LAW REFORM

The offence of public drunkenness

MICHAEL MACKAY discusses a major cause of Aboriginal incarceration in Victoria.

In 1991, after two years of intensive investigation, the Royal Commission into Aboriginal Deaths in Custody handed down its findings and presented 339 recommendations aimed at reducing Aboriginal contact with the criminal justice system. The 99 deaths investigated by the Royal Commission revealed a number of important commonalities between individual deaths, with unemployment, low socio-economic status, and extensive criminal histories of offences typifying many of those who died.

Public drunkenness

One particular characteristic of 27 of those who died was particularly notable — all 27 were, at the time of their deaths, in custody for the sole offence of public drunkenness. Another eight of those who died had been placed in custody for being intoxicated in jurisdictions where public drunkenness was not an offence. In Victoria all three deaths investigated were of people in custody solely for this offence. Over half of those deaths in Queensland and over one quarter of those deaths in Western Australia were of people in custody for violation of those States' laws pertaining to this offence.[1]

In response to this startling finding, the Royal Commission made a number of important recommendations about the offence of public drunkenness. Recommendation 79 urged:

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

The Royal Commission recognised that abolishing the offence was only part of the solution. Intoxicated people should be diverted to non-custodial facilities (such as sobering-up centres),[2] and local government by-laws prohibiting public drinking need close monitoring to ensure that non-payment of fines imposed for violation of such by-laws do not replace the offence of public drunkenness as a major cause of Aboriginal incarceration.

The case of Victoria

Despite these recommendations, public drunkenness remains an offence in Victoria under ss.13-16 of the *Summary Offences Act*.[3] Just how seriously this offence impacts on the Aboriginal community can be gauged from statistics produced by the Statistical Services Division of Victoria Police. In 1993-94 there were 852 arrests of Aborigines for this offence across the State. While these figures do not relate to distinct people (that is, one person arrested three times for this offence would have been counted three times), they still indicate the enormity of the effect this one offence has on the level of contact that members of the Aboriginal community have with Victoria's criminal justice system. Using 1991 census population statistics, this is equivalent to a rate of 51 arrests per 1000 of the Aboriginal population. Assuming that the reported rate of arrest of the entire population for this offence in Victoria in the 1980s has remained fairly constant at around five arrests per 1000 population[4] over the past decade, the rate of arrest of Aborigines for this offence is something like ten times that of the whole population. According to Magistrates' Courts' sentencing statistics for 1994, 8696 cases were heard across Victoria involving the sole offence of public drunkenness.[5] This equates to a rate of around two per 1000 population (with the Aboriginal rate for 1993-94 being approximately 25 times that).

Interesting geographical characteristics of Aboriginal arrests for drunkenness in 1993-94 also emerged from the dataset provided by Victoria Police. *Table 1* shows the number of these arrests which occurred in each of the geographically distinct Police Districts outlined in *Figures 1 and 2*. N district stands out like a beacon, with 342 arrests for the year. The next highest was O district, with 126 arrests.

Figure 1: Victorian Country Police Districts (Districts L to Q)

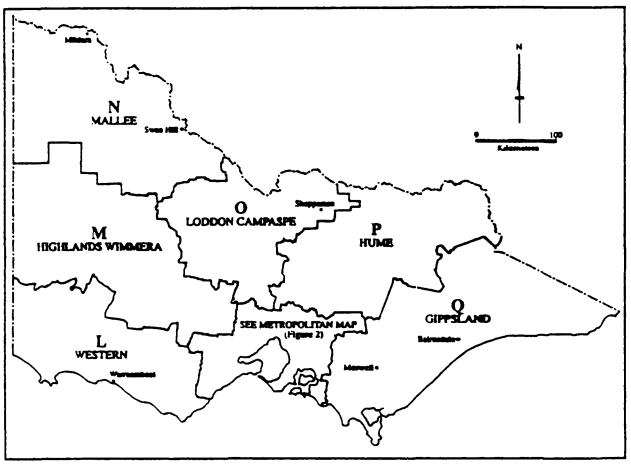

Figure 2: Victorian Metropolitan Police Districts (Districts A to K)

