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

Submission No: 32

Submitted by: Australian Lawyers Alliance (ALA)

Publication:

Attachments:

Submitter Comments:

Submitter Recommendations:

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

Submission to the Community Support and Services Committee

22 August 2022

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The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Community Support and Services Committee inquiry into decriminalising public intoxication and begging offences, with a consideration of health and welfare-based responses. The ALA submits that there is a dire need to address disparities in public health and social welfare amongst vulnerable members of society, particularly Aboriginal and Torres Strait Islander ('ATSI') people, who are disproportionately and imprisoned.[2]

2. Public intoxication offences have been repealed in most English-speaking countries across the world. In Australia, most states and territories have abolished public intoxication as a criminal offence, with the exception of Victoria and Queensland. The act of begging also constitutes a criminal offence in Queensland and Victoria while in the ACT and NSW, beggars can be penalised by discretionary "move on" powers exercised by police in public areas. In practice, these offences are substantially prejudicial to the ATSI community and effectively target the poor, mentally ill, and those subject to racism, particularly the ATSI community.

3. While imperative, legislative reform that decriminalises offences such as public intoxication, begging and urinating in public is not enough. The ALA supports a public-health approach to dealing with public intoxication and taking a preventative approach to addresses the core issues behind many instances of public intoxication. It bears mentioning that health inequity is a vital factor in understanding the Indigenous experience, particularly when considering research studies indicating that those who are more likely to turn to drugs and alcohol to self-medicate are those with inter-generational trauma.[3]

4. Yet, decriminalisation is not enough to address the causes underlying public drunkenness and the need for an integrated, public-health approach to this issue. Following decriminalisation, jurisdictions that have adopted protective custody regimes have largely failed to address the

[2] Alexandra Gannoni and Samantha Bricknell, Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody (Australian Institute of Criminology, Statistical Bulletin 17, February 2019) <https://www.aic.gov.au/sites/defau1Ufiles/2021-05/sb17 indigenous deaths in custody - 25 years since the rciadic v2 0.pdf>.

[33] See Martin Laverty, Dennis McDermott and Tom Calma, 'Embedding Cultural Safety in Australia's Main Health Care Standards' (2017) 207(1) Medical Journal of Australia 15; Judy Atkinson, 'Trauma-informed services and trauma-specific care for Indigenous Australian children', Resource sheet no. 21, 23 July 2013, found at: < http://earlytraumagrief.anu.edu.au/files/ctg-rs21.pdf>.

risk of death in police custody. The lack of an alternative to police cell custody has seen the number of Indigenous deaths in custody soar markedly.[4]

5. In this submission, the ALA will outline the need for an effective health-based service system response that makes places of safety available as an alternative to police cells which provides appropriate health, social and cultural framework for addressing many cases of public intoxication and begging.

'Public drunkenness' and the need for reform

6. Thirty-one years ago, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC)'s final report identified high rates of incarceration or detention in police custody of ATSI people for public drunkenness and associated risks of deaths in custody.[5] The report recommended the decriminalisation of public drunkenness, "(t)hat, in jurisdictions where intoxication has not been decriminalised, governments should legislate to abolish the offence of public drunkenness."[6] Recommendation 80 states 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.[7]

7. With the Victorian Parliament passing the *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Act 2021* in February 2021, Queensland is now the only remaining state in Australia that has not implemented the Royal Commission's recommendations and continues to treat public intoxication as an offence.[8] The ALA submits that Queensland law must be brought into line with the other Australian jurisdictions, and public intoxication should be removed from the *Summary Offences Act 2005* (Qld) for the health and welfare of the community.

[4] See Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020) 36.

[5] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, Royal Commission into Aboriginal Deaths in Custody National Report (1991).

[6] Ibid.

[7] Ibid.

[8] See Summary Offences Act 2005 (Old) section 10.

