SUBMISSION TO QUEENSLAND PARLIAMENT COMMUNITY SUPPORT AND SERVICES COMMITTEE INQUIRY INTO DECRIMINALISATION OF CERTAIN PUBLIC OFFENCES, AND HEALTH AND WELFARE RESPONSES

ABOUT THE JUSTICE REFORM INITIATIVE

The Justice Reform Initiative is an alliance of people who share long-standing professional experience, lived experience and/or expert knowledge of the justice system, further supported by a movement of Australians of goodwill from across the country who believe jailing is failing and that there is an urgent need to reduce the number of people in Australian prisons.

The Justice Reform Initiative is committed to reducing Australia's harmful and costly reliance on incarceration. Our patrons include more than 100 eminent Australians, including two former Governors-General, former Members of Parliament from all sides of politics, academics, respected Aboriginal and Torres Strait Islander leaders, senior former judges including High Court judges, and many other community leaders who have added their voices to end the cycle of incarceration in Australia.

We seek to shift the public conversation and public policy away from building more prisons as the primary response of the criminal justice system and move instead to proven alternative evidence-based approaches that break the cycle of incarceration.

We are committed to elevating approaches that seek to address the causes of contact with the criminal justice system including responses to housing needs, mental health issues, cognitive impairment, employment needs, access to education, the misuse of drugs and alcohol, and problematic gambling. We are also committed to elevating approaches that see Aboriginal and Torres Strait Islander-led organisations being resourced and supported to provide appropriate support to Aboriginal and Torres Strait Islander people who are impacted by the justice system.

Queensland patrons of the Justice Reform Initiative include:

- **The Honourable Mike Ahern AO**, former Premier of Queensland, businessman and founder of the Queensland Community Foundation.
- **Sallyanne Atkinson AO**, former Lord Mayor of Brisbane, businesswoman and Trade Commissioner
- **Professor Kerry Carrington**, Head of the School of Justice, Queensland University of Technology
- **Mick Gooda**, former Aboriginal and Torres Strait Islander Social Justice Commissioner and former Royal Commissioner into the Detention of Children in the Northern Territory
- **Keith Hamburger AM**, former Director-General, Queensland Corrective Services Commission
- **Professor Emeritus Ross Homel, AO,** Foundation Professor of Criminology and Criminal Justice, Griffith University
- **Professor Elena Marchetti**, Griffith Law School, Griffith University
- **The Honourable Margaret McMurdo AC**, former President Court of Appeal Supreme Court of Queensland and Commissioner of the Victorian Royal Commission into the Management of Police Informants
- **Dr Mark Rallings**, former Commissioner, Queensland Corrective Services
- **Greg Vickery AO**, Former President Queensland Law Society and former Chair of the Standing Commission of the International Red Cross and Red Crescent Movement
- **The Honourable Deane Wells**, former Attorney General of Queensland
- **The Honourable Margaret White AO**, former Judge of the Queensland Supreme Court and Queensland Court of Appeal, former Royal Commissioner into the Detention of Children in the Northern Territory, and Adjunct Professor TC Berne School of Law UQ.

KEY RECOMMENDATIONS

1. **That the Queensland Government repeal the offence of public intoxication in section 10 of the *Summary Offences Act 2005* (Qld).**
2. **That the Queensland Government repeal the offence of begging in section 8 of the *Summary Offences Act 2005* (Qld).**
3. **That in repealing the offence of public intoxication from the *Summary Offences Act 2005* (Qld), the Queensland Government create an appropriate public health response model in consultation with relevant stakeholders and communities, including First Nations communities, culturally and linguistically diverse (CALD) communities, specialist homelessness services and community services in regional and remote areas.**
4. **That police should only have the power to apprehend or detain an intoxicated individual under a protective custody legislative regime in the following strictly limited circumstances:**
    - **where the person is suffering from a significant impairment (as a consequence of intoxication), *and* where that person presents a serious and imminent risk to themselves and/or others. All efforts should be made to link the person into health and welfare services ahead of protective custody.**
5. **That strict limits apply to the use of the police power to detain an intoxicated person under any protective custody legislative regime.**
6. **The Queensland Government should develop comprehensive regulations, guidelines, policies, procedures and training to ensure police discretion is applied appropriately and reasonably to all members of the community in terms of assessing whether a person is suffering significant impairment or presenting a serious and imminent risk to themselves/others.**
7. **That in repealing the offence of begging from the *Summary Offences Act 2005* (Qld) the Queensland Government needs to commit to addressing the underlying causes of begging by investing in a service-based response to begging and homelessness. This includes the following:**
    - **Extra resourcing for specialist homelessness services to provide additional services;**
    - **Increased supply of emergency homeless accommodation, crisis accommodation, supported accommodation and social housing;**
    - **Extra resourcing for drug/alcohol treatment and mental health services to provide additional services to people who are homeless or at risk of homelessness.**
8. **The Queensland Government should ensure that multidisciplinary, culturally-responsive, integrated, flexible, trauma-informed, wraparound support (from social workers, youth workers, lawyers and health professionals) is provided alongside social housing and onsite in supported accommodation - recognising the support needs of disadvantaged people with multiple and complex support needs. This should entail holistic support for the whole person, with flexible service models that are person-centred. This support should include housing and associated support for children and young people at risk of justice system involvement.**
9. **The Queensland Government should invest in much-needed sustainable and appropriate accommodation options for people leaving prison and for people leaving residential rehabilitation facilities.**

