

17 April 2019

Kim Wood
Principal Commissioner
Imprisonment and Recidivism Inquiry
Queensland Productivity Commission
PO Box 12112
George St QLD 4003

Dear Commissioner Wood

Re: Queensland Productivity Commission *Inquiry into imprisonment and recidivism*

Thank you for the opportunity to make a submission to this important Inquiry.

For a number of years – together, individually and with others – we have been actively involved in research about criminalisation and criminal law-making. Our primary aim has been to support sound policy decisions about where, how and why the criminal law is deployed as a public policy mechanism. We are pleased and encouraged that the Queensland Productivity Commission (‘the Commission’) is investigating these questions, with a view to narrowing the parameters of the criminal law.

In this submission we have not attempted to address all of the topics, draft recommendations and information requests contained in the Draft Report. Rather, we have addressed those matters on which we have completed relevant research and authored or co-authored publications. These are cited throughout the submission, and we would be happy to provide copies of any of these article upon request.

Reduce the Scope of Criminal Offences: Draft Recommendation 1

In a context where criminal law reform is often focused on expanding the reach and intensity of criminalisation (ie *increasing* the size of the statute book),¹ it is refreshing and encouraging that the Commission is considering ways to *reduce* the number of criminal offences in Queensland. We hope that more Australian jurisdictions will follow this lead.

We agree that the Queensland Government should seek to remove activities from the *Criminal Code Act 1899* and other relevant legislation. Our research suggests that there are especially good reasons for doing so in relation to public order offences, and we return to this matter below, in our response to Recommendation 2.

In terms of reconsidering the parameters of criminalisation we would advocate an approach which does not only focus exclusively on criminal offences, but instead also considers other legislative arrangements by which the parameters of the criminal justice system are shaped. For example, the

¹ L McNamara, J Quilter, R Hogg, H Douglas, A Loughnan and D Brown, ‘Theorising criminalisation: The Value of a Modalities Approach’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91-121 DOI: 10.5204/ijcjsd.v7i3.511; L McNamara & J Quilter, ‘The “Bikie Effect” and other Forms of Demonisation: the Origins and Effects of Hyper-criminalisation’ (2016) 34(2) *Law in Context* 5-35.

scope of police powers and how they are exercised can contribute to ‘over-criminalisation’.² An example is the ‘move-on’ power (in Queensland: *Police Powers and Responsibilities Act 2000* (Qld), Part 5). The legislation that underpins such police powers are often under-appreciated as a potential source of over-criminalisation, because the threat of criminalisation (and punishment) is ‘backgrounded’. Being issued with a direction does not involve an allegation of the commission of a criminal offence, and if the regime works ‘optimally’ no criminal charges or sanctions result – the target of the direction leaves the location where their presence has been deemed by the police to be objectionable. However, non-compliance with a move-on direction *is* an offence. Legislation that establishes ‘two-step’ criminalisation in this way should be included in any review of existing criminal laws.

The challenge in reducing the scope of criminal offences will be to determine the guiding principles for this exercise. Draft Recommendation 1 contains a useful starting point for the development of a set of criteria for considering if an activity should be removed from the Criminal Code or other relevant legislation. There is a body of theoretical literature by criminal law scholars which attempts to define the legitimate parameters of the criminal law.³ However, abstract frameworks are insufficient to guide decisions about when/how the criminal law should be used.⁴

If the Commission is minded to endorse guiding principles of the sort expressed in the Draft Report, it will be important to ensure they are not expressed at such a high level of generality that it is difficult to distinguish one offence from another as to whether there is a case for continued criminalisation of the behaviour in question. The harm principle is an excellent starting point, but its deployment will first require a careful articulation of the concept of ‘harm’. A significant number of existing offences would not be justified on a classic liberal formulation of the harm (to others) principle, including public order and illicit drug use offences. Our point is not that the Commission should retreat from recommending a harm-based rationalisation of Queensland criminal offences, but that this laudable course may first require debate and consultation on different conceptions of harm – including economic and social harms. In addition, it will be necessary to confront the fact that a number of existing offences turn on a *risk* of harm paradigm, rather than realised harm (eg *Summary Offences Act 2005* (Qld) (eg s 14 ‘unregulated high-risk activities’; s 15 ‘possession of implement’). Risk of harm is a vague, capacious and contested concept,⁵ and deserves close interrogation before it is accepted as a justification for the imposition of criminal penalties.

