

## The Management of Public Drunkenness in Western Australia: Policing the Unpoliceable?

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*This paper examines the role of the criminal justice system in managing public order consequences from the problematic use of alcohol in Western Australia (WA) from its beginnings as a British colony in the 1830s up to the recent present.*

*For much of this period until 1990, the dominant approach relied on a broad police power to arrest and charge anyone perceived to be intoxicated in a public place, resulting in large numbers of individuals appearing in Magistrate Courts, who, if reoffenders, were exposed to extended terms of imprisonment calculated not to rehabilitate but to punish and isolate.*

*Decriminalisation of public intoxication occurred in 1990, as the result of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which established a framework outside the criminal justice system for police to formally divert intoxicated people to sobering up centres (SUCs) instead of detaining them overnight in lock ups.*

Whilst this paper examines how the criminal justice system performed a long-standing role of punishing those found drunk in public places in WA since its inception as the Swan River colony in 1829, the police were not the only agency tasked with dealing with the consequences of the problematic use of alcohol.<sup>1</sup>

Apart from the criminal justice system, the mental health system also provided a custodial function until the mid 1970s to manage court ordered detention of so-called 'inebriates'.<sup>2</sup> This role existed for over 100 years, from 1865 when Fremantle Asylum was established and replaced in 1908 by a new hospital at the Claremont site, until the early 1970s. The custodial role

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<sup>1</sup> The term 'problematic use of alcohol' is used in this paper to encompass alcohol use that 'results in problems, individual or collective, health or social... (which) has been used since the mid-1960s in a more general sense (to) avoid commitment or reference to the disease concept of alcoholism'. World Health Organisation, 'Lexicon of alcohol and drug terms published by the World Health Organisation', [http://www.who.int/substance\\_abuse/terminology/who\\_lexicon/en/](http://www.who.int/substance_abuse/terminology/who_lexicon/en/).

<sup>2</sup> This occurred through custodial provisions which applied to 'lunatics' under the *Lunacy Act 1903*, which were also included in the *Inebriates Act 1912* which operated until it was repealed by the *Mental Health Act 1962*. The provision of a custodial regime that had been created by the *Inebriates Act 1912* was continued in the *Convicted Inebriates Rehabilitation Act 1963*. Whilst the *Lunacy Act 1871* and its successor the *Lunacy Act 1903* are constructed around the notion of a 'lunatic', it is conceivable that alcohol affected persons may have been committed as lunatics, over the period before the period between 1871 and 1912.

performed by the mental health system remained in place until the establishment of the Alcohol and Drug Authority (ADA) in 1974.<sup>3</sup>

It should be noted that mental health facilities provided a short stay detoxification or 'drying out' of alcohol dependent individuals through the Perth Public Hospital's Mental Ward after it was established in 1909,<sup>4</sup> as well as at the two major mental institutions, at Claremont Hospital for the Mentally Insane and Heathcote Reception Home, opened in 1908 and 1929, respectively.<sup>5</sup>

The mental health system never embraced that it was to provide a detoxification service for managing alcohol dependent individuals as this 'was never really successful in rehabilitation, because alcoholics needed different treatment from the insane, and the groups did not relish being associated.'<sup>6</sup> This dilemma was not resolved until the opening of the ADA and from the mid 1970s, when detoxification and specialist treatment facilities were established on a public health system model that rested on patient autonomy and voluntary admission for managing alcohol-affected individuals.<sup>7</sup> This meant the treatment of those with problems related to the problematic use of alcohol was managed in WA completely apart from the mental health system from this time. The need to separately manage problematic users apart from the mental health system was espoused for many years by the Mental Health Services (MHS) because of changes in understanding the causes and forms of treatment of alcohol dependence. This was noted by the Director Dr Ellis in the 1973/1974 annual report, when he approvingly supported the establishment of the ADA.

Psychiatrists have a part to play in combating these problems, but I believe their participation should be limited to advising and supporting the community effort except in the relatively few cases where the alcoholism or other drug dependence is directly due to mental illness.<sup>8</sup>

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<sup>3</sup> This loss of the primary custodial role involving the Mental Health Services (MHS) occurred through administrative arrangements at the time of the establishment of the ADA, when the MHS ceased to detain inebriates cf. Ellis (1984). However, there still remained a power vested in the Director of the ADA under the *Convicted Inebriates' Rehabilitation Act Amendment Act 1974* that permitted the civil commitment of inebriates. This power was not exercised by ADA and it was formally removed in 1989 by the *Convicted Inebriate's Rehabilitation Repeal Act 1989*.

<sup>4</sup> G.C. Bolton and P. Joske, *History of Royal Perth Hospital*, Perth, WA, University of Western Australia Press, 1982, p. 81.

<sup>5</sup> The Perth Public Hospital was renamed Royal Perth Hospital in 1946.

<sup>6</sup> A.S. Ellis, *Eloquent testimony: The story of the mental health services in Western Australia 1830-1975*, Perth, WA, University of Western Australia Press, 1984, p. 56.

<sup>7</sup> A.S. Ellis, *Investigation into drugs and alcohol: Final report*, Perth, WA, Health Department of Western Australia, 1971; J. Pougher, 'The management of alcohol and drug problems in Western Australia', *Journal of the Public Health Association (WA Branch)*, vol. 4(2), 1974.

<sup>8</sup> Mental Health Services, *Annual report of the Mental Health Services for 1973/1974*, Perth, WA, Mental Health Services, 1974, p. 7.

Of interest, it appears the wheel has turned in a full circle in relation to the proposition of whether treatment of alcohol and other drug dependency ought to be a specialist service located in a public health framework or be integrated into mental health services, as some 40 years after this separation, the ADA was dissolved as a separate statutory body and reabsorbed into the Mental Health Commission in June 2015.<sup>9</sup>

Although it is outside the scope of this paper, it is also recognised there are other social and health impacts, especially on the State's public hospital system involving alcohol intoxicated drivers who are a major cause of motor vehicle fatalities and accidents. This means police will continue to play a key role in relation to enforcement of laws concerned with alcohol, beyond the public order concerns which are the focus of this paper.<sup>10</sup>

The paper will set out how public drunkenness has been managed in WA as follows. After the introduction contained in the first section, the second section will briefly set out the rationale for the criminalisation of public drunkenness. This will be followed by the third section that will consider the colonial period between 1829 and the early 1890s. The fourth section is primarily concerned with the operation of the *Police Act 1892*, over the period from the early 1890s to 1990, which was the primary tool to suppress and punish public drunkenness.

The fifth section covers the period from decriminalisation in May 1990 up to 2004, over which time the management and detention of intoxicated people in police lock ups was mostly replaced by a short-term protective system of care delivered through SUCs.<sup>11</sup> Except for the Perth metropolitan area, the population utilising SUCs are predominantly Indigenous people in regional locations with high levels of alcohol-related social problems.<sup>12</sup> Whilst more recent research is scant, it is believed that Indigenous people still represent by far the majority of admissions to SUCs.<sup>13</sup> In the latter part of this period a specific piece of legislation, the *Protective Custody Act 2000* was

<sup>9</sup> Mental Health Commission, 'About us', <https://www.mhc.wa.gov.au/about-us/about-us/>, (accessed 30 November 2017).

<sup>10</sup> B. Luckin, 'Anti-drink driving reform in Britain, c 1920-1980', *Addiction*, vol. 105, 2010; K. Terer and R. Brown, *Effective drink driving prevention and enforcement strategies: approaches to improving practice*, Trends & Issues in Crime & Criminal Justice No. 472, 2014, [http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi472.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi472.pdf).

<sup>11</sup> More recently sobering up centres have also been referred to as 'safe places for intoxicated people': Mental Health Commission, *Better choices, better lives: Western Australian mental health, alcohol and other drug services plan 2015-2025*, Perth, WA, Mental Health Commission, 2016, p. 36., [http://www.mentalhealth.wa.gov.au/Libraries/pdf\\_docs/The\\_Plan\\_81215\\_3.sflb.ashx](http://www.mentalhealth.wa.gov.au/Libraries/pdf_docs/The_Plan_81215_3.sflb.ashx).

<sup>12</sup> M. Brady et al., 'The role of a rural sobering up centre in managing alcohol related harm to Aboriginal people in South Australia', *Drug & Alcohol Review*, vol. 25, 2006; A. Daly, R. Midford, and C. Wilkinson, *A survey of twenty seven sobering up centres in Australia*, Technical report No. 1, Perth, WA, WA Alcohol & Drug Authority, 1991; R. Midford, *Decriminalisation of drunkenness and the establishment of sobering up centres in Western Australia*, Perth, WA, Western Australian Alcohol & Drug Authority, 1991.

