



Royal Commission into Aboriginal Deaths in Custody Recommendation

129. Evaluation of blood alcohol testing in custody

That the use of breath analysis equipment to test the blood alcohol levels at the time of reception of persons taken into custody be thoroughly evaluated by Police Services in consultation with Aboriginal Legal Services, Aboriginal Health Services, health departments and relevant agencies.¹

Background²	<p>The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found that alcohol was a contributing factor in many deaths, as symptoms of intoxication sometimes masked serious underlying conditions like head injuries. The report noted support from medical experts for compulsory breath testing in custody, arguing it could help identify both low and dangerously high alcohol levels and ensure timely medical treatment, despite some risk of obscuring other conditions. In concluding the discussion on the topic, Commissioner Johnston offered that:</p> <p style="padding-left: 40px;"><i>Given the prominent role played by alcohol in the deaths investigated and the considerable risks found to be associated with the detention of intoxicated persons, I think that it is one which requires further investigation.³</i></p> <p>He noted that if breath testing was introduced, it should be used only as an assessment tool, since results alone cannot conclusively determine a person's level of intoxication.</p>
Intent	Thoroughly evaluate the use of breath analysis equipment to test blood alcohol levels at the time a person is taken into custody.
Responsibility	The Commonwealth and all state and territory governments.
Key contacts	Victoria Police.
Key action taken	
2005 Review⁴	<p>Victoria Police assessed Recommendation 129 as not implemented.</p> <p>Victoria Police</p> <p>Victoria Police advised that there was no substitute to medical examination noting research conducted in America where blood alcohol contents registered on breathalyser instruments showed they could not determine sobriety. At the time, there were no legislative provisions to enable Victoria Police to utilise breathalyser machines for persons not driving motor vehicles.⁵</p>

¹ Royal Commission into Aboriginal Deaths in Custody (Final Report, 1991) vol 3, 243 ('RCIADIC').

² Ibid vol 3, 207-8 [24.3.36]-[24.3.39].

³ Ibid vol 3, 208 [24.3.39].

⁴ Aboriginal Justice Forum (Vic), Department of Justice (Vic), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (Review Report, October 2005) vol 1, 367-440 ('2005 Review').

⁵ Ibid vol 1, 375.

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	<p>Review Team</p> <p>The Review Team noted that Victoria Police were not implementing Recommendation 129 because the available equipment was considered unsuitable. However, they emphasised that the recommendation remained important given Victoria Police’s continued power to arrest people for public drunkenness.</p>
<p>2018 Review⁶</p>	<p>Commonwealth Government</p> <p>Deloitte found the Commonwealth Government had mostly implemented Recommendation 129, through 1996 research conducted by Australian Federal Police (AFP) into the efficacy of breath testing equipment. The research found that subjective assessment of the level of intoxication of persons in custody and the results of breath testing for alcohol concentrations were highly positively correlated. It was unclear whether this research was undertaken in cooperation with Aboriginal legal, health or other relevant agencies.</p> <p>Victorian Government</p> <p>Deloitte concluded that Recommendation 129 was not implemented in Victoria as stated in the Victorian Government’s 1994 Implementation Report which outlined Victoria Police’ view that breath alcohol analysis of persons at their time of entry to custody rarely resolved medical management issues. Instead, police training and policy was aimed at identifying and resolving these issues.</p>
<p>Since then</p>	<p>Victoria Police⁷</p> <p>In 2023 Victoria Police assessed Recommendation 129 as not implemented, noting:</p> <ul style="list-style-type: none"> • There are no legislative provisions for Victoria Police to routinely test the breath/blood of individuals entering police custody. • Following decriminalisation of public drunkenness, police no longer have powers to detain individuals who are intoxicated for that reason alone. • For persons taken into custody for other matters, Victoria Police conduct a Detainee Risk Assessment upon entering custody. This assessment utilises the Coma Scale and mandates that detainees experiencing medical emergencies be conveyed to hospital. • The Custodial Health Service, including the Custodial Health Advice Line, provides medical care to all prisoners.
<p>Evidence of impact</p>	
<p>Authorising documents</p>	<p>None identified.</p>
<p>Outputs</p>	<p>None identified as Recommendation 129 was not implemented.</p>

⁶ Deloitte Access Economics, Department of Prime Minister and Cabinet, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018) 251-252 ('2018 Review').

