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

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**Submitted by:** Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd (ATSILS)

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Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

Committee Secretary

Community Support and Services Committee

By email: < cssc@parliament.qld.gov.au >

19th August 2022

Dear Colleague,

**RE; INQUIRY INTO THE DECRIMINALISATION OF CERTAIN PUBLIC OFFENCES, AND HEALTH AND WELFARE RESPONSES**

Thank you for the opportunity to make a submission to this important inquiry. Both inside and outside of custodial settings, the shift away from an unsuitable and not fit for purpose criminal justice approach and towards a health-based response for public intoxication will save lives and improve community wellbeing.

**Preliminary Consideration: Our background to comment**

The Aboriginal and Torres Strait Islander Legal Service (Qld)Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include

related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

**Background**

The Royal Commission into Aboriginal Deaths in Custody (also referred to as RCIADIC or the Royal Commission in this submission) investigated 99 deaths of Aboriginal and Torres Strait Islander people in custody over a nine-year period. Their ground breaking report called for both broad reforms and obvious fixes that could be carried out by all Australian jurisdictions. The Royal Commission made 339 recommendations relating to improvements in the criminal justice system and measures to reduce the number of Aboriginal and Torres Strait Islander peoples coming into contact with the criminal justice system

Of the deaths in custody reviewed by the RCIADIC a substantial number were in custody on the grounds of public intoxication.

A recent instance is the death of Tanya Day. The circumstances of her death and alternatives to criminalisation to public drunkenness were examined by an expert reference group who published their findings and recommendations in *De-criminalising Public Drunkenness, Seeing the Clear Light of Day; Report to the Victorian Attorney-General* (August 2020). In the case of Tanya Day, an Aboriginal woman found asleep in a train station, she was ejected from the train and transported to police custody in the cells. She sustained a serious head injury after falling in a police cell and died 17 days later, on 22 December 2017

Sadly such 'mistakes' are being repeated across the generations: the Expert Group commented upon the circumstances of the death of Ms Day's uncle as investigated by the Royal Commission and the similar circumstances of Ms Day's death, in their words (part 3.1 of the report)

> *"we are struck by the unnerving parallel between the circumstances of Mr Day's death in police custody in 1982 and his niece's death 35 years later*"

**There are no lack of parallels between the contemporary experiences in Queensland and Victoria. It is against that background we seek with urgency the implementation of the following recommendations from RCIADIC**

Recommendation 79

*That, in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness.*

Recommendation 85

That:

*a. Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when* ***they should more appropriately have been taken to alternative places of care;***

And

*b. The effect of such legislation should be monitored to ensure that persons who would otherwise have been apprehended for drunkenness* ***are not, instead, being arrested and charged with other minor offences****.*

Recommendation 80

*That the abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain* ***non-custodial facilities for the care and treatment of intoxicated persons****.*

Recommendation 81

*That legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons.*

The Expert Group in the *Seeing the Clear Light of Day* Report also recognised the link between the overrepresentation of Aboriginal and Torres Strait Islander peoples in public drunkenness charges and over representation in the criminal justice system generally. Our practice observes that link in carrying out our day to day legal representation services.

**Specific Questions posed by the Inquiry**

- changes to **legislation and operational policing responses** to decriminalise the public intoxication and begging offences in the *Summary Offences Act 2005*

As described above, we would urge full implementation of RCIADIC recommendations 79, 80, 81 and 85. While there have been some changes implemented in Queensland, such as the establishment of some sobering up places and a power for police to unarrest someone arrested for public drunkenness and take them home or to a place of safety, practices remain widely inconsistent and unsatisfactory.

- the compatibility of proposed legislative amendments, and **health and social welfare-based service delivery responses** to public intoxication and begging, with rights protected under the *Human Rights Act 2019*

The levels of overrepresentation and the discriminatory exercise of charging discretions impact the Right to Recognition and Equality before the Law and also basic considerations of humanity afforded to those who are essentially being punished for needing to live in public spaces.

As illustrated in the cases outlined in the Royal Commission inquiry and illustrated in the Tanya Day death and other recent deaths in custody, the twin human rights of the Right to Life (or more properly expressed, the right for the state to refrain from arbitrary interference with life) and the Right to equivalent levels of healthcare are applicable in these situations. Additionally the Right to Humane Treatment while in Detention is another relevant human Right. It is, in our submission, not necessary or proportionate to subject a person who has merely been intoxicated or even merely suspected of being intoxicated in a public place to be put in the police cells-

As submitted by Tanya Day's family at her inquest, if the intoxicated person is an Aboriginal and/or Torres Strait Islander person, consider that they may have experience of intergenerational trauma, be more likely to have more complex health needs, and may experience being detained in custody in a particularly negative and traumatic way.

Added to this of course is the inevitable strip search that a person consigned to the cells must experience, often in intimidating circumstances.

