



VICTORIAN LAW REFORM COMMITTEE



INQUIRY INTO CRIMINAL LIABILITY FOR SELF-INDUCED INTOXICATION

ISSUES PAPER NO. 1

BACKGROUND

The Victorian Law Reform Committee has been requested to review the law concerning the effect of intoxication on criminal liability. The subject is controversial, involving a conflict between:

1. principles of fundamental importance in criminal law, which require offenders not be convicted of serious offences unless they have acted voluntarily and with intention to do the acts prohibited; and
2. principles of public policy which require that offenders who allow themselves to become intoxicated should not escape criminal responsibility for acts committed while in an intoxicated state and which also require the law to provide adequate protection to the community against criminal offenders.

The leading Australian court decision on criminal liability and intoxication is the judgment of the High Court in *The Queen v. O'Connor* (1980) 146 CLR 64 (O'Connor's case). In O'Connor's case, the High Court decided by a majority of four to three that evidence of intoxication should be taken into account when determining whether the Crown has proved beyond reasonable doubt that a defendant has acted voluntarily and intentionally. Where evidence of intoxication raises any doubt that a defendant has acted voluntarily and intentionally that defendant should be acquitted. This accords with the fundamental principle of criminal law that a person is not guilty of a crime unless the person acted voluntarily and intentionally.

In reaching this conclusion the High Court declined to follow the principle developed by the English courts which culminated in the House of Lord's decision in *DPP v Majewski* [1977] AC 443 (Majewski's case). In that case the House of Lords held that evidence of intoxication is relevant and must be taken into account where a person is charged with an offence of **specific intent** but is not to be taken into account where the offence is one of **general intent**. The decision is a reflection of the public policy principle that if a person chooses to consume alcohol or drugs then it is morally correct to hold that person answerable criminally for any injury he or she causes whilst in that condition.

An offence of **general intent** is one where the defendant intends to commit the proscribed conduct—for example, in the case of a common assault an intent to strike the victim. In the case of a crime of **specific intent** some further intention is

required—for example, in the crime of causing serious injury the defendant must not only intend to strike the victim, but when doing so must intend to cause the victim a serious injury.

It was suggested that following O'Connor's case there would be a number of acquittals of defendants alleging that they were so intoxicated at the time of the commission of the offence that they could not be proved to have acted voluntarily and intentionally. Research carried out in 1986 by the Law Reform Commission of Victoria indicated that to be acquitted an offender has to be grossly intoxicated and that the majority of offenders who take alcohol or drugs before committing an offence are convicted despite being intoxicated. Further, a person who forms a criminal intent prior to taking alcohol or drugs for the purposes strengthening their ability to perform the act, is not able to be acquitted under the principle in O'Connor's case.

The principle enunciated in O'Connor's case became the law in all Australian common law jurisdictions. In the Code States of Queensland, Tasmania and Western Australia the law distinguishes between offences of specific and general intent and the Majewski principle applies under the legislation. In the Northern Territory evidence of intoxication is not relevant to any criminal charge and intoxicated offenders may be imprisoned for up to four years for dangerous acts and omissions.

Recently some of the common law jurisdictions in Australia have made changes to the law concerning intoxication and criminal liability.

Impetus for legislation overturning the principle in O'Connor's case arose out of the recent ACT case of Noah Nadruku who was acquitted on assault charges on the basis that he was intoxicated at the time of committing the offences. New South Wales and the Commonwealth have recently enacted legislation adopting the Majewski approach of distinguishing between offences of specific and general intent. In the ACT, the *Crimes Amendment Bill (No 4)* of 1998 was introduced to prevent evidence of intoxication from being considered in relation to offences of general intent. This Bill is currently before the Legislative Assembly. In South Australia a private members bill concerning intoxication has been introduced and the South Australian Government has circulated a Discussion Paper pending a draft Bill.

The issue for Victoria is to decide whether O'Connor's case should continue to state the law.

The alternatives are to enact legislation based on the principle enunciated in Majewski's case that distinguishes between offences of specific and basic intent or to create an offence of committing a dangerous or criminal act while intoxicated.

TERMS OF REFERENCE

The Committee is required to inquire into, consider and report to the Parliament on the following matters —

1. The criminal liability of persons for actions performed while in a state of self-induced intoxication.
2. Whether it is desirable that the decision of the High Court of Australia in O'Connor's case continues to state the law in Victoria.
3. Whether it is desirable to introduce an offence of committing a dangerous act while grossly intoxicated.

SOME OPTIONS FOR REFORM

What follows is a brief outline of some of the arguments involved in the various options for reform.

1. Make no change to the law

Arguments for

- The present law is consistent with long established principles of criminal liability.
- It is rare for a person to be acquitted on the basis of evidence of intoxication especially in serious cases.
- Since acquittals are rare public safety is not threatened.
- A change to the current law might complicate criminal proceedings.

Arguments against

- A person who has chosen to become intoxicated has no moral right to be acquitted and must be accountable for his or her actions.
- A situation may arise where an offender is acquitted of a serious offence leading to community outrage arising from a sense of justice.

