

‘Intoxication’ and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks

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Table of Contents

Acknowledgments.....	2
Executive Summary.....	5
Introduction.....	11
Background.....	12
Methodology.....	14
Phase 1.....	14
Phase 2.....	15
Phase 3.....	16
Findings: The Expert Literature.....	19
Perceptions of the relationship between alcohol and violence.....	19
Expert literature on the relationship between alcohol and violence.....	21
Expert literature on the relationship between alcohol and sexual and/or family violence.....	23
Expert literature on the relationship between alcohol and homicide.....	27
Expert literature on the effects of drugs.....	28
Expert literature on the relationship between drugs and sexual and/or family violence.....	31
Critiques, controversies and the importance of emergent critical literature on AOD 'effects'.....	32
Findings on Legal 'Knowledges' – Legislation and Case law.....	34
Multiple Purposes.....	35
Legislation.....	35
Cases.....	37
Multiple Definitions and Widespread Under-Definition.....	38
Legislation.....	38
Cases.....	41
Correlation between purpose and definition in legislation.....	43
Intoxication from drugs other than alcohol.....	45
Legislation.....	45
Cases.....	46
Victim Intoxication and Sexual Offences.....	47
Intoxication and Criminal Responsibility.....	50
Sentencing: Mitigation v Aggravation.....	51
Mitigation.....	52
Aggravation.....	53
Intoxication and Public Order.....	54
General Discussion and Recommendations.....	59
Further Research.....	62
Conclusion.....	64
Table 1: Purpose for which Australian criminal law statutes attach significance to intoxication.....	65
Table 2: Type and Frequency of Purposes for which Intoxication Addressed.....	66
Figure 1: The Multiple Purposes of Evidence of Intoxication in Criminal Law.....	67
Table 3: Legislative Approaches to Defining Intoxication in Criminal Law.....	68
Table 4: Statutory Words and Phrases Used to Demarcate 'Intoxication'.....	69

Table 5: Illustration of Modes of Self-Assessment of Intoxication	70
Table 6: Illustrations of Judicial Language on ‘Intoxication’	71
Table 7: Relationship Between <i>Purpose</i> and <i>Definition</i> of Intoxication in Australian Criminal Law Statutes	72
References	73
Appendix 1: Participants - Stakeholder/Expert Workshop, Sydney, 9 Dec 2015	81
Appendix 2: Statutes and Regulations	82
Appendix 3: Cases.....	88

Executive Summary

This report presents the findings of a study that explored how the state of ‘intoxication’ produced by the consumption of alcohol and/or other drugs is treated by the criminal law and criminal justice system in Australia. The study was motivated by the emergence, during the 2010s, of ‘alcohol-fuelled violence’ as a prominent and influential motif in policy debates and criminal law reform initiatives. The aim was to document the variety of ways in which assumptions and claims about the effects of alcohol and other drugs (AOD) are embodied in Australian criminal laws, and to compare those legal ‘knowledges’ with the knowledge that resides in the expert AOD literature.

The project methodology involved three phases:

- i) A review of the expert epidemiological, public health and criminological literature regarding the effects of AOD, with a focus on expert understandings of the relationship between AOD intoxication and violence. Literature published in the period 2000-2015 was reviewed, with a focus on works of commentary and review including systematic reviews and meta-analysis.
- ii) Collection and analysis of currently in force (at May 2015) criminal law statutory provisions, in all Australian jurisdictions, that attach significance to the fact of a person’s ‘intoxication’. Each provision was catalogued with reference to the *purpose* for which significance was attached to intoxication, and with reference to how intoxication was *defined*.
- iii) Collection and analysis of decisions handed down during a 5 year period (2010-2014) by the highest appellate court in each State and Territory, and the High Court of Australia, in which the court considered evidence that the accused, the victim or a witness was ‘intoxicated’ at the time of the alleged commission of a criminal offence.

The review of the expert literature in Phase 1 revealed that there is strong evidence of a *relationship* between violence and alcohol, but not a simple *causal* relationship. Alcohol is regarded as either a ‘conditional’ cause, ‘risk’ factor, or one of multiple factors that might be implicated in the production of violence (including homicide). There is far less evidence to suggest a correlation between illicit drugs and crimes of violence. There is an emergent

but influential body of literature that critiques attempts to isolate or ‘abstract’ alcohol or illicit drugs from the social contexts within which violence occurs. This scholarship has important implications for the validity of instances in which the criminal law seeks to ‘isolate’ intoxication as a discrete factor – eg, as an offence element or sentencing factor.

The chief findings of the Phase 2 review of legislation were:

- 1) Australian criminal laws attach significance to intoxication for a wide variety of purposes, including: as the basis for exercising a coercive power; as relevant to whether a suspect can be interviewed by police; as a core or aggravating element of an offence; as a (limited) ‘defence’ whereby the accused can dispute *mens rea* or ‘voluntariness’ and to limit reliance on intoxication evidence to support other defences; and as an aggravating or mitigating factor in sentencing.
- 2) Legislative provisions that attach criminal law/policing significance to intoxication are not limited to traditional criminal harms, but extend to a number of location - or activity-based ‘sites’ where AOD use is regarded as carrying risks of harm or anti-social behaviour, and thereby, a basis for criminalisation – eg public space use, transport, and dangerous activities (eg, firearms, mining).
- 3) There is no single or widely accepted definition of ‘intoxication’ in Australian criminal laws. Under-definition is widespread; there is significant variation both within jurisdictions and nationally as to how intoxication is defined; and the language used to define and describe intoxication is frequently ambiguous, leaving considerable scope for subjective assessments to be made by persons in authority. Although familiar because of their use in the driving offences context, *biological detection* approaches to defining intoxication (eg offences based on prescribed concentrations of alcohol) are relatively rare.
- 4) Under-definition is especially common in criminal laws concerned with public order offences and police powers. While it might be argued that a flexible approach to definition is appropriate in this context – given the need for ‘on-the-spot’ risk assessments – it is also important to recognise the potential for disproportionate impact on already marginalised individuals and communities, particularly Aboriginal and Torres Strait Islander persons.

5) Australian criminal laws frequently attach significance to ‘intoxication’ caused by illicit drugs (ie drugs other than alcohol) without regard to the evidence that different drugs have different effects, including depressant, stimulant and hallucinogenic effects. Moreover, while the criminal law typically demands that *degrees* of alcohol intoxication be measured (eg blood alcohol concentrations which *deem* a person to be intoxicated), equivalent provisions concerned with illicit drugs typically define intoxication with reference to the mere *presence* of a (prohibited) drug in a person’s system – no matter how much was consumed, by what means and when.

The chief findings of the Phase 3 review of appellate case law were that:

1) Court proceedings in relation to criminal charges involve a wide variety of approaches to assessing whether a person was sufficiently under the influence of alcohol or another drug that they should be regarded as ‘intoxicated’ for the purpose of the criminal law, including: self- and/or witness report of consumption; self- and/or witness report of behaviour or ‘state’; biological detection; appearance/behavioural assessments by a police officer; assessment by medical, toxicology or psychology experts; and judicial assessment of the available evidence (including CCTV footage and video recording of police interviews).

2) Scientific and medical expert evidence regarding AOD effects exerts only a relatively modest influence on the concept of ‘intoxication’ that impacts on assessments of criminal responsibility. Juries are regularly asked to make complex assessments about the extent of a person’s intoxication on the basis of their ‘common knowledge’ about AOD effects. Where judicial guidance *is* offered, it was observed that there was a tendency to deploy ‘tests’ based on a person’s observable mechanical functions as a sort of ‘proxy’ for a state of intoxication that is sufficient to impede intent formation, or other cognitive processes relevant to criminal responsibility.

3) The so-called intoxication ‘defence’ is only one of the ways in which evidence of the accused’s intoxication may impact on the courtroom determination of his/her criminal responsibility. The relationship between evidence of AOD consumption and

effects, criminal trial processes and the determination of criminal responsibility is much more complex than is commonly recognised in both the scholarly literature and the political discourse that frequently surrounds intoxication-focused criminal law reform proposals and debates.

4) While the most common focus of Australian criminal law is accused/offender intoxication, victim intoxication also features prominently, particularly in the context of sexual offences. Despite concerted statutory reform which has attempted to ensure that a complainant's intoxication does not impede successful prosecution of offenders (indeed, that it can *assist* proof of some elements, such as the absence of consent), there is still considerable variation in how courts approach evidence of complainant intoxication – in relation to proof of non-consent and proof of the offender's knowledge of non-consent, and in relation to assessments of the credibility and reliability of the complainant's evidence.

5) Although recent policy debates suggest the ascendancy of the view that intoxication should be regarded as an aggravating factor when it comes to the determination of punishment, judicial approaches to sentencing are more nuanced. Courts consistently articulate a 'general rule' that intoxication per se does not operate as a mitigating factor. However, the study identified a number of circumstances in which intoxication was treated as an 'indirect' mitigating factor by: supporting the characterisation of the offender's conduct as 'out of character'; supporting the characterisation of the offender's conduct as spontaneous/unplanned; linking the offender's behaviour to conditions which are regarded as mitigating, such as mental illness and addiction; or locating the offender in a context of wider disadvantage, specifically, Indigenous community disadvantage. In addition, courts regularly observe that the offender's intoxication 'explained but did not excuse' the criminal behaviour.

6) In addition to those contexts in which legislation prescribes intoxication as an aggravating factor, there are two circumstances in which courts treat intoxication as an aggravating factor when sentencing an offender. First, victim intoxication may be regarded as an aggravating factor where it increased her/his vulnerability (especially where there is evidence that the offender exploited this vulnerability). Second, offender intoxication may be regarded as an aggravating factor where s/he

was considered to have been ‘recklessly intoxicated’ – ie aware, based on past experience, of being at greater risk of engaging in violence or other relevant criminal behaviour, while intoxicated. It is unclear, in the case law, how this insight on the part of the offender is established.

The report concludes with the following recommendations:

- 1) While a single definition of intoxication for all criminal law purposes is neither feasible nor desirable, consideration should be given to the national standardisation of legislative terminology and criteria for assessing ‘intoxication’ for criminal law purposes.
- 2) ‘Best practice’ definitions must be sensitive to the different *sites* or regulatory contexts in which relevant laws operate, the different *purposes* for which significance is attached to intoxication, and the different *rationales* embodied in different statutes.
- 3) Further research is required to cautiously investigate whether the biological detection model could be more widely adopted, beyond the driving context, and potentially including contexts where the purpose in question is to address the increased risk of violence associated with alcohol intoxication.
- 4) Where circumstances demand that assessment based on observed behaviour is the more appropriate (or feasible) approach, this report recommends:
 - a. uniform adoption of expressly stated criteria for making the assessment that a person is intoxicated; and
 - b. a commitment by police forces, and other organisations whose officers/employees exercise coercive powers, to educating the wider community about how police officers are trained to assess intoxication, what criteria are used, and how the exercise of intoxication-related powers is reviewed and monitored by police agencies.

5) Further research is required into the nature of, and rationale for, the criminal law's approach to the effects of drugs other than alcohol in terms of producing the impairment, risk of violence and other effects with which the criminal law is concerned. Attention should be focused on whether the law takes adequate account of the different effects of different drugs, and the appropriateness of deeming the presence of any drug quantity to be evidence of impairment or other adverse effect.

6) Improved and more consistent 'knowledge transfer' between the AOD expert literature and legal contexts (law-making, policing, court decisions) is desirable. This should include greater specificity regarding the implications of AOD consumption for relevant physical, cognitive and emotional functions. Further, the AOD expert literature tends not to be attuned to questions for which answers are needed in law-making and application, and support for research to fill this gap should be considered.

Introduction

Recent years have seen intense media scrutiny, concerted policy discussion and significant law making on the relationship between the consumption of alcohol and other drugs ('AOD') and the commission of criminal offences. Much of the debate has been dominated by the view that, particularly for crimes of violence, the state of 'intoxication' produced by the consumption of AOD should be regarded as an *aggravating* factor that adds to the seriousness of the harm done and warrants additional punishment. For example, two tragic and highly publicised drunken 'one punch' fatal assaults in Sydney's Kings Cross were catalysts for the 2014 introduction of the offence of assault causing death while intoxicated which unambiguously embraced this position (*Crimes Act 1900* (NSW), ss 25A and 25B; see Quilter 2014a, 2014b). Similar changes were later made in Queensland and Victoria: *Criminal Code* (Qld), s 314A; *Crimes Act 1958* (Vic), s 4A (Quilter 2015). These reforms have focused heavily on one particular (and controversial) claim about intoxication: that it 'causes' violence. This is a controversial claim, given that the precise nature of the relationship between AOD consumption and violence is recognised to be complex, particularly as an explanation of an individual's behaviour level (Smyth 2013; Ali & Naylor 2013).

As researchers of criminal law reform and alcohol and drug policy, these events prompted three questions. First, in what sort of contexts and for what *purposes* does the criminal law (and associated laws governing policing) attach significance to a person's intoxication? Is 'aggravation' the main criminal law effect of intoxication evidence or are there other purposes for which significance is attached? Secondly, in the context of the operation of the criminal justice system, what does it mean to say that a person is 'intoxicated', and how is that term defined? Thirdly, what understandings about the relationship between AOD consumption and violent (and other offending) behaviour are reflected in Australian criminal laws, and how do these compare to the expert scientific and social scientific literature? These three questions became the foundation for the project on which this paper reports.

The project aims were to:

- 1) map and assess the multiple *purposes* for which Australian criminal laws attach *significance* to 'intoxication';
- 2) analyse how 'intoxication' is *defined* for criminal law purposes;
- 3) investigate the relationship between the purpose for which significance is attached to intoxication and how intoxication is defined; and
- 4) compare the assumptions about AOD effects contained within the criminal law (particularly in relation to the intoxication/violence nexus) with scientific and social scientific evidence on the effects of AOD, and on the relationship between the consumption of AOD and criminal offending.

Background

Although many aspects of Australia's 'multi-faceted alcohol policy environment' (Howard et al 2014) have attracted considerable research attention (eg Laslett et al 2015; Darke et al 2013; Lancaster et al 2012; Kypri et al 2014; Miller et al 2014), criminal justice policy, and criminal law reform on intoxication specifically, have attracted little scholarly attention. Consequently, while many of the preventive strategies employed outside the criminal justice system (such as liquor license conditions, reduced trading hours, 'designing out' strategies, public transport, education) have been well-informed by the research literature and evidence-based knowledges, criminal law and policing strategies (including new offences, sentencing aggravating factors and coercive police powers) have not. In addition to a small body of literature that considers intoxication in the contexts of public order (eg McNamara and Quilter 2015; Walsh 2008) and sentencing (Potas & Spears 1994; NSW Sentencing Council 2009), as well as some excellent historical work (Loughnan 2012, ch 7), legal scholarship has focused heavily on the 'defence' of intoxication (eg Hemming 2010; Simester 2009; Tolmie 1999). Scholars, jurists and law reformers have debated whether the criminal law's attitude towards intoxication should reflect fidelity to traditional principles of criminal responsibility or a pragmatic compromise that communicates an appropriate message about 'social responsibility' which is responsive to public safety concerns arising out of the perceived frequency with which intoxicated persons act violently (O'Connor (1980) CLR 64; Victorian Law Reform Commission 1999).

Further, the intoxication defence scholarship and case law is heavily focused on *alcohol* intoxication, with little attention paid to ‘intoxication’ caused by other drugs, and even then little attempt is made to specify the sort of evidence which would be required to support an assertion that the accused (or the victim or a witness) was affected by AOD to such an extent as to warrant the label ‘intoxicated’ for criminal law purposes. Finally, in practice, the intoxication defence is rarely raised (Brown et al 2015; *Ainsworth* (1994) 76 A Crim R 127). Its significance in the day-to-day operation of the criminal justice system pales when compared with intoxication-related driving offences, public order offences and the exercise of various police powers (Quilter and McNamara 2013; McNamara and Quilter 2015a; McNamara 2015).

The National Health and Medical Research Council has noted that “‘Intoxication’ is a widely used term with no consistent or formally agreed definition’ (NHMRC 2001). It is a word regularly used in policy debates, media commentary, and academic scholarship as if its meaning is self-evident, but this is not the case. The *Macquarie Dictionary* defines the noun ‘intoxication’ as ‘inebriation’ or ‘drunkenness’ or more expansively as ‘overpowering action or effect upon the mind’. The World Health Organization’s ICD-10 clinical definition provides further guidance: ‘A transient condition following the administration of alcohol or other psychoactive substance, resulting in disturbances in level of consciousness, cognition, perception, affect or behaviour, or other psychophysiological functions and responses’ (Babor et al 1994; World Health Organization 1993). None of these definitions provide precise guidance about how much a person must have consumed, or how incapacitated or affected they must be in order that their state qualifies as ‘intoxicated’. In many social settings, and in general conversations, such specificity is relatively unimportant, and a large number of colloquialisms are employed to describe varying degrees of intoxication (eg from ‘happy’ and ‘tipsy’ to ‘smashed’, ‘legless’ and ‘paralytic’ (Levine 1981)). Such markers of degree are noteworthy for their lack of precision, for the fact that they are informed by a mixture of lay knowledge about intoxication (Valverde 1998, 2003; Loughnan 2012, 2013) and the moralisation of (over)consumption of alcohol (or illicit drugs, to which additional ‘taint’ applies), and for the fact that their deployment is highly subjective. It follows that they are regarded as inappropriate in the criminal law context, where there is rightly a greater expectation of clarity, certainty and evidence-based assessment, because punishment or deprivation of liberty may result.

A primary goal of this project was to assess whether Australian criminal laws meet this expectation.

Methodology

The project involved three phases, focused respectively on ‘knowledges’ about intoxication in the expert literature (phase 1), legislation (phase 2) and case law (phase 3).

Phase 1

For phase 1 of this project, the study sourced relevant literature through established databases to locate all articles that primarily deal with the nature and significance of the relationship between intoxication, risk and violence. The focus was on AOD, epidemiological and public health literature (including literature from the social sciences). Given the large volume of work published on these topics across these disciplines, attention was given to works of commentary and review including systematic reviews and meta-analysis. While these are not the only disciplines that produce knowledge on AOD intoxication, they represent some of the key contributions to the field, or – by virtue of their status as commentaries and reviews – capture key contributions from other disciplines. Searches were conducted across a number of databases, including the Campbell Collaboration systematic reviews, Cochrane Database systematic reviews, Database of systematic reviews (DARE), Web of Science, SCOPUS, AGIS Plus Text, CINCH, APA Full text, Medline, PubMed, EMBASE, CINAHL and Google Scholar. The search was limited to papers published between 2000-2015, to research based in Western societies and to articles written in English. As works of commentary and review draw upon literature from prior to 2000, important work from before this period has also been captured through this process, although it is possible that some key literature might have been missed.

