FINAL REPORT

DRINK AND FOOD SPIKING

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

July 2007

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Final Report – Drink and Food Spiking

1 Introduction

(a) Background of the Model Criminal Code Officers' Committee – now known as Model Criminal Law Officers' Committee

On 28 June 1990, the Standing Committee of Attorneys-General (SCAG) placed the question of the development of a national Model Criminal Code for Australian jurisdictions on its agenda. In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers' Committee, but the name was changed in November 1993 to the Model Criminal Code Officers' Committee (MCCOC). MCCOC released a large number of Discussion Papers and Reports on criminal law topics.[1]

In July 2006, SCAG decided to rename the Committee as the Model Criminal Law Officers' Committee to reflect the Committee's broader role of advising on criminal law issues that have been referred to it by SCAG and the fact that development of the Model Criminal Code is largely complete.

(b) Reference from Standing Committee of Attorneys-General to examine legal aspects of drink spiking

In July 2003, the Australian Institute of Criminology (AIC) was commissioned by the Australian Government Attorney-General's Department, on behalf of the Intergovernmental Committee on Drugs, to conduct Stage One of a national project on drink spiking. Drink spiking was identified as an emerging issue for examination under the alcohol priority area by the Ministerial Council on Drug Strategy (MCDS) and has received considerable media attention in the last couple of years. The AIC report was accepted by the MCDS and published in November 2004.[2]

MCDS referred the legal aspects of the report to SCAG which, in turn, sought the advice of what was then MCCOC on the legal aspects of the AIC Report.[3]

(c) Public consultation – Discussion Paper released in May 2006

In May 2006, MCCOC released a Discussion Paper on Drink Spiking for

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[1] MCCOC and MCLOC Discussion Papers and Reports can be found at the Australian Government Attorney-General's Department website at: <http://www.ag.gov.au/www/agd/agd.nsf/Page/Model_criminal_code>.

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

[3] The AIC report has been used as the main reference work on drink spiking in this paper. The research has some limitations which the AIC acknowledges in its report, due to the difficulty in determining the exact numbers of drink spiking incidents that occur in the community. This is due to high levels of under-reporting, fluctuations in reporting due to awareness campaigns, jurisdictional differences in data recording and extraction procedures, and difficulty in verifying whether a reported incident actually occurred. It remains the first national study on drink spiking and has been accepted by the MCDS.

public consultation. The results of that consultation process are detailed and discussed below.

2 What is Drink and Food Spiking?

The term 'spiking' broadly refers to the addition of an intoxicant to any 'thing' that can be consumed or the administration or attempted administration of an intoxicant without the consent of the person who consumes it, whether in whole, in part or at all. Spiking is a broad concept that may cover a range of situations where the means of spiking and the 'thing' that is spiked may differ.

Drink spiking has gained considerable media coverage and interest. Instances of drink spiking most commonly reported in the media involve the addition of a 'date rape drug' (such as Rohypnol)[4] to a drink (commonly an alcoholic drink) without the knowledge of the victim. The aim is to induce an extremely inebriated state in the victim with the additional intention of taking sexual advantage of the victim or actually doing so. Such cases are at the most serious end of the drink spiking continuum. Another situation that could still have serious consequences would involve the addition of extra alcohol in a known alcoholic drink as a 'prank' - to see the victim make a fool of themselves, for example.

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

> The term 'drink spiking' refers to drugs or alcohol being added to a drink (alcoholic or non-alcoholic) without the consent of the person consuming it. For an incident to be defined as drink spiking in this report, it need not involve further criminal victimisation, even though such offences can occur after an incident of drink spiking.[5]

The Discussion Paper focused on 'drink spiking', consistent with the parameters of the request received from SCAG. However, during the consultation process, concerns were raised in relation to other categories of spiking notably 'food spiking.' Like drink spiking, food spiking has the potential for serious harm and consequence to the victim. As such, the Committee agreed that it was important to address food spiking in its recommendations. The Committee is mindful that, unlike drink spiking, food spiking has not (to the Committee's knowledge) been the focus of a published empirical study and therefore there are no findings regarding its prevalence and nature from which to draw. Nonetheless there seems no reason why 'spiking' of food shall not be subject to the same criminal sanctions as spiking of drink.

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

[5] AIC ix.

3 AIC Findings

The AIC's empirical findings about the prevalence of drink spiking were as follows.

What is the extent of drink spiking in Australia?

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

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

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

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

What is the nature of drink spiking?

There is no single 'typical' incident of drink spiking. Rather, drink spiking appears to be a complicated phenomenon which can occur in a variety of locations, against a variety of victims, with a variety of different spiking additives, for a number of different reasons resulting in disparate effects and consequences. Based on analyses of police data, sexual assault data and AIC hotline data it was found that:

- 4 out of 5 victims are female,
- about half of drink spiking victims are aged under 24, while about one third are aged between 25 and 34,
- the majority of reported drink spiking incidents have no associated criminal victimisation, indicating that 'prank spiking' may be a common motivation for drink spiking,

- between 20 and 30 per cent of incidents reported to police involve sexual assault, while it is estimated that about one third of all drink spiking incidents are associated with sexual assault,
- about five per cent of incidents involve robbery,
- two thirds of suspected drink spiking incidents occur in licensed premises (although for sexual assault victims the location is equally likely to be at the victim or offender's home or another location),
- many victims do not know who the offender was,
- where offenders can be identified, drink spiking can be perpetrated by strangers or known acquaintances, while incidents involving sexual assault are more likely to occur with a known offender,
- many victims experience memory loss after drink spiking,
- apprehension of offenders is very uncommon,
- forensic testing of blood and urine samples is relatively rare and does not conclusively prove that drink spiking has occurred, and
- the vast majority of incidents of drink spiking are not reported to police.

Reporting to police

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

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

Despite considerable media and public perceptions concerning the prevalence of drugs such as flunitrazepam, GHB and Ketamine being used in drink spiking, the forensic evidence to date does not support these claims. Alcohol has tended to dominate results and it is not clear whether this is because (a) alcohol is commonly used to spike drinks, (b) other drugs have left the body by the time of testing and so only alcohol is left to detect, or (c) people are unaware how much alcohol they are actually drinking. The only way to test for the presence of drugs is to conduct scientific analyses. However scientific analyses can only confirm whether or not drugs or alcohol are in the body at the time of testing and cannot confirm that a positive result means that a drink was spiked.[6]

This set of conclusions was derived from the results of a national telephone hotline and is based on perception and ‘self-reporting’. It is therefore, subject to the documented weaknesses of that kind of methodology. Nonetheless, the AIC report constitutes the best available information on the nature and prevalence of the drink spiking problem.

[6] AIC x-xi.

4 Application of the Criminal Law

4.1 The AIC Report

The AIC Report contains a survey of the potential offences involved in drink spiking (as defined by the AIC).[7] Their collection of many specific unreported cases is particularly valuable. These matters will be the subject of analysis below. The AIC summary of the possibly applicable laws is very useful.[8] The AIC's summary of the results of its discussion is as follows.

> **Is drink spiking illegal in Australia?**
>
> There is currently no separate offence category in any Australian jurisdiction for the act of spiking someone's drink per se. Rather, the use of criminal laws to prosecute drink spiking depends on:
>
> - the state/territory in which the incident occurred,
> - the motivation of the person spiking the drink,
> - the type of substance used to spike the drink, and
> - the effects of the spiking.
>
> This means that there is some degree of flexibility in how an incident of drink spiking is recorded by police within each jurisdiction and how courts may interpret the law in relation to such incidents. It is recommended that each jurisdiction review its criminal law provisions in terms of their applicability to different forms of drink spiking and appropriate maximum penalties.

4.2 General Principles of the Application of the Criminal Law

In general terms, the area of the criminal law applicable to the drink spiking situation is 'non-fatal offences against the person'. Non-fatal offences against the person in all jurisdictions in Australia derive from English sources and ultimately from the Imperial *Offences Against the Person Act 1861.*[9]

In 1837 the UK (Imperial) Parliament passed 'An Act to Amend the Laws Relating to Offences Against the Person'.[10] Among other things, that Act created, (for the first time, it seems), offences of administering a poison or other noxious thing. Those offences relevantly provided:

> And be it enacted, That whosoever shall administer to or cause to be taken by any Person any Poison or other destructive Thing, … or shall by any Means whatsoever cause to any Person any bodily Injury dangerous

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[7] AIC Ch 4.
[8] AIC at 104 (Table 15).
[9] 24 & 25 Vict c 100 (1861).
[10] 7 Wm IV & 1 Vict c 85 (1837).

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

These offences were very specific, being confined to cases of administration *with intent to murder*, and not long passed before they were found wanting. In 1860 the UK (Imperial) Parliament passed 'An Act to amend the Law relating to the unlawful administering of Poison'.[11] That Act recited as follows.

> Whereas the present Law has been found insufficient to protect Persons from the unlawful administering of Poison, except in cases where the Intent is to commit Murder: Be it enacted…
>
> I That whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other Person any Poison or other destructive or noxious Thing so as thereby to endanger the Life of such Person, or so as thereby to inflict on such Person any grievous bodily Harm, shall be guilty of Felony…
>
> II Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other Person any Poison or other destructive or noxious Thing with Intent to injure, aggrieve, or annoy such Person, shall be guilty of a Misdemeanour….

