

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

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Change the Record Submission to the Queensland Inquiry Into The Decriminalisation Of Certain Public Offences, And Health And Welfare Responses

We thank the committee for the opportunity to contribute to this inquiry.

Change the Record is Australia's only national, First Nations-led justice coalition. We are a coalition of Aboriginal controlled community organisations, peak bodies and all non-Indigenous organisations with health, legal and human rights expertise. We work closely with Aboriginal-controlled community organisations providing frontline services right across the continent.

Introduction

Decades of evidence demonstrate that the only way governments will end the mass-imprisonment of Aboriginal and Torres Strait Islander peoples, and in turn reduce the risk of First Nations deaths in custody, is to replace the current law-and-order response to the health, economic and social challenges in our communities with a health and social services model of prevention, intervention and care.

Queensland remains the only jurisdiction with no commitment to decriminalise public-intoxication. However, as evidenced by the high numbers of Aboriginal and Torres Strait Islander peoples who are nonetheless arrested and detained for reasons of intoxication; decriminalisation alone has failed to reduce the risks posed to First Nations peoples who are intoxicated in public places and come to the attention of police. This inquiry should pay particular attention to these failures and ensure not to repeat them.

It is our view that there are many lessons that can be learnt from the stalled roll-out of the decriminalisation reforms in Victoria. We will refer to some of them briefly below.

In short, our key recommendations are:

1. Laws which criminalise intoxication, homelessness, poverty and addiction should be repealed.
2. A gaps and needs analysis of services should be undertaken to support a culturally safe and appropriate public health response.
3. Police should be replaced as first responders with a public health service delivery response.
4. A police cell should never be used to detain a person identified as drunk in a public place, and no parallel 'protective custody' regimes should be introduced.

5. A clear regulatory regime should be introduced that constrains the role (if any) of police as 'last-resort responders' where more appropriate responders are not immediately available, that is subject to robust, independent oversight and complemented by a clear complaints mechanism.

Our submission

1. Laws which criminalise intoxication, homelessness, poverty and addiction should be repealed.

Many of the laws under the *Summary Offences Act 2005* respond to public health issues that could be more appropriately addressed through a public health response than a law enforcement one. All of these offences disproportionately target Aboriginal and Torres Strait Islander peoples. Evidence given by Queensland Police stated:

"47 per cent of all people charged for urinating in a public place identified as being Indigenous, 46 per cent of all people charged for public intoxication identified as being Indigenous, and 64 per cent of all persons charged with begging identified as being Indigenous, so there is a significant over-representation of Indigenous people for these offences."¹

This should indicate to the Queensland Government that there are structural factors at play resulting in the disproportionate application of these laws to First Nations peoples. It also means First Nations peoples are bearing the burden of the harm caused by criminalisation. We echo the submission of QIFVLES which states:

"We believe that ultimately the key to addressing the over criminalisation lies in reducing unnecessary contact with the criminal justice system and the likelihood of future harm and incarceration. In this light, a combined approach prioritising culturally safe supports is one that we advocate and support."²

1.1. Public drunkenness

A police cell is never a safe place for an intoxicated person. It is our view that Queensland Police should not have powers to lock people in police cells for being intoxicated in a public place, and that this should be expressly prohibited in legislation.

¹ Public Briefing—Inquiry into the decriminalisation of certain public offences and the health and welfare responses, Transcript of proceedings, July 12 2022, Brisbane p 4
<<https://documents.parliament.qld.gov.au/com/CSSC-0A12/IDCPOHWR-FA50/Transcript%20-%20%2012%20July%202022%20-%20CSSC%20-%20Briefing%20-%20Inquiry%20into%20the%20decriminalisation%20of%20certain%20public%20offences%20and%20health%20and%20welfare%20responses.pdf>>

² QIFVLES Submission No.033 Inquiry into the decriminalisation of certain public offences and the health and welfare responses, Transcript of proceedings, p 2
<<https://documents.parliament.qld.gov.au/com/CSSC-0A12/IDCPOHWR-FA50/submissions/00000033.pdf>>

Dating back to the Royal Commission into Aboriginal Deaths in Custody there have been clear and consistent recommendations to government to abolish the offence of public drunkenness,³ ensure that intoxicated people are taken to appropriate facilities *not* police cells⁴ and that the repeal of these laws does not result in persons being charged with *other* offences in lieu of public drunkenness⁵ (i.e. that practices must substantively change, not in name alone). In order to ensure this happens, the Royal Commission is clear that the whole approach to public health must change and that will involve the Queensland Government adequately funding and supporting health and support services.⁶

Tragically, many of these same recommendations have been resubmitted in Victoria⁷ after the death of Aunty Tanya Day who died in custody after being arrested for public drunkenness when she fell asleep on a train.