<sup>13</sup> G. Swensen *Utilisation of sobering up centres, 1990 - 2007*, Statistical Bulletin No. 41, Perth, WA, Drug and Alcohol Office, 2008.

introduced to manage alcohol intoxicated adults outside the criminal justice system, building on the initial arrangement that had been added in 1990 to the *Police Act 1892*.

The sixth section, which is concerned with the possibility that there has been some recriminalisation of managing public drunkenness, considers a number of developments which in totality raise concerns that this may have occurred because of the introduction of move on notices from June 2005 following the passage of the *Criminal Law Amendment (Simple Offences) Act 2004*, the implementation of prohibited behaviour orders in early 2011 and a trial of criminal penalty infringement notices in 2014.

Statistical information will also be presented as graphs in sections two to five based on time series data from published reports of information concerned with the offence of public drunkenness as well as various other offences, to illustrate trends and patterns concerning police activity related to public intoxication. Data concerned with move on notices will also be included in a table, to highlight some of the issues related to the era since 2004 when recriminalisation has occurred.

In the conclusion, it is suggested that for much of this period the criminal justice system undertook the primary role in managing the public order consequences of intoxication. It is argued that in spite of the decriminalisation of public drunkenness in 1990, problematic use of alcohol continues to be an intractable, so-called 'wicked problem'.<sup>14</sup> Recently concerns about public order consequences have seen governments in the State expand the primary role of the criminal law, which it is suggested is a return to approaches from earlier times when the individual problematic user was considered to be the cause. This approach limits the adoption of policies involving a suite of social, fiscal and legal controls over the availability and the marketing of alcohol with a complementary role performed by the criminal law.

## Rationale for the Criminalisation of Public Drunkenness

The pivotal role played by the State's criminal justice system in managing public drunkenness stems from its earliest colonial times, when it received as law the legislative instruments and administrative practices which existed in

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<sup>14</sup> P. De Grace and L.H. Stahl, *Wicked problems, righteous solutions: A catalogue of modern software engineering paradigms*, Englewood Cliffs, NJ, Yourdon Press, 1990; Australian Public Service Commission, *Tackling wicked problems - a public policy perspective*, Canberra, ACT, Australian Public Service Commission, 2007, [http://www.apsc.gov.au/\\_\\_data/assets/pdf\\_file/0005/6386/wickedproblems.pdf](http://www.apsc.gov.au/__data/assets/pdf_file/0005/6386/wickedproblems.pdf); L.L.C. Poppendieck, 'Wicked problems', May 2002, [www.poppendieck.com/wicked.htm](http://www.poppendieck.com/wicked.htm); B. Hunter, 'Conspicuous compassion and wicked problems: The Howard Government's National Emergency in Indigenous Affairs', *Agenda*, vol. 14(3), 2007; H. Boyd, 'Conspicuous compassion and wicked problems: The Howard Government's National Emergency in Indigenous Affairs', *Agenda*, vol. 14(3), 2007.

the United Kingdom as at 1 June 1829.<sup>15</sup> These inherited British laws had evolved from the criminalisation of public drunkenness, some 300 years before, in Tudor England in 1606, when Parliament passed 'An Act For Repressing The Odious And Loathsome Sin Of Drunkenness'.

Indeed, well before the 1606 Act, there had been a preoccupation with public order as part of wider concerns about vagrancy and homelessness in England from the fourteenth century, with the Statute of Labourers of 1349 which created a framework of potent and harsh measures against these problems. Over time more repressive punishments were adopted against those considered to be 'idle', with severity reaching

a high water mark in the 1500s during the reign of Henry VIII and Edward VI [...] (when) any beggar or vagrant [...] could be arrested and taken to the next market town "there to be tied to the end of a cart naked, and to be beaten with whips throughout the same market town there to be tied to the end of a cart naked, and to be beaten with whips throughout the same market town." For a second offence the vagrant would lose his right ear, for a third offence he would be executed.<sup>16</sup>

However, even though before 1606 public drunkenness was not an offence unless accompanied by public nuisance under English common law, the ecclesiastical courts had punished drunkenness.<sup>17</sup>

The penalisation of public drunkenness in 1606 was a major change, as prior to this time, excessive use of alcohol had been widely tolerated as it was regarded as a necessary and important part of the daily diet of the English working population.<sup>18</sup> The 1606 law provided for a first offence a fine of three shillings and four pence or confinement in the stocks for six hours, with a penalty of five shillings for subsequent offences of being drunk in a public place. It was an offence that was framed as being sinful, described as 'being the root and foundation of many other enormous sins, as a bloodshed, stabbing, murder, swearing, fornication, adultery and such like.'<sup>19</sup>

This means that the English vagrancy and drunkenness laws which came to WA in 1829 were based on the belief that drunkenness was sinful, that

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<sup>15</sup> E. Russell, *A history of the law in Western Australia and its development from 1829 to 1979*, Edited and completed by FM Robinson & PW Nichols in 1950, Nedlands, WA, University of Western Australian Press, 1980, p. 61.

<sup>16</sup> R. Sackville, *Homeless people and the law*, Commission of Inquiry Into Poverty, Canberra, ACT, Australian Government Publishing Service, 1976, p. 11.

<sup>17</sup> D. Brown, 'Police offences', *University of Western Australia Annual Law Review*, vol. 10, 1971-1972.

<sup>18</sup> R. French, *Nineteen centuries of drink in England: a history (reprint)*, London, UK, National Temperance Publication Depot, 1895.

<sup>19</sup> R. French. 184

it was the cause of serious public disorder, and that it posed a risk to productivity and social harmony if it was not repressed.

This approach to a pervasive social problem resulted in much effort being focussed on a small group of recidivist offenders.<sup>20</sup> This created a system where offenders experienced repeated court appearances with attendant severe consequences of deterioration in well-being, becoming a 'revolving door' of cycles of imprisonment, homelessness, presentation at hospital emergency departments, spiralling alcohol abuse and arrest.<sup>21</sup>

The practice of managing drunkenness through escalating harsher punishments meant police, courts, and correctional systems played complementary roles in managing drunkenness built upon the notion of punishment and deterrence that will be considered in the third section of the paper.

### Colonial Era: 1829 to Early 1890

Public drunkenness and other alcohol-related law and order problems were a salient issue in WA from its earliest days—a characteristic shared with other Australian jurisdictions, with similar levels of social problems from high levels of alcohol use.<sup>22</sup>

Alcoholism, drunkenness and the basic problems associated with them – such as personal misery, economic ruin and crime – have been features of Australian society since the very first days of the white man's settlement on the continent. [...] Various writers who described the early days of the colony [of New South Wales] drew attention to the fact that “many poor settlers were ruined by the craving for liquor”, that church services were rendered

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<sup>20</sup> G.F. Bason, 'Chronic alcoholism and public drunkenness - quo vadimus post Powell', *American University Law Review*, vol. 19, 1970; J.R. Gerchow, 'Criminal law - the chronic alcoholic vs the public drunkenness statute', *West Virginia Law Review*, vol. 73, 1971; R.A. Joske and C.N. Turner, 'Studies in chronic alcoholism. I. The clinical findings in 78 cases of chronic alcoholism', *Medical Journal of Australia*, vol. 1, 1952; E.G. Saint and M.A. Mackay, 'Studies in chronic alcoholism. II. A social study of chronic alcoholism', *Medical Journal of Australia*, vol. 1, 1952; M.L. Willenbring et al., 'Community treatment of the chronic public inebriate I: implementation', *Alcoholism Treatment Quarterly*, vol. 10, 1990; Working Party on Vagrancy and Street Offences, *Working paper*, Chairman AJE Brennan, London, UK, Her Majesty's Stationery Office, 1974.

<sup>21</sup> D.J. Pittman and C.W. Gordon, *Revolving door: A study of the chronic police case inebriate*, New Haven, Connecticut, Yale Center of Alcohol Studies, 1958; K. Lovald and H.R. Stub, 'The revolving door: reactions of chronic drunkenness offenders to court sanctions', *Journal of Criminal Law, Criminology & Police Science*, vol. 59(4), 1968.

