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SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION INQUIRY INTO INCARCERATION RATES OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

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I. Introduction

I welcome the opportunity to provide a submission to this important Inquiry.

Over the past 12 years, I have undertaken a number of research projects, and made many recommendations, regarding the impacts of the criminal law and the criminal justice system on vulnerable people. This submission is not a new piece of scholarship – rather, it draws upon my existing work to address some of the questions posed by the Commission in its Discussion Paper.

II. Question 4-2: Should short sentences of imprisonment be abolished as a sentencing option?

Answer: Yes, the academic literature has long supported the abolition of short sentences, advocating for its replacement with non-custodial, therapeutic sentencing alternatives.

The Commission will be aware that Aboriginal and Torres Strait Islander peoples are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts,[1] and that Indigenous women are more likely to be serving short sentences for minor offences.[2]

In 2016, approximately 16.5% of the Australian prison population was serving a sentence of less than 12 months,[3] yet the consensus in the literature is that short prison sentences do not act as an effective deterrent against future offending.[4] It is well-established that short sentences are no more effective than non-custodial alternatives – such as suspended sentences – in reducing recidivism.[5]

Prisoners serving short sentences are less likely to receive case management services, and are less likely to have access to prison programs aimed at addressing their offending behaviour.[6] Despite this, they suffer the same consequences of imprisonment as other prisoners, including loss of accommodation, loss of employment, loss of income, and – particularly for female prisoners – loss of parental responsibility for their children.[7]

> 'I lost everything I ever had – family, furniture, the car was repossessed, everything's gone… I was picked up at 11 o'clock at night from my house and I never returned. And all the furniture, everything that was there, was either taken by somebody or sold to pay the rent. You just couldn't organise it.'
>
> - Former prisoner, *Incorrections*, 2004 at 114.

[1] Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2016* (2016), table 25.

[2] P MacGillivray and E Baldry, *Australian Indigenous Women's Offending Patterns* (Brief 19, Indigenous Justice Clearinghouse, 2015) 1; L Bartels, *Sentencing of Indigenous Women* (Brief 14, Indigenous Justice Clearinghouse, 2012) 3.

[3] Australian Bureau of Statistics, *4517.0 – Prisoners in Australia* (2016), table 25.

[4] Just Reinvest NSW, *Policy Paper: Key Proposals #1–Smarter Sentencing and Parole Law Reform* (2017) 3; J Trevena and D Weatherburn, 'Does the first prison sentence reduce the risk of further offending?' (2015) 187 *Contemporary Issues in Crime and Criminal Justice* 1; B Lind and S Eyland, 'The impact of abolishing short prison sentences' (2002) 73 *Contemporary Issues in Crime and Justice* 1; R Broadhurst and RA Muller, 'The recidivism of prisoners released for the first time: reconsidering the effectiveness question' (1990) 23 *Australian and New Zealand Journal of Criminology* 88.

[5] J Trevena and D Weatherburn, 'Does the first prison sentence reduce the risk of further offending?' (2015) 187 *Contemporary Issues in Crime and Criminal Justice* 1.

[6] Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 38; D Weatherburn, 'Rack 'Em, Pack 'Em and Stack 'Em: Decarceration in an Age of Zero Tolerance' (2016) 28(1) *Current Issues in Criminal Justice* 137, 146*;* T Walsh, 'Is corrections correcting? An examination of prisoner rehabilitation policy and practice in Queensland' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 109.

[7] Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 5, 13, 38; L Bartels, 'Painting the picture of Indigenous women in custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1. See generally T Walsh, *Incorrections: Investigating Prison Release Practice and Policy in Queensland and Its Impact on Public Safely* (Queensland University of Technology, 2004).

> 'They say that jail's for rehabilitating – that's bullshit. The simple fact of the matter is that you don't pay bills there, you don't do this, your medication's regulated. Everything's done for you – do you know what I mean? And that's what a lot of my trouble's been. By going to jail, being in there that long, and I lost everything. And to start again with a dole cheque is really, really hard.'
>
> - Research participant, *A Special Court for Special Cases,* 2011 at 25.

A prison sentence also has the effect isolating people from their communities, and if visits are impracticable due to the location of the prison or the resources of the family, relationship breakdown may occur. For Aboriginal and Torres Strait Islander peoples who live in remote communities, this is a matter of particular concern, for two reasons. First, children may be unable to visit their incarcerated parents making reunification difficult later on. Second, a sentence of imprisonment may have the perverse effect of reuniting family members, further reducing the deterrent effect of a prison sentence.

