



# Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020

Bill Brief

Research Note  
No. 2, February 2021

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Parliament of Victoria



**Introduced:** 08 December 2020

**House:** Legislative Assembly

**Second reading:** 09 December 2020

**Commencement:** 7 November 2022, or earlier by proclamation.

Links to key documents including the Bill, Explanatory Memorandum, Statement of Compatibility and Second Reading Speech can be found at the Library's Infolink [page for this Bill](#).

For further information on the progress of this Bill, please visit the [Victorian Legislation and Parliamentary Documents website](#).

## Acknowledgments

The author would like to thank Ben Huf, Meg Bosanko, Debra Reeves, Marianne Aroozoo, Holly Mclean, Caley Otter and Dolly MacKinnon for their help with the preparation of this publication.

### *Suggested citation:*

A. Wright (2021) *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020*, Parliamentary Library and Information Service, Melbourne, Parliament of Victoria.

*Cover image source: freepik.com*

**Content warning:** *Aboriginal and Torres Strait Islander readers are advised that the following paper contains the name of a person who has died.*

ISSN 2204-4779 (Print) 2204-4787 (Online)

Research Note: No. 2, February 2021.

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## Executive summary

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The Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 seeks to remove public drunkenness as an offence in Victoria. Victoria is one of only two states where it is still an offence. Several state and federal committee inquiries, including the Royal Commission into Aboriginal Deaths in Custody and the Victorian Drugs and Crime Prevention Committee Inquiry into Public Drunkenness, have recommended the offence be removed. The death of Yorta Yorta woman, Tanya Day, in 2017, spurred the most recent push to decriminalise public drunkenness in Victoria.

The proposed Bill will remove sections 13–16 of the *Summary Offences Act 1966* and make consequential amendments to the *Bail Act 1977* and the *Liquor Control Reform Act 1998*. These give police the power to arrest a person found to be drunk, drunk and disorderly, drunk and behaving in a riotous manner, or drunk and in charge of a carriage (not including a motor vehicle as defined by the *Road Safety Act 1986*) or a horse, cattle, or steam engine. Police also have the power to remove a person from a venue and issue them with a banning notice or exclusion order for being drunk. It is intended that the legislation will come into effect in November 2022, to allow time to design and implement a health-based response to public drunkenness.

Most people who are arrested under sections 13–16 of the Summary Offences Act are only arrested once. Those who are arrested more than once are more likely to be experiencing homelessness.

A health-based response to public drunkenness—which sees alcohol and drug issues as a social issue, not a legal one—has been advocated by many legal and social organisations, especially those working with the Aboriginal and/or Torres Strait Islander communities. Those experiencing homelessness and Aboriginal and/or Torres Strait Islander people are more likely to be impacted by these laws.

The Andrews Labor Government convened an Expert Reference Group to put together a proposal for a health-based model for responding to those found drunk in public. The ERG report outlines a proposal for people to be either transported home or to a sobering-up service, rather than taken into custody. First responders would no longer be from the police force, but from specialist services—such as alcohol and other drug services, or Aboriginal and/or Torres Strait Islander services. Police would still have limited powers to take someone into custody who may be posing a danger to others.

Advocates of this shift believe that the change in the way public drunkenness is viewed will ensure that those who are found intoxicated in a public place will no longer be demonised and will instead be able to access the supports they may need. The Opposition and the Police Association have been critical of the decision to introduce a Bill to Parliament without having a plan for a health-based response in place. Medical organisations have expressed concerns that without proper implementation plans and other supports in place, hospital emergency departments will become the default place to take an intoxicated person.

Victoria and Queensland are the only Australian jurisdictions where people can be arrested for public drunkenness. In other jurisdictions, police can detain a person if they are drunk and cannot be returned home, or are deemed to pose a threat to themselves or others. The Expert Reference Group was critical of other jurisdictions not doing enough to stop people being taken into police lockup.

# Introduction

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In August 2019, the Andrews Government announced its intention to decriminalise public drunkenness and replace the offence with a ‘health-based response’.<sup>1</sup> This issue has a long history. Since the 1980s, various state and federal inquiries have recommended that the offence be removed from legislation. Such inquiries have included the Royal Commission into Aboriginal Deaths in Custody, established by the Australian Government in 1987 and which published a five-volume report in 1991, the 2001 Victorian Drugs and Crime Prevention Committee Inquiry into Public Drunkenness and the 2006 Inquiry into Strategies to Reduce Harmful Alcohol Consumption. Various Victorian governments have attempted to do this; however, Victoria is one of two states where public drunkenness remains a criminal offence.

Previous inquiries have found Aboriginal and Torres Strait Islander peoples are disproportionately impacted by these laws. In 2017, Yorta Yorta woman, Tanya Day, died while in police custody, after being arrested for being drunk on a V/Line train.<sup>2</sup> Her death brought attention to Victoria’s public drunkenness law and increased momentum for removing the offence. The Andrews Government formed an Expert Reference Group (‘the ERG’) to put together a proposal for introducing a health-based response to public drunkenness. The Victorian Government released the ERG report at the end of 2020.<sup>3</sup>

The Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 was introduced by the Attorney-General on 8 December 2020 and read a second time on 9 December 2020.<sup>4</sup> If passed, changes will come into operation by 7 November 2022, allowing time for a health-based response to public drunkenness to be designed and implemented.

Victoria and Queensland remain the only states where public drunkenness is an offence. The Northern Territory decriminalised public drunkenness in 1974, followed by New South Wales in 1979, the ACT in 1983, Western Australia in 1990, Tasmania in 2004 and South Australia in 2016. The Northern Territory has had protective custody and intoxication laws in place since 1978.<sup>5</sup>

This Bill Brief provides an overview of the Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020. First, it provides background on the current legislative framework and an overview of the recommendations from previous committees and inquiries. It then provides a brief outline of the recommendations of the Expert Reference Group and the proposed health-based model. The Brief then considers responses to the Bill from various stakeholder groups and concludes with a comparison of public drunkenness laws in other jurisdictions.

Please note that this paper should not be considered a complete guide to the subject.

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<sup>1</sup> J. Hennessy, Attorney General (2019) *New health-based response to public drunkenness*, media release, 22 August.

<sup>2</sup> Coroners Court of Victoria (2020) *Finding into death with inquest*, report prepared by Deputy State Coroner, Caitlin English, Southbank, Coroners Court of Victoria.

<sup>3</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) *Seeing the Clear Light of Day*, report prepared for the Victorian Attorney-General, Melbourne, Expert Reference Group.

<sup>4</sup> *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020* (Vic)

<sup>5</sup> Deloitte Access Economics (2018) *Non-custodial approaches*, Review of the Implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody, report prepared for the Department of the Prime Minister and Cabinet, Canberra, Deloitte Access Economics; Human Rights Law Centre (2017) *Putting an end to the over-criminalisation of public drinking in the Northern Territory*, submission to the Northern Territory Alcohol Policies and Legislation Review, July, Melbourne, HRLC, p. 5.

# Background

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## What is the current legislative framework?

Laws against public drunkenness date back to the 1600s. The English Parliament of 1606 passed a law criminalising and ‘oppressing the odious and loathsome sin of drunkenness’.<sup>6</sup> In Victoria, public drunkenness was initially covered in *An Act for the better prevention of Vagrancy and other Offences* (1852), and *An Act to consolidate the Law relating to the Management of Towns and other Populous Places and for the suppression of various Offences* 1864 (Vic).<sup>7</sup> It was then included in the *Police Offences Act 1865* (Vic). The law has remained largely unchanged since the introduction of the *Summary Offences Act 1966* (Vic).<sup>8</sup>

Public drunkenness offences are outlined in sections 13, 14 and 16 of the Summary Offences Act. Under the proposed amendments, these offences will be removed from the Act. Section 13 states: ‘Any person found drunk in a public place shall be guilty of an offence’.<sup>9</sup> Under section 3 of the Act, a public place is defined to include footways, train stations, parks and schools. Police may deem a person as being ‘drunk’ if their speech, co-ordination, balance or behaviour is ‘noticeably affected’ and it is believed a person has been drinking alcohol.<sup>10</sup>

Section 14 of the Summary Offences Act makes being found drunk and disorderly in a public place an offence.<sup>11</sup>

Section 16 of the Act sets out two offences. Section 16(a) makes it an offence for any person while drunk to behave in a riotous or disorderly manner in a public place and section 16(b) makes it an offence for any person to be drunk in a public place when in charge of a carriage (not including a motor vehicle as defined by the *Road Safety Act 1986* (Vic)) or a horse, cattle, or steam engine.<sup>12</sup> This section also applies to a person riding a bicycle.<sup>13</sup>

Section 15 of the Act gives police and protective services officers (PSOs) the powers of arrest of any person found drunk, or drunk and disorderly, in a public place.<sup>14</sup> Section 15(3) states that a police officer or PSO ‘must ensure the person is lodged in safe custody’.<sup>15</sup> If a person is taken into custody, the Victoria Police Manual (VPM) – Policy Rules Persons in police care or custody; the Victoria Police

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<sup>6</sup> W. Cobbett & T. Hansard (1813) *The Parliamentary History of England from the Earliest Period to the Year 1803: From which Last-mentioned Epoch it is Continued Downwards in the Work Entitled "Hansard's Parliamentary Debates"*, Parliament of Great Britain, taken from Alcohol and Drug Foundation (2019) ‘[Decriminalisation of public drunkenness](#)’, ADF website, 14 October.