When it comes to assessing proportionality, and weighing harm against the ‘cost’ of criminalisation (approaches which we endorse in principle) there are some important threshold ‘unit of analysis’ questions. Should the assessment focus on a single instance of, for example, public urination or cannabis use? Or should it consider the multiple instances that occur in a given time period, and/the cumulative effects and costs over time? In terms of proportionality, what is the relevant sanction that

² L McNamara, ‘Criminalisation Research in Australia: Building a foundation for normative theorising and principled law reform’ in T Crofts & A Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015), pp 33-51.

³ We note in particular, the large volume of work produced by Antony Duff and colleagues in the UK: see, eg, RA Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014); RA Duff, ‘Towards a Modest Legal Moralism’ (2014) 8 *Criminal Law and Philosophy* 217; V Tadros, *Wrongs and Crimes* (Oxford University Press, 2017); RA Duff, *The Realm of the Criminal Law* (Oxford University Press, 2018).

⁴ D Brown, ‘Criminalisation and Normative Theory’ (2013) 25(2) *Current Issues in Criminal Justice* 605-625.

⁵ P O’Malley, *Crime and Risk* (Sage, 2010).

needs to be factored into the equation: the maximum penalty provided for by legislation or the penalty that is typically imposed in practice? There is a strong argument that the cumulative effect of multiple penalties imposed on an individual should also be considered in a proportionality plus cost-benefit analysis, particular where the offence in question is known to impact repeatedly on marginalised persons (eg the effect of begging, move-on direction non-compliance and fare evasion offences on people experiencing homelessness).

Reduce the Scope of Criminal Offences: Draft Recommendation 2

We are supportive of an approach which treats criminalisation as a ‘last resort’ amongst other available public policy options. Therefore, in general terms, we support the development of alternative policy approaches. However, we caution against assuming that civil remedies and non-criminal sanctions are non-punitive or separate from the criminal law. The boundary between criminalisation and other modes of regulation is porous. This is especially the case in relation to hybrid civil-criminal forms of regulation, such as a Domestic Violence Orders, which ‘draw individuals into the orbit of criminal justice intervention, but a criminal offence is only charged by way of a two-step procedure if and when the order is violated’.⁶ Move-on directions, mentioned above, work in a similar fashion.

Furthermore, the administrative imposition of fines, even if characterised as civil penalties or non-criminal sanctions, can have significant punitive effects which may be indistinguishable from the effects of court imposed fines for criminal offences. The imposition of multiple financial penalties on individuals (and families) who are already financially stretched has the capacity to produce a spiral of debt servitude.⁷

Reduce the Scope of Criminal Offences: Information request:

What current offences do not warrant being defined as an offence?

We focus here on public order offences – an area of the criminal law on which we have conducted research and which represents a relatively invisible site of criminalisation.

We submit that there is strong case for decriminalising a number of the offences in the *Summary Offences Act 2005* (Qld), most notably, begging (s 8) and public intoxication (s 10) – which have been decriminalised in most Australian jurisdictions. It is also doubtful that public urination would survive a harm/proportionality/cost analysis of the sort proposed by the Commission (discussed above).

Other offences in the *Summary Offences Act 2005* (Qld) require redefinition to narrow their scope – whether in terms of the breadth of behaviours they cover and/or the penalties they attract. Our general view is that public nuisance offences should not lead to a prison sentence; however, we are conscious that this position might be challenged, given that the current definition of public nuisance includes a variety of behaviours – some of which appear to be more serious than others.

In our view, some forms of public nuisance do not meet the bar for any form of criminalisation – eg disorderly behaviour (s 6(2)(a)(i)); and offensive behaviour (s 6(2)(a)(ii)). By contrast, behaviour that

⁶ See McNamara et al, above n 1, 95.

⁷ J Quilter and R Hogg, ‘The hidden punitiveness of fines’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9-40. DOI: 10.5204/ijcjsd.v7i3.512

is threatening (s 6(2)(a)(iii)) or violent (s 6(2)(a)(iv)) may be regarded as sufficiently harmful to warrant some form of criminalisation, but the available sanction should not include imprisonment. Threatening or intimidating behaviour which is regarded as sufficiently serious to attract the possibility of imprisonment is likely to be covered by *Criminal Code* offences, such as assault (s 245), stalking (s 359B) or threatening violence (s 75).