For those serving short sentences for trivial offences, imprisonment would appear to have an inordinate impact on their lives in comparison with the offence they have committed. Yet, it is well-established that Aboriginal and Torres Strait Islander peoples are more likely to be serving short sentences for trivial offences, such as drunk and disorderly and offensive behaviour-type offences.[8] Indeed, the Victorian Federation of Community Legal Centres found that if all Aboriginal and Torres Strait Islander peoples serving a sentence of six months or less were not imprisoned, the Aboriginal and Torres Strait Islander prison population over 12 months would be reduced by 56%.[9]

Therefore, the consensus in the academic literature is that short-sentences should be abolished, and replaced with non-custodial, therapeutic alternatives.

III. Question 4-5: Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

Answer: In some jurisdictions, including Queensland, legislative reform may be required to enable or encourage greater use of community-based, therapeutic sentencing options.

Queensland provides an example of a jurisdiction in which legislative reform may indeed be necessary to enable, or perhaps only to encourage, judicial officers to make greater use of community-based sentencing options.

[8] Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2016* (2016), table 25; L Bartels, 'Indigenous women's offending patterns: A literature review' (2010) 107 *Australian Institute of Criminology Research and Public Policy Series* 1, 20; H McRae, *Indigenous legal issues: Commentary and materials* (Thomson Reuters, 4th ed, 2009) 502.

[9] Victorian Federation of Community Legal Centres, *Smart Justice: Just Got Locked Up Again*, <http://www.communitylaw.org.au/cb_pages/images/Fact_sheet_7_Indigenous.pdf>

The Corrective Services Act 2006 (Qld)

The *Corrective Services Act 2006* (Qld) abolished a number of best-practice sentencing options which provided alternatives to full-time incarceration, including periodic detention, home detention, and gradual release.[10] The previous Act (the *Corrective Services Act 2000* (Qld)) provided a range of 'post-prison community-based release' options, including release to work. The previous Act set up a scheme whereby those sentenced to imprisonment for more than two years could apply for a post-prison community-based release order which could be tailored to the reintegration needs of the particular prisoner by combining two or more of the available release options. However, this is no longer available to Queensland prisoners, who are now either released on parole or released without supervision or support straight into the community.

> 'They call you a dog and all the rest of the shit that they call you while you're in prison, and you come out thinking that way. And you don't get anywhere once you get out.'
>
> - Research participant, *No Vagrancy,* 2007 at 46.

The removal of these alternatives to full-time incarceration represented an obvious departure from an evidence-based approach. It is well-established that prisoner rehabilitation and community safety are best ensured by the release of prisoners over time to less and less restrictive environments.[11] A rehabilitative release scheme, rather than releasing prisoners absolutely at the expiration of their full-term, progressively prepares prisoners for community life. Such an approach is consistent with the *Standard Guidelines for Corrections in Australia* which states that 'the emphasis of community correctional services should be on maximising opportunities for community-based rehabilitation and integration of offenders'; as well as article 60(2) of the *Standard Minimum Rules for the Treatment of Prisoners* which states that 'necessary steps' should be taken to ensure a 'gradual return to life in society' for prisoners under appropriate supervision.

Without alternative sentencing options being made available to the Queensland judiciary in the *Corrective Services Act 2006* (Qld), it is not possible for judges to tailor sentences to enble prisoners to be gradually released back into the community, with the support and supervision they require.

The *Penalties and Sentences Act 1992* (Qld)

In 2006, the Special Circumstances Court was established in Brisbane to provide a specialist court list aimed at addressing the offending behaviour of vulnerable people charged with low-level offences, rather than imposing traditional penalties like fines. Defendants received case management services from a designated magistrate and a court liaison officer, and they were

[10] T Walsh, 'The Corrective Services Act (2006): An erosion of prisoners' human rights' (2006) 18(2) *Bond Law Review* 143.

[11] See, eg, L Ward, *Transition from Custody to Community: Transitional Support for People Leaving Prison* (2001); G Hill, 'The Correctional System of Greece – The Prison System and Aftercare' (2000) *July Corrections Compendium* 20.

linked with appropriate community services for treatment and support.[12] Despite the court's successes, it was disestablished by the Newman Government in 2012.

An important observation made by judicial officers during my own research on the court was that the *Penalties and Sentences Act 1992* (Qld) did not always contain a sufficient range of sentencing options to allow the magistrates to tailor their orders to the circumstances of individual offenders.[13] The magistrates were forced to 'stretch' the only provision that could be interpreted to allow for this model, specifically section 19(1)(b),[14] or place people on bail knowing that this could lead to additional charges if they breached the bail requirements.