<sup>7</sup> [An Act for the better prevention of Vagrancy and other Offences 1852](#) (Vic), [An Act to consolidate the Law relating to the Management of Towns and other Populous Places and for the suppression of various Offences 1864](#) (Vic), [The Police Offences Statute 1865](#) (Vic), [Police Offences Act 1890](#) (Vic), [Police Offences Act 1891](#) (Vic), [Police Offences Act 1907](#) (Vic), [Police Offences Act 1912](#) (Vic), [Police Offences Act 1915](#) (Vic), [Police Offences Act 1922](#) (Vic), [Police Offences Act 1928](#) (Vic), [Police Offences Act 1940](#) (Vic), [Police Offences Act 1957](#) (Vic), [Police Offences Act 1958](#) (Vic).

<sup>8</sup> [Summary Offences Act 1966](#) (Vic)

<sup>9</sup> [Summary Offences Act 1966](#) (Vic), s 13.

<sup>10</sup> Victoria Legal Aid (date unknown) ‘[Public Drunkenness](#)’, VLA website.

<sup>11</sup> [Summary Offences Act 1966](#) (Vic), s 14.

<sup>12</sup> *ibid.*, s 16.

<sup>13</sup> [Explanatory memorandum](#), Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 (Vic), p. 3.

<sup>14</sup> [Summary Offences Act 1966](#) (Vic), s 16.

<sup>15</sup> *ibid.*, s 15.

Manual – Procedures and Guidelines Safe Management of persons in police care or custody; police station operating procedures and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are applicable.<sup>16</sup>

The VPM Rules state that a risk assessment must be conducted for each person in custody. This assessment is made against a medical checklist and the person in custody must be continuously and frequently observed.<sup>17</sup>

Currently, the penalty for being drunk in a public place is a maximum of eight penalty units, which is equal to \$1,321.76.<sup>18</sup> The penalty increases if a person is found to be drunk and disorderly (for a first offence the penalty is 20 penalty units (\$3,330.40) or imprisonment for three days; for second or subsequent offences, 20 penalty units or imprisonment for one month), or drunk and behaving in a riotous or disorderly manner or whilst in charge of a carriage, horse, cattle or steam engine (10 penalty units (\$1,652.20) or imprisonment for two months).<sup>19</sup>

## What are the current service system responses to public drunkenness?

Currently, First Responders include Victoria Police, Ambulance Victoria, health services including Alcohol and Other Drug (AOD) services, welfare and community services, liquor licensees and other authorised officers.<sup>20</sup> Apart from when an urgent medical response is required, there are currently no statutory powers for health workers to require a person found to be drunk in public to undergo any intervention. Welfare and community services range from professional services with medical staff, such as the Ngwala Willumbong Sobering Centre, to voluntary services.<sup>21</sup>

## Recommendations that the law be changed

Since the early days of the Victorian colony, there have been advocates for moving away from viewing drunkenness as a crime and towards treating it as a social issue. In the 1850s and 1860s, Dr Charles McCarthy was quoted in *The Argus* newspaper opposing the incarceration of ‘common drunkards’.<sup>22</sup> During the debate on the Summary Offences Bill (No. 2) 1966, Campbell Turnbull (Member for Brunswick West) stated:

My view is that a person who is drunk should not be taken to gaol but should be taken home or to a reception house where he can be brought back to consciousness ... I believe gaol is not the proper place for people who are under the influence of liquor.<sup>23</sup>

Over the last 30 years, numerous federal and state reports have recommended that the public drunkenness laws be removed. In 1989, the Law Reform Commission of Victoria reviewed the public drunkenness law and found that there was ‘no support for continued reliance on the criminal law as

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<sup>16</sup> Coroners Court of Victoria (2020) op. cit., p. 65.

<sup>17</sup> Coroners Court of Victoria (2020) op. cit., pp. 65–71.

<sup>18</sup> Department of Justice and Community Safety (date unknown) ‘Penalties and values’, DJCS website.

<sup>19</sup> [Summary Offences Act 1966](#) (Vic), ss 13, 14, 16; Department of Justice and Community Safety (date unknown) ‘Penalties and values’, op. cit.

<sup>20</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) op. cit., pp. 23–24.

<sup>21</sup> *ibid.*

<sup>22</sup> A. Mitchell (1975) ‘[McCarthy, Charles \(1814-1896\)](#)’, Australian Dictionary of Biography website.

<sup>23</sup> C. Turnbull (1966) ‘[Summary Offences Act \(No. 2\) 1966](#)’, *Debates*, Victoria, Legislative Assembly, 5 April, p. 3211.

a means of dealing with the problem of public drunkenness...'.<sup>24</sup> The Commission recommended that sections 13, 14 and 15 of the *Summary Offences Act 1966* (Vic) be repealed.<sup>25</sup>

In 1987, the Australian Government established the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Over four years, the Royal Commission investigated 99 cases involving Aboriginal deaths in custody that occurred between 1980 and 1989.<sup>26</sup> Twenty-seven of those who were investigated by the Royal Commission were in custody due to arrests for public drunkenness.<sup>27</sup> An interim report was published in 1989 and a five-volume final report with 339 recommendations was published in 1991. Recommendation 79 is:

in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness.<sup>28</sup>

Recommendation 80 stated that these laws should be replaced with 'non-custodial facilities for the care and treatment of intoxicated persons'.<sup>29</sup> Other recommendations (80–81, 84, 85 and 135) highlighted the need for the decriminalisation of public drunkenness and the need to provide alternative non-custodial facilities for the care and treatment of drunk people.<sup>30</sup>

In 1990, the Kirner Labor Government put forward legislation to repeal offences related to drunkenness. The Bill was defeated in the Legislative Council.<sup>31</sup> The Kennett Liberal-National Coalition Government repealed the then-section 15 of the Act in 1998, removing the offence of repeated or habitual drunkenness.<sup>32</sup>

In June 2001, the Victorian Drugs and Crime Prevention Committee Inquiry into Public Drunkenness recommended decriminalising the offence of public drunkenness.<sup>33</sup> The Committee stated that:

although it is expected that police must exert a certain level of latitude in their dealings with members in a community, their job is not made easy when it is considered that, unlike many other areas within policing that are defined precisely by judicial or statute interpretation, such precise limits are almost non-existent when it comes to exercising discretion in areas such as public drunkenness.<sup>34</sup>

The Committee recommended that sections 13, 14 and 15 of the Summary Offences Act be repealed and that new legislation, whereby people are arrested under a civil rather than criminal basis, be

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<sup>24</sup> Law Reform Commission of Victoria (1989) *Public Drunkenness*, Report 25, Melbourne, Law Reform Commission of Victoria, p. 9.

<sup>25</sup> *ibid.*

<sup>26</sup> Royal Commission into Aboriginal Deaths in Custody (1991) *National Report*, Volume 1, report prepared for the Governor-General, Adelaide, Royal Commission into Aboriginal Deaths in Custody.

<sup>27</sup> M. Mackay (1996) 'The offence of public drunkenness', *Alternative Law Journal*, 21(3), p. 141.

<sup>28</sup> Royal Commission into Aboriginal Deaths in Custody (1991) *National Report*, Volume 5, report prepared for the Governor-General, Adelaide, Royal Commission into Aboriginal Deaths in Custody.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.* For further information on jurisdiction responses to the Royal Commission's recommendations see: Deloitte Access Economics (2018) *Non-custodial approaches*, op. cit.

<sup>31</sup> *Public Drunkenness (Decriminalisation) Bill 1990* (Vic)

<sup>32</sup> *Summary Offences (Amendment) Act 1998* (Vic)

<sup>33</sup> Drugs and Crime Prevention Committee (2001) *Inquiry into Public Drunkenness*, final report, Melbourne, The Committee, June, p. xi.