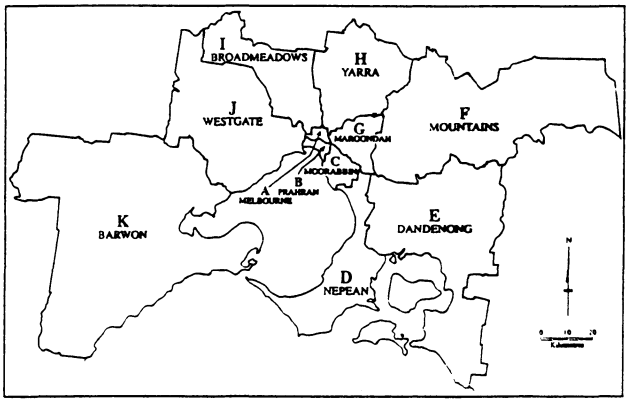

Table 1:
Number of Aboriginals arrested for Drunkenness, by Police Districts, 1993/94

Police Districts	Arrests	Police Districts	Arrests
A	76	J	7
B	111	K	16
C	5	L	20
D	8	M	15
E	8	N	342
F	3	O	126
G	1	P	8
H	18	Q	78
I	10	**Total rate**	**852**

Arrests of Aborigines for this offence in N district constituted around 40% of the total arrests of Aborigines for the offence. While these arrest statistics are compiled according to the station of the arresting police officer, using 1991 census population data it is possible to calculate a rate of arrest per 1000 population living in each Police District for this offence. The resulting figures, in *Table 2*, give a better indication of the geographical differences in arrests for this offence.

Table 2:
Rate of Aboriginals taken into Custody for Drunkeness for 1000 Aboriginal Population by Police Districts, 1993/94

Police Districts	Arrests	Police Districts	Arrests
A	178	J	7
B	407	K	21
C	11	L	29
D	11	M	15
E	8	N	232
F	3	O	56
G	2	P	11
H	12	Q	44
I	10	**Total rate**	**51**

The enormous rate of arrest for the offence in B district (see *Table 2)* reflects the popularity of the St Kilda area as a gathering place for many of Victoria's Aborigines. A district, which includes the CBD, is almost naturally a place of high arrest. The figure for N district, however, cannot be explained in these terms: 232 arrests per 1000 population is approximately 40 times the assumed rate of arrest for this offence for the whole population across the whole State. Unfortunately, figures for non-Aboriginal arrests were not available, so it is impossible to carry out any comparisons between Aboriginal and non-Aboriginal arrests within individual Police Districts. In a recent study it was found that arrests for drunkenness constituted some 22% of all Aboriginal arrests in Victoria in 1993-94, and about 39.6% of all Aboriginal arrests in N District.[6] Members of the Aboriginal community often attribute N District's high rate of arrest for this offence to local government's encouragement of police to 'clean up' the streets of Aboriginal drinkers. The visibility of Aboriginal public drinking is seen as detrimental to the wooing of the tourist dollar, and has also brought about the introduction of local laws prohibiting public drinking, violation of which often leads to the default payment on a fine and incarceration.

To its credit, the Victorian Government has provided capital funds for the establishment of sobering-up centres in Bairnsdale, Mildura, Morwell, Shepparton, Swan Hill, and Warrnambool which are run by local Aboriginal co-operatives. There is, however, no sobering-up centre in the metropolitan region, despite the fact that there were some 263 arrests for this offence in the metropolitan region in 1993-94. At the same time, while most of those arrested for this offence in country areas are being diverted from police custody, they are still charged with the offence before being placed in the custody of the sobering-up centre or the local Aboriginal co-operative. In some regional courts, a fine is often imposed on offenders, default of which often leads to time in police cells. In other regional courts, an offender may be discharged without conviction. Most of those arrested in the metropolitan region are detained in Police cells for some four hours — totally contrary to the recommendations of the Royal Commission, and effectively inviting deaths in custody to occur. While the severity of the punishment for this offence varies in courts across the State, the arrest of Aborigines for public drunkenness often begins or perpetuates a cycle of arrest which, the Royal Commission found, often leads to imprisonment.