Two ‘crime’ categories were selected for further analysis, being: violence and homicide. A sub-category of sexual and/or family violence was subsequently developed, when it became apparent that expert literature often draws distinctions between violence more broadly and sexual violence, family violence and intimate partner violence (IPV), in particular. In addition – as outlined elsewhere in this report – the law often attributes significance to the fact of intoxication in the context of cases involving sexual

assault/sexual violence. This sub-category is a broad descriptor, which includes IPV, 'sexual violence', 'sexual assault' and 'sexual aggression'. The selection of these crime categories was informed by the anticipated findings of phases 2 and 3 of the project, along with the authors' knowledge of key literature in the field. Rather than focussing on all drugs in the literature the study focussed on those noted by Boles and Miotto (2003) as being the most relevant to having a relationship with violence (namely: cocaine, amphetamine, ice or PCP or barbiturate). Using 'intoxication' as a keyword was not as effective as searching for AOD by name and was not included in the main searches. Data were managed using the NVivo data management system. The articles were coded into two main nodes: 'relationship' and 'proximal factors'. Coding to the 'proximal factors' node was undertaken by conducting a text query for 'biological', 'physiological', 'psychopharmacological', and 'psychological'.

Phase 2

The second phase of the project's methodology involved identifying criminal law statutes and regulations in force (as at May 2015) in Australia (state, territory, Commonwealth) that attach significance to 'intoxication' in some way, and cataloguing the provisions using the following questions: 1) For what *purpose* does the provision attach significance to intoxication?; and 2) How does the provision *define* intoxication? A broad definition of 'criminal law' legislation was employed (McNamara 2015; McNamara and Quilter 2015b), to include any statute or regulation that:

- provides for an offence (or defines/limits a defence);
- provides for a penalty or affects sentencing decisions;
- authorises police or other state agencies to exercise a coercive power; or
- establishes procedures by which criminal offences and allied powers, and rules of evidence are administered.

This approach ensured that the study examined not only primary criminal law and procedure statutes (eg *Crimes Act 1900* (NSW), *Summary Offences Act 1966* (Vic), *Penalties and Sentences Act 1992* (Qld)), but also legislation that is mainly concerned with regulating a particular activity or site, and uses criminal law provisions and the concept of 'intoxication' to this end (eg *Dangerous Goods (Road and Rail Transport) Act 2010* (Tas), *Firearms Act 1996* (ACT), *Casino Act 1997* (SA)).

Searches were conducted using the web-based open access Austlii database, using a variety of search terms (ie not simply 'intoxicated' or 'intoxication' but also other common phrases like 'under the influence', 'impaired', 'prescribed concentration' etc.). The full list of search terms were:

intoxic*; drunk*; under the influence; concentration and alcohol; concentration and blood; prescribed and concentration; permitted and concentration; impair* and alcohol; impair* and liquor; incapacit* and alcohol; incapacit* and liquor; inebriat*; alcohol and consum*; liquor and consum*; stupef*; blood and alcohol; and alcohol limit.

Although legislation that addresses the *consumption* of alcohol does not technically turn on evidence of 'intoxication', it was included for two reasons. First, such provisions frequently operate in tandem with provisions on intoxication (eg provisions that make it an offence to consume alcohol *or* be under the influence in certain locations). Secondly, consumption *per se* is the subject of a number of discrete provisions. In these cases the rationale is that consumption of alcohol carries a risk of intoxication, and pre-emptive discouragement (or interruption) of consumption is an appropriate preventive measure.

The numerous provisions regarding *supply* of liquor were only included if they turned on the issue of intoxication (eg provisions making it an offence to supply alcohol to a person who appears intoxicated: see *Liquor Control Reform Act 1998* (Vic) s 104(8)(a)). Consequently, the dataset did not include the myriad drug offences found in all jurisdictions such as possession or supply of certain types of drugs (such as cannabis or heroin) as they do not turn on the issue of 'intoxication'.

Phase 3

Legislation is not self-executing, so it was considered important to include within the research design an approach which would yield some insights into the contribution of the *judiciary* to the operational importance of intoxication in the criminal justice system. Therefore, phase 3 of the project involved collecting all decisions of the highest criminal appellate court in each state and territory, and the High Court of Australia, which were

handed down in the five year period from January 2010 to December 2014, in which the intoxication (of the accused, the victim or a witness) formed part of the evidence in the case. It was determined that a five year time period would be sufficient to illustrate contemporary judicial approaches across the range of evidentiary, substantive offences and sentencing matters to which it was anticipated that intoxication evidence would be considered relevant.

In an attempt to ensure inclusion of all publicly available judgments (whether officially reported or not), the primary mechanism for identification of relevant cases was online searching using the web-based open access Austlii database. Secondary searches were conducted using LexisNexis and relevant court websites (eg Supreme Court of Queensland, <http://www.sclqld.org.au/caselaw/>). Each of the nine Australian jurisdictions was searched in turn, for the identified time frame (2010-2014). The primary search term was 'intoxication' (and variations, as per the phase 2 legislation review). Search results were filtered to ensure that only criminal law cases were included, and that the case did involve evidence of intoxication in some way. The search yielded 327 cases which were read and categorised according to jurisdiction, offence type (based on most serious charge) and type of appeal – conviction, sentence or Crown appeal. This analysis identified the purpose(s) for which intoxication evidence was said to be relevant, and recorded the variety of ways in which appellate courts commented on evidence said to establish that a person was (or was not) relevantly 'intoxicated'.

It is appropriate to acknowledge the limitation of including only higher appellate court decisions in the data set, in a context where the vast majority of criminal law matters are finalised at the lower levels of the criminal court hierarchy, without appeal to a state/territory Court of Appeal/Court of Criminal Appeal, let alone the High Court of Australia. Rather than setting out to collect a representative sample of Australian criminal cases, the more modest (and feasible) aim was to answer two questions: 1) what sort of intoxication-related issues are coming to appellate courts for adjudication (in the context of conviction or sentence appeals, or Crown appeals against sentence)?; and, 2) what guidance are appellate courts offering when it comes to the *relevance* of intoxication, and how the state of 'intoxication' should be *defined* and *evidenced*? The rules governing access to appeal (whether by right or with leave) obviously influence the types of matters that come before higher appellate courts, and it is not possible to assess whether the frequency with which certain issues recurred in the sample is illustrative of patterns at first

instance trials or sentencing hearings. The appellate court decisions reviewed, however, regularly summarised or contained extracts from jury directions, trial transcripts, expert evidence and sentencing remarks, and so provided something of a ‘window’ into how intoxication evidence is addressed in lower and intermediate courts.

Two Australian jurisdictions made relevant changes to sentencing laws during 2014. In New South Wales and Queensland self-induced intoxication was expressly excluded as a mitigating factor (see *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5AA); *Penalties and Sentences Act 1992* (Qld), s 9A). Because these changes occurred late in the period under review they were not be reflected in NSW Court of Criminal Appeal and Queensland Court of Appeal decisions in the dataset.

Expert/Stakeholder Workshop

At the completion of all three phases the project team convened a one-day workshop of alcohol and drug policy experts and justice system stakeholders in Sydney in December 2015 (see Appendix 1 for list of attendees). At this event the authors shared their provisional findings and recommendations and obtained valuable feedback.

Findings: The Expert Literature

The database search for alcohol resulted in 103 articles of which 30 were systematic reviews, 14 were meta-analyses, 57 were reviews, and five were editorials or expert commentaries. Three articles were both systematic reviews and meta-analyses. There were many more articles resulting from the alcohol and violence search (n=79) than for alcohol and homicide (n=14). Some initial searches captured literature examining the relationship between AOD and antisocial behaviour (n=14), but these were later excluded for the purposes of this report because intoxication itself is often culturally defined as anti-social, which makes issues of causality moot. In keeping with the stated focus, this methodology excluded original research articles that were not systematic reviews, meta-analyses, or reviews. The database search for other drugs returned 11 new articles. There were 12 articles in the alcohol search that also covered other drugs or substances. Of the 23 articles, two were systematic reviews, two were meta-analyses, 18 were reviews and one was an editorial.

Perceptions of the relationship between alcohol and violence

As a prelude to the discussion that follows, it is appropriate to acknowledge that understandings of the relationship between intoxication and violence have changed over time, and this has influenced the criminal law significance attached to AOD use and effects. For example, Levine (1983) found that colonial Americans tended not to recognise a connection between intoxication and injuries. This thinking changed radically during the temperance era in Anglophone societies, so that drinking or intoxication was often viewed as the primary or sufficient cause of an unwanted occurrence if it was present. Loughnan (2012) has shown that during the 18th century 'drunkenness' became increasingly visible in public (with distilled spirits becoming cheap and widely available) and alcoholism came to be understood as a social problem. Intoxication came to be regarded as a 'threat' to the social order. 'Intoxication' could not be used to excuse/defend offending behaviour – 'drunkenness is no defence' (*Pearson's Case* (1835) 168 ER 131).

During the 19th century, however, the legal rules about disregarding intoxication as a possible ‘excuse’ began to be relaxed (Loughnan 2012). A line of common law decisions began to accept that evidence of intoxication may be relevant to whether a person had the ‘guilty mind’ required for criminal responsibility (*Beard* [1920] AC 479). In the late 20th century the common law took different paths in the UK and Australia, with the House of Lords limiting the so-called intoxication ‘defence’ to crimes of specific intent (ie crimes for which the Crown must prove, as an element of the offence, an intention to bring about a specific consequence) (*Majewski* [1977] AC 443), and the High Court preferring to allow the intoxication ‘defence’ to be raised for all crimes (*O’Connor* (1980) CLR 64). Legislatures in most Australian jurisdictions have intervened to curtail the defence along the lines of the *Majewski* approach (eg *Crimes Act 1900* (NSW), Part 11A, as amended by the *Crimes Legislation Amendment Act 1996* (NSW)).

Another relevant historical trajectory was the move towards punitive criminalisation of illicit drugs in the latter half of the 20th century (Morris and Hawkins 1970; Roberts et al 2002). An extreme version of the temperance paradigm was applied to drugs, so that *any* use of a drug tended to be automatically treated as the *cause* of undesirable behaviour. The implications of this are considered later in this report, particularly insofar as this perspective has flowed through to current Australian legislation which deems the presence of *any* quantity of illicit drugs to amount to ‘intoxication’ for criminal law purposes.

More generally, ordinary modes of discourse in English have helped to preserve a tendency to view the role of intoxication in adverse events in an ‘all-or-nothing’ frame. Contemporary phrases like ‘alcohol-related violence’ (though they may not actually ascribe any causal role to alcohol) are often interpreted as involving an imputation of causal involvement. In epidemiology and public health scholarly discourse it is widely understood that the causal role of a risk factor is conditional and partial. However, ordinary language, which is influential in political discourse and associated law-making, is often insensitive to the ‘risk factor’ framing of causality, and can tend to assume a simple cause and effect relationship.

In this situation, where views of the role of intoxication in injuries and violence from different historical periods are still extant in popular culture and political discourse, the way in which different sections of the population view the AOD/violence relationship becomes itself an interesting and important research question. This context is relevant to any

consideration of the definition and significance of intoxication in Australian criminal law, including because those responsible for making and implementing criminal laws – judges, lawyers, juries, witnesses, police and others – are likely to be formulating, interpreting and applying the laws with reference to these popular understandings. For this reason, the investigation undertaken for this project has included a subset of the research literature examining the relationship between alcohol and violence (and sexual violence) which is concerned with how people understand or perceive the causes of violence.

Expert literature on the relationship between alcohol and violence

The relationship between alcohol, intoxication and criminality has long been the subject of academic interest and debate (Plant, Plant & Thornton 2002). The precise nature of the relationship between alcohol and violence is best characterised as complex, controversial and debatable (Ali & Naylor 2013; Murphy & Ting 2010; Smyth 2013). For example, although there is evidence to support the conclusion that there is a correlation between AOD consumption and crimes of violence, some point out that most people who consume alcohol do not become aggressive or violent (Beck & Heinz 2013; Boles & Miotto 2003). Alcohol is often characterised as neither a necessary nor sufficient cause of aggression (Leonard 2001; Zerhouni et al 2013). The relationship between alcohol consumption and violence is commonly described as an association rather than causal (Ali & Naylor 2013; Klosterman & Fals-Stewart 2006), or, in other cases, as a risk factor for violence (Clements & Schumacher 2010; McMurran et al 2011). In an influential formulation, Room and Rossow (2001) propose that there is ample evidence to suggest that alcohol causes violence, based on an epidemiological frame. However, they note that the relationship is conditional on other factors: drinking is a cultural and circumstantial practice. In other words, even though epidemiological methods may suggest the involvement of alcohol as a cause of violence this ‘does not mean that, at the level of particular events, the relationship is ... necessary or sufficient’ (Room & Rossow 2001: 219). In their view, the relationship does not meet the strict ‘necessary or sufficient’ criterion for causality and they instead argue that alcohol should be viewed as a conditional cause of violence.

The expert literature also often draws distinctions between what are called ‘proximal’ and ‘distal’ factors. Proximal factors are those that work through the body or mind of the person consuming the alcohol. These are variously described as biological, physiological,

psychopharmacological factors, or psychological factors. A wider literature identifies a range of possible 'distal' factors implicated in incidents of violence. This wider literature commonly identifies distal factors such as cultural, societal, community, neighbourhood and family factors. These might encompass, for example, norms and roles, poverty, unemployment, educational levels, neighbourhood disadvantage, relationship context, or abusive childhoods. Many of these articles propose detailed models for understanding the factors contributing to violence, with alcohol or substance use rarely being prominent (Bell & Naugle 2008; Flynn & Graham 2010; Jewkes 2002; Krahe, Bieneck & Moller 2005; Wilkinson & Hamerschlag 2005). Biological factors are identified in the literature as playing a possible 'mediating' role between alcohol and violence. These biological factors include monoamine transmitters – serotonin, dopamine and norepinephrine. For example, a baseline decreased serotonergic activity has been identified in a subset of individuals with alcoholism that is also associated with increased aggression and violence (Boles & Miotto 2003). Alcohol is also believed to initially cause excess dopamine and norepinephrine levels followed by a state of depletion, a state presumed to be associated with changes in mood that may predispose to aggression (Boles & Miotto 2003).

The so-called 'psychopharmacological explanation' is the most widespread explanation for the relationship between alcohol and violence in the literature (eg Beck & Heinz 2013; Boles & Miotto 2003; Clements & Schumacher 2010; Klosterman & Fals-Stewart 2006; McMurran et al 2011; Smyth 2013; Zerhouni et al 2013). In this literature there is a suggestion that alcohol impairs executive cognitive function, where this is defined as:

a subset of cognitive capacities associated with prefrontal cortex encompassing a variety of higher order cognitive abilities such as attention, abstract reasoning, organization, mental flexibility, planning, self-monitoring, and the ability to use external feedback to moderate personal behaviour. (Zerhouni et al 2013: 4591)

Some literature suggests co-morbidities might be important, especially elevated levels of blood testosterone (Boles & Miotto 2003; Klosterman & Fals-Stewart 2006) and those with pre-existing tendencies towards aggressive behaviour (Boles & Miotto 2003). This literature suggests that there might be an association between certain traits or types of people and alcohol-related violence; these include individual personality and predisposition, or genetics (Smyth 2013).

Many articles conclude that the aetiology of violence is likely to be multifactorial, with alcohol use as only one relevant factor. For example:

Chermack and Giancola (1997) conducted an extensive review of the relationship between alcohol use and aggression. They presented an integrated biopsychosocial theoretical model in which biochemistry, pharmacology and metabolism, gender, provocation and threats, cognition, expectancies, executive functioning, personality, psychopathology, and level of intoxication interact to impact the connection between alcohol consumption and violence. (Stuart, O'Farrell & Temple 2009: 1299)

This quote alludes to some but not all possible distal factors, as well as the wide range of proximal factors potentially implicated in the production of violence.

Expert literature on the relationship between alcohol and sexual and/or family violence

There is a substantial literature dealing with the nature and extent of the relationship between alcohol and sexual and/or family violence, including what is often referred to as 'intimate partner violence' (IPV). The nature of the relationship is controversial and debatable (Ali & Naylor 2013; Clements & Schumacher 2010; Leonard 2005; Murphy & Ting 2010; Smyth 2013). Despite their tendency (one shared by some other researchers) to use terms such as 'use', 'abuse' and 'problems' interchangeably, Ali and Naylor (2013: 379) note that:

Research studies in this area can be categorized into three groups: those supporting a link between perpetration of IPV and alcohol or substance abuse; those supporting a link between victimization and alcohol or substance abuse; and those which identify a reciprocal relationship between alcohol abuse and both the perpetration of IPV and victimization.

Ali and Naylor conclude that there is a 'positive and predictive association between alcohol use and, for example, intimate partner violence' but that findings from studies tend to be

'inconsistent' (2013: 379). They conclude that 'it is difficult to establish a causal link between alcohol abuse and intimate partner violence' (Ali & Naylor 2013: 379; see also Leonard 2005), arguing instead that it is a likely contributing factor. The relationship between alcohol consumption and sexual violence is thus commonly described as an association (Ali & Naylor 2013; Klosterman & Fals-Stewart 2006). Alternatively, alcohol is sometimes described as a 'risk factor' for sexual violence (Clements & Schumacher 2010). Most commonly, explanations of the relationship between alcohol and sexual violence are couched in qualifying terms, such as 'a possible relationship' (Smyth 2013; see also Stuart, O'Farrell & Temple 2009).

Some of this literature draws distinctions based on the nature, type or severity of violence or patterns (including volume) of consumption. So, for example, some research suggests that sexual assaults involving alcohol may be more severe than those not involving alcohol (Abbey et al 2014). There may also be a link between the perpetration of IPV and either heavy drinking or alcohol use disorders, such that habitual alcohol problems may be a better indicator of IPV than acute intoxication (Ali & Naylor 2013; Clements & Schumacher 2010; Garcia, Soria & Hurwitz 2007; Jewkes 2002). There is evidence to suggest an association for both male and female perpetrators of IPV although these associations have been described by some as merely 'small to moderate', 'small' or 'weak' (eg Foran & O'Leary 2008; Testa 2004). Importantly, Langenderfer (2013) calls for caution when interpreting research that suggests an association between alcohol consumption and IPV perpetrated by women, because there is some evidence to indicate that aggression by some women may be in self-defence of violence initiated by their partners. This may also be true of some men who have perpetrated IPV (Langenderfer 2013).

