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CRIMES LEGISLATION AMENDMENT (FOOD AND DRINK SPIKING) BILL 2008

This paper examines the Crimes Legislation Amendment (Food and Drink Spiking) Bill 2008, research on drink spiking in Australia, and law in other jurisdictions.

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Parliament of Victoria

NB: Readers should note that this paper was prepared prior to the passage of the Crimes Legislation Amendment (Food and Drink Spiking) Bill 2008 through the Victorian Parliament. It was passed by the Legislative Council on 3 February 2009, and assented to on 10 February 2009. It is Act no 1/09. Readers interested in the Act as passed should visit the Victorian Legislation and Parliamentary Documents website @ <http://www.dms.dpc.vic.gov.au>.

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Crimes Legislation Amendment (Food and Drink Spiking) Bill 2008

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Introduction

On 7 October 2008 the Government introduced a Bill to create a new offence relating to the spiking of another person's food or drink. The Crimes Legislation Amendment (Food and Drink Spiking) Bill 2008 ('the Bill') seeks to amend the *Summary Offences Act 1966*, and extend an existing offence under the *Crimes Act 1958*. The Bill is a response to a 2007 report on food and drink spiking by the Model Criminal Law Officers' Committee (MCLOC) of the Standing Committee of Attorneys-General (SCAG), based on research conducted by the Australian Institute of Criminology (AIC).

1. The Bill

In the second reading speech of 28 October 2008, the Attorney-General Rob Hulls stated that the Bill fulfils the Government's pledge to reform laws relating to food and drink spiking in order to increase protection 'against harm and sexual assault'.¹ He defined spiking as 'the practice of adding drugs or alcohol to another person's food or drink without that person's consent'. Such behaviour may include adding a 'date rape' drug to sexually assault or take sexual advantage of a victim, or adding extra alcohol to their drink to see the victim 'make a fool of him or herself'.²

While the rates of food and drink spiking are difficult to determine due to under-reporting and verification difficulties, the Attorney-General told the House that drink spiking 'disproportionately affects young women' and, most notably, 'a third of all drink spiking incidents are associated with sexual assault'.³

The Attorney-General discussed the recommendations of the MCLOC report, as endorsed by SCAG. Essentially the MCLOC found that although general offences cover spiking incidents that result in injury or death, 'in most jurisdictions there was a gap in relation to the lower end of the spectrum of drink spiking behaviour'.⁴ In Victoria, the MCLOC reported that there is no specific offence for 'intent to commit an indictable offence', nor is there an offence that covers the intent to commit an indecent act. There is also some legal ambiguity as to the act of spiking with alcohol for a prank; the MCLOC reported that this depends on how much alcohol is administered and how much it interferes with bodily functions.

The MCLOC therefore proposed the creation of two new offences. The first amends the Summary Offences Act by creating a preparatory offence in which the spiked food and drink need not be consumed, nor the victim's senses impaired. As the Attorney-General explained, this means an offence where a person intends to harm another person by giving, or causing that person to be given or consume, spiked food or drink, knowing that the victim is not aware (or is reckless as to whether they are aware) that it is spiked. He stated that the offence 'is also made out if the victim has been given more of an intoxicating substance than they could reasonably expect their food or drink to contain'.⁵

The second recommendation involves an amendment to the Crimes Act, which currently legislates against administering a drug with the intention of rendering a person incapable of resisting sexual penetration. The Bill seeks to amend the Crimes Act to provide for the administering of a drug to another person with the intent to commit an indecent act.

The Attorney-General stated that the Bill makes it clear that food and drink spiking 'is unacceptable, regardless of the extent of harm which results from it'.⁶

¹ Victoria, Legislative Assembly (2008) *Debates*, Bk. 15, p. 4203.

² *ibid.*

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*, p. 4204.

