Enacting safety and omitting gender:
Australian human rights scrutiny processes concerning alcohol and other drug laws

Abstract

Global momentum for drug law reform is building. But how might such reform be achieved? Many argue that human rights offer a possible normative framework for guiding such reform. There has been very little research on whether human rights processes can actually achieve such aims, however. This paper responds to this knowledge gap. It explores how one human rights mechanism – the 'parliamentary rights scrutiny process' – deals with alcohol and other drugs. We consider how four Australian parliaments scrutinised proposed new laws that would deal with alcohol and other drugs for their human rights 'compatibility'. We find that laws that would limit the rights of people who use alcohol and other drugs were routinely seen as justifiable on the basis that alcohol and other drugs were inherently 'unsafe'. Crucially, safety was conceptualised in a gender-neutral way, without regard to the potential role of gender, including specific masculinities, in the production of phenomena such as family violence and sexual violence and other public safety problems. Instead, such problems were regularly constituted as consequences, simply, of alcohol or other drug consumption. In making this argument, we build on the pioneering work of David Moore and colleagues (e.g. 2020). Their work asks important questions about how the causes of violence are constituted across different settings, including research and policy. Drawing on ideas from scholars such as Carol Bacchi (2017) and John Law (2011), they identify 'gendering practices' and 'collateral realities' in research and policy on violence, in which the role of men and masculinities are routinely obscured, displaced or rendered invisible. We find similar problems underway within human rights law. In highlighting these gendering practices and collateral realities, we aim to draw attention to the limitations of some human rights processes and the need for more work in this area.

Keywords

Alcohol, drugs, human rights, safety, gender, law

Introduction

Traditionally, the effects of alcohol and other drugs have been understood in 'pharmacologically determinist' ways (Moore 2020: 211) – as determined, that is, by the biological properties of substances 'themselves'. Over time, this way of thinking about substances has come under challenge from scholars from a wide range of disciplines, including those arguing that alcohol and other drug effects were socially constructed. In David Moore's early work on drinking cultures, for instance, he explored the way that 'the social meaning of drinking is constructed within [different] contexts', (1990: 1265) based on ethnographic fieldwork of the Skinhead subculture in Perth, Western Australia. Drawing on Burke's (1945) 'dramaturgical' perspective, Moore argued that drinking 'takes on different forms and meanings in different scenes', and found that 'having a quiet drink at home or the local pub with a friend is vastly different from heavy drinking with several friends in an inner-city club on a Friday night' (1990: 1268). In this work, Moore was also concerned with the role of masculinities and ethnicity in drinking and in violence, themes to which he would return in later work, albeit from different perspectives. This later work is part of what is sometimes called the 'ontological turn'[i] in alcohol and other drug scholarship. Inspired by ideas from feminist, science and technology studies, new-materialism and post-humanism, this work brings theoretical tools from scholars such as Karen Barad, Annemarie Mol, John Law, Gilles Deleuze, Bruno Latour and Donna Haraway to the field of alcohol and other drug research. Although this work varies in key respects, what it shares is a concern with the notion, common also in social constructionist literature, that pharmacology is 'anterior to its interaction with set and setting' (Moore 2020: 217)[ii]. Instead, it argues that drug effects 'emerge from—are co-constituted by—the multiple

forces and elements in assembled in consumption networks or events' (Moore 2020: 217), including substances, bodies, gender, spatio-temporalities, technologies and more. In other words, the effects of alcohol and other drugs and the forms of harm associated with them are not inherent to substances, inevitable, unavoidable, or natural, but shaped by 'drug events' (e.g. Dennis 2019; Farrugia 2017; Malins 2017; Dilkes-Frayne and Duff 2017; Fitzgerald 2015) and 'assemblages' (Deleuze and Parnet 1987) of various material, human and non-human forces in 'intra-action' (Barad 2007; Fraser 2006). These approaches collectively challenge the common, taken-for-granted assumption that alcohol and other drugs have certain singular, predictable, stable and fixed effects, highlighting instead the multiplicity, unpredictability, instability and inconsistency of drug effects (Fraser, Moore and Keane 2014, Fraser and Moore 2011, Gomart 2002). Such work opens up new questions and possibilities, and has influenced reforms to law, policy and practice (valentine and Seear 2020). Its significance lies in the fact that it helps us to think differently about how forms of harm associated with alcohol and other drugs emerge, and thus how they might be prevented. Such work also disrupts dominant ideas about who or what is to blame when it comes to forms of harm associated with or attributed to alcohol and other drugs, how responsibility and agency is apportioned, and what needs to be changed.

This special issue further explores these issues, by inviting its contributors to explore the various fault lines of contemporary drug policy, practice, research and law and how they might be disrupted using theoretical tools of the kind we have described above. The special issue marks the occasion of David Moore's retirement as Editor of this journal and seeks to engage with and extend his work and that of his collaborators. Our particular inspiration in this paper is recent work by Moore and colleagues on how the relationship between alcohol and violence is constituted through research, policy and practice (e.g. Moore, Duncan and Keane 2020; Moore, Duncan, Keane and Ekendahl 2020; Duncan, Keane, Moore, Ekendahl and Graham 2020; Duncan, Keane, Moore, Ekendahl and Graham 2020; Moore et al. 2017). That collection of papers explores a range of 'alcohol-related' problems in Australia, including 'alcohol-fuelled' or 'alcohol-related' violence. Drawing on Carol Bacchi's work (2017) on gendering practices, John Law's work on collateral realities (2011) and other critical work on the performativity of scientific and policy knowledges and practices (e.g. Bacchi 2009, Latour 2004, Barad 2007, Mol 2002), it examines how the agency of alcohol is constituted in research and policy processes, and how gender is elided along the way. A key theme to emerge across these studies is that 'the contribution of masculinities to violence involving alcohol, especially youthful masculinities, is erased in favour of simplistic claims about the causal role of alcohol' (Moore et al. 2017: 320). Research on alcohol and violence:

> ignores the complexity of assemblages of violence […] precludes recognition that variations in any of the co-constituting forces and elements (such as masculinities) can potentially produce or exclude violent events […] authorises blanket measures (such as 'lockout laws') that not only obscure important contributors to violence, but unnecessarily limit the choices of those unlikely to contribute to problems (most notably here women) […] and lends support to discredited gender stereotypes in which women's freedoms and pleasures are understood to be readily dispensable in the service of others. (Moore et al. 2017: 320)

