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

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22 August 2022

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: CSSC@parliament.qld.gov.au

Dear Committee Secretary

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

The Aboriginal and Torres Strait Islander Women's Legal Services NQ ("ATSIWLSNQ") supports the Queensland government's initiative to inquire into the decriminalisation of certain public offences and we thank you for the opportunity to provide a submission to the *Inquiry into the Decriminalisation of Certain Public Offences, and Health and Welfare Responses* ("the Inquiry").

ATSIWLSNQ provides legal representation to First Nations women in relation to a range of civil law matters, including family law, child protection, domestic violence and human rights issues. We represent First Nations women in relation to reviews of Blue Cards declined pursuant to the *Working with Children (Risk management and Screening Act 2000* (Qld). In no cases have these reviews been in relation to disqualifying offences and in most cases they relate to minor offences, sometimes committed years prior, and sometimes involving minor intoxication offences. The Inquiry is thus of interest to our organisation and our interest in ensuring that criminalisation of First Nations women is reduced, particularly where it presents an unjustifiable obstacle to women caring for the children of family members.

Should further information be required, we would be pleased to assist further.

Yours sincerely,

Cathy Pereira
Principal Solicitor/ Co-ordinator
ATSIWLSNQ Inc.

Inquiry into Decriminalisation of Certain Public Offences

Submission by the
Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc. (ATSIWLSNQ)

About ATSIWLSNQ

Aboriginal and Torres Strait Islander Women's Legal Services North Queensland Inc. ("ATSIWLSNQ") welcomes the opportunity to respond to this Inquiry.

ATSIWLSNQ has an interest in the inquiry as the only specialist legal service for First Nations women in Queensland. The service is based in Townsville with a dedicated staff member on Palm Island. It offers outreach services in Ingham, Ayr and Charters Towers and has represented and assisted clients as far away as Mount Isa to the west, Cairns to the north and Sarina to the south.

Although the service does not offer advice or representation in criminal matters, ATSIWLSNQ has consistently offered legal advice and representation to women in prison in relation to a range of issues which form the core business of the services, in particular domestic violence, child protection and family law matters, as well as discrimination and actions against public entities for contraventions of the *Human Rights Act 2019* (Qld).

Pertinent to the Inquiry and the criminalisation of people for minor public order offences, many clients of the service have had negative interactions with police and faced social, cultural, judicial and financial consequences as a result.

1. Introduction

1.1 Background

Queensland is one of the only remaining jurisdictions in Australia in which public intoxication remains an offence. The *Summary Offences Act 2005* (Qld) makes it an offence to be intoxicated (drunk or otherwise adversely affected by drugs or another intoxicating substance) in public, with a maximum penalty of two penalty units or $287.50 at the time of writing. Begging in a public place is also an offence under the Act, carrying a maximum penalty of 10 penalty units or $1437.50 at the time of writing.

Enforcement of public intoxication and other public order offences has historically disproportionately affected marginalised communities, including homeless people, culturally and linguistically diverse people, people from low socioeconomic backgrounds and First Nations people.[1] Increased interaction with law enforcement and the criminal justice system has marked and measured negative outcomes for members of all of these groups. For this reason, the Royal Commission into Aboriginal Deaths in Custody ("RCIADIC") recommended amongst other things that public intoxication be decriminalised.[2]

[1] This is true globally, in relation to local marginalised populations. See Michael Nusbaumer, 'Hitting the Skids: Social Police and the Control of Public Intoxication' (1988) 21(2) *Sociological Focus* 165, 167.

[2] Royal Commission into Aboriginal Deaths in Custody, Parliament of Australia, *Final Report* (15 April 1991) vol 5.

More than thirty years later, only Queensland and Victoria have not implemented this recommendation.[3]

Decriminalisation of public intoxication and begging offences, while not a panacea, will potentially reduce unnecessary contact between marginalised groups, including Aboriginal and Torres Strait Islander people, and the law enforcement and criminal justice system. This will minimise opportunities for negative outcomes for Aboriginal and Torres Strait Islander people in police custody, in line with the RCIADIC recommendations.

1.2 Decriminalisation in Other Jurisdictions

Every Australian State and Territory except for Queensland and Victoria has now decriminalised public intoxication.[4] Moves towards decriminalisation have taken many different forms, and the extent to which public drinking remains a criminal offence depends on the existence of other laws and by-laws, such as zone-specific drinking restrictions; the existence of related offences giving police the power to arrest or detain publically intoxicated people; and "move-on" powers granted to police that allow them to disrupt public drinking and arrest non-compliant drinkers.[5]

A recurring theme in discussions of decriminalisation in other Australian jurisdictions is that decriminalisation of public intoxication has not necessarily led to a decrease in police interactions with drunk people, particularly drunk First Nations people.[6] This suggests that merely repealing the offence of public intoxication is not sufficient to truly decriminalise the behaviour being targeted (ie being drunk in public). Cornish writes: 'Decriminalisation, if the term is to maintain some credibility, must at least be equated with a removal of punitive actions by the State for the display of particular behaviour.'[7] Similarly, the Victorian Expert Reference Group on Decriminalising Public Drunkenness expressed the overriding principle that 'no one should be placed in a police cell simply because they are intoxicated in public.'[8]

1.3 Royal Commission into Aboriginal Deaths in Custody

Recommendations 79-91 of the RCIADIC are related to the diversion of Aboriginal and Torres Strait Islander people away from police custody. Recommendations 79-82 read as follows:

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[3] The Victorian government has committed to decriminalising public intoxication and has now passed legislation to that effect. In April 2022, however, the government announced that the legislation would not come into effect until November 2023, ostensibly to give the government time to trial new sobering-up centres. See Government of Victoria, *Public Intoxication Reform* (4 August 2022), Department of Health <https://www.health.vic.gov.au/alcohol-and-drugs/public-intoxication-reform-0>.