Key Lessons from other jurisdictions

Overuse of Protective Custody & Police Holding Cells

8. The decriminalisation of public intoxication offences has long been a recommendation since 1991 by the *Royal Commission into Aboriginal Deaths in Custody National Report*[9] and in 2001 by the Victorian Parliamentary Drugs and Crime Prevention Committee in its report of inquiry into public drunkenness.[10] This Committee made the same recommendation in 2006 in its report on *Strategies to Reduce Harmful Alcohol Consumption* where the they recommended the provision of appropriate services, such as sobering-up centres.[11]

9. In most other jurisdictions where decriminalisation has occurred, there has been an introduction of a form of protective custody legislation which aims to ensure police have powers to apprehend individuals as a *last resort* in order to keep them and the community safe. However, data suggests that protective custody measures still result in large numbers of people being taken into police cells and a disproportionate number of those incarcerated being ATSI people. For example, Table 1 below from a 2020 report by an Expert Reference Group on Public Drunkenness to the Victorian Attorney-General shows that of the total number of people taken into custody for public intoxication over a 12-month period in NSW, 18.1% of those identified as ATSI.[12] This figure is stark when considering the general population of ATSI people in NSW is 3.56% in NSW.[13] A further illustration of the number of ATSI people taken into custody for 'public drunkenness' across jurisdictions can be found in Table 1 below.

[9] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, Royal Commission into Aboriginal Deaths in Custody National Report (1991), Recommendation 79-87.

[10] Drugs and Crime Prevention Committee, Parliament of Victoria, Inquiry into Public Drunkenness (2001), <http://www.parliament.vic.gov.au/dcpc/Reports%20in%20PDF/Drunkenness_final_report.pdf> at 25 March 2008.

[11] Drugs and Crime Prevention Committee, Inquiry into Strategies to Reduce Harmful Alcohol Consumption (2006), <http://www.parliament.vic.gov.au/dcpc/Previous_Inquiries/alcoholharmreduction/DCPC-Report_Alcohol_Vol1_2006-03.pdf> at 25 March 2008.

[12] See Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020) 34.

[13] Ibid 34.

Table 1: Use of police cells for public drunkenness in other Australian states and territories

	Total number of people taken into custody over previous 12-month period*	Proportion of total number of people taken into custody who identify as Aboriginal or Torres Strait Islander (%)	% of general population that Aboriginal or Torres Strait Islander (2016 Census))
NSW	1802	18.1%	3.56%
SA	330	41.5%	2.52%
Tas	447	17.4%	5.84%
ACT	829	13.5%	1.9%
NT	8247	92.8%	43.56%
WA	Not available	Not available	4.09%
QLD	Not available	Not available	4.79%

* 12-month period varies slightly between jurisdictions but included data obtained from 2014 to 2019.

10. Table 1 shows that of the total number of people taken into custody over a previous 12-month period is substantially greater across jurisdictions for those who identify as ATSI (particularly when the percentage of ATSI people in the general population is considered). Furthermore, this data suggests that that protective police custody is not used as a last resort and instead, places a substantial burden on police and law enforcement agencies to deal with social and health issues they are not designed to. Prominent consequences of the criminalisation of public drunkenness are over-policing, the lack of health facilities for those with substance abuse problems and the fact that the offence is a 'gateway' to further charges and entrenchment in the criminal justice system.[14]

11. The ERG's report on Decriminalising Public Intoxication makes clear the risks that protective custody regimes pose on the community, including;[15]

    a. The disproportionate impact on people experiencing homelessness, ATSI communities and particular ethnic groups.[16]

[14] Guivarra, Frank E --- "The Survival of Public Drunkenness Laws in Victoria" [2008] IndigLawB 23; (2008) 7(5) Indigenous Law Bulletin 19.

[15] See Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020) 34.

[16] See generally Pennay (2012) citing (Dyb, 2006) Brady, 2010 Galloway et al., 2007.

b. The lack of an appropriate health-based response through the provision of safe places outside police custody leaves intoxicated people subject to police scrutiny and other bias'.[17]

c. Failure to address causes underlying public intoxication leads to an overreliance on emergency services and tertiary health interventions.[18]

12. As the Expert Reference Group concluded in its report to the Victorian Attorney-General on Decriminalising Public Drunkenness, evidence suggests the following:

> "[t]he continued high rates of placement of intoxicated people into police cells indicates that powers granted to police under protective custody regimes are not used as a last resort. Where the option remains to place an intoxicated person into a police cell, police continue to use the power to a significant extent. In our view, the continued use of police cells in relation to public intoxication points to a failure by governments to develop and implement effective health-based responses that are capable of providing more appropriate places of safety for people who are intoxicated and have immediate health needs."[19]

Statistical findings, such as those shown in Table 1, show a disproportionate use of police powers to apprehend the publicly intoxicated despite protective custody regimes being intended as a last resort.