2. Enact legislation distinguishing between offences of specific and general intent

Arguments for

- This distinction achieves a socially acceptable result because persons accused of offences of specific intent, if acquitted, are usually convicted of a lesser offence of general intent. This meets community expectations that wrongdoers will be penalised for offences and maintains community respect for the law.
- It assists the courts to control violence and helps protect the community from further offences.
- It prevents people who allow themselves to become intoxicated from avoiding criminal responsibility for acts committed while in an intoxicated state.

Arguments against

- The distinction between offences of specific and general intent is arbitrary and difficult to apply leading to inconsistent results. There has been no agreement on the test to be applied for distinguishing between offences of specific and general intent. There have, for example, been different decisions on whether rape is a crime of specific or general intent.

3. Create an offence of committing a dangerous or criminal act while intoxicated

Arguments for

- Offenders acquitted of an offence because of intoxication would not entirely avoid liability but would instead be convicted of a lesser offence.
- A separate offence meets community concerns regarding acquittals on serious charges and avoids interference with fundamental principles of the criminal law.
- Persons who choose to become intoxicated cannot avoid responsibility for their actions.

Arguments against

- There are so few acquittals that no change is necessary. A new offence may increase the number of acquittals because a jury may be more

inclined to convict the offender of the lesser offence.

- There may be problems with determining an appropriate penalty. Offences committed by intoxicated offenders range from serious to less serious offences. If the maximum penalty is considerably less than that imposed for the principal offence, offenders may be encouraged to plead intoxication in order to receive a lesser penalty.

In 1986 the Law Reform Commission of Victoria released a report entitled *Criminal Responsibility: Intention and Gross Intoxication* recommending the law as stated in O'Connor's case remain the law in Victoria because there had been few acquittals as a consequence of O'Connor's case. The Commission believed that it is important to maintain fundamental principles of criminal law that a person is not guilty of a crime unless the act is done voluntarily and intentionally. In relation to the creation of a new offence, half the members of the Law Reform Commission of Victoria supported the creation of a new statutory offence but the other half believed that a new offence would be inconsistent with the principle stated in O'Connor's case.

ISSUES FOR CONSIDERATION

The Victorian Law Reform Committee welcomes all submissions. Whilst not wishing to limit the scope of submissions, the committee is particularly interested in receiving submissions that discuss all or some of the following issues.

1. ***What do you think about the law as stated in O'Connor's case? In particular:***

- (a) Do you think it is important to maintain the fundamental principle of criminal law that a person is not guilty of a crime unless the act is done voluntarily and intentionally?
- (b) Do you think evidence of intoxication should be taken into account when determining whether the Crown has proved beyond reasonable doubt that a defendant acted voluntarily and intentionally?
- (c) Do you think O'Connor's case should continue to state the law in Victoria?

2. If you do not think O'Connor's case should continue to state the law in Victoria:

- (a) Do you think legislation should be enacted which distinguishes between offences of specific and general intent?
- (b) Do you think a separate statutory offence of committing a dangerous act while intoxicated should be created? What should be the elements of such an offence? Should the offence created be a strict liability offence?

3. If you do not think that O'Connor's case should continue to state the law in Victoria and you do not agree with either of the proposals suggested immediately above do you have any other suggestions for how the law concerning intoxication and criminal liability could be changed?

4. Do you think that evidence of intoxication is evidence that should be considered only at the time of sentencing of an offender?

THE INQUIRY TIMETABLE

The deadline for submissions is 31 January 1998. The committee is planning to hold public hearings in February. It is anticipated that the committee will table its report during the autumn 1999 sittings of the Parliament.

MAKING A SUBMISSION

The committee invites people and organisations to make written submissions on the terms of reference set out in this issues paper. Those preparing submissions should feel free to include any other issues they consider relevant, whether or not they are mentioned in this issues paper. The committee appreciates receiving any comments on one, some or all of the issues mentioned.

Anyone can make a submission or comment. It is not necessary to have legal or other special qualifications. The inquiry raises issues of importance to all Victorians and it would be helpful to the committee in its deliberations to receive the views of the community at large.

Persons making submissions are encouraged to use the on-line submission template located on the committee's website at <<http://www.lawreform.org.au/>

Intox%20home.htm>. Alternatively, you can provide an electronic version of your submission attached to an email message sent to lawrefvc@vicnet.net.au, or on a floppy disk. The committee may require a separate signed authentication. Hardcopy submissions should be sent to the address shown below.

There is no set format for a submission. Your contribution can take the form of a letter, a short briefing paper or a longer research document.

All submissions are treated as public documents unless confidentiality is requested.

FURTHER INFORMATION

Further information including suggested readings, reports, related links and other material concerning this reference can be obtained from the committee's internet website at www.lawreform.org.au

SUBCOMMITTEE MEMBERSHIP

The membership of the inquiry subcommittee is—

Mr Florian Andrighetto, MLA
(Subcommittee Chairman)

Mr Victor Perton, MLA
(Law Reform Committee Chairman)

Hon Carlo Furletti, MLC

Mr Neil Cole, MLA
(Law Reform Committee Deputy Chair)

Mr Noel Maughan, MLA

Mr Tony Robinson, MLA

ADDRESS FOR SUBMISSIONS

Please send your submission to—

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Please contact the secretariat on (03) 9651 3644 for further information and dates for public hearings.