

# EVIDENCE OF INTOXICATION IN AUSTRALIAN CRIMINAL COURTS: A COMPLEX VARIABLE WITH MULTIPLE EFFECTS\*

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*This article reports on the second stage of a national study of how the effects of alcohol and other drugs are treated by criminal laws and the criminal justice system. Based on a mixed methods analysis of more than 300 appellate court decisions from all Australian jurisdictions handed down in the period 2010–2014, we identify the multiple points at which legal significance is attached to evidence that the accused, the victim or a witness was ‘intoxicated’ at the time of the alleged commission of a criminal offence. Focusing on the rules and principles endorsed by appellate courts in relation to four key ‘sites’ of criminal justice decision-making — the admissibility of police interviews, the credibility and reliability of witness testimony, adjudication on the criminal responsibility of the accused, and determination of sentence for convicted offenders — we show that the impact of intoxication on the enforcement of the criminal law is complex. There is no single characterisation that can account for the multiple points at which intoxication may need to be assessed, and the divergent ways in which it can impact on adjudication. Depending on a range of site-specific and case-specific considerations, intoxication evidence may expand/contract the parameters of criminal responsibility, and it may yield higher or lower criminal penalties.*

## I INTRODUCTION

Recent years have seen intense policy and law reform debates in most Australian jurisdictions about the relevance of intoxication in the context of decisions about criminal responsibility and punishment.<sup>1</sup> These debates have a long history, and the law’s normative characterisation of intoxication has moved between mitigatory and aggravatory positions, shaped by both common law developments

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1 See Julia Quilter, ‘One-Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravating Factor: Implications for NSW Criminal Law’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81.

and statutory reforms. The topic of the so-called ‘defence’ of intoxication in Australian criminal law has received considerable attention, in the journal literature,<sup>2</sup> and in textbooks,<sup>3</sup> although often in a way that is largely abstracted from specific case contexts. There is a heavy emphasis on normative discussion of the controversial specific/general intent distinction which is central to the rules governing the availability of the intoxication ‘defence’.<sup>4</sup> The multiple other ways in which intoxication evidence impacts on the administration of criminal justice and the operation of the criminal law have been largely ignored in the literature.<sup>5</sup> This article represents the first attempt to illuminate how the concept of ‘intoxication’ is given meaning in Australian appellate courts.

This article is part of a larger study of the ‘knowledges’ and assumptions about the intoxication-violence relationship that are reflected in Australian criminal laws.<sup>6</sup> The study seeks to map and assess the several and diverse ways that the effects of alcohol and other drugs (‘AOD’) are implicated in the construction and enforcement of the criminal law, and the administration of criminal justice generally. The larger ambition is that the generation of a more robust and nuanced empirical foundation than has previously been available in the scholarly literature can improve the quality and integrity of policy-making and law reform in relation to how the criminal law might better meet the needs of the community with

- 2 See, eg, Andrew Hemming, ‘Banishing Evidence of Intoxication in Determining Whether a Defendant Acted Voluntarily and Intentionally’ (2010) 29 *University of Tasmania Law Review* 1; A P Simester, ‘Intoxication is Never a Defence’ [2009] *Criminal Law Review* 3; Julia Tolmie, ‘Intoxication and Criminal Liability in New South Wales: A Random Patchwork?’ (1999) 23 *Criminal Law Journal* 218; Mitchell Keiter, ‘Just Say No Excuse: The Rise and Fall of the Intoxication Defense’ (1997) 87 *Journal of Criminal Law and Criminology* 482; Stephen Gough, ‘Intoxication and Criminal Liability: The Law Commission’s Proposed Reforms’ (1996) 112 *Law Quarterly Review* 335; Jeremy Horder, ‘Sobering Up? The Law Commission on Criminal Intoxication’ (1995) 58 *Modern Law Review* 534; David McCord, ‘The English and American History of Voluntary Intoxication to Negate *Mens Rea*’ (1990) 11 *Journal of Legal History* 372; Alan R Ward, ‘Making Some Sense of Self-Induced Intoxication’ (1986) 45 *Cambridge Law Journal* 247; Paul H Robinson, ‘Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine’ (1985) 71 *Virginia Law Review* 1; Alan D Gold, ‘An Untrimmed “Beard”: The Law of Intoxication as a Defence to a Criminal Charge’ (1976) 19 *Criminal Law Quarterly* 34.
- 3 See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4<sup>th</sup> ed, 2017) 283–303; Thalia Anthony et al, *Waller & Williams Criminal Law: Text and Cases* (LexisNexis Butterworths, 12<sup>th</sup> ed, 2013) ch 15; E Colvin, J McKechnie and J O’Leary, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2015) ch 18.
- 4 See, eg, Bronitt and McSherry, above n 3, 290–33; Colvin, McKechnie and O’Leary, above n 3, 450; Anthony et al, above n 3, 994; Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 566–7; Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 153.
- 5 For an exception, see Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 6<sup>th</sup> ed, 2013) 833. See also the work on intoxication and sentencing undertaken periodically by the New South Wales Judicial Commission and the New South Wales Sentencing Council: Ivan Potas and Donna Spears, ‘Alcohol as a Sentencing Factor: A Survey of Attitudes of Judicial Officers’ (Monograph Series No 8, Judicial Commission of New South Wales, June 1994); New South Wales Sentencing Council, ‘Sentencing for Alcohol-Related Violence’ (Report, March 2009); New South Wales Sentencing Council, ‘Alcohol and Drug Fuelled Violence’ (Report, August 2015).
- 6 Julia Quilter et al, ‘New National Study Examines Intoxication in Criminal Law’ (2015) 2 *Law Society of New South Wales Journal* 76; Julia Quilter et al, ‘The Definition and Significance of “Intoxication” in Australian Criminal Law: A Case Study of Queensland’s “Safe Night Out” Legislation’ (2016) 16(2) *Queensland University of Technology Law Review* 42.

respect to the attribution of criminal responsibility for AOD-related anti-social behaviour, harms and risks.

The first stage of our larger study focused on the *legislative* approach to intoxication, by examining the definition and significance of intoxication in Australian criminal law statutes and regulations. We identified and analysed more than 500 criminal law provisions that attach significance to a person's intoxication, for a wide variety of purposes — from enlivening a coercive police power to influencing the sentencing process.<sup>7</sup>

This article reports on the second stage of the study, which is concerned with illuminating *judicial* approaches to intoxication, with a focus on appellate courts. Although the legislative arm of government has been more heavily involved in the *creation* of criminal laws that attach significance to intoxication,<sup>8</sup> the judiciary remains an important part of the criminal justice system in relation to the *operation* of many of these laws (in addition to relevant statutory provisions and common law rules), as well as making assessments in relation to the relevance of intoxication evidence. Magistrates and judges are regularly called upon to adjudicate on the relevance that should be attached to intoxication evidence, whether for assessing evidence admissibility or weight, the utility or otherwise of warnings and directions, adjudicating on criminal responsibility or deciding on the sentence to be handed down. We recognise appellate courts as an authoritative voice of 'knowledge' on the nature and relevance of intoxication for criminal law purposes, and therefore, equally deserving of scholarly attention. Their public pronouncements are designed not only to influence future criminal law enforcement and court room practices, but also to communicate with and educate the wider community about the significance of alcohol and drug use for the criminal law.

In conceiving the larger study of which this article is a part, we identified appellate decisions in criminal cases as a fertile source of data regarding the manner in which the criminal law concept of intoxication is interpreted and operationalised. We recognised that the judiciary continues to play an important role in monitoring past, and guiding future, approaches to the treatment of intoxication evidence in criminal trials. In deciding how to 'access' the judicial dimension of how intoxication is treated in Australian criminal law, we determined that a traditional doctrinal approach to case law research, in which we limited ourselves to locating, describing and discussing the rules contained in authoritative precedents, would be inadequate to meet our objectives.<sup>9</sup> We concluded that a more wide-ranging and systematic review, across all Australian jurisdictions, would support a valuable contribution to the literature. This article provides a snapshot of how and where 'intoxication' features in higher appellate court decisions in criminal cases. It illuminates how appellate courts approach the concept of intoxication,

7 See Julia Quilter et al, 'Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of "Intoxication" in Australian Legislation' (2016) 39 *University of New South Wales Law Journal* 913.

8 Ibid.

9 Cf Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2015) ch 6.

in criminal cases where the use of alcohol and/or other drugs form part of the evidence before the court, and how they guide first instance trial and sentencing courts to approach intoxication evidence.

To these ends, this article reports on the collection, categorisation and analysis of more than 300 higher appellate court decisions in Australia, in which there was evidence that the accused, the victim and/or a witness was intoxicated at the time of the commission of the offence. Its primary aims are to: (i) determine how and where intoxication evidence arises for consideration in the judicial phase of criminal justice administration; (ii) identify the rules, practices and tests for assessing intoxication that are endorsed and employed by appellate courts in relation to the relevance of intoxication and how the state of 'intoxication' should be defined and evidenced; and (iii) assess the role that intoxication plays in shaping the operational parameters of criminal responsibility and influencing the nature and severity of sentences handed down.

Our chief conclusions are that: decisions about intoxication are made at multiple points in the criminal court process; the absence of a widely understood definition of intoxication for criminal law purposes produces a variety of approaches to establishing whether an accused person, victim or witness was relevantly intoxicated; and, contrary to the dominant contemporary political narrative that adverse moral judgment should always attach to criminal offending associated with alcohol and drug use, Australian courts recognise the complex relationship between intoxication and criminalisation. Depending on a range of site-specific and case-specific considerations, intoxication evidence may expand or contract the parameters of criminal responsibility, and it may yield higher or lower criminal penalties.

## II METHODOLOGY

We collected all decisions of the highest criminal appellate court in each state and territory,<sup>10</sup> and the High Court of Australia, which were handed down in a five-year period from January 2010 to December 2014,<sup>11</sup> in which the intoxication of the accused, the victim or a witness formed part of the evidence in the case. We determined that a five-year time period would yield a data-set of a sufficient size and composition to illustrate contemporary appellate court approaches to intoxication evidence across the range of evidentiary, substantive offence and

10 Australian Capital Territory Court of Appeal, New South Wales Court of Criminal Appeal, Northern Territory Court of Criminal Appeal, Queensland Court of Appeal, South Australian Court of Criminal Appeal, Tasmanian Court of Criminal Appeal, Victorian Court of Appeal, Western Australian Court of Appeal.

11 We note that two Australian jurisdictions made relevant changes to sentencing laws during 2014. In New South Wales and Queensland self-induced intoxication was expressly excluded as a mitigating factor: see New South Wales Sentencing Council, 'Alcohol and Drug Fuelled Violence', above n 5. Because these changes occurred late in the period under review they will not be reflected in New South Wales Court of Criminal Appeal and Queensland Court of Appeal decisions in our data-set.

sentencing questions identified in our pilot research — in the context of conviction appeals, sentence appeals, and Crown appeals against sentence.

While noting that we did not set out to select a representative sample of Australian criminal cases,<sup>12</sup> we do acknowledge the limitations of including only higher appellate court decisions in our data-set, in a context where the vast majority of criminal law matters are finalised at the lower levels of the criminal court hierarchy, without appeal to a State/Territory Court of Appeal/Court of Criminal Appeal,<sup>13</sup> and where most appeals from Magistrates/Local Courts are heard by single judge intermediate courts (such as the Victorian County Court or the WA District Court). Nonetheless, in our view, so little empirical research has been done on how the concept of ‘intoxication’ operates in Australian criminal courts that, even with these limitations, the study represents an important and original contribution to the literature.

To ensure comprehensive inclusion of all publicly available judgments handed down in the review period (whether officially reported or not), the primary mechanism for identification of relevant cases was online searching using the web-based open access Austlii database. Secondary searches were conducted using LexisNexis and relevant court websites.<sup>14</sup> We searched each of the nine Australian jurisdictions in turn, for the identified time frame (2010–2014). Our primary search term was ‘intoxication’, with variations employed to maximise search accuracy.<sup>15</sup> Search results were filtered to ensure that only criminal law cases were included, and that all cases did, in fact, involve evidence of intoxication in some way.<sup>16</sup> A full list of cases is contained in Appendix A.

- 12 The rules governing access to appeal (whether by right or with leave) obviously influence the types of matters that come before higher appellate courts, and it is not possible to assess whether the frequency with which certain issues recurred in our sample is illustrative of patterns at first instance trials or sentencing hearings. We note that the appellate court decisions we reviewed regularly summarised extracts from jury directions, trial transcripts, expert evidence and sentencing remarks, and so, to that extent, provide something of a ‘window’ into how intoxication evidence is addressed in lower and intermediate courts.
- 13 Given that intoxication features in numerous criminal law statutes and given the available evidence of the involvement of AOD use in a significant proportion of the high-volume offences in lower courts (eg driving offences, public order offences, assaults; see Quilter et al, ‘Criminal Law and the Effects of Alcohol and Other Drugs’, above n 7), how intoxication evidence plays out in this major tier of the criminal court system will be an important topic for future research.
- 14 See, eg, the cases database available on the website of the Supreme Court of Queensland: Supreme Court Library Queensland, (25 July 2017) CaseLaw <<http://www.sclqld.org.au/caselaw/>>.
- 15 Search terms used in combination with ‘intoxication’ included ‘victim’, ‘offence element’, ‘mitigating’, ‘aggravating’ and ‘sentencing’. Alternative search terms were used to pick up cases where intoxication was in issue even if the word was not used in the judgment (eg ‘drugs’, ‘alcohol’ and ‘intoxicating substances’).
- 16 In a small number of criminal cases the judgment had used the word ‘intoxication’ (or a variation) — eg in one case, to note that the accused was *not* intoxicated at the time — but closer review confirmed that the case was not one in which there was any evidence of the accused, the victim or a witness being intoxicated. Such cases were excluded from the data. A case qualified for inclusion if it included evidence of accused/victim/witness intoxication. We did not additionally require that intoxication was directly germane to a ground of appeal for a case to be included. One case was included even though the accused was not intoxicated at the time of the offence in question: *Bugmy v The Queen* (2013) 249 CLR 571 (*‘Bugmy’*). This decision of the High Court of Australia was included because of its wider significance on the sentencing of intoxicated offenders, specifically Indigenous offenders (see discussion below).

The collected cases (n = 327) were analysed using a two-step process. The first *quantitative* stage involved reading and categorising each case according to jurisdiction, offence type,<sup>17</sup> type of appeal (conviction, sentence or Crown appeal) and the purpose(s) for which intoxication evidence was said to be relevant. In relation to the purposes for which intoxication evidence was considered relevant, we used a 12-part typology (see Figure 1). In addition to allowing us to determine the relative frequency with which different types of intoxication inquiries were undertaken, this exercise also allowed us to identify sub-sets of cases for the second stage of *qualitative* analysis (on which we expand below).

**Figure 1: Purposes of Intoxication Evidence in Criminal Cases**

Accused intoxicated	Victim intoxicated	Witness intoxicated
<ul style="list-style-type: none"> <li>• During police custody/interview</li> <li>• Credibility/reliability</li> <li>• ‘Contributing’ to offence</li> <li>• Element of offence*</li> <li>• Aggravating element offence</li> <li>• Negative mens rea or support defence</li> <li>• Sentencing</li> <li>• Other</li> </ul>	<ul style="list-style-type: none"> <li>• Credibility/reliability</li> <li>• Relevant to absence of consent (sexual assault)</li> <li>• Sentencing</li> </ul>	<ul style="list-style-type: none"> <li>• Credibility/reliability</li> </ul>

\* Or to support proof of an element of an offence

### III QUANTITATIVE FINDINGS

Although the word ‘intoxication’ has traditionally been associated with the effects of *alcohol* consumption, it is now routinely used more broadly in Australian criminal laws to refer to the effects of alcohol and a long list of other drugs.<sup>18</sup> We found, however, that alcohol was the drug that was most frequently involved in the cases we reviewed. The majority of the cases in our data-set were concerned with intoxication by *alcohol* alone (220 cases or 67 per cent of the total). Cannabis was involved in 41 cases and amphetamine/methamphetamine in only 18 cases. 34 cases involved multiple substances (usually including alcohol). Other drugs

17 Where the case involved multiple charges, we categorised according to the most serious charge (as defined by maximum penalty).