In my 2011 study on the Special Circumstances Court, participants agreed that the sentencing options available to magistrates were inadequate to allow them to make appropriate orders requiring defendants to attend treatment or support services under the court's supervision.[15] There a number of models which make provision for these kinds of sentencing alternatives.[16] For example, under section 350 of the *Criminal Procedure Act 1986* (NSW) and section 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the courts can adjourn proceedings so that an accused person can participate in an intervention program. More broadly, under section 83A of the *Sentencing Act 1991* (Vic), the court may adjourn proceedings for a period of time if the magistrate is of the opinion that sentencing should, in the interests of the offender, be deferred.[17]

Therefore, in some jurisdictions, including Queensland, legislative reform may be required to allow judicial officers greater flexibility to tailor sentences.

IV. Question 6-1: Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

Answer: Infringement notices have the effect of compounding disadvantage for vulnerable people. Written cautions are used as an effective diversionary mechanism in the United Kingdom and should be trialled in Australia.

[12] T Walsh, *A Special Court for Special Cases* (University of Queensland and Australian Institute of Judicial Administration, 2011); T Walsh, 'The Queensland special circumstances court' (2007) 16(4) *Journal of Judicial Administration* 223.

[13] T Walsh, 'Defendants' and criminal justice professionals' views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93.

[14] *Penalties and Sentences Act 1992* (Qld) s 19(1)(b): The court may make an order— that the offender be released if the offender enters into a recognisance, with or without sureties, in such amount as the court considers appropriate, on the conditions that the offender must— (i) be of good behaviour; and (ii) appear for conviction and sentence if called on at any time during such period (not longer than 3 years) as is stated in the order.

[15] T Walsh, 'Defendants' and criminal justice professionals' views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93; T Walsh, *A Special Court for Special Cases* (University of Queensland and Australian Institute of Judicial Administration, 2011).

[16] T Walsh, *A Special Court for Special Cases* (University of Queensland and Australian Institute of Judicial Administration, 2011) 73.

[17] See also, *Magistrates Court Act 1989* (Vic) s 4Q(3).

Suspended infringement notices

The starting point for any discussion on fines is that fines should never be imposed upon people who have no means to pay them. It is fundamentally unjust to require a person to pay a fine if they have no means to pay.[18] Infringement notices have the effect of entrenching disadvantage and for people who rely on social security benefits, they may result in recidivism rather than acting as a deterrent. This is discussed further below at Part 5 and Part 7.

> 'What's the point of fining people that are on benefits, which is only going to make their lives harder down the track, and they're just going to keep reoffending? There's no logic. It's set up that if you do something wrong, bad boy. But there's no support afterwards to stop from reoffending.'
>
> - Research participant, *A Special Court for Special Cases*, 2011 at 24.

Written cautions

'Out of court disposals' are becoming increasingly popular in the United Kingdom, as austerity measures have increased pressure upon criminal justice agencies to deal with crime in a more cost-effective manner.[19] Participants in a recent study of mine, conducted in the UK, noted the increased use of 'Community Resolution' or 'Street RJ' (that is, street-based restorative justice), where instead of arresting a person, police 'just deal with' the issue before them. This diversionary response is commonly used in situations involving anti-social behaviour, and public space offences such as begging and rough sleeping. These interactions sit 'outside the formal criminal justice process' in that no records are kept, so they operate as an alternative to arrest and charge.

Participants in this UK study noted that the use of cautions by police had also increased in recent years. Cautions are a more formal kind of 'out of court disposal' and are used in situations where the offence is more serious in nature, or where offender has 'already had a Community Resolution' and has come to the attention of police on a number of occasions. Participants said that in these situations there is likely to be 'a lot more going on' in the person's life and therefore it was recognised that arresting and charging the person may not be the best way of preventing reoffending.

Cautions are 'disclosable' in that they form part of a person's criminal record, but there is no court appearance. This includes 'conditional cautions', which are cautions with conditions attached. These conditions might include attendance at a treatment, housing or welfare service, or engaging in programs. The aim of a conditional caution is to ensure that offenders receive the assistance they need to address the underlying causes of their offending behaviour. Whilst conditional cautions require some 'investment' by the police service, participants in this study agreed that conditional cautions were probably more effective in bringing about crime prevention outcomes than standard cautions.

[18] T 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.

[19] T Walsh, '"The idea is to keep people out of the courts": Criminal justice diversion and why we are a decade behind the UK' (2017) forthcoming.

Written cautions, including cautions with therapeutic conditions attached, should be considered as an avenue for potential diversion, with a view to reducing the number of accused persons coming before the courts and receiving traditional sentences for trivial offences.[20] Alternatively, the use of less formal alternatives involving the restorative justice techniques could also be considered.

V. Question 6-2: Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how? and Question 6-3: Should the number of infringement notices able to be issued in one transaction be limited?

