

PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

# **Criminal Liability for Self-Induced Intoxication**

REPORT

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## CHAIRMEN'S FOREWORDS

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### **Mr Florian Andrighetto, MP—Criminal Liability for Self-Induced Intoxication Subcommittee Chairman**

From the outset the Law Reform Intoxication Subcommittee was excited about embarking on an investigation into an area which has caused such controversy and public outrage.

A high profile rugby player named Nadruku, was charged with seriously assaulting two females in the ACT. The magistrate, who heard the case, dismissed the charges on the basis that the prosecution had failed to prove its case. Evidence was tendered that the defendant was unable to form the required criminal intent because of the large amount of alcohol that he had voluntarily consumed. The magistrate's decision caused an immediate response from many quarters. The national media took to the report with great gusto and journalistic licence. The community expressed immediate outrage and some governments followed with the obligatory knee-jerk reaction.

The Attorney General presented appropriate terms of reference to the Law Reform Committee to inquire into and report on the current Victorian position and make appropriate recommendations in due course.

A subcommittee was established and I found that chairing the inquiry was stimulating and extremely satisfying, particularly as it neared the final stages of the report. All members of the subcommittee developed a keen interest in the variety of written and oral evidence received.

As can be seen from the list of contributors at the end of this report, the submissions came from a broad array of individuals and organisations. I wish to thank the President of the Court of Appeal, Justice John Winneke for the interest shown by him. I also wish to thank the Chief Judge of the County Court, Glenn Waldron for his submission. I particularly wish to thank Judge Mullaly of the County Court for the enormous interest he has shown and the generous time he has given to the subcommittee. I say without reservation, that a great deal of weight was placed on his counsel particularly, in light of his personal involvement in *O'Connor* and his wealth of experience in the criminal law.

Many other eminent figures, professional bodies, government organisations, community groups and members of the community, have contributed to this report. In particular, I also thank the Magistracy from other states and territories.

However, the subcommittee and I were particularly disappointed with the refusal of the Chief Magistrate, Mr Michael Adams Q.C. to provide a submission, or allow any representative of the Victorian Magistracy to make a contribution. In response to my invitations, Mr. Adams Q.C. expressed the view that there was nothing that his jurisdiction could contribute and he saw no reason to co-operate with the inquiry.

Unfortunately, during the course of the inquiry, the subcommittee was informed that similar decisions to that of the ACT in *Nadraku* were in fact occurring in Victorian Magistrates' courts and the subcommittee took the opportunity to look at one of them in detail. In fact, it was the decision of a magistrate at Portland that formed the basis for some of our recommendations.

I cannot understand the position of the Chief Magistrate and it was extremely disappointing to lose the opportunity for comment, particularly in view of the willingness of similar jurisdictions in other states to contribute.

The written submissions made it obvious that the issue was not about the correctness of the decision in the ACT, but a conflict between the fundamental principles of criminal law and public policy.

As one reads through this report, it will become apparent that a great deal of time has been dedicated to two areas. Firstly, the evolution of the fundamental principles of the criminal law and secondly, comparisons with other jurisdictions. The reason for this was the overwhelming call not to interfere with fundamental principles of criminal law. The subcommittee was urged many times to view *Nadraku* as an isolated case and a mere aberration. Those views were carefully considered and many will be pleased with the recommendations on that point.

It became equally obvious that the broad community, particularly those unfamiliar with strict legal reasoning, called for change. The subcommittee was urged to address the perceived notion that acquittal on the basis of self-induced intoxication was illogical, unfair and unacceptable. Again those views were carefully considered and many will be pleased with the recommendations.

I must record my gratitude to all those who made submissions to the subcommittee and, particularly, those who gave their valuable time to attend the public hearings. Without their valued contribution the writing of this report would have been extremely difficult.

To my subcommittee consisting of the Chairman of the Law Reform Committee, Mr Victor Perton MP, Mr Neil Cole MP, Mr Carlo Furletti MLC, Mr Noel Maughan MP and Mr Tony Robinson MP, I express my sincere thanks for their assistance and support.

To our researcher and principal writer Ms Jenny Baker, I express my sincere thanks for her devotion and effort. She was able to effectively communicate and consult with all witnesses and contributors, organise the many meetings and hearings throughout Australia and write an extremely well structured and professional report.

Thanks also to the Committee's research and administrative personnel, who assisted greatly with the production of this report and in particular to Ms Padma Raman for her additional assistance with proofreading. Their assistance was very much appreciated.

I commend the report to the Parliament.

Florian Andrighetto MP  
Subcommittee Chairman  
26 May 1999

## **Mr Victor Perton, MP—Law Reform Committee Chairman**

This has been an arduous and difficult reference. The State Attorney-General made this reference to the all-party Law Reform Committee after the Commonwealth and New South Wales had legislated in a gut reaction to public controversy. The issues have been debated for hundreds of years and there are many different solutions in different countries. Indeed, I was struck by the differences in criminal law and practice between the States and the very high levels of incarceration in other States - high levels of incarceration the cost of which must reduce the levels of other services designed to lower the crime rate.

The Subcommittee Chairman, Florian Andrighetto, has undertaken his duties with terrific determination and great insight. The other Members of the Committee have worked diligently to understand the legal issues, weigh up the evidence and arrive at a consensus decision. The consensus decision was able to be reached because of the well argued evidence given to the Committee in Victoria and the wide-spread interstate and overseas support for the Committee's careful deliberations. Witnesses like the Attorney-General of South Australia, Trevor Griffin, were very willing to give of their time and expertise. Friends of the Committee like the former Administrator of the Northern Territory, Austin Asche, were enthusiastic and generous in their support of the Committee's investigations.

Many of the issues covered in this report are difficult but I believe the report covers them in a way in which most readers will find readily understandable. Our researcher, Jenny Baker, has marshalled the evidence, got the best out of our witnesses and prepared drafts which allowed the Committee Members to concentrate on the issues and agree on a text which should stand the test of time into the next century of Victorian criminal law practice.

Mr Victor Perton MP  
Chairman  
26 May 1999

# FUNCTIONS OF THE COMMITTEE

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## PARLIAMENTARY COMMITTEES ACT 1968

- 4E.** The functions of the Law Reform Committee are—
- (a)* to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;
  - (b)* to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.



## TERMS OF REFERENCE

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The Governor in Council, acting under section 4F(1) of the *Parliamentary Committees Act 1968* and on the recommendation of the Attorney-General, by this Order requires the Law Reform Committee 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 *The Queen v. O'Connor* (1980) 146 C.L.R. 64 continues to state the law in Victoria.
3. Whether it is desirable to introduce an offence of committing a dangerous act while grossly intoxicated.

In conducting the Inquiry the Committee is to have regard to:

- a. The report of the Law Reform Commission of Victoria on *Criminal Responsibility: Intention and Gross Intoxication* (November 1986).
- b. The report of the Criminal Law Officers of the Standing Committee of Attorneys-General on the *Model Criminal Code: Chapter 2—General Principles of Criminal Responsibility* (December 1992).
- c. The report of the New South Wales Law Reform Commission on *Partial Defences to Murder: Diminished Responsibility* (May 1997).
- d. The report of the English Law Commission on *Legislating the Criminal Code: Intoxication and Criminal Liability* (February 1995).
- e. Recent Australian legislation abrogating the decision in *O'Connor*.
- f. Such other legislation, case law, reports and materials as are relevant to the Inquiry.

The Committee is requested to make its final report to the Parliament by the first day of the Autumn 1999 Parliamentary Sittings.

Dated: 12 May 1998

Responsible Minister: JAN WADE, MP  
Attorney-General



### **Relationship between alcohol and crime**

#### *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.*

*Paragraphs 5.1–5.21*

### **Current Consideration of the Enactment of a Special offence of Committing a Dangerous and Criminal Act while Grossly Intoxicated**

#### *Recommendation 2*

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

*Paragraphs 6.54–6.64*

### **Arguments for Retaining the O'Connor Principles**

#### *Recommendation 3*

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

*Paragraphs 6.78–6.96*

### **Intoxication as an Element in Criminal Trials**

#### *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 might 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.*

*Paragraphs 6.97 – 6.101*

## **Jury to Hear all Indictable Offences if O'Connor Principles are Raised**

### *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.*

*Paragraphs 6.102 – 6.106*

## **Sentencing Options**

### *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.*

*Paragraphs 6.107–6.119*

## **Evidence of Propensity and Intoxication**

### *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 drugs to be admissible.*

*Paragraphs 6.120–6.129*

## Scope of the Inquiry

1.1 The Law Reform Committee has reviewed the law relating to criminal liability for actions performed while in a state of self-induced intoxication under Terms of Reference from the Governor-in-Council dated 12 May 1998.<sup>1</sup> The Committee was requested to give particular consideration to:

- (a) Whether it is desirable that the decision of the High Court of Australia in *The Queen v. O'Connor*<sup>2</sup> continues to state the law in Victoria.
- (b) Whether it is desirable to introduce an offence of committing a dangerous act while grossly intoxicated.

The real issue before the Committee was whether there should be a change to fundamental principles of criminal law which provide that a person is not guilty of a criminal offence unless that person has acted voluntarily and intentionally.

1.2 The Law Reform Committee is a joint investigatory committee of the Victorian Parliament with statutory power to conduct investigations into matters concerned with legal, constitutional and parliamentary reform or the administration of justice.<sup>3</sup> The Committee's membership, which includes lawyers and non-lawyers, is drawn from both Houses of the Victorian Parliament and includes all political parties.

1.3 The Committee consulted widely in Victoria and interstate during its Inquiry. Following the public advertisement of the reference and media publicity, thirty-five written submissions were received. These submissions were from a broad cross-section of interested parties, including County Court Judges, the Victorian Director of Public Prosecutions, Victoria Legal Aid, Victoria Police, legal professional bodies, legal and medical academics, community interest groups and private citizens.<sup>4</sup> The

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<sup>1</sup> *Victoria Government Gazette*, G 19, 14 May 1998, p. 1085. See *supra*, p. xix.

<sup>2</sup> (1980) 146 CLR 64.

<sup>3</sup> *Parliamentary Committees Act 1968* (Vic.), s. 4E.

<sup>4</sup> Appendix A contains a list of the names of people who made written submissions to the Inquiry.

Committee took evidence in public hearings in Melbourne<sup>5</sup> and had consultations in Sydney, Brisbane, Adelaide and Darwin.<sup>6</sup>

1.4 The Committee also examined two earlier reports by the Law Reform Commission of Victoria, one which arose directly out of the decision in O'Connor's case and which reviewed the validity of the O'Connor principles,<sup>7</sup> and the other which examined how the criminal justice system should deal with mental malfunction, one aspect of which included an examination of gross intoxication and in particular whether evidence of gross intoxication should continue to form a basis for a plea of automatism.<sup>8</sup>

## Current Law in Victoria

1.5 The leading Australian court decision on criminal liability and self-induced intoxication is the decision of the High Court in *The Queen v. O'Connor* (O'Connor's case).<sup>9</sup> There the court decided by a majority of four to three<sup>10</sup> that evidence of self-induced intoxication is relevant to any criminal offence to determine whether the Crown has proved beyond reasonable doubt that a defendant acted voluntarily or intentionally.<sup>11</sup> Where evidence of self-induced intoxication raises any doubt as to whether the defendant has acted voluntarily or intentionally, he or she should be acquitted. This accords with fundamental principles of criminal law that a person is not guilty of a crime unless that person acted voluntarily<sup>12</sup> and intentionally.<sup>13</sup>

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<sup>5</sup> Appendix B contains a list of the names of people who gave oral evidence to the Inquiry.

<sup>6</sup> Appendix C contains a list of the names of people who met with the Committee during interstate visits.

<sup>7</sup> Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication*, Report no. 6, 1986.

<sup>8</sup> Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report no. 34, 1990.

<sup>9</sup> (1980) 146 CLR 64.

<sup>10</sup> The majority consisted of: Barwick CJ, Stephen, Murphy and Aickin JJ, while the minority comprised: Gibbs, Mason and Wilson JJ.

<sup>11</sup> Since the decision in *O'Connor's* case, New South Wales has enacted the *Crimes Legislation Amendment Act 1996* (NSW) and the Commonwealth has enacted the *Criminal Code Act 1995* (Cth) and the *Criminal Code Amendment Act 1998* (Cth) removing the application of the O'Connor principles enunciated in that case. South Australia has recently enacted the *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA) which retains the O'Connor's principles but which makes some procedural changes in relation to evidence of intoxication. The ACT and Victoria are currently in the process of determining whether *O'Connor's* case should continue to state the law. All of these changes and proposed changes will be discussed in more detail below.

<sup>12</sup> (1980) 146 CLR 64, 87-88 per Barwick CJ, 125-126 per Aickin J and 96-98 per Stephen J.

<sup>13</sup> *ibid.*, 86-87 per Barwick CJ, 96 per Stephen J, 112-114 per Murphy, 125-126 per Aickin J.

1.6 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*.<sup>14</sup> In that case the House of Lords held that evidence of self-induced 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 basic intent. The decision of the House of Lords is a reflection of various public policy principles.<sup>15</sup>

1.7 The distinction between offences of specific and basic intent is unclear and arbitrary, varying from jurisdiction to jurisdiction.<sup>16</sup> In general terms an offence of basic intent is understood to be one where the defendant intends to commit the criminal act, for example, common assault, where the defendant has an intention to strike the victim. An offence of specific intent is understood to be one where some further intention is required, for example, causing serious injury, where the defendant intends not only to strike the victim but also to cause injury when doing so.

1.8 The formation of an intention to commit a criminal act prior to becoming intoxicated and the deliberate consumption of alcohol and/or drugs for the performance of that criminal act will not provide a person with a justifiable excuse based on intoxication.<sup>17</sup> This is referred to as the 'Dutch courage' principle. In *Attorney-General for Northern Ireland v. Gallagher*<sup>18</sup> the defendant killed his wife after making himself drunk. One of the arguments put forward for the defence was that at the time of committing the offence the defendant was suffering from insanity brought about by the consumption of alcohol. The defence of insanity failed because the House of Lords held that the defendant formed the intention to kill his wife when he was sober and consumed the alcohol to give him the ability to commit the offence. If a defendant commits a different crime to that which he or she originally intended, it is doubtful whether the 'Dutch courage' principle operates, unless the offence committed is a lesser included offence of the crime originally intended.

1.9 The principle enunciated in *O'Connor's* case became the law in all Australian common law jurisdictions, namely, New South Wales, South Australia, the

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<sup>14</sup> [1977] AC 443.

<sup>15</sup> See *infra*, paras. 2.27-2.31 for a discussion of the decision and the public policy principles involved.

<sup>16</sup> See *infra*, paras. 6.5-6.24 for a discussion of the distinction between offences of specific and basic intent.

<sup>17</sup> *Attorney-General for Northern Ireland v. Gallagher* [1963] AC 349 approved by the High Court in *The Queen v. O'Connor (O'Connor's case)* (1980) 146 CLR 64.

<sup>18</sup> *Attorney-General for Northern Ireland v. Gallagher* [1963] AC 349.

Australian Capital Territory and Victoria. The relationship between self-induced intoxication and criminal responsibility is different in those jurisdictions that have adopted legislative codes, namely Queensland,<sup>19</sup> Western Australia,<sup>20</sup> Tasmania<sup>21</sup> and the Northern Territory.<sup>22</sup> It should be noted that while there are some similarities between the Criminal Codes, they are far from uniform.

1.10 It should be stressed that the so-called O'Connor's defence is a misnomer as evidence of intoxication has never constituted a defence to a criminal offence.<sup>23</sup> Defences in criminal law, such as, duress, self-defence and provocation are relevant to excuse a defendant once it has been proven that the defendant committed the criminal offence. In contrast evidence of intoxication is an evidentiary rule, relevant before the criminal offence has been proven against a defendant, with the aim of raising doubts concerning the prosecution's case. Therefore, the principle in *O'Connor's* case constitutes a failure by the prosecution to prove one of two essential elements, voluntariness and intention.

## Background to the Inquiry

1.11 On 23 February 1997, Noa Nadruku,<sup>24</sup> a professional rugby player with the Canberra Raiders Rugby League football team, was charged with assaulting two women outside a Canberra nightclub. Both women were punched in the face. The evidence indicated that Nadruku had consumed a very large volume of alcohol, so much so that at the time of committing the offences he was barely conscious. Magistrate Madden noted that:<sup>25</sup>

The two young ladies were unsuspecting victims of drunken thuggery, effectively being king hit. The assaults were a disgraceful act of cowardice...The behaviour is deplorable, intolerable and unacceptable.

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<sup>19</sup> *Criminal Code Act 1899* (Qld) known as the 'Griffith Code' because it is based on a draft prepared by Sir Samuel Griffith.

<sup>20</sup> *Criminal Code Act 1913* (WA) is substantially the same as the Queensland Criminal Code.

<sup>21</sup> *Criminal Code Act 1924* (Tas). The provisions of this Code are different to the other Code States and NT.

<sup>22</sup> *Criminal Code 1983* (NT). The provisions of this Code are different to the other Code States.

<sup>23</sup> *O'Connor's* case (1980) 146 CLR 64; *R. v. Kamipeli* [1975] 2 NZLR 610 (CA); *Viro v. The Queen* (1978) 141 CLR 88.

<sup>24</sup> Nadruku's real surname is Kurimalawai. However all reports of the case refer to him as Noa Nadruku and so this Report will continue with this common usage.

<sup>25</sup> *S.C. Small v. Noa Kurimalawai*, Australian Capital Territory Magistrates' Court, Matter No. CC97/01904, 22 Oct. 1997, Transcript of Proceedings, p. 11.

However, Magistrate Madden concluded that Nadruku should be acquitted on the basis that:<sup>26</sup>

the degree of intoxication is so overwhelming to the extent that the defendant, in my view, did not know what he did and did not form any intent as to what he was doing.

1.12 The Committee is perplexed by the Magistrates' decision to acquit Nadruku when he found that Nadruku had committed 'deplorable, intolerable and unacceptable' acts of 'drunken thuggery'. Many in the media immediately responded with remarks evidencing public disrespect for the legal principles applied to evidence of self-induced intoxication. Mr Roderick Campbell, for example, commented:<sup>27</sup>

If the law which allowed a drunken Noa Nadruku to avoid criminal responsibility for his actions, is an ass, as many people seem to think, one of the fundamentals of the criminal law, voluntariness, must also be on shaky ground.