<sup>22</sup> A. Dingle, 'The truly magnificent thirst: An historical survey of Australian drinking habits', *Historical Studies*, vol. 19, 1980; A.E. Dingle, *Drink and drinking in nineteenth century Australia: a statistical commentary*, Monash papers in economic history, No. 6, 1978; D. Kirkby, 'Drinking the good life: Australia c 1880-1980', in Holt MP (ed.), *Alcohol: A social and cultural history*, Oxford, Berg, 2006; C. Pearl, *Beer, glorious beer*, Melbourne, VIC, Thomas Nelson, 1969.

impossible because of the “number of drunken soldiers and convicts surrounding the outside of the place of worship”, and the colony’s first murder, in January 1794, was probably directly related to the theft of money to buy liquor.<sup>23</sup>

Accounts in the popular press and scholarly writing about this era confirm the heavy use of alcohol in WA. For instance, a news item in the Perth Gazette of September 1853, referred to a list of court cases dealt with by the Perth Magistrates Court:

The consumption of alcohol provided a release from the cares of everyday life for many of Western Australia’s workers. The government responded not by dealing with the root problems but by closing public houses, increasing the duty on liquor and so on. But the heavy drinking went on, as evidenced by an article in the Perth Gazette.<sup>24</sup>

A contribution in Stannage’s 1981 seminal history of the State stated:

Alcohol and social reaction to it was at the root of the crime problem in Western Australia. [...] This was in no way exceptional. Indeed from the 1830s drink had been a serious community problem in Swan River. The coroners’ records show that many of the “death by drowning” and “death by misadventure” cases occurred as a result of bouts of drunkenness [...] Derelict women and men wandered drunken and homeless through the streets of the towns before being arrested and imprisoned overnight, to be charged with being “drunk and disorderly”, “resisting arrest” and so on the next day.<sup>25</sup>

Over the period, governments have resorted to a combination of methods to ameliorate heavy use of alcohol, including restrictions on trading hours of public houses and hotels and an apartheid-like system of controls on the Indigenous population under so-called ‘native welfare’ legislation to exclude Indigenous people from towns and the use of ‘native citizenship’ laws.

The response since the colonial era has been to expand police powers to deal with public drunkenness and other public order offences, such as was

<sup>23</sup> Senate Standing Committee on Social Welfare, *Drug problems in Australia: An intoxicated society?*, Canberra, ACT, Australian Government Publishing Service, 1977, p. 27.

<sup>24</sup> M. Aveling, 'Perth Gazette: Police intelligence: Drunkenness', in M. Aveling (ed.), *Westralian voices: documents in Western Australian social history*, Perth, WA, University of Western Australia Press, 1979, p. 79.

<sup>25</sup> J.E. Thomas, 'Crime and society', in Stannage CT (ed.), *A new history of Western Australia*, Perth, WA, University of Western Australia Press, 1981, p. 642.

provided in the 1849 *Ordinance for regulation the police in Western Australia* (12<sup>th</sup> Vict. No. 20).

Speeches made in the Legislative Council during the course of debate for *An ordinance to provide a more suitable mode of inflicting punishment for drunkenness*, which was passed in May 1851, included remarks by the Governor about the use of the stocks, which confirm this practice had been adopted as a form of punishment for drunkenness in the colony since its inception.<sup>26</sup>

The Bill to provide a more suitable mode of inflicting punishment for Drunkenness was read a second time. Mr Mackie observed that, after 20 years' experience, he did not know of more than two or three cases where the fine was not paid, and the stocks awarded as a punishment. The Governor said such was not the case at Fremantle, the Resident Magistrate having informed him that he could not get delinquents to pay the fine, and had not power to imprison.

Mr Samson asked why the stocks could not be used. By having a shed over them the culprits would be defended from the sun's rays. The Governor considered that six hours in the stocks was not sufficient punishment. Some conversation ensued as to the policy of imprisoning instead of fining, in some cases; and the further consideration of the Bill was adjourned to Wednesday, 30<sup>th</sup> inst., when we believe a clause will be inserted giving magistrates the option of imprisoning or fining.<sup>27</sup>

## Statistical Overview

Statistical information in the figures below show drunkenness occupied a surprisingly large amount of police time over the period since the 1860s, suggesting the problematic use of alcohol was prioritised as the major law and order problem in WA.

The extent to which drunkenness was a policing priority in WA in the colonial period is demonstrated in Figure 1, with annual counts of charges and/or convictions for drunkenness for the years 1861 to 1902, rates of drunkenness and the proportion of drunkenness charges/convictions of all charges/convictions.<sup>28</sup>

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<sup>26</sup> 14<sup>th</sup> Vict No. 25.

<sup>27</sup> Perth Gazette & Independent Journal of Politics and News, 'Legislative Council', *Perth Gazette and Independent Journal of Politics and News*, 25 April 1851.

<sup>28</sup> Data has been extracted from annual reports

Figure 1 shows that offences which resulted in police action and appearance before a magistrate for public drunkenness represented between 45 to 50 per cent of annual charges for all offences up to late 1870s, then declined somewhat to around 25% of charges per year over the remainder of the period.

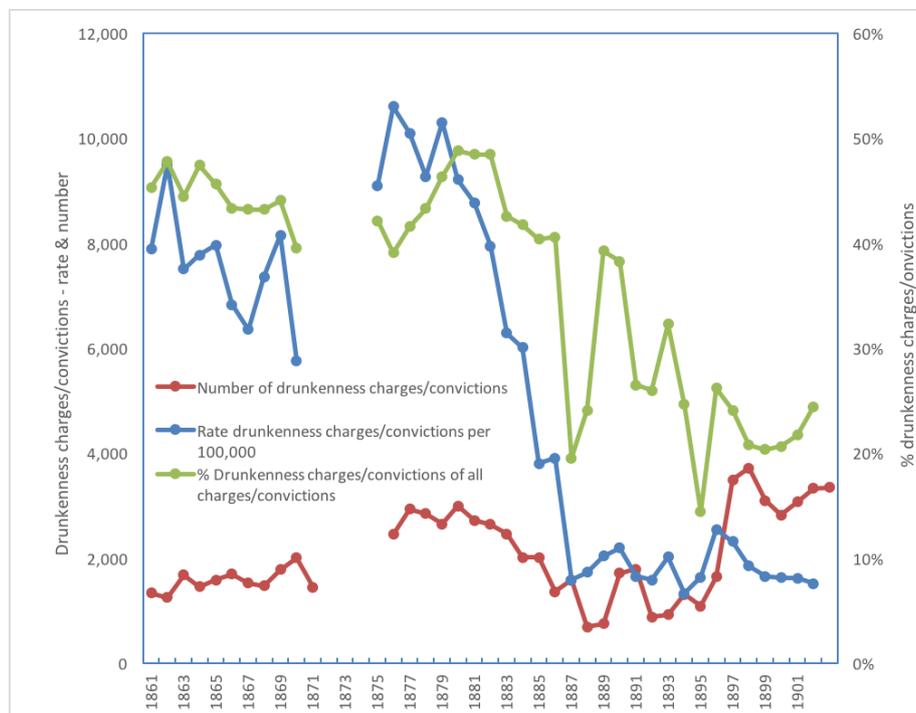


Figure 1: Annual number and rate of drunkenness charges/convictions and proportion of drunkenness charges/convictions of all charges/convictions, Western Australia, 1861 – 1902

### Police Act Era: 1890s to 1990

In March 1892 the *Police Act 1892* consolidated into one piece of legislation a variety of proclamations, ordinances, and laws that had been introduced since 1829, such as the *Ordinance to provide a more suitable mode of inflicting punishment for drunkenness* (14 Vict No. 25), the *Ordinance for the more effectual suppression of drunkenness* (17 Vict No. 8) and the *Police ordinance 1861* (25 Vict No. 15).<sup>29</sup>

The *Police Act 1892* also established a unified and professional police service, which then for a number of years was responsible for the enforcement of both criminal and regulatory laws, such as weights and measures and licensing of motor vehicles. The 1892 legislation also supplanted the use of former service personnel, the Enrolled Pensioner Force, who between 1850 and 1880 had enforced law and order as part of their role concerned with oversight

<sup>29</sup> E. Russell, (p. 188).

of convicts.<sup>30</sup> A total of some 9,720 convicts were transported to WA between 1850 and 1869 after WA was proclaimed a British penal colony in 1849.<sup>31</sup>

Section 53 of the *Police Act 1892* provided the basis for police to arrest a person found drunk or disorderly or 'drunk in any street, public place, or in any passenger boat or vehicle. When first passed, the penalty for public drunkenness was a fine of one pound for a first time offender or imprisonment for up to seven days, with or without hard labour; and a fine of up to five pounds or imprisonment with or without hard labour for up to 21 days for second and subsequent offences.<sup>32</sup>

As these penalties remained unchanged for more than 80 years it can be surmised that the legislature did not have an appetite for escalating them. However, if we look outside of the *Police Act 1892* we can find other punitive measures that were enacted which indicate some enthusiasm for other quasi-punitive regimes, which may have resulted in longer periods of incarceration.