<sup>34</sup> *ibid.*, p. 139.

implemented. It recommended that 'sobering-up centres' be established to treat people found drunk in public.<sup>35</sup>

In 2005, the Victorian Implementation Review of the Recommendations from the RCIADIC recommended that the government should 'proceed, as a matter of urgency', to abolish the offence of public drunkenness.<sup>36</sup> The Review recommended that 'appropriately resourced Aboriginal run Sobering-up Centres' be established and that the Victorian Government implement and monitor recommendations 79, 80 and 81 from the RCIADIC.<sup>37</sup>

In 2006, the Victorian Inquiry into Strategies to Reduce Harmful Alcohol Consumption also recommended that public drunkenness be decriminalised and for the recommendations from the 2001 Drugs and Crime Prevention Committee report to be implemented.<sup>38</sup> It reiterated that sobering-up services are 'an essential requirement of such decriminalisation'.<sup>39</sup>

In February 2008, the Brumby Labor Government flagged its intention to address public drunkenness.<sup>40</sup>

The Attorney-General's submission to the Victorian Alcohol Plan 2008–2013 called for the decriminalisation of public drunkenness.<sup>41</sup> The Victorian Alcohol Action Plan 2013–2017 stated that government should:

develop improved health and crisis responses through health and community agencies to the needs of intoxicated persons held in custody for public drunkenness in order to minimise adverse health and social outcomes related to incarceration.<sup>42</sup>

In 2015, the Victorian Independent Broad-based Anti-corruption Commission (IBAC) investigated the mistreatment of a woman in a Ballarat police cell. Although outside the scope of the investigation, IBAC did recommend that the Victorian Government consider decriminalising public drunkenness.<sup>43</sup> It also acknowledged that this is a 'complex issue', but that previous inquiries have:

highlighted the detrimental consequences that assigning criminal penalties to public drunkenness can have, including increasing the likelihood that harm will come to vulnerable persons while they are detained in police custody.<sup>44</sup>

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<sup>35</sup> *ibid.*, p. 379.

<sup>36</sup> Department of Justice (2005) *Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report, Volume 1, October, p. 49.

<sup>37</sup> *ibid.*

<sup>38</sup> Drugs and Crime Prevention Committee (2006) *Inquiry into Strategies to Reduce Harmful Alcohol Consumption*, final report, Volume 1, Melbourne, The Committee, March, p. xxvi.

<sup>39</sup> *ibid.*

<sup>40</sup> L. Neville, Minister for Mental Health (2008) 'Annual Statement of Government Intentions', *Debates*, Victoria, Legislative Assembly, 28 February, p. 549; & J. Brumby, Premier of Victoria (2008) *Annual Statement of Government Intentions*, Melbourne, Department of Premier and Cabinet.

<sup>41</sup> A. McIntosh (2008) 'Public drunkenness: decriminalisation', *Questions without notice*, Legislative Assembly, 10 September, p. 3446.

<sup>42</sup> Department of Health (2012) *Reducing the alcohol and drug toll: Victoria's plan 2013–2017*, Melbourne, Department of Health.

<sup>43</sup> Independent Broad-based Anti-corruption Commission (2016) *Operation Ross: An investigation into police conduct in the Ballarat Police Service Area*, final report, November, Melbourne, IBAC, p. 55.

<sup>44</sup> *ibid.*

The most recent push to change these laws came after the death of Yorta Yorta woman, Tanya Day, in December 2017. In August 2019, the then-Attorney-General, the Hon. Jill Hennessy, released a media statement that outlined the government's intention to repeal the offences relating to public drunkenness and to introduce a health-based response.<sup>45</sup> The Attorney-General wrote to the Deputy State Coroner presiding over the inquest into the death of Tanya Day, Caitlin English, on 23 August 2019 and 17 December 2019, informing her that the government had convened an Expert Reference Group to provide advice to the Victorian Government and that legislation to repeal the law would be introduced 'as soon as possible within the term of government'.<sup>46</sup>

At the beginning of the Coroner's inquiry, Ms English told the hearings on 5 December 2018 that:

I am planning on making a recommendation as part of my recommendations and findings to abolish the crime of public drunkenness.<sup>47</sup>

Ms English called for the government to remove public drunkenness as an offence, writing that 'police discretion as it applies to an offence such as public drunkenness is very broad'.<sup>48</sup> Recommendation number 1 in the Coroner's report was 'that the offence of public drunkenness be decriminalised and that section 13 of *the Summary Offences Act 1966* be repealed'.<sup>49</sup>

## Who is charged with public drunkenness?

Between 2014 and 2019, there were a total of 41,347 alleged public drunkenness offences recorded in the Victoria Police Law Enforcement Assistance Program (LEAP) database.<sup>50</sup> Eighty-eight per cent of the offences recorded were for being drunk in a public place (as opposed to drunk and disorderly).<sup>51</sup> Most offenders were men (86 per cent), with young males making up the largest cohort of offenders.<sup>52</sup> A majority of offenders were aged between 18 and 29, including 42 per cent of all offending men and 34.5 per cent of all offending women. Those under the age of 18 make up less than one per cent of offenders.<sup>53</sup>

Most offenders (70 per cent) were born in Australia. Of those who were born overseas, four per cent were born in Sudan, three per cent in the United Kingdom and Ireland, and two per cent in New Zealand.<sup>54</sup> Aboriginal and/or Torres Strait Islander peoples are significantly overrepresented among those charged with public drunkenness, accounting for 6.5 per cent of all public drunkenness offences even though this group only makes up 0.8 per cent of the Victorian population.<sup>55</sup> However, the 6.5 per cent figure may underrepresent the size of the cohort, with between nine and 11 per cent of offenders choosing not to say whether they identify as Aboriginal and/or Torres Strait Islander.<sup>56</sup>

People who are experiencing homelessness are also overrepresented in the LEAP data. While only 1.9 per cent of all offenders were recorded as being homeless, this cohort comprised 9.9 per cent of

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<sup>45</sup> J. Hennessy, Attorney-General (2019) op. cit.

<sup>46</sup> Coroners Court of Victoria (2020) op. cit., p. 15.

<sup>47</sup> C. McGinn (2018) 'Castlemaine death: abolish public drunkenness as crime, says coroner', *The Courier*, 6 December.

<sup>48</sup> Coroners Court of Victoria (2020) op. cit., pp. 21, 60.

<sup>49</sup> *ibid.*, p. 107.

<sup>50</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) op. cit., p. 24.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*, p. 25.

<sup>56</sup> *ibid.*

all offences.<sup>57</sup> Those experiencing homelessness are more likely to be arrested for public drunkenness more than once, with almost half of this cohort being arrested four or more times.

The ERG was established to advise the Government on how to implement a health-based response into public drunkenness. Upon analysing the data they received from LEAP, the ERG divided offenders into two distinct groups: high-intensity and low-intensity cohorts. The high-intensity cohort encapsulated offenders who entered custody due to public drunkenness on three or more occasions over a five-year period. This cohort made up 6.5 per cent of offenders and was responsible for 26 per cent of offences.<sup>58</sup> The low-intensity cohort, meaning those who committed the offence of public drunkenness either once or twice over a five-year period, made up 84 per cent.<sup>59</sup> The low-intensity cohort made up 93.5 per cent of offenders and 74 per cent of offences. The ERG matched LEAP data with Department of Health and Human Services (DHHS) data, which showed that people in the high-intensity cohort were also more likely to experience homelessness.<sup>60</sup>

The ERG identified other risk factors that can influence a person's chance of being arrested for public drunkenness, including: perpetrators and victim-survivors of family violence; and the presence of drugs other than alcohol.<sup>61</sup> The ERG identified patterns across the week and the year, with spikes occurring in the early hours of Saturday and Sunday mornings, over the summer holidays and, to a lesser extent, during major sporting and cultural events. These spikes were mostly caused by people in the low-intensity cohort, with arrests of those in the high-intensity cohort occurring consistently throughout the week.<sup>62</sup>

Approximately 50 per cent of all offences occurred within eight local government areas in metropolitan Melbourne and Greater Geelong.<sup>63</sup> These were: City of Melbourne, Greater Dandenong, Mornington Peninsula, City of Port Phillip, City of Yarra, Greater Geelong, City of Frankston and City of Stonnington.

## Tanya Day and Indigenous incarceration

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On 5 December 2017, Yorta Yorta woman, Tanya Day, was travelling by train from Echuca to Melbourne to see her family.<sup>64</sup> During the trip, and while heavily intoxicated, she fell asleep and her legs blocked the aisle. At Castlemaine train station, the conductor called the police to request assistance with an 'unruly' passenger who could not find their ticket.<sup>65</sup> At 3:10pm the police arrived, shook Ms Day awake and removed her from the train. After making attempts to locate a family member to collect her, the police took Ms Day to Castlemaine police station where she was placed in a cell.<sup>66</sup>

Ms Day was due to be released from the police station after 8pm, following the prescribed four-hour sobering-up period. While the police on shift had completed some brief checks, they did not notice

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<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*, p. 26

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> Coroners Court of Victoria (2020) *op. cit.*, p. 4.

