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Public Intoxication in NSW: The Contours of Criminalisation

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Abstract

This article traces the history of the regulation of public intoxication in New South Wales (NSW) from the early 1800s to the present. We argue that although the formal legal status of public drunkenness and drinking has changed over time, and although different approaches have been prominent at different points in the history of NSW, public intoxication has been consistently and continuously criminalised for almost two centuries, despite official ‘decriminalisation’ in 1979. Shifts in regulatory modalities — including offence definitions, police powers, the involvement of local councils and enforcement practices — have been associated with significant changes in how the nature of the problem of public intoxication is conceived and how the persona of the ‘public drunk’ is constructed. Perceived at different times as immoral, annoying and pitiable, most recently, individuals who are intoxicated in public are increasingly seen as ‘dangerous’ and as posing a risk to other members of the community. The threat to public safety and the fear that innocent members of the public might be subjected to random violence have become major drivers of policymaking and law reform in this area, and have produced a less forgiving and more punitive approach to public intoxication.

I Introduction

In recent years, the problem of ‘alcohol-fuelled violence’ has been the subject of intense media scrutiny, and the trigger for a number of significant changes to New South Wales (NSW) criminal laws¹ and liquor licensing laws.² Much of the attention has focused on the dangers posed by young men who, while drunk in public, engage in random attacks, sometimes with fatal consequences.³ In this article, we locate these contemporary debates and legal developments in the

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

² Lenny Roth, ‘Liquor Licensing Restrictions to Address Alcohol-related Violence in NSW: 2008 to 2014’ (Research Paper E-Brief No 4/2014, NSW Parliamentary Research Service, Parliament of New South Wales, 2014).

³ Julia Quilter, ‘Responses to the Death of Thomas Kelly: Taking Populism Seriously’ (2013) 24(3) *Current Issues in Criminal Justice* 439; Julia Quilter, ‘The Thomas Kelly Case: Why a “One Punch” Law is not the Answer’ (2014) 38(1) *Criminal Law Journal* 16.

broader context of the history of the criminalisation of public intoxication⁴ in NSW. A historicised approach⁵ reminds us that although there is a tendency to regard current risks, anxieties and regulatory urges about public intoxication as unprecedented, this is not the case. Public drunkenness and associated disorder has been a preoccupation of governments since the early days of the NSW colony. While constant, the preoccupation has not been static.

This article tracks, from the 19th century to the present, the ways in which drunkenness and drinking in public places have been regulated in NSW.⁶ We show that the criminalisation of public intoxication in NSW has taken a multiplicity of forms over time. It has included the creation of various criminal and regulatory offences and police powers, and different enforcement practices heavily influenced by local exercises of discretion. Shifts over time have been associated with important changes in how the nature of the problem of public intoxication is conceived and how the persona of the ‘public drunk’ is constructed. As a case study of criminalisation as a tool of public policy, the history of the regulation of public intoxication in NSW offers a powerful illustration that how a problem is framed is an important driver of the choice of policy and legal responses.⁷ As Althaus, Bridgman and Davis observe, ‘[t]he importance of narratives in political discourse should not be underestimated’.⁸ Equally, the construction of regulatory subjects (‘public drunks’) is an important dimension of knowledge formation about law’s parameters and legitimacy.⁹

At intervals (often overlapping), the problem of public drunkenness has been variously characterised as one of inherent criminality, morality, race (specifically, Aboriginality), class, drug-dependence, welfare, risk and danger. We

⁴ We will generally use the term ‘public intoxication’ to refer to the primary subject of the article. However, we are conscious that the official adoption of this terminology is a relatively recent development, and that changes in the legislation language and policy discourse used to describe the fact that a person is affected by alcohol (or other drugs) while in a public place (eg ‘public drunk’ or ‘intoxicated person’) are an important part of the story of the changing nature of the regulation of public intoxication over time.

⁵ See also Daryl Brown, ‘History’s Challenge to Criminal Law Theory’ (2009) 3 *Criminal Law and Philosophy* 271.

⁶ We have resisted the temptation to attempt a national overview of the history of public intoxication regulation and drinking in Australia. Although there are a number of generally common themes, and although most of the mechanisms employed in NSW have been employed in some form in some other states and territories, we believe that the comprehensive and deep treatment that jurisdiction-specific studies (such as this one) allow is an important part of the larger agenda (for us and others) of mapping the contours of criminalisation: see Luke McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’ in Arlie Loughnan and Thomas Crofts (eds) *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015). At intervals, we will make brief reference to comparable legislation in other parts of Australia. We note that Greg Swensen is currently completing a major study in Western Australia: see Greg Swensen, ‘Approaches to Managing Public Drunkenness in Western Australia, 1900 to 2010’ (Paper presented at the 37th Annual Alcohol Epidemiology Symposium of the Kettil Bruun Society, Melbourne, 11–15 April, 2011).

⁷ Carol Lee Bacchi, *Analysing Policy. What’s the Problem Represented to be?* (Pearson Australia, 2009).

⁸ Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 5th ed, 2013) 41.

⁹ On positioning and knowledge, see Margaret Davies, ‘Ethics and Methodology in Legal Theory: A (Personal) Research Anti-Manifesto’ (2002) 6(1) *Law Text Culture* 7.

argue that these frames have influenced the shape of criminalisation in this area, but that the fact of criminalisation has been continuous, even during periods of official ‘decriminalisation’. Without underestimating the symbolic importance of moments when crimes are removed from the statute books, we argue that it is necessary to examine critically the consequences of such moves, including the nature and effect of regulatory techniques that are deployed to fill the ‘void’ left by decriminalisation.¹⁰

This paradox can be explained in at least three ways. First, there is a disconnect between the law on the books and the law in practice, including departures that result from pragmatic operational (mis)understandings of the law. Second, even as the formal status of public intoxication has shifted from criminalisation to decriminalisation to forms of re-criminalisation, police have consistently been vested with the power to intervene and remove intoxicated persons from public spaces. Third, a key part of the story of the ‘evolution’ of the State’s regulation of public intoxication is the hybridity of the criminalisation, blending substantive offences and coercive police powers. One of the consequences of the growth of coercive police powers, in preference to substantive offences, is reduced opportunities for targeted individuals to contest the legitimacy of police intervention in relation to their presence and behaviour in public. This phenomenon is not unique to public intoxication and applies to a range of antisocial and other behaviours considered unacceptable in public places.¹¹

In addition to warranting attention in its own right, the history of the treatment of public drinking and public drunkenness by the criminal law and the police since the 19th century provides a good vehicle for demonstrating the nature and virtue of a wider agenda for grounded and contextualised criminalisation research, of the sort advocated by leading criminal law scholars,¹² including for the purpose of grounding and interrogating normative judgments about overcriminalisation.¹³ As Lacey has explained:

¹⁰ Feeley’s classic notion of ‘the process as punishment’ resonates here: Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation, 1979). Note that being intoxicated in a public place remains a criminal offence in Queensland and Victoria: *Summary Offences Act 2005* (Qld) s 10; *Summary Offences Act 1966* (Vic) s 13.

¹¹ See generally, David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) ch 6.

¹² See, eg, David Brown, ‘Criminalisation and Normative Theory’ (2013) 25(2) *Current Issues in Criminal Justice* 605; Ngaire Naffine, ‘Human Agents in Criminal Law and its Scholarship’ (2011) 35 *Criminal Law Journal* 51.

¹³ Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008); Andrew Ashworth, ‘Conceptions of Overcriminalisation’ (2008) 5(2) *Ohio State Journal of Criminal Law* 407; Antony Duff, ‘Theorizing Criminal Law: A 25th Anniversary Essay’ (2005) 25(3) *Oxford Journal of Legal Studies* 353; Antony Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010); Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford University Press, 2012); Carl Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing* (Ashgate, 2010); Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009); Dennis Baker, *The Right Not to be Criminalized: Demarcating Criminal Law’s Authority* (Ashgate, 2011).

The normative task of criminalisation theory can only be satisfactorily pursued if we also interest ourselves in some fundamental explanatory questions about the nature of criminalization over time and space. For the possibility of achieving valued goals or ideals can only be assessed by constructing a clear picture of the various institutional, political and social dynamics which underpin the constitution of criminal law at particular times and in particular places.¹⁴

Such an approach necessarily involves deploying a ‘thick’ and broad conception of criminalisation. This approach does not begin and end with an examination of whether the conduct in question is a criminal offence or not. Rather, it takes account of what Lacey has promoted as ‘three complementary perspectives’ for criminalisation case studies: doctrinal structure, scope and logic; scope and pattern of enforcement; and legislative, social and political genealogy.¹⁵

Criminalisation is a rich and complex phenomenon that can manifest in any one or more of a number of methods of being on the receiving end of the coercive power of the state’s criminal justice institutions and agencies. Arrest, charge, conviction and court-issued punishment might still be widely seen as the paradigm of criminalisation, but we would argue that these processes may be only part of the story of criminalisation in any given context. This is especially so in the context of public order — where, for example, the line between the enforcement of substantive criminal offences and the deployment of coercive police powers is very much blurred, and where offence/power hybridity is also associated with the extension to the police of broad and rarely reviewed discretion to decide when and how to intervene.¹⁶ In particular, the field of public intoxication regulation demands, and illuminates the value of, the deployment of a thick conception of criminalisation. We will show that there has been considerable regulatory ebb and flow over time, in terms of both ‘law on the books’ (creation, abolition and re-creation of offences) and operation (including the enumeration and expansion of police powers that facilitate criminal intervention without charge or prosecution), and these shifts have been associated with evolving conceptions of the nature of the problem that warrants intervention.

Two further introductory remarks are appropriate, to locate this article within broader questions about social, political and legal responses to alcohol consumption. First, the subject of this article reflects a consistent theme in policy and lawmaking in relation to alcohol: a preoccupation with *public* drinking and a tendency to treat the negative effects of intoxication that occur in public as more deserving of the state’s attention than behaviour that occurs in private. Although beyond the scope of this article, this unevenness deserves acknowledgment and warrants further research. For example, the effect is that people who drink in public — often a product of socioeconomic status and/or cultural preference — are exposed to higher levels of scrutiny and criminalisation than those who have, and

¹⁴ Nicola Lacey, ‘What Constitutes Criminal Law?’ in Antony Duff et al (eds) *The Constitution of Criminal Law* (Oxford University Press, 2013) 28. See also Nicola Lacey, ‘Historicising Criminalisation: Conceptual and Empirical Issues’ (2009) 72 *Modern Law Review* 936.

¹⁵ Nicola Lacey, ‘The Rule of Law and the Political Economy of Criminalisation: An Agenda for Research’ (2013) 15(4) *Punishment & Society* 349, 359.

¹⁶ Brown et al, above n 11, 512.

prefer, the option of consuming alcohol in private. The most recent phase of the history of public intoxication regulation, where there has been a heavy focus on the risk of violence associated with public intoxication (rather than mere nuisance or loss of urban amenity), also brings the gender implications of this public/private unevenness into focus. It is striking — and, we would argue, problematic — that the risk of violence associated with private intoxication has largely been ignored in recent policy debates about ‘alcohol-fuelled violence’.¹⁷ Our concern is not simply that a focus on public alcohol-related violence involves an incomplete response to the evidence that alcohol consumption is associated with elevated risks of violence,¹⁸ but that this involves a heavily gendered approach by occluding the context in which women are more likely to be victimised by an alcohol or drug-affected person: in a private or domestic setting.¹⁹

Our final introductory remark is that the history of public intoxication and drinking in NSW (and elsewhere in Australia) is intimately connected with the history of the criminalisation and policing of Indigenous persons and communities.²⁰ The particularities of this history (such as the creation of ‘dry’ communities and the Intervention/‘Stronger Futures’ regimes in the Northern Territory), require detailed and localised analysis.²¹ However, it is appropriate to acknowledge that many of the regulatory measures reviewed in this article — including ostensibly ‘welfare’-based decriminalisation mechanisms — have had, and continue to have, a disproportionately coercive and punitive impact on Aboriginal people in NSW.²² A disturbingly familiar pattern was revealed in the

¹⁷ For example, the debate surrounding the NSW Government’s 2014 plans (ultimately unrealised in the face of Legislative Council resistance) to introduce a raft of new aggravated assault offences where the aggravating factor was that the offender was ‘intoxicated in public’ at the time of the assault: Crimes Amendment (Intoxication) Bill 2014 (NSW). See Quilter, above n 1, 90–91.

