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Office of the President

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Our ref: LP-MC

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

**By email**: [redacted]

Dear Committee Secretary

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

Thank you for the opportunity to provide a submission to the *Inquiry into the Decriminalisation of Certain Public Offences, and Health and Welfare Responses* (**Inquiry**). The Queensland Law Society (**QLS**) appreciates being consulted on this important inquiry.

This response has been compiled by the QLS Criminal Law Committee, Children's Law Committee and the Human Rights and Public Law Committee, whose members have substantial expertise in this area.

**Key recommendations**

1. The Queensland Government should engage a suitable body to undertake a detailed review of all public order offences and their impact on marginalised groups, with a view to setting out the process for decriminalisation and an appropriate health and social welfare-based service delivery model. This review should be undertaken on an urgent basis but should not delay the decriminalisation of the offences considered in this Inquiry.
2. This review should consider risk that decriminalisation of certain public order offences will result in the increased use of public nuisance offences and move-on powers, and should propose amendments to those offences and powers to mitigate that risk. Specific amendments are discussed at page 10.
3. The review should also make recommendations in relation to police discretion and the educational tools that will be required to effect significant cultural change in law enforcement agencies.
4. The Queensland Government should consider expanding the Inquiry's scope and including in the review the decriminalisation of drug use and possession, with a view to reinvesting funds and resources spent on enforcement of drug use and possession offences to a more appropriate health and social welfare-based response framework.

## Executive summary

The Society welcomes the Inquiry and supports the changes flagged in the Inquiry's terms of reference, which suitably acknowledge that a punitive, criminal justice response to public order offences is not an appropriate means to achieve community safety. The Society supports a genuine, health-centred approach to these issues, recognising that people who are charged with street offences may be experiencing complex health and welfare challenges that contribute to their behaviour.

In our view, there is a clear, compelling and urgent imperative to overhaul Queensland's approach to people who are charged with public order offences. Such offences disproportionately affect marginalised groups, including: Aboriginal and Torres Strait Islander Peoples'; people experiencing homelessness; young people; and, people suffering from cognitive, behavioural or psychological impairment. The current law enforcement approach is unsafe, unnecessary and inconsistent with contemporary community standards, where a safer, sensible health and social welfare-based service delivery response is required. We consider such a response would not only reduce unnecessary contact with the criminal justice system for Queensland's vulnerable cohorts, but would result in significant and long-lasting efficiencies and economic savings in the criminal justice system more broadly.

While we support the current Inquiry's terms of reference, we have significant reservations about the exercise of police discretion in public nuisance offences and move-on powers. Specifically, we are concerned that decriminalisation of public intoxication, public urination and begging may lead to an increased use of public nuisance offences (and move-on powers), which have a higher maximum penalty and sentence. We respectfully submit that any inquiry into decriminalisation of certain public offences through a health and social welfare-based model must also consider amendments to the offence of public nuisance and police move-on powers.

Similarly, shifting away from a law enforcement approach to behaviours such as public intoxication, public urination, begging, offensive language etc., will not be effective unless coupled with a significant cultural shift within law enforcement agencies and continuing education as to the appropriate use of police powers and discretion.

Accordingly, our overarching recommendation is that the Queensland Government engage a suitable body to undertake a detailed review of all public order offences and associated police move-on powers, and their impact on marginalised groups, with a view to setting out the process for decriminalisation and an appropriate health and social welfare-based service delivery model.[1] As to the appropriate body for such a review, we recommend the Productivity Commission, an independent consulting firm or expert university group.

Replacing the current law enforcement approach to public order offences with a health-centred response model will increase efficiencies in the criminal justice system, including by freeing up police resources to deal with more serious incidents and reduce the burden on courts and corrective services. A health-centred approach will also promote and enhance the rights enshrined in the *Human Rights Act 2019* (Qld) (**HR Act**).

[1] This review would provide a similar level of detail to that set out in the report, 'Seeing the Clear Light of Day', delivered to the Victorian Attorney-General by the Expert Reference Group on Decriminalising Public Drunkenness in August 2020.

We also take this opportunity to urge the Queensland Government to consider expanding the Inquiry's scope to include decriminalisation of drug use and possession. Drug and alcohol abuse are both health problems and should be treated in a health context. The current law enforcement model that criminalises drug use and possession has proven ineffective in Queensland, and continues to place a significant cost and resource burden on our criminal justice system. Drug enforcement activity in Queensland is estimated to cost $500 million per year, with $222 million of this spent on enforcement of drug possession offences.[2] In our view, these funds would be better reinvested into an appropriate health and social welfare-based response to drug use and possession, which would better address the underlying factors contributing to drug use.