<sup>65</sup> *ibid.*, p. 4, 36.

<sup>66</sup> *ibid.*, p. 5.

that Ms Day had fallen and hit her head numerous times.<sup>67</sup> When the police went to release Ms Day, they found her unresponsive and she was transported to Bendigo Hospital. Upon arrival at Bendigo Hospital, it was discovered that Ms Day had a bleed on her brain due to a traumatic brain injury sustained nearly five hours beforehand when she had fallen in her cell.<sup>68</sup>

Ms Day was transferred to St Vincent's Hospital in Melbourne and died on 22 December 2017.<sup>69</sup> The ERG later stated that: 'the circumstances of Ms Day's death and the coronial inquest has become a tipping point for change in Victoria'.<sup>70</sup>

In an open letter which was supported by 84 social and justice organisations, Ms Day's children wrote:

Abolishing the offence of public drunkenness [was] a key recommendation of the Royal Commission. To date, Victoria is one of only two states that have failed to act... Most Victorians have committed this offence, whether it's coming home from the races, football, or from a party, but not all Victorians are over-policed and over-imprisoned in the way Aboriginal and Torres Strait Islander people are...<sup>71</sup>

Numerous inquiries and studies have found that public drunkenness laws overwhelmingly impact on Aboriginal and Torres Strait Islander peoples. According to the Law Institute of Australia, of those people imprisoned for offences such as public drunkenness in Victoria, more than a quarter identify as Aboriginal and/or Torres Strait Islander (29.6 per cent) and this group makes up nine per cent of all Victorians currently serving a prison sentence for such offences.<sup>72</sup> Aboriginal and Torres Strait Islander peoples only make up 0.8 per cent of the Victorian population.<sup>73</sup> The RCIADIC's National Police Custody Survey (Preliminary Finding) found that Aboriginal people were disproportionately arrested for public drunkenness.<sup>74</sup>

Contributing to the over-representation may be that Indigenous Australians use public space as 'cultural space' more often than non-Indigenous Australians.<sup>75</sup> Indigenous Australians are also over-represented in homelessness data. In 2017–18, almost 10,000 Indigenous Australians used specialist homelessness services in Victoria. This accounts for 9.8 per cent of all clients across this period, even though Indigenous Australians make up less than one per cent of the total Victorian population.<sup>76</sup>

The Deputy State Coroner, Ms. English, investigated the role that unconscious bias may have played in the treatment of Ms Day by the ticket inspector, the train driver and police. She concluded that the ticket inspector's decision to 'define her unruly and to call for police rather than pursue other options has been influenced by her Aboriginality', but that police treatment was not influenced by her Aboriginality.<sup>77</sup> She did nonetheless find that section 13 of the Summary Offences Act 'is an example

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<sup>67</sup> *ibid.*, p. 6-8.

<sup>68</sup> *ibid.*, p. 9.

<sup>69</sup> Coroners Court of Victoria (2020) *op. cit.*, p. 10.

<sup>70</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) *op. cit.*, p. 21.

<sup>71</sup> Family of Tanya Day (2019) '[Open letter calling for the offence of public drunkenness to be abolished](#)', Law Institute of Victoria website, 15 April.

<sup>72</sup> K. Derkley (2019) '[Public drunkenness law should be abolished Victoria](#)', Law Institute of Victoria website.

<sup>73</sup> *ibid.*; Australian Bureau of Statistics (2017) '[2016 Census QuickStats: Australia](#)', ABS website.

<sup>74</sup> D. McDonald (1993) *National Police Custody Survey 1992: preliminary report*, Canberra, Australian Institute of Criminology.

<sup>75</sup> F. Guivarra (2008) '[The Survival of public drunkenness laws in Victoria](#)', *Indigenous Law Bulletin*, 7(5), p. 20.

<sup>76</sup> Australian Institute of Health and Welfare (2019) *Aboriginal and Torres Strait Islander people: a focus report on housing and homelessness*, Canberra, AIHW.

<sup>77</sup> Coroners Court of Victoria (2020) *op. cit.*, pp. 21–23, 42, 60.

of a law which operates to the disadvantage of Aboriginal people hence the RCIADIC recommendation'.<sup>78</sup>

## Expert Reference Group

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Often people are arrested and taken into custody for being drunk in public because police or PSOs have deemed them to be a danger to themselves or others. With the removal of sections 13–16 of the *Summary Offences Act 1966*, a new way of dealing with people found to be drunk in public would need to be implemented. The Victorian Government established an Expert Reference Group to provide advice and guidance. The group consisted of four members:

- Helen Kennedy, former Chief Operating Officer of the Victorian Aboriginal Community Controlled Health Organisation;
- Tony Nicholson, former Executive Director of the Brotherhood of St Laurence;
- Jack Blayney, former Assistant Commissioner and Chief Information Officer of Victoria Police; and
- Nerita Waight, Chief Executive Officer of the Victorian Aboriginal Legal Service.<sup>79</sup>

Two other bodies were established to oversee and assist the work of the ERG: an Executive Oversight Committee, consisting of representatives from the Department of Justice and Community Safety (co-chair), the Department of Health and Human Services (co-chair), Victoria Police, the Department of Premier and Cabinet, and the Department of Treasury and Finance; and a Working Group, consisting of representatives from each of the agencies represented on the Executive Oversight Committee.<sup>80</sup>

The terms of reference asked the ERG to balance any recommendations for the health and safety needs of Victorians with the safety of the community, police, ambulance services and the public, and to develop a proposal that aligns with other government policies.<sup>81</sup> The ERG's final report was released in August 2020 and was titled 'Seeing the Clear Light of Day', a reference to Ms Day.<sup>82</sup>

The ERG held community consultations, representative forums and met with stakeholders, including law enforcement. It also met with key experts, received government briefings, consulted with health services, and reviewed data and evidence.

The proposed model is based around the following key themes:

- Police cells are not safe or appropriate
- Availability of places of safety
- Consent and voluntariness
- Culturally responsive service system
- Intersection with drug intoxication
- Intersection with mental health
- Community and cultural change.<sup>83</sup>

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<sup>78</sup> *ibid.*, p. 20.

<sup>79</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) *op. cit.*, p. 14.

<sup>80</sup> *ibid.*, pp. 107–108.

<sup>81</sup> *ibid.*, p. 14.

<sup>82</sup> J. Hennessy, Attorney-General (2019) *op. cit.*

<sup>83</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) *op. cit.*, pp. 36–37.

They made 86 recommendations and outlined a proposed model for moving towards a health-based response to public drunkenness and how a potential trial could operate.<sup>84</sup> The group concluded:

there is an urgent need to replace the criminal justice model of dealing with public intoxication... a criminal justice model 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.<sup>85</sup>

The ERG's 'primary concern' is that people found intoxicated in public are not 'entangled in the justice system'.<sup>86</sup>

## What is the proposed health-based model?

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Drug and alcohol experts recommend substance abuse or dependence be treated as a health issue rather than a criminal issue. The Alcohol and Drug Foundation states that 'in fact, punitive measures may increase stigma, deter people from seeking help or engaging with harm reduction services'.<sup>87</sup>

Legal organisations have also pushed for a move away from policing this issue. Dan Nicholson, the Executive Director of Criminal Law at Victoria Legal Aid, stated: 'Policing is not the best response to a health problem, especially when it's Victoria's most marginalised who so often find their conduct criminalised'.<sup>88</sup> The Attorney-General, when announcing the ERG, wrote that a health-based approach will 'promote therapeutic and culturally safe pathways to assist alcohol affected people in public places, who may be facing other challenges including homelessness, mental illness, family violence and substance dependency'.<sup>89</sup>

The outcome of the new model proposed by the ERG will be that:

People in Victoria who are intoxicated in public and are at risk to themselves or others will be safe, they will have access to culturally-appropriate care and support if they choose it, their contact with the criminal justice system will be minimised, and the safety of the community and responders will be assured.<sup>90</sup>

The health-based model proposed by the ERG has five stages: first response, initial screening and triage; immediate transportation; place of safety and initial service period; assessment of longer-term needs; and provision of services and broader prevention strategies.<sup>91</sup>

The following is a brief overview of these steps as outlined in the *Seeing the Clear Light of Day* report.

### Stage 1: First Response<sup>92</sup>

Rather than viewing intoxication as a criminal issue, First Responders' primary role will be to ensure the health and safety of an intoxicated person. Where possible, First Responders will not be police officers, but should be health services staff from organisations such as outreach services, AOD services

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<sup>84</sup> *ibid.*, pp. 4–13, 91–92.

<sup>85</sup> *ibid.*, p. 36.

<sup>86</sup> *ibid.*, p. 45.

