

POLICE AS EXPERTS IN THE DETECTION OF ALCOHOL AND OTHER DRUG INTOXICATION: A REVIEW OF THE SCIENTIFIC EVIDENCE WITHIN THE AUSTRALIAN LEGAL CONTEXT

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Alcohol and Other Drug ('AOD') use is prevalent in Australia and worldwide, and is frequently a factor in many crimes. Police are often required to assess whether an individual is relevantly intoxicated. This article reviews the current laws and research surrounding intoxication detection by police, with a focus on Australia. It finds that legislation governing criminal law and police powers offers little guidance, and training in intoxication assessment appears to be underdeveloped. It concludes that assumptions of police expertise in AOD intoxication detection should be viewed with caution. Further research is required into the adequacy of initial and continuing police training, and into the practices employed by police officers on the streets, at the police station, and in the courtroom.

I INTRODUCTION

Alcohol and Other Drug ('AOD') use is a prominent issue within Australia. High levels of substance use¹ are accompanied by a significant amount of AOD-related crime; a substantial proportion of offences are committed by and committed

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¹ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013* (Report, 25 November 2014).

against people under the influence of one or more substances.² The costs to society of AOD-related crimes are high.³ Police officers deal with intoxicated victims, witnesses and/or suspects on a regular, often daily, basis.

This article reviews the 'expertise' of police officers in assessing the 'intoxication' of people they encounter. Despite the ubiquity of words like 'intoxicated' and 'drunk', the precise meaning of such terms is elusive. In the criminal law context, it is often important to assess not simply *whether* a person is under the influence of alcohol or another drug (or both), but also the *extent* of that influence, and the nature of its *effects* on physical and cognitive functioning. Given that police officers are often called upon to make assessments of whether a person is relevantly intoxicated, in a variety of contexts and for a range of purposes, it is important to investigate the quality and reliability of police assessments.

Part II of the article considers the prevalence of AOD use and the frequency with which police interact with people who are intoxicated, as well as the types of crimes in which AOD use most frequently appears. In Part III, attention turns to how police expertise in intoxication detection is viewed in Australia. Part IV aims to convey just how consequential police assessments of intoxication can be, and, therefore, why the 'expertise' of police officers should be scrutinised. We use three examples, drawn from different part of the criminal justice system: public order, police interviewing, and serious crime trials. Part V considers whether Australian legislation provides sufficient guidance to police officers on what intoxication means and how it should be assessed. Part VI investigates what the relevant scientific research reveals about the ability of police officers to assess intoxication, and Part VII considers the level of training Australian police receive to assess intoxication. Part VIII concludes and identifies future avenues for research.

² Paul Dietze et al, 'The Relationship Between Alcohol Use and Injecting Drug Use: Impacts on Health, Crime and Wellbeing' (2013) 128(1) *Drug and Alcohol Dependence* 111; Moira Plant, Martin Plant and Christine Thornton, 'People and Places: Some Factors in the Alcohol-Violence Link' (2002) 7(4) *Journal of Substance Use* 207.

³ Anne-Marie Laslett et al, *The Range and Magnitude of Alcohol's Harm to Others* (AER Centre for Alcohol Policy Research and Turning Point Alcohol and Drug Centre, 2010); Anthony Morgan and Amanda McAtamney, *Key Issues in Alcohol-Related Violence* (Australian Institute of Criminology, 2009).

II PREVALENCE OF AOD USE AND POLICE INTERACTIONS WITH INTOXICATED PEOPLE

The 2013 Australian National Drug Strategy Household Survey demonstrated high levels of substance use. In the previous 12 months, approximately 16 million Australians (80 per cent) consumed alcohol, and three million Australians (15 per cent) used illicit drugs, with the number of users increasing from earlier years.⁴ In 2016, two of the most frequently used illegal substances were cannabis (10 per cent) and meth/amphetamines (1.4 per cent), and five per cent of Australians had misused pharmaceuticals (such as benzodiazepines and opioids) in the last 12 months.⁵ There is a high correlation between many offences and AOD use. For example, in 2016, one in 10 people aged 14 or older had been a victim of an illicit drug-related incident in the previous 12 months.⁶ The costs to society of AOD-related crimes are high. Available estimates suggest that the costs attributable to alcohol-related crime in Australia were \$15.3 billion in 2010,⁷ and the costs attributable to illicit-drug related crime were \$3.8 billion.⁸

Interaction with people who are under the influence of AOD is a frequent part of policing. In a study by Evans and colleagues, law enforcement officers from the United States completed a survey about their experiences with intoxicated witnesses and suspects.⁹ Police responses indicated that contact with intoxicated witnesses was either common or very common (73 per cent of responses). It was also stated that the crimes most likely to be witnessed while intoxicated were violent in nature. Furthermore, police estimated that approximately 52 per cent of victims of sexual violence and 41 per cent of victims of non-sexual violence were intoxicated at the time of the event. While an important first step in determining the prevalence of intoxicated victims and witnesses, the self-report nature of these police estimates may be influenced by memory errors and biases.

Palmer and colleagues conducted an archival analysis of sober and intoxicated witnesses in felony criminal cases (rape, robbery and assault) that

⁴ Australian Institute of Health and Welfare (n 1).

⁵ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016: Detailed Findings* (Report, 28 September 2017).

⁶ *Ibid.*

⁷ Laslett et al (n 3); Morgan and McAtamney (n 3).

⁸ David Collins and Helen Lapsley, *The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05* (Australian Government Department of Health and Ageing, 2008); David Collins and Helen Lapsley, *The Avoidable Costs of Alcohol Abuse in Australia and the Potential Benefits of Effective Policies to Reduce the Social Costs of Alcohol* (Australian Government Department of Health & Ageing, 2008); Morgan and McAtamney (n 3).

⁹ Jacqueline Evans, Nadja Schreiber Compo and Melissa Russano, 'Intoxicated Witnesses and Suspects: Procedures and Prevalence According to Law Enforcement' (2009) 15(3) *Psychology, Public Policy, and Law* 194.

were sampled from a District Attorney's case archives, which contained both cases that were accepted and rejected for prosecution.¹⁰ Of the 1,307 witnesses identified across the cases in the sample, 170 (13 per cent) were reportedly under the influence of alcohol and/or drugs when they witnessed the crime (however, most intoxicated witnesses had only consumed alcohol). In the majority (88 per cent) of these instances, the police established that the witness was under the influence because the witness admitted to drinking alcohol and/or taking drugs. In the remaining cases, police either breathalysed the witness (nine per cent) or had personally observed them consuming the substance (three per cent). It is therefore possible that the 13 per cent identified may actually be an underestimate. It could be the case that witnesses who were not breathalysed and did not admit to being under the influence were thus not recorded as being intoxicated. In addition, the authors of the study acknowledged some other limitations, such as the fact that the cases analysed were only those where an arrest had been made (thus missing those without an arrest), and only covered certain crimes.