[4] But see [n 3] re: decriminalisation in the state of Victoria.

[5] For in-depth discussion of the ways in which police in other jurisdictions have continued to exercise control over the movements and behaviours of publically intoxicated people, see, eg, Commonwealth and Law Enforcement Ombudsman, *Australian Federal Police Use of Powers Under the* Intoxicated People (Care and Protection) Act 1994 (Report no 11, October 2008); Luke McNamara and Julia Quilter, 'Public Intoxication in NSW: The Contours of Criminalisation' (2015) 37(1) *Sydney Law Review* 1; Alison Young and James Petty, 'On Visible Homelessness and the Micro-Aesthetics of Public Space' (2019) 52(4) *Australian and New Zealand Journal of Criminology* 444.

[6] See [n 5], but also Jillian Brewer, 'Public Drunkenness – Australian Law and Practice' in David Biles and David McDonald (eds), *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (Australian Institute of Criminology, 1992) 23, 27-9.

[7] Andrew Cornish, 'Public Drunkenness in New South Wales: From Criminality to Welfare' (June 1985) 18 *Australian and New Zealand Journal of Criminology* 73, 81.

[8] Expert Reference Group on Decriminalising Public Drunkenness, Parliament of Victoria, *Seeing the Clear Light of Day* (Report, August 2020) 1.

> 79. That, in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness. (3:28)
>
> 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. (3:28)
>
> 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. (3:28)
>
> 82. That governments should closely monitor the effects of dry area declarations and other regulations or laws restricting the consumption of alcohol so as to determine their effect on the rates of custody in particular areas and other consequences. (3:28)[9]

At the time that the RCIADIC report was published, public drunkenness had been decriminalised, in New South Wales, the Australian Capital Territory, the Northern Territory and South Australia. Western Australia was, at that time, in the process of decriminalisation. This had not, however, led to an appreciable reduction in the number of First Nations people being detained for public intoxication and related offences, as it was common practice for police to use other measures and powers to detain people intoxicated in public in relation to other public order offences.[10]

For this reason, recommendation 79 of the Report cannot stand alone. It is necessary to consider the ways in which publically intoxicated people can be diverted away from police custody in a post-decriminalisation environment. In particular, recommendation 85 is pertinent:

> 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;*
>
> 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. Such monitoring should also assess differences in police practices between urban and rural areas; and
>
> c. The results of such monitoring of the implementation of the decriminalisation of drunkenness should be made public. (3:29)[11]

In 2019-20, the Queensland Police ("QPS") commenced proceedings against 78,344 Aboriginal and Torres Strait Islander people. It is noteworthy that 24.2 per cent of all offenders that year were Aboriginal or Torres Strait Islander, even though only 4.6 per cent of Queenslanders identify as such.[12] In light of recommendation 87 of the Royal Commission into Aboriginal Deaths in Custody, this is particularly concerning. The recommendation provides that:

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[9] Royal Commission [n 2].
[10] See [n 5]; Cornish [n 7]; Brewer [n 6].
[11] Royal Commission [n 2] (emphasis added).
[12] Queensland Government Statistician's Office, *Crime Report, Queensland, 2019-20* (Report, 2021) 47. The report does not specify exact number of offenders charged with being intoxicated in a public place or begging in a public place.

87. a. All Police Services should adopt and apply the principle of *arrest being the sanction of last resort in dealing with offenders*;

b. Police administrators should train and instruct police officers accordingly and should closely check that this principle is carried out in practice;

c. Administrators of Police Services should take a more active role in ensuring police compliance with directives, guidelines and rules aimed at reducing unnecessary custodies and should review practices and procedures relevant to the use of arrest or process by summons and in particular should take account of the following matters:

i. all possible steps should be taken to ensure that allowances paid to police officers do not operate as an incentive to increase the number of arrests;

ii. a statistical data base should be established for monitoring the use of summons and arrest procedures on a Statewide basis noting the utilisation of such procedures, in particular divisions and stations;

iii. the role of supervisors should be examined and, where necessary, strengthened to provide for the overseeing of the appropriateness of arrest practices by police officers;

iv. efficiency and promotion criteria should be reviewed to ensure that advantage does not accrue to individuals or to police stations as a result of the frequency of making charges or arrests; and

v. procedures should be reviewed to ensure that work processes (particularly relating to paper work) are not encouraging arrest rather than the adoption of other options such as proceeding by summons or caution; and

d. Governments, in conjunction with Police Services, should consider the question of whether procedures for formal caution should be established in respect of certain types of offences rather than proceeding by way of prosecution. (3:42)[13]

Recommendation 88 further, proposes a review of resource allocation in collaboration with Aboriginal organisations, into whether there is sufficient community policing and whether there is 'over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town'.(3:43)[14]

Given the disproportionate rate at which police initiate criminal proceedings against Aboriginal and Torres Strait Islander people in Queensland, it is respectfully submitted that such consideration has not taken place.