<sup>87</sup> Alcohol and Drug Foundation (2019) *op. cit.*

<sup>88</sup> Victoria Legal Aid (2019) *Repealing public drunkenness offence a welcome reform*, media release, 23 August.

<sup>89</sup> J. Hennessy, Attorney-General (2019) *op. cit.*

<sup>90</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) *op. cit.*, p. 16.

<sup>91</sup> *ibid.*, p. 40.

<sup>92</sup> *ibid.*, pp. 41–53.

and Aboriginal Community Controlled Organisations (ACCOs). Responses will be tailored to local areas, depending on whether they are high- or low-demand areas and will be driven by the community. Victoria Police will play a role when the intoxicated person poses a serious and imminent threat to themselves or others.

The preferred and default position should be to return a person to their home, or to be with friends or family. If a risk assessment deems that the intoxicated person poses a risk to themselves or others at their home or other residence (including any risk of family violence), they should not be returned there. No-one should be returned to a house where they pose a threat to the safety of others.

The proposed changes will impact how the Emergency Services Telecommunications Authority (ESTA) handles phone calls relating to public drunkenness. Calls will be triaged away from Victoria Police and Ambulance Services and towards local First Responders.

An underlying principle of the Proposed Health Model is that any intervention to assist a drunk person needs to be done with a person's consent, with recognition that they can reject assistance if they wish. The ERG identified that by removing the existing powers of Victoria Police, the police will need:

an additional statutory power to support them to intervene to assist where there is serious and imminent risk and an intoxicated person does not consent to intervention or assistance.<sup>93</sup>

Police will only intervene if two 'high thresholds' are satisfied. These are significant impairment (i.e. a person meets the definition of intoxication as set out in legislation) and if there is serious and imminent risk to an intoxicated person or others.<sup>94</sup> The proposed definition of intoxication would be:

affected or apparently affected by alcohol or a drug or other substance to such an extent that there is a significant impairment of judgement or behaviour.<sup>95</sup>

Police will transport intoxicated people only if all other options have been exhausted. The ERG is clear that under the proposed model, police cannot use inconvenience (for example, having to wait for a responsible person to collect an intoxicated person) as a reason for them to transport an intoxicated person. Any person taken into custody must be released if they no longer pose a 'serious and imminent risk of significant harm'.<sup>96</sup>

## Stage 2: Transport to a place of safety<sup>97</sup>

Under the proposed model, the preferred and default position is that a drunk person organises their own transport home or does so with the assistance of family and friends. If a person is not able to do this, other options will include:

- Emergency services, such as an ambulance;
- Standalone transport services;
- Integration of transport into various outreach services;
- Integration of transport into health and sobering services;
- Private paramedic and first aid services to support major events or venues; and
- Specialist taxi or rideshare service.

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<sup>93</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) op. cit., p. 45.

<sup>94</sup> *ibid.*, p. 46.

<sup>95</sup> *ibid.*, p. 48.

<sup>96</sup> *ibid.*, p. 49.

<sup>97</sup> *ibid.*, pp. 54–60.

If a person does require transport, it should only be to one of three places: their home or other private residence, where they can be cared for; an emergency department or rural trauma and urgent care centre; or a health and sobering service.

The ERG recommended that there be a legislative basis to allow for Victoria Police to transport an intoxicated person to any of these locations, under strictly limited circumstances.

### Stage 3: Places of safety<sup>98</sup>

Sobering services are a core part of the model recommended by the ERG. These services need to ‘fit’ with the target population and area and provide integrated care where more than the immediate health needs of a drunk person are addressed.

In Greater Melbourne, hubs are proposed for hospitals in the Melbourne CBD (Royal Melbourne and St Vincent’s), as well as the Western, Monash and Frankston hospitals. These locations have been chosen for their apparent accessibility by car in 30 minutes or less from anywhere in metropolitan Melbourne. The ERG also recommended that sobering services be established in each of the six new Mental Health and AOD Hubs and that the Ngwala Willumbong Sobering Service be relocated and substantially expanded to service the northern parts of Melbourne. The ERG estimates that daily maximum service capacity will vary between ten and 25 contemporaneous places. The services staff will be multidisciplinary and will include a health practitioner—such as a registered nurse—and a staff to client ratio of between 1:6 and 1:8.

Sobering services should be ‘combined with modular “pop-up” services to expand capacity in a rapid and flexible manner to respond to demand associated with specific sporting or cultural events’.<sup>99</sup>

### Stage 4: Health and social care pathways<sup>100</sup>

The new model will ensure that people will be able to access follow-up or ongoing support, including long-term health and social care.<sup>101</sup> Service pathways include AOD, mental health, Aboriginal social and emotional wellbeing, family violence and homelessness services. A specific AOD program under the Wotha Daborra model will be established, along with new Aboriginal Social and Emotional wellbeing teams, to ensure that Aboriginal and/or Torres Strait Islander peoples receive culturally appropriate information.

### Stage 5: Broader prevention strategies<sup>102</sup>

The final stage includes continued support and expansion, where necessary, of public awareness campaigns focused on reducing public intoxication. This is part of a broader public health approach which addresses public intoxication, including the *Public Health and Wellbeing Plan 2019–23* and VicHealth’s *Action Agenda for Health Promotion 2019–23*, which includes ‘prevent harm from alcohol’ as one of its five strategic imperatives.<sup>103</sup>

Other strategies proposed by the ERG to address the underlying causes of public intoxication include: supporting those who are experiencing other issues, such as homelessness, drug dependence and mental health by connecting people with relevant services (as outlined in Stage 4). Community-strengthening programs will be implemented to support local communities in tailoring specific

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<sup>98</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) op. cit., pp. 61–82.

<sup>99</sup> *ibid.*, p. 2.

<sup>100</sup> *ibid.*, pp. 83–87.

<sup>101</sup> *ibid.*, p. 16.

<sup>102</sup> *ibid.*, pp. 88–89.

<sup>103</sup> Department of Health & Human Services (2019) *Victorian public health and wellbeing plan 2019–2023*, Melbourne, DHHS; VicHealth (2019) *Action Agenda for Health Promotion 2019–23*, Melbourne, VicHealth.

preventative measures along with other measures to try to minimise the impact of intoxication in private, especially in relation to family violence; and ensuring that liquor licensees play their part in preventing public drunkenness.

The following table, taken from the *Seeing the Clear Light of Day* report, provides an overview of the proposed health-based model.

**Proposed Health Model**

Applying the principles of a public health approach, Figure 4 outlines the ERG’s Proposed Health Model to ensure that an immediate health and safety response by First Responders to public intoxication is integrated into a broader health and wellbeing approach.

The remainder of Part 2 of our report is structured around the five stages of the public health model identified in Figure 4.

Figure 4: ERG’s Proposed Health Model to public intoxication

	Immediate response			Secondary response	Universal response
Stage	1. First response, initial screening and triage	2. Immediate transportation	3. Place of safety & initial service period	4. Assessment of longer term needs and provision of services	5. Broader prevention strategies
Purpose	Initial identification of person’s health and safety needs and associated risks. Triage for appropriate response	Safely transport the individual to a place of safety	To provide a safe place where the individual can rest and recover (sober-up)	Identify health and social needs and appropriate care pathways to reduce harm and improve people’s wellbeing over the longer term	Address the underlying causes to prevent problematic drinking occurring in the first place
Types of responses	Late night entertainment outreach, complex needs outreach, multidisciplinary emergency response, police / ambulance	Private transport of friends or family, Uber / taxi, outreach van, Police / ambulance van	Sobering services, fixed place sobering-up centre, after-care transport home	E-referrals, voluntary AOD services, state wide Aboriginal specific withdrawal service	Education and support services targeted towards the general public as well as specific population groups
Factors to determine appropriate response	<ul style="list-style-type: none"> <li>• Health needs</li> <li>• Safety risk (ind, community)</li> <li>• Consent to receive initial assistance</li> <li>• Available services</li> <li>• Geographic location</li> <li>• Identity / cultural safety</li> </ul>	<ul style="list-style-type: none"> <li>• Health needs</li> <li>• Safety risk (ind, community)</li> <li>• Cooperation of individual; state of consciousness</li> <li>• Available services</li> <li>• Geographic location</li> <li>• Identity / cultural safety</li> </ul>	<ul style="list-style-type: none"> <li>• Health needs</li> <li>• Safety risk (ind, community)</li> <li>• Consent to be taken to place of safety</li> <li>• Available services</li> <li>• Geographic location</li> <li>• Identity / cultural safety</li> </ul>	<ul style="list-style-type: none"> <li>• Health needs</li> <li>• Consent to receive / engage with services</li> <li>• Available services</li> <li>• Broader wellbeing needs</li> <li>• Geographic location</li> <li>• Identity / cultural safety</li> </ul>	<ul style="list-style-type: none"> <li>• Broader wellbeing and health needs</li> <li>• Policy framework and setting</li> <li>• Engagement with target population groups</li> <li>• Local and tailored approaches</li> <li>• Intersection with other prevention strategies (eg AOD, homelessness)</li> </ul>

Source: Expert Reference Group on Decriminalising Public Drunkenness (2020) op. cit., p. 40.