13. Most significantly, the impact of the continued use of police cells means that unacceptably high numbers of people continue to die after being taken into police custody for public intoxication, particularly Indigenous people.[20] For the Day family, this unfortunate reality has ongoing intergenerational impacts going back to the death of Ms Day's uncle, Mr Harrison Day, in 1982.[21] The ALA believes that systemic racism must be considered as a cultural force

[17] See Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020) 34.

[18] Ibid.

[19] Ibid.

[20] Australian Institute of Criminology Deaths in Custody Australia No 8: Australian Deaths in Custody and Custody-Related Police Operations, 1993-94 February 1995 p13; McDonald and Biles 'Methodological Issues in the Calculation of Over Representation and Exposure to Risk in Custody' in Deaths in Custody Australia, 1980-89: Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody Institute of Criminology, Canberra, 1992, p.444.

[21] See Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020) 34.

that contributes to the hiked-up number of Indigenous women in custody for the offence of public intoxication,[22] as explored at the inquest into the death of Tanya Day.

14. While other jurisdictions have passed legislation to decriminalise public drunkenness, in practice the measures that have been adopted instead have perpetuated a punitive, criminal justice approach that conceives of people who are intoxicated in public as antisocial, dangerous and a risk to public safety.[23] The ALA believes that there has not been the necessary shift in systems and attitudes to move away from a criminal justice approach to public intoxication and acknowledgement of this issue for what it is; a health and social issue.

The discriminatory impact of 'public order' offences

15. The ALA believes that effective responses to address public intoxication must involve a holistic understanding of social, cultural and health-related forces that contribute to alcohol dependence. A public-health response to public intoxication is necessary, particularly in light of the danger posed by protective custody measures and the issue of deaths in custody. We believe that police are insufficiently resourced or equipped to respond to the common underlying causes of public intoxication or to render appropriate medical assessments and care.

16. The ALA urges the Queensland government to consider public intoxication in a holistic framework that considers the health and social welfare factors contributing to the incidence of this offence. It is well-established in health literature that alcohol dependence is linked to poor mental health,[24] poverty, homelessness[25], intergenerational trauma. For instance, a 2014 survey of 1,500 homeless people indicated 57% of this population consumed alcohol at risky levels, 39% had used illicit drugs and 7% had injected drugs.[26] Therefore, the ALA submits that

[22] Human Rights Law Centre, 'Aboriginal women 10 times more likely to be targeted by police at time of Tanya Day's death in custody', <https://www.hrlc.org.au/news/2019/4/30/aboriginal-women-10-times-more-likely-to-be-targeted-by-police>

[23] McNamara, Luke; Quilter, Julia --- "Public Intoxication in NSW: The Contours of Criminalisation" [2015] SydLawRw 1; (2015) 37(1) Sydney Law Review 1.

[24] Australian Institute of Health and Welfare (2016). Exploring drug treatment and homelessness in Australia: 1 July 2011 to 30 June 2014, Canberra: Australian Institute of Health and Welfare.

[25] Scutella, R. et al. (2014). Journeys Home Research Report No. 4 Fundings from Waves 1 to 4: Special Topics, Melbourne: The University of Melbourne.

[26] Ibid.

public order offences such as public intoxication, public urination and begging are discriminatory in practice as their occurrence is significantly influenced by attitudes to drinking, poverty, and systemic racism.[27] This is affirmed by the fact that Aboriginal deaths in custody occur largely as a result of the disproportionate number of arrests, remand, and jailing Aboriginal people experience relative to the general population. In addition, racial profiling has also been shown to significantly impact the way in which police carry out their duties.[28] In 2021, a total of 2102 people were charged or fined for 'public order' offences. In example, public intoxication charges accounted for 1256 of those charges, with half of the offenders identifying as Indigenous, despite only making up 4.6 per cent of the population.[29]

17. Generally speaking, Indigenous people significantly more likely to be arrested and imprisoned than other Australians[30] and as a consequence, are six times more likely to die in police custody than non-Indigenous people.[31] Between 1979-80 and 2018-19, Indigenous deaths comprised 18% of prison custody deaths and 22% of police custody deaths across Australia, despite making up just over 3% of the Australian population.[32]

Deaths in Custody – Ware, Mulrunji, Miller and Day

18. The ALA believes that police cells are an inappropriate and unsafe option for people who are intoxicated, particularly for Indigenous people. In practice, public order offences and public

[27] Calla Wahlquist, "Tanya Day's family 'devastated' that no police will face charges for death in custody", *The Guardian* (News article, 27 August 2020) < https://www.theguardian.com/australia-news/2020/aug/27/tanya-days-family-devastated-that-no-police-will-face-charges-for-death-in-custody>.

