

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE OFFICE OF THE REGISTRY

No. B13 of 2002

BETWEEN:

MELISSA JANE COUCHY

Applicant

and

JEANNIE ANNE DEL VECCHIO

Respondent

APPLICANT’S SUMMARY OF ARGUMENT

**Part I – The special leave questions**

1. Does the policing and prosecution of language offences<sup>1</sup> serve unduly to alienate indigenous Australians, particularly the poor, from the police and the criminal justice system?<sup>2</sup> How might principles of equality before the law<sup>3</sup> prevent or at least ameliorate this effect? How should the courts in determining language offences arising out of this interaction

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<sup>1</sup> The offence in this case was using insulting words in public contrary to section 7(1)(d) of the *Vagrants Gaming & Other Offences Act 1931 (Qld)*. The same issues arise in similar statutes in each of the other States and Territories: section 4A of the *Summary Offences Act 1988 (NSW)*, section 17(1)(c) of the *Summary Offences Act 1966 (Vic)*, section 7(1)(c) of the *Summary Offences Act 1953 (S.A.)*, section 59 of the *Police Act 1892 (W.A.)*, section 546A of the *Crimes Act 1900 (Cth)*, sections 47 & 53 of the *Summary Offences Act (NT)* and section 12(1)(d) of the *Police Offences Act 1935 (Tas)*.

<sup>2</sup> Recorded data and statistics suggest that a disproportionate number of persons convicted and gaoled in respect of this and similar offences are indigenous Australians. See **Attachment 1**.

<sup>3</sup> For example, McPherson JA in the Queensland Court of Appeal below (in argument): “One law for the rich and another for the poor ... That’s contrary to our oath, you know?” Cf *Mabo (No. 1)* 1988 166 CLR 189; *Koonwarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Gerhardy v Brown* (1985) 159 CLR 70 at 129, per Brennan J, citing a passage from the judgment of Judge Tanaka in the *South West Africa Cases (Second Phase)* [1966] ICJR 3 at 305-306, including: “We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely to treat equally what are equal and unequally what are unequal ... Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law. Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness.” Brennan J also referred to the observation of Ray CJ in *Kerala v Thomas* [1976] 1 SCR 906 (Supreme Court of India) that “Equality of opportunity for unequals can only mean aggravation of inequality.”. See also *Henry v Boehm* (1973) 128 CLR 482 at 502 per Stephen J: “I regard it as incorrect to say of a disadvantage that because it is the consequence of a requirement of universal application that disadvantage is equally applicable to all; if the discriminating factor relates to the personal attributes of individuals some only of whom possess those attributes then, while the requirement may be said to apply equally to all, the disadvantage will apply unequally for it will apply only to those who do not possess those attributes.”, passage cited with approval in *Street v Queensland Bar Association* (1989) 168 CLR 461. Also refer to *Abdulaziz Cabales and Balkandali* (1985) 2 EHRR 8 at 68: “The difference of treatment must therefore be regarded as having had an objective and reasonable justification and in particular, its result have not been shown to transgress the principle of proportionality.”

accommodate the disproportionately frequent contact between police and itinerant indigenes?

2. This Court has held that discourtesy is to be distinguished from insult.<sup>4</sup> Should random crudeness (including the usage of expletives) in language also be so distinguished?
3. To what extent, if at all, are an alleged insulter's socio-economic and other personal circumstances relevant in determining the allegation of making a criminal insult?
4. How are contemporary community views assessed in determining whether words are insulting? Can judicial notice be relied upon?

## Part II- The relevant facts

5. The applicant is an Australian indigene. At about 4 am on 21 September 2000, she was approached by four police officers in an inner city street of Brisbane.<sup>5</sup> She was intoxicated. She was known to the first police officer on the scene, whom she also recognised. She said that she was lost. He offered to take her to a place called "*the compound*".<sup>6</sup> She told him, in effect, that she did not want to go there.<sup>7</sup>
6. The complainant was the second officer at the scene. Her evidence at trial was:

*"We got there at about – Constable Eaddie and I got there at about 4 a.m. and we located the defendant. She was having a conversation with Sergeant McGahey and another police officer from Fortitude Valley. I had a conversation with Constable – with Sergeant McGahey and then I approached the defendant and had a conversation with her. I said to her, "I am Constable Del Vecchio from Fortitude Valley Police, can you state your full and correct name and address for me?" She turned her back and wouldn't answer me. All of a sudden she turned around and said, "Fuck you cunt." I said, "You're under arrest." She said, "What the fuck for?" I said, "For using insulting words to me."*

<sup>4</sup> *Levis v. Judge Ogden* (1984) 153 CLR 682 at 690: "However, mere discourtesy falls well short of insulting conduct, let alone wilfully insulting conduct which is the hallmark of contempt."