1.4 North Queensland Context

In 2021, the combined Level 3 Local Government regions of Cairns – North, Cairns – South, Charters Towers – Ayr – Ingham, Far North, Innisfail – Cassowary Coast, Outback – North, Port Douglas – Daintree, Tablelands (East) – Kuranda and Townsville had a total population of 550,619 people and a total Indigenous population of 72,854 people, or 13.2 per cent. By contrast, Queensland in total had a population of 5,156,138 people and an Indigenous population of 237,303 people, or 4.6 per cent.[15]

[13] Royal Commission [n 2] (emphasis added).
[14] Royal Commission [n2]
[15] Queensland Government Statistician's Office, *Queensland Regional Profiles* (August 2022). Profile created from datasets available at <https://statistics.qgso.qld.gov.au/qld-regional-profiles>.

The concentration of First Nations Australians in North Queensland is thus far higher than in the rest of the State.

The unemployment rate for First Nations Australians in North Queensland in 2021 was 24.7 per cent, compared with 7.0 per cent amongst the non-Indigenous population. Further, 16.9 per cent of Indigenous households in the region were overcrowded, compared to 2.5 per cent of non-Indigenous households, and 33.2 per cent of First Nations Australians in the region were earning under $300/week, compared to 19.3 per cent of non-Indigenous Australians. Only 8.8 per cent of First Nations North Queenslanders were earning $1,250 or more per week, compared with 22.4 per cent of non-Indigenous North Queenslanders.[16] Overall, these statistics suggest that First Nations people living in North Queensland are far more likely to experience financial insecurity or instability than non-Indigenous North Queenslanders.

2. Issues

2.1 Racial Profiling

2.1.1 Disproportionate Policing and Incarceration

In the first quarter of 2022, 201 per 100,000 Australians were in prison custody. The rate of incarceration of First Nations people, however, was more than ten times as high at 2,269 per 100,000 for the same period.[17] Of particular concern is the rate of female incarceration: 29 per 100,000 in the general population, but 411 per 100,000 for First Nations women.[18] Similarly, in its Inquiry into Aboriginal and Torres Strait Islander over-representation amongst the prison population ("the ALRC inquiry"), the Australian Law Reform Commission found that First Nations people were 27 per cent of the prison population nationally, despite being only around 2 per cent of the national population, making First Nations people 12.5 times more likely to be imprisoned than non-Indigenous Australians, and that First Nations women were 21.2 times more likely to be incarcerated than non-Indigenous women.[19]

The ALRC inquiry found that not only were First Nations people overrepresented in the prison system, but that the pattern of overrepresentation is present at every stage of the criminal justice process. The inquiry found that 'Aboriginal and Torres Strait Islander people [are] seven times more likely to be charged with a criminal offence and appear in court than non-Indigenous people.'[20]

In The Uluru Statement from the Heart this is stated in stark terms: 'Proportionally, [First Nations people] are the most incarcerated people on the planet. *We are not an innately criminal people.*'[21] Indeed, it beggars belief to suggest that First Nations people are truly seven times more likely to commit crimes leading to arrest than non-Indigenous people, or twenty-one times more likely to require imprisonment for criminal behaviour. The disproportionate targeting of First Nations people is not the function of some imagined innate criminality or tendency towards deviance.

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[16] Ibid.

[17] ABS, 'Corrective Services, Australia' (Media Release, 09 June 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.

[18] Ibid.

[19] Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no 133, 05 February 2018) 41.

[20] [n 18] 100.

[21] Referendum Council, 'Uluru Statement from the Heart' (Media Release, 2017) (emphasis added).

It is respectfully submitted that these figures are evidence that RCIADIC recommendation 92, that 'imprisonment should be utilised only as a sanction of last resort,'[22] and recommendation 109, that non-custodial sentencing options be made appropriately available,[23] have not been implemented or, alternatively, that implementation has been grossly inadequate.

2.1.2 Deaths in Custody

RCIADIC investigated 99 Aboriginal and Torres Strait Islander deaths in custody, which took place between 1 January 1980 and 31 May 1989. In the thirty years since the release of the Commission's final report, 489 more Indigenous deaths in custody were reported: an average of 1.36 deaths per month over three decades.[24]

Although the Commission found that Aboriginal and Torres Strait Islander deaths in custody were not due to any particular malice targeted at those detainees as opposed to non-Indigenous detainees, it did find that 'generally, there appeared to be little appreciation of and less dedication to the duty of care owed by custodial authorities and their officers to persons in custody [...] It can certainly be said that in many cases death was contributed to by system failures or absence of due care.'[25]