Beyond this, it is our position that the offences of begging and urination in a public place should also be repealed. These offences are antiquated, their application is discriminatory and they have a perverse outcome of criminalising homelessness, poverty and disproportionately affecting Aboriginal and Torres Strait Islander peoples.

1.2. Begging

There is no public interest in maintaining the criminalisation of begging. Criminalising a behaviour directly caused by poverty, imposing financial penalties by way of fines and criminal sanctions only further impoverishes and criminalises people who were already struggling. This is a clear example of the way in which outdated and retrograde laws criminalise poverty and create an impossible feedback loop of poverty → begging → criminalisation and fines → inability to pay fine → poverty / further criminalisation. The failure to pay fines can lead to other sanctions such as the suspension of a drivers license which can further impede a person's ability to secure work, care for family members, find accommodation and can lead to further criminal sanctions and imprisonment.

As the Queensland Police articulated in their evidence on July 12 2022⁸ there is no evidence of any organised begging activity. Instances of begging are carried out by individuals who need

³ Royal Commission into Aboriginal Deaths in Custody (RCIADIC) 1987–1991 Recommendation 79

⁴ Ibid, Recommendation 85

⁵ Ibid, Recommendation 85

⁶ Ibid, Recommendation 80

⁷ Expert Reference Group on Decriminalizing Public Drunkenness, *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness, Report to the Victorian Attorney-General* (August 2020)

⁸ Public Briefing—Inquiry into the decriminalisation of certain public offences and the health and welfare responses, Transcript of proceedings, July 12 2022, Brisbane p 4

<<https://documents.parliament.qld.gov.au/com/CSSC-0A12/IDCPOHWR-FA50/Transcript%20->

money to survive. We submit the appropriate response to instances of begging is to provide supports and services for individuals who are clearly struggling. If there are particular 'hot spots' for these activities, the Queensland Government could consider opportunities to fund community-led programs to conduct specific outreach and support to these areas.

(We note, that were individuals to be engaged in behaviour that went beyond the description of 'begging' and was aggressive or intimidating, there are existing laws in place that address those behaviours.)

1.3. Urination in a public place

Urination in a public place is another example of an offence that is antiquated, out of step with community expectations and disproportionately impacts people who are homeless and impoverished. The Queensland Police provided evidence that "in 2021, 182 persons were charged with public urination. That equates to less than four people per week. During the same period, police issued 602 infringement notices for public urination, or about 12 per week."⁹ While the Police provided this information as an indication of low arrest and charge rates, in our view that is several hundred people issued with infringements or charged with offenses for engaging in an act that has no victim and does no public damage.

We would urge the Queensland Government to repeal this offence and look at other ways to respond to antisocial behaviour. In the first instance, ensuring there are adequate toilet and shower facilities for people to access, addressing homelessness and the provisions of shelters and amenities for people sleeping rough, and if required engaging community-controlled organisations to undertake appropriate outreach to assist people to utilise these facilities if made available.

2. A gaps and needs analysis of services should be undertaken to support a public health response

We strongly support the conclusion of the Victorian *Clear Light of Day Report* that:

"The current unsafe criminal justice-focused model of dealing with public intoxication must be replaced with an approach that comprises interventions designed to ensure the safety and wellbeing of individuals, as well as promoting access to appropriate services and supports to minimise the incidences of public intoxication in the first place."¹⁰

This shift in focus and resourcing can, and in our view - should - be extended beyond just public intoxication and to the full raft of behaviours driven by socio-economic, health and social factors

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⁹ Ibid.

¹⁰ Expert Reference Group on Decriminalizing Public Drunkenness, *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness, Report to the Victorian Attorney-General* (August 2020) Ch 6, page 39

that could be more appropriately dealt with through a public health response. To do this effectively, the Queensland Government will need to undertake a gaps and needs analysis, in partnership with the community sector who deliver these services, to identify where gaps and funding shortfalls exist and where community needs are not currently being met.

