Inquiry into the Decriminalisation of Certain Public Offences, and Health and Welfare Responses

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QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
Protecting Queenslanders' individual rights and liberties since 1967

Committee Secretary
Community Support and Services Committee
Email: cssc@parliament.qld.gov.au

Dear Madam/Sir

Inquiry into the decriminalisation of certain public offences, and health and welfare responses

Kindly accept this submission in relation to the Community Support and Services Committee's ('Committee') inquiry into the decriminalisation of certain offences under the *Summary Offences Act* 2005 (Qld) ('the Act'). The QCCL thanks the Committee for the opportunity to contribute feedback regarding this important inquiry.

The QCCL is an organisation of volunteers with limited time and resources. Consequently, this submission does not address all aspects of the inquiry.

1. Overview and Principles

   The QCCL supports the decriminalisation of the offences of begging, public intoxication and public urination under the Act on the basis of their discriminatory impact on our vulnerable populations and their antiquated application to our criminal justice system.

   Public order offences, like those above, impose high levels of criminalisation on particular portions of our population such as Indigenous peoples and those experiencing houselessness. The effects of these offences are both discriminatory and unproductive based on a perceived undesirable or unsightly presence, rather than addressing the underlying systemic causes.

   Decriminalisation is not sufficient in addressing these issues, but it is a necessary step.

   This submission will address each of the offences in turn.

2. Begging

   The offence of begging originated from vagrancy laws inherited by Australia from the UK via the *Vagrancy Act 1824* (UK).[1] Under section 8 of the Act, the penalty for begging is 10 penalty units (approximately $1,434) or 6 months imprisonment. From 2004 to 2015,

[1] Tamara Walsh, 'Defending Begging Offenders' (2004) 4(1) *Law and Justice Journal* 58, 58.

convictions in Queensland increased from 147 to 227 per year, highlighting the continued and increasing occurrence of the offence.[2]

The offence is commonly justified on the basis of public protection. The 'broken windows theory' argues that incidences of begging correlate with higher incidences of more serious crimes. Additionally, the Explanatory Notes to the Summary Offences Bill 2004 state that "people who loiter in public places in order to beg… often choose "soft" targets such as women or elderly persons who are more likely to be intimidated and acquiesce." Descriptions such as 'targeting' or 'intimidation' further perpetuate a narrative of begging as morally duplicitous, rather than recognising that the act is most often a last resort for people with inadequate income or social supports. The 'broken windows theory' has also been widely criticised as factually inaccurate and reflective of public misconceptions of and discomfort with poverty.[3] Research has shown that begging is widely considered a shameful experience and undertaken out of necessity.[4] A UK survey found that those participating in begging described it as "demeaning, precarious, and largely unremunerative way of obtaining money."[5]

An obvious distinction must be drawn between simply asking for money and conduct which amounts to harassment, intimidation or fraud. Statistically, the former is much more common. Research conducted by Hanover Welfare Services suggests that "aggressive begging is extremely rare; beggars tend to engage in passive behaviour while begging, sitting in one place perhaps with a sign or asking for money from passers-by and being easily put off when refused."[6] The QCCL does not condone intimidation or aggressive begging, but the criminalisation of all begging cannot be justified on its basis. Conduct that amounts to harassment, intimidation or fraud is better regulated under other provisions of the criminal law, such as offensive behaviour. The New York Civil Liberties Union recently described criminalisation efforts as 'mean-spirited' in "threatening to jail those so desperate that they have to resort to begging."[7]

A further consideration is the impact of criminalisation on human rights. In the US, a recognised protection of begging is found in the freedom of speech. Specifically, the judiciary has recognised that there is little difference between "those who solicit for charities and those who solicit for themselves in regard to the message conveyed; [where] the former are communicating the needs of others, the latter are communicating their personal needs."[8] Begging seems to have an inherent connection to the right to speak and

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[2] Paula Hughes, 'The Crime of Begging: Punishing Poverty in Australia' (2017) 30(5) *Parity* 32. See also, Walsh (n 1).
[3] Hughes (n 2).
[4] Phillip Lynch, 'Understanding and Responding to Begging' (2005) 29(2) *Melbourne University Law Review*, 533.
[5] Peter Kemp, *Homelessness and Social Policy* (Routledge, 1997) 78-9.
[6] Walsh (n 1) 58.
[7] NYCLU, 'Legislative Memo: Aggressive Begging' *NYCLU* (Website) <https://www.nyclu.org/en/node/1598/%22>.
[8] Loper v New York Town Police Department, 999 F.2d 699, 700 (2d Cir. 1993).

express oneself. Although Australia has no equivalent to the US first amendment, the newly adopted *Human Rights Act 2019* (Qld) protects the freedom of expression. Preventing an individual from expressing a social need orally or otherwise may contravene this right.