<sup>5</sup> One of the police described Dixon Street as a "*back street*". New Farm is an inner city suburb of Brisbane.  
<sup>6</sup> There was no evidence led as to what this "*compound*" was although it was suggested by the respondent's counsel before the Court of Appeal that: "*Just on the issue of the compound, which is probably getting off my point ultimately, but at that time in New Farm Park there was a shelter that had been erected by the council for the purposes of the Aboriginal community that was living in that area, and I must admit that for my part I took that to be the compound, as it was sometimes referred to, certainly in the circles in which I mix, and I took it to be a reference to that.*"

<sup>7</sup> Sgt McGahey: "*A short time later, I located the defendant in Dixon Street. The defendant approached the police vehicle and propped herself against the driver side door. She then said to me, "Hello, Sarge, you know me, Lisa Couchy." I said to the defendant, "Lisa, what are you doing down here?" She said, "I'm lost. Where am I?" I noted during this conversation that the defendant appeared to me affected by liquor and certainly smelt of liquor. I said to her, "Lisa, you're at New Farm. Do you want to go to the compound?" She then said, "Sarge, the compound is for fucking dogs" and about – at that time, another police vehicle containing Constables Del Vecchio and Eaddie arrived and I then left the police vehicle which I had been in and I had a conversation with both those police officers. Constable Del Vecchio and – well, actually I think all three of us approached the defendant, and Constable Del Vecchio said to the defendant, "What is your full and correct name and address?" The defendant then appeared to ignore the question. She then looked at Constable Del Vecchio and said, "You fucking cunt." Constable Del Vecchio then said to the defendant, "You are under arrest." The defendant then said, "What the fuck for?" Constable Del Vecchio then said, "For using insulting language to me."*"

*She said, "I was on a roll there and I just lost it."*<sup>8</sup>

7. On 7 December 2000, the applicant was summarily convicted and sentenced to 3 weeks imprisonment. On 16 August 2001, Howell DCJ dismissed an appeal against the conviction but allowed the appeal against sentence, reducing it to 7 days.<sup>9</sup> On 4 February 2002, the Queensland Court of Appeal<sup>10</sup> refused the applicant leave to appeal against the conviction and the sentence.<sup>11</sup>

### Part III – Summary of argument

8. In saying to the police "*fuck you cunt*", in the context in which the words were spoken in this case, the applicant was not using insulting words in the statutory sense.<sup>12</sup> Words merely convey a message. The intent of the message and how it is received depends substantially on the context and the persons involved in the dialogue. Many words evolve to attract a vastly different meaning by colloquial use.<sup>13</sup> Whether any word is insulting in a statutory sense, has to be assessed against evolving community usage, expectations and standards. Courts should not seek to set these standards, rather, just assess them.
9. One only has to attend a cricket or football match to ascertain that these and similar utterances are part and parcel of contemporary life.<sup>14</sup> The meaning of any word or phrase has to take into account its colloquial use. A careful study of the dialogue in this case reveals that the applicant was, in using the words she did, merely telling the complainant (admittedly in a

<sup>8</sup> The applicant was not otherwise threatening to the police. She was observed "*ranting and waving to herself*". No one other than police was present. She was known to one officer as usually being a loud person. She was not accused of or charged with any other offence.

<sup>9</sup> The time she had served before the hearing of the appeal was taken into account and she was not placed back into custody.

<sup>10</sup> de Jersey CJ, McPherson JA & Douglas J

<sup>11</sup> de Jersey CJ (in argument): "*And the other point to be made is that Magistrates have an enormously wide exposure to the colour of daily life through their work every day, much broader than Judges in this Court for example. We see masses of it in the Criminal Court but magistrates who see the burly burly of daily life couldn't help but distil some sort of perception of community expectations.*"

de Jersey CJ (judgment): "*In this case, it fell to the Magistrate to reach a view on contemporary community expectations, and to that exercise he may be taken to have brought to bear a wide experience of life, including substantial regular contact with many members of the community.*"

<sup>12</sup> See generally *Ball v. McIntyre*[1966] 9 F.L.R. 237; *Dillon v. Byrne* (1972) 66 QJPR 113, *Horton v. Rowbottom* (1993) 68 A Crim R 381; *E (A Child)* (1994) 76 A Crim R 343 and paragraphs 14-26 of the applicant's written submissions before the Court of Appeal.