18 See, eg, s 428A of the *Crimes Act 1900* (NSW) states: “‘intoxication’ means intoxication because of the influence of alcohol, a drug or any other substance”, and “‘drug’ includes a drug within the meaning of the *Drug Misuse and Trafficking Act 1985* and a poison, restricted substance or drug of addiction within the meaning of the *Poisons and Therapeutic Goods Act 1966*”; see also Quilter et al, ‘The Definition and Significance of “Intoxication” in Australian Criminal Law’, above n 6, 47–8.

featured very rarely.<sup>19</sup> Because our methodology focused on appellate decisions, we are unable to claim that our data-set was necessarily representative of the frequency with which different drugs are associated with criminal charges. However, in light of the intense media scrutiny, in recent years, of the role of ‘ice’ (crystal methamphetamine) in contributing to criminal violence,<sup>20</sup> it is worth noting that this category of illicit drug featured in just six per cent of cases in our sample.<sup>21</sup> Alcohol was 10 times more likely to be the drug involved in criminal appeal cases that raised intoxication issues.<sup>22</sup>

Table 1 summarises the distribution of the sample of 327 cases across jurisdictions and offence type. More than three-quarters of the cases involved serious charges of homicide (25 per cent), non-fatal violence (27 per cent) or sexual offences (28 per cent). Only a relatively small number of cases arose out of the driving context, and the majority of these involved serious charges where drunk (or drug) driving had caused serious harm or death. Although worth noting, the concentration of cases at the more serious end of the spectrum is unsurprising given that the seriousness of the crime(s) of which a person has been convicted and/or length of sentence are likely to influence decisions about whether to appeal.

Table 2 summarises the outcome of our categorisation of the cases according to the 12-part typology of *purposes* for which intoxication evidence may be relevant. For offender and victim intoxication respectively, Tables 3 and 4 cross-match the quantitative data according to offence type and the purpose for which intoxication evidence was considered.

19 Heroin (seven), cocaine (two), methadone (two), valium (two), oxycontin, zolpidem (‘Stilnox’), benzodiazepine (‘Xanax’), flunitrazepam (‘Rohypnol’), LSD, venlafaxine (‘Effexor’), anabolic steroid. Elsewhere, we have examined whether trial and appellate processes and decision-making in relation to intoxication are sufficiently sensitive to the different effects of different drugs: Julia Quilter and Luke McNamara, ‘The Meaning of “Intoxication” in Australian Criminal Cases: Origins and Operation’ *New Criminal Law Review* (forthcoming).

20 See, eg, David Meddows, ‘Ice Killers: How the Toxic Drug Affects the Brain to Fuel Rage and Violence’, *The Daily Telegraph* (online), 7 December 2015 <<http://www.dailytelegraph.com.au/news/nsw/ice-killers-how-the-toxic-drug-effects-the-brain-to-fuel-rage-and-violence/news-story/f4b941de52807a7a811297f4b3c486f3>>.

21 Noting that the data-set consists of appellate decisions handed down in the period 2010–2014, we acknowledge that there may be a ‘lag’ between the increase in ice usage that has occurred in Australia during the early 2010s (Commonwealth of Australia, Department of the Prime Minister and Cabinet, ‘National Ice Action Strategy 2015’ (Report, 2015) 9) and the appearance of ice-related intoxication cases in appellate courts, such that the proportion of cases where methamphetamine features may be higher in the second half of the 2010s and the future.

22 For a review of the evidence on the relationship between violence, alcohol and other drugs, see Julia Quilter et al, ‘“Intoxication” and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks’ (Report, Australian Institute of Criminology, forthcoming).

**Table 1: Australian Criminal Appeal Decisions Featuring Intoxication Evidence, 2010–2014: Offence Type x Jurisdiction**

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	HCA	Total
<b>Homicide</b>	1	21	2	26	3	1	13	12	2	<b>81</b>
<b>Sexual/Indecent assault</b>	1	22	3	12	6	0	17	10	0	<b>71</b>
<b>Child sexual assault</b>	0	4	0	0	3	1	4	7	0	<b>19</b>
<b>Assaults</b>	4	19	4	18	5	5	19	13	2	<b>89</b>
<b>Driving harms</b>	1	9	0	4	2	2	1	3	0	<b>22</b>
<b>Property*</b>	1	12	0	4	3	4	5	4	0	<b>33</b>
<b>Drug</b>	0	0	0	2	0	0	0	1	0	<b>3</b>
<b>Other</b>	0	2	0	3	2	0	0	2	0	<b>9</b>
<b>Total</b>	<b>8</b>	<b>89</b>	<b>9</b>	<b>69</b>	<b>24</b>	<b>13</b>	<b>59</b>	<b>52</b>	<b>4</b>	<b>327</b>

\* This category includes ‘hybrid’ property/violence offences such as robbery, and property damage offences such as arson.

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

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



Table 3: Accused's Intoxication: Offence Type x Purpose

	Interview/ police detention	Credibility/ reliability	'Contributed' to offence	Core element of offence*	Aggravating element	Negative elements/ defence	Sentencing	Other
Homicide	3	6	2	0	0	42	24	4
Sexual Assault	2	3	6	4	0	9	19	4
Child Sexual Assault	1	1	3	0	0	1	10	2
Assaults	3	10	15	0	1	12	46	5
Driving harm	0	0	1	2	3	0	15	1
Property	2	6	0	0	0	0	22	3
Drugs	2	0	0	0	0	1	0	0
Other	1	1	0	2	0	1	7	4
<b>Total</b>	<b>14</b>	<b>27</b>	<b>27</b>	<b>8</b>	<b>4</b>	<b>66</b>	<b>145</b>	<b>23</b>

\* Or to support proof of an element of an offence.

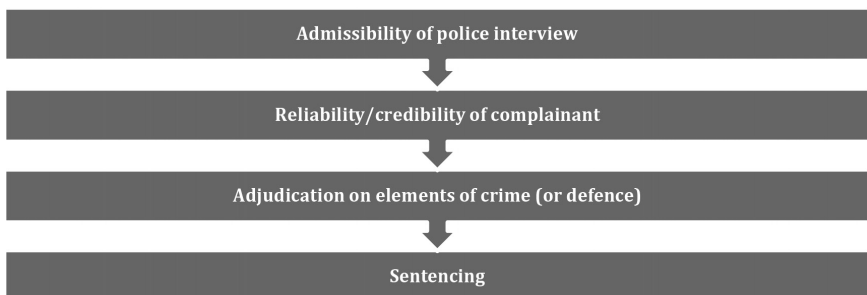
**Table 4: Victim’s Intoxication: Offence Type x Purpose**

	Credibility/ reliability	Element of offence (consent)	Sentencing
<b>Homicide</b>	2	0	4
<b>Sexual Assault</b>	21	16	10
<b>Child Sexual Assault</b>	2	2	4
<b>Assaults</b>	1	0	2
<b>Driving harm</b>	0	0	0
<b>Property</b>	2	0	1
<b>Drugs</b>	0	0	0
<b>Other</b>	0	1	0
<b>Total</b>	<b>28</b>	<b>19</b>	<b>21</b>

As anticipated, the context in which the relevance of intoxication was most frequently considered was sentencing. The total sample (n = 327)<sup>23</sup> included 134 appeals against convictions, 184 appeals against sentence and 45 Crown appeals against sentence.<sup>24</sup> Also expected was the large number of cases (66) in which evidence of the accused’s intoxication was said to be relevant to mens rea elements or a defence. There were also a significant number of cases in contexts which feature less commonly in policy debates (and scholarship) on the relevance of intoxication evidence.

In 71 cases the relevance of intoxication to the credibility and/or reliability of a person’s testimony (whether accused, victim or witness) was in issue. In 68 instances the relevance of the intoxication of the *victim* was the subject of consideration. The large majority of such cases involved sexual offences. The approach, attitudes and guidance offered by appellate courts in these contexts will

**Figure 2: Selected Sites of Intoxication Evidence in Criminal Courts**



23 Some cases involved more than one type of appeal (eg conviction and sentence).

24 Sentencing appeals constitute the majority of the criminal law case-load of higher appellate courts: see David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6<sup>th</sup> ed, 2015) 279–80.

be analysed in more detail below. Finally, our sample included cases in which the court considered the admissibility of evidence gathered during police interview with an intoxicated suspect. Although not large in number, we identified these cases as warranting closer analysis because this ‘site’ is so rarely one that attracts scholarly attention, and because it bears out our starting premise that assessments about whether a person was/is intoxicated, and the significance of this ‘state’, are made at multiple points in the administration of criminal justice.

Based on these preliminary quantitative analyses and categorisations, we identified four ‘sites’ for closer qualitative analysis (see Figure 2), a selection process that was influenced by a range of factors. The *frequency* with which they occurred in the data-set, and their *prominence* in policy and law reform debates, meant that we chose to investigate further the following two categories:

- (i) appeals from trials at which evidence of the accused’s intoxication was said to be relevant to the accused’s guilt (or otherwise), including cases in which the accused had raised a ‘defence’ of intoxication (going to voluntariness or mens rea) or where intoxication evidence was considered relevant in relation to a discrete full or partial defence (eg provocation); and
- (ii) sentence appeals (defendant or Crown) in assault and sexual assault cases,<sup>25</sup> in which the court addressed the relevance (if any) of the defendant’s intoxication at the time of the commission of the offence as a potential mitigating or aggravating factor.

We also selected for closer analysis two categories of cases because the issues they raise have been relatively *invisible* in debates over the criminal law significance of intoxication:

- (iii) conviction appeals in which a central issue was the admissibility of statements made by a suspect during a police interview conducted at a time when s/he was intoxicated; and
- (iv) conviction appeals in sexual offence cases in which the intoxication of the victim was considered in relation to her/his reliability and credibility as a complainant and/or in relation to proof of the absence of consent.

#### IV QUALITATIVE ANALYSIS OF SELECTED SITES

We have deliberately chosen four different points in the ‘sequence’ of criminal justice decision-making as our sites for closer analysis of how intoxication is conceived and how it influences adjudication: pre-trial police interviews; assessments of witness credibility and reliability, specifically in sexual assault

25 We determined that reviewing all cases in our data-set that fell into these two major offence categories (n = 179) would provide us with a sufficient sub-sample to identify jurisdictional patterns of similarity/difference, as well as the opportunity to consider whether there was any evidence of differences in the significance attached to offender intoxication as between non-fatal violence offences and sexual offences.

trials; the assessment of criminal responsibility, including the availability of defences; and sentencing. Each of the sites could usefully be the subject of article-length treatment — given, as we noted earlier, their relative invisibility in the scholarly literature on intoxication and criminal law. However, it is not our aim here to provide a comprehensive overview of the laws throughout Australia that pertain to, respectively, police interviews, sexual assault trials, responsibility/defences and sentencing. Such a treatment is neither feasible nor necessary, given the aims of this article. Rather, we seek to produce novel insights about the concept of intoxication in Australian criminal law, through the ‘side-by-side’ analysis of four sites of criminal justice decision-making that are commonly treated in the literature (if at all) as discrete settings where intoxication evidence may arise.<sup>26</sup> Two key insights are generated from this approach. First, we are able to show that definitional uncertainty regarding what is meant by ‘intoxication’ exists across the full spectrum of criminal justice decision-making from police interviewing to sentencing. Second, we are able to draw attention to the fact that a recurring feature of the influence that intoxication exerts, across multiple decision-making ‘sites’, is that it is often a ‘double-edged’ sword: evidence of intoxication can both facilitate and impede convictions, and raise and lower penalties.

In this study, we have actively resisted the familiar impulse to move swiftly to normative proscriptions and law reform recommendations. We assert that mapping exercises and foundational empirical analyses of the sort presented in this article — involving the collection, presentation and analysis of original quantitative and qualitative data on the operational concept of ‘intoxication’ — are an essential pre-condition to sound evaluation and reform, as well as being important contributions in their own right. We hope that our study will encourage more detailed site-specific studies into how the conception of intoxication is implicated in criminal court adjudication and other decision-making points in criminal justice administration and that it can also make a useful contribution to future policy debates and sober assessment of law reform proposals.

To summarise, the discussion that follows is designed to do two things. First, we want to provide further (selective) detail to demonstrate the point we have already made about the multiple decision-making instances at which criminal courts attend to the relevance of intoxication evidence, including the challenges posed by what is a poorly defined and understood concept. Secondly (and relatedly), against the grain of the traditional tendency to essentialise intoxication questions in criminal law as about exculpation (or mitigation) versus inculpation (or aggravation) — that is, in dichotomous normative terms — we aim to demonstrate that, in practice, intoxication plays a more complex and contingent role in criminal case adjudication and in the ultimate determination of the

26 Brown et al, above n 24, a text with an earned reputation for unsettling casebook conventions, adopts such an approach: 71–4 (drink spiking), 456 (police interviews), 590 (assault), 537–9, 544–54 (public order), 707 (sexual assault), 217–22, 881–6 (intoxication ‘defence’) and 1251 (sentencing). See also Bronitt and McSherry, above n 3: 283–303 (intoxication ‘defence’ and other defences), 687–8 (rape and sexual assault), 688–90 (drink spiking), 906–7 (public order).

parameters of criminal responsibility and severity of punishment. It follows that the policy behind legislative moves to pre-empt or 'fix' the site-specific relevance of intoxication can be confounded by competing considerations and interpretation of the evidence.

### A 'Voluntariness' and Police Interviews

Appellate court consideration of the interviewing by police of intoxicated suspects arises within the legal context of both the laws governing detention and police interrogation, and the rules governing the admissibility of evidence that may have been unfairly or improperly obtained. In the first category, some jurisdictions have enacted legislation that expressly establishes that a person should not be questioned while intoxicated.<sup>27</sup> These provisions recognise that it is inappropriate to interview a suspect while s/he is intoxicated, including because of the risk of unfairness to an accused, but also because it may compromise the accuracy of the fact-finding exercise. In those jurisdictions where no such legislation has been enacted,<sup>28</sup> the legitimacy of questioning of an intoxicated person will be assessed according to the common law on 'voluntariness'.<sup>29</sup>

The mere fact that a person was interviewed while intoxicated does not, however, automatically mandate that any evidence so obtained will be excluded. Particularly where serious crimes of violence are involved, a blanket prohibition on any and all inculpatory evidence gathered during an interview with an intoxicated offender may be regarded as against the interests of justice and the victim. Therefore, the second relevant legal context relates to the judicial discretion to admit or exclude evidence.

In those jurisdictions where the *Uniform Evidence Act* applies,<sup>30</sup> for example, s 138 provides for the exclusion of 'improperly or illegally obtained evidence'. Section 138(2)(a) states that an admission made during questioning is taken to be obtained improperly where the person conducting the questioning knew or should have known that the interview was conducted in circumstances which were 'likely to impair substantially the ability of the person being questioned to respond rationally to the questioning'. In other jurisdictions, comparable

27 See *Police Powers and Responsibilities Act 2000* (Qld) s 423; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 117(1)(k); *Police Administration Act* (NT) s 138(q)(ii); *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(4)(j); *Crimes Act 1914* (Cth) s 23C(7)(e) (applicable to Commonwealth offences and ACT offences that are 'punishable by imprisonment for a period exceeding 12 months' (s 23A(6)).

28 Some jurisdictions have enacted legislation to regulate post-arrest detention and questioning without expressly identifying intoxication as a relevant factor: *Crimes Act 1958* (Vic) s 464A; *Criminal Investigation Act 2006* (WA) s 140. South Australia has a specific regime for 'interviewing suspects with complex communication needs' (*Summary Offences Regulations 2016* (SA) pt 4) but this category expressly excludes communication difficulties caused by intoxication (cl 18(2)).

29 *Sinclair v The King* (1946) 73 CLR 316, 322; *McDermott v The King* (1948) 76 CLR 501, 507; *R v Lee* (1950) 82 CLR 133, 144; *R v Ostojic* (1978) 18 SASR 188, 192.

30 *Evidence Act 1995* (Cth); ACT; *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

legislation or the common law (or a combination of the two) operate to similar effect.<sup>31</sup>

Although the issue of police interviewing of intoxicated suspects arose in our data-set relatively rarely, the available evidence shows that a significant proportion of individuals in police custody after arrest are under the influence of alcohol or other drugs.<sup>32</sup> Therefore, we consider that it is worth considering the guidance offered by appellate courts on this matter, because of its potential relevance to police practice in relation to suspects apprehended and detained by police when intoxicated.