Turning to Australia, police officers indicated that they also commonly interacted with intoxicated witnesses or victims.¹¹ In a survey conducted among Australian Federal Police ('AFP') officers, 76 per cent indicated they interacted with an intoxicated person on a weekly or more basis, with 32 per cent of officers stating interactions were on a daily basis.¹²

III POLICE AS EXPERTS

When defining expertise for the purposes of this article, it should be noted at the outset that police officers will not typically be classified as an expert (in intoxication detection) under the terms of s 79 of the *Uniform Evidence Act*.¹³ Our focus in this article is not on the admissibility of police opinion evidence. Rather, we are concerned to examine the implication of the fact that the day-to-day practices of police officers — and the law and policies that frame them — involve

¹⁰ Francesca Palmer et al, 'Intoxicated Witnesses and Suspects: An Archival Analysis of Their Involvement in Criminal Case Processing' (2013) 37(1) *Law and Human Behavior* 54.

¹¹ Lauren Monds et al, 'Intoxication Detection in Health and Policing' (Conference Paper, Australasian Professional Society of Alcohol and Other Drugs (APSAD) Conference, 12–15 November 2017).

¹² *Ibid.*

¹³ Section 79 provides that opinion evidence is allowed in trials when it concerns specialised knowledge. The *Uniform Evidence Act* operates in some Australian jurisdictions: Commonwealth, New South Wales, Victoria, Tasmania and the Northern Territory. Section 79(1) states: 'If a person has specialised knowledge based on the person's training, study or experience the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.'

an assumption that officers possess some form of expertise (even in lay terms) when it comes to intoxication assessment.¹⁴ Perhaps this development of expertise can be better understood in the light of the tasks that are required from police officers on a daily basis. Officers encounter intoxicated people in various contexts in the performance of their duties. In each of these contexts, officers may be required to make an assessment not only of the level of intoxication, but also of the type of substance the person of interest has taken. This decision will then inform how to further engage with this person, and which legal steps to take. It is not uncommon that officers will subsequently have to justify these decisions, and their assessment, in court. As such, police officers are expected to have some specialised knowledge, be it by training or experience, informing their decision.

A practical example of this expertise assumption can be found in New South Wales Police training materials, where police are advised that: ‘where you have an intoxicated witness who is to be interviewed, it is usually best to defer their interview until they are sober, provided that you are satisfied that their evidence will not be contaminated or lost’.¹⁵ Given that victims and witnesses are generally not breathalysed or drug-tested, there is a clear assumption here that police officers are able to determine or detect whether someone is intoxicated or not based on their experience or training. There are further clear allusions to the fact that police have certain skills and/or are aware of certain cues in various police documents. For example, the New South Wales Police Force *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* states:

Some signs and cues will only be detected with careful observation and questioning. You should take the time necessary to make a proper assessment. Remember, if you recognise any of the signs, take steps to reduce the opportunity for self-injury and arrange for any illness to be treated.¹⁶

This statement clearly implies that cues can be detected with observation, and certain signs are known to police officers, as they can be recognised. The question remains, then: Does their experience with intoxicated people warrant this assumption of expertise?

IV THE CONSEQUENCES OF POLICE ASSESSMENTS OF INTOXICATION

Earlier in this article, we outlined the multiple contexts in which police and others are required to assess whether a person is relevantly intoxicated. In this part we

¹⁴ Although beyond the scope of this article, there are other assessments regularly made by police officers in relation to which similar questions might be posed, such as cognitive impairment and mental illness.

¹⁵ New South Wales Police Legal Services Training Section, *The Interviewing of Intoxicated Persons* (Law Notes 09, 2004).

¹⁶ New South Wales Police Force, *Code of Practice for CRIME* (January 2012) 22.

show just how consequential such decisions can be, and why we should be concerned when the evidence suggests that detection ability may be low and police training inadequate. We do so by way of three examples drawn from different stages or ‘sites’ of the criminal justice system: (i) public order policing (on the street); (ii) police interviews of accused persons (in the police station); and (iii) police evidence given at trial (in the court room). Our examples demonstrate that police assessments of intoxication can be consequential in different ways. For example, assessments of intoxication in the context of public order policing may be regarded as relatively ‘low stakes’, in that the penal consequences are minimal or modest. However, a large number of individuals are affected by such decisions, and the effects on already marginalised groups — including Aboriginal and Torres Strait Islander people, people experiencing homelessness, and young people in disadvantaged areas — can be disproportionately high. Serious crime of violence trials in the District Court or Supreme Court, in which a police officer’s account of the accused’s apparent level of intoxication (or not) is influential (eg as relevant to the Crown’s ability to prove *mens rea*) occur much less frequently, but the stakes are very high, given the punishment to which a person is likely to be subjected if convicted.

A Public Order

Although it receives relatively little attention from criminal-law researchers,¹⁷ the operation of police powers and ‘minor’ public order offences is a high volume domain of the criminal justice system.¹⁸ The latter includes offences where intoxication is a defining element of the offence, such as the crime of being intoxicated in a public place, and where intoxication is frequently associated with the crime in question, such as public nuisance¹⁹ or using offensive language in a public place.²⁰ More than 20,000 individuals are charged with public order crimes

¹⁷ Luke McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’, in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 33, 44–51.

¹⁸ Some public order offences have attracted greater research attention in recent years, such as using offensive language in a public place under s 4A of the *Summary Offences Act 1988* (NSW). See, eg, Elyse Methven, ‘A Little Respect: Swearing, Police and Criminal Justice Discourse’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 58; Elyse Methven, “‘Weeds of Our Own Making’ Language Ideologies, Swearing and the Criminal Law’ (2016) 34(2) *Law in Context* 117; Julia Quilter and Luke McNamara, ‘Time to Define “the Cornerstone of Public Order Legislation”: The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)’ (2013) 36(2) *University of New South Wales Law Journal* 534–62.

¹⁹ See, eg, *Summary Offences Act 2005* (Qld) s 6.