## The Bill

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The Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 seeks to repeal sections 13–16 of the *Summary Offences Act 1966*. These sections deal with public drunkenness and Victoria Police’s powers of arrest.

The Bill has four parts. Part 1 of the Bill sets out the purpose and commencement of the Bill. If passed, legislation will come into effect on 7 November 2022, or earlier by proclamation. The long period before commencement is intended to allow for a public health response to be implemented. It also reflects the Victorian Government’s commitment to reforming this area:

Legislation to repeal the offences must be passed now, to establish a stake in the ground for reform. The legislation will provide certainty and clear expectations to service providers regarding when the public health model is to be in place.<sup>104</sup>

Part 2 seeks to remove sections 13–16 of the *Summary Offences Act 1966* and removes mentions of these sections from the Act which relate to the power to serve infringement notices.

Section 16(b) applies to being drunk while riding a bicycle. With the removal of this section, the Government has indicated that changes to address road safety while riding a bicycle will be made.<sup>105</sup>

Part 3 seeks to make consequential amendments to the *Bail Act 1977* and the *Liquor Control Reform Act 1998*.<sup>106</sup> It amends section 11(1) of the Bail Act to remove references to sections 13, 14 and 16 of the *Summary Offences Act 1966*. Section 11 gives police officers the power to release a person who has been ‘apprehended on one of the offences upon payment of a cash deposit as a security for payment of any penalty that may be imposed for that offence’.<sup>107</sup>

Item 4 of Schedule 2 to the Liquor Control Reform Act will be repealed to remove references to sections 14 and 16 of the *Summary Offences Act 1966* for the ‘purposes of banning notices and exclusion orders’.<sup>108</sup> Banning notices can currently be issued by police officers to ban a person from a dedicated area for 72 hours and exclusion orders exclude a person from a dedicated area for up to 12 months. This will not affect the power to issue a banning notice or exclusion order based on any other offence. Similarly, the Magistrates’ Court will no longer be able to make an exclusion order for a person who is found guilty of the relevant public drunkenness offence, which would exclude them from a designated area, or some or all licenced premises within that area, for up to 12 months.

## Second reading speech

The second reading speech was made by then-Attorney-General, the Hon. Jill Hennessey, on 9 December 2020, stating: ‘People who are drunk in public need support, not punishment’.<sup>109</sup> The Attorney-General outlined the shift in how public drunkenness would be treated in Victoria, should

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<sup>104</sup> J. Hennessey, Attorney General (2020) ‘[Second Reading Speech: Summary Offences Amendment \(Decriminalisation of Public Drunkenness\) Bill 2020](#)’, *Debates*, Legislative Council, 9 December, p. 3926.

<sup>105</sup> *ibid.*

<sup>106</sup> [Summary Offences Amendment \(Decriminalisation of Public Drunkenness\) Bill 2020](#) (Vic)

<sup>107</sup> [Bail Act 1977](#) (Vic); [Explanatory Memorandum](#), Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020, p. 5.

<sup>108</sup> [Liquor Control Reform Act 1998](#) (Vic); [Explanatory memorandum](#), Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020, p. 5.

<sup>109</sup> J. Hennessey, Attorney General (2020) *op. cit.*, p. 3926.

the Bill pass, stating that it will move: ‘the response away from law enforcement to an approach that focuses on health and safety’.<sup>110</sup>

Ms Hennessy provided a brief history of the road to decriminalisation of this offence, including that the Royal Commission into Aboriginal Deaths in Custody had ‘stressed the importance of alternative non-custodial systems, laws and services for people who are intoxicated in public’.<sup>111</sup>

Although the Bill will potentially not take effect until November 2022, the Victorian Government wished to show its commitment to the reforms and stated that ‘setting a clear date by which the new public health response must be in place will provide a pathway to establishing a new way of dealing with this issue’.<sup>112</sup> This delay will allow for the Government ‘to effectively design, trial and implement a health model across the state by the time decriminalisation takes effect’.<sup>113</sup>

The Attorney-General concluded that this Bill:

formally recognises that public drunkenness should be treated as a health issue, not a law enforcement issue. Repealing public drunkenness offences is a critical first step to ensure people who are drunk in public are not locked up in a police cell, but are supported to access the care and services they need, thereby enhancing the health and wellbeing of the drunk person and the safety of the community as a whole. It brings Victoria a step closer to finally making these critical recommendations of the Royal Commission into Aboriginal Deaths in Custody a reality.<sup>114</sup>

## Stakeholder comments

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Stakeholders in favour of the Bill believe that moving towards a public health model of treating public drunkenness is long overdue and is the fairest and most compassionate way of dealing with those who are intoxicated. The Law Institute of Victoria (LIV) supports the move away from using the criminal justice system to deal with this issue, stating that:

By implementing recommendations 79-81 [of the Royal Commission into Aboriginal Deaths in Custody], public drunkenness can be moved outside the ambit of the criminal justice system and towards a model of care and treatment, to avoid an outcome such as that which occurred in the case of Tanya Day.<sup>115</sup>

LIV President, Sam Pandya, said in response to the Bill, ‘Public drunkenness requires a health response, not a criminal justice response’.<sup>116</sup> The legal director of the Human Rights Law Centre, Monique Hurley, who represented the family of Tanya Day at the coronial inquest, said: ‘if someone is too drunk, they should be taken home or somewhere safe, they should not be locked up’.<sup>117</sup>

Members of the Aboriginal and/or Torres Strait Islander communities have welcomed the proposed changes. Victorian Aboriginal Community Controlled Health Organisation (VACCHO) Acting CEO, Trevor Pearce, said that alcohol use is ‘a public health issue, not a crime, and should be treated as

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<sup>110</sup> J. Hennessey, Attorney General (2020) op. cit., p. 3926.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> S. Webb (2019) ‘[Letter to Attorney-General](#)’, Law Institute of Victoria website.

<sup>116</sup> Law Institute of Victoria (2020) ‘[Public drunkenness laws should be abolished](#)’, media release, 2 December.

<sup>117</sup> Human Rights Law Centre (2020) ‘[Decriminalisation of public drunkenness welcome, but long overdue](#)’, HRLC website, 8 December.

such. This outdated law is unnecessarily punitive and racist in nature'.<sup>118</sup> Aboriginal Executive Council Chair, Esme Bamblett, said that police would soon be 'free' from enforcing an 'antiquated harmful law'.<sup>119</sup>

Responding to the *Seeing the Clear Light of Day* report, Tanya Day's family said:

Overall, the release of the ERG report is a welcome step forward in progressing public drunkenness reform. But it is also tinged with grief and sadness. It took the death of our mother for the Andrews Government to commit to repealing laws that should have been abolished 30 years ago when it was recommended by the Royal Commission into Aboriginal Deaths in Custody.<sup>120</sup>

Helen Kennedy, a Trawlloowa woman and a former chief operating officer of the VACCHO, stated that Victoria needs to look to other jurisdictions who have decriminalised public drunkenness already:

It is so important that it's done as a staged implementation because it is complex, and I think it's really important to say that we were, as a group, really conscious of learning from the lessons of other jurisdictions that have decriminalised public drunkenness... We have seen examples of a failure to implement the right public health services to support the decriminalisation, and some unintended consequences.<sup>121</sup>

A case study from the PILCH Homeless Persons' Legal Clinic (now Justice Connect) found that the 'prospect of being fined for public drunkenness did not act as a deterrent ... nor did it provide an incentive ... to recover'.<sup>122</sup> The PILCH Clinic also stated that dealing with cases of public drunkenness placed 'a significant resource burden' on community legal centres and other support services who assist those who have been charged with public drunkenness.<sup>123</sup>

Some opponents of the Bill believe that the law should not be changed without a proper implementation plan for the health-based model in place. The Victorian Opposition has raised concerns that the proposed 'plans to decriminalise public drunkenness, without proper stakeholder consultation, raises more questions than answers'.<sup>124</sup> Shadow Minister for Police and Community Safety, David Southwick, stated that the Government had 'put the cart before the horse with no plan to ensure the safety of the broader community'.<sup>125</sup> He has also stated that the plans fail to address key stakeholders' serious concerns.<sup>126</sup>

The Police Association of Victoria has been critical of the Bill, stating that the proposal was 'all press releases and no policy'.<sup>127</sup> Wayne Gatt, Secretary of the Police Association, said: 'for decades police have fought to remove alcohol-fuelled violence from our streets. We cannot compromise on this work

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<sup>118</sup> M. Coggan (2019) 'Victoria to remove "archaic" public drunkenness law as Tanya Day inquest begins', Pro Bono Australia website.