In NSW, express guidance is provided by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) regime for determining the time allowed for questioning a suspect. Section 117(1)(k) provides that ‘any time that is required to allow the person to recover from the effects of intoxication due to alcohol or another drug or a combination of drugs’ is not to count for the purpose of the rules governing the period for which a suspect may be detained for questioning.<sup>33</sup> In the cases we reviewed, such provisions appear to generally operate as a barrier to questioning an intoxicated person. For example, in *Adzioski v The Queen*,<sup>34</sup> the New South Wales Court of Criminal Appeal noted that police had delayed interviewing the suspect due to his level of intoxication, and gave him time to recover before undertaking an electronically recorded interview with him.<sup>35</sup>

However, this was not universally so. In *R v Martin*,<sup>36</sup> the Queensland Court of Appeal considered the admissibility of a police interview with a suspect in light of that State’s equivalent legislation on not questioning an intoxicated suspect,<sup>37</sup> as well as the rules governing the exercise of judicial discretion to admit evidence.<sup>38</sup> Based on a sample taken several hours later it was estimated by a government medical officer that the offender’s Blood Alcohol Concentration (‘BAC’) when he was first interviewed by the police at the scene was approximately 0.311. On appeal, the defendant argued that evidence obtained during this interview should have been excluded for non-compliance with these provisions. The Queensland Court of Appeal did not uphold this ground of appeal, deferring to the trial judge’s discretion to admit the evidence. However, McMurdo P underscored the importance of requiring police officers to comply with their obligations under the Act:

31 *Evidence Act 1929* (SA) s 34KD; *Evidence Act 1977* (Qld) s 130; *R v Ireland* (1970) 126 CLR 321; *R v Swaffield* (1998) 192 CLR 159; *Van der Meer v The Queen* (1988) 82 ALR 10.

32 Sarah Coghlan et al, ‘Drug Use Monitoring in Australia: 2013–14 Report on Drug Use Among Police Detainees’ (AIC Monitoring Report No 27, Australian Institute of Criminology, 2015).

33 See also *Police Powers and Responsibilities Act 2000* (Qld) s 423; *Police Administration Act* (NT) s 138(q)(ii); *Crimes Act 1914* (Cth) s 23C(7)(e).

34 [2013] NSWCCA 69 (5 April 2013).

35 *Ibid* [10]. See also *Butters v The Queen* [2010] NSWCCA 1 (4 February 2010) [7].

36 [2011] QCA 342 (29 November 2011).

37 *Police Powers and Responsibilities Act 2000* (Qld) s 423.

38 *R v Ireland* (1970) 126 CLR 321.

Many judges may well have concluded that matters of public policy requiring police officers to comply with their responsibilities under the Act warranted the exclusion of the contentious evidence in this case, lest police officers be tempted to flaunt the requirements of the Act by taking investigative shortcuts. Further, a jury may place undue weight on the evidence without giving sufficient consideration to its unreliability as evidence of the appellant's true state of mind at the time of the killing because of his gross intoxication at the time of the conversation. Had the decision at first instance been mine, I would have excluded the evidence for these reasons.

But I remain unpersuaded that the judge took into account any wrong consideration in exercising his discretion to admit this evidence.<sup>39</sup>

In Western Australia, where no such legislation is in place,<sup>40</sup> the common law test of 'voluntariness', and the common law rules governing the admissibility of evidence,<sup>41</sup> appears to leave considerable scope for statements made during a police interview to be regarded as admissible, despite evidence that the accused was significantly intoxicated at the time of the interview. For example, in *Western Australia v Silich*,<sup>42</sup> the accused was interviewed at a time when his BAC was estimated to be 0.116. The WA Court of Appeal observed that, '[h]owever, there was no evidence as to the effect which such a level of alcohol would have had upon the appellant's mental faculties at the time of his interview'.<sup>43</sup> The Court endorsed the trial judge's preferred approach which was to watch the police interview video and make his own assessment as to whether the interview was 'voluntary'; i.e. whether Mr Silich was 'capable of: (a) appreciating that he had a choice to speak or remain silent, and was capable of exercising sufficient volition to give effect to what he knew was this right; and (b) understanding the questions put to him and what he was confessing'.<sup>44</sup> The trial judge held that the accused was capable and admitted the evidence. The Court of Appeal found no fault with this approach to voluntariness and did not accept arguments that the evidence ought to have been excluded for being unreliable or unfairly obtained.<sup>45</sup>

This example illustrates that while we have become accustomed, in the high visibility and high-volume context of driving offences, to regard certain BAC levels as incontrovertible 'proof' of (impaired) 'intoxication' for the purposes of criminal responsibility and punishment, they are not determinative (and may not

39 *R v Martin* [2011] QCA 342 (29 November 2011) [24]–[25].

40 No specific legislation in relation to intoxicated suspects and police interviews has been enacted in Western Australia, Victoria, Tasmania, South Australia or the Australian Capital Territory. We recognise that equivalent police practices may be adopted even in the absence of such legislation: see, eg, *Booth v The Queen* [2014] ACTCA 38 (22 August 2014) [22]; *R v Williams* [2014] ACTCA 30 (18 August 2014) [7].

41 *R v Swaffield* (1988) 192 CLR 159; *Van der Meer v The Queen* (1988) 82 ALR 10.

42 (2011) 43 WAR 285.

43 *Ibid* [15].

44 *Ibid* [157].

45 See also *WP v Western Australia* [2011] WASCA 198 (22 September 2011); *Wright v Western Australia* (2010) 43 WAR 1; *Oubid v Western Australia* [2013] WASCA 79 (21 March 2013).

be available) in many criminal justice decision-making contexts. We consider this matter further below.<sup>46</sup>

## B Victim Intoxication in Sexual Assault Cases

While the most common focus of Australian criminal law is accused/offender intoxication, victim intoxication also features prominently, particularly in the context of sexual offences. Our data-set contained a number of instances where the court was concerned with the significance of the victim's intoxication. The vast majority of these were sexual assault or indecent assault matters and included 28 instances where the credibility and/or reliability of the victim was considered. We note that no other offence category revealed such a pattern of concern for the credibility/reliability implications of the victim's intoxication. In addition, there were 19 instances where victim intoxication was considered in relation to proof of non-consent, and 21 instances where the court considered whether the victim's intoxication (and, therefore, vulnerability), was an aggravating factor at sentencing.

In the discussion that follows, we draw attention to three issues where we detected considerable variation in how courts approach evidence of complainant intoxication:

- (i) assessments of the credibility,<sup>47</sup> and reliability,<sup>48</sup> of the complainant's evidence;
- (ii) proof of non-consent; and
- (iii) proof of the offender's knowledge of non-consent.

On the question of credibility and reliability, there is consistent recognition that intoxication is *relevant*. This finding was anticipated. More surprising was the finding of considerable variation in *how* courts characterised the effect of intoxication on credibility/reliability. Some decisions reflect the view that intoxication will necessarily diminish the reliability of a complainant's evidence.<sup>49</sup> By contrast, in others, courts have taken the position that the complainant's intoxication may render her/his account *more* reliable, by offering an explanation other than dishonesty for gaps in the complainant's recall or inconsistencies

46 See Quilter et al, 'Criminal Law and the Effects of Alcohol and Other Drugs', above n 7; Quilter and McNamara, above n 19.

47 The cases in our data-set were concerned with qualitative assessments of a complainant's credibility, rather than technical applications of the rules governing the admissibility of credibility evidence (eg pt 3.7 of the *Uniform Evidence Act*).

48 Although s 165 of the *Uniform Evidence Act*, dealing with unreliable evidence and warnings to the jury, makes no express reference to intoxication or AOD effects, s 165(1)(c) is sufficiently broad in its terms ('evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like') as to include intoxication. See, eg, *R v Moffatt [No 3]* [1999] NSWSC 233 (26 March 1999) [80].

49 See, eg, *Roberts v The Queen* (2012) 226 A Crim R 452, [52]; *Cook v Western Australia* [2010] WASCA 241 (22 December 2010) [68]; *R v Daniel* (2010) 207 A Crim R 449, [50].



in her/his account of events, thereby strengthening the prosecution case.<sup>50</sup> The variations to which we are drawing attention here are not simply attributable to case-to-case factual differences, but appear to be the result of different judicial conceptions of how alcohol and other drugs may impact on perception and recall of events. Two decisions of the South Australia Court of Criminal Appeal illustrate the contrast.

In *R v Daniel*,<sup>51</sup> the Court upheld an appeal against a conviction for rape. One of the grounds of appeal was that the trial judge had erred in directing the jury on the relevance of the complainant's intoxication. Justice Sulan stated:

In my view, the direction failed to adequately instruct the jury that, in considering the reliability of the complainant's evidence, and whether they could be satisfied beyond reasonable doubt of the appellant's guilt upon her evidence, her state of intoxication was relevant. It was relevant to her perception, and to her recall of the events. It was also relevant, when considering her credibility.

In restricting his direction to the question of whether the complainant might have lost her inhibitions, but has now forgotten, or is now unwilling to admit her conduct, the trial judge failed to give a sufficient direction about the relevance of the complainant's state of intoxication.<sup>52</sup>

In *R v Compton*,<sup>53</sup> the Court considered appeals against convictions for the rape of a 14-year-old boy. The Court rejected the appellants' argument that the convictions were unsafe and unsatisfactory given factors said to diminish the complainant's reliability and credibility, including his intoxication.<sup>54</sup> Justice Stanley said:

In my view, the issues surrounding the reliability of the complainant's evidence were not sufficient to preclude satisfaction of the appellants' guilt to the requisite standard. They were matters to be considered in assessing whether the charges had been proved to the requisite standard, but did not per se, preclude a finding of guilt. Further, the inconsistencies identified on the evidence could all be explained by the complainant's youth, *intoxication at the time*, sense of shame, his fear of not being believed, and the nature of the ordeal he had endured as a teenage boy of 14 years of age.<sup>55</sup>

On the question of proof of non-consent, most Australian jurisdictions have enacted provisions which expressly identify victim intoxication as a condition that vitiates or may vitiate consent.<sup>56</sup> Such provisions recognise that in some circumstances a complainant may not have the capacity to freely and voluntarily

50 See, eg, *R v Compton* (2013) 237 A Crim R 177, [159]–[162]; *Bray v The Queen* (2014) 46 VR 623; *R v O'Loughlin* [2011] QCA 123 (10 June 2011) [18].

51 (2010) 207 A Crim R 449.

52 *Ibid* [50]–[51].

53 *R v Compton* (2013) 237 A Crim R 177.

54 The appeals were upheld on another ground.

55 *R v Compton* (2013) 237 A Crim R 177, [162] (emphasis added).

56 *Crimes Act 1900* (NSW) s 61HA(6)(a); *Crimes Act 1958* (Vic) s 34C(2)(e); *Crimes Act 1900* (ACT) s 67(1)(e); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d). No such provisions have been enacted in Queensland or Western Australia; however, as will be discussed here, it is not obvious that complainant intoxication evidence has a markedly different impact on the conduct of rape trials in these states.

consent due to her/his intoxicated state. They may also be said to operate to address a range of stereotypes including those of jurors, demonstrated in mock jury studies, in which jurors are more likely to attribute greater responsibility and blameworthiness to complainants who are intoxicated.<sup>57</sup> In relation to the offender's knowledge of non-consent, each Australian jurisdiction has imposed either complete or partial limits on whether *offender* intoxication can be taken into account either as a result of either specific provisions governing the mens rea for sexual assault,<sup>58</sup> or general rules which exclude the intoxication 'defence'<sup>59</sup> in cases of 'general intent' crimes (a category that includes sexual assault).<sup>60</sup>

On the implications of victim intoxication for proof of non-consent and the accused's knowledge of non-consent, we detected a degree of divergence in attitude and approach in the cases in our data-set. Certainly, in some cases, the judicial approach seemed to reflect the policy reflected in the statutory provisions just mentioned.<sup>61</sup> For example, in *Still v The Queen*,<sup>62</sup> the complainant's intoxication was seen as supporting the Crown's ability to prove non-consent:

The complainant was heavily affected by alcohol, incoherent in her speech shortly before entering the taxi and probably bordering upon being comatose. These were significant aspects bearing upon the giving of consent to sexual activity with the Appellant, who was a complete stranger.<sup>63</sup>

However, surprisingly, and sometimes despite the legislative provisions that are underpinned by a contrary policy purpose,<sup>64</sup> some cases appeared to validate the position that a person can be both extremely intoxicated and nonetheless consenting to sexual intercourse, even in the face of her/his claim that s/he was not consenting. In *Mitic v The Queen* the Victorian Court of Appeal endorsed the following passage from the Queensland Court of Appeal's decision in *R v Francis*:

It is not correct as a matter of law that it is rape to have [sexual intercourse with] a woman who is drunk who does not resist because her submission is due to the fact that she is drunk. The reason why it is not is that that at least includes the case where the [intercourse] is consensual notwithstanding that the consent is induced by excessive consumption of alcohol. The critical question in this case

57 See, eg, Emily Finch and Vanessa E Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) 45 *British Journal of Criminology* 25. Studies have also found that police and prosecutorial discretion are likely to be exercised against proceeding where the complainant has been drinking or using drugs: Statewide Steering Committee to Reduce Sexual Assault, 'Study of Reported Rapes in Victoria 2000–2003' (Summary Research Report, Office of Women's Policy, Department for Victorian Communities, July 2006) [119].

58 *Crimes Act 1900* (NSW) s 61HA(3)(e); *Crimes Act 1958* (Vic) s 37H(1)(a).

59 *Crimes Act 1900* (NSW) pt 11A; *Criminal Law Consolidation Act 1935* (SA) pt 8; *Criminal Code Act 1899* (Qld) s 28; *Criminal Code Act Compilation Act 1913* (WA) s 28; *Criminal Code Act 2002* (ACT) ch 2 pt 2.3 div 2.3.3; *Criminal Code Act 1983* (NT) pt IIAA div 3 sub-div 2; *Criminal Code Act 1924* (Tas) s 17; *Criminal Code Act 1995* (Cth) pt 2.3 div 8.

60 On the specific/general intent distinction, see above n 4.

61 See, eg, *R v Simon* [2010] VSCA 66 (31 March 2010) [23]; *Still v The Queen* [2010] NSWCCA 131 (23 June 2010); *Singh v Western Australia* [2012] WASCA 262 (11 December 2012).

62 [2010] NSWCCA 131 (23 June 2010).

63 *Ibid* [66].

64 *Crimes Act 1900* (NSW) s 61HA(3)(e); *Crimes Act 1958* (Vic) s 37H(1)(a).

was whether the complainant had, by reason of sleep or a drunken stupor, been rendered incapable of deciding whether to consent or not.<sup>65</sup>

Such an approach is also reflected in the recommended direction in the *New South Wales Criminal Court Bench Book*:

In considering whether the Crown has proved beyond reasonable doubt that [the complainant] did not consent you may have regard to the following matters if you have found them proved on the evidence before you:

[T]hat the complainant had sexual intercourse while substantially intoxicated by alcohol or any drug ...

It does not follow simply because you find that fact proved that you should be satisfied beyond reasonable doubt that the complainant did not consent, but it is a relevant fact that you should consider in deciding whether the Crown has proved this element [non-consent] of the offence as it must do so before you can convict the accused.

If the Crown fails to prove that the complainant was not consenting, the accused is “not guilty” of this charge.<sup>66</sup>

It is clear, then, that the statutory guidance that is offered in most Australian jurisdictions has not produced a consistent practice of treating complainant intoxication as synonymous with the absence of consent. It might be said that this is unsurprising given the qualified language of relevant legislative provisions. For example, s 61HA(6)(a) of the *Crimes Act 1900* (NSW) states that ‘[t]he grounds on which it *may* be established that a person does not consent to sexual intercourse include: (a) if the person has sexual intercourse while *substantially intoxicated* by alcohol or any drug’.<sup>67</sup> If a person who is ‘substantially intoxicated’ (we will return directly to the question of what this phrase means) can nonetheless be found to have consented, it is appropriate to ask whether such provisions have any effect on the conduct of a sexual assault trial or the nature of the inquiries therein. There may be said to be symbolic and educational benefits in such legislation — for judges, juries and the wider community. However, the manner in which they have been drafted and interpreted means that the central inquiry in rape/sexual assault trials is whether the Crown has established an absence of ‘free and voluntary’ consent or agreement.<sup>68</sup> It is not obvious that the Crown derives any significant benefit from statutory provisions that address victim intoxication.