¹⁸ Anthony Morgan and Amanda McAtamney, ‘Key Issues in Alcohol-Related Violence’ in *Research in Practice No 4* (Australian Institute of Criminology, 2009); NSW Bureau of Crime Statistics and Research, ‘Alcohol-related Crime for Each NSW Local Government Area: Numbers, Proportions, Rates, Trends and Ratios’ (NSW Bureau of Crime Statistics and Research, 2014); Peter Miller, Cache Diment and Lucy Zinkiewicz, ‘The Role of Alcohol in Crime and Disorder’ (2012) 18 *Prevention Research Quarterly* 1.

¹⁹ A large majority of domestic violence assault occurs in residential premises (ie in private): NSW Bureau of Crime Statistics and Research, ‘Trend and Patterns in Domestic Violence Assaults’ (NSW Bureau of Crime Statistics and Research, 2011). On the relationship between alcohol, drugs and domestic violence, see Gaby Marcus and Rochelle Braaf, *Domestic and Family Violence Studies, Surveys and Statistics: Pointers to Policy and Practice* (Australian Domestic and Family Violence Clearing House, 2007); Rebecca Macy, Connie Renz and Emily Pelino, ‘Partner Violence and Substance Abuse are Intertwined: Women’s Perception of Violence–Substance Connections’ (2013) 19(7) *Violence Against Women* 881.

²⁰ Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001); Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) ch 10.

²¹ See, eg, Sarah Hudson, ‘Alcohol Restrictions in Indigenous Communities and Frontier Towns’ (Centre for Independent Studies, 2011); Fiona Nicoll, ‘Bad Habits — Discourses of Addiction and the Racial Politics of Intervention’ (2012) 21(1) *Griffith Law Review* 164; Kristen Smith et al, ‘Alcohol Management Plans and Related Alcohol Reforms’ (Brief No 6, Indigenous Justice Clearinghouse, 2013); Shelley Bielefeld, ‘History Wars and Stronger Futures Laws: A Stronger Future or Perpetuating Past Paternalism?’ (2014) 39(1) *Alternative Law Journal* 15.

²² See NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities Report* (2009); New South Wales Law Reform Commission, *Penalty Notices*, Report No 132 (2012) 293–6.

NSW Ombudsman's 2014 report on the first year of operation of the offence of continuing to be intoxicated and disorderly in public after having been given a 'move-on' direction (introduced in 2011).²³ The Ombudsman found that 30% of the 'on-the-spot' fines and 37% of the charges for this offence involved an Aboriginal person.²⁴

Our discussion will start in Part II with a brief overview of 19th century public order-based approaches to the criminalisation of street drunkenness, which exhibited a strong focus on the public 'drunk' as unworthy, and a blight on the streetscape, synonymous with vagrants and beggars, as well as morally suspect working class drinkers. We also consider the way in which the summary offence of public drunkenness was deployed, particularly in the second half of the 20th century, not so much as a crime to be condemned and punished, but as a mechanism for police removal of drunks from public places, with relatively little appetite for formal prosecution and court-imposed sentences. Part III examines the move, during the 1970s and 1980s, towards the 'decriminalisation' of public drunkenness, ostensibly motivated by a welfare-based policy agenda that aimed to extricate chronic alcoholics ('skid-row drunks') from the criminal justice system, which was ill-suited to meeting their needs. Our analysis of this phase highlights the importance of a sophisticated conception of criminalisation as a regulatory tool that looks beneath the presence/absence of a specific criminal offence to consider the range of ways in which a person may come into contact with the criminal justice system. Although, with the passage of the *Intoxicated Persons Act 1979* (NSW), conduct that was criminal one day became 'legal' the next, persons who were drunk in public still found themselves the subject of police scrutiny and well within reach of the power of the police to 'apprehend' and 'detain' (albeit without charge) by virtue of their drunkenness, or to be charged with other public order crimes to which intoxication was a significant causal contributor (such as offensive conduct or offensive language in a public place).²⁵

Part IV charts the rise of local government/police partnerships to prohibit drinking in designated public areas from the 1990s, originally designed to empower both police officers and local council officers to give warnings and, where deemed necessary, to enforce 'on-the-spot' fines for minor regulatory offences under local government legislation, and later focused exclusively on the power to confiscate alcohol from persons drinking in a public place that had been declared 'alcohol-free'. Part V considers the late 2000s adaptation of generic public order move-on powers²⁶ introduced in the late 1990s into targeted move-on powers that

²³ *Summary Offences Act 1988* (NSW) s 9. This provision, and the move-on power with which it is associated (*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 198), are discussed in detail in Part V of this article.

²⁴ NSW Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988* (2014) 95.

²⁵ 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.

²⁶ Various forms of move-on powers have been adopted in all Australian jurisdictions: *Crime Prevention Powers Act 1998* (ACT) s 4; *Summary Offences Act* (NT) ss 47A–47B; *Police Powers and Responsibilities Act 2000* (Qld) ss 44–8; *Summary Offences Act 1953* (SA) s 18; *Police*

allow the police to direct intoxicated individuals to move-on where their presence in a public place is considered to warrant dispersal, the augmentation of these powers with a specific offence of continued intoxicated and disorderly behaviour in 2011,²⁷ and the introduction of ‘sobering up’ centres in 2013.²⁸

If the policy emphasis in the decriminalisation era of the 1980s and 1990s was, at least ostensibly, to destigmatise public intoxication and ‘care’ for drunks in need, the measures adopted during the last two decades have had a very different focus, exhibiting a much stronger emphasis on condemnation of public drinking and drunkenness and an approach that conceives of public drunks as antisocial, dangerous and a risk to public safety.²⁹ Most recently, the correlation between public intoxication and violence has been a major driver of shifts in the contours of criminalisation. For example, in 2014, the NSW Parliament introduced a new offence of assault causing death while intoxicated, which attracts a mandatory minimum sentence of eight years’ imprisonment.³⁰

We conclude that public intoxication has been consistently criminalised from the early colonial period to the present. Although the shape and prevailing mechanisms of criminalisation have changed over time, there has never been a period when public intoxication has been tolerated, or when the police have not had significant tools at their disposal to remove drunks from public places.

II The Crime of Public Drunkenness

For most of NSW’s history, ‘public drunkenness’ was a stand-alone offence and one of the most frequently prosecuted crimes on the statute books. However, in contrast to the early 21st century focus on risk and violence, for a long period, the predominant motivation for heavy criminalisation was moral judgment of excessive drinking (reflecting what Valverde has described as the perception of inebriety as a ‘hybrid object’, ‘part vice, part disease’³¹), and a concern to maintain

Offences Act 1935 (Tas) s 15B; *Summary Offences Act 1966* (Vic) s 6; *Criminal Investigation Act 2006* (WA) s 27.

²⁷ *Summary Offences Act 1988* (NSW) s 9, as amended by the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (NSW).

²⁸ *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW).

²⁹ We acknowledge that any attempt to ‘periodise’ dominant regulatory drivers risks oversimplification. We are not suggesting that a correlation between public intoxication and public safety risks only occurred to policy makers, legislators and law enforcers in the 21st century; rather, that in this latest period, such considerations became more prominent and influential than they had been in preceding periods, with significant implications for the shape of public intoxication criminalisation.

³⁰ *Crimes Act 1900* (NSW) s 25B, as amended by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW). See Quilter, above n 3; Quilter, above n 1. The judiciary has also made strong comments about the problem of alcohol-related violence in public places: eg *R v Loveridge* [2014] NSWCCA 120 (4 July 2014), [103], [105].

³¹ Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (Cambridge University Press, 1998) 51.

the amenity of public places and thoroughfares by ‘removing’ public drunks (particularly, poor and working class men) from the visible environment.³²

The first statutory attempt to specify the jurisdiction of the Court of Petty Sessions (the equivalent of today’s Local Court in NSW) — the *Offenders Punishment and Justice Summary Jurisdiction Act 1832* (NSW) — identified ‘drunkenness’ as one of the criminalised behaviours. The *Vagrancy Act 1835* (NSW) made it an offence to be a ‘habitual drunkard ... in any street or public highway or being in any place of public resort’.³³ By the turn of the century, the offence of public drunkenness was contained in s 6 of the *Police Offences Act 1901* (NSW): ‘Whosoever is found drunk in any street or public place shall be liable to a penalty not exceeding one pound’. The offence of being a habitual drunkard was found in s 4(1)(d) of the *Vagrancy Act 1901* (NSW).

Public drunkenness was heavily criminalised in practice as well. Sturma’s study of crime and policing in mid-19th century colonial NSW shows that more people were arrested for drunkenness than for any other offence. For example, in 1841, 60% of all arrests in Sydney were for drunkenness.³⁴ There were variations over time, but arrest rates were consistently high. In his account of the history of criminality in Sydney, Grabosky observes:

By far the most striking development in post-war Sydney was the massive increase in arrests for drunkenness. Huge annual increases occurred between 1945 and 1948, to the extent that public drunkenness offenders constituted well over half of the total input to the New South Wales criminal justice system at the end of the decade.³⁵

Grabosky argues that the ‘preoccupation’ of authorities with drunkenness in the post-war years was ‘without precedent’, although Sturma’s account of the early colonial period indicates a consistent practice of intense policing of public drunkenness. Certainly, for much of the 20th century, public drunkenness was the most common of the public order offences in Australia, consistently amounting to over 60% of those offences.³⁶ In common with many of the summary public order offences, especially those which may be classed as ‘victimless’ crimes, public drunkenness was utilised by police as a basic street-sweeping offence.³⁷

³² See also Arlie Loughnan, ‘The Expertise of Non-Experts: Knowledges of Intoxication in Criminal Law’ in Jonathan Herring et al (eds), *Intoxication and Society: Problematic Pleasures of Drugs and Alcohol* (Palgrave Macmillan, 2013) 52.

³³ *Vagrancy Act 1835* (NSW) s 2. The full title of the Act gives an insight into how the crime problem and the targets of policing were conceived at the time: ‘An Act for the prevention of Vagrancy and for the punishment of idle and disorderly persons Rogues and Vagabonds and incorrigible Rogues in the Colony of New South Wales’.

³⁴ Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983) 143.

³⁵ Peter Grabosky, *Sydney in Ferment: Crime Dissent and Official Reaction 1788 to 1973* (Australian National University Press, 1977) 133.

³⁶ Satyanshu Mukherjee, *Crime Trends in Twentieth Century Australia* (Allen & Unwin, 1981) 82.

³⁷ David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 1st ed, 1990), 960; Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 50.

In 1951, there were over 80,000 arrests in NSW for drunkenness and related offences.³⁸ By 1970 this figure had dropped to 60,000, but drunkenness crimes were still the ‘greatest single input’ to the criminal justice system.³⁹ At this time, the offence of public drunkenness was contained in s 6 of the *Summary Offences Act 1970* (NSW): ‘A person found drunk in a public place or school is guilty of an offence’. As with previous statutes, the maximum penalty was relatively modest: a \$10 fine.⁴⁰ The main point of the criminalisation of public drunkenness was not to provide for harsh punishment or to condemn and deter overconsumption of alcohol. Cornish has observed that the crime of public drunkenness was ‘not a response to the existence of alcohol abuse, nor a punishment of that abuse, but rather a punishment of the failure to maintain a public display of adherence to the values of sobriety, cleanliness and order’.⁴¹ There is a connection here with the ideological project of neoliberalism. The discursive construction of public drinkers/drunks locates them as ‘costly citizens’ in Wacquant’s juxtaposed categories of ‘commendable citizens’ and ‘deviant’.⁴² Commendable citizens who drink ‘responsibly’, and/or in ‘respectable’ (private) settings are not subject to the same scrutiny and management.⁴³ There is a relationship also with the construction and imposition of authoritative conceptions of what public space is ‘for’. As White has noted:

The form of urban space has fundamentally been shaped by the contours of economic development and class-related social processes over several hundred years. The very definition of ‘public space’ has been the subject of much contestation between different classes, as have the purposes and behaviours deemed to be appropriate within any such space. In the Australian context, for example, the working-class traditions of using the street as a multi-functional social space have long been a source of middle-class concern.⁴⁴

Anthony has pointed out that Indigenous peoples are especially susceptible to ‘spatial management through criminalization ... because of their visibility in public space’.⁴⁵ The policing of Aboriginal presence, drinking and drunkenness in public places has been an important component of the legal geography of colonialism.

