

TASMANIAN ASSOCIATION OF COMMUNITY LEGAL CENTRES

Animal Welfare Community Legal Centre • Environmental Defenders Office • Hobart
Community Legal Service • Launceston Community Legal Centre • North West Community
Legal Centre • Tenants' Union • Women's Legal Service • Worker Assist

3 September 2012

Public Consultation *Police Offences Act 1935*
Department of Police and Emergency Management
GPO Box 308
HOBART TAS 7000

Dear Minister,

Re: Consultation into Potential Reforms of the *Police Offences Act 1935*

The Tasmanian Association of Community Legal Centres (TACLCLC) appreciates the opportunity to respond to potential reforms of the *Police Offences Act 1935* (Tas).

TACLCLC is an incorporated network representing the eight community legal centres in Tasmania. Our member centres provide accessible advice, representation and legal education services to the community, and advocate for law reform on a range of public interest matters.

Whilst our submission is late we believe that the research undertaken on infringement notices and public nuisance offences will assist the Department of Police and Emergency Management with its review of these important issues.

Infringement Notices

Infringement notices are an alternative method of dealing with minor summary offences, whereby the person to whom the notice is issued is provided with the option of paying a fixed penalty rather than proceeding to a court hearing.¹ Currently, Tasmania issues infringement notices for a small number of offences² although the *Police Offences Act 1935 Consultation Paper* seeks to broaden the range of public nuisance offences for which infringement notices can be issued. The proposed expansion follows recent legislative change in Victoria and New South Wales where infringement notices were extended to include stealing and offensive language and behaviour offences.³

¹ See for example section 3 of the *Monetary Penalties Enforcement Act 2005* (Tas).

² Sections 25, 26 and 61 of the *Police Offences Act 1935* (Tas).

³ In New South Wales laws were extended to allow infringement notices to be issued for a number of offences including stealing less than \$300 (fine of \$300); offensive language (\$150) and; offensive behaviour (\$200). In Victoria police are able to issue infringement notices for a number of offences including stealing and weapons possession.

The Tasmanian Association of Community Legal Centres (TACLC) does not believe that there should be any expansion of the use of infringement notices because they disproportionately impact on the socially and financially disadvantaged, often result in a harsher sentence and place pressures on offenders to plead guilty to offences that they may not have committed or for which a valid defence may be pleaded.

- *Disproportionate Impact on Socially and Financially Disadvantaged*

The primary objection to any expansion of the range of offences available for issuing infringement notices is that particularly public nuisance type offences have a disproportionate impact on the socially and financially disadvantaged.⁴ It has been consistently reported that the poor, the homeless, young people, indigenous persons and people with mental illnesses are more likely to be charged with public nuisance offences.⁵

In *Won't Pay or Can't Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland* the author provides a convincing analysis of the reasons for this overrepresentation including that marginalised people spend more time in public spaces than other members of the community.⁶ The homeless, for example, are often unable to access private spaces whilst young people may feel restricted by the lack of freedom provided to them in private spaces such as the home or school.

As well, the socially and financially disadvantaged are more likely to be targeted for the selective enforcement of public nuisance offences with a large number of studies demonstrating that despite broad discretionary powers the police are more likely to target the socially and financially disadvantaged utilising public space than more 'legitimate' users of public space.⁷ An example is language used by young persons, which may be socially acceptable to them but that others may consider offensive.

Finally, the socially and financially disadvantaged are more likely to be charged with public nuisance offences because the offence is associated with a particular status. An example is drinking alcohol in a public space with homeless people often unable to access licenced premises and other private spaces.

⁴ Public nuisance offences are generally described as those offences in which a person behaves in a manner that is disorderly, offensive or threatening. Offences may include offensive language or behaviour and drinking in a public space.

⁵ See for example New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices* (October 2006); Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20(2) *Bond Law Review* 1; Tamara Walsh, 'Who is the public in public space?' (2004) 29(2) *Alternative Law Journal* 82.

⁶ Tamara Walsh, 'Won't Pay or Can't Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) 17(2) *Current Issues in Criminal Justice* 217 at 219-221.