65 *R v Francis* [1993] 2 Qd R 300, 305, cited in *Mitic v The Queen* [2011] VSCA 373 (30 November 2011) [24]; See also *Jones v The Queen* [2010] NSWCCA 117 (4 June 2010).

66 Judicial Commission of New South Wales, ‘Criminal Trial Courts Bench Book’ (Bench Book, Judicial Commission of New South Wales, October 2002) [5–1566] <[https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual\\_intercourse\\_without\\_consent.html#p5-1566](https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual_intercourse_without_consent.html#p5-1566)>.

67 (Emphasis added). Note that this provision that provides that intoxication ‘may’ vitiate consent can be contrasted with the unequivocal language of s 61HA(4)(b) dealing with a complainant who is unconscious or asleep: ‘A person *does not consent* to sexual intercourse ... if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep’ (emphasis added).

68 *Crimes Act 1900* (NSW) s 61HA(2); *Crimes Act 1958* (Vic) s 34C(1); *Crimes Act 1900* (ACT) s 67(1); *Criminal Code Act 1924* (Tas) s 2A(1); *Criminal Code Act 1983* (NT) s 192(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

Indeed, to the extent that they encourage complainant candour and disclosure about their intoxication — on the basis that this evidence will assist in proving at least one element of the prosecution case (i.e. non-consent) — such evidence also has the potential to weaken the Crown case by providing the defence with a basis on which to impugn the complainant’s reliability or credibility. This is one of the ways in which evidence of complainant intoxication may be said to be a double-edged sword in sexual assault cases. We expand on this characterisation below.

One of the further findings of our case analysis relates to the failure to define the state of intoxication required to ‘trigger’ provisions such as those contained in s 61HA(6)(a) of the *Crimes Act 1900* (NSW) (consent may be negated where the person is ‘substantially intoxicated by alcohol or drugs’). There is no definition of ‘intoxicated’ — let alone ‘*substantially* intoxicated’ — for the purposes of this section. In the cases reviewed, the available evidence of the victim’s intoxication was often limited. It was rare for a BAC reading or expert evidence on the likely effects of AOD consumption to be available. Intoxication evidence often took the form of the victim’s self-report on how much s/he had consumed and/or how s/he recalled feeling at the time of the offence.

Understandably, sexual assault victims often used imprecise colloquial language to convey their degree of intoxication. The following examples are illustrative:<sup>69</sup>

- ‘pretty drunk’;<sup>70</sup>
- ‘starting to feel out of it’, ‘never felt that drunk before in [her] life’;<sup>71</sup>
- ‘when asked to describe how intoxicated she was on a scale of 1 to 10, she described herself as being a 10’;<sup>72</sup>
- ‘She described herself as being “quite merry”, but not so much so as to have an impaired memory of what happened’;<sup>73</sup>
- ‘She said at this stage she was still “very drunk” and on a scale of one to ten she estimated she was at about eight to nine’;<sup>74</sup>
- ‘In evidence she said that, by this time, she had drunk between five and eight cans of a mixed alcohol drink and was “a bit drunk”’;<sup>75</sup>
- ‘pretty drunk’, ‘definitely tipsy drunk’, ‘extremely drunk’;<sup>76</sup>
- ‘very stoned’ [marijuana];<sup>77</sup>

69 See also Quilter and McNamara, above n 19.

70 *Roberts v The Queen* (2012) 226 A Crim R 452, [6].

71 *Amato v The Queen* [2013] VSCA 346 (3 December 2013) [22].

72 *R v Almotared* [2011] QCA 128 (17 June 2011) [11].

73 *R v O’Loughlin* [2011] QCA 123 (10 June 2011) [3].

74 *Jones v The Queen* [2010] NSWCCA 117 (4 June 2010) [16].

75 *DPP (Vic) v Werry* (2012) 37 VR 524, 527 [9].

76 *R v McGuire* [2013] QCA 290 (4 October 2013) [2]–[3], [6].

77 *R v Elomari* [2012] QCA 27 (28 February 2012) [5].

- ‘When asked to describe how intoxicated she was out of 10, she replied “nine”’,<sup>78</sup>
- ‘I was very drunk and tired’.<sup>79</sup>

Given the imprecise and subjective colloquial nature of these expressions to describe both the presence and extent of intoxication, a significant issue arises as to how such terms and descriptions are *translated* into legal significance, so as to contribute to the resolution of important questions such as consent, reliability and credibility.

Elsewhere,<sup>80</sup> employing a theoretical framework drawn from the work of Mariana Valverde,<sup>81</sup> and Arlie Loughnan,<sup>82</sup> we have argued that juries are frequently directed by judges (and legal practitioners) to draw on ‘common knowledge’ or ‘lay knowledge’ about AOD in order to give meaning to the legal concept of intoxication. We have questioned whether this is an appropriate foundation for making decisions about complex cognitive functions of the sort that tribunals are regularly required to make — like intention formation where the accused was intoxicated at the time of the commission of a serious violent crime, or, for present purposes, like the giving of consent to sexual intercourse where the complainant was intoxicated.

In the context of sexual assault trials where consent is in issue, an additional reason why self-reporting and lay conceptions of intoxication are operative and influential is that there may be a gap between what is understood about the effects of alcohol and other drugs — even by scientific experts — and the question to be answered regarding consent. The point is illustrated by one of the rare cases in our data-set in which there was ‘objective’ evidence of the complainant’s level of intoxication:<sup>83</sup>

The highest the remaining evidence went was that the complainant was significantly drunk at the time of intercourse, possibly with a blood-alcohol concentration as high as between 0.165% and .2%, and stumbling and repeating her speech. But, as Dr Odell said, he could not venture an opinion as to whether that had deprived the complainant of the capacity to consent.<sup>84</sup>

It is clear that, despite decades of well-intentioned progressive statutory law reform (including on the relevance to be attached to intoxication),<sup>85</sup> evidence of victim intoxication can (still) be a double-edged sword in sexual assault cases.

78 *Cook v Western Australia* [2010] WASCA 241 (22 December 2010) [23].

79 *O’Rafferty v The Queen* [2014] ACTCA 35 (21 August 2014) [16].

80 Quilter and McNamara, above n 19.

81 Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press, 2003).

82 Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012).

83 *Mitic v The Queen* [2011] VSCA 373 (30 November 2011).

84 *Ibid* [24].

85 Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (2010) 39 *Crime and Justice: A Review of Research* 565; Julia Quilter, ‘Re-Framing the Rape Trial: Insights from Critical Theory About the Limitations of Legislative Reform’ (2011) 35 *Australian Feminist Law Journal* 23.

On the one hand, legislative provisions expressly identify intoxication as a factor that may suggest the *absence* of consent, and as evidence which may support the Crown's case. On the other hand, the same evidence can be relied upon by the defence in a number of ways: to raise doubt about the victim's reliability and credibility, or in support of an assertion that the accused honestly and reasonably believed that the complainant was consenting.

The challenges associated with the justice system's approach to victim intoxication need to be addressed sensitively. The inappropriateness of being overly proscriptive and imposing on victims of sexual assault a 'test' of intoxication that they must 'pass' is obvious. The conundrum to which we have drawn attention cannot be resolved merely by offering a statutory definition of intoxication (however much drafters aim for context-sensitivity); but the status quo, where victim intoxication is often evidenced via self-report, articulated in (value-laden) lay terms and filtered by the attitudes of judges and juries, leaves victims unduly vulnerable to adverse judgment.<sup>86</sup> Related to the more general point that relying on 'common knowledge' to define intoxication for criminal law purposes is problematic,<sup>87</sup> here we emphasise that resort to 'what we all know' is especially problematic in sexual assault trials, given the long and entrenched history of stereotypes about rape complainants.<sup>88</sup>

### C The Intoxication 'Defence'<sup>89</sup>

The most familiar way in which intoxication evidence can be raised in relation to criminal responsibility, which has been well examined in the textbooks and the scholarly literature,<sup>90</sup> is where the evidence is relied on by an accused for the purpose of disputing the Crown's ability to prove a core element of the offence (eg intent to cause death or grievous bodily harm on a charge of murder). In all Australian jurisdictions,<sup>91</sup> apart from Victoria,<sup>92</sup> this option has been limited<sup>93</sup> to

86 Emily Finch and Vanessa E Munro, 'Intoxicated Consent and the Boundaries of Drug-assisted Rape' [2003] *Criminal Law Review* 773; Finch and Munro, above n 57; Andrea Flynn and Kathryn Graham, "'Why Did It Happen?'" A Review and Conceptual Framework for Research on Perpetrators' and Victims' Explanations for Intimate Partner Violence' (2010) 15 *Aggression and Violent Behavior* 239.

87 Quilter and McNamara, above n 19.

88 See Julia Quilter, 'From *Raptus* to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law & History* 89; Quilter, 'Re-Framing the Rape Trial', above n 85.

89 We have made no attempt to estimate the frequency with which intoxication evidence is employed as part of a defence strategy (or the success rate of such approaches) because our data-set could not support such analysis (noting that a defendant who has successfully relied on an intoxication 'defence' at trial is relatively unlikely to be appealing to a higher court).

90 See above n 2–3.

91 *Crimes Act 1900* (NSW) pt 11A; *Criminal Law Consolidation Act 1935* (SA) pt 8; *Criminal Code Act 1899* (Qld) s 28; *Criminal Code Act Compilation Act 1913* (WA) s 28; *Criminal Code Act 2002* (ACT) pt 2.3 div 2.3.3; *Criminal Code Act 1983* (NT) pt IIAA div 3 sub-div 2; *Criminal Code Act 1924* (Tas) s 17; *Criminal Code Act 1995* (Cth) pt 2.3 div 8.

92 *R v O'Connor* (1980) 146 CLR 64; Law Reform Committee, Parliament of Victoria, *Criminal Liability for Self-Induced Intoxication*, Report (May 1999).

93 These restrictions do not apply to 'involuntary' intoxication (see generally, Bronitt and McSherry, above n 3, 299–300) which, as our current data-set confirms, feature very rarely in the decided cases.

crimes that have a specific intent component — i.e. where the offence definition requires the Crown to prove as an element of the offence that the accused intended to bring about a particular consequence.<sup>94</sup> While these rules are colloquially referred to as the intoxication ‘defence’, it is appropriate to note that, even if successful, such reliance on intoxication evidence is likely to result in conviction for a lesser (general intent) crime, rather than acquittal.<sup>95</sup>

One of the insights supported by the cases in our data-set is that this familiar context is only one of several ways in which intoxication evidence may impact on assessments of criminal responsibility. Moreover, contrary to the views that circulate periodically in media accounts and political discourse,<sup>96</sup> intoxication evidence is as likely to *increase* the prospect of a conviction as to provide the accused with a basis for ‘getting off’. We will elaborate on the *strategic risk* posed by reliance on intoxication evidence in the discussion that follows.

The diversity we have found includes where intoxication is:

- asserted as relevant to whether the accused had another form of subjective mens rea — such as awareness of what a joint enterprise participant was doing or intending;<sup>97</sup>
- asserted by a defendant to support the subjective test component of another defence, such as provocation,<sup>98</sup> self-defence,<sup>99</sup> or mistake of fact;<sup>100</sup>
- counter-intuitively, asserted by the Crown to strengthen (not weaken) the prosecution’s assertion that the defendant acted with the requisite intent;<sup>101</sup> and

94 The distinction was endorsed by the House of Lords in *DPP v Majewski* [1977] AC 443, and although it was rejected by the High Court of Australia in *R v O’Connor* (1980) 146 CLR 64, legislatures have modified the Australian common law position. The veracity of the general intent/specific intent distinction as an appropriate basis for determining the availability of exculpatory intoxication evidence has been questioned: see, eg, Tasmanian Law Reform Institute, *Intoxication and Criminal Responsibility*, Final Report No 7 (August 2006) 46; above n 4.

95 See, eg, *R v Harold* [2010] QCA 267 (8 October 2010).

96 See, eg, Bronnitt and McSherry, above n 3, 285–6; Brown, above n 24, 217–22.

97 See, eg, *Ulutui v The Queen* (2014) 41 VR 676; *R v Heyward & Minter* [2010] SASFC 38 (28 September 2010); *Mulkatana v The Queen* (2010) 28 NTLR 31.

98 See, eg, *R v Lindsay* (2014) 119 SASR 320.

99 See, eg, *Dal Cortivo v The Queen* (2010) 204 A Crim R 55.

100 See, eg, *Commissioner of Police v Stehbens* [2013] QCA 81 (16 April 2013); *Prazmo v Western Australia [No 2]* [2010] WASCA 99 (25 May 2010).

101 See, eg, in *Ward v The Queen* [2013] NSWCCA 46 (1 March 2013) [82], the trial judge directed the jury that: ‘You can have an intoxicated intention. You can have an intention that is based on alcohol and drugs. In fact, very often, unfortunately, the situation is that a person forms a certain intention because they are intoxicated and they would no [sic] not have formed it if they were not.’ See also *R v Barden* [2010] QCA 374 (23 December 2010); *Mulkatana v The Queen* (2010) 28 NTLR 31.

- asserted by the Crown to foreclose access to a defence (noting that legislation defining some defences expressly excludes reliance on intoxication evidence<sup>102</sup>).<sup>103</sup>

It is important to recognise that the accused does not control whether intoxication is in issue. Trial judges have an obligation to put intoxication evidence to the jury even if not asserted by the defendant if the judge considers that there is sufficient evidence that intoxication may be relevant to a matter that goes to the guilty/not guilty decision.<sup>104</sup> This may be an outcome that a defendant has actively attempted to avoid for strategic reasons, such as inconsistency with their main line of defence (eg diminished responsibility/substantial impairment or ‘insanity’/mental illness)<sup>105</sup> or out of a concern that they may be judged harshly because of the stigma associated with excessive alcohol consumption (or the consumption of illicit drugs) or regarded as unreliable or lacking in credibility.

The cases in our data-set show that an accused faces a significant ‘strategic risk’ if evidence of her/his intoxication is before the court. This matter has been the subject of judicial comment,<sup>106</sup> and an influence on defence practice, but it has rarely been discussed or documented in the literature.<sup>107</sup> One common form of strategic risk we identified in the cases we reviewed is illustrated by the Queensland case of *Stehbens*,<sup>108</sup> in which the accused was charged with assaulting a police officer. She gave evidence of her intoxication to support her defence of mistake under s 24 of the *Criminal Code* (Qld): that is, that she did not realise the person she hit was a police officer. She was convicted at first instance, appealed successfully to the District Court, but this decision was reversed by the Court of Appeal and the conviction restored. The Court endorsed the Magistrate’s adverse assessment of the defendant’s reliability given her ‘alcohol consumption and her admitted state of mind at the time the alleged offence took place’.<sup>109</sup>

102 In some jurisdictions, legislation provides that an accused person is precluded from relying on certain defences if they were intoxicated at the time of the alleged commission of the offence: eg, the defence of insanity in the *Criminal Code Act Compilation Act 1913* (WA) s 28 and the *Criminal Code Act 1899* (Qld) s 28, the partial defence of extreme provocation in the *Crimes Act 1900* (NSW) s 23 and the partial defence of diminished responsibility in *Criminal Code Act 1983* (NT) s 159(3).

103 *Babic v The Queen* (2010) 28 VR 297; *MG v The Queen* (2010) 29 VR 305, 309 [16]; *R v Stanley* [2013] NSWCCA 124 (28 May 2013); *R v Humbles* [2014] SASCFC 91 (13 August 2014).

104 See, eg, *SW v The Queen* [2013] NSWCCA 103 (7 June 2013); *R v George* [2014] 2 QD R 150; *R v Barden* [2010] QCA 374 (23 December 2010); *Mulkatana v The Queen* (2010) 28 NTLR 31.

105 *Ibid.* The case of *R v Logan* [2012] QCA 210 (17 August 2012) is illustrative. The accused sought to play down his level of intoxication in a context where he sought to rely on the defence of insanity (*Criminal Code Act 1899* (Qld) s 27) or the partial defence of diminished responsibility (*Criminal Code Act 1899* (Qld) s 304A). After initially indicating that he was intoxicated at the time of the conduct in question, he later resiled (‘probably [became] aware that it would not be helpful’ ([73])). By contrast, the prosecution drew attention to the accused’s alleged intoxication and asserted that he had ‘killed in an intoxicated frenzy’ ([2]).