**Public order offences disproportionately affect marginalised groups**

Public order offences (also known as street offences) comprise a variety of behaviours that are considered to be contrary to reasonable standards of public behaviour. The *Summary Offences Act 2005* (Qld) (**Summary Offences Act**) makes it an offence to:

- be a public nuisance by behaving in a disorderly, offensive, threatening or violent way;[3]
- urinate in a public place;[4]
- beg in a public place;[5]
- wilfully expose oneself;[6] and,
- be intoxicated in a public place.[7]

The public nuisance offence came into effect in April 2004 and replaced a number of offences found previously under the *Vagrants, Gaming and Other Offences Act 1931* (Qld). Public nuisance acts as a "catch-all" offence of creating a public nuisance, which includes offensive behaviour and obscene language. Section 6(3)(a), for example, provides that 'a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language'.[8] Importantly, the introduction of this offence resulted in a 'dramatic increase in the number of prosecutions for unacceptable language and behaviour', where the kinds of behaviour that form the basis for such charges have been described as 'extremely trivial'.[9]

These offences, and their selective enforcement by police, disproportionately target vulnerable members of our community; in particular: Aboriginal and Torres Strait Islander Peoples'; people experiencing homelessness; people suffering from cognitive, behavioural or psychological impairment; and, young people. Often, people charged with public order offences will suffer from a combination of these disadvantages, increasing their chances of coming into contact with the criminal justice system.

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[2] See below at p 12.
[3] *Summary Offences Act 2005* (Qld) s 6.
[4] Ibid s 7.
[5] Ibid s 8.
[6] Ibid s 9.
[7] Ibid s 10.
[8] Ibid s 6(3)(a).
[9] Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123, 124.

Aboriginal and Torres Strait Islander Peoples'

Aboriginal and Torres Strait Islander Peoples' continue to be significantly over-incarcerated in the criminal justice system.[10] This over-incarceration is due, at least in part, to the disproportionate effect that all public order offences have on Aboriginal and Torres Strait Islander Peoples'.

The Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommended the decriminalisation of certain public order offences, such as public intoxication, and establishment of 'adequately funded programs to establish and maintain non-custodial facilities for the care and treatment of intoxicated persons.'[11] The RCIADIC's recommendations sought to reduce the disproportionate and adverse impacts of criminalising public intoxication by diverting Aboriginal and Torres Strait Islander Peoples' from custody. A number of other inquiries and reviews have since also recommended that public intoxication be decriminalised, emphasising the need for appropriate health and welfare responses which prioritise the care and treatment of intoxicated individuals.[12] More recently, the Women's Safety and Justice Taskforce also recommended the offences of public intoxication and begging be immediately repealed, given their disproportionate adverse impact on vulnerable cohorts and the progress of legislation in other jurisdictions.[13]

Consistent across these inquiries and reviews is the observation that public order laws have been selectively and unevenly enforced, with a disproportionate number of Indigenous people arrested for behaviour that is generally not seen as criminal when engaged in by non-Indigenous people. For example, since 1989-90, nearly one-quarter (24%) of Indigenous people who died in police custody Australia-wide have been suspected of committing a public order offence, such as public intoxication, disorderly conduct or unpaid fines.[14] In contrast, over the same time period, reports show that non-Indigenous people who have died in custody have most commonly been suspected of committing a violent offence (38%).[15]

This over-incarceration, in all charges for public order offences, is evident in the 2021-22 statistics provided by the Queensland Police Service (**QPS**) in their response to questions on notice from the present Inquiry, where:

- out of 209 charges for urinating in a public place, 97 of those (comprising 53 per cent) were brought against persons identifying as Indigenous;

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[10] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, ALRC Report 133, December 2017) 21.
[11] Royal Commission into Aboriginal Deaths in Custody (Final Report, April 1991) rec 80.
[12] Expert Reference Group on Decriminalising Public Drunkenness, *Seeing the Clear Light of Day – Report to the Victorian Attorney-General* (August 2020); Independent Broad-based Anti-corruption Commission, *Operation Ross: An investigation into police conduct in the Ballarat Police Service Area* (November 2016); C S Reynolds, *Review of South Australia's Public Intoxication Act 1984* (December 2012); Drugs and Crime Prevention Committee, *Inquiry into Strategies to Reduce Harmful Alcohol Consumption* (Final Report, Volume 1, March 2006); Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (Review Report, Volume 1, October 2005); Drugs and Crime Prevention Committee, *Inquiry into Public Drunkenness* (Final Report, June 2001); Western Australian Law Reform Commission, *Project No 85 – Police Act Offences* (August, 1992).
[13] Women's Safety and Justice Taskforce, *Hear Her Voice* (Report Two, Volume Two, 2022) 474.
[14] Laura Doherty and Samantha Bricknell, *Deaths in custody in Australia 2018-19* (Australian Institute of Criminology, Statistical Report 31, 2020) 15.
[15] Ibid.