More recent research on emergency department presentations also flattens out these complex dynamics, constituting alcohol as the principal agent of various forms of harm, including 'alcohol-fuelled violence' through four gendering practices (Moore, Keane and Duncan 2020). They find that gender is: omitted from consideration, overlooked when making policy recommendations (rendering such recommendations as gender-neutral), rendered as invisible via methodological considerations, and only occasionally addressed in terms of risk and vulnerability. Our paper seeks to engage with and build on these ideas, by considering the treatment of alcohol, other drugs and gender in a different set of practices: those unfolding under human rights law. As we will explain, the treatment of both alcohol and other drugs in human rights law is an area of considerable interest to researchers, policymakers,

advocates and people who use alcohol and other drugs, but there has been relatively little work on how these legal processes deal with substances and what this means (although see Seear 2020). In what follows, we adapt the questions that Moore, Keane and Duncan (2020) posed in their work on alcohol research and policy, to consider what human rights law does with alcohol and other drugs. We ask: How do alcohol and other drugs figure in Australian parliamentary human rights deliberative processes? How do these processes constitute the effects of alcohol and other drugs? How do they treat the agency of other forces and elements? And with what implications? In asking these questions, we aim to add to the body of scholarship that raises questions about how substances are problematised and what problems come to be constituted as effects of substances 'themselves'; how these effects are made and addressed through practices; and what the implications of such practices are. We also aim to draw attention to the need for more critical work on human rights processes and what they enable and foreclose regarding alcohol, other drugs and gender.

Human rights practices

Global drug policy is currently undergoing a seismic shift. Numerous countries, including Portugal, Canada, Uruguay and parts of the United States of America have decriminalised or legalised some drugs, such as cannabis, and momentum is building in other countries for reform. But how might such reform be achieved? What principles might guide such reforms? Many are enthusiastic about the potential role that human rights could play, as a potentially progressive catalyst and normative framework to guide legal and policy reform. In early 2019, for instance, the heads of all 31 United Nations agencies released a communiqué calling for decriminalisation of drugs and a move away from ineffective punitive approaches (United Nations Chief Executives Board for Coordination 2019). Importantly, the UN's call for immediate change noted that reforms must be shaped by human rights. The recent *International Guidelines on Human Rights and Drug Policy* recommend that all countries undertake a 'transparent review' of drug laws and policies for their human rights compliance, and subject proposed new laws to human rights 'assessment' (World Health Organization 2019). The underlying assumption in these calls is that human rights can help initiate less punitive approaches to illicit drug use, reduce forms of harm associated with drugs, such as drug overdose deaths, the spread of viruses such as hepatitis C, and other social and health problems, and greatly improve the lives of people who use illicit drugs. This has happened to some degree in Canada, where human rights law has been leveraged in a series of landmark legal cases to secure rights (e.g. supervised injecting rooms, heroin assisted treatment) for a small number of people. Beyond this, however, the claim is that human rights and drug policy have inadvertently operated as 'parallel universes', as one former UN Special Rapporteur previously argued (Hunt 2008) and that much can be achieved by bringing human rights and drug policy into conversation with one another.

This overlooks the numerous ways in which human rights and drug policy have already interacted, however, in some parts of the world. Australia is a useful case study in this respect. It is a signatory to the three international treaties that prohibit the use, possession and supply of specific substances, as well as various international human rights conventions. As a federated system, Australia has three levels of government, comprising: the Commonwealth, state and territories, and local. Each tier of government has responsibility for different issues, though these issues can sometimes overlap. In terms of drug policy, the starting point is the Commonwealth's *National Drug Strategy 2017-2026* (Department of Health 2017). This strategy emphasises harm minimisation through three pillars: demand reduction, supply reduction and harm reduction. The use of both alcohol and other drugs is otherwise regulated through a complex web of laws across all three levels of government. Alcohol and other drugs figure in several different areas of law, including the criminal law, public health law, child protection law and housing law, to name just a few (see Seear and Fraser 2014a). As some of these areas are the responsibility of the Commonwealth and some of the states and territories, and some local governments regulate the use of alcohol and other drugs on public lands, the specifics of how substances are managed varies. It is

beyond the scope of the article to explore these differences in depth, but the key point is that states and territories have some independence when it comes to making laws that deal with substances. For instance, the penalties for drug use and possession vary across the states and territories; approaches to the use and possession of drug paraphernalia also differ; and other laws, such as laws governing the rights and responsibilities of tenants in public housing vary – with differences in what can happen, for instance, if tenants are caught in possession of illicit drugs.

The legislative framework concerning human rights is also complex, and differs across the country. Australia does not have an overarching bill of rights, and has only limited human rights protections in its constitution (see Williams 2002). Thus, rights protections have proceeded in a more piecemeal fashion through legislative reform in the Commonwealth and its states and territories. Four jurisdictions have passed specific human rights laws. These are: the Australian Capital Territory (ACT), which was the first jurisdiction in Australia to develop a human rights 'charter' (as they are colloquially known), with the *Human Rights Act 2004*. The state of Victoria then introduced the *Charter of Human Rights and Responsibilities Act 2006*, followed by the Commonwealth, which has the *Human Rights (Parliamentary Scrutiny) Act 2011* (which is, unlike the other laws, limited to parliamentary scrutiny), and Queensland, which has the *Human Rights Act 2019*. Each of these laws sets out a (largely similar) human rights 'scrutiny' process for all proposed new laws in the relevant jurisdictions. This scrutiny process unfolds across stages. First, a new law (a 'bill') is proposed. When this bill is introduced into the parliament for debate, a 'statement of compatibility' detailing whether or not the proposed new law is compatible with human rights must accompany it.[iii] This statement is an assessment, first, of whether any human rights are 'engaged', or potentially infringed by the law, in the sense that those rights would be curtailed in some way. It also requires an assessment of whether or not such an infringement is justifiable, based on a legislative test.[iv] In the state of Victoria, for instance, that test appears in Section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006*, and states that:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
>
> a the nature of the right; and
> b the importance of the purpose of the limitation; and
> c the nature and extent of the limitation; and
> d the relationship between the limitation and its purpose; and
> e any less restrictive means reasonably available to achieve the purpose
>
> that the limitation seeks to achieve.[v]

Importantly, some rights (such as the right to protection from torture) are absolute, meaning that they cannot be limited in any circumstances. This designation is said to reflect the relative importance and inviolability of the right (Joseph and Castan 2013). The statement of compatibility must be put before parliament so that it can be debated. A parliament can pass a bill into law even if it limits human rights, and even if there is controversy or disagreement among members of parliament about whether such limitations are properly justifiable. This has led some experts to criticise them as a 'weak form' of rights protection (Gans 2009). Our interest here is not in the apparent strength or weakness of rights protections. Instead, we treat them as an important constitutive practice, like research or other policymaking processes, with the capacity to constitute the subjects and objects with which they deal. These deliberative processes thus offer important insights into how parliaments understand and manage alcohol and other drug problems and the rights of people who use alcohol and other drugs, and have potentially important lessons for how human rights might be mobilised to guide policy and law reform. Although our focus here is on Australian legislative processes, our findings may also be relevant to other

jurisdictions utilising similar human rights deliberative processes, and to those calling for human rights-based law reforms.