106 *R v Ainsworth* (1994) 76 A Crim R 127, 138 (Gleeson CJ).

107 The matter is discussed briefly in Brown et al, above n 24, 881; and Colvin et al, above n 3, 444.

108 *Commissioner of Police v Stehbens* [2013] QCA 81 (16 April 2013).

109 *Ibid* [43].



The South Australian case of *Stott* provides a further illustration.<sup>110</sup> The Full Court ruled that the trial judge had been correct to direct the jury that the accused's intoxication was simultaneously relevant to the question of whether the accused foresaw the risk associated with his driving behaviour *and* his credibility and reliability as a witness. The trial judge's direction is worth extracting at some length to make the point:

Mr Stott's intoxication, if you find that he was intoxicated, may affect your deliberations in a number of ways. ... His intoxication is relevant in considering whether he had the intention which I have told you is an ingredient of the various charges, or whether he was reckless in the way that I have explained to you. The inferences about intention and recklessness which may be drawn in the case of a sober person from his actions may not be as readily drawn in the case of an intoxicated person. ... So when you are considering with what intention or state of mind the accused acted, you will bear in mind the effect, if any, of the influence of alcohol upon his mind. As I have mentioned, you will bear in mind intoxication when considering both intention and recklessness. ... Mr Stott's intoxication at the time may also affect your estimate of his credibility and reliability as a witness here in the witness box. It may also affect your assessment of the accuracy of his perception at the time the events were occurring.<sup>111</sup>

In a further and more surprising twist on the notion of intoxication-as-strategic risk (that is, surprising when compared with the popular conception of the so-called 'drunk's defence'), we identified a number of cases in our data-set in which trial judges and appellate courts endorsed the Crown's adoption of an approach which relied on evidence of the accused's intoxication to *strengthen* (not weaken) the assertion that the Defendant acted with the requisite intent.<sup>112</sup> The case of *Ward* was the most striking example.<sup>113</sup> The trial judge (whose approach was approved of by the New South Wales Court of Criminal Appeal) effectively turned the intoxication 'defence' on its head by suggesting that the accused's (multi-drug) intoxication could actually assist the jury to conclude that she had the requisite intent (when she ran the victim down with her car). Howie J said:

You can have an intoxicated intention. You can have an intention that is based on alcohol and drugs. In fact, very often, unfortunately, the situation is that a person forms a certain intention because they are intoxicated and they would no [sic] not have formed it if they were not. ...

You have a specific intention to do something, even though you are intoxicated. That may be the reason why you have that intention. You have heard some evidence about the disinhibiting effect of alcohol. How sometimes people will do

110 *R v Stott* (2011) 111 SASR 346.

111 *Ibid* 353–4 [20].

112 *Babic v The Queen* (2010) 28 VR 297; *MG v The Queen* (2010) 29 VR 305, 309 [16]; *Ward v The Queen* [2013] NSWCCA 46 (1 March 2013); *R v Humbles* [2014] SASCFC 91 (13 August 2014).

113 *Ward v The Queen* [2013] NSWCCA 46 (1 March 2013).

things, form intentions, carry out actions they wouldn't do if they were stone cold and so on.<sup>114</sup>

A variation on this approach was evident in *Hothnyang*.<sup>115</sup> The Victorian Court of Appeal endorsed the trial judge's distinction between: intoxication that makes a person unable to form intent; and intoxication that disinhibits a person, and makes him/her 'unable to resist the temptation to [intentionally] kill or inflict really serious injury'.<sup>116</sup>

Another variation was apparent in *Stanley*,<sup>117</sup> a case in which the question of whether the accused's intoxication raised a reasonable doubt about whether he had the requisite specific intent. The Crown 'conceded' that the events in question (including the criminal offending) would not have happened but for the accused's intoxication, but this was a concession designed to strengthen the prosecution case. The trial judge endorsed the Crown's theory of intoxication's causal role and observed that 'specific intent can sometimes be formed by people who are in a terrible state of intoxication or whatever'.<sup>118</sup>

It is not our contention that there is anything inappropriate about the Crown's strategic enlistment of intoxication evidence to support a conviction. However, the practice does provide a further illustration of one of our central arguments in this article: the relationship between evidence of AOD consumption and effects, criminal trial processes and the determination of criminal responsibility is much more complex than is commonly recognised in both the scholarly literature and the political discourse that frequently surrounds intoxication-focused criminal law reform proposals and debates. An important dimension of this complexity is the absence of any meaningful guidelines — legislative or judicial — on the point at which a person's level of intoxication will be considered so high as to support a conclusion that there was reasonable doubt about whether she acted with a requisite specific intent. The cases in our data-set suggest that juries are regularly asked to make this complex assessment on the basis of their 'common knowledge' about AOD effects.<sup>119</sup>

It is appropriate to acknowledge that the Crown does not always 'exploit' the accused's intoxication to achieve conviction. It is apparent that prosecutors will sometimes take intoxication into account in the plea negotiation process. For

114 Ibid [82], [84]. See also *R v Barden* [2010] QCA 374 (23 December 2010) [7], where the trial judge told the jury that '[a] drunken intention is still an intention. If he had drunkenly formed the intention to do grievous bodily harm he is guilty of murder'; and *Mulkatana v The Queen* (2010) 28 NTLR 31, 40–1 [44] ('drunken intention').

115 *Hothnyang v The Queen* [2014] VSCA 64 (11 April 2014).

116 Ibid [45]. See also *R v Humbles* [2014] SASFC 91 (13 August 2014) [32] where the Crown emphasised the impulsivity/disinhibition effects of the accused's intoxication as a result of alcohol and methylamphetamine consumption.

117 *R v Stanley* [2013] NSWCCA 124 (28 May 2013).

118 Ibid [17].

119 See, eg, *R v Stott* (2011) 111 SASR 346, 353–4 [20]; *Shepherd v The Queen* [2011] NSWCCA 245 (17 November 2011) [192]; *R v Stanley* [2013] NSWCCA 124 (28 May 2013) [60]; *Babic v The Queen* (2010) 28 VR 297, 320–1 [106]. The implications of reliance on 'common knowledge' as the reference point for understanding and applying the concept of intoxication as it relates to criminal responsibility are discussed more fully in Quilter and McNamara, above n 19.

example, in *West*,<sup>120</sup> the defendant's intoxication (and the challenge this posed for the Crown's ability to prove the requisite intent beyond reasonable doubt) was identified by the Victorian Court of Appeal as a determinative factor in the Crown's decision to accept pleas to *recklessly* causing serious injury (rather than *intentionally* causing serious injury).<sup>121</sup>

## D Sentencing<sup>122</sup>

The High Court has held that sentencing should be approached as a process of 'intuitive' or 'instinctive' synthesis<sup>123</sup> — language which is designed to convey that sentencing is a human (and not mechanical) decision-making process that must take account of all of the myriad factors that are relevant. It is a process which involves:

the exercise of a discretion controlled by judicial practice, appellate review, legislative indicators and public opinion. Statute, legal principle and community values all confine the scope in which instinct may operate.<sup>124</sup>

In addition to the common law sentencing principles and purposes of punishment which have developed over time,<sup>125</sup> legislatures in several jurisdictions have enacted statutory formulations of sentencing purposes and principles,<sup>126</sup> whether expressed as 'aggravating' and 'mitigating' factors,<sup>127</sup> or relevant 'considerations'.<sup>128</sup>

NSW and Queensland are the only Australian jurisdictions in which (since 2014) courts have been given legislative guidance on the relevance of intoxication to sentencing — in the form of express statements that self-induced intoxication

120 *West v The Queen* [2014] VSCA 36 (13 March 2014).

121 *Ibid* [31].

122 We have not set out to complete a fine-grained comparative study of Australia's different sentencing regimes. We will focus on general patterns and commonalities when it comes to rules, principles and practices on the relevance of intoxication to sentencing, while also drawing attention to noteworthy variations and departures.

123 *Markarian v The Queen* (2005) 228 CLR 357. For a critique of this approach to sentencing, see Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 3<sup>rd</sup> ed, 2016) 29–31.

124 *Markarian v The Queen* (2005) 228 CLR 357, 390 [84].

125 *Bugmy* (2013) 249 CLR 571; *Muldock v The Queen* (2011) 244 CLR 120; *York v The Queen* (2005) 225 CLR 466; *Markarian v The Queen* (2005) 228 CLR 357; *Veen v The Queen [No 2]* (1988) 164 CLR 465; *R v Jackway*; *Ex parte Attorney-General* [1997] 2 Qd R 277; *R v Leach* (1979) 1 A Crim R 320; *R v Morris* (1958) 76 WN (NSW) 40; *R v Radich* [1954] NZLR 86; *R v Ball* (1951) 35 Cr App Rep 164; *R v McCowan* [1931] St R Qd 149.

126 *Sentencing Act 1995* (WA) s 6; *Penalties and Sentences Act 1992* (Qld) s 9(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(2); *Sentencing Act 1991* (Vic) s 5; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Sentencing Act* (NT) s 5.

127 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act* (NT) s 6A; *Sentencing Act 1995* (WA) ss 7–8. Even in states where no comparable provisions have been enacted the courts recognise and apply aggravating and mitigating factors: see, eg, *Daley v Tasmania* [2016] TASCCA 10 (22 August 2016); *Ashdown v The Queen* (2011) 37 VR 341; *R v KU*; *Ex parte Attorney-General (Qld) [No 2]* [2011] 1 Qd R 439.

128 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Crimes (Sentencing) Act 2005* (ACT) ss 33–6; *Penalties and Sentences Act 1992* (Qld) s 9(2).

is a *not* a mitigating factor.<sup>129</sup> In all other jurisdictions, common law sentencing principles inform the decision as to what significance, if any, should be attached to offender intoxication.<sup>130</sup>

A strong undercurrent in recent debates about how the criminal law should be reformed to better deter AOD-related violence<sup>131</sup> is that the criminal justice system, and the sentencing process in particular, has been too ‘soft’ on violence associated with AOD consumption; that intoxication is too often treated as a basis for reducing an offender’s sentence rather than increasing it. Our review of sentencing appeal decisions handed down in the period 2010–2014 confirms that this is an inaccurate and too simplistic an account of the principles and practices that govern sentencing in cases where the accused was intoxicated. This finding provides further support for the central thesis advanced in this article regarding the complex relationship between intoxication and criminal court adjudication.

Not all Australian jurisdictions adopt the same starting point when it comes to the relevance of offender intoxication to the determination of a sentence.<sup>132</sup> For example, in the Northern Territory, the Court of Criminal Appeal has observed that:

The courts have pointed out that the intoxication of an offender through the consumption of alcohol may constitute an aggravating factor or a mitigating factor depending upon the circumstances of the case. There is no general rule that such intoxication need be one or the other. In some circumstances it may be a neutral factor.<sup>133</sup>

By contrast, the starting point adopted by courts in some states is that there *is* a ‘general rule’ that intoxication *per se* does not operate as a mitigating factor.<sup>134</sup> For example, in *Hasan*,<sup>135</sup> the Victorian Court of Appeal asserted that: ‘courts around Australia have consistently rejected the proposition that intoxication can mitigate

129 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5AA), as amended by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW); *Penalties and Sentences Act 1992* (Qld) s 9(9A), as amended by the *Safe Night Out Legislation Amendment Act 2014* (Qld). Note that the cases in our data set were decided before these provisions came into force.

130 See generally, Bagaric and Edney, above n 123, 372–7.

131 A 2016 Australian Senate Legal and Constitutional Affairs References Committee Inquiry into the need for a nationally-consistent approach to alcohol-fuelled violence was asked to investigate *inter alia*, ‘whether a judicial commission in each state and territory would ensure consistency in judgments relating to alcohol-related violence in line with community standards’: Parliament of Australia, *Need For a Nationally-Consistent Approach to Alcohol-Fuelled Violence*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Alcohol\\_fuelled\\_violence](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Alcohol_fuelled_violence)>. In 2015 the New South Wales Sentencing Council was asked to consider a proposal that intoxication be treated as a mandatory aggravating factor for crimes of violence. The Council declined to endorse the proposal: New South Wales Sentencing Council, ‘Alcohol and Drug Fuelled Violence’, above n 5, 12–13. See also New South Wales Sentencing Council, ‘Sentencing for Alcohol-Related Violence’, above n 5.

132 Regarding recent changes in New South Wales and Queensland, see above n 129.

133 *R v Wilson* (2011) 30 NTLR 51, 62 [44]; see also *Barron v Tasmania* (2010) 20 Tas R 114, 118–19 [17] where the Tasmanian Court of Criminal Appeal found that intoxication had not been overlooked by the trial judge ‘in the plea [of] mitigation’.

134 See, eg, *Western Australia v Hassell* [2014] WASCA 158 (27 August 2014); *Langdon v Kelemete-Leoli-McLean* (2011) 206 A Crim R 368.

135 *Hasan v The Queen* (2010) 31 VR 28.

the seriousness of an offence or reduce the offender's culpability'.<sup>136</sup> Similarly in *Hart*,<sup>137</sup> the Court of Appeal of Queensland stated '[t]he Court has repeatedly emphasized that intoxication cannot properly be regarded as a mitigating feature in cases of violent crime'.<sup>138</sup> There was also some evidence of intra-jurisdictional variation during the periods under review. For example, in *Stewart*,<sup>139</sup> the New South Wales Court of Criminal Appeal (Button J) stated:

As for the role of alcohol, it is well established that the intoxication of an offender at the time of the commission of an offence can be taken into account by a sentencing court: see *R v Coleman* (1990) 47 A Crim R 306. Whether intoxication is a matter of mitigation or aggravation will depend upon the facts of the particular case.<sup>140</sup>

In the same year, in *GWM*,<sup>141</sup> a differently constituted New South Wales Court of Criminal Appeal endorsed the approach in *Hasan* and stated that 'voluntary intoxication operates rarely (at best) to mitigate penalty'.<sup>142</sup>

It was not obvious that differences in starting point materially affected the way in which intoxication evidence was treated in specific instances. Across the country we identified four major circumstances in which intoxication is treated as an 'indirect'<sup>143</sup> mitigating factor:

1. in support of characterisation of the offender's conduct as 'out of character';
2. in support of characterisation of the offender's conduct as spontaneous/unplanned;
3. where the offender's AOD use and intoxication on the occasion in question is associated with dependency/addiction or other mental illness (or cognitive impairment); and
4. where the offender's intoxication is located in a wider context of disadvantage, specifically, Indigenous community disadvantage.

More tentatively, given the ambiguous language often used by courts, we would add a fifth category: where intoxication is said to 'explain' (but not excuse) an offence.<sup>144</sup> We suggest that where a sentencing or appellate court uses language that emphasises the role of intoxication in the offending behaviour (thereby 'explaining' the offence) there is an implied reduction in the offender's culpability.

136 Ibid 33 [21].

137 *R v Hart* [2012] QCA 38 (6 March 2012).

138 Ibid [42].

139 *Stewart v The Queen* [2012] NSWCCA 183 (29 August 2012).

140 Ibid [51] (Button J).

141 *R v GWM* [2012] NSWCCA 240 (21 November 2012).

142 Ibid [78] (Johnson J).

143 'Indirectly' is our characterisation of how intoxication is impacting on sentencing in these cases. The effect is indirect to the extent that the courts are effectively asserting that intoxication *per se* is not a mitigating factor, but evidence that the accused was intoxicated may allow him/her to access a recognised mitigating factor (eg 'out of character' and 'spontaneous/unplanned').

144 See, eg, *Bourke v The Queen* (2010) 199 A Crim R 38; *Stewart v The Queen* [2013] NSWCCA 185 (9 August 2013); *R v Williams; Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 250; *R v Wilson* (2011) 30 NTLR 51; *R v Taylor* (2010) 203 A Crim R 302; *Queensland Police Service v Terare* (2014) 245 A Crim R 211; *R v Williams* [2014] ACTCA 30 (18 August 2014).

