchy’s case was the power asymmetry between her and the police officers. In addition to her arrest, at multiple instances the police officers assumed the ability to control Couchy’s movements and words, a control that Couchy resisted. First, Sergeant McGahey suggested to Couchy that she should go to the compound, a request which Couchy was not legally obliged to comply with. Constable Del Vecchio dictated that Couchy state her full name and address (although she was familiar to police), which Couchy refused to do. Third, the Constables directed Couchy to get in the van, which Couchy also refused (but was forced) to do.

I have elsewhere argued that when this obvious power asymmetry is taken into account, as well as the facts that Couchy is Indigenous, was homeless, and regularly came into contact with the police,[62] it is possibly to entertain multiple interpretations of Couchy’s use of the words ‘fucking cunt’ to a (presumably non-Indigenous) female police officer in the early hours of the morning on an inner-city Brisbane street.[63] For example, the phrase could be construed as an expression of resistance, or as venting frustration in response to being ordered around by police; both of which are preferable alternatives to physical retaliation.

However, the Queensland Court of Appeal declined to entertain a sympathetic reading of Couchy’s words and situation, which took into account the aforementioned contextual factors. The Chief Justice questioned the relevance of the defendant’s ‘Aboriginality,’[64] while another judge stated: ‘I just think to add the word ‘Aboriginal’ stretches the bar too far; it's not necessary.’[65] The Court also declined to take the defendant’s poverty or homelessness into account in assessing the ‘context’ in which her language was used. The Court even went so far as to suggest that taking these contextual factors into account would discriminate against wealthy, white men like themselves: ‘You mean that if I said these words I'd be guilty of an offence, but if she says them she's not? … One law for the rich and another for the poor.’[66] The judges failed to mention the very low likelihood that they—in light of their socio-economic status, social standing, occupation, education and language habits, in short, their privilege—would find themselves in a similar position to that of the defendant, an issue that I examine below. The case ofDel Vecchio v Couchy illustrates the absurd lengths that judges will go to—in an effort to obtain a ‘neutral’ or ‘objective’ viewpoint— to blind themselves to the relevance of their own whiteness and privilege,[67] and to deny fundamental aspects of a defendant’s identity and social situation.[68]

## 4. Reliance on objective standards

Laws that prohibit offensive language necessitate that judges rely on legal fictions such as ‘community standards’ and the views of the ‘reasonable person’ when determining whether language is criminally offensive. There is no clear legal statement regarding what those ‘community standards’ might be, or how a judge is to discern them (should they consider surveys, popular culture, literature, or their own observations, for example?) It is similarly unclear which ‘community’ a judge should have regard to (is it the whole of Australia, or a local community such as Redfern, Double Bay, or Townsville?) The case law simply provides that offensiveness is a matter for ‘judicial notice’, allowing judges to rely on their unique everyday experience and ‘common sense’ to determine what community standards on offensive language are.[69] My research has found that judicial officers regularly fail to adequately explain in their reasons for judgment how they determined community standards, who ‘the reasonable person’ is, or what views they hold.[70] Further, it is doubtful that police or transport officers, when issuing infringement notices for offensive language, adequately engage with the complex elements of offensive language crimes.[71] This is plainly unsatisfactory, and leads to an unequal and indeterminate application of offensive language crimes, as outlined in the following part.

## 5. Offensive language crimes are characterised by uncertainty and inconsistent application

Offensive language provisions are characterised by indeterminacy and a consequent risk of inconsistent application. A core criminal justice principle is that persons ‘should not be forced to guess at their peril’[72] whether their behaviour will be punished. With offensiveness deemed a matter for judicial notice, different decision-makers can apply contradictory ideas when adjudicating offensiveness. Some judicial officers view swear words as disgusting, sexual or violent;[73] others perceive swearing as legitimate, ubiquitous and necessary component of the English language, as able to be protected under free expression laws, and as non-violent, ephemeral expressions of frustration, anger or resistance.[74] As a result of this, a person cannot predict with sufficient certainty which ideas a judicial or police officer will rely on to inform their assessment of whether their words are offensive. The crime does not possess the characteristics of legal certainty, consistency and non-arbitrariness. This puts these laws at risk of being in breach of the ‘rule of law’, as a person cannot sufficiently moderate their behaviour in order to comply with ‘the law’.[75]

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## 6. The influence of irrational reactions such as disgust

Many politicians, judicial officers, and also members of the general public, denounce swear words as dirty, disgusting or dangerous based on irrational reactions of disgust, as well as an inadequate understanding of the meaning and functions of swear words.[76] My research has exposed and debunked many tacit ‘common sense’ judgments that judicial officers have relied on when adjudicating offensive language crimes[77]. These views, contrary to sociolinguistic research on swearing,[78] include that:

* swear words have a ‘nature’, which is invariably disgusting, dirty or sexual;
* swear words are contagious or polluting;
* swear words conjure up disgusting or sexual images;
* swear words do not comprise part of ‘Standard English’;
* swear words are only used by the poorly educated;
* swear words should be considered more offensive if spoken to an authority figure, or in the presence of the elderly, women or children;
* slipping language standards lead to increased moral depravity and social disorder; and
* it is possible to rid the English language of swear words.[79]

The reliance of police and judicial officers on these disputed and outdated language ideologies undermines the legitimacy of offensive language crimes as they are currently framed and interpreted. It also points to a need for the legal system to have greater recourse to expert linguistic evidence on swearing; rather than rely on the unpredictable, and sometimes ill-informed, views of judges on what constitutes ‘community standards’ on offensive language.

## 7. Double Standards

Swear words are ubiquitous in popular culture, in everyday language, and are used by police officers, judges,[80] and by persons in positions of influence (including Australian Prime Ministers).[81] For instance, in 2012, former Australian Prime Minister Kevin Rudd was infamously caught on camera saying at the Copenhagen Climate Change conference, ‘[t]hose Chinese fuckers are trying to rat-fuck us.’ Responding to Rudd’s outburst, then Opposition Leader Tony Abbott offered a gesture of solidarity, acknowledging ‘[w]ell, he wouldn't be the only politician to use colourful language behind closed doors.’[82] The fact that those in positions of influence admit to swearing (and have sworn) undermines the proposition that these words are contrary to community standards, as well as the criminal punishment of others for these words.