1.13 Shortly after the decision, the Federal Attorney-General, the Hon Daryl Williams announced that he was advising State and Territory Attorneys-General that he would raise the issue of criminal liability for actions performed while in a state of self-induced intoxication at the next meeting of the Standing Committee of Attorneys-General to be held in December 1997. The Attorney-General said that he would ask the Victorian, South Australian and ACT Attorneys-General to adopt the approach of the Model *Criminal Code Act 1995* (Cth)<sup>28</sup> on this issue.<sup>29</sup>

1.14 In early December 1997, the Federal Minister for Justice, Senator the Hon. Amanda Vanstone, announced that 'the [Federal] Government will ensure the early removal of the so-called "drunk's defence" from Commonwealth criminal law'.<sup>30</sup> According to the Minister: 'The use of the drunk's defence has sent a disturbing message to those who get intoxicated and engage in violent behaviour'.<sup>31</sup> Subsequently, the *Criminal Code Amendment Act 1998* (Cth) was enacted in March 1998 to significantly reduce the use of the defence under Commonwealth criminal law.<sup>32</sup>

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<sup>26</sup> *ibid.*

<sup>27</sup> *The Canberra Times*, 5 Nov. 1997.

<sup>28</sup> See ss. 4.2(6), 4.2(7) & Division 8.

<sup>29</sup> Australia, the Hon. Daryl Williams, AM, QC, MP, Attorney-General, 'States Urged to Dump Drunk's Defence', *Media Release*, 29 Oct. 1997.

<sup>30</sup> Australia, Senator the Hon. Amanda Vanstone, Minister for Justice, 'Government to Ensure Early Removal of Drunk's Defence', *Media Release*, 2 Dec. 1997.

<sup>31</sup> *ibid.*

<sup>32</sup> The Act came into operation on 13 Apr. 1998.

1.15 The Committee's investigation has confirmed the highly controversial nature of the issue of self-induced intoxication<sup>33</sup> and criminal responsibility. The issue of how the law should treat self-induced intoxicated offenders has been with us for hundreds of years. At the heart of the controversy is a clash between the philosophy of criminal liability and certain principles of public policy:

- (1) It is a fundamental element of criminal responsibility that a person should only be held accountable for criminal conduct if that person acted voluntarily and intentionally.
- (2) There is, on the other hand, a general expectation amongst the community that the law will:
  - (a) protect the community against criminal conduct committed by offenders who have freely chosen to become intoxicated; and
  - (b) penalise self-induced intoxicated persons who commit criminal acts.

1.16 As one commentator notes:<sup>34</sup>

The issue presents the choice of whether the magnitude of an offence should be measured from the objective perspective of the community or the subjective perspective of the offender.

When considering self-induced intoxication, the public policy question that must be addressed is whether the criminal law should allow a defendant to argue that he or she did not form the requisite intent or that he or she acted involuntarily and, therefore, is entitled to be acquitted. Currently, the law in Victoria allows evidence of self-induced intoxication to be raised to show that a defendant acted involuntarily or unintentionally.<sup>35</sup>

1.17 This report examines how Victorian criminal law should deal with persons who commit criminal acts and who seek to rely on evidence of self-induced intoxication to show that they did not intend to commit the act or that they acted involuntarily. It should be noted that the Committee found that 'the defence' of self-induced intoxication is rarely successful because it is extremely difficult for a defendant to establish that he or she was so grossly intoxicated as to be incapable of forming the intention or of acting voluntarily.

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<sup>33</sup> See *infra*, para. 1.34 for an examination of the concept of self-induced intoxication. Intoxication includes the consumption of alcohol and/or other drugs. Irrespective of the intoxicant consumed, the principles are the same, see *R. v. Lipman* [1970] 1 QB 152.

<sup>34</sup> M. Keiter, 'Just say no excuse: the rise and fall of the Intoxication Defense', (1997) 87 *Journal of Criminal Law and Criminology*, 482.

<sup>35</sup> *O'Connor's case* (1980) 146 CLR 64.

## Terms and Concepts

### Common Law and Code Jurisdictions

1.18 Australian criminal law can be found in legislation, decisions of courts (common law) or a mixture of legislation and common law. Queensland, Western Australia, Tasmania and the Northern Territory have codified the criminal law and by so doing have elected to depart from common law principles. In these jurisdictions basic concepts have been redefined and must be understood in the context of the Codes—common law definitions are not relevant. In Victoria, South Australia, the Australian Capital Territory and New South Wales aspects of the criminal law have been embodied in legislation but not codified, and the criminal law in those jurisdictions remains largely a product of the common law.

### Elements of Criminal Offences

1.19 To appreciate the debate surrounding the issue of self-induced intoxication, it is essential to understand the basis on which criminal responsibility is established.

1.20 At common law, a criminal offence consists of an *actus reus* or guilty act (the conduct element) and a *mens rea* or guilty intention (the mental element). The Latin words *actus reus* and *mens rea* are derived from the maxim *actus non facit reum nisi mens sit rea*, which means that there is no guilty act without a guilty mind. Both these elements must be present at the same time for a person to be guilty of a criminal offence. Generally, if either the conduct or fault element is missing, there will be no offence. Some statutes establish strict liability and absolute liability offences, where conduct alone can be sufficient to establish criminal liability, for example, drink driving with a blood alcohol level exceeding .05.

### Conduct Element

1.21 The conduct element of an offence requires either a positive act or an omission to act and it also requires that a defendant acted voluntarily, that is of his or her own free will. The English legal philosopher, Herbert Hart,<sup>36</sup> traces the theory of human conduct back to the nineteenth century, to John Austin's Lectures,<sup>37</sup> which espoused

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<sup>36</sup> H.L.A. Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968, p. 97.

<sup>37</sup> Lectures XVIII-XIX, 5<sup>th</sup> edition, 1885, cited in Hart, *ibid.* John Austin was an English jurist appointed as professor of jurisprudence at London University in 1826. Jurisprudence was not really recognised as a necessary branch of legal studies and he resigned in 1835. However in the

the theory that conduct was a muscular contraction. However the theory of conduct went beyond a mere muscular contraction, requiring that muscular contraction to be accompanied by 'volition' or 'will'.<sup>38</sup> A distinction must be drawn here between the mental element, which requires knowledge, foresight or desire of consequences, as against the conduct element, which requires simply a desire for muscular movement. Austin explained the theory of conduct in the following terms:<sup>39</sup>

Certain movements of our bodies follow invariably and immediately our wishes or desires for those same movements: Provided, that is, that the bodily organ be sane, and the desired movement be not prevented by any outward obstacle...These antecedent wishes and these consequent movements, are human volitions and acts strictly and properly so called...the only objects which can be called acts, are consequences of Volitions. A voluntary movement of my body, or a movement which follows a volition, is an act. The involuntary movements which are the consequences of certain diseases, are not acts.

1.22 Involuntary conduct is defined as conduct that involves a muscular contraction unaccompanied by any desire for it. While Austin's theory of conduct is simple and still found in criminal law books, Hart questions its validity. The first problem he points to is that there is a failure by the theory to indicate when an omission is involuntary. For example, the conduct of a person who falls into a coma or who suffers a stroke cannot be described as arising from the desire to make muscular movements.<sup>40</sup> The second problem he argues is that voluntary actions are not accompanied by a desire to move the muscles:<sup>41</sup>

What happens in normal action is that if we decide to do something we think of it in the ordinary terminology of action...and given that we have learnt to do these things and our faculties are unimpaired, our muscular movements normally follow smoothly on our decision. We do not have to launch our muscles into action by desiring that they contract as the Austinian terminology of 'acts' caused by 'volitions' suggests.

1.23 Hart suggests an alternative explanation of involuntary conduct, which provides for a separate analysis of omission to act. Involuntary conduct, such as epilepsy, stroke, reflex, automatism can be characterised as conduct which the person does not think he or she is doing; that is, such conduct does not result from the desire to do it.<sup>42</sup> Omissions, on the other hand, occur:<sup>43</sup>

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mid-1800s interest in his lectures revived and subsequently these played an influential role in the development of jurisprudence in England.

<sup>38</sup> *ibid.*

<sup>39</sup> Lecture XVIII, pp 411-415, quoted in Hart, *ibid.*, p. 98.

<sup>40</sup> Hart, *ibid.*, p. 100.

<sup>41</sup> *ibid.*, p. 103.

<sup>42</sup> *ibid.*, p. 105.

<sup>43</sup> *ibid.*, p. 106.

if he is unconscious and so unable to do any conscious action, or if, though conscious he is unable to make the particular muscular movements required for the performance of actions.

1.24 Regardless of how one defines ‘voluntariness’, the concept is not without its complexities. Voluntariness, for example, concerns both the conduct and mental element and in so doing blurs the distinction between the two elements. Consequently, a distinction must be drawn between whether an act was willed and whether an act was intended. This has been described as creating ‘complexity and confusion’ making it very difficult for judges to give clear instructions to juries.<sup>44</sup> In its 1988 discussion paper, the Law Reform Commission of Victoria proposed that voluntariness should be redefined as relevant to the mental element of an offence,<sup>45</sup> but the proposal was later withdrawn.<sup>46</sup> The current law in Victoria is that voluntariness continues to constitute part of the conduct element of an offence.

## Automatism

1.25 Automatism is a difficult concept to define, but it is generally accepted that it refers to conduct performed where the bodily movements are beyond a person’s control; that is, where a person acts without any awareness of what he or she is doing. It appears that automatism was first used in this sense in 1951 in the English case of *Harrison-Owen*.<sup>47</sup> There are earlier cases which raise issues of automatism<sup>48</sup> and as far back as 1889, Mr Justice Stephen discussed the significance of somnambulism in the case of *R. v. Tolson*.<sup>49</sup> Originally, automatism came within the defence of insanity, which allows a defendant to be excused if it can be shown that the defendant did not know the wrongness or nature of his or her act and that lack of knowledge derives from a ‘disease of the mind’.<sup>50</sup> Where automatism constitutes a ‘disease of the mind’, it still comes within the rules which apply to insanity. However, since the mid-twentieth century, there has been recognition of sane automatism and such conduct has been considered to constitute a separate defence

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<sup>44</sup> South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility*, Discussion Paper, Jul. 1998, p. 13.

<sup>45</sup> Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Discussion Paper no. 14, 1988, pp. 78–79.

<sup>46</sup> *Mental Malfunction and Criminal Responsibility*, Report, op.cit., p. 67.

<sup>47</sup> [1951] 2 All ER 726.

<sup>48</sup> *H.M. Advocate v. Ritchie* [1926] SC (J) 45. See also Williams, *Criminal Law: the General Part* (2<sup>nd</sup> ed.), pp. 482–490; Edwards, ‘Automatism and Criminal Responsibility’ (1958) 21 *Modern Law Review* 375, p. 380.

<sup>49</sup> (1889) 23 QBD 168, p. 187.

<sup>50</sup> The leading common law case is *R. v. M’Naghten* (1843) 10 Cl & F 200; 8 ER 718.

from insanity.<sup>51</sup> The scope of automatism has continued to expand and includes, for example, sleepwalking,<sup>52</sup> concussion,<sup>53</sup> hysterical dissociation<sup>54</sup> and hypoglycaemia.<sup>55</sup>

1.26 In 1990, the Law Reform Commission of Victoria considered whether the defence of sane automatism should be abolished, but decided against its abolition on the basis that it is a defence which is rarely pleaded, and which if pleaded rarely succeeds.<sup>56</sup> The Law Reform Commission also noted that to remove the defence would:<sup>57</sup>

be contrary to the notion of free will which underpins our system of criminal responsibility to convict those whose actions were not willed or were the product of clouded or altered states of consciousness. It would be unjust to hold people responsible for actions which they could neither alter nor control.

1.27 For intoxication to create a state of automatism, the person would have to be grossly intoxicated, and even a state of gross intoxication does not always result in automatism, but may do no more than make a person less inhibited.<sup>58</sup> Consideration was given by the Law Reform Commission of Victoria in 1990 to whether evidence of self-induced intoxication should no longer form a basis of the defence of automatism.<sup>59</sup> The Commission noted that the arguments in favour of such a proposal included the fact that even though a defendant may have acted involuntarily, such a person should still be held responsible for his or her actions and that the community required protection from criminal self-induced intoxicated offenders who committed criminal acts.<sup>60</sup> The Commission concluded that self-induced intoxication should continue to be a ground of the defence of automatism on the basis that no distinction should be drawn between gross intoxication and other forms of automatism and that no person should be held criminally liable for conduct involuntarily performed.<sup>61</sup> The

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<sup>51</sup> *R. v. Harrison-Owen* [1951] 2 All ER. 726.

<sup>52</sup> *R. v. Cogdon* (1950) unreported, noted in Morris, 'Somnambulistic Homicide: Ghosts, Spiders and North Koreans' (1951) 5 *Res Judicatae* 29. See more recently *R. v. Brugess* [1991] 2 WLR 1206; *R. v. Parks* (1992) 75 CCC (3d) 287 & *R. v. Wade* (1994) 89 CCC (3d) 39.

<sup>53</sup> *Kay v. Butterworth* (1945) 61 TLR 452; *R. v. Minor* (1955) 112 CCC 29; *Coates v. The Queen* (1957) 96 CLR 353; *Ziems v. Prothonotary of the Supreme Court* (1957) 97 CLR 279; *Hill v. Baxter* [1958] 1 QB 277; *R. v. Wakefield* (1958) 75 WN (NSW) 55; *Cooper v. McKenna* [1960] Qd R 406; *R. v. Scott* [1967] VR 276; *R. v. Stripp* (1978) 69 Cr App R 318.

<sup>54</sup> *R. v. Radford* (1985) 20 A. Crim. Rep 388; *R. v. S* [1979] 2 NSWLR 1.

<sup>55</sup> *R. v. Bentley* [1960] CLY 707; *Watmore v. Jenkins* [1962] 2 QB 572; *R. v. Quick* [1973] QB 910; *R. v. Bailey* [1983] 1 WLR 5; *R. v. Hennessy* [1989] 2 All ER 9.

<sup>56</sup> *Mental Malfunction and Criminal Responsibility*, Report, op. cit., pp 67-68.

<sup>57</sup> *ibid.*, p. 67.

<sup>58</sup> Mitchell, 'The Intoxicated Offender—Refuting the Legal and Medical Myths', (1988) 11 *International Journal of Law and Psychiatry* 77.

<sup>59</sup> *Mental Malfunction and Criminal Responsibility*, Report, op. cit., pp 76-77.

<sup>60</sup> *ibid.*, p. 76.

<sup>61</sup> *ibid.*, p. 77.

Committee, in conducting this current Inquiry, has not encountered evidence of sufficient weight to warrant it reaching a different conclusion.

## **Mental Element**

1.28 To establish the mental element of an offence, it must be shown that the defendant had a guilty mind or an evil intention. In the words of the eminent English commentator, Sir William Blackstone ‘as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all’.<sup>62</sup> This proposition has been traced back to the fourth century to St. Augustine, the Bishop of Hippo in Africa, and can also be found in the works of the well known English jurists: Sir Edward Coke, Sir Matthew Hale and Sir William Hawkins.<sup>63</sup> The principle of ‘vicious will’ was a vague concept applied to find a defendant guilty unless that defendant could show a defence; such as, duress, insanity, coercion and so on.

1.29 The nineteenth century witnessed a change in the approach to the mental element of criminal offences. New theories concerning the human body and its complexities were expounded by the French philosopher Descartes and adopted by the English legal reformer, Jeremy Bentham and the English legal philosopher, John Austin.<sup>64</sup> The most important enunciation of the mental element of an offence is that of Sir James Stephen in the 1889 case of *R. v. Tolson*.<sup>65</sup> Stephen indicated that the state of mind differed according to the particular offence under consideration, noting that some offences required the desire to bring about a specific result, while others required mere inattention. What is important to note, is that each criminal offence had its own mental element, separate from any other criminal offence. It is Stephen’s view that lays the foundation for our understanding of the mental element of criminal offences today.

1.30 A person’s conduct may be considered to be ‘intentional’ in two different senses. In one sense, a defendant may be acting intentionally if that defendant makes a conscious decision to bring about a certain consequence. If a defendant is acting indifferently, this will not be sufficient to show that the defendant made a ‘conscious’ decision to achieve certain results. In the second sense, a defendant acts intentionally if the defendant is aware that the consequences will inevitably occur as a result of his or her conduct. Here a ‘conscious’ decision by the defendant is not relevant, all that is

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<sup>62</sup> *Commentaries on the Laws of England*, bk iv, Clarendon Press, Oxford, 1769, p. 21.

<sup>63</sup> L. Waller and C.R. Williams, *Criminal Law Text and Cases*, 6<sup>th</sup> edition, Butterworths, 1989, p. 6.

<sup>64</sup> *ibid.*

<sup>65</sup> (1889) 23 QBD 168.

necessary is for the defendant to foresee the inevitable consequences of his or her conduct.

1.31 The Australian criminal law commentator, Brent Fisse, argues that the first explanation of intention—that is, the desire to bring about a particular consequence—is the appropriate meaning to be given to intention, because the second explanation is really indistinguishable from the concept of recklessness.<sup>66</sup> To establish the mental element of an offence on the basis of recklessness, it must be shown that the defendant thought about the consequences of his or her conduct, but persisted in the behaviour regardless of those consequences. The Committee notes the debate even at the highest judicial levels, in that the House of Lords has extended the scope of recklessness to include failure to have regard to an obvious risk,<sup>67</sup> whereas, the Australian High Court has consistently held the view that recklessness is proven by establishing foresight of consequences.<sup>68</sup>

#### *Is Intention Determined by an Objective or a Subjective Test?*

1.32 Whether intention should be determined according to objective or subjective standards became an issue after the controversial English case in 1961 of *DPP v. Smith*.<sup>69</sup> In that case, the defendant was driving a car containing stolen property. A police officer intercepted him, but the defendant accelerated with the police officer clinging to the side of the car, resulting in the death of the police officer. The House of Lords applied an objective test, holding that a person is guilty of murder where an ordinary person would have foreseen that the defendant's action would result in death or grievous bodily harm. *Smith's* case did not remain the law in England for very long and the principle was abolished in 1967 by section 8 of the *Criminal Justice Act 1967* (UK). Under that provision, proof of actual intention is now required.<sup>70</sup>

1.33 The decision in *Smith's* case received much criticism in Australia. In *Parker v. The Queen*<sup>71</sup> the High Court ruled that the test for determining intention was

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<sup>66</sup> B. Fisse, *Howard's Criminal Law*, 5<sup>th</sup> edition, The Law Book Company, 1990, p. 481.