It will be important to collect data on the *operation* of all *Summary Offences Act 2005* (Qld) in order to undertake a sound harm/proportionality/cost assessment. On their face, offences like trespass (s 11) and ‘persons unlawfully gathering in or on a building or structure’ (s 12), might be regarded as necessary inclusions in the statute books. However, our on-going national research on the criminalisation of homelessness suggests that people experiencing homelessness are disproportionately represented amongst those charged with trespass and related offences. Further evidence about the operation of such offences would be required in order to determine whether the current offence should be redefined in some way, and/or whether the maximum penalties should be reduced.

The Draft Report asks, ‘Does criminalisation impede a health-based response to the problem of illicit drug usage?’ Our submission does not address criminal offences concerned with illicit drug use because, apart from a study of Australian drug driving laws,⁸ we have not conducted relevant research. However, we suggest that the question posed – about the relative merits of criminalisation and health-based responses – might equally be asked in relation to some non-drug offences. An offence like wilful exposure (*Summary Offences Act 2005* (Qld) s 9) may not be the most obvious example of an existing offence that warrants decriminalisation. However, if we think about health-based responses broadly, and depending on the facts, it may be that the best response to an act of wilful exposure may be a mental health-based response. This example underscores an important point: criminalisation and decriminalisation are not simply about what is or is not on the statute books, but how the law is enforced and what sorts of responses are preferred by decision-makers.

Increase the range of non-custodial sanctions: Recommendation 4

We endorse the Commission’s suggestion that non-custodial sentencing options should be more widely available. We offer one note of caution about removing restrictions on monetary penalties. While fines are often perceived to be at the more benign end of the sentencing spectrum, as mentioned above, fines can be more punitive than they appear. They have cumulative effects including potential loss of driver’s licences and adding to household debt burdens. Attempts to ameliorate the harshness of such financial penalties (time to pay orders) may see a person indebted for decades to come. In this way fines may exacerbate the socio-economic disadvantage that is associated with some criminal offending; that is, fines can be ‘criminogenic’.⁹ In a context where the Commission is concerned with reducing both imprisonment and recidivism, care should be taken to avoid endorsing reform pathways that may improve the former while contributing to the latter.

⁸ J Quilter and L McNamara, “‘Zero Tolerance’ Drug Driving Laws in Australia: A Gap Between Rationale and Form?” (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 47-71 DOI: 10.5204/ijcjsd.v6i3.416.

⁹ Quilter and Hogg, above n 7, 22-23.

Reduce the use of remand: Recommendation 6

In our research on the criminalisation of homelessness we have heard from a number of Magistrates that appropriate accommodation for bail purposes is a major barrier to a person being granted bail. We, therefore, strongly endorse the expansion of bail hostels and other forms of appropriate accommodation for homeless persons who are charged with criminal offences.

Reduce the use of remand: Recommendation 8

We strongly endorse the recommended insertion of ‘guiding principles into the Bail Act 1980’. In our view, it is important that these principles should have the force of law. To this end they should feature in an objects or purposes section of the Act – rather than being in a Preamble. In its current form the *Bail Act 2013* (NSW) takes the latter option:

Preamble

The Parliament of New South Wales, in enacting this Act, has regard to the following:

- (a) the need to ensure the safety of victims of crime, individuals and the community,
- (b) the need to ensure the integrity of the justice system,
- (c) the common law presumption of innocence and the general right to be at liberty.

The important ‘guiding principles’ which the Commission has proposed should not be consigned to a largely symbolic Preamble. We regard this aspect of the current *Bail Act 2013* (NSW) as a weakness. Ironically, a better model for Queensland to follow is the *original Bail Act 2013* (NSW), before it was hastily amended in 2014. In its original form, the 2013 Act incorporated the presumption of innocence and the general right to be at liberty in a section devoted to the ‘Purposes of Act’ (s 3(2)). The decision to move these principles to a Preamble was a regrettable knee-jerk response to concerns that the new *Bail Act 2013* (NSW) was ‘weak on crime’.¹⁰

Expand Diversionary Options: Draft Recommendation 16

We applaud those parts of this draft recommendation which are directed at better use of police discretion. Our work on public order offences shows that the manner in which police officers exercise discretion is critical to whether or not a person’s behaviour is characterised as criminal, especially in relation to provisions that turn on vague terms like ‘offensive’¹¹ (such as the offence of public nuisance in s 6 of the *Summary Offences Act 2005* Qld)), and/or which require police to make an observation-