Further consideration must be given to the disproportionate effect on Indigenous peoples which may contravene section 10 of the *Racial Discrimination Act 1975* (Cth). Section 10 of the Racial Discrimination Act calls for the right to equality before the law. Begging laws tend to disproportionately impact the youth, mentally ill, houseless, and Indigenous peoples who receive approximately 40% of fines issued, yet only constitute a relatively small portion of the population.[9]

The crime of begging also raises important access to justice questions. Due to the living and financial circumstances of those charged, almost no charges are contested, offenders are largely unrepresented in court, and defences to the offences are limited.[10] Keeping track of necessary dates and documentation for court appearances would be tremendously challenging for those in insecure housing or with no permanent address.

An additional consideration is the practicality of criminally punishing begging. Research suggests that monetary orders represented more than half of all sentences imposed for begging in Queensland in the 2009 to 2015 period.[11] Given the financial circumstances of the people targeted by the begging offence, it is unlikely "that, if found guilty, the individual will have the ability to pay any fine imposed on them…thus [negating it as] an effective deterrent."[12] Criminalisation of begging effectively "discriminates on the basis of social of social status, as it disproportionately impacts on persons who are living in poverty…people who beg are 'among the most marginalised, disadvantaged and disenfranchised in society.'"[13] The imposition of criminal penalties on "persons who are already suffering extreme poverty and disadvantage [is] completely inappropriate and unproductive towards solving the real social issues that underlie the problem of begging."[14] In a society that tolerates poverty, visible evidence of it must also be tolerated.[15] The imposition of criminal penalties, in particular fines, is likely to only further entrench disadvantage.

The QCCL supports the decriminalisation of begging on the basis of the above and implores the Committee to consider the cyclical harm criminalisation of begging has on already vulnerable populations. Incidences of begging can be greatly reduced by targeting

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[9] 'Begging as a Criminal Offence: Why is this being Reintroduced in Australia' *Downing Centre Court* (Website) < https://downingcentrecourt.com.au/blog/begging-as-a-criminal-offence-why-is-this-being-reintroduced-in-australia/?print=print>.
[10] See Walsh (n 1); Hughes (n 2).
[11] Hughes (n 2).
[12] Human Rights Law Resource Centre, Submission to the Alice Spring Town Council, Draft Alice Springs (Management of Public Places) Bylaws (2009) no. 48.
[13] Ibid no. 50.
[14] Ibid no. 51.
[15] J Waldron, 'Homelessness and Community' (2000) 50 *University of Toronto Law Journal* 371, 386-7.

systemic issues such as housing, health care and societal supports. Decriminalisation of the offence is a necessary first step.

3. Public Drunkenness

The offence of public drunkenness, like begging, effectively criminalises poverty and has a disparate application to Indigenous peoples. The offence is found under section 10 of the Act whereby a person must not be drunk in a public place under a maximum penalty of 2 penalty units (approximately $287).

Over 30 years ago, the Royal Commission into Aboriginal Deaths in Custody called for the decriminalisation of this offence as part of the 339 recommendations made relating to reducing the numbers of Indigenous peoples coming into contact the Australian criminal justice system.

Decriminalisation of public drunkenness subsequently occurred in most Australian states between 1974 and 1990, with Victoria recently decriminalising its offence in February 2021. Queensland stands as the last state to have a criminal offence of public drunkenness.

Research shows that a majority of deaths in police cells occur to individuals detained for drunkenness.[16] The importance of decriminalising this offence is highlighted in circumstances where public drunkenness laws disproportionately affect people at social disadvantage, and in Australia, disproportionately affect Aboriginal and Torres Strait Islander peoples.[17] The data revealed in the Royal Commission's report underscores that this has long been an issue. The report found that:

> In Australia as a whole, some 35 per cent of all occasions in which a person was held in the police cells during the [surveyed] month were for drunkenness: either arrests for the offence of drunkenness or protective custody detentions where public intoxication has been decriminalised. Some 57 per cent of the Aboriginal custodies were for drunkenness, compared with approximately 27 per cent of the non-Aboriginal custodies. These figures [are not including] a large number of other offences which resulted in police custody, particularly street offences, which are believed to be alcohol related."[18]

According to crime data from the Australian Bureau of Statistics for the year 2020-21, 32% of public order offences (including public drunkenness) are recorded against First Nations

[16] Luke McNamara and Julia Quilter, 'Public intoxication in NSW: the contours of criminalisation' (2015) 37(1) Sydney Law Review, 1.
[17] Ibid.
[18] *Royal Commission into Aboriginal Deaths in Custody Report* (Vol 2) 15.2.

peoples, a significant increase from 20% in 2008-9.[19] Noting that Indigenous peoples make up only 4% of the Queensland population, this significant overrepresentation highlights a systemic issue needing to be addressed.

