

# THE DEFINITION AND SIGNIFICANCE OF 'INTOXICATION' IN AUSTRALIAN CRIMINAL LAW: A CASE STUDY OF QUEENSLAND'S 'SAFE NIGHT OUT' LEGISLATION

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*Australian criminal law is being actively reconfigured in an effort to produce a more effective response to the problem of alcohol-related violence. This article uses the Safe Night Out Legislation Amendment Act 2014 (Qld) as a case study for two purposes: i) to introduce a set of conceptual tools and typologies that can be used to investigate the relationship between 'intoxication' and criminal law; and ii) to raise a number of concerns about how the effects of alcohol and other drugs are implicated in laws governing police powers, criminal responsibility and punishment. We draw attention to the different and sometimes inconsistent ways in which significance is attached to evidence of the consumption of alcohol and other drugs, as well as to variations and ambiguities in how legislation attempts to capture the degree of impairment or effects that are regarded as warranting the attachment of criminal law significance.*

## I INTRODUCTION

How to reduce alcohol-related violence is one of Australia's most pressing social policy challenges, and many aspects of Australia's 'multi-faceted alcohol policy environment'<sup>1</sup> have attracted considerable research attention.<sup>2</sup> Despite the fact that criminal justice policy (including criminal law reform) has been an important and prominent component of crime

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<sup>1</sup> Steven J Howard, Ross Gordon and Sandra C Jones, 'Australian Alcohol Policy 2001–2013 and Implications for Public Health' (2014) 14 *BMC Public Health* 848, 848.

<sup>2</sup> See, eg, Anthony Morgan and Amanda McAtamney, 'Key Issues in Alcohol-related Violence' (Summary Paper No 4, AIC, 2009); Anne-Marie Laslett et al, 'The Hidden Harm: Alcohol's Impact on Children and Families' (Report, Foundation for Alcohol Research and Education, 2015); Shane Darke, Anthony Shakeshaft and Christopher Doran, 'Alcohol and Violence: Alcohol Consumption, Homicide and Completed Suicide in Australia, 1979-2009' (Technical Report No 324, National Drug and Alcohol Research Centre, 2013); Kari Lancaster et al, 'More Than Problem-solving: Critical Reflections on the "Problematisation" of Alcohol-related Violence in Kings Cross' (2012) 31 *Drug and Alcohol Review* 925; Kypros Kypri, Patrick McElduff and Peter Miller, 'Restrictions in Pub Closing Times and Lockouts in Newcastle, Australia Five Years On' (2014) 33 *Drug and Alcohol Review* 323; Peter Miller et al, 'Alcohol, Masculinity, Honour and Male Barroom Aggression in an Australian Sample' (2014) 33 *Drug and Alcohol Review* 136.

prevention-oriented alcohol policy, it is an under-researched topic. Recent years have seen a significant shift in Australian criminal justice policy towards the explicit identification of intoxication as a factor relevant to the exercise of police powers, criminal responsibility and punishment. Such developments have often occurred as part of a swift government policy response to a specific crisis. For example, two tragic and highly publicised drunken 'one punch' fatal assaults in Sydney's Kings Cross were catalysts for the 2014 introduction in New South Wales ('NSW') of a new offence of assault causing death while intoxicated (*Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW)).<sup>3</sup> Influenced by events in NSW as well as by local events and concerns,<sup>4</sup> multiple changes to Queensland's criminal law were made in August 2014 by the *Safe Night Out Legislation Amendment Act 2014* (Qld) ('SNO Act') – the centre-piece of the then State Government's response to heightened concerns about alcohol-related anti-social behaviour and violence.<sup>5</sup>

Although the sites of criminal law's engagement with intoxication have proliferated recently, the debate over what legal significance, if any, should be attached to the 'fact' that the accused (or the victim) was intoxicated has a long history. At the heart of this debate is a struggle over legal responsibility versus social responsibility, a tension between principle and pragmatism, and a preoccupation with the part played by the criminal law in protecting the community from violence and public disorder. As the Victorian Law Reform Commission stated, it is a 'fundamental element of criminal responsibility that a person should only be held accountable for criminal conduct if that person acted voluntarily and intentionally', but there is also 'a general expectation amongst the community that the law will: (a) protect the community against criminal conduct committed by offenders who have freely chosen to become intoxicated; and (b) penalise self-induced intoxicated persons who commit criminal acts'.<sup>6</sup>

While there is a large body of literature on the relationship between alcohol/drug consumption and anti-social behaviour and violence in criminology, public health, alcohol and other drugs (AOD) and allied social science disciplines,<sup>7</sup> little attention has been paid to how Australian criminal law inscribes this relationship. With the exception of the literature on the 'defence' of intoxication (which is only *one* of the sites where the criminal law engages with AOD use),<sup>8</sup>

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<sup>3</sup> Julia Quilter, 'One Punch Laws, Mandatory Minimums and "Alcohol-Fuelled" as an Aggravated Factor: Implications for NSW Criminal Law' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81.

<sup>4</sup> See, eg, 'Editorial: Curbing Alcohol-fuelled Violence and Sending the Message that just One Punch can Kill is no Easy Solution', *Courier-Mail* (Online), 23 January 2014 <<http://www.couriermail.com.au/news/opinion/editorial-curbing-alcoholfuelled-violence-and-sending-the-message-that-just-one-punch-can-kill-is-no-easy-solution/story-fnihsr9v-1226807974807>>.

<sup>5</sup> Campbell Newman, "'Safe Night Out Strategy" to Stop the Violence' (Media Statement, 23 March 2014) <<http://statements.qld.gov.au/Statement/2014/3/23/safe-night-out-strategy-to-stop-the-violence>>.

<sup>6</sup> Victorian Law Reform Commission, *Criminal Liability for Self-Induced Intoxication*, Report (1999) [1.15].

<sup>7</sup> Aaron Hart and David Moore, 'Alcohol and Alcohol Effects: Constituting Causality in Alcohol Epidemiology' (2014) 41 *Contemporary Drug Problems* 393; Cameron Duff, 'The Social Life of Drugs' (2013) 24 *International Journal of Drug Policy* 167; Catherine Smyth, 'Alcohol and Violence – Exploring the Relationship' (2013) 13 *Drugs and Alcohol Today* 258; Robin Room and Ingeborg Rossow, 'The Share of Violence Attributable to Drinking' (2001) 6 *Journal of Substance Use* 218; Antonia Abbey, 'Alcohol's Role in Sexual Violence Perpetration: Theoretical Explanations, Existing Evidence and Future Directions' (2011) 30 *Drug and Alcohol Review* 481–9; Amanda D Cowley, "'Let's Get Drunk and Have Sex": The Complex Relationship of Alcohol, Gender, and Sexual Victimization' (2014) 29 *Journal of Interpersonal Violence* 1258; Jennifer Pilgrim, Dimitri Gerostamoulos and Olaf Drummer, "'King Hit" Fatalities in Australia, 2000-2012: The Role of Alcohol and Other Drugs' (2014) 136 *Drug and Alcohol Dependence* 119.