²⁰ See, eg, *Summary Offences Act 1988* (NSW) s 4A.

every year.²¹ A further unknown number receive penalty notices ('on-the-spot' fines) and move-on directions, often for behaviour that is, or is deemed to be, AOD-related.²² In the Northern Territory, controversial 'paperless arrest' laws allow police to arrest a person where the officer believes 'on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence',²³ and to hold them in custody for a period of up to four hours²⁴ or, *if the person is intoxicated*, 'for a period longer than four hours until the member believes on reasonable grounds that the person is no longer intoxicated'.²⁵ A High Court challenge to the constitutionality of the paperless arrest regime — motivated in large part by concerns of disproportionate use against Aboriginal people²⁶ — failed.²⁷

The powers and offences discussed here can be criticised on a range of over-criminalisation grounds, and it is not our contention that ambiguity about the definition of intoxication (or corresponding doubts about the accuracy of police assessments of whether a person is relevantly intoxicated) is their central flaw. Our aim is more specific: to highlight the fact that significant loss-of-liberty consequences (arrest, custody, fines, and potentially prison) can result from an on-the-street encounter in which a person is deemed by a police officer to be sufficiently intoxicated to warrant their intervention.

B *Police Interviews*

As a general proposition, it is recognised that a person should not be subjected to a police interview while intoxicated — both because such a state creates a risk of unfairness and erosion of the right against self-incrimination, and because any evidence so gathered may be unreliable. The spirit of these propositions is variously reflected, depending on the Australian jurisdiction in question, in

²¹ It is reported that 24,288 defendants had public order charges finalised in Australian courts in 2017–18: Australian Bureau of Statistics, *Criminal Courts, Australia, 2017–18* (Catalogue No 4513.0, 28 February 2019).

²² See, eg, New South Wales Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences 1988* (Report, 2014) <https://www.ombo.nsw.gov.au/___data/assets/pdf_file/0006/18852/Policing-intoxicated-and-disorderly-conduct-Report-Review-of-section-9-of-the-Summary-Offences-Act-1988_Aug14_web.pdf>.

²³ *Police Administration Act 1978* (NT) s 133AB.

²⁴ *Ibid* s 133AB(2)(a).

²⁵ *Ibid* s 133AB(2)(b).

²⁶ Jonathon Hunyor, 'Imprison Me NT: Paperless Arrests and the Rise of Executive Power in the Northern Territory' (2015) 8(21) *Indigenous Law Bulletin* 3.

²⁷ *North Australia Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569. See the discussion in Luke McNamara and Julia Quilter, 'High Court Constitutional Challenges to Criminal Law and Procedure in Australia' (2018) 41(4) *University of New South Wales Law Journal* 1047, 1067–8.

legislation governing detention and police interrogation, police codes of practice, legislative and common-law rules governing the admissibility of evidence that may have been unfairly or improperly obtained, or a combination of the above.

For example, in Queensland, s 423 of the *Police Powers and Responsibilities Act 2000* (Qld) states that if the police want to interview someone who is ‘apparently under the influence of liquor or a drug’, questioning must be delayed ‘until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person’s ability to understand his or her rights and to decide whether or not to answer questions’.²⁸ In New South Wales, s 117(1)(k) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) identifies ‘any time that is required to allow the person to recover from the effects of intoxication due to alcohol or another drug or a combination of drugs’ as one of the reasons why the clock can be stopped in relation to the maximum period for which a person can be detained for questioning.²⁹ Although not as explicit as the Queensland provision, s 117(1)(k) creates an expectation that a person should not be questioned while intoxicated.

In jurisdictions where there is no legislation of the sort enacted in Queensland and New South Wales,³⁰ whether it is appropriate to question a person who was intoxicated falls to be assessed (if the matter goes to trial) according to the common law on ‘voluntariness’.³¹

It is important to note that, somewhat counterintuitively, whether under the various statutory regimes or the common law, the mere fact that a person is intoxicated at the time of a police interview does not necessarily mean that any evidence gathered during the interview will be ruled inadmissible. In fact, police policies clearly countenance the possibility that a person with some degree of intoxication may be interviewed. For example, the New South Wales Police Force

²⁸ *Police Powers and Responsibilities Act 2000* (Qld) s 423(1)–(2). See also *Police Administration Act* (NT) s 138(q)(ii); *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(4)(j); *Crimes Act 1914* (Cth) s 23C(7)(e) (applicable to Commonwealth offences and Australian Capital Territory offences that are ‘punishable by imprisonment for a period exceeding 12 months’ (s 23A(6))).

²⁹ See also *Police Administration Act* (NT) s 138(q)(ii); *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(4)(j); *Crimes Act 1914* (Cth) s 23C(7)(e) (applicable to Commonwealth offences and Australian Capital Territory offences that are ‘punishable by imprisonment for a period exceeding 12 months’ (s 23A(6))).

³⁰ Some jurisdictions have enacted legislation to regulate post-arrest detention and questioning without expressly identifying intoxication as a relevant factor: *Crimes Act 1958* (Vic) s 464A; *Criminal Investigation Act 2006* (WA) s 140. South Australia has a specific regime for ‘interviewing suspects with complex communication needs’ (*Summary Offences Regulations 2016* (SA) pt 4), but this category expressly excludes communication difficulties caused by intoxication (cl 18(2)). Equivalent police practices to those in New South Wales and Queensland may be adopted even in the absence of specific legislation: eg, *Booth v The Queen* [2014] ACTCA 38, [22].

³¹ *Sinclair v The King* (1946) 73 CLR 316, 322. See also Luke McNamara et al, ‘Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects’ (2017) 43(1) *Monash University Law Review* 148, 160.

Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) states that when issuing the pre-interview caution (designed to respect the privilege against self-incrimination), police should ‘take into account’ the suspect’s ‘apparent intellectual capacity, age, background, *level of intoxication*, language skills etc when cautioning’.³²

The ‘safeguard’ here is a broad judicial discretion to exclude or admit such evidence. For example, where the *Uniform Evidence Act* applies,³³ s 138 provides for the exclusion of ‘improperly or illegally obtained evidence’, including evidence obtained where the person conducting the questioning knew or should have known that the interview was conducted in circumstances that were ‘likely to impair substantially the ability of the person being questioned to respond rationally to the questioning’ (s 138(2)(a)).³⁴

The Queensland Court of Appeal decision in *R v Martin*³⁵ grapples with this issue. In that case, a government medical officer determined (based on a sample taken several hours after police interview) that the offender’s Blood Alcohol Concentration (‘BAC’) was approximately 0.311 when first interviewed. On appeal, the defendant argued that evidence obtained during this interview should have been excluded.³⁶ The Court of Appeal, while recognising that the ‘matters of public policy requiring police officers to comply with their responsibilities under the Act warranted the exclusion of the contentious evidence’, nevertheless found that the trial judge had not taken into account any wrong consideration in admitting the evidence.³⁷

In Western Australia, there is no legislative provision addressing interviews of intoxicated suspects, and so the common-law test of ‘voluntariness’, and the common-law rules governing the admissibility of evidence, apply. If confessional or other statements made by an accused are involuntary, they are inadmissible. If considered voluntary, a judge *may* exercise a discretion to exclude statements on unfairness grounds, or because the taking of the statement was illegal or contrary to public policy.³⁸ This means that how a court approaches the relationship between intoxication and involuntariness is important to the question of the admissibility of statements made in police interviews. By way of illustration, in

³² New South Wales Police Force (n 16) 68 (emphasis added).

