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VALS article submitted to the Indigenous Law Bulletin titled ‘The Survival of Public Drunkenness Laws in Victoria’

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Introduction

The 1991 *Royal Commission into Aboriginal Deaths in Custody* National Report¹ recommended the decriminalisation of public drunkenness.² Ten years later, the Victorian Parliamentary Drugs and Crime Prevention Committee also recommended decriminalisation³ in its report of inquiry into public drunkenness.⁴ More recently again, this same committee has released another report of inquiry – *Strategies to Reduce Harmful Alcohol Consumption*⁵ – which again recommends the decriminalisation of public drunkenness, subject to the provision of appropriate services, such as sobering-up centres. The Victorian Aboriginal Legal Service Co-operative Limited (‘VALS’) argues that the Victorian Government should take notice of these recommendations and reform the law so that it is no longer a crime to be drunk in a public place.

VALS believes that one of the strongest reasons for the decriminalisation of public drunkenness relates to the negative experiences of Indigenous Australians on this issue. The effect of criminalising being drunk in public is evidenced by scenarios set out in this article portraying over-policing; the lack of holistic 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. VALS is critical of the way in which Victoria lags behind other jurisdictions that have already decriminalised public drunkenness. It is essential that decriminalisation take place in order to appropriately address public drunkenness as a public health rather than a criminal issue.

A Background to Public Drunkenness as an Offence

To date, most states and territories have decriminalised public drunkenness to some degree. New South Wales passed legislation in 1979⁶ to achieve this and have legislated subsequently to further amend their approach to this issue.⁷ In South Australia and the Australian Capital Territory, detention of intoxicated persons is only allowed as a last resort and in specified circumstances.⁸ Public drunkenness need not be dealt with as a legal problem but can, and arguably should, be dealt with as a public health, medical or social welfare problem, as most jurisdictions in Australia have demonstrated. Victoria is the only State not to have legislated to amend its approach to public drunkenness.

Public Drunkenness in Victoria

Over the past couple of decades, discussion around decriminalising public drunkenness in Victoria has become a regular feature on the Parliamentary calendar. Major reviews occurred in 1989-90,⁹ 2001,¹⁰ 2005¹¹ and 2006.¹²

Sixteen years ago, Desmond Lane, writing for the *Aboriginal Law Bulletin*¹³ set out the arguments for decriminalising public drunkenness:¹⁴

- Decriminalisation would reduce the rate of people being locked up in police cells;
- Decriminalisation would reduce the risk of deaths in custody;
- '[I]t is accepted that criminalisation does not operate as a deterrent against acts of further public drunkenness'.¹⁵

Lane's article noted that the Liberal and National Party Opposition rejected decriminalisation, in part due to concerns that there would be inadequate provision of sobering-up centres for Indigenous and non-Indigenous people in Victoria.¹⁶

Policing Public Drunkenness

Public drunkenness law and the way it is policed puts Indigenous Australians at a disadvantage. Below are some VALS' case studies which are illustrative of the problem of public drunkenness law.

Over-policing

- *A man was released from a police cell after being arrested for public drunkenness. He was then arrested for public drunkenness again whilst on his way home.*
- *Police were called to a neighbourhood dispute and used capsicum spray on an Indigenous man. Whilst showering in his home to remove the capsicum spray, he had an asthma attack. He called out from the window of the house to police officers at the front of the house that he needed an ambulance. They told him that an ambulance had been called and to stay put. The man went out to the front of his house and was tackled to the ground and arrested for public drunkenness.*
- *A man had an argument with his brother, sat outside the front of his house to cool off and was arrested for public drunkenness. His feet were in the gutter and his bottom was on his own property.*

A gateway to further charges and entrenchment in the criminal justice system

- *An Indigenous Australian is arrested for public drunkenness and placed on bail on his own undertaking. He fails to attend court and is charged with breaching bail. A warrant is issued for his arrest.*
- *A man is outside a pub after drinking there and is arrested. The police arrest him for public drunkenness and he challenges his arrest. He is also charged with resist arrest and assault police.*

The policing of public drunkenness law can lead to additional charges at the point of arrest. Arrest for public drunkenness can often be the trigger for discussion with the police about the merits of the

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charge. This leads to further charges being made. Some charges that Indigenous Australians tend to receive in combination with being drunk in a public place are: use threatening words, offensive language, indecent language, resist arrest, assault police or criminal damage. Public drunkenness, in combination with two other charges, is known within the Koorie community as the 'trifecta' or 'ham, cheese and tomato'.