[28] Racial Profiling and Police Subculture Janet Chan Canadian Journal of Criminology and Criminal Justice 2011 53:1, 75-78; Evan Young, "After new allegations, Indigenous legal expert says racial profiling by police is still 'very common'", *SBS News* (News article, 31 March 2021) < https://www.sbs.com.au/news/article/after-new-allegations-indigenous-legal-expert-says-racial-profiling-by-police-is-still-very-common/upf0595hk>.

[29] Matt Dennien, 'Lawyer flags support for offensive language law rethink amid broader reforms, *Brisbane Times* (News article, 14 July 2022) <https://www.brisbanetimes.com.au/national/queensland/lawyers-seek-overhaul-of-public-swearing-laws-amid-broader-reforms-20220707-p5azud.html>.

[30] Alexandra Gannoni and Samantha Bricknell, Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody (Australian Institute of Criminology, Statistical Bulletin 17, February 2019).

[31] Laura Doherty and Samantha Bricknell, Deaths in custody in Australia 2018-19 (Australian Institute of Criminology, Statistical Report 31, 2020) 12, https://www.aic.gov.au/sites/defau1Ufiles/2021-05/sr31 deaths in custody in australia 2018-19 v2.pdf.

[32] Australian Institute of Criminology, National Deaths in Custody Program,

https://www.aic.gov.au/statistics/national-deaths-custody-program

intoxication laws in target a disproportionate number of Indigenous people arrested for behaviours that are generally not seen as criminal when engaged in by non-Indigenous people. Since 1989-90, nearly a quarter (24%) of Indigenous persons who died in police custody Australia-wide were suspected of committing a good order offence, such as public drunkenness, disorderly conduct or unpaid fines.[33] Whereas non-Indigenous persons who have died in custody were most commonly suspected of committing a violent offence (38%).[34] More recently between 2019-20 in Queensland, 1,009 per 100,000 Indigenous people were prosecuted against by police for public order offences, of which public intoxication is counted.[35] This is compared to 87 per 100,000 non-Indigenous people who were prosecuted by the Queensland police for the same group of offences. As with the national statistics, this discrepancy is made worse by the fact that Indigenous people represent just 4% of Queensland's population.[36]

19. In this context, we note the coronial findings into the death of Benjamin Richard Ware.[37] In this case, findings revealed the inadequacy of operational procedures of care and the quality of care provided to intoxicated clients at Diversionary Centres by police officers. On 7 October 2005, Mr Ware was found apparently intoxicated and lying on the footpath at the front of a Hotel in Cairns. Police found Mr Ware conscious and co-operative, later taking and admitting him into the care of the Lyons Street Diversionary Centre. Although he vomited during the evening, Mr Ware settled and was allowed to sleep it off. He relocated to an outside Gazebo during the night. Although regular observations were made of Mr Ware, it was thought he was asleep and at about 2pm, he was found unconscious and transferred by ambulance to Cairns Base Hospital. He was found to have sustained a serious head injury from which he later died. In a similar case, Cindy Miller was found dead in 2018 after a drug overdose in a

[33] Laura Doherty and Samantha Bricknell, Deaths in custody in Australia 2018-19 (Australian Institute of Criminology, Statistical Report 31, 2020) 15.

[34] Ibid.

[35] ABS, Table 22, Selected Offenders - Indigenous status and principal offence by selected states and territories, 2008-09 to 2019-20, https://www.abs.gov.au/statistics/people/crime-and-justice/recordedcrime-offenders/latest-release#data-download.

[36] ABS, Aboriginal and Torres Strait Islander Population - Queensland, (2016 Census Data Summary).

