Policing Public Order

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Offensive Language & Behaviour, The Impact on Aboriginal People.

AJAC

Aboriginal Justice Advisory Council

Summary

This report examines the offences of offensive language and offensive conduct (sections 4 and 4a of the Summary Offences Act 1988) and the impact of those offences on Aboriginal people in New South Wales. The report uses data provided by the NSW Bureau of Crime Statistics and Research from 1998 Criminal Court Statistics.

Aboriginal people continue to be grossly over represented in criminal proceedings for offensive language and offensive conduct charges. On average Aboriginal people are 15 times more likely to be prosecuted for offensive language or conduct. However some local government areas, Inverell and Richmond river,. Recorded rate over 80 times the state average per 1000 people. Offensive language and conduct charges continue to represent a significant proportion of overall court appearances. Aboriginal people constitute 20%, or one fifth, of all people prosecuted for offensive language/ conduct charges in NSW during 1998.

In more than one quarter of all cases an offence against police accompanied the offensive language conduct charge.

Prosecutions for offensive language conduct charges largely went undefended, and a considerable proportion of Aboriginal defendants were convicted ex parte.

Fines were the most common penalty imposed by courts. While the average fine imposed on Aboriginal defendants is equal to the average fine imposed generally, a number of courts, imposed fines considerably less than the state average.

Finally a clear link can now be drawn between the over representation of Aboriginal people in offensive language/ conduct charges and broader Aboriginal contact with the criminal justice system and the continued social and economic marginalisation of Aboriginal people within NSW.

The Offences

The NSW Summary Offences Act, reintroduced in 1988, establishes the offences of Offensive Language and Conduct.

Section 4 provides for offensive conduct:

1) A person must not conduct himself or herself in an offensive manner in or near, or in view or hearing from, a public place or school.
2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.
3) It is sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

The maximum penalty for offensive conduct is 6 penalty units ($660) or imprisonment for 3 months.

Subsection 4A provides for the offence of offensive language,

1) A person must not use offensive language in or near, or within hearing from, a public place or school

   It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

   A court may, in respect of a person convicted of an offence under this section, make an order requiring the person to perform community service work instead of imposing a fine.

The maximum penalty for offensive language is 6 penalty units ($660) or 100 hours community service.

What Constitutes "Offensive"

There have been a number of court judgments which may aid in determining what constitutes offensive language or conduct. In Worcester v Smith O'Bryan J proposed that offensive behaviour must be "such as is calculated to arouse anger or resentment or disgust or outrage in the mind of a reasonable person." Kerr J in *Ball v Macintyre* stated that "conduct which offends against the standards of good taste or good manners which is a breach of the rules of courtesy or runs contrary to accepted social rules may be illadvised, hurtful, not proper conduct. People may be offended by such conduct, but it may well not be offensive within the meaning of the section ... this charge is not available to ensure punishment of those who differ from the majority."

There is some argument that for an offence to occur the defendant must intend the act or language to be offensive. The supreme court of the Northern Territory in Pregelj v *Manison* examined the role of mens rea or "a guilty mind" in the commission of an offence of offensive behaviour. The court stated that a person must know that their behaviour will offend for them to be guilty of an offence. "The gravamen of offensive behaviour is the offending of another person, and the offending must be intended. ...by intend to offend I mean do an act with knowledge that the activity would, or at least could offend ... behaviour, offensive in other circumstances, committed in complete privacy cannot be offensive."

Similarly in the SA Supreme Court in Stone v Ford, Bollen J stated that it was incumbent on the prosecution to prove beyond reasonable doubt that the defendant intended to act in an

offensive manner. In the matter of SA Police v Pfeifer, Bollen J further stated *"Mens rea* of the type mentioned, the intention to be offensive ... must be proved before there can be a conviction for an offence."

The changes in public attitudes to language and behaviour also effect what may be termed offensive.