- out of 53 charges for begging in a public place, 23 of those (comprising 56 per cent) were brought against persons identifying as Indigenous; and,
- out of 1,299 charges for being intoxicated in a public place, 618 of those (comprising 52 per cent) were brought against persons identifying as Indigenous.[16]

As regards the broader public nuisance offence, the Queensland Sentencing Advisory Council (**QSAC**) reports that, from 2005 to 2019, public nuisance was the most common offence for Aboriginal and Torres Strait Islander Peoples' (63,888 charges), who constituted 31.9 per cent of all people charged with public nuisance.[17] This is despite Indigenous people accounting for only 4% of Queensland's population.[18] The ability to charge people with offensive language under public nuisance laws and subsequent infringement notices for such conduct continue to be an issue for Aboriginal and Torres Strait Islander Peoples'.[19]

There are various reasons why Aboriginal and Torres Strait Islander Peoples' are more likely to be charged with public order offences. Cultural and structural factors lead to frequently being present in or gathering together in public spaces, these groups are also frequently searched and charged by police for possession or consumption of alcohol and other (low level) offences.[20] Further, the presence or intervention of police officers, sometimes for entirely unrelated reasons, can be provocation enough for the expression of some form of resistance or insult by Aboriginal and Torres Strait Islander Peoples'.[21]

Members of our Criminal Law Committee also report the issue of ticketing of street offences by QPS continues to be a significant issue for Aboriginal and Torres Strait Islander Peoples' and other marginalised group. By virtue of the ticketing process, these groups do not automatically have a process (i.e. a court process) which leads them to receive legal advice. Our members report numerous instances where QPS officers have used a CPN ticket to deal with a situation which may have involved misuse of powers by officers and/or excessive use of force. The ticketing process avoids any judicial or legal scrutiny of these actions, while also somewhat insulating them from complaints because of de-facto acceptance of the misconduct by the person ticketed.

Criminal charges for public order offences become a barrier to eligibility for the grant of a "Working with Children" card (**Blue Card**). This affects the ability of Aboriginal and Torres Strait Islander Peoples' to look after children from their own communities in out of home placements. Aboriginal and Torres Strait Islander children are placed in out of home care at 11 times the rate of non-Indigenous children,[22] and only 42 per cent of Indigenous children in out of home care are placed with community carers.[23] Lack of access to a Blue Card, driven by high rates of

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[16] Queensland Police Service, *Response to questions taken on notice* (1 August 2022) 5.
[17] Queensland Sentencing Advisory Council, *Connecting the dots: The sentencing of Aboriginal and Torres Strait Islander peoples in Queensland* (Sentencing Profile, March 2021) 22.
[18] Queensland Government, *Aboriginal and Torres Strait Islander peoples in Queensland, Census 2016* (2017) <https://www.qgso.qld.gov.au/issues/2796/aboriginal-torres-strait-islander-peoples-qld-census-2016.pdf>.
[19] Australian Law Reform Commission (n 10) 422 [12.167].
[20] Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (Report, May, 2008) (*Policing Public Order*) 21.
[21] Paula Morreau, 'Policing Public Nuisance: The Legacy of Recent Events on Palm Island' (2007) 6(28) *Indigenous Law Bulletin* 9.
[22] Australian Institute of Health and Welfare, Australian Government, 'Rate of children in out-of-home care remains stable' (Media Release, 18 May 2021).
[23] Family Matters, 'Aboriginal and Torres Strait Islander Children' (Snapshot, 2021) <https://www.familymatters.org.au/wp-content/uploads/2021/12/FamilyMattersSnapshot2021.pdf>.

criminal charging for public order offences, perpetuate patterns of disconnection with family, community and culture. In populations where poverty and homelessness are endemic, criminalisation impacts people's ability to find and retain employment and affordable housing, and can exacerbate problems related to domestic and family violence.

Homeless people

Homeless people, in particular visibly homeless people, are also 'subjected to high levels of surveillance and policing'.[24] Walsh highlights that people sleeping rough 'are exposed to high levels of policing because they live their lives outdoors, and they engage in behaviours that most people have the "luxury" of carrying out in the privacy of their own homes'.[25] Homeless people and people sleeping rough, by their very definition, occupy public spaces on account of their disadvantage, and necessarily 'conduct certain behaviours (such as urinating, defecating, drinking alcohol and socialising) in public which the majority of the population prefer to conduct in the privacy of their homes. ... [R]esearch demonstrate[s] that, in many cases, homeless people are charged for behaviour that should not reasonably be considered 'offensive'.[26]

For example, treating begging as a criminal offence is ineffective as a deterrent, is discriminatory, and fails to address the underlying causes of begging.[27] Hughes observes: 'Using the criminal justice system to punish those who beg is an ineffective and inappropriate solution. It fails to address individual needs linked to begging, such as homelessness, poverty, unemployment, mental illness and substance dependency. In fact, the imposition of criminal penalties... is likely to further entrench disadvantage.'[28]

Often, the fact that a person is experiencing homelessness will not be given sufficient weight by law enforcement officers when deciding whether to charge a person with a public order offence:

> Unfortunately, contextual factors that explain a person's behaviour, such as poverty and homelessness, are often considered legally 'irrelevant' to the question of criminal responsibility, and are generally invisible to, or marginalised throughout, the law enforcement process. Justice is not served, and unnecessary costs are incurred by governments, when society uses the criminal law to punish non-compliance with middle-class social norms, especially where this is directly related to social and economic disadvantage (such as begging and sleeping rough).[29]

Reports suggest that people experiencing homelessness are also 'targeted and harassed' by police and other law enforcement officials (for example, by transport officials for fare evasion).[30] This occurs across most Australian jurisdictions, where research suggests the Australian Capital Territory (**ACT**) is the only jurisdiction in which policing of homeless people appears oriented 'towards support and assistance rather than surveillance, control and punitive

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[24] L McNamara, J Quilter, T Walsh and T Anthony, '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, 112.
[25] Ibid 114.
[26] Tamara Walsh, *No Offence: The Enforcement of Offensive Language and Behaviour Offences in Queensland* (Report, April 2006) 18.
[27] Paula Hughes, 'The crime of begging: Punishing poverty in Australia' (2017) 30(5) *Parity* 32; Pillip Lynch, 'Understanding and Responding to Begging' (2005) 29(2) *Melbourne University Law Review* 518; Tamara Walsh, 'Defending Begging Offenders' (2004) 4(1) *Law and Justice Journal* 58; Pillip Lynch, 'Begging For Change: Homelessness and The Law' (2002) 26(3) *Melbourne University Law Review* 690.
[28] Hughes (n 27) 33.
[29] Tamara Walsh, Luke McNamara, Julia Quilter and Thalia Anthony, 'National Study on the Criminalisation of Homelessness and Poverty' (2019) 32(4) *Parity* 25.
[30] McNamara, Quilter, Walsh and Anthony (n 24) 115.

enforcement'.[31] The following comments on the ACT police response from legal practitioner interviewees illustrate the different policing approach in that jurisdiction:

> It seems like the ACT police have a fairly good reputation when it comes to dealing with people who are homeless. ... It was more the police checking to make sure that they were okay and they had access to other services, and giving them contact details...
>
> That was something that a client of mine said yesterday, as well. He'd been disturbed by the police in the park, and he's come down here from Queensland, so he was surprised when they were just checking if he was all right, rather than ... because he's just come from a situation where he was arrested and assaulted by police, just for no reason that he could decipher. But here they seem to have left him alone.[32]

Young people

Importantly, the number of young people charged for being 'offensive' has increased dramatically since the offence of public nuisance was introduced. Walsh reports, in an earlier study, that as many as 60% of public nuisance defendants coming before the Brisbane Magistrates Court are aged 25 years or under.[33] Young people frequently occupy public spaces on account of their own lack of private space and a desire to express themselves more freely without oversight by adults, such as parents and teachers.[34] Public spaces may also provide a haven for marginalised young people, who are escaping abuse or family and domestic violence. While engaging in 'identity formation and boundary testing', young people may be more likely to engage in "offensive" behaviour in public.[35] The criminalisation of young people through charges for public order offences can have significant long-term impacts on a young person's life.

People suffering from cognitive, behavioural or psychological impairment

Public order offences also target people suffering from cognitive, behavioural or psychological impairment. The following case examples highlight the inappropriateness of criminalising people with mental illness: 'One defendant was charged with public nuisance for acting 'abusively' towards police and hospital staff after taking an overdose of his anti-psychotic medication. Another had been behaving 'violently' in a mall while suffering from hallucinations; he was under the belief that he was being chased by motorcycle gangs. Yet another was charged with public nuisance for attempting to commit suicide outside an Ozcare office.'[36]

The decriminalisation of certain public order offences, such as public intoxication, public urination and begging, have the potential to reduce contact between police and these marginalised communities. We acknowledge, however, that decriminalising public intoxication, public urination and begging will not resolve the disproportionate contact these groups have with the criminal justice system, nor will it resolve the over-incarceration of Aboriginal and Torres Strait Islander Peoples' in the criminal justice system. Nevertheless, we consider these types of

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[31] Ibid 118.
[32] Ibid.
[33] Tamara Walsh, *No Offence: The Enforcement of Offensive Language and Behaviour Offences in Queensland* (Report, April 2006) 20.
[34] Ibid.
[35] Ibid.
[36] Ibid 21.

offences contribute substantially to the problem, and reform in this area represents an essential first step.