<sup>119</sup> M. Johnston (2020) 'Police slams Labor plan to scrap public drunkenness offence in Victoria', *Herald Sun*, 28 November.

<sup>120</sup> Human Rights Law Centre (2020) 'Expert report on public drunkenness recommends laws be abolished: Day family respond', HRLC website, 28 November.

<sup>121</sup> C. Wahlquist (2020) 'Victoria to introduce sobering-up centres after review finds that police should be the last resort', *The Guardian*, 28 November.

<sup>122</sup> L. Adams (2012) 'A glass half empty: perspectives on criminalising homelessness and alcohol dependence', *Parity*, 25(2), p. 16.

<sup>123</sup> *ibid.*

<sup>124</sup> M. O'Brien, Leader of the Opposition (2020) *Statement on proposed decriminalisation of public drunkenness*, media release, 29 November.

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*

<sup>127</sup> M. Johnston (2020) *op. cit.*

by making rash decisions'.<sup>128</sup> Mr Gatt was critical of the decision to introduce legislation two years before the Bill would come into law, without having a proposed model in place, stating: 'if you don't intend to do anything for 24 months, make the legislative changes once you know what the model looks like'.<sup>129</sup> The Police Association wants clarity about who will replace police in assisting people found to be drunk in public and queried who will respond to triple-zero calls about an intoxicated person endangering others.<sup>130</sup>

The medical community have expressed concern about the impact the changed laws could have on emergency departments. AMA Victoria President, Associate Professor Julian Rait, does not want any rushed changes that risk overwhelming emergency departments with intoxicated people, especially given the growing mental health crisis.<sup>131</sup> Similarly, the Victorian Chair of the Australian College for Emergency Medicine, Dr Mya Cubitt, stated that, while supportive of decriminalising public drunkenness, 'emergency departments are not good places for these people and we are already overwhelmed with such issues'.<sup>132</sup> Dr Cubitt told *The Age* that 'we would love to be engaged in [the] consultation process, so we don't unintentionally make things worse'.<sup>133</sup>

By contrast, the Health and Community Services Union welcomed the new law and called on the Government to ensure that on-call specialist outreach teams are funded to assist police in getting people safely home.<sup>134</sup> The Australian Nursing and Midwifery Federation (Victorian Branch) Secretary, Liz Fitzgerald, welcomed the health-based model plan, stating:

Thirty years is too long to wait, but it is appropriate we wait just a little longer while the measures are put in place to support police and health services so they can provide safe care. Importantly, this legislation will benefit many and not just those from Indigenous communities ... Nurses know that a health model rather than a criminal response is the best way to protect the community and the people who are intoxicated.<sup>135</sup>

## Other jurisdictions

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Although Victoria and Queensland are the only states or territories where public drunkenness is still a crime, in other jurisdictions police remain empowered to transport drunk people to a police station to sober up.<sup>136</sup> Laws in other jurisdictions outline the threshold that must be met before a person is taken into custody. In most cases:

- Police must have made reasonable attempts to contact a responsible person who can take care of the intoxicated person.
- Those taken into custody must be released after a certain time has passed or they have sobered up.

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<sup>128</sup> M. Johnston (2020) op. cit.

<sup>129</sup> Z. Hope (2020) '[Dangerous virtue signalling: Police union fury at public drunkenness laws putting 'the cart before the horse'](#)', *The Age*, 28 November.

<sup>130</sup> (2020) '[Victoria to decriminalise public drunkenness in a change long advocated by Aboriginal communities](#)', *SBS News*, 28 November.

<sup>131</sup> M. Johnston (2020) op. cit.

<sup>132</sup> Z. Hope (2020) op. cit.

<sup>133</sup> *ibid.*

<sup>134</sup> Health and Community Services Union (2020) '[HACSU welcomes repeal of public drunkenness laws in Victoria](#)', media release, 2 December.

<sup>135</sup> Australian Nursing and Midwifery Journal (2020) '[Victoria poised to decriminalise public drunkenness](#)', ANMJ website, 30 November.

<sup>136</sup> Expert Reference Group on Decriminalising Public Drunkenness (2020) op. cit., p. 33.

- Cells should not be used as a place to house an intoxicated person.

The ERG was critical of other jurisdictions who have ‘largely failed to address the risk of death in police custody’, as there ‘has been [a] failure to provide an effective health-based service system response that makes places of safety available as an alternative to police cells’.<sup>137</sup> The ERG believes that ‘protective custody regimes’ have not addressed the risk of death in police custody and indicated that the powers granted to police to take people into custody have not be used as a last resort.<sup>138</sup> The ERG further stated that ‘there has not been the requisite shift in systems and attitudes to move away from a criminal justice approach to public intoxication’.<sup>139</sup>

The following table, taken from the ERG’s final report, shows the use of the lockups for intoxicated people across Australia.

**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.

Source: Expert Reference Group on Decriminalising Public Drunkenness (2020) op. cit., p. 34.

<sup>137</sup> *ibid.*

<sup>138</sup> *ibid.*, p. 34.

<sup>139</sup> *ibid.*, p. 35.

## Jurisdictional comparison

Below is a brief summary of relevant legislation in selected Australian jurisdictions.

Jurisdiction	Decriminalisation	Current legislation giving police the powers to take an intoxicated person into custody
<b>ACT</b>	Public drunkenness was decriminalised in 1983 through amendments to the <i>Crimes Act 1900</i> (NSW), as it applied in the ACT. <sup>140</sup>	<p>Police in the ACT may take a person into custody where there is no available sobering-up shelter or reasonable alternative under the <i>Intoxicated People (Care and Protection) Act 1994</i> (ACT).<sup>141</sup></p> <p>The intention of the Act is to ‘provide a legislative basis for places where people found intoxicated in public could sober up in a safe environment’.<sup>142</sup></p> <p>A person can be taken into police custody if a police officer believes a person is intoxicated and is:</p> <ul style="list-style-type: none"> <li>(a) behaving in a disorderly way; or</li> <li>(b) behaving in a way likely to cause injury to himself, herself or another person, or damage to any property; or</li> <li>(c) incapable of protecting himself or herself from physical harm.<sup>143</sup></li> </ul> <p>The definition of ‘intoxicated’ as defined in the Act is: ‘apparently under the influence of alcohol, another drug or substance, or a combination of alcohol, drugs or substances’.<sup>144</sup></p>

<sup>140</sup> Commonwealth Ombudsman (2008) *Australian Federal Police: Use of Powers under the Intoxicated People (Care and Protection) Act 1994*, report prepared by the Commonwealth and Law Enforcement Ombudsman, Prof. John McMillan, Report no. 11/2008, Canberra, Commonwealth Ombudsman, p. 8.

<sup>141</sup> *Intoxicated People (Care and Protection) Act 1994* (ACT), s 4.

<sup>142</sup> Commonwealth Ombudsman (2008) op. cit., p. 8.

<sup>143</sup> *Intoxicated People (Care and Protection) Act 1994* (ACT), s 4, c 1.

<sup>144</sup> *ibid.*, s 2.

Jurisdiction	Decriminalisation	Current legislation giving police the powers to take an intoxicated person into custody
		A person can only be taken into custody if there is no other reasonable alternative for the person's care, and they must be released if they cease to be intoxicated, or after eight hours. <sup>145</sup>
NSW	Public drunkenness was decriminalised in 1979 by the <i>Intoxicated Persons Act 1979</i> (NSW). <sup>146</sup>	<p>Section 206 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW) states that:</p> <p>A police officer may detain an intoxicated person found in a public place who is:</p> <p>(a) behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property, or in need of physical protection because the person is intoxicated.</p> <p>(b) in need of physical protection because the person is intoxicated.<sup>147</sup></p> <p>Intoxicated person is defined as: 'a person who appears to be seriously affected by alcohol or another drug or a combination of drugs.'<sup>148</sup></p> <p>A drunk person must be given reasonable time to find their own way home, and will only be taken to an authorised place of detention if there is no-one to take care of the person, or the behaviour of the intoxicated person is deemed to be a threat to a responsible person.<sup>149</sup> Conditions of apprehension are set out in section 207 and stipulate that the person is not under the age of 18, that a drunk person must be kept separate from others where possible, and that</p>

<sup>145</sup> *ibid.*, s 4, c 2, 3.

<sup>146</sup> L. McNamara & J. Quilter (2015) 'Public intoxication in NSW: the contours of criminalisation', *The Sydney Law Review Journal*, 37(1). For more information on policing public drunkenness in NSW, see: NSW Ombudsman (2014) *Policing intoxicated and disorderly conduct: Review of section 9 of the Summary Offences Act 1988*, August, Sydney, NSW Ombudsman.