[37] Inquest into the death of Benjamin Richard Ware (28 March 2013),

https://www.courts.qld.gov.au/ data/assets/pdf file/0008/178217/cif-ware-br-20130328.pdf

watch-house in Ipswich, west of Brisbane. The inquest into her death found police were not properly trained or equipped to provide medical help to the Aboriginal woman.[38]

20. In the case of Mr Mulrunji, a harrowing series of events beginning with an arrest for "public nuisance" and culminating in Mr Mulrunji's death has led many to question the lawfulness of police actions and the need for independent investigation of deaths in custody – particularly where, as in that case, police were suspected of covering up to protect their own.[39] In September 2006, Coroner Christine Clements found that Mulrunji died of the punches inflicted by Sergeant Hurley, that police failed to rightly investigate the death of Mulrunji and crucially, and that Mulrunji should never have been arrested.[40]

21. In the inquest of Tanya Day, the Deputy State Coroner found that management of an intoxicated person in custody was inadequate and specifically that there was a "culture of complacency regarding intoxicated detainees"[41] within Victoria Police and a systemic failure to recognise the medical dangers of intoxication. The Deputy State Coroner also found that police officers did not take proper care of Ms Day's safety, security, health and welfare as required by Standard Operating Procedures and that any checks on her physical safety were "illusory".[42]

22. While the ALA acknowledges the importance of maintaining community safety, we consider that a punitive, criminal justice response to intoxicated people is not an appropriate means to achieve this end. In our view, community safety is adequately safeguarded by other offences that deal with anti-social behaviour, and given the existence of these provisions the offence of public intoxication does little to further protect the community. On the contrary, the offence contributes to the problematic and disproportionate criminalisation of Aboriginal and

[38] Michael Mckenna, "Review of deaths in custody investigations ordered", *The Australian* (News article, 22 August 2021) <https://www.theaustralian.com.au/nation/review-of-deaths-in-custody-investigations-ordered/news-story/2180902e08ac4fa689e1c9781979d5fb>.

[39]The Tall Man, *Thought Maybe* (Website film by Tony Krawitz, 2011) <https://thoughtmaybe.com/the-tall-man/>.

[40] Inquest into the death of Mulrunji, (27 September 2006).

[41] Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020) 37.

[42] Inquest into the death of Mulrunji, (27 September 2006).

Torres Strait Islander Peoples for minor offences, increasing the number of Indigenous persons held in custody and increasing the associated risks of Indigenous deaths in custody.

Human Rights implications

The Right to Life

23. The right to life is protected under article 6 of the *International Covenant of Civil and Political Rights* ('ICCPR'), a treaty that was ratified by Australia in 1980. The fundamental nature of this right was made clear by the UN Human Rights Committee when it described it as "the supreme right"[43] and at international law, it is an absolute right.[44]

24. The right to life under Article 6(1) of the ICCPR informs section 16 of the *Human Rights Act 2019 (Qld)* ('Human Rights Act') which includes a positive duty to protect the right to life.[45] It states that "[e]very person has the right to life and has the right not to be arbitrarily deprived of life."[46] This is particularly relevant when it comes to government agencies in their decision-making and actions. Importantly, the scope of this right extends to laws that criminalise public intoxication where there is an impact on the way that essential services (such as medical or welfare services) are provided, how and whether these services can be accessed in a way that protects people's welfare or safety, the delivery of necessary medical resources and investigations into the conduct of public entities such as those occurring after a death in custody.[47]

The Right to Culture

25. It is worth noting that human rights must be construed in "the broadest possible way"[48] and that a public authority must understand in general terms how Charter rights may be relevant to their action. In the case of Tanya Day, the Coroner's Court of Victoria found that a number

[43] Human Rights Committee, *General comment No. 36*: *Article 6 of the International Covenant on Civil and Political Rights, on the right to life,* 124th session, UN Doc CCPR/C/GC/36 (30 October 2018).

[44] Ibid.

[45] Ibid.

[46] Queensland Human Rights Commission, "Right to life, Section 16 of the Human Rights Act 2019", (Web page) <https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-life>.

[47] Ibid.