³⁸ Grabosky, above n 35, 135.

³⁹ Ibid 142, 143.

⁴⁰ In September 1970, average annual male weekly earnings were \$79.20: Commonwealth Bureau of Census and Statistics, ‘Average Weekly Earning, September Quarter 1970’, Reference No 6.18 (1970).

⁴¹ Andrew Cornish, ‘Public Drunkenness in New South Wales: From Criminality to Welfare’ (1985) 18(2) *Australian & New Zealand Journal of Criminology* 73.

⁴² Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009) xvii.

⁴³ We thank one of the anonymous referees for this suggestion.

⁴⁴ Rob White, ‘The Making, Taking and Shaking of Public Spaces’ in E Barclay, C Jones and R Mawby (eds), *The Problem of Pleasure: Tourism, Leisure and Crime* (Routledge, 2012) 32. See also Nick Blomley, ‘2011 Urban Geography Plenary Lecture — Colored Rabbits, Dangerous Trees, and Public Sitting: Sidewalks, Police and the City’ (2012) 33(7) *Urban Geography* 917; David Delaney, Irus Braverman and Nicholas Blomley (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014).

⁴⁵ Anthony, above n 37, 50. See also Chris Cunneen, ‘Changing the Neo-Colonial Impacts of Juvenile Justice’ (2008) 20(1) *Current Issues in Criminal Justice* 43.

The value of having the crime of ‘public drunkenness’ on the statute books was that it provided the police with a ‘simple’ basis (ostensibly neutral, in terms of class and race) for intervening when the presence of ‘drunks’ on the streets was regarded as an issue of public order concern:

The maximum penalty upon conviction was only a fine of \$10, but the unofficial punishment was really the point of the offence: the fact that the person was subject to arrest, detained pending a hearing before a magistrate, had a criminal conviction recorded against his or her name, and perhaps was imprisoned for defaulting on whatever fine was imposed.⁴⁶

The following account by the NSW Bureau of Crime Statistics and Research confirms that the criminalisation of public drunkenness was very much a ‘street-sweeping’ exercise:

The maximum penalty was \$10 or up to 48 hours’ imprisonment on default. The period of detention varied from case to case and depended on the time required for the prisoner to recover. When he/she was considered sober enough to be released, bail was granted, usually on the lodgement of \$1.00. Those who were released were allowed to forfeit bail routinely by not appearing at court. In 1978, for example, approximately 80% of 50,387 cases were disposed of by the offender forfeiting bail of \$1.00. Prisoners who did not have that amount in their property were kept in custody until they appeared in court. The bulk of those who eventually faced the Magistrate were chronic alcoholics who were homeless and penniless. In many cases, any imposition of penalty resulted in short periods of imprisonment.⁴⁷

During parliamentary debate in 1979 on the legislation that would decriminalise public drunkenness (discussed below), the then Attorney-General, Frank Walker, provided further detail on practices regarding the criminal offence of public drunkenness in the late 1970s. He noted that once the \$1.00 bail was paid,

[n]o further action is ever taken to bring these people back to court. Of those individuals who cannot raise this sum of \$1 and appear before a court, about three quarters are released without any penalty being imposed. The remainder who are fined are invariably imprisoned in default.⁴⁸

As will be noted below (Part V), there is a remarkable similarity between the *practices* described here, at a time when public drunkenness was unambiguously a criminal offence, and the current state of the *law*, under which public drunkenness is not a criminal offence, but where individuals can be subjected to coercive police powers to ‘move-on’, detained for ‘sobering up’ purposes and issued with a summary penalty in the form of an on-the-spot fine.

⁴⁶ Brown et al, above n 37, 974.

⁴⁷ NSW Bureau of Crime Statistics and Research, *Intoxicated Persons 1981* (NSW Bureau of Crime Statistics and Research, 1984) 1; see also NSW Bureau of Crime Statistics and Research, *City Drunks* (NSW Bureau of Crime Statistics and Research, 1973).

⁴⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4922 (Frank Walker).

III Decriminalisation?

In 1979, as part of a suite of reforms to NSW public order laws, the crime of public drunkenness was abolished and replaced with a legislative regime that provided police with explicit powers to pick up individuals who were drunk in public and remove them from the streets.⁴⁹ Without arrest or charge, ‘intoxicated’ persons could be taken to a ‘proclaimed place’ so that they could sober up.⁵⁰ In his second reading speech, the Attorney-General, Frank Walker, explained the rationale for the legislation:

The purpose of this legislation is to abolish the offence of being found drunk in a public place. The effect of that proposal is that public drunkenness will no longer be punishable as a crime. The drunken person will no longer suffer the stigma of being a criminal. The Government believes this is a long overdue reform. It must be recognised, however, that although the crime is abolished, the problem of public drunkenness will remain. Some restraint of these drunken people must be provided both for their own protection and the protection of the community. ... Criminologists and other persons in the community have increasingly pointed to the futility of processing such offenders through the courts and the prison system. The present law is no longer suitable to deal with the offence of public drunkenness. A better way must be found.⁵¹

Before turning to consider the nature and effect of the legal and practical changes effected by the *Intoxicated Persons Act 1979* (NSW), including whether it truly did represent decriminalisation, it is worth noting the change of legislative language and policy discourse. The objects of the state’s concern were no longer ‘drunks’ or ‘drunkards’ (terms that are laden with pejorative moral evaluation), but ‘intoxicated’ persons. The official move from the language of ‘drunkenness’ to ‘intoxication’ suggested a more scientific and morally neutral position on the status that justified or required state intervention if it occurred in public. Despite this appearance of a shift towards a more scientific approach, the new terminology achieved no greater precision, and the legislation and enforcement practice still turned on subjective assessments of behaviour considered to be attributable to the consumption of alcohol.

The *Intoxicated Persons Act 1979* (NSW) ‘replaced’ the offence of public drunkenness. The rhetoric around the *Intoxicated Persons Act 1979* (NSW) was that it was ‘intended to operate on a “social welfare model”, rather than on a “criminal model” (as under the *Summary Offences Act 1970* (NSW)) or a “medical

⁴⁹ Similar regimes were subsequently introduced in most Australian jurisdictions, for example, the *Public Intoxication Act 1984* (SA) and the *Police Act 1935* (Tas) s 4A, as amended by the *Police Offences Amendment (Public Drunkenness) Act 2000* (Tas). These were prompted, in some cases, by an explicit recommendation by the Royal Commission into Aboriginal Deaths in Custody that decriminalisation was essential because the continued criminalisation of public drunkenness was contributing to the overrepresentation of Aboriginal and Torres Strait Islanders persons in police and prison custody: Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), vol 3, 28.

⁵⁰ *Intoxicated Persons Act 1979* (NSW) s 5.

⁵¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4921–2 (Frank Walker).

model” (which could involve compulsory treatment and rehabilitation).⁵² In addition to preferring to speak of ‘intoxication’ rather than ‘drunkenness’, the terminology used in the Act also departed from ‘the language of the criminal law’⁵³ in describing the powers the *Intoxicated Persons Act 1979* (NSW) gave to the police. Intoxicated persons were to be ‘detained’, not arrested, and held temporarily in a ‘proclaimed place’, rather in prison or police custody.

We argue, however, that it would be a mistake to over-characterise the welfare credentials of the *Intoxicated Persons Act 1979* (NSW), in terms of both the substance and the operation of the new regime. From a definitional point of view s 5(1) of the *Intoxicated Persons Act 1979* (NSW)⁵⁴ provided behaviour-based criteria for the exercise of detention (unlike the vagueness of the repealed ‘public drunkenness’ offence). The statutory criteria blended ‘new’ welfare grounds with ‘old’ public order concerns. The grounds for detention were that the person was:

- (a) behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property; or
- (b) in need of physical protection because the person is intoxicated.

Only two of these five grounds could be considered to reflect concern for the welfare of the intoxicated individual (likely to cause self-injury, and in need of protection). The other three grounds (disorderly behaviour, behaviour likely to cause injury to other persons, behaviour likely to cause property damage) reproduce classic discretionary criteria for facilitating police maintenance of public order, which have long been a mainstay of public order laws. This dual character was reflected in the Attorney-General’s second reading speech (quoted above in the text accompanying n 51), which emphasised that the new regime was designed to protect both the intoxicated individual and community safety. We are conscious that this analysis runs contrary to the accepted understanding of this period in the regulation of public intoxication. In advancing it here, our aim is not mere historical pedantry about how the *Intoxicated Persons Act 1979* (NSW) should be characterised, but rather to draw attention to the continuity of the public safety/public order tenets within the history of the regulation of public intoxication. This insight has particular significance when we turn, in Part V below, to consider current regulatory methods, and surrounding policy rhetoric, which focus on the risk and harm of public intoxication. Our point is that even during the period of so-called ‘decriminalisation’ it is possible to identify the traces of, and foundations for, the later reintroduction of a more public safety-focused, risk-oriented and punitive model.

In 2000, the definition of an ‘intoxicated person’ was expanded to include ‘a person who appears to be seriously affected by alcohol or another drug or a combination of drugs’.⁵⁵ However, neither in the original *Intoxicated Persons Act 1979* (NSW), nor at any point since, has any attempt been made to define the level

⁵² Brown et al, above n 37, 975.

⁵³ Ibid.

⁵⁴ See now, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 206(1).

⁵⁵ *Intoxicated Persons Act 1979* (NSW) s 3, as amended by the *Intoxicated Persons Amendment Act 2000* (NSW). See now, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 205.

of intoxication required to justify or require police intervention. As we will show later, a vaguely defined conception of intoxication, which leaves the police with significant latitude to exercise discretion about when intervention is warranted, is not unique to the *Intoxicated Persons Act 1979* (NSW) regime, but flows across all forms of regulation.

Under the original *Intoxicated Persons Act 1979* (NSW), the operative section of the Act permitted the detention of a person found ‘intoxicated in a public place’ for up to eight hours ‘in a proclaimed place’.⁵⁶ ‘Proclaimed places’ included all police stations, all juvenile justice detention centres, and some facilities operated by voluntary agencies (such as the St Vincent de Paul Society’s Matthew Talbot Hostel in Sydney).

In contrast to the early 19th century characterisation of public drunks as part of the category of ‘rogues and vagabonds’, Cornish has observed that the move to decriminalise public drunkenness centred around the idea of the ‘skid-row alcoholic’, even though chronic alcoholics accounted for only about 20% of public drunkenness arrests.⁵⁷ The adoption of a ‘welfare’ model, rather than a criminal law one, was ‘motivated by bourgeois humanitarianism, expressed either in terms of ‘care’ of the unfortunate or ‘treatment’ of the sick’.⁵⁸ These sentiments were echoed by Attorney-General Frank Walker:

The measures which we propose in this legislation will not in themselves rehabilitate. However, they will not inhibit rehabilitation, as we believe the present law does, and in many instances they will offer alcoholics an opportunity for treatment, care and humane consideration.⁵⁹

Removing the stigma of being labelled ‘a “drunk” and minor criminal’⁶⁰ was central to the stated motivation for decriminalisation. The shift in language to ‘intoxicated person’ was consistent with this agenda. However, in practice, in the early years of the operation of the *Intoxicated Persons Act 1979* (NSW), there was little difference between the ‘welfare model’ and the ‘criminal law’ model that it replaced. As Cornish observed:

Save for the fact that they no longer appeared in court, detainees were subject to the processing and treatment that any person detained for a crime would undergo. Formal labelling by the courts as a criminal no longer occurred, but the process otherwise remained neatly intact.⁶¹

The difference between the treatment of public drunks before and after decriminalisation is even smaller when attention is paid to the account by the NSW Bureau of Crime Statistics and Research of late 1970s practice (see above text accompanying fn 47), which showed that court appearances were the exception rather than the norm. In fact, a number of commentators argued in the early 1980s that, in some respects, treatment under the *Intoxicated Persons Act 1979* (NSW) was more problematic than treatment during the period when public drunkenness

⁵⁶ *Intoxicated Persons Act 1979* (NSW) s 5(1).