As with some of the other literature discussed in this section of the report, the wider literature identifies alcohol (and other drug) use as just one of many factors that may play a role in the production of sexual violence. This wider literature commonly identifies distal factors such as cultural, societal, community, family and neighbourhood factors (Abbey et al 2014; Bell & Naugle 2008; Clements & Schumacher 2010; Foran & O'Leary 2008; Jewkes 2002; Klosterman & Fals-Stewart 2006; Langenderfer 2013; Leonard 2005). Further research is required to draw meaningful conclusions about individual and situational factors that may interact with acute alcohol consumption to produce risk (Crane et al 2016). IPV typically occurs in the home, yet contextual and environmental factors such as the use of drinking venues and exposure to neighbourhood conditions may

influence the likelihood of its occurrence. Additional research that provides new insights into how individual psychosocial characteristics, contextual aspects of drinking, and environmental factors influence alcohol-related IPV is needed (Cunradi, Mair & Todd 2014). Indeed, many interacting factors, including but not limited to alcohol intoxication, are likely to contribute to IPV (Klosterman & Fals-Stewart 2006).

A sub-set of the literature examining the relationship between alcohol and sexual violence is concerned with how people understand the causes of violence. According to Flynn and Graham (2010: 240), this is a small but important body of work:

Despite the prevalence of IPV, few studies have examined the perceptions of those involved in partner violence in an effort to understand why, in their minds, the violence occurred – that is, the reason, cause or explanation people give for why they or their partner acted aggressively. Yet, individuals' perceptions are central to their own experiences of violence and the manner in which they behave in the face of violence from others.

Aggression due to alcohol and drug problems is more frequently attributed to male partners (Flynn & Graham 2010; see also Abbey et al 2014). The process of how individuals attribute the 'causes' of violence are nevertheless complex and the literature has limitations. In their review of this attribution literature, Flynn and Graham concluded that:

Our review has indicated major limitations in conceptual clarity and specification of the proximity of perceived influences to incidents of IPV. Our findings of large differences in endorsement [or how people attribute the causes of violence] depending on how an item is worded or measured suggest that greater attention to content and construct validity and construct coverage would contribute to a better understanding of the different levels of perceived influences on IPV. (2010: 249)

So what can be said about the literature on sexual violence and alcohol consumption? In an editorial addressing the relationship between alcohol consumption and violence, Leonard (2005) concluded that:

My own view is that we have reached the point where we should conclude that heavy drinking is a contributing cause of violence. In asserting that heavy drinking contributes to violence, we should not gloss over the several important caveats. This assertion does not mean that the presence of alcohol is the only or even the primary determinant of whether violence will occur. Alcohol is neither a necessary nor sufficient cause of violence. Of most critical importance, alcohol's influence on intimate partner violence is not uniform. Instead, it is clear that alcohol contributes to violence in some people under some circumstances. There remains much to be learned about the specific conditions under which alcohol contributes to violence.

More recently, researchers (eg Ali & Naylor 2013; Langenderfer 2013) have echoed the call for more research on the alcohol-sexual-IPV relationship. Importantly, as well, these and other scholars (eg Leonard 2005) note some of the controversies surrounding claims about the relationship between alcohol and sexual violence. Some of these controversies are addressed in more detail further below.

Finally, on the question of the relationship, if any, between alcohol and sexual violence, there is a large, separate body of research examining the relationship between alcohol consumption and victimisation. Research suggests that alcohol use and intoxication increases one's susceptibility to victimisation because individuals who are intoxicated either are or appear more susceptible to attack. Data also suggest that alcohol may contribute to the outcomes of sexual assaults (eg completed rape, physical injuries), yet how alcohol interacts with other situational and behavioural factors in predicting these outcomes has only begun to be addressed. These issues are complex and particularly controversial. Expressing a concern for the implications of work that focuses on women's drinking in public, Sarah Ullman (2003: 482) explains that:

... we cannot assume that women's drinking in and of itself increases sexual victimization risk. It appears to put women at greater risk of completed rape, possibly because of other situational, behavioral, and social psychological factors that are not yet completely understood. However, comparisons of assaults where both parties drink versus cases where only offenders are drinking have shown worse outcomes for 'offender only' drinking cases than assaults where both parties are drinking, suggesting that victim drinking plays less of a role in assault outcomes.

Expert literature on the relationship between alcohol and homicide

Homicide can be understood as one manifestation of violence and in this sense, hypotheses from the literature on the relationship between alcohol and violence remain relevant. Psychopharmacological explanations are the most prominent in literature where homicide is the focus, although pre-existing comorbidities are also characterised as important, including comorbid psychopathology (Darke 2010), personality disorders (Darke 2010; Kauppi et al 2010) or even personality characteristics (Cartwright 2001). One possibility that emerges from the literature is the notion that alcohol is enabling, in the sense that the 'attributes' of alcohol interact with social norms, thus permitting certain kinds of conduct (including violence) in public. In their meta-analysis of research examining the relationship between alcohol consumption and homicide, Kuhns et al (2014) found that an average of 48% of homicide offenders were reportedly positive for alcohol. An average of 37% were 'intoxicated' at the time of the offense. Importantly, however, they caution that these findings are often based upon secondary data sources such as case notes and interviews with offenders (rather than biological samples). They conclude that:

Nevertheless, it seems apparent that we have a relatively limited understanding of the relationship between alcohol consumption and homicide offending beyond what we can learn from offender's self-report or from observations as recorded in case records. (Kuhns et al 2014: 263)

Importantly, there is a separate and substantial body of literature that examines the relationship over time between rates of homicide and levels of alcohol consumption in a population. Although some of this literature was not captured through the specific methodology used here, it relevantly finds that: what happens to homicide rates when the population's consumption of alcohol goes up and down varies between cultures, and that Australia is in the middle of English-speaking and northern European countries, showing a relatively strong relationship. Thus Ramstedt (2011) found for Australia that for a one-litre increase in per capita consumption there was an 8% increase in rates of homicide victims overall and for males and a 6% increase for females. This research supports the idea that there is a relationship between alcohol consumption and homicide in Australian society, but says little about the mechanisms of connection.

Expert literature on the effects of drugs

Cameron Duff (2013: 169) argues that the AOD field is plagued by 'interminable debates regarding the "causes" of problems related to the use of alcohol and other drugs', including the relationship between drugs, in particular, and violence. There is a considerable literature that examines the relationship between other drugs and violence or homicide (Anderson & Bokor 2012; Boles & Miotto 2003; Hoaken & Stewart 2003; Kuhns et al 2009; Moore et al 2008; Shorey, Stuart & Cornelius 2011; Stuart, O'Farrell & Temple 2009; Testa 2004). Importantly, this literature also draws distinctions between different illicit drugs – rather than collapsing them together for the purposes of any analysis. As the Australian Attorney-General's Department (2004) has pointed out:

The relationship between illicit drugs and crime is very complex... Many different data sources establish that there is a 'raw correlation' ... [H]owever this correlation does not necessarily amount to causation.

There are several theories about the relationship between other drugs, however, and violence. A number of commentators suggest that there is a relationship between drugs and violence and that it may be based on social processes such as those associated with the drug distribution system, or that violence might be used to obtain drugs or money for drugs (Anderson & Bokor 2012; Boles & Miotto 2003; Moore et al 2008). Looking then at specific drugs, it is said that:

The psychostimulants are the class of drug with the most idiosyncratic literature regarding their relationship to violence. While mass media representations have convinced most laypeople and many clinicians that these drugs undeniably generate aggression ..., the experimental literature is largely inconsistent. (Hoaken & Stewart 2003: 1543)

Hoaken and Stewart (2003: 1543) go on to say that:

Although there are several reports in the literature associating the various forms of amphetamine and cocaine use with heightened violence ..., the consistency of this relationship, as well as whether this is the product of a direct pharmacological action, remains in some doubt.

Boles and Miotto (2003: 155) suggest that amphetamines and cocaine 'could play a contributing role in violent behavior', but again note the complexity of the relationship based on 'real-world' studies, instead discussing the individual and environmental moderating factors. In contrast, Anderson and Bokor (2012) discuss a causal relationship between drugs and violence, talking of drug-induced violence. Even so their findings about the possible existence of a relationship between psychostimulants and violence is qualified, employing terms like 'can cause', 'associated with', 'under certain conditions cause' (Anderson & Bokor 2012: 41). Others use the terminology of 'association', noting that increases in drug use and drug-related problems are significantly associated with increases in aggression between intimate partners. In a meta-analysis, it is concluded that cocaine use appears to be related to increased risk of death from a firearm and is a greater risk factor for violent victimisation in the United States than in Newfoundland and Scandinavia (Kuhns et al 2009). In discussing the potential relationship between other drugs (of an unspecified type) and homicide, Graham (2006) concludes it is necessary to distinguish between levels of drug use among offenders and estimates of the contribution of drugs to the violence, as drug use may not always contribute to the crime. Drug-related homicides may have more to do with people being marginalised from mainstream society, for example, because of unemployment or other factors commonly associated with marginalisation and exclusion. Also, although there has been some research on illicit drug use and victimisation within the context of homicide, Kuhns et al (2010) express concerns about the limitations of such research and the interpretation of positive toxicology findings among victims. Among other things, they note that:

we cannot conclude that a positive drug test means that a homicide was drug-related without a review of the individual case circumstances, documented temporal correspondence between drug use and lethal outcome and elimination of other precipitating causes of violence. (Kuhns et al 2010: 1128)

Research into homicide victimisation also rarely considers the time that has elapsed between a victim's consumption and/or intoxication, the lethal injury and/or death. Crucially, they also note that different studies use different standards for establishing a positive test result. There appear to be important limitations that hamper researchers' ability to draw definitive conclusions.

Some literature suggests that biological factors may be associated with aggression among people who use drugs (eg Boles & Miotto 2003). Amphetamines release these neurotransmitters, whereas cocaine acts as a monoamine reuptake inhibitor, particularly of dopamine and norepinephrine. Cocaine and amphetamine are believed to eventually lead to a state of 'depletion'. This apparent state of depletion is presumed to be associated with changes in mood that may predispose to aggression (Boles & Miotto 2003: 158). Other literature suggests that consumption of particular illicit drugs may alter mood. It has been suggested, for instance, that sustained or 'chronic' amphetamine use may produce a variety of effects ranging from irritability to physical aggression, and psychosis including delusions that may be associated with aggression. Psychosis is also said to be induced more often by amphetamines than cocaine, perhaps because of the longer duration of action produced by amphetamines when compared with the shorter half-life of other stimulants (Boles & Miotto 2003).

Comorbidities, such as antisocial personality disorder and psychopathy, are understood to be potentially associated with a greater likelihood of uninhibited acts of aggression. It has also been suggested that the only individuals likely to act aggressively when intoxicated by amphetamines are those who have pre-existing problems with impulse control or aggressive tendencies (Hoaken & Stewart 2003).

Like psychostimulants, the reputation of phencyclidine (PCP) and the empirical evidence to support that reputation are divergent (Hoaken & Stewart 2003). Hoaken and Stewart (2003: 1545) note that 'the frequency and intensity of a pharmacological effect, and in fact whether such a relationship truly exists, are at this time in question due to the lack of controlled laboratory studies'. The pharmacological effects of PCP are not yet well understood but the evidence suggests that it is comorbidities, such as pre-existing psychosis (Boles & Miotto 2003: 168) personality characteristics or a past history of psychiatric hospitalisation (Hoaken & Stewart 2003) that lead to an association between PCP and violence.

Expert literature on the relationship between drugs and sexual and/or family violence

While there is a literature that examines the relationship between other drugs and sexual and/or family violence (Moore et al 2008; Stuart, O'Farrell & Temple 2009; Testa 2004), it is not as extensive as that for alcohol. Some research finds a strong association between illicit drug use and IPV, particularly among male perpetrators (Stuart, O'Farrell & Temple 2009). Relatively few studies have been conducted on the connection between IPV and specific illicit drugs. The majority of this research examines cocaine and cannabis. The majority of studies on cocaine and IPV find a strong positive relationship (Stuart, O'Farrell & Temple 2009). Moreover, research shows that cocaine use is associated with severe IPV perpetration and victimisation in men and women (Stuart, O'Farrell & Temple 2009). It seems likely that drugs that can reduce people's inhibition, such as cocaine, will have similar relations to those of alcohol with IPV, but there has been little population-based research on this subject (Jewkes 2002). Cocaine emerges as the illicit substance with the strongest relationship to psychological, physical, and sexual aggression (Moore et al 2008). Some of the literature notes that because drug use is frequently combined with alcohol consumption, it becomes a challenge to disentangle its contribution to violent events among intimates (Wilkinson & Hamerschlag 2005).

Finally, and as noted earlier in the discussion of literature examining *perceptions* of the relationship between alcohol and violence, a sub-set of the expert literature into drug use explores how people understand the causes of violence, including any perceived relationship between drugs and violence including sexual and/or family violence. On occasion, people (both perpetrators and victims) perceive drugs to play a role in the production of IPV (eg Flynn & Graham 2010) although less often than they do for alcohol. As noted above, however, the process of how individuals understand and perceive the 'causes' of violence are complex; this literature also has limitations and more work is needed.

Critiques, controversies and the importance of emergent critical literature on AOD 'effects'

Importantly, expert literature on the relationships between AOD and criminal offending of the kind described in detail above has been subject to a number of criticisms. This section of the report touches only briefly upon some of this literature (some of which involves original empirical research, and some of which are commentaries). The principal aim of phase 1 of this project was not to provide a comprehensive overview of the critical literature but instead to summarise discourses and dominant themes regarding the relationship between AOD and violence that can be located within particular disciplines. These critiques can be broadly characterised as taking two main forms. The first are critiques of the assumptions (or logics) about AOD effects that often underpin such research, while the second are critiques about the implications of claims made about the relationship between AOD and violence. Critiques of the former kind often involve questions about the processes and methods deployed in epidemiological, public health and criminological research. In his challenge of expert literature on the relationships between AOD and violence, Cameron Duff explains that there is a logical problem with the positivist assumption that one can 'quantify and ascribe "causal" responsibility to individual actors, objects or factors' (2013: 168). Duff and others (Hart & Moore 2014; Fraser, Moore & Keane 2014; Seear & Moore 2014; Seear 2014; Demant 2013; Fraser & Moore 2011) have extended these insights to research of the kind described above, including research seeking to highlight the complex nature of the AOD-criminality nexus. For instance, Hart and Moore (2014) argue that even research that emphasises the role of other factors in 'mediating' or 'amplifying' the effects of alcohol still assumes, to some extent, that alcohol possesses a set of stable properties and attributes.

As noted above, critics of the literature positing a relationship between AOD and violence have also expressed concerns about the possible implications of the claims found therein. Some argue that there is no credible evidence that excessive drinking, either acutely or chronically, is a cause of sexual/intimate partner aggression, that alcohol serves as an 'excuse' for aggression, and that aggression does not stop with alcohol treatment (for a discussion and critique of these ideas, see Leonard 2005). Some worry that AOD may be used as a means for denying personal responsibility for abusive or violent behaviour (Ali & Naylor 2013; Murphy & Ting 2010). Feminists have been especially reluctant to accept the link between alcohol abuse and IPV for this reason. Feminist critics have raised concerns,

for example, about the implications of claims that alcohol may cause violence in studies of IPV, where alcohol is singled out in such a way that the agency of the perpetrator is obfuscated (Murphy & Ting 2010). Claims about the intoxication-victimisation nexus have also been the subject of feminist critique because of the implication that alcohol seemingly acts upon men and women differently, with it rendering some (women) vulnerable and passive, whilst others (men) are rendered aggressive and active (Seear & Fraser 2013). In a similar sense, Ullman (2003) has cautioned against any suggestion or conclusion that men may not be able to control themselves sexually when drinking and instead called for more education with men to counter such a view.

An important question that is likely to be of increasing significance in the future is whether it is possible to reconcile some of these critiques and conclusions with findings from the positivist literature on AOD collected for this phase of the project. The position is particularly complex with regards to methodological critiques of the kind described earlier. Future work might examine whether these critiques can be reconciled in any meaningful way with the positivist literature and/or whether any emerging areas of consensus might be able to inform and strengthen policy and law-making responses to AOD and intoxication going forward.

Although it is acknowledged that feminist critiques levelled at the literature examined in this phase of the project are not homogenous, there are some signs of an emerging consensus between some feminists, researchers and key stakeholders. For example, the Foundation for Alcohol Research and Education (FARE), in consultation with domestic violence NGOs, has adopted language in which the use of the word 'cause' is avoided, since it has such diverse significations, and because, in common language, it is usually taken as meaning a single necessary-and-sufficient cause (eg FARE 2015). As feminist critiques about alcohol and intimate and sexual violence illustrate, other considerations besides the positivist findings of the scientific literature are also at stake in public policy and criminal laws on intoxication and crime.

Findings on Legal ‘Knowledges’ – Legislation and Case law

Phases 2 and 3 of the study produced ten key findings about the status of ‘intoxication’ in Australian criminal laws:

1. The criminal law attaches significance to intoxication for a wide variety of purposes at all stages of the criminal justice system.
2. Australian criminal law statutes currently take a multitude of approaches to the definition of ‘intoxication’, and under-definition is widespread.
3. While the criminal law has traditionally focused on *alcohol* intoxication, in numerous contemporary criminal justice contexts from policing to sentencing, the effects of other (illicit) drugs are regarded as ‘intoxication’ for criminal law purposes.
4. Under-definition, and definitions that require the exercise of subjective discretion, are prevalent not only in the police powers/public order context, but are also common in relation to statutory provisions governing criminal responsibility, including offence and defence definitions.
5. Magistrates and judges (and juries) are regularly called upon to assess the relevance that should be attached to intoxication evidence, including in relation to decisions about evidence admissibility or weight, criminal responsibility and the determination of sentences.
6. Court room inquiries about intoxication are not determined by scientific expert knowledge, but rather are informed by ‘common knowledge’ about AOD effects. Judicially formulated ‘tests’ based on observable mechanical functions of an intoxicated person are employed as a ‘proxy’ for complex cognitive processes that are relevant to criminal responsibility.
7. In relation to determinations of criminal responsibility, depending on the context and criminal trial strategies, intoxication evidence *may* operate to exculpate an accused person (ie, in the manner usually described as the intoxication ‘defence’), but it may also operate in an inculpatory way, by strengthening the Crown case.
8. *Victim* intoxication is a significant focus of inquiry in criminal law cases, particularly in sexual assault and indecent assault trials, and such evidence

may be applied in a way which confounds the goals of legislative reforms that have attempted to reduce the scrutiny and adverse characterisation of the victim's behaviour.