⁷ Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123, 129-131; New South Wales Bureau of Crime Statistics and Research 'Race and Offensive Language Charges', *Crime and Justice Statistics* (August 1999); Tamara Walsh, 'Who is the public in public space?' (2004) 29(2) *Alternative Law Journal* 82.

In summary the financially and socially disadvantaged are overrepresented in public nuisance offence statistics because they are more likely to use public space, are more vulnerable to being charged and finally the offences are more likely to criminalise behaviour associated with status.

- *Infringement Notices are often a harsher sentence*

Historically, support for infringement notices has been based on the grounds that the penalty imposed would be smaller than what would otherwise be imposed in court and that there would be less stigmatisation as a result of the offender not having to attend court.⁸ However, infringement notices may be disproportionate to the sentence that would otherwise be imposed on an offender. Police officers may elect to issue an infringement notice rather than simply provide a warning or caution.

Research carried out in England highlights this issue; where, following the introduction of infringement notices in 2001, 'over half and maybe as much as three-quarters of those given [infringement notices] would otherwise have received no formal sanction'.⁹

Additionally, when offenders are required to attend court the judiciary is provided with a number of sentencing options including the lesser sentences of a good behaviour bond and dismissal of the charge.¹⁰

Alternative sentencing options provide the court with the flexibility to impose the most appropriate sentence on the offender in light of the particular circumstances of the offender. Furthermore, the courts must meet the important sentencing principle of proportionality, which operates to restrain excessive punishment.¹¹ The infringement notice system however is unable to moderate the punishment in circumstances where there has been multiple offending meaning that an excessive punishment will often be imposed.¹²

Another difficulty with infringement notices is that no consideration is given to the offender's capacity to pay meaning that it may be disproportionate to the sanction imposed by a court. This can be contrasted with the sentencing process adopted by the courts and the requirement that the financial circumstances of

⁸ Martin Friedland, *Securing Compliance: Seven Case Studies* (University of Toronto Press: 1990) 8.

⁹ Adam Crawford, 'Governing through anti-social behaviour: Regulatory challenges to criminal justice' (2009) 49 *British Journal of Criminology* 810-831, 821. Similarly, a review carried out of the infringement system in Scotland between April 2007 and March 2009 concluded that the issuing of infringement notices led to an increased number of offenders being formally sanctioned including 'occasions when police would have previously dealt with the offence informally, by warning the offender': Ben Cavanagh, 'A Review of Fixed Penalty Notices (FPNs) for Anti-Social Behaviour' (Scottish Government Social Research, 2009) 6.

¹⁰ Section 7 of the *Sentencing Act 1997* (Tas).

¹¹ See for example *Veen v The Queen* (1979) 143 CLR 458; *Veen v The Queen (No 2)* (1988) 164 CLR 465; R Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

¹² And in circumstances where the offender is unable to pay the infringement notice/s costs will accumulate with Tasmania's Monetary Penalties Enforcement Service adding an extra \$65 to the original notice.

the offender be taken into account in determining both the type of sanction and the appropriate amount.¹³

- Pressured into acknowledging guilt

Some commentators have noted that when offered a choice between a hearing and an infringement notice, some offenders may feel pressured to acknowledge guilt and simply accept the infringement notice.¹⁴ The right to plead not guilty will be counter-weighted by the risk of challenging the notice and a potentially more serious sentence, a conviction and additional court fees.¹⁵

As well as these broader concerns about infringement notices TACLIC also has specific concerns about their introduction for the offences of offensive language and behaviour and stealing goods valued at less than \$500.

The Evidence from Tasmania

Providing police with the power to issue infringement notices is often seen as a win-win in which an offender receives a discounted sentence and the State deals with the offence in a more cost efficient manner. The Consultation Paper however fails to provide any statistical data of the likely effect of the introduction of infringement notices in Tasmania.

