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**Abstract** | This study explores how the state of ‘intoxication’ from the consumption of alcohol or other drugs is treated by the criminal justice system in Australia. The authors analysed more than 500 statutory provisions which attach significance to a person’s ‘intoxication’ for a variety of purposes, and 327 appellate court decisions handed down in Australia between 2010 and 2014 in which the court considered evidence that the accused, the victim or a witness was ‘intoxicated’ at the time of the alleged offence. The study found that ‘intoxication’ has multiple purposes in the criminal law, but there is a widespread problem of under-definition. In the absence of clear definition, intoxication is often assessed on the basis of highly subjective criteria—in contexts as diverse as public order policing and assessments of victim credibility in sexual assault trials. The authors recommend that consideration be given to the standardising the definition of ‘intoxication’, consistent with society’s expectation that criminal law should mark a clear line between ‘sobriety’ and ‘intoxication’ if the latter state is to carry penal consequences.

## The significance of ‘intoxication’ in Australian criminal law

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Recent years have seen intense media scrutiny, concerted policy discussion and significant law reform on the relationship between the consumption of alcohol and other drugs (AOD) and the commission of criminal offences. These debates invite consideration of two related questions with which this paper is concerned. First, in what sorts of contexts and for what purposes does the criminal law (including laws governing police powers) attach significance to a person’s intoxication? Second, in the context of the criminal justice system, what does it mean to say that a person is ‘intoxicated’, and how is that term defined? These two questions became the foundation of a Criminology Research Grant-funded study. This paper summarises the main findings of the study. It: (i) maps and assesses the multiple purposes for which Australian criminal laws attach significance to ‘intoxication’; (ii) analyses how ‘intoxication’ is defined for criminal law purposes; and (iii) investigates the relationship between the purpose for which significance is attached to intoxication and how intoxication is defined.

## Background

### The relationship between intoxication and criminal offending

Recent criminal law reforms have focused heavily on one particular claim about alcohol intoxication: that it ‘causes’ violence (Quilter 2014). This is a controversial claim. There is evidence to support the conclusion that there is a correlation between aggression/violence and alcohol consumption (eg Exum 2006; Graham & Homel 2008; Room & Rossow 2001). Payne and Gaffney (2012) found that a significant proportion of offenders attribute their offending to the use of alcohol or other drugs. However, most people who consume alcohol do not become aggressive or violent (Beck & Heinz 2013; Boles & Miotto 2003). The precise nature of the relationship between alcohol and violence is complex (Smyth 2013; Ali & Naylor 2013). Room and Rossow (2001) have argued that epidemiologically there is evidence of a conditional causal relationship:

This does not mean that, at the level of particular events, the relationship is either necessary or sufficient. (2001: 219)

When it comes to drugs other than alcohol—such as cannabis, ‘ecstasy’, cocaine, amphetamines (including ‘ice’) and heroin—claims of a causal link to offending are contested (Anderson & Bokor 2012; Heerde & Hemphill 2014). In the case of psychostimulants, such as amphetamines and cocaine, Hoaken and Stewart (2003: 1543) have noted:

While mass media representations have convinced most laypeople and many clinicians that these drugs undeniably generate aggression...the experimental literature is largely inconsistent.

McKetin et al. (2014) found that the use of methamphetamine (‘ice’) does increase the risk of violence. Boles and Miotto (2003: 155) suggest that amphetamines and cocaine ‘could play a contributing role in violent behavior’ but note the complexity of the relationship and highlight individual and environmental moderating factors. It has been suggested that the only individuals likely to act aggressively when intoxicated by amphetamines are those who have pre-existing problems (Hoaken & Stewart 2003).

### Defining ‘intoxication’

‘Intoxication’ is a word regularly used in policy debates, media commentary, and legal scholarship as if its meaning is self-evident, but this is not the case. In many social settings, and in general conversations, such specificity is relatively unimportant, and we have developed a number of colloquialisms 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 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. The clinical definition in the World Health Organization’s *International Statistical Classification of Diseases and Related Health Problems 10th revision* provides more useful 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)

Nonetheless, the question remains: how does Australian criminal law conceive of ‘intoxication’?