<sup>13</sup> For example, the words "mad" and "filth" are used by teenagers and surf enthusiasts as a description of something very good. "Spunk" was used to denote male ejaculate in pornographic literature but is a now also an adolescent description for a physically attractive person. The word "pig" has long been used as a reference to a police officer in a derogatory sense. The word "wog" was historically a derogatory reference to Europeans yet it is now used as a term of affection amongst Europeans.

<sup>14</sup> On the day after the appeal to the Court of Appeal was decided, it was widely reported in the Australian community that the captain of the Australian cricket team had uttered the words: "*this room is full of c---heads*" referring to a group of journalists. No action was taken and it was observed by the Chief Executive of the Australian cricket Board that it was a "*difficult press conference... after a difficult match and a long summer.*"

way that some would regard as crude) and the other police to leave her alone.<sup>15</sup>

10. The courts below each treated the context as simply one of a calculated insult of a police officer in the execution of her duty.<sup>16</sup> The Court of Appeal justices were of the view that the fact that the words were used by an itinerant indigene was not relevant.<sup>17</sup> It must be incorrect to exclude attributes of the applicant from the context in which the words are spoken. The subjective attributes of the complainant *were* treated as material.<sup>18</sup> In assessing whether the words were insulting, the full context should have included:

- 10.1. who the applicant was, including her apparent age, her ethnicity, her grasp of English, her physical appearance and demeanour;
- 10.2. her emotional state;
- 10.3. her state of intoxication;
- 10.4. the message intended to be conveyed by her;
- 10.5. the physical surroundings including the time and place of the utterance; and
- 10.6. the relationships between the participants in the dialogue and others present.<sup>19</sup>

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<sup>15</sup> The preceding conversation with Sgt McGahey [at footnote 8] suggests that she also did not wish to be taken to “*the compound*”.

<sup>16</sup> Herlihy M (judgment): “*It is an objective test that I have to apply, that is are those words used in the circumstances in which they were here insulting objectively. Well the words were used for a female police officer in the course of her duty. And the words are apparent on their face to be scornful abuse of that officer. Any word other than cunt I think may have put a doubt in my mind but the word “cunt” itself, I would hold to be insulting of a female, be it a police officer or otherwise. That word coupled with the word “fucking” is, I would have thought, in today’s standards applying in Brisbane 2000 would be insulting when used in a loud voice at somebody who is asked ones name and address. I, therefore, on the evidence, find the defendant guilty of the charge and hold that the words were insulting as they were used in the early morning of 21 September*”. Howell DCJ: “*It was appropriate in the circumstances in which the police officer found herself and the accused in Dixon Street at about 4 a.m. to ask the complainant her name and address. On the evidence accepted by the learned magistrate, the words used and accompanying circumstances and applying the tests stated by the appellate court(s), in my view, left it clearly open to the learned magistrate to find that the words used were insulting and, for completeness, clearly intended to be insulting*” Court of Appeal (per de Jersey CJ with whom McPherson JA & Douglas J agreed): “*But I believe that even allowing for modern licence, the community would generally still regard the use of the words ‘you fucking cunt’ to a female police officer going about her duty, albeit by a drunken person in the early morning, as insulting.*”

<sup>17</sup> de Jersey CJ: “*Well he [the magistrate] may not have taken into account the Aboriginality of her, but I might say for my part I have some question as to whether that was relevant*”

“*I was trying to depersonalise the offender because I don’t think, notwithstanding what you say, that race should be seen as playing a significant role in this*”

Douglas J: “*I just think to add the word ‘Aboriginal’ stretches the bar too far; it’s not necessary.*”

Mr Boe: “*(...) The fact is she is Aboriginal and I can’t ignore that, nor should the Court.*”

Douglas J: “*The fact is I’m Caucasian and all of us in this country have different racial backgrounds. It shouldn’t matter.*”

<sup>18</sup> Contrast the approach taken in *Saunders v. Herold* (1991) 105 FLR 1 at 8: “*I do not think the reasonable bystander would regard the presence of a police officer as requiring restraint in the use of indecent language and be offended at its non-exercise.*” See in this context the analogous approach taken in *Parker v. The Queen* (1963) 111 CLR 610 & *Stingel v. The Queen* (1990) 171 CLR 312 in relation to provocation.