<sup>8</sup> See, for example, Andrew Hemming, 'Banishing Evidence of Intoxication in Determining Whether a Defendant Acted Voluntarily and Intentionally' (2010) 29 *University of Tasmania Law Review* 1; AP Simester, 'Intoxication

scholars of criminalisation and criminal responsibility have largely ignored the topic.<sup>9</sup> 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.

The sites where Australian criminal law attaches particular significance to the intoxication of an individual have grown significantly in the last two decades, including in relation to the exercise of coercive police powers, admissibility of evidence, the definition of offences and defences, and the determination of sentence. This growth in the visibility and importance of intoxication in the criminal law statute books and the increasing breadth of its significance, however, has not been matched by a growth in definitional clarity. Nor has attention been paid to whether the proliferation of legislative ‘sites’ has produced internal inconsistencies in the criminal law regarding intoxication’s significance, and if so, whether these variations are justified and what unintended consequence they might produce. Further, policy-makers and legislators appear to have been reshaping the criminal law regarding the significance to be attached to intoxication with minimal regard to knowledge from criminology, public health, AOD and allied social science disciplines regarding the effects of intoxication and how states of intoxication can and should be defined.

We are currently undertaking the first comprehensive national catalogue of ‘knowledges’ and assumptions about the intoxication-violence relationship that are reflected in Australian criminal laws, and court-room knowledge formation regarding the effects of intoxication, and their implications for criminal responsibility.<sup>10</sup> We will be comparing these legal knowledges with scientific and social scientific expert knowledge on the relationship between AOD consumption and violent criminal offending.<sup>11</sup> By mapping and assessing the multiple ways in which Australian criminal law attaches significance to the attribute of intoxication, and by investigating the effects these approaches may have in practice, we aim to facilitate enhanced clarity, consistency and integrity in laws that attach penal significance to the fact of a person’s intoxication, and improve the criminal law’s capacity to meet the needs of the community with respect to the attribution of criminal responsibility for alcohol-related anti-social behaviour, harms and risks.

The first stage of our project involves a survey of all criminal law and procedure statutes in Australia that ‘turn’ on evidence of intoxication – whether to justify the exercise of a police power, as a substantive element of an offence, or as an aggravating factor relevant to an element of an offence or sentencing – and examine how intoxication is defined in each case. There are more than 500 such provisions across Australia, including some 65 in Queensland alone. A significant number of these provisions were added to the Queensland statute books by the SNO Act, which was passed by the Parliament of Queensland on 26 August 2014, and which made

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is Never a Defence’ [2009] 1 *Criminal Law Review* 3; Julia Tolmie, ‘Intoxication & Criminal Liability in NSW: A Random Patchwork’ (1999) 23 *Criminal Law Journal* 218.

<sup>9</sup> Cf Julia Quilter, ‘Criminalisation of Alcohol Fuelled Violence: One-Punch Laws’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 82.

<sup>10</sup> Julia Quilter, Kate Seear, Luke McNamara and Robin Room, ‘New National Study Examines Intoxication in Criminal Law’ (2015) 15 *LSJ: Law Society of NSW Journal* 76.

<sup>11</sup> Kate Seear, Julia Quilter, Luke McNamara and Robin Room, ‘Quick Fixes Aren’t the Answer, Alcohol and Violence have a Complex Relationship’, *The Conversation*, 18 August 2015, <<https://theconversation.com/quick-fixes-arent-the-answer-alcohol-and-violence-have-a-complex-relationship-42908>>.

relevant changes to a range of statutes. In this article we will use the SNO Act as a vehicle for explaining the organising framework for our larger study, and outlining some of our preliminary findings on the diversity of contexts in which significance is attached to intoxication in Australian criminal law, and on the range of approaches taken to the task of *defining* 'intoxication'.

## II INTOXICATION'S SIGNIFICANCE AND DEFINITION

Historically, 'intoxication' could not be used to excuse/defend offending behaviour – 'drunkenness is no defence'.<sup>12</sup> Loughnan has traced the historical development of both the patterns of alcohol consumption and the social meanings given to alcohol during the 17<sup>th</sup> and 18<sup>th</sup> centuries.<sup>13</sup> She shows that during this time 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 – which reminds us that contemporary anxieties about 'alcohol-fuelled violence' have a long history.

During the 19<sup>th</sup> century, however, the legal rules on intoxication began to be relaxed, with a greater willingness to allow the admission of intoxication evidence as relevant to the proof of elements.<sup>14</sup> The context for this development was a shift in the criminal law's approach to the question of criminal responsibility. During the course of the 19<sup>th</sup> century, the common law increasingly focused on the *mens rea* of offences and the accused's subjective culpability – not simply the *actus reus*. A line of English decisions, culminating in *DPP v Majewski*<sup>15</sup> began to accept that evidence of intoxication may be relevant to whether the 'accused lacked a guilty mind', but only where 'the offence charged involved a specific intent'.<sup>16</sup> Although its status as a discrete category of criminal offence may be dubious,<sup>17</sup> a crime of 'specific intent' is typically explained as one in which the Crown must prove, as an element of the offence, an intention to bring about a specific consequence.<sup>18</sup>

In *O'Connor* the High Court (by majority) declined to follow *Majewski* and ruled that the availability of intoxication evidence to dispute mens rea should not be limited only to crimes of specific intent. Chief Justice Barwick noted that the principles of criminal responsibility which supported this outcome:

have been established bearing in mind and not disregarding the need of the society for protection from violent and unsocial behaviour. These principles, on the one hand, provide the society with a protection against violent and unsocial conduct, whilst on the other hand, maintain a just balance between the Crown and the citizen who is charged with having broken the criminal law. That *Majewski's Case* is a departure from such principles can scarce be gainsaid. It seems to me to be completely inconsistent with the principles of the common law that a man should be conclusively presumed to have an intent which, in fact, he does not have, or to have done an act which, in truth, he did not do.<sup>19</sup>

<sup>12</sup> *Pearson's Case* (1835) 168 ER 131.

<sup>13</sup> Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) Ch 7.

<sup>14</sup> *Ibid.*

<sup>15</sup> See *DPP v Beard* [1920] AC 479; *DPP v Majewski* [1977] AC 443.

<sup>16</sup> *R v O'Connor* (1980) CLR 64, 106 (Mason J).

<sup>17</sup> See, eg, Tasmanian Law Reform Institute, *Intoxication and Criminal Responsibility*, Final Report No 7 (August 2006) 46.

<sup>18</sup> See, eg, *Crimes Act 1900* (NSW) s 428C.

<sup>19</sup> *R v O'Connor* (1980) CLR 64, 87 (Barwick CJ).