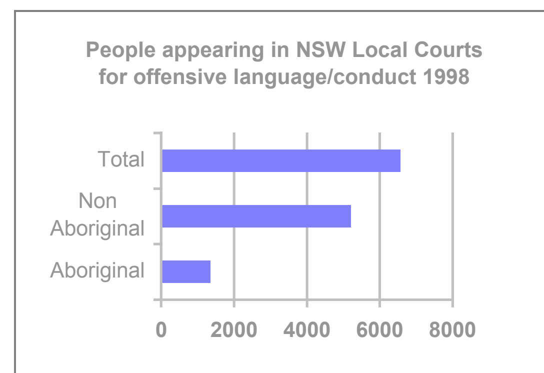
In a recent decision at Dubbo Local Court, Magistrate David Heilpern dismissed an offensive language charge against an Aboriginal juvenile. In dismissing the matter the magistrate said, "The word fuck is extremely commonplace now . One cannot walk down the streets of any of the towns in which I sit, day or night, without hearing the word or its derivatives used as a noun, verb, adjective and indeed a term of affection."

The magistrate also referred to the proclivity with which the word is used in the electronic media such as television, radio and on the intemet. "If your children like JJJ and listen to R in the morning, one cannot help be assailed by the word fuck with regularity". "In short, my view is that community standards have changed and that the word in the context of this case is not offensive within the meaning of the Act ... This is especially so where there is no evidence that the words were spoken loudly and there is an absence of evidence suggesting aggression or malice at that time".

In the South Australian matter of *Horton v Rowbottom,* Mulligan J established that the use of the word fuck is not automatically offensive. In 1988 Yeldhamm J of the NSW Supreme Court found that a magistrate had not erred in finding that the words "get fucked" and "get fucked you cunts" were "not intrinsically offensive in the requisite legal sense of that word". Similarly in hearing an appeal of an offensive language matter relating to the words "get fucked I'm not going anywhere, Matthew Smith is dead because of you cunts" Judge Drucker of the NSW District Court stated "I do not believe that the words are offensive and I uphold the appeal and quash the conviction". It is dear then that what may be determined offensive by a court can be influenced by changing community standards relating to behaviour and language, the circumstances of the alleged offence and the intention of the defendant.

The Current Situation

Aboriginal people continue to be over represented in prosecutions for offensive language/ conduct. During 1998 a total of 6558 persons were prosecuted for offensive language or offensive conduct in NSW. Of those people 1350, or 20.59%, were Aboriginal people. Aboriginal people constitute 1.8% of the population of NSW.



Of all Aboriginal people appearing in local court during 1998 14.3% appeared on at least one offensive language or conduct charge. During 1998 a total of 17241 charges against Aboriginal people were finalised in local courts, 8.2% of those charges were for offensive language or conduct.

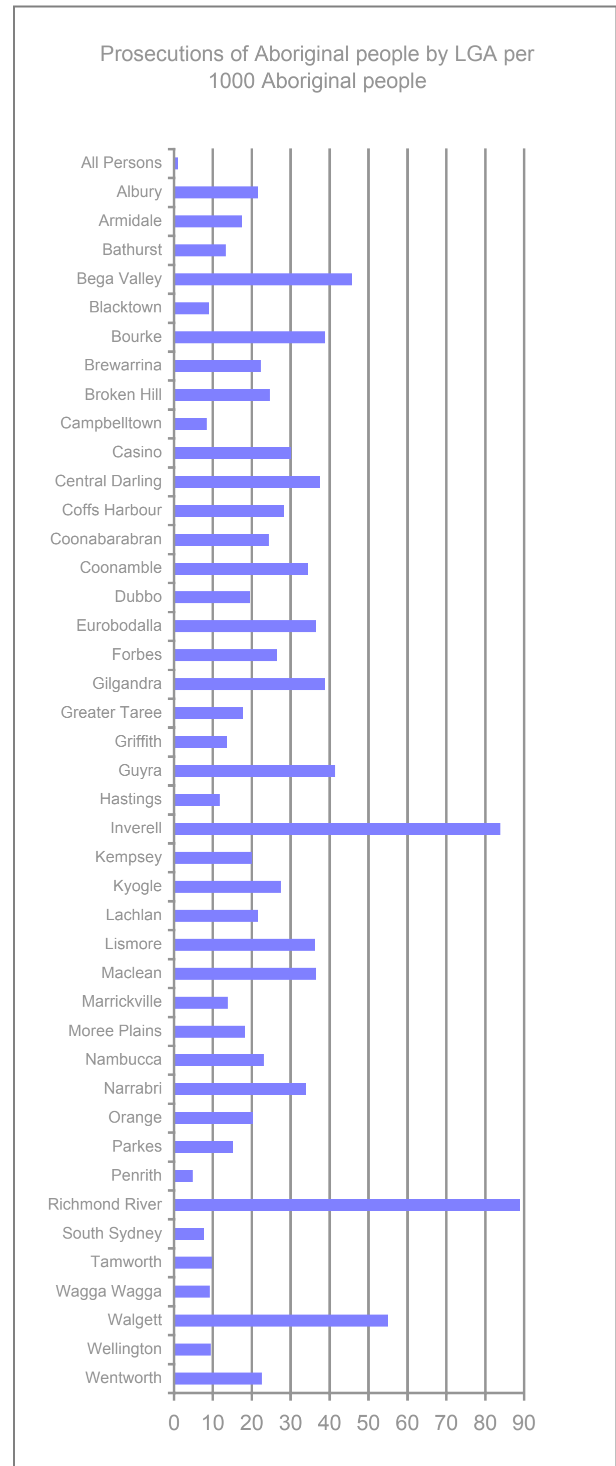
While 6.2% of all people appearing in local court in 1998 appeared on at least one offensive language/ conduct charge, 14.27% of all Aboriginal people appeared on at least one offensive language or conduct charge. Some local courts recorded a significant number of Aboriginal people appearing on these charges. Thirteen Local Courts recorded that at least 25%, or one quarter of all Aboriginal people appearing, appeared on offensive language / conduct charges, while 4 courts recorded more than a third of Aboriginal people appearing appeared on an offensive language/conduct charge.