³³ *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

³⁴ Comparable legislation or the common law (or a combination) operate: see *Evidence Act 1929* (SA) s 34KD; *Evidence Act 1977* (Qld) s 130; *R v Ireland* (1970) 126 CLR 321; *R v Swaffield* (1998) 192 CLR 159; *Van der Meer v The Queen* (1988) 82 ALR 10.

³⁵ [2011] QCA 342.

³⁶ *Evidence Act 1977* (Qld) s 130.

³⁷ *R v Martin* [2011] QCA 342, [24]–[25]. See, further, McNamara et al (n 31) 161–2.

³⁸ *R v Swaffield* (1988) 192 CLR 159.

Western Australia v Silich,³⁹ the accused had an estimated BAC of 0.116 when interviewed by police. The trial judge admitted the evidence, determining that the interview was ‘voluntary’. The trial judge did so by watching the police interview video and determining that Mr Silich was ‘capable of: (a) appreciating that he had a choice to speak or remain silent, and was capable of exercising sufficient volition to give effect to what he knew was this right; and (b) understanding the questions put to him and what he was confessing’.⁴⁰ The Court of Appeal affirmed this approach to voluntariness and rejected arguments that the evidence ought to have been excluded for being unreliable or unfairly obtained.

C *Serious Crime Trials*

Police assessments of intoxication are less dominant in the courtroom, but still important. Quilter and colleagues recently completed a study of more than 300 Australian criminal cases that featured evidence that the accused, the victim, and/or a witness was intoxicated at the time of the commission of the offence.⁴¹ They found that there are a wide variety of practices and types of evidence in terms of how the assertion of intoxication was substantiated: (i) biological detection (eg blood alcohol concentration); (ii) self- and/or witness reports of consumption; (iii) self- and/or witness reports of behaviour or ‘state’; (iv) *assessment of appearance and behaviour by police officers*; (v) CCTV footage and video recordings of police interviews; (vi) assessments by medical, toxicological or psychiatric experts; and (vii) judicial assessments of, and commentary on, all of the available evidence.⁴²

In a number of the cases examined, the relatively objective evidence of a BAC reading was not before the court, and a policer officer’s observation-based assessment of a person’s level of intoxication was an influential component of the evidence before the court as to the accused’s intoxication. For example, in *R v Baker*,⁴³ the defendant was charged with attempted murder. At trial, one of the

³⁹ (2011) 43 WAR 285.

⁴⁰ *Ibid* [157]. The Court of Appeal affirmed this approach to voluntariness and rejected arguments that the evidence ought to have been excluded for being unreliable or unfairly obtained. The Court of Appeal dismissed an appeal against the decision to admit the interview evidence.

⁴¹ Julia Quilter et al, ‘Intoxication’ and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks (Report to the Criminology Research Advisory Council, Grant: CRG 20/14–15, May 2018) (“Intoxication” and Australian Criminal Law’); Julia Quilter et al, ‘The Significance of “Intoxication” in Australian Criminal Law’ (Research Paper No 546, Australian Institute of Criminology, 11 May 2018); McNamara et al (n 31).

⁴² McNamara et al (n 31).

⁴³ *R v Baker* [2014] QCA 5 (‘Baker’). See further Julia Quilter and Luke McNamara, ‘The Meaning of ‘Intoxication’ in Australian Criminal Cases: Origins and Operation’ (2018) 21(1) *New Criminal Law Review* 170, 175.

central points of contestation was whether the accused, given his intoxication, had the requisite *mens rea* (intent to kill). No BAC or toxicology report was before the Court.⁴⁴ The available evidence included testimony by the accused and a witness as to how much the accused had consumed ('grog, pot and a bit of ecstasy'; '10 Tooheys New'),⁴⁵ the accused's self-rating of his intoxication on a 10-point scale ('6, 7'⁴⁶), and the evidence of a police officer that he did not observe 'any indicia of intoxication'.⁴⁷

Note the tenor of this last observation. In stark contrast to the public order context discussed above, where police routinely make affirmative findings as to a person's intoxication — which in turn justifies police intervention (move-on, detention, arrest, charge, fine) — in criminal trials, police assessment can form part of the Crown case *negating* the defendant's assertion of an intoxication 'defence'.⁴⁸ In *R v Huni*,⁴⁹ the defendant was charged with attempted murder. His intoxication was relevant to whether the Crown could prove an intention to kill (the fault element for attempted murder). Evidence of the extent of his intoxication came from a number of sources including evidence given by a number of police officers. In the course of judgment in an unsuccessful appeal against conviction in the Queensland Court of Appeal, that evidence was summarised as follows:

According to the constable, he appeared to be intoxicated; his speech was slow and slurred but he was calm and seemed to be aware of his surroundings.⁵⁰

[Detective] Libke said he could smell alcohol on the appellant and noticed that his speech was slow. Detective Scott recalled that the appellant had slurred speech, but appeared to understand his questions, although he repeated himself.⁵¹

In *R v Humbles*,⁵² on a charge of murder in a judge-alone trial, the trial judge was satisfied beyond reasonable doubt that the defendant had the intention to kill, notwithstanding a BAC reading of 0.252–0.284 at the time of the commission of the offence and expert opinion that, at this level, 'his ability to think through the consequences of his actions would be grossly impaired'.⁵³ In reaching this conclusion, the judge applied a functional approach to intoxication (often based

⁴⁴ *Baker* (n 43) [79].

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid* [78]. In *Babic v R* [2010] 203 A Crim R 543, 568, the trial judge described as a 'classic police description of someone who is intoxicated ... someone who is affected to a degree by alcohol or drugs, which was unsteady of their feet, breath smells of alcohol, slurring of words'.

⁴⁸ See *McNamara et al* (n 31) 170–1.

⁴⁹ [2014] QCA 324.

⁵⁰ *Ibid* [11].

⁵¹ *Ibid* [13].

⁵² [2014] SASCF 91 ('*Humbles*').

⁵³ *Ibid* [17].

on a person's mechanical functionality — which is observable — rather than their cognitive performance — which is not).⁵⁴ The evidence on which the trial judge expressly relied included evidence that the accused gave coherent answers to basic police questions, such as a request for his identity.⁵⁵

A related and noteworthy feature of the cases analysed in the national study was a tendency for judges to prefer lay conceptions of 'intoxication' as the touchstone for critical judgements about the accused's criminal responsibility, over expert scientific knowledge about the known effects of alcohol and other drugs.⁵⁶ Ironically, given the lay terms in which police officers (and witnesses, such as pub licensees⁵⁷) typically assess and describe a person's apparent level of intoxication (often based on a person's mechanical functionality), this judicial preference can increase the importance and impact of the police evidence. Consistent with the analyses of Valverde and Loughnan about common sense and 'lay expertise' on intoxication,⁵⁸ the authoritative voices of police — as well as lawyers and judges — shape the version of 'common sense' that operates in the courtroom and informs decision-making by the tribunal of fact.