The logic appears to be that the person would not have offended if s/he had been sober, and that this is relevant to the determination of sentence. The following comments by the Queensland Court of Appeal in *Williams* are illustrative:

Where, as here, the evidence, such as it was, suggested that the respondent had used amphetamines for a limited period leading up to the offence and never thereafter then two related things follow. One is that it can be said that the impact of the drug explained the inexplicable — why a man with no previous conviction for violence of any sort over twenty-three years of adult life should behave so appallingly. Secondly, the prospect of the respondent re-offending is considerably less than if he suffered from an uncontrollable psychological disturbance of some kind.<sup>145</sup>

## 1 Mitigation: Out of Character

The starting point for understanding how intoxication can inform ‘out of character’ mitigation is that character has long been regarded as relevant to sentencing, and ‘good’ character is generally recognised as a mitigating factor, both at common law,<sup>146</sup> and in sentencing legislation.<sup>147</sup> Although we detected a range of views about the breadth of this category, there was widespread recognition in the cases under review that one of the ways in which intoxication evidence can have a mitigatory effect is if it supports the characterisation of the offender’s conduct as ‘out of character’. The decision of the Victorian Court of Appeal in *Simon* is illustrative.<sup>148</sup>

Alcohol, though not a circumstance of mitigation, seems likely to explain the applicant’s behaviour on this occasion, which was quite out of character. Nothing in the applicant’s antecedents, his relationship with the complainant and H, or his minor criminal record, hinted that the applicant would offend in such a way; or, in my opinion, carried any implication that he would be likely to do so in the future.<sup>149</sup>

In the widely cited decision of *Hasan* the Victorian Court of Appeal, while conceding that ‘[a]n “out of character” exception is acknowledged to exist’, asserted ‘but it has almost never been applied’.<sup>150</sup> Our review of appellate decisions handed down in the period 2010–2014 suggests that this somewhat understates the availability of this particular mode of intoxication-related indirect mitigation. Although it did not feature in large numbers in our data-set, appellate courts in three jurisdictions (including Victoria) recognised the out of character

145 *R v Williams; Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 250, 268 [95]; see also *R v Wilson* (2011) 30 NTLR 51, 61–2 [43]; *R v Brown* [2013] QCA 185 (16 July 2013) [11].

146 *Veen v The Queen [No 2]* (1988) 164 CLR 465.

147 See, eg, *Sentencing Act 1991* (Vic) s 6; *Sentencing Act* (NT) s 5; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f).

148 *R v Simon* [2010] VSCA 66 (31 March 2010).

149 *Ibid* [55].

150 *Hasan v The Queen* (2010) 31 VR 28, 33 [21]; see also *R v GWM* [2012] NSWCCA 240 (21 November 2012).

exception and endorsed its application to mitigate sentence during the period under review.<sup>151</sup>

## 2 Mitigation: Spontaneous/Unplanned

That an occasion of criminal offending was planned or pre-meditated is generally regarded as an aggravating factor. This principle has been expressed in sentencing legislation in some jurisdictions,<sup>152</sup> and is recognised at common law.<sup>153</sup> The corollary is that a person who engages in ‘spontaneous’ criminal conduct is less culpable and that this should be a factor that mitigates the sentence.<sup>154</sup>

Our data-set included a small number of cases in which appellate courts recognised that evidence that the accused was intoxicated at the time may support characterisation of the offence as spontaneous or unplanned, rather than planned or pre-meditated. The case of *R v YS* is illustrative:<sup>155</sup>

Despite the objective gravity of the offending in this case, his Honour was entitled to afford the respondent’s youth and immaturity considerable weight in the assessment of a just and proportionate sentence. In addition, his Honour made a further critical finding, namely that the respondent’s sexual offending was impulsive. That finding is not under challenge on the appeal. In my view, that finding, when coupled with the evidence which established that under intensive psychological assessment the respondent was shown to have a compromised capacity for reasoned judgment and empathy, an undeveloped capacity to control his impulsive behaviour and a reduced capacity for mature decision-making (no doubt aggravated by his state of intoxication at the time of the offending) was also entitled to significant weight in this sentencing exercise.<sup>156</sup>

While this category of indirect intoxication-related mitigation is not limited to a particular type of offence, we did note that a number of the cases in our sample in which it was successfully invoked were sexual offences (including child sexual assault).<sup>157</sup> The number of cases in our sample is too small to support generalised claims about sentencing patterns, but there appears to be an inconsistency that

151 See, eg, *R v Simon* [2010] VSCA 66 (31 March 2010); *Johnson v The Queen* [2011] VSCA 360 (14 November 2011); *Chen v The Queen* [2013] NSWCCA 116 (22 May 2013); *PDT v Western Australia* [2012] WASCA 134 (20 June 2012) [25]; *Kaschull v Western Australia* [2012] WASCA 245 (29 November 2012).

152 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

153 *Neal v The Queen* (1982) 149 CLR 305, 314. For recent applications, see, eg, *Western Australia v Malone* [2015] WASCA 188 (16 September 2015) [76]; *R v Ogilvie* [2015] ACTSC 296 (9 September 2015) [31]; *R v NQ* [2013] QCA 402 (20 December 2013) [14]; *R v M, AG* (2013) 116 SASR 219, 226 [40].

154 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(b).

155 [2014] NSWCCA 226 (23 October 2014).

156 *Ibid* [99]; see also *MDZ v The Queen* [2011] NSWCCA 243 (15 November 2011) [65], [74]; *BIP v The Queen* [2011] NSWCCA 224 (14 October 2011) [64]; *Barron v Tasmania* (2010) 20 Tas R 114, 118–9 [17].

157 All of these cases were from New South Wales (noting that this State provided 28 per cent of the cases in our total data-set): *R v YS* [2014] NSWCCA 226 (23 October 2014); *MDZ v The Queen* [2011] NSWCCA 243 (15 November 2011); *BIP v The Queen* [2011] NSWCCA 224 (14 October 2011); *LB v The Queen* [2011] NSWCCA 220 (7 October 2011).

warrants further investigation in future research. The possible inconsistency to which we refer is between the suggestion that in the case of sexual offending (which typically occurs in *private* settings) intoxicated-related spontaneity may be mitigating, and the strong position articulated by the courts in recent years that when it comes to ‘street’ violence (i.e. public non-sexual violence) intoxicated-related spontaneity should be treated as aggravating (discussed further below).

### 3 Mitigation: Mental Illness and Cognitive Impairment

That a person’s criminal offending occurred at a time when they were suffering from a mental illness, or cognitive impairment,<sup>158</sup> is generally considered to be a mitigating factor, due to decreased moral culpability, and a reduced need for general deterrence.<sup>159</sup> Because intoxication per se is generally *not* a mitigating factor, cases where both factors are present require the court to grapple with the complex relationship between mental illness, AOD use and criminal offending. A large number of the sentencing appeals in our data-set fall into this category. These cases revealed judicial recognition of five different versions of the intoxication/mental illness relationship:

- (i) A mental illness may have been exacerbated by AOD consumption;
- (ii) A mental illness may have contributed to AOD use;
- (iii) AOD use may have triggered the mental illness;
- (iv) AOD dependence may constitute the diagnosed mental illness (eg alcohol use disorder); and
- (v) AOD use may be a form of ‘self-medication’ for coping with the symptoms of a mental illness.

A range of mental illnesses were raised by the cases, including schizophrenia, depressive disorder, anxiety, attention deficit disorder, attention deficit hyperactivity disorder, drug dependence disorder, borderline and dependent

158 ‘Mental illness’ and ‘cognitive impairment’ are variously defined in a range of statutes relevant to criminal justice administration across Australian jurisdictions. See generally New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No 135 (2012). Debate surrounds current approaches in some contexts; see, eg Arlie Loughnan, ‘Contemporary Comment: Reforming the Criminal Law on Mental Incapacity’ (2013) 25 *Current Issues in Criminal Justice* 703; Linda Steele, Leanne Dowse and Julian Trofimovs, ‘Who is Diverted?: Moving Beyond Diagnosed Impairment Towards a Social and Political Analysis of Diversion’ (2016) 38 *Sydney Law Review* 179. However, definitional complexities were not a prominent feature of the sentencing cases in our data-set.

159 See, eg, *R v Verdins* (2007) 16 VR 269; *Lauritsen v The Queen* (2000) 22 WAR 442. Note, however, that sometimes the nexus between an offender’s mental illness and criminal offending is regarded as requiring the attribution of greater weight to specific deterrence and the need to protect the public: See, eg, *Beldon v The Queen* [2012] NSWCCA 194 (6 September 2012) [64].



personality disorder.<sup>160</sup> Evidence of cognitive impairment was also present in a number of cases.<sup>161</sup>

A recurring message in the appellate decisions we reviewed was that, although it is difficult to do so, the two factors of intoxication and mental illness must be ‘disentangled’.<sup>162</sup> The relationship between intoxication and cognitive impairment raised similar challenges.<sup>163</sup> Although artificial in many respects (and perhaps impossible), the driver for this exercise, as noted above, is that mental illness and cognitive impairment are consistently regarded as mitigating factors whereas intoxication is generally not regarded as mitigating.

It was evident from our analysis of the cases that judges struggle with the task of separating the offender’s intoxication from her/his mental illness and determining the role that each played in the offending behaviour. For example, in *Adzioski v The Queen* (where the offender suffered from schizophrenia),<sup>164</sup> the Court said:

While the level of the applicant’s intoxication might provide a complete answer to the offending, his Honour regarded such a result as overly simplistic in that it might artificially deny the presence of the underlying mental health condition. His Honour concluded that the answer was likely to involve a synthesis of all of those factors.<sup>165</sup>

A recurring ground of appeal was that the sentencing judge had placed too much weight on mental illness rather than attribute the behaviour to intoxication (i.e. in the context of a Crown appeal that the sentence was inadequate),<sup>166</sup> or vice versa (in the context of a defence appeal against severity).<sup>167</sup> For example, in *Bennett v The Queen*,<sup>168</sup> the Victorian Court of Appeal found that the sentencing judge had attached too much significance to the offender’s alcohol use and intoxication and not enough to his mental illness (chronic anxiety and depression).<sup>169</sup> In *R v Ball*,<sup>170</sup>

160 See, eg, *MDZ v The Queen* [2011] NSWCCA 243 (15 November 2011); *George v The Queen* [2013] NSWCCA 263 (12 November 2013); *Papas v Western Australia* [2011] WASCA 3 (10 January 2011).

161 See, eg, *JM v The Queen* (2012) 223 A Crim R 55; *Reberger v The Queen* [2011] NSWCCA 132 (10 June 2011); *Jacobs v The Queen* [2011] VSCA 238 (18 August 2011); *R v Lakin* (2014) 118 SASR 535.

162 See, eg, *R v Chandler* [2012] NSWCCA 135 (28 June 2012) [56]–[59]; *Papas v Western Australia* [2011] WASCA 3 (10 January 2011) [14]; *R v van Setten* [2012] SASCFC 90 (1 August 2012) [25]. It is important to note that the task of assessing the relative significance of intoxication and mental illness was undertaken not only in the sentencing context, but also in trials where the accused’s guilt was being assessed: See, eg, *Catley v The Queen* [2014] NSWCCA 249 (31 October 2014); *Vulovic v The Queen* [2013] NSWCCA 340 (20 December 2013); *R v Clough [No 2]* [2011] 2 Qd R 222; *R v Chenery* [2011] QCA 271 (7 October 2011); *A-G (Qld) v Bosanquet* [2012] QCA 367 (21 December 2012); *Namatjira v The Queen* [2013] NTCCA 8 (19 July 2013); *Goodridge v The Queen* [2014] NSWCCA 37 (26 March 2014); *R v Huni* [2014] QCA 324 (5 December 2014).

163 See, eg, *Reberger v The Queen* [2011] NSWCCA 132 (10 June 2011).

164 [2013] NSWCCA 69 (5 April 2013).

165 *Ibid* [35].

166 See, eg, *DPP (Vic) v Sullivan* [2014] VSCA 222 (17 September 2014) [51], [54]; *DPP (Vic) v Edwards* (2012) 44 VR 114, 141 [126]–[128].

167 See, eg, *R v van Setten* [2012] SASCFC 90 (1 August 2012) [25]; *Papas v Western Australia* [2011] WASCA 3 (10 January 2011) [14].

168 [2011] VSCA 253 (25 August 2011).

169 *Ibid* [62]–[66].

170 [2013] NSWCCA 126 (24 May 2013).

the New South Wales Court of Criminal Appeal held that a history of alcohol (and ‘Stilnox’) use was influential in the conclusion that there was little basis for mitigation based on mental illness (depression).<sup>171</sup>

The task is especially complicated where the mental illness in question is a drug dependence disorder, and the offender was intoxicated by the drug(s) in question at the time of the offence.<sup>172</sup>

#### 4 Mitigation: Indigenous Community Disadvantage

During the period under review the High Court of Australia handed down two important decisions; *Bugmy v The Queen*,<sup>173</sup> and *Munda v Western Australia*,<sup>174</sup> that clarify the circumstances under which intoxication associated with a background of AOD-related disadvantage — such as has been recognised as occurring in some Indigenous communities — may provide grounds for mitigation. The decisions came more than two decades after the Supreme Court of New South Wales decision in *R v Fernando*.<sup>175</sup> In this case, Wood J outlined a set of principles to guide the sentencing of Aboriginal offenders where community disadvantage formed part of the background to the offending behaviour.<sup>176</sup>

In *Bugmy*, the High Court described the scope and relevance of *Fernando* as follows:

The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender’s conduct. However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand.<sup>177</sup>

The Court went on to hold that the relevant principles do not apply *only* to Aboriginal offenders: ‘There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender.’<sup>178</sup> In *Munda* the Court counselled against an approach to intoxication-based mitigation which would treat ‘Aboriginal offending ... as less serious than offending by persons of other

171 Ibid [136].

172 See, eg, *Carpenter v The Queen* [2013] NSWCCA 130 (30 May 2013) [22], where the Court observed: ‘Dr Nielssen diagnosed a substance abuse disorder based upon the applicant’s account of longstanding cannabis use, binge drinking and frequent episodes of amnesia whilst under the effects of alcohol. Despite accepting that the applicant’s state of intoxication contributed to the offending in the sense that he was unlikely to have committed the offences if sober, his Honour was not satisfied that the applicant’s substance abuse disorder mitigated the objective seriousness of his offending. This was not subject to any challenge on the appeal.’

173 (2013) 249 CLR 571 (*Bugmy*).

174 (2013) 249 CLR 600 (*Munda*).

175 (1992) 76 A Crim R 58 (*Fernando*).

176 Ibid 62–3.

177 *Bugmy* (2013) 249 CLR 571, 593 [38].

178 Ibid 592 [36].

ethnicities'.<sup>179</sup> In addition, the Court emphasised that 'it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide'.<sup>180</sup>

Technically, the relevant mitigating factor may apply whether or not the offender was intoxicated at the time of the offence in question,<sup>181</sup> but the majority of the cases in which *Fernando/Bugmy/Munda* submissions are made involve an intoxicated offender.

The decision of the New South Wales Court of Criminal Appeal in *Prince v The Queen*,<sup>182</sup> decided after *Bugmy* and *Munda*, is illustrative:

The appellant reported exposure to cannabis at age 13 and to alcohol at age 14. After his father's death alcohol use increased to daily intake, to the point of blacking out. While intoxicated he was involved in aggressive behaviour, fighting with both strangers and family. In the community the longest period he had spent alcohol free was one month. He did not experience difficulty abstaining while in custody, but used alcohol to self medicate. His alcohol abuse led directly to increased aggressive and criminal behaviour. ...

The evidence of the appellant's awful childhood experiences of violence and drug and alcohol abuse, cast significant light on his ongoing problems with anger management, violence and criminal conduct throughout his adult life, so as to reduce his moral culpability for his inability to control himself.<sup>183</sup>

This case suggests that, even after *Bugmy*, it is accurate to identify the Indigenous community disadvantage mode of AOD-related mitigation as one of the contexts in which intoxication may have a mitigating effect on sentence.

## 5 Aggravation

In addition to those contexts in which legislation prescribes intoxication as an aggravating factor,<sup>184</sup> there are three circumstances in which courts treat intoxication as an aggravating factor when sentencing an offender — two that relate to offender intoxication and one that relates to victim intoxication.

First, offender intoxication may be regarded as an aggravating factor if the court determines that s/he was 'recklessly' intoxicated; that is, the offender knew, based on previous personal experience, that when s/he consumes alcohol (and/or other

179 *Munda* (2013) 249 CLR 600, 619 [53].