Critically, the Commission found that 'great hardship was imposed on the relatives of the deceased persons as a result of the inadequacies of most post-death investigations. It must never again be the case,' wrote the Commissioners, 'that a death in custody, of Aboriginal or non-Aboriginal persons, will not lead to rigorous and accountable investigations and a comprehensive coronial inquiry.'[26] In 2004, however – more than a decade after the publication of the Commission's final report – a Palm Island man, Mulrunji, was arrested (while intoxicated) for public nuisance, taken into police custody and subsequently died. A 2006 coronial inquest found that Mulrunji died of 'intra-abdominal haemorrhage, due to the ruptured liver and the portal vein' and that 'severe compressive force applied to the upper abdomen, or possibly the lower chest, or both together, was required to have caused this injury.'[27] These findings were later disputed and overturned and the officer involved was acquitted of manslaughter, but a decade later, Mortimer J found that the Queensland Police Service had contravened s 9(1) of the *Racial Discrimination Act 1975* (Cth) by, amongst other things, passing inaccurate information to the coroner in an attempt to protect the officer involved.[28]

Of particular note is the coroner's finding that Mulrunji never should have been arrested in the first place. At the time of his arrest, Mulrunji was intoxicated and had exchanged words with a Police Liaison Officer, but had walked away afterwards, stopping only to swear at the police. The officer involved drove down the street to catch up with Mulrunji, thus re-escalating the situation, and arrested him.[29] In *Coleman v Power*,[30] Kirby J wrote that police officers should be 'thick skinned and broad shouldered in their duties,' and that police powers to arrest people for public nuisance were 'not given to police officers to sanction, or suppress, the public expression of opinions about themselves or their colleagues [...]'[31] – that is, that the threshold for offensive language to constitute

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[22] Royal Commission [n 2].
[23] Ibid.
[24] Australian Institute of Criminology, 'New Deaths in Custody Report Released' (Media Release, 02 December 2021).
[25] Royal Commission [n 2] vol 1, [1.2.3].
[26] Royal Commission [n 2] vol 1, [1.2.7].
[27] *Inquest into the death of Mulrunji* (Queensland Coroner's Court, Coroner Clements, 27 September 2006) 7.
[28] *Wotton v Queensland (No 5)* [2016] FCA 1457.
[29] *Inquest* [n 26] 2-3.
[30] (2004) 220 CLR 1 ('*Coleman*').
[31] *Coleman* [n 29] 99 (Kirby J).

public nuisance should be higher when that language is directed at police, not lower.[32] Mulrunji, who walked down the street and away from police before turning back to swear at them once, had arguably not reached this threshold.

While Mulrunji was not arrested for public intoxication, there is no doubt that his drunkenness, or the appearance of drunkenness, was a factor in the decision to arrest him leading to his death. Around Australia, including jurisdictions where public intoxication has been decriminalised, drunkenness is a factor in police decisions to arrest people for other public order offences, such as public nuisance.[33] As the data from RCIADIC and more recent investigations into deaths in custody show, the disproportionate rates of arrest and detention of First Nations people for these minor offences are directly correlated with the unacceptably high rates of death in custody. If public intoxication and begging are to be decriminalised, there must therefore be special care taken to ensure that police do not simply continue to arrest intoxicated persons on other pretexts, as occurred in the case of Mulrunji and has occurred in other jurisdictions, leading to potentially fatal consequences.

2.2 Ineffectiveness of Criminalisation in Addressing Substance Abuse

Section 9 of the *Summary Offences Act 2005* (Qld) does not target "problem" drinking; it creates an offence for public intoxication per se. If the goal, however, is to respond to alcohol abuse as a societal or even medical problem, criminal consequences for public intoxication offences ranging from confiscating alcohol from street drinkers, to detention in police custody and imprisonment for repeated instances of public intoxication, have repeatedly proven ineffective. In relation to the link between public intoxication offences and addressing substance abuse, Cornish writes:

> The crime of public drunkenness is not a response to the existence of alcohol abuse, nor a punishment of that abuse, but rather a punishment of the failure to maintain a public display of adherence to the values of sobriety, cleanliness and order.[34]

Indeed, while risky alcohol consumption has decreased slightly in the Australian population in general and in the Aboriginal and Torres Strait Islander population specifically over the past decade,[35] there is no indication that this is as a result of criminalisation of public intoxication (which has been decriminalised almost everywhere in Australia for much longer).

International studies suggest that laws against public intoxication exist not to control or address problematic alcohol consumption, but rather to give governments and law enforcers tools for maintaining social control.[36] Reviews of street drinking bans have found no clear evidence that they actually reduce public drinking,[37] and historical precedent suggests that even total alcohol prohibition

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[32] 'Judges have remarked that in many cases the most appropriate course of action for a police officer to whom offensive language or behaviour has been directed will be to turn a blind eye [...] A number of court decisions also provide a warning to police that the way they choose to deal with particular incidents may actually provoke an offence or escalate incidents and lead to further offences.' Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (Report, May 2008) 35.

[33] McNamara [n 5].

[34] Cornish [n 7] 73.

