
THE PRICE OF LAW AND ORDER POLITICS: RE-EXAMINING *THE FINES, PENALTIES AND INFRINGEMENT NOTICES ENFORCEMENT AMENDMENT ACT 2012 (WA)*

by Amanda Porter

INTRODUCTION

On 4 August 2014, 22-year-old Yamatji woman, known for cultural reasons as 'Miss Dhu', died in police custody. Her death was one of more than 340 Indigenous deaths in custody since the report of the Royal Commission into Aboriginal Deaths in Custody was handed down in 1991 ('RCIADIC').¹ Very little attention has been given to either the circumstances surrounding her death and the actions of those involved. In particular, little scrutiny has been given to the laws and regulations justifying her arrest in the first place. Miss Dhu's case represents one of a significant number of Western Australians who are arrested and detained for the exclusive reason of 'paying down' unpaid fines, whereby unpaid fines can be paid down at a rate of \$250 per day.² Recent amendments to the *Fines, Penalties and Infringement Notices Enforcement Act 2012 (WA)* ('Fines Act') created tougher non-custodial measures and enhanced sanctions to deal with a fine defaulter, forming part of a 'law and order' approach to criminal justice. The purpose of this article is to detail the circumstances of this death in custody and to critically examine the legislation and broader criminal justice policy developments in Western Australia ('WA').

THE DEATH OF A YOUNG ABORIGINAL WOMAN IN CUSTODY

On 2 August 2014, police officers arrested Miss Dhu pursuant to a warrant for unpaid fines of around \$1000. She was taken to the emergency department of the South Hedland Health Campus twice while in custody, but was deemed 'medically fit' and returned to her cell on each occasion. At around midday on 4 August 2014, Miss Dhu was taken for a third time to the South Hedland Health Campus and was pronounced dead 20 minutes later.³

An autopsy performed by forensic pathologist Jodi White was inconclusive but found bleeding in and around the lungs, a head wound, two old rib fractures, and fractured lungs. It also found dried vomit in her nose, mouth and all over her body. The two witnesses, Ruffin and Wilson, state that Miss Dhu was in agony while in police custody; crying and at times begging on her knees for help. Her parents were not notified of her degrading health despite calling the South Hedland police station on two occasions.⁴

The tragic elements surrounding Miss Dhu's death in custody are manifold: the futility of her arrest for unpaid fines, evidence that her pleas for help went unnoticed, and the apparent failure by medical professionals to provide appropriate medical care.

Even more tragic is that her death was entirely avoidable. Miss Dhu's death forms part of a long history of avoidable Aboriginal deaths in custody. Recent examples include the 2012 death of an Aboriginal woman in Broome after being arrested for drinking in a public place, and the death in 2008 of a respected Aboriginal Elder 'Mr Ward' who died in the back of a paddy wagon after being driven 400 kilometres across the WA desert. WA has a particularly poor reputation when it comes to Aboriginal deaths in custody: 38.5 per cent of all adult prisoners are Aboriginal, despite representing just 3.5 per cent of the state population.⁵ Sixty-eight per cent of all young people detained in juvenile detention centres are Aboriginal.⁶

In 1991, the RCIADIC made 339 recommendations in order to avoid future deaths in custody. Several recommendations appear to have been neglected by the relevant authorities. In particular:

- Recommendation 87: Arrest only when no other way of dealing with the problem.
- Recommendation 92: Imprisonment as a sanction of last resort.
- Recommendation 120: Amnesty on the execution of warrants for unpaid fines.
- Recommendation 121: Sentences of imprisonment should not be imposed in default of a payment of a fine.
- Recommendation 128: Medical services provided to persons held in police watch-houses should be of an equivalent standard to those available to the general public.
- Recommendation 137: Careful and thorough checks of all detainees in police custody.
- Recommendation 161: Immediately seek medical attention if any doubt arises about a detainee's condition.⁷

In addition to ignoring these RCIADIC recommendations, the death of Miss Dhu highlights further systemic injustices within the WA criminal justice system.

LAW AND ORDER POLITICS IN WA

The Fines Act introduced in August 2013, created tougher non-custodial measures and enhanced sanctions to deal with fine defaulters.⁸ Specifically, the legislation allowed for tougher sanctions including wheel clamping; the removal of vehicle licence plates; publication of the names of major debtors registered with the Fines Enforcement Registry on a State Government website; increased restrictions on driving and vehicle licence renewal, and enhanced enforcement of infringement notices. This legislation gives broad powers to police officers, including the power to make a 'warrant of commitment' in the case a debtor fails to pay a court fine or complete a work and development order.⁹

The crackdown on unpaid fines and debt must be understood within the broader context of the WA Government's "tough on crime" approach to criminal justice—a platform upon which the Barnett government was elected to power in the March 2013 state elections. Specifically, recent policy measures have included the "clamping down on fines" campaign, mandatory jail for assaults on public officers, increased property confiscation powers and reduced parole.

Statistics tabled in the WA Parliament on 11 June 2013 reveal that 5017 (one in seven) admissions to WA prisons between 2008 and 2013 were for the exclusive reason of 'paying down' fines.¹⁰ There were also more than 13 000 cases over the same period involving offenders behind bars for an unrelated matter who also elected to 'pay down' their fines while serving the term.¹¹ WA Attorney-General Michael Mischin has publicly defended the state policy of 'paying down' fines, stating that:

Aboriginal people will not get fined if they do not break the law. ... If they choose to break the law and get fined, ... they can enter into time-to-pay arrangements or work-and-development orders to meet their obligations. If they choose not to avail themselves of that then [there is nothing] the government can do about it, but to say there is no consequence if you refuse to pay a fine that means that people have a licence to break the law, maybe in petty ways but without consequences and that just reduces the respect for the rule of law.¹²

There are a number of shortcomings with this argument. Firstly, the current policy of imprisoning people for unpaid fines disproportionately impacts upon low income earners. For someone on Newstart (\$303 per week), a fine of \$1000 represents effectively one months income.