The introduction of the *Convicted Inebriates Rehabilitation Act 1963* suggests policy makers believed that a system of civil commitment to compel offenders to undergo a period of enforced 'treatment' of up to 12 months in a designated section within Karnet Prison (a low security prison) was a potent penalty. This approach was triggered when a person had been convicted of an offence where drunkenness was an 'element or was a contributory cause' of that offence, when the individual was considered to be an 'inebriate'.

The low fines originally contained in the *Police Act 1892* when it was originally passed remained unchanged until November 1975, when they were increased to \$10 and \$25, for first time and repeat offenders, respectively.<sup>33</sup> The 1975 amendment did not change the term of imprisonment, which remained as provided in 1892, up to seven days for a first time offender or up to 21 days for repeat offenders.

As the methodology in the *Police Act 1892* for applying punishments to those convicted for public drunkenness was done by using the same framework as was used to punish repeat vagrancy offenders, by differentiating between one-off or occasional and repeat offenders, this may have also constrained policy makers from increasing penalties.

This framework meant that until the mid 1970s, a repeat offender would face increasingly harsh punitive consequences if they appeared before a summary court charged with public drunkenness, depending on the frequency

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<sup>30</sup> F.H. Broomhall, *The veterans: A history of the Enrolled Pensioner Force in Western Australia 1850-1880*, Victoria Park, WA, Hesperian Press, 1989.

<sup>31</sup> J.S. Battye, *Western Australia: a history from its discovery to the inauguration of the Commonwealth*, Facsimile edition reprinted 1978, Perth, WA, University of Western Australia Press, 1924

<sup>32</sup> In 1966 when decimal currency was introduced in Australia, the penalty for a Section 53 offence was converted to a fine of \$2 for first offenders and \$10 for repeat offenders. Australia changed from the Imperial units to decimal currency in February 1966. A pound (£1) converted to \$2: Decimal Currency. Act 1965 [Act 1965/113].

<sup>33</sup> Police Act Amendment Act (No. 2) 1975.

with which they appeared before a court. Section 53 set out that a first time offender could be fined up to \$10 and/or be imprisoned for up to seven days and that a second or subsequent conviction incurred a fine of up to \$25 and/or imprisonment up to 21 days. However, the arrangement in the *Police Act 1892* was that if a person was convicted for public drunkenness more than three times within a 12 month period, they faced the framework of escalated punishments set out in Sections 65(6) and 66(1).

This framework provided that if a person had been convicted three times of public drunkenness within the past 12 months, under Section 65(6) they would be declared a 'habitual drunkard', attracting a fine of up to \$500 and/or imprisonment of not more than six months. Until the November 1975 amendment, the penalty for being a habitual drunkard was imprisonment for up to six months, however, following this amendment a non-custodial option of a fine of up to \$500 was added, in addition to imprisonment for up to six months.

The penalty of imprisonment of up to six months in Section 65(6) operated as an offender would be declared an 'idle and disorderly person', a provision that applied to a range of other vagrancy-related offences. Section 66 established the next stage of escalated punishment, that if a person had been convicted more than three times within 12 months, they were declared a 'rogue and a vagabond', in which case the offender could be imprisoned for up to 12 months, with or without hard labour. The penultimate escalated consequence was that if a 'rogue and vagabond' committed further offences, including a Section 66(7) offence, they could be declared an 'incorrigible rogue', with imprisonment for up to 18 months, with hard labour.

If a person was convicted for public drunkenness, which was their third conviction, but were last convicted more than 12 months ago, they faced a lower penalty, a fine of not more than \$10 or not more than 21 days imprisonment before the 1975 amendment, when the fine increased to \$25.

The muted reforms in November 1975 replaced the vagrancy-derived terms with the term of having committed 'an offence on summary conviction'. Except for the change in terminology, the *Police Act* continued to retain the provisions of escalating penalties of repeat offenders, such as being declared a 'habitual drunkard'. The amendment also increased the penalty of a fine of up to \$1,000 or imprisonment of not more than 12 months, if a person was convicted of a Section 65 offence.

Although early High Court judgements contained critical comments about the system of tiered punishments through the vagrancy influenced legislation, such as in the cases of *Lee Fan v Dempsey*<sup>34</sup> and *Mitchell v Scales*,<sup>35</sup> these did not prompt a quick response by Western Australian legislators.

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<sup>34</sup> *Lee Fan v Dempsey* (1907) 5 CLR, High Court of Australia, 31 October 1907.

<sup>35</sup> *Mitchell v Scales* (1907) 5 CLR 405, High Court of Australia (Full Court), 11 December 1907.

There is evidence of judicial concern about the rationale for retention of the system of punishment of the spectrum of offenders, including public drunkenness, contained in the *Police Act 1892*. An example is the 1962 High Court of Australia case of *Zanetti v Hill*, an appeal involving a conviction for an idle and disorderly person under Section 65 of the *Police Act 1892*.<sup>36</sup> In the course of its judgement the High Court referred to an 1821 UK Parliamentary Select Committee on Vagrancy, raising concerns about the English vagrancy legislation received by other Australian colonies. This was before WA had been established as a British colony in 1829, reinforcing the Court's view that the vagrancy laws were always unsuited for an Australian context:

[I]t is obvious that to transfer the application of such provisions from rural England in Tudor times and later, to the very different conditions of city life in Perth and give it a just and respectable operation must involve many difficulties.<sup>37</sup>

### Statistical Overview

Figure 2 shows how public drunkenness was dealt with over the period 1899/1900 to 2010/2011. This figure has been constructed from two sources of data, criminal justice data up to 1991/1992 and a proxy measure of public intoxication based on the number of apprehensions by police and admissions to SUCs of intoxicated persons for the period from 1992/1993 to 2010/2011.

Figure 2 shows that the annual rate of charges for public drunkenness peaked in 1914/1915 (1,850 per 100,000) and then declined until 1933/1934 (1,749 per 100,000), before slowly increasing up to 1972/1973 (16,379 per 100,000) before falling. Since the establishment of the Alcohol and Drug Authority in 1974, the rate has remained relatively stable at approximately 1,000 per 100,000.

The annual number of charges and/or apprehensions has increased over most of the period from the low point in 1933/1934 (2,087 charges), to nearly 24,000 apprehensions/admissions in 2003/2004. The reduction in apprehensions/admissions since 2003/2004 is probably due to the closure of a number of SUCs and government shifts in policy and funding priorities.

Figure 3 indicates there were two peaks in the annual number of drunkenness charges associated with the First World War in 1914/1915 (5,900 charges) and the Second World War in 1942/1943 (4,800 charges), with a smaller peak in 1929/1930 (3,500 charges) in the inter-war period. The other notable feature was the steady growth in the number of drunkenness charges after the Second World War period up to 1962/1963 (7,400 charges).

<sup>36</sup> *Zanetti v Hill* (1962) 108 CLR 433, High Court of Australia, 5 December 1962.

<sup>37</sup> *Zanetti v Hill*, p.437.

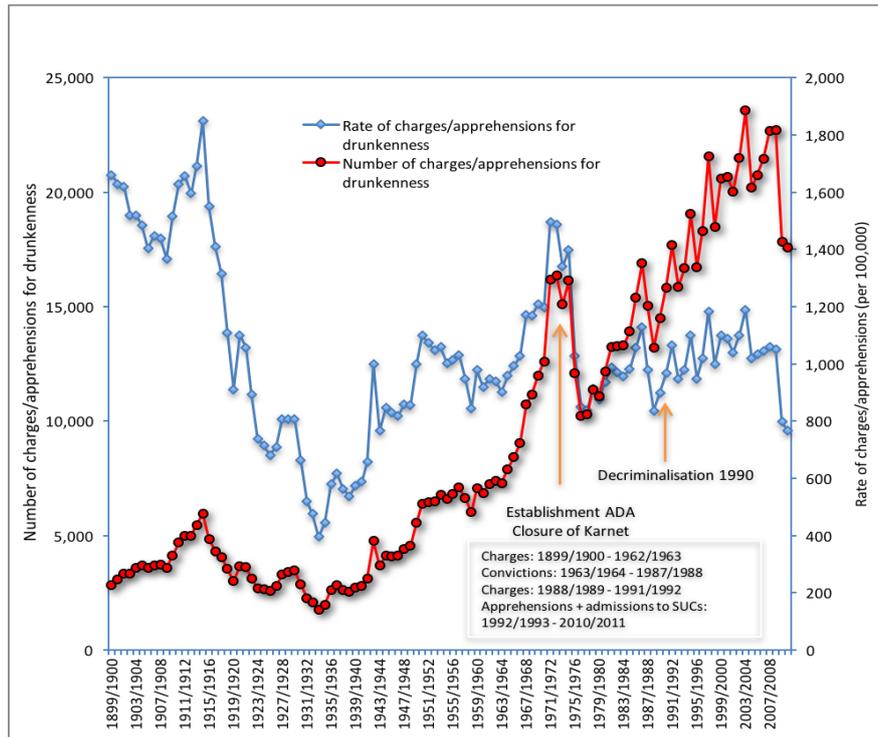


Figure 2: Annual number and rate of charges/apprehensions for drunkenness, Western Australia, 1899/1900 – 2010/2011