⁷ David Jones and Tyler McRae, 'Victoria Police Review of Recommendations from the Royal Commission into Aboriginal Deaths in Custody' (Response to AJC Request, Tranche Two).

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<p>Outcomes</p>	<p>Day Family Submission to the Coroners Court of Victoria (2019)⁸</p> <p>The Day Family suggested several recommendations the Coroner could make to ensure other families were not faced with the death of a loved one in police custody, including:</p> <p><i>That the Chief Commissioner of Police review the adequacy of legislation, the VPM, standard operating procedures and training/refresher modules regarding dealing with intoxicated persons to require that police officers:</i></p> <ul style="list-style-type: none"> • <i>consider and utilise alternatives to custody</i> • <i>consider arrest as a last resort and consider all alternatives before arresting a person, particularly in cases of minor offences</i> • <i>undertake individual health and risk assessments to determine whether the person requires medical attention or accommodations prior to taking a person into custody</i> • <i>if the intoxicated person is an Aboriginal or Torres Strait Islander person, consider that they may have experiences of intergenerational trauma, be more likely to have more complex health needs and may experience being detained in custody in a particularly negative and traumatic way; and provide adequate care and supervision of persons taken into custody to maintain their health, safety and wellbeing.⁹</i>
<p>Community views</p>	<p>Day Family Submission to the Coroners Court of Victoria (2019)¹⁰</p> <p>In this submission the children of Aunty Tanya Day outlined the ways in which police officers' judgements may have been influenced by stereotypes to the detriment of the care provided to their mother:</p> <p><i>When Mum was at the charge counter, they knew she was intoxicated. They did not offer to breathalyse Mum, which would have revealed how dangerously intoxicated she really was, because they had never seen it done before. It wasn't usual. Nevertheless, they knew she was at significant risk of falling. They knew that intoxicated people could deteriorate rapidly. They should have sought medical attention at that stage.</i></p>
<p>Related recommendations</p>	
<p>Inquest into the Death of Tanya Day¹¹</p>	<p>Recommendation 6</p> <p>That training be implemented within Victoria Police regarding the medical risks of individuals affected by alcohol.</p>

⁸ Belinda Day/Stevens et al, 'Submissions by Belinda Day/Stevens, Warren Stevens, Apryl Watson and Kimberley Watson, the Children of Tanya Day', Submission in *Inquest into the Death of Tanya Louise Day*, COR 2017 6424, 15 October 2019.

⁹ Belinda Day/Stevens et al, *Inquest into the Death of Tanya Day - Submissions by the Children of Tanya Day* (Submission, 15 October 2019) 26-27 ('Day Family Submission').

¹⁰ Day/Stevens et al, 'Submissions by Belinda Day/Stevens, Warren Stevens, Apryl Watson and Kimberley Watson, the Children of Tanya Day'.

¹¹ Coroner Caitlin English, *Inquest into the Death of Tanya Louise Day* (Findings COR 2017 6424, 9 April 2020) ('Inquest into the Death of Tanya Louise Day').

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2005 Review¹²

Recommendation 42

That Victoria Police, in partnership with the Victorian Aboriginal Legal Service and any other relevant agencies, provide a report to the Aboriginal Justice Forum detailing any progress of discussions on the evaluation of breath analysis equipment to test blood alcohol levels of persons taken into custody.

That the Victorian Government continue to implement and monitor Recommendation 129 through any monitoring process established as a consequence of this Review.

Assessment summary¹³

The intent of Recommendation 129 was for police services to thoroughly evaluate the use of breath analysis equipment to test blood alcohol levels at the time a person is taken into custody.

In line with Victoria Police's own assessment, we determined that no action had been taken towards implementation of Recommendation 129 and therefore there was no evidence of implementation.