Taylor has observed that people who enjoy a more privileged position in Australian society, by virtue of their profession, social status, education and ‘connections’, are rarely prosecuted for using what Taylor calls ‘high category’ swear words (such as ‘cunt’ or ‘fuck’), even where they use these words in relatively public locations.[83] Meanwhile, less privileged members of society, including those disadvantaged by poverty or homelessness, those whose language deviates from so-called ‘Standard English’,[84] and Indigenous persons, continue to be overrepresented in offensive language cases.[85] The empirical reality that prominent persons and police are rarely punished for using offensive language, while Indigenous Australians and marginalised groups are disproportionately represented as recipients of offensive language crimes and CINs, means that police are inevitably applying double standards: targeting some people for swearing, but not others, and are turning a blind eye to swear words by their colleagues. This hypocrisy was particularly acute when a police officer arrested an Aboriginal man for saying to police: ‘Don’t tell me to get fucked’.[86]

The Aboriginal Legal Services regularly receives complaints about offensive and abusive language and behaviour from police, a problem identified by the RCIADIC.[87] The 1992 ABC documentaryCop it Sweet filmed police arresting and charging an Aboriginal defendant on ‘The Block’ in Redfern for using four-letter words; the same police who were filmed using four-letter words towards members of the public without caution or reprimand.[88] The hypocrisy of police taking offence to words they themselves use was further highlighted in the 2016 coronial inquest into the death of Ms Dhu, who, in August 2014, at the age of 22, died after being taken into police custody for unpaid fines (many of which were for disorderly conduct because she had sworn at police officers). Sergeant Rick Bond, shift supervisor on the day of Ms Dhu’s death, gave evidence at the inquest that he had whispered into Ms Dhu's ear: ‘You're a fuckin’ junkie’. He said it was normal practice in the Pilbara for police officers to use the word ‘fuck’ to detainees.[89] Ms Dhu’s fines for swearing at police, her treatment in custody,[90] and her subsequent death, highlight the gross hypocrisy and injustice of a situation in which someone can be imprisoned for swearing at a police officer, while police officers can escape punishment for swearing at those in their custody.

## 8. Police are in confliction positions of victim, enforcer and judge

As the NSWLRC reported in 2012, many offensive language offences are directed at police (or other enforcing officers) in situations where there is no ‘victim’ other than the issuing officer.[91] This police ‘victim’ must decide whether to ignore the language, give a warning or caution, issue a CIN or charge the person with an offence. This results in a potential conflict of interest where ‘in effect, the victim [is] issuing the punishment’,[92] undermining the perception (and likelihood) that these laws will be objectively enforced in an open-minded, dispassionate fashion.

## Conclusion: Reform or repeal of offensive language crimes

Given the trivial and ubiquitous nature of the speech that offensive language crimes seek to punish—swear words; the broad and unclear ambit of these crimes; their disproportionate enforcement against Indigenous Australians and marginalised groups; the overrepresentation of Indigenous Australians in juvenile detention facilities and prisons; the inconsistent application of offensive language crimes; the reliance on legal fictions such as ‘community standards’; cultural differences in views towards swear words; judicial and police officers’ recourse to irrational reactions of disgust when punishing swearing; and the fact that the ‘victim’ of these offences (police) can also adjudicate offensiveness, it is my opinion that swear words, unaccompanied by threats of imminent unlawful contact, do not warrant criminal sanction. Something ‘more than mere offensiveness’[93] should be needed to support a criminal conviction for offensive language crimes.

One way that these crimes could be narrowed in scope is by adding an additional legal element, requiring that the language directly threaten or incite physical violence towards persons or property. However, it could be argued that in amending offensive language crimes in this fashion, they would become unused in practice, as such conduct would likely already be covered by existing criminal provisions (such as the crime of psychic assault under s 61 of theCrimes Act 1900 (NSW)). I note here that police have other offences available to them to target specific areas of insult, the incitement of violence, or intimidation.[94] Further, police have a number of ‘street sweeping’ tools (such as move-on powers)[95] at their disposal which they can have recourse to in order to prevent disorderly behaviour in public space.[96]

Another suggestion may be to amend offensive language provisions so that they contain an additional legal element which targets vilification on racial, religious, ethnic etc. grounds. In other words, the prosecution would also have to prove that the language was directed at offending someone or a group of people because of their perceived race, sexuality, colour, national, ethnic or religious origin.[97] To add this legal element would send a message that the community finds hate speech or racial vilification more offensive than mere ‘four-letter words’.  One concern I have with such an amendment would be the potential for police to disproportionately target slurs utteredby Indigenous Australians towards non-Indigenous Australians. Police and the courts have been historically prone to reinforcing existing power inequalities when policing and adjudicating offensive language crimes. For instance, in the case of Green v Ashton [2006] QDC 8, an Indigenous Australian was convicted with public nuisance under s 6 of theSummary Offences Act 2005 (Qld) for saying to police officers: ‘I don’t care, you are all racist cunts’. The District Court judge reasoned that the words were offensive because ‘police officers are often the butt of an accusation of carrying out their duties in a racist way’ and the police officer would be ‘particularly sensitive’ to ‘allegations’ of racism.[98] As legal academic Lennan has written, the historical failure of police to adequately charge those who use racist slurs and profanities towards Indigenous Australians means that such laws have ‘more commonly been used as an instrument of racism than as a legal means of punishing racist expression.’[99] Thus, any narrowing of offensive language crimes to target hate speech must be accompanied by a significant cultural shift within the police force.

## Overall position

Having considered various options for amendment, and the practical problems that such amendments may encounter, it is my opinion that offensive language crimes should be repealed. Simply put, the punishment of swearing should not be the prerogative of the criminal law.  In addition to this, offensive conduct crimes should be amended so as to specifically exclude the punishment of swear words.

[1] For further research on this topic, see<https://uts.academia.edu/ElyseMethven> .

[2] ALRC, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84) (19 July 2017) 117–19 <<https://www.alrc.gov.au/publications/indigenous-incarceration-rates-dp84>>.

[3] Summary Offences Act 1988 (NSW) s 4A;Summary Offences Act 2005 (Qld) s 6; Police Offences Act 1935 (Tas) s 12;Summary Offences Act 1978 (NT) ss 47 and 53; Summary Offences Act 1966 (Vic) s 17(1)(c);Criminal Code Act 1913 (WA) (‘Criminal Code’) s 74A; Crimes Act 1900 (ACT) s 392.

[4] Police v Pfeifer (1997) 68 SASR 285;Danny Lim v The Queen [2017] DCR 231.

[5] See, eg, Summary Offences Act 1988 (NSW) s 4.

[6] Summary Offences Act 2005 (Qld) s 6;Summary Offences Act 1978 (NT) ss 47 and 53.

[7] For example, s 7 of the Vagrancy Act 1849 (NSW) provided that a person could be apprehended by a police officer or a member of the public for using ‘any profane indecent or obscene language to the annoyance of the inhabitants or passengers in any public street or place’.