⁶ *ibid.*

Purpose

The purpose of the Bill is twofold:

- 'to amend the Crimes Act 1958 to extend the offence of administering a drug with the intention of rendering a person incapable of providing resistance to an act of sexual penetration to also apply to an indecent act: and
- to amend the Summary Offences Act 1966 to create a new offence for the spiking of another person's food or drink'

Amendments to the *Crimes Act 1958*

Part 2 outlines amendments to the Crimes Act. Section 3 inserts a new clause at the end of Section 53 of the Crimes Act, to provide that a person must not 'administer a drug, matter or thing to a person' or cause them 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 commit, or in any way be a party to the commission of, an indecent act with that person.

As the Attorney-General explained to the House, the current legislation only applies to 'situations where a person has been rendered incapable of resisting sexual penetration'.⁷ The Bill defines 'indecent act' in the new section as meaning an indecent assault or act in circumstances provided for under other sections of the Crimes Act. The penalty for this new offence is five years maximum imprisonment.

Amendments to the *Summary Offences Act 1966*

Part 3 of the Bill inserts a new Division 4B into the Summary Offences Act. Section 41H(1) of this new division defines terms related to food and drink spiking, including:

- 'give': to prepare food or drink; and to make food or drink available for consumption
- 'harm': includes 'impair the senses or understanding of a person in a way that the person might reasonably be expected to object to in the circumstances'
- 'impair' includes 'further impair'
- 'intoxicating substance' includes a substance 'that affects a person's senses or understanding'

Sub-section 2 then provides that a person is guilty of an offence and liable to a maximum two year term of imprisonment if they give another person (the victim), or cause the victim to be given or to consume, food or drink containing an intoxicating substance:

- and know 'that the victim is not aware, or is reckless as to whether the victim is aware', that:
 - the food or drink contains the intoxicating substance; or
 - that the food or drink 'contains more of an intoxicating substance than the victim would reasonably expect it to contain'
- and intend 'the victim to be harmed by the consumption of that food or drink'.

As the Attorney-General explained in the second reading speech, the offence 'does not criminalise all instances in which a person gives another person more alcohol

⁷ *ibid.*, p. 4202.

than they are aware of', such as an extra shot of alcohol as a good will gesture on a person's birthday or celebratory occasion. Rather, the focus is on the intent – giving a person extra alcohol will come under this offence 'if there is an intention to harm the other person'.⁸

2. Spiking: trends and research

This section discusses the incidence of drink spiking in Australia, the AIC research findings and the MCLOC conclusions. It should be noted at the outset that while the Bill provides for both food and drink spiking, the evidence presented here relates directly to drink spiking. This is because food spiking has not been the subject of published empirical studies, and the MCLOC therefore stated that 'there are no findings regarding its prevalence and nature from which to draw'.⁹ Most of the MCLOC report addresses drink spiking, as this was the particular focus of the SCAG reference.¹⁰ The report stated however, that this does not preclude food spiking from being subject to the same criminal sanctions as drink spiking.

The AIC emphasised that the exact rate of drink spiking in Australia is difficult to establish, but 'roughly estimated' a figure of 3000 – 4000 suspected incidents between July 2002 and June 2003.¹¹ More precise figures are unavailable due to under-reporting and 'jurisdictional differences' in data extraction and recording.¹² The AIC stated that there are various reasons why victims may be reluctant to report their experience to police or health authorities. Firstly, victims of drink spiking may experience memory loss, or fear and embarrassment after the incident. They may also not regain full consciousness until a day or two later. Victims may view their experience as a trivial or personal matter, or blame themselves for what happened. Finally, the AIC found that victims may not believe that police can do anything about the crime, particularly as there may be a lack of evidence.¹³

Drink spiking can have a devastating and long lasting effect on a victim. In the short term, they may experience muscle spasms, vomiting, loss of consciousness, lack of balance or coordination, slurred speech and respiratory difficulties. These symptoms may contribute to their experiencing serious criminal victimisation, such as robbery or sexual assault. As the AIC noted, there is a risk that the victim may proceed to drive a vehicle without realising they are under the influence of drugs or alcohol, thereby endangering their own life and the lives of others.¹⁴ All these effects depend on the type and quantity of drugs or alcohol administered, which is dependent upon the motivation of the offender, the location, and 'the ease with which drugs or alcohol may be added to the drink'.¹⁵ The AIC concluded that there is no 'typical' incident of drink spiking:

... 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

⁸ *ibid.*, p. 4204.