## Methodology

The first stage of the research design was to identify all criminal law statutes and regulations in force (as at May 2015) in Australia (state, territory or Commonwealth) that attach significance to ‘intoxication’ in some way, and to catalogue the provisions using the following questions:

- For what purpose does the provision attach significance to intoxication?
- How does the provision define intoxication?

A broad definition of ‘criminal law’ legislation (McNamara 2015; McNamara & Quilter 2015) was used, 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 (Quilter et al. 2016).

Stage two of the project involved collecting all decisions handed down in the highest criminal appellate court in each state and territory, and the High Court of Australia, 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 (n=327). Decisions 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’ (McNamara et al. 2017).

## Findings

### 1. Intoxication is relevant for multiple purposes in the criminal law

Although legal scholarship has tended to focus on the significance of intoxication as a ‘defence’ to criminal responsibility (eg Hemming 2010; Simester 2009; Tolmie 1999), and recent media commentary and law reform discussion has focused on intoxication as an aggravating factor (Quilter 2014), 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). The study identified seven discrete purposes:

- 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 of AOD (to pre-empt intoxication and associated risks).

Table 1 summarises the findings, across all Australian jurisdictions, on the purposes for which significance is attached to intoxication in criminal legislation.

	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— accused 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%)
<b>Total</b>	<b>42</b>	<b>99</b>	<b>82</b>	<b>64</b>	<b>56</b>	<b>64</b>	<b>39</b>	<b>47</b>	<b>36</b>	<b>529</b>

Source: Intoxication in Criminal Law Project, 2015 Legislation Dataset [computer file]

A separate typology for analysing the cases was developed in stage two to address the following:

- 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 (see also McNamara et al. 2017).

The overall typology of 12 purposes for which Australian criminal law attaches significance to intoxication is represented in Figure 1.

Figure 1: The multiple purposes of evidence of intoxication in criminal law



## 2. There are multiple definitions and widespread under-definition

There is no single or widely accepted definition of 'intoxication' in Australian criminal laws. Table 2 records and illustrates the seven main approaches to statutory definition identified in this study:

- no definition;
- limited definition;
- degree of impairment;
- assessment based on observation of behaviour, but with no criteria specified;
- assessment based on observation of behaviour, with criteria specified;
- biological detection (ie prescribed concentration of alcohol (PCA) or blood alcohol concentration (BAC)/presence of a prohibited drug in breath/blood/urine); and
- assessment by a health professional.

**Table 2: Legislative approaches to defining intoxication in criminal law**

Type of definition	Examples
No definition	<ul style="list-style-type: none"> <li>• '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))</li> <li>• 'Any person found drunk in a public place shall be guilty of an offence' (<i>Summary Offences Act 1966</i> (Vic) s 13)</li> </ul>
Limited definition	<ul style="list-style-type: none"> <li>• '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))</li> <li>• 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)</li> </ul>
Degree of impairment	<ul style="list-style-type: none"> <li>• 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)</li> <li>• 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))</li> </ul>
Observation of behaviour—no criteria	<ul style="list-style-type: none"> <li>• 'A person must not sell liquor to a person who appears to be drunk' (<i>Liquor Licensing Act 1990</i> (Tas) s 78(1))</li> <li>• '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))</li> </ul>
Observation of behaviour—criteria	<ul style="list-style-type: none"> <li>• 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)</li> </ul>
Biological detection (concentration/presence)	<ul style="list-style-type: none"> <li>• 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))</li> </ul>
Health professional assessment	<ul style="list-style-type: none"> <li>• 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))</li> </ul>

The most striking feature of the legislation dataset is that 41 percent of the criminal law provisions that attach significance to AOD 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) (see Table 3).

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.