However, legislatures in most Australian common law jurisdictions have subsequently intervened to curtail the defence along the lines of the *Majewski* approach.<sup>20</sup> In Queensland, the ‘specific intent’ crime limitation had already been adopted. Section 28(3) of the Queensland *Criminal Code* provides that:

When an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

As noted earlier, legal scholarship has focused on normative arguments about the intoxication ‘defence’ and its legislative curtailment.<sup>21</sup> With the exception of limited work done on the relevance of intoxication to sentencing,<sup>22</sup> the multiple other ways in which the criminal law attaches significance to intoxication have largely been ignored.<sup>23</sup> We believe that thorough and critical examination of the ways in which criminalisation<sup>24</sup> is being deployed to address violence and other offending attributed to AOD consumption demands a more comprehensive analysis. The larger project of which this article forms a part aims to make a contribution to filling this gap. Two key organising concepts for this study are the *purposes* for which the criminal law attaches significance to alcohol and other drug effects,<sup>25</sup> and the *definition* of ‘intoxication’<sup>26</sup> which is employed to this end.

### A Purpose

We have developed a working typology that recognises seven different purposes for which Australian criminal law and procedure legislation attaches significance to intoxication (see Figure 1). Application of this typology opens up for analysis the variety of rationales behind criminal laws concerned with intoxication. Depending on the context, the law may be concerned with the welfare of the intoxicated person (eg sobering up centres), the functional impairment of the intoxicated person (eg driving offences), the cognitive and decision-making capacity of the intoxicated person (eg provisions that treat victim intoxication as a vitiating factor in relation to consent in sexual assault matters) or may treat an intoxicated person as

<sup>20</sup> For example, in 1996 the NSW Parliament legislated against the decision of *O’Connor* (*Crimes Legislation Amendment Act 1996* (NSW)) limiting the intoxication defence to crimes of specific intent only. See now *Crimes Act 1900* (NSW), Pt 11A.

<sup>21</sup> See above n 8.

<sup>22</sup> See, eg, Ivan Potas and Donna Spears, *Alcohol as a Sentencing Factor: A Survey of Attitudes of Judicial Officers* (Judicial Commission of NSW, 1994); NSW Sentencing Council, *Sentencing for Alcohol-Related Violence* (March 2009).

<sup>23</sup> Public order offences and policing have attracted some attention. See, eg, Luke McNamara and Julia Quilter, ‘Public Intoxication in NSW: The Contours of Criminalisation’ (2015) 37(1) *Sydney Law Review* 1; Tamara Walsh, ‘Poverty, Police and the Offence of Public Nuisance’ (2008) 20(2) *Bond Law Review* 198; Tamara Walsh, ‘Policing Disadvantage: Giving Voice to Those Affected by the Politics of Law and Order’ (2008) 33 (3) *Alternative Law Journal* 160.

<sup>24</sup> On the concept of ‘criminalisation’, see Luke McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 33.

<sup>25</sup> Note that our focus in this study is the criminal law significance that arises from the effects of alcohol or other drug consumption, and not the criminal laws that determine which drugs can and cannot be lawfully consumed, possessed and supplied (such as the offences defined by the *Drug Misuse Act 1986* (Qld)).

<sup>26</sup> In this article we will generally use the term ‘intoxication’ when referring to the state/effects produced by AOD use with which the criminal law is concerned, though noting that the meaning of the term ‘intoxication’ is by no means self-evident, and legislation uses a multitude of words, phrases and signifiers to describe the state in question (eg ‘drunk’, ‘under the influence’, ‘impaired’ etc). Indeed, the inherent ambiguity in much of the statutory language used in Australia is one of our chief concerns.

more culpable and deserving of greater punishment (eg the offence of assault causing death while intoxicated).<sup>27</sup>

## B Definition

The other variable that is under-appreciated in scholarship and commentary on AOD and criminal law is the question of how 'intoxication' is defined. The word is sometimes used 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'.<sup>28</sup> None of these definitions provide much guidance about how much a person must have consumed, or how incapacitated 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 we have developed a number of colloquialisms to describe varying degrees of intoxication (eg from 'happy' and 'tipsy' to 'smashed', 'legless' and 'paralytic').<sup>29</sup> Such markers of degree are noteworthy for their lack of precision, and for the fact that they are value-laden and 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. Ironically, when we turn to the cases and statute books with that expectation, it is surprising to find that although colloquialisms may be absent, vagueness and imprecision are not.

We have developed a typology that facilitates the categorisation of Australian criminal law and procedure (including policing) statutes into one of seven statutory approaches to defining intoxication (see Figure 2). We have become accustomed to putatively 'accurate' approaches to defining degrees of intoxication in the context of drink driving offences, such as those under the *Transport Operations (Road Use Management) Act 1995* (Qld), where lines are drawn based on prescribed concentration of alcohol (PCA) levels, determined by breath or blood or urine analysis.<sup>30</sup> However, in most criminal law contexts, such attempts at specificity are the exception rather than the rule. In only a minority of instances does legislation provide a precise definition based on blood alcohol content (or the presence of illicit drugs) or guidance in the form of explicit criteria for making an observation/behaviour-based assessment of whether a person is intoxicated.

An additional complication arises from the fact that the signifier 'intoxication' is not limited to alcohol. For example, in Queensland, for criminal law and policing purposes, the state of 'intoxication' may arise from the consumption of alcohol or a long list of other *proscribed* drugs (such as cocaine, heroin, methylamphetamine, and since 2014,<sup>31</sup> steroid drugs such as stanozolol). This is so despite the fact that different drugs have different effects – that is, they may be depressants, stimulants or hallucinogens.<sup>32</sup> In addition, the effects of the same quantity of a particular drug can vary significantly from person to person. For example, as Perl has noted in relation to alcohol, 'behavioural effects of alcohol are unpredictable and can vary from one

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<sup>27</sup> *Crimes Act 1900* (NSW) s 25A(2).

<sup>28</sup> Susan Butler (ed), *Macquarie Dictionary* <<https://www.macquariedictionary.com.au/>>.

<sup>29</sup> For a much longer list, see Harry Gene Levine, 'The Vocabulary of Drunkenness' (1981) 42 *Journal of Studies on Alcohol* 1038.

<sup>30</sup> It is worth noting that PCA tests accurately measure the quantum of alcohol in a person's system, not the level of impairment of the tested individual.

<sup>31</sup> See *Drugs Misuse Regulation 1987* (Qld), Sch 1, amended by the SNO Act.

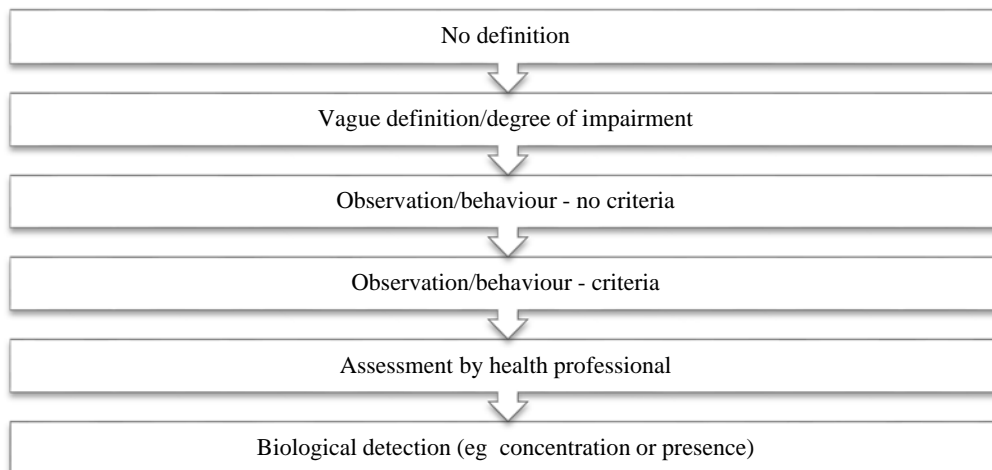
<sup>32</sup> Thomas Babor et al, *Lexicon of Alcohol and Drug Terms* (World Health Organization, 1994).

person to another and factors such as tolerance to alcohol are known to influence alcohol's effects on behaviour'.<sup>33</sup>

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



**Figure 2: Legislative Approaches to Defining Intoxication in Criminal Law**



<sup>33</sup> Judith Perl, 'The Physiology of Alcohol and Substance Abuse' (2012) 24(8) *Judicial Officers' Bulletin* 63, 65.