<sup>67</sup> *R. v. Caldwell* [1982] AC 341; *R. v. Lawrence* [1982] AC 510; *R. v. Seymour* [1983] 2 AC 493.

<sup>68</sup> *R. v. Crabbe* (1985) 156 CLR 464; *Pemble v. The Queen* (1971) 124 CLR 107; *La Fontaine v. The Queen* (1976) 136 CLR 62.

<sup>69</sup> [1961] AC 290.

<sup>70</sup> It was argued in *Majewski's* case that section 8 was inconsistent with the principles in *DPP v. Beard* [1920] AC 497, but the argument was rejected.

<sup>71</sup> (1963) 111 CLR 610.

subjective; that is, intention must be determined by reference to the defendant's actual state of mind. The Code States also apply a subjective test.<sup>72</sup>

## Self-Induced Intoxication

1.34 Self-induced (or what is also termed 'voluntary' or 'deliberate') intoxication means that a person knowingly consumes alcohol or drugs. However, sometimes a person's consumption of alcohol or drugs may be involuntary where, for example, a person's drink has been 'surreptitiously laced'<sup>73</sup> or where a person has been forced to consume the intoxicant against his or her will. This contrasts with a person's failure to appreciate the quantity or strength of alcohol or drugs consumed which does not constitute an argument for involuntary intoxication. Involuntary intoxication is part of the general principle that allows evidence of intoxication to be considered to show that a defendant acted unintentionally or involuntarily.

## Gross Intoxication

1.35 When referring to intoxication, the Committee wishes to make clear that it is only 'gross' intoxication that may lead to a successful claim that the defendant was incapable of acting intentionally or voluntarily. It is important to be aware that there are numerous degrees of intoxication and while a person may have been disinhibited, or more aggressive, or experiencing less self-control as a consequence of that intoxication, that person may still have been able to act intentionally or voluntarily. The experienced former prosecutor and lawyer, County Court Judge, his Honour Judge P. Mullaly gave the following evidence about the degree of intoxication:<sup>74</sup>

A person's state of intoxication from alcohol can vary very greatly in degree. A person may be intoxicated in the sense that his personality is changed, his will is warped, his disposition altered or his self-control weakened so that whilst intoxicated to this degree he does act voluntarily and intentionally which in a sober state he would or might not have done. His intoxication to this degree though conducive to and perhaps explanatory of his actions has not destroyed his will or precluded the formation of any relevant intent. This degree of intoxication does not provide any defence. In order to be relevant in a trial of this nature the intoxication must relate to the voluntary nature of the acts done or to the formation of any necessary intent.

1.36 The focus of this report is upon gross intoxication, that is not simply the consumption of a couple of drinks, but a degree of intoxication to the extent that a

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<sup>72</sup> ss. 302(1) and (3) *Criminal Code Act 1899* (Qld); ss. 278, 279(1) and (3) *Criminal Code Act 1913* (WA) and ss. 156(2)(a), (b) and (c) *Criminal Code Act 1924* (Tas).

<sup>73</sup> *O'Connor's case*, (1980) 146 CLR 64, 92, per Gibbs J.

<sup>74</sup> County Court of Victoria, *Minutes of Evidence*, 15 Mar. 1999, p. 5.

person is incapable of forming an intention to commit a criminal offence or of acting voluntarily.

## The Law Prior to the Nineteenth Century

2.1 In England prior to the early nineteenth century, early notions of retribution and punishment resulted in evidence of self-induced intoxication being regarded as no excuse for a criminal offence. A person who voluntarily consumed alcohol with the consequence that his or her will-power was destroyed was in no better position with regard to criminal acts than a sober person.

2.2 Early courts expressed the view that the taking of alcohol was in itself a blameworthy act. One of the first statements of the law concerning intoxication can be found in the sixteenth century case of *Reniger v. Feogossa*:<sup>75</sup>

If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.

2.3 The writings of prominent authorities of the sixteenth and seventeenth centuries<sup>76</sup> also indicate that the prevailing legal principle was that a person who committed a criminal offence was not to be excused on account of a condition brought about by his or her own fault.

2.4 However some authorities went further and treated drunkenness as an aggravation of an offence. In 1603 in *Beverley's Case*,<sup>77</sup> not only was drunkenness described as providing no excuse to a criminal offence, but it was given the status of an offence in itself with the consequence of aggravating the criminal offence committed. In the early part of the seventeenth century, the eminent English jurist Sir Edward Coke expressed a similar view:<sup>78</sup>

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<sup>75</sup> (1551) 1 Plowd 19; 75 ER 31.

<sup>76</sup> R. Hooker, *Laws of the Ecclesiastical Polity*, sixteenth century, bk i and Lord Bacon, *Elements of the Common Laws of England*, 1636, p. 29.

<sup>77</sup> (1603) 4 Co Rep 125.

<sup>78</sup> E. Coke, *Institutes of the Laws of England*, bk i, London, 1628, p. 247a.

As for a drunkard who is voluntarius daemon, he hath no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it.

2.5 Other distinguished English legal writers, including Sir William Blackstone,<sup>79</sup> Joseph Chitty<sup>80</sup> and William Russell,<sup>81</sup> later expressed similar sentiments. How this proposition operated in practice remains unclear.<sup>82</sup> It is possible that ‘aggravation’ referred simply to a judicial discretion to take intoxication into account when sentencing a defendant. Alternatively, it may have been used by the prosecution to show that a ‘defendant was so bad as to really warrant conviction’.<sup>83</sup> Finally, it simply may have reflected a prevailing sentiment of the times that drunkenness was a ‘loathsome and odious sin...being the root and foundations of many other enormous sins’.<sup>84</sup> It should be noted that the suggestion that drunkenness constituted an aggravation of an offence, was omitted from a number of leading authorities during that period, including Sir Francis Bacon,<sup>85</sup> Sir Matthew Hale<sup>86</sup> and William Hawkins.<sup>87</sup> Hawkins, for example, commented:<sup>88</sup>

He who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober.

2.6 Regardless of the suggestion that drunkenness constituted an ‘aggravation’, the prevailing principle prior to the early nineteenth century remained that a defendant who committed a criminal offence while in a state of self-induced intoxication remained answerable for the offence as if he or she had been sober at the time the offence was committed.<sup>89</sup>

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<sup>79</sup> W. Blackstone, *Commentaries on the Laws of England*, bk iv, Clarendon Press, Oxford, 1769, p. 26.

<sup>80</sup> J. Chitty, *Criminal Law*, vol. 3, London, 1816, p. 725.

<sup>81</sup> W. Russell, *Crimes and Misdemeanours*, vol. 1, London, 1918, p. 11.

<sup>82</sup> R. Singh, ‘History of the Defence of Drunkenness in English Criminal Law’ (1933) 49 *LQR* 528, 531; J. Herlihy, ‘Voluntary Intoxication as a “Defence” at Common Law and under the Criminal Codes of Queensland and Western Australia’, (1980-81) 6 *The Queensland Lawyer* 153, 154; D. McCord, ‘The English and American History of Voluntary Intoxication to Negate Mens Rea’ (1990) 11 *The Journal of Legal History* 372, 374.

<sup>83</sup> D. McCord, *op. cit.*, p. 375.

<sup>84</sup> Preamble, 4 Jac. 1, c 5, *An Act for Repressing the Odious and Loathsome Sin of Drunkenness*, cited in R. Singh, *op. cit.*, p 532.

<sup>85</sup> F. Bacon, *Elements of the Common Laws of England*, London, 1636, p. 29.

<sup>86</sup> M. Hale, *Historia Placitorum Coronae. The History of the Pleas of the Crown*, vol. 1, T. Dogherty (ed.), London, 1800, p. 32.

<sup>87</sup> W. Hawkins, *A Treatise on the Pleas of the Crown*, 6<sup>th</sup> ed., T. Leach (ed.), His Majesty’s Law-Printers, London, 1777-87, bk i, c. 1, s.6.

<sup>88</sup> *ibid.*

<sup>89</sup> Interestingly, a South Australian Private Member’s Bill, which is currently before the Legislative Council, contains a provision based on the same principle, that is that a self-induced intoxicated defendant should be treated as having been sober at the time of the offence.

2.7 The first modifications to the principle that drunkenness did not constitute an excuse to a criminal offence are to be found in the writings of Matthew Hale,<sup>90</sup> who suggested that intoxication could constitute an excuse for a criminal offence if that intoxication rendered a defendant permanently insane, but not if it only led to a condition of temporary insanity.

## The Nineteenth Century

2.8 During the early nineteenth century, the severity of the common law, which refused to recognise drunkenness as an excuse for any criminal conduct, gradually relaxed with the judiciary adopting a more sympathetic attitude to serious crimes where the penalties were harsh; often involving the death sentence or transportation. When reading the cases, it is difficult to ascertain any particular governing principle—the law concerning self-induced intoxication and criminal responsibility was in a state of flux.

2.9 The first reported English case to suggest that drunkenness could in some circumstances be taken into consideration when considering a defendant's culpability is the 1819 case of *R. v. Grindley*.<sup>91</sup> In that case, Mr Justice Holroyd held that, while intoxication did not excuse the commission of a crime, when considering whether the act of murder was premeditated or committed in the heat of the moment, evidence of intoxication should be taken into account.<sup>92</sup>

2.10 The treatment by the courts of intoxication and culpability in the 1830's was inconsistent. In cases involving self-defence and a defendant's bona fide belief that he or she was about to be attacked, and cases involving the effect of sudden provocation on a defendant, it was held that drunkenness could be taken into consideration. In 1830, in *Marshall's case*,<sup>93</sup> which involved a charge of stabbing, Mr Justice Park held that the jury might take into account the defendant's drunkenness when considering whether the defendant acted under a bona fide apprehension that his person or property was about to be attacked.<sup>94</sup> Five years later in *Pearson's case*,<sup>95</sup> a defendant

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<sup>90</sup> M. Hale, loc. cit., pp. 31-32.

<sup>91</sup> Referred to in *R. v. Carroll*, (1835) 7 C & P 145; 173 ER 64.

<sup>92</sup> *ibid.*, 146.

<sup>93</sup> (1830) 1 Lewin 144.

<sup>94</sup> Park J is reported to have given a similar direction in *R. v. Goodier* (1831) 1 Lewin 76 cited in *DPP v. Beard* [1920] AC 479, 496.

<sup>95</sup> (1835) 2 Lewin 144.

was charged with murder for beating his wife to death with a rakeshank. Mr Justice Park noted that while drunkenness was no excuse for a criminal offence, it:<sup>96</sup>

may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation.

2.11 Similar views were expressed by Baron Parke two years later in *R. v. Thomas*<sup>97</sup> where it was commented that the passion of an intoxicated person was more easily excitable than that of a sober person.<sup>98</sup>

2.12 In contrast to these cases, was the decision of Mr Justice Park in 1835 in *R. v. Carroll*,<sup>99</sup> where he held that drunkenness could not be taken into consideration where premeditation was in issue. In reaching this conclusion His Honour overruled the earlier decision of *R. v. Grindley*,<sup>100</sup> which he criticised as being too wide in its application with the potential for risk to human safety if it were to be 'considered as law'.

2.13 Comments on the relationship between drunkenness and intent were first made in 1836 in *R. v. Meakin*.<sup>101</sup> In that case, the defendant was accused of stabbing the deceased with a fork with intent to murder. Baron Alderson directed the jury that when examining intent, drunkenness may be taken into consideration when the instrument used is not a dangerous type of instrument:<sup>102</sup>

but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.

On the facts before him, Baron Alderson directed the jury that the use of the fork by the defendant constituted the use of a dangerous weapon and that this indicated a malicious intent that could not be altered by evidence of drunkenness. The jury returned a guilty verdict.

2.14 In 1838, further consideration was given to drunkenness and intention in *R. v. Cruse*,<sup>103</sup> where the defendant was charged with assault with intent to commit murder. Mr Justice Patterson directed the jury that drunkenness was an important factor to be considered where intent was in issue and that although the defendant

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<sup>96</sup> *ibid.*

<sup>97</sup> (1837) 7 C & P 817.

<sup>98</sup> *ibid.*, 820.

<sup>99</sup> (1835) 7 C & P 145.

<sup>100</sup> Referred to in *R. v. Carroll*, (1835) 7 C & P 145; 173 ER 64.

<sup>101</sup> (1836) 7 C & P 297.

<sup>102</sup> *ibid.*

<sup>103</sup> (1838) 8 C & P 541.

may have committed an act of great violence, the defendant may have been unable to form any intent due to drunkenness.<sup>104</sup>

2.15 Mr Justice Patterson's remarks were carefully examined by Mr Justice Coleridge (as he then was) in *R. v. Monkhouse*,<sup>105</sup> which involved a charge of wounding with intent to murder. While agreeing with the substance of the earlier direction, His Honour questioned the propriety of the language used in the earlier case.<sup>106</sup> His Honour directed the jury that while drunkenness did not constitute a defence to a criminal offence, the jury must consider whether the defendant was so intoxicated that he was unable to form the intent charged.<sup>107</sup> If a defendant was rendered more irritable or excitable by his or her intoxicated condition, then that condition was not a relevant factor for the jury to take into account. However, Mr Justice Coleridge said that a defendant's intoxicated condition should be considered by the jury if it:<sup>108</sup>

was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention.

This direction remains important as the first to suggest that evidence of intoxication is relevant to negative specific intent.

2.16 In 1887, Mr Justice Stephen made a thorough examination of the relationship between drunkenness and homicidal intention in *R. v. Doherty*.<sup>109</sup> On the question of whether the verdict should be murder or manslaughter, Mr Justice Stephen said that when intention:<sup>110</sup>

is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime.

However if a drunken person formed an intention to kill or do grievous bodily harm to another and carried out that intention, then that drunken person was as guilty of murder as if he or she had been sober.<sup>111</sup> In other words, this case established that where a specific intent is an essential element of a criminal offence, evidence of

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<sup>104</sup> *ibid.*, 546.

<sup>105</sup> (1849) 4 Cox CC 55.

<sup>106</sup> *ibid.*, 56.

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

<sup>109</sup> (1887) 16 Cox CC 306.

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*, 308.

drunkenness was relevant to whether a defendant formed the intention necessary for the particular crime.

2.17 It is interesting to note that *R. v. Doherty*<sup>112</sup> is inconsistent with the proposition in *R. v. Meakin*<sup>113</sup> that where a dangerous instrument was used, evidence of drunkenness could not be taken into account by the jury when considering a defendant's intention.<sup>114</sup>

2.18 The 1880's also witnessed developments in the law concerning the relationship between drunkenness and mental disease. In 1881, in *R. v. Davis*,<sup>115</sup> a case which involved a charge of wounding with intent to murder, the evidence showed that the defendant was suffering from delirium tremens caused by alcohol. Mr Justice Stephen held that drunkenness amounting to temporary insanity could constitute a defence to crime. His Honour said:<sup>116</sup>

if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible.

2.19 This view stood in contrast to the earlier cases in the 1820's of *R. v. Burrows*<sup>117</sup> and *R. v. Rennie*,<sup>118</sup> where Mr Justice Holroyd refused to recognise drunkenness as an excuse for a criminal offence unless that drunkenness constituted a continuing or permanent condition of insanity.

2.20 The proposition enunciated in *R. v. Davis*<sup>119</sup> was confirmed four years later by Mr Justice Day in *R. v. Baines*.<sup>120</sup> In *DPP v. Beard*<sup>121</sup> the Lord Chancellor, Lord Birkenhead, expressly approved this proposition,<sup>122</sup> making clear that drunkenness causing only temporary insanity did constitute a defence to a criminal charge.

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<sup>112</sup> *ibid.*

<sup>113</sup> (1836) 7 C & P 297.

<sup>114</sup> R. Singh, *op. cit.*, p. 541 and J. Herlihy, *op. cit.*, p. 158.

<sup>115</sup> (1881) 14 Cox CC 563.

<sup>116</sup> *ibid.*, 564.

<sup>117</sup> (1823) 1 Lewin 75.

<sup>118</sup> (1825) 1 Lewin 76.

<sup>119</sup> (1881) 14 Cox CC 563.

<sup>120</sup> *The Times*, 25 Jan. 1896.

<sup>121</sup> [1920] AC 479

<sup>122</sup> *ibid.*, 501.

## Twentieth Century Authorities

2.21 The first important common law statement in the twentieth century concerning drunkenness and criminal responsibility occurred in *R. v. Meade*.<sup>123</sup> In that case, the defendant struck the victim with a broomstick and punched her with his fist causing the rupture of her intestine and her death. The defendant was found guilty of murder and appealed on the basis that the trial judge had led the jury to believe that a verdict of manslaughter required evidence that the defendant was insane or in a condition similar to insanity. The English Court of Appeal upheld the verdict declaring that a person is taken to intend the natural consequences of his or her act, but that such a presumption can be rebutted by evidence of drunkenness which shows that the defendant's mind was so affected by drink 'that he was incapable of knowing that what he was doing was dangerous, i.e. likely to inflict injury'.<sup>124</sup> This was a much broader principle than that which had previously been laid down by Mr Justice Stephen in *R. v. Doherty*,<sup>125</sup> in that its application was universal and not restricted to offences where intent was an essential element of the crime charged.