In May 2012 TACLIC submitted a Freedom of Information request to the Department of Justice requesting records of all adults charged with offensive language and behaviour as well as stealing less than \$500 of property during the 2010-2011 financial year.¹⁶ Offensive language and behaviour offences were chosen for investigation because they capture the largest number of offenders likely to be affected by any change in the law and because the offences rely to large extent on the discretion of individual police officers. The offence of stealing less than \$500 worth of goods was chosen because it is arguably the most serious of the offences that may be subject to the issuance of an infringement notice.

- Stealing goods of less than \$500

The data made available by the Department of Justice demonstrates that during 2010-2011 there were 881 adults charged with stealing goods of less than \$500.00 under section 38A of the *Police Offences Act 1935* (Tas) or section 234 of the *Criminal Code 1924* (Tas). Almost two-thirds of offenders were male (61%) and the largest grouping of offenders were young persons aged between 18-25 (38%). The Consultation Paper recommends that infringement notices only be issued to offenders acknowledging guilt. The following statistics are therefore based only on those offenders who pleaded guilty before the Magistrates Court.

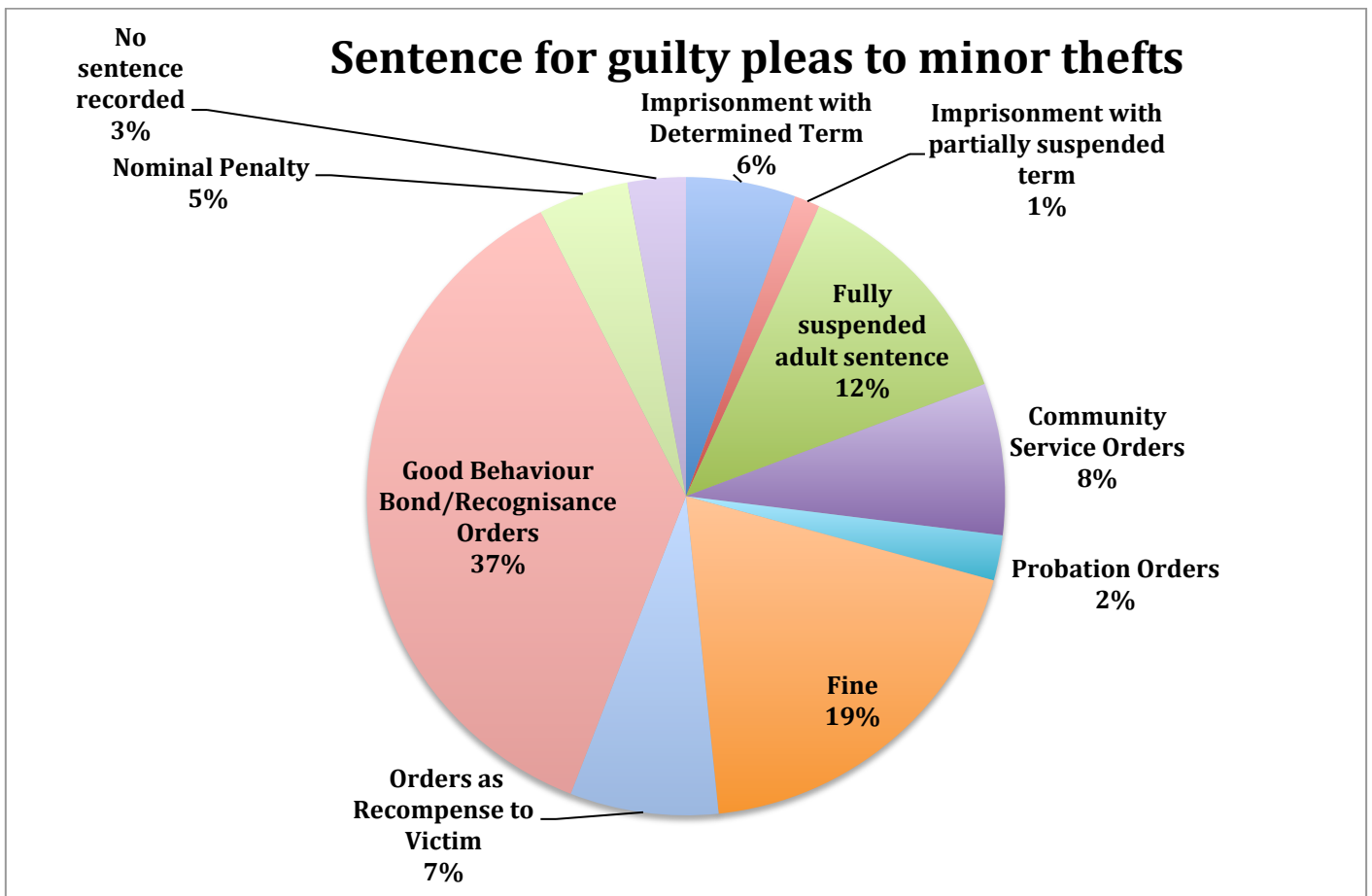
¹³ *Broughton v Lowe* [1979] Tas R (NC 7) Serial No 7/1979.