Theoretical approach

Our paper draws on and combines three theoretical approaches. The first is work from critical human rights scholars on the generative function of rights. As Costas Douzinas has argued, for instance;

> The legal recognition of a particular category of rights, say women's rights, is at the same time the partial recognition of a particular type of identity linked with these rights. Conversely, an individual recognized as a legal subject in relation to women's rights is accepted as the bearer of certain attributes and the beneficiary of certain activities and, at the same time, as a person of a particular identity which partakes amongst others of the dignity of human nature. (Douzinas 1996: 127)

In later work, Douzinas argues that human rights 'have acquired ideological and legal pre-eminence precisely because they are so central in bestowing subjectivity and identity', meaning that perhaps 'the greatest achievement of rights is ontological: rights contribute to the creation of human identity' (2007: 7). The point here is that subjects are constituted via rights processes. This matters because rights outline, endorse and inscribe 'appropriate modes of being human, and authorise disciplinary and regulatory practices, including political subjection, control and violence' (Seear 2020: 43). Our second framework is John Law's work on 'collateral realities' (Law 2011). Law understands policy making and other practices to be generative. He defines collateral realities as the less obvious or explicit realities:

> that get done incidentally, and along the way. They are realities that get done, for the most part, unintentionally. They are realities that may be obnoxious. Importantly, they are realities that could be different. It follows that they are realities that are through and through political. (2011: 156)

This framework on collateral realities has already been applied to the study of alcohol and other drug research (originally by Fraser 2013), as well as law (Seear 2015). Our third and final inspiration for this paper is Carol Bacchi's work on gendering practices, first introduced to us through the aforementioned work of Moore and colleagues (Moore et al. 2017). Bacchi argues that policy often involves 'gendering practices', which she defines as:

> active, ongoing, and always incomplete processes that *constitute* (make come into existence) […] 'women' and 'men' as specific kinds of unequal political subjects […therefore] when we develop or analyze a policy, we ought to ask specifically how it is potentially gender*ing* and how it may encourage the production of behaviors and characteristics conventionally associated with those called 'women' and 'men', making them come to be. (2017: 20; original emphasis)

This focus on 'gendering practices' builds on Bacchi's longstanding interest in the ways that policymaking processes actively constitute problems through processes of problematisation and problem representation (Bacchi 2009). In other words, problems, objects and subjects, as well as gender, are not given or fixed in nature but shaped via the processes that purport to be addressing them as 'pre-existing'. This work has been extended to contemplate how non-binary gender identities are figured in policy research and design (Chetkovich 2019). Bacchi's work has already been influential in studying problem formulation in alcohol and other drug policy (e.g. Moore and Fraser 2013; Fraser and Moore 2011) and law (Seear and Fraser 2014b) but there has been no attempt, as far as we are aware, to extend her interest in gendering practices to human rights law. Nevertheless, such an analysis is appropriate, given that Bacchi defines policies as 'processes of governing in a broad sense', noting that they include 'specific

pieces of legislation', government reports, the role of expert knowledges in discursive aspects of policy and so on. We see human rights processes as a governing process.

In what follows, we combine the insights from Douzinas (2007), Law (2011) and Bacchi (2017) to explore what human rights processes do with subjects, objects and gender, and to consider the collateral realities made, along the way. Combining these theoretical frameworks allows us to consider a series of effects generated by human rights law, including effects that may have been overlooked within the field of alcohol and other drug research up until now, but which have important implications for the future application of human rights frameworks to the field.

Method

To undertake this analysis, statute data were collected through a search for the word *drug* in Australian legislation databases. In the Australian Capital Territory, this was done via the ACT Legislation Register website and then filtering to the years from 1 July 2004 onwards, being since the commencement of the *Human Rights Act 2004*. In Victoria, this was done via the Victorian Legislation website, limiting the search to the years 2007 and onwards, being since the commencement of the *Charter of Human Rights and Responsibilities Act 2006*. In the Commonwealth, this was done via the Parliament of Australia website, limiting the search to the years 2012 onwards, being since the commencement of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Finally, in Queensland, this was done via the Queensland Legislation website limiting the search to the years 2020 and onwards, being since the commencement of the *Human Rights Act 2019*. The search collected any bills in these databases that mentioned the term 'drug'.

We found 317 bills in total. Given that the search was conducted on the term 'drug', a range of substances featured in these bills. Alcohol featured 31 times, whereas the generic descriptors 'drugs' and 'drugs of dependence' featured 25 times and 15 times, respectively. Specific substances such as cannabis (6 times), ice and MDMA (1 time each) were mentioned less frequently. There was also mention of medicinal drugs. The search was, however, limited to the term 'drug' so, for example, if a bill discussed alcohol or another drug but did not use the term 'drug', it would not have been captured in this search and subsequent analysis.

After identifying these bills, we then collated relevant documents including: the bills themselves; the statements of compatibility; explanatory memoranda that accompany bills, in which more detail about the purpose and nature of proposals is provided; scrutiny committee reports; and the official record of parliamentary debates, the Hansard. The Hansard is a verbatim written record of all parliamentary debates, including debates about proposed laws and other parliamentary processes. The Hansard is publicly available and regularly updated following each parliamentary sitting. 69 bills raised human rights compatibility issues relating to either alcohol or other drugs (and sometimes both) during the parliamentary scrutiny process. Of these, most concerned criminal law (47 bills), followed by administrative law (24 bills), and civil law (1 bill). Of these 69 bills, 60 passed, 7 either lapsed or failed to pass, and two were still under deliberation as at the time of writing.

We analysed the bills' extrinsic materials, assessing which rights were claimed to be potentially limited by the bills, and the rationales offered for those proposed limitations. We also carefully analysed the language used to describe alcohol and other drugs, and what problems they were said to pose. We also considered what other forces or collateral realities were present or absent in such accounts, and considered the possible implications of those presences and absences. For example, we also analysed the extrinsic material for any discussion of gender. In the next section, we outline our findings through consideration of particular bills.

Analysis

A wide range of rights were engaged by the measures proposed across these bills. The most commonly engaged rights were:

- Privacy and reputation (engaged on 32 occasions);
- Liberty and security of the person (15 occasions),
- Presumption of innocence (14 occasions);
- Recognition and equality before the law (14 occasions);
- Fair trial (13 occasions);
- Freedom of movement (8 occasions);
- Protection from torture (7 occasions);
- Right to life (6 occasions); and
- Protection of the family and child (6 occasions).