Secondly, the current policy disproportionately impacts especially on Indigenous people from low socioeconomic backgrounds. It ignores various recommendations of the RCIADIC, specifically recommendation 121 which states that governments should

consider a defendant's capacity to pay in assessing the appropriate monetary penalty and ensure that imprisonment is not automatically imposed in default of fine repayment.¹³

Miss Dhu's death forms part of a long history of avoidable Aboriginal deaths in custody.

Thirdly, there are strong moral arguments against the current policy of paying down fines. It is a shameful indictment of the failure to implement the RCIADIC recommendations that Miss Dhu's death holds multiple parallels with deaths in custody examined as part of the RCIADIC, almost 25 years earlier. In 1989, an Aboriginal woman in Innisfail died in a watch-house of organ failure while in custody for non-payment of \$30 in fines. The recommendations of the RCIADIC were designed to prevent such tragic deaths. How can one defend laws that *encourage* deaths in custody?

In addition to being difficult to defend ethically, this legislation is difficult to defend on an economic level. Under section 53(3)(A) of the Fines Act, the period of imprisonment (under a warrant of commitment) is determined by dividing the amount owed by the amount prescribed and rounding the result down to the nearest whole number of days. According to section 6BAA of the Act, unpaid debts are currently paid back at the rate of \$250 per day. Yet with the average cost per prisoner per day currently at \$345, it costs more per day to keep someone in prison than the rate at which the fine is paid back.¹⁴ For a government that has recently pledged record funding of \$655 million¹⁵ to increasing prison beds, the sums do not add up.

Finally, the current WA policy of imprisoning debt collection contravenes international law. Article 2 of the *Convention on the Elimination of All Forms of Racial Discrimination* ("CERD") requires that governments undertake policies to eliminate racial discrimination including the review of public policies and measures which have the *effect* of creating or perpetuating racial disadvantage.

CONCLUSION

The law and order approach to criminal 'justice' in WA is hard to defend on many levels: economically, morally and with respects to international law. Importantly, the current policy of down-paying fines runs counter to several specific RCIADIC recommendations. In October last year, Colin Barnett made an individual commitment to Miss Dhu's family to try to reduce the number of Aboriginal deaths in custody in WA. A good start would be to implement and

ensure policy consistency with the recommendations of RCIADIC. One of the 339 recommendations, for example, was that the police notify the Aboriginal Legal Service ('ALS') whenever they take an Indigenous person into custody. The NSW ALS currently operates such a service, known as Custody Notification Service or 'lifeline' service, which costs just \$500 000 annually to run.¹⁶ It is highly likely that such a service would have saved the life of Miss Dhu. Frustratingly, the RCIADIC was published over 20 years ago: how many more avoidable deaths will there be before the recommendations of the RCIADIC are taken seriously?

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- 1 ABC TV, 'Aboriginal deaths in custody bring focus to disturbing rate of imprisonment', 7.30, 30 October 2014 (Bronwyn Herbert) <<http://www.abc.net.au/7.30/content/2014/s4118422.htm>>; A 2015 report on deaths in custody by the Australian Institute of Criminology is forthcoming.
- 2 Department of Attorney General, Government of Western Australia, *Court Fines* <http://www.courts.dotag.wa.gov.au/c/court_fines.aspx>.
- 3 Michael McKenna and Paige Taylor, 'Dhu's family demands answers over 'secret' investigation', *The Australian*, 22 October 2014 <<http://www.theaustralian.com.au/national-affairs/state-politics/dhus-family-demands-answers-over-secret-investigation/story-e6frgczx-1227097825947>>.
- 4 ABC Radio National, 'Julieka Dhu's family speak about her death in custody', *PM*, 29 September, 2014 (Caitlyn Gribbin) <<http://www.abc.net.au/pm/content/2014/s4096909.htm>>.
- 5 Mathew Lyneham and Andy Chan, 'Deaths in custody in Australia to 30 June 2011: 20 years of monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody' (Monitoring Report No. 20, Australian Institute of Criminology, 2013), 2.
- 6 *Ibid.*
- 7 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report*, (1991) ('RCIADIC').
- 8 These enhanced measures were introduced in the metropolitan area in August 2013 and then expanded into more remote parts of WA in April 2014.
- 9 *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2012* (WA). See also: WA Attorney General Department, 'Fine defaulters to face new penalties', (Media release, 22 March 2012) <<http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=5603>>.
- 10 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 June 2013, 1263 (J.M Francis, Minister for Corrective Services).
- 11 *Ibid* 1262.
- 12 Helen Davidson, 'Death in custody over unpaid parking fines: independent inquiry refused', *The Guardian* (online), 25 September 2014 < <http://www.theguardian.com/world/2014/sep/25/death-in-custody-over-unpaid-parking-fines-independent-inquiry-refused>>.
- 13 Above n 7, Recommendations, 121.
- 14 Paige Taylor, 'WA desert debtors avoid trend to jail for fines', *The Australian*, 23 January 2015 <<http://www.theaustralian.com.au/national-affairs/indigenous/wa-desert-debtors-avoid-trend-to-jail-for-fines/story-fn9hm1pm-1227193757031>>.
- 15 Government of Western Australia, 'Acacia Prison expansion contracts awarded', (Media release: 28 June 2012) <<http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=6084>>.
- 16 NSW Aboriginal Legal Service, *Custody Notification Service*, <<http://www.alsnswact.org.au/pages/custody-notification>>.



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