As noted in the Clear Light of Day Report in mid 2020 (para 3.1)

> *Since the Royal Commission's report in 1991, the number of Aboriginal and Torres Strait Islander people who have died in custody around Australia is 438. As we discuss further below, Victoria and Queensland remain the only Australian states not to have abolished the offence of public drunkenness. As is made abundantly clear in the Royal Commission's report, there will continue to be devastating human impacts unless and until Victoria's current criminal justice approach to public intoxication is discarded and replaced with a health-based response that ensures the safety and wellbeing of individuals who require support.*

***Specific comment on begging offences***

The offence which criminalises begging in a public space should be repealed. Any antisocial behaviour which impacts upon the peaceful passage through or enjoyment of a public space can adequately be dealt with under the offence of commit public nuisance.

The imposition of fines (and jail time) for begging has a perverse logic to it, in that fines and court levies simply drive the person into deeper levels of destitution and increase the likelihood of jail. For those who serve periods of imprisonment, upon release, they are in a worse situation and the factors that led to the begging in the first place are generally increased.

The homeless, who are often fined for public drunkenness, begging and public urination are particularly disadvantaged. A criminal justice response fails to provide remedies to address the situation, a remedial response would be a less costly and more effective remedy.

**The impacts of decriminalising public intoxication and begging in rural and remote communities**

There are wide-ranging circumstances in rural and remote communities which are difficult to condense into a short paragraph except to make two main points:-

The law is often inconsistently applied and enforcement becomes capricious and targeted. One aspect of the problem is that young and inexperienced police officers fall into the trap of believing they need to arrest their way out of social problems instead of recognising that alternative responses, such as therapeutic responses are a better way to proceed.

There are a number of alcoholics who are displaced from their communities because of their addiction and the existence of an Alcohol Management Plans in the community but inadequate facilities within those communities to treat those with legacy issues. There are some but not many residential rehabilitation facilities to service the whole of the Cape. Consequently there are a number of alcoholics who are effectively in exile from their communities and living an itinerant lifestyle in larger population centres. They are in an invidious position and at perpetual risk of falling foul of public intoxication laws.

***The impact of fines for begging and other offences***

Unpaid fines referred to SPER can lead to a suspension of a driver's licence – significantly reducing a defaulter of a realistic chance of finding or attending work to earn money to pay the fines or to carry out community service obligations. While there is an opportunity for those who cannot pay their fines to do community service instead, those options are limited in time and location. Although there is some flexibility in SPER arrangements in

rural and remote areas, numerous obstacles remain to make the situation of those in rural and remote areas very disadvantageous.

Lack of identification documents is a particular problem in remote communities with its attendant problems for accessing Centrelink payments, bank account services, or even commercial flights home after medical evacuations or transfers. Those situations create a need for displaced peoples to ask for help along with an attendant risk of a begging charge.

**The design of health and social welfare-based responses that are culturally safe and appropriate and informed by First Nations people, including Aboriginal and Torres Strait Islander health and legal services and also representative bodies for seniors and people with a disability**

There are many obstacles facing Aboriginal and Torres Strait Islander peoples with addictions and complex issues to access services, Culturally unsafe and inappropriate services are just as bad as no services at all as they lead to high dropout rates. Stable funding arrangements for culturally safe and successful programs is an essential prerequisite to sustained provision of service

**The appropriateness of other police powers and offences to ensure community safety and public order arising from public intoxication and begging, particularly in the context of events where there may be significant alcohol consumption**

Big events bring their own particular issues and need for safety planning. They do have with them the power to exclude from the premises and for police response to provide warnings and to charge for misbehaviour as opposed to mere intoxication. It may be that events such as these may require an inner boundary and outer boundary for consumer control. However, even in situations of events, we note the success of a multifaceted response to over consumption at Schoolies Week at the Gold Coast..

**The appropriateness of repealing the 'Urinating in a public place' offence under the *Summary Offences Act 2005.***

The public urination provision in the *Summary Offences Act* 2009 is so widely drafted that quite possibly a significant proportion of the Queensland population have already offended against its provisions in the 13 years since its enactment. Even in Victorian times it was acceptable for a horse and carriage driver to relieve himself at the edge of the roadway behind the third near wheel of the carriage. These days even a boatie observing the social convention of retiring to the stern of the boat to relieve himself would be committing an offence. Instead the criminal law should concentrate on offensive behaviour not on calls of nature carried out discreetly and

out of direct line of sight where circumstances permit. Blatant, non-discrete, offensive examples of such behaviour could in any event still fall within the ambit of a public nuisance offence.

We fully support the repeal of this offence.

If for any reason such does not receive the support we believe is warranted, then at the very least an amendment should be inserted, providing a 'reasonable excuse' defence. How often has someone on a long car journey been caught short a long distance away from the next public toilet (and thus pulls over and discretely relieves themselves behind a tree et)? Such conduct should not be an offence. As mentioned above, blatantly offensive conduct could still constitute an offence (a public nuisance).

**CONCLUSION**

We support the repeal of all three offences and support the diversionary response advocated for in The Royal Commission into Aboriginal Deaths in Custody and more recent reports and inquiries. We further commend the government on the related suggestion regarding local community consultation. In our view, such changes would remove discriminatory impacts on those who occupy public spaces and remove unnecessary and disproportionate penalties.

Yours faithfully,

Shane Duffy

Chief Executive Officer