

DISCUSSION PAPER

DRINK SPIKING

Model Criminal Code Officers' Committee of the
Standing Committee of Attorneys-General

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1. Introduction

In July 2003 the Australian Institute of Criminology (AIC) was commissioned by the Commonwealth Government Attorney-General's Department, on behalf of the Intergovernmental Committee on Drugs, to conduct Stage One of a national project on drink spiking. Drink spiking was identified as an emerging issue for examination under the alcohol priority area identified by the Ministerial Council on Drug Strategy and has received considerable media attention in the last couple of years. The AIC report was published in November 2004¹ and was presented as a report to the Ministerial Council on Drug Strategy. The Council referred the legal aspects of the report to the Standing Committee of Attorneys-General (SCAG) who, in turn, sought the advice of the Model Criminal Code Officers Committee (MCCOC). This is that advice.

On 28 June, 1990, the SCAG placed the question of the development of a national Model Criminal Code for Australian jurisdictions on its agenda. In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee, but the name was changed in November 1993 to the MCCOC in order to reflect the principal remit of the Committee directly. The first formal meeting of the Committee took place in May 1991. Since then, MCCOC has, with the consent of SCAG, regularly released Discussion Papers and Final Reports on a large variety of major criminal offences and general principles of criminal law. In more recent times, its remit has been more to consider and report on very specific subject-matter referred to it by SCAG. This is one such topic.

2. What is Drink spiking?

The common media reporting of drink spiking concentrates on a serious type of criminal behaviour. That is the addition of a "date rape drug" (such as Rohypnol)² to a drink (commonly an alcoholic drink) without the knowledge of the victim in order to induce an extremely inebriated state in the victim with the additional intention of taking sexual advantage of the victim or actually doing so. Such cases are at an extreme end of the continuum. Milder cases (although still instances of bad behaviour) might be the addition of extra alcohol in a known alcoholic drink as a prank - just to see the victim make a fool of themselves, for example.

The AIC Report took a broad view of drink spiking. The AIC Report defines drink spiking as:

¹ Taylor, Prichard and Charlton, *National project on drink spiking : investigating the nature and extent of drink spiking in Australia* (AIC, 2004) [AIC].

² Some such drugs, such as Rohypnol, are now manufactured so as to change colour or add a warning flavour (or both) when added to alcohol. This report does not lay any blame at the feet of Roche, which manufactures that drug. For example, a recent report of a case in Sydney (<http://www.smh.com.au/articles/2006/01/31/11/1138590504806.html>) featured a drug called Rivotril.

“The term ‘drink spiking’ refers to drugs or alcohol being added to a drink (alcoholic or non-alcoholic) without the consent of the person consuming it. For an incident to be defined as drink spiking in this report, it need not involve further criminal victimisation, even though such offences can occur after an incident of drink spiking”³.

This is a very broad definition of drink spiking. Taken literally, it would cover the case in which a bar tender gave a valued customer a little extra vodka in his or her ordered martini just for being a good customer. It is well to bear the continuum of definition in mind. Obviously, the stereotype of the cunning drug armed rapist will occur less often and will have far more serious social and legal consequences than the prankster or the good samaritan bar tender.

3. The AIC Findings

It is best to let the empirical AIC findings about the prevalence of drink spiking speak for themselves.

“What is the extent of drink spiking in Australia?”

There is currently no way to determine the exact number of drink spiking incidents which occur within the community. This is due to (a) high levels of under-reporting, (b) fluctuations in reporting due to awareness campaigns, (c) jurisdictional differences in data recording and extraction procedures and (d) difficulty in verifying whether a reported incident actually occurred. In the absence of exact numbers, rough estimates of drink spiking prevalence are calculated in this report based on a procedure which inflates the number of incidents which are reported to police by the level of under-reporting in self-report victim surveys. It is important to remember that this procedure is based on certain assumptions and the resulting estimates should be taken as a rough guide only to the number of incidents which may have been suspected by people to have occurred to them in 2002-03.

In this report it is roughly estimated that between 1 July 2002 and 30 June 2003 (i.e. over a twelve month period):

- between 3000 and 4000 suspected incidents of drink spiking occurred in Australia;
- approximately one third of these incidents involved sexual assault;
- between 60 and 70 per cent of these incidents involved no additional victimisation;
- between 15 and 19 suspected drink spiking incidents occurred per 100,000 persons in Australia during 2002/03.

It is important to bear in mind that the number of suspected drink spiking sexual assaults estimated to have occurred during 2002-03 is very very small compared with the much larger numbers of sexual assaults in general which were reported to police during that year.

What is the nature of drink spiking?

There is no single 'typical' incident of drink spiking. Rather, drink spiking appears to be a complicated phenomenon which can occur in a variety of locations, against a variety of victims, with a variety of different spiking

³ AIC ix.

additives, for a number of different reasons resulting in disparate effects and consequences. Based on analyses of police data, sexual assault data and AIC hotline data it was found that:

- 4 out of 5 victims are female;
- about half of drink spiking victims are aged under 24, while about one third are aged between 25 and 34;
- the majority of reported drink spiking incidents have no associated criminal victimisation, indicating that 'prank spiking' may be a common motivation for drink spiking;
- between 20 and 30 per cent of incidents reported to police involve sexual assault, while it is estimated that about one third of all drink spiking incidents are associated with sexual assault;
- about five per cent of incidents involve robbery;
- two thirds of suspected drink spiking incidents occur in licensed premises (although for sexual assault victims the location is equally likely to be at the victim or offender's home or another location);
- many victims do not know who the offender was;
- where offenders can be identified, drink spiking can be perpetrated by strangers or known acquaintances, while incidents involving sexual assault are more likely to occur with a known offender;
- many victims experience memory loss after drink spiking;
- apprehension of offenders is very uncommon;
- forensic testing of blood and urine samples is relatively rare and does not conclusively prove that drink spiking has occurred; and
- the vast majority of incidents of drink spiking are not reported to police.

Reporting to police

It is estimated that less than 15 per cent of suspected drink spiking sexual assaults are reported to police, and between 20 and 25 per cent of suspected drink spiking non-sexual assault cases are reported to police. This means that the vast majority of suspected drink spiking incidents are not reported to police. If we are to gain a better understanding of how often drink spiking occurs and if police are to be able to identify patterns of drink spiking and develop targeted policing strategies there is clearly a need to improve the rates of reporting to police. This message could be articulated in awareness and education campaigns. Reporting rates could also be improved through a public perception that all incidents of drink spiking will be treated seriously by police regardless of knowledge of offender, memory loss and associated victimisation.

What evidence is there that drugs are used in drink spiking?

Despite considerable media and public perceptions concerning the prevalence of drugs such as flunitrazepam, GHB and Ketamine being used in drink spiking, the forensic evidence to date does not support these claims. Alcohol has tended to dominate results and it is not clear whether this is because (a) alcohol is commonly used to spike drinks, (b) other drugs have left the body by the time of testing and so only alcohol is left to detect, or (c) people are unaware how much alcohol they are actually drinking. The only way to test for the presence of drugs is to conduct scientific analyses. However scientific analyses can only confirm whether or

not drugs or alcohol are in the body at the time of testing and cannot confirm that a positive result means that a drink was spiked.”⁴

This set of conclusions was derived from the results of a national telephone hotline and is therefore based on perception and “self-reporting”. It is also, therefore, subject to all of the documented weaknesses of that kind of methodology. This is not the place to deal with that question. The aim of this paper to deal with the question of the applicability of the criminal law to this question once the behaviour occurs.

4. *The Application of the Criminal Law*

(a) *The AIC Report*

The AIC Report contains a quite thorough survey of the potential offences involved in drink spiking (as defined by the AIC).⁵ Their collection of many specific unreported cases is particularly valuable. These matters will be the subject of comment below. The AIC summary of the possibly applicable laws is very useful⁶. Its summary of the results of its discussion is:

Is drink spiking illegal in Australia?

There is currently no separate offence category in any Australian jurisdiction for the act of spiking someone's drink per se. Rather, the use of criminal laws to prosecute drink spiking depends on:

- the state/territory in which the incident occurred;
- the motivation of the person spiking the drink;
- the type of substance used to spike the drink; and
- the effects of the spiking.

This means that there is some degree of flexibility in how an incident of drink spiking is recorded by police within each jurisdiction and how courts may interpret the law in relation to such incidents. It is recommended that each jurisdiction review its criminal law provisions in terms of their applicability to different forms of drink spiking and appropriate maximum penalties. Consideration of these issues could also be given by the Model Criminal Code Officers Committee (Parliament of Australia 1998).