Lack of holistic facilities

An Indigenous Australian was continually being picked up for public drunkenness and criminal damage offences. The police applied the Alcoholics and Drug-Dependent Persons Act (Vic) 1968 in order to gain access to assessment for rehabilitation services for him. Even though the individual was assessed as eligible for rehabilitation, there was nowhere for him to go. He subsequently spent a total of six weeks in police cells.

Barriers to decriminalisation

Concerns regarding the adequate provision of sobering-up centres have previously prevented decriminalisation of public drunkenness in Victoria.¹⁷ In fact, many recommendations have stated specifically that decriminalisation should be subject to the provision of appropriate services.¹⁸

In 1991, the Public Drunkenness (Decriminalisation) Bill 1990 (Vic) failed in the Legislative Council. In criminologist Sarah James' review of the rejection, she found that opposition could be traced to a lack of consultation over the Bill, a subsequent lack of council debate, and what was seen to be a conflict of interest between abolishing the offence and the existence of local laws to deal with public drinking.¹⁹

Over the last eight years, the Victorian Government has developed two Victorian Aboriginal Justice Agreements²⁰ which focus largely on the criminal justice system and have included funding for many initiatives. In addition, a review of the Implementation of the Recommendations of the *Royal Commission into Aboriginal Deaths in Custody*, published in 2005, called for the decriminalisation of public drunkenness.²¹ Yet the issue of public drunkenness continues to escape the attention of State Government.

VALS argues that public drunkenness should be viewed primarily in the context of public health – as a social and medical issue – rather than as a criminal offence. The offence of public drunkenness is one which disproportionately affects Indigenous Australians.²² For a range of reasons Indigenous Australians use public space as 'cultural space' more often than do non-Indigenous Australians. Additionally, homelessness and low income levels both contribute to Indigenous Australians being highly visible to police. Physical presence in public spaces as a precursor to arrest is supported by the figures which show that public drunkenness arrests do not correlate with drinking trends. In the National Aboriginal and Torres Strait Islander Health Survey of 2004-05, 15 per cent of Indigenous Australians reported drinking at risky or high risk levels, compared with 14 per cent of non-Indigenous Australians.²³

Public Drunkenness – Moving Forward

VALS argues that, in light of the ineffectiveness of the law relating to public drunkenness, and the potential for abuse of the law, the offence of being intoxicated in a public place should be abolished in Victoria. There are two streams of argument against decriminalisation. One is the long running position that abolition of public drunkenness law can only happen once there are enough sobering-up-
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up centres available. The other is that, in the interests of community safety, police and local councils need every weapon available to them, including bans on public drinking, and ‘move on’ laws.

Yet the failure to properly provide alternatives to criminal charges for being drunk in public seems to be used to distract attention from the unproductive exercise of arresting people who are leaving pubs, walking home from pubs, or walking from a taxi to their front door. There is no benefit, no value adding, resulting from police maintaining this sort of operation. Decriminalisation of public drunkenness will underline the importance of police dealing with public drunkenness as a safety and social welfare issue and consequently result in them using the least restrictive option in dealing with people.

According to Ombudsman Victoria and the Office of Police Integrity, ‘Victoria is the only State in Australia where being drunk in a public place is of itself a criminal offence and where police do not have access to designated places of safety for holding drunks.’²⁴

In their report on custody, both offices advocated no longer treating public drunkenness as a legal problem and instead treating it as a public health, medical or social problem:

Intoxicated persons are a danger to themselves and to others and accommodating them in unsuitable police cells, rather than taking them to health care facilities and sobering up centres with properly trained staff, puts them and their jailers at risk.²⁵

In NSW, treating public drunkenness as a public health issues means using arrest as a last resort. Police are also required to:

Provide immediate assistance to ensure Aboriginal people are put in contact with the support structures available, to enable them to regain well being and physical wholeness.²⁶

Conclusion

Despite the existence of a multitude of reports that have each recommended the decriminalisation of public drunkenness, these recommendations have fallen on deaf ears. Where they have been listened to, attempts at implementation have been thwarted by lack of debate and comprehension of the issues related to public drunkenness. After decades of inaction, decriminalisation of public drunkenness is again on the cards following Attorney-General Rob Hulls’ confirmation that it remains on the Government’s agenda.²⁷ VALS will continue to advocate for the decriminalisation of public drunkenness and reiterate its call for perception of the issue to be moved out of the criminal and into the public health sphere. Until this happens, Victoria will continue to lag behind other jurisdictions in its treatment of this important issue.