In all, Aboriginal people are approximately 15 times more likely to be prosecuted for offensive language or conduct charges than the rest of the NSW population.

A significant number of local government areas recorded a large over representation of the proportion of local Aboriginal populations appearing on offensive language and/or conduct charges. While Aboriginal people are over represented generally some local government areas were up to eighty times the state average for prosecutions for offensive language and conduct charges.

Local government areas particularly in the north west, north and far south coasts recorded astronomical levels of over representation.

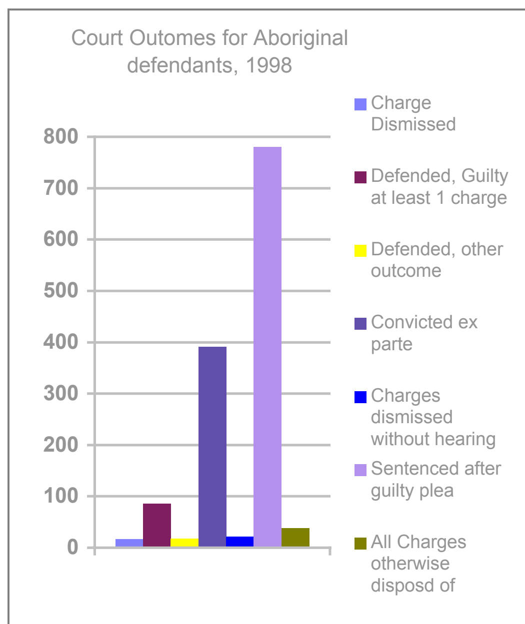
The local government areas of Inverell recorded a level of 83 times the average and Richmond River recorded close to ninety times the state average. In all nine local government areas registered more than ten times the state average for charges of offensive language and/or conduct charges. Eleven recorded twenty times the state average, nine recorded thirty times the average, twelve recorded forty times the average, one fifty times the State average.



While the distribution of over representation is state wide, it is particularly pronounced in the north west, the north coast, central west, far west and far south coast.

It is interesting to note that the local government areas in Sydney with the states largest populations of Aboriginal people, Blacktown, Penrith, Campbelftown, recorded levels of prosecution below the state average for Aboriginal people.

The most common outcome for Aboriginal people appearing on offensive language or conduct charges was to be sentenced after pleading guilty 57.78%.



The second most common outcome was to be convicted ex parte, 29%. Only 8.9% of matters were defended and only 1.3% of matters were dismissed after a defended hearing.

