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Chapter 12 of the National Report notes the following:
"...there is one fundamental change necessary to change the nature of the race relations in Australia, and with it to reduce the over-representation of Aboriginal people in the criminal justice system. This is an alteration in the unequal relations between Aboriginal and non-Aboriginal Australians, in the position of Aboriginal people from being dependents on (and, in some instances, victims of) government controls to becoming negotiators with the government -- and with other interest groups in the broader community."

The primary focus of chapter 12 is racial discrimination with an emphasis on hotels and hotel-keepers and the role that they play within the context of relations between Indigenous and non-Indigenous Australians. The National Report notes that historically, in the long process of establishing equal rights for Indigenous people, more attention was given to the right to drink than to wage equality.

1. RCIADIC Recommendations

Recommendation 58: That Governments give consideration to amending the liquor laws to provide a right of appeal to persons excluded from a hotel where that exclusion is or its continuation is harsh or unreasonable.

Recommendation 58 stems from various cases involving the exclusion or banning of Indigenous people from hotels that may be considered to have been carried out on an arbitrary, harsh or unreasonable basis, and may therefore be seen to perpetuate a culture of exclusion and discrimination with respect to Aboriginal people. This could promote confrontation between Indigenous and non-Indigenous people. The National Report notes that traditionally the Australian 'pub' became a place where, in theory at least, both Indigenous and non-Indigenous people could meet and mix on equal terms as most (if not all) country towns with high Indigenous populations have a hotel. The National Report goes on to note, however, that in reality, practices such as black versus white bars and the power of the publicans to ban individuals from entering the pub (including barring for life) has resulted in pubs becoming another place of exclusion and discrimination for Indigenous people, as opposed to a common social place for the community.
**Recommendation 59:** That Police Services use every endeavour to police the provisions of Licencing Acts which make it an offence to serve intoxicated persons.

Recommendation 59 was made in consideration of the RCIADIC's view that there is often a close relationship between hotel management and the police, particularly in country towns. The RCIADIC considered that "in towns with large Aboriginal populations and numerous arrests for alcohol-related offences, many of those arrests occur in or around the hotel and some of them at the instigation of the publican". In such cases, the RCIADIC noted that it is predictable that Indigenous people will feel that there is a very strong alliance between the hotel and the police with special advantages afforded to the publican. The key complaint in this respect, was "the fact that the persons are served to the profit of the publican and that the police are seen to be not interested". Accordingly, the basis of the Recommendation is that "it would greatly improve the image of police in the eyes of Aboriginal people if they are seen to be active in enforcing the law not only against Aboriginal drinkers but also against publicans."

2. **Overview of findings**

The National Report called for amendments to the liquor laws to allow a right of appeal for persons excluded from a hotel as well as an increased responsibility on the police to ensure that they fairly police the hoteliers and their staff with respect to the offence of serving alcohol to intoxicated persons.

In assessing the implementation of these Recommendations we have reviewed State, Territory and Federal legislation and, where publically available, relevant government policies, codes of conduct, inspection standards, guidelines and manuals.

2.1 **Amendments to liquor laws to provide a right of appeal to persons excluded from a hotel (Recommendation 58)**

**Recommendation 58:** That Governments give consideration to amending the liquor laws to provide a right of appeal to persons excluded from a hotel where that exclusion is or its continuation is harsh or unreasonable.

2.1.1 **Implementation at a federal level**

As liquor laws are dealt with at a state and territory level rather than a federal one, Recommendation 58 is not appropriate for implementation by the Commonwealth.

2.1.2 **State and territory level**
Queensland, Tasmania and the ACT have not implemented Recommendation 58. These jurisdictions do not provide a right of appeal to persons subject to an exclusion or banning order from licensed premises.¹ In Queensland, the Liquor Act 1992 (Qld) no longer provides for long-term banning orders of persons from licensed premises.² In this sense at least, it is not necessary to implement Recommendation 58 in Queensland given that the provisions pertaining to civil banning orders have been repealed.