### Public order policing and discretion

It is well-established that public order offences act as "gateway" offences to the criminal justice system.[37] That is, further and more serious charges (for example, resist arrest, obstruct or assault police, or failure to follow a police direction) are laid as a result of an interaction between police and a person for fairly trivial behaviour. One member of the Queensland Sentencing Advisory Council observes this phenomenon in relation to public nuisance offences and their impact on Aboriginal and Torres Strait Islander Peoples':

> I think that when you look at some of the themes coming out, is that a lot of the charges and a lot of the sentencing stuff all starts with public nuisance, it goes to resisting arrest, obstructing police and then assault of a police officer. And many individuals won't view different things as assault – just grabbing them and that sort of stuff, but you know, as legislation says, it is assault, and so before individuals know it they've got five or six charges against their name just from public nuisance.[38]

Reducing unnecessary interactions between police and marginalised groups for this type of behaviour may reduce the likelihood of these groups being subjected to further criminalisation and more serious charges. In our view, community safety can be adequately safeguarded by other offences that deal with anti-social behaviour, such as public nuisance and police move-on powers.

However, we consider there is a need to examine both the offence of public nuisance and police move-on powers. This is because charges for the offence of public nuisance and failure to obey a move-on direction comprise a significantly higher number of public order charges heard in the Magistrates Courts than public intoxication, public urination and begging. The below data received from the Magistrates Courts from 2017-18 to 2021-22 highlights the far greater numbers of public nuisance charges:[39]

| Charge Title | Year | | | | |
|---|---|---|---|---|---|
| | 2017-18 | 2018-19 | 2019-20 | 2020-21 | 2021-22 |
| s. 6 Public nuisance | 9,583 | 8,861 | 7,073 | 9,650 | 8,349 |
| s. 7 Urinating in a public place | 190 | 172 | 145 | 196 | 151 |
| s. 8 Begging in a public place | 251 | 131 | 80 | 74 | 90 |
| s. 10 Being intoxicated in a public place | 2,020 | 1,987 | 1,394 | 1,260 | 1,050 |

[37] Ibid 14. See also Tamara Walsh, 'Public nuisance, race and gender' (2017) 26(3) *Griffith Law Review* 334; JH Wootton, Royal Commission into Aboriginal Deaths in Custody, Commonwealth of Australia, *Report into the Inquiry into the Death of James Archibald Moore* (Report, 1990); JH Wootton, Royal Commission into Aboriginal Deaths in Custody, Commonwealth of Australia, *Regional Report of the Inquiry into New South Wales, Victoria and Tasmania* (Report, 1991);

[38] Queensland Sentencing Advisory Council (n 17) 23.

[39] Data received Business Intelligence and Data Analytics, Court Services Queensland (18 August 2022).

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|---|---|---|---|---|---|
| **Grand Total** | **12,044** | **11,151** | **8,692** | **11,180** | **9,640** |

Both public nuisance offences and police move-on powers[40] grant police wide discretionary powers in deciding who and when to prosecute, and this has the capacity to result in the selective enforcement of these laws,[41] and particularly unjust outcomes for marginalised groups.[42] The nature of public order offences and police move-on powers is that they are "police offences"; that is, they are largely police-generated by police on patrol, and thus have a far greater impact on those groups who exist more prominently in public spaces:

> Most police resources are devoted to uniformed patrol of public space ... It has long been recognised that the institution of privacy has a class dimension ... The lower the social class of people, the more their social lives take place in public space, and the more likely they are to come to the attention of the police for infractions. People are not usually arrested for being drunk and disorderly in their living rooms, but they may be if their living room is the street ... The overwhelming majority of people arrested and detained at police stations are economically and socially marginal.[43]

Our members also note difficulties arise with the extent of move on directions and importantly, the banning notice regime. Members report officers sometimes give blanket bans for alleged (and typically uncharged) anti-social behavior from the entirety of all of the drink safe precincts using a banning notice, often when 24/7 application. Our members note this is similarly the case with move on directions. The directions and bans are often completely unworkable for those on which they are imposed, because the homeless community and those with complex needs often need to be in those areas for the support services they regularly access. Members report experiences where clients have been charged with numerous breaches of banning notices simply for going to pick up medication, get to a food van or see a support worker.

While discretion is widely recognised as a vital feature of police work, 'appropriate management of police discretion is vital',[44] particularly in relation to public nuisance and police move-on powers. For example, a previous CCC report into police move-on powers highlights that rather than being an effective diversionary tool, police move-on powers may 'actually draw people unnecessarily into the criminal justice system'.[45] Research by Griffith University into public nuisance ticketing has found there is 'a degree of confusion and misunderstanding about what policing option to use where, when and for what type of offender in public order policing', where

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[40] Police move-on powers give police officers the power to move people away from an area (or to cease and desist activities) without requiring any triggering offence to have been committed: *Police Powers and Responsibilities Act 2000* (Qld) ch 2, pt 5.

[41] The Australian Law Reform Commission for example, highlights the over-policing of these offences and their impact on Aboriginal and Torres Strait Islander Peoples', where Aboriginal and Torres Strait Islander women are more likely to be charged and arrested for public order offences and other forms of minor offending than non-Indigenous women: Australian Law Reform Commission (n 10) 363 [11.64].