A wide range of alcohol and other drug effects were also constituted. This constitutive process begins with the bill's proponent (such as the relevant Minister) responsible for the carriage of the bill through the relevant house of parliament offering an explanation not only of *what measures are proposed* but *why such measures are thought to be needed*. In offering such explanations, parliamentarians frequently offer pronouncements on *what the effects of alcohol and other drugs are*, and *what problems are thought to be generated by them*, or *the range of problems they shape*. Then, in outlining which human rights, if any, are engaged by these provisions, and in articulating whether and why such limitations might be justifiable,[vi] parliamentarians expound on the *nature and extent* of the problems thought to be posed by alcohol and other drugs. All of this happens because the scrutiny process requires parliamentarians to consider whether rights infringements are justifiable. As such, the process obliges parliamentarians to articulate the apparent scale or gravity of the threats, risks, harms or effects produced by alcohol and other drugs, and to explain how and why the proposed measures that limit rights are an appropriate response to the harms being addressed. The measures proposed should have been designed with the scale of these threats, risks, harms or effects in mind. Importantly, we found that human rights processes very often led to claims that alcohol and other drugs were inherently unsafe, and that rights infringements were justifiable in order to protect communities from the safety risks posed by alcohol and other drugs. In the next sections, we explore how safety is constituted through human rights criteria and why this matters, followed by a consideration of how gender is elided in articulations of safety and assessments of human rights compatibility.

Constituting safety

Several potential rights limitations were said to be justifiable, necessary and proportionate on the basis that they would enhance, protect or promote safety. Where human rights were engaged, the argument was often that limitations on human rights (for example, through drug and alcohol testing) were reasonable and proportionate in order to protect the safety of individuals, particularly children and young people. Of the 69 bills analysed, only eight did not engage with safety in any way. Of these eight, seven proposed measures pertaining to alcohol and other drugs for other reasons. For instance, the Australian Sports Anti-Doping Authority Amendment Bill 2013 (Cth) proposed measures designed to advance fairness in sport. A further one bill had an unclear rationale because the relevant Minister did not fully explain the reasons for the proposed measures regarding mandatory reporting of health practitioners practicing while intoxicated by alcohol or drugs (Health Practitioner Regulation National Law (ACT) Bill 2009 (ACT)). The remaining 61 bills all had a clearly articulated connection to safety. The bills proposed measures to regulate alcohol and other drug effects and promote safety across a range of settings, including in workplaces, corrections and prisons, on public transport, in courts, in

public spaces where major events are held, and in private residences. As well as traversing different settings, the bills proposed measures designed to keep a range of different subjects safe. These included:

- *People who use roads, waterways and other forms of transport such as trains.* For example, the Lakes Amendment Bill 2017 (ACT) proposed alcohol and other drug testing of people using lakes and was designed to protect the safety of people using waterways;
- *People who consume alcohol and other drugs.* For example, the Health Legislation Amendment Bill 2015 (ACT) sought to protect people who may be impaired by a recreational drug from civil litigation when administering the drug naloxone to another person in an emergency situation, and this was said to be justified on the basis that naloxone saves lives;
- *Workers.* For example, the Law Enforcement Integrity Legislation Amendment Bill 2012 (Cth) proposed measures for alcohol and other drug screening of customs workers, a measure said to be explicitly about providing a safer working environment;
- *Communities.* For example, the Sex Offenders Registration Amendment Bill 2016 (Vic) proposed measures allowing courts to prohibit registered sex offenders from using or obtaining a drug of dependence, and also proposed measures for subjecting such offenders to alcohol and other drug testing. This was said to be necessary in order to keep communities safe; and
- *Children.* For example, the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (ACT) proposed measures to legalise the cultivation of cannabis plants and the possession of cannabis but contained other measures to protect children from exposure to cannabis (including smoke) on the basis that they were especially vulnerable.

Looking at these different settings and subjects more closely, we see that the bills constitute alcohol and other drugs as posing different kinds of threats to safety. These include, as already mentioned, threats to the safety of publics but also, crucially, to public order, and the safety of individuals in both public and private spaces. Several bills proposed measures that were said to be justifiable on the basis that they would keep communities safe and prevent offending and re-offending. Sometimes the language of safety was explicit. For instance, the criminalisation of the production, sale and promotion of psychoactive substances would lead to rights limitations said to be justifiable on the grounds that untested synthetic substances pose a potentially grave threat to public health and safety (Drugs, Poisons and Controlled Substances Miscellaneous Amendment Bill 2017 (Vic)), although how and why was not fully explained. Other bills were concerned with protecting community safety by preventing re-offending. So, for instance, the Corrections Legislation Further Amendment Bill 2017 (Vic) proposed alcohol and other drug testing in part, to 'lessen the risk of the prisoner or offender reoffending or posing a danger to the community' (*Parliamentary Debates*, Legislative Council, 21 September 2017: 4932). In some instances, the connection between alcohol and other drug use and community safety was implied. For example, the Sentencing Amendment Bill 2010 (Vic) proposed new sentencing powers for judges, including the power to make intensive correction management orders to address the alcohol or other drug use of offenders. Offenders placed on such orders would be released back into the community but intensively managed and supervised. Such measures limited key human rights such as the right not to undergo medical treatment without consent. However, the Minister's view was that this was justifiable. As he explained:

> A condition governing [orders] is that the offender must submit to treatment programs […] which may limit the offender's right not to be subjected to medical treatment without his full, free and informed consent, as protected by section 10(c) of the charter. I nevertheless consider that any limit is reasonable and demonstrably justifiable in the terms of section 7(2) of the charter. (*Parliamentary Debates*, Legislative Assembly, 6 October 2010: 4022)

Circular statements such as these were commonplace in the human rights statements we analysed. Ministers would often declare that rights limitations were 'demonstrably justifiable' or simply

'reasonable', with little to no demonstration of why. For this reason it was often important to attend carefully to language in other parts of the compatibility statement to establish the supposed basis for rights compatibility. In the case of the Sentencing Amendment Bill 2010 (Vic), the measures were designed to address the 'underlying causes' of offending (*Parliamentary Debates*, Legislative Assembly, 6 October 2010: 4023), and were a 'necessary measure to prevent crime and promote respect for the law' (*Parliamentary Debates*, Legislative Assembly, 6 October 2010: 4020). They would work 'to protect the community from the offender, to facilitate the rehabilitation of the offender and to deter the offender from similar reoffending' (*Parliamentary Debates*, Legislative Assembly, 6 October 2010: 4021). Here, the implicit claim is that consumption of alcohol or other drugs leads to criminal offending, rendering communities unsafe and in need of protection.