### III CASE STUDY: THE *SAFE NIGHT OUT LEGISLATION AMENDMENT ACT 2014* (QLD)

The SNO Act made multiple changes to Queensland's criminal law and policing statute books on the significance of a person's intoxication. Whereas equivalent changes have happened incrementally over time in most jurisdictions, the changes that took place in Queensland with the passage of one 'single theme' (ie centred on alcohol-related violence and disorder) Omnibus bill in 2014 reflected the Government's decision to undertake a wide-ranging overhaul of the State's statute books. The statutes relevantly amended were the: *Bail Act 1980* (Qld); *Criminal Code* (Qld); *Liquor Act 1992* (Qld); *Penalties and Sentences Act 1992* (Qld); *Police Powers and Responsibilities Act 2000* (Qld); *Summary Offences Act 2005* (Qld); and *Wine Industry Act 1994* (Qld). As such, the SNO Act provides an excellent vehicle for explaining the organising framework for our larger study, demonstrating the utility of our typologies on *purpose* and *definition* and illustrating how they might be deployed to analyse changes in the manner in which the criminal law attaches significance to intoxication.

In the second reading speech on the Safe Night Out Legislation Amendment Bill 2014 (Qld), the then Queensland Attorney-General, Jarrod Bleijie, explained the rationale behind the Government's omnibus response to the problem of alcohol-related violence:

The passage of this bill will deliver positive changes for the people of Queensland by reducing alcohol and drug related violence and providing a safer night-life that all Queenslanders can enjoy, because we on this side of the House know that a great night out is a safe night out. It is a comprehensive and holistic approach aimed at delivering long-term changes to the culture that leads to antisocial and violent behaviour. It also reflects the clear community sentiment that this culture and the violence associated with it is not welcome in Queensland and must stop now.<sup>34</sup>

Whether the changes made by the SNO Act are capable of delivering the promised results, remains to be seen, and should be the subject of ongoing research and analysis. Our examination in the remainder of this article has a more specific purpose. We aim to highlight: i) the diversity of criminal law and procedure sites and multiple purposes for which significance is now attached to intoxication; ii) the range of assumptions about the AOD/violence/safety relationship that are now embedded in Queensland legislation and the combination of punitive and harm minimisation measures employed to address the problem; iii) the emphasis on alcohol-related violence that occurs in *public*; and iv) the approaches that have been taken to the difficult task of defining 'intoxication'.

#### A *Diversity of Ways the SNO Act Attaches Significance to Intoxication*

Of the 65 criminal law and procedure statutory provisions in Queensland that attach significance to intoxication, 21 were introduced by the SNO Act.<sup>35</sup> More relevant than volume, for present purposes, is the fact of diversity: the part played by evidence of intoxication in the

<sup>34</sup> Queensland, *Hansard*, Queensland Legislative Assembly, 26 August 2014, 2655 (Bleijie).

<sup>35</sup> See *Bail Act 1980* (Qld) s 11AB; *Criminal Code* (Qld) ss 365A, 365B; *Liquor Act 1992* (Qld) ss 42A, 128B; *Penalties and Sentences Act 1992* (Qld) ss 9(9A), 108B; *Police Powers and Responsibilities Act 2000* (Qld) ss 53BC, 378, 378A, 390E, 390G, 390I, 390L, 394, 548C, 548D; *Summary Offences Act 2005* (Qld) s 10; and *Wine Industry Act 1994* (Qld) s 36. Section 365C of the *Criminal Code* (Qld) and s 9A of the *Liquor Act 1992* (Qld) are also relevant new provisions added by the SNO Act, but they are definitional rather than operative provisions. Their significance is discussed below in Part III, Section E of this article. Note also that in addition to the large number of new provisions relating specifically to 'intoxication', the Act also introduced a variety of other measures (particularly in the liquor licensing context) that were designed to tackle 'alcohol-related' violence, amenity, and safety issues: see Part III, Section C.



multiple amendments made by the Act (see Table 1) are not constant (nor, as we will discuss below, are approaches to definition uniform). The SNO Act demonstrates instances of six of the seven different purposes in our typology of criminal law provisions that attach significance to intoxication (see Figure 1 above).

The first, and by far the largest, category (15 of 21), includes provisions which empower an officer of the state to exercise a coercive power. For example, under the *Police Powers and Responsibilities Act 2002* (Qld), a police officer:

- may detain and transport a person to a sober safe centre where the officer ‘reasonably suspects a person is intoxicated’ (s 390E);
- is authorised to undertake breath, saliva, blood or urine testing of persons suspected of committing particular assault offences where the officer ‘reasonably suspects ...the person is intoxicated’ (s 548C(1)(b)) or where a person is arrested for committing a relevant assault offence and the officer ‘reasonably suspects ... the person is intoxicated’ (s 548D(1)(b)).

In another context, the power is of a different nature and is exercisable by a court or police officer making a bail decision. Section 11AB of the *Bail Act 1980* (Qld) (since amended) required the imposition of a condition that an accused person must complete a Drug and Alcohol Assessment and Referral (‘DAAR’) course if s/he was charged with a prescribed offence, committed in public, while the person was ‘adversely affected by an intoxicating substance’.<sup>36</sup>

The second category is where the ‘fact’ of a person’s intoxication is a core element of a criminal offence. The SNO Act did not create any new instances of this category under Queensland law, but did amend s 10 of the *Summary Offences Act 2005* (Qld) from it being an offence to be ‘drunk in a public place’, to it being an offence for a person to be ‘intoxicated in a public place’. The significance of this terminology, and the absence of any attempt to define ‘intoxicated’ for this purpose, will be considered below.

The third category is where it is the intoxication of a person other than the accused that is an element of an offence. The SNO Act added to the *Wine Industry Act 1994* (Qld) a responsible-service-of-alcohol style offence of a type that is a standard inclusion in liquor licensing regimes. Under s 36(1) of the *Wine Industry Act 1994* (Qld) it is an offence to supply wine to a person who is ‘unduly intoxicated’. The rationale for criminalisation, of course, is the culpability of the supplier in providing alcohol to a person where this is considered unacceptable from a risk management and harm minimisation point of view. The meaning, significance and clarity of the adverb ‘unduly’ are considered further below.