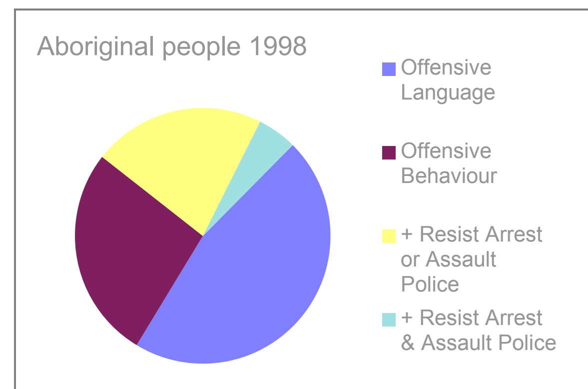
For the total of Aboriginal people appearing in a local court 14.4% proceeded to a defended hearing and 5.3% were dismissed after a defended hearing.

That is Aboriginal people were much less likely to defend an offensive language or conduct charge and those charges were less likely to be dismissed after a defended hearing than other charges.

Often offensive language and conduct charges are linked to other charges particularly resisting arrest and assault police. The general notion of the trifecta, (offensive language/ conduct, resist arrest and assault police) has been one that has characterised views of Aboriginal police relations for some time.

The evidence however suggests that offensive conduct/ language charges are linked with either resist arrest or assault police rather than all three charges being layed together.

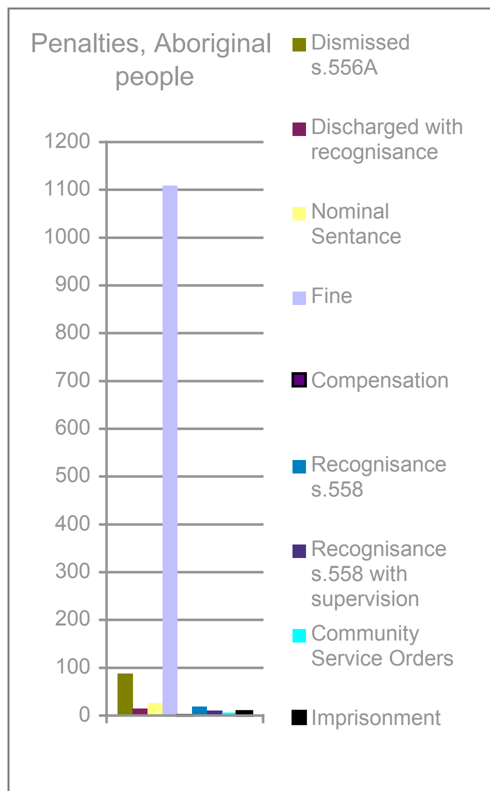
A total of 286 Aboriginal people, or 21.1 % of all Aboriginal people charged with public order offences were charges with offensive language/ conduct charges and resist arrest or assault police. 64 Aboriginal people, 4.7% were charged with all three, offensive language/ conduct resist arrest and assault police.



This suggests that 27%, or more than a quarter, of Aboriginal people charged with offensive language/ conduct were also charged with an offence against police.

By far the most common penalty imposed on Aboriginal defendants were fines.

The most common fine amount imposed on Aboriginal defendants was between $51 and $100.



However the average amount of fine imposed on Aboriginal defendants was approximately $162.

The average level of fine imposed on Aboriginal people was the same as that for the general population.

While in general courts did not vary far from the average some courts which dealt with significant numbers of Aboriginal defendants such as Dubbo, Narromine, Eden and Inverell recorded average fines at the lower end of the scale, between $75 and $95.

Other courts such as Kempsey, Casino, Wentworth, Nowra, Wee Waa and Wilcannia, also dealing with significant numbers of Aboriginal defendants, imposed average fines above the average, between $225 and $266.

Comments

There have been a number of reports spanning twenty five years examining the continuing over representation of Aboriginal people for public order offences in NSW. Elizabeth Eggleston, in her work entitled “Fear, Favour or Affection” highlighted the over representation of Aboriginal people for street offences.