By 1860 there were no less than four different offences of differing seriousness dealing with the administration of poisons and other noxious things in existence. The first two dealt with those done with intent to murder; the third with intent to endanger life and the fourth with intent to injure, aggrieve or annoy.

So far as the common law jurisdictions are concerned, the four offences found their way, pretty much unchanged, into the Crimes Act (or equivalent) legislation of the various colonies and then States.[12] So far as the common law jurisdictions are concerned, New South Wales is typical. The *Crimes Act 1900* (NSW) contains the following provisions.

> *<u>27 Acts done to the person with intent to murder</u>*
> Whosoever:
> administers to, or causes to be taken by, any person any poison, or other destructive thing, or
> by any means wounds, or causes grievous bodily harm to any person,
> with intent in any such case to commit murder, shall be liable to imprisonment for 25 years.

[11] 23 Vic c 8 (1837).
[12] See, for example, the first *Criminal Law Consolidation Act 1873* (SA).

29 Certain other attempts to murder

Whosoever:

attempts to administer to, or cause to be taken by, any person any poison, or other destructive thing, or

shoots at, or in any manner attempts to discharge any kind of loaded arms at any person, or

attempts to drown, suffocate, or strangle any person,

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

39 Using poison etc so as to endanger life

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

41 Administering poison etc with intent to injure or annoy

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

At the turn of the last century, Sir Samuel Griffith completed his famous codification of the criminal law, adopted by Queensland, Western Australia and Tasmania and in modified form by the Northern Territory. The Code also contained 'substance administration' offences. The Tasmanian Code, for example contains the following offences.

169 Administering drug to facilitate offence

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

175 Unlawfully administering poison with intent to harm

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

176 Administering a noxious thing

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

In the last decade or so, some serious thinking has taken place about the nature of these and other such offences and, indeed, this ad hoc style of offence making. Whatever the specific reason for these separate offences, and no doubt there was some, why did we have to have these great lists of offences which were merely specific examples of the same thing? To take one example, why have offences of endangering life by shooting, wounding, administering poisons, garrotting, placing stones on railway lines and so on? If the idea was to prevent conduct that recklessly endangered life or grievous

bodily harm, *what did it matter how it was done*? One general offence of recklessly endangering life with an included general offence of recklessly endangering grievous bodily harm would do.

The idea that all such behaviour should be criminalised in a general endangerment offence originated in the 1962 draft of the American *Model Penal Code.*[13] That offence was committed where a person 'recklessly engages in conduct which places another person in danger of death or serious bodily injury'. It was further provided that recklessness and danger would be presumed where any person knowingly points a firearm at another whether or not the actor believed that the firearm was loaded. In the 1970s, the Mitchell Committee review of South Australian criminal law recommended the enactment of an offence in the following terms: 'A person commits an offence if he recklessly engages in conduct which places or may place another person in danger of death or serious injury.'[14] In 1998, the MCCOC arrived at the following conclusions.

> The Committee [MCCOC] does not believe that there should be specific endangerment offences in relation to listed situations, for example, trains and aeroplanes. A plethora of specific offences, which, taken together, really indicates that a general principle and hence a general offence is involved, is one of the vices in the old scheme of things which the Committee wishes to eradicate. Endangerment of human lives should be covered by one offence, whether it be by hijacking an aeroplane or bombing a house. There should be endangerment offences despite the risks of over inclusion. The modern environment is, for all people an interdependent environment, in which life and safety must and does depend on the skill and foresight of others. No-one who drives a car or is a passenger on a plane, or uses a lift or lives near a large dam can guard against the reckless indifference to life or harm of others.[15]

The proposals set out later in this Report have been framed on the premise that there should not be a myriad of offences depending on the means by which endangerment is brought about.

4.3 The Offences In Australian Jurisdictions – by category

Drink spiking resulting in serious harm, or with an intent to commit a further offence against the victim, is already criminalised under a range of State and Territory laws, as the following discussion illustrate. It is important to note that these offences focus on the type of harm, rather than how the harm occurred. The table annexed to this report summarises the extent to which State and Territory offences cover the broad range of conduct encompassed by 'drink spiking', as defined by the AIC report.

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[13] American Law Institute, *Model Penal Code, Proposed Official Draft* (1962).

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

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

For the purposes of this summary, incidents involving drink spiking have been divided into six categories:

(a) drink spiking resulting in death,
(b) drink spiking causing, or with intent to cause, injury or harm,
(c) drink spiking with intent to commit a sexual offence,
(d) drink spiking to commit an offence,
(e) drink spiking with drugs (other than alcohol) without lawful excuse, and
(f) drink spiking with alcohol for a prank.

(a) Drink spiking resulting in death

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

(b) Drink spiking causing, or with intent to cause, injury or harm

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

There are potential gaps in the coverage of offences covering this category of drink spiking in New South Wales, and Australian Capital Territory. This is because their offences specifically target the administration of 'poisons', 'injurious substances', 'noxious things', 'stupefying or overpowering drugs' and 'drugs', and do not necessarily cover drink spiking with alcohol.

(c) Drink spiking with intent to commit a sexual offence

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

The offences in Western Australia and the Northern Territory cover this category of drink spiking most comprehensively, as they apply to sexual offences more generally (ie they are not limited to sexual penetration), and they cover drink spiking with alcohol. The offences in Queensland also apply to 'sexual acts' generally, where a drug or 'other thing' used with an intent to stupefy or overpower has been used to procure a sexual act.[16]

There is a gap in the coverage of the offences in New South Wales as the offences do not appear to apply where the drink spiking agent is alcohol.

While the Victorian offence covers drink spiking with alcohol, it only applies where there is intent to enable an act of sexual penetration (not sexual acts

[16] In *R v Murcott* [1893] 19 VLR 408, it was held that a thing which stupefies by intoxicating is a stupefying thing.

more generally). This gap is covered by a more general offence of administering, without consent, any substance capable of interfering substantially with the bodily functions of the other person (eg capable of inducing unconsciousness or sleep).

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

The South Australian versions of the old offences (ss 25 and 27 of the *Criminal Law Consolidation Act 1935*) were repealed in 2006 and replaced by a regime of general harm and reckless endangerment offences. Coverage of drink spiking with intent will fall to be considered under these more general offences combined, where necessary, with the ancillary offence of attempt.

(d) Drink spiking with intent to commit an indictable offence

New South Wales, Queensland, Tasmania, Western Australia, South Australia and the Northern Territory all have serious offences covering drink spiking with a drug with intent to commit an offence. Maximum penalties range from 20 years to life imprisonment. The New South Wales, Queensland and Western Australian offences are limited to intent to commit an indictable offence, the Northern Territory offence to intent to commit an offence punishable by 2 years imprisonment, and the Tasmanian offence to commit any offence.

There is a potential gap in the coverage of the New South Wales offences as the offences do not necessarily apply to drink spiking with alcohol. This gap does not exist to the same extent in South Australia, Western Australian, Queensland and the Northern Territory as those jurisdictions also have serious general offences, such as doing an act with intent to harm another person, or stupefying in order to commit an indictable offence.

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

Victoria does not have any serious offence covering this category of drink spiking. Partial coverage is provided by the general Victorian offence of

administering, without consent, any substance capable of interfering substantially with the bodily functions of the other person (eg capable of inducing unconsciousness or sleep).

The South Australian versions of the old offences (ss 25 and 27 of the *Criminal Law Consolidation Act*) were repealed in 2006 and replaced by a regime of general harm and reckless endangerment offences. Coverage of drink spiking with intent will fall to be considered under these more general offences combined, where necessary, with the ancillary offence of attempt.

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

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

New South Wales and Queensland have offences of administering a poison or other destructive or noxious thing to another person with intent to injure, aggrieve or annoy that person. The equivalent offence in Tasmania has been modernised and now encompasses alcohol and other drugs. Maximum penalties range up to 21 years imprisonment.

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

(f) Drink spiking with alcohol for a prank

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

Whilst New South Wales and Queensland have offences of administering a poison or other destructive or noxious thing to another person with intent to injure, aggrieve or annoy that person, it is unclear whether drink spiking with alcohol would fall within the ambit of those offences. Case law suggests that alcohol will only be considered a 'noxious thing' for the purposes of those offences if it is administered in sufficient quantity.[17]

Similarly, there is a question as to whether drink spiking with alcohol would fall within the broad definitions of 'assault' contained in Western Australia and Queensland's offences. In these jurisdictions the definition of the 'application of force' includes the application of any substance or thing capable of effecting

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

a person's purpose, *if applied in such degree*, that causes injury or personal discomfort.

The equivalent Tasmanian offence of administering a poison or other destructive or noxious thing with intent to injure, aggrieve or annoy that person covers alcohol.

Whilst Victoria has an offence of administering, without consent, any substance capable of interfering substantially with bodily functions (eg capable of inducing unconsciousness or sleep), whether alcohol qualifies as such a substance may depend on the quantity that is administered.

The position in South Australia uses similar terminology, but by contrast there is complete coverage if the alcohol, once administered, produces or is likely to produce, unconsciousness or 'protracted impairment of a physical or mental function'.

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

4.4 The Offences In Australian Jurisdictions – by jurisdiction

(a) New South Wales

New South Wales inherited and has maintained the 1861 consolidated offences. They have not changed in any substance since the enactment of the *Crimes Act 1900*. The intent to murder offences are detailed above. Section 38 to 41 provide as follows.