[8] See, eg, reg 50 of the Passenger Transport Regulation2007 (NSW), which provides that ‘A person must not, in or on a public passenger vehicle or train or in a public area: (a) behave in an offensive manner, or (b) use any offensive language, or ... (e) spit.’ The regulations provide a maximum penalty of 10 penalty units ($110) or a penalty notice amounting to $400 (schedule 3).

[9] See, eg, Parramatta Park Trust Regulation 2012 (NSW) reg 49 and sch 3 pt 2 which prohibits ‘indecent, obscene, insulting or threatening language’.

[10] Passenger Transport Act 1990 (NSW) ss 46G and 46W.

[11] Passenger Transport Regulation2007 (NSW) reg 50 and sch 3.

[12] Criminal Procedure Regulation2017 (NSW) sch 4; Criminal Procedure Act 1986 (NSW) ss 333-40;

[13] The content of these definitions is summarised in my doctrinal analysis of offensive language crimes in Chapter 4 of my PhD thesis: Elyse Methven,Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes (University of Technology Sydney, 2017).

[14] [1951] VLR 316, 318.

[15] See McCormack v Langham (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991) 6 in which Studdert J rejected the proposition that the words ‘fucking poofter’ were not offensive, stating ‘I reject the contention that community standards have slipped to such an extent that the utterances attributed to the respondent in the present case could not, as a matter of law constitute an offence.’; see alsoPolice v Butler [2003] NSWLC 2, [22]-[34]; Heanes v Herangi (2007) 175 A Crim R 175, 218[198];Saunders v Herold (1991) 105 FLR 1, 6. Justice Higgins stated: ‘It is, in my opinion, relying on my knowledge of the standards of the community and the reasonable expectations of the community, quite unlikely that the reasonable person to be postulated as hypothetically present in the circumstances of this case would have been offended by any of the various versions of what the appellant allegedly said’.

[16] Crimes Act 1900 (ACT) s 392: ‘A person shall not in, near, or within the view or hearing of a person in, a public place behave in a riotous, indecent, offensive or insulting manner’.

[17]Criminal Procedure Regulation 2017 (NSW) sch 4; Criminal Procedure Act 1986 (NSW) ss 333-40; Summary Offences Act 1988 (NSW) s 4A(1): ‘A person must not use offensive language in or near, or within hearing from, a public place or a school.’ Section 4A(2) provides a defence where the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence. Instead of imposing a fine, a court may make an order directing the person to perform community service work (up to 100 hours), s 4A(3)-(6).

[18] Summary Offences Act 1978 (NT) ss 47 and 53;Summary Offences Regulations 1994 (NT) reg 4A. Note that the location depends on the words used, for example, indecent, obscene or profane language is punishable in a public place, or within the view or hearing of any person passing therein.

[19] Summary Offences Act 2005 (Qld) s 6;State Penalties Enforcement Regulation 2014 (Qld) sch 1.

[20] Summary Offences Act  1953 (SA) ss 7 and 22. Remarkably, the use of either indecent or profane language has a substantially lesser penalty attached to them than offensive, threatening, abusive or insulting language.

[21] Police Offences Act 1935 (Tas) s 12. If a person is convicted within six months after another offence under s 12(1), the person is liable to double the prescribed penalty. Note also that the use any threatening, abusive, or insulting words or behaviour is only punishable where there is intent or calculated to provoke a breach of the peace or whereby a breach of the peace may be occasioned.

[22] Summary Offences Act 1966 (Vic) ss 17, 60AA and 60AB.

[23] Criminal Code (Infringement Notices) Regulation 2015 (WA) sch 1;Criminal Procedure Act 2004 (WA) ss 8 and 9; Criminal Code (WA) ss 74A, 720-3.

[24] See Methven, above n 13, Chapter 3; see also Tony McEnery,Swearing in English: Bad Language, Purity and Power from 1586 to the Present (Routledge, 2006).

[25] Methven, above n 13, Chapter 3.

[26] NSW Ombudsman, ‘Review of the Impact of Criminal Infringement Notices on Aboriginal Communities’ (2009) 57; NSW Anti-Discrimination Board, ‘Study of Street Offences by Aborigines’ (Report, 1982) 48–9.

[27] See, eg, James Leaver, ‘Swear like a Victorian: Victoria’s Swearing Laws and Similar Provisions in NSW and Queensland’ (2011) 36Alternative Law Journal 163.

[28] NSW Anti-Discrimination Board, above n 26.

[29] NSW Ombudsman, above n 26; NSW Bureau of Crime Statistics and Research, ‘Persons of Interest (POIs) Proceeded against by the NSW Police Force for Offensive Language or Conduct Offences’.

[30] Australian Bureau of Statistics, Aboriginal and Torres Strait Islander Population Data Summary (28 June 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Data%20Summary~10>>.

[31] NSW Bureau of Crime Statistics and Research, above n 29.

[32] Ibid.

[33] Hal Wootten, ‘Report of the Inquiry into the Death of David John Gundy’ (Royal Commission into Aboriginal Deaths in Custody, 1991) 184.

[34] Aboriginal Justice Advisory Council, ‘Policing Public Order: Offensive Language and Behaviour, the Impact on Aboriginal People’ (1999).

[35] Ibid.

[36] More than a quarter of Aboriginal people charged with offensive language/ conduct were also charged with an offence against police: ibid.

[37] 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) 17Current Issues in Criminal Justice 217; Tamara Walsh, ‘Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses’ (2005) 24University of Queensland Law Journal 123.

[38] Rob White, ‘Indigenous Young Australians, Criminal Justice and Offensive Language’ (2002) 5Journal of Youth Studies 21; Chris Cunneen, Conflict, Politics and Crime: Aboriginal Communities and the Police (Allen and Unwin, 2001).

[39] Jarrod White, ‘Power/Knowledge and Public Space: Policing the “Aboriginal Towns”’ (1997) 30The Australian and New Zealand Journal of Criminology 275, 277–8.

[40] Methven, above n 13 ch 9; Elyse Methven, ‘Offensive Language Crimes in Law, Media, and Popular Culture’ [2017]Oxford Research Encyclopedia of Criminology and Criminal Justice <<http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-281>>.

[41] Cunneen, above n 38; White, above n 38; Diana Eades,Courtroom Talk and Neocolonial Control (Mouton de Gruyter, 2008).

[42] Marcia Langton, ‘Medicine Square’ in Ian Keen (ed),Being black: Aboriginal cultures in ‘settled’ Australia (Aboriginal Studies Press, 1988) 201, 220.