[35] ABS, 'National Health Survey: First Results' (Media Release, 12 December 2018) <https://www.abs.gov.au/statistics/health/health-conditions-and-risks/national-health-survey-first-results/latest-release>; ABS, 'National Aboriginal and Torres Strait Islander Health Survey' (Media Release, 11 December 2019) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/national-aboriginal-and-torres-strait-islander-health-survey/latest-release>.

[36] See, eg, Nusbaumer [n 1] 167.

[37] See Amy Pennay and Robin Room, 'Prohibiting Public Drinking in Urban Public Spaces: A Review of the Evidence' (2012) 19(2) *Drugs: Education, Prevention and Policy* 91.

does not stop people from drinking alcohol, but merely redirects them towards riskier black market consumption.[38]

2.3 Legal, Administrative and Financial Burden of Criminalisation

2.3.1 Blue Card/Yellow Card Eligibility

Currently, people arrested for public intoxication or begging may be issued with a fine, and those who are unable to pay their fines and are found in default of a SPER enforcement notice may be sentenced to prison.[39] A conviction for an offence that is not on the list of disqualifying offences does not necessarily preclude someone from eligibility for a Blue Card or Yellow Card, but may be viewed by those charged with assessing and approving applicants for working with children or working with people with disability respectively, as speaking to their overall suitability to hold a Blue Card or Yellow Card.[40]

Based on the experiences of our clients and consultation with community stakeholders, the impacts of conviction for minor offences can have serious consequences on eligibility for Blue Cards. The Blue Card may be suspended or cancelled. Loss of a Blue Card after a minor offence for those looking after children of family members under Child Protection provisions, means they will no longer be eligible to be a "kinship carer" for the children of the family. The children will be removed and may be placed in out of home care with a foster carer who will more likely than not be non-Indigenous.[41] Those in paid employment requiring a Blue Card will lose their employment, as working with children mandates that the employee must hold a Blue Card. Those who are not currently employed, will be denied opportunities of working with children if they do not hold a Blue Card.

Caring for children of extended family members has always been a part of the fabric of Aboriginal and Torres Strait Islander communities around Australia. The impact on children of removal from family members, is separation from parents, family and/or community, contrary to the paramount legislative principle of the "best interests of the child",[42] often reinforcing and entrenching the burden of inter-generational trauma for future generations. Further, such outcomes are obstructive to the legislative intent where the goal is reunification of children with their parents.[43]

Of particular concern is that Blue Card eligibility for kinship care of children applies not only to kinship carers but to all those with whom the Blue Card holder shares a household. In the circumstances of a housing crisis and the overcrowding experienced by many Aboriginal and Torres Strait Islander households, the choice facing families may be as stark as choosing between caring for children who

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[38] While Australia does not have the same storied history of failed alcohol prohibition as, say, the United States – our temperance movement never having quite seized the national legislative imagination in the same way – the fallout from that moment in American history is a useful object lesson for legislators considering alcohol prohibition in Indigenous communities. See, eg, ALRC [n 18] 431-2; Allaman Allamani, 'Alcohol Consumption Policies and the Prevention of Alcohol Consumption-Related Problems: Needs, Duties, and Responsibilities' (2012) 47(12) *Substance Use and Misuse* 1252, 1255.

[39] Queensland Government, *SPER enforcement orders* (Web Page, 1 July 2022) <https://www.qld.gov.au/law/fines-and-penalties/overdue-fines/enforcement-order>; Legal Aid Queensland, *Possible penalties and sentences* (Web Page, 5 September 2019) <https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Criminal-court-process/Possible-penalties-and-sentences>.

[40] *Working with Children (Risk Management and Screening) Act 2000* (Qld), s.16,176k; *Disability Services Act 2006* (Qld), s.94; see also eg, *Sadlier v Commission for Children and Young People and Child Guardian* [2012] QCAT 635.

[41] Only 42% of First Nations children in out of home care are placed with community carers: Family Matters, Aboriginal and Torres Strait Islander children, Snapshot 21.

[42] *Child Protection Act 1999* (Qld), s.5A

[43] Ibid, s.

might otherwise be put into out of home care with non-indigenous strangers and maintaining the integrity of the family unit. Where a family member has been recently released from police custody or prison they will very likely be found ineligible for a Blue Card, even if the offence was neither serious nor disqualifying.

Inability to find employment by reason of Blue Card ineligibility is of particular concern on Palm Island, where employment opportunities are already extremely limited and tend to be in the government or service sectors, which require strict background checks for Blue Cards and Yellow Cards.

Convictions for minor offences such as public intoxication or begging might result in a vicious cycle of incarceration, inability to find work, recidivism, and re-incarceration.

Although the decision not to issue someone a Blue Card can be appealed, QCAT currently lists waiting times for children and young people matters (including Blue Card eligibility) at 33 weeks or about eight months.[44] Even after a matter is heard, there may be further wait times of up to 12 months for a decision to be made due to workloads and backlogs in QCAT. This prolongs unemployment and exacerbates the separation of children from their families and community and forces children in the child protection system into out of home care.