10. **The Queensland Government should coordinate a whole of government approach to supporting people during and after incarceration, with a focus on providing social housing and affordable housing options with integrated supports, including but not limited to properties specifically designated for the purposes of release on bail or parole.**
11. **The Queensland Government should commit resources to both outcomes based monitoring and proper evaluation of community led and health led supports and services that aim to disrupt cycles of criminal justice involvement**
12. **That the Queensland Government develop and implement a Protocol for Queensland Police and other enforcement agencies to use in responding to people experiencing homelessness, which would:**
    - **avoid unnecessary, enforcement-based interactions with people experiencing homelessness;**
    - **ensure that where interactions do occur, they are appropriate and respectful;**
    - **support enforcement officers to use their discretion and consider alternative options to fines and charges when interacting with people experiencing homelessness; and**
    - **train and equip enforcement officers to make referrals to appropriate services as an alternative to fines and charges.**
13. **Police Area Commands should commit to building relationships with local specialist homelessness services so police are able to provide appropriate referrals and information for people experiencing homelessness who may not be currently in contact with any homelessness services.**

THE CRIMINALISATION OF PUBLIC INTOXICATION

Under section 10(1) of the *Summary Offences Act* 2005 (Qld) ('*QSOA*') a person must not be intoxicated in a public place (maximum penalty – 2 penalty units). Intoxicated means drunk or otherwise affected by drugs or another intoxicating substance (s10(2)).

Most states and territories in Australia have repealed public drunkenness/intoxication offences. The Victorian Government has committed to repealing the offence of being drink in a public place (section 13, *Summary Offences Act* 1966 (Vic)).

Decriminalisation of public drunkenness is an important measure in developing a health-focused response to public intoxication. Key recommendations from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in relation to public intoxication were:

- abolition of the offence of public drunkenness (recommendation 79)
- establishment of non-custodial facilities for the care and treatment of intoxicated people (recommendation 80); and
- creation of a statutory duty that police must consider and use alternatives to the detention of intoxicated people in police cells (recommendation 81).

Of the 99 deaths investigated in the commission, 35% involved Aboriginal people who were detained in relation to public intoxication.

The decriminalisation of public drunkenness of itself has failed to eliminate the incarceration of people who are intoxicated. The absence of adequately resourced health-based responses has perpetuated the overuse of detention in police cells of people who are found intoxicated in a public place. This reinforces the need to replace the criminal justice-focused model of dealing with public intoxication with a public health approach that ensures the safety and wellbeing of individuals, as well as promoting access to appropriate services and supports to minimise the incidences of public intoxication.[1]

Alcohol offences should be seen as a social and health problem. A public health approach to public intoxication would shift the focus away from a narrow and reactive criminal justice intervention towards an approach that provides individuals at risk of public intoxication with the information, supports and services they need.[2]

PUBLIC INTOXICATION AND POLICE DETENTION

There is significant evidence to indicate that people found intoxicated in public spaces are continuing to be detained in police cells, including in those states/territories that have decriminalised public drunkenness. Police in those jurisdictions are continuing to use the protective custody legislative regimes to place intoxicated people into police cells.