[43] Keith Allan and Kate Burridge, Forbidden Words: Taboo and the Censoring of Language (Cambridge University Press, 2006).

[44] Andrea Millwood-Hargrave, ‘Delete Expletives?’ (Broadcasting Standards Commission, 2000) <<http://ligali.org/pdf/ASA_Delete_Expletives_Dec_2000.pdf>>; Allan and Burridge, above n 43.

[45] Langton, above n 42; see also Eades, above n 41.

[46] Marcia Langton et al, ‘“Too Much Sorry Business”: Report of the Aboriginal Issues Unit of the Northern Territory’ (Vol 5, Australian Government Publishing Service, 1991) 352.

[47] Langton, above n 42, 221.

[48] Ibid.

[49] Ibid 219.

[50] Diana Eades, Aboriginal Ways of Using English (Aboriginal Studies Press, 2013) 103; Ashley Montagu has further argued in his Anatomy of Swearing that Aboriginal Australians’ swearing practices had ‘developed far beyond any of the peoples of Western cultures’ in ‘their sanctioning of swearing under the appropriate conditions’; Aboriginal Australians have recognised the power and uses of swearing for good and for bad and use swear words in a ‘sort of ritualized letting off of steam—the induction of a general feeling of well-being as a consequence of being permitted to enjoy to the full the freedom of what, under other conditions, is prohibited.’ Ashley Montagu,The Anatomy of Swearing (Collier Books, 1967) 18. This research is particularly significant in light of my findings in the following chapter, of how judicial officers applying the ‘community standards’ to offensive language charges gloss over, or obscure, differences in linguistic practices.

[51] White, above n 38, 31.

[52] See Aileen Moreton-Robinson, ‘Whiteness, Epistemology and Indigenous Representation’ in Moreton-Robinson, Aileen (ed),Whitening Race: Essays in Social and Cultural Criticism (Aboriginal Studies Press, 2004) 75.

[53] Del Vecchio v Couchy [2002] QCA 9; This case has been examined in Methven, above n 13.

[54] Constable Del Vecchio also submitted an alternative version of the words used by Couchy—’Fuck you cunt’: Transcript of Proceedings,Couchy v Del Vecchio (Brisbane Magistrates’ Court, 30238 of 2000, Magistrate Herlihy, 7 December 2000) 2.

[55] Contrary to the Vagrants Gaming and Other Offences Act 1931 (Qld) (‘VGOO Act’). This Act was replaced by s 6 of the Summary Offences Act 2005 (Qld).

[56] Del Vecchio v Couchy (Unreported, Brisbane Magistrates’ Court, Magistrate Herlihy, 7 December 2000).

[57] Couchy v Del Vecchio (Unreported, District Court of Queensland, Howell DCJ, 16 August 2001).

[58] Del Vecchio v Couchy [2002] QCA 9; The High Court were not satisfied that there would be sufficient prospects of success to warrant a grant of leave:Couchy v Del Vecchio (Gummow, Callinan and Heydon JJ, 2004) vol 520.

[59] See, eg, ‘Study of Street Offences by Aborigines’ (NSW Anti-Discrimination Board, 1982); Aboriginal Justice Advisory Council, ‘Policing Public Order: Offensive Language and Behaviour, the Impact on Aboriginal People’ (1999).

[60] See Tamara Walsh, ‘Waltzing Matilda One Hundred Years Later: Interactions between Homeless Persons and the Criminal Justice System in Queensland’ (2003) 25Sydney Law Review 75; Tamara Walsh, ‘Who is “Public” in a “Public Space”?’ (2004) 29Alternative Law Journal 81.

[61] Chris Ronalds, Murray Chapman and Kevin Kitchener, ‘Policing Aborigines’ in Mark Findlay, Sandra Egger and Jeff Sutton (eds),Issues in Criminal Justice Administration (Allen & Unwin, 1983) 168, 171.

[62] It was noted in the Magistrates’ Court proceedings that Couchy had an extensive criminal history, mainly of minor offences. Couchy was also the appellant in subsequent offensive language cases, namely:Couchy v Birchley [2005] QDC 334; Couchy v Guthrie [2005] QDC 350.

[63] Methven, above n 13.

[64] Transcript of Proceedings, Couchy v Del Vecchio (District Court of Queensland, D1098 of 2001, Howell DCJ, 16 August 2001) 5–6.

[65] Ibid 6.

[66] Ibid 3.

[67] Moreton-Robinson, above n 52.

[68] It is notable that the Court of Appeal in its judgment never acknowledged that the defendant was Indigenous: Del Vecchio v Couchy [2002] QCA 9. Also see my discussion of the case of Conners v Craigie (Unreported, McInerney J, 5 July 1993): Methven, above n 13.

[69] Transcript of Proceedings, Del Vecchio v Couchy (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002) 3 (McPherson JA); see alsoRomeyko v Samuels (1972) 2 SASR 529, 563; Crowe v Graham (1969) 121 CLR 375, 411 (Windeyer J);Dalton v Bartlett (1972) 3 SASR 549, 561 (Walters J); Hortin v Rowbottom (1993) 68 A Crim R 381.

[70] See Methven, above n 13 ch 10; Judge Scotting similarly criticised the magistrate in the lower court proceedings for failing to articulate these standards and view inDanny Lim v The Queen [2017] DCR 231.

[71] Luke McNamara and Julia Quilter, ‘Turning the Spotlight on “Offensiveness” as a Basis for Criminal Liability’ (2014) 39Alternative Law Journal 36.

[72] Douglas Husak, Overcriminalization: The Limits of the Criminal Law (Oxford University Press, 2009) 12.

[73] See, eg, Jolly v The Queen [2009] NSWDC 212;Herangi v Stephen John Heanes (Unreported, Perth Magistrates’ Court, Magistrate Nicholls, 23 October 2006);Green v Ashton [2006] QDC 8; see also Elyse Methven, ‘“Weeds of Our Own Making”: Language Ideologies, Swearing and the Criminal Law’ (2016) 34(2)Law in Context 117.

[74] See, eg, Ball v McIntyre (1966) 9 FLR 237;McCormack v Langham (Unreported, Lismore Local Court, Magistrate Pat O’Shane, 19 February 1991); Transcript of Proceedings,Conners v Craigie (Redfern Local Court, 124/92, Magistrate Horler, 24 November 1992);Police v Butler [2003] NSWLC 2; Danny Lim v The Queen [2017] DCR 231.

[75] Methven, above n 13 ch 10.

[76] Ibid chapters 5 and 6; Methven, ‘“Weeds of Our Own Making”: Language Ideologies, Swearing and the Criminal Law’, above n 73.