[42] See generally Crime and Misconduct Commission, *Police move-on powers: A CMC review of their use* (Report, December 2010) (*Police move-on powers*); Helen Punter, 'Move-on powers: New paradigms of public order policing in Queensland' (2011) 35 *Criminal Law Journal* 386; Walsh, 'Public nuisance, race and gender' (n 37); Morreau (n 21).

[43] R Reiner, 'Policing and the police', in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (1997, 2nd ed, Clarendon Press) 1011.

[44] Crime and Misconduct Commission, *Police move-on powers* (n 42) 12.

[45] Ibid 12-3; Punter (n 42) 391.

police also have difficulty identifying offenders who might be eligible for welfare responses in preference to other responses.[46] The CCC warns in respect of public nuisance:

> The most controversial aspect of the exercise of police discretion in relation to the public nuisance offence clearly involves the enforcement of the offence for what may be regarded as trivial behaviour. This is the particularly the case for offensive language offences, but it is also true for other behaviours at the less serious end of the public nuisance spectrum, such as public urination (at least in some circumstances). The appropriate management of police discretion is clearly vital to ensuring the offence is used properly, fairly and effectively.[47]

In this context, we are concerned that even where certain public order offences are decriminalised, wide and unevenly enforced police discretion will lead to an increased use of public nuisance laws by law enforcement, which carry a higher maximum penalty and term of imprisonment.[48] Any law reform in this space must consider strategies that avoid the use of replacement offences to deal with behaviours such as intoxication or offensive language. We would not support decriminalisation of public drunkenness, begging or public urination leading to an increased use of public nuisance offences or police move-on powers. In this regard, we note there is a need to ensure control of police discretion so that public nuisance prosecutions do not replace these charges. These reforms have evident widespread community support and accord with contemporary community standards and this has been demonstrated by cognate law reform interstate.

Decriminalising certain public order offences is insufficient without also adopting an appropriate health-based service response that makes places of safety available as an alternative to police cells and provides health and social care pathways.[49] This is clear from the experience in other jurisdictions. Where decriminalisation has occurred, the introduction of 'protective custody regimes' in the offence's place has meant large numbers of vulnerable people are still being held in cells because they are drunk in public.[50]

In this context, we consider any review into public order offences in Queensland must include in its scope a review of the use of police discretion in relation to the offence of public nuisance, as well as police move-on powers, and potential amendments to these provisions to reduce this risk.

Recommendations arising out of previous reports and inquiries may be particularly relevant. For example, the offence of public nuisance contained in s 6 of the Summary Offences Act could also be amended to provide that

- a police officer must not start a proceeding against a person for a public nuisance offence unless it is reasonably necessary in the interests of public safety;

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[46] Crime and Misconduct Commission, *Police move-on powers* (n 42) 13.
[47] Crime and Misconduct Commission, *Policing Public Order* (n 20) 122.
[48] Committing a public nuisance offence under s 6 of the Summary Offences Act attracts a penalty of 10 penalty units or 6 months imprisonment, whereas public urination and public intoxication attract a penalty of only 2 penalty units and no term of imprisonment.
[49] Expert Reference Group on Decriminalisation Public Drunkenness, *Seeing the Clear Light of Day* (Report to the Victorian Attorney-General, August 2020) 33.
[50] Ibid 33-4.

- in determining whether to proceed against a person for a public nuisance offence, a police officer shall have regard to: all the circumstances pertaining at the material time, particularly the personal circumstances on the person; contemporary community standards; whether the conduct is sufficiently serious to warrant the intervention of the criminal law; and, any other relevant circumstances; and,
- a complaint from a member of the public is required before a police officer may start a proceeding against a person for public nuisance.[51]

Further potential amendments to the Summary Offences Act include:

- introducing a defence of reasonable excuse into the offence of public nuisance;
- inserting a 'vulnerable persons' provision to ensure police officers consider alternative courses of action before proceeding against a vulnerable person for trivial, or only arguably offensive, behaviour; and,
- increasing the range and appropriateness of sentencing alternatives for petty offences.[52]

Various recommendations have also been made to improve the use of police discretion in relation to public nuisance offences and police move on powers. For example, the CCC has highlighted the need for a greater re-focus on informal resolution methods by police:

> We have raised the concern about the decline in the use of informal resolution methods in the context of public nuisance ticketing and charging, and restoring order in Indigenous communities. We reiterate that concern here in the context of move-on powers. The greater use of formal and possibly criminal sanctions in policing public order has the potential to lessen the goodwill of the public and create negative perceptions of the legitimacy of police in public space when they are perceived as 'overpolicing' or misusing their presence or powers.[53]

Importantly, official decriminalisation of certain public order offences will not automatically equal substantive decriminalisation. A health and social welfare-based service delivery model to the behaviour typically captured under public order offences demands a significant and systemic cultural shift within law enforcement agencies. While police officers will inevitably remain first responders in some circumstances, 'the effective operation of a health-based response means that police officers should not be relied on' as primary responders to situations where, for example, a person presents intoxicated in public.[54]

**Reducing the burden on the criminal justice system**

Decriminalisation of certain public order offences, coupled with an effective and appropriately resourced health and social welfare-based service delivery model, will result in economic efficiencies for the criminal justice system, including for police, courts and corrective services. A health and social welfare-based model will see police removed as first responders in dealing with behaviour such as public intoxication, thus freeing up police resources. A framework that diverts people away from the criminal justice system and into appropriate health services will inevitably also reduce the burden on Queensland's Magistrates Courts, and aligns with work being done by the Criminal Procedure Review Team to ensure contemporary and effective criminal procedure laws in Queensland.