As we shall see, this is substantially correct. But there are reasons for it. Some might think that there are very good reasons for at least some of it. In order to see the whole picture, though, it is necessary to step back from the particular offences that now exist and see how we came to them and why.

(b) *General Principles of the Application of the Criminal Law*

(i) *Some History*

In general terms, the area of the criminal law with which we are concerned is that called “non-fatal offences against the person”. Non-fatal offences against

⁴ AIC x-xi.

⁵ AIC Ch 4.

⁶ AIC at 104 (Table 15).

the person in all jurisdictions in Australia derive from English sources. In general terms, non-fatal offences against the person in all Australian jurisdictions derive ultimately from the Imperial *Offences Against the Person Act 1861*⁷. But that was not an offence-creating statute. It was a consolidation of a lot of previous statutes. They can be found listed in the *Criminal Statutes Repeal Act 1861*⁸. The latter lists both previous part consolidations⁹ and previous single or partial new enactments. If one traces the lists through the centuries, is tolerably clear that this area of law is riddled with single instance statutes creating ad hoc offences to supplement an inadequate common law coverage. To take a simple example, assault was an offence at common law but wounding was not¹⁰.

One of the major offences with which this Report is concerned illustrates the point neatly. In 1837 the UK (Imperial) Parliament passed “An Act to Amend the Laws Relating to Offences Against the Person”.¹¹ Among other things, that Act created, (for the first time, it seems), offences of administering a poison or other noxious thing. Those offences relevantly provided:

“And be it enacted, That whosoever shall administer to or cause to be taken by any Person any Poison or other destructive Thing, ... or shall by any Means whatsoever cause to any Person any bodily Injury dangerous to Life with Intent in any of the Cases aforesaid to commit Murder, shall be guilty of Felony...”.

“And be it enacted, That whosoever shall attempt to administer to any Person any Poison or other destructive Thing, ... with Intent in any of the Cases aforesaid to commit the Crime of Murder, shall, although no bodily Injury be effected, be guilty of Felony, ...”.

This does seem to be a first creation of such offences because they are not listed in the earlier consolidation of non-fatal offences against the person, the *Offences Against the Person Act 1828*¹². Apart from the antique wording and capitalisation, these offences were very specific, being confined to cases of administration *with intent to murder*, and not long passed before they were found wanting. In 1860 the UK (Imperial) Parliament passed “An Act to amend the Law relating to the unlawful administering of Poison”¹³. That Act recited:

“Whereas the present Law has been found insufficient to protect Persons from the unlawful administering of Poison, except in cases where the Intent is to commit Murder: Be it enacted...

I That whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other Person any Poison or

⁷ 24 & 25 Vict c 100 (1861).

⁸ 24 & 25 Vict c 95 (1861).

⁹ For example, the *Offences Against the Person Act 1828* (9 Geo IV, c 31).

¹⁰ Wounding as an offence dates from *An Act to prevent Malicious Maiming and Wounding* (22 & 23 Car II, c 1 (1670)) There is, incidentally, no sound reason for maintaining the distinction between assault and wounding in modern law (if there ever was). See, generally, MCCOC, *Final Report, Non-Fatal Offences Against the Person* (1998) at 2-3.

¹¹ 7 Wm IV & 1 Vict c 85 (1837).

¹² 9 Geo IV c 31 (1828).

¹³ 23 Vict c 8 (1837).

other destructive or noxious Thing so as thereby to endanger the Life of such Person, or so as thereby to inflict on such Person any grievous bodily Harm, shall be guilty of Felony...

II Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other Person any Poison or other destructive or noxious Thing with Intent to injure, aggrieve, or annoy such Person, shall be guilty of a Misdemeanour...”.

This Act did not repeal the earlier Act, so by 1860 there were no less than 4 different offences of differing seriousness dealing with the administration of poisons and other noxious things in existence. The first two dealt with those done with intent to murder; the third with intent to endanger life and the fourth with intent to injure, aggrieve or annoy.

As mentioned earlier, the 1861 consolidation was meant to bring all existing offences into one statute and a complementary statute abolished the specific enactments so consolidated. So, in that consolidation, we find, under the heading of “Attempts to murder”, s 11, (Administering Poison or wounding with Intent to Murder) and s 14, (Attempting to administer Poison, or shooting or attempting to shoot or attempting to drown &c, with Intent to murder), and, under the heading “Acts causing or tending to cause Danger to Life or bodily Harm”, s 23 (Maliciously administering Poison &c, so as to endanger Life or inflict grievous bodily Harm) and s 24 (Maliciously administering Poison &c, with intent to injure, aggrieve, or annoy).

(ii) *Further Developments - Evolution of General Principles of Criminal Legislation*

Whatever the motivation for the original two enactments, it is plain sailing for the offences in question for over a century after 1861. So far as the common law jurisdictions are concerned, the four offences found their way, pretty much unchanged, into the Crimes Act legislation of the various colonies and then States.¹⁴ So far as the common law jurisdictions are concerned, New South Wales is typical. Even in 2005, its *Crimes Act 1900* still says:

27 Acts done to the person with intent to murder

Whosoever:

administers to, or causes to be taken by, any person any poison, or other destructive thing, or
by any means wounds, or causes grievous bodily harm to any person, with intent in any such case to commit murder, shall be liable to imprisonment for 25 years.

29 Certain other attempts to murder

Whosoever:

attempts to administer to, or cause to be taken by, any person any poison, or other destructive thing, or
shoots at, or in any manner attempts to discharge any kind of loaded arms at any person, or
attempts to drown, suffocate, or strangle any person,

¹⁴ See, for example, the first *Criminal Law Consolidation Act 1873* (SA).

with intent in any such case to commit murder, shall, whether any bodily injury is effected or not, be liable to imprisonment for 25 years.

39 Using poison etc so as to endanger life

Whosoever maliciously administers to, or causes to be administered to, or taken by, any person, any poison or other destructive or noxious thing, so as to endanger the life of such person, or so as to inflict upon such person grievous bodily harm, shall be liable to imprisonment for ten years.

41 Administering poison etc with intent to injure or annoy

Whosoever maliciously administers to, or causes to be administered to, or taken by, any person, any poison or other destructive or noxious thing, with intent to injure aggrieve or annoy such person, shall be liable to imprisonment for five years.

The antecedents of these offences should now be obvious.

At the turn of the last century, Sir Samuel Griffith completed his famous codification of the criminal law. It was adopted instantly in Queensland, and later in Western Australia and Tasmania. It might also be said that the Northern Territory has a version of it, albeit a remote one. The Griffith code was not meant as a radical re-think of the criminal law but rather a codification of the existing “common law”, by which is meant, in this context, the criminal law as it existed by judge-made and statute law. The various versions of this Code have been extensively amended and revised over the century since first enactment. But, for example, the Tasmanian Code contains these offences:

169. Administering drug to facilitate offence

Any person who administers any stupefying or overpowering drug or thing to any person, with intent thereby to facilitate the commission of an offence, or to facilitate the flight of an offender after the commission or attempted commission of an offence, is guilty of a crime.

175. Unlawfully administering poison with intent to harm

Any person who unlawfully, and with intent to injure or annoy any person, administers or causes any poison or other noxious thing to be administered to, or taken by, such person, and thereby endangers his life, or does him any grievous bodily harm, is guilty of a crime.

176. Administering a noxious thing

Any person who unlawfully, and with intent to injure or annoy any person, administers, or causes any poison or other noxious thing to be administered, to, or taken by, any person, is guilty of a crime.

The ultimate provenance of much of this is obvious. It is worth noting that s 169 (Administering a drug to facilitate an offence) is a modern version of an old “choking and stupefying” offence (also contained in the 1861 consolidation but going back much further than that) originally aimed at street mugging with chloroform or a similar substance but later generalised. As we shall see below,

the choking and stupefying offence has had a deal of staying power long after its intended target has disappeared.

So we can say, with a fair degree of accuracy, that the 1861 consolidation was very influential. It came into place in the various States in the period up to 1900 and remained in place, in some places still currently, but in modernised form or altered form, according to the legislative tinkering that took place in that jurisdiction over that century or more.