2.22 *R. v. Meade*<sup>126</sup> remained the leading authority until 1920 when the House of Lords delivered its decision in *D.P.P. v. Beard*.<sup>127</sup> In that case, the defendant raped a young girl of 13 and in placing his hand across her mouth to prevent her screaming suffocated her. Beard's defence was that he was drunk at the time and he had not intended to kill the girl. The trial judge directed the jury that the defence of drunkenness could only be relied upon if it produced in the defendant a state of insanity. The Court of Appeal quashed Beard's conviction and substituted a verdict of manslaughter. The House of Lords reinstated the murder conviction making important pronouncements concerning intoxication and criminal responsibility.<sup>128</sup>

2.23 The decision generated debate and uncertainty arising from two passages that proved difficult to reconcile. Commentators have criticised the approach, some arguing that evidence of intoxication should be able to negative *mens rea* for any

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<sup>123</sup> [1909] 1 KB 895.

<sup>124</sup> *ibid.*, 899.

<sup>125</sup> (1887) 16 Cox CC 306.

<sup>126</sup> [1909] 1 KB 895.

<sup>127</sup> [1920] AC 479.

<sup>128</sup> *ibid.* Lord Birkenhead L.C. delivered the judgment and the other Law Lords agreed. The other Law Lords were: Earl of Reading CJ, Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Buckmaster and Lord Phillimore.

offence.<sup>129</sup> In the first of the two controversial passages, the Lord Chancellor, Lord Birkenhead, said:<sup>130</sup>

where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime.

The other controversial passage occurs later in the decision:<sup>131</sup>

I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime...It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea.

2.24 One of the major controversies was whether evidence of self-induced intoxication could be raised by a defendant in relation to any offence to show that he or she did not have the appropriate guilty mind for the offence charged, or whether evidence of self-induced intoxication was only relevant to offences with a specific intent; that is, offences with an intention to achieve a particular result. It is arguable that, in the first passage, Lord Birkenhead may not have meant to distinguish between offences of specific and basic intent, but he may simply have been referring to offences where intent is an important element of an offence.

2.25 Controversy aside, the principle that was subsequently applied by most judges and practitioners in England was that which distinguished between offences of specific and basic intent, with the consequence that where a defendant was charged with an offence of specific intent, evidence of self-induced intoxication was able to be relied upon by a defendant to show that he or she did not have the necessary intent. Accordingly, 'specific' and 'basic' intent have been given distinct technical meanings,

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<sup>129</sup> For a discussion of the case and the principles arising out of it see, e.g., R. Singh, 'Defence of Drunkenness in Criminal Law', [1933] 49 *LQR* 528; G. Williams, *Criminal Law: The General Part*, 2nd ed., Stevens & Sons, London, 1961; G. Williams, *The Mental Element*, Stevens & Sons, London, 1965; S. Beck and G. Parker, 'The Intoxicated Offender—a Problem of Responsibility', (1966) *Can. Bar Rev.*, 563; G. Orchard, 'Drunkenness, Drugs and Manslaughter', [1970] *Crim. L.R.* 132; A. Ashworth, 'Reason, Logic and Criminal Liability', (1975) 91 *LQR* 102; S. Beaumont, 'Drunkenness and Criminal Responsibility—Recent English Experience', (1976) 54 *Can. Bar Rev.* 777; A. Dashwood, 'Logic and the Lords in Majewski', [1977] *Crim. L.R.* 532; P. Fairall, 'Majewski Banished', (1980) 4 *Crim. L.J.* 264; Colvin, 'A Theory of the Intoxication Defence', (1981) 59 *Can. Bar Rev.* 750; M. Goode, 'Some Thoughts on the Present State of the Defence of Intoxication', (1984) 8 *Crim. L.J.* 217; Quigley, 'Reform of the Intoxication Defence', (1987) 33 *McGill L.J.* 1; Quigley, 'Specific and General Nonsense', (1987) 11 *Dalhousie L.J.* 75.

<sup>130</sup> [1920] AC 479, 499.

<sup>131</sup> *ibid.*, 504.

with the result that evidence of self-induced intoxication is treated differently according to the nature of the offence charged.

2.26 Another interesting point is that while Lord Birkenhead spoke of the effect of intoxication on the capacity of the defendant to form the relevant mental state, subsequent decisions altered the rule so that the crucial question was whether the prosecution could prove that the defendant formed the requisite mental element in fact.<sup>132</sup>

## Modern Authorities

2.27 The leading modern authority in English law is the decision by the House of Lords in *DPP v. Majewski*.<sup>133</sup> The defendant was involved in a brawl at a public house in which he assaulted patrons and police. He was charged with assault occasioning actual bodily harm and assaulting a constable in the execution of his duty. He gave evidence that he had consumed a large quantity of alcohol and drugs and that at the time of the alleged offences he did not know what he was doing and had no intention of striking anyone. The trial judge directed the jury that self-induced intoxication was irrelevant and could afford him no defence. The defendant was convicted and the Court of Appeal dismissed his appeal. However, the Court of Appeal certified the following question as a point of law of public importance for the consideration of the House of Lords, namely:<sup>134</sup>

Whether a defendant may properly be convicted of assault notwithstanding that by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault.

2.28 The House of Lords was unanimous in concluding that even though the defendant was intoxicated he could be convicted of the assault. In reaching that conclusion their Lordships were prepared to sacrifice legal consistency and logic on grounds of public policy.

2.29 *Majewski's* case divides offences into those of specific and basic intent. The commonly accepted view of the principle laid down in the case is that in relation to crimes of basic intent, evidence of self-induced intoxication cannot be considered when determining whether a defendant formed the intention to commit the offence

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<sup>132</sup> See, e.g., *Broadhurst v. The Queen* [1964] AC 441; *R. v. Kamipeli* [1975] 2 NZLR 610; *R. v. Singapore* (1975) 11 SASR 469; *R. v. Sheehan* [1975] 2 All ER 960 (A); *R. v. Dees* (1978) 40 CCC (2d) 58, (Ont. C.A.).

<sup>133</sup> [1977] AC 443.

<sup>134</sup> *ibid.*, p. 469.

or whether a defendant acted voluntarily.<sup>135</sup> In other words, a defendant may face conviction for an offence of basic intent even though the defendant had no intention to commit the offence or acted involuntarily. Where the intoxication produced a state of insanity, evidence of self-induced intoxication may be considered to determine whether a defendant formed the mental element for offences of basic intent. The principles enunciated in *Beard's* case<sup>136</sup> were thus confirmed and the division of criminal offences into 'basic' and 'specific' intent became entrenched in English common law.

2.30 The decision in *Majewski's* case was based on principles of public policy, notably:

- (1) that the law should provide protection against unprovoked violent conduct of intoxicated offenders; and
- (2) that it is morally just to hold intoxicated offenders responsible for criminal conduct, given that they freely chose to become intoxicated.

In relation to the need to protect the community, Lord Salmon, for example, said:<sup>137</sup>

The law is primarily concerned with human affairs. I believe that the main object of our legal system is to preserve individual liberty. One important aspect of individual liberty is protection against physical violence. If there were to be no penal sanction for any injury unlawfully inflicted under the complete mastery of drink or drugs, voluntarily taken, the social consequence could be appalling.

As to the justice involved in convicting an intoxicated offender, Lord Chancellor, Elwyn-Jones accurately summed-up the views of all their Lordships:<sup>138</sup>

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases.

2.31 The decision in *Majewski's* case and its division of offences into those of specific and basic intent has been strongly criticised. The major difficulty arising from this decision (as with *Beard's* case) is how to consistently differentiate between

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<sup>135</sup> UK, Law Commission, *Intoxication and Criminal Liability*, Consultation Paper no. 127, 1993 suggests that there are two other interpretations of *Majewski's* case. See pp. 13–17.

<sup>136</sup> [1920] AC 479. The House of Lords acknowledged that the principles in *Beard's* case were illogical but decided that these principles could be justified on policy grounds.

<sup>137</sup> [1977] AC 443, 484.

<sup>138</sup> *ibid.*, 474.

offences of specific and basic intent. This and other criticisms are discussed further below.<sup>139</sup>

2.32 A further restriction was placed on the use of evidence of intoxication in 1982 in the case of *R. v. Caldwell*.<sup>140</sup> *Caldwell's* case concerned the former employee of a hotel proprietor who became very intoxicated, broke a window and started a fire in a ground floor room. The fire was stopped before any substantial damage occurred. The defendant said that while he intended to cause damage he did not consider that people's lives might be in jeopardy. The House of Lords held that evidence of self-induced intoxication could not be considered where recklessness constitutes the fault element of an offence.<sup>141</sup> Recklessness was defined as conduct which created a risk that would have been obvious to the ordinary prudent person, but the defendant either gave no thought to the possibility of the risk or, having recognised the risk, decided to take it anyway.<sup>142</sup> This definition stands in contrast to the subjective definition adopted by Australian courts.<sup>143</sup> The crucial point here is that as a consequence of *Caldwell's* case, evidence of intoxication could no longer be considered where recklessness was at issue.

2.33 This was the state of the law in Australia when the High Court was required to consider the law in relation to self-induced intoxication in *The Queen v. O'Connor*.<sup>144</sup> The law in the various Australian jurisdictions before and since *O'Connor's* case is discussed in the next chapter.

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<sup>139</sup> See *infra*, paras 6.5-6.4.

<sup>140</sup> [1982] AC 341.

<sup>141</sup> *ibid.*, 356 per Lord Diplock.

<sup>142</sup> This definition of recklessness arises where recklessness is an element of an offence and only applies to a narrow range of cases including criminal damage under the *Criminal Damage Act 1971* (UK). See, UK, Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no. 229, p. 19. The Law Commission also noted that the *Caldwell* definition of recklessness used to apply to offences which have now been abolished including: reckless driving, causing death by reckless driving and involuntary manslaughter (see *ibid.*). A further point made by the Law Commission is that the general definition of recklessness includes both a subjective and objective test; namely, that a person is reckless when that person is aware of the risk and it is unreasonable having regard to the circumstances to take that risk (*ibid.*, 17).

<sup>143</sup> *R. v. Crabbe* (1985) 156 CLR 464; *O'Connor's* case (1980) 146 CLR 64; *Pemble v. The Queen* (1971) 124 CLR 107.

<sup>144</sup> (1980) 146 CLR 64.



3.1 In *The Queen v. O'Connor* Chief Justice Barwick remarked:<sup>145</sup>

I can readily understand that a person who has taken alcohol or another drug to such an extent that he is intoxicated thereby to the point where he has no will to act or no capacity to form an intent to do an act is blameworthy and that his act of having ingested or administered the alcohol or other drug ought to be visited with severe consequences...But, though blameworthy for becoming intoxicated, I can see no ground for presuming his acts to be voluntary and relevantly intentional.

As noted earlier,<sup>146</sup> the leading case in Australian common law jurisdictions is the decision of the High Court in *O'Connor's* case in which the court by a majority held that evidence of self-induced intoxication is relevant in relation to any criminal offence to determine whether a defendant acted voluntarily or intentionally. This principle differs significantly from the approach adopted in the Code States, which in general terms follows the English law as laid down in *D.P.P. v. Majewski*.<sup>147</sup>

3.2 As *O'Connor's* case involved assault, it left open the possibility that evidence of self-induced intoxication, while relevant to murder, would not be relevant to a charge of manslaughter. In *R. v. Martin*<sup>148</sup> the High Court made it clear that there was no exception to the application of the *O'Connor* principles:<sup>149</sup>

The decision in *O'Connor's* case, however establishes clearly that evidence of intoxication may be relevant whenever it is necessary to prove the mental element of a crime. And there can be no doubt that the Crown is required to prove in manslaughter, no less than in other crimes, that the actions of the accused upon which it relies were at least voluntary, since manslaughter is not only the unlawful, but also the voluntary, killing of another without malice.

In other words, whenever evidence of self-induced intoxication is relevant to an issue bearing on guilt, that evidence is admissible.

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<sup>145</sup> (1980) 146 CLR 64, 87.

<sup>146</sup> See *supra*, paras. 1.5-1.6

<sup>147</sup> [1977] AC 443.

<sup>148</sup> (1984) 58 ALJR 217.

<sup>149</sup> *ibid.*, p. 218.

## Common Law Jurisdictions

3.3 In 1983, Professor Louis Waller commented:<sup>150</sup>

The common law migrated successfully to Australia. But not only have great changes been wrought by local statute. There has also been much judge-made law of an autochthonous<sup>151</sup> kind. It is only in the last two decades, however, that Australian courts and judges have made themselves independent of the English judicial hierarchy.

The decision by a narrow majority of four to three by the High Court in *O'Connor's* case represented a departure from the English common law.

3.4 The defendant, in that case, was seen searching in the glove box of a policeman's motor vehicle. The policeman saw that the defendant had removed a blue map-holder from his car and a chase ensued. Eventually, the policeman caught the defendant and arrested him for theft. The defendant then stabbed the policeman in the upper arm. The defendant was charged with theft, wounding with intent to resist arrest or to do grievous bodily harm and unlawful wounding.<sup>152</sup> The defendant gave evidence that he had consumed alcohol over a substantial part of the day and 15 avil tablets, with the consequence that at the time of the conduct he did not know what he was doing or in his words 'everything blacked out'.

3.5 The trial judge directed the jury in accordance with the principles in *Majewski's* case, that evidence of self-induced intoxication could be considered in relation to the charges of theft and resisting arrest because these were charges of specific intent, but that evidence could not be considered in relation to the alternative charge of unlawful wounding because that was an offence of basic intent. The defendant was acquitted of the specific intent offences, but was convicted of the basic intent offence of unlawful wounding. The defendant appealed to the Victorian Court of Criminal Appeal, which quashed his conviction.<sup>153</sup> The Crown's appeal to the High Court was dismissed, with the majority decision upholding the paramountcy of principles of criminal responsibility; that is, that a defendant should not be found guilty of an offence unless he or she has acted voluntarily and with the appropriate guilty intent.

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<sup>150</sup> Louis Waller, 'Intoxication and Criminal Responsibility', paper delivered at the 15th Leonard Ball Oration, University of Melbourne, 1983, p. 8.

<sup>151</sup> 'Autochthonous' is defined by *The New Shorter Oxford English Dictionary* to mean indigenous, native or aboriginal.

<sup>152</sup> *Crimes Act 1958* (Vic), s. 423 allows an alternative verdict of unlawful wounding if the jury is satisfied that a defendant is guilty of the wounding but not satisfied of other elements of the offence charged.

<sup>153</sup> The decision of the Court of Criminal Appeal (Young CJ, Starke and Gray JJ) was unanimous. *The Queen v. O'Connor* [1980] VR 635.

3.6 Prior to the High Court's decision, common law jurisdictions mostly applied the principles laid down in *Majewski's* case; that is, a distinction was made between offences of specific and basic intent.<sup>154</sup> In Victoria, however, the practice was different and evidence of self-induced intoxication was considered relevant for any offence.<sup>155</sup>

3.7 The maintenance of fundamental principles of criminal responsibility, that is, the right of a defendant not to be found guilty unless he or she acted voluntarily or with the appropriate intent, dominates the separate majority judgments. For example, in relation to the mental element of a criminal offence, Justice Stephen commented:<sup>156</sup>

Important legal principles are, I think, here involved, principles that constitute the foundation of our present notions of criminal responsibility. For criminal liability to be incurred (cases of strict liability and culpable negligence always apart) civilized penal systems have, in modern times, insisted that the accused should be shown to possess a blameworthy state of mind.

3.8 Chief Justice Barwick asked the question whether 'intoxicated violence' warranted a departure from established common law principles and concluded:<sup>157</sup>

These principles, on the one hand, provide the society with a protection against violent and unsocial conduct, whilst on the other hand, maintain a just balance between the Crown and the citizen who is charged with having broken the criminal law...It seems to me to be completely inconsistent with the principles of the common law that a man should be conclusively presumed to have an intent which, in fact, he does not have, or to have done an act which, in truth, he did not do.

3.9 Chief Justice Barwick and Justice Aickin specifically rejected the suggestion in *Majewski's* case that self-induced intoxication itself constitutes recklessness and therefore the appropriate mental element for offences of basic intent.<sup>158</sup> The majority considered that the ability of a defendant to raise evidence of self-induced intoxication for any offence would not prevent a jury from finding a defendant guilty of the offence charged. The majority considered that juries would be very slow to accept evidence of self-induced intoxication. Chief Justice Barwick said:<sup>159</sup>

In my opinion, properly instructed jurors would be scrupulous and not indulgent in deciding an issue of voluntariness or of intention. Indeed, I am inclined to think that they may tend to

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<sup>154</sup> e.g., *R. v. Mennis* [1973] 2 NSWLR 113; *R. v. Gordon* (1963) 63 SR (NSW) 631; *R. v. Stones* (1956) 56 SR (NSW) 25; *R. v. Fahey* (1978) 19 SASR 577

<sup>155</sup> *R. v. Keogh* [1964] VR 400; *R. v. Haywood* [1971] VR 755; *R. v. Tait* [1973] VR 151; *R. v. Flight*, unreported, Victorian Full Court, Starke, McInerney and Crockett JJ, 1977 in which Crockett J made *obiter dicta* comments that he preferred to follow the principles espoused in *R. v. Keogh*, *R. v. Haywood* and *R. v. Bugg* [1978] VR 251. Evidence of intoxication was not of course relevant for strict liability offences.

<sup>156</sup> (1980) 146 CLR 64, 96.

<sup>157</sup> *ibid.*, 86–87.

<sup>158</sup> *ibid.*, 85 per Barwick CJ, 120 per Aickin J.

<sup>159</sup> *ibid.*, 79 per Barwick CJ. See also *ibid.*, 104–105 per Stephen J.

think that an accused who had taken alcohol and particular other drugs to the point of extreme intoxication had brought on himself what flowed from the state of intoxication.

3.10 Ultimately, the majority rejected the classification of offences into those involving basic or specific intent, finding the distinction illogical and difficult to apply.<sup>160</sup>

3.11 The principle in *O'Connor's* case does not apply to the case where the defendant consumes alcohol for the purposes of strengthening his resolve to commit the crime.<sup>161</sup> Nor does it apply to a person who consumes intoxicants knowing that he has a propensity to commit crime.<sup>162</sup>

3.12 The justices in the minority in *O'Connor's* case accepted the principles laid down in *Majewski's* case, and in so doing emphasised the overriding importance of public policy issues. Public policy issues included the need for a defendant to be accountable for his or her actions when he or she had voluntarily chosen to become intoxicated, and society's expectation that the law would provide protection against violent offenders.<sup>163</sup> Justice Wilson, for example, said:<sup>164</sup>

The desire for simplicity in the law cannot override the primary principle that the law must meet the needs and demands of the community. In my opinion, the community requires protection from the sometimes violent conduct of intoxicated individuals.