[77] Methven, above n 13; Methven, ‘“Weeds of Our Own Making”: Language Ideologies, Swearing and the Criminal Law’, above n 73.

[78] See, eg, Timothy Jay, Why We Curse: A Neuro-Psycho-Social Theory of Speech (John Benjamins, 1999); Kristin Jay and Timothy Jay, ‘Taboo Word Fluency and Knowledge of Slurs and General Pejoratives: Deconstructing the Poverty-of-Vocabulary Myth’ (2015) 52 Language Sciences 251.

[79] See Methven, above n 13 chapter 10.

[80] Simon Horobin, We All Cuss, so Why Shouldn’t Judges and Politicians Use the c-Word, Too? The Conversation <<http://theconversation.com/we-all-cuss-so-why-shouldnt-judges-and-politicians-use-the-c-word-too-71099>>.

[81] Jay, above n 78; Timothy Jay, ‘Cursing: A Damned Persistent Lexicon’ in Douglas J Herrmann et al (eds),Basic and Applied Memory Research: Volume 1: Theory in Context; Volume 2: Practical Applications (Psychology Press, 2014); Timothy Jay, ‘The Utility and Ubiquity of Taboo Words’ (2009) 4Perspectives on Psychological Science 153; Allan and Burridge, above n 43; Kate Burridge,The ‘c-Word’ May Be the Last Swearing Taboo, but Doesn’t Shock like It Used to The Conversation <<http://theconversation.com/the-c-word-may-be-the-last-swearing-taboo-but-doesnt-shock-like-it-used-to-54813>>.

[82] ‘Leaked Video Shows Rudd Swearing’ ABC News (online), 19 February 2012 <<http://www.abc.net.au/news/2012-02->

19/kevin-rudd-swearing-video-leaked/3838352>.; ‘Abbott Not Innocent of Swearing’ SMH (online), 23 July 2010 <[http://www.smh.com.au//breaking-news-national/abbott-notinnocent-](http://www.smh.com.au/breaking-news-national/abbott-notinnocent-)

of-swearing-20100723-10nso.html>.

[83] Taylor, above n 211, 232.

[84] See Chapter Eight for discussion and criticism of the notion of ‘Standard English’.

[85] Taylor, above n 211, 234.

[86] Brian Taylor, ‘Offensive Language: A Linguistic and Sociolinguistic Perspective’ in Diana Eades (ed),Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia (University of New South Wales Press, 1995) 219, 219.

[87] See ‘Indigenous Deaths in Custody’ (Australian Human Rights Commission, 1996) ‘Chapter 6: Police Practices’ <<https://www.humanrights.gov.au/publications/indigenous-deaths-custody-chapter-6-police-practices>>.

[88] Jenny Brockie, Cop It Sweet (ABC Television, 1992).

[89] Calla Wahlquist, ‘Ms Dhu Inquest: Officer Was Told of Her Condition Six Hours before She Died’The Guardian (online), 22 March 2016 <<https://www.theguardian.com/australia-news/2016/mar/22/ms-dhu-inquest-officer-was-told-of-her-condition-six-hours-before-she-died>>; see also Hal Wooten’s comments above, in Wootten, ‘Report of the Inquiry into the Death of David John Gundy’, above n 29.

[90] The CCTV footage reportedly shows Ms Dhu being mocked, ignored, dismissed and laughed at by police as she cried, choked on her own vomit in the cells and her hands turned blue. She was twice taken to Hedland Health Campus, and both times returned to the police station. At the coronial inquest in Perth, officers testified they thought Ms Dhu was faking being sick. See Wahlquist, above n 99.

[91] NSW Law Reform Commission, ‘Penalty Notices’ (Report, 2012) 299.

[92] Ibid 300.

[93] McNamara and Quilter, above n 71, 37.

[94] In NSW, see, eg, Crimes Act 1900 (NSW) s 60 (assault and other actions against police officers), which provides that ’a person who assaults ... harasses or intimidates a police officer while in the execution of the officer’s duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years’; s 61 (common assault, which includes psychic assault); s 93C (affray);Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13 ( stalking or intimidation with intent to cause fear of physical or mental harm).

[95] See, eg, Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 197.

[96] NSW Law Reform Commission, above n 91, 307–10.

[97] It could be argued that currently, offensive language crimes are more broadly drafted than s 18C of the Racial Discrimination Act 1975 (Cth) (which is a civil, and not a criminal provision, and therefore a less serious intrusion into freedom of expression): Elyse Methven, ‘Section 18C and Unravelling the Government’s “Freedom Agenda”’The Conversation (online), 1 April 2014 <<http://theconversation.com/section-18c-and-unravelling-the-governments-freedom-agenda-25021>>.

[98] His Honour stated [at 11]: ‘In Bundaberg, which I have regularly visited on circuit, it is notorious that many of the people charged in the courts with indictable or summary offences are of Aboriginal or Torres Strait Islander blood. It is also notorious that tension exists between some members of those communities and police officers. I have no doubt that police officers are often the butt of an accusation of carrying out their duties in a racist way and that many police officers are particularly sensitive to these allegations: Green v Ashton [2006] QDC 8.

[99] Ibid 126–30.

Question 6–5

**Question 6–5: Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the court?**

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## Introduction

Alongside the repeal of offensive language crimes, Australian jurisdictions which allow police and enforcing officers to issue penalty notices for offensive language crimes should remove these alternative schemes. The NT Government should also remove the power of police to conduct a paperless arrest for obscene or objectionable language. Even if state and territories were to retain or narrow the scope of offensive language crimes, they should still abolish the CIN schemes, and offensive language crimes should be dealt with by way of traditional court processes. The reasons which ground this submission are outlined below.

## Overview of CINs for Offensive language

Alongside traditional court processes, police officers in most Australian jurisdictions (NSW, the NT, Queensland, Tasmania, Victoria and WA) have powers to issue ‘on the spot fines’ (penalty notices, infringement notices or ‘CINs’) for offensive or obscene language.[1] CINs are notices to the effect that, if the person served does not elect to have the matter determined by a court (‘court-elect’), that person must pay the amount prescribed for the offence within a fixed time period.[2] Recipients who court-elect risk incurring a criminal record, harsher penalties, additional costs, and the expended time and stresses associated with the process of criminal prosecution.[3] In NSW, CINs may only be issued to persons over the age of 18 and must be issued by a police officer, while in WA the offender must be 17 years of age or older.[4]

CINs for offensive language were introduced with the objectives of easing congestion in overstretched courts, and saving police officers time and money when processing minor offences.[5] It is questionable whether these goals are achieved in the long term, or whether they offset the potential for CINs to result in ‘net-widening’.[6]