While these reforms were introduced with the aim of ensuring police had powers to apprehend individuals as a last resort to keep them and the community safe, it is clear that these powers are not being so used. It also illustrates the failure to develop and implement effective health responses that

[1] *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness*. 2020. Report to the Victorian Attorney-General. August 2020. 21, 33.

[2] Ibid 39.

can provide more appropriate places of safety for people who are intoxicated and have immediate health needs.[3]

The following table indicates the continued use of police cells for public intoxication in states and territories that have decriminalised public drunkenness.[4]

	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 (%)
NSW	1802	18.1%
SA	330	41.5%
Tas	447	17.4%
ACT	829	13.5%
NT	8247	92.8%
WA	Not available	Not available

* 12-month period varies slightly between jurisdictions but included data obtained from 2014 to 2019.

The continued use of police cells under the operation of protective custody regimes has a disproportionate impact on Aboriginal and/or Torres Strait Islander people, First Nations communities, people experiencing homelessness, and particular ethnic groups.

A PUBLIC HEALTH APPROACH TO PUBLIC INTOXICATION

Reliance on the criminal justice system has been ineffective in reducing levels of public intoxication. In addition, it criminalises individuals and unnecessarily draws them into contact with the legal system, whether through the offence of public drunkenness (in those states where the offence has not been removed) or through the operation of the protective custody legislative regimes.

The Justice Reform Initiative (JRI) endorses the proposed framework for implementing a public health approach to public intoxication, which was developed by the Victorian Expert Reference Group on Decriminalising Public Drunkenness ('the Victorian ERG'). That model had the following underlying implementation themes:

Police cells not safe or appropriate - Detaining a person who is intoxicated in a police cell is unsafe and cannot be an option in a health-based response. No one should be placed into a police cell simply because they are intoxicated in public.

Availability of places of safety - In order to eliminate the use of police cells for public intoxication there must be safe places available that are accessible and appropriate to meet the health and safety needs of people who are intoxicated (eg. going home to family or friends, health and community-based services, etc).

Consent and voluntariness - A consent-based model is central to an effective health response to public intoxication at all stages of possible intervention.

Culturally responsive service system – There is a need for a service system that is capable of supporting people with diverse cultural backgrounds, including Aboriginal and Torres Strait Islander people and CALD communities.

[3] Ibid 34.

[4] Ibid.

Intersection with drug intoxication - Public intoxication often co-occurs with drug use. A person who is intoxicated should be subject to a health-based response.

Intersection with mental health – There is a high correlation between public intoxication and mental health. A health-based response can best respond to people experiencing mental illness.

Community and cultural change - A transition to a health-based approach to public intoxication requires a shift in community and cultural attitudes about public intoxication - that public intoxication is a public health issue that requires holistic responses capable of addressing the underlying causes of public intoxication.[5]

The Victorian ERG noted that a public health response to public intoxication requires a cultural shift in the characterisation of intoxication as a health rather than a law enforcement issue. This requires considering the following:

- the role and functions of First Responders
- which agencies or services should undertake the role of First Responders
- guaranteed coverage and availability of services
- consent and powers of First Responders
- tailored local responses.

Role and functions of First Responders

The JRI agrees with the Victorian ERG that all First Responders under the public health model should perform their roles and functions in such a way as to ensure the health and safety of individuals who are intoxicated in public. The first consideration should be whether the person who is intoxicated can return to their home, or to friends or family while they sober up. Where this is possible, this should be the preferred and default position.[6]

First response services and agencies

There are a number of First Responders that have a range of roles and functions when responding to a person who is intoxicated in public. This includes police, ambulance officers, health and community services and operators of licensed premises. Under a health-based approach, the roles and functions of these various agencies and services needs to be complementary and intersecting. The nature of a response will depend on the particular circumstances involved and an assessment of the health needs and risks.

Wherever possible, First Responders should be health services personnel and/or personnel from community services organisations. In situations where a person who is intoxicated is a serious and imminent risk to themselves or to others, there is an appropriate role for Police to play based on the safety risk considerations identified. The role of Police within a health-based response should involve:

- engaging with the individual to make an assessment of whether immediate medical assistance is required and to call an ambulance if needed;
- if the person does not need immediate medical assistance, making inquiries to identify a safe place for the person, including contacting a responsible person (family/ friend) or a sobering up centre or other similar support service; and

[5] Ibid 36-37.