[48] Application Under the Major Crimes (Investigative Powers) Act 2004; DAS v Victorian Equal Opportunity Commission (2009) 24 VR 415 ('Major Crimes'), 434, [80]; De Bruyn v Victorian Institute of Forensic Mental Health (2016) 48 VR 647 ('De Bruyn'), 691 [126]; DPP v Ali (No 2) [2010] VSC 503 [29]; DPP v Kaba (2014) 44 VR 526 [108].

of human rights were engaged under the *Charter of Human Rights and Responsibilities 2006* (Vic) (the Charter), including cultural rights. Article 27 of the ICCPR recognises the existence of a "right" to culture and requires that it should not be denied by State parties to the ICCPR. The Commission found that the right to culture was engaged in the case of Tanya Day for a number of reasons including that she was an Aboriginal woman who held distinct cultural rights by reason of her race, that reality of overrepresentation of, and "cultural ignorance" towards Aboriginal people in the criminal justice system[49] and that as an Aboriginal woman, Tanya faced particular psychological challenges while in police custody due to Indigenous inter-generational trauma (including by reason of the death of her family member in custody, Harrison Day). For example, there is evidence in the Coronial Brief that Tanya was highly distressed about being placed in police custody[50] and felt unsafe and agitated while in custody.[51]

26. The need for cultural competence of police officers attending to intoxicated persons and the lack thereof was demonstrated in the words of Dr Anthony who attended to Ms Day's care and elaborated on the failure of Victoria Police to properly attend to Tanya's health and welfare in the holding cell. He noted dominant views of Aboriginal women as "intoxicated" and "troublesome"[52] as playing a role in Tanya's treatment in the lead up to her death, and the role "which the unique fears Aboriginal persons experience in custody were recognised by those involved with her on the day of her arrest and informed appropriate culturally safe and trauma-informed care".[53]

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[49] Victorian Department of Justice (2005), Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report, Volume 1, 5.

[50] BOE (104), Statement of Kristian Hurford, [5] ("We parked in the sally port and got the female out of the back. She was wobbly on her feet, a bit bemused by the situation and began to cry. I told her to calm down she was not in any trouble and we were trying to get her help."); BOE (297), Statement of Belinda Stevens, [69], [71], [73].

[51] BOE (297), Statement of Belinda Stevens, [73]; BOE (304), Statement of Warren Stevens, [52a]; BOE (111), Statement of Wayne Rowe, 4 ("At first, she didn't want to comply but she wasn't being resistant, she just wasn't listening to what we were saying and kept asking us "Why?" and trying to bargain with us to release her."); BOE (126), Statement of Edwina Neale ("each time we checked on her she asked when she could go home").

[52] Anthony Report, 41 [69] and [70]; BOE (125) Edwina Neale, Statement, 3 ("her manner towards myself and the other members was still quite belligerent, she clearly didn't want to be here").

[53] See Martin Laverty, Dennis McDermott and Tom Calma, 'Embedding Cultural Safety in Australia's Main Health Care Standards' (2017) 207(1) Medical Journal of Australia 15; Judy Atkinson, 'Trauma-informed

A Public Health Model

27. In order to comply with our international human rights obligations and to uphold essential rights under the *Human Rights Act 2019 (Qld),* the ALA strongly believes that a culturally safe, health-based approach to public intoxication must replace criminalisation of the poor, mentally ill, homeless and discriminatory use of this offence against ATSI people. As our submission outlines, a criminal justice approach has proved to be unsafe, has led to avoidable deaths, has been ineffective in reducing the recurring public intoxication of individuals and has unnecessarily entangled people in the legal system.[54]

28. We are convinced that a culturally-informed, integrated, health-based response is necessary in addressing public intoxication and must be an approach that considers the health and safety needs of intoxicated people. The ALA recommends that further consultation be undertaken to ensure that intoxicated people receive proper medical supervision and access to health treatment as and when required.

29. The ALA is in full support of the proposed framework for a public-health approach to public intoxication, having particular regard to the following recommendations of the Expert Reference Group on decriminalising public drunkenness:[55]

    a. Police cells are not safe or appropriate.[56]

    b. Safe places must be available to replace police cells (this includes going home to family or friends and a variety of community-based services). Current data on public intoxication offences should be used for statistics on the expected demand for placements at such health-services.[57]

services and trauma-specific care for Indigenous Australian children', Resource sheet no. 21, 23 July 2013, found at: < http://earlytraumagrief.anu.edu.au/files/ctg-rs21.pdf>.

[54] Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020) 36.

[55] Ibid

[56] Ibid.