> *38 Using chloroform etc to commit an offence*
> Whosoever unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or cause to be taken by, any person, any chloroform laudanum or other stupefying or over-powering drug or thing, with intent in any such case to enable himself or herself, or another person, to commit, or with intent to assist another person in committing, an indictable offence, shall be liable to imprisonment for 25 years.[18]
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> *39 Using poison etc so as to endanger life*
> Whosoever maliciously administers to, or causes to be administered to, or taken by, any person, any poison or other destructive or noxious thing, so as to endanger the life of such person, or so as to inflict upon such person grievous bodily harm, shall be liable to imprisonment for ten years.
>
> *41 Administering poison etc with intent to injure or annoy*
> Whosoever maliciously administers to, or causes to be administered to, or taken by, any person, any poison or other destructive or noxious thing,

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

with intent to injure, aggrieve or annoy such person, shall be liable to imprisonment for five years. [19]

New South Wales has a comprehensive suite of administration offences, depending for application on the classification of the drug involved. Section 13 of the *Drug Misuse and Trafficking Act 1985* provides as follows.

> *13 Administration of prohibited drugs to others*
> (1) A person who administers or attempts to administer a prohibited drug to another person is guilty of an offence.
> (2) Nothing in this section renders unlawful the administration or| attempted administration of a prohibited drug to another person by:
> (a) a person licensed or authorised to do so under the *Poisons Act 1966*, or
> (b) a person authorised to do so by the Secretary of the Department of Health.
> (3) Nothing in this section renders unlawful the administration or attempted administration of a prohibited drug to a person for or to whom the prohibited drug has been lawfully prescribed or supplied.

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

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

The Poisons and Therapeutic Goods Act offence that carries a penalty of imprisonment is, in context, directed principally at people who sell prescribed restricted substances (benzodiazepines and other 'high risk' prescription drugs) without having the appropriate license. The section is titled 'Prohibition

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[19] New South Wales has provided the following sentencing statistics concerning convictions under these provisions.

Section 38 *Crimes Act*:

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

Section 39 *Crimes Act*:

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

Section 41 *Crimes Act*:

District Court: Nil.

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

on supply of certain substances otherwise than by wholesale'. The Act's definition of 'supply' (in section 4) makes it clear that its policy is directed at commercial sale—however given that the definition is non-exhaustive, and includes 'dispense and distribute', it is likely that adding such a substance to another person's drink would fall within the scope of the offence. For both the *Poisons and Therapeutic Goods Act* and the *Regulation* offences, again lack of knowledge or consent of the 'victim' is not an element, so they may catch drink spiking, but were not drafted to aim at it.

(b) Queensland

Queensland has the 1899 redrafted versions of the 1861 offences.

> *316 Stupefying in order to commit indictable offence*
> Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer, any stupefying or overpowering drug or thing to any person, is guilty of a crime, and is liable to imprisonment for life.

Section 6 of the *Drugs Misuse Act 1986* provides that a person who unlawfully supplies a dangerous drug to another is guilty of a crime. The offence carries a penalty range of 5 to 25 years imprisonment. The provision specifies under sub-section (2) that an offence is one of aggravated supply if the offender is an adult and the person to whom the thing is supplied does not know he or she is being supplied with the thing. This suggests that the offence can be committed in circumstances where the victim is supplied the drug without their knowledge.

Sections 317 to 323 of the *Criminal Code* provides as follows.

> *317 Acts intended to cause grievous bodily harm and other malicious acts*
> Any person who, with intent—
> (a) to maim, disfigure or disable, any person; or
> (b) to do some grievous bodily harm or transmit a serious disease to any person; or
> (c) to resist or prevent the lawful arrest or detention of any person; or
> (d) to resist or prevent a public officer from acting in accordance with lawful authority—
> either—
> (e) in any way unlawfully wounds, does grievous bodily harm, or transmits a serious disease to, any person; or
> (f) unlawfully strikes, or attempts in any way to strike, any person with any kind of projectile or anything else capable of achieving the intention; or
> (g) unlawfully causes any explosive substance to explode; or
> (h) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or
> (i) causes any such substance or thing to be taken or

received by any person; or
(j) puts any corrosive fluid or any destructive or explosive substance in any place; or
(k) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person;
is guilty of a crime, and is liable to imprisonment for life.

322 Maliciously administering poison with intent to harm

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

323 Wounding and similar acts

(1) Any person who--
(a) unlawfully wounds another; or
(b) unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person;
is guilty of a misdemeanour, and is liable to imprisonment for 7 years.

Section 218 of the *Criminal Code* was inserted in 1992 close to its current form. It replaced the offence of Procuring defilement of woman by threats, or fraud or administering drugs and provides as follows.

Section 218 Procuring sexual acts by coercion etc.

(1) A person who—
(a) by threats or intimidation of any kind, procures a person to engage in a sexual act, either in Queensland or elsewhere; or
(b) by a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere; or
(c) administers to a person, or causes a person to take, a drug or other thing with intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person;
commits a crime.
Maximum penalty—imprisonment for 14 years.

Queensland enacted section 316A into the *Criminal Code 1899* which was passed with amendments on 31 October 2006.

316A Unlawful drink spiking

(1) A person who administers, or attempts to administer, in drink a substance to another person (the *other person*) without the other person having knowledge of the substance with intent to cause the other person to be stupefied or overpowered is guilty of a crime and is liable to imprisonment for 5 years.
(2) If the substance is alcohol, for section 24 only, the circumstances in which the other person is taken to have knowledge of the alcohol include where the other person would not object to the administration of the alcohol if the other person had actual knowledge of it.

(3) The following matters are immaterial—
(a) whether the lack of knowledge of the substance is lack of knowledge of the presence at all of the substance or of the particular quantity of the substance;
(b) whether the substance is capable of having the effect intended;
(c) whether a particular person is intended to be the person to whom the substance is administered or attempted to be administered.

(4) A reference to causing the other person to be stupefied or overpowered is—
(a) a reference to causing the other person to be stupefied or overpowered in circumstances where the other person is not intending to be stupefied or overpowered at all; or
(b) a reference to causing the other person to be further stupefied or overpowered in circumstances where the other person is not intending to be further stupefied or overpowered at all or to the extent intended by the person who administers, or attempts to administer, the substance.

(5) This section does not apply to an act lawfully done in the course of the practice of a health professional, the carrying out of a function under an Act or the performance of the responsibilities of a parent or carer.

(6) In relation to an attempt to administer a substance, for this section and section 4, attempt includes adding a substance to drink in preparation for the administration of the substance.

(7) In this section—
adding a substance, to drink, includes, without limiting section 7, the following—
(a) cause to be added to drink;
(b) substitute drink with other drink containing the substance;
(c) take any step to provide drink containing the substance instead of other drink.
circumstances, where the other person is not intending to be stupefied or overpowered, includes any circumstance of timing, place, condition, or way of stupefaction or overpowering.
dangerous drug see the Drugs Misuse Act 1986, section 4.
drink includes water, beverage, or other liquid, intended or prepared for human consumption.
health professional has the meaning given by the Health Services Act 1991, section 60.
stupefied or overpowered includes—
(a) a state of intoxication caused by alcohol, a drug or another substance; and
(b) behavioural change caused by a dangerous drug, whether or not the mind is otherwise affected.'

(c) Victoria

Victoria inherited the 1861 offences like everyone else but significantly overhauled the non-fatal offences against the person in a major way in 1985.

It has both general endangerment offences and administration offences. At the time at which the 1861 offences were largely eliminated, the question whether a separate administration offence was required was carefully considered and the separate offences were retained as a matter of caution.

The specific *Crimes Act* offences are as follows.

19 Offence to administer certain substances

(1) A person who—

(a) without lawful excuse, administers to or causes to be taken by another person any substance which is capable, and which the first-mentioned person knows is capable, in the circumstances, of interfering substantially with the bodily functions of the other person; and

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

is guilty of an indictable offence.

Penalty: Level 6 imprisonment (5 years maximum).

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

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

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

53 Administration of drugs etc.

A person must not—

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

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

with the intention of rendering that person incapable of resistance and thereby enabling himself or herself or another person to take part in an act of sexual penetration with that person.

Penalty: Level 5 imprisonment (10 years maximum).

The *Crimes Act* general endangerment offences as follows.

22 Conduct endangering life

A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence.

Penalty: Level 5 imprisonment (10 years maximum).

23 Conduct endangering persons

A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence.

Penalty: Level 6 imprisonment (5 years maximum).

In addition, the *Drugs, Poisons and Controlled Substances Act 1981* provides as follows.

> *74 Introduction of a drug of dependence into the body of another person*
> A person who, without being authorized by or licensed under this Act or the regulations to do so, introduces or attempts to introduce a drug of dependence into the body of another person is guilty of an offence against this Act and liable to a penalty of not more than 30 penalty units or to level 8 imprisonment (1 year maximum) or to both that penalty and imprisonment.

(d) South Australia

The applicable major offences are to be found in the *Criminal Law Consolidation Act 1935*.

The old poisoning and stupefying offences have disappeared. They were replaced by new style general causing harm offences in 2006 and general endangerment offences dating from 1986. The endangerment provision is section 29.