Answer: Fines should never be imposed upon people who have no means to pay them. If a fine is imposed upon a person, it should be in proportion to their income, as well as the gravity of the offence.

It is fundamentally unjust to require a person to pay a fine, either under a court order or via an infringement notice, if they have no means to pay.[21]

> 'Like, if you're on a pension, how the bloody hell are you supposed to afford that? But then people say "why go out and steal?" Well, why? Why people steal is because they can't afford things. And they say "get a job" but it's easier to say "get a job", when who wants to employ someone?... I want to get a job, but just nobody wants you.'
>
> - Research participant, *A Special Court for Special Cases*, 2011 at 25.

Monetary penalties have the effect of entrenching disadvantage. Since social security benefits are pegged at levels well below the poverty line,[22] people who rely on social security benefits to survive will be unable to pay the fine and provide themselves and their dependents with the necessities of life. This can lead to further offending – either because the person must obtain money or food for themselves and their dependents or because they lose respect for 'the system'.

> 'I've been charged three times for begging alms, which means asking people for change on the street. Now how does that justify the first two times I was fined hundreds of dollars? So I sit back and think, "who's really making the money out of this?" I'm only trying to survive. This court is a lot different. I've not seen the magistrate fine anyone, because it's not about the money here.'
>
> - Research participant, *A Special Court for Special Cases*, 2011 at 25

Of course, those who tend to receive fines because they have engaged in trivial offending behaviour are also those most likely to experience social and economic disadvantage.[23] Not

[20] See also, Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (Discussion Paper 65, 2002) 216.

[21] T 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; T Walsh, 'Juvenile economic sanctions: A logical alternative?' (2014) 13(1) *Criminology and Public Policy* 69.

[22] Australian Council of Social Service, *Social Security in Australia: Current Trends* (2017).

[23] T 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.

only does this make the system appear farcical and unfair to defendants, but there is also a financial cost to the community as significant resources are dedicated to fine enforcement, often with limited success.[24]

Under s 734(2) of the *Canadian Criminal Code,* a court may only impose a fine if it is satisfied that the defendant is able to pay the fine. Additionally, a formula for calculating fines has been developed and is used by Magistrates based on the level of minimum wage.[25] Many Australian States and Territories have similar provisions; however, my research has suggested that offenders' means are not routinely considered by magistrates when they impose fines.[26]

All Australian jurisdictions should empower either a court or fine enforcement agency to convert a monetary penalty into a community service order in circumstances where an offender cannot afford to pay a fine.[27] And, critically, attendance at therapeutic or treatment programs should be considered 'community service' for the purpose of such orders.

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

Answer: Offensive language should not remain a criminal offence unless the threshold for offensiveness set by the High Court is spelt out within the relevant provision.

There is an inherent tension between the debates with respect to 'section 18C' of the *Racial Discrimination Act 1975* (Cth) and the routine application of offensive language offences against Aboriginal and Torres Strait Islander peoples. The Attorney-General has proposed that Commonwealth racial vilification laws be repealed because people have a 'right' to say things that are offensive. Yet, thousands of people each year receive criminal penalties for using offensive language and Aboriginal and Torres Strait Islander peoples are disproportionately charged with these types of offences.[28]

[24] NSW Law Reform Commission, *Penalty Notices*, (Report No 132, 2012) 317; NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (Criminal Infringement Notices Review, Report to Parliament, 2005) 42, 132; B Chapman et al, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fine*s (Centre for Economic Research, Discussion Paper 461, 2003) 1, 6.

[25] T Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People* (Queensland University of Technology, 2004).

[26] See also, *Victoria Police Toll Enforcement and Others v Taha and Others* (2013) 49 VR 1.

[27] See eg, *Infringements Act 2006* (Vic) s 27A-L; *State Penalties Enforcement Act 1999* (Qld) pt 3B; *Fines Act 1996* (NSW) pt 4, div 8.

[28] T Walsh, 'Ten years of public nuisance, race and gender in Queensland' (2016) 40 *Criminal Law Journal* 59; NSW Law Reform Commission, *Penalty Notices* (Report No 132, 2012) 301; NSW Ombudsman, *Impact of Criminal Infringement Notices on Aboriginal Communities Review* (2009); Queensland Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (2008) 18-22; T Walsh, 'Policing Disadvantage: Giving Voice to those Affected by the Politics of Law and Order' (2008) 33(3) *Alternative Law Journal* 160.