<sup>147</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 206.

<sup>148</sup> *ibid.*, s 205.

<sup>149</sup> *ibid.*, s 206, cl 4.

Jurisdiction	Decriminalisation	Current legislation giving police the powers to take an intoxicated person into custody
		they be released when they cease to be intoxicated. <sup>150</sup> An intoxicated person must not be placed in a cell unless absolutely necessary. <sup>151</sup>
NT	Public drunkenness was decriminalised in 1974 with an amendment to the <i>Police and Police Offences Ordinance 1924</i> (NT). <sup>152</sup>	<p>The Northern Territory has Protective Custody and Intoxication laws under section 128 of the <i>Police Administration Act 1978</i> (NT). Police can take any person who appears to be intoxicated and cannot look after themselves into custody.<sup>153</sup></p> <p>Section 130 states that a person who is apprehended under section 128:</p> <ul style="list-style-type: none"> <li>(a) shall not be charged with an offence; and</li> <li>(b) shall not be questioned by a member in relation to an offence.<sup>154</sup></li> </ul> <p>In this Act a person is intoxicated if:</p> <ul style="list-style-type: none"> <li>(a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired; and</li> <li>(b) it is reasonable in the circumstances to believe the impairment results from the consumption or use of alcohol or a drug.<sup>155</sup></li> </ul> <p>A person can only remain in custody until they are no longer intoxicated.<sup>156</sup></p>

<sup>150</sup> *ibid.*, s 207, cl 2.

<sup>151</sup> *ibid.*, s 207, cl 2e.

<sup>152</sup> Human Rights Law Centre (2017) *op. cit.*, p. 5.

<sup>153</sup> [Police Administration Act 1978](#) (NT), s 128.

<sup>154</sup> *ibid.*, s 130.

<sup>155</sup> *ibid.*, s 127A.

<sup>156</sup> *ibid.*, s 131.

Jurisdiction	Decriminalisation	Current legislation giving police the powers to take an intoxicated person into custody
<b>QLD</b>	Public intoxication is still illegal in Queensland. Section 10 of the <i>Summary Offences Act 2005</i> (Qld) makes it an offence to be drunk in public. <sup>157</sup> Intoxication is defined as: ‘drunk or otherwise adversely affected by drugs or another intoxicating substance’. <sup>158</sup> The penalty for public intoxication is two penalty units, which is currently \$266.90. <sup>159</sup>	The issue of removing the offence was raised by Queensland Greens MP, Michael Berkman, at a Community Support and Services Committee – Community, Housing and Digital Economy hearing in December 2020. <sup>160</sup> He asked the Hon. Craig Crawford, Minister for Aboriginal and Torres Strait Islander Partnerships, whether the Government was considering removing the offence. Mr Crawford stated that the issue was for the Attorney-General. <sup>161</sup>
<b>SA</b>	In 2016, South Australia amended Section 7 of the <i>Public Intoxication Act 1984</i> to decriminalise public drunkenness. <sup>162</sup>	The object and guiding principles of the <i>Public Intoxication Act 1984</i> is to: <ul style="list-style-type: none"> <li>(a) to promote the minimisation of harm that may befall a person in a public place as a result of a person's intoxication; and</li> <li>(b) for that purpose, to confer appropriately limited powers— <ul style="list-style-type: none"> <li>(i) to remove an intoxicated person from a public place in which the person is vulnerable or may become a threat; and</li> <li>(ii) to take the person to a place of safety until the person is recovered.</li> </ul> </li> </ul>

<sup>157</sup> *Summary Offences Act 2005* (Qld), s 10.

<sup>158</sup> *ibid.*, s 10, cl 2.

<sup>159</sup> Department of Local Government, Racing and Multicultural Affairs (2020) ‘[Value of a penalty unit](#)’, DLGRMA website.

<sup>160</sup> M. Berkman (2020) ‘[Community Support and Services Committee](#)’, *Estimates*, Queensland, 15 December, p. 46.

<sup>161</sup> *ibid.*

<sup>162</sup> *Public Intoxication (Review Recommendations) Amendment Act 2016* (SA); *Public Intoxication Act 1984* (SA).

Jurisdiction	Decriminalisation	Current legislation giving police the powers to take an intoxicated person into custody
		<p>(2) In the performance of their functions under this Act, the Minister, police officers, authorised officers and other persons or bodies involved in the administration of this Act are to be guided by the following principles:</p> <p>(a) primary concern is to be given to the health and well-being of a person apprehended under this Act;</p> <p>(b) a person detained under this Act should, where practicable, be detained in a place other than a police station.<sup>163</sup></p> <p>A person can be apprehended by police if the police have reasonable grounds to believe that:</p> <p>(a) a person who is in a public place is under the influence of a drug; and</p> <p>(b) by reason of that fact, the person is unable to take proper care of himself or herself.<sup>164</sup></p> <p>The Act defines ‘drug’ as including: ‘alcohol or any other substance that is capable (either alone or in combination with other substances) of influencing mental functioning’.<sup>165</sup></p> <p>Once a person is apprehended, police must, as soon as possible, transport the person to a place of residence, a police station or a sobering-up centre.<sup>166</sup> The Act states that a person detained under the Act ‘where practicable’ should not be detained at a police station.<sup>167</sup></p>

<sup>163</sup> *ibid.*, s. 2.

<sup>164</sup> *ibid.*, s 7, c 1.

<sup>165</sup> *ibid.*, s 7, c 4.

<sup>166</sup> *ibid.*, s 7, c 3a.

<sup>167</sup> *ibid.*, s 2, c 2b.

Jurisdiction	Decriminalisation	Current legislation giving police the powers to take an intoxicated person into custody
<b>TAS</b>	The <i>Police Offences Amendment (Public Drunkenness) Act 2000</i> (Tas) was repealed on 27 March 2004. <sup>168</sup>	<p>Under the <i>Police Offences Act 1935</i> section 4A, a person can be taken into custody and held for up to eight hours if a police officer believes that the person is intoxicated and:</p> <ul style="list-style-type: none"> <li>a) is behaving in a manner likely to cause injury to himself, herself or another person, or damage to any property; or</li> <li>(b) is incapable of protecting himself or herself from physical harm.<sup>169</sup></li> </ul> <p>‘Intoxicated’ is defined in the Act as: ‘means under the influence of alcohol, another drug or a combination of drugs.’<sup>170</sup></p> <p>A police officer must have made ‘reasonable inquiries’ to find a place of safety, or a responsible person, before taking a person into custody.<sup>171</sup> Section 4A does not include criminal charges or fines for being drunk in a public place. A person taken into custody must be released after a period of 8 hours, or when a police officer believes it is reasonable to.<sup>172</sup></p>
<b>WA</b> <sup>173</sup>	Public drunkenness was decriminalised in Western Australia in 1990 with the repeal of section 53 of the <i>Police Act 1892</i> (WA). <sup>174</sup>	<p>In 2000, the <i>Protective Custody Act 2000</i> (WA) introduced a legislative framework for detaining intoxicated people.<sup>175</sup> A person may be apprehended:</p> <p>If an authorised officer reasonably suspects that a person who is in a public place or who is trespassing on private property —</p>

<sup>168</sup> [Police Offences Amendment \(Public Drunkenness\) Act 2000](#) (Tas)

<sup>169</sup> [Police Offence Act 1935](#) (Tas), s 41, cl 2.

<sup>170</sup> *ibid.*, s 4a, c 1.

<sup>171</sup> *ibid.*, s 4a, c 4.

<sup>172</sup> *ibid.*, s 4a, c 6.

<sup>173</sup> For more information on the decriminalisation of public drunkenness in WA, see: R. Midford (1993) ‘[Decriminalisation of public drunkenness in Western Australia: the process explained](#)’, *Australian Journal of Social Issues*, 28(1).

<sup>174</sup> [Acts Amendment \(Detention of Drunken Persons\) Act 1989](#) (WA), s 53.

<sup>175</sup> [Protective Custody Act 2000](#) (WA)

Jurisdiction	Decriminalisation	Current legislation giving police the powers to take an intoxicated person into custody
		<p>(a) is intoxicated; and</p> <p>(b) needs to be apprehended —</p> <p style="padding-left: 40px;">(i) to protect the health or safety of the person or any other person; or</p> <p style="padding-left: 40px;">(ii) to prevent the person causing serious damage to property.<sup>176</sup></p> <p>Intoxicated is defined in the Act as: ‘affected by, or apparently by, an intoxicant to such an extent that there is a significant impairment of judgment or behaviour’.<sup>177</sup></p> <p>People cannot be detained longer than necessary, and detention in a lock-up or police station is considered a last resort.<sup>178</sup></p>

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<sup>176</sup> *ibid.*, s 6, cl 1.

<sup>177</sup> *ibid.*, s 3.

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