¹⁰ D Brown and J Quilter, Speaking too soon: The sabotage of bail reform in New South Wales’ (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 73-97 DOI: 10.5204/ijcjsd.v3i2.181

¹¹ J Quilter & 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* 534-562; L McNamara and J Quilter, ‘Turning the Spotlight on ‘Offensiveness’ as a Basis for Criminal Liability’ (2014) 39(1) *Alternative Law Journal* 36.

based assessment of whether a person is ‘intoxicated’¹² – as in the case of public intoxication under s 10 of the *Summary Offences Act 2005* (Qld).

KPIs to encourage the efficient use of police discretion, diversion and cautions represent an innovation that has considerable potential for reducing over-criminalisation.

In general terms we support additional diversionary options for police; however, the greater availability of on-the-spot fines needs to be approached with caution. Evidence shows that the availability of penalty notice/on-the-spot fines for low level offending can operate to *net-widen*, rather than reduce the total number of persons coming into contact with the criminal justice system.¹³

An additional problem with on-the-spot fines is that they compound the problem of inadequate oversight and scrutiny of the decision of police officers to enforce public order laws or use their police powers. As we have previously noted

... the contexts in which these laws are operationalised (including, literally, ‘on the street’) is such that it is rare for courts (or any non-police agency) to be given the opportunity to scrutinise how these laws are being used (including how intoxication is being assessed). As with most public order offences, intoxication-related charges attract high rates of guilty pleas, and the problem of ‘invisibility’ is exacerbated by the growing use of ‘on-the-spot’ fines or ‘tickets’, laws that provide for move-on without charges, or detention that is allegedly non-punitive (see *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41). It is noteworthy that the growth of on-the-spot fines for public order and other minor criminal offences also impacts harshly on the homeless and other financially disadvantaged persons.¹⁴

¹² One of the findings of a national study of Australian criminal laws that attached significance to ‘intoxication’ is that in the majority of instances of laws governing offences and powers, police (and other decision-makers) are given inadequate guidance on what intoxication means or how to assess it. See generally: J Quilter, L McNamara, K Seear & R Room, ‘Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of ‘Intoxication’ Under Australian Legislation’ (2016) 39(3) *UNSWLJ* 913-949; J Quilter, L McNamara, K Seear & R Room, ‘The Definition and Significance of “Intoxication” in Australian Criminal Law: A Case Study of Queensland’s “Safe Night Out” Legislation’ (2016) 16(2) *QUT Law Review* 42-58; J Quilter, L McNamara, K Seear and R Room, ‘The significance of “intoxication” in Australian criminal law’, *Australian Institute of Criminology Trends and Issues* Paper No 546 (May 2018); L McNamara and J Quilter, ‘Public Intoxication in NSW: The Contours of Criminalisation’ (2015) 37(1) *Sydney Law Review* 1-35.

¹³ NSW Law Reform Commission, *Penalty Notices*, Report No 132 (NSWLRC, 2012); NSW Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences 1988* (NSW Ombudsman 2014); NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (NSW Ombudsman, 2009).

¹⁴ J Quilter, L McNamara, K Seear and R Room, ‘Intoxication’ and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks. Report to the Criminology Research Advisory Council. Grant: CRG 20/14-15 (May 2018), p 56. See also E Methven, ‘“A Very Expensive Lesson”: Counting the Costs of Penalty Notices for Anti-social Behaviour’ (2014) 26(2) *Current Issues in Criminal Justice* 249-258; B Saunders et al, ‘The Impact of the Victorian Infringements System on Disadvantaged Groups: Findings from a Qualitative Study’ (2014) 49(1) *Australian Journal of Social Issues* 45-66; P Mazerolle et al, *Ticketing for public nuisance offences in Queensland: An evaluation of the 12-month trial* Griffith University, 2010).

The recommendation that a ‘simple public interest test for police’ be developed is also an innovation that warrants further investigation. In order for the test to achieve the objective of reducing criminalisation, it will need to be framed in such a way as to exclude from the reach of public order and other minor offences behaviours that are currently falling within it. A harm/proportionality/cost analysis (discussed above in relation to Recommendation 1), could be a useful touchstone for this exercise. For example, it is well known that offensive language/public nuisance on-the-spot fines and charges often arise when an individual swears at a police officer.¹⁵ A simple public interest test might provide that, by definition, such behaviour is insufficiently harmful to warrant an on-the-spot fine, arrest or charge, and that other options should be employed by police officers (eg do nothing, counsel, caution, issue move-on direction).