<sup>19</sup> See for example the assertions in the text **Principles of Criminal Law** [Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, LBC Information Services, Pyrmont NSW, 2001] at p. 795:

“*In this case [E (A Child) (1994) 76 A Crim R 343] the obscenity of the language was measured in ‘neutral linguistic’ terms: using the word “fuck” merely as a general expletive did not violate community standards. However this approach does not reveal the true political context of the words. In this case, the accused was an Aboriginal youth who was resisting police authority to impose a curfew and to detain him without proper legal authority (this significant issue was not explored at trial or raised on appeal). In the absence of formal powers to detain him, offensive language provided the police with a ‘holding charge’ and a legal basis for exercising authority over the youth*”

and

11. The applicant was an intoxicated Aboriginal woman who was being interviewed by police, in a semi-urban street at 4 am. She was not being questioned about having committed any criminal offence. No one else was present or in apparent hearing of the conversation.<sup>20</sup> She was lost. She was being told by police that she would be taken to a compound in a nearby park, a place that she did not want to be taken to. The applicant's aboriginality was clearly obvious to the police and taken into account in what they said to her.<sup>21</sup> There was nothing literal in her use of the expression "fuck you cunt"; it was clearly slang.<sup>22</sup> In these circumstances, this Court can reasonably infer that the words uttered by the applicant, uncouth as they might be to some 'classes' within the community, were not calculated to insult anyone in the eyes of a reasoned and objective person. At the very least there must be some considerable doubt about it.

12. In sum the Court of Appeal erred in:

- 12.1. excluding the applicant's persona and personal attributes from the context used to assess the 'criminal' use of the words;
- 12.2. failing to properly determine the meaning conveyed by the words;
- 12.3. failing to properly understand the complexities associated in the relationship between police and indigenes and how the greater community views these complexities when assessing the permissible bounds of language;
- 12.4. misconceiving equality before the law in this context;
- 12.5. abdicating its appellate role and responsibilities;<sup>23</sup> and
- 12.6. finding that merely because a week's imprisonment had been served pending the intermediary appeal, such a penalty was not manifestly excessive.

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*"Although the law determines offensiveness by reference to an 'objective test' based on community standards, it is not a value-neutral concept. The conceptions of good order and decency created and applied by both police officers and magistrates have the potential to operate unfairly against minorities who are perceived to be a threat to social order and/or police authority."*

<sup>20</sup> See *Logan v Jessop* (1987) SCCR 604 where it was held by the Scottish High Court that the absence of people other than police being present meant that the circumstances were insufficient to found a conviction. The words 'fuck' and 'cunt' were the subject of complaint in that case.

<sup>21</sup> Since the compound is apparently a "shelter that had been erected by the council for the purposes of the Aboriginal community that was living in that area," it is unlikely that a non-Aboriginal person would be taken there or told that they would be.

<sup>22</sup> A collection of slang definitions appear in **Cassell's Dictionary of Slang, Wellington House London, 2000**

p.455:

**fucking** *adj.* **1.** [mid-19C+] a general intensifier, e.g. *fucking horrible, fucking stupid* **2** [mid-19C+] *implying a variety of negatives, e.g. vile, despicable, unpleasant, corrupt, dirty.* **3** [1920s+] *as infix. -fucking- (cf. ABSOFUCKINGLUTELY; FANFUCKINGTASTIC; GUARANFUCKINGTEE).*

**fucking** *n.* [late 17C+] *the act of copulation [FUCK v. + sfx. -ing]*

**fucking** *n.* [mid-19C+] *harsh and/or unfair treatment. [FUCK v. + sfx. -ing]*

p.301:

**cunt** *n.* **1** [mid-19C+] *a fool, a dolt, an unpleasant person of either sex (cf. ARSEHOLE n.).* **2** [1920s+] *a person.* **3** [1930s+] *something very difficult or unpleasant to do or achieve. [fig. uses of CUNT n. (1). In some circumstances cunt, like the US Black use of MOTHERFUCKER, is so frequent and so repetitive as virtually to lose its shock or taboo value and become a neutral synonym for 'person']*

<sup>23</sup> See paragraphs 3 & 4 of the applicant's submissions before the Court of Appeal.