⁵⁷ Cornish, above n 41, 75.

⁵⁸ *Ibid* 73.

⁵⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4922 (Frank Walker).

⁶⁰ *Ibid*.

⁶¹ Cornish, above n 41, 76.

was a criminal offence. For Egger, Cornish and Heilpern, a major difficulty with the new regime was that ‘residual ties are kept with the criminal justice system. The retention of the powers of compulsion and involuntary detention are dangerous in the absence of the protection offered by the criminal law’.⁶² Cornish elaborated on this concern:

What the Act allowed was detention without trial and without judicial review. The behaviour in question, public drunkenness, was still seen as a public order issue, and the Act still sought control of public behaviour and provided a sanction of detention. ... Decriminalization, if the term is to maintain some credibility, must at least be equated with a removal of punitive actions by the State for the display of particular behaviour. The *Intoxicated Persons Act* fails to match this definition.⁶³

When the *Intoxicated Persons Act 1979* (NSW) came into operation in 1980, the welfare model was confounded by a shortage of ‘proclaimed places’. Consequently, many intoxicated persons were detained in police cells just as they had been in the days when public drunkenness was a crime. For example, in 1981, there were 43,459 detentions (60.9%) and 27,937 receptions (39.1%).⁶⁴ This was a particular problem for Aboriginal people. A significant number of the Aboriginal persons who died in police custody or in gaol during the 1980s — the major catalyst for the establishment of the Royal Commission into Aboriginal Death in Custody⁶⁵ — were detainees under the *Intoxicated Persons Act 1979* (NSW) or were arrested for offences intimately related to alcohol consumption.⁶⁶

In 1985, the *Intoxicated Persons Act 1979* (NSW) was amended in an attempt to reduce the use of police station detention, by making this a ‘last resort’ option to be used when the person could not be delivered to the care of a ‘responsible person’ (friend or relative) or to another proclaimed place. By 1987 the balance had shifted, but there were still 18,294 police detentions (20.3%) compared to 71,901 receptions in other proclaimed places (79.7%).⁶⁷

The story of the early years of operation of the *Intoxicated Persons Act 1979* (NSW) serves as a reminder, as Brown observed, that

it is important to look empirically at the actual changes in practice secured beneath the general and often misleading rubric of decriminalisation. Even when genuine, decriminalisation is rarely a passage from criminal regulation to non regulation, absence of regulation or ‘freedom’.⁶⁸

In 2000, the *Intoxicated Persons Act 1979* (NSW) was amended by the *Intoxicated Persons Amendment Act 2000* (NSW). The primary obligation under

⁶² Sandra Egger, Andrew Cornish and Hans Heilpern, ‘Public Drunkenness: A Case History in Decriminalisation’ in Mark Findlay, Sandra Egger and Jeff Sutton (eds) *Issues in Criminal Justice Administration* (Allen and Unwin, 1983) 29, 42.

⁶³ Cornish, above n 41, 81.

⁶⁴ Brown et al, above n 37, 980.

⁶⁵ Royal Commission into Aboriginal Deaths in Custody, above n 49.

⁶⁶ See Michael Hogan, David Brown and Russell Hogg (eds), *Death in the Hands of the State* (Redfern Legal Centre Publishing, 1988) 41, 48.

⁶⁷ Brown et al, above n 37, 980.

⁶⁸ David Brown, ‘Politics of Reform’ in George Zdenkowski, Chris Ronalds and Mark Richardson (eds), *The Criminal Injustice System: Volume Two* (Pluto Press, 1988) 268, 270.

the revised Act was for police to release a person found intoxicated in public into the care of a ‘responsible person’, unless this was impossible, impracticable or inappropriate. A ‘responsible person’ includes

any person who is capable of taking care of an intoxicated person, including:

- (a) a friend or family member, or
- (b) an official or member of staff of a government or non-government organisation or facility providing welfare or alcohol or other drug rehabilitation services.⁶⁹

The category of ‘proclaimed places’ was abolished. Only police stations and juvenile detention centres (and not hostels or other welfare facilities) could serve as ‘authorised detention centres’, and detention was to be used only as a last resort. As noted above, the definition of intoxication was also extended at this time to include not only the effect of alcohol, but also other drugs.⁷⁰

In 2005, the *Intoxicated Persons Act 1979* (NSW) was repealed and its contents relocated to pt 16 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).⁷¹ Unfortunately, since 1987, neither the NSW Police nor the NSW Bureau of Crime Statistics and Research have published data on the use of the *Intoxicated Persons Act 1979* (NSW) or the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 16, which means it has been difficult to assess either the frequency or appropriateness of the use of these powers.⁷² However, in a 2014 report on the first 12 months of operation of some of the latest legislative vehicles for addressing public intoxication — s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and s 9 of the *Summary Offences Act 1988* (NSW) (discussed below, in Part V) — the NSW Ombudsman recorded police data indicating that, since 2009, the pt 16 powers have been used between 2000 and 4000 times a year.⁷³

So, how should the era of official ‘decriminalisation’ be regarded in the history of public intoxication regulation in NSW? The fact that under the *Intoxicated Persons Act 1979* (NSW) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 16, the police retained significant powers to remove/detain individuals found drunk in public means that care needs to be taken in characterising this period as one of meaningful decriminalisation. Employing a thick conception of criminalisation — which is concerned not only with whether a criminal offence exists and is enforced, but also with the existence and deployment of coercive police powers — we can see that public intoxication remained an active target of ‘criminalisation’ after 1979, as it had been prior to that date. It is noteworthy that throughout the 1980s and into the 1990s, the dominant rhetoric was focused on the need to provide public dunks with adequate care. However, the latter part of this period also saw the emergence of a stronger ‘law and order’

⁶⁹ See now, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 205.

⁷⁰ *Ibid.*

⁷¹ The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) came into force in December 2005, at which time the *Intoxicated Persons Act 1979* (NSW) was repealed.

⁷² Personal communication (email) from NSW Bureau of Crime Statistics and Research, 6 August 2014.

⁷³ NSW Ombudsman, above n 24, 61.

rhetoric in NSW policy and law reform debates.⁷⁴ As we show (Parts IV and V below) this shift was associated with an increasing tendency to highlight a perceived relationship between public intoxication (and public drinking) and antisocial behaviour, ranging from the annoyance and loss of amenity of noise, litter and broken glass, to public safety concerns and fear of violence. Increasingly, the public drunk/drinker was portrayed less as a person in need of care, and more frequently as a public safety risk to be managed.

IV Bans on Public Drinking – Alcohol Free Zones and Alcohol Prohibited Areas

Only a decade after the formal decriminalisation of public *drunkenness*, the powers of local councils to criminalise public *drinking* were significantly expanded with the enactment of the *Local Government (Street Drinking) Amendment Act 1990* (NSW). The power to place restrictions on the behaviours allowed in public places — including the consumption of alcohol — has long been a staple of the jurisdiction of the local government tier of government.⁷⁵ However, from 1990, local council restrictions emerged as a significant component of the regulatory response to public intoxication. Although they have attracted little scholarly attention, we argue that the growth of local government restrictions is an important part of the story of the criminalisation of public intoxication in NSW. While the formal focus of local council regimes is public drinking (of alcohol) rather than public intoxication, there is no doubt that the regulatory focus is the person who is *affected* by alcohol in public not, per se, the person who consumes alcohol in public. The aim was to decrease the likelihood of public intoxication by banning public drinking. In this way, restrictions imposed pursuant to local government powers illustrate an important shift in the orientation of public intoxication regulation towards pre-emptive risk management, where public amenity and community safety concerns are paramount.⁷⁶ Importantly, as we will show in Part V, this shift was not unique to local government regulation, but was also manifested in the approach to criminal laws and police powers adopted by the NSW Government from the 2000s.

The *Local Government (Street Drinking) Amendment Act 1990* (NSW) empowered local councils to declare discrete areas of public space (roads, footpaths and carparks) within their local government boundaries to be Alcohol Free Zones ('AFZs'). This power supplemented councils' pre-existing power to ban drinking in parks and reserves (which are, these days, referred to as Alcohol Prohibited Areas ('APAs')). During the second reading speech on the 1990

⁷⁴ Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998).

⁷⁵ Brown et al, above n 37, 982.

⁷⁶ Pre-emptive criminalisation or 'preventive justice' based on risk has been the subject of considerable scholarly attention in recent years: see, eg Brown et al, above n 11, 1207; Lucia Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009); Pat O'Malley, *Crime and Risk* (Sage, 2010); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014).

legislation, the Minister for Local Government, David Hay, explained the rationale as follows:

The Local Government (Street Drinking) Amendment Bill is another initiative of this Government in its continuing commitment to law and order. It is a clear statement to irresponsible drinkers that their anti-social behaviour on roads and footpaths will no longer be tolerated. The rights of the citizens of this State to use public thoroughfares in safety and without interference will not be compromised. The object of this bill is to enable local councils to zone as alcohol-free those roads and footpaths that are the habitual haunts of drinkers. Consumption of alcohol will be prohibited in alcohol-free zones, and the police will have various low grade or sensitive enforcement powers. ... The great strength of the measures contained in the bill is the power given to police to intervene at an early stage to diffuse situations involving street drinkers before the possibility of more serious offences being committed arises.⁷⁷

The original legislation created an offence of drinking in an ‘alcohol free zone’. Enforcement involved a two-step process: a mandatory warning, followed by the option of confiscation of the alcohol or the imposition of a \$20 on-the-spot fine.⁷⁸ AFZs could only be created after a request from a community member or group, or the police, and only after consultation and council deliberation as to whether the conditions for the creation of an AFZ were satisfied. Zones were to be time limited (originally 12 months) and had to be adequately sign-posted — so that drinkers were aware of the public spaces in which alcohol consumption was prohibited. In his second reading speech, the Minister emphasised that AFZs were only to be declared in discrete locations: ‘I emphasise that alcohol-free zones are not designed to achieve, and will not result in, a total prohibition on the public consumption of alcohol. They will come into being in response to identified trouble spots’.⁷⁹ Guidelines issued by the Department of Local Government suggest that AFZs should be as small as possible and caution that it would usually be ‘inappropriate to zone the greater part of a town, suburb or urban area as alcohol-free’.⁸⁰ As we illustrate below, local council practice does not always conform with this expectation.

There have been various statutory modifications over the years. The most significant of these occurred in 2008 with the enactment of *Liquor Legislation Amendment Act 2008* (NSW). This Act abolished the offences of drinking in an AFZ or APA, so that the only consequence of breach of a ban on drinking was that the alcohol could be lawfully confiscated.⁸¹ The requirement for a warning before confiscation was also abolished. In addition, the legislation extended the power to confiscate alcohol in AFZs, previously exercisable only by the police, to authorised

⁷⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 November 1990, 10381 (David Hay).

⁷⁸ *Local Government Act 1919* (NSW) s 512I (since repealed).

⁷⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 November 1990, 10382 (David Hay).

⁸⁰ NSW Department of Local Government, *Ministerial Guidelines on Alcohol-free Zones* (2009) Foreword.