⁹ Model Criminal Law Officers' Committee (2007) *Final Report: Food and Drink Spiking*, Standing Committee of Attorneys-General, p. 3.

¹⁰ *ibid.*, p. 2.

¹¹ Australian Institute of Criminology (2004) *National Project on Drink Spiking: Investigating the nature and extent of drink spiking in Australia*, Ministerial Council on Drug Strategy, Commonwealth of Australia, pp. x, 47.

¹² MCLOC (2007) *op. cit.*, p. 3.

¹³ AIC (2004) *op. cit.*, pp. 4–6; Editorial (2004) 'A cowardly modern crime', *The Sunday Age*, 9 May, p. 14.

¹⁴ AIC (2004) *op. cit.*, pp. 2–3.

¹⁵ *ibid.*, p. 3.

additives, for a number of different reasons resulting in disparate effects and consequences.¹⁶

Pages 39–41 of the AIC report contain five case studies of drink spiking incidents, which serve as useful illustrations of the diversity of victims, locations and consequences.

Traditionally the concept of drink spiking was popularly associated with robbery or sabotage; the expression to 'slip' someone a 'mickey' entered the popular lexicon thanks to the criminal habits of early 1900s Chicago bartender Mickey Finn. AIC data has revealed that approximately five percent of drink spiking incidents in Australia involve robbery.¹⁷

AIC data has also shown that most reported incidents of drink spiking 'have no associated criminal victimisation', leading the MCLOC to conclude that 'prank spiking' for a joke may be a common motivation, 'to see the victim make a fool of themselves'.¹⁸ This behaviour has also been discussed in news reports and other studies.¹⁹ Prank spiking is a key focus of the MCLOC report and the resultant Bill.

Drink spiking has gained a great deal of media attention due to sexual assault cases involving the use of 'date rape' drugs such as Rohypnol, Valium or gamma hydroxy butyrate (known as GHB or 'fantasy'). These may be added to alcoholic or non-alcoholic drinks. AIC data shows that almost one third of reported cases of drink spiking involve sexual assault, a figure that the Attorney-General noted in the second reading speech.²⁰ As the MCLOC reported, sexual assault victims are just as likely to be attacked in their or the offender's home as they are in licensed premises.²¹ They are also likely to know the offender.²²

It is important to note however, that drink spiking does not necessarily involve the use of drugs or illicit substances. The Australian Centre for the Study of Sexual Assault (ACSSA), the AIC and the MCLOC have all concluded that drink spiking with alcohol is the most common form of spiking.²³ ACSSA argued that there has been a common representation in drink spiking campaigns of perpetrators as 'strangers lurking unseen in the shadows of nightclubs', using illicit drugs to inebriate their victims, while the administering of extra alcohol to a drink by someone known to the victim is less understood.²⁴

Awareness of the use of alcohol in drink spiking is also complicated by two things: alcohol is more easily detected in the bloodstream than illicit drugs, which leave the body relatively quickly; and, victims may not be aware of (or remember) how much alcohol they consumed of their own volition.²⁵ Nonetheless, the AIC found that

¹⁶ MCLOC (2007) op. cit., p. 3; AIC (2004) op. cit., p. x.

¹⁷ MCLOC (2007) op. cit., p. 4.

¹⁸ *ibid.*, p. 2.

¹⁹ S. Hodgson & C. Caulfield (2004) 'Fatal night out caught on video: spiked drink may have been prank', *Herald Sun*, 1 April, p. 7; Victoria. Parliament. Drugs and Crime Prevention Committee (2004) *Inquiry into Amphetamine and 'Party Drug' Use in Victoria: Final Report*, Melbourne, The Committee, pp. 163–164.

²⁰ MCLOC (2007) op. cit., p. 4.