## Part IV - Reasons why special leave should be granted

13. Interaction between the police and impoverished, itinerant and intoxicated indigenous Australians is disproportionately common.<sup>24</sup> This interaction contributes significantly to the alienation of indigenes from police and the criminal justice system. The relationship between the police and itinerant indigenes is complex; understanding and appropriately accommodating these complexities is important. When the relationship activates the criminal justice system, a proper understanding becomes necessary to avoid injustice.
14. It can be assumed that police officers in Australia deal more frequently with indigenous Australians, than most members of the community. Mostly, this interaction occurs with the citizen being intoxicated. It is perhaps understandable that some police are more intolerant than others and this explains, in part, why arrests are made.<sup>25</sup> It cannot however be assumed that the views of some police officers correlate with that of the balance of the community. Viewing conduct of the kind being considered here as sufficient to warrant arrest and charge with a criminal offence, rather than diversion to an organisation such as *as "Murri Watch"*<sup>26</sup> or to a hospital or to the person's place of abode, bears some examination. Some police officers might protest: *"what else could I do?"* It need hardly be said that it is not for a court to entertain social and political responsibility for the complex social 'problem' of dispossessed indigenous Australians, chronically alcoholic and poor and how police are to cope or deal with them. A fortiori, as observed in *Dooley v. Polzin*, *"Her Majesty's courts are not dustbins into which the social services can sweep the difficult members of the public"*.<sup>27</sup>
15. Governments, both State and Federal, have been perplexed about overrepresentation of indigenes in the criminal justice system. They have invested considerable public resources to attempt to address these issues which can undoubtedly be sourced to this country's colonial history.<sup>28</sup> This political commitment must at least partly reflect current community expectations.<sup>29</sup>
16. It is obvious that Ms Couchy has struggled to integrate "appropriately" into non-indigenous society and the behaviour that prompted her arrest is a manifestation of these complex factors. Her use of the words on this occasion was not such that warranted criminal sanction

<sup>24</sup> Incarceration can result due to the inappropriate resort to arrest by police when confronted with this language, as well as overnight incarceration pending production in court in addition to the failure of 'offenders' to pay fines or to even appear at court to answer these charges. There is also the risk of what is called in some circles the 'ham cheese & tomato' reality that follows attempts to arrest intoxicated people. Repeated offending is regarded as undeterred criminal behaviour resulting in imprisonment.

<sup>25</sup> See the approach taken in *Police v. Carr* (unreported) NSWSC on appeal per Smart AJ, 25 January 2002.

<sup>26</sup> *Murri Watch* is a Brisbane based community organisation that provides social workers, usually indigenous, who attend police stations, watchhouses and public places to collect and take care of itinerant indigenous people who are picked up off the streets in an intoxicated state.

<sup>27</sup> (1991) 57 A Crim R 420 at 422 citing *Clarke* (1975) 61 Cr App R 320

<sup>28</sup> Recent examples of attempts at executive examination of these issues are the *Cape York Justice Study Report*, November 2001 at [www.premiers.qld.gov.au/about/community/capeyorkreport.htm](http://www.premiers.qld.gov.au/about/community/capeyorkreport.htm)  
*The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2000), the Royal Commission of Inquiry into Aboriginal Deaths in Custody 1991, *National Report, Overview and Recommendations* (Commissioner E. Johnston) QGPS, Canberra and the Queensland and Aboriginal & Torres Strait Islander Justice Agreement, December 2000 – **Attachment 2**.