Similar logics were in operation in many other criminal bills. For example, the Bail Amendment (Stage One) Bill 2017 (Vic) would allow for the implementation of several changes to bail laws. Those changes were informed by a review of the previous bail laws by former Supreme Court Justice Paul Coghlan and findings from Victoria's landmark Royal Commission into Family Violence (2016). The bill would set out the purposes of bail and 'remind decision-makers of the important legal principles relevant to bail' (*Parliamentary Debates*, Legislative Council, 8 June 2017: 3334). It would provide that bail must be refused for serious drug offences unless the accused shows a compelling reason. If a person were to be granted bail pending a hearing, decision-makers would have the power to impose bail conditions, including that they be required to report regularly to a police station, reside at a particular address, comply with a curfew, and surrender their passport; and that they be prohibited from consuming any alcohol or other drugs, and attending venues that sell alcohol. Some of these conditions had different rationales. For instance, the requirement that the accused surrender their passport is designed to ensure that they do not abscond, and that they appear in court for later hearings. In contrast, the regulation of alcohol and other drug consumption appeared to be tied to community safety and welfare more broadly.

These articulations of risk and safety are important in three interconnected senses. First, they suggest that alcohol and other drugs are constituted as frequently and inherently unsafe. Alcohol and other drugs are positioned, both implicitly and explicitly, as playing a major causal role in criminal offending. Second, they constitute safety as an important political concern; a legitimate, essential and achievable public policy objective; and an objective the pursuit of which justifies interferences with numerous rights. In this sense, we might think of a 'right to safety' as an important collateral reality (Law 2011) of parliamentary scrutiny processes. Following Douzinas (2007, 1996) we might also think of these processes as constitutive of subjectivity and identity; here, although safety is not itself a standalone human right, scrutiny processes constitute being safe as a vital aspect of public and private life, and of what it means to be human. This emphasis on safety is not surprising, given that these human rights laws recognise the right to life. In most instances, however, and crucially, it is the safety of others (i.e. people other than those who use alcohol or other drugs) that is positioned as at risk and in need of safeguarding. To the extent that safety is constituted as a vital aspect of public and private life, then, and of what it means to be human, we argue that people who use alcohol and other drugs are constituted as a perpetual threat to society. These scrutiny processes appear to invoke utilitarian considerations in which the safety of the general public appears to trump the safety of people who use alcohol and other drugs. These assessments thus have the effect of constituting those who use substances as outside the human (see also Butler 1993). Third, in most instances, when articulating proposed rights limitations and the reasons why they might be justified, there were few attempts by parliamentarians to explicate the bases upon which alcohol and other drugs undermine individual or community safety. The connections between alcohol and other drugs and safety were often simply assumed or asserted, without further explication, or articulated in nebulous and vague ways. Of particular interest to us is the way that human rights processes resulted in generalised references to 'safety' and 'risk', particularly in regards to offending and reoffending. Especially important, we suggest, is the absence of almost any references to

who might be perpetrating such crimes, or the gendered dimensions of some phenomena. We consider these issues in the next section.

Constituting gender

As we noted earlier, human rights processes instantiate the agency of alcohol and other drugs in various phenomena, eliding the potential role of other human and non-human forces. But what other forces do we see being omitted here? There are many possibilities, especially given the wide range of problems alcohol and other drugs were associated with in the bills we studied, and the complexity of these phenomena, but in this section we focus on one particularly stark omission: gender. Gender was notably absent in several respects. None of the human rights processes we analysed explored alcohol and other drugs alongside gender. This is notable because several bills dealt with problems that have a well-established link to masculinities, such as family violence and sexual violence. A recent review of the 'history and current state of interpersonal violence research and prevention' amongst men and women, which cites estimates from both the World Health Organization and the United Nations, notes that men are 'overwhelmingly more likely than women to be both perpetrators and victims of interpersonal violence' (Fleming et al. 2015: 250). This same review also notes that:

- '95% of persons convicted of homicide were male';
- 'between 25 and 38% of women [worldwide] experience some sort of violence perpetrated by male partners'; and
- '81% of interpersonal violence deaths were men'. (Fleming et al. 2015: 250-51)

Violence is a gendered problem in Australia (Fitz-Gibbon 2021). Such factors were not examined in the bills we studied, however. Take, for instance, the ACT's Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2019, which sought to establish a drug court with an associated system for alcohol and other drug treatment orders in that jurisdiction. The court would allow those who had committed certain offences to avoid a term of imprisonment, if willing to plead guilty and undergo intensive alcohol or other drug treatment. The court would be open to many offenders, except those accused of 'serious violent' offences and 'sexual offences'. Serious violent offences were defined as: murder, manslaughter, and the intentional or reckless infliction of grievous bodily harm. Offences such as stalking, assault and other family violence offences falling short of serious offences would therefore be included. The explanatory statement accompanying the bill described it as 'part of a goal to reduce recividism (re-offending) by 25 per cent by 2025'.[vii] In other jurisdictions, such as Victoria, 90% of drug court participants are men (KPMG 2014). We might speculate as to why, but it is likely to reflect broader trends in which men most often perpetrate crimes, as we noted earlier. Gender was not mentioned in the explanatory statement or as part of the human rights compatibility statement, however. For instance, the bill was said to engage the 'right to protection of family and children'. In assessing human rights, it was said that the offender may need to reside separately from the family unit and that this may limit this right. However, this was seen to be justifiable because:

> The **nature of the right** is not absolute, but has been characterised as a protection against unlawful or arbitrary interference of the family unit. The **purpose of the limitation** is to protect victims of family violence, including to ensure the safety and protection of children, and to make perpetrators accountable for family violence. This is through the provision of tailored family violence programs. The **nature and extent of the limitation** is that by protecting one party in domestic and family violence, the other party's rights are necessarily limited. These restrictions are proportionate to the aim of keeping people safe and are the **least restrictive means possible** in the circumstances. The means used are reasonable, considering the growing evidence that shows the persistence and prevalence of domestic violence. (7; original emphasis)

In this and relevant documents accompanying the bill, including the presentation speech, we encounter gender-neutral references to subjects, described variously as 'perpetrators', 'victims', 'children', 'parties' or 'people'. Although family violence is said to be persistent and prevalent, there is no assessment of which groups may be more at risk of experiencing family violence and whether this raises any human rights considerations worthy of analysis. There is no mention of the role of specific masculinities in the production of violence. The management of substances was ultimately deemed to be appropriate, thus centring substances as having a critical, causal role in harms such as family violence, while gender is unaddressed.