[6] Ibid 42.

- where required, ensuring that there is appropriate transport to take the person to the safe place.[7]

Guaranteed coverage and availability of services

As noted by the Victorian ERG, an effective health-based response to public intoxication must be capable of meeting the levels of expected demand across the state. This requires appropriate First Responders to be available on a statewide basis 24-hours a day, seven days a week. This is particularly important in Queensland's regional and remote areas.[8]

Consent and powers of First Responders

Any intervention to assist a person who is intoxicated must be with the individual's informed consent and respect their right to reject treatment or assistance where they have capacity to do so. In relation to health treatment, consent is required for medical professionals (who may also be First Responders) to provide treatment to an individual, unless the person requires emergency assistance.[9]

Any response from police as First Responders needs to ensure that the person does not become entangled in the criminal justice system. Police should only have the power to apprehend or detain an individual who is intoxicated in strictly limited circumstances. In order for police to exercise any power to detain a person who is intoxicated, the person must be suffering significant impairment ***and*** that person presents a serious and imminent risk to themselves and/or others. In addition, there must be strict limits to the use of the police power to detain such a person who is intoxicated.[10]

There is potential for police to misuse their discretionary power in terms of assessing whether a person is suffering significant impairment or presenting a serious and imminent risk to themselves/others. It is therefore critical that the Queensland Government develop comprehensive regulations, guidelines, policies, procedures and training to ensure police discretion is applied appropriately and reasonably to all members of the community.[11]

Tailored local responses

A health-based approach requires the resourcing of local support services. These services should be community-led by relevant communities, including First Nations communities and CALD communities.[12]

Availability of places of safety

An essential part of a health-based approach is the availability of places of safety available for people who are found to be intoxicated in public. Wherever possible, under a health-based model a home, or other safe private residences, are the preferred and default safe place option to assist people with sobering-up needs. In many instances of public intoxication, a person can be assisted by friends or family without any intervention needed from health or emergency services.[13]

Where a safe private residence is not available or appropriate in the circumstances, a person who poses a safety risk to themselves and/or others should be transported to an emergency department or urgent

[7] Ibid 42-44.

[8] Ibid 44-45.

[9] Ibid 45.

[10] Ibid 45-46.

[11] Ibid 49.

[12] Ibid 51.

[13] Ibid 62.

care centre if they require urgent medical care, or a sobering service if they require a short recovery period and cannot be cared for elsewhere.

There are long-standing 'sobering up' services and facilities in Queensland that form a critical part of the service landscape (such as the Yumba-Meta Reverend Charles Harris Diversionary Centre, Lyons Street Diversionary Service and Murri-Watch Diversionary Centre). It is especially useful to acknowledge the work of the Yumba-Meta programs which aim to provide continuity of care including a transition from supported accommodation to long term housing. These services provide a central role in building pathways out of incarceration where they exist. However, the extent to which these services are resourced adequately, are able to meet demand, and importantly are supported by a robust service system (including available housing) requires further examination.

The Victorian ERG noted that new sobering services are integral to the Proposed Health Model, as they will replace the current use of police cells and will have the capacity to meet the variances in demand according to location and time.[14] In developing these services the following key principles for service delivery are essential:

- The workforce for sobering services needs to be multidisciplinary, at a minimum include a health practitioner;
- The staff of sobering services must reflect the profile and needs of the population and region it serves;
- These services should be community-led by relevant communities (First Nations, CALD) and ensure that services are delivered in a culturally appropriate manner.

THE CRIMINALISATION OF BEGGING

Under section 8(1) of the *QSOA* a person must not -

a) beg for money or goods in a public place; or
b) cause, procure or encourage a child to beg for money or goods in a public place; or
c) solicit donations of money or goods in a public place.

The maximum penalty for this offence is 10 penalty units or 6 months imprisonment.

In addition to Queensland, begging remains as a criminal offence in Tasmania, Victoria, Northern Territory, and South Australia.[15]

The criminalisation of begging is most likely to adversely affect the most disadvantaged people in the community, as they are the people most likely to engage in begging due to their parlous financial circumstances. Moreover, the criminalisation of begging fails to address the particular circumstances that have led to a person undertaking this conduct and may result in unnecessary contact with the criminal justice system.