While this recommendation remains relevant, we recognise there may be fewer circumstances in which it could apply. The de-criminalisation of public drunkenness came into effect on 7 November 2023, and police in Victoria no longer have the power to detain people for that reason. However, they may detain intoxicated people on other charges. In these cases, the original RCIADIC concerns about intoxication potentially masking symptoms of other serious health issues remain as relevant as ever:

They can't tell if a person is intoxicated or how intoxicated they are just by talking to them. People suffering with diabetes may have lows and highs or appear incoherent at times. . . that is a big issue, and a lot of people have been picked up over the years because of their diabetes condition, and it has been taken as if they were intoxicated. . .there have been people who passed because of that. (Marion Hansen, Chairperson, AJC and Chairperson, Southern Metropolitan RAJAC)

We considered that implementation of Recommendation 129 could potentially reduce incarceration as people with underlying medical issues masked by intoxication could get the medical help they need rather than being held in police cells. This aligns with the ongoing advocacy of Aboriginal families and communities for health rather than custodial responses to intoxication to prevent deaths in custody.

¹² 2005 Review, 440.

¹³ Meeting with Aboriginal Justice Caucus Working Group (Project Team, Online, 6 March 2024) ('Working Group Meeting (6 March 2024)'); Meeting with Aboriginal Justice Caucus (Project Team, In person, 10 April 2024) ('Aboriginal Justice Caucus Meeting (10 April 2024)').

Assessment of Recommendation 129

Is the intent of the recommendation accurately described?

Yes No

Does the action taken align with the intent of the recommendation?

0 – No action taken

1 – Action taken is of little relevance to the intent of the recommendation

2 – Action taken partially aligns with the intent of the recommendation

3 – Action taken fully aligns with the intent of the recommendation

0

(Score out of 3)

Is there evidence of the desired impact or outcome/s?

0 – No evidence

1 – Evidence of output rather than outcome

2 – Some evidence action contributed to outcome/s

3 – Clear link between action and impact or outcome/s

0

(Score out of 3)

How relevant is the recommendation in the current context?

0 – No relevance – refers to practices, agencies or laws that no longer exist

1 – Low – some relevance, but most aspects of the recommendation no longer apply

2 – Moderate – remains relevant, but some aspects of recommendation no longer apply

3 – High – entirely relevant to current context

2

(Score out of 3)

Does full implementation have the potential to reduce incarceration, increase safety in custody and/or progress Aboriginal self-determination?

0 – No potential to improve Aboriginal justice outcomes

1 – Low – potential to improve Aboriginal justice outcomes, but none of the three identified

2 – Moderate – potential to progress one or two of the outcomes identified

3 – High – potential to reduce incarceration AND increase safety in custody AND self-determination

2

(Score out of 3)

Potential actions for further work

Use breathalysers if people entering custody appear intoxicated

Use breathalysers to test the blood alcohol levels at the time of reception of persons taken into custody to ensure medical assistance can be provided if needed.

Moderate priority for further work

Relevance and potential impact

		Low (0-2)	Moderate (3-4)	High (5-6)
Extent of action taken and evidence of outcomes	High (5-6)			
	Moderate (3-4)			
	Low (0-2)		Rec 129	

Bibliography

Meeting with Aboriginal Justice Caucus Working Group (Project Team, Online, 6 March 2024)

Aboriginal Justice Forum (Vic), Department of Justice (Vic), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (Review Report, October 2005)

Meeting with Caucus, Aboriginal Justice (Project Team, In person, 10 April 2024)

Coroner Caitlin English, *Inquest into the Death of Tanya Louise Day* (Findings COR 2017 6424, 9 April 2020)

Day/Stevens, Belinda et al, 'Submissions by Belinda Day/Stevens, Warren Stevens, Apryl Watson and Kimberley Watson, the Children of Tanya Day', Submission in *Inquest into the Death of Tanya Louise Day*, COR 2017 6424, 15 October 2019

Day/Stevens, Belinda et al, *Inquest into the Death of Tanya Day - Submissions by the Children of Tanya Day* (Submission, 15 October 2019)

Deloitte Access Economics, Department of Prime Minister and Cabinet, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018)

Jones, David and Tyler McRae, Victoria Police 'Victoria Police Review of Recommendations from the Royal Commission into Aboriginal Deaths in Custody' (Response to AJC Request Tranche Two, 2023)

Royal Commission into Aboriginal Deaths in Custody (Final Report, 1991)