Research conducted for the NSW Anti Discrimination Board in 1982 examining the Summary Offences Act 1970 and the Offences in Public Place Act 1979 highlighted the over representation of Aboriginal people for offensive language and conduct charges. The report stated that *"convictions for street offences occur more frequently in LGA's with a high Aboriginal population"...Aborigines charged with minor offences in public places greatly outnumber non aborigines".*

A Bureau of Crime Statistics and Research report in 1987 entitled "Criminal Justice in North West NSW" found large over representation of Aboriginal people in criminal justice proceedings in north West NSW and found a direct link between police Aboriginal relations and the rate Aboriginal people were charged with public order type offences. The report draws a direct link between over policing in a number of north west towns and the levels of charges against Aboriginal people. *"The* over commission of offences *by Aboriginal* people *and over policing* are *not* necessarily *two* separate issues *but* indeed *feed off one another as* part *of* a continuum...As part *of Aboriginal* popular memory in the *north west is* the history *of* large scale police *intervention into* everyday life. As a response *to* that history there is *often* aggressive hostility *shown towards* police *in* the public sphere."The report draws a link between law and order and the social visibility of Aboriginal people. "It would seem that a popular remedy to the *Aboriginal problem* has rested on the assumption that law *and* order would be *achieved if* aborigines were made *invisible through more* policing *of* the streets".

A further report conducted by the NSW Bureau of Crime Statistics and Research in 1997 found that *"Aboriginal people* are grossly over *represented among* arrests for offensive language *and conduct... this* is particularly true in country towns where much of the *conduct which* results in charges of offensive *conduct and offensive* language seems to stem from *intense hostility* between *Aboriginal people and police".*

Aboriginal people continue to be grossly over represented in prosecutions for offensive language and offensive conduct. As has been shown, in some local government areas Aboriginal people are prosecuted at a rate greater than eighty times the state average. A direct link must be drawn between these charges and the policing of Aboriginal people,, particularly the policing of public space.

It is interesting to note that local government areas in Sydney, with the State's largest Aboriginal populations recorded relatively low rates of representation compared to country

areas. This level of discrepancy may suggest that where Aboriginal people are more visible, that is in rural areas, they are more likely to be prosecuted for offensive language or conduct. It would further suggest that the heavy levels of policing in some rural areas has a direct impact on the number of aboriginal people prosecuted for offensive language and conduct. This in itself would indicate a degree of targeting of Aboriginal people by police for those offences. The notion that Aboriginal people in some areas of NSW are up to eighty time more offensive than the rest of the community is more than ludicrous. That over representation must be examined in the context of policing strategies which focus on Aboriginal use of public space.

The seemingly inherent link between offensive language and conduct and offences against police as shown by 27% of offensive language and conduct charges being accompanied by further offences against police, is an indication of the poor level of Aboriginal police relations in NSW and the detrimental effect that poor relationship has on Aboriginal people.

The Summary Offences Act provides a defence for both offences of offensive language and offensive conduct. The Act states that "It is sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence."

However it is clear from relatively low number of uncontested matters that this defence is either inadequate or is simply not being accessed by Aboriginal people and their legal representatives. While it appears that some local and superior courts in NSW are prepared to recognise changing social values in determining offensive language and conduct charges it appears that Aboriginal people do not test the limit of that recognition. While it should be recognised that many legal representatives of Aboriginal people, such as Aboriginal Legal Services are under resourced at best, it is surprising that these charges are not challenged more often as they continue to be so prevalent in so many Aboriginal communities.

While it is sometimes argued that offensive language and conduct charges in themselves are relatively minor, the strong link between these charges and charges against police, highlight the role these relatively minor charges have in increasing the overall contact of Aboriginal people with the

criminal justice system. it demonstrates the role these offences play in increasing the broader over representation of Aboriginal people within that system. Research completed by Broadhurst and Long for the Australian Criminology Research Council in calculating the probability of re arrest for Aboriginal people after an initial contact with the criminal justice system demonstrates the broader effect that arrests for public order offences has on spiraling arrest rates. *"if aborigines are arrested once, the likelihood of re, arrest is 92 per cent If they go to a second arrest, the likelihood of a third arrest is 94 per cent You get to the point of virtual certainly. These people are living in the criminal justice system once the sequence is set underway".*

There is a direct connection then between the policing and prosecution of public order type offences and the likelihood of a more serious and prolonged involvement in the criminal justice system. These relatively minor offences have more serious longer term consequences for many Aboriginal people and indeed for significant sections of Aboriginal communities. The continued enforcement of these offences can only maintain and further entrench involvement with criminal prosecutions.