## Reasons for submission:

The key reasons which ground my submission that CIN schemes should be removed from offensive language crimes are as follows:

## 1.     Overrepresentation of Indigenous Australians and net-widening concerns

In the year 1 April 2016 to 31 March 2017, Indigenous adults accounted for 15% (245) of all adults (1609) issued a criminal infringement notice for offensive language.[7] This is despite the fact that Indigenous Australians comprise only 3% of the NSW population.[8] This is concerning given that in 2005 and in 2009, the NSW Ombudsman reported evidence of ‘net-widening’ in the use of CINs for offensive language, with police issuing CINs in circumstances where a warning or caution would have been more appropriate or where a court would likely have acquitted the defendant.[9] Few recipients challenge penalty notices, through either internal review or court election. Accordingly, many CIN recipients are paying fines in circumstances where they would likely have been acquitted by a court.[10] Indigenous Australians are even less likely than non-Indigenous Australians to request an internal review or to court-elect in order to challenge the fines.[11] As a result, it is likely that a number of Indigenous Australians are being punished for offensive language when they would have been found not guilty by a court, had no conviction recorded by a court, or would have had their charges withdrawn by police.

## 2.     Fine enforcement measures

Given that the NSW Ombudsman found that nine out of every 10 Indigenous Australians issued with a CIN failed to pay within the time allowed, many Indigenous Australians who receive a CIN face fine enforcement measures.[12] This has a particularly severe impact on vulnerable people, those who distrust the criminal justice system, and those without the means to pay the fines. The failure to pay CIN amounts may lead to more serious fine enforcement measures, including increasing levels of debt and driver licence sanction. This can increase the chance of secondary offending.[13] In NSW, if a CIN is not paid within 21 days, a reminder notice is issued to the recipient. After 28 days, enforcement costs are added and enforcement processes commenced.

It has been elsewhere noted that driver licence sanctions have a particularly damaging impact on Aboriginal people living in regional, rural or remote communities, where private vehicles are often the only practical means of transport available to access work or basic services.[14] The findings of the coronial inquiry into the death of Ms Dhu illustrate further problems with jurisdictions that allow unpaid fines to be substituted with imprisonment in police custody without court oversight. Ms Dhu had a total of $3,622 owing for minor offences including swearing at police (disorderly conduct).[15] In August 2014, at the age of 22, Ms Dhu died after being taken into police custody for these unpaid fines, and while in police custody, she was mocked, ignored, dismissed and laughed at by police as she cried, choked on her own vomit in the cells and her hands turned blue.[16]

## 3.     CIN amounts are fixed, vary significantly between jurisdictions and are disproportionate to income

In NSW, the CIN amount is $500. This is only 25% smaller than the maximum fine that a court can impose for offensive language ($660), noting that in most cases, a Court would be unlikely to impose the maximum fine amount for offensive language.[17] The fine was more than tripled from $150 to $500 as part of a package of laws introduced to combat drunken and anti-social behaviour, in response to a number of high-profile ‘one-punch’ incidents in NSW.[18] The NSW fine increases occurred without any evidence that this would deter drug and alcohol-fueled violence.[19] In Victoria, the CIN amount for using profane, indecent or obscene language, or threatening, abusive or insulting words, in or within hearing from a public place is two penalty units (currently $317.14).[20] In Queensland, police may serve an infringement notice of $126.15 on a person who uses offensive, obscene, indecent, threatening or abusive language in a public place, and $378.45 if the language is used within, or in the vicinity of, licensed premises.[21] In WA, police can issue a fine of $500 for disorderly conduct.[22] Accordingly, there is a significant discrepancy between the fine amounts for various jurisdictions.

In the NT, police may issue a penalty notice amounting to $432 for any riotous, offensive, disorderly or indecent behaviour or using obscene language in, or within the hearing of, any person in any public place (s 47 of theSO Act (NT)); $144 for using any profane, indecent or obscene language in a public place, or within hearing of any person passing therein (s 53(1)(a)); and $288 for threatening, abusive or objectionable words or behaviour, or offending or causing substantial annoyance to another person, in a public place or in licensed premises (s 53(7)).[23] NT governments have so far ignored the NT Department of Justice’s recommendations, made in 2010, to streamline and remove duplication in these offences.[24] As a result, police have the discretion to fine a person either $432 or $144 for using obscene language.[25]

## 4.     Paperless arrest powers

In 2014, the former NT Government introduced a new arrest, detain and fine regime, contained in thePolice Administration Act (NT).[26] The laws allow police to arrest a person for profane, indecent or obscene language in public, without a warrant, and hold that person for up to four hours in custody without charge.[27] The NT Government labelled these provisions ‘paperless arrest’ laws, although they are not always paperless.[28] The laws were subjected to constitutional challenge after Miranda Bowden was arrested, detained and fined under ss 123 and 133AB for a number of minor offences, including using obscene language in public. The High Court of Australia, in a 6:1 decision, upheld the validity of div 4AA, finding that it did not confer on the executive a power to detain which is penal or punitive in character.[29] The paperless arrest laws have been used extensively since they first came into operation, with over 80 per cent of people detained under the laws being Indigenous Australians.[30] Although the current NT Labor Government has previously indicated that it will repeal these paperless arrest powers,[31] this has so far not been done.

## 5.     Increased police discretion

While CINs might be promoted because of their ‘increased efficiency’, such efficiency comes at the expense of justice and equal and transparent enforcement of offensive language crimes. The NSWLRC highlighted the potential for CINs to substantially widen police discretion. When faced with behaviour that might amount to a penalty notice offence, a police officer need not issue a CIN; they can instead choose to ignore the behaviour, use their common law power to issue an informal warning, issue a caution, or serve a court attendance notice (CAN). With CINs, this choice is rarely subjected to judicial scrutiny.[32]

## 6.     Complex legal elements of offensive language crimes

The legal elements of offensive language crimes are too complex to be decided ‘on-the-spot’ by police, and require the oversight of those with formal legal qualifications—judicial officers. The complicated and multiple legal elements of offensive language crimes, many of which are yet to be resolved at appellate court level, have been examined in detail elsewhere.[33] To illustrate this complexity here, I note that generally, the prosecution must prove the following elements beyond reasonable doubt. Firstly, the defendant must have spoken the words voluntarily (in a ‘conscious’ and ‘willed’ manner).[34] Secondly, the defendant’s words must have been ‘offensive’, ‘indecent’ or ‘obscene’. Each of these adjectives has a distinct legal definition, for example, the common law definition of offensiveness is that provided inWorcester v Smith: ‘such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person’.[35] An important ‘gloss’ on the test of offensiveness is that the impugned language must warrant the interference of the criminal law.[36]