9. In the sentencing context, Australian courts espouse a 'general rule' that intoxication is not a mitigating factor, but intoxication operates as an 'indirect' mitigating factor in certain situations ('out of character'; spontaneous/unplanned behaviour; where related to mental illness or addiction; where as part of wider Indigenous community disadvantage), and is regarded as an aggravating factor in others (where the accused was 'recklessly intoxicated' or where the accused took advantage of the victim's intoxication).
10. The policing and criminalisation of anti-social behaviour in public places relies heavily on police powers and public order offence definitions that are triggered by a person's apparent intoxication.

Multiple Purposes

Legislation

Although legal scholarship has tended to focus on the significance of intoxication as a 'defence' to criminal responsibility, and recent media commentary and law reform discussion has focused on intoxication as an *aggravating* factor, this study found that the story of intoxication's relevance to Australian criminal law is much more complex. The review of Australian criminal law statutes and regulations that attach significance to intoxication identified 529 provisions across 115 statutes, 79 regulations and 19 by-laws; a total of 213 instruments (see Appendix 2). Seven discrete purposes were identified: intoxication as the basis for the exercise of a coercive power; intoxication of the accused as a core element of an offence; intoxication of the victim or a third party as a core element of an offence; intoxication of the accused as an aggravating element of an offence; limitations on intoxication evidence to support a defence; intoxication of the accused as relevant (or irrelevant) to sentencing; and consumption (predicated on intervention *before* intoxication, and associated risks). Table 1 summarises the project's findings, across all Australian jurisdictions, regarding the purposes for which significance is attached to intoxication in criminal law legislation.

The most common purposes for which Australian criminal law attaches significance to intoxication are to: provide the basis for the exercise of a coercive power by the police or another state agency (eg correctional centre employee) (35%); and where the fact of a person's intoxication is a core element of an offence definition (30%). Section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) is an example of the former:

(1) A police officer may give a direction to an intoxicated person who is in a public place to leave the place and not return for a specified period if the police officer believes on reasonable grounds that the person's behaviour in the place as a result of the intoxication ... :

(a) is likely to cause injury to any other person or persons, damage to property or otherwise give rise to a risk to public safety, or

(b) is disorderly.

A simple example of the latter is regulation 134(d) of the *Fire Brigades Regulations 1943* (WA): 'Any employee who ... consumes intoxicants or drugs to excess ... shall be guilty of an offence'. A more complex example of the latter – where intoxication forms only one of the elements of the crime – is s 16(a) of the *Summary Offences Act 1966* (Vic): 'Any person who, while drunk ... behaves in a riotous or disorderly manner in a public place'.

Although the volume of intoxication provisions is uneven across Australian jurisdictions, common to all states and territories is a heavy concentration of provisions that grant coercive powers (mainly to the police) and provisions that define intoxication as a core element of an offence. In Western Australia these categories account for 80% of instances, and the average across all jurisdictions is 65%. In the context of the recent focus on regarding intoxication as a factor that increases an offender's culpability, thus warranting harsher punishment (eg *Crimes Act 1900* (NSW), ss 25A and 25B; *Loveridge* [2014] NSWCCA 12; Quilter 2017, 2014a, 2014b), it is noteworthy that the most rarely used purpose for attaching significance to intoxication in Australian legislation is to treat it as an aggravating element of an offence (2% nationally), and as a sentencing factor (2% nationally). (It is important not to overstate the observation that few sentencing provisions expressly attach significance to intoxication. Such provisions as have been

enacted in some jurisdictions typically apply generally to all crimes, and so, operationally, their impact may be great.)

Cases

We developed a separate typology for analysing the cases in phase 3 to capture the various ways (beyond specific legislative formulations) in which criminal justice decision-making may require assessment of a person's intoxication – from initial apprehension and police questioning, through charge, trial, sentencing and appeal. The relevant purposes were:

- intoxication of the accused during police interview as relevant to the integrity (and admissibility) of that interview;
- intoxication of the accused, victim or witness as relevant to his/her credibility/reliability in giving evidence;
- intoxication of the victim as relevant to proving the absence of consent in the context of sexual offences;
- intoxication of the accused as relevant to the intoxication 'defence';
- intoxication of the accused as a limitation on other defences; and
- intoxication of the victim as relevant to sentencing.

Table 2 summarises the frequency with which the cases in our dataset reflected these different contexts and purposes. The context in which the relevance of intoxication was most frequently considered was sentencing. The total sample (n = 327) included 134 appeals against convictions, 184 appeals against sentence and 45 Crown appeals against sentence (noting that some cases involved more than one type of appeal, eg conviction and sentence). In a large number of cases (66) evidence of the accused's intoxication was said to be relevant to a *mens rea* element or a defence. In 71 cases the relevance of intoxication to the credibility and/or reliability of a person's testimony (whether accused, victim or witness) was in issue. In 68 instances the relevance of the intoxication of the *victim* was the subject of consideration. The large majority of such cases involved sexual offences. The approach, attitudes and guidance offered by appellate courts in these contexts will be analysed in more detail below. Finally, our sample included cases in which the court considered the admissibility of evidence gathered during police interview with an intoxicated suspect. Although not large in number, these cases are noteworthy because this 'site' of criminal justice administration is so rarely one that attracts the attention of

scholars concerned with intoxication and criminal law. This finding also bears out one of the project's starting premises: that assessments about whether a person was/is intoxicated, and the significance of this 'state', are made at multiple points in the administration of criminal justice.

Our overall typology of 12 purposes for which Australian criminal law and practice attaches significance to intoxication, combining both Phase 2 legislation and Phase 3 cases findings, is represented in Figure 1.

Multiple Definitions and Widespread Under-Definition

Legislation

Contrary to the reasonable expectation that the criminal law should mark a clear line between 'sobriety' and 'intoxication' if the latter state is to carry penal consequences, there is no single or widely accepted definition of 'intoxication' in Australian criminal laws. Table 3 records and illustrates the seven main approaches to statutory definition that were identified: 1) no definition; 2) limited definition; 3) degree of impairment; 4) assessment based on observation of behaviour, but with no criteria specified; 5) assessment based on observation of behaviour, with criteria specified; 6) biological detection (ie prescribed concentration of alcohol ('PCA') (or blood alcohol concentration ('BAC'))/presence of a prohibited drug in breath/blood/urine); and 7) assessment by a health professional. Note that although the colloquial use of the term 'intoxication' relates specifically to *alcohol*, criminal laws are frequently concerned with AOD. This study found significant national variation in how legislatures attempt to capture both *alcohol* and *other drugs*. In some states (eg NSW and Queensland) 'intoxication' is often (though not universally) defined broadly so as to include the effects of AOD. In other states (eg Tasmania) use is made of 'parallel' provisions to define, respectively, an impairment offence based on alcohol, and an impairment offence based on other drugs.

The most striking feature of the legislation data set is that 41% of the criminal law provisions that attach significance to intoxication contain *no definition* of intoxication or a very *limited definition* (typically, simply to include the effects of other drugs as well as alcohol eg s 428A of the *Crimes Act 1900* (NSW): "intoxication" means intoxication

because of the influence of alcohol, a drug or any other substance’). A second notable feature is that although it is ubiquitous in the driving context, biological detection is employed relatively rarely overall (15% of total provisions). Thirdly, where an attempt *is* made to distinguish sobriety (or ‘acceptable’ levels of alcohol consumption) from AOD consumption of a sufficient magnitude to warrant the intervention of the criminal law, multiple different forms of language are used to this end.

Statutory language often lacks precision and numerous variations and inconsistencies were identified – differences for which there was no obvious rationale. The study detected not only inter-jurisdictional differences, but differences between statutes in the same jurisdiction. It identified more than 50 different legislative words and phrases that were designed to demarcate a level of ‘intoxication’ that triggered criminal law legislation in one way or another (see Table 4).

While recognising that particularities of context and purpose will sometimes require variations in statutory language, the rationale for the adoption (or maintenance) of so many different ways of articulating the meaning of intoxication for criminal law purposes is hard to discern. To some extent, the variations may be explained by different drafting language having been preferred in different jurisdictions at different points in time. However, there is no obvious justification for their simultaneous operation today, and it seems very likely that operational inconsistencies will occur.

Most significantly, the multiplicity of phrases in Australian criminal law legislation that are employed in an attempt to draw a line between sobriety (or ‘acceptable’ levels of alcohol consumption) and intoxication are, frequently, poorly adapted to the task. For example, language that purports to describe a level of impairment that warrants the criminal law label ‘intoxicated’ might give the appearance of relative precision, but, on closer inspection, they are frequently circular or vague, or both, and unhelpful in defining a legal category of intoxication (as the list above illustrates). For example, what does it mean to say that a victim of sexual assault must be ‘*substantially* intoxicated’ before her/his intoxication may be relied upon to vitiate consent (*Crimes Act 1900* (NSW), s 61HA(6)(a))? And how is this to be proven? How is it possible to determine whether a person’s ‘*mind is disordered* by intoxication or *stupefaction*’ (*Criminal Code* (WA), s 28)? Curiously, some provisions appear to set a standard that is *higher* than appears warranted given the magnitude of ‘risk’ associated with intoxication in the circumstances of the activity in

question (eg s 29(1) of the *Firearms Act 1977* (SA), which provides that it is an offence for a person to handle a firearm at a time when the person is ‘*so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the firearm ...*’ (emphasis added)).

Only a minority of statutory provisions articulate behavioural criteria for assessing intoxication. In such cases, a commonly used (and copied) test provides that a person is intoxicated if:

- (a) the person’s speech, balance, coordination or behaviour appears to be noticeably impaired; and
- (b) it is reasonable in the circumstances to believe the impairment results from the consumption or use of alcohol or a drug. (*Police Administration Act 1978* (NT), s 127A)

Originally developed in the liquor licensing context as the standard for determining when licensees should stop serving alcohol to patrons (eg *Liquor Control Reform Act 2008* (Vic), s 3AB(1); *Liquor Act 1992* (Qld), s 9A), this formulation has been more widely adopted in recent years in legislation governing public order offences and police powers (eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 198(5); *Police Administration Act 1978* (NT), s 127A). Even with the benefit of additional guidelines of the sort that are provided by governments to licensees (eg Western Australian Department of Racing, Gaming and Liquor 2010; NSW Department of Justice 2015), observation-based assessment of intoxication is a ‘complex interpretive exercise’ (Pennay 2014; also MacLean et al 2012). Rubenzer (2011: 119) has reported that:

... there is little evidence that police officers, bartenders, mental health professionals, or alcohol counselors can accurately assess intoxication of strangers at moderate levels of intoxication from informal observations. In addition, the limited evidence available suggests that even extensive experience serving drinkers or assessing drunk drivers does not substantially improve this skill without reliance on sobriety or breathtests. Significant numbers of sober or low BAC subjects were identified as intoxicated in several studies, while substantial numbers of legally intoxicated subjects escaped detection. Despite low levels of accuracy, police officers tend to be quite confident in their judgments, and the evidence is consistent in showing little relationship between confidence and accuracy.

There is, however, evidence that well-executed Standardised Field Sobriety Tests (first developed by the US Department of Transportation's National Highway Traffic Safety Administration in the late 1970s (NHTSA 1999)) of the type employed by some US law enforcement authorities are a reasonably reliable method for assessing BAC and impairment, and may also be employed in relation to other drugs (Lenné, Triggs & Regan 2004; Stough et al 2006). At a minimum they offer a framework against which the decision-maker can defend or justify his/her assessment.

Cases

One of the flow-on consequences of statutory under-definition is that, for matters that reach the courtroom, lawyers, witnesses, judges, juries and magistrates are required to adjudicate on intoxication in the absence of clear criteria. Perhaps, unsurprisingly then, our review of the 327 cases in our sample revealed a wide variety of approaches to assessing whether a person was sufficiently under the influence of alcohol or another drug that they should be regarded as 'intoxicated' for the purposes of the criminal law, including: self- and/or witness report of consumption; self- and/or witness report of behaviour or state of mind; biological detection; appearance/behavioural assessment by police officer; assessment by medical, toxicology or psychology expert; and judicial assessment of the available evidence (including viewing CCTV footage and video recordings of police interviews).

One of the most striking findings in this respect was the regularity with which judges employed (and encouraged juries to employ) lay or 'common sense' understandings of intoxication, including heavy reliance on victim/witness self-report/self-assessment (see Table 5). The trial practice of asking a witness to retrospectively self-assess their intoxication at the time of the commission of the alleged offence on a 1-10 numerical rating scale is common practice in Australian criminal courts (see examples in Table 5).

Although numerical rating scales (NRSs) are widely regarded as valid as a self-report mechanism for assessing *pain* (Jensen and Karoly 2010), their use for the self-assessment of intoxication levels is more contentious, particularly for criminal law purposes. While there is evidence of NRSs having some utility in assessing generic

degrees of intoxication (Callinan 2014; Manton et al 2014), such scales are insensitive to the wide spectrum of alcohol and other drug effects covered by the term ‘intoxicated’. The World Health Organization’s ICD-10 (WHO 1993: F10-F19) recognizes that intoxication is not a single-symptom condition and that the ‘signs’ and ‘dysfunctional behavior’ upon which a diagnosis may be based can include, variously, ‘disturbances in the level of consciousness, cognition, perception, affect, or behavior that are of clinical importance (WHO 1993: F1x.0 Intoxication). It follows that NRSs, just like observation-based assessment methods (Room 2009; Kaestel et al 2018), may be inaccurate, and unlikely to be a helpful guide to the nuanced discrete intoxication-related issues on which a criminal court may be required to adjudicate – such as whether a witness’s testimony is reliable, whether a complainant in a sexual assault case consented or whether the accused acted with the requisite *mens rea* for the crime in question.

Imprecise colloquial language about intoxication was also employed by judges (see illustrations in Table 6), including in the context of directions as to how a jury should approach its task as the tribunal of fact in relation to the significance of intoxication evidence. Juries can be faced with the onerous task of having to decide *whether* the accused was intoxicated, the *degree* of the accused’s intoxication, and what *effect* the intoxication had on the accused’s mind. Where the accused’s intoxication was said to be relevant to assessing his/her criminal responsibility, jurors were regularly directed to apply their ‘common sense’ to the relevant assessments (e.g. *Baker* [2014] QCA 5, [82]; *Stott* (2011) 111 SASR 346, 353-4 [20]; *Shepherd* [2011] NSWCCA 245, [192]; *Stanley* [2013] NSWCCA 124, [60]; *Babic* (2010) 28 VR 297, 320-1 [106]).

It is debatable whether ‘common sense’ is an appropriate foundation for making decisions about the impact of AOD use on complex cognitive functions, such as *intention formation*, where the accused was intoxicated at the time of the commission of a serious violent crime, or the giving of *consent* to sexual intercourse where the complainant was intoxicated. There does not always appear to be adequate appreciation of just how challenging such inquiries are. For example, in the case of *Stanley* [2013] NSWCCA 124, the accused, who was recognised to have been ‘grossly intoxicated’ ([6]), was charged, inter alia, with assault with intention to have sexual intercourse (*Crimes Act 1900* (NSW), s 61K). On the facts and the manner in which the indictment was framed, the Crown was required to prove that the accused had the specific intent to put his penis in the victim’s

mouth. The NSW Court of Criminal Appeal described this central question for the jury as ‘a simple one, of a kind routinely answered by juries’ ([56]).

Even if this is true of proving intent generally (see Gans 2012: 76; Lacey 1993; *Iannella v French* (1968) 119 CLR 84: 95), it is questionable whether it is safe to assume that the ‘common knowledge’ of jurors extends to understanding the effect of alcohol on complex cognitive functions, let alone in the case of other drugs (such as methamphetamine), of which many jurors will have had no personal experience or exposure to expert knowledge.

We were surprised at how unevenly expert evidence on AOD effects featured in the cases in our dataset. Further, we observed that even where such evidence was available, judges appeared reluctant to allow the knowledge of medical/scientific experts to strongly influence determinations regarding the intoxication of an accused person or victim (eg *Martin* [2011] QCA 342, [68, [71]; *Humbles* [2014] SASCFC 91, [25]; *Davis* [2012] QCA 97, [59]; *Silich* (2011) 43 WAR 285, [28]; *Namatjira* [2013] NTCCA 08, [32]-[34]; *McDougall* [2013] ACTCA 14, [42]). Detailed analysis of the reasons behind this apparent preference for ‘common’ over ‘expert’ knowledge is beyond the scope of the present study. At a minimum, however, these findings serve to remind us that (like ‘insanity’) the concept of ‘intoxication that operates in the criminal law context is a *legal* one, rather than a scientific one (Valverde 2003; Loughnan 2012, 2013).

The implications of statutory under-definition and a preference for ‘common sense’ understandings of intoxication, for sexual assault trials, are considered further below.

Correlation between purpose and definition in legislation

Table 7 cross-matches the project’s original seven-part legislative typology for classifying and understanding the purpose for which significance is attached to intoxication in Australian statutes, with the seven identified approaches to *defining* intoxication. This report makes four observations on the interaction between purpose and definition in Australian criminal laws.

First, there is a high correlation between provisions that provide for the exercise of a coercive power by police or other state agency, and the inclusion of no definition of

intoxication (or only a very limited definition) in the legislation. This approach requires the police (or other decision-maker) to exercise discretion in determining whether a person is sufficiently affected by AOD to warrant being subjected to the power provided for by the legislation.

Secondly, where the nature of the significance attached is that it is a core element of an offence that the defendant was intoxicated (and to a lesser extent, where third party intoxication is an element), it is surprising – given the centrality of the alleged intoxication to the criminality of the conduct – how many such provisions provide no definition.

Thirdly, and connected to the second point, where intoxication is an aggravating element of the offence (that is, also central to criminal responsibility, supporting increased culpability and a higher penalty) there is considerable variation in the approach to definition. For example, while half of these provisions provide for a biological detection definition, the other half includes provisions which variously provide for: no definition; an oblique form of words that purports to articulate a degree of impairment; or assessment based on behaviour, but with no criteria.