⁸¹ See now *Local Government Act 1993* (NSW) ss 642, 632A.

council officers. In Parliament, the Minister for Gaming and Racing, Kevin Greene, explained that:

Police and enforcement officers will be able to immediately confiscate the alcohol and dispose of it by tipping it out, sending a clear message to the offender that their behaviour is unacceptable. This is an immediate and greater deterrent than issuing a \$22 fine, as provided for under the current law. The bill therefore also abolishes this provision.⁸²

The *Liquor Legislation Amendment Act 2008* (NSW) also increased the maximum (renewable) duration of an AFZ from three years to four years.⁸³

Today, the powers to create and enforce AFZs and APAs are contained in ch 16 of the *Local Government Act 1993* (NSW), ss 642, 632A. The Act continues to provide for two separate regimes for AFZs and APAs. Since the enactment of the *Local Government Amendment (Confiscation of Alcohol) Act 2010* (NSW), which extended to APAs the same power of confiscation that apply to AFZs, the two regimes are effectively identical in terms of how they are enforced: they do not create a punishable offence, but empower the police (or authorised council officers) to confiscate alcohol.⁸⁴ For AFZs the confiscation power is contained in s 642(1):

A police officer or an enforcement officer may seize any alcohol (and the bottle, can, receptacle or package in which it is contained) that is in the immediate possession of a person in an alcohol-free zone if:

- (a) the person is drinking alcohol in the alcohol-free zone, or
- (b) the officer has reasonable cause to believe that the person is about to drink, or has recently been drinking, alcohol in the alcohol-free zone.⁸⁵

The alcohol can be ‘tipped out’ on the spot or seized and disposed of by the police or council officer.⁸⁶

Under s 644 of the Act, a proposal for an AFZ may be prepared by council on its own motion, or after an application by the police, a community group representative or a person who lives or works in the area. Public consultation is required⁸⁷ and consultation with the NSW Anti-Discrimination Board is required for councils with significant Aboriginal populations.⁸⁸ The Act does not specify the criteria that should be used to determine whether an AFZ should be created; instead s 646 provides that the council must follow the *Ministerial Guidelines on Alcohol-Free Zones* (2009).⁸⁹

⁸² New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2008, 11451 (Kevin Greene).

⁸³ *Local Government Act 1993* (NSW) s 644B(4).

⁸⁴ Note that although drinking in an AFZ or APA is no longer an offence, a person who does not cooperate with a confiscation may still be charged with wilfully obstructing a police officer or council officer in their execution of a duty, an offence under the *Local Government Act 1993* (NSW) s 660. The maximum penalty is 20 penalty units (\$2200).

⁸⁵ For APAs the equivalent power is contained in the *Local Government Act 1993* (NSW) s 632A(1).

⁸⁶ *Ibid* ss 642(2), 632A(2).

⁸⁷ *Ibid* s 644A.

⁸⁸ *Ibid* s 644(3).

⁸⁹ NSW Department of Local Government, above n 80.

The Guidelines' statements of the objectives of the AFZ system are significant in the context of our attempt to map the contours of criminalisation in relation to public intoxication, including the identification of dominant policy imperatives. According to the Guidelines, AFZs are: designed 'to prevent disorderly behaviour caused by the consumption of alcohol in public areas in order to improve public safety',⁹⁰ and are 'an early intervention measure to prevent the escalation of irresponsible street drinking to incidents involving serious crime'.⁹¹ Notably, advice as to the sorts of evidence that a proponent may bring forward to support the case for an AFZ suggests that the harm/risk threshold may be somewhat lower. The Guidelines indicate that a submission that the public's use of roads and/or footpaths and/or carparks 'has been compromised by street drinkers' could be supported by evidence of instances of malicious damage to property, littering, offensive behaviour or other crimes'. None of these — especially the latter two — are harbingers of more serious crime, let alone the sort of violence that might legitimately give rise to public safety concerns. The combined effect of the *Local Government Act 1993* (NSW) and the *Ministerial Guidelines on Alcohol-Free Zones* is that councils are left with wide discretion as to whether an AFZ should be created. As we will show below (in Part V), a similar elevation of risk management and public safety priorities, above concern for the welfare of public drinkers, is evident in state-wide criminal laws and police powers.

Section 632A of the *Local Government Act 1993* (NSW) provides an equivalent power in relation to APAs. Subsection 4 empowers councils to declare any public place (or a part of a public place) to be an APA permanently — that is, without duration limit.⁹² APAs are widely used to ban drinking in areas primarily used for recreation — specifically, parks and beaches.

The power to impose bans on public drinking has been enthusiastically and widely embraced by many local councils across NSW. In some cities, AFZs are very large. For example, Wollongong City Council has declared a single AFZ that includes all streets, roads and carparks in the entire CBD, inner city residential and beachside areas.⁹³ In other cities, numerous small locations have been declared AFZs. In 2013, there were 325 AFZs and 247 APAs in inner Sydney (City of Sydney Council).⁹⁴ The growth of restrictions sometimes attracts criticism, including because the effect may be to force problem drinkers 'into less conspicuous places and away from support services including temporary food and shelter'.⁹⁵

⁹⁰ Ibid Foreword.

⁹¹ Ibid 5.

⁹² An APA cannot be declared in relation to a public road or car park (which fall exclusively within the AFZ regime).

⁹³ Wollongong City Council, 'Wollongong CBD Alcohol Free Zone 2010–2014' (1 April 2011) <<http://www.wollongong.nsw.gov.au/services/community/Documents/Wollongong%20Alcohol%20Free%20Zone%20Map.pdf>>.

⁹⁴ City of Sydney, Culture and Community Committee, Community Sub-Committee, *Minutes* (22 July 2013) City of Sydney <http://www.cityofsydney.nsw.gov.au/_data/assets/pdf_file/0006/149181/130722_CCC_ITEM12.pdf>.

⁹⁵ Matthew Moore, 'New Alcohol-free Zones Draw Criticism', *The Sydney Morning Herald* (online), 19 July 2010 <<http://www.smh.com.au/nsw/new-alcoholfree-zones-draw-criticism-20100718-10g3f.html>>.

A noteworthy feature of the *Local Government Act 1993* (NSW) regime for regulating public drinking is that it reflects a local council–police partnership model. However, it is a partnership with a particular objective. This partnership has a stronger focus on managing risk in relation to antisocial behaviour and public order offending, unlike the regime under the *Intoxicated Persons Act 1979* (NSW) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 16 (discussed above, Part II), where a significant (though, as we have shown, not exclusive) objective of the ‘partnership’ between police and drug and alcohol rehabilitation and homelessness services was to provide welfare and health-based assistance to chronic alcoholics and other drug addicts.⁹⁶

Under the *Local Government Act 1993* (NSW), the NSW Police Force plays an influential role in the identification of streets that it considers should be declared an AFZ and in providing evidence to support the proposal. Section 644A(2)(a) require councils to notify local police about any proposals. The Ministerial Guidelines go further, stating: ‘In preparing a proposal to establish an alcohol-free zone a council must consult with the relevant Police Local Area Commander about the appropriate number and location of alcohol-free zones’.⁹⁷ Under the Act, an APA cannot be established without the approval of the Police Local Area Commander.⁹⁸

Another aspect of the local council–police partnership model for regulating public drinking — shared enforcement responsibilities — has not eventuated. Under the *Local Government Act 1993* (NSW), both police officers and council enforcement officers have the power to confiscate alcohol.⁹⁹ In practice, in most council areas, only the police — and not council rangers — enforce bans on public drinking. Many councils have taken the formal position that it will not ask its officers to play a part in alcohol confiscation because there are risks associated with this enforcement method that council officers are not trained or empowered to address.¹⁰⁰

Placing primary or exclusive responsibility for policing AFZs and APAs and enforcing bans on public drinking with the NSW Police, however, creates a significant resourcing challenge. In its 2007 review of AFZs, the Department of

⁹⁶ That is not to say that the NSW Police Force has abandoned health-oriented partnerships to address harms associated with public intoxication and drinking. For, example, the ‘Last Drinks’ campaign involves a partnership between police, doctors, nurses and paramedics that aims to ‘to tackle the issue of alcohol-fuelled violence head-on, by challenging the 24/7 drinking culture that has permeated modern Australian society’, with a focus on restricting the late night availability of alcohol at licensed premises: Last Drinks Campaign, *About the Campaign* (2012) Last Drinks: Call Time on Street Crime <<http://lastdrinks.org.au/about/>>. See also Julia Quilter, ‘Populism and Criminal Justice Policy: An Australian Case Study of Non-punitive Responses to Alcohol related violence’ (2015) 48(1) *Australian & New Zealand Journal of Criminology* 24.

⁹⁷ NSW Department of Local Government, above n 80, 8.

⁹⁸ *Local Government Act 1993* (NSW) s 632A(8).

⁹⁹ *Local Government Act 1993* (NSW) ss 642(1) and 632A(1). In the case of AFZs, councils must apply to the Commissioner of Police to request authorisation for council officers/rangers to exercise this power.

¹⁰⁰ See Andrew West, ‘Councils Fearful of Enforcing Alcohol Confiscation Laws’, *The Sydney Morning Herald* (online), 1 September 2011 <<http://www.smh.com.au/nsw/councils-fearful-of-enforcing-alcohol-confiscation-laws-20110831-1jm28.html>>.

Local Government was told by council stakeholders that although police supported the AFZ system, they ‘don’t have sufficient resources to enforce [AFZs]’.¹⁰¹ Some councils elect to pay the NSW Police Force to provide alcohol-related policing services during high volume public events such as Australia Day and New Year’s Eve celebrations, in accordance with the NSW Police Force’s *Cost Recovery and User Charges Policy*.¹⁰²

Another challenge for the *Local Government Act 1993* (NSW) system for regulating public drinking is how to ensure that people are aware of the restrictions with which they are expected to comply. The regime places great faith in the capacity of street signage to communicate and demarcate. Indeed, the *Local Government Act 1993* (NSW) mandates the use of appropriate signage as a basis for the validity of AFZ and APA bans on public drinking. Section 632(7) provides that:

An alcohol prohibited area operates only so long as there are erected at the outer limits of the area, and at suitable intervals within the area, conspicuous signs:

- (a) stating that the drinking of alcohol is prohibited in the area, and
- (b) specifying the times or events, as specified in the declaration by which the area was established, during which it is to operate.¹⁰³

For AFZs, councils must publish newspaper notices when a zone is established or extended,¹⁰⁴ and erect appropriate signage.¹⁰⁵ Because AFZs are for a fixed duration, signs must identify the ‘period ... for which the alcohol-free zone is to operate’ (for example, 1 July 2012–30 June 2016). The Ministerial Guidelines provide further guidance:

A council is required to consult with the police regarding the placement of signs. ... Signs designating an alcohol-free zone must indicate that the drinking of alcohol is prohibited in the zone. Signs should note that alcohol may be seized and disposed of if alcohol is being consumed in the zone. Starting and finishing dates for the operation of the zone should also be included. It is recommended that signs use consistent, easily recognisable symbols and include a map of the area defining the location of the zone.¹⁰⁶

Many councils also display maps on their websites.¹⁰⁷

Even if all councils consistently achieved full compliance with the signage requirements (informal fieldwork observation suggests that they do not),¹⁰⁸

¹⁰¹ NSW Department of Local Government, *Evaluation of Alcohol Free Zones in NSW: Final Report* (April 2007) 13. See also Nicole Hasham and Emma Partridge, ‘“Powerless” on Booze’, *The Sydney Morning Herald* (online), 17 December 2013 <<http://www.smh.com.au/nsw/powerless-on-booze-20131216-2zhfk.html>>.

¹⁰² NSW Police Force, *Cost Recovery and User Charges Policy* (May 2010).

¹⁰³ For APAs, see *Local Government Act 1993* (NSW) s 632A(7).

¹⁰⁴ *Local Government Act 1993* (NSW) s 644B(3).

¹⁰⁵ *Local Government Act 1993* (NSW) s 644C(3).

¹⁰⁶ NSW Department of Local Government, above n 80, 10.