3.13 To the minority a defendant who chooses to become intoxicated is morally accountable for any offences committed while in that state.<sup>165</sup> In Justice Mason's words:<sup>166</sup>

it is wrong that a person should escape responsibility for his actions merely because he is so intoxicated by drink or drugs that his act is not willed when by his own voluntary choice he embarked on the course which led to his intoxication.

The minority's view was that while principles of criminal responsibility are important, there may be exceptions to these principles and public policy factors make self-induced intoxication one such exception.<sup>167</sup>

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<sup>160</sup> *ibid.*, 81–82 per Barwick CJ; 101–104 per Stephen J; 112 per Murphy J; and 120 per Aickin J.

<sup>161</sup> *ibid.*, 73 per Barwick CJ; 103 per Stephen J; 124–125 per Aickin J.

<sup>162</sup> *ibid.*, 85 per Barwick CJ; 103 per Stephen J; and 124–125 per Aickin J.

<sup>163</sup> *ibid.*, 93 per Gibbs J; 110 per Mason J; and 139 per Wilson J.

<sup>164</sup> *ibid.*, 138–139.

<sup>165</sup> *ibid.*, 94 per Gibbs J; 109–110 per Mason J; and 136 per Wilson J.

<sup>166</sup> *ibid.*, 110.

<sup>167</sup> *ibid.*, 110 per Mason J; 93 per Gibbs J; and 133–134 per Wilson J.

3.14 What emerges from *O'Connor's* case is the principle that evidence of self-induced intoxication is relevant to whether the Crown has proved beyond reasonable doubt that a defendant acted voluntarily or that a defendant acted with the appropriate guilty intent. It is for the jury to determine what inferences should be drawn from the evidence. To allow a jury to consider evidence that a defendant was, for example, schizophrenic, diabetic, suffering post-traumatic stress disorder, but to exclude from consideration of the jury evidence of self-induced intoxication is to make a value judgment about why a defendant acted in a particular way, shifting the focus of the law from a crucial concern, lack of intent or voluntariness. Such an exclusion also imports unfairness and inequality into the legal system by allowing the law to apply differently to different defendants. What is important is that all relevant evidence, including that of self-induced intoxication, be available for the jury to consider; to do otherwise is to violate fundamental principles of criminal law.

3.15 As mentioned above, the principles enunciated in *O'Connor's* case became the law in all Australian common law jurisdictions. Recently, some Australian common law jurisdictions have changed the law concerning self-induced intoxication and criminal responsibility, and at the time of writing this Report, other jurisdictions are considering whether those principles should be abrogated.<sup>168</sup>

### **New South Wales**

3.16 Pressure for alteration to the law in New South Wales concerning intoxication and criminal responsibility arose out of the case of *R. v. Paxman*.<sup>169</sup> David Paxman consumed a considerable amount of alcohol and visited the home of a woman he had known for some months and shot and killed her sleeping son. Paxman claimed that the rifle simply discharged. Paxman was charged with manslaughter and pleaded guilty. Proof of the elements of the crime itself were never in issue, nor was evidence of self-induced intoxication. The judge's decision to set a minimum sentence of three and half years gave the case significant media attention with the media urging the abolition of the drunk's defence.<sup>170</sup> The real issue in the Paxman case was sentencing and not evidence of self-induced intoxication.

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<sup>168</sup> See footnote 11, Chapter 1.

<sup>169</sup> New South Wales District Court, 21/6/95.

<sup>170</sup> See e.g., M. Sharp, 'Killing not justified by drink, says Shaw', *Sydney Morning Herald*, 23 Jun. 1995; 'Drunk defence will be banned', *Daily Telegraph Mirror*, 5 Jul. 1995.

3.17 In July 1995, the New South Wales Attorney-General announced that action would be taken ‘to ensure that a person charged with murder could not rely upon his or her intoxication in order to be set free’<sup>171</sup> and that consideration would be given to creating a new offence of committing a dangerous or criminal act while intoxicated and other alternatives.

3.18 As a consequence, the *Crimes Legislation Amendment Act 1996* (NSW) was enacted, which inserted Part 11A into the *Crimes Act 1900* (NSW); the aim of which was to bring the law closer to the principles stated in *Majewski’s* case.<sup>172</sup> In the Second Reading Speech on the Bill, Mr Whelan, MP, the Minister for Police, noted that the preference for the Majewski approach was based on important policy considerations and:<sup>173</sup>

that to excuse otherwise criminal conduct in relation to simple offences of basic intent—such as assault—because the accused is intoxicated to such an extent, is totally unacceptable at a time when alcohol and drug abuse are such significant social problems.

3.19 These amendments allow evidence of intoxication to be taken into account in determining whether a defendant had the appropriate guilty intent in relation to offences of specific intent.<sup>174</sup> However, evidence of intoxication cannot be taken into account in relation to an offence of specific intent, if the defendant became intoxicated in order to strengthen his or her resolve to commit the offence.<sup>175</sup> The definition given to offences of specific intent, ‘an offence of which an intention to cause a specific result is an element’<sup>176</sup> is based on the definition suggested by Justice Gibbs in *Viro v. The Queen*.<sup>177</sup> Some sixty examples of offences of specific intent are set out in a table in sub-section 428B(2) *Crimes Act 1900* (NSW), which, notwithstanding the lengthy list of ‘examples’, is an inclusive and not an exhaustive list. Where a person is charged with an offence of basic intent, evidence of self-induced intoxication cannot be taken into account to determine whether the defendant acted intentionally.<sup>178</sup> Finally, in relation to any offence, evidence of self-induced intoxication cannot be considered in determining whether a defendant acted voluntarily.<sup>179</sup>

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<sup>171</sup> New South Wales, the Hon. J. W. Shaw, QC, MLC, Attorney-General, *Press Release*, 4 Jul. 1995.

<sup>172</sup> See Criminal Legislation Further Amendment Bill 1995 (NSW), *Explanatory Note*, p. 5.

<sup>173</sup> Mr T. Whelan, MP, Minister for Police, Criminal Legislation Further Amendment Bill 1995 (NSW), Second Reading Speech, *Hansard*, 6 Dec. 1995, p. 4279.

<sup>174</sup> *Crimes Act 1900* (NSW), s. 428C(1).

<sup>175</sup> *Crimes Act 1900* (NSW), s. 428C(2).

<sup>176</sup> *Crimes Act 1900* (NSW), s. 428B.

<sup>177</sup> (1978) 141 CLR 88, 111.

<sup>178</sup> *Crimes Act 1900* (NSW), s. 428D(a).

<sup>179</sup> *Crimes Act 1900* (NSW), s. 428G.

3.20 The changes implemented by the *Crimes Legislation Amendment Act 1996* (NSW) make clear that the common law as stated in *O'Connor's* case has no place in New South Wales. The evidence taken by the Committee is that evidence of self-induced intoxication is not raised very often because it is extremely difficult to establish that a defendant was so intoxicated that he or she was unable to form any intent.<sup>180</sup> While the legislation can be seen as an attempt to achieve a fair compromise between principles of criminal responsibility and public policy issues, it is not without criticism.

3.21 The drafting of Part 11A has attracted particular attention. Part 11A does not, for example, clearly address how the concept of 'recklessness' is to be dealt with.<sup>181</sup> It would appear that where an offence can be committed recklessly or intentionally, evidence of self-induced intoxication can only be raised to negate the specific intent and not the reckless aspect of the offence. Moreover, Part 11A is based on the ability to distinguish between offences of specific and basic intent. While examples of offences of specific intent are provided, the list is not exhaustive leaving the courts with the responsibility of determining the nature of offences not included in the legislation.<sup>182</sup> This is not an easy task because the distinction between offences of basic and specific intent is artificial, unclear and arbitrary.<sup>183</sup> There is also the criticism that where an offence of basic intent is involved, a defendant is imputed with an intention which he or she does not in fact possess.<sup>184</sup>

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<sup>180</sup> Victoria, Parliament, Law Reform Committee, *Meeting Notes*, (hereinafter referred to as *Meeting Notes*) meeting with officers of the Criminal Law Review Division of the NSW Attorney-General's Department, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with officers of the NSW Office of the Director of Public Prosecutions, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with academics from the Institute of Criminology, Sydney University, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with officers of the NSW Legal Aid Commission, Sydney, 9 Feb. 1999.

<sup>181</sup> *Meeting Notes*, meeting with officers of the Criminal Law Review Division of the NSW Attorney-General's Department, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with officers of the NSW Office of the Director of Public Prosecutions, Sydney, 8 Feb. 1999.

<sup>182</sup> *Meeting Notes*, meeting with officers of the Criminal Law Review Division of the NSW Attorney-General's Department, Sydney, 8 Feb. 1999 indicate that the table of offences was included in the legislation as a guide and to assist the judiciary, freeing them from the need to review the common law every time an intoxication case arises. *Meeting Notes*, meeting with NSW magistrates, Sydney, 9 Feb. 1999 the view was expressed that it would be preferable for the legislation to contain an exhaustive categorisation of offences.

<sup>183</sup> *Meeting Notes*, meeting with academics from the Institute of Criminology, Sydney University, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with judges of the District Court of NSW, Sydney, 9 Feb. 1999; *Meeting Notes*, meeting with NSW magistrates, Sydney, 9 Feb. 1999.

<sup>184</sup> P. Gillies, *Criminal Law*, 4<sup>th</sup> ed., Law Book Company, Sydney, 1997, p. 288. See also, South Australia, Attorney-General's Department, *Intoxication and Criminal Responsibility*, Discussion Paper, Jul. 1998, p. 32.

## *Relationship between Part 11A and Other Defences*

3.22 As was so aptly noted by one commentator:<sup>185</sup>

Lawmakers should be ever mindful that the criminal law is not made up of disparate rules but comprises a complex and inter-woven set of rules, the alteration of a part which can affect many other parts.

3.23 There is a need to clarify the relationship between intoxication provisions and other criminal defences.<sup>186</sup> The New South Wales Law Reform Commission recommended changes to the law on diminished responsibility and provocation to reflect the policy implemented by the intoxication provisions.<sup>187</sup> In relation to diminished responsibility, the New South Wales Law Reform Commission recommended that it be made clear that a defendant's abnormality of mind should arise from a pre-existing mental or physiological condition and that evidence of self-induced intoxication should not be considered when determining whether a person suffered from diminished responsibility.<sup>188</sup> The law concerning diminished responsibility was subsequently amended by *the Crimes Amendment (Diminished Responsibility) Act 1997* (NSW),<sup>189</sup> which reflects the recommendations made by the New South Wales Law Reform Commission.<sup>190</sup> Under the new section 23A a defendant may only rely on the defence of substantial impairment if that defendant's capacity to understand events, or to judge right and wrong was substantially impaired because of an abnormality of mind arising from an underlying condition. 'Underlying condition' is defined as a pre-existing mental or physiological condition and does not include a condition of a transitory kind.<sup>191</sup> Evidence of self-induced intoxication must be disregarded for the purpose of determining whether or not the defendant was suffering from substantial impairment.

3.24 One criticism that has been made of these changes is that they appear to deny the application of the defence to a person who suffers a mental disorder after

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<sup>185</sup> Editorial, (1998) 22 *Crim. L.J.* 137, p. 139.

<sup>186</sup> *Meeting Notes*, meeting with academics, the Institute of Criminology, Sydney University, Sydney, 8 Feb. 1999.

<sup>187</sup> New South Wales, Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report no. 82, May 1997; New South Wales, Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report no. 83, Oct. 1997.

<sup>188</sup> *ibid.*, pp. 64-68.

<sup>189</sup> The defence is no longer known as diminished responsibility, but as substantial impairment.

<sup>190</sup> *Crimes Act 1900* (NSW), ss. 23A(1)(a) & 23A(3).

<sup>191</sup> *Crimes Act 1900* (NSW), s. 23A(8).

consuming a spiked drink or unknowingly taking a drug, because such a condition would be transitory and not pre-existing.<sup>192</sup>

3.25 In relation to provocation, the New South Wales Law Reform Commission recommended that loss of self-control resulting from a mistaken belief caused by self-induced intoxication should be disregarded in determining whether a defendant acted under provocation.<sup>193</sup> In its report, the Commission recommended that the ordinary person test be removed from the defence of provocation; with the result that the test would no longer be that of the ordinary sober person. The Commission indicated that it was necessary to exclude consideration of evidence of intoxication from loss of control resulting from a mistaken belief in order to prevent defendants, who were relying on the provocation defence, from arguing that their self-control was weakened on the basis of intoxication. To maintain consistency, the Commission wanted to make clear that self-induced intoxicated defendants could not rely on the defence of provocation. These recommendations have not been adopted yet by the New South Wales' Legislature. It has been argued that evidence of self-induced intoxication should be excluded from the defence of provocation, even if the New South Wales' Legislature does not abolish the ordinary person test.<sup>194</sup> This is because evidence of intoxication can be taken into account when determining whether a defendant lost self-control at the time of the killing.<sup>195</sup>

3.26 The relationship between self-induced intoxication and self-defence also needs to be made clear. In two recent judgments, *R. v. Conlon*<sup>196</sup> and *R. v. Kurtic*,<sup>197</sup> Chief Justice Hunt<sup>198</sup> indicated that when determining the reasonableness of a defendant's belief as to the seriousness of a threat or his or her belief that the force used was reasonably necessary, evidence of intoxication is relevant.<sup>199</sup> In *Kurtic's* case,<sup>200</sup> Chief Justice Hunt made clear that the 1996 amendments to the *Crimes Act 1900* (NSW) did not affect the law of self-defence.<sup>201</sup> Self-defence requires consideration of a defendant's reasonable belief while the 1996 amendments appear to contemplate the

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<sup>192</sup> Editorial, (1998) *Crim. L.J.* 137, 138.

<sup>193</sup> New South Wales, Law Reform Commission, op. cit., 91.

<sup>194</sup> Editorial, (1998) *Crim. L.J.* 137, 138.

<sup>195</sup> *R. v. Croft* [1981] 1 NSWLR 126.

<sup>196</sup> (1993) 69 A Crim R 92.

<sup>197</sup> (1996) 85 A Crim R 57.

<sup>198</sup> Formerly Chief Justice of the Common Law Division of the Supreme Court of NSW.

<sup>199</sup> *R. v. Conlon* (1993) 69 A Crim R 92, pp 101-102 and *R. v. Kurtic* (1996) 85 A Crim R 57, p. 63.

<sup>200</sup> (1996) 85 A Crim R 57.

<sup>201</sup> *ibid.*, p. 64.

reasonable person's belief.<sup>202</sup> Arguably for the sake of consistency the New South Wales law on self-defence should be amended to exclude evidence of self-induced intoxication. This comment applies equally to other defences such as honest and reasonable mistake of fact, necessity and duress. The failure to consider the relationship between intoxication and other defences highlights the importance of considering the whole legal framework when reformulating the law.

## The Commonwealth

3.27 Prior to the enactment of the *Criminal Code Act 1995* (Cth), the principles enunciated in *O'Connor's* case applied to most Commonwealth offences. However, in respect of Commonwealth offences found in statutes other than the *Crimes Act 1914* (Cth), 'the principles of criminal responsibility which applied were those of the State or Territory in which the case was heard'.<sup>203</sup>

3.28 In 1990, in recognition of the need to establish consistent criminal laws throughout Australia, the development of a national uniform Model Criminal Code for Australia was placed on the agenda of the Standing Committee of Attorneys-General.<sup>204</sup> In order to develop further the concept of a uniform model law, the Standing Committee of Attorneys-General established a sub-committee, subsequently known as the Criminal Law Officers Committee. In its final report,<sup>205</sup> the Criminal Law Officers Committee recommended that the principles enunciated in *O'Connor's* case be adopted; that is, that evidence of self-induced intoxication be taken into account when considering whether a defendant acted intentionally or voluntarily. The justification for the recommendation in favour of *O'Connor's* case was that fundamental principles of criminal responsibility should be given paramount importance.<sup>206</sup> However, the Standing Committee of Attorneys-General rejected this recommendation, preferring the approach of the Code States and the principles enunciated in *Majewski's* case.

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<sup>202</sup> See particularly, s. 428F *Crimes Act 1900* (NSW).

<sup>203</sup> J. Norberry, Criminal Code Amendment Bill 1997 (Cth), *Bills Digest No 132 1997-98*, fn. 1, p. 4.

<sup>204</sup> The problems resulting from inconsistent criminal laws in Australia were discussed in the Report of the Gibbs Committee (chaired by Sir Harry Gibbs, former Chief Justice of the High Court) entitled *Review of Commonwealth Criminal Law*. The Gibbs Committee recommended the adoption of general criminal laws throughout Australia.

<sup>205</sup> Australia, Standing Committee of Attorneys-General, Criminal Law Officers Committee, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility*, Final Report, AGPS, Canberra, 1993.

<sup>206</sup> *ibid.*, p. 17.

3.29 When determining whether a defendant acted intentionally, the *Criminal Code Act 1995* (Cth) disallows consideration of self-induced intoxication in relation to offences of basic intent<sup>207</sup> and any element of an offence based on negligence,<sup>208</sup> but allows evidence of self-induced intoxication to be considered in relation to offences of specific intent, knowledge and recklessness. In the second reading speech to the *Criminal Code Bill 1994* (Cth), Mr Duncan Kerr, Minister for Justice, said:<sup>209</sup>

It is the view of the Commonwealth and the unanimous view of state and territory Attorneys-General that legislation to enable intoxication to be used as an excuse for otherwise criminal conduct in relation to simple offences of 'basic intent' is totally unacceptable at a time when alcohol and drug abuse are causing so many social problems.