The fourth, and perhaps most controversial, category is where a person’s intoxication is treated as an aggravating element of an offence. The SNO Act added a new Chapter 35A to the *Criminal Code* (Qld). Under Chapter 35A, for a number of offences, including grievous bodily harm (s 320), wounding (s 323) and assaulting police (s 340), it is a circumstance of aggravation that the offence was committed ‘in a public place while the person was adversely affected by an intoxicating substance’ (s 365A(2)).<sup>37</sup>

<sup>36</sup> Section 11AB was amended by the *Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2016* (Qld). A DAAR condition is no longer mandatory, and may be imposed (if the defendant consents) in relation to any offence.

<sup>37</sup> See also *Penalties and Sentences Act 1992* (Qld) s 108B(1).

The fifth way in which significance is attached to intoxication by the SNO Act is that the ability of an accused person to raise evidence of their intoxication as part of their defence has been curtailed (in addition to the limitations which already existed under s 28(3) of the *Criminal Code* (Qld)). Specifically, the mistake of fact defence in s 24 of the *Criminal Code* (Qld) cannot now be raised if the 'mistake' which the accused seeks to raise is a belief s/he was 'not adversely affected by an intoxicating substance' (s 365B(1)). An error of this sort (even if honest) no longer qualifies as a potentially exculpatory mistake of fact.

The sixth and final way in which the SNO Act changes Queensland criminal law when it comes to intoxication occurs in the sentencing context. Section 9(9A) of the *Penalties and Sentences Act 1992* (Qld) now contains an express statement that voluntary intoxication cannot be used as a mitigating factor. The move could be regarded as largely symbolic, given that, at least formally, the courts, including the Queensland Court of Appeal, have for some time taken the position that intoxication is not a mitigating factor.<sup>38</sup> However, s 9(9A) would appear to foreclose even indirect reliance on intoxication via a plea in mitigation that the offender's violent behaviour was 'out of character'.<sup>39</sup>

Traditionally, both legal scholarship and popular/media discourse on the relationship between criminal law and intoxication has tended to focus on the merits of the 'defence' of intoxication – that is, where an accused contests the Crown's ability to prove that s/he had the requisite fault element for an offence. In this discussion we have attempted to draw attention to the fact that the question of how and why AOD consumption is relevant to policing and the administration of criminal justice is actually more complex and multi-faceted than that. We have highlighted the multiple and different ways in which the SNO Act effected legislative amendments that attach significance to evidence of intoxication.

## B *Assumptions Made About the Alcohol/Violence/Risk Relationship*

The SNO Act is illustrative not only of the variety of purposes for which significance is attached to intoxication in the criminal law and policing context, but also the different *assumed* or *attributed* effects of AOD and value judgements regarding intoxication that are embedded in legislation. The majority of provisions introduced by the SNO Act associate intoxication with risk and danger and/or additional blameworthiness. Relatedly, there is a manifest commitment to minimising the opportunity, for a person who has 'chosen' to become intoxicated,<sup>40</sup> to avoid or reduce criminal responsibility for behaviour in which s/he has engaged. For example, the effect of the new Chapter 35A of the *Criminal Code* (Qld) and s 108B of the *Penalties and Sentences Act 1992* (Qld) is that intoxication makes an offender *more* culpable, and mandatorily aggravates the offence. Similarly the new s 9(9A) in the *Penalties and Sentences Act 1992* (Qld) ensures that 'voluntary intoxication' cannot be a

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<sup>38</sup> *R v Rosenberger; ex parte Attorney-General* [1995] 1 Qd R 677.

<sup>39</sup> *R v Jones* [2008] QCA 181; see also *Hasan v R* (2010) 222 A Crim R 306. The move to expressly disallow reliance on intoxication as a mitigating factor in the sentencing context followed a similar move in NSW earlier in 2014: see now *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5AA), as amended by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW).

<sup>40</sup> This article focuses on the criminal law's treatment of voluntary intoxication, though we recognise that involuntary (or 'unintentional') intoxication is treated differently: see, eg *Criminal Code* (Qld) s 28; *Penalties and Sentences Act 1992* (Qld) s 9(9A); Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 287.

mitigating factor in the sentencing exercise.<sup>41</sup> The judgement that is implicit in these arrangements is that alcohol is *causally* implicated in violence and people who allow themselves to become intoxicated can rightly be condemned (and punished more severely) for taking a known risk. References to ‘alcohol fuelled violence’ were made frequently, by both Government and Opposition Members of Parliament, during debate on the Safe Night Out Legislation Amendment Bill 2014.<sup>42</sup> When the Bill was first introduced in June 2014, the then Premier Campbell Newman said, ‘Fresh measures are called for to counter the dangerous trend of innocent people falling victim to senseless violence at the hands of people who are drunk or high on illicit drugs’.<sup>43</sup>

Negative judgement, or condemnation, however, is not universal across all provisions introduced by the SNO Act. There is also recognition that a person under the influence of AOD may be in need of medical-welfare assistance. Such concerns underpin expanded police powers under the *Police Powers and Responsibilities Act 2000* (Qld) to provide an additional basis for discontinuing the arrest of an intoxicated person in a public place, where the officer is satisfied ‘it is more appropriate for the person to be detained and transported to a sober safe centre’ (s 378A). Police officers also have new powers to detain and transport an intoxicated person to a sober safe centre (s 390E) where the officer ‘reasonably suspects’ the person is behaving in a way that ‘poses a risk of physical harm to the person, or another person’ (s 390E(1)(b)(ii)). Furthermore, once such a person is admitted to a sober safe centre, this triggers further provisions requiring assessment by a health care professional (s 390G) and ongoing assessment after four hours by a health care professional and the making of recommendations regarding release of the person independently or into the ‘care of a responsible person’ to take the person to a ‘place of safety’ (s 390I).

Another example of a partly medical-welfare paradigm is found in provisions added to the *Bail Act 1980* (Qld). These create a new mandatory bail condition (s 11AB) for intoxicated offenders to complete a Drug and Alcohol Assessment and Referral (DAAR) course where ‘the person’s drug or alcohol use is assessed’ (s 11AB(4)(a)) and ‘the person is given information about appropriate options for treatment and may be offered counselling or education’ (s 11AB(4)(b)).<sup>44</sup>

### C Competing Paradigm? Risk Management/Harm Minimisation

While many of the methods by which the SNO Act attaches significance to intoxication reflect a commitment to punitive ‘law and order’ solutions,<sup>45</sup> others are more accurately understood

<sup>41</sup> *R v Williams; Ex parte Attorney-General (Qld)* [2014] QCA 346 (19 December 2014) [94].

<sup>42</sup> See, eg, Queensland, *Hansard*, Queensland Legislative Assembly, 26 August 2014, 2658, 2660 (Bleijie); Queensland, *Hansard*, Queensland Legislative Assembly, 26 August 2014, 2662, 2666 (Palaszczuk).