180 *Ibid.*

181 In *Bugmy* (2013) 249 CLR 571, the offender was not intoxicated at the time of the commission of the offence.

182 [2013] NSWCCA 274 (18 November 2013).

183 *Ibid* [136], [150]. See also *R v YS* [2014] NSWCCA 226 (23 October 2014); *R v Williams* [2014] ACTCA 30 (18 August 2014) [7].

184 See, eg, dangerous operation of a vehicle while 'adversely affected by an intoxicating substance': *Criminal Code 1899* (Qld) s 328A(2)(a). This phrase is also now used in ch 35A of the *Criminal Code 1899* (Qld): See Quilter et al, *The Definition and Significance of 'Intoxication' in Australian Criminal Law*, above n 6, 50.

drugs) that s/he is at greater risk of offending or becoming violent.<sup>185</sup> In *Dosen v The Queen*,<sup>186</sup> the Victorian Court of Appeal explained as follows: '[i]ntoxication — whether by alcohol or drugs — can be a circumstance of aggravation where it is shown that the offender had foreknowledge that, if he became intoxicated, he was likely to behave as he did on the relevant occasion.'<sup>187</sup> The rationale for this approach is illustrated by the decision of the Queensland Court of Appeal in *R v John*.<sup>188</sup>

The prosecutor responded that the notion of reduced moral culpability through mental disease or illness was not applicable to someone who had notice almost 20 years ago that when he drinks he behaves violently. The appellant knew that his self-induced intoxication could result in him behaving in a serious violent manner towards others and yet he again drank to excess on this occasion.<sup>189</sup>

Although aggravation in such circumstances appears consonant with (subjective) principles of criminal responsibility, it is not entirely clear what evidence needs to be before the sentencing court before an offender can be regarded as having been 'recklessly' intoxicated. Should there be evidence of previous offending? Is evidence of previous (AOD-related) offending required? Or will evidence of previous AOD abuse or addiction be sufficient? (If so, how are 'abuse and 'addiction' defined?)"<sup>190</sup> Must it be shown that the offender had insight about the role of AOD consumption in her/his criminal behaviour? Or is such a person 'deemed' to have such insight, by virtue of past offending while intoxicated? The relevance of these questions is magnified further by the fact that, in the sentencing process, unless they form part of agreed facts, the presence of aggravating factors must be proven beyond reasonable doubt (whereas mitigating factors can be established on the balance of probabilities).<sup>191</sup>

Secondly, offender intoxication may be an aggravating factor where the crime in question takes the form of 'random' street violence. Without expressly naming *public* intoxication as an aggravating factor, courts have indicated that such cases give rise to a greater need for specific and general deterrence. For example, in *R v Levy; Ex parte Attorney-General (Qld)*,<sup>192</sup> the Queensland Court of Appeal said:

185 See, eg, *Mendes v The Queen* (2012) 221 A Crim R 161; *MDZ v The Queen* [2011] NSWCCA 243 (15 November 2011); *Gosland v The Queen* [2013] VSCA 269 (24 September 2013); *R v Lutze* (2014) 121 SASR 144; *Victor v Western Australia* [2011] WASCA 94 (13 April 2011).

186 [2012] VSCA 307 (14 December 2012).

187 *Ibid* [18].

188 [2014] QCA 86 (24 April 2014).

189 *Ibid* [47]; see also *Small v The Queen* (2013) 231 A Crim R 279.

190 See generally Kate Seear and Suzanne Fraser, 'Beyond Criminal Law: The Multiple Constitution of Addiction in Australian Legislation' (2014) 22 *Addiction Research and Theory* 438.

191 In *Filippou v The Queen* (2015) 256 CLR 47, 69 [64] the High Court summarised the law as follows: 'a sentencing judge may not take facts into account in a way that is adverse to an offender unless those facts have been established beyond reasonable doubt and, contrastingly, the offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour', citing *R v Olbrich* (1999) 199 CLR 270, 281 [25]–[27]. See also *Anderson v The Queen* (1993) 177 CLR 520, 539.

192 (2014) 244 A Crim R 296.

In my view his Honour gave too little weight to the aspect of public deterrence. Cases of this sort often involve young men who are intoxicated and seemingly indifferent, at least at the time of their assault, to the consequences of what they are doing. In many of the cases the assailants express remorse once they are sober and the consequences are known. Many seem to have little in the way of criminal history and inevitably, because of their youth, have some prospects of rehabilitation and employment. But all of those matters cannot deny, in an appropriate case, the need for public deterrence to be recognised by a term of actual imprisonment.<sup>193</sup>

Thirdly, *victim* intoxication may be regarded as an aggravating factor where it increased her/his vulnerability, especially where there is evidence that the offender exploited this vulnerability.<sup>194</sup> The large majority of cases in which this mode of intoxication-related aggravation was operative were sexual offence cases.<sup>195</sup>

## V CONCLUSION

Our original motivation for the project from which this article emanates was a concern that recent policy debates and law reform proposals and initiatives, particularly in relation to ‘alcohol-fuelled violence’,<sup>196</sup> were not underpinned by a sound appreciation of the complex status quo on the relationship between intoxication and criminal law. Some of the insights offered in this article about the complex and multiple effects of intoxication evidence in criminal cases may already be familiar to criminal law practitioners through their experience in trials and sentencing hearings, but they have never before been documented in the scholarly literature. The focus in this article has been on the presentation and analysis of original quantitative and qualitative data on how the concept of ‘intoxication’ is understood, and how it operates, in Australian criminal courts, rather than the articulation of specific recommendations for law reform or policy adjustment. However, consistent with our commitment to effective knowledge transfer, we hope that the findings and analysis presented in this article can form a constructive part of the evidence base for policy debates and future law reform proposals, and can serve as a catalyst for wider scholarly interest in an aspect of criminal law and justice administration that has been under-researched.

193 Ibid 313 [77]. See also *Hards v The Queen* [2013] VSCA 119 (7 May 2013); *DPP (Tas) v Blackaby* [2013] TASCRA 4 (7 June 2013); *O’Reilly v The Queen* [2014] NTCCA 14 (24 September 2014); *R v Loveridge* (2014) 243 A Crim R 31.

194 In some jurisdictions, sentencing legislation expressly treats as an aggravating factor circumstances in which the offender *causes* the victim’s intoxication: see, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(cb).

195 See, eg, *R v Nabegeyo* (2014) 34 NTLR 154; *R v Lee* [2012] QCA 239 (7 September 2012); *R v Brace* [2011] SASCFC 54 (14 June 2011); *R v Djordjevic* [2012] SASCFC 69 (15 June 2012); *Lim v Western Australia* [2010] WASCA 186 (23 September 2010); *Miles v Western Australia* [2010] WASCA 93 (18 May 2010); *Western Australia v Stanforth-Smith* [2014] WASCA 170 (5 September 2014); *Prempeh v Western Australia* [2013] WASCA 150 (19 June 2013).

196 See Quilter, ‘One-Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravating Factor’, above n 1.

This article confirms that decisions about intoxication are made at multiple points in the criminal justice system and the gross depiction of the criminal justice system as excessively generous to intoxicated defendants is inaccurate. Depending on the question to be answered, intoxication evidence may render it more or less likely that the conduct in question will be characterised as *criminal*, and, in the sentencing context, intoxication may serve to mitigate or aggravate the sentence. The variation and nuance we have documented here may clash with the dominant contemporary political narrative — that adverse moral judgment should (always) attach to criminal offending associated with alcohol and drug use. They are, however, a logical consequence of the complex relationship between intoxication and the enforcement of the criminal law. Future policy debates and law reform initiatives should recognise that there is no single characterisation that can account for the multiple points at which intoxication may need to be assessed, and the divergent ways in which it impacts on criminal case adjudication.

## **APPENDIX A**

### **HIGH COURT**

#### **2013**

*Bugmy v The Queen* (2013) 249 CLR 571

*Munda v Western Australia* (2013) 249 CLR 600

#### **2012**

*Cooper v The Queen* (2012) 293 ALR 17

#### **2011**

*Roach v The Queen* (2011) 242 CLR 610

### **AUSTRALIAN CAPITAL TERRITORY**

#### **2014**

*Booth v The Queen* [2014] ACTCA 38 (22 August 2014)

*Byrne v The Queen* [2014] ACTCA 31 (15 August 2014)

*Monfries v The Queen* (2014) 68 MVR 385

*O'Rafferty v The Queen* [2014] ACTCA 35 (21 August 2014)

*R v Flowers* [2014] ACTCA 13 (8 May 2014)

*R v Williams* (2014) 254 A Crim R 441

#### **2013**

*McDougall v The Queen* [2013] ACTCA 14 (25 March 2013)

#### **2010**

*Dal Cortivo v The Queen* (2010) 204 A Crim R 55

**NEW SOUTH WALES****2014**

- Aitken v The Queen* (2014) 68 MVR 334  
*Ali v The Queen* [2014] NSWCCA 45 (9 April 2014)  
*Aslan v The Queen* [2014] NSWCCA 114 (20 June 2014)  
*Catley v The Queen* [2014] NSWCCA 249 (31 October 2014)  
*Craig v The Queen* [2014] NSWCCA 243 (31 October 2014)  
*Dia v The Queen* [2014] NSWCCA 9 (20 February 2014)  
*Goodridge v The Queen* [2014] NSWCCA 37 (26 March 2014)  
*Greenwood v The Queen* [2014] NSWCCA 64 (23 April 2014)  
*Keeley v The Queen* [2014] NSWCCA 139 (25 July 2014)  
*Matthews v The Queen* [2014] NSWCCA 151 (8 August 2014)  
*Milsom v The Queen* [2014] NSWCCA 142 (28 July 2014)  
*Nand v The Queen* [2014] NSWCCA 293 (5 December 2014)  
*R v Kyle* [2014] NSWCCA 300 (9 December 2014)  
*R v Loveridge* (2014) 243 A Crim R 31  
*R v YS* [2014] NSWCCA 226 (23 October 2014)  
*Simpson v The Queen* [2014] NSWCCA 23 (4 March 2014)  
*Woodward v The Queen* (2014) 68 MVR 376

**2013**

- Adzioski v The Queen* [2013] NSWCCA 69 (5 April 2013)  
*Buksh v The Queen* [2013] NSWCCA 60 (11 April 2013)  
*Carpenter v The Queen* [2013] NSWCCA 130 (30 May 2013)  
*Chen v The Queen* [2013] NSWCCA 116 (22 May 2013)  
*George v The Queen* [2013] NSWCCA 263 (12 November 2013)  
*Melbom v The Queen* [2013] NSWCCA 210 (9 September 2013)  
*Nair v The Queen* [2013] NSWCCA 79 (18 April 2013)  
*Ngati v The Queen* [2013] NSWCCA 203 (30 August 2013)  
*Prince v The Queen* [2013] NSWCCA 274 (18 November 2013)  
*R v Ball* [2013] NSWCCA 126 (24 May 2013)  
*R v Stanley* [2013] NSWCCA 124 (28 May 2013)  
*R v Wright* (2013) 229 A Crim R 245  
*Small v The Queen* (2013) 231 A Crim R 279  
*Smith v The Queen* [2013] NSWCCA 64 (27 March 2013)  
*Smith v The Queen* [2013] NSWCCA 209 (9 September 2013)  
*Stewart v The Queen* [2013] NSWCCA 185 (9 August 2013)  
*SW v The Queen* [2013] NSWCCA 103 (7 June 2013)  
*Vulovic v The Queen* [2013] NSWCCA 340 (20 December 2013)  
*Ward v The Queen* [2013] NSWCCA 46 (1 March 2013)  
*Willmott v The Queen* [2013] NSWCCA 244 (5 November 2013)  
*Youssef v The Queen* [2013] NSWCCA 308 (6 December 2013)  
*Zuccarini v The Queen* [2013] NSWCCA 228 (14 October 2013)  
*ZZ v The Queen* [2013] NSWCCA 83 (19 April 2013)

## 2012

*Beldon v The Queen* [2012] NSWCCA 194 (6 September 2012)  
*Blackwell v The Queen* [2012] NSWCCA 227 (1 November 2012)  
*Buckley v The Queen* [2012] NSWCCA 85 (7 May 2012)  
*Gommesen v The Queen* (2012) 62 MVR 196  
*JB v The Queen* (2012) 83 NSWLR 153  
*JM v The Queen* (2012) 223 A Crim R 55  
*JT v The Queen* [2012] NSWCCA 133 (28 June 2012)  
*KR v The Queen* [2012] NSWCCA 32 (14 March 2012)  
*Lute v The Queen* (2012) 60 MVR 475  
*Mendes v The Queen* (2012) 221 A Crim R 161  
*R v Brown* [2012] NSWCCA 199 (18 September 2012)  
*R v Chandler* [2012] NSWCCA 135 (28 June 2012)  
*R v GWM* [2012] NSWCCA 240 (21 November 2012)  
*R v Millwood* [2012] NSWCCA 2 (6 February 2012)  
*R v Murrell* [2012] NSWCCA 90 (9 May 2012)  
*R v Nykolyn* [2012] NSWCCA 219 (17 August 2012)  
*Stewart v The Queen* [2012] NSWCCA 183 (29 August 2012)  
*Sullivan v The Queen* (2012) 221 A Crim R 490  
*Tweeddale v The Queen* [2012] NSWCCA 99 (21 May 2012)  
*Webb v The Queen* (2012) 225 A Crim R 550  
*Williams v The Queen* (2012) 229 A Crim R 67

## 2011

*Abdel-Hady v The Queen* [2011] NSWCCA 196 (28 October 2011)  
*BIP v The Queen* [2011] NSWCCA 224 (14 October 2011)  
*Blackwell v The Queen* (2011) 81 NSWLR 119  
*Burns v The Queen* (2011) 205 A Crim R 240  
*CW v The Queen* [2011] NSWCCA 45 (22 March 2011)  
*Foster v The Queen* [2011] NSWCCA 285 (20 December 2011)  
*LB v The Queen* [2011] NSWCCA 220 (7 October 2011)  
*McClain v The Queen* [2011] NSWCCA 191 (30 June 2011)  
*MDZ v The Queen* [2011] NSWCCA 243 (15 November 2011)  
*Reberger v The Queen* [2011] NSWCCA 132 (10 June 2011)  
*Rotner v The Queen* [2011] NSWCCA 207 (8 September 2011)  
*R v AB* (2011) 59 MVR 356  
*R v KB* [2011] NSWCCA 190 (2 September 2011)  
*R v West* [2011] NSWCCA 91 (12 April 2011)  
*Shepherd v The Queen* [2011] NSWCCA 245 (17 November 2011)  
*Smith v The Queen* [2011] NSWCCA 110 (13 May 2011)  
*Smith v The Queen* [2011] NSWCCA 290 (23 November 2011)

## 2010

*Ali v The Queen* [2010] NSWCCA 35 (2 March 2010)  
*Bourke v The Queen* (2010) 199 A Crim R 38  
*BP v The Queen* (2010) 201 A Crim R 379



*Butters v The Queen* [2010] NSWCCA 1 (4 February 2010)  
*Hutchison v The Queen* [2010] NSWCCA 122 (11 June 2010)  
*Jones v The Queen* [2010] NSWCCA 117 (4 June 2010)  
*Josefski v The Queen* (2010) 217 A Crim R 183  
*King v The Queen* [2010] NSWCCA 202 (10 September 2010)  
*McDonald v The Queen* [2010] NSWCCA 220 (30 September 2010)  
*Still v The Queen* [2010] NSWCCA 131 (23 June 2010)  
*Woodbridge v The Queen* (2010) 208 A Crim R 503

## **NORTHERN TERRITORY**

### **2014**

*O'Reilly v The Queen* [2014] NTCCA 14 (24 September 2014)  
*R v Nabegeyo* (2014) 34 NTLR 154  
*Wesley v The Queen* [2014] NTCCA 17 (17 October 2014)

### **2013**

*Green v The Queen* [2013] NTCCA 14 (31 October 2013)  
*Namatjira v The Queen* [2013] NTCCA 8 (19 July 2013)

### **2012**

*Goddard v The Queen* [2012] NTCCA 6 (8 March 2012)