Victoria, the Northern Territory, South Australia and Western Australia have partially implemented Recommendation 58.³ Both South Australia and Western Australia have a clear mechanism under the respective legislation that allows a review of banning orders provided that the ban itself lasts for more than one month. Under s 115AD of the Liquor Control Act 1988 (WA) for example, a person who is dissatisfied with a banning order imposed by the Police Commissioner may apply to the Liquor Commission for a review of the banning order in the approved form and with the prescribed fee. In South Australia a mirror provision exists in s128 of the Liquor Licensing Act 1997 (SA).

Victoria and the Northern Territory also have review mechanisms built into the legislation. A person subject to a banning order may request the Police Commissioner to revoke the order. However, the grounds on which a person may request a revocation of the order are not specifically set out in the respective legislation. Section 120M(3) of the Liquor Act 1980 (NT), for example, provides that the Police Commissioner may revoke a banning order where 'it is appropriate to do so'. The review power in Victoria is drafted in a similar way. The key difference between the review powers in South Australia and Western Australia on one hand and Victoria and the Northern Territory on the other is that the latter review is done internally by the Police Commissioner whereas the former is heard by a third person.

NSW has not enacted legislation to provide a review mechanism or a right of appeal to persons excluded from a hotel other than in limited circumstances relating to 'high risk' venues.⁴ Generally, section 78 of that Act provides that banning orders may be made by the Independent Liquor and Gaming Authority and, in doing so, must not take into account a person's race or

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¹ Liquor Act 1992 (Qld); Liquor Act 2010 (ACT); Liquor Licensing Act 1990 (TAS).
² Safe Night Out Legislation Amendment Act 2014 (Qld).
³ Liquor Control Reform Act 1998 (Vic), s 106I; Liquor Act 1980 (NT), s 120M; Liquor Licensing Act 1997 (SA), s 128; Liquor Control Act 1988 (WA), 115AD.
⁴ Liquor Act 2007 (NSW), s 144H.

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ethnic or national origins. This direction supports the policy intent of Recommendation 58. However, a "reviewable decision" for the purposes of the Act is defined by reference to section 144G, which relates only to the provision of liquor licenses. There is therefore no formal route under the legislation for a banning order to be reviewed.

However, in respect of 'high risk venues' in Kings Cross and the Sydney CBD in NSW, a person issued with a long-term banning order in respect of such a venue may apply to the Civil and Administrative Tribunal for a review of the decision under section 116AF of the Liquor Act 2007 (NSW). The legislation does not specify any grounds on which the review will be granted.

Whilst the Liquor Legislation Amendment (Statutory Review) Act 2014 (NSW) modifies the grounds on which the Independent Liquor and Gaming Authority can issue long-term banning orders prohibiting persons from entering licensed premises in the Kings Cross or Sydney CBD precincts, nothing in this amending act erodes the rights of persons to appeal a banning order for 'high risk venues' in NSW. For instance, from 15 December 2014, a long-term banning order can be issued by the Independent Liquor and Gaming Authority in the Sydney CBD and Kings Cross precincts where a person is charged with, or found guilty of, a serious indictable offence involving violence while either the offender or the victim was affected by alcohol.

2.2 Policing provisions of the Licencing Acts (Recommendation 59)

Recommendation 59: That Police Services use every endeavour to police the provisions of the Licensing Acts which make it an offence to serve intoxicated persons".

2.2.1 Implementation at a federal level

As policing is governed by the States and Territories, Recommendation 59 is not, primarily, a matter for implementation by the Commonwealth. From a policy perspective however, there are various federal initiatives that provide an insight into the implementation of this Recommendation.

The Intergovernmental Committee on Drugs Standing Committee on Alcohol is a sub-committee set up under the National Drug Strategy. The National Alcohol Strategy produced by the Intergovernmental Committee on Drugs Standing Committee on Alcohol is described as a plan for action developed through collaboration between Australian governments, non-government and
industry partners and the broader community. It outlines priority areas for coordinated action to develop drinking cultures that support a reduction in alcohol-related harm in Australia. Under this strategy, each state and territory government is then responsible for putting legislation and strategies in place to minimise the harm alcohol causes to various vulnerable groups in society. One of the ways state and territory governments are enabling this national strategy is through mandatory staff training on the responsible service of alcohol.