<sup>29</sup> The Queensland government in entering into the Queensland Aboriginal & Torres Strait Islander Agreement proclaims a commitment to halve the incarceration rate of indigenes in this State.

as they could not, as held in *Dillon v. Byrne*: “tend to annoy or insult such persons as are faced with it – and sufficiently deeply or seriously to warrant the interference of the criminal law.”<sup>30</sup>

17. Surely “well-conducted and reasonable men and women”<sup>31</sup> are likely to feel pity and compassion when apprised of all the circumstances surrounding the interaction between the applicant and the police. Some might even hold a sense of collective guilt. The relationship between her persona and circumstances and the language she turns to in her interaction with the police, especially when she is intoxicated is self evident. There could not reasonably be any expectation or desire in the community that she be arrested, prosecuted and gaoled for the manifestation of her socio-economic reality.
18. The *Vagrants Gaming & Other Offences Act 1931* (Qld) is more than 70 years old<sup>32</sup> and its interpretation requires updating.<sup>33</sup> A statute that requires assessment of contemporary community standards is a difficult one to apply. A comparison of how the section is being approached by different courts throughout Australia demonstrates that judicial opinion is widely divided. The President of the Queensland Court of Appeal has gone so far as to declare the section invalid.<sup>34</sup> An attempt should be made to ensure that the offence and similar offences in other States are kept in a “serviceable” state and not subject to idiosyncratic

<sup>30</sup> (1972) 66 QJPR 113 at 133

<sup>31</sup> *Dillon v. Byrne* (supra) also at 133

<sup>32</sup> See page 1790 and following of the Hansard transcript of the Second Reading Speeches in the Queensland parliament concerning this legislation. An excerpt is set out at paragraph 31 of the applicant’s written submissions before the Court of Appeal. Some of the comments (“*comboism*” and “*gin*” for example) by these parliamentarians are laced with racist values that would probably be considered offensive or an insult to most members of the community if uttered now, whether under parliamentary privilege or not. It is noted that the parliamentary discussion is not referring specifically to section 7, rather parts of section 4 of the Act

<sup>33</sup> As observed in *Dietrich v The Queen* (1992) 177 CLR 293, Brennan J at 318: “I do not doubt that the Courts of this country, and especially this Court as the ultimate court of appeal, acting within their respective jurisdictions and in response to the exigencies of particular cases, create new rules of the common law. The common law has been created by the Courts and the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society. Had the Courts not kept the common law in serviceable condition throughout the centuries of its development, its rules would now be regarded as remnants of history which had escaped the shipwreck of time (adaptation from Francis Bacon, *The Advancement of Learning*, (1605), Bk 2, fol.10b). In modern times, the function of the Courts in developing the common law has been freely acknowledged (see, for example, *Myers v Director of Public Prosecutions* (1965) AC 1001, per Lord Reid at 1021; *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556, per Barwick C.J. at 563; *Geelong Harbour Trust Commissioners v Gibbs Bright and Co* (1974) AC 810, per Lord Diplock at 820-821). The reluctance of the Courts in earlier times to acknowledge that function was due in part to the theory that it was the exclusive function of the Legislature to keep the law in a serviceable state. But Legislatures have disappointed the theorists and the Courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community. Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby (as in *L Shaddock and Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225, or *Hawkins v. Clayton* (1988) 164 CLR 539 or *David Securities Pty Ltd v Commonwealth Bank of Australia* (unreported, 7 October 1992). And, in those exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice (as in *Mabo v Queensland* (1992) 66 ALJR 408; 107 ALR 1). “The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community.”

<sup>34</sup> *Coleman v. P & C (Attorney-General intervening)* (unreported)[2001] QCA 539. McMurdo P was in the minority. Davies and Thomas JJA upheld the validity of the section.

and sometimes capricious treatment.<sup>35</sup> The Court is best placed to do so.<sup>36</sup>

19. In the Court of Appeal below, it was felt that the judicial notice taken by the magistrate should not be reviewed.<sup>37</sup> It seems settled *“that a judge is justified in taking judicial notice of a fact, only if he is “fully satisfied of the fact” and that he “must be cautious to see that no reasonable doubt exists”.*<sup>38</sup> de Jersey CJ suggested below that magistrates, due to their exposure to the *“hurly burly of daily life couldn’t help but distil some sort of perception of community expectations.”* It involves unattractive reasoning to conclude that exposure to civil and criminal litigants in the summary jurisdiction, of itself, results in reposing in magistrates a sufficient or even a superior capacity to determine the issue.<sup>39</sup> This approach is not universal and is unsupported by further explanation or authority<sup>40</sup> and bears examination by the Court.
20. The Queensland Court of Appeal’s approach did not demonstrate a proper or complete appreciation of these complexities. It is out of step with that which is developing and established elsewhere.<sup>41</sup> Treatment of these issues by this Court would have significant