Over-representation of Aboriginal and Torres Strait Islander Peoples

It has long been reported that Aboriginal people are over-represented amongst those who are charged with offensive language.[29] The NSW Ombudsman has reported that around 14% of all criminal infringement notices (CINs) issued are for offensive language; yet 27% of CINs issued to Aboriginal people are for offensive language.[30]

The extent of Indigenous over-representation in Queensland is even greater. My most recent research has found that Aboriginal people are up to 12 times more likely to be charged with, or receive infringement notices for, public nuisance in Queensland.[31] Often, these charges are based on allegations that the person said something that offended or insulted a police officer. In Queensland in 2014 alone, over 2000 infringement notices were issued for 'language offences directed at police officers'.[32]

Indeed, in the first ten years of the operation of the public nuisance offence in Queensland, approximately one quarter of all adults charged with public nuisance were Indigenous, and 40% of all children and young people charged with public nuisance were Indigenous.[33] Therefore, young Indigenous people are up to 13 times more likely than their non-Indigenous counterparts to be charged with public nuisance in Queensland.

In addition to this, my recent analysis of penalties imposed for public nuisance between 2005-2014 in Queensland Magistrates Courts, revealed that Indigenous people tended to receive harsher penalties for public nuisance offences.[34] For example, Indigenous people were more likely to receive a custodial sentence for a public nuisance offence than non-Indigenous offenders.

Of course, there are many reasons why Aboriginal and Torres Strait Islander peoples are more likely to be charged and convicted of offensive language offences, and these are well-documented.[35] Firstly, it has been suggested that policing of Indigenous people through

[29] See particularly J Quilter and L McNamara, 'Time to define "the cornerstone of public order legislation": The elements of offensive conduct and language under the Summary Offences Act 1988 (NSW)' (2013) 36 *University of New South Wales Law Journal* 534; J Lennan, 'The "Janus Faces" of offensive language laws' (2006) 8 *University of Technology Sydney Law Review* 118; T Walsh, 'Offensive language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 (1) *University of Queensland Law Journal* 123.

[30] NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 35; NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (Criminal Infringement Notices Review, Report to Parliament, 2005).

[31] T Walsh, 'Public nuisance, race and gender in Queensland' (2017) forthcoming.

[32] Statistics obtained from the Queensland Police Service, Statistical Services Division: T Walsh, 'Ten years of public nuisance, race and gender in Queensland' (2016) 40 *Criminal Law Journal* 59.

[33] T Walsh, 'Public nuisance, race and gender in Queensland' (2017) forthcoming.

[34] T Walsh, 'Public nuisance, race and gender in Queensland' (2017) forthcoming.

[35] See eg, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009), 35; C Cunneen, 'Changing the neo-colonial impacts of juvenile justice' (2008) 20 *Current Issues in Criminal Justice* 43, 44-5; J Lennan, 'The "Janus Faces" of offensive language laws' (2006) 8 *University of Technology Sydney Law Review* 118; NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (Criminal Infringement Notices Review, Report to Parliament, 2005) 36; C Cunneen, 'Times have changed? Police v Dunn' (1999) 4(24) *Indigenous Law Bulletin* 13; R Jochelson, 'Aborigines and public order legislation in New South Wales' (1997) 34 *Current Issues in Criminal Justice* 1; E Johnston, *Royal*

offences such as offensive language is intended to 'manage' specific vulnerable groups, instead of addressing conduct which relates to actual social harm. Secondly, it has been suggested that that the visibility of Indigenous people in public space, like other vulnerable groups, makes them more prone to police surveillance. As Diana Eades explains, swearing is considered to be a normal part of Aboriginal social interaction, and in particular a necessary part of settling disputes.[36] Since Aboriginal and Torres Strait Islander peoples are more likely to be in public space, they are more likely to be criminalised for using such language.

The politico-historical underpinnings of Aboriginal and Torres Strait Islander women's insults to police officers must also be acknowledged. My analysis of relevant case law has suggested that, when offensive language is used by Aboriginal and Torres Strait Islander women towards police officers, their words constitute a profound reflection of their feelings of powerlessness and marginalisation.[37] As McCullough explains:

> '[P]olicemen and white authority figures are often referred to as "cunts" during moments of anger and humour made to express anger at whiteness and at authority. Whiteness and authority are often thought of synonymously in the Murri world… The many meanings and uses of cunt… are a way to laugh at the white man.'[38]

Standard of offensiveness

Further, the standard of offensiveness set by the High Court in *Coleman v Power* is not being applied by magistrates, particularly in relation to offensive language directed at police officers.[39] In that case, the majority stated that offensive behaviour type offences are intended to protect the public from harms including disorder, violence, intimidation, and serious affront.[40] The offence was construed narrowly to encompass only conduct of a certain level of seriousness.[41] Further, the majority position was that insulting words directed at police officers would most likely not, in the absence of aggravating circumstances, amount to conduct sufficiently serious to attract a criminal sanction.[42]

Commission into Aboriginal Deaths in Custody: National Report (Australian Government Publishing Service, 1991) Volume 5, [7.1.8]; P Kerr, 'Street offences by Aborigines: ADB Report, 1982 – A Review' (1983) 12 *Alternative Criminology Journal* 38. See generally, C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2007); C Chan and C Cunneen, *Evaluation of the Implementation of the NSW Police Aboriginal Strategic Plan* (Aboriginal Justice Advisory Committee, 2001); C Cunneen, *Conflict, Politics and Crime* (Allen and Unwin, 2001).