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[51] Walsh, *No Offence: The Enforcement of Offensive Language and Behaviour Offences in Queensland* (n 26) 34-5.
[52] Ibid 35-7.
[53] Crime and Misconduct Commission, *Police move-on powers* (n 42) 11.
[54] Expert Reference Group on Decriminalisation Public Drunkenness (n 49) 43.

It is critical, however, that any new framework is appropriately funded and resourced to assure the availability and quality of the various health-based service responses required. Insufficient resourcing will inevitably lead to the continuation of a justice-led response to behaviours such as public intoxication, and in turn, continued burden on services like police and courts.

Further, as identified in the table on page 8, the offence of public nuisance alone places a far greater burden on the Queensland Magistrates Courts than public intoxication, public urination and begging. Consideration should be given to amending this offence (and that of failure to disobey a police direction in respect of police move-on powers) to greater align with contemporary community standards and further reduce the unnecessary burden dealing with these offences (where they relate to trivial behaviour, such as offensive language) places on the Queensland Magistrates Courts.

**A health and social welfare-based response to certain behaviour will enhance human rights**

Queensland's current law enforcement response to public intoxication and begging engages, and arguably limits, a number of human rights protected under the HR Act, including: the right to recognition and equality before the law (s 15); the right to life (s 16); the right to freedom of movement (s 19); the right to take part in public life (s 23); the right to privacy and reputation (s 25); the cultural rights of Aboriginal and Torres Strait Islander Peoples' (s 28); the right to liberty and security of person (s 29); and, the right to health services (s 37).

In our view, decriminalising public intoxication, public urination and begging, and substituting an appropriate and adequately resourced health and social welfare-based service delivery response, will promote and enhance the human rights listed above. In particular, it will enhance people's freedom of movement, liberty and security, equality before the law and access to health services. Decriminalisation and an increased focus on a health and social welfare framework reflects will also reduce the disproportionate impact these offences have on vulnerable cohorts, including Aboriginal and Torres Strait Islander Peoples', people experiencing homelessness, young people, and people suffering from cognitive, behavioural or psychological impairment.

Further, it will ensure better protection of the health of persons who are treated under the proposed new framework, in particular where a person is in custody, resulting in immediate action to secure medical attention whenever required. A health centric framework will also empower Aboriginal and Torres Strait Islander communities to inform development of cultural safety standards and ensure the model is underpinned by the principles of self-determination and cultural recognition.

**Decriminalisation of low level drug offences**

Finally, we take this opportunity to urge the Queensland Government to consider including in the Inquiry the potential decriminalisation of low level drug offences, because drug use (similar to public intoxication) is a health problem and should be treated in a health context. Queensland remains behind other Australian jurisdictions in its response to drug law reform. As a result, Queensland continues to imprison twice as many people for drug possession and drug use as the rest of Australia combined. Enforcement activity is estimated to cost $500 million per year, with $222 million of this spent on enforcement of drug *possession* offences, as opposed to

supply offences.[55] This is in addition to the financial cost of imprisonment to an individual, estimated at $48,300 per year.[56]

The National Drug Strategy highlights the following priority populations as areas where the largest risk of harm exists: Aboriginal and Torres Strait Islander Peoples'; people with mental health conditions; young people; older people; people in contact with the criminal justice system; culturally and linguistically diverse populations; and, LGBTIQA+ people.[57] According to the ANU Drug Research Network, 63 per cent of people with drug dependence suffer from mental illness, compared to 20 per cent of the general population.[58] Conviction for low level drug use and drug possession offences have severe and long-lasting negative impacts on an individual. These include increased likelihood of unemployment, social exclusion, homelessness and further offending, increased risks to health and mental well-being, increased reliance on welfare, time costs, social capital costs, lost productive capacity, disqualification from some types of employment, and increased likelihood of further criminalisation.[59]

The Women's Safety and Justice Taskforce recently recommended expanding Queensland's drug diversion program, specifically calling for amendments to the *Police Powers and Responsibilities Act 2000* (Qld) to expand the Police Drug Diversion Program to include possession of small amounts of illicit drugs.[60] The Women's Safety and Justice Taskforce also recommended a review of the efficacy and value for money of maintaining a criminal justice response to the offences of possession of dangerous drugs under s 9 of the *Drugs Misuse Act 1986* (Qld), and whether there are more effective ways of responding to illicit drugs, including through a health system response.[61]