The National Alcohol Strategy describes prevention of intoxication as its first priority. As part of this, the strategy acknowledges that "as all Australian jurisdictions have responsible service laws in place, encouraging responsible service is usually more a matter of enforcing existing laws than creating new ones". The strategy recommends that states:

- ensure a visible police presence at and around licensed venues and events, and ensure action is taken for breaches of liquor legislation;
- develop a nationally agreed and workable definition of intoxication;
- increase community understanding of liquor licensing laws and requirements for the responsible service of alcohol in the context of harm reduction;
- increase capacity of police, local government and liquor licensing authorities to enhance enforcement of liquor licensing laws, particularly those relating to serving people who are intoxicated; and
- examine the liquor licensing laws in each jurisdiction with regard to the adequacy and appropriateness of current penalties for breaches and the feasibility of developing a demerit points system, especially for serious and repeat offences.

The National Alcohol Strategy was originally developed to cover the period 2006 to 2009 and was subsequently extended to cover the period to 2011. While we understand a revised strategy is being developed under the auspice of the Intergovernmental Committee on Drugs, it appears that the

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6 Liquor Act 1992 (Qld), s 141C; Liquor Regulation 2008 (NSW), r 40; Liquor Control Reform Act 1998 (Vic), s 26B; Liquor Licensing Act 1997 (SA), s 97; Liquor Control Act 1988 (WA), s 33(6B); Liquor Act 1980 (NT), s 6(h); Liquor Act 2010 (ACT), Pt 12; Liquor Licensing Act 1990, s 46A.

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current national strategy on alcohol has been folded into the current National Drug Strategy 2010-2015. This Strategy is broadly based on three pillars being - demand reduction, supply reduction and harm reduction. The current National Drug Strategy also reinforces the idea of a partnership between health and police portfolios to deal with the enforcement of excessive drinking.

The Intergovernmental Committee on Drugs has commissioned a number of independent reports and studies. Among these is a three part report produced by the National Centre for Education and Training on Addiction at Flinders University in collaboration with South Australian Police and with the input of various other state and territory police departments. Part three of this report, published in 2010, focused on police expectations and experiences in the enforcement of liquor licensing legislation.

The report found that dealing with intoxication at a conceptual and practical level was a priority for police and one of the most challenging issues that they faced. While serving and supplying an intoxicated and/or drunk person was an offence in every state and territory, jurisdictions defined these terms in different ways and applied different evidentiary burdens in relation to intoxication-related offences.

Across all jurisdictions, police respondents highlighted the difficulties associated with proving the offence of serving alcohol to drunken persons on licensed premises. The reasons for these difficulties varied between jurisdictions, but included issues such as:

- inadequate definitions of intoxication contained within the legislation;
- the range of defences against the offence available;

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• the need for police to remain on the licensed premises for a long period of time to observe drunken patrons being served alcohol;
• the fact that police observations of drunken behaviour are not considered sufficient proof of drunkenness;
• having offences related to the serving of alcohol to drunk patrons heard by liquor licensing magistrates who do not have expertise in this area; and
• the relatively small penalties that can be associated with serving drunk patrons.

The report concluded that the difficulties experienced by police in proving the offence of serving drunken patrons suggested that this issue should receive greater legislative attention.

2.2.2 Implementation at a State and Territory level

It is an offence under liquor licensing legislation in each state and territory for licensees, their managers or employees to serve alcohol to a person who is drunk or intoxicated. In addition, in line with the National Alcohol Strategy, each state and territory has introduced regulations making it a legal requirement for anyone working with alcohol products in the hospitality industry to undertake training in the responsible service of alcohol, which includes training on when to refuse to provide alcohol.

What it means to be "intoxicated" varies between jurisdictions. The ACT, New South Wales and Victoria all adopt a similar definition based on a person's speech, balance, coordination or behaviour being noticeably affected and it being reasonable in the circumstances to believe this is due to the consumption of liquor. In 2011, this definition of 'intoxicated' was adopted by the Northern Territory. Western Australia adopts a similar test but requires the subjects actions to be "impaired" as opposed to "affected", which is arguably a higher standard.