Fourthly, where the legislative provision shapes intoxication's availability for a defence (again, central to criminal responsibility) the large majority of provisions contain no definition or only a limited definition (82%). In all of these situations the challenging task of defining intoxication for criminal law purposes is left to decision-makers in the criminal justice system: police; prosecutors; magistrates/judges; and juries. The desirability of this sort of discretion being exercised by individuals with little or no expertise in clinical judgments about AOD effects is considered further below. Under-definition is clearly problematic when a person's potential exposure to criminal punishment is at stake, when deprivation of liberty may result, or where the decision in question will influence whether the criminal law's protection will be extended to an intoxicated victim. Greater definitional clarity is essential when the nature of the significance attached to intoxication is that it is a core element, an aggravating element of an offence or a factor that may aggravate sentence. However, the definitional deficiencies identified in this study are no less of a concern where the consequences of a person's characterisation as 'intoxicated' are less punitive – eg where they are 'moved on' by police, detained for their own 'welfare', issued with a penalty notice or charged with a minor public order offence. Indeed, given that the 'street level' exercise of police powers is, by its nature, rarely subjected to independent

oversight or scrutiny, it is imperative that the potential for intoxication-related provisions to operate unfairly and/or harshly is confronted. In addition, it is important to be alert to the dangers of injustice arising out of adverse characterisation of a victim's intoxication, particularly in the context of sexual violence. The role of intoxication in public order policing, and the treatment of victim intoxication, are considered further below.

Intoxication from drugs other than alcohol

Legislation

A further complication with the concept of 'intoxication' in Australian criminal law is that many statutory provisions encompass both *alcohol* intoxication and intoxication caused by the consumption of other drugs. While historically the criminal law was concerned with the effects of alcohol specifically, and the preferred legislative terminology were terms such as 'drunk', 'drunkenness' and 'inebriates', over time, governments have sought to bring other drugs within the scope of the concept of intoxication. This project identified significant jurisdictional differences in how legislatures attempt to achieve this expansive definition of intoxication. In NSW, for example, intoxication is widely (though not uniformly) defined as 'intoxication because of the influence of alcohol, a drug or any other substance' (*Crimes Act 1900* (NSW), s 428A), thereby bringing within the definition of intoxication the more than 350 proscribed drugs and plants listed in the *Drug Misuse and Trafficking Act 1985* (NSW), Sch 1. Other states (eg Tasmania) have enacted 'parallel' provisions to define an offence based on alcohol *and* an offence based on other drugs. It is rare, however, for legislation to expressly identify the particular drugs (other than alcohol) that can give rise to intoxication. This blanket approach belies the obvious fact that different drugs have different effects, including depressant, stimulant and hallucinogenic effects (Babor et al 1994).

The project's findings demonstrate that, while the criminal law typically demands that *degrees* of alcohol intoxication be measured (eg BAC or PCA levels), equivalent provisions concerned with illicit drugs define intoxication with reference to the mere *presence* of a (prohibited) drug in a person's system – no matter how much was consumed, by what means and when (see generally Quilter & McNamara 2017). The policy argument might be that while alcohol is a legal drug, where the drug is illegal there

is no need to set particular limits since the law is more about determining moral culpability, and mere presence is, arguably, morally equivalent to *excessive* consumption of the legal drug, alcohol. However, if the rationale for the provision in question is a concern to manage the risks associated with *impairment*, whether this results in an incapacity to perform a function (eg driving) or reduced inhibition leading to an increased risk of violence, this argument lacks power (Woolf 2013). Courts are sometimes confronted with the consequences of the law's insensitivity to such distinctions. For example, a Magistrate in the NSW Local Court dismissed a charge of 'drug (cannabis) driving' in a case where the accused gave evidence that he had consumed cannabis nine days before the time at which he was subjected to a random roadside test. Magistrate Heilpern found that the accused had an honest and reasonable belief that the drug was no longer in his system (*Police v Carrall* (unreported, NSW Local Court, Lismore, 1 February 2016; Visentin 2016)).

If the rationale for the inclusion of drugs other than alcohol in the definition of intoxication is said to be that consumption carries an enhanced risk of violence, it is necessary to confront the fact, as discussed above, that evidence of a causal relationship between the most popular illicit drugs and violence is equivocal (Boles & Miotto 2003).

It might be countered that the law's treatment of the effects of illicit drugs is less concerned with discrete impairment or risk of violence rationales, than with communicating a more general message of deterrence in relation to drugs that have been assessed as sufficiently harmful that their use should be criminalised. One may query, however, whether it inspires confidence in the administration of criminal justice if drugs are 'deemed' to have adverse cognitive and/or behavioural effects, without reference to the available expert knowledge.

Cases

Recognising, as noted above, that 'intoxication' in Australian criminal laws includes the effects of alcohol and a long list of other drugs, alcohol was, nonetheless, the drug that was most frequently involved in the cases we reviewed. The majority of the cases in our dataset were concerned with intoxication by *alcohol* alone (220 cases or 67 per cent of the total). Cannabis was involved in 41 cases and amphetamine/methamphetamine in only 18 cases. 34 cases involved multiple substances (usually including alcohol). Other drugs

featured very rarely (heroin (7), cocaine (2), methadone (2), valium (2), oxycontin, zolpidem ('Stilnox'), benzodiazepine ('Xanax'), flunitrazepam ('Rohypnol'), LSD, venlafaxine ('Effexor'), anabolic steroid).

Our methodology focused on *appellate* decisions, and so we are unable to claim that our dataset was representative of the frequency with which different drugs are associated with criminal charges. Further, as this project's dataset consisted of appellate decisions handed down in the period 2010–2014, and there may be a 'lag' between the increase in ice usage that has occurred in Australia during the early 2010s (Cth Department of Prime Minister & Cabinet 2015: 9) and the appearance of ice-related intoxication cases in appellate courts, such that the proportion of cases where methamphetamine features may be higher in the second half of the 2010s and the future. With these qualifications, it is worth noting, in light of intense media scrutiny regarding the role of 'ice' (crystal methamphetamine) in contributing to criminal violence (eg Meddows 2015, AAP 2017), that this category of illicit drug featured in just six per cent of cases in our sample. Alcohol was 10 times more likely to be the drug involved in criminal appeal cases that raised intoxication issues.

Victim Intoxication and Sexual Offences

The majority of the legislative provisions analysed for this project were concerned with criminal offences that an intoxicated person may be charged with, or powers to which an intoxicated person might be subjected. However, in a number of instances (approx. 12 per cent of the total provisions) the concern of the criminal law is with the intoxication of the victim or a third party (eg offences of supplying alcohol to an intoxicated person in the licensing context). Victim intoxication provisions fall into two main categories: offences or sentencing principles concerned with the administration of a drug to a person for the purpose of facilitating the perpetration of a crime against that person (eg 'drink spiking' offences); and provisions that address the relevance of victim intoxication in the context of sexual offences (eg as a possible way of proving that consent was not 'freely' given).

The cases dataset contained numerous instances where the court was concerned with the significance of the victim's intoxication. The vast majority of these were sexual assault or indecent assault matters and included 28 instances where the credibility and/or reliability of the victim was considered. No other offence category revealed a similar pattern of

concern for the credibility/reliability implications of the victim's intoxication. In addition, there were 18 instances where victim intoxication was considered in relation to proof of non-consent, and 20 instances where the court considered whether the victim's intoxication (and, therefore, vulnerability), was an aggravating factor at sentence.

Concerted statutory reform has attempted to ensure that a complainant's intoxication does not impede successful prosecution of offenders. Indeed, in some instances it should assist in proving elements of the offence, such as non-consent. Most Australian jurisdictions have enacted provisions which expressly identifies victim intoxication as a condition that vitiates (or may vitiate) consent (see, eg, *Crimes Act 1900* (NSW), s 61HA(6)(a); *Crimes Act 1958* (Vic), s 34C(2)(e); Bronitt & McSherry 2017: 687-88; Brown et al 2015: 676-7).

However, the sexual assault and indecent assault cases in our dataset showed considerable variation in how courts approach evidence of complainant intoxication, particularly in relation to:

- (i) proof of non-consent;
- (ii) proof of the offender's knowledge of non-consent; and
- (iii) assessments of the credibility and reliability of the complainant's evidence.

On the implications of victim intoxication for proof of non-consent and the accused's knowledge of non-consent, this study detected a degree of divergence in attitude and approach. Surprisingly, and sometimes despite legislative provisions that are underpinned by a contrary policy purpose, several cases appeared to validate the position that a person can be both *extremely* intoxicated and nonetheless consenting to sexual intercourse even in the face of the victim's claim that s/he was not consenting (eg *Jones* [2010] NSWCCA 117; *Mitic v R* [2011] VSCA 373, [24], citing *Francis* [1993] 2 Qd R 300).

On the question of credibility and reliability there is consistent recognition that intoxication is *relevant* to credibility/reliability, although some variation in terms of the nature of its relevance. Some decisions reflect the view that intoxication will necessarily diminish the reliability of a complainant's evidence (eg *Roberts* (2012) 225 A Crim R 452; *Cook* [2010] WASCA 241; *Daniel* (2010) 207 A Crim R 449). In others, the court has held that the complainant's intoxication may render her/his account *more* reliable, by offering an explanation other than dishonesty for gaps in the complainant's recall or inconsistencies in

her/his account of events, thereby strengthening the prosecution case (eg *Compton & Barratt* (2013) 237 A Crim R 177; *Bray* [2014] VSCA 276; *O'Loughlin* [2011] QCA 123).

The inconsistencies and risks referred to here are exacerbated by the problems of statutory under-definition and 'common sense' assessment discussed above. In sexual assault trials the court was required to determine the extent and significance of the intoxication of the *victim*. As noted above, it is common for legislation to treat victim intoxication as a vitiating factor, so far as consent is concerned. For example, under s 61HA(6)(a) of the *Crimes Act 1900* (NSW), consent may be negated where the person is 'substantially intoxicated by alcohol or drugs'. However, there is no definition of 'intoxicated' – let alone '*substantially* intoxicated' – for the purposes of this section. In the cases reviewed in the present study, the evidence of the victim's intoxication often took the form of victim self-report on how much s/he had consumed and/or how she recalled feeling at the time of the offence. Rarely, a BAC reading or other expert evidence was available. Understandably, sexual assault victims often used imprecise colloquial language to convey their degree of intoxication. For example:

- 'pretty drunk' (*Roberts* (2012) 225 A Crim R 452, [6]);
- 'starting to feel out of it', 'never felt that drunk before in [her] life' (*Amato* [2013] VSCA 346, [22];
- 'when asked to describe how intoxicated she was on a scale of 1 to 10, she described herself as being a 10' (*Almotared* [2011] QCA 128, [11]);
- 'She described herself as being "quite merry", but not so much so as to have an impaired memory of what happened' (*O'Loughlin* [2011] QCA 123, [3]);
- 'She said at this stage she was still "*very drunk*" and on a scale of one to ten she estimated she was at about eight to nine' (*Jones* [2010] NSWCCA 117, [16]);
- 'In evidence she said that, by this time, she had drunk between five and eight cans of a mixed alcohol drink and was "a bit drunk"' (*Werry* [2012] VSCA 208, [9]);
- 'pretty drunk', 'definitely tipsy drunk', 'extremely drunk' (*McGuire* [2013] QCA 290, [2], [3], [6]);
- 'When asked to describe how intoxicated she was out of 10, she replied "nine"' (*Cook* [2010] WASCA 241, [23]); and
- 'very stoned' [marijuana] (*Elomari* [2012] QCA 27, [5]).

Given the imprecise and subjective colloquial nature of these expressions to describe the level of intoxication (Levine 1981), a significant issue arises as to how such terms/descriptions are *translated into* legal significance – for example, in relation to issues such as consent, reliability and credibility.

One of the rare cases where there was ‘objective’ evidence of the victim’s level of intoxication (*Mitic v R* [2011] VSCA 373), highlighted the gap that exists between the known effects of alcohol and one of the issues of primary importance to the criminal law in a sexual assault trial (ie non-consent):

The highest the remaining evidence went was that the complainant was significantly drunk at the time of intercourse, possibly with a blood-alcohol concentration as high as between 0.165% and .2%, and stumbling and repeating her speech. But, as Dr Odell said, he could not venture an opinion as to whether that had deprived the complainant of the capacity to consent. (at [15])

Intoxication and Criminal Responsibility

The term intoxication ‘defence’ is often used loosely, and in a way that masks the multiple ways in which intoxication can be implicated in the assessment of criminal responsibility. In fact, the defence strategy of relying on intoxication to negative the Crown’s capacity to prove the elements of the crime charged is only one of the ways in which intoxication evidence can influence the course and outcome of a criminal trial. The cases in our dataset showed that intoxication may be implicated in the determination of criminal responsibility in a range of other ways. It may be:

- asserted by a defendant to support the subjective test component of another defense, such as provocation (eg *Lindsay* [2014] SASCFC 56), self-defence (eg *Dal Cortivo* [2010] ACTCA 14) or mistake of fact (eg *Stehbens* [2013] QCA 81; *Prazmo* (No 2) [2010] WASCA 99);
- the subject of a judge’s direction to the jury, even if not asserted by the defendant, reflecting the trial judge’s obligation to put intoxication evidence to the jury if there is sufficient evidence that it may be relevant to a matter that goes to the guilt or

innocence of the accused (eg *SW* [2013] NSWCCA 103; *George* [2013] QCA 267; *Barden* [2010] QCA 374; *Mulkatana and Mulkatana* [2010] NTCCA 4);

- asserted by the Crown to foreclose access to a defence, noting that legislation defining some defences (eg, the defence of insanity in s 27 of the *Criminal Code* 1913 (WA) and s 27 of the *Criminal Code* 1899 (Qld); the partial defence of extreme provocation in s 23 of the *Crimes Act* 1900 (NSW); and the partial defence of diminished responsibility in s 159(3) of the *Criminal Code* 1983 (NT)) expressly excludes reliance on intoxication evidence (eg *Babic* [2010] VSCA 198; *MG* [2010] VSCA 97, [16]; *Stanley* [2013] NSWCCA 46; *Humbles* [2014] SASCFC 91); and
- asserted by the Crown to strengthen (not weaken) the prosecution's assertion that the defendant acted with the requisite intent (eg *Ward* [2013] NSWCCA 46, [82], where the trial judge directed the jury that: 'You can have an intoxicated intention. You can have an intention that is based on alcohol and drugs. In fact, very often, unfortunately, the situation is that a person forms a certain intention because they are intoxicated and they would no [sic] not have formed it if they were not').

The last two categories are noteworthy in the context of the tendency to assume that intoxication is only ever raised by the accused to explain his/her behaviour to exculpatory effect. The cases in our dataset show that the relationship between evidence of AOD consumption and effects, and the determination of criminal responsibility, is much more complex than is commonly recognised in both the scholarly literature and the political discourse that frequently surrounds intoxication-focused criminal law reform proposals and debates. Depending on a range of site-specific and case-specific considerations, evidence that the accused (or the victim) was intoxicated may expand/ or contract the parameters of criminal responsibility. As we will explain in the next section, it may also yield higher or lower criminal penalties, depending on the circumstances and the demands of individualised justice.

Sentencing: Mitigation v Aggravation

Depending on a number of variables, evidence that the accused was intoxicated at the time of the commission of an offence may be a mitigating or aggravating factor at

sentencing, or it may be regarded as ‘neutral’ (NSW Sentencing Council 2009). This project’s review of appellate decisions handed down in the period 2010-2014 shows that Australian courts consistently articulate a ‘general rule’ that intoxication per se does not operate as a mitigating factor (eg *Arthurs & Plater* [2013] VSCA 258; *Prince* [2013] NSWCCA 274; *Hassell* [2014] WASCA 158; *Langdon v Kelemete-Leoli-McLean* (2011) 206 A Crim R 368).¹

Mitigation

However, this study identified a number of circumstances in which intoxication appears to operate as an ‘indirect’ mitigating factor:

1. in support of the characterisation of the offender’s conduct as ‘out of character’ (eg *Hasan* (2010) 222 A Crim R 306; *GWM* [2012] NSWCCA 240);
2. in support of the characterisation of the offender’s conduct as spontaneous/unplanned (eg *GWM* [2012] NSWCCA 240);
3. where the offender’s AOD use and intoxication on the occasion in question is associated with dependency/addiction or mental illness (or cognitive impairment) (e.g. *Chandler* [2012] NSWCCA 135; *Bennett* [2011] VSCA 253); or
4. where the offender’s intoxication is located in a wider context of disadvantage, specifically, Indigenous community disadvantage (*Bugmy* (2013) 249 CLR 571; *Munda* (2013) 249 CLR 600).

More tentatively, given the ambiguous language often used by courts, a fifth category is proffered: where intoxication is said to ‘explain’ an offence (eg *Bourke* [2010] NSWCCA 22, [11], [26]; *Mendes* (2012) 221 A Crim R 161, [44]; *Williams; Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 250; *Wilson* (2011) 30 NTLR 51; *Taylor* (2010) 303 A Crim R 302; *Williams* [2014] ACTCA 30). This report suggests that where a sentencing or appellate court uses language that emphasises the role of intoxication in the offending behaviour (thereby ‘explaining’ the offence) there is an implied reduction in the offender’s

¹Since 2014, this approach – ie that intoxication *not* be treated as a mitigating factor – has been mandated by legislation in NSW and Queensland: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5AA), as amended by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW); *Penalties and Sentences Act 1992* (Qld) s 9A, as amended by the *Safe Night Out Legislation Amendment Act 2014* (Qld).

culpability. The logic appears to be that the person would not have offended if s/he had been sober (eg *Williams; Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 250, 268 [95]; *Wilson* (2011) 30 NTLR 51, 61-2 [43]; *Brown* [2013] QCA 185, [11]).

The precise meaning of the ‘out of character’ *exception* is hard to discern from the case law, and there appears to be some variation in how it is conceived and applied. Although it did not feature in large numbers in the dataset, appellate courts in three jurisdictions recognised the out of character exception and endorsed its application to mitigate sentences during the period under review (eg *Simon* [2010] VSCA 66; *Johnson* [2011] VSCA 360; *Chen* [2013] NSWCCA 116; *PDT* [2012] WASCA 134; *Kaschull* [2012] WASCA 245).

To a lesser extent, the same may be said of the degree of deliberation (unplanned) ‘exception’. The dataset included a small number of cases in which appellate courts recognised that evidence that the accused was intoxicated at the time may support characterisation of the offence as spontaneous or unplanned, rather than planned or pre-meditated (eg *YS* [2014] NSWCCA 226). While not limited to a particular type of offence, a number of cases in the dataset in which it was successfully invoked were sexual offences (including child sexual assault) (eg *YS* [2014] NSWCCA 226; *MDZ* [2011] NSWCCA 243; *BIP* [2011] NSWCCA 224; *LB* [2011] NSWCCA 220).

This study also revealed that when intoxication evidence is presented alongside or in association with evidence of mental illness, courts face the challenging task of ‘disentangling’ the two issues, and making a very difficult (probably impossible) determination as to which factor played the greater role in the offending behaviour (eg *Chandler* [2012] NSWCCA 135, [56]-[59]; *Papas* [2011] WASCA 3; *van Setten* [2012] SASCFC 90). The driver for this exercise is that mental illness is recognised as a mitigating factor, whereas intoxication is generally not regarded as mitigating.