The Royal Commission's report highlights another significant issue in that detention for public drunkenness in rural areas is much longer than for those in metropolitan areas, a problem made even worse for Indigenous peoples. A 1998 survey found that for public drunkenness "the average length of time in police custody for [First Nations] people was approximately 17 hours in Cairns compared with 7.6 hours in Brisbane."[20]

For those experiencing housing insecurity, public drinking may be "a result of necessity, due to a lack of access to private spaces in which to lawfully drink."[21] One respondent to a survey conducted by Rights in Public Spaces Action Group stated:

> It's a class issue … If you can afford to go to a restaurant that has outdoor dining, you can drink 'til your heart's content … but what if you can't afford it and you are homeless … where do you go?[22]

Legislation in NSW, Tasmania and the ACT highlight examples of successfully implementing models to decriminalise public drunkenness whereby police retain the power to remove intoxicated persons from public places and take them to a safe place while they recover.[23] Research highlights that a health-focused response with the use of sobering-up centres results in reductions in public drunkenness-related emergency service use, incarceration rates and custody time.[24] Alcoholism and alcohol abuse should be dealt with via health and social support systems, rather than in the criminal justice system.[25]

Victoria has recently decriminalised the offence of public drunkenness. The Seeing the Clear Light of Day report identified a long history and clear need for urgent change, with the death of a Yorta Yorta woman in 2017 being the ultimate tipping point.[26] Given that there have been over 500 deaths of Indigenous peoples in custody since the Royal Commission's report, there is a clear and urgent need for change in Queensland as well.

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[19] Australian Bureau of Statistics, 'Recorded Crime - Offenders' *Australian Bureau of Statistics* (Website) < https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#media-releases>.
[20] Report (n 17) 21.1.58.
[21] Tamara Walsh, "Who Is the 'Public' in 'Public Space'?: A Queensland Perspective on Poverty, Homelessness and Vagrancy." (2004) 29(2) *Alternative Law Journal* 81, 83.
[22] Ibid 83.
[23] *Intoxicated Persons Act 1979* (NSW); *Police Offences Act 1935* (Tas) ss 4A, 4B; *Intoxicated Persons (Care and Protection) Act 1994* (ACT).
[24] Amy Pennay et al, 'Decriminalising Public Drunkenness: Accountability and Monitoring Needed in the Ongoing and Evolving Management of Public Intoxication' (2021) 40(2) *Drug and Alcohol Review* 205, 207.
[25] Walsh (n 20) 83.
[26] Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (August 2020) 21.

As recently highlighted by the Queensland Law Society, care must be taken to ensure that the decriminalisation of public order offences, such as begging and public intoxication, does not result in the increased use of public nuisance offences "which fall under the public-order banner but carry higher penalties and include disorderly or offensive behaviour or language."[27]

4. Public Urination

The QCCL acknowledges the inherent discomfort in discussing the decriminalisation of public urination; however, discomfort should not justify criminality without some greater basis.

Public urination is currently an offence under section 7 of the Act which denotes that a person must not urinate in a public place with a maximum penalty of 2 penalty units (approximately $287).

Criminalising public urination effectively criminalises poverty. Although this behaviour may occur in circumstances where drug or alcohol use impairs judgement, a substantial number of incidences would arise on the basis of necessity. Those experiencing houselessness often face difficulty in finding a publicly available restroom, especially in areas outside of large cities. As with the offence of begging, entirely criminalising the behaviour ignores important underlying systemic issues.

Human rights, such as the right to life, may be violated on the basis that urinating is an essential part of maintaining a healthy body. Unlike begging or public drunkenness, it is not as simple as choosing to abstain from partaking in the action. Trying to prevent oneself from urinating can cause serious health ramifications, such as incontinence, urinary infections and kidney infections.

A significant consideration in the discussion is the desire to prevent the public's exposure to an individual's genitals; however, this is already sufficiently covered by the offence of wilful exposure. An additional offence is unnecessary and serves to further target vulnerable populations who may not have the ability or resources to control their actions.

5. Conclusion

The QCCL strongly urges the Committee to consider the detrimental impacts on the lives and rights of those targeted by these offences. A number of underlying and systemic factors contribute to the often-uncomfortable necessity to partake in begging, public drunkenness and public urination. These factors should be addressed with a health-focused response and increased social support rather than relying on the criminal justice system. Punitive measures have not, and will not, effectively end the behaviours

[27] Tony Keim, 'QLS Seeks Reform of Public Intoxication Laws' *QLS Proctor* (Website) < https://www.qlsproctor.com.au/2022/03/qls-seeks-reform-of-public-intoxication-laws/>.

described, but will only serve to further entrench prejudice and discrimination on the basis of race and class.

We thank Alexa Samuels, QCCL intern, for her assistance in the preparation of this submission.

We trust this is of assistance to you in your deliberations

Yours Faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
8 August 2022