The study identified numerous variations and inconsistencies—differences for which there was often no obvious rationale. There were not only inter-jurisdictional differences, but differences between statutes in the same jurisdiction. More than 50 different legislative words and phrases are used, many of which lack detail or precision (eg ‘drunken manner’, ‘apparently intoxicated’, ‘under the influence’, ‘adversely affected’, ‘unduly affected’, ‘seriously affected’, ‘seriously affected, apparently by’, and ‘mind is disordered by intoxication or stupefaction’).

**Table 3: Relationship between *purpose* and *definition* of intoxication in Australian criminal legislation**

	To exercise a power	Core element of offence—offender intoxicated	Core element of offence—3rd party intoxicated	Aggravating element of offence	Limitation on defence	Sentencing	Total
No definition	43	72	27	3	14	5	164 (35%)
Limited definition	3	1	0	0	23	1	28 (6%)
Degree of impairment	20	27	8	2	3	0	60 (13%)
Observation of behaviour—no criteria	71	11	9	1	0	1	93 (20%)
Observation of 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%)
<b>Total</b>	<b>182</b>	<b>158</b>	<b>63</b>	<b>13</b>	<b>45</b>	<b>11</b>	<b>472</b>

Source: Significance of Intoxication in Criminal Law Project, 2015 Legislation Dataset [computer file]

Although biological detection is ubiquitous in the driving context, the study found that biological detection is employed relatively rarely overall (16% of total provisions; Table 3).

Frequently, criminal justice decision-makers are required to assess intoxication based on observation of behaviour, without the benefit of legislative criteria (20%; Table 3). This pattern is most pronounced in the public order context, where laws are literally enforced ‘on the street’ so that there is little opportunity to scrutinise how these laws are being used (including how intoxication is being assessed). This problem is exacerbated by the fact that opportunities for judicial scrutiny are rare, given that intoxication-related public order offences attract high rates of guilty pleas (McNamara 2015) and are increasingly enforced by ‘on-the-spot’ fines or ‘tickets’ (Saunders et al. 2014; NSW Law Reform Commission 2012; Mazerolle 2010). The available statistics and the research literature show a long-term pattern of disproportionate impact of intoxication-related public order laws on Indigenous persons, the homeless and youth (Anthony 2015; McNamara 2015; NSW Ombudsman 2009; Queensland Crime and Misconduct Commission 2008; Quilter & McNamara 2013; Walsh

2008). Of course, definitional ambiguity when it comes to ‘intoxication’ is only one of myriad factors that produce such patterns. Nonetheless, it is an important and under-recognised contributor to the highly discretionary environment in which public order policing decisions are made.

Only a small minority of statutory provisions articulate behavioural criteria for assessing intoxication (10%; Table 3). In such cases, a commonly used 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)

**Table 4: Examples 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 over 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 on a scale from 1 to 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]

Source: Significance of Intoxication in Criminal Law Project, 2015 Cases Dataset [computer file]

One of the further 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. Analysis of the 327 cases in the sample demonstrates that there is widespread use of ‘lay’ definitions of intoxication, heavy reliance on victim/witness self-report/self-assessment (Table 4), and routine use of questions such as ‘On a scale from one to 10, how drunk were you?’ which have no foundation in legislative provisions, medical or other evidence-based literature (eg Amato [2013] VSCA 346; Almotared [2011] QCA 128; Jones [2010] NSWCCA 117; Kaestel et al. 2018). Imprecise colloquial language about intoxication was employed frequently by witnesses, and also by judges (Table 5). Where the accused’s intoxication was said to be relevant to assessing his/her criminal responsibility, jurors were directed to apply their ‘common sense’ to this assessment (eg Baker [2014] QCA 5; Stanley [2013] NSWCCA 124; Stott [2011] SASFC 145; Babic [2010] VSCA 198) with limited appreciation of the complexity of the task (McNamara et al. 2017; Quilter & McNamara 2018).