The Kennett Government and law reform

Since its election in 1992, the Kennett Coalition Government has done its utmost to evade the issue of law reform in relation to public drunkenness offences, even though it claimed to support the Royal Commission's recommendations in principle. The Government's excuses for failing to deliver law reform are worthy of examination, particularly considering that, when in opposition, the Coalition had rejected legislation aimed at decriminalising public drunkenness. According to the Government, '[t]he offence of public drunkenness cannot be repealed without adequate alternative options for dealing with intoxicated persons'.[7] The Government agrees that sobering-up centres '. . . may provide an alternative method for dealing with public drunkenness in cases where such a centre is available',[8] but claims there are not enough such centres currently in operation for the decriminalisation of public drunkenness to be a successful proposition. Just how many of these centres the Government needs, and just how long it plans to 'monitor' these centres before embracing reform is unknown. It seems strange that the Government should use the excuse of not having enough sobering-up centres and then stall the establishment of any of these centres in the metropolitan region.

The main argument used by the Coalition in 1991, when in opposition and rejecting the government Bill decriminalising public drunkenness, is similar to the one it falls back on today in government — that the lack of sobering-up centres trivialises the problem. The Coalition, however, had other qualms about the Bill, including that it proposed that police be unable to question or begin other investigative

procedures concerning someone detained in a sobering-up centre or police cell for drunkenness. The notion of individual liberty was also a major part of the then opposition's rhetoric, with criticism that the Bill did not allow a person to seek release from detention on the basis of wrongful apprehension. At the same time, those apprehended would have been unable to complain about their treatment by police. The fact that the proposed legislation would have forced police to use the option least restrictive to a person's liberty also concerned the opposition, in that police would have to consider a series of options before locking an intoxicated person in a cell at the police station.

Other MPs argued that the legislation was '. . . looking after a minority of a minority . . .',[9] suggesting that the interests of minority groups are not worth addressing. The then opposition also expressed its concern that the legislation would encourage more drunken revelries on the streets, a problem it visualised as having increased since the relaxation of sale of liquor legislation. According to one opposition member at the time, 'many people feel that this Bill is sending the wrong message to the community . . . People do not want a message going out into the community that says it is okay to be drunk'.[10] Peculiarly enough, this is not the kind of response one would get today from a member of the Victorian Government if one was to inquire about the message sent out by the Government in its heavy promotion of gambling and the Melbourne Casino.

Conclusions

The high rate of arrest of Aborigines for the offence of public drunkenness can only be seen as a major obstacle in the path of reducing Aboriginal contact with the criminal justice system. Interestingly, evidence from Western Australia shows that after that State decriminalised public drunkenness the number of Aborigines detained in police cells declined markedly.[11] The very fact that the offence requires discretionary choices by police about the level of intoxication of alleged offenders is problematic, and leaves the state open to accusations that the laws it administers can be used by police to discriminate against one particular minority group. At the same time, the nature of this discretion is such that it is extremely difficult and time-consuming to mount a defence of not guilty. More importantly, the fact that so many of those Aborigines arrested for this offence are being detained in police cells for the mandatory four hours has left the Aboriginal community open to the possibility of a spate of preventable deaths in custody which, since the Royal Commission, it has been lucky enough to avoid.

It is not the drunkenness of Aborigines which is the target of ss.13-16 of the Victorian *Summary Offences Act*. Rather, it is the visibility of Aboriginal drinking behaviour which makes Aborigines more likely to be charged with this offence, and localised public order campaigns have tended to prod local police towards the use of the sections. Differing perspectives of public space and acceptable behaviours within such space are not acknowledged by the Act.