[36] D Eades *Aboriginal Ways of Using English* (Aboriginal Studies Press, 2013) 103.

[37] T Walsh, 'Public nuisance, race and gender in Queensland' (2017) forthcoming.

[38] MB McCullough, 'The gender of the joke: Intimacy and marginality in Murri humour' (2014) 79(5) *Ethnos* 677, 691.

[39] *Coleman v Power* (2004) 220 CLR 1; T Walsh, 'Ten years of public nuisance, race and gender in Queensland' (2016) 40 *Criminal Law Journal* 59.

[40] *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39, [32], [198], [256]. See also T Walsh, 'The Impact of Coleman v Power on the Policing, Defence and Sentencing of Public Nuisance Cases in Queensland' (2006) 30(1) *Melbourne University Law Review* 191.

[41] *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39, [11]-[12], [183], [254]-[255].

[42] T Walsh, 'Ten years of public nuisance, race and gender in Queensland' (2016) 40 *Criminal Law Journal* 59, 70; *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39, [16]. The same point has been made in the New Zealand cases: see A Geddis, 'Freedom of Expression and Civility in the New Zealand Supreme Court' (2013) 42 *Commonwealth Law World Review* 324, 337.

Despite this clear precedent, many individuals are charged with and penalised for offensive language that does not meet this threshold level of seriousness. In the Queensland cases I examined in 2016, the primary question asked by the courts was whether or not the language *could* be considered offensive in the circumstances.[43] Instead, the courts should be determining whether or not the conduct in questions was serious enough to attract a criminal sanction. Similar findings have been made by Lever (2011) in Victoria.[44]

The reason for the failure to apply the standard may be the vagueness of the wording of offensive language provisions. Quilter and McNamara prefer the early renditions of the offence that criminalised 'breaches of the peace', opposed to 'offensiveness'.[45] This is consistent with the approach of the New Zealand Supreme Court.[46]

Therefore, offensive language should not remain a criminal offence unless the threshold for offensiveness spelt out by the High Court in *Coleman v Power* is enforced – and experience would suggest that this will require legislative reform.

VII. 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?

Answer: Yes. There is no doubt that use of infringement notices to penalise trivial behaviour such as offensive language has a net-widening effect.

In their review of the Queensland public nuisance ticketing trial, Mazerolle et al noted some of the criticisms of ticketing for public nuisance type offences, including 'reductions in procedural fairness', the potential for net-widening and 'over-representation of members of vulnerable groups'.[47]

Statistical evidence from Queensland indicates that the introduction of ticketing for public nuisance has resulted in a massive increase in the number of people charged with public nuisance offences. My research has demonstrated that there was a 51% increase between 2008 (before ticketing) and 2014 (five years after ticketing was introduced).[48] In 2014, there were 11,595 public nuisance charges recorded by the Queensland courts, and a further 23,878 infringement notices issued for public nuisance.[49] A similar, but more modest, effect was observed in New South Wales after infringement notices were introduced for offensive language and offensive behaviour in 2007.[50]

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[43] T Walsh, 'Ten years of public nuisance, race and gender in Queensland' (2016) 40 *Criminal Law Journal* 59, 70.
[44] J Lever, 'Swear like a Victorian: Victoria's Swearing Laws and Similar Provisions in NSW and Queensland' (2011) 36(3) *Alternative Law Journal* 163.
[45] J Quilter and L McNamara, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36(2) *University of New South Wales Law Journal* 534, 540-1.
[46] See *Valerie Morse v The Police* [2012] 2 NZLR 1.
[47] P Mazerolle et al, *Ticketing for Public Nuisance Offences in Queensland: An Evaluation of the 12 Month Trial* (Griffith University, 2010) 9, 10.
[48] T Walsh, 'Ten years of public nuisance, race and gender in Queensland' (2016) 40 *Criminal Law Journal* 59.
[49] T Walsh, 'Ten years of public nuisance, race and gender in Queensland' (2016) 40 *Criminal Law Journal* 59.
[50] NSW Law Reform Commission, *Penalty Notices* (Report No 132, 2012) 301.