Gender-neutrality was also a feature of other bills addressing violence and family violence, including those bills we described in the previous section. This was especially notable in the scrutiny process pertaining to the Bail Amendment (Stage One) Bill 2017 (Vic), which, as we noted earlier, was informed in part by findings from the Royal Commission into Family Violence. The role of gender (particularly masculinities) was central to many of the Commission's deliberations, findings and recommendations (Sifris, Seear and Grant 2016). The Commission acknowledged the disproportionate impact of family violence on women and children.[viii] Gender did not explicitly figure in proposed reforms to bail laws, however. For instance, though the bill required bail decision-makers to consider the risk of family violence when making bail decisions, there was no provision that decision-makers should consider the gender of alleged perpetrators or victims when deciding whether or not to grant them bail. No other bail conditions attended explicitly to gender, even though attending to gender might be important, given its importance in assemblages of crime. Other putative factors were instead singled out for special attention, including, of course, alcohol and other drugs. This is a policy decision, and one we might see in other jurisdictions without a human rights charter. The key point, however, is that the human rights process does not prompt a consideration of gender issues. Rather, proposed bills pass through rights scrutiny without any consideration of gender. The scrutiny process thus has the effect of further eliding the role of gender in family violence, while fixing the associations between alcohol, other drugs and unsafety. It does this by declaring the proposals to be *necessary*, *reasonable*, and so on. Gender, which was such a prominent feature of the landmark Commission that prompted these reforms, becomes invisible, and human rights processes neither afford nor prompt any resistance to its disappearance.

The aforementioned Sentencing Amendment Bill 2010 (Vic), which proposed new sentencing powers, proceeded in the same way. The potentially gendered dimensions of some offending are neither a feature of the bill itself nor considered as part of the scrutiny process. This erasure of gender occurs despite the fact that one part of the rationale for the bill, referenced in the previous section, used gendered terminology to describe the targets of the bill. There, the Minister observed that the orders 'may limit the offender's right not to be subjected to medical treatment without *his* full, free and informed consent' (*Parliamentary Debates*, Legislative Assembly, 6 October 2010: 4022; our emphasis). This was not reflected in other sections of the statement of compatibility, however, where the Minister reverted to binary language ('his or her') to describe the targets of the bill.

Similar problems can be found in the Sex Offenders Registration Amendment Bill 2016 (Vic). That bill was designed to protect the community and children from sexual abuse. It would introduce broad new powers for courts to make 'prohibition orders' for registrable sex offenders, all of which were designed to protect the 'sexual safety of one or more persons, of children or of the community generally' (*Parliamentary Debates*, Legislative Council, 24 March 2016: 1493). Although the court would have discretion to make other orders it considered 'necessary or desirable', alcohol and other drugs were singled out for special attention. So, clause 8 of the bill allowed for orders 'prohibiting the registrable offender from using, or unlawfully obtaining, a drug of dependence' and prohibiting 'the registrable offender from consuming alcohol'. In the statement of compatibility, these measures were described as justifiable on the basis that they are 'common risk factors of sexual offenders' (ibid: 1495). Here, the consumption of many different substances was said to pose a risk for sexual offending, thereby

positioning substances as having predictable effects regardless of the type of substance or the amount consumed. Although the court could take other factors into account when deciding whether or not to make an order, including age and other 'circumstances' such as accommodation and employment needs, gender was not listed as a relevant factor. In the statement of compatibility accompanying the bill, the relevant Minister briefly considered vulnerability to sexual abuse and assault. Noting that the protection of children was 'the core purpose' of such orders, the Minister qualified this by pointing out that 'persons vulnerable to sexual abuse and requiring of protection are not limited to children, and that sexual offending can target all age-groups' (ibid). The bill would therefore also allow orders to be made for the protection of 'adults or the community generally' (ibid). While we acknowledge, of course, that people of all genders can be victims of sexual offending, it is noteworthy that the scrutiny process only constitutes two categories of subject as vulnerable to such abuse: children and adults. Without further differentiation, or any attempt to recognise the importance of gender, we conclude that human rights processes obscure complex dynamics including those pertaining to sexual abuse.

To illustrate the point further, the ACT's Children and Young People Bill 2008 introduced measures to protect children and young people from the significant risk of abuse and neglect due to a primary caregiver's parenting capacity being impaired because of their use of substances. The proposed legislation was, in part, a response to two reports: *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of Child Protection Management* (The Vardon Report) and *The Territory's Children: Ensuring Safety and Quality Care for Children and Young People* (The Murray Report). The Vardon Report noted that exposure to drug and alcohol use by parents could render children in need of care and protection. The Murray Report found that, of children and young people who had experienced abuse while in care:

- 56% of their parents used drugs or alcohol excessively (though 'excessive' was not defined in the report);
- 49% of families had repeated reports of domestic violence;
- 38% of parents had a diagnosed mental illness or personality disorder;
- 15% of parents had a criminal history or were currently in jail; and
- 38% of families were characterised by both parental domestic violence and parental drug and alcohol overuse – the most common combination of 'concerning' social characteristics in child protection reports and on children's files (though 'overuse' was not defined in the report).

The report contended that increased substance or alcohol abuse caused a 'breakdown' in parenting and resulted in rising rates of domestic violence and increasing reports of child abuse amongst children in care. The types of abuse included sexual abuse, emotional abuse, neglect and physical abuse. Detailed accounts of the reasons why alcohol and other drugs posed threats to safety were rarely offered, however. Even when bills were informed by major reports, as with the Children and Young People Bill 2008, key elements remained imprecise. There was no detail, for instance, on what 'excessive' consumption, substance 'abuse' or 'overuse' entailed, and no attempt to explore whether different substances or consumptive practices have different implications for levels of safety. In many cases, alcohol and other drugs were simply described as uniformly unsafe, attached to generically described phenomena such as 'offending' and 'reoffending', without distinctions as between crimes or offenders, and proposed measures were aimed at preventing *any* alcohol or other drug consumption. Crucially, there was also no consideration of potentially gendered patterns of abuse and family violence.

Where bills do address gender, it is often addressed only in binary terms. For example, in legislation empowering a police officer or authorised person to direct the removal of items that obscure a person's face for the purpose of conducting alcohol or drug testing, there was provision that a directed person may request permission to remove the item in front of a police officer or authorised person 'who is the same sex' (Road Transport (General) Amendment Bill 2011 (ACT)). Legislation for stop, detain and

search powers at major events, which could lead to the discovery of prohibited substances, was amended to provide that a police officer may conduct a search only if 'the officer is the same sex as the person being searched' (Major Events Bill 2014 (ACT)). A recent audit of ACT laws pointed to the need to 'ensure laws do not assume binary gender in a way which is not fully inclusive' (Equality Australia 2019: 21). Indeed, in these bills there is no consideration of gender diverse people and their ability to nominate whether a male or female person performs the procedure. Gender diversity is effectively erased alongside gender. These measures all passed through rights scrutiny and were deemed to be reasonable, justifiable, and so on. In this sense, we can say that scrutiny processes are also *gendering* in that they help to reproduce and stabilise the gender binary.