> *29 Acts endangering life or creating risk of grievous bodily harm*
> (1) Where a person, without lawful excuse, does an act or makes an omission—
> (a) knowing that the act or omission is likely to endanger the life of another; and
> (b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered,
> that person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 15 years.
>
> (2) Where a person, without lawful excuse, does an act or makes an omission—
> (a) knowing that the act or omission is likely to cause grievous bodily harm to another; and
> (b) intending to cause such harm or being recklessly indifferent as to whether such harm is caused,
> that person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 10 years.
>
> (3) Where a person, without lawful excuse, does an act or makes an omission—
> (a) knowing that the act or omission is likely to cause harm to the person of another; and
> (b) intending to cause such harm or being recklessly indifferent as to whether such harm is caused,
> the person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 5 years.

Otherwise, the basis of the law is a series of offences based on the intentional and reckless causing of harm and serious harm (ss 21, 23, 24). The point for present purposes is that harm includes unconsciousness, and serious harm

includes ‘serious and protracted impairment of a physical or mental function’ (s 21), which means that mere harm will include protracted impairment of a physical or mental function’. There can be little doubt that serious drink spiking would fall under these categories of offence.

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

> *18 Sale, supply, administration and possession of prescription drugs*
> (1) A person must not sell by retail, supply or administer to another person or to an animal, or prescribe for a person or an animal, a prescription drug (not being a drug of dependence) unless he or she is—
> (a) a medical practitioner, dentist, veterinary surgeon or nurse acting in the ordinary course of his or her profession; or
> (b) a member of any other prescribed profession acting in the ordinary course of that profession and in accordance with the regulations; or
> (c) a pharmacist dispensing the prescription of a medical practitioner, dentist, veterinary surgeon or member of a prescribed profession; or
> (d) a person administering to another person or to an animal a prescription drug that has been lawfully prescribed for or supplied to that other person, or that animal; or
> (e) a person licensed to do so by the Minister.
> Maximum penalty: $10 000 or imprisonment for 2 years.

There is also potentially a more serious offence available.

> *32 Prohibition of manufacture sale etc of drug of dependence or prohibited substance*
> (1) A person must not knowingly—
> (a) manufacture or produce a drug of dependence or a prohibited substance; or
> (b) …
> (c) … administer such a drug or substance to another person; or…

This offence applies not to pharmacy drugs but to drugs of dependence and prohibited substances. These drugs are listed in Schedules in the Regulations, and they include, at the top end, the very serious drugs, ranging from heroin and the various amphetamines to cannabis products. The penalty provisions are contained in s 32 of the Act.

South Australia recently passed the *Criminal Law Consolidation (Drink Spiking) Amendment Act 2007* amending the Criminal Law Consolidation Act. The following provision was inserted dealing with the spiking of food or beverages.

> *32C—Spiking of food or beverages*
> (1) A person is guilty of an offence if the person adds a substance, or causes a substance to be added, to any food or beverage intending to

cause, or being recklessly indifferent as to causing, impairment of the consciousness
or bodily function of another who will or might consume the food or beverage without knowledge of the presence of the substance (whether at all or in the quantity added).
Maximum penalty: Imprisonment for 3 years.
(2) In this section—
food or beverage includes any solid or liquid substance prepared or intended for human consumption.

South Australia also inserted the following offence dealing with possession of prescription drugs without lawful excuse in licensed premises, which provides as follows.

32C—Spiking of food or beverages
(2) A person is guilty of an offence if, between the hours of 9 pm on any day and 5 am on the following day, the person enters or remains in licensed premises while in possession of a prescription drug or controlled drug that—
(a) is such as to be capable of producing a state of intoxication in a person who consumes the drug; and
(b) is not contained in packaging on which is affixed a prescribed label indicating that the drug was lawfully prescribed for or supplied to the person.

Maximum penalty: Imprisonment for 30 months.

(3) It is a defence to a charge of an offence against subsection (2) to prove that the prescription drug or controlled drug was lawfully prescribed for or supplied to the person or that the person had some other lawful reason for being in possession of the prescription drug or controlled drug.

(e) Tasmania

The serious Tasmanian offences are contained in the *Criminal Code* and have been reproduced at page 7.

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

In addition, s 24 of the *Misuse of Drugs Act 2001* provides as follows.

24 Possessing, using or administering controlled drug
A person must not –
…
(c) administer a controlled drug to another person.
Penalty:
Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years.

'Controlled drugs' are listed in a schedule to the Act.

(f) Western Australia

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

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

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

294 Acts intended to cause grievous bodily harm or prevent arrest
Any person who, with intent to maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, or to resist or prevent the lawful arrest or detention of any person:
(1)Unlawfully wounds or does any grievous bodily harm to any person by any means whatever; or
(2)Unlawfully attempts in any manner to strike any person with any kind of projectile; or
(3) Unlawfully causes any explosive substance to explode; or
(4) Sends or delivers any explosive substance or other dangerous or noxious thing to any person; or
(5) Causes any such substance or thing to be taken or received by any person; or
(6) Puts any corrosive fluid or any destructive or explosive substance in any place; or
(7) Unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person; or
(8) Does any act that is likely to result in a person having a serious disease;

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

Subsection 294 (5) appears to encompass drink spiking. A drink spiker would intend to disable an individual and does so by causing the individual to take a noxious substance.

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

> *304 Acts or omissions causing bodily harm or danger*
> (1) If a person omits to do any act that it is the person's duty to do, or unlawfully does any act, as a result of which:
> (a) bodily harm is caused to any person; or
> (b) the life, health or safety of any person is or is likely to be endangered,
> the person is guilty of a crime and is liable to imprisonment for 5 years.
> Summary conviction penalty: imprisonment for 2 years or a fine of $8 000.
>
> (2) If a person, with an intent to harm, omits to do any act that it is the person's duty to do, or does any act, as a result of which ¾:
> (a) bodily harm is caused to any person; or
> (b) the life, health or safety of any person is or is likely to be endangered, the person is guilty of a crime and is liable to imprisonment for 20 years.
>
> (3) For the purposes of subsection (2) an intent to harm is an intent to:
> (a) unlawfully cause bodily harm to any person;
> (b) unlawfully endanger the life, health or safety of, any person;
> (c) induce any person to deliver property to another person;
> (d) gain a benefit, pecuniary or otherwise, for any person;
> (e) cause a detriment, pecuniary or otherwise, to any person;
> (f) prevent or hinder the doing of an act by a person who is lawfully entitled to do that act; or
> (g) compel the doing of an act by a person who is lawfully entitled to abstain from doing that act.

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

> *293 Stupefying in order to commit indictable offence*
> Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer any stupefying or overpowering

drug or thing to any person, is guilty of a crime, and is liable to imprisonment for 20 years.

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

Any person who:

(1) By threats or intimidation of any kind procures a woman or girl to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or

(2) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or

(3) Administers to a woman or girl, or causes a woman or girl to take, any drug or other thing with intent to stupefy or overpower her in order to enable any man, whether a particular man or not, to have unlawful carnal knowledge of her; or

(4) Does any of the foregoing acts with respect to a man or boy;

is guilty of a misdemeanour, and is liable to imprisonment for 2 years.

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

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

222 'Assault', definition of

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

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

223 Assaults unlawful

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

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

317 Assaults occasioning bodily harm

[20] See *R v Robertson* (1997) 91 A Crim R 388.

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

(a) if the offence is committed in circumstances of aggravation, to imprisonment for 7 years; or

(b) any other case, to imprisonment for 5 years.

It is unlikely this would extend to administering a drug without consent or knowledge on behalf of the recipient**.**

Lastly, every jurisdiction other than Western Australia has legislation that makes the administration of various drugs typically used for drink spiking unlawful. The *Misuse of Drugs Act 1981* creates an offence under section 6, making it unlawful to supply prohibited drugs to another.

(g) Northern Territory

Under the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* there is a sequence of general harm and endangerment offences in accordance with MCCOC recommendations.

174C Recklessly endangering life

A person is guilty of a crime if –

(a) the person engages in conduct; and

(b) that conduct gives rise to a danger of death to any person; and

(c) the person is reckless as to the danger of death to any person that arises from the conduct.

Penalty: Imprisonment for 10 years or, for an aggravated offence, 14 years.

174D Recklessly endangering serious harm

A person is guilty of a crime if –

(a) the person engages in conduct; and

(b) that conduct gives rise to a danger of serious harm to any person; and

(c) the person is reckless as to the danger of serious harm to any person that arises from the conduct.

Penalty: Imprisonment for 7 years or, for an aggravated offence, 10 years.

In addition, Northern Territory has also enacted a negligence offence.

174E Negligently causing serious harm

A person is guilty of a crime if –

(a) the person engages in conduct; and

(b) that conduct causes serious harm to another person; and

(c) the person is negligent as to causing serious harm to the other person or any other person by the conduct.

Penalty: Imprisonment for 10 years.

Section 176 of the Code contains a more specific offence of administering a poison with intent to facilitate another crime.

176 Stupefying in order to commit crime

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

Section 177 is a general causing of serious bodily harm offence.

177 Acts intended to cause grievous harm or prevent apprehension

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

…

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

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

…

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

(h) Australian Capital Territory

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

27 Acts endangering life etc

…

(3) A person who intentionally and unlawfully—

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

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

…

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

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

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

…

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

28 Acts endangering health etc

…

(2) A person who intentionally and unlawfully—

(a) administers to, or causes to be taken by, another person any poison or other injurious substance with intent to injure or cause pain or discomfort to that person; or

…

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

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

5 Recent Developments

5.1 New South Wales

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

- whether or not alcohol or any other intoxicating substance is used as the spiking agent
- the spiking occurred without the knowledge or consent of the victim, and
- where the offender intended that the victim become intoxicated or be overpowered.