Aggravation

The case law recognises that offender intoxication may *aggravate* the sentence in at least three circumstances. The first is where the person is ‘recklessly’ intoxicated: s/he knows (based on previous experiences) that when s/he consumes alcohol (and/or other drugs)

that s/he is at greater risk of offending or becoming violent (eg *Mendes* (2012) 221 A Crim R 161, [75]; *Gosland & McDonald* [2013] VSCA 269; *Dosen* [2012] VSCA 307; *John* [2014] QCA 86; *Small* (2013) 231 A Crim R 279). Although aggravation in such circumstances appears consonant with (subjective) principles of criminal responsibility, it is unclear what evidence needs to be before the sentencing court before an offender can be regarded as having been ‘recklessly’ intoxicated. Should there be evidence of previous offending? Is evidence of previous *AOD-related* offending required? Or will evidence of previous AOD abuse or addiction be sufficient? If so, how are ‘abuse’ and ‘addiction’ defined (Seear & Fraser 2014)? Must it be shown that the offender had insight about the role of AOD consumption in his/her criminal behaviour? Or is such a person ‘deemed’ to have such insight, by virtue of past offending while intoxicated?

The second circumstance in which the cases examined suggested that intoxication may be an aggravating factor, is where the crime in question takes the form of ‘random’ street violence. Without expressly naming *public* intoxication as an aggravating factor, courts have indicated that such cases give rise to a greater need for specific and general deterrence (eg *Levy*; *Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 296; *Hards* [2013] VSCA 119; *Loveridge* [2014] NSWCCA 120; see Quilter 2017).

Finally, victim intoxication may be regarded as an aggravating factor where it increased his/her vulnerability, especially where there is evidence that the offender exploited this vulnerability (eg *Nabegeyo* (2014) 34 NTLR 154; *Lee* [2012] QCA 239; *Brace* [2011] SASCFC 54; *Djordjevic* [2012] SASCFC 69; *Lim* [2010] WASCA 186; *Miles* [2010] WASCA 93; *Prempeh* [2013] WASCA 150).

Intoxication and Public Order

‘Public drunkenness’ is a well-known historical public order offence which has been abolished in most Australian jurisdictions (but not in Victoria and Queensland: *Summary Offences Act 1966* (Vic), s 13; *Summary Offences Act 2005* (Qld), s 10). However, despite apparent ‘decriminalisation’ (McNamara and Quilter 2015a) the national review of legislation undertaken for this study shows that, across the country, public drinking and intoxication in public are still the subject of a large number of statutory provisions which create criminal offences and provide for police powers (22% of total provisions). Examples

of the latter include the power to ‘move on’ intoxicated persons in NSW (*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 198), and ‘paperless arrest’ powers in the NT (*Police Administration Act* (NT), s 133AB). Bans on public *drinking* are also an important part of the regulatory environment, including state-wide bans that operate in some jurisdictions, and location-specific bans established by local governments in others (McNamara & Quilter 2015a; Pennay 2012; Pennay & Room 2012; Manton, Pennay & Savic 2014).

Five features of the nature and operation of public order laws concerned with intoxication are especially noteworthy. First, under-definition of ‘intoxication’ is a distinctive feature of criminal laws in this area. Numerous provisions contain no definition of ‘intoxicated’ or ‘drunk’, or rely heavily on behavioural criteria, which require significant discretion to be exercised, and leave decision-makers (eg, most commonly, police officers) with considerable latitude when determining where the line should be drawn between a person who is, for example ‘adversely affected’ or ‘unduly intoxicated’, and a person who is not. Even where more detailed criteria are provided for in legislation (eg *Liquor Control Reform Act 2008* (Vic), s 3AB(1), which states: ‘For the purposes of this Act, a person is in a state of intoxication if his or her speech, balance, co-ordination or behaviour is noticeably affected and there are reasonable grounds for believing that this is the result of the consumption of liquor’; see also *LEPRA 2002* (NSW), s 198(5); *Liquor Act 1992* (Qld), s 9A; *Police Administration Act 1978* (NT), s 127A), police officers are still required to exercise judgment, based on observation alone, as to whether there is a relationship between the observed behaviour and the consumption of alcohol (or other drugs) (McNamara and Quilter 2015a).

Secondly, these are the sorts of criminal offences that are enforced, and powers that are exercised, on a regular basis. More than 30,000 public order charges are finalised in Australian courts every year, and many of these are intoxication-related (ABS, *Criminal Courts, Australia, 2015/16* (4513.0); McNamara 2015). If to this number is added the additional instances in which the mode of criminal justice system engagement is an ‘on-the-spot’ fine or a move-on direction, the number of people who are affected by the criminal justice system’s treatment of public intoxication grows even further (NSW Law Reform Commission 2012; Mazerolle et al 2010; NSW Ombudsman 2014).

Thirdly, the contexts in which these laws are operationalised (including, literally, ‘on the street’) is such that it is rare for courts (or any non-police agency) to be given the opportunity to scrutinise how these laws are being used (including how intoxication is being assessed). As with most public order offences, intoxication-related charges attract high rates of guilty pleas, and the problem of ‘invisibility’ is exacerbated by the growing use of ‘on-the-spot’ fines or ‘tickets’, laws that provide for move-on without charges, or detention that is allegedly non-punitive (see *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41). It is noteworthy that the growth of on-the-spot fines for public order and other minor criminal offences also impacts harshly on the homeless and other financially disadvantaged persons (Saunders et al 2014; NSW Law Reform Commission 2012; Mazerolle 2010).

Fourthly, the available statistics and the research literature show a long-term pattern of disproportionate impact of intoxicated-related public order laws on Indigenous persons (and also, the homeless and youth) (Queensland Crime and Misconduct Commission 2008, 2010; NSW Ombudsman 2009; Walsh 2008; Anthony 2009, 2013, 2015; McNamara & Quilter 2014; Quilter & McNamara 2013; McNamara 2015; *Rowe v Kemper* [2009] 1 Qd R 247). Of course, such enforcement practices are the result of complex factors, but the manner in which relevant legislation is drafted is certainly implicated. Where ‘on-the-spot’ assessment by non-experts is required (as it frequently is by public order laws), individuals who are already exposed to high levels of policing and surveillance, and in relation to whom there is a long history of alcohol-related stereotypes – including Indigenous persons and homeless persons – may be especially vulnerable to adverse characterisations of behaviour. It might be said that ambiguity and flexibility in the definition of intoxication is more palatable (or even desirable) in this context, compared to other criminal law contexts where the consequences for a person assessed to be intoxicated are more severe. However, there is good reason to be wary about concluding that vagueness and ambiguity is less objectionable at the ‘lesser’ end of the spectrum of criminal law enforcement, given the frequency with which coercive police powers are employed and public order offences enforced, and the strong evidence of disproportionate impact on already marginalised individuals and communities.

Fifthly, particularly if ‘criminalisation’ is conceived of broadly (McNamara 2015; McNamara and Quilter 2015a, 2015b), to include not only criminal offence enforcement and traditional penalties, but also coercive police powers, it is apparent that reliance on the criminal law

and the criminal justice system to address the ‘problem’ of public intoxication is increasing, rather than decreasing, notwithstanding the recognised limitations and known negative effects of such an approach. A troubling example is the recent intensification of the policing and punishment of intoxicated persons in the Northern Territory, via a raft of overlapping police detention and procedural powers – including as a result of the enactment of the *Alcohol Mandatory Treatment Act 2013* (NT) and the *Police Administration Amendment Act 2014* (NT). These changes have been shown to impact significantly on Indigenous people and communities (Hunyor 2015; Anthony 2015; McNamara & Quilter 2016; *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41).

We also note that the tendency to conflate ‘risk of violence’ intoxication with *public* intoxication tends to reduce the visibility of the role of AOD in ‘private’ violence (see Laslett et al 2015; Kearns et al 2015; Wilson et al 2014; Klosterman & Fals-Stewart 2006; Leonard 2005). The development of appropriate criminal justice responses to domestic violence is a complex issue and largely beyond the scope of the current project, aside from noting the ‘blind spot’ to which reference has been made here. We also note that some jurisdictions have taken steps towards more explicit and constructive recognition of the relationship between AOD consumption and domestic violence offending. For example, s 35 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) enables a court to set as an apprehended violence order prohibition or restriction that the defendant cannot approach the protected person within 12 hours of consuming intoxicating liquor or illicit drugs:

(1) When making an apprehended violence order, a court may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court and, in particular, to ensure the safety and protection of the person in need of protection and any children from domestic or personal violence.

(2) Without limiting the generality of subsection (1), an apprehended violence order made by a court may impose any or all of the following prohibitions or restrictions:

...

(c) prohibiting or restricting the defendant from approaching the protected person, or any such premises or place, within 12 hours of consuming intoxicating liquor or illicit drugs ...

See also s 84(4) of the *Domestic and Family Violence Act 2007* (NT), which provides that a 'person may be detained for a longer time if a police officer is satisfied it is necessary to do so to enable a police officer to properly give a copy of the DVO to the person because of the person's apparent intoxication'. (See also *Domestic Violence and Family Violence Protection Act 2012* (Qld) s 119).

We recognise that there may be practical enforcement issues with these provisions, and their operation will require close scrutiny.

General Discussion and Recommendations

This study has identified a paradox in the relationship between the concept of ‘intoxication’ as a state produced by the consumption of AOD and the importance it plays in shaping numerous aspects of the laws and practises of the criminal justice system. On the one hand, ‘intoxication’ is ubiquitous in the criminal law – not just in the volume with which it appears in the statute books, but in the frequency with which it animates a diverse range of criminal justice decisions, including to enliven police powers, as part of the definition of a criminal offence, in determining evidence admissibility or weight, as relevant in the assessment of criminal responsibility and influencing the sentence that results from a conviction. On the other hand, there is no single or widely accepted definition of ‘intoxication’. This is contrary to the reasonable expectation that the criminal law should mark a clear line between ‘sobriety’ (or acceptable levels of consumption) and ‘intoxication’ if the latter state is to be influential – in the determination of whether a person should be criminally punished whether a person’s liberty should be deprived, or whether the protection of the criminal law should be extended to a victim.

Under-definition and ambiguity are widespread. A majority of the 500+ criminal law provisions analysed fail to clearly demarcate the boundaries of ‘intoxication’ despite the important role that the concept plays. The current existence of more than 50 phrases to draw the line may be a result of the accumulation of provisions drafted at different points in Australia’s history, and exacerbated by this country’s federal system of criminal laws, but it hardly inspires confidence that robust decisions are being made about how, when and why it is appropriate to attach criminal law significance to a person’s ‘intoxication’. The absence of an authoritative approach to defining intoxication flows from statutes through to the court-room, where intoxication is defined and its significance assessed using a variable mixture of toxicology, expert evidence, witness self-report/self-assessment and judicial ‘common sense’.

Serious consideration should be given to the national standardisation of legislative terminology. It is recognised that this will be a challenging exercise, given that this project also found that there is no one characterisation of AOD and their effects in Australian criminal law, and no single rationale for the attachment of significance to intoxication. In

some contexts, the capacity for AOD to impair cognitive function is recognised as a factor relevant to rules governing criminal responsibility. In other contexts, the cognitive impairment effects of AOD are ignored in favour of moral judgments about the culpability of persons who allow themselves to become intoxicated to the extent that they pose a greater risk of engaging in violent behaviour than if they abstained from drinking (or drank less) alcohol, or refrained from consuming illicit drugs. In other contexts still, the *risks* that are considered to be associated with AOD are foregrounded and represent the basis for criminalising intoxication (or, in some cases, consumption). Given this complexity, and in light of the factors that make the achievement of national uniformity in a federal constitutional setting where criminal law-making is primarily a matter for states and territories, a realistic first step might be the development of national principles or guidelines that can help to inform jurisdiction-specific reforms in the direction of clarity and internal consistency.

Where circumstances demand that assessment based on observed behaviour is the more appropriate (or feasible) approach, this report makes two recommendations: i) uniform adoption of expressly stated criteria for making the assessment that a person is intoxicated; and ii) a commitment by police forces (and other relevant agencies) to educating the wider community about how officers/employees are trained to assess intoxication, what criteria are used (especially where, as is often the case currently, the legislation provides no guidance), and how the exercise of intoxication-related powers is reviewed and monitored. The latter would be especially valuable in the public order context, and inspire greater confidence about the quality of ‘on-the-spot’ decision making by police officers. The potential for wider deployment of training associated with the NSW Police Force’s Alcohol Linking Program (Wiggers 2009; Wiggers et al 2016) also warrants exploration.

The challenges associated with the justice system’s approach to victim intoxication need to be addressed sensitively. The inappropriateness of being overly proscriptive and imposing on victims of sexual assault a ‘test’ of intoxication that they must ‘pass’ is obvious. Indeed it is clear that, despite decades of well-intentioned progressive statutory law reform (Daly & Bourhous 2010; Brown et al 2015; Quilter 2011), including on the relevance to be attached to intoxication, evidence of victim intoxication can (still) be a double-edged sword in sexual assault cases. On the one hand, legislative provisions designed to support and protect victims of sexual assault purport to equate victim intoxication with victim non-consent, and

encourage victim disclosure about her intoxication, on the basis that it will assist in proving at least one element of the prosecution case (ie non-consent). On the other hand, the same evidence can be relied upon by the defence in a number of ways: to raise doubt about the victim's reliability/credibility or in support of an assertion that s/he honestly and reasonably believed that s/he was consenting. This conundrum cannot be resolved merely by offering a statutory definition of intoxication (however much drafters aim for context-sensitivity), but the status quo, where victim intoxication is often evidenced with self-report, articulated in (value-laden) lay terms and filtered by judge/jury 'common sense', leaves victims unduly vulnerable to adverse judgment (Finch & Munro 2003, 2005; Taylor 2007).

Finally, this project suggests that the widespread inclusion of drugs other than alcohol in statutory definitions of intoxication is also problematic, particularly where intoxication is defined as the mere *presence of any quantity* of a drug in a person's body, without reference to when the drug was consumed, without reference to impairment or other adverse consequences of consumption, and without recognition that different drugs have different effects (Roth 2015; Barns 2016; Visentin 2016). The policy objective of deterring certain drugs (so long as they remain prohibited substances) needs to be disentangled from the separate question of the capacity of drugs (like cannabis, 'ice', cocaine, and 'ecstasy') to produce cognitive and/or behavioural effects and risks that are relevant to the administration of criminal justice. At the same time, policy-makers must confront the fact that 'legal' prescription drugs (such as diazepam (valium)) can also have impairment effects (Woolf 2013; Shoebridge 2015; Quilter and McNamara 2017).

Further Research

We conclude that the way forward is to undertake a more fine-grained jurisdiction-by-jurisdiction analysis of the origins, form and operation of criminal laws that address intoxication. Future research should clearly identify the *rationale* for attaching significance to intoxication in each instance – such as: impaired capacity to perform a function (eg driving); impaired cognitive and decision-making capacity (eg to give consent); increased risk of violence; reduced public amenity and perceived safety; or moral condemnation for irresponsible consumption. The aim should be to support the adoption of definitions that are evidence-based with respect to the discrete effects of different drugs and which provide clear guidance as to the parameters of the category ‘intoxicated’ to which penal or other consequences will attach. A single definition of intoxication for all criminal law purposes is neither feasible nor desirable. Any ‘best practice’ definitions must be sensitive to the different *sites* or regulatory contexts in which relevant laws operate, the different *purposes* for which significance is attached to intoxication, and the different *rationales* embodied in different statutes.

Further research is required to cautiously investigate whether the biological detection model could be more widely adopted, beyond the driving context, and potentially including contexts where the purpose in question is to address the increased risk of violence associated with alcohol intoxication. For instance, since experimental studies show a significant increase in aggressive behaviour at above a blood-alcohol limit of about 0.10%, it has been suggested that a BAC limit at or near this level be set as the operational definition of intoxication in enforcing prohibitions on selling alcohol to the already intoxicated (Pennay 2014).

Future research and any resulting law reform proposals should attend to the full complexity of how statutory definitions and judicial guidance on the meaning of intoxication are *operationalised*. A dimension which should be attended to in such research is how those applying the law – police, lawyers, judges and juries – conceptualise intoxication and its implications, and how this may affect the law’s operationalisation.

Such research should respect jurisdictional differences, understand differences across discrete decision-making sites within the criminal justice system, and be sensitive to legitimate 'local' factors.

Finally, further research and dialogue towards a more nuanced understanding of the intoxication/violence relationship would be desirable. An 'all-or-nothing' simple causation approach to this relationship is both unhelpful and unsupported by the research literature. Public discussion involving the wider community as well as law-makers could fruitfully address the complexities surrounding AOD use and 'risk factors' for adverse events including violence and other criminal offending. The evidence on alcohol's role in violence (and that of other drugs) does and should inform public policy initiatives. However, this report counsels against hasty moves to 'fix' overly simplistic assumptions about the intoxication-offending relationship in legal rules (as have occurred, for example, in the case of the new offence of assault causing death while intoxicated under s 25A(2) of the *Crimes Act 1900* (NSW) (Quilter 2015)). Recognition that the relationship between AOD and violence is complex and multi-factorial raises a doubt about the validity of any criminal law-making that attributes special status to the role of AOD consumption as predictably or singularly causal.

Conclusion

This report has presented the findings of an examination of the role that ‘intoxication’ plays in Australian criminal law. The most significant finding is that despite the fact that intoxication plays an important role in the operation of the criminal justice system, relevant to decision-making for a wide variety of purposes, ‘intoxication’ is poorly defined. While recognising that particularities of context and purpose will sometimes require variations in statutory language, this project found high levels of ambiguity and under-definition that are undesirable. Law reform options should be cautiously developed, paying close attention to the available evidence about AOD effects. The law should embody valid mechanisms for assessing intoxication in terms that are closely allied to the underlying rationale for the criminal law in question.