¹⁰⁷ See, eg. Warringah Council, ‘Maps of established Alcohol Free Zones in Warringah’ <<http://www.warringah.nsw.gov.au/sites/default/files/documents/general-information/alcohol-free-zones/alcohol-areas.pdf>>; Byron Shire Council, ‘Byron Bay — Alcohol-free Zone’ (18 September 2007) <<http://www.byron.nsw.gov.au/publications/alcohol-free-zone-byron-bay>>.

the *Local Government Act 1993* (NSW) regime's reliance on signage as a type of 'silent cop'¹⁰⁹ for the regulation of public drinking is problematic. Streets signs can be a very imperfect way of communicating precise information and can compound problems of complexity, invisibility and 'unknowability' that pervade public drinking regulation regimes. In a recent report, the New Zealand Law Commission observed that 'liquor bans' (the New Zealand equivalent of NSW AFZs and APAs) raise 'serious rule of law issues':

One requirement of the rule of law is that law has to be accessible. ... There is an issue with accessibility of the law relating to liquor bans. How people affected by liquor bans can find out where those bans do and do not apply is highly problematic. The bans are pepper-potted around New Zealand in an increasingly large number of areas, but only where there have been particular problems with alcohol. ... *The boundaries of where people can and cannot drink in public are not easy to ascertain from signage. In some areas, people would not know there was a liquor ban without conducting a really serious search for the signage, and at night this can be particularly difficult to see.*¹¹⁰

It would appear that the limitations of signage-based 'jurisdiction' are not the only source of inconsistency and confusion in relation to local council restrictions on public drinking. An introduction to ch 16 of the *Local Government Act 1993* (NSW) confirms that (since 2008) it is no longer an offence to drink in an AFZ or an APA:

This Chapter also contains provisions relating to the creation and enforcement of alcohol prohibited areas ... and alcohol-free zones These provisions do not create offences in relation to drinking in public places or streets but instead provide for confiscation and tip out powers.¹¹¹

It appears, however, that police and council understanding *and practice* may not always be consistent with the AFZ and APA provisions of the *Local Government Act 1993* (NSW). In December 2013, the NSW Legislative Council's Standing Committee on Social Issues released a report on *Strategies to Reduce Alcohol Abuse among Young People in New South Wales*.¹¹² In the context of its discussion of AFZs and APAs, the Committee reported that 'A fine of \$20 can be issued to persons caught drinking in an alcohol free area', and attributed this statement to a Police Association spokesperson.¹¹³ Further, in March 2014 we were advised by a police

¹⁰⁸ Kate McIlwain, 'Wollongong Alcohol-free Zones Cause Confusion', *Illawarra Mercury* (online), 12 June 2014 <<http://www.illawarramercury.com.au/story/2348252/wollongong-alcohol-free-zones-cause-confusion>>.

¹⁰⁹ 'Silent cop' was the colloquial name given to a low round metal dome fixed to the road at intersections designed to guide motorists making right hand turns, in the way that police officers may have done in the early days of motoring when police officers on traffic duty were a common occurrence.

¹¹⁰ New Zealand Law Commission, *Alcohol in Our Lives: Curbing the Harm* (NZLC R114, 2010) 396–7 (emphasis added).

¹¹¹ *Local Government Act 1993* (NSW) ch 16.

¹¹² Standing Committee on Social Issues, Parliament of New South Wales, *Strategies to Reduce Alcohol Abuse among Young People in New South Wales* (2013).

¹¹³ *Ibid* 88, fn 426. It is noted that in its response to the Standing Committee report, the Government stated that no such offence/power existed, though incorrectly indicated that the date of abolition as 2007 rather than 2008, following the enactment of the *Liquor Legislation Amendment Act 2008*

officer that police had the power to impose a \$50 on-the-spot fine for drinking in an AFZ.¹¹⁴ Some councils still display signs that indicate that public drinking is an offence that attracts a specified fine,¹¹⁵ and some councils provide warning on their websites that persons found drinking in AFZs or APAs can be fined.¹¹⁶

In a June 2014 newspaper story on the proposed extension of Wollongong City Council AFZs, a senior police officer, commenting on the value of AFZs to the police, was quoted as illustrating his point as follows:

Alcohol-free zones are an early intervention strategy to stop the escalation of crime ... and they give police an aid to take some action where we wouldn't necessarily have powers. For example, if there's an area in Wollongong where people are drinking in the street, and causing trouble ... it mightn't be trouble enough that they commit any offence but the alcohol-free zones give us power to go up there, speak to them, dispose of the alcohol and issue warnings or give them a fine.¹¹⁷

As noted above, public drinking is no longer an offence and, therefore, cannot be the reason for the valid imposition of a fine.¹¹⁸

These examples suggest, at a minimum, that, contrary to expectations that changes to the law are immediate and 'self-executing', in practice, gaps and lag effects are not uncommon. They are also a reminder that, especially in the public order context, local police *practice* is a critical determinant of what the law 'is', sometimes even despite of explicit legislation to the contrary. Certainly, it is likely that, as with all police powers, discretion plays an important part in the enforcement of drinking bans in APAs and AFZs. A senior police officer was recently reported as stating that AFZs 'were not designed to prevent well-behaved citizens from activities like enjoying a quiet tittle on a picnic'.¹¹⁹ Wollongong Police crime manager Detective Inspector Joe Thone said:

With any of these regulations, there needs to be an element of common sense ... So if you get mum and dad down the beach or on the foreshore having a glass of wine while having dinner, that's not going to cause a problem for anybody and it's not going to cause a problem for police. You have to implement the laws in the spirit of the legislation.¹²⁰

Our analysis of the implications of these public statements is that the 'spirit' of the legislation is to provide a mechanism for interrupting the activities of undesirable and dangerous public drinkers, without impeding the public

(NSW): NSW Government, 'NSW Government Response to *Strategies to reduce alcohol abuse among young people in New South Wales*' (June 2014) 3.

¹¹⁴ Confidential personal communication, 20 March 2014.

¹¹⁵ McIlwain, above n 108.

¹¹⁶ For example, the Byron Shire Council claims that the Council's system of APAs is 'supported by a severe fixed penalty for offenders': Byron Shire Council, 'Alcohol-free zones' <<http://www.byron.nsw.gov.au/alcohol-free-zones>>.

¹¹⁷ Wollongong Police crime manager Detective Inspector Joe Thone, quoted in Kate McIlwain, 'Wollongong Alcohol-free Zones to be Extended', *Illawarra Mercury* (online), 6 June 2014 <<http://www.illawarramercury.com.au/story/2334939/wollongong-alcohol-free-zones-to-be-extended/>>.

¹¹⁸ The only available fine in such circumstances is for failure to comply (*Local Government Act 1993* (NSW) s 660), if a person does not comply with a confiscation: see above n 84.

¹¹⁹ McIlwain, above n 117.

¹²⁰ *Ibid.*

consumption of alcohol by respectable and responsible citizens, especially where the latter occurs in settings that advance the pro-commerce objectives of the council.¹²¹ Whether this selectivity (and its embedded priorities regarding legitimate uses of public space) is regarded as an acceptable feature of NSW law and law enforcement is likely to depend on one's level of confidence in the ability of police officers to make the necessary distinctions accurately and fairly. In the context of this article, it highlights the fact that local government imposed restrictions represent an important element of the suite of options available to the police to deal with public intoxication.¹²² Moreover, they are underpinned by the same antisocial behaviour/crime prevention rationale, and a similar hybridity of police powers and criminal offences that has characterised the most recent 'era' in the criminalisation of public intoxication, to which attention will now be turned.

V Intoxication-specific Move-on Powers and Associated Offences

In the late 1990s, express statutory 'move-on' powers were given to the police as a mechanism for allowing them to demand that individuals leave a particular public place where their presence was deemed to be undesirable.¹²³ It is likely that police officers had long exercised such powers on an informal basis, in NSW and elsewhere.¹²⁴ Nonetheless, the creation of express statutory powers to this effect — originally added to the *Summary Offences Act 1988* (NSW) and later relocated to the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) — was a significant moment in what we have described as the hybridisation of public order criminalisation, with reduced dependence on substantive offences and greater reliance on coercive police powers without the need for charge, arrest or penalty notice. A decade later, move-on powers were extended to provide police with an additional tool for addressing risks associated with public intoxication. This shift in the regulation of public intoxication has been characterised by more punitive and less welfare-based strategies, associated with a policy discourse that positions the 'public drunk' not as vulnerable and in need of care, but as reckless and dangerous and in need of constraint and condemnation. This trajectory has escalated further in recent years in a context of heightened anxiety about alcohol-fuelled violence, especially where it occurs in public places.¹²⁵

¹²¹ Some local councils have declared and sign-posted AFZs in streets where they have simultaneously permitted alfresco dining and liquor consumption at licensed premises. In such cases, the Ministerial Guidelines suggest that councils should impose conditions on the licensee regarding 'the requirements of the zone, including clear delineation and control of the licensed area from the alcohol-free zone': NSW Department of Local Government, above n 80, 8.

¹²² Whether bans on public drinking are effective in achieving their goals requires further research: see Amy Pennay and Robin Room, 'Prohibiting Public Drinking in Urban Public Spaces: A Review of the Evidence' (2012) 19(2) *Drugs: Education, Prevention and Policy* 91.

¹²³ *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW).

¹²⁴ See NSW Ombudsman, *Policing Public Safety: Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act* (NSW Ombudsman, 1999) [10.70]; Brown et al, above n 11, 556.

¹²⁵ In February 2014, the NSW Government introduced a Bill that would have created 11 new aggravated assault offences, where the aggravating factor was that the assault had occurred when the offender was 'intoxicated in public'. The Crimes Amendment (Intoxication) Bill 2014 was

In the original incarnation of intoxication-specific move-on powers, following the enactment of the *Law Enforcement and Other Legislation Amendment Act 2007* (NSW), a move-on direction could be given to an intoxicated person who was in a group of three or more intoxicated persons in a public place if the officer believed on reasonable grounds that their behaviour was likely to cause injury to another person or damage property or otherwise gives rise to a risk to public safety. The *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (NSW) amended this power to allow police to move-on intoxicated individuals, and to add ‘disorderly’ behaviour as a basis for a move-on direction. Section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) is quoted in full below, to facilitate subsequent analysis of its key features (including the statutory language employed) and comparison with the public intoxication regimes previously examined:

198 Move on directions to intoxicated persons in public places

- (1) 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 (referred to in this Part as *relevant conduct*):
 - (a) is likely to cause injury to any other person or persons, damage to property or otherwise give rise to a risk to public safety, or
 - (b) is disorderly.
- (2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:
 - (a) preventing injury or damage or reducing or eliminating a risk to public safety, or
 - (b) preventing the continuance of disorderly behaviour in a public place.
- (3) The period during which a person may be directed not to return to a public place is not to exceed 6 hours after the direction was given.
- (4) The other person or persons referred to in subsection (1) (a) need not be in the public place but must be near that place at the time the relevant conduct is being engaged in.
- (5) 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.

passed in the Legislative Assembly, but was significantly amended by the Legislative Council. These amendments were not accepted by the Legislative Assembly.

- (6) A police officer must give to a person to whom the officer gives a direction under this section (being a direction on the grounds that the person is intoxicated and disorderly in a public place) a warning that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given. The warning is in addition to any other warning required under Part 15.

In addition to the offence referred to in s 198(6) (that is, the offence in *Summary Offences Act 1988* (NSW) s 9, discussed below), failure to comply with a move-on direction is an offence under s 199 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

The first point to note about this regime is that the criteria for police intervention in s 198(1) overlap substantially with the s 206 criteria in pt 16 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), but with noteworthy variations. The ‘welfare’ criteria have been deleted and a ‘public safety’ risk has been added. Second, the emphasis is on *removing* intoxicated persons from public places — or, more specifically, placing a legal obligation on intoxicated persons to remove themselves — with no responsibility placed on police to deliver the person into the care of a responsible person (as in the pt 16 regime). Third, s 198 gives the impression of being a highly structured and circumscribed coercive power: behaviour-based criteria must be satisfied; the move-on direction must be for specified purposes (to prevent injury or damage, to eliminate a public safety risk, or to stop disorderly behaviour);¹²⁶ and the maximum period for which a person can be ‘banned’ from being in a public place is six hours.¹²⁷ On closer inspection of the provision, however, it is apparent that s 198 employs language that vests police with a very broad discretion to assess the risks associated with a person’s presence in public and determine whether to issue a move-on direction. Furthermore, s 198(5) provides a loosely drawn behaviour-based ‘test’ of whether a person is ‘intoxicated’ that requires a police officer to exercise judgment, based on observation alone, as to whether there is a relationship between the observed behaviour and the consumption of alcohol or other drugs.¹²⁸ In addition, the circumstances in which directions are given — ‘on the spot’ oral directions on the street with no requirement to issue directions in writing,¹²⁹ and where non-compliance is a criminal offence — mean that specific instances in which the s 198 power is invoked are rarely reviewed or scrutinised.¹³⁰

¹²⁶ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 198(2).