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

The New South Wales Government announced the formation of a multi-agency Drink Spiking Action Group (DSAG) in November 2004, comprising representatives from the Police Service, hotel licensees, Department of Gaming and Racing, medical and health specialists and government policymakers. The role of DSAG was and is to coordinate a response to drink spiking at all levels of government. DSAG has coordinated a number of initiatives, including improving police and health investigative procedures when suspected incidents of drink spiking come to light. DSAG is now in the process of preparing a media information kit to be released by the New South Wales Police Service) on drink spiking.

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

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

Partners involved in the campaigns are the New South Wales Police Service, Liquor Consultative Committees, hotel licensees, local Councils, health sexual assault services, TAFE and the Department of Education and Training.

5.2 Victoria

Victoria has recently considered the issue of drink spiking in producing the Government Response to the Drugs and Crime Prevention Committee (the Committee*) Inquiry into the Amphetamine and 'Party Drug' Use in Victoria.*[21] Recommendation 3 of the Inquiry, which received in principle support in the Government response to the Report, concerns the creation of a new general offence of drink spiking.[22]

Final Report Recommendation 3:

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

Government Response to Recommendation 3

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

However, the Government accepts the Committee's view that these provisions may not cover all circumstances and may not provide a sufficient penalty for cases involving a sexual motivation but not penetration (for example drink spiking to enable taking of pornographic pictures). It is noted that Section 61 of the UK *Sexual Offences Act* applies to any form of sexual activity.

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

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

- §raise awareness about drink spiking (whether via illicit drug, licit drug or unrequested extra alcohol) and the related harms associated with drink spiking (sexual assault, rape, assault, theft, personal injury, illness, etc) in participating venues state-wide;
- § increase awareness of and encourage the adoption of protective/preventative practices, behaviours and responsibility in social settings;
- § encourage reporting of drink spiking incidents;

[21] The Final Report of the *Inquiry into Amphetamine and 'Party Drug' Use in Victoria* is available at http://www.parliament.vic.gov.au/dcpc/.

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

§increase access to victims of drink spiking to services for support, counselling and treatment;
§develop a standard resource that can be utilised to establish practical guidelines for industry and services in relation to management of the drink spiking issue. The aim is to have these guidelines adopted as part of the Responsible Serving of Alcohol (RSA) and staff training/accreditation; and
§facilitate cross-agency dissemination of information regarding drink spiking and responsive measures.

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

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

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

5.3 ACT

In the Australian Capital Territory, the Attorney-General announced in early November 2006 plans to introduce changes to the Territory's drink spiking laws. The purpose of the changes is to legislate for a particular offence around drink spiking. He suggested that the changes were to occur at a time during the Australian Capital Territory's Government's current term.

5.4 Northern Territory

The Northern Territory recognised the problem of spiking by developing an awareness raising campaign, 'watch your drink, yourself and your friend,' being the first stage of a broader project. This was undertaken by developing a specific protocol. In April 2004, the Women's Health Strategy Unit published

the Protocol - ‘A coordinated approach to better respond to drug-facilitated sexual assault in Darwin Urban.’ The aim of the protocol was to ensure all victims of drug-facilitated sexual assault receive appropriate treatment and referral and improve current services provided to victims of drug facilitated sexual assault.

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

6 Consultation on the Discussion Paper

The MCCOC Discussion Paper recommended as follows.

> MCCOC recommends that all Australian jurisdictions enact an offence of 'mere' drink spiking (without further intent), that the offence be summary, and that the offence extend to any substance (any classification of poison, substance, drug, alcohol, traditional aphrodisiac etc) which is likely to impair the consciousness or bodily function of the victim, or which is intended to do so, whether or not the spiked drink is drunk wholly, partly or at all.
>
> The MCCOC recommends that New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory amend their criminal laws to close the gaps, and potential gaps, in the coverage of their laws that have been identified in this report.

In May 2006, the MCCOC Secretariat wrote to stakeholders and interested organisations in all States and Territories inviting them to comment on the Drink Spiking Discussion Paper and the recommendation. Comments were invited to be submitted by 9 June 2006. (See **Appendix A** for the list of organisations and individuals who commented on the Discussion Paper).

The vast majority of submissions received in response to the drink spiking discussion paper supported the Committee's recommendations.

7 Model Drink and Food Spiking Offences

For the reasons set out later in this section of the Final Report, MCLOC has concluded that the model drink and food spiking offence should be drafted as follows.

Spiking drink or food

(1) In this section:

> ***harm*** includes an impairment of the senses or understanding of a person that the person might reasonably be expected to object to in the circumstances.
>
> ***impair*** includes further impair.
>
> ***intoxicating substance*** includes any substance that affects a person's senses or understanding.

(2) A person:

> (a) who causes another person to be given or to consume drink or food:
>
> > (i) containing an intoxicating substance that the other person is not aware it contains, or
> >
> > (ii) containing more of an intoxicating substance than the other person would reasonably expect it to contain, and
>
> (b) who intends a person to be harmed by the consumption of the drink or food,

is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

(3) For the purposes of this section, giving a person drink or food includes preparing the drink or food for the person or making it available for consumption by the person.

Notes:

1. The definitions that apply to offences in Part 5.1 of the Model Criminal Code include a definition of harm (cl 5.1.1) that encompasses temporary or permanent physical harm or harm to a person's mental health, and that extends to physical harm that is physical contact with a person that a person might reasonably object to in the circumstances. The above definition of 'harm' is intended to extend the definition of harm in relation to intoxication in a way that is consistent with the way in which mere physical contact is treated as harm.
2. In jurisdictions that have not enacted the relevant provisions of the Model Criminal Code, modifications may be required to achieve the same result.
3. The offence is to be dealt with as an indictable or summary offence under relevant provisions of the criminal procedure law of the local jurisdiction (with a penalty in line with applicable principles in that local jurisdiction).
4. Special defences for parents or carers have not been included on the basis that an appropriate defence will be provided by the general law.

The model offence reflects the fact that the Committee considers that this offence should be framed in broad terms so that the *conduct to be criminalised*, the *substance* that is spiked and the *intended result on the victim* are as broad in scope as possible. The advantage of a broad approach is that the offence will be directed against each of the ways in which a person motivated to engage in the act of spiking may in fact cause harm – without the need to draft a myriad of specific criminal offences.

The model offence is designed to strike an appropriate balance between the broad approach adopted in criminalising the act of spiking and ensuring that the offence does not capture behaviour that society would not consider merits criminal sanction. An example of this might be where a bartender places a little bit of extra alcohol in a regular customer's drink, or a friend orders a double shot of spirits for their mate without alerting them to the extra alcohol in the drink. By adopting the fault element of intent to cause harm, this class of persons are appropriately protected.

The offence addresses the gap that exists in the less-serious instances of drink spiking offences (without the requirement of intent to commit a further offence against the victim) on the drink spiking continuum, not otherwise significantly criminalised by the States and Territories except South Australia and Queensland. As the model offence captures the less serious or milder instances of drink spiking a two year maximum penalty of imprisonment for the offence is considered appropriate.

The reasoning behind the framing of each specific aspect of the model offence is as follows.

7.1 Conduct to be criminalised

('A person who causes another person to be given or to consume drink or food containing an intoxicating substance that the other person is not aware that it contains, or containing more of an intoxicating substance than that other person would reasonably expect it to contain…'

'For the purposes of this section, giving a person drink or food includes preparing the drink or food for the person or making it available for the consumption by the person.')

The conduct to be criminalised and the point at which culpability arises was raised for consideration in the formulation of the offence. The option of whether to focus on the 'addition' of the intoxicant to the substance was considered. One argument in support of this approach is reflected in the South Australian offence that concentrates on the 'adding' to the food or drink, thereby avoiding the need to have specific reference to the substitution of the drink or reference to whom the victim is.

The alternate approach considered was whether focus needed to concentrate on the 'administration' of the substance to the person. For example, the Queensland and Tasmanian offences require the administration of the substance to the person, with the Queensland offence also extending to the 'attempt' of administration to the person.

The appeal of this approach was said to be in its breadth, enabling situations involving a substitution of a drink either in part (eg where the offender supplies full strength beer instead of light beer) or in its entirety (eg where a victim asks for a bottle of water but is given a triple Gin) to be captured by the offence. By confining the offence to the 'addition' of a substance to the food or drink, this would not adequately cover the substitution example.

An example of a possible formulation that included both the element of 'adding' to the substance (and) 'causing or permitting the addition of' the substance was considered by the Committee..

> For the purposes of this section, causing another person to take an intoxicant includes adding, causing or permitting the addition of any quantity of an intoxicant to anything voluntarily taken by the other person (including anything that already contained an intoxicant).

The Committee favoured a broad formulation of the offence to cover the addition of an intoxicant to a substance (presence of substance) as well as the administration of more of a substance to be consumed by the victim (quantity of the substance). In this way, the offence would cover those situations where the drink or food contains more of

an intoxicating substance than the other person would reasonably expect it to contain.

The Committee also agreed that the conduct to be criminalised should encompass the situation where the person directly prepares the drink or food for consumption by the victim or where the person makes it available for consumption by the victim.

Although the Queensland provision includes an 'attempted' administration offence, there is no need to separately provide for an 'attempt' in the Model offence because the Model Criminal Code already contains a general provision criminalising attempt (section 2.11.1).