The high arrest rates for Aboriginal people has a direct correlation with the continuing social and economic disadvantage. A recent report, "The Effect of Arrest on Indigenous Employment Prospects" completed by Hunter and Borland for the NSW Bureau of Crime Statistics and Research examines the economic consequences of arrest in detail. Hunter and Borland conclude that Aboriginal people who have been arrested have significantly lower prospects of employment, 18.3% for men, 13.1% for women. Further they conclude that the differences in the arrest levels for Aboriginal and non Aboriginal people could account for approximately 15% of the difference in employment outcomes between those two groups. Low employment prospects as a result of arrest increase economic and social marginalisation and increase the probability of a more lengthy and serious involvement with the criminal justice system.

It has now been clearly established that the chain of events which can be set in progress through arrests for the relatively minor offences of offensive language and behavior can have much longer term and more serious consequences for many Aboriginal people.

It must be remembered that sections 4 and 4a of the Summary Offences Act 1988 deal exclusively with language and conduct which is merely offensive, not threatening, alarming or dangerous. Both police and courts have powers such as those under sections 93C, 199, 200 and 352 of the Crimes Act or section 11 a of the Summary Offences Act, to deal with conduct which may be dangerous to people or property. The removal of the offensive language and conduct sections of the Summary Offences Act would in no way limit the ability of police and courts to effectively deal with people or behaviour which does constitute a real threat to the safety of either the public or property.

A range of reports cited show that the problem of Aboriginal over representation for public order type offences has not diminished, indeed that over representation is becoming generational. The Royal Commission into Aboriginal Deaths in Custody specifically recommended that the use of offensive language should not normally be occasion for arrest and charge. However the current rates of prosecution of Aboriginal people in New South Wales shows quite clearly

that this recommendation is not being implemented. Whether people are proceeded against by Charge, Court Attendance Notice, Field Court Attendance Notice or Summons the end result is the same, criminal prosecution, and in most cases conviction. It would be suggested then that the problems around Aboriginal people and public order type offences highlighted by the Royal Commission continue largely unchanged in New South Wales.

Sometimes prosecutions for offensive language and conduct matters are dismissed as being trivial offences, however research now clearly shows that these offences increase the likelihood of rearrest and a long involvement with the criminal justice system. Research also shows that convictions for these offences has a direct impact on the employment prospects of Aboriginal people and a continued effect on the social and economic marginalisation of Aboriginal people.

There is no real evidence that offensive language and conduct statutes in any way increase the general safety of the community, indeed all evidence shows that their greatest impact is to maintain Aboriginal disadvantage.