Authorising 'neutrality'

The particularities of parliamentary human rights processes play an essential role in the constitution/erasure of gender. We say this because the scrutiny process allows bills to be adjudged against apparently neutral, stable and 'objective' criteria, such as reasonableness. The purported 'neutrality' and objectivity of these processes ultimately lends credibility to the bills. In other words, the public are to feel reassured that the bills were tested against apparently consistent and reliable criteria deemed to protect the rights of all. But this overlooks the gendered dimensions of the tests themselves. Our argument here is informed by feminist scholarship, which has long highlighted the problems with apparently 'objective' legal tests, including those based on reasonableness (e.g. Cane 2013, Conaghan 1996, Cahn 1992). For instance, many areas of law incorporate tests based on the purportedly objective standard of the 'reasonable person' (or, in earlier times, the 'reasonable man'). Although the nature of these critiques varies, a key complaint is that reasonableness tests implicitly reinforce the notion that 'exterior and purportedly "impartial" referents are the most reliable, rational and valuable methods for evaluating human experience (Seear 2015: 79). As Naomi Cahn (1992: 1405) explains, such:

> conceptions of reasonableness are gendered through their creation of a standard of conduct based on rationality, exclusive of emotions and morality. Feminist theory has re-examined the reasonableness standard as part of a critique of 'objective' standards. So-called neutral and objective standards may contain unstated assumptions that are actually gendered.

Such critiques are relevant to our analysis in at least three senses. First, the criteria used to assess human rights limitations similarly purport to be neutral, objective, self-evident and easily understood. We are enjoined to think of them as a stable, reliable and objective touchstone against which potential parliamentary excesses can be checked. Second, they explicitly use the language of 'reasonableness', which invites critiques of the kind Naomi Cahn and others mention. Third, as we explain in this section, they reproduce the erasure of gender (whilst concurrently deferring to masculine ideals such as reason, rationality and objectivity) by failing to afford gender any dedicated attention in the scrutiny process.

In many instances, proposed measures are described as 'proportionate' but proportionate in what we say is a narrow sense. Proportionality is conceptualised principally in terms of the asserted relationship between the problem (e.g. criminal offending) and the proposed measure in response (e.g. alcohol and other drug testing) and even then, assessments are fairly superficial. They are superficial in the sense that while several bills problematise alcohol and other drug consumption, there is often no attempt to consider whether it is proportionate to impose measures that might affect all members of the public or categories of people ('offenders') without differentiation, including, critically, as to gender. Hence, bills are routinely said to be rights-compliant even when uneven effects are present. There is no attempt to assess whether the application of blanket measures to whole populations is justifiable, necessary or proportionate, or to consider whether the authorisation of uniform measures for populations is reasonable. This is in part, we suggest, an effect of the requirements of human rights scrutiny processes, which demand that measures are not arbitrary. In many cases, this appears to encourage measures that

would encompass everyone, on the basis that more targeted or selective approaches would be too arbitrary, or insufficiently neutral. Here, adherence to the myth of neutrality creates new problems. Put simply, attempts to guard against arbitrariness authorise universal measures in an attempt to protect citizens against unreasonable, inconsistent or even biased exercises of authority and power. Paradoxically, though, this is a perverse outcome for some, especially women, who are, as Moore et al. (2017: 320) notes, more 'unlikely to contribute to problems' such as family and sexual violence in different-gender settings and yet at risk of rights infringements on the basis of a generalised attempt to prevent, for instance, 'people' from offending, or 'people' from creating safety risks in public spaces.

Following Bacchi (2017), Moore, Keane and Duncan (2020) and Moore, Duncan, Keane and Ekendahl (2020), we argue that human rights processes do not typically allow parliamentarians to attend to the complexity of social problems. Instead, they authorise measures such as alcohol and other drug testing and treatment, prohibitions on alcohol or drug consumption, or granting new search and seizure powers without warrants in public spaces. Such developments have three key effects. First, they concretise the relationship between alcohol and other drugs and social problems, and have the potential to reinforce public understandings of *any* substance use as a (or the) key driver of such problems. As a consequence, putatively neutral and objective human rights processes help stabilise the idea that the potential for violence or abuse is universal, laying hidden in us all, capable of being unleashed by even very small amounts of alcohol or other drug use (see also Seear and Fraser 2013). Second, this erases the role of specific masculinities in the production of problems including those pertaining to public and private violence, and fails to acknowledge the gendered dimensions of safety. There is no consideration of masculinities in bills dealing with public order and public safety issues, for instance, such as safety on public transport, at major events such as sporting events and music festivals, or in other public spaces. Gender should have been relevant here, given the well-established links with masculinities in these contexts, and given that women, trans, non-binary and gender-diverse populations are at greater risk in such contexts and feel less safe in public spaces (Fileborn 2020). If human rights processes were sensitive to such considerations, they would have afforded or required parliamentarians to consider such things. But this would require a major conceptual shift in how several criteria relating to rights limitations are interpreted and applied. For instance, when considering if proposed measures were 'proportionate', or 'arbitrary', parliaments might have considered whether blanket measures applied to populations was indeed appropriate, on gender grounds. Similarly, when assessing whether any 'less restrictive means' were available, parliament might have considered policy alternatives directed more specifically towards men and specific masculinities. The same problem holds regarding the arbitrariness test. Put simply, men and masculinities are not singled out for consideration or special treatment. On several occasions, random testing was said to be more appropriate in order to overcome any perceived arbitrariness. This included, crucially, bills that purported to enhance community safety more generally. But is there not something arbitrary about the application of general measures to populations, including those who are much more likely to be victims (such as women and gender diverse people)? Such questions are not addressed in human rights assessments. Instead, 'gender differences are obscured via the production of a generic norm' (Moore, Duncan, Keane and Ekendahl 2020: 3). Indeed, none of the bills we studied address the fact that men are more likely to engage in some of the problematic behaviours being addressed, and there were no gender-specific measures in these bills. In this sense, a key 'gendering practice' (Bacchi 2017) of human rights processes is that it helps render gender as 'invisible' (Moore, Duncan, Keane and Ekendahl 2020: 9). This is a puzzling result, especially with regards to phenomena such as violence. As Moore et al. (2021) have recently argued, 'men's drinking (as well as masculinities in general) should be a prime focus of specific policy attention and initiatives'. This last observation by Moore et al. (2021) brings us to the third and final reason why the gendering practices of human rights processes matter. The erasure of gender differences in favour of a generic subject helps direct resources towards certain measures (e.g. more policing, criminalisation of drugs) and away from other potential public policy responses (e.g. addressing masculinities in health promotion, education and law reform). This, in turn, has likely material effects.