The Bill also makes clear that self-induced intoxication may be considered where the defendant's conduct is accidental,<sup>210</sup> such as a 'drunk who stumbles into another person lying in the street'<sup>211</sup> and in determining whether the defendant had a mistaken belief as to the facts.<sup>212</sup> Where any other defence is raised and that defence is based on actual knowledge or belief, evidence of intoxication may be considered, but where any defence is based on a reasonable belief, evidence of self-induced intoxication cannot be considered.<sup>213</sup> The *Criminal Code Act* disallows consideration of evidence of self-induced intoxication when determining whether a defendant acted voluntarily.

3.30 While the *Criminal Code Act* received assent on 15 March 1995, most of its provisions are not due to take effect until March 2000. However urgent legislation amending the commencement time of the intoxication provisions was enacted<sup>214</sup> as a consequence of the controversial acquittal of Mr Noa Nadruku by an ACT Magistrate in October 1997.<sup>215</sup> In a media release made shortly after the decision, the Federal Attorney-General, the Hon. Daryl Williams said:<sup>216</sup>

The use of this defence has sent disturbing messages to those who get intoxicated and engage in violent behaviour. It has given them a supposed excuse for their behaviour when there is no excuse.

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<sup>207</sup> *Criminal Code Act 1995* (Cth), s. 8.2(1).

<sup>208</sup> *Criminal Code Act 1995* (Cth), s. 8.3(1).

<sup>209</sup> Australia, House of Representatives, *Debates*, 1 Mar. 1995, pp. 1333–1334.

<sup>210</sup> *Criminal Code Act 1995* (Cth), s. 8.2(3).

<sup>211</sup> *Criminal Code Bill 1994* (Cth), *Explanatory Memorandum*, p. 22.

<sup>212</sup> *Criminal Code Act 1995* (Cth), s. 8.2(4).

<sup>213</sup> *Criminal Code Act 1995* (Cth), ss. 8.4(1) & 8.4(2).

<sup>214</sup> *Criminal Code Amendment Act 1998* (Cth).

<sup>215</sup> *S.C. Small v. Noa Kurimalawai*, Australian Capital Territory Magistrates' Court, Matter No. CC97/01904, 22 Oct. 1997, Transcript of Proceedings.

<sup>216</sup> Australia, the Hon. Daryl Williams, AM, QC, MP, Attorney-General, 'States Urged to Dump Drunk's Defence', *Media Release*, 29 Oct. 1997.

3.31 In response to the *Nadraku* case, the Commonwealth Government enacted the *Criminal Code Amendment Act 1998*, with the effect that the self-induced intoxication provisions commenced operation on 13 April 1998. The Commonwealth Government also indicated that it wanted the remaining common law jurisdictions to change the law concerning intoxication and criminal liability. In the second reading speech for the Criminal Code Amendment Bill 1997, Senator Ian Campbell said:<sup>217</sup>

While the common law is rarely used, and then usually in relation to the state offence of assault, the government wishes to provide a lead to those states who have not enacted the model criminal code provisions on this topic.

### Australian Capital Territory

3.32 In the Australian Capital Territory, the Crimes Amendment Bill (No 4) (1998) was introduced with the aim of preventing the application of the O'Connor principles in the Territory.<sup>218</sup> Impetus for a change to the law again arose out of the *Nadraku* case and the widespread community concern at the acquittal of the defendant. In moving that the Crimes Amendment Bill (No 4) (1998) be agreed to, Mr Gary Humphries, the Attorney-General noted that while the O'Connor 'defence' was rarely successful, the *Nadraku* case served as 'a reminder that it, nonetheless, is part of our law and it can be successfully used'.<sup>219</sup>

3.33 Section 428XC of the Bill provides:<sup>220</sup>

Evidence of self-induced intoxication cannot be considered in determining whether an act or omission that is an element of an offence was intended or voluntary.

The intention of this Bill is to prevent evidence of self-induced intoxication from being used to show lack of intention or voluntariness where the offence consists of conduct alone.<sup>221</sup> In the case of murder, for example, evidence of self-induced intoxication could not be taken into account to show that the defendant did not

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<sup>217</sup> Australia, Senate, *Debates*, 3 Dec. 1997, p. 10266. The desire that other common law states would follow suit was also expressed by Senator Stott Despoja see, Australia, Senate, *Debates*, 5 Mar. 1998, (Criminal Code Amendment Bill 1997, Second Reading Debate available at <http://www.aph.gov.au/Senate/puhs/index.htm>) See also, the Hon. Daryl Williams, Attorney-General, *ibid*.

<sup>218</sup> The Crimes Amendment Bill was first introduced into the ACT Legislative Assembly on 13 Nov. 1997 and was entitled 'Crimes Amendment Bill (No 6) (1997)'. Debate on the motion to accept the Bill was adjourned. The Bill was subsequently reintroduced into the Legislative Assembly on 28 May 1998 as Crimes Amendment Bill (No 4) (1998).

<sup>219</sup> Crimes Amendment Bill (No 4) (1998), *Presentation of the Bill by the Attorney-General Mr Humphries*, 28 May 1998, p. 705.

<sup>220</sup> Crimes Amendment Bill (No 4) (1998).

<sup>221</sup> Crimes Amendment Bill (No 4) (1998), *Explanatory Memorandum*, p. 2.

intend to commit the conduct but could be considered to show that the defendant did not intend the consequence.

3.34 The Australian Capital Territory House of Assembly Standing Committee on Scrutiny of Bills and Subordinate Legislation criticised the proposed Bill on two grounds. First, it pointed out that the Bill cuts across the fundamental principle of criminal law that a defendant should possess a guilty intention before being held criminally responsible for an offence.<sup>222</sup> Secondly, the Committee indicated that it is not clear how the comments made in the *Explanatory Memorandum* relate to the specific provisions of the Bill.<sup>223</sup> The Attorney-General's response to this criticism was that the provision focuses on the physical element of an offence only and that where an offence of specific intent is concerned, evidence of self-induced intoxication is to be considered.<sup>224</sup> As yet the Bill has not been enacted, but is under review by the Justice and Community Safety Committee of the House of Assembly.<sup>225</sup>

## South Australia

3.35 In November 1996, the South Australian Shadow Attorney-General, Mr Michael Atkinson, introduced into the House of Assembly a Private Member's Bill dealing with the issue of self-induced intoxication and criminal responsibility. A key clause of the Bill provided:<sup>226</sup>

5D (1) A person charged with an offence who was in a state of self-induced intoxication at the time of the alleged offence will be taken—

- (a) to have had the same perception and comprehension of surrounding circumstances as he or she would have had if sober; and
- (b) to have intended the consequences of his or her acts or omissions so far as those consequences would have been reasonably foreseeable by that person if sober.

3.36 This provision means that when assessing a defendant's culpability, a jury or the court will have to imagine how the defendant would have acted if he or she had not been intoxicated. The Bill was hotly debated and criticised by the Government as

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<sup>222</sup> Australian Capital Territory, Legislative Assembly, Standing Committee on Scrutiny of Bills and Subordinate Legislation, *Report no. 17, 1997*, pp. 1–2.

<sup>223</sup> *ibid.*, p. 2.

<sup>224</sup> G. Humphries, MLA, Letter to B. Wood, MLA, Chair, ACT Standing Committee on Scrutiny of Bills and Subordinate Legislation, 1998.

<sup>225</sup> The Justice and Community Safety Committee are not due to report on this Bill until the first week of July 1999.

<sup>226</sup> Criminal Law Consolidation (Intoxication) Amendment Bill 1996.

containing unacceptable flaws. Mr Cummins, MLA, speaking on behalf of the Government, described the Bill as a 'reversal of all the tenets of the common law and I would have thought the complete reversal of the concept of justice'.<sup>227</sup>

3.37 While the Government acknowledged the need to deal with the issue of self-induced intoxication, it refused to support the private Bill. Mr Cummins, MLA, said<sup>228</sup>:

this Bill will not achieve what the honourable member wants. What it will do is worsen the situation, upset the tenets of the common law and basically make a man guilty for a crime that he had absolutely no intention of committing.

The Bill was subsequently defeated.

3.38 On 4 December 1997, Mr Atkinson reintroduced the private Bill<sup>229</sup> into the House of Assembly. At the time he said:<sup>230</sup>

I do not want to remove the intoxication excuse because I believe that it will induce violent young males to alter their habits. Mine is not an exercise in harm minimisation. I am moving this Bill to right wrongs. Those who have committed violent crime should not be acquitted owing to self-induced intoxication. The Bill is a just law, and the vast majority of electors will see it as such.

3.39 The Bill is again proving contentious with the Government commending the motivation for the Bill but arguing that it is unworkable.<sup>231</sup> The Bill was in fact circulated amongst members of the legal profession including the Chief Justice, the Legal Services Commission of South Australia, the Law Society Criminal Law Committee and the Law Society Council, who all concluded that the Bill was unacceptable and should be rejected.<sup>232</sup> After the release of a government discussion paper,<sup>233</sup> the Shadow Attorney-General successfully moved to amend the Bill with the consequence that it now leaves the O'Connor principles intact but provides for the creation of a special offence. The Bill was passed by the Legislative Assembly and is currently being considered by the Legislative Council.

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<sup>227</sup> South Australia, House of Assembly, *Debates*, 18–20 Mar. 1997, p. 1358, per Mr Cummins.

<sup>228</sup> *ibid.*, p. 1359.

<sup>229</sup> Criminal Law Consolidation (Intoxication) Amendment Bill 1997 (SA).

<sup>230</sup> South Australia, House of Assembly, *Debates*, 2–4 Dec. 1997, p. 74, per Mr Atkinson.

<sup>231</sup> South Australia, House of Assembly, *Debates*, 17–19 Feb. 1998, pp 402–406, per Mr Hamilton Smith. See also comments made by Hon. Mr K. T. Griffin, (Attorney-General) in South Australia, Legislative Council, *Debates*, 17–19 Feb. 1998, p. 296.

<sup>232</sup> K. T. Griffin, *loc. cit.*

<sup>233</sup> South Australia, Attorney-General's Department, *Intoxication and Criminal Responsibility*, Discussion Paper, Jul. 1998.

3.40 In February 1998, speaking to the Legislative Council, the Attorney-General indicated that the Government had requested the preparation of a Bill to deal with the issue of self-induced intoxication with the aim of achieving a balance between principles of criminal responsibility and holding offenders who drink themselves senseless responsible for their actions.<sup>234</sup> As mentioned above, a discussion paper was prepared by the Attorney-General's department and circulated throughout the community.<sup>235</sup> The ultimate result of the discussion which followed has been the recent enactment of the *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA).<sup>236</sup>

3.41 The *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA) does two things and it does so without disturbing the O'Connor principles. Firstly it makes clear that if a defendant becomes intoxicated in order to strengthen his or her ability to commit a criminal offence, then that defendant will not be able to rely on evidence of self-induced intoxication.<sup>237</sup> Secondly, the Act introduces a procedural change, under which a trial judge only has to direct a jury on the issue of intoxication where the defence specifically request the trial judge to address the jury on that issue.<sup>238</sup> The aim of this latter provision is to overcome the problem of defence counsel, raising evidence of intoxication but making little of it, and then appealing a conviction if the trial judge fails to give a full direction on the evidence of intoxication to the jury.<sup>239</sup>

3.42 The changes implemented by this Act are designed to leave intact the O'Connor principles, thus preserving fundamental principles of criminal law. In the second reading speech on the Bill, the comment was made:<sup>240</sup>

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<sup>234</sup> K. T. Griffin, loc. cit.

<sup>235</sup> South Australia, Attorney-General's Department, loc. cit.

<sup>236</sup> This Act was assented to on 1 April 1999.

<sup>237</sup> *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA), s. 268.

<sup>238</sup> *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA), s. 269.

<sup>239</sup> One recent example of this was a case involving a charge of rape against a country police officer. The police officer had apparently consumed approximately five beers. Intoxication was not at issue during the trial. The defendant was convicted. The decision was appealed and the South Australian Court of Criminal Appeal overturned the conviction on the basis that there should have been a direction on the basis of the O'Connor principles. This case was mentioned to members of the Victorian Law Reform Committee by Matthew Goode, *Meeting Notes*, meeting with Matthew Goode, Legal Officer, Policy and Legislation, South Australian Attorney-General's Department, Adelaide, 6 Apr. 1999.

<sup>240</sup> *Criminal Law Consolidation (Intoxication) Amendment Bill 1998*, Second Reading Speech, The Hon. I.F. Evans, Minister for Industry and Trade, House of Assembly, *Parliamentary Debates*, 4 March 1999, p. 995.

This issue, or rather set of issues, goes to the very heart of the criminal justice system and to the central basis on which society attributes criminal responsibility. It is not clear that any reform is needed at all.

3.43 This comment was based on three grounds:<sup>241</sup>

- (1) Fundamental principles of criminal law, that no defendant should be convicted unless that defendant has acted voluntarily and intentionally, are logical and have been accepted by the High Court of Australia.
- (2) All the evidence suggests that acquittal on the basis of self-induced intoxication is rare, and that cases such as *Nadruku* are isolated instances.
- (3) Proposed solutions to the O'Connor principles may be worse than the problem sought to be addressed.

3.44 The final solution adopted is a cautious but well thought out approach in that it does not erode fundamental principles of criminal law, but it prevents unnecessary and costly appeals. Of course, there still remains the possibility that the Shadow Attorney-General's Bill may be passed and if this does happen, the law in South Australia concerning self-induced intoxication may become extremely complex.

## The Code States

3.45 The Queensland, Western Australian and Tasmanian Criminal Code provisions on intoxication have been interpreted as imposing a rule similar to the principles endorsed by the House of Lords in *Majewski's* case.

### Queensland and Western Australia

3.46 The application of the principles contained in *O'Connor's* case to the *Criminal Code Act 1899* (Qld) was emphatically rejected in *R. v. Kusu*<sup>242</sup> where Justice W.B. Campbell (with whom Justice Matthews concurred) said:<sup>243</sup>

O'Connor is not an authority on the construction of the Criminal Code, and I do not consider that it is relevant to the law in Queensland as laid down in the Code.

3.47 Support for this view is also found in the decision of Justice Wilson in *O'Connor's* case, where His Honour noted that the principles discussed in that case

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<sup>241</sup> *ibid.*, pp. 995-996.

<sup>242</sup> [1981] Qd R 136.

<sup>243</sup> *ibid.*, 142.

were not applicable to the Criminal Codes of Western Australia or Queensland.<sup>244</sup> Western Australian courts<sup>245</sup> have also specifically rejected the application of *O'Connor's* case. It is important to keep in mind that the common law doctrine of intention (or *mens rea*) is not part of the law in Queensland or Western Australia. The Codes themselves compendiously state the law concerning intention.

3.48 Evidence of intoxication is not a defence under the Codes, but rather, it is relevant to whether the Crown has proved beyond reasonable doubt the appropriate mental element of the offence charged. Sub-section 28(3) of the Queensland and Western Australian Criminal Codes provide:

(3) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

Sub-section 28(3) restricts consideration of evidence of intoxication (whether intentional or unintentional) to offences of specific intent.<sup>246</sup> What is important is not the quantity of alcohol or drugs consumed, but the impact of those intoxicants on the defendant. Even if the defendant is only partially intoxicated and capable of forming intent, evidence of intoxication may still be considered by the jury who will have to determine whether the defendant in fact formed the relevant intent.<sup>247</sup>

3.49 The successful use of evidence of intoxication by a defendant does not necessarily mean that the defendant will be acquitted. Often a defendant in such circumstances will be convicted of a lesser offence. For example, if a defendant is acquitted of murder, he or she may be convicted of manslaughter. Likewise, an acquittal of unlawful wounding with intent to do grievous bodily harm under the Queensland or Western Australian Criminal Codes<sup>248</sup> may still lead to a conviction of the lesser offence of unlawful wounding.<sup>249</sup>

3.50 Where the code does not specify the mental element of an offence, regard must be had to section 23 of the Queensland and Western Australian Criminal Codes, which provides:

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<sup>244</sup> (1980) 146 CLR 64, 130.

<sup>245</sup> *Cameron v. The Queen* (1990) 47 A Crim R 397, 410; *Haggie v. Meredith* (1993) 9 WAR 206, 212.

<sup>246</sup> *Dearnley v. The King* [1947] QSR 51; *R. v. Herlihy* [1956] QSR 18; *R. v. Kusu* [1981] Qd R 136; *R. v. Miers* [1985] 2 Qd R 138; *Missingham v. Rogers; Ex parte Missingham* (1985) 2 MVR 367; *Perkins v. The Queen* [1983] WAR 184.

<sup>247</sup> *R. v. Crump* [1966] Qd R 340, 343; *R. v. Nicholson* [1956] QSR 520, 524; *R. v. Crozier* [1965] Qd R 133 and *Thomas v. The Queen* (1960) 102 CLR 584, 597, per Fullagar J.

<sup>248</sup> *Criminal Code Act 1899* (Qld), s. 317 and *Criminal Code Act 1913* (WA), s. 294.

<sup>249</sup> *Criminal Code Act 1899* (Qld), s. 323 and *Criminal Code Act 1913* (WA), s. 301.

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

This section provides that a person is not criminally responsible for an act or omission that occurs independently of the will or an event that occurs by accident. The Queensland and Western Australian courts have made clear that an intoxicated offender cannot seek to use the provisions of this section to defend his or her conduct.<sup>250</sup> In other words, a defendant cannot use evidence of intoxication to show that his or her conduct was an involuntary act.

3.51 Intoxication is a defence where it amounts to unsoundness of mind and the defendant unintentionally became intoxicated.<sup>251</sup> These provisions also apply if the defendant is only temporarily deprived of the capacity to:

- (a) know what he or she is doing;
- (b) control his or her conduct; or
- (c) know that he or she ought not to engage in the conduct.

3.52 Unintentional conduct relates to a defendant who has, for example, taken drugs for medical reasons without understanding the consequences, or a defendant who has had his or her drink laced, or a defendant who has been coerced into becoming intoxicated. There has been some debate about the meaning of the words 'without intention on his part' and whether, for example, these words include negligent or reckless intoxication.<sup>252</sup> It has been suggested that a literal reading of the sub-section does include a defendant who recklessly or negligently became intoxicated.<sup>253</sup>

3.53 Evidence suggests that the defence is rarely pleaded.<sup>254</sup> The fact that there are few reported cases tends to support this.<sup>255</sup> There is a presumption that a person is of

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<sup>250</sup> *R. v. Kusu* [1981] Qd R 136; *R. v. Miers* [1985] 2 Qd R 138; *Re Bromage* [1991] 1 Qd R 1; *Battle v. The Queen* (1993) 8 WAR 449; *Haggie v. Meredith* (1993) 9 WAR 206.