According to research undertaken by the Victorian based Hanover Welfare Services (now Launch Housing), people who undertake begging experience high levels of hardship, including homelessness, mental illness, substance dependence, trauma, family violence and poverty.[16] In many cases those who

[14] Ibid 61.

[15] *Police Offences Act 1935* (Tas), s8; *Summary Offences Act 1966* (Vic), s49A; *Summary Offences Act* (NT), s56; Summary *Offences Act 1953* (SA), s12.

[16] Michael Horn and Michelle Cooke, *A Question of Begging: A study of the extent and nature of begging in the City of Melbourne* (Hanover Welfare Services, June 2001).

undertake begging have been unable to access some form of social support or assistance from welfare services, healthcare or housing services.[17] According to the Australian Institute of Health and Welfare, the unmet demand for specialist homelessness services continues to be high, with a daily of average of 300 requests for assistance unable to be met, and a total of 114,000 in the 2020–21 period.[18]

There is also evidence to suggest a high prevalence of serious medical conditions amongst those who beg. According to a 2010 survey conducted of people begging in the Melbourne CBD and inner city area, 54% of participants suffered from mental illness, 15% experienced physical disability and 11.5% had an intellectual disability.[19]

The results of the survey also indicated that an overwhelming majority of respondents had experienced some form of dependency; drug dependency accounted for almost 40% of respondents; alcohol dependency accounted for approximately 15%, and problem gambling accounted for 15%.[20]

According to data from the Queensland Police Service, between 2009-2015 there were a total of 1562 convictions for the offence of begging. Over that period, there was an average of 227 convictions per year and no significant decrease in the rate of convictions over time. The most commonly imposed penalty over this period was a monetary order or fine, representing more than half of all sentences imposed for begging in Queensland from 2009-15 period.[21]

Many people on low incomes or from a socio-economically disadvantaged backgrounds find it difficult, and sometimes impossible to pay when faced with a fine. When a fine defaulter is unable to pay a fine or infringement notice the penalty can escalate resulting in the possibility of imprisonment through secondary offending. This may occur where non-payment results in suspension of licence or a Community Service Order (CSO). Where there is a subsequent charge for driving while disqualified or a breach of the CSO, further additional penalties may be imposed, including possible imprisonment, with penalties increasing with each related infraction.

The JRI strongly supports the decriminalisation of begging and its removal as an offence in the *Summary Offences Act 2005*. Rather than criminalise begging, it is necessary to address the underlying causes and problems associated with begging. Where these involve issues of drug and alcohol dependency it is important to treat the dependency and its causes. This requires a health/harm minimisation approach.

A 2019 report from the Australian Institute of Health and Welfare indicates the strong link between criminalisation and homelessness or housing insecurity. The report indicated that one in three people entering prison reported being homeless in the four weeks before prison, while over half of the people being discharged from prison expect to be homeless upon release.[22] The JRI submits that the Queensland Government needs to commit to addressing the underlying causes of begging by investing in a service-based response to begging and homelessness. This includes the following:

- Extra resourcing for specialist homelessness services to provide additional services;

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[17] Philip Lynch, Understanding and Responding to Begging [2005] *Melbourne University Law Review* 16.

[18] Australian Institute for Health and Welfare, *Specialist homelessness services 2020-21*, Chapter 5: Unmet demand for specialist homelessness services

[19] PILCH Homeless Persons' Legal Clinic. 2010. *We want change – calling for the abolition of the criminal offence of begging*. November 2010. 14.

[20] Ibid 14-15.

[21] Paula Hughes. 2017. 'Punishing Poverty in Australia.' *Parity.* 32-33.

[22] Australian Institute of Health and Welfare 2019. The health of Australia's prisoners 2018. Canberra: AIHW. 22, 24.

- Increased supply of emergency homeless accommodation crisis accommodation, supported accommodation and social housing;
- Extra resourcing for drug/alcohol treatment and mental health services to provide additional services to people who are homeless or at risk of homelessness.