¹⁴ See for example Gary Slapper, 'Pay-as-you-Go Street Justice' (2010) 74(1) *Journal of Criminal Law* 1, 1.

¹⁵ Pat O'Malley, 'Anonymity of electronic fines is liberating for some' (2010) 48(4) *Law Society Journal* 16-17.

¹⁶ Offenders aged less than 18 years of age were intentionally not requested. This is because whilst proportionally more likely to have committed the offence of stealing and public nuisance type offences, the Consultation Paper rules them out as persons able to be issued with an infringement notice.

Importantly, of the 70 per cent of offenders who pleaded guilty, the overwhelming majority received a less severe sentence than the fine as proposed in the Consultation Paper.

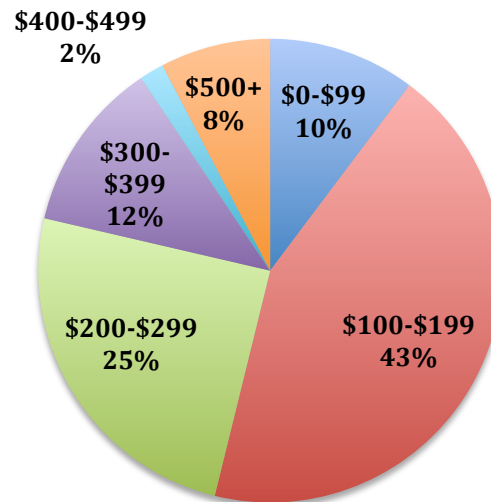


In other words, 52 per cent of all offenders sentenced to stealing goods of less than \$500 received either a Good Behaviour Bond/Recognisance Order; an order to recompense the offender; a nominal penalty or no sentence was recorded.¹⁷

Finally, when only those offenders sentenced to a fine are considered the data demonstrates that an extraordinary 92 per cent received a fine of less than \$500.00.

¹⁷ Given that 19 per cent of offenders received either a suspended sentence or a term of imprisonment it is suggested that an even larger percentage of offenders received either a Good Behaviour Bond, an order of recompense, a nominal penalty or had no sentence recorded. This is because the Consultation Paper recommends that infringement notices not be available to offenders who have committed an offence on three separate occasions. Whilst unclear from the statistical data provided to us, it is suggested that those offenders sentenced to imprisonment or a suspended sentence probably had a criminal history.

Fines for guilty pleas minor thefts



These figures demonstrate that the likely effect of the Consultation Paper's proposed amendments to stealing charges will be infringement notices that result in harsher penalties in most cases than being sentenced in court.

- Offensive Language and Behaviour

Laws in every state and territory prohibit offensive language and behaviour. Examples include section 6 of the *Summary Offences Act 2005* (Qld) which makes it an offence to behave in a disorderly, offensive, threatening or violent way¹⁸ and the Australian Capital Territory which prohibits riotous, indecent, offensive or insulting behavior.¹⁹

In Tasmania, section 12 of the *Police Offences Act 1935* (Tas) provides:

12. Prohibited language and behaviour

(1) A person shall not, in any public place, or within the hearing of any person in that place –

- (a)** curse or swear;
- (b)** sing any profane or obscene song;
- (c)** use any profane, indecent, obscene, offensive, or blasphemous language; or
- (d)** use any threatening, abusive, or insulting words or behaviour with intent or calculated to provoke a breach of

¹⁸ This offence is punishable by a fine of up to ten penalty units, and/or six months' jail.

