Tabled – 30 May 2001

GOVERNMENT RESPONSE TO THE REPORT OF THE LAW REFORM COMMITTEE ON CRIMINAL LIABILITY FOR SELF-INDUCED INTOXICATION

Background

The Government welcomes the Committee's report and thanks the Committee and those who made submissions to it for their contributions.

In May 1998 the Committee was asked to inquire into and report to Parliament on:

- The criminal liability of persons for actions performed while in a state of self-induced intoxication.
- Whether the relevant common law principles (as stated in the High Court decision in *The Queen v. O'Connor* (1980) 146 CLR 64) should continue to apply in Victoria.
- Whether it is desirable to introduce an offence of committing a dangerous act while grossly intoxicated.

The Law Reform Committee consulted widely in Victoria and interstate. Following the public advertisement of the inquiry the Committee received thirty five written submissions from a broad range of interested parties, including judges, lawyers, community interest groups and private citizens. The Committee's report containing the following nine recommendations was tabled in May 1999.

Government Response

Recommendation 1
That the Drugs and Crime Prevention Committee be given terms of reference to examine the relationship between the use of alcohol and/or drugs and the impact of these on crimes of violence in our community.

There have been many broad-ranging inquiries into the link between alcohol and violence. The Government will consider whether any particular aspects of the relationship between alcohol and violence have not been sufficiently examined in the past and would benefit from closer analysis by the Drugs and Crime Prevention Committee.

Recommendation 2
It is not desirable to introduce in Victoria an offence of committing a dangerous act while grossly intoxicated.

Recommendation 3
The decision of the High Court of Australia in The Queen v. O'Connor should continue to state the law in Victoria.

The question of whether a person should be criminally liable for actions performed while in a state of self-induced intoxication is difficult and controversial because it raises a conflict between:

- The basic principle that a person should not be criminally liable if he or she did not have the relevant criminal state of mind (such as intention or recklessness) or was not acting voluntarily, even though he or she performed the physical element of the offence; and
- The sense of injustice felt by many when the reason why the person did not have the relevant criminal state of mind was due to a prior action (becoming intoxicated) over which the person did have some choice or control.

The Government welcomes the Committee's exhaustive examination of this matter and supports both of these recommendations. Neither of the two recommendations requires any further action.

Recommendation 4
Where there is evidence that a defendant was intoxicated at the time of the commission of an offence to the extent that the defendant's consciousness may have been impaired, evidence of such intoxication is not to be placed before the jury by the judge, or if raised by the jury is to be withdrawn from the jury's consideration, unless the defendant specifically requests the judge to address the jury on that issue.

Recommendation 5
Where the defence has failed to request a judge to direct the jury on evidence of self-induced intoxication and where a defendant is subsequently convicted of a criminal offence, that defendant is thereby prevented from using the issue of intoxication as a ground of appeal.

The Government shares the Committee's desire to prevent appeals which are unreasonable, unfair, unnecessarily costly or which have the potential to cause the public to lose confidence in the legal system.

Recommendation 4 would represent a significant departure from the existing common law principle which provides that, if a possible answer to the charge in question arises on the evidence the judge is obliged to give relevant directions to the jury regardless of the wishes of the parties.

In practice this principle is balanced by a further common law principle that, if the judge fails to direct the jury adequately or at all on a relevant matter and counsel for the accused does not take exception to the directions at the trial, the inadequacy of the directions cannot later be used as a ground of appeal unless it has caused a substantial miscarriage of justice. This further common law principle reflects recommendation 5; except that, whereas recommendation 5 is expressed as an absolute prohibition, the common law principle has an exception dealing with situations that would otherwise lead to substantial miscarriages of justice.

The Government considers that these existing principles provide an important safeguard against unfair trials while simultaneously providing a safeguard against unreasonable appeals. An analysis of criminal appeals in Victoria between 1985 and 1999 reveals that a failure to direct a jury adequately or at all in relation to intoxication is rarely pursued as a ground of appeal and, when pursued, is almost never successful.