One clear example was highlighted by the Queensland Police in their evidence was the lack of safe places to take people if they are a risk to themselves or others due to intoxication. As they said, “in the absence of those sorts of services is that we are reverting to the watch house approach, which is an increased risk..”¹¹

A comprehensive assessment of what services are needed should be undertaken, including dedicated, standalone services for Aboriginal and Torres Strait Islander peoples. The expert advice for Aboriginal Legal Services and Family Violence Legal Prevention Services, amongst other relevant service delivery services and community controlled organisations, should be sought to accurately assess need. Meeting this need will be a crucial element of any health-based response that replaces these outdated laws.

3. Police should be replaced as first responders within a public health service delivery response

As is becoming increasingly recognised, police are not the best placed to be first responders in a range of circumstances - for example, the Royal Commission into Victoria’s Mental Health System last year recommended that health professionals, not police, be engaged in responding to mental health incidents wherever possible.¹²

The public offences captured by this inquiry intersect strongly with other social and health concerns such as mental illness, addiction, drug and alcohol dependency, homelessness and poverty. As socio-economic and health issues, it is our position that the police are not the appropriate first responders and should only be called upon in a very narrow set of circumstances where there is a real and immanent risk to a person.

There is no one-size fits all response (and indeed this is part of the problem with the current law enforcement model of First Responders) and there will necessarily be a graduated response needed. The Victorian Expert Reference Group report offers some possible ways forward with a graduated response that includes primary/universal interventions (that include early intervention, education and prevention); secondary early intervention for at-risk groups and to deescalate

¹¹Public Briefing—Inquiry into the decriminalisation of certain public offences and the health and welfare responses, Transcript of proceedings, July 12 2022, Brisbane p 7
<<https://documents.parliament.qld.gov.au/com/CSSC-0A12/IDCPOHWR-FA50/Transcript%20-%202012%20July%202022%20-%20CSSC%20-%20Briefing%20-%20Inquiry%20into%20the%20decriminalisation%20of%20certain%20public%20offences%20and%20health%20and%20welfare%20responses.pdf>>

¹² Royal Commission into Victoria’s Mental Health System (2021), *Final Report: Summary and Recommendations*, p46.

emerging issues, and tertiary interventions.¹³ It is our view that this is a useful starting point, but that any effective model will need to be place-based and driven by community consultation and co-design.

Local communities hold the most up to date and accurate information about the challenges they face, and the services and solutions that they would find most useful. Given the disproportionate impact of the current laws on First Nations peoples, it is crucial that any alternative model be “culturally competent and trauma informed” as well as being “led by Aboriginal and Torres Strait Islander peoples.”¹⁴ We strongly endorse Recommendation 3 contained within the submission made by QIFVLES to this Inquiry.

4. No protective custody regimes

If the Queensland Government agrees to repeal the offences identified by this Inquiry, it is our position that it is essential that this positive step not be undermined by the introduction of “protective custody” powers that continue to allow for the detention of intoxicated people in police cells pursuant to a civil rather than criminal regime.

Evidence from other jurisdictions where public intoxication has been decriminalised clearly shows that intoxicated people - and disproportionately Aboriginal and Torres Strait Islander peoples - are still being locked up in police cells under other protective custody regimes.¹⁵ Devastatingly, this continues to result in Aboriginal deaths in custody. In 2016 Wiradjuri woman Rebecca Lyn Maher died at Maitland police station while being detained in protective custody. The Coroner in this case found that Ms Maher’s death could have been prevented if Ms Maher had been given appropriate health care and an ambulance had been called, instead of her being detained in the police watchhouse.¹⁶

The repealing of the relevant offences should be undertaken with the commitment to replace a law-enforcement response model with a public health response. Transitioning away from the current criminal response to a best practice, health-based approach will save lives and reduce deaths in custody. There must be no attempt to introduce other law enforcement mechanisms to replace the repealed offences that simply maintain the primacy police and law enforcement as first responders just under another name.