But in the last decade or so, some serious thinking has taken place about the nature of these and other such offences and, indeed, the whole received Imperial and Victorian ad hoc style of offence making. Whatever the specific reason for these separate offences, and no doubt there was some, why did we have to have these great lists of offences which were merely specific examples of the same thing? To take one example, why have offences of endangering life by shooting, wounding, administering poisons, garrotting, placing stones on railway lines and so on? If the idea was to prevent conduct that recklessly endangered life or grievous bodily harm, *what did it matter how it was done?* Surely one general offence of recklessly endangering life with an included general offence of recklessly endangering grievous bodily harm would do.

The idea that all such behaviour should be criminalised in a general endangerment offence originated in the 1962 draft of the *American Model Penal Code*¹⁵. That offence was committed where a person “recklessly engages in conduct which places another person in danger of death or serious bodily injury.” It was further provided that recklessness and danger would be presumed where any person knowingly points a firearm at another whether or not the actor believed that the firearm was loaded. In the 1970s, the (South Australian) Mitchell Committee recommended the enactment of an offence in the following terms: “A person commits an offence if he recklessly engages in conduct which places or may place another person in danger of death or serious injury.”¹⁶ In 1998, the MCCOC recommended:

“The Committee [MCCOC] does not believe that there should be specific endangerment offences in relation to listed situations, for example, trains and aeroplanes. A plethora of specific offences, which, taken together, really indicates that a general principle and hence a general offence is involved, is one of the vices in the old scheme of things which the Committee wishes to eradicate. Endangerment of human lives should be covered by one offence, whether it be by hijacking an aeroplane or bombing a house. There should be endangerment offences despite the risks of over inclusion. The modern environment is, for all people an interdependent environment, in which life and safety must and does depend on the skill and foresight of others. No-one who drives a car or is a passenger on a plane, or uses a lift or lives near a large dam can guard against the reckless indifference to life or harm of others.”¹⁷

¹⁵ American Law Institute, *Model Penal Code, Proposed Official Draft*, (1962).

¹⁶ Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report, The Substantive Criminal Law*, (1977).

¹⁷ MCCOC, *Final Report, Non-Fatal Offences Against the Person* (1998) at 69.

The point is this. *The reduction of dozens of offences to one or two general offences based on an examination of the general principle at work in the area may be referred to as parsimony in the use of the criminal sanction.* There is no point in having twenty different offences if two will do.

Further, one settles what the (say) two offences will look like by the use of discriminators which make sense in the allocation of the criminal sanction. The two discriminators which makes sense, overwhelmingly, are (a) the consequences of behaviour and (b) the fault with which it is done. *Overwhelmingly, how it is done does not matter.*

Overwhelmingly, the point is to have general overarching principled offences instead of enacting a new offence every time a new social problem appears, thus avoiding a multitude of specific, overlapping and confusing offences.

(c) *The Offences In Australian Jurisdictions*¹⁸

Offences covering drink spiking are contained in State and Territory legislation. The table annexed to this report summaries the extent to which State and Territory offences cover the broad range of conduct encompassed by 'drink spiking', as defined by the AIC report.

For the purposes of analysis, the conduct encompassed by drink spiking has been divided into 6 categories:

- (1) drink spiking resulting in death;
- (2) drink spiking causing, or with intent to cause, injury or harm;
- (3) drink spiking with intent to commit a sexual offence;
- (4) drink spiking with intent to commit an offence;
- (5) drink spiking with drugs (other than alcohol) without lawful excuse;
- (6) drink spiking with alcohol for a prank.

Drink spiking resulting in death

All States and Territories have offences of murder and manslaughter which cover drink spiking resulting in death. In all jurisdictions the maximum penalty for murder is life imprisonment. The maximum penalty for manslaughter ranges from 20 years to life imprisonment.

Drink spiking causing, or with intent to cause, injury or harm

All States and Territories also have offences covering drink spiking causing, or with intent to cause, injury or harm. As can be seen from the table, the penalties vary widely (from life imprisonment to 2 years) depending on the degree of harm caused or intended.

There are potential gaps in the coverage of offences covering this category of drink spiking in NSW, Victoria and ACT. This is because their offences

¹⁸ It is not intended to deal with murder and manslaughter in this Report. There is nothing problematic about those offences in this context in any Australian jurisdiction.

specifically target the administration of 'poisons', 'injurious substances', 'noxious things', 'stupefying or overpowering drugs' and 'drugs', and do not necessarily cover drink spiking with alcohol.

Drink spiking with intent to commit a sexual offence

All States and Territories, except the ACT, have serious offences covering drink spiking with a drug with intent to enable an act of sexual penetration. Maximum penalties range from 10 years to life imprisonment.

The offences in South Australia, Western Australia and the Northern Territory cover this category of drink spiking most comprehensively, as they apply to sexual offences more generally (they are not limited to sexual penetration), and they cover drink spiking with alcohol.

There is a gap in the coverage of the offences in NSW, Queensland and Tasmania as they do not appear to apply where the drink spiking agent is alcohol.

There is a gap in the coverage of the Victorian offence as, whilst it covers drink spiking with alcohol, it only applies where there is intent to enable an act of sexual penetration (not sexual acts more generally). This gap is covered by a more general offence of administering, without consent, any substance capable of interfering substantially with the bodily functions of the other person (eg. capable of inducing unconsciousness or sleep). However, that offence only carries a maximum penalty of 5 years imprisonment, which may be considered inappropriately low where the drink spiking is done with intent to commit a sexual offence.

The ACT does not have any serious offence covering this category of drink spiking. The ACT offence of administering drugs with intent to commit an indictable offence against the person does not apply to sexual offences as they are not classified as offences against the person. The general offence of administering an injurious substance with intent to cause pain or discomfort may apply in some circumstances. However, that offence only carries a maximum penalty of 5 years imprisonment, which may be considered inappropriately low.

Drink spiking with intent to commit an indictable offence

New South Wales, Queensland, Tasmania, South Australia, Western Australia and the Northern Territory all have serious offences covering drink spiking with a drug with intent to commit an indictable offence. Maximum penalties range from 20 years to life imprisonment. The Tasmanian and Northern Territory offences are not limited to drink spiking with intent to commit an indictable offence, they apply to drink spiking with intent to commit *any* offence.

There is a potential gap in the coverage of the New South Wales and Queensland as they do not necessarily apply to drink spiking with alcohol. This gap does not exist to the same extent in South Australia, Western Australian

and the Northern Territory as those jurisdictions also have serious general offences, such as doing an act with intent to harm another person, which will cover many instances of drink spiking with alcohol which fall within this category.

The ACT has an offence of administering a stupefying or overpowering drug or injurious substance intending to commit an indictable offence against the person punishable by at least 10 years imprisonment. This offence carries a maximum penalty of 15 years imprisonment. It provides only incomplete coverage for this category of drink spiking as: (a) it does not necessarily apply to drink spiking with alcohol; and (b) it does not apply generally where there is intent to commit an indictable offence (the offence intended must be an offence against the person that carries a maximum penalty of 10 years or more).

Victoria does not have any serious offence covering this category of drink spiking. Partial coverage is provided by the general Victorian offence of administering, without consent, any substance capable of interfering substantially with the bodily functions of the other person (e.g. capable of inducing unconsciousness or sleep). However, this offence carries a maximum penalty of 5 years imprisonment which may not be sufficient in cases where a serious crime is intended.

Drink spiking with drugs (other than alcohol) without lawful excuse

All States and Territories, except Western Australia, have general offences covering the unauthorised administration of certain drugs to another person. The AIC report notes that these offences tend to cover drugs commonly used in drink spiking (benzodiazepines, GHB, Ketamine, speed and ecstasy), although the ACT offences do not cover Ketamine.¹⁹ Maximum penalties typically range from 20 penalty units to 5 years, although aggravated offences (eg involving administration to children) in Queensland and the ACT carry much higher penalties.

New South Wales, Queensland, South Australia and Tasmania also have offences of administering a poison or other destructive or noxious thing to another person with intent to injure, aggrieve or annoy that person. Maximum penalties range from 3 years to 21 years imprisonment.

Western Australia is the only State that does not criminalise this category of drink spiking.

Drink spiking with alcohol for a prank

Drink spiking with alcohol for a prank is the one category of drink spiking (as defined by the AIC) which does not appear to be comprehensively criminalised by any jurisdiction.

¹⁹ Page 102.