[57] Ibid.

c. A consent-based model means that voluntariness is necessary at every stage of intervention (from engaging with first responders to long term treatment) by the public-health approach model to be implemented.[58]

d. A culturally responsive service system[59] is needed through tailored solutions that are informed by the engagement and participation of ATSI and CALD communities. Respect for self-determination and solutions developed locally are key aspects of an effective culturally safe framework.

e. Intersection with drug intoxication[60]: It is important to recognise that public intoxication very often occurs with drug use and that a health-based response must look at drug use and dependence holistically such that "intoxication" is the preferred terminology and not "drunkenness".

f. Intersection with mental health:[61] The high correlation between drug use and dependence with mental health issues must be incorporated into a framework that supports the provision of appropriate health care.

g. Community and cultural change:[62] Crucially, an underlying shift must occur in community and cultural attitudes about public intoxication. This involves increasing education that public intoxication is a public health issue that requires holistic responses that are capable of addressing the underlying causes.

Begging offences and the need for reform

Criminalisation of poverty

30. Traditionally, begging offences have been justified as a preventive measure to ensure public safety.[63] However, evidence has not supported a correlation between high crime and

[58] Ibid.

[59] Ibid 37.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Tamara Walsh, 'Defending Begging Offences' [2004] QUT Law and Justice Journal, 4.

'vagrancy' or begging.[64] Instead, beggars and homeless people are generally arrested for minor, victim-less crimes[65] and are more likely to be victims of crime themselves, given their vulnerable state.[66] The ALA believes that the concept of vagrancy that underpins the current criminal begging offence is outdated, inappropriate and manifestly unjust. This offence ignores individual and systemic factors such as mental health, poverty, hunger, homelessness and illness that lead to begging. Australian courts have acknowledged the lack of correlation between begging and crime as well as the complexity of the nature of begging and the need to look for solutions outside the scope of law enforcement.

31. In Parry v Denman (Unreported, District Court, Queensland (Cairns), Appeal No 11 of 1997, 23 May 1997), the Justice White acknowledged that it should not be a criminal offence to be poor, and that "one has to consider that a more useful approach from the community's point of view would be to effect some treatment of underlying causes of the begging". Similarly, in R v Mills (Unreported, Magistrates' Court (Melbourne), 14 December 2001), the Victorian Magistrate's Court stated that "there is great force to the argument that the community should accept responsibility for people in the offender's position".

Implications under the *Human Rights Act 2019* (Qld)

32. Begging is not criminal activity but a means of survival for a grave number of social issues in Queensland society. By criminalising begging, Queensland law violates fundamental human rights of some of the most marginalised and disadvantaged sections of society. Begging offences disproportionately impact those already denied basic necessities such as food, shelter and health care, and then adds to their disadvantage by denying them even the basic right to communicate and seek to address their plight. Fundamentally, laws that criminalise begging are in contravention of Australia's international human rights obligations and rights

[64] Jeremy Waldron, 'Homelessness and Community' (2000) 50 University of Toronto Law Journal 371, 57.

[65] Foscarinis, above n 30, 57; Donald E. Baker, 'Anti-Homeless Legislation: Unconstitutional Efforts to Punish the Homeless' (1990/91) 45 University of Miami Law Review 417

[66] See further Sarah Larney, Elizabeth Conroy, Katherine L. Mills, Lucy Burns and Maree Teesson, 'Factors associated with violent victimisation among homeless adults in Sydney, Australia '(2009) 33 (4) Australia and New Zealand Journal of Public Health 347; Tim Newburn and Paul Rock, Living in fear: Violence and victimisation in the lives of single homeless people (2005); Julie Lam and Robert Rosenheck, 'The effect of victimisation on clinical outcomes of homeless persons with serious mental illness' (1998) 49 Psychiatry Servo 678.

under Queensland's own *Human Rights Act 2019* (Qld) ('QHRA'). Under the QHRA, the following protected human rights are engaged by the offence of begging:

The right to Life

33. Section 16 of the *QHRA* states that "[e]very person has the right to life and has the right not to be arbitrarily deprived of life". As previously stated, the right to life cannot properly be understood in a restrictive manner and its protection requires that states adopt positive measures, including measures to reduce infant mortality, to increase life expectancy, and to eliminate malnutrition and epidemics. The Supreme Court of Canada, the Supreme Court of India, the European Commission on Human Rights and the European Court of Human Rights all consider that the right to life is to be interpreted broadly and that it imposes positive obligations on states.[67] Given that people beg to get money for the basic necessities of life, laws that prevent individuals from accessing food, accommodation and other vital means of survival mean that the criminal offence of begging interferes with the right to life.