7.2 Type of substance that is spiked

('A person who causes another person to be given or to consume drink or food containing an intoxicating substance…')

The type of substance that can be 'spiked' was raised as an issue in submissions to the Discussion Paper.

A representative of the New South Wales Eastern and Central Sexual Assault Service urged that the recommendation extend to spiked food and said:

> Our figures would indicate that between 20 - 25% of presentations following a recent sexual assault feel that they may have been drugged as a method to increase their vulnerability to an assault. Drugs used of course include alcohol on its own or in combination with another drug. My comments arise from the actual experiences reported to me by people who have presented to this service.

In support of the inclusion of food in the offence, Mark Griffiths from the Royal Prince Alfred Hospital highlighted that there were other methods apart from drink, for administering drugs to a person without their knowledge. Mr Griffiths noted that a drug can be administered to a person without their knowledge including via food.

Whether drink spiking should extend to drink *and* food, or whether the offence should be limited to the spiking of drink only was raised for consideration. One option was to extend the offence to drink *and* food. For example, the South Australian offence extends to the spiking of food. The Tasmanian offence less specifically provides for an offence of food spiking but includes drug, alcohol or 'other thing' within the scope of its offence. The argument for this approach is that it would widen the scope of the offence and capture situations where food or another 'thing' was spiked.

In principle, the spiking of food can be equally serious and merits the same criminal punishment as the spiking of a drink. What is spiked is not the issue. The objective is to create overarching principled offences. Therefore the

Committee recommends that the spiking offence should apply to both the spiking of drink and food.

7.3 Fault element

('A person…who intends that any other person be harmed by the consumption of the drink or food is guilty of an offence.')

The MCCOC Discussion Paper proposed an offence of 'mere' drink spiking, without the need to prove a further intent (ie that a further offence would be committed against the victim). The argument in support of this approach is that this would close the gap identified in the Discussion Paper of the less-serious or milder instances of drink spiking in State and Territory legislation.

The Discussion Paper recommended that the States and Territories enact a mere drink spiking offence without the need to prove intent to commit a further offence against the victim. The Committee recommends that there should be a fault element of intent, but that this should be limited to an intent to cause harm to the victim.

The requirement to legislate for an intent was raised by the New South Wales Young Lawyers' Criminal Law Committee and the Law Society of New South Wales, who did not agree that the offence should be framed without intent. Both were supportive of the creation of a summary offence of drink spiking with intent.

Similarly, the New South Wales Law Society Criminal Law (Committee) advised that it did not agree that it should be a criminal offence to spike a drink where there is no intention to commit a subsequent offence. It follows that the New South Wales Law Society Criminal Law (Committee) would not agree that 'prank' drink spiking should constitute a criminal offence.

The Committee does not agree. The further intention should, of course, make drink spiking a serious offence, but the Committee is convinced, for the reasons given in the Discussion Paper, that drink spiking without that further intention can constitute a sufficient social threat and harm in the circumstances defined by the Committee, to warrant more minor criminal sanctions. It is not just bad behaviour or minor anti-social behaviour. It is threatening behaviour. It involves an intention to interfere with the bodily well-being of a person without their knowledge or consent.

The need to legislate for the potential, and the harm, present in the conduct could be encapsulated by a 'reckless' element (enabling the reflection of a graded culpability). The consideration of a 'reckless endangerment element' may assist in arguments that the requirement to prove 'intent' would be difficult, as raised in submissions by Legal Aid Queensland.

> The difficulties associated with this emerging social problem are not related to a legislative hiatus, but rather to the numerous other factors canvassed in the AIC report, including evidentiary obstacles to prosecution… .

This raises the issue of the *ulterior fault element* ie the requisite intent with which the act of spiking is undertaken. One option identified was to frame the ulterior fault element of the offence as extending to both 'intent' and 'reckless indifference'. For example under the South Australian offence, a person must intend to cause, or be recklessly indifferent as to causing, impairment of the consciousness or bodily function of another. The argument for this approach is that it captures those persons who foresee that there is a substantial risk of the consequences, but nonetheless continue to engage in the act.

The alternate option considered was to limit the ulterior fault element to 'intent' only. For example, under the Queensland formulation, a person must 'intend' to cause another person to be stupefied or overpowered, similarly provided for in the Tasmanian provision. The argument for this approach would avoid criminal liability in situations where a friend, host or 'good samaritan' bar-tender gives the person an extra shot of alcohol in the absence of malicious intent (where alcohol is the spiking agent). This approach would ensure that this class of persons were not exposed to criminal liability where for example, one extra shot of alcohol was said to impair consciousness.

In considering the appropriate ulterior fault element, the Committee was concerned that the application of recklessness with respect to the impact on the victim would risk broadening the offence excessively eg potentially exposing Good Samaritan bar-tenders, hosts of parties and friends to criminal liability as it could reasonably be argued that there was an awareness of a substantial risk that the victim would become intoxicated and that the risk was unjustifiably taken.

The Committee also agreed that the offence of drink or food spiking would be complete regardless of whether the result actually occurred eg caused the victim to become intoxicated. The fault element would be based on the *intention* to cause harm to the victim. If the intention is present, then this would merit criminal punishment under the offence.

The second issue for consideration is the basis for which the fault element should apply and whether it should be based on an intention to *impair* the senses or the understanding of the victim, in line with the Queensland and South Australian offences, or whether it should be based on an intention to *harm* the victim by impairing the senses or the understanding of the victim.

The level of protection afforded to bar staff and friends buying each other drinks was raised in submissions by the New South Wales Victims Advisory Board*,* the Law Society of New South Wales, the New South Wales Young Lawyers Criminal Law (Committee) (in part) and the New South Wales Director of Public Prosecutions who argued that any proposed law should be limited to those who intend that 'the victim will become intoxicated or

overpowered'. The Committee was of the view that formulation of this approach was too restrictive and may require too extreme a consequence.

The Committee considered the option of framing the offence as impairment of consciousness or bodily function. For example, South Australia requires there to be an 'impairment of consciousness or bodily function of another.' The argument for this approach is that it creates a wide ambit for the potential result or consequence to the victim.

An alternative option is a requirement that the victim be stupefied or overpowered. For example, this approach is covered in the Queensland and Tasmanian offences that require the drink spiking to cause the other person to be 'stupefied or overpowered'.

There is judicial authority that 'stupefy' includes stupefy through intoxication (*R v Murcott (1893) 19 VLR 408)* and there is also judicial authority which confirms that there can be degrees of stupefaction (*R v Arnold; Ex parte A-G* [2002] QCA 357). In its submission, Queensland noted that the term 'stupefy' has been judicially interpreted as referring to the dulling of senses or faculties, or blunting the faculties of perception or understanding. The potential effect need not extend to total deprivation of sensibility but total loss of faculties would be comprised in the term.

The term 'stupefy or overpower' is further defined in section 316A of the Queensland *Criminal Code*, to include behavioural change caused by a dangerous drug. The point of the extended definition was to ensure the provision covered situations where stimulants were the spiking agent used.

In line with this approach, a draft offence that provides for a definition of 'intoxicant' to include 'a substance that has an intoxicating, stupefying or overpowering effect' and results in the victim becoming 'intoxicated, stupefied or overpowered' was considered by the Committee.,

> *Intoxicant* means any of, or any combination of, the following:
>
> (a) alcohol,
>
> (b) a prescribed restricted substance as defined by the regulations under the *Poisons and Therapeutic Goods Act 1966* (or relevant State or Territory legislation)
>
> (c) a prohibited drug (within the meaning of the *Drug Misuse and Trafficking Act 1985*) (or relevant State or Territory legislation)
>
> (d) food, drink or any other substance that has an intoxicating, stupefying or overpowering effect.
>
> Using intoxicants with intent to intoxicate, stupefy or overpower (summary offence)
>
> A person who causes another person to take an intoxicant:
>
> (a) without that other person's consent to the taking of the intoxicant, and
>
> (b) with intent that the other person become intoxicated, stupefied or overpowered,
>
> is guilty of an offence.

Maximum penalty: Imprisonment for 2 years, or a fine of 100 penalty units, or both.

The Committee agreed that the conduct of the accused would require an intention to cause harm to the victim that would be manifested in a physical, psychological or perceptual way. The formulation of the effect on the victim would need to be wide enough to capture instances of drink spiking that involved the addition of, or giving an additional quantity of, an intoxicating substance, where the effect on the victim could result in the impairment or the dulling of the victim's senses, or conversely, the elevation or heightened awareness of the senses of the victim eg causing the victim to collapse into a frenzy, where stimulants were the spiking agent used.

The Committee agreed that a formulation of harm would raise the threshold for the offence and avoid capturing behaviour that is not intended to merit criminal sanction, such as a parent who gives a colicky baby a sedative in order to enjoy a good night sleep. A formulation of harm also accords with the definition of harm (clause 5.1.1) that applies to offences in Part 5.1 of the Model Criminal Code. 'Harm' as defined in the Model Criminal Code is very broad and rests on the central notion that harm is a matter of degree. 'Harm' encompasses temporary or permanent physical harm or harm to a person's mental health, and extends to physical harm that is physical contact with a person that a person might reasonably object to in the circumstances.