Table 1: Purpose for which Australian criminal law statutes attach significance to intoxication

	ACT	NSW	NT	Qld	SA	WA	Tas	Vic	Cth	Total
To exercise a power	13	42	28	27	16	27	9	12	8	182 (34%)
Core element of an offence – D intoxicated	9	18	26	17	19	24	17	18	10	158 (30%)
Core element of an offence – 3rd party intoxicated	7	10	6	8	6	7	5	8	6	63 (12%)
Aggravating element of offence	1	4	1	3	4	0	0	0	0	13 (2%)
Limitation on defence	7	9	9	2	5	1	4	1	7	45 (9%)
Sentencing	1	3	1	2	0	0	2	1	0	10 (2%)
Consumption	4	13	10	5	6	5	2	7	5	57 (11%)
Other			1							1 (0.2%)
Total	42	99	82	64	56	64	39	47	36	529

Table 2: Type and Frequency of Purposes for which Intoxication Addressed

ACCUSED INTOXICATED	
Intoxication during police custody/interview	n = 14
Credibility/reliability	n = 27
'Contributing' to offence	n = 27
Element of an offence (or to support proof of an element)	n = 8
Aggravating element of an offence	n = 4
To negative <i>mens rea</i> or support a defence	n = 66
Relevant to sentencing	n = 145
Other	n = 21
VICTIM INTOXICATED	
Credibility/reliability	n = 29
Relevant to proof of non-consent (sexual assault)	n = 19
Sentencing (aggravating)	n = 20
WITNESS INTOXICATED	
Credibility/reliability	n = 15

Figure 1: The Multiple Purposes of Evidence of Intoxication in Criminal Law



Table 3: Legislative Approaches to Defining Intoxication in Criminal Law

Type of definition	Examples
No definition	<ul style="list-style-type: none"> • 'A casino operator must not ... permit intoxication within the gaming area of the casino' (<i>Casino Control Act 1992</i> (NSW) s 163(1)(a)) • 'Any person found drunk in a public place shall be guilty of an offence' (<i>Summary Offences Act 1966</i> (Vic) s 13)
Limited definition	<ul style="list-style-type: none"> • 'A person must not perform a body piercing or body modification procedure on a person who is intoxicated (whether by alcohol or by any other substance or combination of substances)'. (<i>Summary Offences Act 1953</i> (SA) s 21Q(1)) • For the 'defence' of intoxication: "intoxication" means intoxication because of the influence of alcohol, a drug or any other substance' (<i>Crimes Act 1900</i> (NSW) Part 11A s 428A)
Degree of impairment	<ul style="list-style-type: none"> • For certain prescribed offences: 'It is a circumstance of aggravation ... that the offender committed the offence in a public place while the offender was adversely affected by an intoxicating substance' (<i>Penalties And Sentences Act 1992</i> (Qld) s 108B) • For the offence of culpable driving of a motor vehicle in ACT: 'under the influence of alcohol, or a drug, to such an extent as to be incapable of having proper control of the vehicle' (<i>Crimes Act 1900</i> (ACT) s 29(6)(b))
Observation/behaviour – no criteria	<ul style="list-style-type: none"> • 'A person must not sell liquor to a person who appears to be drunk' (<i>Liquor Licensing Act 1990</i> (Tas) s 78(1)) • 'the following classes of persons are excluded from entering or remaining in a totalisator agency —... persons apparently under the influence of intoxicating liquor' (<i>Racing and Wagering Western Australia Regulations 2003</i> (WA) reg 27(1)(c))
Observation/behaviour – criteria	<ul style="list-style-type: none"> • For the purpose of the police power to take a person into custody for an infringement notice offence: 'a person is intoxicated if: (a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired, and (b) it is reasonable in the circumstances to believe the impairment results from the consumption or use of alcohol or a drug' (<i>Police Administration Act 1978</i> (NT) ss 133AB, 127A)
Biological detection (concentration/presence)	<ul style="list-style-type: none"> • In South Australia, the offence of causing death or harm by use of vehicle is an aggravated offence if '... the offender committed the offence while there was present in his or her blood a concentration of 0.08 grams or more of alcohol in 100 millilitres of blood' (<i>Criminal Law Consolidation Act 1935</i> (SA), s 5AA(1a))
Health professional assessment	<ul style="list-style-type: none"> • For the purpose of detention at a sober safe centre in Queensland, 'a health care professional must assess the person and give a recommendation to the manager of the centre about whether, in the reasonable opinion of the professional ... the person is intoxicated ...' (<i>Police Powers and Responsibilities Act 2000</i> (Qld) s 390G(1)(a))

Table 4: Statutory Words and Phrases Used to Demarcate ‘Intoxication’

Key Word/Phrase	Variations
Drunk	‘drunk’ ‘found drunk’, ‘being drunk’, ‘be drunk’, ‘drunkenness’, ‘drunken manner’ ‘appears to be drunk’
Intoxicated	‘intoxicated’, ‘intoxicated person’, ‘person is intoxicated’, ‘person was intoxicated’, ‘state of intoxication’, ‘still intoxicated’, ‘remains intoxicated’ ‘appears to be intoxicated’, ‘apparently intoxicated’ ‘unduly intoxicated’, ‘substantially intoxicated’, ‘incapacitated by intoxication’
Under the Influence	‘under the influence’ ‘apparently under the influence’, ‘appears to be under the influence’, ‘reasonable belief that the [person] is under the influence’ ‘so much under the influence ... as to be incapable of exercising effective control of ...’, ‘under the influence ... to such an extent as to be incapable of ...’, ‘under the influence ... to such an extent that he or she is likely to ...’
Impaired	‘impaired by’, ‘impaired by the influence of’ ‘very substantially impaired’ ‘speech, balance, co-ordination or behaviour appears to be noticeably impaired’ ‘impair the person’s ability to’, ‘be in a state in which ... his or capacity ... is impaired’, ‘decision-making capacity is impaired because of ...’ ‘impair the victim’s mental acuity’, ‘faculties are ... so impaired that the person is unfit to be entrusted with the person’s duty’, ‘impaired by intoxication to the point of criminal irresponsibility’
Affected	‘affected or impaired’ ‘apparently affected’, ‘visibly affected’ ‘affected by, or apparently by ... to such an extent that there is a significant impairment of judgment or behaviour’ ‘affects a person’s senses or understanding’ ‘adversely affected’, ‘unduly affected’, ‘seriously affected’ ‘speech, balance, co-ordination or behaviour is noticeably affected’ ‘seriously affected apparently by’ ‘affected ... in a way which could detrimentally affect the person’s ability to ...’, ‘so affected ... as to be incapable of consenting’, ‘affected ... so as to impair capacity to ...’
Other	‘appears to be unfit for work because ...’, ‘incapable of exercising responsible control’ ‘mind is disordered by intoxication or stupefaction’ ‘intoxicated ... to the point of being incapable of freely and voluntarily agreeing ...’ ‘welfare of a person ... is seriously at risk as a result of ...’

Table 5: Illustration of Modes of Self-Assessment of Intoxication

Form of Self-Assessment	Description	Case
Volume of alcohol consumed – quantitative	‘She had drunk three cans of a vodka energy drink, a Midori and a “Cowboy shot” ...’	<i>Sharma</i> [2011] VSCA 356, [5]
	‘She had consumed two casks of white wine and a dozen vodka cruisers’	<i>Frank</i> [2010] QCA 150, [11]
	‘... he said he had drunk “probably half a bottle” of Jim Beam before taking the bus to the city, but that the bottle was “not a huge one”. He said later that night he drank “a box” of beer over two and a half hours.’	<i>DBW</i> [2011] WASCA 206, [30]
Volume of alcohol consumed – qualitative	‘Ms Sambo agreed she had been drinking a lot on the day of the killing’	<i>Harold</i> [2010] QCA 267, [12]
	‘As to her state of intoxication, MS gave evidence that she had been drinking alcohol throughout the night.’	<i>Rahmanian</i> [2010] SASC 137, [11]
	‘The complainant had drunk heavily during the day and evening’	<i>Butler</i> [2011] QCA 265, [4]
Time period for which alcohol consumed	‘She had drunk two or three cans of pre-mixed bourbon every hour from midnight until 4 am’	<i>Quinlan</i> [2012] QCA 132, [4]
	‘They had spent the afternoon at the local tavern and both were intoxicated.’	<i>Munda</i> (2013) 249 CLR 600, [81]
	‘She had been drinking (champagne) for many hours’	<i>Singh</i> [2012] WASCA 262, [10]
Measurement out of 10	‘The appellant described himself as “pissed” when he arrived ... assessing his level of intoxication as eight and a half or nine out of ten ...’	<i>McDougall</i> [2013] ACTCA 14, [18]
	‘When asked to describe how intoxicated she was out of 10, she replied “nine” ...’	<i>Cook</i> [2010] WASCA 241, [23]
	‘She said at this stage she was still “very drunk” and on a scale of one to ten she estimated she was at about eight to nine’	<i>Jones</i> [2010] NSWCCA 117, [16]
Descriptive/adjectival	‘She said that she did not feel drunk but was “a bit tipsy, a bit happy” and not completely drunk’	<i>Sharma</i> [2011] VSCA 356, [18]
	‘Just cruising, just out of it, whacked, you know.’	<i>Sullivan</i> (2012) 221 A Crim R 490, [10]
	‘He was heavily intoxicated to the extent that he claimed to have blacked out repeatedly ...’	<i>Derks</i> [2011] QCA 295, [21]

Table 6: Illustrations of Judicial Language on ‘Intoxication’

Affected by	‘He was, I am satisfied, affected by alcohol’.	<i>Stewart</i> [2012] NSWCCA 183, [21]
	‘GM was significantly affected by alcohol’.	<i>Mulkatana & Mulkatana</i> [2010] 28 NTLR 31, [54]
Intoxicated (+)	‘At the time of the killing, he was intoxicated by alcohol and cannabis.’	<i>Munda</i> (2013) 249 CLR 600, [82]
	‘Had consumed a considerable amount of alcohol during the evening and she was extremely intoxicated’.	<i>Singh</i> [2012] WASCA 262, [25]
	‘She became very intoxicated’.	<i>Victor</i> [2011] WASCA 94, [4]
	‘The trial judge found that the respondent was very intoxicated when the events in question occurred’	<i>Camus</i> [2014] WASCA 74, [105]
	‘marked intoxication’	<i>Lakin</i> (2014) 118 SASR 535, [54]
	‘She was significantly intoxicated’.	<i>Ali</i> [2014] NSWCCA 45, [8], [31]
Under the influence	‘Was very substantially impaired by the fact that he was under the influence by a combination of drugs (they being alcohol and cannabis)’.	<i>Millwood</i> [2012] NSWCCA 2, [2]
	‘You told the police you thought it was likely you were under the influence of alcohol or drugs at the time of your actions.’	<i>P</i> [2014] TASCCA 5, [21]
	He also became aware fairly quickly after entering the house that the appellant was under the influence of liquor to some degree’	<i>Martin</i> [2011] QCA 342, [14]
Other	‘The judge noted that both appellants were intoxicated and his Honour inferred that both were addled by alcohol.’	<i>Gosland & McDonald</i> [2013] VSCA 269, [6]
	‘The defendant ‘had taken a good deal of liquor’.	<i>Lutze</i> (2014) 121 SASR 144, [30]
	‘[The victim’s evidence] is vague and imprecise in significant aspects, probably as a result of her befuddlement from drink’.	<i>Amato</i> [2013] VSCA 346, [46]

Table 7: Relationship Between *Purpose* and *Definition* of Intoxication in Australian Criminal Law Statutes

	To exercise a power	Core element of offence – offender intoxicated	Core element of offence – 3 rd party intoxicated	Aggravating element of offence	Limitation on defence	Sentencing	Total
No definition	43	72	27	3	14	5	164 (35%)
Limited defn	3	1	0	0	23	1	28 (6%)
Degree of impairment	20	27	8	2	3	0	60 (13%)
Ob/behaviour – no criteria	71	11	9	1	0	1	93 (20%)
Ob/Behaviour – criteria	27	5	14	0	1	2	49 (10%)
Biological detection (concentration or presence)	15	42	5	7	4	2	75 (16%)
Health professional assessment	3						3 (0.6%)
Total	182 (39%)	158 (33%)	63 (13%)	13 (3%)	45 (10%)	11 (2%)	472

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Appendix 1: Participants - Stakeholder/Expert Workshop, Sydney, 9 Dec 2015

Lucy Adams	Manager and Principal Lawyer, Homeless Law, Justice Connect (Melbourne)
Kym Chapple	Policy, Communications and Legislation, Office of Greens MP David Shoebridge
Sarah Crellin	Deputy Principal Legal Officer, Central South Eastern Region, Aboriginal Legal Service (Redfern)
Nick Cowdery AM QC	Member, NSW Sentencing Council
Carrie Fowlie	Chief Executive, Alcohol Tobacco and Other Drug Association ACT (ATODA)
Kieran Ginges	Barrister, Maurice Byers Chambers
Russell Goldflam	Solicitor, Northern Territory Legal Aid Commission (NTLAC)
Jonathan Hunyor	Principal Legal Officer, North Australian Aboriginal Justice Agency (NAAJA)
Dr Michael Livingston	Centre for Alcohol Policy Research, La Trobe University
Mary Maddigan	Acting Director, Criminal Law Review Victorian Department of Justice & Regulation
A/Prof Anthony Moynham	Consultant, Clinical Forensic Medicine, Royal Prince Alfred Hospital and Adjunct Associate Professor, University of Sydney
John Pickering SC	Deputy Director, Office of the Director of Public Prosecutions (NSW)
Prof Alison Ritter	Director, Drug Policy Modelling Program (DPMP), National Drug and Alcohol Research Centre (NDARC), UNSW
Jane Sanders	Principal Solicitor, Shopfront Youth Legal Centre (Sydney)
David Shoebridge	Member of the Legislative Council, NSW Parliament
Craig Smith SC	Deputy Senior Public Defender (NSW)
Paul Stanley	Matthew Stanley Foundation (Qld)
Michael Thorn	Chief Executive, Foundation for Alcohol Research and Education (FARE)
Karen Willis	Executive Officer, NSW Rape Crisis Centre

Appendix 2: Statutes and Regulations

AUSTRALIAN CAPITAL TERRITORY

Acts

Bail Act 1992
Children and Young People Act 2008
Corrections Management Act 2007
Crimes (Sentencing) Act 2005
Crimes Act 1900
Criminal Code 2002
Firearms Act 1996
Intoxicated People (Care and Protection) Act 1994
Lakes Act 1976
Liquor Act 2010
Public Baths and Public Bathing Act 1956
Public Pools Act 2015
Rail Safety National Law (ACT) Act 2014
Road Transport (Alcohol and Drugs) Act 1977
Road Transport (Safety and Traffic Management) Act 1999

Regulations

Health Professionals Regulation 2004
Road Transport (Public Passenger Services) Regulation 2002

NEW SOUTH WALES

Acts

Bail Act 2013
Casino Control Act 1992
Crimes (Administration of Sentences) Act 1999
Crimes (Domestic and Personal Violence) Act 2007
Crimes (Sentencing Procedure) Act 1999
Crimes Act 1900
Firearms Act 1996
Intoxicated Persons (Sobering Up Centres Trial) Act 2013
Law Enforcement (Powers and Responsibilities) Act 2002
Liquor Act 2007
Local Government Act 1993
Major Events Act 2009
Marine Safety Act 1998
Passenger Transport Act 1990
Passenger Transport Act 2014
Police Act 1990
Rail Safety National Law (NSW)
Restricted Premises Act 1943
Road Transport Act 2013
Summary Offences Act 1988

Regulations

Children (Detention Centres) Regulation 2010
Crimes (Administration of Sentences) Regulation 2014
Education and Care Services National Regulations
Fire Brigades Regulation 2014
Liquor Regulation 2008
Lord Howe Island Regulation 2014
Management of Waters and Waterside Lands Regulations - NSW 1972
Passenger Transport (Drug and Alcohol Testing) Regulation 2010
Passenger Transport Regulation 2007
Police Regulation 2008
Rail Safety (Adoption of National Law) Regulation 2012
Road Rules 2014
Sydney Olympic Park Authority Regulation 2012
Zoological Parks Regulation 2014

By-Laws

Crown Lands (General Reserves) By-Law 2006
Racecourses (General) By-Law 1990
Randwick Racecourse By-Law 1981

NORTHERN TERRITORY**Acts**

Bail Act 1982
Criminal Code Act 1983
Domestic and Family Violence Act 2007
Firearms Act 1997
Kava Management Act 1998
Liquor Act 1978 1979
Marine Act 1981
Police Administration Act 1978
Racing and Betting Act 1983
Sentencing Act 1995
Summary Offences Act 1923
Totalisator Licensing and Regulation Act 2000
Traffic Act 1987
Youth Justice Act 2005

Regulations

Correctional Services (Non-Custodial Orders) Regulations 2011
Courtesy Vehicle Regulations 2003
Crown Lands (Recreation Reserve) Regulations 1938
Dangerous Goods Regulations 1985
Greyhound Racing Rules 1981
Marine (Passenger) Regulations 1982
Minibus Regulations 1998
Motor Vehicle (Hire Car) Regulations 1985
Motor Vehicles Regulations 1977

Private Hire Car Regulations 1992
Taxi Regulations
Tourist Vehicles Regulations 1998
Youth Justice Regulations 2006

By-Laws

Charles Darwin University (Site and Traffic) By-Laws
Darwin City Council By-Laws 1994
Darwin Waterfront Corporation By-Laws
Jabiru Town Development (Community Hall) By-Laws
Jabiru Town Development (Swimming Pool Complex) By-Laws
Katherine Town Council By-Laws
Palmerston (Public Places) By-Laws
Port By-Laws

QUEENSLAND

Acts

Aboriginal and Torres Strait Islander Communities (Justice, Land And Other Matters) Act 1984
Bail Act 1980
Community Services (Aborigines) Act 1984
Community Services (Torres Strait) Act 1984
Criminal Code
Domestic and Family Violence Protection Act 2012
Liquor Act 1992
Major Events Act 2014
Penalties and Sentences Act 1992
Police Powers and Responsibilities Act 2000
Police Service Administration Act 1990
Public Trustee Act 1978
South Bank Corporation Act 1989
Summary Offences Act 2005
Transport (Rail Safety) Act 2010
Transport Operations (Marine Safety) Act 1994
Transport Operations (Passenger Transport) Act 1994
Transport Operations (Road Use Management) Act 1995
Veterinary Surgeons Act 1936
Weapons Act 1990
Wine Industry Act 1994

Regulations

Coal Mining Safety and Health Regulation 2001
Corrective Services Regulation 2006
Juvenile Justice Regulation 2003
Mining and Quarrying Safety and Health Regulation 2001
State Buildings Protective Security Regulation 2008
Youth Justice Regulation 2003
Transport Operations (Passenger Transport) Standard 2010

SOUTH AUSTRALIA

Acts

Casino Act 1997
Criminal Law Consolidation Act 1935
Firearms Act 1977
Harbors and Navigation Act 1993
Liquor Licensing Act 1997
Motor Vehicles Act 1959
Police Act 1998
Public Intoxication Act 1984
Road Traffic Act 1961
Security and Investigation Industry Act 1995
Summary Offences Act 1953