The right to freedom of expression

34. Section 21 of the *QHRA* states:

> (1) Every person has the right to hold an opinion without interference.
>
> (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether—
>
> (a) orally; or
>
> (b) in writing; or
>
> (c) in print; or
>
> (d) by way of art; or
>
> (e) in another medium chosen by the person.

35. The right to freedom of expression under s21 of the *QHRA* is engaged by the criminal offence of begging. This right is considered important to the ability of individuals to participate in core democratic processes and is likely to enjoy a high degree of protection.[68] It has been

[67] *Gosselin v Quebec (Attorney General)* 2002 SCC 84, [346] (Arbour J); *Francis Coralie Mullin v Administrator, Union Territory of Delhi & Ors* (1981) 2 SCR 516, 524; *Shanti Star Builders v Narayan K Totama* (1990) 1 SCC 520.

[68] PILCH Homeless Persons' Legal Clinic. 2010. *We want change – calling for the abolition of the criminal offence of begging*. November 2010. 12.

interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others; the right is not confined to political, cultural or artistic expression.[69] The expression protected by the right to freedom of expression includes expression of news and information, such as commercial expression, advertising and works of art.[70]

36. The Supreme Court of Canada has indicated that begging is 'a tool used by those in poverty to engage in dialogue with the rest of society about their plight',[71] and as such constitutes 'expression' under the right to freedom of expression in the *Canadian Charter of Rights and Freedoms*.[72] Accordingly, Courts have considered that blanket prohibitions on begging may constitute a breach to the right to freedom of expression contained in the Canadian Charter.

37. The ALA submits that it is unlikely that the begging offence in the *QSOA* can be interpreted in a manner consistent with the *QHRA*, given that it is a criminal offence to ask for money or goods. The act of begging would amount to 'expression' within the meaning of s21. In the overwhelming majority of cases begging is an activity of last resort and is a means of communicating the immediate and vital needs of those who engage in it. Further it is submitted that the criminalisation of begging could not be considered as a reasonable, proportionate or justifiable limitation on human rights.

38. Accordingly, it is not possible to interpret the criminal begging offence consistently with human rights, and this conclusion is sufficient to establish that the criminal begging offence is a violation of the freedom of expression under the *QHRA*.

Recommendations

39. The ALA makes the following recommendations, that the Queensland Government:

[69] *Lange v Australian Broadcasting Corporation (Lange)* (1997) 189 CLR 520.

[70] Department of Constitutional Affairs, A Guide to the Human Rights Act (UK) 1998 (3rd ed, October 2006), p 23.

[71] *Ramsden v Peterborough (City)*, [1993] 2 S.C.R. 1084 (Taylor J).

[72] Section 2(d) of the *Canadian Charter of Rights and Freedoms* states 'Everyone has the following fundamental freedoms: b) freedom of …expression'.

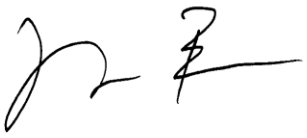
a. Repeal the offence of public intoxication and begging to achieve legislative decriminalisation and to comply more fully with rights protected under the *Human Rights Act 2019 (Qld).*

b. Ensure the implementation of the Proposed Health Model as suggested by the ERG to the Victorian Attorney-General; a model that considers the need for holistic health-based responses and is capable of responding to drug use and experiences of mental health, including dual diagnosis, where possible.[73]

c. Further undertaking consultation to ensure that the management of intoxicated people, who have committed criminal offences, and are incarcerated in police cells, can be more effectively supported and comply with the mandatory terms of Victoria Police's governing policy and procedures, including proper medical supervision and access to health treatment where required.

40. The Australian Lawyers Alliance (ALA) has welcomed the opportunity to have input into the Community Support and Services Committee inquiry into decriminalising public intoxication and begging offences, and health and social welfare-based responses.

41. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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[73] Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness (Report to the Victorian Attorney-General, August 2020).