2.3.2 Other Penalties including Driver Licence Suspension

A person who has been issued with an infringement notice for public intoxication or begging but is unable to pay the fine or does not pay it in time may be issued with a SPER enforcement order. These orders give SPER a broad range of powers to collect fine debts, including garnishing wages, property seizure and even licence suspension.[45]

As noted, the current maximum penalty for the offence of begging in a public place is 10 penalty units, or $1,437.50 at the time of writing. This is more than double the current fortnightly JobSeeker Payment rate for a single person (currently $642.70/fortnight without extras like rental and utility assistance)[46] and more than the current full-time weekly minimum wage (currently $812.60/week before tax).[47] As 33.2 per cent of First Nations people in the North Queensland region earn at or below $300/week, and only 8.8 per cent earn over $1,250/week, payment of fines may not be realistically possible and is more likely to lead to enforcement. SPER and the courts can levy additional fees against people who cannot pay fine debts in a timely fashion. Currently, SPER charges an administration fee of $75.60 on any enforcement order that is for a criminal infringement notice (such as a begging or intoxication fine), as well as an enforcement fee of $126.70 if they are required to take enforcement actions such as licence suspension or property seizure.

The imposition of fines against people who are manifestly unable to pay them was addressed in RCIADIC recommendation 121b.[48] The levying of additional fees and charges when people are unable to pay a fine debt is pointless and entrenches cycles of poverty, incarceration and disadvantage. Someone who cannot pay a $200 fine is not going to be more likely to pay a $200 fine plus $200 in administration fees. Driver licence suspensions have a longer-term and insidious impact. A person

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[44] Queensland Civil and Administrative Tribunal, *Timeframes* (Web Page, 19 July 2022) <https://www.qcat.qld.gov.au/applications/timeframes>.

[45] Queensland Government, *Fine Enforcement* (Web Page, accessed 18 August 2022) <https://www.qld.gov.au/law/fines-and-penalties/fine-enforcement>.

[46] Services Australia, *How much can you get* (Web Page, 26 May 2022) <https://www.servicesaustralia.gov.au/how-much-jobseeker-payment-you-can-get?context=51411>.

[47] Fair Work Ombudsman, *Minimum wages* (Web Page, 01 July 2022) <https://www.fairwork.gov.au/pay-and-wages/minimum-wages#national>.

[48] Royal Commission [n 2].

whose licence has been suspended may be faced with the options of ceasing driving, with potential impacts on their ability to work and earn more money with which they could pay off their fines, or to continue to drive on the suspended licence, risking further fines and other criminal penalties.

When a person is unable to work without a licence, it creates an additional hardship to be unable to have the licence reinstated due to a continued inability to pay a fine. Due to the difficulties and poor transport infrastructure in North Queensland, we are aware that some people choose to drive on a suspended driver licence when the alternative is to miss work and be unable to provide for their family and dependents.

There has long been awareness in Australia of the criminalisation of poverty.[49] Seeking enforcement of debts for minor offences against people who cannot pay them to the extent of suspending driver licences or other qualifications only entrenches people in cycles of poverty and desperation. Although public intoxication and begging are not the only offences disproportionately enforced against marginalised people,[50] repealing them would remove two potential causes of fine default enforcement notices against those unable to pay.

2.4 Lack of Services for Juvenile Clients

Many alcohol management or sobering up facilities will not admit clients under the age of 18 years.[51] Juvenile offenders are at particularly high risk of harm, as fewer diversionary options exist and there is therefore a high risk of detention in police custody.

Juvenile offenders are disproportionately targeted by police,[52] and Indigenous juvenile offenders are particularly at risk given the evidence of criminalisation of First Nations people in general and children in particular. In Queensland in 2006-07, First Nations people made up 33 per cent of police apprehensions of juvenile offenders.[53] In New South Wales, Western Australia, South Australia, Victoria and the Northern Territory during the same time period, an inverse relationship existed between age and Indigeneity of juvenile offenders and how often they interacted with police (that is, police were far more likely to apprehend an Indigenous 10-year-old than a non-Indigenous 10-year-old, but that likelihood dropped as the age of the offender increased).[54] Therefore, the lack of available non-custodial facilities for juvenile offenders arrested for minor offences is particularly concerning.

2.5 Human Rights Considerations

Australia is a signatory to treaties and covenants protecting the human rights of its citizens, some of which have been adopted into legislation to give them legal force. Article 9 of the International Covenant on Civil and Political Rights ("ICCPR") provides that everyone has the right to liberty and

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[49] Parliament of Australia, *Law and Poverty in Australia: Commission of Inquiry into Poverty Second Main Report* (Parliamentary Paper No 294, October 1975) ch7.

[50] Ibid; Luke McNamara et al, 'Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia (2021) 10(1) *International Journal for Crime, Justice and Social Democracy* 111.

[51] See, eg, Commonwealth Ombudsman [n 5] 54; Suzanne Jarvis et al, 'Public Intoxication: Sobering Centres as an Alternative to Incarceration, Houston, 2010-2017' (2019) 109(4) *American Journal of Public Health Practice* 597; Alina Turner, 'Alternatives to Criminalising Public Intoxication: Case Study of a Sobering Centre in Calgary, AB' (2015) 8(27) *School of Public Policy Research Papers* 1, 6.