Queensland and South Australia have recently adopted a definition of 'intoxicated' similar to that used in the ACT, New South Wales, Victoria and Western Australia but expanded so as to cover effects attributable to

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10 Liquor Act 2010 (ACT), s 104; Liquor Act 2007 (NSW), s 5; Liquor Control Reform Act 1998 (Vic), s 3 AB.
11 Liquor Act 1980 (NT), s 7.
12 Liquor Control Act 1988 (WA), s 3A.

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substances other than alcohol.\textsuperscript{13} Queensland originally adopted a concept of "unduly intoxicated". This concept was changed by the \textit{Safe Night Out Legislation Amendment Act 2014 (Qld)} to more closely reflect the position in the ACT, New South Wales and Victoria. The concept of "unduly intoxicated" is now described by way of indicia such that a person is 'taken to be unduly intoxicated' where the person's speech, balance, coordination or behaviour is noticeably affected and there are reasonable grounds for believing the affected speech, balance, coordination or behaviour is the result of the consumption of liquor, drugs or another intoxicating substance.\textsuperscript{14}

Tasmania remains the only state not to define intoxication in the legislation.

As noted above, in the 2010 report produced by the National Centre for Education and Training on Addiction at Flinders University in collaboration with South Australian Police, this lack of certainty around the definition of "intoxicated" was identified as a significant impediment to the ability of police to provide effective enforcement.\textsuperscript{15} Therefore, legislative intervention since the date of those studies in the Northern Territory, Queensland and South Australia can be viewed as part of a continuing process of implementation of Recommendation 59.

Aside from this analysis, it is difficult for this Report to provide a conclusive view on the extent to which the Recommendation has been implemented by each jurisdiction's police forces. We do not, for example, have access to comparative data for enforcement action taken by each state's police on a year by year basis. However, a desktop search of publicly available material, including the websites of each jurisdiction's police departments and (where available) the police manuals, does provide some limited insight into the adoption of the Recommendation in each jurisdiction's law enforcement infrastructure. Where a state or territory is not covered in the paragraphs below, we found no relevant publicly available information.

In Tasmania, information on the police website indicates that the police have put in place an Alcohol Implementation Plan which sets out a number of measures for improving the policing of licensing laws in the state, including:

- providing Responsible Service of Alcohol training to Tasmania Police in Licensing and Road and Public Order positions to ensure they have the appropriate knowledge to enforce the liquor licensing laws;

\textsuperscript{13} \textit{Liquor Licensing Act 1997 (SA)}, s 4 "intoxicated".
\textsuperscript{14} \textit{Liquor Act 1992 (Qld)}, s 9A.
developing an online training package to increase knowledge and understanding of the application of the Liquor Licensing Act 1990, including Responsible Service of Alcohol provisions; and

- increased focus on the enforcement of liquor licensing laws including current responsible service of alcohol provisions.\(^{16}\)

In the Northern Territory, there is and has been a general ongoing government policy seeking to address the significant impacts of alcohol on the Indigenous population in NT known as ‘Enough is Enough’. This has flowed on to the NT Police, but not through any formal legislative requirements. In cooperation with the NT Department of Justice, the NT Police have dedicated significant focus to targeting alcohol-related crime and public order issues. This is one of the NT Police’s key strategic issues as set out in the NTPFES Annual Report 2013-2014\(^{17}\) and the NT Government’s 2014-15 Budget Paper.\(^{18}\) However, the focus in these publications appears to be on the prevention of alcohol related offences and the unlawful consumption of alcohol as opposed to the enforcement of responsible service of alcohol legislation against licensees or persons serving alcohol.

In New South Wales a three strikes disciplinary regime for the state’s licensed venues commenced on 1 January 2012. A strike can be incurred if a licensee or approved manager commits a prescribed serious offence under the *Liquor Act 2007* (NSW), including permitting intoxication or violence and selling or supplying liquor to a minor.\(^{19}\) Venues that incur a strike are effectively on a good behaviour bond for three years as any further convictions for key liquor offences in that period could lead to second and third strikes being incurred. Remedial measures, in the form of licence conditions, can be imposed where a strike is incurred. A third strike can result in the imposition of licence conditions, licence suspension for up to 12 months, licence cancellation and a moratorium on a new liquor licence being granted for the same business operators at the venue for up to 12 months, and/or disqualification of a licensee for any period of time.