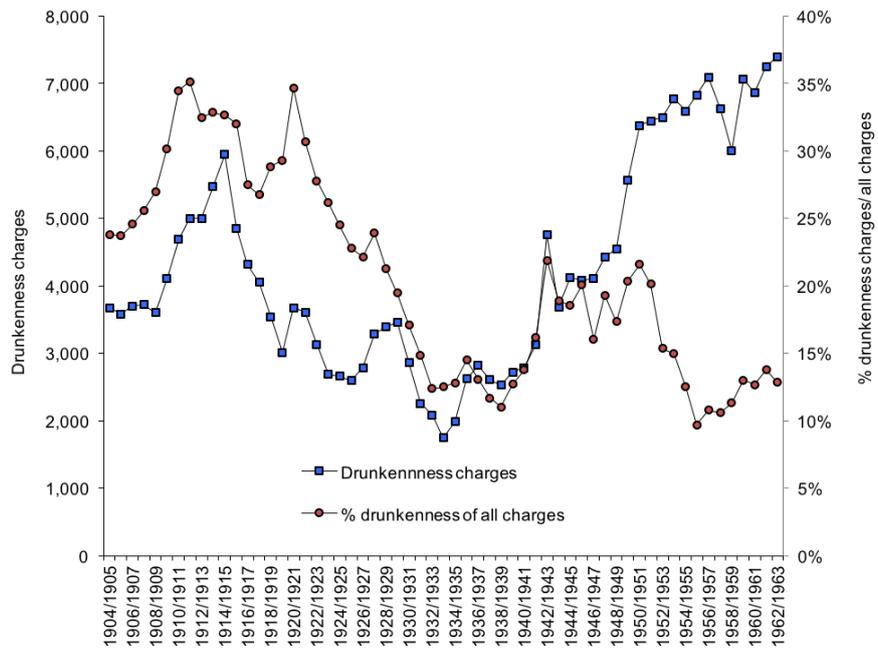


Figure 3: Annual number of charges for drunkenness and the proportion of drunkenness charges of all charges, Western Australia, 1904/1905 – 1962/1963

Annual reports published by the WA police up to 1962/1963 contain appendix tables which include breakdowns of charges by gender and Indigenous status, which are in Figure 4, provide a glimpse of nuances in the policing of drunkenness.

For example, over the period from 1904/1905 to 1962/1963 whilst there was a similar overall pattern of drunkenness offences involving both males and females, the proportion of female drunkenness offences of all female offences was higher in the periods after the First and Second World War periods, rising to about half of all charges and one third, respectively.

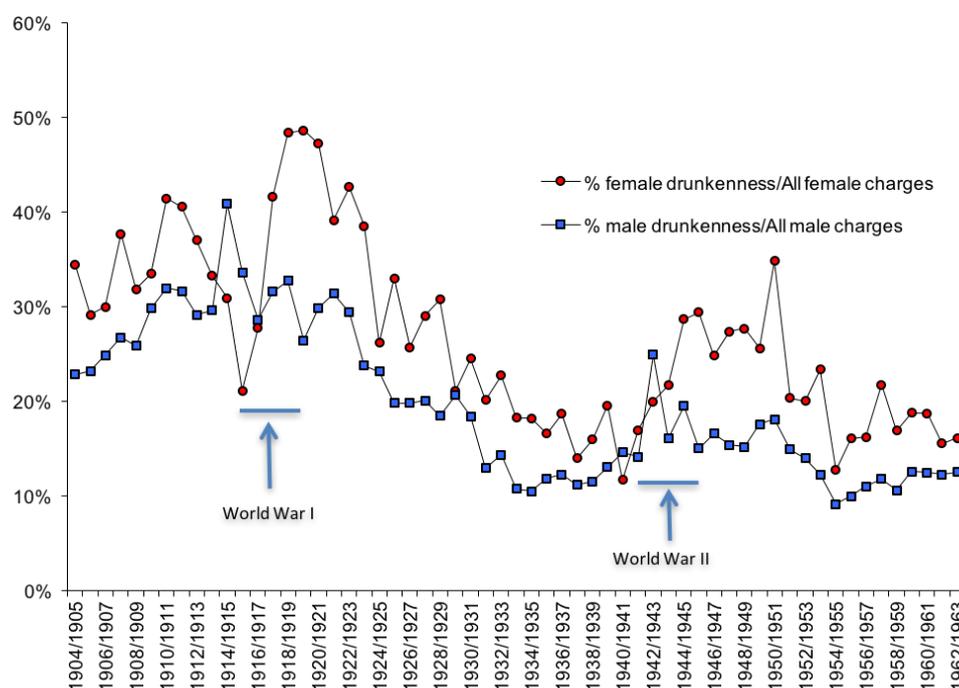


Figure 4: Proportion (%) of drunkenness charges of all charges by gender, Western Australia, 1904/1905 – 1962/1963 <sup>38</sup>

The reason for this disparity would require further analysis of contemporaneous records of these periods. as at other times females had a much lower rate of drunkenness charges.<sup>39</sup> This low proportion of women charged with drunkenness does not seem to be related to Indigenous status, at least prior to 1949/1950, as the majority of annual charges before the early 1950s involved non-Indigenous women. Perhaps women’s use of alcohol was more heavily policed and attracted great opprobrium compared to men’s, thus resulting in higher rates.

<sup>38</sup> Source: Annual reports of WA Police

<sup>39</sup> Out of the total of 253,000 charges for drunkenness dealt with in the period 1904/1905 to 1962/1963, 226,000 (89%) involved males and 27,000 (11%) involved females.

An example of concerns about the presence of women on licensed premises was voiced by the Commissioner for Police in the Department's 1942/1943 annual report:

Constant check has also been made on young women found in hotel lounges. Very few persons under age have been located. Three hotels have had their lounges for ladies only. This has proved effective in stopping women of low repute from loitering in hotel lounges with men. Several hotels do not have lounges. Generally speaking, lounges are fully patronised by women, some whom spend considerable time in them, but in most cases they are wives of servicemen and draw allotments.

Licensed premises have, on the whole, been well conducted. Due to rationing of liquor, many of them have frequently closed early.'

#### **Decriminalisation: 1990 to 2004**

The impetus for decriminalising public drunkenness stemmed from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which involved both national and jurisdiction specific investigations.<sup>40</sup> The RCIADIC crystallised the recognition in WA and other jurisdictions that the high rate of detention and imprisonment of Indigenous people arose as they came to police attention solely because of their inebriation. This revolution in law enforcement for managing this public order issue described as a public welfare model, means that such individuals 'were perceived as not being sick, but rather as vulnerable and having certain social needs, namely care and protection, rather than detoxification or treatment.'<sup>41</sup>

Another impetus for decriminalisation was a review of the *Police Act 1892* by the WA Law Reform Commission, which had recommended a range of offences, including those concerned with vagrancy, should be repealed as they were seriously outdated and out of step with prevailing community standards.<sup>42</sup>

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<sup>40</sup> Royal Commission Into Aboriginal Deaths in Custody, *Regional report of inquiry into individual deaths in custody in Western Australia*, Commissioner DJ O'Dea, Canberra, ACT, Australian Government Publishing Service, 1991.; Royal Commission Into Aboriginal Deaths in Custody, *Regional report of inquiry into underlying issues in Western Australia*, PL Dodson Commissioner, Canberra, ACT, Australian Government Publishing Service, 1991.

<sup>41</sup> R. Midford, 'Decriminalisation of public drunkenness in Western Australia: the process explained', *Australian Journal of Social Issues*, vol. 28(1), 1993, p. 54.