[52] Kelly Richards, Australian Institute of Criminology, *Juveniles' Contact with the Criminal Justice System in* Australia (Report, 2009) 27.

[53] Richards [n 48] 38.

[54] Richards [n 48] 41-3.

security of person, and nobody shall be subjected to arbitrary arrest or detention.[55] Further, 'anyone who is deprived of [their] liberty by arrest *or detention* shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of [their] detention and order [their] release if the detention is not lawful.'[56] Article 9 ICCPR is also reflected in the provisions of the *Human Rights Act 2019* (Qld) ("HRA")[57] In States that have decriminalised public intoxication, however, it is not uncommon for police to detain intoxicated people without arresting them and, contrary to the provisions of Article 9 ICCPR, for this detention to be unreviewable in a court, because no arrest ever took place.[58] Although there are usually set time limits on detention for intoxication under the various State and Territory Acts, such detentions are still against the spirit of the ICCPR and the various domestic legislative instruments that might give it force.

Article 17 ICCPR forbids 'arbitrary or unlawful interference with [...] privacy, family, home or correspondence.'[59] Many writers and commentators have made the point that criminalisation of public intoxication punishes behaviour that some are forced to carry out in public because they have no private premises available to them (by reason of poverty, homelessness, unsafe housing or other circumstances).[60] These people do not lose the right to privacy guaranteed under Article 17 solely by reason of housing insecurity, but their daily activities are nonetheless subject to a great deal of interference by the State.

In Queensland, Division 2 HRA lists civil and political rights that public entities, including the police, must extend to those with whom they have dealings. These rights echo and are derived from Australia's treaty obligations under the ICCPR. In particular, s 15 HRA guarantees recognition and equality of the law; s 25 upholds the right to privacy; and s 29 and 30 HRA provide for the liberty and security of person and humane treatment in custody, respectively. Aboriginal and Torres Strait Islander people's cultural rights are also specifically protected in s 28 HRA.

The objects of the HRA demonstrate a clear intention by the Legislature to protect and promote human rights in Queensland and to build a culture in the Queensland public sector that respects and promotes human rights.[61] This is reinforced in 58 HRA which makes it unlawful for a public entity to act or make a decision in a way that is not compatible with human rights and, in making a decision, to fail to give proper consideration to a human right relevant to the decision.[62]

While the HRA does not provide a cause of action against public entities who breach its provisions, it does codify the rights Queenslanders can and should expect in their dealings with public entities such as the police and creates a conciliation process for complainants if their rights are violated.

3. Recommendations

3.1 Decriminalise Public Intoxication and Other Public Nuisance Offences

ATSIWLSNQ is strongly in support of RCIADIC recommendation 79, that public intoxication be decriminalised for the reasons outlined in this submission. As long as public intoxication continues to

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[55] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('ICCPR').
[56] Ibid (emphasis added).
[57] *Human Rights Act 2019* (Qld), s.29(1) & (2)
[58] S.29(7) and see, eg, Commonwealth Ombudsman [n 5] 33.
[59] ICCPR [n 51] art 17.
[60] See, eg, McNamara [n 46] 114; Young and Petty [n 5] 447.
[61] *Human Rights Act 2019* (Qld), s.3
[62] *Human Rights Act 2019* (Qld), s.58(1)(a) and (b)

attract criminal penalties, the potential for disproportionate legal, financial and personal consequences for First Nations people will be unacceptable. Further, the impact on First Nations women and children will continue to be high due to the large numbers of First Nations women who care for children of the family either under kinship arrangements or other legal placement arrangements in Child Protection matters, where loss of a Blue Card will mean ineligibility to care for children.

3.1.1 Reduce Overall Law Enforcement Response to Publically Intoxicated Persons

In line with RCIADIC recommendations 80-82, ATSIWLSNQ calls for an approach to decriminalisation that incorporates a social welfare response, including diversion away from police custody and creation of non-custodial care options for intoxicated persons who require monitoring or acute care. In particular, decriminalisation of public intoxication must not coincide with granting or utilisation of other police powers to arrest and charge intoxicated persons with other, potentially more serious offences (e.g. disorderly conduct, public nuisance).

Further, decriminalisation of public intoxication should not be rendered invalid by re-criminalising the same behaviour through use of spatial restrictions on alcohol that are designed to target First Nations drinkers over and above others.[63]

3.2 Invest in Short-Term and Long-Term Supports for Problematic Substance Use

3.2.1 Sobering-up Centres

Sobering-up centres, which take intoxicated persons in overnight and provide them with a safe place to sleep, bathroom and laundry facilities and sometimes one or more meals, are both a short-term means of diverting people away from police custody or unnecessary hospital visits and a long-term way of connecting intoxicated persons with referrals to services, such as rehabilitation centres, housing providers and ongoing medical care. Reviews of sobering-up centres around Australia and the world have found that they reduce the numbers of intoxicated persons held in police custody and can help improve client outcomes by facilitating service referrals.[64]

3.2.2 Alcohol Intoxication Management Services

Alcohol Intoxication Management Services (AIMS) are short-term facilities, usually located near centres of high alcohol consumption, providing acute care for alcohol intoxication without a need for diversion to hospital or other emergency services. A review of AIMS in England and Wales found that they made users feel safe during periods of acute intoxication and that users displayed a preference for attending AIMS over emergency services.[65] Clients may self-refer to AIMS, but can also be taken there by community workers such as night patrollers or by police liaison officers. It is important that if AIMS services are used, there are adequate facilities in place in conjunction with decriminalisation to prevent the continued use of detention in police cells.