CHALLENGING THE JUSTIFICATIONS FOR CRIMINALISING BEGGING

Australia's current begging laws can be traced back to the offence of 'vagrancy' in 1300s England.[23] The continuing criminalisation of begging in contemporary criminal law is often justified on the basis that a criminal offence for begging serves as a preventative measure to promote public safety. This justification reflects the 'broken windows theory' of community policing – that visible signs of disrepair or street disorder (including begging) suggest that social controls are weak, resulting in increased criminal activity. Vagrancy offences such as begging are therefore justified as being 'preventative offences' aimed at maintaining public safety.[24]

This justification cannot be sustained as there is no evidence to indicate a causal nexus between high crime and 'vagrancy' or begging in certain areas. People who beg and people who are homeless are no more likely than members of the general population to commit serious crime.[25]

The offence of begging is also justified as a measure to reduce annoyance to the general public and commercial retailers, due to perceived notions of 'professional begging' and aggressive behaviour on the part of those who beg. However, based on an analysis of those charged with begging offences in Melbourne, there is no evidence to suggest that those who were so charged were begging for any reason other than financial necessity based on their disadvantage.[26] Moreover, the vast majority of people who beg experience significant disadvantage, including homelessness, mental illness, substance dependence, family violence, trauma and poverty.

THE OFFENCE OF BEGGING AND THE QUEENSLAND HUMAN RIGHTS ACT

Under the *Human Rights Act 2019* (Qld) ('*QHRA*') the following protected human rights are engaged by the offence of begging:

Right to Life

Section 16 of the *QHRA* states:

> Every person has the right to life and has the right not to be arbitrarily deprived of life.

There is strong international human rights jurisprudence in support of the principle that the right to life should not be interpreted narrowly. The expression 'inherent right to life' cannot properly be understood in a restrictive manner and the protection of the right requires that states adopt positive

[23] Kimber J 2013 'Poor Laws: A Historiography of Vagrancy in Australia' 11(8) *History Compass*, vol.11 no.8, 537.

[24] Tamara Walsh, 'Defending Begging Offences' [2004] QUT Law and Justice Journal, 4.

[25] Jeremy Waldron, 'Homelessness and Community' (2000) 50 University of Toronto Law Journal 371, 379-80, at 386-7; Maria Foscarinis, 'Downward spiral: Homelessness and its criminalisation' (1996) 14 Yale Law and Policy Review 1, 55- 56, at 57.

[26] Adams L 2014 'Asking for change: Tackling begging with enforcement in Melbourne', *Parity* vol.27, no.9, pp.24–26; Lynch, see n 17 above.

measures, including measures to reduce infant mortality, to increase life expectancy, and to eliminate malnutrition and epidemics. The Supreme Court of Canada, the Supreme Court of India, the European Commission on Human Rights and the European Court of Human Rights all consider that the right to life is to be interpreted broadly and that it imposes positive obligations on states.[27]

As noted above, people beg to get money for the basic necessities of life. By preventing individuals from accessing food, accommodation and other vital means of survival, the criminal offence of begging interferes with the right to life.

The right to freedom of expression

Section 21 of the *QHRA* states:

> (1) Every person has the right to hold an opinion without interference.
>
> (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether—
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> (a) orally; or
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> (b) in writing; or
>
> (c) in print; or
>
> (d) by way of art; or
>
> (e) in another medium chosen by the person.

The criminal begging offence engages the right to freedom of expression under s21 of the *QHRA*, which covers the imparting and receipt of ideas and information. The objective of this right is to ensure individual self-fulfilment in a tolerant society. The right is considered important to the ability of individuals to participate in core democratic processes and is likely to enjoy a high degree of protection.[28]

The right to freedom of expression has been interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others; the right is not confined to political, cultural or artistic expression.[29] The expression protected by the right to freedom of expression includes expression of news and information, such as commercial expression, advertising and works of art.[30]

The Supreme Court of Canada has indicated that begging is 'a tool used by those in poverty to engage in dialogue with the rest of society about their plight',[31] and as such constitutes 'expression' under the right to freedom of expression in the *Canadian Charter of Rights and Freedoms*.[32] Accordingly, Courts have considered that blanket prohibitions on begging may constitute a breach to the right to freedom of expression contained in the Canadian Charter.

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[27] *Gosselin v Quebec (Attorney General)* 2002 SCC 84, [346] (Arbour J); *Francis Coralie Mullin v Administrator, Union Territory of Delhi & Ors* (1981) 2 SCR 516, 524; *Shanti Star Builders v Narayan K Totama* (1990) 1 SCC 520.

[28] See n 19 above, 12.