The ‘reasonable person’ is said to be neither thin-skinned nor overly thick-skinned.[37] She or he is also reasonably tolerant and understanding and reasonably contemporary in his or her reactions.[38] The reasonable person has some sensitivity to social behaviour and social expectations in public places.[39] And a reasonable person is neither a social anarchist nor a social cynic, whose view of changes in social standards is that they are all in one direction—the direction of irresponsible self-indulgence, laxity and permissiveness.[40]

 When considering the perspective of the reasonable person, a magistrate (or police officer) must have regard to ‘contemporary community standards’.[41] The decision-maker must also consider the ‘context’ or circumstances in which the words were used; it is an error of law to hold that swear words such as ‘fuck’ and ‘cunt’ are necessarily offensive.[42] The words must have been used in, or near, or within hearing from a public place (this ‘location’ element differs amongst the various jurisdictions).[43] In some jurisdictions, the prosecution must prove that the defendant intended, or was reckless, as to whether the language was offensive, indecent and so on.[44] In NSW, the defendant must not have had a ‘reasonable excuse’ for using the words (the defendant is to prove this on the balance of probabilities).[45] In other jurisdictions where the offence is considered one of strict liability, the defendant may argue the defence of honest and reasonable mistake of fact.[46] Finally, it is unclear whether the freedom of political communication, which has been implied into the Australian constitution,[47] extends to protect ‘four-letter words’ uttered to challenge persons in position of power, authority or political policies.[48] The latest offensive conduct case heard at appellate jurisdiction, Lim v The Queen [2017] NSW 231, has held that the criminal offence should be construed without unduly burdening political communications.[49]

It is highly doubtful that police are correctly, objectively and diligently considering all these legal elements when determining whether to issue a CIN for offensive language. This is all the more concerning given that police need not give reasons for their decisions to issue CINs, and these decisions are rarely challenged by CIN recipients.

## Conclusion

By allowing CINs to be issued for offensive language, efficiency has been prioritised over justice, including a transparent, rigorous and fair application of the criminal law. The preferable option, in addition to repealing offensive language crimes, is for all Australians jurisdictions to remove offensive language provisions from CIN and paperless arrest schemes.

[1] Criminal Procedure Regulation 2017 (NSW) sch 4;Criminal Procedure Act 1986 (NSW) ss 333-40; Summary Offences Regulations 1994 (NT) regs 3-4A;State Penalties Enforcement Act 1999 (Qld) ss 13-15, 27-3; State Penalties Enforcement Regulation 2014 (Qld) sch 1;Police Offences Act 1935 (Tas) s 61; Monetary Penalties Enforcement Act 2005 (Tas) s 14;Summary Offences Act 1966 (Vic) s 12(1)(c), ss 60AA and 60AB(2); Criminal Code Act 1913 (WA) ss 730-3;Criminal Code (Infringement Notices) Regulation 2015 (WA) sch 1; for discussion of the use of penalty notices for offensive language in NSW see: Elyse Methven, ‘Should Penalty Notices Be Issued for Using Offensive Language?’ (2012) 37 Alternative Law Journal 63; Elyse Methven, ‘A Very Expensive Lesson: Counting the Costs of Penalty Notice for Anti-Social Behaviour’ (2014) 26 Current Issues in Criminal Justice 249.

[2] See, eg, Criminal Procedure Act 1986 (NSW) s 334.

[3] See NSW Ombudsman, ‘Review of the Impact of Criminal Infringement Notices on Aboriginal Communities’ (2009): ‘Foreword’.

[4] Criminal Procedure Act 1986 (NSW) s 335;Criminal Code (Infringement Notices) Regulation 2015 (WA) reg 5.

[5] NSW Law Reform Commission, ‘Penalty Notices’ (Report, 2012).

[6] NSW Ombudsman, ‘Review of the Impact of Criminal Infringement Notices on Aboriginal Communities’, above n 3; NSW Law Reform Commission, above n 5; Elyse Methven, ‘A Very Expensive Lesson: Counting the Costs of Penalty Notice for Anti-Social Behaviour’ (2014) 26 Current Issues in Criminal Justice 249; 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) 17Current Issues in Criminal Justice 217.

[7] NSW Bureau of Crime Statistics and Research, ‘Persons of Interest (POIs) Proceeded against by the NSW Police Force for Offensive Language or Conduct Offences’.

[8] Australian Bureau of Statistics, Aboriginal and Torres Strait Islander Population Data Summary (28 June 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Data%20Summary~10>>.

[9] NSW Ombudsman, ‘On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police’ (2005) 76; NSW Ombudsman, ‘Review of the Impact of Criminal Infringement Notices on Aboriginal Communities’, above n 3.

[10] NSW Ombudsman, ‘Review of the Impact of Criminal Infringement Notices on Aboriginal Communities’, above n 3, v–vi.

[11] Ibid.

[12] Ibid 117.

[13] NSW Law Reform Commission, above n 5 xxi; NSW Ombudsman, ‘Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988’ (2014) 5, 100; Methven, above n 6.

[14] Methven, above n 6; Mary Spiers Williams and Robyn Gilbert,Reducing the Unintended Impact of Fines (Indigenous Justice Clearinghouse, 2011).

[15] Melinda Cooper, ‘Money as Punishment: Neoliberal Budgetary Politics and the Fine’ <<https://www.academia.edu/34333175/Money_as_Punishment_Neoliberal_Budgetary_Politics_and_the_Fine>> See also Fogliani R (2016) Inquest into the Death of Julieka Ivanna Dhu (11020-14). State Coroner of Western Australia.

[16] Calla Wahlquist, ‘Ms Dhu Inquest: Officer Was Told of Her Condition Six Hours before She Died’The Guardian (online), 22 March 2016 <<https://www.theguardian.com/australia-news/2016/mar/22/ms-dhu-inquest-officer-was-told-of-her-condition-six-hours-before-she-died>>.

[17] Judicial Commission of NSW, Judicial Sentencing Guidelines: NSW Court Fines (2017) <<https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/fines.html>>;Crimes (Sentencing Procedure) Act 1999 (NSW) (‘Crimes (Sentencing Procedure) Act’) s 21. Further, under the Fines Act 1996 (NSW) s 6, a court is required to consider the means of the accused to pay the fine.

[18] Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW) sch 5; amending the Criminal Procedure Act 1986 (NSW) sch 3.

[19] Methven, above n 6.

[20] Summary Offences Act 1966 (Vic) ss 17(1)(c), 60AA and 60AB(2); one penalty unit equates to $158.57 from 1 July 2017 to 30 June 2018. Penalty unit rates are fixed each year by the Treasurer of Victoria under the Monetary Units Act 2004 (Vic) s 6.