¹⁹ Section 392 of the *Crimes Act 1900* (ACT); see also section 4A of the *Summary Offences Act 1988* (NSW); section 17 of the *Summary Offences Act 1966* (Vic); section 74A of the *Criminal Code Act Compilation Act 1913* (WA); sections 7 and 22 of the *Summary Offences Act 1953* (SA); and section 47 of the *Summary Offences Act 1923* (NT).

the peace or whereby a breach of the peace may be occasioned.

(1A) A person who contravenes a provision of subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months.

(2) A person convicted in respect of an offence under this section committed within 6 months after he has been convicted of that or any other offence thereunder is liable to double the penalty prescribed in subsection (1) in respect of the offence in respect of which he is so convicted.

Similar to recent amendments introduced in other Australian states²⁰ the Consultation Paper proposes that infringement notices be issued for offensive language and behaviour.

TACLC strongly believes that offensive language and behaviour offences should be determined solely before the courts, particularly given the high evidentiary standard that appellate courts have held must be met in establishing that the language was offensive.

It is clear from the case law that the test for whether behaviour or language is offensive is an objective one;²¹ that is, the behaviour or language in question must attract the disapproval of the reasonable person.

It is not sufficient as Kerr J observed in the decision of *Ball v McIntyre* for such behaviour to be merely 'hurtful, blameworthy or improper',²² 'foolish or misguided'²³ or 'a breach of the rules of courtesy or good manners'.²⁴ But rather be 'calculated to wound the feeling, arouse anger or resentment or disgust or outrage in the mind of the reasonable person'.²⁵ In short, offensive language or behaviour must arouse a 'significant emotional reaction' to amount to an offence.²⁶

As well as being satisfied beyond a reasonable doubt that the language used was offensive, the courts have also made very clear that it is not possible to proscribe

²⁰ In New South Wales a \$200 infringement notice may be imposed for offensive conduct and a \$150 infringement notice imposed for offensive language under sections 4 and 4A of the *Summary Offences Act 1988* (NSW); section 333 of the *Criminal Procedure Act 1986* (NSW). Whilst in Victoria a \$600 infringement notice may be issued under sections 17 and 60AA of the *Summary Offences Act 1966* (Vic).

²¹ *Connolly v Willis* [1984] 1 NSWLR 373, 378; *Coleman v Power* (2004) 209 ALR 182 at 262 per Heydon J. The question of whether certain language or behaviour is offensive is a question of fact to be determined by the magistrate: see *Barrington v Austin & Others* [1939] SASR 130; *Humphries v Smith* [1963] Qd R 67 per Mansfield CJ.

²² [1966] 9 FLR 237 at 241 per Kerr J.

²³ [1966] 9 FLR 237 at 244 per Kerr J.

²⁴ [1966] 9 FLR 237 at 241 per Kerr J.

²⁵ [1966] 9 FLR 237 at 237 per Kerr J.

²⁶ [1966] 9 FLR 237 at 243 per Kerr J.

a list of words which are always offensive regardless of their context; rather, all the circumstances -including changing community standards- will need to be taken into account.²⁷

For example in *Police v Butler* [2003] NSWLC 2 the police were called to a neighbourhood dispute. While police were there a number of young people came out the front of the house and began to yell and shout at the occupants of the house next door. The defendant came out on the front porch and shouted at the police and also at the neighbours:

“What the fuck are youse doing here. My fuckin’ son had to get me out of bed. I can’t believe youse are here. What the fuck are youse doing here” (to the police)

“I fuckin’ know what this is about. Its about that fuckin’ gas bottle. They can get fucked, I’m not paying them fucking nothing. They can get me our fuckin’ bottle back” (to the police about the neighbours)

“We never had any fuckin’ trouble till youse fuckin’ moved here. Youse have fuckin’ caused this trouble and called the fuckin’ police on me” (to the neighbours)

Whilst the Magistrate agreed that the language used ‘was ill-advised, rude, and improper conduct’ he was not satisfied beyond a reasonable doubt that it was offensive.