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[63] This has been a longstanding issue in rural, remote and regional areas with large Aboriginal and Torres Strait Islander populations where alcohol restrictions have been externally imposed without community consultation and participation. See Peter D'Abbs, 'Problematising Alcohol Through the Eyes of the Other: Alcohol Policy and Aboriginal Drinking in the Northern Territory' (2012) 39(Fall) *Contemporary Drug Problems* 371.

[64] See Commonwealth Ombudsman [n 5] 42; Jarvis [n 47] 598; Turner [n 47] 21; Amy Pennay et al, 'Decriminalising Public Drunkenness: Accountability and Monitoring Needed in the Ongoing and Evolving Management of Public Intoxication' (2021) 40 *Drug and Alcohol Review* 205, 207.

[65] Andy Irving et al, 'The Acceptability of Alcohol Intoxication Management Services to Users: A Mixed Methods Study' (2020) 39 *Drug and Alcohol Review* 36.

3.2.3 Non-Law Enforcement Night Patrols

Night patrols are community-led services wherein workers patrol an area, detect community issues that may arise (such as fights and persons in need of assistance) and intervene with a view to de-escalating conflict and mitigating or removing the need for police involvement. An example of a highly effective night patrol that has helped address public intoxication issues within an Aboriginal community is the Tangentyere Council Night Patrol, whose patrollers cover the 19 town camps surrounding Alice Springs. The patrol was founded with the express aim of reducing problems with alcohol and other substance misuse and minimising interactions between First Nations people and the criminal justice system.[66] To that end, patrollers, who come from all of the major language groups represented within the town camps, help intoxicated persons get to safe accommodation or services without the need for police intervention or custody. The patrol has received the Australian Institute of Criminology's Violence Prevention Award on multiple occasions in recognition of its impact on the community.[67]

Non-law enforcement night patrols provide a culturally-appropriate and safe intervention for community members who may need acute or long-term supports without police involvement. Strempel et al suggest that these services are strongest when they are community-led, have strong relationships with local service providers, provide extensive training for staff, are well-funded by relevant statutory bodies and exist as part of a multi-service program delivery.[68]

3.2.4 Long-Term Supports: Residential and Rehabilitation Services

As with short-term supports such as sobering-up centres and night patrols, research shows that effective long-term supports such as rehabilitation services are most effective when they are community-owned and run with local needs and priorities in mind.[69] Rehabilitation services seeing Aboriginal and Torres Strait Islander patients should make the provision of culturally competent care a priority so as to maximise patient outcomes and service engagement.

Addressing alcohol intoxication symptomatically will ultimately not solve the underlying problems of poverty, homelessness and entrenched disenfranchisement. To that end, a 'housing first' approach, which connects people with stable accommodation as a matter of priority regardless of their sobriety, employment or criminal history, is a strategy that has improved outcomes for poor and marginalised people in test environments.[70] RCIADIC recommendations 321-327 focus on the importance of improving housing conditions for Aboriginal and Torres Strait Islander people as a determinant of equality and justice.[71]

3.3 Retrain Police in De-escalation and Alternatives to Arrest

Finally, no amount of legislative or social reform will result in sustained material change if police are not also retrained to interact more positively and constructively with First Nations people committing minor offences. The example of Mulrunji demonstrates that when police are trained to escalate situations and see arrest as the only way or the best way of resolving a conflict, the potential for negative consequences for those arrested are unacceptably high. Furthermore, as demonstrated in multiple reports, legislative decriminalisation of public order offences such as public intoxication and

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[66] Phillipa Strempel et al, Australian National council on Drugs, *Indigenous Drug and Alcohol Projects: Elements of Best Practice* (Research Paper No 8, 2003) 10.
[67] Ibid 6.
[68] Ibid 20.
[69] Ibid 55.
[70] See, eg, Turner [n 47].
[71] Royal Commission [n 2].

begging, has not led to a decrease in arrests where police have either misinterpreted discretionary powers afforded to them under legislation or chosen to arrest people under different laws and provisions rather than diverting them to non-custodial services.

To continue such practices is contrary to the provisions of the *Human Rights Act 2019* (Qld), in particular sections 58, 29, 28 and 26, and the human rights conventions from which these provisions have been derived.

To obviate the continuation of unacceptable police practices in targeting First Nations people, including children, ATSIWLSNQ strongly recommends community-led cultural competency be mandated during police officer training and reinforced as part of their ongoing professional development. Police policies and procedures should be updated, where appropriate to stress the need to attempt de-escalation of conflict and to seek non-custodial solutions to conflict and disorderly conduct that is not otherwise criminal. ATSIWLSNQ is supportive of statutory obligations on police to seek non-custodial solutions before resorting to arrest, in line with RCIADIC recommendations 81, 85, 86, 87 and 88.