<sup>35</sup> There is no intent, in this appeal, to sharply criticise the magistracy. Theirs is a wide and difficult jurisdiction with limited time and resources made available to summarily determine the vast majority of criminal cases decided in the country. The development of the common law would necessarily be a low priority in the lower courts. The role best sits with this Court. *“The Judicial Method”*: The Hon. Justice M H McHugh AC [1999] 73 ALJ 37 at 40: *“It is the apex of the judicial hierarchy – in Australia, the High Court – which has the most apparent and significant law-making role. Because of the appellate structure and the special leave procedures required to bring a matter before the High Court, most cases which come to the Court on appeal are generally hard cases which can be plausibly decided either way. Because of its position at the top of the judicial hierarchy, the High Court is forced to make law in many cases.”*

<sup>36</sup> Dawson J in *Morris v. The Queen* (1987) 163 CLR 454 at 475: It is for this Court *“to develop and clarify the law and to maintain procedural regularity in the courts below.”* This passage was cited with approval in *Carson v. John Fairfax & Sons Pty Ltd* (1991) 173 CLR 194 at 218.

<sup>37</sup> McPherson JA (in argument): *“Well, it’s a matter for judicial notice then.”*

<sup>38</sup> *Todorovic v. Waller - Jetson v. Hankin* (1981) 150 CLR 402 where Gibbs CJ & Wilson J adopted Isaacs J in *Holland* (1917) 23 CLR 149 at 153: *“In the absence of evidence, that can only be done by an intuitive recognition that the chosen discount rate bears a just relation to the impact of inflation. Courts can of course take judicial notice of the way in which rates of interest, and the rate of inflation, have moved in the past, in so far as that is commonly and certainly known. In Holland v. Jones (1917) 23 CLR 149, at p 153, Isaacs J. went so far as to say that a judge is justified in taking judicial notice of a fact, only if he is “fully satisfied of the fact” and that he “must be cautious to see that no reasonable doubt exists”.* We regard it as impossible to say that it is commonly and certainly known that rates of interest do no more than match the current inflation rate or that the real interest rate is zero. No published statistics showing the position in Australia, authentic enough to warrant judicial being taken of them, have been brought to the notice of the Court which would support the view that there is no real interest rate in Australia. In a number of cases in the United States and Canada, where evidence has been called on the issue, that conclusion has been rejected. Equally, it is impossible to take judicial notice of the extent to which interest rates include an inflationary element - in other words, as to what is the real interest rate. In truth the Court is forced to make a judicial guess (to use Lord Diplock’s words in *Paul v. Rendell* (1981) 55 ALJR, at p 376; 34 ALR, at p 578) as to the difference between prevailing interest rates on safe investments and the rate of inflation. (at p421)

<sup>39</sup> *“The Judicial Method”*: The Hon. Justice M H McHugh AC [1999] 73 ALJ 37 at 45:

*“These illustrations show that neither the logic nor reasoning by analogy from decided cases is the only factor in judicial law-making. The process is much more pragmatic. Values and the practical working of legal rules have as much a part to play in creating, extending or modifying a legal rule as logic does. No doubt many of the values invoked to develop or modify the law derive from the legal system itself. Values such as freedom of the individual, equality before the law, certainty and predictability, unconscionability, good faith, reasonableness and, in recent years, fairness permeate the legal system. They shape judicial law-making.”*

<sup>40</sup> See a relevant discussion by Stanley Yeo in the article *Judicial Law-making and Community Standards* (1999) 8 JJA 203.

<sup>41</sup> For example in *DPP v. Orum* [1988] Crim LR 848 it was said: *“words and behaviour”* [The accused had said: *“You fuck off. This is a domestic and you can’t do nothing. You can’t fucking arrest me. I know my rights. If you don’t go*

impact on police operational behaviour, police prosecution policy, and judicial determination across the country.

21. The Court has not had to recently consider the operation of ‘language offences’.<sup>42</sup> This case provides an “*opportunity*” to provide the necessary guidance.<sup>43</sup> The statutory offence of insulting words should be rendered less susceptible to selective prosecution. This may result in the improvement in relations between police and indigenes in this country, which is a most desirable and necessary, if not popular, outcome.

## Part V – Costs

22. Costs should not be awarded to the respondent, in any event, as she is a police officer indemnified by the Crown.
23. The applicant should be awarded her costs of this application, if leave is granted.