### **2011**

*Blacker v The Queen* (2011) 252 FLR 338  
*R v Wilson* (2011) 30 NTLR 51

### **2010**

*Mulkatana v The Queen* (2010) 28 NTLR 31

## **QUEENSLAND**

### **2014**

*Queensland Police Service v Terare* (2014) 245 A Crim R 211  
*R v Baker* [2014] QCA 5 (7 February 2014)  
*R v Boubaris* [2014] QCA 199 (22 August 2014)  
*R v Castle; Ex parte A-G (Qld)* [2014] QCA 276 (7 November 2014)  
*R v Civic* [2014] QCA 322 (5 December 2014)  
*R v Davidson* [2014] QCA 348 (19 December 2014)  
*R v Douglas* (2014) 243 A Crim R 454  
*R v Huni* [2014] QCA 324 (5 December 2014)  
*R v John* [2014] QCA 86 (24 April 2014)  
*R v Johnson* [2014] QCA 79 (15 April 2014)  
*R v Kleimeyer* [2014] QCA 56 (28 March 2014)  
*R v Levy; Ex parte A-G (Qld)* (2014) 244 A Crim R 296

*R v Nikora* (2014) 243 A Crim R 489  
*R v Porter* [2014] QCA 14 (14 February 2014)  
*R v Williams; Ex parte A-G (Qld)* (2014) 247 A Crim R 250

### 2013

*A-G (Qld) v Fardon* [2013] QCA 299 (10 October 2013)  
*Commissioner of Police v Stehbens* [2013] QCA 81 (16 April 2013)  
*R v Anthony* [2013] QCA 95 (3 May 2013)  
*R v Brown* [2013] QCA 185 (16 July 2013)  
*R v George* [2014] 2 Qd R 150  
*R v Glenbar* (2013) 240 A Crim R 22  
*R v Langlo & Nuggins* [2013] QCA 117 (21 May 2013)  
*R v McGuire* [2013] QCA 290 (4 October 2013)  
*R v Mitchell* [2013] QCA 248 (6 September 2013)

### 2012

*A-G (Qld) v Bosanquet* [2012] QCA 367 (21 December 2012)  
*A-G (Qld) v Ellis* [2012] QCA 182 (29 June 2012)  
*Hocking v A-G (Qld)* [2012] QCA 65 (23 March 2012)  
*R v Bacon* [2012] QCA 340 (7 December 2012)  
*R v Davis* [2012] QCA 97 (17 April 2012)  
*R v Edwards* [2012] QCA 117 (4 May 2012)  
*R v Elomari* [2012] QCA 27 (28 February 2012)  
*R v Gulbis-Paris* [2012] QCA 348 (7 December 2012)  
*R v Hart* [2012] QCA 38 (6 March 2012)  
*R v Hill* [2012] QCA 59 (20 March 2012)  
*R v Kay* [2012] QCA 327 (30 November 2012)  
*R v Lee* [2012] QCA 313 (16 November 2012)  
*R v Logan* [2012] QCA 210 (17 August 2012)  
*R v Ma* [2012] QCA 317 (20 November 2012)  
*R v PAO* [2012] QCA 8 (10 February 2012)  
*R v Quinlan* [2012] QCA 132 (22 May 2012)  
*R v Sailor* [2012] QCA 246 (13 September 2012)

### 2011

*LAB v A-G (Qld)* [2011] QCA 230 (13 September 2011)  
*R v Almotared* [2011] QCA 128 (17 June 2011)  
*R v Butler; R v Lawton; R v Marshall* [2011] QCA 265 (4 October 2011)  
*R v Chenery* [2011] QCA 271 (7 October 2011)  
*R v Derks* [2011] QCA 295 (21 October 2011)  
*R v Evans and Pearce* [2011] 2 Qd R 571  
*R v GAM* [2011] QCA 288 (18 October 2011)  
*R v Grimaldi* [2011] QCA 114 (3 June 2011)  
*R v Handley* [2011] QCA 361 (13 December 2011)  
*R v Harold* [2011] QCA 99 (17 May 2011)  
*R v Hopper* [2011] QCA 296 (21 October 2011)

*R v Lacey & Lacey* [2011] QCA 386 (23 December 2011)  
*R v Martin* [2011] QCA 342 (29 November 2011)  
*R v O'Loughlin* [2011] QCA 123 (10 June 2011)  
*R v Ray* [2011] QCA 365 (13 December 2011)  
*R v Thomason; Ex parte A-G (Qld)* [2011] QCA 9 (11 February 2011)  
*R v Toohey* [2011] QCA 354 (9 December 2011)  
*R v TX* [2011] 2 Qd R 247

## 2010

*R v Barden* [2010] QCA 374 (23 December 2010)  
*R v Blackaby* [2010] QCA 84 (16 April 2010)  
*R v CAW* [2010] QCA 103 (7 May 2010)  
*R v Clough [No 2]* [2011] 2 Qd R 222  
*R v Davy* [2010] QCA 118 (21 May 2010)  
*R v Frank* [2010] QCA 150 (18 June 2010)  
*R v Harold* [2010] QCA 267 (8 October 2010)  
*R v Tapara* [2010] QCA 320 (16 November 2010)  
*R v Taylor* (2010) 203 A Crim R 302  
*R v Williamson* [2010] QCA 277 (15 October 2010)

## SOUTH AUSTRALIA

### 2014

*R v Carberry* [2014] SASCF 78 (18 July 2014)  
*R v Ceruto* (2014) 66 MVR 94  
*R v Humbles* [2014] SASCF 91 (13 August 2014)  
*R v Lakin* (2014) 118 SASR 535  
*R v Lindsay* (2014) 119 SASR 320  
*R v Lutze* (2014) 121 SASR 144  
*R v Marafioti* (2014) 118 SASR 511

### 2013

*R v Compton; R v Barratt* (2013) 237 A Crim R 177  
*R v Nedza* [2013] SASCF 142 (18 December 2013)  
*R v Wymond; R v Evans* [2013] SASCF 12 (14 March 2013)

### 2012

*R v Belczacki* (2012) 112 SASR 95  
*R v Djordjevic* [2012] SASCF 69 (15 June 2012)  
*R v van Setten* [2012] SASCF 90 (1 August 2012)

### 2011

*R v Betts* [2011] SASCF 27 (21 April 2011)  
*R v Brace* [2011] SASCF 54 (14 June 2011)  
*R v Higgs* (2011) 111 SASR 42  
*R v Ossitt* (2011) 274 LSJS 516

*R v Sierke* [2011] SASCFC 53 (10 June 2011)  
*R v Smith* (2011) 277 LSJS 438  
*R v Stott* (2011) 111 SASR 346  
*R v Wait* [2011] SASCFC 91 (19 August 2011)

## **2010**

*R v Daniel* (2010) 273 LSJS 271  
*R v Heyward & Minter* [2010] SASCFC 38 (28 September 2010)  
*R v Rahmanian* [2010] SASC 137 (12 May 2010)

## **TASMANIA**

### **2014**

*Tap v Tasmania* [2014] TASCRA 5 (14 November 2014)

### **2013**

*DPP (Tas) v Blackaby* [2013] TASCRA 4 (7 June 2013)  
*DPP (Tas) v CSS* [2013] TASCRA 10 (8 October 2013)  
*Smart v Tasmania* [2013] TASCRA 15 (23 December 2013)

### **2011**

*DPP (Tas) v Finnegan* [2011] TASCRA 3 (21 April 2011)  
*DPP (Tas) v Rogers* [2011] TASCRA 17 (9 November 2011)  
*DPP (Tas) v Smithurst* (2011) 60 MVR 34  
*KMJ v Tasmania* (2011) 20 Tas R 425

### **2010**

*Barron v Tasmania* (2010) 20 Tas R 114  
*DPP (Tas) v Broadby, Cockshutt and Woolley* (2010) 20 Tas R 399  
*Gregson v Tasmania* [2010] TASCRA 4 (24 March 2010)  
*Moyle v Tasmania* (2010) 55 MVR 61  
*Startup v Tasmania* [2010] TASCRA 5 (10 May 2010)

## **VICTORIA**

### **2014**

*AS v The Queen* [2014] VSCA 83 (7 May 2014)  
*Audsley v The Queen* (2014) 44 VR 506  
*Bray (A Pseudonym) v The Queen* (2014) 46 VR 623  
*Buchanan (A Pseudonym) v Secretary to the Department of Health* (2014) 43 VR 210  
*DPP (Vic) v Sullivan* [2014] VSCA 222 (17 September 2014)  
*DPP (Vic) v Zarb* (2014) 46 VR 832  
*Hothnyang v The Queen* [2014] VSCA 64 (11 April 2014)  
*Pasznyk v The Queen* (2014) 43 VR 169

*Rana v The Queen* [2014] VSCA 198 (4 September 2014)  
*Saw Wah v The Queen* (2014) 45 VR 440  
*Singh v The Queen* [2014] VSCA 250 (7 October 2014)  
*Ulutui v The Queen* (2014) 41 VR 676  
*West v The Queen* [2014] VSCA 36 (13 March 2014)

## 2013

*Amato v The Queen* [2013] VSCA 346 (3 December 2013)  
*Arthars v The Queen; Plater v R* (2013) 39 VR 613  
*Crocker v The Queen* (2013) 39 VR 668  
*Dong v The Queen* [2013] VSCA 354 (5 December 2013)  
*Gosland v The Queen; McDonald v The Queen* [2013] VSCA 269 (24 September 2013)  
*Hards v The Queen* [2013] VSCA 119 (7 May 2013)  
*Nash v The Queen* (2013) 40 VR 134  
*Niaros v The Queen* [2013] VSCA 249 (13 September 2013)  
*Tunja v The Queen* (2013) 41 VR 208

## 2012

*Acar v The Queen* [2012] VSCA 8 (2 February 2012)  
*Dosen v The Queen* [2012] VSCA 307 (14 December 2012)  
*DPP (Vic) v Edwards* (2012) 44 VR 114  
*DPP (Vic) v Werry* (2012) 37 VR 524  
*Eade v The Queen; Vanstone v The Queen* (2012) 35 VR 526  
*Hegarty v The Queen* [2012] VSCA 252 (11 October 2012)  
*IK v Secretary to the Department of Justice* [2012] VSCA 12 (10 February 2012)  
*Morrison v The Queen* [2012] VSCA 222 (14 September 2012)  
*NJ v The Queen* (2012) 36 VR 522  
*Phillips v The Queen* (2012) 37 VR 594  
*Roberts v The Queen* (2012) 226 A Crim R 452  
*RSJ v The Queen* [2012] VSCA 148 (29 June 2012)  
*Shaw v The Queen* [2012] VSCA 78 (2 May 2012)

## 2011

*Ashdown v The Queen* (2011) 37 VR 341  
*Baltas v The Queen* [2011] VSCA 169 (10 June 2011)  
*Bennett v The Queen* [2011] VSCA 253 (25 August 2011)  
*DPP (Vic) v Gerrard* (2011) 211 A Crim R 171  
*Gorlachencharau v The Queen* (2011) 34 VR 149  
*Halamboulis v The Queen; DPP (Vic) v Halamboulis* [2011] VSCA 449 (22 December 2011)  
*Jacobs v The Queen; Ross v The Queen* [2011] VSCA 238 (18 August 2011)  
*Johnson v The Queen* [2011] VSCA 360 (14 November 2011)  
*Johnstone v The Queen* (2011) 31 VR 320  
*Kavanagh v The Queen* [2011] VSCA 234 (18 August 2011)  
*Khan v The Queen* [2011] VSCA 286 (23 September 2011)

*Mitic v The Queen* [2011] VSCA 373 (30 November 2011)  
*Neal v The Queen* (2011) 32 VR 454  
*Rintoull v The Queen* [2011] VSCA 245 (23 August 2011)  
*Sharma v The Queen* [2011] VSCA 356 (21 November 2011)  
*Sibanda v The Queen* (2011) 33 VR 67

## 2010

*Aidid v The Queen; MA v The Queen* (2010) 25 VR 593  
*Babic v The Queen* (2010) 28 VR 297  
*Hasan v The Queen* (2010) 31 VR 28  
*Hudson v The Queen* (2010) 30 VR 610  
*MG v The Queen* (2010) 29 VR 305  
*R v Simon* [2010] VSCA 66 (31 March 2010)  
*Tancredi v The Queen; Pamvouxoglou v The Queen* [2010] VSCA 157 (8 June 2010)  
*Wills v The Queen* [2010] VSCA 235 (14 September 2010)

## WESTERN AUSTRALIA

### 2014

*Blurton v Western Australia* [2014] WASCA 61 (21 March 2014)  
*Dixon v Western Australia [No 2]* [2014] WASCA 1 (8 January 2014)  
*Millar v Western Australia* [2014] WASCA 2 (8 January 2014)  
*Moir v Western Australia* [2014] WASCA 25 (4 February 2014)  
*Pearce v Western Australia* [2014] WASCA 156 (28 August 2014)  
*Western Australia v Camus* (2014) 240 A Crim R 384  
*Western Australia v Hassell* [2014] WASCA 158 (27 August 2014)  
*Western Australia v Staniforth-Smith* [2014] WASCA 170 (5 September 2014)  
*Western Australia v Walley* [2014] WASCA 85 (23 April 2014)

### 2013

*Colbung v Western Australia* [2013] WASCA 257 (6 November 2013)  
*Field v Western Australia* [2013] WASCA 209 (6 September 2013)  
*Goodwyn v Western Australia* (2013) 45 WAR 328  
*Heaton v Western Australia* (2013) 234 A Crim R 409  
*Munmurrie v Western Australia* [2013] WASCA 167 (25 July 2013)  
*Oubid v Western Australia* [2013] WASCA 79 (21 March 2013)  
*Peters v Western Australia [No 2]* (2013) 65 MVR 13  
*Pool v Western Australia* [2013] WASCA 274 (2 December 2013)  
*Prempeh v Western Australia* [2013] WASCA 150 (19 June 2013)  
*Toki v Western Australia* [2013] WASCA 214 (17 September 2013)  
*Western Australia v Lee* [2013] WASCA 246 (22 October 2013)

### 2012

*Kaschull v Western Australia* [2012] WASCA 245 (29 November 2012)  
*Liu v Western Australia* [2012] WASCA 218 (31 October 2012)

*Lodge v Magorian* (2012) 42 WAR 270  
*McLaughlin v Western Australia* (2012) 224 A Crim R 134  
*PDT v Western Australia* [2012] WASCA 134 (20 June 2012)  
*Singh v Western Australia* [2012] WASCA 262 (11 December 2012)  
*Western Australia v Munda* (2012) 43 WAR 137  
*Windle v Western Australia* [2012] WASCA 61 (21 March 2012)

## 2011

*Brown v Western Australia* (2011) 207 A Crim R 533  
*Caulfield v Western Australia [No 2]* [2011] WASCA 230 (24 October 2011)  
*DBW (a child) v Western Australia* [2011] WASCA 206 (30 September 2011)  
*Evans v Western Australia* [2011] WASCA 182 (5 September 2011)  
*GJT v Western Australia* (2011) 214 A Crim R 272  
*Langdon v Kelemete-Leoli-McLean* (2011) 206 A Crim R 368  
*Narkle v Western Australia* [2011] WASCA 160 (26 July 2011)  
*Papas v Western Australia* [2011] WASCA 3 (10 January 2011)  
*Victor v Western Australia* [2011] WASCA 94 (13 April 2011)  
*Western Australia v Silich* (2011) 43 WAR 285  
*Wongawol v Western Australia* (2011) 42 WAR 91  
*WP v Western Australia* [2011] WASCA 198 (22 September 2011)

## 2010

*Austic v Western Australia* [2010] WASCA 110 (11 June 2010)  
*Barron v Western Australia* (2010) 55 MVR 123  
*Butler v Western Australia* [2010] WASCA 104 (31 May 2010)  
*Cook v Western Australia* [2010] WASCA 241 (22 December 2010)  
*Lim v Western Australia* [2010] WASCA 186 (23 September 2010)  
*McKey v Western Australia* [2010] WASCA 210 (29 October 2010)  
*Miles v Western Australia* [2010] WASCA 93 (18 May 2010)  
*Powell v Tickner* (2010) 203 A Crim R 421  
*Prazmo v Western Australia [No 2]* [2010] WASCA 99 (25 May 2010)  
*Waldron v Western Australia* [2010] WASCA 63 (7 April 2010)  
*Ward v Western Australia [No 2]* [2010] WASCA 208 (27 October 2010)  
*Wright v Western Australia* (2010) 43 WAR 1