<sup>43</sup> Queensland, *Hansard*, Queensland Legislative Assembly, 6 June 2014, 2234 (Newman, Premier). Note that one of the most attention-grabbing and controversial changes effected by the SNO Act – the introduction of a new homicide offence to address ‘one punch’ fatal assaults (‘unlawful striking causing death’, *Criminal Code* (Qld) s 314) – did not ultimately include an intoxication element as part of the offence definition: see Quilter, above n 9, 85–90.

<sup>44</sup> We are cautious in our characterisation of this *Bail Act* amendment as reflecting a ‘medical-welfare paradigm’. The medicalisation and pathologisation of all persons who consume AOD is controversial, and measures that are ostensibly ‘benevolent’ can nevertheless be punitive and stigmatising: see Heather Brook and Rebecca Stringer, ‘Users, Using, Used: A Beginner’s Guide to Deconstructing Drugs Discourse’ (2005) 16(5) *International Journal of Drug Policy* 316.

<sup>45</sup> See Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998); Julia Quilter, ‘Populism and Criminal Justice Policy: An Australian Case Study of Non-Punitive Responses to Alcohol Related Violence’ (2015) 48(1) *Australian and New Zealand Journal of Criminology* 24.

as applying risk management and harm minimisation approaches. Most notably, in the licensing context, the SNO Act made several amendments to the *Liquor Act 1992* to introduce such strategies, including:

- powers for the Commissioner for Liquor and Gaming to direct a licensee to change the licensee's approved risk-assessed management plan for a premises (s 52A);
- ensuring that variations of licences (either by application of the licensee or on the Commissioner's own initiative) consider the purpose of 'minimising alcohol-related disturbances, or public disorder, in a locality' (s 111(2)(g)(ii));
- when the Commissioner makes a decision under the Act in relation to a relevant premises, the Commissioner may consider the impact on, among other things, violence, nuisance, drunkenness, public urination, indecent or offensive behaviour, noisiness (s 128B(2));
- obligations on licensees regarding responsible service of alcohol (Pt 6, Div 1AA);
- use of ID scanning for certain licensed premises (Pt 7, Div 2); and
- establishment of safe night precincts (Pt 6AB) with the stated purposes of: '(a) minimis[ing] harm, and the potential for harm, from the abuse and misuse of alcohol and drugs, and associated violence; and (b) minimis[ing] alcohol and drug-related disturbances, or public disorder' (s 173NA).

Overall, what should be made of the different approaches to AOD consumption and intoxication contained in the SNO Act? On the one hand, it is admirable that the Parliament has attempted to come to terms with the complexity of AOD consumption's relationship to vulnerability, risk, harm, and safety. To the extent that the welfare-medical and harm minimisation approaches described here manifest a recognition that coercive and punitive policing and criminal law responses cannot 'solve' the problems that can be associated with AOD consumption, they are positive and welcome. On the other hand, there is no doubt that several of the legislative changes effected by the SNO Act intensify an asserted nexus between intoxication and adverse moral judgement – a view which, at least in relation to *alcohol* intoxication, sits uncomfortably with the status of drinking as 'a legally and socially sanctioned activity'.<sup>46</sup>

#### D *Focus on Public Intoxicated Behaviour*

The heavy focus of recent public, media and political outcry concerning alcohol-related violence has been on male-to-male violence that occurs in public or in/around licensed premises.<sup>47</sup> Domestic violence that occurs in private settings has not featured prominently in the recent policy debates on, and criminal law reforms addressing alcohol-related violence, despite the evidence that domestic violence is also often associated with intoxication.<sup>48</sup> The SNO Act continues this trend: it is only intoxication-related violence and disorder that occurs in *public* that is the subject of the multiple additional ways in which significance is attached to intoxication.

For example, the mandatory aggravation provisions added to Chapter 35A of the *Criminal Code (Qld)* in relation to serious assaults are only triggered where 'the offence was committed *in a public place* while the person was adversely affected by an intoxicating substance' (s

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<sup>46</sup> Loughnan, above n 13, 201.

<sup>47</sup> See Quilter, above n 9; Quilter, above n 45.

<sup>48</sup> See Laslett et al, above n 2.

365A(2); emphasis added).<sup>49</sup> Additional powers under the *Police Powers and Responsibilities Act 2000* (Qld) regarding sober safe centres are triggered only where a person is intoxicated in a public place (ss 378A, 390E), as are the provisions relating to breath, saliva, blood and urine testing (ss 548C(1)(b)(ii), 548D(1)(b)(ii)). Perhaps most surprisingly, as originally enacted,<sup>50</sup> the bail condition that a person must undertake a DAAR course (*Bail Act 1980* (Qld), s 11AB) only arose in relation to prescribed offences committed in a public place while intoxicated, not in relation to the same offences committed in a private location. While the various definitions of ‘public place’ in the amended Acts are broad and include, for instance, places where an occupier allows members of the public to enter either for payment or not, such as a licensed premises,<sup>51</sup> they clearly do not cover domestic settings where a large proportion of violence occurs.<sup>52</sup> Such a demarcation between the gravity of alcohol-related violence that occurs in public, and that which occurs in private, appeared somewhat at odds with recent efforts to improve social policy and criminal law responses to domestic violence.<sup>53</sup>

To be clear, we are not recommending that the more punitive approaches introduced by the SNO Act for public violence should simply have been extended to violence that occurs in private (domestic) settings. Rather, we are drawing attention to an inconsistency (and a potential ‘blind spot’) in responses to violence and in the characterisation of problematic AOD consumption, including the relevance of ‘setting’. New policy approaches to AOD use and violence should challenge rather than perpetuate gendered assumptions.<sup>54</sup>

### E Definitions of Intoxication

Earlier in this article we noted that Australian legislation governing criminal law and police powers is characterised by a diverse range of approaches to defining ‘intoxication’ and is regularly imprecise. These features are evident in the changes to Queensland legislation effected by the SNO Act. In our analysis of these changes we have identified three noteworthy features.

<sup>49</sup> See also *Penalties and Sentencing Act 1992* (Qld) s 108B(1).

<sup>50</sup> See above n 36.

<sup>51</sup> See for example *Bail Act 1980* (Qld) s 11AB(4), *Penalties and Sentencing Act 1992* (Qld) s 108A; *Police Powers and Responsibilities Act 2000* (Qld) s 602A.

<sup>52</sup> Australia Bureau of Statistics, ‘Personal Safety Survey 2012’ (Cat 4906.0, 2013).

<sup>53</sup> See Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever* (February 2015); also *Domestic and Family Violence Protection Act 2012* (Qld). On 18 August 2015 Premier Palaszczuk announced that the Queensland Government would act on all 140 recommendations contained in the *Not Now, Not Ever* report: Premier Anastacia Palaszczuk, ‘Palaszczuk Government says Not Now, Not Ever’ (Media Release, 18 August 2015) <<http://statements.qld.gov.au/Statement/2015/8/18/palaszczuk-government-says-not-now-not-ever>>. On 10 September 2015, in response to a highly publicised domestic violence fatality, the Premier announced plans for fast-tracking the implementation of recommendations: AAP, ‘Queensland Premier Promises Resources and Legislation Following Spate of Family Violence’, *The Guardian* (Online), 10 September 2015 <<http://www.theguardian.com/australia-news/2015/sep/10/queensland-premier-promises-resources-and-legislation-following-spate-of-family-violence>>.