¹²⁷ *Ibid* s 198(3).

¹²⁸ The risk of error in the deployment of behaviour-based tests for intoxication was recently illustrated by the experience of a 24 year old Wollongong man with cerebral palsy who was mistakenly assumed, by a pub bouncer, to be affected by alcohol: Ashleigh Tullis, ‘Dapto’s Mick Robson wants disability training for bouncers’, *Illawarra Mercury* (online), 14 July 2014 <<http://www.illawarramercury.com.au/story/2417177/daptos-mick-robson-wants-disability-training-for-bouncers/>>.

¹²⁹ In some jurisdictions, a move-on direction must be in writing: eg *Criminal Investigation Act 2006* (WA) s 27(6).

¹³⁰ Under s 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), a police officer exercising power under s 198 must also provide identity details, reasons and a warning that non-compliance is an offence.

The use of discretion-laden concepts and tests is deliberate. For example, a conscious drafting decision was taken not to define ‘disorderly’. In the second reading speech on the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (NSW), the Attorney-General explained:

There is no definition of ‘disorderly’ in the bill. The intention of the Government is to impose sanctions against behaviour that contravenes community standards to the extent that it warrants the intervention of the criminal law. Disorderly behaviour can vary according to time, place and the context in which it is conducted. Behaviour that may not disturb or annoy others in one instance could amount to a criminal offence in another. For example, an intoxicated individual who is yelling loudly and persistently to the extent that it annoys others, and who does not cease his or her behaviour when asked to move on by police, could be committing an offence of intoxicated and disorderly conduct. It will be for police to determine the appropriate response according to the context in which the behaviour occurs.¹³¹

This change substantially expanded the scope of the pre-existing ‘general’ move-on power in s 197 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), with a consequential expansion in police discretion. The NSW Ombudsman has noted that unlike the previously existing move-on power, under s 198(1)(b), ‘disorderly’ behaviour ‘is not qualified by a requirement that the behaviour is likely to have an adverse impact on a member of the public’.¹³²

The decision to vest police officers with *more* discretion occurs in a context where there is a long history of police discretion being exercised in a way that is unfavourable to Aboriginal persons,¹³³ both in relation to the ‘traditional’ offence of public drunkenness, as well as allied offences like offensive behaviour and offensive conduct under ss 4 and 4A of the *Summary Offences Act 1988* (NSW).¹³⁴

The *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (NSW) also amended the *Summary Offences Act 1988* (NSW) to create a companion offence for the intoxication specific move-on power in s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Section 9 of the *Summary Offences Act 1988* (NSW) now provides:

- (1) 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.

Maximum penalty: 15 penalty units.

¹³¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 June 2011, 3135–6 (Greg Smith).

¹³² See NSW Ombudsman, *Summary Offences Act 1988 Section 9: Continuation of Intoxicated and Disorderly Behaviour Following Move On Direction*, Issues Paper (2012) 8.

¹³³ See McRae and Netheim, above n 20, 529–30.

¹³⁴ See Quilter and McNamara, above n 25; Luke McNamara and Julia Quilter, ‘Turning the Spotlight on “Offensiveness” as a Basis for Criminal Liability’ (2014) 39(1) *Alternative Law Journal* 36.

Section 9(6) duplicates the behaviour-based definition of ‘intoxication’ contained in s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (with the attendant problems discussed above).

How should this unusual offence be characterised? On the one hand, it resembles (albeit, in a convoluted fashion) a revival of the old offence of ‘drunk and disorderly’, which was a mainstay of public order law until it was abolished in 1979 as part of the decriminalisation of public drunkenness (discussed in Part III, above). Although it does not re-criminalise public intoxication per se (in that non-compliance with a move-on direction is also part of the actus reus of the s 9 offence), it is the first new NSW criminal offence that is directed expressly at public intoxication in over three decades.

On the other hand, it may be regarded as having more in common with the offence of failing to comply with a move-on direction under s 199 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), with which it clearly overlaps. The NSW Ombudsman has questioned ‘whether in practice the scheme is sufficiently focused on repeated intoxicated and disorderly behaviour or in practice duplicates the existing powers of police’.¹³⁵ The Ombudsman’s preliminary analysis of police data during the first year of the operation of s 9 revealed that Criminal Infringement Notices (‘CINs’)¹³⁶ issued for the s 9 offence ‘commonly relate to incidents where police could have alternatively issued a penalty notice under section 199(1)’.¹³⁷

The maximum penalty for the offence under s 199(1) is two penalty units (\$220). When first introduced, the maximum penalty for the offence under s 9 was six penalty units (\$660) or police could issue a CIN for \$200. In 2014, the maximum penalty for the s 9 offence was increased to 15 penalty units (\$1650) and the CIN was increased to \$1100¹³⁸ (the context for which is discussed below). Both the NSW Law Reform Commission and the NSW Ombudsman have previously expressed concern about the potential for ‘on-the-spot’ enforcement of public order offences to produce ‘net-widening’ and overcriminalisation, and to impact disproportionately on already marginalised groups, including Aboriginal people and those coping with homelessness.¹³⁹

¹³⁵ Above n 132, 10.

¹³⁶ A CIN is an ‘on the spot’ penalty notice. Pursuant to the *Criminal Procedure Regulation 2010* (NSW), police have the option of issuing a CIN for seven offences, including the offence defined by s 9 of the *Summary Offences Act 1988* (NSW).

¹³⁷ Above n 132, 10.

¹³⁸ *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) sch 5, amended the *Criminal Procedure Regulation 2010* (NSW) sch 3. In May 2014, average weekly earnings in Australia were \$1,122.90: Australian Bureau of Statistics, ‘6302.0 — Average Weekly Earnings, Australia, May 2014’ (August 2014). This means that the on-the-spot fine for NSW’s contemporary public drunkenness crime is almost 100% of average weekly earnings and the maximum court-imposed fine is almost 150% of average weekly earnings. Compare this with the de facto fine of \$1 and maximum penalty of \$10 for public drunkenness in 1970 (discussed above in Part I), which constituted approximately 1% and 13% respectively of 1970 average weekly earnings: Commonwealth Bureau of Census and Statistics, above n 40.

¹³⁹ NSW Ombudsman, above n 22; NSW Law Reform Commission, above n 22. See also Quilter and McNamara, above n 25; McNamara and Quilter, above n 134; Bernadette Saunders et al, ‘The Impact of the Victorian Infringements System on Disadvantaged Groups: Findings from a Qualitative Study’ (2014) 49(1) *Australian Journal of Social Issues* 45; Elyse Methven, ‘“A Very

In 2012, the NSW Ombudsman noted that the power in s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the offence contained in s 9 of the *Summary Offences Act 1988* (NSW) also overlap with the ‘welfare’-based powers that are still contained in pt 16 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (discussed in Part II, above). The Ombudsman observed that the approaches reflect very different conceptions of the problem of public intoxication and of solutions to it:

Police have retained the power to detain an intoxicated person under section 206 of the [*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (‘LEPRA’)] ... if they are disorderly or behaving in a manner likely to cause injury or damage, or if they are in need of protection. The purpose of this provision is to protect the intoxicated person and other people from injury and property from damage Given that the conditions under which a person can be detained under section 206 of the LEPRA are almost identical to those which may be an offence under section 9 of the [*Summary Offences Act 1988* (NSW)], police now have the discretion to detain the person under section 206, or to take proceedings under section 9. This presents officers with a choice between fundamentally different approaches for the same set of circumstances. However there are no guidelines as to when they should select one approach over another.¹⁴⁰

While the legislation and police policy may provide little guidance, the government rhetoric that has surrounded the latest shift in criminal law and police powers to address public intoxication has conveyed a clear sense of what the turn towards harsher treatment is about. Paternalistic concern for, and patience towards, the ‘skid-row drunk’ — the focus of the 1979 decriminalisation reforms — has been replaced by antagonism and hostility towards the dangerous and potentially violent drunk who is regarded as an unacceptable risk in public. Compare the words of the then Attorney-General in 1979 (quoted above, Part II, in relation to the introduction of the *Intoxicated Persons Act 1979* (NSW)) with the words of the Attorney-General in 2011, in relation to the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (NSW):

We have said that people are entitled to enjoy a night out without fear of having their evening ruined by drunken and violent hooligans. ...

It is clear that more needs to be done to make the streets of New South Wales safe again. Sadly, there are individuals who are determined to drink to excess or party hard on their drug of choice and then choose not to obey reasonable directions given by police to go home before trouble starts. This policy is not about targeting the homeless, the mentally ill, the Aboriginal community or the disadvantaged in our society. It is to manage the excessive intoxicated behaviour seen in entertainment districts on weekends.

People are entitled to have fun, but not to the detriment of other people's night out. Those people are the reason that police need additional enforcement tools in the form of the new intoxicated and disorderly conduct offence. This State bears the cost of that type of behaviour every day through a burden on the health system. Every weekend emergency

Expensive Lesson?: Counting the Costs of Penalty Notices for Anti-social Behaviour’ (2014) 26(2) *Current Issues in Criminal Justice* 249.

¹⁴⁰ NSW Ombudsman, above n 132, 14.

departments across New South Wales see the impact of intoxicated and disorderly behaviour, and the cost of dealing with the resultant injuries represents a burden to the State for which taxpayers should not have to pay.¹⁴¹

As with detentions under pt 16 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (discussed above, Part II), neither the NSW Police Force nor the Bureau of Crime Statistics and Research routinely publishes data on the frequency with which the s 198 move-on power is used. Since s 9 of the *Summary Offences Act 1988* (NSW) defines a substantive offence, statistics are collected by the Bureau of Crime Statistics and Research. In 2013, 453 on-the-spot fines were issued and 113 charges were finalised in the Local Court.¹⁴² That these ‘charge’ figures represent only a very small percentage of the occasions on which police exercised their powers under s 198 of *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) to move-on an intoxicated person has been confirmed in a report released by the NSW Ombudsman in 2014. In the 12-month period from October 2011 to September 2012, NSW Police issued 33,580 intoxicated person move-on directions under s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).¹⁴³ During this period, non-compliance with s 198 orders resulted in 2,252 penalty notices or charges.¹⁴⁴

The Ombudsman found that not only was there considerable overlap between the different legislative provisions — particularly, ss 198/199 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and s 9 of the *Summary Offences Act 1988* (NSW) — but that police were given inadequate guidance as to how their discretion should be exercised. The Ombudsman concluded that the expansion of powers/offences in 2011:

did not provide police with a significant additional tool to manage or reduce alcohol-related crime during the review period. By far the majority of the incidents resulting in legal action under section 9 could have been dealt with by police using the existing ‘failure to comply with direction’ offence provision at section 199 of LEPRA.¹⁴⁵

Alarming, the Ombudsman found numerous instances of the s 9 offence being used in tandem with the ‘welfare’-based power to detain in s 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).¹⁴⁶ The paradox of ‘decriminalisation’ appears to have come full circle.

As noted above, 2014 saw a further escalation in the rhetoric surrounding the dangers of public intoxication, including a 250% increase in the maximum penalty and a 550% increase in the CIN for the offence under s 9 of the *Summary*

¹⁴¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 June 2011, 3135 (Greg Smith).

¹⁴² Data provided by the NSW Bureau of Crime Statistics and Research (5–6 August 2014) and on file with the authors.

¹⁴³ NSW Ombudsman, above n 24, 1.

¹⁴⁴ This figure included 1768 penalty notices or charges under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199, and 484 penalty notices or charges under the *Summary Offences Act 1988* (NSW) s 9: *ibid*.