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A publicly available register of institutions issued with a strike is available on the website of the Office of Liquor, Gaming & Racing.\textsuperscript{20} As of 8 April 2015 a total of 119 first strikes, 13 second strikes and 2 third strikes had been issued.

In Victoria, a five star and demerit points system was introduced in February 2011. This scheme is designed to target licensees who repeatedly break the law. Under the demerit points scheme, demerit points are issued where there is non-compliance with one of the six most serious offences under the Liquor Control Reform Act 1998.\textsuperscript{21} These offences relate to supplying liquor to an intoxicated person, supplying liquor or permitting liquor to be supplied to an underage person, and permitting a drunk and disorderly person or underage person on the licensed premises.

To complement the demerit points scheme, the five star rating system was introduced to reward compliant licensees. The five star rating system rewards licensees with a good compliance history with a discount on their annual fees. Licensees that obtain a four star rating will receive a five per cent discount, while those that have a five star rating will receive a 10 per cent discount.

The Victorian Commission for Gambling and Liquor Regulation maintains a demerit schedule on its website. As of 25 March 2015 a total of 67 licences were listed in the schedule with a total of 84 demerit points between them.

As noted above, the South Australian police have taken a lead role, together with the National Centre for Education and Training on Addiction at Flinders University, in producing a three part report on liquor licensing and law enforcement in Australia. This report identified a number of difficulties with enforcement of the offence of serving alcohol to drunken persons on licensed premises. The South Australian legislature has reacted to this by introducing (and subsequently widening as described above) a definition of "intoxicated".

South Australia has also introduced a Late Night Trading Code of Practice under which licensed premises operating after midnight must employ a drinks marshal (being a person approved as a Responsible Person under the \textit{Liquor Licensing Act 1997 (SA)}) to monitor compliance with liquor licensing legislation and in particular the offence of serving alcohol to a person who is intoxicated.

In Western Australia a review of the operation of the \textit{Liquor Control Act 1988 (WA)} was undertaken by an independent review committee in 2013, with input from various stakeholders including the WA police.

\textsuperscript{21} \textit{Liquor Control Reform Act 1998 (Vic)}, Pt 4A.
On the issue of training for the responsible service of alcohol, the independent review committee recommended that the mandatory training requirement be expanded so as to cover staff employed for crowd control in licensed establishments. This recommendation has not been expressly adopted in legislation, though it may form part of the requirements for obtaining a crowd controller's licence under section 37 of the Security and Related Activities (Control) Act 1996 (WA).

On the issue of the definition of "drunk" the committee considered various submissions, including from the WA police. The WA police submissions expressed concern that the definition was weighted against the police, particularly in proving that a person was "impaired" by alcohol as opposed to "affected" (as is the case in most other jurisdictions). The Committee acknowledged that the interpretation of the current definition and the use of the term 'impaired' can be challenging for WA police to successfully prosecute licensees for a breach of section 115(1) of the Liquor Licensing Act 1997 (WA). However, it concluded there were no convincing arguments contained in the submissions to justify an amendment to the term 'impaired'.

Lastly, on the issue of police enforcement of the Liquor Licensing Act 1997 (WA), the Committee recognised that there was a significant level of alcohol related harm occurring in Western Australia. It concluded that, although there appeared to be sufficient powers within the legislation to effectively enforce the provisions of the Liquor Licensing Act 1997 (WA), there was a perception in some sectors of the community this was not being done. The Committee concluded there was no need for sweeping changes to the enforcement provisions of the Liquor Licensing Act 1997 (WA), but rather that the existing powers should be used more effectively and more often when breaches occurred, particularly where the breaches are repeated. The Committee recommended that sufficient resources should be provided to the police and other enforcement agencies to meet the reasonable expectations of the community that the provisions of the Liquor Licensing Act 1997 (WA) be enforced.

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