[29] *Lange v Australian Broadcasting Corporation (Lange)* (1997) 189 CLR 520.

[30] Department of Constitutional Affairs, A Guide to the Human Rights Act (UK) 1998 (3rd ed, October 2006), p 23.

[31] *Ramsden v Peterborough (City)*, [1993] 2 S.C.R. 1084 (Taylor J).

[32] Section 2(d) of the *Canadian Charter of Rights and Freedoms* states 'Everyone has the following fundamental freedoms: b) freedom of …expression'.

It is submitted that it is unlikely to be able to interpret the begging offence in the *QSOA* in a manner consistent with the *QHRA*, as it is a criminal offence to ask for money or goods. The act of begging would amount to 'expression' within the meaning of s21. In the overwhelming majority of cases begging is an activity of last resort and is a means of communicating the immediate and vital needs of those who engage in it. Further, it is submitted that the criminalisation of begging could not be considered as a reasonable, proportionate or justifiable limitation on human rights.

Accordingly, it is not possible to interpret the criminal begging offence consistently with human rights, and this conclusion is sufficient to establish that the criminal begging offence is a violation of the freedom of expression under the *QHRA*.

POLICING AND HOMELESSNESS

The removal of the offences of public intoxication and begging would be important initiatives that reduce the prospect of criminalisation of people who are homeless and spend significant time in public space. However, it is important to recognise that the broader question of policing of public space and the exercise of police discretion in the use of various powers in their interactions with homeless people needs to be reviewed. These include the exercise of the following powers under the *Police Powers and Responsibilities Act 2000* (Qld) (*PPR Act*):

- Move-on directions (ss46-47 *PPR Act*);
- Stop, question, request for identification (s40 *PPR Act*);
- Power to conduct a personal search without a warrant (s29 *PPR Act*).

The exercise of police discretion is an important mechanism within the criminal justice system to *divert* people from the formal criminal justice process where the circumstances indicate that such a response would be too harsh. In these situations, justice may be better served by not introducing a person into the criminal justice process. In terms of policing homeless people in public places, the JRI considers the appropriate use of police discretion involves refraining from issuing sanctions or directing people to move on, conducting searches or utilising powers of arrest where the potential harm to the individual is disproportionate to the potential benefit to the wider community.

An alternative approach to policing homelessness

To reduce the interactions between people experiencing homelessness and the justice system, the JRI recommends that the Queensland Government develop and implement a protocol that would act as a guidance document for Queensland Police and other agencies to assist them to apply discretion when it comes to public order offences in relation to people experiencing homelessness.

Such a Protocol would emphasise the importance of the appropriate use of discretion, which includes taking into consideration both the individual circumstances and the prevalence of mental health disorders and substance use disorder amongst the homeless population. It also encourages police to facilitate referral pathways to appropriate services for people sleeping rough.

A similar protocol was introduced by the NSW Government in 2012. The 'Protocol for Homeless People in Public Places' (the Protocol) acknowledges and promotes the rights of people experiencing homelessness alongside the rights of other community members - for example, by highlighting the rights of people experiencing homelessness to use and enjoy public space and to carry and store their belongings with them. The main principle underpinning the protocol is that unless they ask for help or intervention is deemed necessary, people experiencing homelessness should be left alone when using

public places. It emphasises the importance of the use of discretion when it comes to policing of people experiencing homelessness.

The Protocol also aims to assist people experiencing homelessness to access appropriate services if they so request, and to provide advice and information on points of assistance they may wish to access in the future. NSW Police have been signatories to the Protocol since its inception.

The Protocol does not prevent organisations from taking appropriate action where health or safety is at risk or if there is a breach of the peace, or if unlawful behaviour has occurred.[33]

It is important to recognise that police are sometimes one of the only services that have ongoing contact with people who are the most vulnerable and disenfranchised and experiencing homelessness. Police may play an important role in providing referrals and avenues of support. When police work cooperatively with specialist homelessness services, they can help to improve outcomes for people experiencing homelessness by making appropriate referrals and facilitating support.

Strengthening cross-sector collaboration between Queensland Police and other community-based support services as well as local specialist homelessness services and mental health services would increase the number of people able to gain the support of services.

[33] Homelessness NSW, Public Interest Advocacy Centre. 2021. *Policing Public Space: the experiences of people sleeping rough*. May 2021. 7.