The problem with infringement notices replacing notices to appear in public nuisance matters is that there is very little police accountability regarding why and how people are charged. Further, the broad and vague manner in which offensive behaviour and 'nuisance' offences are framed means that little guidance is provided to police officers regarding how their discretion should be exercised.[51] This issue is heightened when one considers the risk that police officers will issue infringement notices in circumstances where they suspect a court might not uphold the charge.[52] Moreover, unlike courts, police are not required to inquire into a person's financial circumstances before issuing an infringement notice.[53] It is also difficult for police to accurately assess a person's housing or mental health status.[54] If these matters came before a court, a more appropriate, therapeutic sentence could be imposed, or the matter could be discharged without penalty.

Anecdotally, homelessness services routinely rate 'public nuisance infringement notices' as the most pressing legal issue affecting their clients. Considering the increase in the number of public nuisance charges in Queensland since the introduction of infringement notices, the over-representation of Aboriginal and Torres Strait Islander peoples amongst those ticketed, and the potential for infringement notices to perpetuate the cycle of disadvantage,[55] offensive language provisions should be removed from criminal infringement notice schemes.

VIII. Question 6-6: Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines and/or work and development orders.

Answer: Yes. Day fines are a more equitable alternative to the imposition of flat-rate fines.

Fine amounts should be calculated to be proportionate to both the gravity of the offence and the offender's capacity to pay. 'Flat-rate' fines are inherently inequitable and have a disproportionate adverse impact on people on low incomes.[56]

The 'day fine' system is a well-established alternative to flat-fines, that has been used extensively in Europe for many decades.[57] The day fine system calculates the fine with

[51] J Quilter and L McNamara, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36(2) *University of New South Wales Law Journal* 534.
[52] NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (Criminal Infringement Notices Review, Report to Parliament, 2005) 74.
[53] E Methven, "A Very Expensive Lesson: Counting the Costs of Penalty Notices for Anti-social Behaviour" (2014) 26(2) *Current Issues in Criminal Justice* 254.
[54] P Mazerolle et al, *Ticketing for Public Nuisance Offences in Queensland: An Evaluation of the 12 Month Trial* (Griffith University, 2010) 75.
[55] Queensland Public Interest Law Clearing House, *Responding to Homelessness and Disadvantage in the Fines Enforcement Process in Queensland* (2013).
[56] T 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; T Walsh, 'Juvenile economic sanctions: A logical alternative?' (2014) 13(1) *Criminology and Public Policy* 69.
[57] T Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People* (Queensland University of Technology, 2004).

consideration to both the gravity of the offence and the offender's means.[58] The court allocates a 'unit value' to the offence on the basis of its seriousness. Following this, the court determines the dollar value of each unit on the basis of the offender's means. What this means is that a disadvantaged offender who receives an infringement notice for a minor public space offence may only be paying off a few dollars a week. Whilst the fine might appear small, it in fact represents a proportional and just penalty.

The 'day fine' system not only enables realistic and fair fines for the offender but also has tangible benefits for the government. The system has been found to have a higher rate of repayment, generating more revenue and resulting in lower enforcement costs.[59]

IX. Question 11-1: What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?

Answer: The most reasonable and cost-effective diversionary option would be to stop charging people with offences where there is no punitive value in doing so.

It is widely acknowledged that traditional court models do not effectively contribute to crime prevention goals, particularly for people experiencing disadvantage or people with complex needs. In communities that experience high levels of disadvantage, the criminal courts seem to create a 'revolving door' effect, whereby the same individuals are constantly charged with an array of low-level criminal offences.[60] Problem-solving courts address this issue through therapeutic jurisprudence, where offenders are encouraged to engage with the court and support services to address the underlying causes of their offending behaviour.

The Brisbane Special Circumstances Court, while it existed, was a problem-solving court that had a significant positive impact upon many defendants who came before it. My 2011 and 2007 studies on that Court identified a number of factors that contributed to the success of the Court and the level engagement by the defendants.[61] These factors included the availability of services and the team approach of the court players, the establishment of a respectful environment, and a sense of belonging within the court.

> 'The best thing about the court is when the judge talks to you and finds out what you really – how you're really feeling, what you really want. The judge just basically speaks to you really nicely and lets you know that they're there for you to help and whatever help you need to get back on track – what your life was supposed to be.'
>
> - Research participant, *A Special Court for Special Cases,* 2011 at 28.

[58] J Greene, 'Structuring criminal fines: Making an intermediate penalty more useful and equitable' (1988) 13 *The Justice System Journal* 37.

[59] See further T Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People* (Queensland University of Technology, 2004).