The importance of context was also emphasised in the ACT Supreme Court decision of *Saunders v Herold* (1991) 105 FLR 1. The accused, an Aboriginal man, and his friends were asked to leave the Canberra Worker’s Club, which they did. Outside, the accused was approached by police, and was alleged to have said “Why don’t you cunts just fuck off and leave us alone?” Higgins J quashed the conviction for offensive conduct on the grounds that when all the circumstances of the case were taken into account it did not amount to offensive language:²⁸

In this case, the words were vulgar and crude, but understood in the context of a verbal disagreement with the police at 3 am in a deserted street, the conduct could not be regarded by the reasonable bystander as offensive.

...

It is enough for present purposes to note that, in the absence of a group of school children, aged pensioners or a congregation of worshippers gathered outside the Canberra Worker's Club, there was not likely to be anyone present who would, rightly or not, be considered by the reasonable bystander to be offended so as to

²⁷ The circumstances including date, time, verbal context, intonation and even intention: see *Bradbury v Staines* [1970] Qd R 76 at 89 per Matthews J; *Pregelj and Wurrumurra v Manison* (1987) 51 NTR 1 at 17 per Nader J, 24 per Rice J; *Nelson v Mathieson* [2003] VSC 451; *Coleman v Power* (2004) 209 ALR 182 at 188 per Gleeson CJ.

²⁸ (1991) 105 FLR 1 at 6-8.

indirectly offend that bystander. The reasonable bystander would not in the absence of such a person be offended.

Additionally, the purpose of offensive language and behaviour offences is to protect the public from unlawful interference not to protect police from insults.²⁹

Whilst police officers may argue that as members of the public their enjoyment of public space may have been interfered with, it has often been held that offensive language or behaviour is likely to be 'wearily familiar' to police officers to the extent that it 'will have little emotional impact save that of boredom'.³⁰

In the case of *Coleman v Power Gummow*, Hayne and Kirby JJ agreed that only 'fighting words', or words which are intended or likely to provoke unlawful physical retaliation, should amount to an offence³¹ with a majority of the High Court finding that merely directing an insult at a police officer will not amount to a criminal offence because such conduct is unlikely to result in a breach of the peace or provoke unlawful physical retaliation.³²

While the judges agreed that police officers must not be expected to be impervious to insult,³³ they remarked that police officers should be 'thick-skinned and broad shouldered in the performance of their duties'³⁴ and that they should be expected to 'resist the sting of insults directed to them'.³⁵

Despite the high evidentiary standard in proving that language or behaviour is 'offensive' and the difficulty police have in demonstrating that insults directed at them amounted to a breach of the peace or provoke unlawful physical retaliation a significant number of offenders continue to be prosecuted in Magistrates Courts throughout Australia.

Research carried out in Queensland for example demonstrates that a large number of offenders were being prosecuted based solely on language or behaviour directed at police officers leading the author to conclude that 'enforcement and interpretation of these offences by police and magistrates is not in line with higher court authority'.³⁶

This is supported by TACLIC own observations of the Magistrates Court over a two week period earlier this year, where on a number of occasions it was noted

²⁹ *Stutsel v Reid* (1990) 20 NSWLR 661 at 663-4; see also *Coleman v Power* (2004) 209 ALR 182 at 247-8 per Kirby J.

³⁰ *DPP v Orum* [1988] 3 All ER 449, 451-2.

³¹ (2004) 209 ALR 182 at 227 per Gummow and Hayne JJ; at 246-7 per Kirby J.

³² (2004) 209 ALR 182 at 188 per Gleeson CJ; at 231 per Gummow and Hayne JJ; at 247-8 per Kirby J.