<sup>54</sup> For more on the relationship between gender assumptions and AOD policy more broadly, see, eg, David Moore et al, ‘Sameness and Difference: Metaphor and Politics in the Constitution of Addiction, Social Exclusion and Gender in Australian and Swedish Drug Policy’ (2015) 26(4) *International Journal of Drug Policy* 420; Nancy D Campbell and Elizabeth Ettore, *Gendering Addiction: The Politics of Drug Treatment in a Neurochemical World* (Palgrave Macmillan, 2011); Suzanne Fraser and Kylie Valentine, *Substance and Substitution: Methadone Subjects in Liberal Societies* (Palgrave Macmillan, 2008); Susan C Boyd, *From Witches to Crack Moms: Women, Drug Law, and Policy* (Academic Press, 2004); Nancy Campbell, *Using Women: Gender, Drug Policy, and Social Justice* (Routledge, 2000).

First, generally (though not universally) the terms 'drunk' or 'drunken' have been replaced with 'intoxicated'.<sup>55</sup> At first glance this would appear to be simply a case of modernising language and of no particular consequence. However, on closer inspection, it becomes apparent that the change is not 'neutral', specifically because the term 'intoxicated' is generally regarded as referring to the influence or effects of a variety of drugs, including not only alcohol, but other drugs as well.

Secondly, the SNO Act adopts a variety of approaches to the definition of intoxication, including five of the six definitional categories identified above (see Figure 2): no definition; vague definition/degree of impairment (eg 'unduly intoxicated'); observed behaviour – with explicit criteria; assessment by a health professional; and biological detection of either an illicit drug or PCA (breath, saliva, blood or urine test). The most commonly used expression to describe a requisite degree of intoxication is 'adversely affected by an intoxicating substance' (added to the *Criminal Code*, parts of the *Police Powers & Responsibilities Act 2000* (Qld) and *Bail Act 1980* (Qld)). The other commonly used phrase is 'unduly intoxicated', used in the *Liquor Act 1992* (Qld) and *Wine Industry Act 1994* (Qld). Other expressions are 'voluntary intoxication of an offender by alcohol or drugs' (*Penalties and Sentences Act 1992* (Qld)) or simply 'intoxicated' (*Summary Offences Act 2005* (Qld) and parts of the *Police Powers & Responsibilities Act 2000* (Qld)).

Despite its use across a number of statutes, the phrase 'adversely affected by an intoxicating substance' is only further defined in the *Criminal Code* (Qld), s 365C of which states:

**Proof of being adversely affected by an intoxicating substance**

- (1) A person is taken to be adversely affected by an intoxicating substance if—
- (a) the concentration of alcohol in the person's blood is at least 150mg of alcohol in 100mL of blood; or
  - (b) the concentration of alcohol in the person's breath is at least 0.150g of alcohol in 210L of breath; or
  - (c) any amount of a drug prescribed by regulation is present in the person's saliva; or
  - (d) the person fails to provide a specimen as required under the *Transport Operations (Road Use Management) Act 1995*, section 80 as applied under the *Police Powers and Responsibilities Act 2000*, chapter 18A.

Note that in the case of drugs other than alcohol, it is the presence of *any* amount of the drug which is regarded as satisfying the definition of intoxicated. This means that a person will be considered to be legally *intoxicated* even where there is no reason to believe that the nature and quantity of the illicit drug in their system was implicated in their alleged criminal offending – for example, MDMA (ecstasy) consumed up to 24 hours previously.<sup>56</sup>

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<sup>55</sup> See, eg, *Summary Offences Act 2005* (Qld) s 10; *Police Powers and Responsibilities Act 2000* (Qld) ss 53BC(1), 378, 378(3), 394(2)(c). Curiously, one of the new provisions added to the *Liquor Act 1992* (Qld), s 128B(2)(d), uses the term 'drunkenness' rather than 'intoxication'.

<sup>56</sup> The elimination half-life of ecstasy is estimated to be 7 hours although this can be higher in certain circumstances: see Amanda Baker, Nicola K Lee and Linda Jenner (eds), *Models of Intervention and Care for Psychostimulant Users* (Department of Health and Ageing, 2004). See also Australian Drug Foundation, *Ecstasy Factsheet* (2015) <[http://www.druginfo.adf.org.au/attachments/article/394/FS\\_Ecstasy\\_Mar2015.pdf](http://www.druginfo.adf.org.au/attachments/article/394/FS_Ecstasy_Mar2015.pdf)>. Importantly, a growing body of literature from the social sciences questions claims about the nature of claimed drug effects, including suggestions that effects are predictable and stable: see, eg, Suzanne Fraser and David Moore (eds), *The Drug Effect: Health, Crime and Society* (Cambridge University Press, 2011).

Although the *Police Powers and Responsibilities Act 2000* (Qld) also uses the phrase ‘adversely affected by an intoxicating substance’,<sup>57</sup> it does not pick up or cross-reference the definition contained in s 365C of the *Criminal Code* (Qld). The same is true of the *Bail Act 1980* (Qld). It may be that the different approaches to definition reflect different legislative objectives in response to the specificities of context. Nonetheless, it is noteworthy that the Parliament has decided to use the same language (‘adversely affected by an intoxicating substance’) in different statutes, but define it in only one (the *Criminal Code* (Qld)).

The phrase ‘unduly intoxicated’ is defined, for the purpose of the new provisions added to the *Liquor Act 1992* (Qld) and the *Wine Industry Act 1994* (Qld), based on observed behaviour criteria. Section 9A of the *Liquor Act 1992* (Qld) is illustrative:

**9A When a person may be taken to be unduly intoxicated**

For this Act, a person may be taken to be unduly intoxicated if—

- (a) the person’s speech, balance, coordination or behaviour is noticeably affected; and
- (b) there are reasonable grounds for believing the affected speech, balance, coordination or behaviour is the result of the consumption of liquor, drugs or another intoxicating substance.<sup>58</sup>

We note that these attempts to provide legislative guidance still leave decision-makers (eg police officers and others) with considerable latitude when determining where the line should be drawn between, on the one hand, a person who is ‘adversely affected’ (eg under the *Police Powers and Responsibilities Act 2000* (Qld)) or ‘unduly intoxicated’ (eg under the *Liquor Act 1992* (Qld)), and, on the other, a person who is not. As McNamara and Quilter have observed in the context of a comparable definition in New South Wales, considerable risks are associated with ‘a loosely drawn behaviour-based “test” of whether a person is “intoxicated” that requires a police officer to exercise judgement, based on observation alone, as to whether there is a relationship between the observed behaviour and the consumption of alcohol or other drugs’.<sup>59</sup> 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.