Table 5: Examples of judicial language describing ‘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 &amp; 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]
Under the influence	‘She was significantly intoxicated.’	<i>Ali</i> [2014] NSWCCA 45, [8], [31]
	‘...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]
Other	‘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]
	‘The judge noted that both appellants were intoxicated and his Honour inferred that both were addled by alcohol.’	<i>Gosland &amp; McDonald</i> [2013] VSCA 269, [6]
	‘...the applicant 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]

Source: Significance of Intoxication in Criminal Law Project, 2015 Cases Dataset [computer file]

Although criminal law provisions most commonly focus on the intoxication of the accused, victim intoxication features prominently in the case law, particularly in the context of sexual offences. Despite concerted statutory reform attempts to ensure a complainant's intoxication does not impede successful prosecution of offenders (indeed, 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 (see, for example, *Cook* [2010] WASCA 241; *Jones* [2010] NSWCCA 117; *Bray* [2014] VSCA 276; McNamara et al. 2017).

### 3. Intoxication includes the effects of alcohol and other drugs

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. This study identified significant jurisdictional differences in how legislatures attempt to achieve this expansive definition of intoxication. In New South Wales, 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), including 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). In addition, while the criminal law typically demands that, where biological detection is employed, degrees of alcohol intoxication be measured (eg PCA or BAC 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 (Quilter & McNamara 2017; Woolf 2013; Roth 2015). Courts are currently grappling with this discrepancy. For example, in February 2016 a magistrate in the NSW Local Court dismissed a charge of 'drug (cannabis) driving' where the accused gave evidence that he had consumed cannabis nine days before he was subjected to a random roadside test (*Police v Carrall* (Unreported, NSW Local Court, Magistrate Heilpern, 1 February 2016); Visentin 2016).

### 4. Correlation between purpose and definition in legislation

Table 3 cross-matches the typology for classifying the purpose of intoxication in statutory provisions with the seven diverse ways of defining intoxication identified in this study. Four observations can be made about this interaction:

- There is a high correlation between provisions allowing 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;
- Where the purpose of a statutory provision is that intoxication is a core element of an offence (and less frequently, where third party intoxication is an element), a surprisingly high proportion of provisions contain no definition;

- Where intoxication is an aggravating element of the offence, there is considerable variation in the approach to definition. For example, while half of these provisions use a biological detection definition, the other half variously provides: no definition, an oblique form of words that purports to articulate a degree of impairment, or assessment based on behaviour but with no criteria.
- Of the legislative provisions that shape the potential to use intoxication as a defence, the large majority contain no definition or only a limited definition.

## 5. Sentencing: Is offender intoxication neutral, mitigating or aggravating?

Much of the recent debate on AOD-related violence has focused on the claim that intoxication should be regarded as an aggravating factor that adds to the seriousness of the harm done and warrants additional punishment (Quilter 2014). The stage one review of legislation found that the treatment of intoxication as an aggravating element of an offence is rare (2% of total provisions), as it is as an expressed sentencing factor (2%). (It is worth noting, however, that sentencing legislation applies generally to all crimes.)

Nonetheless, common-law sentencing principles regularly attach significance to offender intoxication. The review of appellate decisions handed down in the period 2010 to 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); that it is at best ‘neutral’ (NSW Sentencing Council 2009). However, there are a number of circumstances in which intoxication appears to operate as an indirect mitigating factor:

- in supporting characterisation of the offender’s conduct as ‘out of character’ (eg *Hasan* (2010) 222 A Crim R 306; *GWM* [2012] NSWCCA 240);
- in supporting characterisation of the offender’s conduct as spontaneous/unplanned (eg *GWM* [2012] NSWCCA 240);
- where the offender’s AOD use and intoxication on the occasion in question is associated with dependency/addiction, mental illness or cognitive impairment (eg *Chandler* [2012] NSWCCA 135; *Bennett* [2011] VSCA 253); or
- 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).

Offender intoxication may aggravate the sentence in at least two circumstances:

- where the person is ‘recklessly’ intoxicated—that is, they know, based on previous experiences, that when they consume alcohol (and/or other drugs) they are at greater risk of offending or becoming violent (eg *Mendes* (2012) 221 A Crim R 161; *Gosland & McDonald* [2013] VSCA 269); and
- 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 *Hards* [2013] VSCA 119; *Loveridge* [2014] NSWCCA 120; Quilter 2017).