³³ (2004) 209 ALR 182, 188 per Gleeson CJ; *Stutsel v Reid* (1990) 20 NSWLR 661, 663.

³⁴ *Coleman v Power* (2004) 209 ALR 182, 247 per Kirby J.

³⁵ *Coleman v Power* (2004) 209 ALR 182, 256 per Gummow and Hayne JJ.

³⁶ Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123 at 142. See also NSW Ombudsman, Review of the impact of Criminal Infringement Notices on Aboriginal communities (August 2009) at 57.

that unrepresented accused were convicted of offensive language offences directed at police officers in circumstances contrary to Australian precedent:³⁷

In Hobart to celebrate an end-of-year work dinner John and his friends decided to head to a Salamanca nightclub where they intended to continue celebrations. After being refused entry on the grounds that he was too drunk John heatedly sought to plead his case for admittance. A policeman who was in the area asked John to leave, who responded by yelling that he was a “fucking dickhead”. John was arrested and charged with offensive language. John was unrepresented at the hearing, pleaded guilty, was convicted and fined \$150 plus court costs of \$49.

Michael was walking through Salamanca alone at around 2:00a.m. after a night out with friends. He was in high spirits after drinking around ten rum and cokes. On the spur of the moment he yelled out “Fuck the Police” as a group of policemen walked past on the other side of the street. Michael was chased, arrested and charged with offensive language. Michael was unrepresented at the hearing, pleaded guilty, was convicted and fined \$150 plus court costs of \$33.60

As these two examples highlight, it is difficult to reconcile the offender’s sentence with the authority of Australia’s appellate courts. Nevertheless, TACLC recommends that the judiciary continue to scrutinise offensive language provisions. This is because whilst matters before the courts are able to be reviewed by judicial officers, defence lawyers and the public it is likely that the introduction of infringement notices will see arbitrariness creep into police decision-making with a strong possibility of a more severe sentence.

Again, the data made available by the Department of Justice demonstrates the likelihood of increased harshness with 40 per cent of offenders charged with offensive behaviour and 33 per cent per cent of offenders charged with offensive language during 2010-2011 receiving either a Good Behaviour Bond, a nominal penalty, a recompense order or having no sentence recorded.

If the evidence from New South Wales is any guide it is likely that the issuance of infringement notices by the police will significantly increase the number of offenders being punished for offensive language or behaviour offences. The introduction of infringement notices in November 2007 resulted in a significant reduction in the number of offenders receiving a warning and a correlating increase in the number of offenders receiving an infringement notice with the *NSW Bureau of Crime Statistics and Research* finding that the number of warnings issued dropped from 15 percent shortly after the infringement notice was introduced to 0.1 percent less than a year later.³⁸

³⁷ The case studies were witnessed on Monday 16 January 2012 and Monday 30 January 2012 when TACLC sat in on proceedings before the Magistrates Court in Hobart.

³⁸ Interestingly, at the same time the number of persons charged increased slightly from 42 per cent to 43 per cent. As found in NSW Ombudsman, Review of the impact of Criminal Infringement Notices on Aboriginal communities (August 2009) at iv.

Conclusion

This submission has sought to demonstrate that that there should be no extension of the small number of offences currently able to be issued with an infringement notice in Tasmania.

Infringement notices have a disproportionate impact on the socially and financially disadvantaged including the poor, the homeless, young people, indigenous persons and people with mental illnesses. Infringement notices also result in a lack of judicial and public scrutiny meaning that arbitrary decisions may be made.

Any expansion of the range of offences for which infringement notices may be issued will mean even less consideration is afforded to an offender's personal circumstances or capacity to pay. As such, the proposed amendments may reduce court time and costs however, will disproportionately increase the financial difficulties of the socially and financially disadvantaged.

We thank you for your time in considering this submission.

Please do not hesitate to contact us if you have any queries or would like to discuss our submission further.

Yours Faithfully,

Benedict Bartl
Policy Officer
Tasmanian Association of Community Legal Centres