V LAWS REQUIRING POLICE TO ASSESS INTOXICATION

Quilter and colleagues' recent Australian study of the significance and definition of 'intoxication' in Australian criminal laws identified more than 500 statutory provisions across the country that were animated in one way or another by the concept of 'intoxication'.⁵⁹ The two key findings of this study were that: (i) significance is attached to a person's 'intoxication' for a wide variety of criminal justice purposes, touching on all stages in the criminal justice system — from first police contact to imprisonment; and (ii) 'intoxication' is very rarely defined with precision.

With respect to *purpose*, Quilter and colleagues identified seven primary purposes of 'intoxication' in Australian criminal law and procedure legislation: (i) intoxication of a person as the basis for the exercise of a coercive power; (ii)

⁵⁴ On the functional approach to assessing intoxication, see Quilter and McNamara (n 43) 199–204.

⁵⁵ *Humbles* (n 52) [25].

⁵⁶ Quilter and McNamara (n 43) 191–5.

⁵⁷ See, eg, *Blackwell v R* [2011] NSWCCA 93.

⁵⁸ Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003); Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012).

⁵⁹ Julia Quilter et al, 'Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of 'Intoxication' Under Australian Legislation' (2016) 39(3) *University of New South Wales Law Journal* 913. The study analysed 529 provisions across 115 statutes, 79 regulations and 19 by-laws. This was one component of a larger study: Quilter et al, 'Intoxication' and Australian Criminal Law' (n 41).

intoxication of the accused as a core element of an offence; (iii) intoxication of the victim or a third party as a core element of an offence; (iv) intoxication of the accused as an aggravating element of an offence; (v) limitations on intoxication evidence to support a defence; (vi) intoxication of the accused as relevant (or irrelevant) to sentencing; and (vii) consumption of AOD (predicated on pre-emptive intervention, to avoid risks associate with intoxication).⁶⁰

In a large majority of the statutory provisions examined by Quilter et al, police are the first (and often only) persons to assess whether a person is relevantly intoxicated. This is because a significant proportion of statutory provisions that turn on ‘intoxication’ are concerned with giving police coercive powers, or define public order offences that are most likely to be dealt with by an ‘on-the-spot’ fine or charges that result in a guilty plea and a sentence imposed by a Magistrate. For example, s 198(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (‘LEPRA’) states:

A police officer may give a direction to an intoxicated person who is in a public place to leave the place and not return for a specified period if the police officer believes on reasonable grounds that the person’s behaviour in the place as a result of the intoxication ...:

- (a) is likely to cause injury to another person or persons, damage to property or otherwise give rise to risk to public safety, or
- (b) is disorderly.

Non-compliance with an intoxication move-on direction is an offence under s 199 of LEPRA (fine of 2 penalty units: \$220). Non-compliance with a move-on direction and continuation of disorderly behaviour is a more serious offence under s 9(1) of the *Summary Offences Act 1988* (NSW).⁶¹ The maximum penalty is 15 penalty units (\$1,650) or police can impose an on-the spot fine of \$1,100.

Although it has been repealed in most parts of Australia,⁶² another example is provided by the ‘classic’ (and notorious) offence of public drunkenness (or intoxication), which remains on the statute books in Queensland and Victoria.⁶³ Section 10(1) of the *Summary Offences Act 2005* (Qld) states: ‘A person must not

⁶⁰ Quilter et al (n 59) 917.

⁶¹ Section 9(1) of the *Summary Offences Act 1988* (NSW) states:

A person who:

- (a) is given a move on direction for being intoxicated and disorderly in a public place, and
 - (b) at any time within 6 hours after the move on direction is given, is intoxicated and disorderly in the same or another public place,
- is guilty of an offence.

⁶² Luke McNamara and Julia Quilter, ‘Public Intoxication in NSW: The Contours of Criminalisation’ (2015) 37(1) *Sydney Law Review* 1.

⁶³ *Summary Offences Act 2005* (Qld) s 10(1); *Summary Offences Act 1966* (Vic) s 13.

be intoxicated in a public place.’ The maximum penalty is 2 penalty units (currently \$261.10).

These are just two contexts in which police assess a person’s intoxication. Others include: when a person is taken into ‘protective custody’,⁶⁴ when deciding whether a person should be granted bail,⁶⁵ when assessing whether an accused person is fit to participate in a police interview,⁶⁶ when taking statements from victims and witnesses, and when giving evidence in a trial about the demeanour and behaviour of a defendant, victim or witness.⁶⁷

Given the frequency with which police are called on to determine a person’s intoxication, it is important to consider the extent to which the legislature couples the responsibility to assess intoxication with guidance about how the assessment should be made. To put it another way: What does it mean to say that a person is ‘intoxicated’?

With respect to definition, Quilter and colleagues identified seven approaches to the statutory definition of ‘intoxication’ on a spectrum from imprecise to relatively precise: (i) no definition; (ii) limited definition; (iii) degree of impairment; (iv) assessment based on observation of behaviour, but with no criteria specified; (v) assessment based on observation of behaviour, with criteria specified; (vi) biological detection (ie prescribed concentration of alcohol (‘PCA’)/BAC or presence of a prohibited drug in breath/blood/urine); and (vii) assessment by a health professional.⁶⁸

Surprisingly, given that the legislation analysed by Quilter and colleagues carried penal consequences of one sort or another, ‘intoxication’ was frequently poorly defined. Although it is a familiar method of intoxication definition, in the light of Australia’s long history of high-visibility and high-volume roadside random breath-testing, biological detection⁶⁹ is rarely employed in Australian criminal law and procedure legislation (16 per cent of the statutory provisions examined). In 41 per cent of the provisions examined there was *no* definition of intoxication or a *very limited* definition.⁷⁰ In a further 33 per cent of instances, legislation purported to capture the requisite level of intoxication by using some form of magnifying language or by directing the inquiry to observed behaviour. To illustrate, in the case of one of the examples used above — public intoxication in Queensland — s 10(2) of the *Summary Offences Act 2005* (Qld) provides that

⁶⁴ See, eg, *Police Administration Act* (NT) s 128.

⁶⁵ See, eg, *Bail Act 2013* (NSW) s 44(4).

⁶⁶ See, eg, *Police Powers and Responsibilities Act 2000* (Qld) s 423, and the discussion above Part IV(B).