Whilst New South Wales, Queensland and South Australia have offences of administering a poison or other destructive or noxious thing to another person with intent to injure, aggrieve or annoy that person, it is unclear whether drink spiking with alcohol would fall within the ambit of those offences. Case law suggests that alcohol will only be considered a “noxious thing” for the purposes of those offences if it is administered in sufficient quantity.²⁰

Once again, whilst Victoria has an offence of administering, without consent, any substance capable of interfering substantially with bodily functions (e.g. capable of inducing unconsciousness or sleep), whether alcohol qualifies as such a substance will probably depend on the quantity that is administered.

Western Australia, the Northern Territory and the Australian Capital Territory do not have any offences applicable to this category of drink spiking.

(i) *New South Wales*

New South Wales inherited and has maintained the 1861 consolidated offences. They have not changed in any substance since the enactment of the 1900 *Crimes Act*. The intent to murder offences are detailed above. Section 38 of the Act says:

38 Using chloroform etc to commit an offence

Whosoever unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or cause to be taken by, any person, any chloroform laudanum or other stupefying or over-powering drug or thing, with intent in any such case to enable himself or herself, or another person, to commit, or with intent to assist another person in committing, an indictable offence, shall be liable to imprisonment for 25 years.²¹

Section 39 says:

39 Using poison etc so as to endanger life

Whosoever maliciously administers to, or causes to be administered to, or taken by, any person, any poison or other destructive or noxious thing, so as to endanger the life of such person, or so as to inflict upon such person grievous bodily harm, shall be liable to imprisonment for ten years.

Section 41 says:

41 Administering poison etc with intent to injure or annoy

Whosoever maliciously administers to, or causes to be administered to, or taken by, any person, any poison or other destructive or noxious thing, with intent to injure aggrieve or annoy such person, shall be liable to imprisonment for five years.²²

²⁰ The leading case is *Marcus* [1981] 2 All ER 833 (CCA).

²¹ This offence has a different genesis from those traced above, which is why it was not found in those illustrations of the general principle of criminal legislation involved here. It was originally enacted to deal specifically with nineteenth century street muggers although it has a more general application. NSW alone has it still.

²² New South Wales has provided the following sentencing statistics:

Section 38 Crimes Act:

New South Wales has a comprehensive suite of administration offences, depending for application on the classification of the drug involved;

Section 13 of the *Drug Misuse and Trafficking Act 1985* says:

13 Administration of prohibited drugs to others

(1) A person who administers or attempts to administer a prohibited drug to another person is guilty of an offence.

(2) Nothing in this section renders unlawful the administration or attempted administration of a prohibited drug to another person by:

(a) a person licensed or authorised to do so under the *Poisons Act 1966*

, or

(b) a person authorised to do so by the Secretary of the Department of Health.

(3) Nothing in this section renders unlawful the administration or attempted administration of a prohibited drug to a person for or to whom the prohibited drug has been lawfully prescribed or supplied.

This offence is a general drug offence not specifically aimed at intoxicating a person without their consent, i.e. lack of consent or knowledge on the part of the person to whom the drug is administered is not an element of the offence.

Under section 10(3) of the *Poisons and Therapeutic Goods Act 1966*, it is an offence to supply a prescribed restricted substance to another person. The maximum penalty is 2 years imprisonment. Under clause 58 of the *Poisons and Therapeutic Goods Regulations 2002*, it is an offence to administer a prescribed restricted substance to another person. The maximum penalty is a fine of 20 penalty units.

The *Poisons and Therapeutic Goods Act* offence that carries a penalty of imprisonment is, in context, directed principally at people who sell prescribed restricted substances (benzodiazepines and other 'high risk' prescription drugs) without having the appropriate license. The section is titled 'Prohibition on supply of certain substances otherwise than by wholesale'. The Act's definition of 'supply' (in section 4) makes it clear that its policy is directed at commercial sale—however given that the definition is non-exhaustive, and includes "dispense and distribute", it is likely that adding such a substance to another person's drink would fall within the scope of the offence. For both the *Poisons*

District Court: 11 convictions in the period January 1998-December 2004. (Results: 2 suspended sentences, 9 full-time imprisonment. Imprisonment full terms range from 4 years to 16 years, median 9 years; effective Non-Parole Periods (NPP) only available in 2 matters (2 years and 7 years). Local Court: N/A (strictly indictable).

Section 39 Crimes Act:

District Court: 3 convictions in the period January 1998-December 2004. (Results: 1 good behaviour bond, 2 full-time imprisonment. Imprisonment full terms were 12 months and 3 years; NPPs were 6 months and 18 months.) Local Court: 1 conviction in the period April 2001-March 2005. (Result: Community Service Obligation (CSO))

Section 41 Crimes Act:

District Court: Nil.

Local Court: 3 convictions in the period April 2001-March 2005. (1 good behaviour bond, 1 CSO and 1 full-time imprisonment-- 9 months with a NPP of 3 months.)

and *Therapeutic Goods Act* and the *Regulation* offences, again lack of knowledge or consent of the 'victim' is not an element; so they may catch drink spiking, but were not drafted to aim at it.

(ii) *Queensland*

Queensland has the 1899 redrafted versions of the same old offences. Section 316 of the *Criminal Code* says:

316 Stupefying in order to commit indictable offence

Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer, any stupefying or overpowering drug or thing to any person, is guilty of a crime, and is liable to imprisonment for life.

Section 322 says:

322 Maliciously administering poison with intent to harm

Any person who unlawfully, and with intent to injure or annoy another, causes any poison or other noxious thing to be administered to, or taken by, any person and thereby endangers the person's life, or does the person some grievous bodily harm, is guilty of a crime, and is liable to imprisonment for 14 years.

Section 323(1) says:

323 Wounding and similar acts

(1) Any person who--

(a) unlawfully wounds another; or

(b) unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person;

is guilty of a misdemeanour, and is liable to imprisonment for 7 years.

(iii) *Victoria*

Victoria inherited the 1861 offences like everyone else but overhauled the non-fatal offences against the person in a major way in 1985. It has both general endangerment offences and administration offences. At the time at which the 1861 offences were largely eliminated, the question whether a separate administration offence was required was carefully considered and the separate offences were retained as a matter of caution. Here is the result.

The specific *Crimes Act* offences are:

19. Offence to administer certain substances

(1) A person who—

(a) without lawful excuse, administers to or causes to be taken by another person any substance which is capable, and which the first-

mentioned person knows is capable, in the circumstances, of interfering substantially with the bodily functions of the other person; and

(b) knows that the other person has not consented to the administration or taking of the substance or is reckless as to whether or not the other person has so consented—

is guilty of an indictable offence.

Penalty: Level 6 imprisonment (5 years maximum).

(2) For the purposes of sub-section (1)—

(a) a person is not to be taken to have consented to the administration or taking of a substance if, had the person known the likely consequences, the person would not be likely to have consented to the administration or taking; and

(b) a substance shall be taken to interfere substantially with bodily functions if the substance is capable of inducing unconsciousness or sleep.

53. Administration of drugs etc.

A person must not—

(a) administer a drug, matter or thing to a person; or

(b) cause a drug, matter or thing to be taken by a person—

with the intention of rendering that person incapable of resistance and thereby

enabling himself or herself or another person to take part in an act of sexual penetration with that person.

Penalty: Level 5 imprisonment (10 years maximum).

The *Crimes Act* general endangerment offences are:

22. Conduct endangering life

A person who, without lawful excuse, recklessly engages in conduct that places

or may place another person in danger of death is guilty of an indictable offence.

Penalty: Level 5 imprisonment (10 years maximum).

23. Conduct endangering persons

A person who, without lawful excuse, recklessly engages in conduct that places

or may place another person in danger of serious injury is guilty of an indictable offence.

Penalty: Level 6 imprisonment (5 years maximum).

In addition, the *Drugs, Poisons and Controlled Substances Act 1981* provides:

74. Introduction of a drug of dependence into the body of another person

A person who, without being authorized by or licensed under this Act or the regulations to do so, introduces or attempts to introduce a drug of dependence into the body of another person is guilty of an offence against this Act and liable to a penalty of not more than 30 penalty units or to level 8 imprisonment (1 year maximum) or to both that penalty and imprisonment.

(iv) *South Australia*

The applicable major offences are to be found in the *Criminal Law Consolidation Act 1935*. At the time of this discussion paper, it contains two of the old stupefying offences: section 25 - choking or stupefying to commit indictable offence - and the familiar poisoning offence, section 27 - maliciously administering poison etc with intent to injure, aggrieve or annoy any other person - taken very much straight from the Imperial legislation.