In line with this reasoning, the Committee agreed that there must be an intent to cause harm through intoxication or an intent to cause harm by impairing the senses, or understanding to a degree that the person might reasonably object to the consumption of the drink or food. It would not be necessary to cause actual harm to the person under the offence. Instead, the presence of the intention to cause harm would be sufficient to constitute the offence.

7.4 Defences

The Committee considered the inclusion of a defence to provide that a person does not commit an offence if the person has reasonable cause to believe that the other person would not have objected to consuming the drink or food if the other person had been aware of the presence and the quantity of the intoxicating substance in the drink or food.

One option raised was to create a defence against criminal responsibility where an accused who adds or administers a substance to the drink or food of another person but at the time honestly and reasonably believes that the other person, had they known of the presence or the quantity of the substance, would not have objected to the addition or the administration of the substance. For example, the Queensland offence creates an excuse from criminal responsibility where the accused was acting under an honest and reasonable mistake that the victim would not have objected to the addition of the alcohol. The Queensland provision also makes it clear, however, that even if the victim intended to be stupefied, they are entitled to become stupefied on their own terms (timing, place, condition or method of stupefaction).

However, given that the definition of 'harm' adopted for the model offence includes 'an impairment…that the person might reasonably be expected to object to in the circumstances', the Committee agreed that providing a specific defence of consent was redundant. In circumstances where the accused is acting under an honest and reasonable mistake that the victim would not have objected to the addition, or the additional substance being added to their drink or food, a general mistake of fact defence will be available.

The issue of whether specific exemptions were required for carers and health professions was also raised for consideration by the Committee. One option was to create exemptions for this class of persons. An example of a draft formulation follows.

> This section does not apply to causing a person to take an intoxicant in the course of medical or dental practice or the practice of any other health profession.

The Committee considered that defences for health care and other professionals are best included either in the general criminal law, the 'lawful excuse' defence in the Model Criminal Code and/or health legislation.

7.5 Penalty

('Maximum penalty: Imprisonment for 2 years.')

The issue of the appropriate penalty was raised for consideration by the Committee. South Australian Police argued that the Discussion Paper's proposal 'trivialised' the act of drink spiking and thought that the recommended offence ought to somehow be incorporated in the existing general endangerment offences.

The Discussion Paper proposed that the model offence be classed as a summary offence. This is to close the gap identified in State and Territory provisions dealing with less serious instances of the drink spiking.

The Committee noted that the appropriate maximum penalty for summary offences may be dependent on the individual jurisdiction's penalty regimes.

For example, the South Australian offence prescribes a penalty of 3 years imprisonment.

An alternative option considered was a penalty of five years, in line with the penalty prescribed by the Queensland offence. Alternatively, the option of making the offence subject to the current penalty regime prescribed by the individual State or Territory was considered. For example, in Tasmania the maximum penalty for all Code offences is 21 years imprisonment.

The Committee agreed that the appropriate maximum penalty for the offence would be two years imprisonment. The argument for this penalty option is that it reflects the nature of the offence as being a less-serious offence on the drink spiking continuum, thus avoiding alignment with indictable offences such as reckless endangerment.

Whether the offence should be classed as a summary or indictable offence is not a matter for the Model Criminal Code but is dependent on the individual penalty regimes of the States and Territories.

8 Conclusions

It is a clearly discernable trend across the common law world that good practice law making has abandoned the practice of enacting very specific statutory offences which deal with just one narrow aspect of a more general social or behavioural problem. There is good reason for this trend. The English criminal legal system in the late eighteenth and nineteenth centuries was mired in very unnecessary specifics and high technicalities of both procedure and substance. The generalising of the criminal prohibition makes the law easy to understand, simpler to prosecute and defend, more accessible to the citizen and more sensible overall. The understandable desire to add and add specific criminal offences to the criminal law as a response to an immediate demand to 'do something' about an emerging behavioural problem, or the resurfacing of an old one into public consciousness, should therefore be resisted unless there is clear evidence that the criminal law does not address the problem or, at least, all of it, or if it is ineffective for identifiable special reasons.[23] It is not good social policy to end up with criminal legislation which resembles the complex mess that resulted in the consolidations of the early to mid nineteenth century. It is not good policy to recommend the enactment of a specific criminal offence merely 'to raise the profile of the issue in the community'[24].

The Committee has found that there appears to be no gap in the criminal law as it applies to very serious offences involving drink-spiking. There is, for example, no sensible reason why the existing law on homicide cannot deal satisfactorily with those cases in which drink-spiking ends in death. What counts is the consequence and not how the consequence came about.

The MCLOC is of the opinion that the comprehensibility and accessibility of the law could be improved if States and Territories enacted its recommendations about serious non-fatal offences against the person (See Appendix B for coverage of drink spiking offences in each State and Territory). It really is unconscionable that the basic form, structure and coverage of some serious criminal offences are dictated by the exigencies of 150 years ago. Equally, and for similar reasons, there is no warrant for having just one 'drink spiking' offence covering the whole spectrum of possible situations and results. Drink spiking is a continuum of behaviours on a continuum of severity and that should be reflected in the offence structure applicable to the general

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[23] The offence of culpable driving causing death is a good example of this. This offence could is a form of manslaughter where the instrument used is a motor vehicle. However, during the 1960s in Victoria Parliament considered it necessary to create a separate and specific offence for culpable driving. Having a separate offence emphasised the criminality of that specific form of conduct, which at that time was widely considered to be less serious than other forms of manslaughter, leading to juries being reluctant to convict such drivers of manslaughter. When the offence of culpable driving was first introduced it had a maximum penalty of 7 years. In contrast, the offence now has a maximum penalty of 20 years imprisonment (which is the same as manslaughter). The specific offence evolved with changing community expectations and was a useful mechanism for addressing this problem.

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

behaviour, based on degrees of culpability, generally centred around the intention with which the act was done, *as is now the case*.

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

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

The MCLOC regards this observation as outlining a point at which there might be a gap in the law. The MCLOC has determined that there should be a particular drink and food spiking offence to fill a gap in the operation of the criminal law at the lower end of the criminal law spectrum, and has carefully crafted an offence to do the job. This Report carefully outlines the elements of that offence.

Insofar as the behaviour concerned involves the administration of drugs, the picture is murky. The offences of the administration of drugs found in the controlled substances or poisons legislation of each State and Territory (except WA) are not designed for this purpose (being aimed at consensual drug using behaviour), and the massively complicated nature of the classification and scheduling of drugs means that the coverage of these offences is difficult to fathom and research. In addition, while case law appears to be clear that alcohol (or, it seems, almost anything) can be a 'noxious thing' for the purposes of the more serious ancient offences if it is administered in sufficient quantity[25], it might be thought to add to transparency to make that clear (as Tasmania has done). In any event, the over-administration of alcohol (and other, slightly more exotic things) does not fall within the scope of existing mere administration offences in drug law.

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

The MCLOC commends the recommended offence to Ministers.

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

Appendix A: Persons/ Organisations consulted on the MCLOC Drink Spiking Discussion Paper

Comments were received from the following organizations/ individuals.

1. Australian Hotels Association (AHA).
2. Victims Advisory Board, NSW.
3. Law Society of NSW.
4. NSW Young lawyers' Criminal Law Committee.
5. Australian Hotels Association, NSW Branch.
6. M. Griffiths, Royal Prince Alfred Hospital, NSW.
7. Queensland Police.
8. South Australian Police
9. Western Australian Police.
10. ACT policing.
11. Northern Territory Police.
12. Director of Public Prosecutions, SA.
13. Director of Public Prosecutions, NSW.
14. Legal Aid, Queensland
15. JA and LG Eager.

Appendix B: Coverage of drink spiking offences in each State and Territory

	Drink spiking resulting in death	**Drink spiking causing, or with intent to cause, injury or harm**	**Drink spiking with intent to commit a sexual offence**	**Drink spiking with intent to commit an indictable offence**	**Drink spiking with drugs (other than alcohol) without lawful excuse**	**Drink spiking with alcohol for a prank**
NSW	Offences of murder (life imprisonment) and manslaughter (25 years).	Using poison or noxious thing etc on another with intent to inflict GBH* (10 years) : *s39 Crimes Act*. Administering a poison or other destructive or noxious thing with intent to injure, aggrieve or annoy (5 years): *s41 Crimes Act*. **Potential gap**: these offences may not cover drink spiking with alcohol.	Using a drug on another with intent to commit an indictable offence (25 years) : *s38 Crimes Act*. **Potential gap**: this offence may not cover drink spiking with alcohol.	Using a drug on another with intent to commit an indictable offence (25 years) : *s38 Crimes Act*. **Potential gap**: this offence may not cover drink spiking with alcohol.	Administering a poison or other destructive or noxious thing with intent to injure, aggrieve or annoy (5 years) : *s41 Crimes Act*. Administering a prohibited drug to another person without authorisation (2 years) : *s13 Drug Misuse and Trafficking Act*. Administering a prescribed restricted substance to another person (20 penalty units) : *cl.58 Poisons and Therapeutic Goods Regulations*.	**Potential gap** Possible that offence of administering a poison or other destructive or noxious thing with intent to aggrieve or annoy would apply – case-law suggests that whether alcohol qualifies as a 'noxious thing' depends on the quantity in which it is administered.
Vic	Offences of murder (life imprisonment) and manslaughter	Administering, without consent, any substance capable of interfering substantially with the	Administering a drug or other substance with the intention of rendering that person incapable of resistance	**Potential gap** No specific offence. This situation would generally be covered	Administering, without consent, any substance capable of interfering substantially with the bodily functions of the	**Potential gap** Possible that offence of administering, without consent, any substance