<sup>42</sup> Law Reform Commission of Western Australia, *Police Act offences: Discussion paper*, Project No. 85, Perth, WA, Law Reform Commission of Western Australia, 1989, [www.lrc.justice.wa.gov.au/2publications/reports/P85-DP.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/P85-DP.pdf).; Law Reform Commission of Western Australia, *Police Act offences: Report*, Project No. 85, Perth, WA, Law Reform Commission of Western Australia, 1992, [http://www.lrc.justice.wa.gov.au/\\_files/P85-R.pdf](http://www.lrc.justice.wa.gov.au/_files/P85-R.pdf).

## Acts Amendment (Detention of Drunken Persons) Act 1989

Public drunkenness was decriminalised in April 1990 by the *Acts Amendment (Detention of Drunken Persons) Act 1989*, which repealed Sections 53 and 65(6) of the *Police Act 1892* and added a new section, Part VA – Apprehension and detention without arrest, which set out the arrangements in WA for managing drunk and intoxicated persons, through a health focussed service to provide short term care, instead of detention in police lockups.<sup>43</sup> The 1989 reform also included changes in the *Police Act 1892*, by repealing Sections 53 and 65(6) and amending Section 43. Whereas previously police had a broad power to apprehend a person who had been ‘drunk and disorderly’, Section 43 was amended with the object of establishing a narrower criterion, by stating police could apprehend someone who was ‘conducting himself in a disorderly manner’. Part VA gave police three options when dealing with an intoxicated person:

- to detain ‘for as long as it reasonably appears to a police officer that the person remains intoxicated’ (Section 53D); or
- to release the intoxicated person ‘into the care of an approved hospital without him or her being required to enter into a recognisance or as a condition of an order for bail’ (Section 53H); or
- to release the intoxicated person into the care of some capable of taking adequate care of the person (Section 53G).

There were other provisions in the 1989 Act, not considered in this paper, which amended the State’s child welfare legislation to enable detention of intoxicated young people.

The 1989 Act also increased the penalty for the offence of ‘disorderly conduct’ in Section 54 of the *Police Act 1892*. As this was a higher penalty than applied to the repealed offence of public drunkenness, this reform meant an intoxicated person could be exposed to a fine of up to \$500 or imprisonment for up to six months, or both.

## Protective Custody Act 2000

The framework to manage intoxicated persons was reformed in November 2000, when the *Protective Custody Act 2000* repealed Part VA of the *Police Act 1892*, to create a separate legislative framework for managing intoxicated persons.<sup>44</sup> The Act expanded persons who could be detained due to

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<sup>43</sup> The key concepts for operating sobering up centres were developed by Dr Jaroslav Skala, who opened a 22 bed facility in 1951 in Prague: M.N. Weisman, ‘The Prague sobering up station: an eye witness report’, *Maryland State Medical Journal*, vol. 13(10), 1964.

<sup>44</sup> This Act commenced in January 2001.

intoxication through a broader definition, when this involved the use of 'either alcohol or a drug or a volatile or other substance capable of intoxicating a person'.<sup>45</sup>

This reform set out the administrative requirements and expectations for police when deciding to deal with a person who is intoxicated 'to such an extent that there is significant impairment of judgement or behaviour'.<sup>46</sup> This framework emphasises the weight police should place on apprehending an intoxicated person to either protect their health or safety, the health or safety of others, or to prevent damage to property.

### **Recriminalisation: 2004 to Present**

Whilst this section is reliant on limited data, it is contended that as these reforms in totality change how police deal with intoxicated people, there needs to be monitoring of their impact to determine if options for diverting intoxicated people away from the criminal justice system, which had been codified by the *Protective Custody Act 2000*, may have been compromised.

### **Police Act 1892: Section 50 (Move On Notices)**

In 2004, the *Criminal Law Amendment (Simple Offences) Act 2004* inserted a new Section 50 in the *Police Act 1892*, for police to issue a move on order if they believed the person was about to or had committed a simple (i.e. non-serious) offence.

This resolved a difficulty police had experienced of a diminution of their power to arrest a person which had previously existed in Section 43(1). This had enabled police to arrest a person if they were suspected of being about to commit an offence, but which was lost after the repeal of archaic provisions in the *Police Act 1892* after 1990. As Inspector Carver pointed out, the restoration of a comparable power (i.e. what had previously existed in the repealed Section 43)

[...] is very important to us because some legislation was removed from the statutes that specifically empowered us to deal with lots of street offences, particularly in relation to loitering with intent, and evil designs, where we clearly suspected that a person was about to commit an offence. That legislation was removed. We fought quite hard for the introduction of the move-on notice legislation.<sup>47</sup>

<sup>45</sup> Protective Custody Act 2000 Section 3.

<sup>46</sup> Protective Custody Act 2000 Section 3.

<sup>47</sup> Legislative Council Standing Committee on Legislation, 'Transcript of evidence taken on 23 August 2006 to Inquiry into Criminal Investigation Bill 2005 by Standing Committee on Legislation', 2006,

The *Criminal Law Amendment (Simple Offences) Act 2004* was part of a wide ranging agenda of law reforms by the then Labor government.<sup>48</sup> These were spearheaded by then Attorney General Hon. Jim McGinty to modernise provisions in the Police Act and streamline the processing of offences by the courts, in response to earlier reviews.<sup>49</sup> The Section 50 power to issue move on notices operated between 1 June 2005 and 30 June 2006, when it was repealed and replicated as Section 27 of the *Criminal Investigation Act 2006*.<sup>50</sup> Section 27 provides a severe penalty, for non-compliance with a police issued move on order, which had existed in the repealed Section 50, of a fine of up \$12,000 and/or imprisonment up to 12 months (Section 153). A criticism of this legislation is that a small but visible group of Indigenous people have been selectively over targeted by police, of whom a number are probably intoxicated.<sup>51</sup> Arguably if some of those served with move on notices are intoxicated they should be apprehended and conveyed to a facility in accordance with the *Protective Custody Act 2000* instead of issued with a move on notice. It has been asserted that the

move on laws are used by police as a mechanism for the social control of Aboriginal people. The laws are used to move individuals from well-known public places in city areas where Aboriginal people congregate. The laws have become another example of discriminatory policing of an already over-policed Aboriginal population and are further contributing to the huge over representation of Aboriginal people in the WA criminal justice system.<sup>52</sup>

A 2013 appeal to the Supreme Court of WA involved a case where a seven month term of imprisonment had been imposed on an intoxicated Indigenous woman who had failed to comply with a move-on order as a result of an altercation with her partner in a public place. The Supreme Court noted a regime of imprisonment should not be adopted to solve social problems when involving non-intentional failure to comply with a move-on notice. 'As the magistrate properly acknowledged, move on orders are used as a preventative

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[www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/71DAA96D3DBE23C348257831003B045E/\\$file/ls.cib.060823.tro.001.ml.d.pdf.1](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/71DAA96D3DBE23C348257831003B045E/$file/ls.cib.060823.tro.001.ml.d.pdf.1)

<sup>48</sup> Cf: Criminal Investigation (Identifying People) Act 2002, Sentence Administration Act 2003, Corruption and Crime Commission Act 2003, Criminal Procedure Act 2004, Cannabis Control Act 2004, Criminal Investigation Act 2006

<sup>49</sup> M.J. Murray, *The Criminal Code: a general review*, Perth, WA, Attorney General's Department, 1983; Law Reform Commission of Western Australia, *Police Act offences: Report*.

<sup>50</sup> Section 50 of the Police Act 1892 was repealed by the Criminal Investigation (Consequential Provisions) Act 2006, which commenced on 1 July 2007.

<sup>51</sup> D. Emerson, 'ALS claim move-on notices bias', *The West Australian*, 9 November 2012.

<sup>52</sup> D. Eggington and K. Allingham, 'Move on justice: a new mechanism for police control', *Indigenous Law Bulletin*, vol. 6, 2006.

measure by the police. However, their efficacy in respect of people who are obviously homeless must be doubted.<sup>53</sup>

Table 1 does lend support to the belief that move on notices have become a method for police to manage anti-social behaviour, especially in relation to Indigenous people, as between 2005 and 2013 about half of all notices were issued to this population.