## Part VI

24. The authorities relied upon are:

- 24.1. *Lewis v. Judge Ogden* (1984) 153 CLR 682 at 690
- 24.2. *Ball v. McIntyre* [1966] 9 F.L.R. 237 at 240-241, 243
- 24.3. *Dillon v. Byrne* (1972) 66 QJPR 113 at 133
- 24.4. *Horton v. Rowbottom* (1993) 68 A Crim R 381 at 385-389
- 24.5. *E (A Child)* (1994) 76 A Crim R 343 at 347-350
- 24.6. *DPP v. Orum* [1988] Crim LR 848 at 849
- 24.7. *Saunders v. Herold* (1991) 105 FLR 1 at 5-7
- 24.8. *Police v Carr* (unreported) Wellington Local Court, Heilpern M, 8 June 2000, particularly at headings 4, 5 and 6
- 24.9. *DPP v. Carr* (unreported), NSWSC, per Smart AJ, 25 January 2002
- 24.10. *Dooley v Polzin* (1991) 57 A Crim R 420 at 422

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*away, I'm going to hit you"] would be wearily familiar to police and have little emotional impact save that of boredom". In *Saunders v. Herold* (1991) 105 FLR 1, Higgins J was considering an appeal by an Aboriginal man who, after being ejected from a Canberra Worker's club, was approached by police. He is alleged to have said: "Why don't you cunts just fuck off and leave us alone". In allowing the appeal it was observed: "What constitutes behaving in an offensive manner depends very much on the circumstances. Conduct and language engaged in at a football match or squash court may be acceptable, or, at least, unremarkable, but offensive if engaged in during a church service or a formal social event". See also the other cases referred to in paragraphs 14 – 31 of the applicant's submissions before the Court of Appeal. Some relevant articles on the subject include: M. Langton (1988) 'Medicine Square: Swearing and fighting as dispute processing mechanisms in Aboriginal society and their illegality under the Australian legal system', in *Being Black: Aboriginal Cultures in "Settled" Australia*, pp 201-225 and S. Yeo 'Judicial Law-making and Community Standards', *Journal of Judicial Administration*, 1999 VI 8, pp 203 –215.*

<sup>42</sup> The most recent consideration by this Court of a language offence was *Thurley v. Hayes* (1920) 27CLR 548. The Court (Knox CJ, Gavan Duffy & Rich JJ) did not consider the issue of accommodation of contemporary community expectations or standards in assessing the language.

<sup>43</sup> See "*Judicial Law-making – Is Honesty the Best Policy?*" Doyle CJ, (1995) 17 Adel L Rev 161 at 163.

- 24.11. *Dietrich v The Queen* (1992) 177 CLR 293 at 318
- 24.12. *Morris v. The Queen* (1987) 163 CLR 454 at 475

25. The legislation referred to is:

- 25.1. *Vagrants Gaming & Other Offences Act 1931 (Qld)*;
- 25.2. *Judiciary Act 1903 (Cth)*

26. The other materials relied upon by the applicant are:

- 26.1. Cassell's Dictionary of Slang, Wellington House London, 2000
- 26.2. M. Langton (1988) 'Medicine Square: Swearing and fighting as dispute processing mechanisms in Aboriginal society and their illegality under the Australian legal system', in *Being Black: Aboriginal Cultures in "Settled" Australia*, pp 201-225
- 26.3. S. Yeo 'Judicial Law-making and Community Standards', *Journal of Judicial Administration*, 1999 VI 8, pp 203 –215.
- 26.4. S. Bronnitt and B. McSherry, *Principles of Criminal Law*, LBC Information Services, Pymont NSW, 2001
- 26.5. Queensland Aboriginal and Torres Strait Islander Justice Agreement, Queensland Government, 19 December 2000
- 26.6. The Hon Justice MH McHugh AC 'The Judicial Method' (1999) 73 ALJ 37 at 40, 45
- 26.7. The Hon Chief Justice Doyle 'Judicial Law-Making – Is Honesty the Best Policy?' (1995) 17 Adel L Rev 161 at 163

## **Part VII- Oral Argument**

27. The applicant does wish to supplement this summary with oral argument.

Dated the twenty-fifth day of March 2002.

Signed  
Andrew Boe  
Boe Callaghan  
Solicitors for the applicant.