## Discussion and recommendations

This paper has shared the findings of a study on the role that intoxication plays in Australian criminal law. The most significant finding to date is that despite the fact that it is playing an increasingly important role in the operation of the criminal justice system, relevant to decision-making for a wide variety of purposes, 'intoxication' is poorly defined. The criminal law should mark a clear line between 'sobriety' (or acceptable levels of consumption) and 'intoxication' if the latter state is to carry penal consequences. Serious consideration should be given to the national standardisation of legislative terminology.

This will be a challenging exercise, given that this project also found that there is no one characterisation in Australian criminal law of drugs and alcohol and their effects, and no single rationale for the attachment of significance to intoxication. Particularities of context and purpose will sometimes require variations in statutory language. A realistic first step might be the development of national principles or guidelines to help inform jurisdiction-specific reforms in the direction of clarity and internal consistency.

Further research is required to investigate whether biological detection or assessment by health professionals 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. The need for caution here must be noted, because the scholarly literature on the relationship between AOD use and violence and other criminal offending emphasises that the aetiology of violence is multifactorial, with AOD being only one relevant factor (Duff 2013; Hart & Moore 2014). It is recognised that issues of practicability and cost may militate against biological detection/health professional assessment models in some contexts.

Where circumstances demand that assessment based on observed behaviour is the more appropriate (or feasible) approach, policymakers and legislators should implement two recommendations:

- uniform adoption of expressly stated criteria for assessing that a person is intoxicated (eg *Police Administration Act 1978* (NT) s 127A, quoted above); and
- a commitment by police forces to educating the wider community about how police officers are trained to assess intoxication, what criteria are used (especially where legislation provides no guidance, as is often the case currently), and how the exercise of intoxication-related powers is reviewed and monitored by police agencies.

The potential for wider deployment of training associated with the NSW Police Force's Alcohol Linking Program (Wiggers et al. 2016; Wiggers et al. 2009) warrants exploration.

The challenges associated with the justice system's approach to victim intoxication, especially in the context of sexual assault, need to be addressed sensitively. The findings of this study provide further evidence that, despite more than 30 years of progressive criminal law reform, the goal of delivering justice to victims of sexual assault (Daly & Bourhous 2010; Brown et al. 2015), continues to be impeded by definitional ambiguity regarding victim intoxication, and the resilience of 'common sense' attitudes about the relationship between intoxication, consent and credibility (Finch & Munro 2005, 2003; Taylor 2007).

When it comes to the question of what substances can produce the state of ‘intoxication’ with which the criminal law is concerned, the policy objective of deterring the use of certain drugs (so long as they remain prohibited substances) needs to be disentangled from the separate question of the capacity of drugs (like ‘ice’) to produce cognitive or behavioural effects and risks that are relevant to the assessment of criminal responsibility. Further challenges exist in the road safety context, where policymakers must confront the fact that legal prescription drugs such as diazepam (Valium) can also cause impairment (Woolf et al. 2013; Shoebridge 2015). In a context where state governments and police forces have made a major commitment to addressing drug-impaired driving (Transport for NSW 2015), closer attention should be paid to the known effects of drugs rather than their status as licit or illicit (Quilter & McNamara 2017).

## Conclusion

The findings of this study suggest that a thorough jurisdiction-by-jurisdiction review of criminal laws that address intoxication is overdue. The review should clearly identify the different rationales for attaching significance to intoxication, such as: impaired capacity to perform a function (eg driving); impaired cognitive and decision-making capacity (eg to give consent); increased risk of violence and reduced public amenity and perceived safety; or moral condemnation for irresponsible consumption. The review should aim to arrive at a definition that is sensitive to the discrete effects of different drugs and that provides clear guidance as to the parameters of the category ‘intoxicated’ to which penal consequences should attach. Future research should also attend to the full complexity of how statutory definitions and judicial guidance on the meaning of intoxication are operationalised. Such investigations should take account of jurisdictional differences, and differences across all decision-making sites within the criminal justice system.

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