Next year marks the 30th Anniversary of the Royal Commission into Aboriginal Deaths in Custody ("RCIADIC"). This important landmark will be a prominent theme of the recently announced CLANT conference, which for the first time will be held in Darwin in August 2021.

It is appropriate to stock and look at what progress has been made in the NT in the last 30 years towards fulfilling the 331 recommendations.

One aspect of Aboriginal incarceration that has been neglected by social justice advocates over the past decade has been 'protective custody'. Although civil in nature, the exercise of this power often intersects with the criminal justice system, particularly when those being taken into custody object to their deprivation of liberty, as was the case in *Prior v Mole*, which went all the way to the High Court. generating some illuminating obiter along the way, which will be referred to below.

The RCIADIC recommended that;

> 81. Legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons.
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> 85.a. Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care;

In 2018-2019, there were 7655 Aboriginal people taken into protective custody in the Northern Territory. This is more than 50% of the total number of Aboriginal people being arrested and taken into police custody for offending over the same period. It is an extraordinary number of people ending up in a police cells for the sin of drinking to excess. The number of non-indigenous people taken into protective custody each year for the same period was 272. A review of NT coronial inquests over the past two decades shows that the great majority of Aboriginal people dying in police custody were in protective custody at the time.

While the power to take a person into police custody for their own safety because of their intoxication is not unique to the NT, what is unique to the NT is the absence of the requirement of the apprehending officer to actively pursue alternatives to custody. In other jurisdictions (excluding Victoria which doesn't have a protective custody power), there is a legislated requirement to consider alternatives to police custody. In NSW people are to be taken into protective custody "temporarily", unless there is no one suitable to care for them or they are behaving or likely to behave in such a violent manner that it is not practical to have another person care for them[1]. In WA, officers must, as soon as reasonably practicable after apprehension, release the person into the care of another, unless it is impracticable to do so[2]. In the ACT, a police officer may take the person into custody only if the officer is satisfied that there is no other reasonable alternative for the person's care and protection[3]. A

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[1] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 206

[2] *Protective Custody Act 2000* (WA), s 12

[3] *Intoxicated People (Care and Protection) Act 1994* (ACT), s 4(2)

similar requirement exists in Tasmanian[4] and South Australian legislation[5]. In NSW and WA there is a requirement for police to notify the Aboriginal Legal Service when they detain an Aboriginal person in protective custody, and in the ACT the person in protective custody has the right to speak to a lawyer, family or friend. No such right exists for Aboriginal people in the NT – they simply disappear until an officer decides they are sober.

Additionally, in other jurisdictions the exercise of the power is limited to situations where the person is so intoxicated they are a risk to their own, or other's safety, or likely to damage property. In the NT, police can also apprehend because the person might intimidate, alarm or cause substantial annoyance, or are likely to commit any offence (which includes the offence of drinking in a public place for which there is no power of arrest thanks to the RCIADIC recommendation). If the officer apprehends for any of those reasons, there is no legal requirement to consider either at the time of apprehension or after, any alternative to incarceration. With such wide powers, and no requirement to consider alternatives after the initial apprehension, it is little wonder that our police cells are full of intoxicated Aboriginals.

Which brings us back to *Prior v Mole*. Mr Prior, an Aboriginal man, was apprehended in Stuart Park by police for drinking in public and behaving in a "belligerent manner". The involvement of police escalated the situation and resulted in Mr Prior assaulting one of the officers. At first instance, Justice Southwood accepted that apprehension for protective custody should be used as a last resort, observing that the right to personal liberty is "the most elementary and important of all common law rights". He quashed the conviction after finding the apprehension by police was unnecessary and improper. In the Court of Appeal the original finding of guilt was reinstated. The plurality did "not agree that in each and every situation where the conditions for taking a person into protective custody have been satisfied, a police officer must necessarily turn his or her mind to what alternatives there may be". They concluded that "sometimes an experienced police officer will know from the person's behaviour and other surrounding circumstances, that protective custody is the only available option". Perhaps its just 'the *vibe'* but in so ruling, the Court of Appeal arguably threw a cloak around the actions of police rendering effective scrutiny of the lawfulness of the apprehension by a court largely impossible.

Of course it is not for the court to read into the *Police Administration Act* a protection that is not there. If this NT Government is serious about reducing the number of Aboriginal people in police custody, and honouring the clear ambitions of the RCIADIC, it needs to put the same safeguards into the *Police Administration Act* that all of the other jurisdictions have and make apprehensions for intoxication an option of absolute last resort.

Expect to hear more about this at the CLANT conference – the call for papers is now open!

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[4] *Police Offences Act 1935* (Tas), s 4a

[5] *Public Intoxication Act 1984* (SA), 2