⁶⁷ See discussion above Part IV(C).

⁶⁸ Quilter et al (n 59) 922.

⁶⁹ Julia Quilter and Luke McNamara, “‘Zero Tolerance’ Drug Driving Laws in Australia: A Gap Between Rationale and Form?” (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 47.

⁷⁰ Typically, they simply include the effects of other drugs as well as alcohol. See, eg, *Crimes Act 1900* (NSW) s 428A: “‘intoxication’ means intoxication because of the influence of alcohol, a drug or any other substance’.

“‘intoxicated” means drunk or otherwise adversely affected by drugs or another intoxicating substance’. Quilter et al identified more than 50 different formulations of words or phrases used in legislation for the purpose of marking relevant intoxication, such as ‘incapacitated by intoxication’, ‘apparently under the influence’, ‘very substantially impaired’, and ‘visibly affected’. The last of these is perhaps the most literal version of a common feature of intoxication ‘definitions’ in Australian criminal law: an assumption that a person’s level of intoxication can be assessed by observing them. And yet, police officers (and others) are routinely required to make this assessment without any express statutory criteria or approved method.

Aside from the small number of provisions that adopt the biological detection model, in only 10 per cent of the statutory provisions examined was there any attempt to articulate the criteria for making observation-based assessments of intoxication. To return to the first of the two examples provided above — the New South Wales police power to issue an intoxication move-on direction (LEPRA s 198(1)) — s 198(5) of LEPRA offers the following definition of intoxication:

For the purposes of this section, a person is *intoxicated* if:

- (a) the person’s speech, balance, co-ordination or behaviour is noticeably affected, and
- (b) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug.⁷¹

Noting that this formulation is at the ‘better’ end of the spectrum of legislative definitions of intoxication, it nonetheless lacks precision, and hands considerable discretion to the police.

The relatively limited guidance provided by legislation gives rise to important questions: How good are police at accurately assessing intoxication? To what extent are police detection practices in relation to assessing intoxication sufficient and aligned with empirical evidence?

VI RESEARCH ON POLICE ABILITY TO DETECT INTOXICATION

This part reviews the research available as to the ability of police officers to detect intoxication, including general police ability to recognise intoxication, as well as

⁷¹ A similar formulation is used in a number of other Australian statutes. See, eg, *Liquor Act 1992* (Qld) s 9A; *Police Administration Act 1978* (NT) s 127A; *Liquor Control Reform Act 2008* (Vic) s 3AB(1).

the more formal Drug Recognition Experts ('DRE') program that is prominent in the United States but less so in Australia.

One of the earliest studies on police ability to detect intoxication appears to be that of Pagano and Taylor in 1980.⁷² Volunteers (36 male students) received either a high (BAC of ~0.10 per cent) or low (BAC of ~0.04 per cent) dose of alcohol and then interacted with police for up to 20 minutes. Police were instructed to provide ratings of perceived level of intoxication via an estimate of BAC at three time points: 30 seconds after volunteer arrival, five minutes after volunteer arrival, and after completion of an alcohol influence checklist (approximately 15 minutes to complete; the checklist included ratings of appearance and odour, attitudes or behaviours, and performance on multiple tests of balance and dexterity).

The results of this study suggested that police frequently overestimated the level of intoxication of the participant at the lower level and underestimated at the higher level: for the low-dose condition (BAC 0.04 per cent) judgements ranged from 0 to 0.134 per cent (average 0.049 per cent). Particularly concerning were the high-dose ratings (BAC of ~0.10 per cent), which ranged from 0 to 0.15 per cent (average 0.061 per cent). These participants were dosed to the legal limit for driving (at that time and in that jurisdiction of Ohio, the legal limit for driving was <BAC 0.10 per cent) and were not always perceived as being highly impaired. Furthermore, there was no significant relationship between confidence and accuracy of these estimates; highly confident police were not significantly likely to be more accurate. Although police were able to revise their assessments at the multiple time points throughout the interaction, the results suggested that police generally made their decision within the first 30 seconds of the interaction and then did not change their determination; if anything, the authors reported that the increased contact time only served to reinforce the initial decision and increased police confidence ratings in their accuracy. Years of service were also not significantly related to accuracy, suggesting that experience did not improve recognition ability.⁷³

In another early study,⁷⁴ police were compared with other people who also interact frequently with alcohol-intoxicated people: social drinkers and bartenders. In a similar study design to Pagano and Taylor, volunteers were dosed to achieve either BAC 0.05 per cent or 0.10 per cent, and observers were asked to rate whether volunteers were sober, moderately intoxicated, or very intoxicated. Overall, each group performed poorly in accurately detecting the presence and level of alcohol intoxication (average of 25 per cent accuracy). On average, police

⁷² Marc Pagano and Stuart Taylor, 'Police Perceptions of Alcohol Intoxication' (1980) 10(2) *Journal of Applied Social Psychology* 166.

⁷³ *Ibid.*

⁷⁴ James Langenbucher and Peter Nathan, 'Psychology, Public Policy, and the Evidence for Alcohol Intoxication' (1983) 38(10) *American Psychologist* 1070.

were actually found to perform significantly worse than bartenders; however, a subset of the police (N=5) were found to perform consistently better than everyone else at detecting the presence of alcohol. Upon exploring the data further, it was determined that the majority of this subset (four out of the five) had received >90 hours training as part of a specialised tactical unit for detecting alcohol-intoxicated drivers. Importantly, however, even this highly accurate group still underestimated intoxication. The findings of several other studies suggest not only that police officers are poor at detecting intoxication in people with very high BACs and prone to considerably underestimating BAC in general, but also that they return high rates of false positives (ie officers determined that volunteers were impaired when sober).⁷⁵

In recent times the prominence of alcohol breathalysers has been able to take some of the 'guesswork' out of determining the presence of alcohol, and Breath Alcohol Concentration ('BrAC') readings can be used to indicate whether a person has crossed the threshold for deemed impairment set by drink-driving laws. Having said that, except in the case of roadside random breath tests, police usually only deploy breathalysers following suspicion of intoxication. Therefore, the results of the abovementioned research still raise important issues about police ability to form an appropriate suspicion of potential alcohol-related impairment.

Furthermore, while alcohol remains the primary substance by which people are intoxicated during a crime, it is necessary to consider the role of other substances or polysubstance use. This is especially problematic, as current portable drug tests (usually collected via saliva) are generally less precise in being able to indicate whether other substances are causing current impairment or are merely in the person's system, as many substances can remain in the body long after any impairing effects have ceased. Conversely, it does not always follow from the fact that a drug test is negative that no impairment is present, such as in the case of 'hangover' effects or other medical reasons for impairment.⁷⁶ This

⁷⁵ John Brick and John Carpenter, 'The Identification of Alcohol Intoxication by Police' (2001) 25(6) *Alcoholism: Clinical and Experimental Research* 850; Richard Compton, *Field Evaluation of the Los Angeles Police Department Drug Detection Program* (National Highway Traffic Safety Administration, 1986); Joann Wells et al, 'Drinking Drivers Missed at Sobriety Checkpoints' (1997) 58(5) *Journal of Studies on Alcohol* 513.