<sup>251</sup> E.g., *Dearnley v. The King*, [1947] QSR 51. This has always been the position at common law, see e.g., *R. v. Davis* (1881) 14 Cox CC 563.

<sup>252</sup> R. O'Regan, 'Intoxication and Criminal Responsibility', (1977-80) 10 *UQLJ* 70, 72-73; I. Leader-Elliott, 'Intoxication Defences: The Australian Perspective', in S. Yeo (Ed.), *Partial Excuses to Murder*, Federation Press, Sydney, pp. 221-222; D. O'Connor & P. Fairall, *Criminal Defences*, 3<sup>rd</sup> ed., Butterworths, North Ryde, 1966, p. 241.

<sup>253</sup> E. Colvin and S. Linden-Laufer, *Criminal Law in Queensland and Western Australia, Cases and Commentary*, Butterworths, Sydney, 1994, p. 349.

<sup>254</sup> *Meeting Notes*, meeting with Queensland Legal Aid and Public Defenders, Brisbane, 10 Feb. 1999; *Meeting Notes*, meeting with Queensland Department of Justice, Brisbane, 10 Feb. 1999; *Meeting Notes*, meeting with academics, School of Criminology, Griffith University, Brisbane, 10 Feb. 1999; *Meeting Notes*, meeting with Office of Director of Public Prosecutions, Queensland, Brisbane, 11 Feb. 1999.

sound mind until the contrary is proved, which means the onus of proving insanity is on the defendant.<sup>256</sup> One case in which the defence of intoxication based on unsoundness of mind was raised and which was only reported in the newspaper was that of Mr Peter Walsh.<sup>257</sup> Mr Walsh celebrated the successes of his football team and became intoxicated. He later visited a female neighbour requesting that she put him up for the night. Subsequently, he threatened to kill her and inflicted multiple stab wounds. He was charged with attempted murder, causing grievous bodily harm and burglary. He denied guilt and relied on the defence of intoxication. The defence argued that the defendant reached a pathological state and that this resulted from the consumption of alcohol from glasses at various tables which meant that he might have inadvertently consumed a hallucinogenic drug. The jury returned a verdict of not guilty on all counts. The insanity verdict allows an accused to be kept in strict custody.<sup>258</sup> Confinement is at the discretion of the Governor-in-Council. Mr Walsh was kept in confinement for six months for psychiatric tests and treatment before the Cabinet recommended his release.

3.54 In 1997, the Queensland Criminal Code provisions concerning intoxication were amended<sup>259</sup> to overcome a problem which had arisen in a decision by the Court of Appeal in *Re Bromage*.<sup>260</sup> In that case, the defendant had voluntarily ingested alcohol but involuntarily ingested pesticides. It was argued that the defendant was entitled to rely on a defence of unsoundness of mind within section 27 of the *Queensland Criminal Code*. The Mental Health Tribunal allowed the defence. On appeal, the Court of Criminal Appeal held that what had to be determined was whether the defendant's state of mind was such that he was mentally unsound and that it was not concerned with the exclusion of evidence of self-induced intoxication in section 28.

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<sup>255</sup> *R. v. Corbett* [1903] QSR 246; *R. v. Smith* [1949] QSR 126; *Nosworthy v. The Queen* (1983) 8 A Crim R 270.

<sup>256</sup> *Criminal Code Act 1899* (Qld), s. 26 and *Criminal Code Act 1913* (WA), s. 26.

<sup>257</sup> *The Courier Mail*, 3, 4, 7 and 18 July 1984; 15 January 1985. See also I. Leader-Elliott, 'Intoxication Defences: The Australian Perspective', loc. cit.

<sup>258</sup> While originally the Qld legislation provided that a defendant found guilty under the insanity provisions would be detained at Her Majesty's pleasure (s. 647 *Criminal Code Act 1899* (Qld)), the Patient Review Tribunal now has power to determine the future detention of the defendant (see, *Mental Health Act 1986*). In WA detention is still at her majesty's pleasure (see, s. 653 *Criminal Code Act 1913* (WA)).

<sup>259</sup> The amendments were contained in the *Criminal Law Amendment Act 1997* (Qld) and were part of a major overhaul given to the Queensland Criminal Code to bring it up-to-date and make it more effective. With the exception of ss. 1 & 2, all provisions of the Amendment Act commenced operation on 1 Jul. 1997.

<sup>260</sup> [1991] 1 Qd R 1.

3.55 Sub-section 28(2) was amended to make it clear that evidence of self-induced intoxication, whether on its own or in conjunction with evidence of involuntary intoxication, could not be considered where the insanity defence was raised.<sup>261</sup> In the Bill's second reading speech, the Attorney-General said that the Queensland Government wanted to make certain that:<sup>262</sup>

if in future a person becomes intentionally intoxicated and commits a criminal offence then he or she will not be excused from criminal responsibility if he or she has also consumed some other toxic agent and the substances act in combination on the person's mind.

In other words, the Queensland Government wanted to make sure that where a defendant pleaded insanity based on intoxication and where there is evidence of both self-induced and involuntary intoxication, only the evidence of involuntary intoxication would be considered. No such amendment has been made to the Western Australian Criminal Code.

## Tasmania

3.56 The law concerning intoxication is contained in section 17 of the *Criminal Code 1924* (Tas). Sub-section 17(2) provides:

Evidence of such intoxication as would render the accused incapable of forming the specific intent essential to constitute the offence with which he is charged shall be taken into consideration with the other evidence in order to determine whether or not he had the intent.

3.57 Section 17 in substance enacts Lord Birkenhead's summary of the law in *Beard's case*<sup>263</sup> and applies the principle arising from that case that evidence of intoxication is relevant to crimes of specific intent, but is not relevant to crimes of basic intent. While sub-section 17(2) does not specifically state what the effect of evidence of intoxication is upon crimes of basic intent.<sup>264</sup>

the clear implication of expressing an exculpatory exception in respect of crimes of specific intent is to exclude the possibility that intoxication could have an exculpatory effect upon other crimes.

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<sup>261</sup> s. 28 (2) was amended by the insertion of the words 'to any extent' after the words 'to the case of a person who has' and by the insertion of the words 'and whether his or her mind is disordered by the intoxication alone or in combination with some other agent' after the words 'for the commission of an offence or not'.

<sup>262</sup> Hon. D. Beanland, Attorney-General, Criminal Law Amendment Bill 1996, Second Reading Speech, *Parliamentary Debates* (Qld) Nov. 1996 – Dec. 1996, p. 4871. See also Criminal Law Amendment Bill 1996, *Explanatory Notes*, pp. 5–6.

<sup>263</sup> [1920] AC 479, 499.

<sup>264</sup> Mr Justice Cox, *Palmer v. The Queen* [1985] Tas R 138, p. 155.

3.58 In *Snow v. The Queen*,<sup>265</sup> the defendant was charged with rape and the question was whether evidence of self-induced intoxication was relevant to that charge. It was held that evidence of self-induced intoxication was not relevant because the offence of rape was classified as one not requiring proof of specific intent. It differs from the common law and the Western Australian and Queensland Codes under which the question to be considered by the jury is whether the defendant actually formed the relevant intent. The Tasmanian *Criminal Code* adopts a capacity test and the question for the jury to consider is whether the defendant was capable of forming the specific intent required. Evidence of self-induced intoxication will only be relevant to whether a defendant was capable of forming that specific intent, if the defendant is in an advanced stage of drunkenness or 'blind' drunk.<sup>266</sup>

3.59 In relation to the issue of involuntary acts, like the Queensland and Western Australian *Criminal Codes*, the Tasmanian *Criminal Code*<sup>267</sup> adopts the principle that a defendant is not responsible for an involuntary act. Again, like Queensland and Western Australian courts, the Tasmanian courts have decided that evidence of intoxication cannot be considered in relation to a plea of involuntariness.<sup>268</sup>

3.60 The Tasmanian *Criminal Code* adopted the common law rule stated in *Beard's* case that insanity caused by alcohol is a defence. In contrast to the Queensland and Western Australian Codes, no distinction is made between intentional and unintentional intoxication.

3.61 On 2 September 1988, the Tasmanian Attorney-General requested the Law Reform Commissioner<sup>269</sup> to comment on whether intoxication should constitute a defence in criminal proceedings. The Law Reform Commissioner concluded that it was indefensible to exclude consideration of evidence of intoxication from offences of basic intent and recommended the repeal of section 17 to bring the law in Tasmania in line with *O'Connor's* case.<sup>270</sup> The Law Reform Commissioner was of the view that adoption of the principles enunciated in *O'Connor's* case would not lead to an increase in acquittals and that juries would in fact believe that a defendant who had

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<sup>265</sup> [1962] Tas SR 271.

<sup>266</sup> Attorney-General's Reference No 1 of 1996, (1998) 7 Tas R 293, 297 per Cox CJ.

<sup>267</sup> s. 13 *Criminal Code Act 1924* (Tas).

<sup>268</sup> *Snow v. The Queen* [1962] Tas SR 271; *R. v. Martin* (1979) Tas R 211, *Arnol v. The Queen* [1981] Tas R 157; *Palmer v. The Queen* (1985) Tas R 138; *R. v. Bennett* (1989) 45 A Crim R 45.

<sup>269</sup> On 26 May 1988 the Law Reform Commission of Tasmania was abolished by the *Law Reform Commissioner Act 1988* (Tas.) and it was replaced by the Law Reform Commissioner of Tasmania.

<sup>270</sup> Tasmania, Law Reform Commissioner, *Report on Insanity, Intoxication and Automatism*, LRC 61, 1989, p. 13.

voluntarily consumed alcohol or drugs should bear the consequences of his or her actions.<sup>271</sup> To the Committee's knowledge this report was never acted upon.

3.62 More recently, the issue of intoxication evidence falling short of insanity arose for consideration in *Attorney-General's Reference No. 1 of 1996*,<sup>272</sup> a case involving homicide. The Tasmanian Court of Criminal Appeal had to determine whether evidence of intoxication could be considered when determining:

- (a) the extent of a defendant's knowledge of the consequences of his or her conduct; and
- (b) a defendant's knowledge of or capacity to appreciate the consequences of his conduct, where the evidence of intoxication interacted with a mental disorder falling short of insanity.

Section 157 of the Criminal Code provides for various grounds upon which a person can be found guilty of murder. In issue in this case was sub-section 157(1)(c) which provides that culpable homicide is murder if it is committed:

by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person.

3.63 On the issue of whether evidence of intoxication is relevant to whether a defendant knew the consequences of his conduct, the majority of the Court of Criminal Appeal, consisting of Justices Wright, Crawford and Zeeman concluded that evidence of intoxication is relevant.<sup>273</sup> Justice Wright noted:<sup>274</sup>

I am in full agreement with Zeeman J in his conclusion that as a consequence of decisions, both of the High Court and this Court...it is necessary in an appropriate case to consider evidence of intoxication...when considering whether an accused person actually knew that his allegedly criminal conduct was likely to cause death.

Justice Wright also pointed to the authority of *Beard's* case, noting that the philosophy of that case forms the foundation of section 17 of the Code and further, that although *Beard* deals with intent and not knowledge, he noted:

It seems to me that the basic legal policy acknowledged by *Beard* should apply to all situations provided for in the Code where a subjective mental element is an ingredient of the crime alleged.

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<sup>271</sup> *ibid.*, pp. 13–14.

<sup>272</sup> [1998] 7 TasR 293.

<sup>273</sup> *ibid.*, 319 per Wright J; 323 per Crawford J; 338 per Zeeman J; (contra 305 per Cox CJ and 313 per Underwood J).

<sup>274</sup> *ibid.*, 315 per Wright J.

In relation to the issue of whether the defendant ought to have known, in circumstances falling short of the defence of insanity, a majority of the Court of Criminal Appeal, consisting of Chief Justice Cox and Justices Underwood and Wright held that evidence of intoxication is not relevant.<sup>275</sup> Chief Justice Cox, said:<sup>276</sup>

the accused cannot, in my view, rely on a self-induced condition which diminishes the knowledge and capacity with which he is otherwise endowed. While it is only right that, for example, an abnormal mental condition for which he was in no way responsible should be taken into account in making the assessment required by the second limb of para(c), there is no justification for excusing his failure to observe the standard if the reduction of his capacity is induced by reason of intoxicants, knowingly and willingly taken.

## Northern Territory

3.64 The *Criminal Code 1983* (NT) embraces the O'Connor principles.<sup>277</sup> Evidence of intoxication is relevant to a determination of criminal responsibility under section 31 of the code, which provides that a person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

3.65 As originally worded, section 7 of the *Criminal Code* provided that where there was evidence of self-induced intoxication there was a presumption that a defendant foresaw the natural and probable consequences of his or her conduct. This presumption was criticised in 1983 by then Prime Minister, The Hon. Robert Hawke, as placing an 'insuperable burden on a defendant' and as a breach of article 14 (the presumption of innocence) of the 1966 International Covenant on Civil and Political Rights scheduled to the *Human Rights Commission Act 1981* (Cth).<sup>278</sup> In other words, it reversed the normal onus of proof that a defendant is innocent until proven guilty and put the burden on the defendant to establish his innocence. This provision was amended by the *Criminal Code Amendment Act 1984* (NT) so that this presumption is now an evidentiary and not a legal one. This means that a defendant must adduce evidence of intoxication but the burden of proving intention or recklessness remains on the prosecution.

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<sup>275</sup> *ibid.*, 319 per Wright J; 305 per Cox CJ; 313 per Underwood J; (contra 327 per Crawford J and 338 per Zeeman J).

<sup>276</sup> *ibid.*, p. 305.

<sup>277</sup> *Meeting Notes*, meeting with Northern Territory Attorney-General's Department and the Office of the Director of Public Prosecutions, Darwin, 8 Apr. 1999; *Meeting Notes*, meeting with Sir William Kearney, Supreme Court (NT), Darwin, 8 Apr. 1999.

<sup>278</sup> Letter dated 17 Nov. 1983 written by the Prime Minister to the Chief Minister of the Northern Territory cited in (1984) 58 ALJ 70, 71.

3.66 A defendant may only rely on the defence of insanity if the intoxication was involuntary.<sup>279</sup>

3.67 Special provisions apply in relation to intoxication and offences against the person and property offences.

3.68 Under section 318 of the *Criminal Code* a person who is charged with murder or manslaughter or any offence against the person and who is found not guilty because of evidence of intoxication, may be found guilty of the alternative offence of committing a dangerous act under section 154 of the *Criminal Code*.

3.69 Sub-section 154(1) of the *Criminal Code* provides:

Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

In *Baumer v. The Queen*<sup>280</sup> the High Court described section 154 as casting:

a wide net, so as to cover all acts or omissions endangering the life, health or safety of any member of the public where the risk ought to have been clearly foreseen and the act or omission avoided.

3.70 The decided cases indicate that a broad range of conduct comes within the ambit of the section.<sup>281</sup> In fact, section 154 has been described as being too wide in its application, catching anyone who is a little thoughtless.<sup>282</sup>

3.71 Section 154 was drafted with the purpose of ensuring a defendant does not avoid criminal responsibility on the basis of self-induced intoxication.<sup>283</sup> It means that,

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<sup>279</sup> s. 36 *Criminal Code* 1983 (NT).

<sup>280</sup> (1988) 166 CLR 51, 55.

<sup>281</sup> See e.g., *T. v. Bourne*, unreported, NT Supreme Court, 14 Aug. 1989 (discharging a firearm across a public park in the direction of houses); *R. v. Hutton, Beeby and Rivers*, unreported, NT Supreme Court, 16 Aug. 1993 (holding a man over a second-floor balcony); *R. v. Butler* (No. 1) (1991) 102 FLR 341 (swinging and striking a person with a nulla nulla); *H. v. O'Brien*, unreported, NT Supreme Court, 13 Dec. 1990 (throwing a lid of a paint tin at vehicles travelling on the road); *R. v. Maurice* (1992) 2 NTLR 115 (applying a choke hold to a partner during consensual sexual intercourse).

<sup>282</sup> *Meeting Notes*, meeting with Mr Greg Cavanagh, Magistrate, Northern Territory Magistrates' Court, Darwin, 7 Apr. 1999; *Meeting Notes*, meeting with Mr Steve Southwood, President of the Northern Territory Law Society and Ms Maria Ceresa, Executive Officer, Darwin, 7 Apr. 1999; *Meeting Notes*, meeting with Mr Richard Coates, Director, Northern Territory Legal Aid Commission, Darwin, 8 Apr. 1999.

<sup>283</sup> See e.g., the comments made by Hon. J. Robertson, *Northern Territory Legislative Assembly Parliamentary Record*, vol XVI, 15 Mar. 1983 to 2 Jun. 1983, pp. 266–267 and also D. Sturgess, QC, Criminal Code Seminar, Darwin, Oct. 1983, *Transcript* [held in Northern Territory Supreme

if a defendant is acquitted of the principal offence on the basis that intention cannot be proved because of evidence of self-induced intoxication, that defendant may still be penalised for committing a dangerous act or omission. Chief Justice Barwick's comment in *O'Connor's case*<sup>284</sup> that legislatures should consider enacting a separate offence to deal with people who are acquitted because of intoxication, has been cited in support of section 154.<sup>285</sup>

3.72 However, section 154 does not create a special offence dealing specifically with intoxicated offenders, instead it creates a 'fall-back' provision, under which offenders, whether intoxicated or not, who are acquitted of any offence against the person, may be held criminally responsible under this section. The section has been strongly criticised by the judiciary and members of the profession.<sup>286</sup> Its exclusion of consideration of intent or foresight represents a fundamental departure from principles of criminal responsibility.<sup>287</sup>

3.73 In relation to property offences, section 383 *Criminal Code* provides that where a defendant is charged with an indictable property offence and there is evidence of intoxication, the jury are required to find specially whether the defendant is not guilty by reason of self-induced intoxication. If the jury makes such a finding, the court may order the defendant to pay reparation to the victim and to pay the costs of investigation and bringing the charge.