Thirdly, variations in the degree of definitional specificity across the range of provisions introduced by the SNO Act is not random (see Table 1). There is a greater degree of precision in relation to the most serious consequences for an allegedly intoxicated person – such as where it is asserted as a circumstance of aggravation under Chapter 35A of the *Criminal Code*. There is a lesser degree of precision – and more scope for discretion (and error) – in the adjudication of intoxication where the state of being intoxicated triggers a police power (eg detention in a safe sober centre under s 390E of the *Police Powers and Responsibilities Act 2002* (Qld)) or provides the basis for a minor public order offence (eg being intoxicated in public under s 10 of the *Summary Offences Act 2005* (Qld)). It might be suggested that an appropriate balance has thus been struck. However, we should be wary about concluding that vagueness and ambiguity are 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,<sup>60</sup> and the strong evidence of disproportionate impact on already

<sup>57</sup> See *Police Powers and Responsibilities Act 2000* (Qld) s 3 and Sch 6 (Dictionary).

<sup>58</sup> See also *Wine Industry Act 1994* (Qld) s 36(2).

<sup>59</sup> McNamara and Quilter, above n 23, 26.

<sup>60</sup> Approximately 40 000 public order charges are finalised in Australian courts every year, and, in addition a large (but unknown) number of public order ‘crimes’ are enforced by ‘on-the-spot’ fines: McNamara, above n 24, 36.

marginalised individuals and communities, including the homeless, and Aboriginal and Torres Strait Islander persons.<sup>61</sup>

#### IV CONCLUSION

Our research on the relevance of 'intoxication' to criminal law and policing powers is ongoing, and so we have made no attempt here to reach firm conclusions or offer specific reform recommendations. Rather, we have used the *Safe Night Out Legislation Amendment Act 2014* (Qld) to introduce the conceptual tools and typologies – highlighting the relationship between *purpose* and *definition* – that we believe are well-adapted to the task of undertaking a comprehensive national assessment, and to illustrate some of the distinctive features of contemporary legislative arrangements in Australia. In closing, we add the following observations to those already made in the body of this article.

First, it is noteworthy that a number of the measures adopted by the Queensland Parliament were modelled on similar changes introduced in NSW in the preceding 12–18 months.<sup>62</sup> There is nothing inherently wrong with this sort of cross-jurisdictional 'borrowing' – indeed, it might be said to be one of the strengths of Australia's federal system – but there is a danger that proposals for radical change can sometimes receive less scrutiny than is warranted if they are portrayed or regarded as relatively unremarkable because another State has recently taken similar steps.<sup>63</sup>

Secondly, the SNO Act powerfully illustrates the fact that Australian law-makers are continuing to blur the line between what they perceive to be a growing societal expectation that 'dangerous' intoxication be morally condemned and discouraged and the legitimacy of treating intoxication as a trigger for liberty deprivation or a justification for penalty enhancement. More attention needs to be paid to explaining the normative merits, fairness and efficacy of such approaches, including in light of the evidence that the threat of higher penalties rarely produces the general deterrence effects promised, and given that the cognition-impairing effects of AOD are such that, in the 'moment', the potential for specific deterrence is also likely to be compromised.<sup>64</sup> In addition, we suggest that the operation of these provisions should be the subject of ongoing scrutiny for the purpose of identifying possible unintended and/or problematic consequences, including outcomes that are not sensitive to the available evidence on the effects of different drugs, and which produce context-to-context inconsistencies.

Finally and relatedly, there is an unresolved paradox at the heart of Australian criminal law and procedure in relation to intoxication – a paradox that is highlighted by the SNO Act. The paradox can be represented as two narratives. According to the first, 'booze' (and other drugs) are to blame – an approach which conceives of AOD use as a shared societal problem which requires collective solutions, including attitudinal changes and changes to cultural practices

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<sup>61</sup> See, eg, *Rowe v Kemper* [2009] 1 Qd R 247; Queensland Crime and Misconduct Commission, *Police Move-on Powers: A CMC Review of their Use* (2010); Queensland Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (2008); Walsh, above n 23; Paul Mazerolle et al, *Ticketing for Public Nuisance Offences in Queensland: An Evaluation of the 12-Month Trial* (Griffith University, 2010).

<sup>62</sup> *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW); *Liquor Amendment Act 2014* (NSW); and a raft of other statutes discussed in Quilter, above n 45, 35–7.

<sup>63</sup> Quilter, above n 9, 100; Luke McNamara and Julia Quilter, 'The "Bikie Effect" and Other Forms of Demonisation: The Origins and Effects of Hyper-criminalisation' (2016) 34(2) *Law in Context* (forthcoming).

<sup>64</sup> Seear et al, above n 11.



and expectations, particularly in relation to alcohol.<sup>65</sup> According to the second, ‘violent drunks’ deserve to be doubly condemned for the violence that they perpetrate and for their decision to become intoxicated – an approach which evokes classic liberal conceptions of choice and individual criminal responsibility. Policy makers and law reformers need to grapple with the complexity of violence and the range of factors that may contribute to its prevalence, including masculinity, and social norms regarding the ‘acceptability’ of drinking.<sup>66</sup> The temptation to ‘solve’ the problem of AOD-related violence by embedding in the criminal law rules and values that ‘fix’ the AOD-risk-violence relationship should be resisted.

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<sup>65</sup> See Foundation for Alcohol Research and Education, *Annual Alcohol Poll: Attitudes and Behaviours* (2014).

<sup>66</sup> Duff, above n 7; Lancaster et al, n 2; Morgan and McAtamney n 2; Stephen Tomsen, “‘Boozers and Bouncers’: Masculine Conflict, Disengagement and the Contemporary Governance of Drinking-Related Violence and Disorder’ (2005) 38 *Australian and New Zealand Journal of Criminology* 283; Robert MacCoun, Beau Kilmer and Peter Reuter, *Research on Drugs-Crime Linkages: The Next Generation*, National Institute of Justice Special Report (July 2003); R Room and G Collins (eds), ‘Alcohol and Disinhibition: Meaning and Nature of the Link’ (NIAAA Research Monograph 12, US Department of Health and Human Resources, 1983).

**Table 1: Qld Safe Night Out Legislation – Purpose and Definition of Intoxication**

	<b>Police/coercive power</b>	<b>Core element of offence – D intoxicated</b>	<b>Core element of offence – 3<sup>rd</sup> party intoxicated</b>	<b>Aggravating element of offence</b>	<b>Limitation on defence</b>	<b>Sentencing</b>	<b>Total</b>
<b>No definition</b>	LA 1992, s 128B					PSA 1992, s 9(9A)	2
<b>Vague definition/degree of impairment</b>	PPRA 2000, s 53BC PPRA 2000, s 378 PPRA 2000, s 378A PPRA 2000, s 390E PPRA 2000, s 390F PPRA 2000, s 390L PPRA 2000, s 394 BA 1980, s 11AB	SOA 2000, s 10				PSA 1992, s 108B	10
<b>Observed behaviour – no criteria</b>	PPRA 2000, s 548C PPRA 2000, s 548D		WIA 1994, s 36(2)				3
<b>Observed behaviour – criteria</b>	LA 1992, s 42A						1
<b>Assessment by health professional</b>	PPRA 2000, s390G PPRA 2000, s 390I PPRA 2000, s 390L						3
<b>Biological detection (concentration or presence)</b>				CC, s 365A	CC, s 365B		2
<b>Total</b>	<b>15</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>2</b>	<b>21</b>