⁷⁶ John Brick and Carlton Erickson, 'Intoxication is Not Always Visible: An Unrecognised Prevention Challenge' (2009) 33(9) *Alcoholism: Clinical and Experimental Research* 1489; Jerome Yesavage and Von Leirer, 'Hangover Effects on Aircraft Pilots 14 Hours After Alcohol Ingestion: A Preliminary Report' (1986) 143(12) *The American Journal of Psychiatry* 1546; David Sandler, 'Expert and Opinion Testimony of Law Enforcement Officers Regarding Identification of Drug Impaired Drivers' (2000) 23(1) *University of Hawai'i Law Review* 151; Craig Gunn et al, 'A Systematic Review of the Next-Day Effects of Heavy Alcohol Consumption on Cognitive Performance' (2018) 113(12) *Addiction* 2182.

means that it is especially important to be able to detect current levels of impairment for these substances at the time of the event.⁷⁷

Recent research from an Australian survey of police demonstrated that while police (N=151) are generally confident in their ability to detect alcohol intoxication overall (87 per cent reported alcohol as at least somewhat easy to detect on a scale of 'not at all' to 'extremely easy'), considerably lower confidence was observed when considering other drug categories.⁷⁸ In particular, only 60 per cent of police rated opioids (eg heroin) as at least somewhat easy to detect, with even lower ratings for cannabis (39 per cent) and amphetamines (30 per cent). As above with the research suggesting a poor relationship between confidence and accuracy for alcohol detection, even for those with high confidence for drug recognition, this may be misplaced.

The DRE program was developed in the United States in the 1970s in response to concerns around the ability of police officers to detect alcohol and other drug impairment, particularly in the context of driving while intoxicated.⁷⁹ The DRE program involves 12 steps that are systematically employed in each case of suspected intoxication to measure signs and symptoms of a variety of drug classes (developed based on medical guidelines), with the aim of yielding a determination of intoxication from a drug category (or multiple categories in the case of suspected polysubstance use). Following this assessment, intoxication is usually confirmed by a toxicological analysis of a blood sample. To be certified as a DRE requires approximately 100 hours of training, multiple exams, and observed practice of successful drug detection. Not all police undergo this training; rather, upon suspicion of intoxication, a suspect will be referred by police for a DRE assessment.

Evaluations of the DRE program are numerous. The majority of these evaluations occurred in a laboratory with volunteers receiving high and low doses of various substances, before being assessed by DRE practitioners. Some studies have demonstrated high levels of accurate detections (between 80–90 per cent accuracy)⁸⁰ and/or low false positive rates (eg less than 10 per cent).⁸¹ However, many of these studies report high accuracy rates in terms of correct drug category chosen, *once a determination of intoxication has been made*; in several cases the detection of presence of intoxication yielded low accuracy rates. Further studies

⁷⁷ Kari Declues, Shelli Perez and Ariana Figueroa, 'A Two-Year Study of Δ 9 Tetrahydrocannabinol Concentrations in Drivers; Part 2: Physiological Signs on Drug Recognition Expert (DRE) and Non-DRE Examinations' (2018) 63(2) *Journal of Forensic Sciences* 583.

⁷⁸ Monds et al (n 11).

⁷⁹ Sandler (n 76).

⁸⁰ Ibid.

⁸¹ George Bigelow et al, *Identifying Types of Drug Intoxication: Laboratory Evaluation of a Subject-examination Procedure* (Final Report, May 1985).

have found detection rates that are at chance levels, for multiple drug categories.⁸²

One key criticism of the evaluations of the DRE program has been that police have not been allowed to employ the full range of strategies to determine intoxication that they would usually implement in real situations, namely, asking the suspect about substance use and searching the suspect and their belongings for drugs and drug paraphernalia. Research suggests that suspect confession rates for substance use are relatively high when asked,⁸³ and the presence of drugs or drug paraphernalia is of course a very salient cue to the likelihood of intoxication. In addition, as the DRE procedures are most often employed in cases of driving under the influence, a suspect is usually submitted to this procedure following behaviour that already suggests the possibility of intoxication (ie driving erratically). It is argued that when the signs or cues assessment is included alongside the interviewing and searching, the success rates are likely to be much higher.

An additional concern relates to the fact that some research on the DRE evaluation suggests that despite the systematic approach described in the training, in reality the process is not always applied as systematically. Police may focus on particular signs that they believe are more telling of intoxication, ignoring others that may provide evidence for or against intoxication for that particular category. There may also be individual differences in observational ability; even if a particular approach has evidence to suggest that it is successful, it does not follow that everyone is able to apply the DRE approach with the same degree of success.⁸⁴

It is important to note that, regardless of the evidence in favour of or against the DRE program, this program is not employed in all jurisdictions (eg Australia), and the level of police training received on alcohol and drug recognition outside the DRE program can vary considerably (of which more below). Where it does exist, it is primarily employed in the situation of suspected intoxication, which suggests that the person has already displayed some behaviour to suggest potential impairment. In the light of the research discussed earlier, which suggests considerable underestimates of severity of intoxication, many people may be impaired but fail to arouse enough suspicion to prompt an intoxication

⁸² David Shinar and Edna Schechtman, 'Drug Identification Performance on the Basis of Observable Signs and Symptoms' (2005) 37(5) *Accident Analysis & Prevention* 843.

⁸³ For example, in one study it was found that the majority of suspects admitted to narcotics use; however, confession rates were lower for other substances such as cannabis: Eugene Adler and Marcelline Burns, *Drug Recognition Expert (DRE) Validation Study* (Final Report, June 1994).

⁸⁴ Jason Chin and Helena Likwornik, 'R v Bingley and the Importance of Scientifically Guided Legal Analysis' (2017) 43(1) *Queen's Law Journal* 33.

assessment (eg in the case of people who are highly tolerant to the effects of a substance).