²¹ *ibid.*

²² *ibid.*

²³ A. Neame (2003) *Beyond Drink Spiking: drug and alcohol facilitated sexual assault*, Briefing no. 2, Australian Centre for the Study of Sexual Assault at the Australian Institute of Family Studies, p. 5;

MCLOC (2007) op. cit., p. 4.

²⁴ Neame (2003) op. cit., p. 8.

²⁵ The ACSSA also noted that sexual assault also occurs 'in the absence of drink spiking' i.e. when a victim has consumed alcohol and / or other drugs to the point of being unable to give free consent. The

victims who phoned the Drink Spiking Hotline stated that the symptoms they had experienced were vastly different from those associated with excessive and voluntary consumption of alcohol, and 'were at pains to point out that they knew the difference'.²⁶

In Victoria, drink spiking has been the subject of community awareness campaigns and crime prevention initiatives since 2002, when the 'Keep an Eye Open' drink spiking campaign ran in Greater Melbourne and Bendigo. In 2004 the Victorian Law Enforcement Drug Fund, in conjunction with Crime Prevention Victoria, ran a drink spiking awareness campaign through Convenience Advertising, which placed ads in more than 130 licensed venues around Victoria.²⁷

The Victorian Parliament's Drugs and Crime Prevention Committee was asked to examine the nature, extent and culture of amphetamine and 'party drug' use in 2002.²⁸ The Committee released its *Inquiry into Amphetamine and 'Party Drug' use in Victoria: Final Report* in May 2004 and recommended that 'a new general offence' of drink spiking be created 'with a sufficient level of penalty to reflect the gravity of the crime'. The Government responded to the report by stating that consultations with stakeholders and specialists on the issue would be conducted to determine whether existing legislative provisions need to be expanded upon.²⁹

The issue of food and drink spiking has been on the agenda of state and territory governments for several years, having been recognised as an issue of concern under the Ministerial Council on Drug Strategy's alcohol priority area.³⁰ On behalf of the Intergovernmental Committee on Drugs, the Commonwealth Attorney-General's Department commissioned the AIC to undertake stage one of a national project on drink spiking in 2003. The resultant study was 'the first comprehensive report on drink spiking in Australia'. The AIC based its findings on data submitted from the Centre Against Sexual Assault (CASA), police in each jurisdiction, and a national Drink Spiking Hotline which operated between November and December 2003 and collected reports from 201 people.³¹

The AIC's report was submitted to the Ministerial Council on Drug Strategy in November 2004. It recommended that each Australian jurisdiction review its legislative provisions on drink spiking, and that improvements be made in the following areas: prosecution of offenders; targeted prevention strategies; improved data collection; and the trial of educational initiatives with stakeholders.³² The AIC concluded that reports of drink spiking must be taken seriously and documented effectively by relevant agencies in order to encourage victims to report their experiences, to develop community awareness, and to understand the phenomenon.³³

AIFS argued that this is often portrayed in the media and elsewhere as being merely a case of 'alcohol-related harm' rather than assault, and the victim's fault. See further: Neame (2003) op. cit., p. 9.

²⁶ AIC (2004) op. cit., pp. ix-x.

²⁷ Australian Centre for the Study of Sexual Assault at the Australian Institute of Family Studies, *Promising Practice Programs*, viewed 7 November 2008, <<http://www.aifs.gov.au>>.

²⁸ Victoria. Parliament. Drugs and Crime Prevention Committee (2004) op. cit., p. iv.

²⁹ Victoria (2004) *The Victorian Government Response to the Recommendations of the Drugs and Crime Prevention Committee Inquiry into Amphetamine and Party Drug Use in Victoria*, Melbourne, The Committee, pp. 7-8.

³⁰ MCLOC (2006) op. cit., p. 3; MCLOC (2007) op. cit., p. 1.

³¹ AIC (2004) op. cit., p. iii.

³² *ibid.*, pp. xiii-xiv.

³³ *ibid.*, pp. ix-x, xiv.