The Queensland Parliamentary Mental Health Select Committee, in its report titled *Inquiry into the opportunities to improve mental health outcomes for Queenslanders*, also highlighted strategies that provide people who use drugs and alcohol with early support, and divert them away from the criminal justice system, are more beneficial for individuals, and more cost effective for Government, than punitive law enforcement responses.[62]

Research indicates there is strong public support in Australia for a decriminalised approach to low level drug offences (as opposed to simply expanding drug diversion services), and further that decriminalisation: reduces the costs to society, especially in the criminal justice system; reduces social costs to individuals, including improving employment prospects; does not increase drug use; and, does not increase other crime.[63] Under a decriminalised model, trafficking and sale of drugs would remain an offence.

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[55] AMA Queensland, *Position Statement on Drug Law Reform* (June 2022) 3.
[56] Ibid.
[57] Department of Health, *National Drug Strategy 2017-2026* (18 September 2017) 26.
[58] Australian National University Drug Research Network, *Submission to Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill 2021*
[59] Ibid.
[60] Women's Safety and Justice Taskforce, *Hear Her Voice* (Report Two, Volume One, 2022) recommendation 98.
[61] Ibid recommendation 104.
[62] Mental Health Select Committee, *Inquiry into the opportunities to improve mental health outcomes for Queenslanders* (Report No. 1, 57th Parliament, June 2022) 75.
[63] C Hughes, A Ritter, J Chalmers, K Lancaster, M Barratt, and V Moxham-Hall, *Decriminalisation of Drug Use and Possession in Australia – A Briefing Note* (University of New South Wales, Drug Policy Modelling Program, 2016).

This approach is reflected in the ACT through the Drugs of Dependence (Personal Use) Amendment Bill 2021 (**Personal Use Bill**). The introduction of the Personal Use Bill aims to bring the ACT's drug laws:

> [into] line with modern community standards and reflect global trends that seek to treat drug use as a public health problem and not one first and foremost of the criminal justice system. The [Drugs of Dependence (Personal Use) Amendment Bill 2021] will reduce the burden on [the ACT's] criminal justice system by allowing police to divert drug users at the first point of contact to appropriate services and avert prosecution.[64]

The Personal Use Bill seeks to decriminalise possession of certain drugs under personal possession limits, creating a new concept of a simple drug offence with a $100 fine for contravention. The Select Committee on the Drugs of Dependence (Personal Use) Amendment Bill 2021, in its inquiry into the Personal Use Bill, recommended it be passed after receiving evidence that overwhelmingly supported its introduction on the grounds that it would reduce harm, reduce stigma and increase use of drug treatment services.[65] Some additional recommendations were made by the Select Committee to further improve the Personal Use Bill, including that the ACT Government should review drug possession limits to ensure they reflect the evidence on patterns of consumption for personal use, and provide alternative options to a fine such as attending an information session on drug harm reductions, a peer support service or alcohol and other drug treatment, or, in specific situations, to completely waive the fine.[66]

Queensland's current policy settings have proven ineffective in reducing drug use, with almost half of all Queenslanders (44.3 per cent) over the age of 18 having used illicit drugs in their lifetime.[67] The Queensland Productivity Commission concludes that despite the state's policy of criminalisation, 'consumption of illicit drugs has not declined in Queensland'.[68] Rather, this model continues to place a significant cost and resource burden on Queensland police, courts and corrective services. In our view, these funds would be better reinvested into an appropriate health and social welfare-based response to drug use and possession, which would better address the underlying factors contributing to drug use.

We also note that enforcement of Queensland's drug laws has contributed to increased court workload, leading to significant delays in court processes.[69] For example, our members report significant delays associated with the provision of drug purity certificates. Drug purity certificates are essential to committing a matter to trial and any delay results in an accused being held on remand inappropriately or for a significant amount of time. The delays associated with the provision of drug purity certificates result in further court delays, whilst an accused in placed in custody.

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[64] Explanatory Statement, Drugs of Dependence (Personal Use) Amendment Bill 2021 (ACT) 1.
[65] Select Committee on the Drugs of Dependence (Personal Use) Amendment Bill 2021, *Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill 2021* (November 2021) 10 [2.14].
[66] Ibid vi-viii.
[67] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism – Final Report* (August 2019) 212.
[68] Ibid 212.
[69] Queensland Law Society, *Delays in the provision of drug purity certificates* (February 2017) <https://www.qls.com.au/Submissions/2017/Delays-in-the-provision-of-drug-purity-certificate>.

Accordingly, we recommend consideration be given to expanding the Inquiry to include decriminalisation of drug use and possession with a view to replacing the current law enforcement model with a health-centric framework.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Kara Thomson
**President**