The other 3 poisoning offences have disappeared. They were replaced by new style general endangerment offences in 1986. These provisions say:

29—Acts endangering life or creating risk of grievous bodily harm

(1) Where a person, without lawful excuse, does an act or makes an omission—

(a) knowing that the act or omission is likely to endanger the life of another; and

(b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered,
that person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 15 years.

(2) Where a person, without lawful excuse, does an act or makes an omission—

(a) knowing that the act or omission is likely to cause grievous bodily harm to another; and

(b) intending to cause such harm or being recklessly indifferent as to whether such harm is caused,
that person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 10 years.

(3) Where a person, without lawful excuse, does an act or makes an omission—

(a) knowing that the act or omission is likely to cause harm to the person of another; and

(b) intending to cause such harm or being recklessly indifferent as to whether such harm is caused,
the person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 5 years.

In 2005, South Australia passed the *Statutes Amendment and Repeal (Aggravated Offences) Act 2005*. It has not yet been proclaimed. When it is proclaimed it will repeal the two remaining choking and stupefying offences. Instead, the basis of the law will be a series of offences based on the intentional and reckless causing of harm and serious harm. The point for present purposes is that harm includes unconsciousness, and serious harm includes “serious and protracted impairment of a physical or mental function”. There can be little doubt that serious drink spiking would fall under these categories of offence.

In addition, South Australia has two drug administration offences. They are in the *Controlled Substances Act 1985*. The first deals with prescription drugs, and it says:

18—Sale, supply, administration and possession of prescription drugs

(1) A person must not sell by retail, supply or administer to another person or to an animal, or prescribe for a person or an animal, a prescription drug (not being a drug of dependence) unless he or she is—

(a) a medical practitioner, dentist, veterinary surgeon or nurse acting in the ordinary course of his or her profession; or

(b) a member of any other prescribed profession acting in the ordinary course of that profession and in accordance with the regulations; or

(c) a pharmacist dispensing the prescription of a medical practitioner, dentist, veterinary surgeon or member of a prescribed profession; or

(d) a person administering to another person or to an animal a prescription drug that has been lawfully prescribed for or supplied to that other person, or that animal; or

(e) a person licensed to do so by the Minister.

Maximum penalty: \$10 000 or imprisonment for 2 years.

There is, potentially, a more serious offence available. It says:

32—Prohibition of manufacture sale etc of drug of dependence or prohibited substance

(1) A person must not knowingly—

(a) manufacture or produce a drug of dependence or a prohibited substance; or

(b) ...

(c) ... administer such a drug or substance to another person; or...

This offence applies not to pharmacy drugs but to drugs of dependence and prohibited substances. These drugs are listed in Schedules in the Regulations, and they include, at the top end, the very serious drugs, ranging from heroin and the various amphetamines to cannabis products. The penalty provision are contained in s 32 of the Act and are Byzantine. No purpose is served by describing them here. Suffice it to say that they are, in theory and depending on lots of circumstances, horrendously high.

(v) *Tasmania*

The serious Tasmanian offences are contained in the *Criminal Code* and have been reproduced above. For completeness, here they are again:

169. Administering drug to facilitate offence

Any person who administers or causes another person to take any drug, alcohol or other thing with intent to stupefy or overpower that person in order to facilitate the commission of an offence, or to facilitate the flight of an offender after the commission or attempted commission of an offence, is guilty of a crime.

'Offence' includes summary and indictable offences.

175. Unlawfully administering poison with intent to harm

Any person who unlawfully, and with intent to injure or annoy any person, administers or causes any poison or other noxious thing to be administered to, or taken by, such person, and thereby endangers his life, or does him any grievous bodily harm, is guilty of a crime.

176. Administering a noxious thing

Any person who unlawfully, and with intent to injure or annoy any person, administers, or causes any poison or other noxious thing to be administered, to, or taken by, any person, is guilty of a crime.

The maximum penalty for all Code offences is the same. It is 21 years imprisonment.

In addition, s 24 of the *Misuse of Drugs Act 2001* provides:

24. Possessing, using or administering controlled drug

A person must not –

...

(c) administer a controlled drug to another person.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years.

“Controlled drugs” are listed in a schedule to the Act. They are the nasty ones.

(vi) Western Australia

Although not adopting the provisions recommended by the MCC Report directly, the Western Australian Parliament has adopted the reasoning behind the Model Code recommendations by replacing various specific offences with a single broad offence under section 304 of the *Criminal Code*. As is described in the second reading speech for the *Criminal Code Amendment Act 2004* (*Hansard*, Legislative Assembly, 3 April 2003), this provision was intended to replace a series of offences with a similar mischief, namely:

- 208 - Poisoning water-holes;
- 296 - Intentionally endangering safety of persons travelling by railway;
- 296A - Intentionally endangering safety of persons travelling by aircraft;
- 298 - Causing explosion likely to endanger life;
- 299 - Attempting to cause explosion likely to endanger life;
- 300 - Maliciously administering poison with intent to harm;
- 302 - Failure to supply necessaries;
- 304 - Endangering life of children by exposure;
- 306 - Unlawful acts causing bodily harm;
- 307 - Endangering safety of persons travelling by railway;
- 308 - Sending or taking unseaworthy ships to sea;
- 309 - Endangering steamships by tampering with machinery;
- 310 - The like by engineers;
- 311 - Evading laws as to equipment of ships and shipping dangerous goods; and
- 312 - Landing explosives.

The result of this is that Western Australia has both general endangerment provisions and specific poisoning offences in its *Criminal Code*. They are:

294. Acts intended to cause grievous bodily harm or prevent arrest

Any person who, with intent to maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, or to resist or prevent the lawful arrest or detention of any person:

- (1) Unlawfully wounds or does any grievous bodily harm to any person by any means whatever; or
- (2) Unlawfully attempts in any manner to strike any person with any kind of projectile; or
- (3) Unlawfully causes any explosive substance to explode; or
- (4) Sends or delivers any explosive substance or other dangerous or noxious thing to any person; or
- (5) Causes any such substance or thing to be taken or received by any person; or
- (6) Puts any corrosive fluid or any destructive or explosive substance in any place; or
- (7) Unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person; or
- (8) Does any act that is likely to result in a person having a serious disease;

is guilty of a crime, and is liable to imprisonment for 20 years.

Subsection 5 of this provision appears to bring drink spiking within its scope. A drink spiker would intend to disable an individual and does so by causing the individual to take a noxious substance.

In Western Australia it used to be a crime to administer a noxious thing to another person that could endanger the life of that person under section 300 of the *Criminal Code*. This was repealed by section 19 of the *Criminal Code Amendment Act 2004*. This provision, along with several others which were repealed, have been replaced with a broader offence under section 304 of the *Criminal Code*. This section provides as follows:

304. Acts or omissions causing bodily harm or danger

(1) If a person omits to do any act that it is the person's duty to do, or unlawfully does any act, as a result of which:

- (a) bodily harm is caused to any person; or
- (b) the life, health or safety of any person is or is likely to be endangered,

the person is guilty of a crime and is liable to imprisonment for 5 years.

Summary conviction penalty: imprisonment for 2 years or a fine of \$8 000.

(2) If a person, with an intent to harm, omits to do any act that it is the person's duty to do, or does any act, as a result of which $\frac{3}{4}$

- (a) bodily harm is caused to any person; or
- (b) the life, health or safety of any person is or is likely to be endangered,

the person is guilty of a crime and is liable to imprisonment for 20 years.

(3) For the purposes of subsection (2) an intent to harm is an intent to:

- (a) unlawfully cause bodily harm to any person;

- (b) unlawfully endanger the life, health or safety of, any person;
- (c) induce any person to deliver property to another person;
- (d) gain a benefit, pecuniary or otherwise, for any person;
- (e) cause a detriment, pecuniary or otherwise, to any person;
- (f) prevent or hinder the doing of an act by a person who is lawfully entitled to do that act; or
- (g) compel the doing of an act by a person who is lawfully entitled to abstain from doing that act.

Two specific offences (of, by now, well recognisable ancestry) require mention. Section 293 of the *Criminal Code* makes it unlawful to administer a stupefying drug with the intention of committing an indictable offence. Section 192 of the *Criminal Code* makes it unlawful to administer a stupefying drug in order to have unlawful carnal knowledge of a person. These sections are reproduced below.

293. Stupefying in order to commit indictable offence

Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer any stupefying or overpowering drug or thing to any person, is guilty of a crime, and is liable to imprisonment for 20 years.