Period	Indigenous		Other	Unknown	Total Issued
	n.	%			
Jun 2005 – Sep 2006	-		-	-	
Jun 2005 – Sep 2006	-		-	-	6,800
May – Oct 2007	1,467	49.6%	1,492	2,421	5,380
2008	4,635	53.7%	3,991	6,322	14,948
2009	6,878	52.5%	6,229	7,211	20,318
2010	7,764	49.5%	7,921	7,810	23,495
2011	7,361	51.0%	7,060	7,108	21,529
2012	10,022	50.5%	9,839	9,202	29,063
2013	11,103	54.6%	9,230	7,364	27,697

Table 1: Number of move on notices issued (Section 27), WA, June 2005 – 2013<sup>54</sup>

Note: Proportion of notices issued to Indigenous persons is based on sum of 'Indigenous' and 'Other' and excludes 'Unknown' cases.

<sup>53</sup> Bropho v Harrison [2013] WASC 250, Supreme Court of WA, 5 July 2013.

<sup>54</sup> Source: June 2005 – September 2006: Evidence given by Inspector Carver to Standing Committee on Legislation, Criminal Investigation Bill 2005, 14.

May 2007 – October 2007: Question on notice, Hon. Giz Watson, Hansard, Legislative Council, 14 November 2007, 7055.

February 2008 – January 2009: Question on notice, Hon. Giz Watson, Hansard, Legislative Council, 17 March 2009, 1848.

January 2009 – October 2011: Question on notice, Hon. Margaret Quirk, Hansard, Legislative Assembly, 1 December 2011, 10451.

September 2011 – September 2012: Question on notice, Hon. Margaret Quirk, Hansard, Legislative Assembly, 6 November 2012, 7946.

2008 – May 2013: Question on notice, Hon. Ben Wyatt, Hansard, Legislative Assembly, 6 August 2013, 2723; Question on notice, Hon Margaret Quirk, Hansard, Legislative Assembly, 8 August 2013, 3140.

2009 – May 2013: Question on notice, Hon Margaret Quirk, Hansard, Legislative Assembly, 21 November 2013, 6499.

2008 – 2013: Question on notice, Hon Margaret Quirk, Legislative Assembly, 8 May 2014

Note: Proportion of notices issued to Indigenous persons is based on sum of 'Indigenous' and 'Other' and excludes 'Unknown' cases.

## Prohibited Behaviour Orders Act 2010

A recent reform, the *Prohibited Behaviour Orders Act 2010*, may facilitate the erosion of health-oriented approaches in favour of a dominant punitive framework to manage alcohol-related public order issues. This legislation commenced 23 February 2011 after an extended history and was promoted as a forceful tool to respond to law and order concerns. It had first been foreshadowed in the WA Liberal Party's pre-election platform in the September 2008 State election, and was restated in pre-election policy statements in the March 2013 State election:

The Liberals believe that Western Australians should be safe and feel safe in their homes and in the community, free from the fear of crime and antisocial behaviour. Certain areas within our state are hotspots for crime and anti-social behaviour. The next step in the Liberals' efforts to target crime will specifically tackle these crime hotspots, ensuring resources are directed to where crime is most prevalent and has the greatest impact on the community.<sup>55</sup>

The Attorney-General's second reading speech linked this reform to a 'law and order' agenda:

This concept is related to a particular form of antisocial behaviour order used in the United Kingdom, known as criminal anti-social behaviour orders, which can be made only following conviction for a criminal offence.

In crafting this legislation, the government has paid close attention to those elements of the UK scheme that have been most efficient. Targeting this form of intervention against persons already engaged in repeat criminal offending means that the focus of police and courts will squarely be on the persistent group of offenders who are responsible for a disproportionate amount of antisocial behaviour.<sup>56</sup>

Besides the size of the penalties associated with a PBO, there are concerns with enforcement, such as that they involve extended social control with limited

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<sup>55</sup> Liberal Party of Western Australia, 'Putting police where they count and criminals where they belong', *The Liberals' plan to fight crime in our suburbs*, <http://www.wa.liberal.org.au/sites/www.wa.liberal.org.au/files/plans/Fighting%20Crime%20in%20Our%20Suburbs%20%28MH%20FINAL%29.pdf>, Marh 2013, (accessed Date Accessed).

<sup>56</sup> Hon Michael Mischin, Hansard, Legislative Council, 15 September 2010, 6643-6646

judicial oversight of punishment as non-compliance is enforced through an administrative processes.<sup>57</sup>

The penalties for breaching a PBO are substantial, because if the PBO was made in the Children's Court, the fine is \$2,000 or imprisonment for two years, or both; if made in the Magistrates Court, a fine of \$6,000 or imprisonment for two years, or both; and if the PBO was made by the Supreme or District Court, a fine of \$10,000 or imprisonment for five years, or both.

### **Criminal Code: Chapter 83 (Criminal Penalty Infringement Notices)**

Another reform is the *Criminal Code Amendment Act (Infringement Notices) Act 2011*, assented to on 2 May 2011. This inserted a new chapter (Chapter 83 – Infringements) in the *Criminal Code*, so police could issue a Criminal penalty infringement notice (CPIN) by the issuance of regulations. An excerpt from the Second reading speech of the then Minister for Police suggests that CPINs were to be issued for a restricted class of 'minor offences', instead of arresting an offender:

More recently, there have been moves in Australia and the United Kingdom to expand the use of infringement notices for offences usually characterised as criminal in nature. In the United Kingdom, summary or public order offences such as being drunk and disorderly and threatening behaviour may be dealt with by way of a penalty notice for disorder. In New South Wales, criminal infringement notices, or CINs, can be issued for eight nominated criminal offences, including common assault, shoplifting, offensive conduct and offensive language.<sup>58</sup>

A trial of CPINs commenced in September 2014 in the metropolitan area for two offences, disorderly conduct and stealing up to the value of \$500, with a state-wide introduction of CPINs planned for March 2015. A review of the trial use of CPINs was released by the WA Ombudsman in April 2016.<sup>59</sup> A CPIN has a \$500 penalty.<sup>60</sup>

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<sup>57</sup> T. Crofts, 'The law and (anti-social behaviour) order campaign in Western Australia', *Current Issues in Criminal Justice*, vol. 22, 2011.

<sup>58</sup> Code Amendment (Infringement Notices) Bill 2010, Hon Rob Johnson, Minister for Police, Second reading speech. Hansard, Legislative Assembly, 8 September 2010, 6137-6139.

<sup>59</sup> Ombudsman Western Australia, *Monitoring of the infringement notices provisions of the Criminal Code: consultation paper*, Perth, WA, Ombudsman Western Australia, 2016, [http://www.ombudsman.wa.gov.au/CCINs/Documents/Monitoring\\_infringement\\_notices\\_provisions\\_Criminal\\_Code\\_Consultation\\_Paper.pdf](http://www.ombudsman.wa.gov.au/CCINs/Documents/Monitoring_infringement_notices_provisions_Criminal_Code_Consultation_Paper.pdf).

<sup>60</sup> N. Cox, 'On-the-spot-fines trial for petty crimes: WA top cop O'Callaghan', *WAToday*, 18 September 2014, <<http://www.watoday.com.au/wa-news/onthespotfines-trial-for-petty-crimes-wa-top-cop-ocallaghan-20140918-10ipbo.html>.

## Liquor Licensing Act 1988

The *Liquor Licensing Act 1988* contained a provision which represented a major change in responsibility for enforcement of various liquor licensing offences from the police to the Office of Racing, Gaming and Liquor.<sup>61</sup>

This meant primary responsibility for enforcement to liquor licensing inspectors employed under the Office of Racing, Gaming and Liquor, who as they are only able to issue infringements for arrestable offences previously dealt with by the police. It could be argued this shift may have created a perception that offences like street drinking and underage drinking were now regarded as less serious than they had been regarded.

The reduced perceived seriousness of these alcohol-related offences occurs because offenders issued with a liquor infringement faced a fixed monetary penalty as under Section 167(3) of the *Liquor Control Act 1988*, set at 10% of the maximum fine contained in the legislation.<sup>62</sup> Another consequence of this reform is that enforcement of an unpaid infringement becoming an administrative matter overseen by the Fines Enforcement Registry instead of the previous system of a police and court operated enforcement process.<sup>63</sup>

The rationale for these measures was to provide police with expanded powers to deal with alcohol-related public disorder and violence stemming from extended hours of opening of hotels and night clubs, especially in the Northbridge late night entertainment precinct.<sup>64</sup>

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<sup>61</sup> The Liquor Licensing Act 1988 was renamed the Liquor Control Act 1988 by the Liquor and Gaming Legislation Amendment Act 2006.

<sup>62</sup> For example, the offence of consuming alcohol in some unlicensed premises, such as on any park or reserve in Section 119(1) or in Section 119(4) drinking on any public road or outside a licensed premise, each of which provided a fine of \$2,000. However, if an individual received an infringement this would attract a fixed penalty of \$200 and did not result in a record of conviction.