[60] T Walsh, 'Defendants' and criminal justice professionals' views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93; M King et al, *Non-Adversarial Justice* (Federation Press, 2014).

[61] T Walsh, 'Defendants' and criminal justice professionals' views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93; T Walsh, 'The Queensland special circumstances court' (2007) 16(4) *Journal of Judicial Administration* 223.

The professional participants in this study emphasised the importance of treating accused persons with dignity and respect, and showing genuine compassion and understanding. Most of the professional participants, and some of the defendant participants, also agreed that it was the authority of the court that facilitated positive outcomes for defendants in many cases and that, without it, many defendants would not be motivated to change.

One difficulty with problem-solving courts is only a small number of defendants are able to access them. There are two ways in which the scope of problem-solving courts could be widened to encompass more defendants. Firstly, more problem-solving courts could be established. While most commentators agree that this would be ideal, it is an expensive way of delivering services,[62] although many have argued that cost benefits accrue in other areas.[63]

Alternatively, the methods and practices of problem-solving courts could be implemented in all generalist courts where the circumstances suggest that this is appropriate. There are many barriers to this approach, including the lack of available sentencing alternatives (discussed above), as well as the lack of awareness and understanding amongst some magistrates of the underlying causes of offending behaviour of people with complex needs.

A diversionary strategy that could be implemented immediately and at no cost would be for judicial officers to simply discharge defendants where there is no punitive value in convicting and sentencing them. This is provided for in the South Australian legislation.[64] A conditional discharge, where the discharge is coupled with an active referral to an appropriate community service, would serve defendants better and would bring about a significant reduction in criminal justice system costs.

X. Conclusion

I note that there is no mention in the Discussion Paper regarding the association between the criminalisation of Aboriginal and Torres Strait Islander peoples and the child protection system.

In the course of my research, I have become convinced that there is a clear connection between the offending behaviour of Aboriginal and Torres Strait Islander peoples and the high rates of removal of Aboriginal and Torres Strait Islander children from their families.

The placement of a child in out of home care has a profound impact upon Aboriginal and Torres Strait Islander peoples, particularly mothers, but also communities in general. Mothers often become intensely angry, depressed and traumatised when their children are removed from their care. They find it extremely difficult to recover and move forward from this traumatic event. Often police officers are associated with the trauma of child removal because they may be present at the time of removal, or because they have made the notification to child protection services. Aboriginal and Torres Strait Islander women may lose respect for police

[62] A Freiberg, 'Problem-oriented courts: An update' (2005)14 *Journal of Judicial Administration* 196, 214-5.
[63] P Hora and WG Schma, 'Therapeutic jurisprudence' (1998) 82 *Judicature* 8; G Berman and A Gulick, 'Just the (unwieldy, hard to gather, but nonetheless essential) facts, ma'am: What we now and don't know about problem-solving courts' (2003) 30(3) *Fordham Urban Law Journal* 1027.
[64] *Criminal Law (Sentencing) Act 1988* (SA) s 15; *Sentencing Act 2017* (SA) s 23.

specifically, and 'the system' in general, when their children are removed from their care, and they may feel (with some justification) that the violent colonialist policies of the past are continuing today. In a study I undertook with Prof Heather Douglas, one of the participants said:[65]

> 'What I've noticed is that a lot of [Indigenous parents] think that once child safety becomes involved that's the end of it for them, they can't do anything more, they can't challenge the process… they're overwhelmed by the system and by their own experiences … that's a huge issue. It's their own experiences and if you've got someone that's been in the system all of their life, then it's just too much for them. The other thing is women that get caught up in the system often don't fight to have their children back simply because they have no hope.'

Of course, through the renewed focus on the conditions of young people in youth detention, we are reminded of the impacts that removal from their families has on the children, and the fact that child protection intervention is often associated with youth justice involvement later down the track. The reasons for this are complex, and are a focus of my current research.

Suffice to say, it is my view that any investigation into the criminalisation of Aboriginal and Torres Strait Islander peoples must acknowledge the continuing influence that the operations of the child protection system have on their involvement in the criminal justice system.

'I don't feel valued. I don't feel we ever have. Society is indirectly linked to the system. People in the system don't forget. They are still members of society. Negative perceptions are deliberately disseminated in order to create racism on the ground level. We've been rejected, us Aborigines. We might have the same problems that non-Indigenous prisoners and criminals will have, but we have that additional problem of being black that makes it harder for us.'

- Research participant, *No Vagrancy,* 2007 at 55.

[65] H Douglas and T Walsh, 'Continuing the stolen generations: Child protection interventions and Indigenous people' (2013) 21(1) *International Journal of Children's Rights* 59.