[21] Queensland police may serve an infringement notice on a person for a prescribed public nuisance offence where a person has already been arrested for a prescribed public nuisance offence.State Penalties Enforcement Act 1999 (Qld) ss 13-15, 27-3; State Penalties Enforcement Regulation 2014 (Qld) sch 1; see also Paul Mazeroll et al, ‘Ticketing for Public Nuisance Offences in Queensland: An Evaluation of the 12-Month Trial’ (Griffith University, 2010)

<<http://rti.cabinet.qld.gov.au/documents/2010/oct/police%20legislation%20amend%20bill%2010/Attachments/Griffith%20Report.pdf>>.

[22] Criminal Code (Infringement Notices) Regulation 2015 (WA) sch 1;Criminal Procedure Act 2004 (WA) ss 8 and 9; Criminal Code Act 1913 (WA) ss 74A, 720-3.

[23] Summary Offences Act 1978 (NT) s 53(1) and (7);Summary Offences Regulations 1994 (NT) regs 3-4A.

[24] The issues paper recommended that the convoluted, and in many cases overly punitive provisions in s 47 be substantially revised and that s 53 be repealed: Legal Policy Division, ‘Review of the Summary Offences Act’ (Issues Paper, Northern Territory Department of Justice, 2010) 23–6, 63.

[25] Although it was noted that obscene language is not in practice charged under s 47, but instead under s 53(1)(a): ‘The figures show “obscene language” has not been charged in the last ten years under this subsection but has been charged instead under section 53(1)(a)(i) for total of 527 times’, ibid 23.

[26] Police Administration Act 1978 (NT) div 4AA of pt VII.

[27] Ibid ss 123 and 133AB; Police Administration Regulations (NT) reg 19A. Section 133AB provides that where a member of the police force has arrested a person without and the member believed, on reasonable grounds, that the person had committed, was committing or was about to commit, an infringement notice offence, that in these circumstances, the member may take the person into custody for a period of up to four hours (and can be held for a longer period where the person is intoxicated). Following this period, the member may then issue the person with an infringement notice, release the person on bail, or bring the person before a justice or court for the infringement notice offence or another offence, or, release the person unconditionally.

[28] Northern Territory, Parliamentary Debates, Legislative Assembly, 22 October 2014 12th Assembly (John Elferink, A-G and Minister for Justice). They are not always paperless in that police may still issue a criminal infringement notice to the fine recipient.

[29] North Australian Aboriginal Justice Agency Ltd & Another v Northern Territory (2015) 326 ALR 16, 75.

[30] Human Rights Law Centre, High Court Upholds but Curtails Northern Territory’s Paperless Arrest Laws (11 November 2015) <<http://hrlc.org.au/high-court-upholds-but-curtails-northern-territorys-paperless-arrest-laws/>>; ABC, ‘High Court Rules on NT Paperless Arrest Powers’, The Law Report, 17 November 2015 <<http://www.abc.net.au/radionational/programs/lawreport/high-court-rules-on-nt-paperless-arrest-powers/6943296#transcript>>.

[31] NT Labor Vows to Overturn Paperless Arrest System (17 August 2015) ABC News <<http://www.abc.net.au/news/2015-08-17/nt-labor-vows-to-overturn-paperless-arrest-system/6702798>>.

[32] CP Act (NSW) s 342(3); See Methven, ‘A Very Expensive Lesson’, above n 194, 252; NSW Ombudsman, ‘Review of the Impact of Criminal Infringement Notices on Aboriginal Communities’, above n 30, 55.

[33] Elyse Methven, Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes (University of Technology Sydney, 2017) ch 4; Luke McNamara and Julia Quilter, ‘Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)’ (2013) 36University of New South Wales Law Journal 534.

[34] Ryan v The Queen (1967) 121 CLR 205;Jeffs v Graham (1987) 8 NSWLR 292.

[35] Worcester v Smith [1951] VLR 316, 318.

[36] Melser v Police [1967] NZLR 437;Spence v Loguch (Unreported, Supreme Court of NSW, Sully J, 12 November 1991).

[37] McCormack v Langham (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991)5;Evans v Frances (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990).

[38] Ball v McIntyre (1966) 9 FLR 237, 245 (Kerr J).

[39] Evans v Frances (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990).

[40] Spence v Loguch (Unreported, Supreme Court of NSW, Sully J, 12 November 1991) 10.

[41] McCormack v Langham (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991);Police v Butler [2003] NSWLC 2; Heanes v Herangi (2007) 175 A Crim R 175;Saunders v Herold (1991) 105 FLR 1.

[42] Hortin v Rowbottom (1993) 68 A Crim R 381;Bradbury v Staines; Ex parte Staines [1970] Qd R 76; Dalton v Bartlett (1972) 3 SASR 549.

[43] See, eg Summary Offences Act 2005 (Qld) s 6;Criminal Code Act 1913 (WA) (‘Criminal Code’) s 74A.

[44] Pregelj v Manison (1987) 51 NTR 1; c.f.Police v Pfeifer (1997) 68 SASR 285; for discussion in the NSW context, see McNamara and Quilter, above n 34.

[45] Summary Offences Act 1988 (NSW) s 4A(2);Jolly v The Queen [2009] NSWDC 212; Danny Lim v The Queen [2017] DCR 231.

[46] He Kaw Teh v The Queen (1985) 157 CLR 523.

[47] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520;Coleman v Power (2004) 220 CLR 1.

[48] Monis v The Queen (2013) 249 CLR 92; Madeleine Figg, ‘Monis v the Queen; Droudis v the Queen (2013) 295 ALR 259’ (2013) 32(1)University of Tasmania Law Review 125; Adrienne Stone, Free Speech Balanced on a Knife’s Edge: Monis v The Queen; Droudis v The Queen‘ (26 April 2013) Opinions on High <<http://blogs.unimelb.edu.au/opinionsonhigh/2013/04/26/stone-monis/>>.

[49] Danny Lim v The Queen [2017] DCR 231; citingMonis v The Queen (2013) 249 CLR 92, [331] and [334].

Question 6–6

Proposal 6–2

Question 6–7

Question 6–8

Question 6–9

Question 6–10

Proposal 7–1

Question 8–1

Question 8–2

Question 9–1

Proposal 10–1

Question 10–1

Proposal 11–1

Question 11–1

Proposal 11–2

Question 11–2

Proposal 11–3

Question 12–1

Question 12–2

Question 12–3

Question 12–4

Question 12–5

Question 12–6

Question 13–1

Other comments?

File

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