At the same time, it must be recognised that merely decriminalizing this offence is unlikely to have a great effect on incarceration levels. When the previous Victorian Labor Government attempted to decriminalise this offence in 1991, many local governments were quick to pass local laws prohibiting the consumption of alcohol in public places within their boundaries. More than one local government made it clear that the intention in passing such laws was to ensure public drinking by Aborigines could continue to be controlled in the absence of any offence of public drunkenness.[12] While the present Victorian Government claims that '. . . legislation of this type is a matter for local government and should not be actively promoted by police officers',[13] a representative from a local government which enacted such a law claimed that '[t]he police first approached council and asked council if we'd look to passing a local law [about public drinking] . . . This law gets you before you get drunk. The police reckon its the best law they've got'.[14] Clearly, police have had a significant input into the introduction of such local laws. Violation of these local laws results in a fine. While imprisonment for violation of such laws is not possible, non-payment of fines often leads to a period of incarceration.

Of even greater concern is that the crime of habitual drunkenness remains on the statutes (s.15 of the *Summary Offences Act*). Four arrests for drunkenness in the one year means an individual can be charged with habitual drunkenness by police. Only in a minority of cases are offenders sent to a rehabilitation facility, and usually only after the offender has appealed to the County Court. Such legislation is quite contrary to the recommendations of the Royal Commission, and has been widely criticised by the Commonwealth's House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, which argues that '[i]t is highly inappropriate, as well as being ineffective and a waste of taxpayers' resources, to attempt to treat a behavioural or medical problem through the criminal law . . .'.[15]

Significantly, four Aborigines have died in custody in Victoria since the period examined by the Royal Commission. Two of these deaths were of people arrested for public drunkenness. Hopefully, it will not take another death in custody for the Government to change its stance and quicken its step towards decriminalisation of public drunkenness. If decriminalisation is to reduce Aboriginal contact with the criminal justice system, however, the Government must adhere more closely to the Royal Commission's Recommendation 82 concerning the monitoring of the effects of local laws which designate 'dry' areas.[16]

Postscript: Funding has recently been provided for the establishment of a sobering-up centre in East St Kilda.

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References

1. Royal Commission Into Aboriginal Deaths In Custody, 1991, Final Report, Australian Government Publishing Service, Canberra, p.46.
2. See RCIADIC Recommendation 80.
3. For convenience, the offences of 'drunk in a public place', 'drunk and disorderly in a public place', 'drunk behave riotously in a public place' and 'habitual drunkenness' are referred to as the one offence for the majority of this paper.
4. Law Reform Commission of Victoria, 'Public Drunkenness', Report No. 25, Law Reform Commission, Melbourne. The Commission found that between 1982 and 1986-87, the annual rate of arrest for public drunkenness in Victoria fluctuated between 4.5 and 5.3 per 1000 population for the entire community. Magistrates' Courts' sentencing statistics for 1994 show that a total of 8696 faced court for drunkenness offences, which equates to roughly two per 1000 population (see 'Sentencing Statistics', Magistrates' Courts, Victoria, 1994).
5. Department of Justice, 1995, 'Sentencing Statistics', Magistrates' Courts, Victoria, 1994, Caseflow Analysis Section, Courts and Tribunals Services Division. The figure was obtained by adding the figures for the four offences defined as public drunkenness in this paper.

6. See Mackay, M., 'Law, Space and Justice: A Geography of Aboriginal Arrests in Victoria', in *People and Place* (1996) 4 (1) *People and Place* 28-9.
7. Aboriginal Affairs Victoria, 'Royal Commission Into Aboriginal Deaths In Custody: Victorian Government 1994 Implementation Report', Department of Health and Community Services, Melbourne, 1995, p.100.
8. Aboriginal Affairs Victoria, above, p.100.
9. Victorian Legislative Council, 1991, p.1739.
10. Jan Wade in Legislative Assembly, 1991, p.688-9.
11. Harding, R.W., Broadhurst, R. Ferrante A. and Loh, N., *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission Into Aboriginal Deaths In Custody*, Hawkins Press, Sydney, 1995, pp.87-8.
12. James, S., 'We Don't Have the Aboriginal Problem': Local Responses to Public Drunkenness', Unpublished Honours Thesis, Department of Criminology, University of Melbourne, 1992. For a brief description of this thesis, see James, S., 'Aboriginal People, Local Government, and Public Drunkenness in Victoria', in (1994) 18(1) *Humanity and Society* 39-52.
13. Aboriginal Affairs Victoria, above, p.101.
14. James, above, p.11.
15. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 1994, *Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission Into Aboriginal Deaths In Custody*, AGPS, Canberra, p.133.
16. Recommendation 82 of the RCIADIC states '[t]hat governments should closely monitor the effects of dry area declarations and other regulations or laws restricting the consumption of alcohol so as to determine their effect on the rates of custody in particular areas and other consequences'.