The Ministerial Council referred the legal matters within the AIC report to SCAG, which sought the input of the MCLOC, then known as the Model Criminal Code Officers' Committee (MCCOC).³⁴ The MCLOC's 2006 discussion paper and 2007 final report were informed by the AIC's research. The MCLOC concluded that while state and territory criminal law provides for serious consequences of drink spiking, there is a need to improve the law in relation to 'serious non-fatal offences'.³⁵ The report argued that drink spiking 'is a continuum of behaviours on a continuum of severity' and therefore the offence structure should reflect this; a specific food and drink spiking offence should 'fill the gap in the operation of the criminal law at the lower end of the criminal law spectrum'.³⁶

3. Current Victorian legislation

Drink spiking offences under Victorian law are largely related to the intention behind the spiking or its consequences. The variety of offences and relevant legislation were outlined in the MCLOC report, and are summarised in this section.

Spiking resulting in death is provided for under the offences of murder or manslaughter under Division 1 of the Crimes Act.

Spiking intending or resulting in injury or harm may be covered by two offences under the Crimes Act. Firstly, administering without consent a substance capable of interfering substantially with the bodily functions of another person (for example, inducing sleep or unconsciousness) is an offence under Section 19. Secondly, recklessly engaging in conduct that places or may place another person in danger of serious injury or death is provided for under Sections 22 to 23.

Spiking with intent to commit a sexual offence is provided for under Sections 53 of the Crimes Act: administering 'a drug, matter or thing' to another person or causing them to take a drug, matter or thing, with 'the intention of rendering that person incapable of resistance' and thereby enabling an act of sexual penetration.

The MCLOC concluded that while the intent to commit an indecent act is not covered under Section 53 of the Crimes Act, it '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' under Section 19 of the Crimes Act.³⁷ The MCLOC noted however, that the penalties associated with these offences 'may not be considered sufficient'.³⁸

The MCLOC found that Victorian law does not contain a specific offence for drink spiking with the intent to commit an indictable offence.

Drink spiking with drugs other than alcohol, without lawful excuse, may be provided for under both Section 19 of the Crimes Act, and Section 74 of the *Drugs, Poisons and Controlled Substances Act 1981* (introducing a drug of dependence without authorisation).

³⁴ The Model Criminal Code Officers' Committee was renamed by SCAG in July 2006.

³⁵ MCLOC (2007) op. cit., p. 42.

³⁶ *ibid.*, p. 42–43.

³⁷ *ibid.*, p. 10.

³⁸ *ibid.*, p. 2, Appendix B.

The act of food or drink spiking with alcohol for a prank may be an offence under Section 19 of the Crimes Act, but, as the MCLOC stated, 'whether alcohol qualifies as such a substance may depend on the quantity that is administered'.³⁹

4. Legislation in other Australian jurisdictions

The MCLOC report concluded that the law in most Australian jurisdictions contains gaps and shortcomings in relation to various aspects of drink spiking. The application of criminal law to a drink spiking incident depends upon:

- the jurisdiction
- the motivation of the perpetrator
- the type of substance administered
- the effects of the spiking

Pages 8–26 and Appendix B of the MCLOC report outline the law in each jurisdiction, as applicable to drink spiking incidents. The MCLOC reiterated the AIC finding that 'there is currently no separate offence in any Australian jurisdiction for the act of spiking someone's drink per se'.⁴⁰

Importantly, the MCLOC found that the act of drink spiking for a prank was not '*comprehensively* criminalised by any jurisdiction'.⁴¹ As with Victorian legislation, there appears to be some ambiguity as to the status of alcohol in laws that cover the administering of a poison or noxious thing with intent to injure or annoy (with the exception of Tasmania), or laws that define assault as including the administering of a substance to cause injury or personal discomfort.⁴²

³⁹ *ibid.*, p. 12.

⁴⁰ *ibid.*, p. 5; AIC (2004) *op. cit.*, p. xii.

⁴¹ MCLOC (2007) *op. cit.*, p. 11.

⁴² *ibid.*, pp. 11–12.

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