	Drink spiking resulting in death	**Drink spiking causing, or with intent to cause, injury or harm**	**Drink spiking with intent to commit a sexual offence**	**Drink spiking with intent to commit an indictable offence**	**Drink spiking with drugs (other than alcohol) without lawful excuse**	**Drink spiking with alcohol for a prank**
	(20 years).	bodily functions of the other person (e.g. capable of inducing unconsciousness or sleep) (5 years) : *s19 Crimes Act*. Recklessly engaging in conduct that places another person in danger of death (10 years) or serious injury (5 years) : *ss22-23 Crimes Act*.	and enabling an act of sexual penetration (10 years) : *s53 Crimes Act*. **Potential gap** This offence does not cover drink spiking with intent to commit sexual offences other than sexual penetration. Whilst this situation would probably be covered by some of the other offences, such as administration offences, those penalties may not be considered sufficient. Victoria does not have a general offence of administering a drug with intent to commit an indictable offence.	by some of the other offences, such as administration offences.	other person (e.g. capable of inducing unconsciousness or sleep) (5 years) : *s19 Crimes Act*. Introducing a drug of dependence into the body of another person without authorisation (1 year) : *s74 Drugs, Poisons and Controlled Substances Act*.	capable of interfering substantially with the bodily functions of the other person would apply – may depend on how much alcohol is administered.
Qld	Offences of murder (life imprisonment) and manslaughter	Administering a poison or other noxious thing endangering life or causing GBH*	Administering a drug with intent to stupefy or overpower the person to enable a sexual act to be	Administering a stupefying or overpowering drug with intent to commit an indictable offence.	Administering a poison or other noxious thing to another with intent to injure or annoy (7 years) : *s323(1) Criminal Code*.	Unlawful drink spiking – A person who administers, or attempts to administer, in drink a substance to another

	Drink spiking resulting in death	**Drink spiking causing, or with intent to cause, injury or harm**	**Drink spiking with intent to commit a sexual offence**	**Drink spiking with intent to commit an indictable offence**	**Drink spiking with drugs (other than alcohol) without lawful excuse**	**Drink spiking with alcohol for a prank**
	(life imprisonment)	(14 years) : *s322 Criminal Code* Administering a poison or other noxious thing to another with intent to injure or annoy(7 years) : *ss323(1) Criminal Code*. **Potential gap**: these offences may not cover drink spiking with alcohol.	engaged in with the person (14 years) : *s218 Criminal Code Act*. Administering a stupefying or overpowering drug with intent to commit an indictable offence (life imprisonment) : *s316 Criminal Code*.	(life imprisonment) : *s316 Criminal Code*.	Supplying a dangerous drug to another person (penalty ranging from 5 years to 25 years depending on the type of drug and to whom it is administered) : *ss4 and 6 Drugs Misuse Act* ('supply defined to include 'administer').	person (the *other person*) without the other person having knowledge of the substance with intent to cause the other person to be stupefied or overpowered is guilty of a crime and is liable to imprisonment for 5 years: *s 316A (1), (2), (3), (4), (5), (6) (7) Criminal Code (Drink Spiking) and Other Acts Amendment Act 2006.*
SA	Offences of murder (life imprisonment) and manslaughter (life imprisonment)	Engaging in conduct intending to endanger life (15 years), or intending to cause serious harm (10 years), or intending to cause harm (5 years) : *s29 Criminal Law Consolidation Act*.	General offences of engaging in conduct intending to cause serious harm or harm (penalties ranging from 20 years to 7 years depending on fault and degree of harm): *ss21-25 Criminal Law Consolidation Act*.	General offences of engaging in conduct intending to cause serious harm or harm (penalties ranging from 20 years to 7 years depending on fault and degree of harm): *ss21-25 Criminal Law Consolidation Act*.	General offences of engaging in conduct intending to cause serious harm or harm (penalties ranging from 20 years to 7 years depending on fault and degree of harm): *ss21-25 Criminal Law Consolidation Act*. Administering a prescription drug without authorisation (2 years) :	Spiking of food or beverages – A person is guilty of an offence if the person adds a substance, or causes a substance to be added, to any food or beverage intending to cause, or being recklessly indifferent as to causing, impairment of the consciousness or bodily function of another who will or might consume the

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					s18 Controlled Substances Act.	food or beverage without knowledge of the presence of the substance (whether at all or in the quantity added) (3 years) : *s32C (1), (2) Criminal Law Consolidation (Drink Spiking) Amendment Act 2006*.
WA	Offences of murder (life imprisonment) and manslaughter (20 years).	Causing any substance or thing to be taken by a person with intent to disable or cause GBH* (20 years) : *s294 Criminal Code*. Doing an act resulting in bodily harm to another, or which is likely to endanger the life, health or safety of another (5 years (2 years if tried summarily)) : *ss304(1) Criminal Code*.	Administering a stupefying or overpowering drug with intent to commit an indictable offence (20 years) : *s293 Criminal Code* Administering a drug or other thing with intent to stupefy or overpower in order to have unlawful carnal knowledge of the person (2 years) : *s192 Criminal Code* Doing an act with intent to harm which results	Administering a stupefying or overpowering drug with intent to commit an indictable offence (20 years) : *s293 Criminal Code*. Doing an act with intent to harm which results in bodily harm to another, or which is likely to endanger the life, health or safety of another (20 years) : *ss304(2) Criminal Code*.	**No offence** – no offences covering administering controlled drugs without authorisation or administering drugs with intent to aggrieve or annoy.	**No offence**

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an indictable offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
		Doing an act with intent to harm which results in bodily harm to another, or which is likely to endanger the life, health or safety of another (20 years) : *ss304(2) Criminal Code*.	in bodily harm to another, or which is likely to endanger the life, health or safety of another (20 years) : *ss304(2) Criminal Code*			
Tas	Offences of murder (life imprisonment) and manslaughter (21 years).	Administering any poison or other noxious thing endangering life or causing GBH* (21 years) : *s175 Criminal Code*. Administering any stupefying or overpowering drug, alcohol or thing with intent to commit an offence (21 years) : *s169 Criminal Code*.	Administering any stupefying or overpowering drug, alcohol or thing with intent to commit an offence (21 years) : *s169 Criminal Code*.	Administering any stupefying or overpowering drug, alcohol or thing with intent to commit an offence (21 years) : *s169 Criminal Code*.	Administering any poison or other noxious thing with intent to injure or annoy (21 years) : *s176 Criminal Code* Administering a controlled drug to another person (2 years) : *s24 Misuse of Drugs* Act.	**Potential gap** Possible that offence of administering a poison or other destructive or noxious thing with intent to aggrieve or annoy would apply – case-law suggests that whether alcohol qualifies as a 'noxious thing' depends on the quantity in which it is administered.
NT	Offences of murder (life	Offences of recklessly	Administering any stupefying or	Administering any stupefying or	Administering a dangerous drug to:	**No offence**

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an indictable offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
	imprisonment) and manslaughter (life imprisonment)	endangering life (10-14 years), serious harm (7-10 years) and negligently causing harm (10 years): *ss174C*, *174D, 174E Criminal Code*. Causing a substance to be taken by a person with intent to disable or cause serious harm (life imprisonment) : *s177 Criminal Code*.	overpowering drug with intent to commit a crime (life imprisonment) : *s176 Criminal Code*. Causing a substance to be taken by a person with intent to disable or cause serious harm (life imprisonment) : *s177 Criminal Code*.	overpowering drug with intent to commit a crime (life imprisonment) : *s176 Criminal Code*. Causing a substance to be taken by a person with intent to disable or cause serious harm (life imprisonment) : *s177 Criminal Code*.	a child (14 years); any other person (5 years) : *s5 Misuse of Drugs Act*.	
ACT	Offences of murder (life imprisonment) and manslaughter (20 years).	Administering a stupefying or overpowering drug or injurious substance likely to endanger life or cause GBH*(10 years) : *s27 Crimes Act*. Administering any	**Potential gap** The offence of administering drugs with intent to commit an indictable offence against the person does not cover sexual offences as they are not classified as offences against the	Administering a stupefying or overpowering drug or injurious substance intending to commit and indictable offence against the person punishable by at least 10 years imprisonment.	Administering a drug of dependence to another person (2 years) : *ss169(4) Drug of Dependence Act* Administering a prohibited substance to another person (2 years) : *ss171(3) Drug of Dependence Act*.	**No offence**

	Drink spiking resulting in death	Drink spiking causing, or with intent to cause, injury or harm	Drink spiking with intent to commit a sexual offence	Drink spiking with intent to commit an indictable offence	Drink spiking with drugs (other than alcohol) without lawful excuse	Drink spiking with alcohol for a prank
		poison or other injurious substance with intent to injure or cause pain or discomfort (5 years) : *s28 Crimes Act*. **Potential gap**: these offences may not cover drink spiking with alcohol.	person. Although basic administration offences apply broadly to administration of drugs (not alcohol), the maximum penalty is 2 years imprisonment. The offence of administering an injurious substance with intent to cause pain or discomfort many apply in some circumstances, but only carries a maximum penalty of 5 years.	(15 years) : *s27 Crimes* Act. **Potential gap**: this offence may not cover drink spiking with alcohol.		

* GBH = grievous bodily harm