192. Procuring person to have unlawful carnal knowledge by threats, fraud, or administering drugs

Any person who:

- (1) By threats or intimidation of any kind procures a woman or girl to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or
- (2) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or
- (3) Administers to a woman or girl, or causes a woman or girl to take, any drug or other thing with intent to stupefy or overpower her in order to enable any man, whether a particular man or not, to have unlawful carnal knowledge of her; or
- (4) Does any of the foregoing acts with respect to a man or boy; is guilty of a misdemeanour, and is liable to imprisonment for 2 years.

It should be noted that the penalty for the former is 20 years whilst the penalty for the latter is only two years. When considering reform of this area these disparate penalties are cause for concern given the necessity to consider the penalty of lesser offences constituted by the same actions²³.

In addition to all of the above, Western Australia has a comparatively broad definition of assault that would encompass drink spiking. Relevant provisions are reproduced below.

222. "Assault", definition of

A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his

²³ See *R v Robertson* (1997) 91 A Crim R 388.

consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.

The term “applies force” includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.

223. Assaults unlawful

An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.

The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

317. Assaults occasioning bodily harm

(1) Any person who unlawfully assaults another and thereby does that other person bodily harm is guilty of a crime, and is liable:

- (a) if the offence is committed in circumstances of aggravation, to imprisonment for 7 years; or
- (b) any other case, to imprisonment for 5 years.

Lastly, every jurisdiction other than Western Australia has legislation that makes the administration of various drugs typically used for drink spiking unlawful. The *Misuse of Drugs Act 1981* creates an offence under section 6, making it unlawful to supply prohibited drugs to another. It is unlikely this would extend to administering a drug without consent or knowledge on behalf of the recipient.

(vii) Northern Territory

Section 154 of the Northern Territory *Criminal Code* is a general endangerment offence:

154. Dangerous acts or omissions

(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

(2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section.

Section 176 is a more specific offence of administering a poison with intent to facilitate another crime:

176. Stupefying in order to commit crime

Any person who, with intent to commit or to facilitate the commission of a crime, or to facilitate the flight of an offender after the commission or attempted commission of a crime, administers, or attempts to administer, any stupefying or overpowering drug or thing to any person is guilty of a crime and is liable to imprisonment for life.

Section 177 is a general causing of grievous bodily harm offence:

177. Acts intended to cause grievous harm or prevent apprehension

Any person who, with intent to disfigure or disable any person, or to cause grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person –

...

(d) sends or delivers any explosive substance or other dangerous or noxious thing to any person;

(e) causes any such substance or thing to be taken or received by any person;

...

is guilty of a crime and is liable to imprisonment for life.

(viii) Australian Capital Territory

The ACT *Crimes Act* has two general endangerment offences. They collect the old familiar specific endangerment crimes:

27 Acts endangering life etc

...

(3) A person who intentionally and unlawfully—

(a) chokes, suffocates or strangles another person so as to render that person insensible or unconscious or, by any other means, renders another person insensible or unconscious; or

(b) administers to, or causes to be taken by, another person any stupefying or overpowering drug or poison or any other injurious substance likely to endanger human life or cause a person grievous bodily harm; or

...

is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

(4) A person who does an act referred to in subsection (3)—

(a) intending to commit an indictable offence against this part punishable by imprisonment for a maximum period exceeding 10 years; or

...
is guilty of an offence punishable, on conviction, by imprisonment for 15 years.

28 Acts endangering health etc

...
(2) A person who intentionally and unlawfully—
(a) administers to, or causes to be taken by, another person any poison or other injurious substance with intent to injure or cause pain or discomfort to that person; or

...
is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

There are various offences of administering a drug in the *Drugs of Dependence Act 1989*. The maximum penalty is 2 years or a fine of \$5,000 or both²⁴.

5. Some Jurisdictional Comments on Reform To Date

(a) Victoria

Victoria has recently considered the issue of drink spiking in producing the Government Response to the Drugs and Crime Prevention Committee (the Committee) *Inquiry into the Amphetamine and 'Party Drug' Use in Victoria*²⁵. Recommendation 3 of the Inquiry into Amphetamine and 'Party Drug' Use in Victoria concerns the creation of a new general offence of drink spiking²⁶.

Recommendation 3 received in principle support in the Government Response. The relevant extracts from the Government Response were:

Final Report Recommendation 3: The Committee recommends that consideration be given to the creation of a new general offence of 'drink spiking' with a sufficient level of penalty to reflect the gravity of this crime. Such an offence should be in addition to and not in substitution of the provisions of Section 53 of the *Crimes Act 1958* (administration of a drug).

Government Response to Recommendation 3

Support in principle. The offence of drink spiking is currently covered by three provisions - Section 19 of the *Crimes Act 1958*, Section 53 of the *Crimes Act 1958* and Section 74 of the *Drugs Poisons and Controlled Substances Act 1981*.

However, the Government accepts the Committee's view that these provisions may not cover all circumstances and may not provide a sufficient penalty for cases involving a sexual motivation but not penetration (for example drink spiking to enable taking of pornographic

²⁴ The AIC Report concludes that this does not cover Ketamine. That is not surprising. Ketamine is a comparatively recently commonly abused drug.

²⁵ The Final Report of the *Inquiry into Amphetamine and 'Party Drug' Use in Victoria* can be viewed in its entirety at <http://www.parliament.vic.gov.au/dpcp/>.

²⁶ See, generally, Part C: Effects of Amphetamines and 'Party Drugs' - Physical, Psychological and Social Consequences (pages 162 - 166)

pictures). It is noted that Section 61 of the UK *Sexual Offences Act* applies to any form of sexual activity.

Accordingly, the Government will consult with specialists and stakeholders with a view to determining whether the existing provisions need to be broadened as part of the foreshadowed major review of the *Crimes Act 1958*.

In addition, the Government notes that a 'drink spiking' awareness raising initiative has been recently commissioned to focus attention on the issue. The 'Drink Spiking Community Education Campaign', coordinated by Crime Prevention Victoria and funded through the Victorian Law Enforcement Drug Fund (VLEDF), aims to:

- § raise awareness about drink spiking (whether via illicit drug, licit drug or unrequested extra alcohol) and the related harms associated with drink spiking (sexual assault, rape, assault, theft, personal injury, illness, etc) in participating venues state-wide;
- § increase awareness of and encourage the adoption of protective/preventative practices, behaviours and responsibility in social settings;
- § encourage reporting of drink spiking incidents;
- § increase access to victims of drink spiking to services for support, counselling and treatment;
- § develop a standard resource that can be utilised to establish practical guidelines for industry and services in relation to management of the drink spiking issue. The aim is to have these guidelines adopted as part of the Responsible Serving of Alcohol (RSA) and staff training/accreditation; and
- § facilitate cross-agency dissemination of information regarding drink spiking and responsive measures.

The current campaign builds on the 'Keep an Eye Open' community education initiative conducted on this theme in 2002.

Other non-legislative Government initiatives in place which relate to, or will have potential relevance to, the incidence and impact of drink spiking include:

- § the Inner City Entertainment Precincts Taskforce (ICEPT) which is an interagency taskforce established to develop a strategic framework for the management of amenity, safety and security in and around inner city entertainment precincts. The taskforce includes representatives from the Government, Victoria Police, and local councils and is currently drafting a discussion paper with options for consideration within which 'drink spiking' has some relevance.
- § the 'Drink Spiking Project', being jointly piloted by Victoria Police and the Centre Against Sexual Assault to collect data concerning the offence and those responsible and to provide the community with information on how to get help and raise awareness of the issue.
- § The Women's Safety Strategy, a whole-of-government response to violence against women, recognises that drink spiking is often a premeditated step to sexual assault, which is overwhelmingly experienced by women and perpetrated by men known to them. The Strategy includes a Statewide Steering Committee to Reduce Sexual Assault, which includes Government, police, courts, sexual

assault services and men's programs, to improve responses to sexual violence.

(b) Northern Territory

The NT recognised the problem of spiking by developing, as part of a broader project, the first stage of which was an awareness raising campaign "watch your drink, yourself and your friend, by developing a specific protocol. In April 2004, the Women's Health Strategy Unit published the Protocol - "A coordinated approach to better respond to drug-facilitated sexual assault in Darwin Urban." The aim of the protocol was to ensure all victims of drug-facilitated sexual assault receive appropriate treatment and referral and improve current services provided to victims of drug facilitated sexual assault.