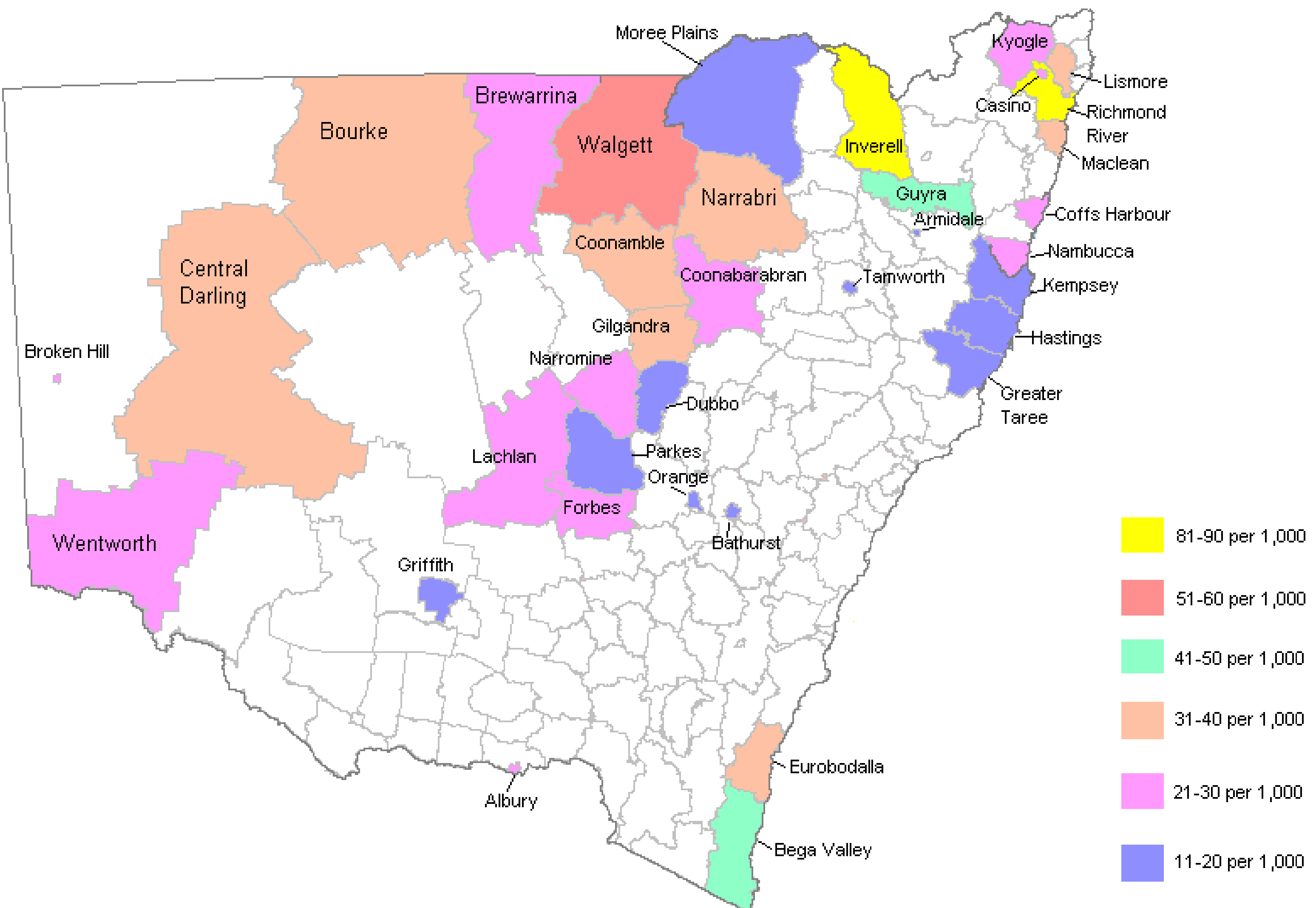
There are other options available to police to actively work with Aboriginal communities in maintaining public order that do not involve resorting to continued arrests for trivial matters. Public order statutes have been redrafted on at least 4 occasions in the past 20 years and the impact on Aboriginal people remains the same. The problem appears to be not the wording of the offences but the offences themselves. The issue of Aboriginal over representation in the criminal justice system and the broader marginalisation of Aboriginal communities cannot be properly addressed while Aboriginal people are still so heavily targeted for public order offences. With the mountains of evidence now available which clearly show that these offences provide no tangible benefit to the general community but act to further alienate Aboriginal people, there can be no justifiable reason for maintaining them on the statute.

Aboriginal Over Representation

Government Area

Local Government Area	Rate per 1000 Aboriginal People
Albury	21.68
Armidale	17.53
Bathurst	13.29
Bega Valley	45.74
Blacktown	8.97
Bourke	38.78
Brewarrina	22.32
Broken Hill	24.58
Campbelltown	8.31
Casino	30.11
Central Darling	37.48
Coffs Harbour	28.23
Coonabarabran	24.39
Coonamble	34.32
Dubbo	19.51
Eurobodalla	36.4
Forbes	26.51
Gilgandra	38.72
Greater Taree	17.7
Griffith	13.64
Guyra	41.42
Hastings	11.66
Inverell	83.93
Kempsey	19.95
Kyogle	27.3
Lachlan	21.61

Local Government Area	Rate per 1000 Aboriginal People
Lismore	36.14
Maclean	36.48
Marrickville	13.71
Moree Plains	18.32
Nambucca	22.96
Narrabri	33.9
Orange	20.19
Parkes	15.15
Penrith	4.73
Richmond River	88.89
South Sydney	7.71
Tamworth	9.69
Wagga Wagga	9.12
Walgett	54.95
Wellington	9.39
Wentworth	22.44



Aboriginal over representation for Offensive Language and Conduct by LGA, 1998