<sup>63</sup> Established by the *Fines, Penalties and Infringement Notices Enforcement Act 1994* to manage repayment of unpaid fines and infringements, which had been previously by dealt by the Magistrates Courts under the *Justice Act 1902*.

<sup>64</sup> Western Australia Police, 'Submission to the review of the Liquor Control Act', 2013, [http://www.rgl.wa.gov.au/docs/default-source/rgl/46-wa-police-\(led\)-\(2\).pdf?sfvrsn=0](http://www.rgl.wa.gov.au/docs/default-source/rgl/46-wa-police-(led)-(2).pdf?sfvrsn=0); J. Bassett, 'Police blitz in Northbridge leads to arrests', *PerthNow*, 14 February 2009, [www.news.com.au/perthnow/story/0,21598,25053190-2761,00.html](http://www.news.com.au/perthnow/story/0,21598,25053190-2761,00.html); A. Buckley-Carr, 'Public order lost in Northbridge: top cop', *The West Australian*, 4 April 2009; D. Hatch, 'Northbridge's bars 'should shut earlier'', *The West Australian*, 27 March 2009; R. O'Connell, 'Northbridge businesses want police focus shifted', *The West Australian*, 2 June 2009; R. O'Connell, 'Northbridge brawls force street closure', *The West Australian*, 30 June 2009; L. Rickard, 'Northbridge alcohol clampdown aims to cut booze-filled violence', *WAToday*, 6 May 2011, [www.watoday.com.au/wa-news/northbridge-alcohol-clampdown-aims-to-cut-booze-fuelled-violence-20110506-1eb9m.html](http://www.watoday.com.au/wa-news/northbridge-alcohol-clampdown-aims-to-cut-booze-fuelled-violence-20110506-1eb9m.html); R. Sparvell, 'Northbridge brawl: WA's top doctor calls for nightclub lockout trial', *WAToday.com*, 2 May 2016, <http://www.watoday.com.au/wa-news/northbridge-brawl-was-top-doctor-calls-for-nightclub-lockout-trial-20160502-gok1r1.html>.

### ***Conclusion: Where to from here?***

The paper has shown how the policing of drunkenness in WA had, until 1990, relied on the *Police Act 1892*. This meant the principles of harsh punishment and imprisonment for dealing with public drunkenness, which were developed to target vagrancy in Tudor England, which had been incorporated in the laws received by the colony, were not finally swept aside when public drunkenness was decriminalised.

A backdrop to the recent concerns about the management of alcohol-related public order offending is that there was a major reform of the State's liquor licensing laws in 1988, a year before decriminalisation, which came into effect in May 1990. Though the impact of this major reform is not considered in this paper, it is likely that as it liberalised the availability of alcohol, it has contributed to the increased rise levels of alcohol-related violence documented by the police as noted.<sup>65</sup>

The tranche of 'law and order' reforms adopted since mid 2004 seem to involve the re-criminalisation of the management of public intoxication in WA, which has been justified as necessary to increase public safety, particularly in the Northbridge night time entertainment precinct by targeting anti-social behaviour, attributable to public intoxication.<sup>66</sup> The benefits to the liquor industry as a result of the relaxation of regulatory arrangements can be seen in push back by the industry against attempts to re-regulate through reducing opening hours and minimum pricing arrangements being strongly resisted.<sup>67</sup>

A surprising finding was that in spite of there being a starkly different context in WA when established as a colony in 1829 compared to the circumstances in Tudor England, a set of inherited laws were applied without substantive reforms right up to the mid 1970s to manage drunkenness. This framework perpetuated the belief that social problems like public drunkenness, homelessness and poverty, were matters that justified the use of the criminal justice system to solve them.

<sup>65</sup> P. Lampathakis, 'Booze fuels move-on blitz', *Sunday Times*, 14 April 2013.

<sup>66</sup> Australian Labor Party West Australian Branch, 'Labor's plan for safe night-spots', 2005, [walabor.org.au/download/planforsafefernightspots.pdf](http://walabor.org.au/download/planforsafefernightspots.pdf); J. Busch, *Northbridge: shaping the future*, Perth, WA, Office of Crime Prevention, Department of Premier & Cabinet, 2002, [www.northbridgehistory.wa.gov.au/uhtml/documents/Northbridge%20-%20Shaping%20the%20Future\\_1.pdf](http://www.northbridgehistory.wa.gov.au/uhtml/documents/Northbridge%20-%20Shaping%20the%20Future_1.pdf); C. MacCarthur, *The emperor's new clothes: the role of the Western Australian press and state government in selling the story of the Northbridge curfew*, Murdoch University thesis, 2007, <http://researchrepository.murdoch.edu.au/170/>; M. Rayner, 'Northbridge curfew', *Indigenous Law Bulletin*, vol. 5(27), 2003; V. Hughes and B. Thompson, *Is your house in order? Re-visiting liquor licensing practices and the establishment of an entertainment precinct in Northbridge*, Perth, WA, Western Australia Police, 2009, [www.police.wa.gov.au/LinkClick.aspx?fileticket=11mMI5z8Rrs%3D&tabid=1068](http://www.police.wa.gov.au/LinkClick.aspx?fileticket=11mMI5z8Rrs%3D&tabid=1068); M.H. Roberts, 'Question without notice 275: Move on notices', 21 June 2005, <http://www.parliament.wa.gov.au/parliament/pquest.nsf/Parliament/pquest.nsf/SrchQON/4ACA629DCD0C4192482571CB00332E2B?opendocument>.

<sup>67</sup> F. Taylor, 'Drink floor price hurts those doing the right thing', *The West Australian*, 22 September 2017.

There was a reluctance to relinquish this harsh punitive approach towards public drunkenness, with limited legislative change in 1975 and it was not until 1990 that a major reform established a different approach reliant on protective measures for managing public intoxication, especially involving Indigenous people, outside of the criminal justice system. This approach resulted in the development of sobering up centres over the decade, explicitly established apart from specialist services for treatment other forms of problematic use of alcohol when the ADA was established in 1974. Almost all of these centres were located in the State's North West and largely used by intoxicated Indigenous people for overnight stays, not treatment.<sup>68</sup>

We should be cognisant that detention has been a recurrent theme in WA in managing problematic users of alcohol, as not only was the criminal justice system involved in the management of public drunkenness, but also the mental health system through the adoption of compulsory detention under the *Inebriates Act 1912* and the *Lunacy Act 1903*.<sup>69</sup> Both of these acts were repealed in 1962 by the *Mental Health Act 1962*. At the same time the *Convicted Inebriates Rehabilitation Act 1963* was passed, which established a system of civil commitment overseen by corrective services, a system which ceased after the establishment of the ADA, even though it was not repealed until 1989.

The framework established by the *Police Act 1892* also existed in conjunction with other forms of social control over individuals, such as provisions in liquor licensing legislation to exclude specified individuals from licensed premises by issuing of prohibition orders, laws in relation to Indigenous people involving both liquor licensing and so-called native welfare laws to control Indigenous use of alcohol.

The reservations raised in this paper about recent reforms in WA are based on concerns which arise because they utilise expanded methods of social control involving an array of mechanisms, such as move on notices, infringements and banning orders, to underpin coercive policing and exclusion of those who may threaten social order.<sup>70</sup> Without increased critical commentary about these reforms we may see a return to discredited policies of earlier times which deployed the criminal justice system to respond to problematic use of alcohol, raising the spectre of policing the unpoliceable.

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<sup>68</sup> G. Swensen, *Utilisation of sobering up centres in Western Australia, 1990 - 1997*, Statistical Bulletin No. 5, Perth, WA, WA Drug Abuse Strategy Office, 1999.

<sup>69</sup> The management of persons with alcohol-related mental disorders in the Fremantle Asylum had also occurred under earlier legislation of the *Lunacy Act 1871*, which the *1903 Lunacy Act* had repealed, as described by Dr A Ellis a former Director of Mental Health Services: A.S. Ellis, *Eloquent testimony: The story of the mental health services in Western Australia 1830-1975*.

<sup>70</sup> B. Fischer and B. Poland, 'Exclusion, "risk", and social control - reflection on community policing and public health', *Geoforum*, vol. 29(2), 1998; A. Pennay, E. Manton, and M. Savic, 'Geographies of exclusion: street drinking, gentrification and contests over public space', *International Journal of Drug Policy*, vol. 25, 2014; R. White and A. Sutton, 'Crime prevention, urban space and social exclusion', *Australian & New Zealand Journal of Sociology*, vol. 31(1), 1995.