We treat these articulations as not simply *descriptive* of alcohol, other drugs and effects, in the sense of being representations of pre-existing and established phenomena, but as *constitutive* of such effects. One reason for this is that the vast majority of bills (60 of 69) became law, thus bringing new material arrangements into being, such as: laws regulating consumption; rules regarding eligibility for access to medical treatment; conditions regarding eligibility for licensing; requirements for alcohol and other drug testing and treatment; changes to criminal laws that have implications for the prospect of conviction; and specific, additional powers for police, corrections staff, protective services officers and others to search people, seize objects, and more. By directing policy attention and resources to some factors or forces while neglecting others, we miss crucial opportunities for intervening in and addressing social problems. These gendering practices are likely to generate or exacerbate those problems, rather than to prevent them.

Conclusion

This paper has explored how parliamentary human rights processes in Australia deal with alcohol and other drug issues and how gender factors into such assessments. Our findings suggest that human rights scrutiny processes do not necessarily offer protection against rights limitations for people who use alcohol and other drugs, as some have suggested they might. We found that parliaments proposed laws that would limit a wide range of rights for its citizens, in a diverse range of settings and contexts, and that they sought to justify those rights based on simplistic assertions about the effects of alcohol and other drugs, particularly claims they pose an inherent threat to safety. The notion that alcohol and other drugs pose a safety risk will not be a surprise to many. In the bills we analysed, however, we located a wide range of safety effects and concerns, including apparent threats beyond those that might be familiar (e.g. drink and drug driving). Safety, in other words, was broadly defined and operationalised, and there was often no attempt to explain how, precisely, alcohol and other drugs are unsafe, beyond assertions that consumption simply makes public and private spaces unsafe, produces offending or risks people re-offending. In many cases, the presence or consumption of *any* alcohol or other drugs, in *any* amount, was depicted as always already unsafe. We also found that safety, risk and harm is conceptualised in a gender-neutral way, without regard to the potential role of gender, including specific masculinities, in the production of problems such as family violence, sexual violence and other public safety concerns. As we noted earlier, rights have an ontological function (Douzinas 2007). The process of rights scrutiny works to constitute the objects and subjects of analysis (i.e. drugs, people who use drugs) and the relationships between them (Seear 2020). Our analysis suggests that human rights process reinscribe narrow, problematic and partial accounts of the aetiology and 'nature' of social problems in their approach to safeguarding safety. Worryingly, they enable narrow conceptualisations of problems and solutions, conceptions of agency, responsibility and fault. References in parliamentary documents to the right to health or the right to life are often interpreted as requiring parliaments to ensure something like a 'right to be safe from alcohol-related violence', or a 'right to be safe in public spaces'. Rather than leading to more nuanced assessments of the complex assemblage of forces that might undermine public and private safety, however, human rights mechanisms become a blunt authorising framework for ensuring safety, and the permission structure for blanket measures applied to 'people'.

Our reading of human rights mechanisms – as purportedly neutral, objective and so on – has implications not just for those affected by their use, but for the enthusiasm with which individuals and organisations speak about human rights and their potential value as a normative framework to guide drug policy reforms. In our view, it is imperative that all alcohol and other drug laws should be developed with an appreciation of the way they might impact differently on groups, including women, non-binary and gender-diverse people, First Nations or LGBTIQ populations (the latter two groups not analysed in this paper, but something we will explore in future work). We argue that in considering questions such as whether proposed laws unreasonably limit freedoms, human rights processes should

also allow us to attend to whose freedoms are being dispensed with in pursuit of putatively 'safer' worlds. But rights processes do not attend to such challenges, instead enabling laws to be applied unevenly. This is itself an unsafe practice that we must safeguard against. We also need to consider what is made present or absent via such processes, how realities and collateral realities are produced and stabilised and be more explicit about why such issues matter. The process of parliamentary human rights scrutiny in Australia, admittedly just one way that human rights considerations might be brought to bear on alcohol and other drug law, suggests that there are serious limitations to what rights processes can achieve, at least in terms of how rights deliberations presently unfold. There may also be a perception among some that laws which have been through rights scrutiny have more legitimacy than laws not subject to rights scrutiny, such as laws that pre-date the introduction of the charters or laws in non-charter jurisdictions. All of these issues pose a challenge for rights-enthusiasm in the drug policy space. Our work thus seeks to extend the work of David Moore and colleagues, by demonstrating not only that research and policy practices are flawed on gendered grounds, but that human rights processes actually underpin and enable, rather than prevent, those flaws. Research, policy and human rights law share common features, rendering gender invisible in legal responses to certain forms of harm, stabilising the role of alcohol and other drugs, and instantiating the primacy of the (paradoxically) 'universal' subject as implicated in these harms. We close with one final observation on recent developments in one jurisdiction we studied. The state of Victoria has recently passed a new law called the *Gender Equality Act 2020*. This Act requires specific consideration of the 'gender impact' of policies, programs or services that have 'a direct and significant impact on the public' (section 9). We welcome this initiative, because it acknowledges the potential for policies, programs and services to impact differentially on genders in ways that can be harmful. That said, this new law risks separating gender assessments out from human rights assessments and entrenching the divisions we have identified in this paper. Gender, that is, is seen not as a core part of the charter assessment, but a separate assessment covered by alternate legislation. In our view, gender considerations must be safeguarded as a central element of the human rights scrutiny process. This is essential if human rights processes are to have any credibility, and if they are to avoid reproducing the harmful and gendered logics of 'pharmacological determinism' (Moore 2020: 211) we strive to leave behind.

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[i] Although on this term, see Keane (2017).
[ii] As in, for instance, Zinberg's (1984) seminal work on drug, set and setting.
[iii] This is not required for 'private members' bills' (that is, Bills not presented by a Minister) in the ACT: see *Human Rights Act 2004* (ACT) s 37(1).
[iv] Notably, the process is slightly different in the ACT and does not require detailed statements of compatibility: see *Human Rights Act 2004* (ACT) s 37(3).
[v] See also *Human Rights Act 2004* (ACT) s 28; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2015) 7-8 [1.12]-[1.22]; *Human Rights Act 2019* (Qld) s 13.
[vi] This is not a requirement of 'private members' bills' (that is, bills not presented by a Minister) in the ACT: see *Human Rights Act 2004* (ACT) s 37(1).
[vii] The bill also required the court to be satisfied that the offender was 'dependent' on alcohol or a controlled drug and that such dependence 'substantially contributed to the commission of the offence' (clause 14). On this, we note that previous research suggests that such criteria are often easily satisfied and that the court process constitutes both dependence and crime as an effect of dependence (Sarmiento 2018).
[viii] This is not to say that the report reproduces the gender binary, as gender diversity and sexuality is addressed in volume 5 of the report.