HUMAN RIGHTS

The 'loophole' in victims compensation

TIM ANDERSON argues for the rights of prisoners convicted of serious crimes

Bipartisan moves in New South Wales to exclude prisoners from the State's victims compensation scheme will most likely violate Australia's human rights obligations, and this will draw the Federal Government into an international legal challenge.

NSW Premier Bob Carr and Opposition Leader Peter Collins have both said they want to close the 'loophole' which allows, for example, a person convicted of murder to claim compensation for a serious assault suffered whilst in jail. Both politicians have said it is outrageous that Andrew Garforth, the convicted killer of Ebony Simpson, and former hotelier Andrew Kalajzich, should be able to make a claim. Garforth was severely bashed in jail by other prisoners, while Kalajzich, jailed for the killing of his wife, was stabbed at Lithgow Jail.

Undoubtedly many people will feel great sympathy with moves to deny ordinary rights to those convicted of horrific crimes. However the NSW Council for Civil Liberties has decided to support a challenge to the United Nations Human Rights Committee, under the International Covenant on Civil and Political Rights, if new laws entrench discrimination and violate the principal of equality before the law. The Federal Government would then have to decide whether to support the State laws, or abandon them and protect Australia's reputation on human rights. When Tasmania's anti-gay laws were challenged, the Keating Government chose the latter course.

The Council for Civil Liberties will support a challenge, despite its unpopularity, because it recognises that human rights are often eroded with popular support. It is easy to support the rights of those with whom one sympathises; but human rights only have meaning when they are universal, and rights are easily corroded by populist attacks on unpopular citizens.

Are those convicted of murder entitled to be called citizens? If you support the international agreements on human rights: yes, certainly. The arguments against denying rights, and victims compensation, to those convicted of serious crimes are these:

- there is a popular but false dichotomy between 'victims' and 'criminals' — many people are both;
- when the state imposes punishment for a crime, it demands that a person accepts responsibility for his or her actions — yet no democratic society can demand responsibility without also protecting rights;
- the moral argument for rehabilitation disappears if those already serving prison sentences are also denied basic civil rights;
- just as there should not be 'worthy' and 'unworthy' rape victims, so making this distinction is dangerous in victims compensation.

The current political arguments against compensation for serious offenders parallel those run by the *Daily Mirror* in the late 1970s, when it defended a defamation action by the late prisoner and escape artist Darcy Dugan. The *Mirror's* defence was not that it had a run a true story, but that under the ancient English doctrine of 'attainder', Dugan, as a convicted capital felon, was of 'corrupt blood' and simply had no civil rights.

In 1978, the conservative majority of the High Court held that this ancient doctrine applied in Australia. Chief Justice Barwick argued that the merit of the doctrine was not for the court to decide. In his leading judgment, Justice Jacobs said there was 'no clear authority' on whether those convicted of a serious crime were to be denied civil rights, but that as Darcy Dugan was still serving a commuted death sentence, 'attainder' applied to him.

However, the lone and proverbial dissenter, Justice Lionel Murphy, decried the old doctrine as violating 'the universally accepted standards of human rights', as spelt out in several international agreements. Murphy addressed some of the flaws of the current proposal, when he wrote:

> The civil death doctrine does not accord with modern standards in Australia . . . There is an overwhelming weight of evidence against the doctrine that a convicted person should, while under sentence, be without redress for a personal wrong, whether the wrong arises before, during or after imprisonment . . . Although the [civil death] doctrine treats the person as dead if he seeks to be a plaintiff, it treats him as alive when he is a defendant. The doctrine is anachronistic.

After this case a NSW Labor Government introduced the *Felons (Civil Proceedings) Act 1981*, which ensured a

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