¹³ Expert Reference Group on Decriminalizing Public Drunkenness, *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness, Report to the Victorian Attorney-General* (August 2020) Ch 6, page 39

¹⁴ QIFVLES Submission No.033 Inquiry into the decriminalisation of certain public offences and the health and welfare responses, Transcript of proceedings, p 1
<<https://documents.parliament.qld.gov.au/com/CSSC-0A12/IDCPOHWR-FA50/submissions/00000033.pdf>>

¹⁵ Expert Reference Group on Decriminalizing Public Drunkenness, *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness, Report to the Victorian Attorney-General* (August 2020) p 34

¹⁶ ‘Rebecca Maher Inquest: Death in Custody could have been Prevented if Police called Ambulance’ *The Guardian*, 5 July 2019 <<https://www.theguardian.com/australia-news/2019/jul/05/rebecca-maher-inquest-death-in-custody-could-have-been-prevented-if-police-called-ambulance>>

5. The role of police as First Responders should be constrained and clearly regulated

It is our position that the police are not the appropriate First Responders for the types of health, substance use, socio-economic and social issues captured within the terms of reference of this inquiry. We strongly recommend that the Queensland Government invest in a holistic health-based response that prioritises local, community-based organisations and health professionals as First Responders.

If police must have powers to intervene, they must be strictly limited and subject to robust and appropriate legislative safeguards to effectively ensure they are “last-resort responders”. This is integral to the success of the reforms, with the evidence clear that once police become involved in an incident, there is always a significant risk of escalation and up-charging. We endorse the recommendations of given by the Victorian Aboriginal Legal Service to the Parliamentary Inquiry on Victoria’s Criminal Justice System, namely:¹⁷

- *No one should be detained in a police cell or police station because they are intoxicated in public. This must be explicitly prohibited in legislation;*
- *Police should not have a legislated power to detain an intoxicated individual while they make enquiries to locate a safe place for that individual;*
- *Any power given to police to detain an intoxicated individual for the purposes of transporting them to a safe place must only be available as a last resort and must be strictly limited. As recommended by the ERG, the power should only be exercised if the following threshold is met:*
 - (1) *there is a “serious and imminent risk of significant harm to the individual or other individuals”;* and
 - (2) *the police officer has exhausted all other avenues by which an intoxicated person could be transported to a safe place;*
- *With respect to transportation, the involvement of police should be limited to where the threshold of “serious and imminent risk of significant harm to the individual or other individuals” is met and all other avenues for transport have been exhausted, in the spirit of a public health response.*

Recognising the extraordinary powers of police and the particular vulnerability of the individuals who may be subjected to police powers, it is crucial that there is clear oversight, reporting and review on how and when police use powers as ‘First Responders’ in these circumstances. There must also be clear and accessible complaints mechanisms available to individuals who believe their rights have been breached by police in these circumstances.

Conclusion

¹⁷ Victorian Aboriginal Legal Service, Submission 239 to the Inquiry into Victoria’s Criminal Justice System, 18 September 2021

<https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System/Submissions/139_VALS_Eastern_Australian_Aboriginal_Justice_Services_Ltd_Redacted.pdf#page=99>

Change the Record supports the repeal of the three identified offences, and strongly encourages the Queensland Government to work with the Queensland Aboriginal Legal Services, Queensland Family Violence Prevention Legal services and other community controlled and health services to develop a public health approach to what can be properly characterised as health, addiction, socio-economic and social issues.

We note that for these reforms to benefit the community, the Queensland Government will need to adequately fund and resource the services and supports required to meet unmet community need.

We end this brief submission with the words of Tanya Day's family who observed that "if the Victorian Government had done what the Royal Commission into Aboriginal Deaths in custody recommended 30 years ago and abolished the offence of public drunkenness, our mum would still be alive today". They go on to state that the decision to decriminalise public intoxication is just the beginning, and that "this country has so much further to travel. For as long as Aboriginal and/or Torres Strait Islander people are targeted by police, are locked up and mistreated, and continue to die in police custody, the fight for true and complete justice for our people will be ongoing".¹⁸

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¹⁸ 'Tanya Day Inquest, Coroner recommends Victoria police officers be referred to DPP' *NITV* 9 April 2020 <<https://www.sbs.com.au/nitv/article/2020/04/09/tanya-day-inquest-coroner-recommends-victoria-police-officers-be-referred-dpp>>