Build a better decision-making architecture: Recommendations 17 and 18

We applaud the recommendation to establish a justice reform office. Our research shows that far too much criminal law making happens without adequate evidence gathering, co-ordination, consultation, costing and estimation of likely effects, including unintended effects. When given the opportunity, law reform commissions and other bodies regularly undertake high-quality research and produce sound recommendations. However, there is typically no appropriate decision making architecture to translate these recommendations into policy and law reform.

The proposed justice reform office would need to take account of the diversity of *processes* by which criminal law statutes come into being. Most are not the result of a reference to a law reform commission. A significant proportion of change proposals are developed ‘in house’ within government departments, or are the product of what we have described as ‘single-stage executive decision making’ where Cabinet makes a quick decision to enact laws, typically in response to a tragic ‘trigger’ event.¹⁶ Designing a best practice decision-making architecture must involve further examination of the sorts of attributes that a ‘lead up’ process should have – including genuine and inclusive consultation, transparency, careful evidence-gathering, robust analysis and due deliberation (not haste).

Our research has shown that, in Australia, existing institutional arrangements, involving bodies that *in theory* might be regarded as part of a criminal law decision-making architecture, are generally ineffective. For example, pre-enactment parliamentary scrutiny committees (such as the Legislation Review Committee in NSW) have been shown to be ineffective in influencing the shape of the criminal law. The reasons are several, but they include the fact that such bodies become involved far too late in the policy and law-making process.¹⁷ Attempts to involve the judiciary in post-enactment scrutiny, in an effort to curb over-criminalisation, have rarely succeeded.¹⁸

¹⁵ Quilter and McNamara, above n 11; E Methven, ‘A Little Respect: Swearing, Police and Criminal Justice Discourse’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 58-74 DOI: 10.5204/ijcjsd.v7i3.428.

¹⁶ L McNamara, J Quilter, R Hogg, H Douglas, A Loughnan, D Brown and L Farmer, ‘Understanding *processes* of criminalisation: Insights from an Australian study of criminal law-making’ (2019) *Criminology & Criminal Justice* (forthcoming).

¹⁷ L McNamara & J Quilter, ‘Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales’ (2015) 27 *Current Issues in Criminal Justice* 21-40.

¹⁸ L McNamara and J Quilter, ‘High Court Constitutional Challenges to Criminal Law and Procedure in Australia’ (2018) 41(4) *UNSWLJ* 1047-1082.

We note that in 2018 the Law Council of Australia suggested that *all* proposed changes to criminal justice policy and law should be required to undergo a ‘justice impact test’ to ‘better account for the downstream impacts of new laws and policies on the justice system, particularly in assisting disadvantaged groups.’¹⁹ This proposal resonates with the Commission’s recommendation that Queensland should develop a better decision-making architecture for criminalisation decisions. Both of these suggestions also echo the emerging ‘justice reinvestment’ paradigm which promotes redeployment of some of the \$16 billion a year that Australian federal, state and territory governments spend on police, courts and prisons, back into communities whose socio-economic, housing, education, health and other disadvantages contribute significantly to the problems for which the criminal justice system is too often the default ‘solution’.²⁰

We thank the Commission for the excellent work that has been undertaken on this important inquiry. If we can be of any further assistance, please do not hesitate to contact us.

Sincerely



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¹⁹ Law Council of Australia, *Justice Project*. Final Report (August 2018), 46. <https://www.lawcouncil.asn.au/justice-project/final-report>. This recommendation is based on United Kingdom Ministry of Justice, *Guidance: Justice impact test* (2 November 2016) <https://www.gov.uk/government/publications/justice-impact-test>.

²⁰ D Brown, C Cunneen, M Schwartz, J Stubbs and C Young, *Justice Reinvestment: Winding Back Imprisonment* (Palgrave Macmillan, 2015). See also L McNamara and J Quilter, ‘Influencing the Shape of Criminal Law-Making in NSW: Insights from Recent Empirical Studies’ in J Debeljak and L Grenfell (ed), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, forthcoming 2019).