Frank Guivarra is the Chief Executive Officer of the Victorian Aboriginal Legal Service Co-operative Limited.

¹ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody National Report* (1991).

² Ibid, recommendations 79-87.

³ *Summary Offences Act 1966*(Vic) ss13, 14 and 16.

⁴ Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into Public Drunkenness* (2001), <http://www.parliament.vic.gov.au/dpc/Reports%20in%20PDF/Drunkenness_final_report.pdf> at 25 March 2008.

⁵ Drugs and Crime Prevention Committee, *Inquiry into Strategies to Reduce Harmful Alcohol Consumption* (2006), <http://www.parliament.vic.gov.au/dpc/Previous_Inquiries/alcoholharmreduction/DCPC-Report_Alcohol_Vol1_2006-03.pdf> at 25 March 2008.

⁶ *Intoxicated Persons Act 1979* (NSW).

⁷ The *Intoxicated Persons Act 2000* (NSW) made amendments to the earlier Act with a greater emphasis on health and welfare. Priority is to place the intoxicated person into the care of a *responsible person* and only when such a person cannot be identified may the intoxicated person be held in police custody. The definition of 'intoxication' was also amended in 2000 to take into account intoxication by drugs or drugs and alcohol.

⁸ *Public Intoxication Act 1984* (SA) and *Intoxicated Persons (Care and Protection) Act 1994* (ACT) respectively.

⁹ Victorian Law Reform Commission, *Public Drunkenness* (Report No 25, 1989); Victorian Law Reform Commission, *Public Drunkenness* (Supplementary Report No 32, 1990).

¹⁰ Drugs and Crime Prevention Committee above n 5.

¹¹ Implementation Review Team, 'Victorian Implementation Review of the Recommendations from the *Royal Commission Into Aboriginal Deaths in Custody: Review Report*' (2005).

¹² Drugs and Crime Prevention Committee, above n 6.

¹³ The *Aboriginal Law Bulletin* was published from 1981 through to 1997, when it was renamed the *Indigenous Law Bulletin*.

¹⁴ Desmond Lane, 'Public Drunkenness in Victoria', (1991) 2(51) *Aboriginal Law Bulletin* 21, 21.

¹⁵ *Ibid*, citing Parliamentary Debate (Victoria), Legislative Assembly, 30 November 1990, 2911 (The Hon Tom Roper MP).

¹⁶ *Ibid*.

¹⁷ Drugs and Crime Prevention Committee, above n 5.

¹⁸ See, for eg, Drugs and Crime Prevention Committee, above n 5, xi.

¹⁹ Sarah James (1992) cited in Drugs and Crime Prevention Committee, above n 5, 30.

²⁰ State Government of Victoria, *Victorian Aboriginal Justice Agreement 2000: Phase 1* (2000); State Government of Victoria, *Victorian Aboriginal Justice Agreement 2000: Phase 2* (2006).

²¹ Implementation Review Team, 'Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody – Review Report' (2005), Recommendations 54-58.

²² While the 2006 report of the Drugs and Crime Prevention Committee (above n 6) does not provide statistics on arrest, the 2001 report (above n 5) notes research by Gardiner and Mackay which found that 23.6 per cent of Aboriginal arrests in 1995-6 were for public drunkenness. In regard to the processing of such charges, Gardiner and Mackay found an increase of 42 per cent on the previous year: Drugs and Crime Prevention Committee, above n 5, 64.

²³ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Health Survey 2004-2005* (2006).

²⁴ Ombudsman Victoria and the Office of Police Integrity, *Conditions for Persons in Custody* (2006) 18, <http://www.opi.vic.gov.au/resources/documents/Conditions_for_persons_in_custody.pdf> at 21 May 2008.

²⁵ *Ibid*.

²⁶ Drugs and Crime Prevention Committee, above n 5, 111, citing an agreed protocol between the NSW Department of Community Services, NSW Police Force and NSW Health for the treatment of homeless persons affected by alcohol and/or other drugs.

²⁷ 'Public drunkenness, while ugly, should not be a crime', *The Age* (Melbourne), 3 May 2007, <http://www.tertiary.theage.com.au/bmentry_view.asp?intid=43> at 21 May 2008.