¹⁴⁵ *Ibid* 5.

¹⁴⁶ *Ibid* 61–5.

Offences Act 1988 (NSW). This punitive turn was part of the NSW Government's 'crackdown' on violence associated with public intoxication, in response to widespread outrage and a concerted media campaign following two highly publicised fatal assaults on the streets of King's Cross in Sydney perpetrated by young men affected by alcohol.¹⁴⁷ The then Premier, Barry O'Farrell, explained the increases as follows:

Alcohol-related violence and antisocial behaviour is not welcome on our streets and, frankly, will no longer be tolerated. It is therefore critical that police can fine those offenders who do behave in such a manner, and that the fine is a sufficient amount to act as a deterrent for this unacceptable behaviour.¹⁴⁸

The increased fines depart dramatically from the recommendation of the NSW Law Reform Commission that penalties imposed by way of on-the-spot fines should not normally exceed 25% of the maximum penalty that can be imposed by a court.¹⁴⁹ The fine levied by CIN for an alleged violation of s 9 of the *Summary Offences Act 1988* (NSW) is now 66% of the maximum fine that can be imposed in the NSW Local Court. The NSW Ombudsman cited the increased fines as an additional reason to be concerned about how s 9 is employed in practice:

In light of the sizeable differences in monetary penalties that now apply and the disproportionate numbers of vulnerable people affected, it is important that police uses of the section 9 offence be directed at more serious incidents. For this reason we have recommended that section 9 be amended so that it relates more squarely to serious instances of intoxicated and disorderly conduct, including violent or threatening conduct not already covered by section 199 LEPR.¹⁵⁰

Although these latest developments appear to support an analysis that highlights an incremental shift towards more explicit and punitive criminalisation of public intoxication during the 2000s,¹⁵¹ we would caution against a simple linear narrative. We have already shown that the decriminalisation/welfare model of the 1980s was not all that it appeared. Next, we highlight an apparent revival of a welfare model not only alongside, but closely aligned with the punitive shifts of recent years: the introduction of 'sobering up centres'.

In 2013, the NSW Government commenced a 12-month trial of 'sobering up centres', including one mandatory centre run by the NSW Police in central Sydney and two 'accredited' centres run by non-government providers in Randwick and Wollongong. The stated objective of the *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW) was to 'promote the safety of public

¹⁴⁷ See Quilter, above n 1.

¹⁴⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 26623 (Barry O'Farrell). Note that, at the same time, the CIN fine was also increased for the *Summary Offences Act 1988* (NSW) crimes of offensive conduct in a public place (from \$200 to \$500) and offensive language in a public place (from \$150 to \$500), which are frequently associated with high levels of intoxication: see Brown et al, above n 11, 536.

¹⁴⁹ NSW Law Reform Commission, above n 22, Recommendation 4.5(a).

¹⁵⁰ NSW Ombudsman, above n 24, 5.

¹⁵¹ Similar 're-criminalisation' trajectories can be identified in other Australian jurisdictions: see, eg, *Alcohol Protection Orders Act 2013* (NT); considered in *Nummar v Pennuto* (2014) 287 FLR 430.

places and public amenity by facilitating a trial of a scheme to reduce alcohol-related violence and other antisocial behaviour'.¹⁵²

The accredited centres were described by the Government as 'optional', implying that the intoxicated person had a choice about whether they spent time in the centre. This was reflected in s 11(1)(b), which stated that 'admission to the centre is voluntary' and s 15(1), which stated that '[a] person who has been admitted to an accredited sobering up centre may leave ... at any time'. However, s 6 of the Act gave express powers to the police to detain a person and take them to a centre, if they were 'in need of physical protection' because they were intoxicated, or if a police officer believed that they were 'a public nuisance'. Under s 6(3), a person was defined as being a public nuisance if the person was 'behaving in an offensive or disorderly manner and the person's behaviour is interfering, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public'.

The two accredited/voluntary centre trials were cut short in June 2014.¹⁵³ The Minister for Family Community Services cited low usage rates and the Government's view that the money involved would be 'better spent where it's needed on other programs'.¹⁵⁴ At the same time, the operation of the police-run mandatory centre was extended for a further two years until 1 July 2016,¹⁵⁵ and the catchment area was increased.¹⁵⁶

Police powers in relation to the mandatory sobering up centre are contained in s 5 of the *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW). The grounds for mandatory detention under s 5(1) are:

- the person has received a move-on direction under s 198 of LEPRA (discussed above) and 'persists in engaging in the relevant conduct that gave rise to the direction' (s 5(1)(a)(ii));
- the person is 'behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property' (s 5(1)(b)(i)); or
- the person is in need of physical protection because the person is intoxicated (s 5(1)(b)(ii)).

Section 5(1) replicates the 'welfare' and public order criteria contained in s 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (discussed above, Part III), and overlaps with the grounds for moving on an intoxicated person specified in s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (above).

¹⁵² *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW) s 3.

¹⁵³ Joshua Butler, 'Wollongong Drunk Tank Shut Before Trial Over', *Illawarra Mercury* (online), 29 May 2014 <<http://www.illawarramercury.com.au/story/2314538/wollongong-drunk-tank-shut-before-trial-over>>.

¹⁵⁴ Alicia Wood, 'Drunk tanks: Last Drunks Called for Failed Experiment', *The Daily Telegraph* (online), 28 May 2014 <<http://www.dailytelegraph.com.au/news/nsw/drunk-tanks-last-drunks-call-for-failed-experiment/story-fni0cx12-1226933728740>>.

¹⁵⁵ *Intoxicated Persons (Sobering Up Centres Trial) Amendment (Extension) Regulation 2014* (NSW).

¹⁵⁶ *Intoxicated Persons (Sobering Up Centres Trial) Amendment (Sydney City Catchment Area) Regulation 2014* (NSW).

If a person is detained under s 5(1), admission to the Sydney City centre is compulsory.¹⁵⁷ A detained person can be released when the person in charge of the centre is satisfied that the person is no longer intoxicated or where the person can be released into the care of a responsible person, up to an eight-hour maximum.¹⁵⁸

Unlike the accredited sobering up centres for which no fee was payable, all persons taken to the mandatory centre were originally charged a user-pays fee (first visit: \$200; second: \$400; third: \$600; fourth and subsequent: \$800).¹⁵⁹ In June 2014, these arrangements were modified so that only persons detained on the non-compliance/persistence ground (s 5(1)(a)) are charged a fee.¹⁶⁰ In addition, persons detained in the mandatory centre on the basis of the non-compliance/persistence ground are issued with a CIN (now \$1100) for the offence under s 9 of the *Summary Offences Act 1988* (NSW) that such behaviour represents.¹⁶¹

These latest developments suggest that the recent revival of a ‘welfare’ approach to public intoxication may have been illusory. It was certainly short-lived. It is true that welfare considerations remain part of the criteria for detaining a person in the central Sydney mandatory sobering up centre, but the other criteria (focused as they are on public order concerns), the fact that the centre is run by the police and detainees are held in cells at the Central Local Court, and the financial impost on persons detained (which may be well in excess of \$1000), suggest that criminalisation remains firmly embedded as a dominant response to the problem of public intoxication. Moreover, the image of the ‘public drunk’ — and the related justification for regulation through criminal law and police powers — is now firmly associated not merely with annoyance and reduced public amenity, but with a very real risk of personal violence.¹⁶² This correlation has been a major driver towards more punitive and less forgiving forms of criminalisation.¹⁶³

¹⁵⁷ *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW) s 11.

¹⁵⁸ *Ibid* s 13.

¹⁵⁹ *Intoxicated Persons (Sobering Up Centres Trial) Regulation 2013* (NSW).

¹⁶⁰ *Intoxicated Persons (Sobering Up Centres Trial) Amendment (Extension) Regulation 2014* (NSW).

¹⁶¹ A NSW Police Force ‘fact sheet’ suggests that all persons detailed in the mandatory sobering up centre will be issued with a CIN (NSW Police, ‘Fact Sheet: Sobering Up Centres’ <http://www.police.nsw.gov.au/__data/assets/pdf_file/0009/254295/Sobering_Up_Centres_Fact_Sheet.pdf>), but such action in the case of a person detained on the ground of ‘behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property’ would be unjustified because such behaviour is not an offence known to NSW law.

¹⁶² Similar shifts are identifiable in other Australian jurisdictions. See, eg, the recent legislative package introduced in Queensland: *Safe Night Out Legislation Amendment Act 2014* (Qld).

¹⁶³ We are not suggesting that public order focused criminalisation is the only regulatory response to increased anxiety about alcohol-fuelled violence and the danger of public intoxication. Since the mid-2000s, and especially in the last few years, restrictions on liquor sales at licensed premises, particularly in known ‘hot spots’ has been an important component of the NSW Government’s regulatory strategy and has resulted in numerous amendments to the *Liquor Act 2007* (NSW). See Roth, above n 2; Quilter, above n 96; Allan Trifonoff et al, ‘What Police Want From Liquor Licensing Legislation: The Australian Perspective’ (2014) 15(4) *Police Practice and Research* 293; Kypros Kypri, Patrick McElduff and Peter G Miller, ‘Restrictions in Pub Closing Times and Lockouts in Newcastle, Australia Five Years On’ (2014) 33(3) *Drug and Alcohol Review* 323.

VI Conclusion

Our examination of the history of the regulation of public intoxication in NSW establishes that although the formal legal status of the behaviour in question has changed over time, and although different approaches have been prominent at different points in the history of the State, public intoxication has been consistently and continuously criminalised for almost two centuries. In reaching this conclusion we have employed a thick conception of ‘criminalisation’ that looks beyond the list of offences on the statute books, and considers also the status of police powers — which, in the public order context, are at least as significant as substantive offences — as well as the all-important question of how laws are enforced and powers deployed on the ground.

In addition to challenging the conventional wisdom that criminal law and policing receded as regulatory strategies at the moment of official ‘decriminalisation’ in 1979, we have also shown that from the 1990s there has been an incremental hardening of regulatory strategies and that this shift is associated with changing attitudes and policy discourse regarding the image of the ‘public drunk’. Once invoking pity and/or annoyance for diminishing the amenity of the urban environment, people (particularly young men) who are drunk in public are now widely seen as dangerous and as posing a risk to other members of the community. The threat to public safety and the fear that innocent members of the public might be subjected to random ‘street’ violence have become major drivers of policymaking and law reform in this area. This momentum towards a less forgiving and more punitive approach to public intoxication may have reached its high water mark in 2014, when the NSW Government introduced a new offence of assault causing death while intoxicated (with a mandatory minimum sentence of eight years’ imprisonment),¹⁶⁴ and proposed the introduction of a raft of new aggravated assault offences where the aggravating factor was the fact that the assault had occurred while the accused was ‘intoxicated in public’. It is noteworthy that the Crimes Amendment (Intoxication) Bill 2014 stalled in the Legislative Council not because these offences were considered to be unnecessary or objectionable but because the Government also sought to attach mandatory minimum sentences to a number of the proposed new offences, which provoked staunch resistance.¹⁶⁵

We mention this development because it provides a contemporary context for a final observation we would like to draw from the history of the regulation of public intoxication in NSW: the need to reconsider the policy and law reform preoccupation with *public* intoxication. As we observed in the introduction to this article, not only does this focus effect the *overcriminalisation* of marginalised persons (particularly Aboriginal drinkers), but it risks *undercriminalising* the alcohol-related harms experienced disproportionately by women in private

¹⁶⁴ *Crimes Act 1900* (NSW) s 25B, as amended by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW).

¹⁶⁵ See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 19 March 2014, 27445 (Adam Searle), 27457 (David Shoebridge).

settings.¹⁶⁶ A sound evidence-based policy and law reform response to the personal violence and other risks associated with alcohol and drug use is one which avoids, rather than reproduces, the traditional tendency to treat criminal offending that occurs in public as more deserving of the State's attention than offending that occurs in private.

¹⁶⁶ See A M Laslett et al, *The Hidden Harm: Alcohol's Impact on Children and Families* (Foundation for Alcohol Research and Education, 2015).