Recommendations 4 and 5 have the potential to undermine the common law safeguards against unfair trials referred to above. The Government is not persuaded that the existing principles are inappropriate; however, the Government will continue to monitor appeals in which intoxication is raised as a ground of appeal.

Recommendation 6
Where a defendant charged with an indictable offence seeks to rely on evidence of self-induced intoxication as a ground for acquittal the charges must not be dealt with summarily but shall be tried before a judge and jury.

Recommendation 6 is expressed so as to apply only to those cases in which the defendant "seeks to rely on evidence of self-induced intoxication as a ground of acquittal"; however, as the Committee points out in its report, intoxication is not a defence, it is simply a fact which may in certain circumstances raise reasonable doubt as to whether or not the prosecution has proved the offence.

Under Victorian criminal law, the prosecution is required to produce evidence to prove the offence charged: aside from certain defences, a defendant is not expected or required to argue 'grounds of acquittal'.

Because intoxication operates simply as a relevant fact, rather than as a defence, there is no simple way of isolating in advance those indictable offences triable summarily involving intoxication which should be heard in the County Court and those which should continue to be heard in the Magistrates' Court.

The Committee notes at page 73 of its report that up to 90% of crimes of violence involve some sort of consumption of alcohol. Each year the Magistrates' Court hears over 10,000 charges of indictable offences involving violence. Even if a conservative estimate is made of the proportion of those offences which involve a significant amount of alcohol, it is clear that very many such offences are currently heard summarily and that considerable expense and inconvenience would occur if a substantial proportion of those offences had to be heard in the County Court instead.

It may be that, as the Committee suggests, the community is more accepting of the decisions of a jury rather than a magistrate when the decision requires an assessment of community values and standards of behaviour. Yet magistrates are trusted with the responsibility of making decisions in many areas involving comparable assessments, such as deciding what constitutes 'dishonesty' or 'offensive behaviour'.

The Government is not persuaded by the reasons given by the Committee for this recommendation. Accordingly, the Government does not propose to adopt recommendation 6.

Recommendation 7
A greater use of anger management and alcohol and drug rehabilitation programs should be considered in sentencing offenders and appropriate mechanisms should be put in place for evaluating the effectiveness of these programs

Recommendation 8
The Committee notes that funding of these programs could be a problem but sees some value in exploring the possibility of placing a surcharge on alcohol similar to

that placed on tobacco and use the money raised to fund these programs. Appropriate mechanisms should be provided for identifying and treating those with potential alcohol and or drug related problems at an earlier stage.

The Government recognises the benefits of anger management and alcohol and other drug rehabilitation programs in sentencing offenders and the need to ensure that appropriate mechanisms are in place for evaluating those programs.

The Drug Policy Expert Committee chaired by Dr David Penington has been asked to examine the Government's drug strategy. That strategy covers both licit and illicit drugs. Stage two of the Committee's terms of reference encompasses an examination of the existing sentencing options involving drug treatment and rehabilitation and the mechanisms for evaluating the effectiveness of these options.

With regard to recommendation 8, the Government notes under the Commonwealth Constitution the Commonwealth has the exclusive power to impose a levy on the production or sale of goods. Historically the courts have permitted an exception in relation to alcohol and tobacco; however, subsequent to the Committee's inquiry the exception was overruled by the High Court.

Recommendation 9
That if a defendant raises the issue of self-induced intoxication, the Rules of Evidence be varied to allow evidence of prior conduct or criminal offences involving alcohol and/or other drugs to be admissible.

The legal principles regarding the admissibility of propensity evidence are complex. They were recently modified in Victoria by section 398A of the Crimes Act 1958. The Government will continue to monitor the operation of section 398A.

Conclusion

The Government thanks the Committee for its work in undertaking these terms of reference and producing its report.