As a result of drug-facilitated sexual assaults, the NT Police also developed a "toxicology protocol" which is adhered to by NT Police and the Sexual Assault Referral Centre. Like other jurisdictions the NT also responded to drug-facilitated sexual assault by conducting educational campaigns aimed at raising awareness about drug-facilitated sexual assault and promoting safe drinking practices and protective behaviour in the context of licensed premises.

Clearly these are all "post-event" strategies and focus on the fallout from the act of drink spiking not the act.

(c) New South Wales

(i) Law Reform

The NSW Government has made a public commitment to introducing a law outlawing drink spiking per se, in accordance with the recommendations of the AIC Report. In the NSW Legislative Assembly on 23 March 2005 (following a press release of then-Premier Bob Carr on 16 November 2004) the Attorney General stated that NSW would introduce an offence of drink spiking where there was no consequent criminal or malevolent intent, i.e. 'prank spiking'. Features of the intended offence were said to be:

- it does not matter whether alcohol or any other intoxicating substance is used as the spiking agent
- the spiking must occur without the knowledge or consent of the victim
- the offender must have the intention that the victim is intoxicated or overpowered.

At the same time, the Attorney stated that NSW intends to simplify and modernise its current drink spiking offences (in the *Crimes Act*), in particular by putting it beyond doubt that they cover the use of alcohol with the requisite criminal intent.

(ii) Other Reforms

The NSW Government announced the formation of a multi-agency Drink Spiking Action Group (DSAG) in November 2004, comprising representatives

from Police, hotel licensees, Department of Gaming and Racing, medical and health specialists and Government policymakers of all kinds. The role of DSAG was and is to coordinate a response to drink spiking at all levels of government. DSAG has coordinated a number of initiatives, including improving Police and Health investigative procedures when suspected incidents of drink spiking come to light. It is now in the process of preparing a media information kit (to be released by NSW Police) on drink spiking.

In addition, the Government's Violence Against Women Specialist Unit has been engaged in a series of anti-drink spiking campaigns since the year 2000. These include:

- the development of posters, information sheets, information and training sessions designed to enhance community and local business awareness of drug and alcohol facilitated sexual assault; and
- audits of pubs and clubs, which reviewed environments and encouraged practices to promote safety for women in licensed premises.

Partners involved in the campaigns are NSW Police, Liquor Consultative Committees, hotel licensees, Local Councils, Health sexual assault services, TAFE and the Department of Education and Training.

6. Conclusions

It is a clearly discernable trend across the common law world, and hence analogous jurisdictions, for law makers to abandon the practice of enacting very specific statutory offences which deal with just one narrow aspect of a more general social or behavioural problem. There is good reason for this trend. The Victorian criminal legal system was mired in very unnecessary specifics and high technicalities of both procedure and substance. The generalising of the criminal prohibition makes the law easy to understand, simpler to prosecute and defend, more accessible to the citizen and more sensible overall.

The understandable desire to add and add specific criminal offences to the criminal law as a response to an immediate demand to "do something" about an emerging behavioural problem, or the resurfacing of an old one into public consciousness, should therefore be resisted unless there is clear evidence that the criminal law does not address the problem - or, at least, all of it. there is no point in piling Ossian onto Pella if there is no substantive gain, and there is much to be lost. It is not good social policy to end up with criminal legislation which resembles the complex mess that resulted in the consolidations of the early to mid nineteenth century. It is not good policy - it is bad policy - to recommend the enactment of a specific criminal offence merely "to raise the profile of the issue in the community"²⁷. Revisiting or re-enacting the legal conventions and structures of nearly 200 years ago is not a good idea.

²⁷ AIC at 94 reporting on a recommendation of the Victorian Parliamentary Drug and Crime Prevention Committee (2004).

The MCCOC has considered the matter independently. There appears to be no gap in the criminal law as it applies to very serious offences. MCCOC is of the opinion that the comprehensibility and accessibility of the law could be improved if States and Territories enacted its recommendations about serious non-fatal offences against the person. It really is unconscionable that the basic form, structure and coverage of some serious criminal offences are dictated by the exigencies of 150 years ago.

Equally, and for similar reasons, there is no warrant for having just one “drink spiking” offence. Drink spiking is a continuum of behaviours on a continuum of severity and that should be reflected in the offence structure applicable to the general behaviour, based on degrees of culpability, generally centred around the intention with which the act was done, *as is now the case*.

The weakness in the law lies at the least serious end of the scale. The AIC Report says:

“...the majority of suspected drink spiking incidents have no additional criminal victimisation. It is not clear whether these incidents result from (a) 'prank spiking', (b) an inability of the offender to carry out additional victimisation, or (c) people being unaware of how much alcohol they are consuming and misattributing the effects to alcohol. Based on views of stakeholders and anecdotal evidence it is likely that at least some of these instances involve 'prank spiking'”.

Insofar as the behaviour concerned involves the administration of drugs, the picture is murky. The offences of the administration of drugs found in the controlled substances or poisons legislation of each State and Territory (except WA) are not designed for this purpose really (being aimed at consensual drug using behaviour), and the massively complicated nature of the classification and scheduling of drugs means that the coverage of these offences is difficult to fathom and research. In addition, while case law appears to be clear that alcohol (or, it seems, almost anything) is a “noxious thing” for the purposes of the more serious ancient offences if it is administered in sufficient quantity²⁸, it might be thought to add to transparency to make that clear. In any event, the over-administration of alcohol (and other, slightly more exotic things) does not fall within the scope of existing mere administration offences.

Therefore, the MCCOC recommends that all Australian jurisdictions enact an offence of “mere” drink spiking (without further intent), that the offence be summary, and that the offence extend to any substance (any classification of poison, substance, drug, alcohol, traditional aphrodisiac etc) which is likely to impair the consciousness or bodily function of the victim, or which is intended to do so, whether or not the spiked drink is drunk wholly, partly or at all.

²⁸ The leading case is *Marcus* [1981] 2 All ER 833 (CCA).

The MCCOC recommends that NSW, Victoria, Queensland, WA and the ACT amend their criminal laws to close the gaps, and potential gaps, in the coverage of their laws that have been identified in this report.

The MCCOC notes such information as it has on social and behavioural programs of various kind involving various partnerships initiated by governments. The MCCOC remarks that these crime prevention measures, or something like them, are essential to prevent victimisation. However, the MCCOC regards the area as external to its remit.

Coverage of drink spiking offences in each State and Territory

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
NSW	Offences of murder (life imprisonment) and manslaughter (25 years)	Using poison or noxious thing etc on another with intent to inflict GBH* (10 years) : <i>s39 Crimes Act</i> Administering a poison or other destructive or noxious thing with intent to injure, aggrieve or annoy (5 years): <i>s41 Crimes Act</i> Potential gap: these offences may not cover drink spiking with alcohol	Using a drug on another with intent to commit an indictable offence (25 years) : <i>s38 Crimes Act</i> Potential gap: this offence may not cover drink spiking with alcohol	Using a drug on another with intent to commit an indictable offence (25 years) : <i>s38 Crimes Act</i> Potential gap: this offence may not cover drink spiking with alcohol	Administering a poison or other destructive or noxious thing with intent to injure, aggrieve or annoy (5 years) : <i>s41 Crimes Act</i> Administering a prohibited drug to another person without authorisation (2 years) : <i>s13 Drug Misuse and Trafficking Act</i> Administering a prescribed restricted substance to another person (20 penalty units) : <i>cl.58 Poisons and Therapeutic Goods Regulations</i>	Potential gap Possible that offence of administering a poison or other destructive or noxious thing with intent to aggrieve or annoy would apply – case-law suggests that whether alcohol qualifies as a ‘noxious thing’ depends on the quantity in which it is administered.
Vic	Offences of murder (life	Recklessly engaging in conduct that	Administering a drug or other substance with	Potential gap	Administering, without consent, any substance	Potential gap

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
	imprisonment) and manslaughter (20 years)	places another person in danger of death (10 years) or serious injury (5 years) : <i>ss22-23 Crimes Act</i>	<p>the intention of rendering that person incapable of resistance and enabling an act of sexual penetration (10 years) : <i>s53 Crimes Act</i></p> <p>Potential gap This offence does not cover drink spiking with intent to commit sexual offences other than sexual penetration. Whilst this situation would probably be covered by some of the other offences, such as administration offences, those penalties may not be considered sufficient. Victoria does not have a general offence of administering a drug with intent to commit an indictable offence.</p>	No specific offence. This situation would probably be covered by some of the other offences, such as administration offences, however those penalties may not be considered sufficient depending on the seriousness of the crime intended.	<p>capable of interfering substantially with the bodily functions of the other person (e.g. capable of inducing unconsciousness or sleep) (5 years) : <i>s19 Crimes Act</i></p> <p>Introducing a drug of dependence into the body of another person without authorisation (1 year) : <i>s74 Drugs, Poisons and Controlled Substances Act</i></p>	Possible that offence of administering, without consent, any substance capable of interfering substantially with the bodily functions of the other person would apply – may depend on how much alcohol is administered.