Regulations

Botanic Gardens and State Herbarium Regulations 2007
Explosives Regulations 2011
Libraries Regulations 2013
Passenger Transport Regulations 2009
Recreation Grounds Regulations 2011

TASMANIA

Acts

Corrections Act 1997
Criminal Code Act 1924
Criminal Law (Detention and Interrogation) Act 1995
Dangerous Goods (Road and Rail Transport) Act 2010
Firearms Act 1996
Liquor Licensing Act 1990
Marine Safety (Misuse of Alcohol) Act 2006
Mental Health Act 2013
Police Offences Act 1935
Road Safety (Alcohol and Drugs) Act 1970
Security and Investigations Agents Act 2002
Sex Industry Offences Act 2005
Youth Justice Act 1997

Regulations

Explosives Regulations 2012
Libraries Regulations 2012
National Parks and Reserved Land Regulations 2009
Wellington Park Regulations 2009

VICTORIA

Acts

Casino Control Act 1991
Corrections Act 1986
Crimes Act 1958
Firearms Act 1996
Gambling Regulation Act 2003
Liquor Control Reform Act 1998
Local Government Act 1989
Marine (Drug, Alcohol and Pollution Control) Act 1988
Rail Safety (Local Operations) Act 2006
Road Safety Act 1986
Sentencing Act 1991
Serious Sex Offenders (Detention and Supervision) Act 2009
Summary Offences Act 1966
Victoria Police Act 2013

Regulations

Bus Safety Regulations 2010
Corrections Regulations 2009
Dangerous Goods (Explosives) Regulations 2011
Firearms Regulations 2008
Metropolitan Fire Brigades (General) Regulations 2005
Prevention of Cruelty To Animals Regulations 2008
Sentencing Regulations 2011
Transport (Conduct) Regulations 2005
Transport (Passenger Vehicles) Regulations 2005

WESTERN AUSTRALIA

Acts

Betting Control Act 1954
Conservation and Land Management Regulations 2002
Criminal Code
Government Railways Act 1904
Health Act 1911
Liquor Control Act 1988
Protective Custody Act 2000
Rail Safety Act 2010
Road Traffic Act 1974
Road Traffic Code 2000
Sentence Administration Act 2003
Western Australian Marine Act 1982
Young Offenders Act 1994

Regulations

Aboriginal Heritage Regulations 1974
Conservation and Land Management Regulations 2002

Dangerous Goods Safety (Storage and Handling Of Non-Explosives) Regulations
Education and Care Services National Regulations 2012
Fire Brigades Regulations 1943
Land Administration (Land Management) Regulations 2006
Library Board (Registered Public Libraries) Regulations 1985
Liquor Control (Kunawarritji Restricted Area) Regulations 2011
Mines Safety and Inspection Regulations 1995
Museum Regulations 1973
Police Force (Member Testing) Regulations 2011
Police Force Regulations 1979
Port Authorities Regulations 2001
Prisons Regulations 1982
Public Transport Authority Regulations 2003
Racing And Wagering Western Australia Regulations 2003
Road Traffic (Authorisation To Drive) Regulations 2008
Road Traffic (Omnibus) Regulations 1975
Western Australian Meat Industry Authority Regulations 1985

By-Laws

Byford Recreation Reserve By-Laws
Djarindjin Aboriginal Community By-Laws
Evaporites (Lake Macleod) (Cape Cuvier Berth) By-Laws 1991
Government Railways (Sale and Consumption Of Liquor) By-Law 1971
Hamersley Iron (Port Of Dampier) By-Laws
Iron Ore (Robe River) Cape Lambert Ore and Service Wharves By-Laws 1995
National Trust of Australia (W.A.) By-Laws 1972
Pemberton National Park and Recreational Reserve By-Laws

COMMONWEALTH

Acts

Australian Border Force Act 2015
Australian Federal Police Act 1979
Crimes Act 1914
Criminal Code Act 1995
Defence Force Discipline Act 1982
International Criminal Court Act 2002
Migration Act 1958
Navigation Act 2012
Stronger Futures in the Northern Territory Act 2012

Regulations

Airports (Control of On-Airport Activities) Regulations 1997
Australian War Memorial Regulations 1983
Australian National Maritime Museum Regulations 1991
Civil Aviation Regulations 1988
National Gallery Regulations 1982
National Library Regulations 1994

Appendix 3: Cases

HIGH COURT

2013

Bugmy v R (2013) 249 CLR 571

Munda v WA (2013) 249 CLR 600

2012

Cooper v R (2012) 87 ALJR 32

2011

Roach v R (2011) 242 CLR 610

AUSTRALIAN CAPITAL TERRITORY

2014

Booth v R [2014] ACTCA 38

Byrne v R [2014] ACTCA 31

Monfries v R [2014] ACTCA 46

O'Rafferty v R [2014] ACTCA 35

R v Flowers [2014] ACTCA 13

R v Williams [2014] ACTCA 30

2013

McDougall v R [2013] ACTCA 14

2010

Dal Cortivo v R (2010) 204 A Crim R 55

NEW SOUTH WALES

2014

Aitken v R [2014] NSWCCA 201

Ali v R [2014] NSWCCA 45

Aslan v R [2014] NSWCCA 114

Catley v R [2014] NSWCCA 249

Craig v R [2014] NSWCCA 243

Dia v R [2014] NSWCCA 9

Goodridge v R [2014] NSWCCA 37

Greenwood v R [2014] NSWCCA 64

Keely v R [2014] NSWCCA 139

Matthews v R [2014] NSWCCA 151

Milsom v R [2014] NSWCCA 142

Nand v R [2014] NSWCCA 293

R v Kyle [2014] NSWCCA 300

R v Loveridge [2014] NSWCCA 120

R v YS [2014] NSWCCA 226

Simpson v R [2014] NSWCCA 23

Woodward v R [2014] NSWCCA 205

2013

Adzioski v R [2013] NSWCCA 69
Buksh v R [2013] NSWCCA 60
Carpenter v R [2013] NSWCCA 130
Chen v R [2013] NSWCCA 116
George v R [2013] NSWCCA 263
Melbom v R [2013] NWCCA 210
Nair v R [2013] NSWCCA 79
Ngati v R [2013] NSWCCA 203
Prince v R [2013] NSWCCA 274
R v Ball [2013] NSWCCA 126
R v Stanley [2013] NSWCCA 124
R v Wright (2013) 229 A Crim R 245
Small v R (2013) 231 A Crim R 279
Smith v R [2013] NSWCCA 64
Smith v R [2013] NSWCCA 209
Stewart v R [2013] NSWCCA 185
SW v R [2013] NSWCCA 103
Vulvovic v R [2013] NSWCCA 340
Ward v R [2013] NSWCCA 46
Willmott v R [2013] NSWCCA 224
Youssef v R [2013] NSWCCA 308
Zuccarini v R [2013] NSWCCA 228
ZZ v R [2013] NSWCCA 83

2012

Beldon v R [2012] NSWCCA 194
Blackwell v R [2012] NSWCCA 227
Buckley v R [2012] NSWCCA 85
Gommesen v R [2012] NSWCCA 226
JB v R (2012) 83 A Crim R 153
JM v R (2012) 223 A Crim R 55
JT v R [2012] NSWCCA 133
KR [2012] NSWCCA 32
Lute v R [2012] NSWCCA 67
Mendes v R (2012) 221 A Crim R 161
R v Brown [2012] NSWCCA 199
R v Chandler [2012] NSWCCA 135
R v GWM [2012] NSWCCA 240
R v Millwood [2012] NSWCCA 2
R v Murrell [2012] NSWCCA 90
R v Nykolyn [2012] NSWCCA 219
Stewart v R [2012] NSWCCA 183
Sullivan v R (2010) 221 A Crim R 490
Tweeddale v R [2012] NSWCCA 99
Webb v R (2012) 225 A Crim R 550
Williams v R (2012) 229 A Crim R 67

2011

Abdel-Hady v R [2011] NSWCCA 196

BIP v R [2011] NSWCCA 224
Blackwell v R (2011) 81 A Crim R 119
Burns v R (2011) 205 A Crim R 240
CW v R [2011] NSWCCA 45
Foster v R [2011] NSWCCA 285
LB v R [2011] NSWCCA 220
McClain v R [2011] NSWCCA 191
MDZ v R [2011] NSWCCA 243
R v AB [2011] NSWCCA 229
R v KB [2011] NSWCCA 190
R v West [2011] NSWCCA 91
Reberger v R [2011] NSWCCA 132
Rotner v R [2011] NSWCCA 207
Sheppard v R [2011] NSWCCA 245
Smith v R [2011] NSWCCA 110
Smith v R [2011] NSWCCA 290
Sullivan v R [2011] NSWCCA 270

2010

Ali v R [2010] NSWCCA 35
Bourke v R (2010) 199 A Crim R 38
BP v R (2010) 201 A Crim R 379
Butters v R [2010] NSWCCA 1
Hutchison v R [2010] NSWCCA 122
Jones v R [2010] NSWCCA 117
Josefski v R (2010) 217 A Crim R 118
King v R [2010] NSWCCA 202
McDonald v R [2010] NSWCCA 220
Still v R [2010] NSWCCA 131
Woodbridge v R (2010) 208 A Crim R 503

NORTHERN TERRITORY

2014

O'Reilly v R [2014] NTCCA 14
R v Nabegeyo [2014] NTCCA 4
Wesley v R [2014] NTCCA 17

2013

Green v R [2013] NTCCA 14
Namatjira v R [2013] NTCCA 8

2012

Goddard v R [2012] NTCCA 6

2011

Blacker v R (2011) 211 A Crim R 250
R v Wilson (2011) 211 A Crim R 510

2010

Mulkatana & Mulkatana v R (2010) 28 NTLR 31

QUEENSLAND

2014

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R v Baker [2014] QCA 5
R v Boubaris [2015] QCA 199
R v Castle [2014] QCA 276
R v Civic [2014] QCA 322
R v Davidson [2014] QCA 348
R v Douglas [2014] QCA 187
R v Huni [2014] QCA 324
R v John [2014] QCA 86
R v Johnson [2014] QCA 79
R v Kleimeyer [2014] QCA 56
R v Levy [2014] QCA 205
R v Nikora [2014] QCA 192
R v Porter [2014] QCA 14
R v Williams [2014] QCA 346

2013

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Commissioner of Police v Stehbens [2013] QCA 81
R v Anthony [2013] QCA 95
R v Brown [2013] QCA 185
R v George [2013] QCA 267
R v Glenbar [2013] QCA 353
R v Langlo & Nuggins [2012] QCA 117
R v McGuire [2013] QCA 290
R v Mitchell [2013] QCA 248

2012

AC (Qld) v Bosanquet & Ors [2012] QCA 367
AG (Qld) v Ellis [2012] QCA 182
Hocking v AG (Qld) [2012] QCA 65
R v Bacon [2012] QCA 340
R v Davis [2012] QCA 97
R v Edwards [2012] QCA 117
R v Elomari [2012] QCA 27
R v Gulbis-Paris [2012] QCA 348
R v Hart [2012] QCA 38
R v Hill [2012] QCA 59
R v Kay [2012] QCA 327
R v Lee [2012] QCA 329
R v Logan [2012] QCA 210
R v Pao [2012] QCA 8
R v Qianli Ma [2012] QCA 317
R v Quinlan [2012] QCA 132
R v Sailor [2012] QCA 246

2011

LAB v AG (Qld) [2011] QCA 230
R v Almotared [2011] QCA 128

R v Butler [2011] QCA 265
R v Chenery [2011] QCA 271
R v Derks [2011] QCA 295
R v Evans [2011] QCA 135
R v GAM [2011] QCA 288
R v Grimaldi [2011] QCA 114
R v Handley [2011] QCA 361
R v Harold [2011] QCA 99
R v Hopper [2011] QCA 296
R v Lacey & Lacey [2011] QCA 386
R v Martin [2011] QCA 342
R v O'Loughlin [2011] QCA 123
R v Ray [2011] QCA 365
R v Thomasen [2011] QCA 9
R v Toohey [2011] QCA 354
R v TX [2011] QCA 68

2010

R v Barden [2010] QCA 374
R v Blackaby [2010] QCA 84
R v CAW [2010] QCA 103
R v Clough (No 2) (2010) 200 A Crim R 140
R v Davy [2010] QCA 118
R v Frank [2010] QCA 150
R v Harold [2010] QCA
R v Tapara [2010] QCA 320
R v Taylor (2010) 203 A Crim R 302
R v Williamson [2010] QCA 277

SOUTH AUSTRALIA

2014

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R v Ceruto [2014] SACFC 5
R v Humbles [2014] SASCF 91
R v Lakin (2014) 118 SASR 535
R v Lindsay (2014) 119 SASR 320
R v Lutze (2014) 121 SASR 114
R v Marafioti (2014) 118 SASR 511

2013

R v Compton & Barratt (2013) 237 A Crim R 177
R v Nedza [2013] SASCF 142
R v Wymond; R v Evans [2013] SASCF 12

2012

R v Belczacki (2012) 112 SASR 95
R v Djordjevic [2012] SASCF 69
R v Van Setten [2012] SASCF 90

2011

R v Betts [2011] SASCFC 27
R v Brace [2011] SASCFC 54
R v Higgs (2011) 111 SASR 42
R v Ossitt [2011] SASCFC 23
R v Sierke [2011] SASCFC 53
R v Smith [2011] SASCFC 124
R v Stott (2011) 111 SASR 346
R v Wait [2011] SASCFC 91

2010

R v Daniel (2010) 207 A Crim R 449
R v Heyward & Minter [2010] SASCFC 38
R v Rahmanian [2010] SASC 137

TASMANIA**2014**

P v Tas [2014] TASCCA 5

2013

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DPP v CSS [2013] TASCCA 10
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2011

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2010

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Bray v R [2014] VSCA 276
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DPP v Zarb [2014] VSCA 347
Hothnyang v R [2014] VSCA 64
Pasznyk v DPP [2014] VSCA 87
Rana v R [2014] VSCA 198

Saw Wah v R [2014] VSCA 7
Singh v R [2014] VSCA 250
Ulutui v R [2014] VSCA 110
West v DPP [2014] VSCA 36

2013

Amato v DPP [2013] VSCA 346
Arthurs v R [2013] VSCA 258
Crocker v R [2013] VSCA 318
Dong v R [2013] VSCA 354
Gosland & McDonald v R [2013] VSCA 269
Hards v R [2013] VSCA 119
Nash v R [2013] VSCA 172
Niaros v R [2013] VSCA 249
Tunja v R [2013] VSCA 174

2012

Acar v R [2012] VSCA 8
Dosen v R [2012] VSCA 307
DPP v Edwards [2012] VSCA 293
DPP v Werry [2012] VSCA 208
Hegarty v R [2012] VSCA 252
IK v Sec. to the Dept. of Justice [2012] VSCA 12
Miller v R [2012] VSCA 265
Morrison v R [2012] VSCA 222
NJ v R (2012) 229 A Crim R 448
Phillips v R (2012) 222 A Crim R 149
Roberts v R (2012) 225 A Crim R 452
RSJ v R [2012] VSCA148
Shaw v R [2012] VSCA 78
Vanstone v R (2012) 222 A Crim R 93

2011

Ashdown v R (2011) 219 A Crim R 454
Baltas v R [2011] VSCA 169
Bennett v R [2011] VSCA 253
DPP v Gerrard (2010) 211 A Crim R
Gorlachenchearau v R (2011) 217 A Crim R 353
Halamboulis v R [2011] VSCA 449
Jacobs v R [2011] VSCA 238
Johnson v R [2011] VSCA 360
Johnstone v R [2011] VSCA 60
Kavanagh v R [2011] VSCA 234
Khan v R [2011] VSCA 286
Mitic v R [2011] VSCA 373
Neal v R (2011) 213 A Crim R 190
Rintoull v R [2011] VSCA 245
Sharma v R [2011] VSCA 356
Sibanda v R (2011) 213 A Crim R 303

2010

Babic v R (2010) 203 A Crim R 543
Hasan v R (2010) 222 A Crim R 306
Hudson v R (2010) 205 A Crim R 199
MG v R (2010) 200 A Crim R 433
R v Aidid [2010] VSCA 56
R v Simon [2010] VSCA 66
Tancredi v R [2010] VSCA 157
Will v R [2010] VSCA 235

WESTERN AUSTRALIA

2014

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Dixon v WA (No 2) [2014] WASCA 1
Millar v WA [2014] WASCA 2
Moir v WA [2014] WASCA 25
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WA v Camus [2014] WASCA 74
WA v Hassell [2014] WASCA 158
WA v Staniforth-Smith [2014] WASCA 170
WA v Walley [2014] WASCA 85

2013

Colbung v WA [2013] WASCA 257
Field v WA [2013] WASCA 209
Goodwyn v WA (2013) 230 A Crim R 50
Heaton v WA (2013) 234 A Crim R 409
Munmurrie v WA [2013] WASCA 167
Oubid v WA [2013] WASCA 79
Peters v WA [2013] WASCA 205
Pool v WA [2013] WASCA 273
Prempeh v WA [2013] WASCA 150
Toki v WA [2013] WASCA 214
WA v Lee [2013] WASCA 246

2012

Kaschull v WA [2012] WASCA 245
Liu v WA [2012] WASCA 218
Lodge v Margorian (2012) 220 A Crim R 427
McLaughlin v WA (2012) 224 A Crim R 134
PDT v WA [2012] WASCA 134
Singh v WA [2012] WASCA 262
WA v Munda (2012) 221 A Crim R 548
Windle v WA [2012] WASCA 61

2011

Brown v WA (2011) 207 A Crim R 533
Caulfield v WA [2011] WASCA 230
DBW (a child) v WA [2011] WASCA 206

Evans v WA [2011] WASCA 182
GJT v WA (2011) 214 A Crim R 272
Langdon v Kelemete-Leoli-McLean (2011) 206 A Crim R 368
Narkle v WA [2011] WASCA 160
Papas v WA [2011] WASCA 3
Victor v WA [2011] WASCA 94
WA v Silich (2011) 43 WAR 285
Wongawol v WA (2011) 212 A Crim R 284
WP v WA [2011] WASCA 198

2010

Austic v WA [2010] WASCA 110
Barron v WA [2010] WASCA 27
Butler v WA [2010] WASCA 104
Cook v WA [2010] WASCA 241
Lim v WA [2010] WASCA 186
McKey v WA [2010] WASCA 210
Miles v WA [2010] WASCA 93
Powell v Tickner (2010) 203 A Crim R 421
Prazmo v WA (No 2) [2010] WASCA 99
Ward v WA (No 2) [2010] WASCA 208
Waldren v WA [2010] WASCA 63
Wright v WA (2010) 203 A Crim R 339