Furthermore, while suspects of crime may be routinely suspected of intoxication and assessed accordingly, victims and witnesses of crime generally are not. While police may still ask victims or witnesses during the interview about substance consumption, it does not appear to occur in a systematic way. This is potentially problematic, given the copious research suggesting the fallibility of eyewitness testimony.⁸⁵ While some research suggests that alcohol intoxicated witnesses are no less accurate than sober ones,⁸⁶ such findings are typically based on laboratory studies where, for ethical reasons, participants are not allowed to be intoxicated above the BAC 0.08 per cent threshold. Field studies in bars where intoxication has been measured up to BAC 0.3 per cent have yielded findings suggesting that, above 0.1 per cent, memory errors may start to increase.⁸⁷ In a United Kingdom survey, the majority of police (74 per cent) indicated that the primary method by which they determined whether an intoxicated witness was competent enough to be interviewed was 'common sense'.⁸⁸

Only two studies have investigated the role of cannabis consumption on eyewitness memory, with both finding a reduction in quantity of information recalled in the cannabis-consumption group relative to a no-cannabis-consumption control group.⁸⁹ Vredeveldt et al found no between-group differences regarding memory errors.⁹⁰ At present, no other published research exists for other substances.

Of course, there are multiple reasons why drug testing all suspects, witnesses and victims of crime may not be appropriate (eg, it reduces rapport, increases stigma, may violate rights, not cost-effective). However, the current situation is such that people may not be assessed for intoxication when they are in fact impaired and are being treated as credible witnesses when perhaps their testimony should be elicited and evaluated more carefully.

⁸⁵ For a review, see Elizabeth Loftus, 'Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory' (2005) 12(4) *Learning & memory* 361.

⁸⁶ Lauren Monds et al, 'No Evidence that Alcohol Intoxication Impairs Judgments of Learning in Face Recognition' (2019) 33(3) *Applied Cognitive Psychology* 325; Lauren Monds et al, 'Assessing the Reliability of Intoxicated Witnesses' (2017) 71(4) *Australian Police Journal* 152; Heather Flowe et al, 'Alcohol and Remembering a Hypothetical Sexual Assault: Can People Who Were under the Influence of Alcohol During the Event Provide Accurate Testimony?' (2016) 24(8) *Memory* 1042.

⁸⁷ Christopher Altman et al, 'Witnesses' Memory for Events and Faces under Elevated Levels of Intoxication' (2018) 26(7) *Memory* 946.

⁸⁸ Deborah Crossland, Wendy Kneller and Rachel Wilcock, 'Intoxicated Eyewitnesses: Prevalence and Procedures According to England's Police Officers' (2018) 24(10) *Psychology, Crime & Law* 979.

⁸⁹ Annelies Vredeveldt et al, 'Effects of Cannabis on Eyewitness Memory: A Field Study' (2018) 32(4) *Applied Cognitive Psychology* 420; John Yuille et al, 'An Exploration on the Effects of Marijuana on Eyewitness Memory' 1998) 21(1) *International Journal of Law and Psychiatry* 117.

⁹⁰ Vredeveldt et al (n 89).

VII TRAINING IN AUSTRALIA

An obvious solution when it comes to improving police officers' ability to correctly detect levels of intoxication is to provide training in these skills. However, very little is (publicly) known on if and how police officers in Australia are trained in AOD intoxication detection. In the abovementioned survey of AFP officers, when asked about any training that police had received in terms of intoxication detection, there were a range of responses, from formal police recruit training to informal on-the-job experience. Interestingly, 62 per cent of respondents indicated that they found their current training on intoxication adequate, while 48 per cent indicated that they would like to receive further training.⁹¹

When turning to published research on training and its effectiveness within Australian Police Forces, little information can be found. A desktop review of police policy and training documents in the public domain from the various Australian Police Forces showed no direct reference to training in intoxication detection. As mentioned above, in certain documents there is some reference to knowledge-transfer or provided training. For example, in the New South Wales Police Force *Code of Practice for CRIME*, specific cues to look out for are provided:

Immediately call for medical assistance (in urgent cases send the person to hospital), if someone in custody: is severely affected by alcohol or other drugs (eg, incapable of standing from a sitting position unassisted, seen to be lapsing in and out of consciousness).⁹²

Another example that assumes that officers know when someone is intoxicated based on their observations and/or experience is the following:

Check sleeping prisoners as often as possible, in accordance with the custody assessment. If satisfied the person is sleeping and breathing normally, without apparent distress, do not disturb them. Snoring is a danger sign of respiratory distress. Never ignore it, particularly when the person is affected by alcohol or drugs.⁹³

While both examples indicate that officers are expected to know how to assess whether someone is intoxicated, as said above, besides allusions along these lines in the various documents assessed, no direct mention of when or how those skills and cues are acquired or being trained is being described.

When turning to published literature, the same gap is observed. Various articles suggest that training should be provided and evaluated,⁹⁴ and other

⁹¹ Monds et al (n 11).

⁹² New South Wales Police Force (n 16) 55.

⁹³ Ibid 53.

⁹⁴ See, eg, Quilter et al, 'Intoxication' and Australian Criminal Law' (n 41).

research discusses education and training issues and guidelines.⁹⁵ However, this literature review showed a clear lack of review of the implementation of training in intoxication detection within Australian Police Forces. This is problematic, as it suggests that the majority of training happens 'on the job'. Supposedly, it can thus be assumed that expertise in intoxication detection is created by exposure and experience. It becomes evident that officers are performing these detections on a daily basis, and justifying their decisions in court, without any publicly evaluated training.

VIII FUTURE DIRECTIONS AND CONCLUSIONS

In summary, it is clear that police frequently interact with intoxicated members of the public. They use their knowledge and experience to detect whether someone is under the influence of AOD, what substance was likely consumed, and thus how to proceed with this interaction based on the suspected intoxication. Police may also be asked in court to justify their decisions based on this assumed 'specialised knowledge'. Despite the existence of comprehensive AOD-detection training programs overseas (eg the DRE program in United States), evidence for the effectiveness of such programs is still mixed. Training in Australia on this issue appears to be largely informal and occurring 'on the job'. This minimal training, alongside vague legal definitions of 'intoxication', has important consequences, including in high-stakes serious crime trials.

From a research standpoint, further evaluation of programs such as the DRE training is important. Such programs also require regular updating to account for the detection of novel psychoactive substances and polysubstance use. Furthermore, given that referral to DRE testing relies first on a police suspicion of intoxication, future research should also focus on improving the general ability of police officers to form an adequate suspicion of intoxication, especially outside of driving situations. Further research is also required into day-to-day decision-making by police officers about intoxication. The challenges to empirical research into the operational practices of police officers are well known. However, given that Australian criminal laws frequently offer little guidance as to the criteria that should inform such assessments, and that police intoxication assessments can be hugely consequential, it is important to better understand and evaluate how police officers make their judgements. In conclusion, given the current state of the evidence, assumptions of police expertise in intoxication detection should be viewed with caution.

⁹⁵ M O'Neill, D Addy and AM Roche, *Guidelines for Evaluating Alcohol and Other Drug Education and Training Programs* (National Centre for Education and Training on Addiction, 2004).