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
Qld	Offences of murder (life imprisonment) and manslaughter (life imprisonment)	Administering a poison or other noxious thing endangering life or causing GBH* (14 years) : s322 <i>Criminal Code</i> Administering a poison or other noxious thing to another with intent to injure or annoy (7 years) : ss323(1) <i>Criminal Code</i> Potential gap: these offences may not cover drink spiking with alcohol	Administering a drug with intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person (14 years) : s218 <i>Criminal Code Act</i> Administering a stupefying or overpowering drug with intent to commit an indictable offence (life imprisonment) : s316 <i>Criminal Code</i> Potential gap: these offences may not cover drink spiking with alcohol	Administering a stupefying or overpowering drug with intent to commit an indictable offence (life imprisonment) : s316 <i>Criminal Code</i> Potential gap: these offences may not cover drink spiking with alcohol	Administering a poison or other noxious thing to another with intent to injure or annoy (7 years) : s323(1) <i>Criminal Code</i> Administering a dangerous drug to another person (penalty ranging from 5 years to 25 years depending on the type of drug and to whom it is administered) : ss4 and 6 <i>Drugs Misuse Act</i> ('supply defined to include 'administer')	Potential gap Possible that offence of administering a poison or other destructive or noxious thing with intent to aggrieve or annoy would apply – case-law suggests that whether alcohol qualifies as a 'noxious thing' depends on the quantity in which it is administered.
SA	Offences of murder (life imprisonment) and	Engaging in conduct intending to endanger life (15 years), or intending	Administering a stupefying or overpowering drug or substance with intent to	Administering a stupefying or overpowering drug or substance with intent	Administering a poison or other destructive or noxious thing with intent to injure, aggrieve or	Potential gap Possible that offence of administering a poison or

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
	manslaughter (life imprisonment)	to cause GBH* (10 years), or intending to cause harm (5 years) : <i>s29 Criminal Law Consolidation Act</i>	commit an indictable offence (life imprisonment) : <i>s25 Criminal Law Consolidation Act</i> Even if the above offence does not cover drink spiking with alcohol, it is likely that the general offence of engaging in conduct intending to cause GBH* or harm would apply.	to commit an indictable offence (life imprisonment) : <i>s25 Criminal Law Consolidation Act</i> Even if the above offence does not cover drink spiking with alcohol, it is likely that the general offence of engaging in conduct intending to cause GBH* or harm would apply.	annoy that person (3 years) : <i>s27 Criminal Law Consolidation Act</i> Administering a prescription drug without authorisation (2 years) : <i>s18 Controlled Substances Act</i>	other destructive or noxious thing with intent to aggrieve or annoy would apply – case-law suggests that whether alcohol qualifies as a ‘noxious thing’ depends on the quantity in which it is administered.
WA	Offences of murder (life imprisonment) and manslaughter (20 years)	Causing any substance or thing to be taken by a person with intent to disable or cause GBH* (20 years) : <i>s294 Criminal Code</i> Doing an act resulting in bodily harm to another, or	Administering a stupefying or overpowering drug with intent to commit an indictable offence (20 years) : <i>s293 Criminal Code</i> Administering a drug or other thing with intent to stupefy or	Administering a stupefying or overpowering drug with intent to commit an indictable offence (20 years) : <i>s293 Criminal Code</i> Doing an act with intent to harm which results in bodily harm	No offence – no offences covering administering controlled drugs without authorisation or administering drugs with intent to aggrieve or annoy.	No offence

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
		<p>which is likely to endanger the life, health or safety of another (5 years (2 years if tried summarily)) : <i>ss304(1) Criminal Code</i></p> <p>Doing an act with intent to harm which results in bodily harm to another, or which is likely to endanger the life, health or safety of another (20 years) : <i>ss304(2) Criminal Code</i></p>	<p>overpower in order to have unlawful carnal knowledge of the person (2 years) : <i>s192 Criminal Code</i></p> <p>Doing an act with intent to harm which results in bodily harm to another, or which is likely to endanger the life, health or safety of another (20 years) : <i>ss304(2) Criminal Code</i></p>	<p>to another, or which is likely to endanger the life, health or safety of another (20 years) : <i>ss304(2) Criminal Code</i></p>		
Tas	Offences of murder (life imprisonment) and manslaughter (21 years)	Administering any poison or other noxious thing endangering life or causing GBH* (21 years) : <i>s175</i>	Administering any stupefying or overpowering drug, alcohol or thing with intent to commit an offence (21 years) :	Administering any stupefying or overpowering drug, alcohol or thing with intent to commit an offence (21 years) :	Administering any poison or other noxious thing with intent to injure or annoy (21 years) : <i>s176 Criminal Code</i>	Potential gap Possible that offence of administering a poison or other destructive or noxious thing with intent

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
		<p><i>Criminal Code</i></p> <p>Administering any stupefying or overpowering drug, alcohol or thing with intent to commit an offence (21 years) : <i>s169 Criminal Code</i></p>	<p><i>s169 Criminal Code</i></p>	<p><i>s169 Criminal Code</i></p>	<p>Administering a controlled drug to another person (2 years) : <i>s24 Misuse of Drugs Act</i></p>	<p>to aggrieve or annoy would apply – case-law suggests that whether alcohol qualifies as a ‘noxious thing’ depends on the quantity in which it is administered.</p>
NT	<p>Offences of murder (life imprisonment) and manslaughter (life imprisonment)</p>	<p>Causing a substance to be taken by a person with intent to disable or cause grievous harm (life imprisonment) : <i>s177 Criminal Code</i></p> <p>Reckless conduct that causes: serious danger to the life, health or safety of another person (5 years); grievous harm (7 years);</p>	<p>Administering any stupefying or overpowering drug with intent to commit a crime (life imprisonment) : <i>s176 Criminal Code</i></p> <p>Causing a substance to be taken by a person with intent to disable or cause grievous harm (life imprisonment) : <i>s177 Criminal Code</i></p> <p>Reckless conduct that</p>	<p>Administering any stupefying or overpowering drug with intent to commit a crime (life imprisonment) : <i>s176 Criminal Code</i></p> <p>Causing a substance to be taken by a person with intent to disable or cause grievous harm (life imprisonment) : <i>s177 Criminal Code</i></p>	<p>Administering a dangerous drug to: a child (14 years); any other person (5 years) : <i>s5 Misuse of Drugs Act</i></p>	<p>No offence</p>

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
		death (10 years) : <i>s154 Criminal Code</i>	causes: serious danger to the life, health or safety of another person (5 years); grievous harm (7 years): <i>s154 Criminal Code</i>	Reckless conduct that causes: serious danger to the life, health or safety of another person (5 years); grievous harm (7 years); death (10 years) : <i>s154 Criminal Code</i>		
ACT	Offences of murder (life imprisonment) and manslaughter (20 years)	Administering a stupefying or overpowering drug or injurious substance likely to endanger life or cause GBH* (10 years) : <i>s27 Crimes Act</i> Administering any poison or other injurious substance with intent to injure or cause pain or discomfort (5 years)	Potential gap The offence of administering drugs with intent to commit an indictable offence against the person does not cover sexual offences as they are not classified as offences against the person. Although basic administration offences apply broadly to administration of drugs	Administering a stupefying or overpowering drug or injurious substance intending to commit an indictable offence against the person punishable by at least 10 years imprisonment (15 years) : <i>s27 Crimes Act</i> Potential gap: this offence may not cover drink spiking	Administering a drug of dependence to another person (2 years) : <i>ss169(4) Drug of Dependence Act</i> Administering a prohibited substance to another person (2 years) : <i>ss171(3) Drug of Dependence Act</i>	No offence

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
		<p>: <i>s28 Crimes Act</i></p> <p>Potential gap: these offences may not cover drink spiking with alcohol</p>	<p>(not alcohol), the maximum penalty is 2 years imprisonment.</p> <p>The offence of administering an injurious substance with intent to cause pain or discomfort many apply in some circumstances, but only carries a maximum penalty of 5 years.</p>	with alcohol		

* GBH = grievous bodily harm