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Court Library], pp. 23–31, cited in J. Blokland, 'Dangerous Act: A Critical Appraisal of Section 154 of the Northern Territory Criminal Code', (1995) 19 *Crim. L.J.* 74, 76.

<sup>284</sup> (1980) 146 CLR 64, 87.

<sup>285</sup> Hon. D. Manzie, Attorney-General, *Northern Territory Legislative Assembly Parliamentary Record*, vol XXXII, 7 Feb 1991, p. 360; D. Sturgess, QC, *op. cit.*, p. 24.

<sup>286</sup> Criminal Code Seminar, *Transcript*, *op. cit.*, pp. 84–85 & 91–97; J. Nader, 'The Criminal Code in the Northern Territory', paper presented to the Australian Bar Association Conference, 1990, pp 28–30, both cited in J. Blokland, *op. cit.*, p 74. *Meeting Notes*, meeting with Northern Territory Attorney-General's Department and the Office of the Director of Public Prosecutions, Darwin, 8 Apr. 1999; *Meeting Notes*, meeting with Sir William Kearney, Supreme Court (NT), Darwin, 8 Apr. 1999.

<sup>287</sup> J. Blokland, *ibid.*



### United Kingdom – Recent Developments

4.1 The historical development of the law in the United Kingdom has been discussed in chapter 2 of this report. However, since *Majewski's* case there have been law reform proposals and legislative action, which have had the effect of limiting the operation of the *Majewski* principles.

4.2 In 1980, the United Kingdom Criminal Law Revision Committee criticised the approach taken in *Majewski's* case and recommended that the distinction between basic and specific intent be abandoned.<sup>288</sup> The Committee's proposal was that evidence of self-induced intoxication should be considered to rebut the existence of the mental element of any offence, but could not be considered where recklessness was in issue.<sup>289</sup> This suggestion was never acted upon.

4.3 In 1993, the United Kingdom Law Commission released a consultation paper<sup>290</sup> in which it concluded that the distinction between offences of basic and specific intent was unsatisfactory, complex and difficult to apply. It recommended that the *Majewski* principles be either abolished without replacement or abolished and a new offence of criminal intoxication be created. Such an offence was aimed at catching a defendant who became deliberately intoxicated and who subsequently committed one of the offences listed in the proposed legislation. Two years later, the Law Commission changed its mind and in its final report recommended that the *Majewski* approach be codified with some amendments.<sup>291</sup>

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<sup>288</sup> Fourteenth Report, *Offences Against the Person*, Cmnd 7844, 1980, Part VI, p. 115.

<sup>289</sup> *ibid.*

<sup>290</sup> UK, Law Commission, *Intoxication and Criminal Liability*, Consultation Paper no. 127, London, 1993.

<sup>291</sup> UK, Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no. 229, 1995.

4.4 In 1998, the United Kingdom Home Office published a consultation paper<sup>292</sup> in which it set out proposals for reform of the law concerning non-fatal violence against the person. The paper does not deal with the offences of murder or manslaughter. Appended to the paper is a proposed Government Bill. Clause 19 of the proposed Bill provides that a person who was voluntarily intoxicated at the time of committing the conduct element of an offence shall be treated as having been aware of any risk which he would have been aware of had he not been intoxicated and having known or believed in any circumstance which he would have known or believed had he not been intoxicated. The Government's aim is to make clear that intoxicated offenders who have freely chosen to become intoxicated will be held criminally responsible for any violent acts committed while in that state. To the Committee's knowledge, at the time of tabling its report no legislation has been enacted.<sup>293</sup>

## New Zealand

4.5 The law concerning intoxication and criminal responsibility in New Zealand is governed by the decision of the New Zealand Court of Appeal in *R. v. Kamipeli*.<sup>294</sup> In that case, the defendant consumed a considerable quantity of beer and on his way home punched and kicked a passer-by who subsequently died. The defendant was charged with murder, but pleaded that he was so drunk at the time that he did not know what he was doing. Prior to the decision in *Kamipeli's* case, a distinction was drawn between offences of specific and basic intent, with evidence of self-induced intoxication only being relevant to offences of specific intent. However, the Court of Appeal determined that these principles should be rejected and that while drunkenness was not in itself a defence, evidence of intoxication, whether self-induced or involuntary, must be taken into account in determining whether all elements of an offence have been proved beyond reasonable doubt.<sup>295</sup> In reaching this conclusion, the Court of Appeal noted that:<sup>296</sup>

The alternative is to say that when drunkenness is raised in defence there is some special exception from the Crown's general duty to prove the elements of the charge. We know of no sufficient authority for that, nor any principle which justifies it.

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<sup>292</sup> UK, Home Office, *Violence: Reforming the Offences Against the Person Act 1861*, The Stationery Office, London, 1998.

<sup>293</sup> See UK, Home Office, *Annual Report 1998-99*, available at <http://www.homeoffice.gov.uk/annrep/1998/huar5.htm>

<sup>294</sup> [1975] 2 NZLR 610.

<sup>295</sup> *ibid.*, p. 614.

<sup>296</sup> *ibid.*, p. 616.

4.6 Shortly after *Kamipeli's* case, the decision was delivered in *Majewski's* case and the Court of Appeal subsequently left open whether those principles should be followed in New Zealand.<sup>297</sup> It remains open to the Court of Appeal to adopt the principle of distinguishing between offences of specific and basic intent, however until it does so the guiding principle will be as stated in *Kamipeli's* case.

4.7 The New Zealand Criminal Law Reform Committee suggested that manslaughter might constitute an exception to the general principles stated in *Kamipeli's* case.<sup>298</sup> Currently, evidence of self-induced intoxication can be relied upon to reduce a charge of murder to manslaughter but whether such evidence can constitute a defence to manslaughter remains open.<sup>299</sup>

4.8 The ultimate conclusion of the New Zealand Criminal Law Reform Committee was that evidence of intoxication is relevant to determining whether the elements of any criminal offence have been proved.<sup>300</sup> In 1991, the Crimes Consultative Committee released a Report<sup>301</sup> examining proposed reform of the criminal law as contained in the *Crimes Act 1961* (NZ). The New Zealand Law Reform Committee recommended the codification of the principles laid down in *Kamipeli's* case, that is evidence of self-induced intoxication be relevant to whether a defendant acted intentionally, recklessly or with the requisite knowledge. In accepting these principles, the Committee acknowledged that there existed community concern about the acquittal of intoxicated offenders, however the experience of members of the Committee suggested that 'it is very rare indeed for a person to escape liability on this basis'. The Committee's recommendations were never acted upon.

4.9 Currently the law in New Zealand is as stated in *Kamipeli's* case which means that evidence of intoxication is relevant to whether the prosecution has proved all elements of a criminal offence beyond reasonable doubt.

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<sup>297</sup> *R. v. Roulston* [1976] 2 NZLR 644, 653–654; *R. v. Meek* [1981] 1 NZLR 499, 504. In *Kamipeli's* case the Court of Appeal concluded that there should be no distinction between offences of specific and basic intent.

<sup>298</sup> New Zealand, Criminal Law Reform Committee, *Report on Intoxication as a Criminal Defence to a Charge*, Wellington, New Zealand, 1984, p. 17.

<sup>299</sup> *R. v. Grice* [1975] 1 NZLR 760; 766–767.

<sup>300</sup> New Zealand, Criminal Law Reform Committee, *op. cit.*, p. 53.

<sup>301</sup> New Zealand, Crimes Consultative Committee, *Report on Crimes Bill 1989*, 1991. The Committee was given the task of reviewing a Bill to reform the criminal law, which was introduced in May 1989.

## Canada

4.10 Canada's criminal law follows the British system of common law with an emphasis on following precedents and with scope for judges to make new law. As in other common law jurisdictions, self-induced intoxication is not a defence but is relevant to whether the prosecution has proved beyond reasonable doubt all essential elements of the offence charged. In recent times, the most controversial case concerning intoxication and criminal responsibility was that of *R. v. Daviault*.<sup>302</sup> Prior to that case, evidence of intoxication was relevant to offences of specific intent but was precluded from consideration for offences of basic intent.<sup>303</sup>

4.11 The enactment of the *Canadian Charter of Human Rights and Freedoms 1982*, particularly section 7<sup>304</sup> and sub-section 11(d),<sup>305</sup> raised new issues concerning intoxication and criminal responsibility. It has been argued,<sup>306</sup> that the exclusion of evidence of intoxication from offences of basic intent constitutes an infringement of:

- (1) fundamental principles of justice which require that a defendant cannot be convicted unless it is proven that the defendant possessed the relevant guilty intention for the offence; and
- (2) the presumption of innocence by excluding consideration of evidence of the defendant's true intention.

4.12 In *R. v. Bernard*,<sup>307</sup> while the arguments based on an infringement of the Charter were rejected, four of the majority justices said that an exception would be made for extreme intoxication in the future. In other words, it was suggested that if a defendant was intoxicated to the extent that he or she was in a state of automatism, evidence of that intoxication could be considered in relation to an offence of basic intent. Without a pronouncement from the Supreme Court, the issue remained unresolved, but some judges did in fact acquit defendants charged with basic intent offences.<sup>308</sup>

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<sup>302</sup> [1994] 3 SCR 63.

<sup>303</sup> *Leary v. The Queen* (1977) 33 CCC (2d) 473; *R. v. George* (1960) 128 CCC 289 & *R. v. Swietlinski* (1980) 55 CCC (2d) 481.

<sup>304</sup> s. 7 provides: 'Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice'.

<sup>305</sup> s. 11(d) provides that all persons have the right: 'to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.

<sup>306</sup> See e.g., *R. v. Bernard* [1988] 2 SCR 833.

<sup>307</sup> *ibid.*

<sup>308</sup> See e.g., *R. v. Saulnier* (1992) 110 NSR (2d) 58 (S. Ct.); *R. v. Edgar* (1991) 10 C.R. (4<sup>th</sup>) 67 (C.C. Prov. Ct.); *R. v. Finlayson* [1990] O.J. No. 422 (Dist. Ct., Brockville, 19 Mar. 1990); *R. v. McIntyre* [1992] PEIJ No. 85 (Sup. Ct., 10 Jul. 1992); *R. v. Tom* [1992] 79 CCC (3d) 84 (BCCA) cited in E. Sheehy, 'The Intoxication Defense in Canada: Why Women should Care', (1996) 23(4) *Contemporary Drug Problems* 595.

4.13 The issue of intoxication and basic intent offences arose for consideration by the Supreme Court of Canada in *R. v. Daviault*.<sup>309</sup> *Daviault's* case involved an alcoholic who was charged with dragging a 65-year-old woman from her wheelchair and violently sexually assaulting her. There was evidence that Daviault had consumed seven or eight beers and the contents of a 40-ounce bottle of brandy prior to committing the offence. Daviault claimed that he did not intend to sexually assault the woman and that he had no recollection of the incident. The trial judge held that Daviault was unable to form the required intent and acquitted him.

4.14 This acquittal was subsequently overturned by the Court of Appeal, where it was held that evidence of self-induced intoxication was not relevant to an offence of basic intent, such as sexual assault. On appeal to the Supreme Court, the issue was whether the Court of Appeal was correct in its conclusion that evidence of intoxication could not be considered in relation to offences of basic intent.

4.15 A majority of the Supreme Court concluded that section 7 and sub-section 11(d) of the Charter required a court to consider evidence of self-induced intoxication in relation to offences of basic intent where a defendant was so intoxicated that he was no longer aware of what he was doing; that is, in a state of extreme intoxication akin to automatism or insanity.<sup>310</sup> The majority also ruled that a defendant who wished to rely on such evidence, had to do more than adduce evidence raising a doubt as to his or her mental state—the defendant had to prove on the balance of probabilities that he or she was in such a state.

4.16 The decision in *Daviault's* case caused community outrage because of the availability of intoxication as an excuse for an offence and also 'the abdication of the responsibility of the legal system to punish violent behaviour, particularly violence against women'.<sup>311</sup> Judges came under attack as the decision was viewed by many as

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<sup>309</sup> [1994] 3 SCR 63.

<sup>310</sup> *ibid.*, p. 65. A new trial was ordered for Daviault. It is interesting to note that the evidence of Daviault's intoxication was never tested, because the victim died and it was thought that Daviault could not therefore receive a fair trial. Accordingly, he was acquitted.

<sup>311</sup> S. Bondy, 'Self-induced intoxication as a defense in the criminal code of Canada: issues and discussion around *Daviault v. R.*', (1996) 23(4) *Contemporary Drug Problems* 571. See also R. Room, 'Drinking, violence, gender and causal attribution: a Canadian case study in science, law and policy', (1996) 23(4) *Contemporary Drug Problems* 649, A. Onn, 'Self-induced Intoxication: Balancing Principles of Justice and Responsibility', (1996) 23(4) *Contemporary Drug Problems* 687.

giving intoxicated ‘men an excuse to rape women’.<sup>312</sup> After the decision, there were three cases in which evidence of ‘extreme’ intoxication was successfully relied on and these all involved assaults on women.<sup>313</sup> There remained a sense of community concern with the unfairness of a legal system, which allowed ‘unearned leniency to undeserving offenders’.<sup>314</sup>

4.17 The Canadian Parliament’s response to *Daviault’s* case was swift. Bill No C-72 was introduced into the Canadian Parliament in February 1995 and was passed by the House of Commons on 22 June 1995. Its provisions were to take effect from 15 September 1995.<sup>315</sup> In enacting legislation, the Government had the difficult task of balancing the rights of the individual in a democratic society not to be unjustly imprisoned, against the need to protect community members from harm. The opening paragraphs of the bill indicate that in the view of the Parliament the need for intoxicated offenders to be accountable for their conduct was paramount:

the Parliament of Canada shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it.

4.18 The provisions of section 33.1 read as follows:

1. It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
2. For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
3. This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

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<sup>312</sup> R. Room, loc. cit.

<sup>313</sup> *R. v. Blair* [1994] AJ No. 807; *R v. Theriault* - see *M. Shahin*, ‘Cocaine high lets man beat assault charge’, *The Ottawa Citizen*, 18 Nov. 1994 cited in E. Sheehy, op. cit., *R. v. Compton* - see G. Dimmock, ‘Drunk Excuse Works’, *The Telegraph Journal*, 10 Nov. 1994 cited in E. Sheehy, ibid.

<sup>314</sup> S. Bondy, op. cit. p. 3.

<sup>315</sup> The Bill amended the *Criminal Code* by inserting a new s. 33.1. The amending legislation was referred to as the ‘Rock Amendment’, because it was introduced by the Minister for Justice, Hon. Allan Rock.

4.19 These amendments to the Canadian *Criminal Code* put in place the first legislative provisions dealing with evidence of self-induced intoxication. The amendments codify the law relating to intoxication as it was prior to *Daviault's* case—with some added restrictions. The legislation allows evidence of intoxication to be considered in relation to offences of specific intent, but not in relation to offences of basic intent. However it goes a little further than this, by providing a new standard of reasonable care, which does not allow violence by persons who are intoxicated.

## Civil Law Jurisdictions

### Germany

4.20 Under the German legal system it is presumed that a criminal offender intended and understood the consequences of the criminal act—it must then be shown by the offender that he or she comes within one of the exceptions or deviations to criminal liability.<sup>316</sup>

4.21 A criminal offence requires voluntariness and capacity without either of these elements, the criminal offence will not be made out. An intoxicated defendant will have a defence to a criminal offence, if he or she can show that either of these elements, (that is, voluntariness or capacity) was missing at the time of committing the offence.

4.22 If a criminal offence is involuntary, it will not be punishable. If intoxication results in a defendant being unconscious and that defendant commits a criminal act, then voluntariness will not be established.<sup>317</sup>

4.23 It must also be established that a defendant had capacity at the time the criminal offence was committed. Section 52 of the German Criminal Code provides:<sup>318</sup>

- (1) There shall be no punishable act if the perpetrator at the time of the act, by reason of a disturbance of the consciousness, or a morbid mental disorder, or a mental defect, was not capable of appreciating the wrongfulness of the act or of acting in accordance with such appreciation.

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<sup>316</sup> B. Fischer and J. Rehm, Alcohol Consumption and the Liability of Offenders in the German Criminal System, (1996) 23(4) *Contemporary Drug Problems* 707.

<sup>317</sup> South African Law Commission, *Offences Committed Under the Influence of Liquor or Drugs*, Report, Jan. 1986, p. 79.

<sup>318</sup> *ibid.*, fn. 35, p. 79.

- (2) If the capacity to appreciate the wrongfulness of the act or to act in accordance with such appreciation was at the time of the act materially diminished by one of the above-mentioned factors, the punishment may be mitigated in terms of the provisions with regard to punishment of attempt.

4.24 Section 20 of the German Criminal Code contains factors, such as age or mental illness which impair a person's consciousness and therefore a person's ability to be found responsible for a criminal offence. If a defendant is intoxicated, that defendant will have to show that the intoxication seriously impaired his or her normal consciousness and that he or she was deprived of the capacity to appreciate the wrongfulness of his or her act.<sup>319</sup>

4.25 In relation to intoxication, one of the factors considered by German courts in determining whether a defendant's consciousness was seriously impaired is the defendant's blood alcohol concentration (BAC). If the BAC exceeds .20%, this raises the possibility of reduced liability.<sup>320</sup> However BAC is looked at in the context of other factors. A defendant with a BAC of .254 was found by a German Constitutional court to be liable for a charge of murder on the basis that the defendant was accustomed to consuming large quantities of alcohol and that some of his behaviour at the time of committing the offence did not show that his consciousness was seriously impaired.<sup>321</sup> It can therefore be concluded that, where there is evidence of intoxication, the practice of German courts is to take account of all relevant factors, including a defendant's BAC level, but a defendant's BAC level will not have precedence over other factors, but will be examined in the context of those other factors.

4.26 While intoxication may operate as a defence and result in the acquittal of a defendant, that defendant may still be held criminally liable under the special offence of being negligently or intentionally intoxicated. Sub-section 323(a)(1) provides:<sup>322</sup>

Anybody who negligently or intentionally becomes intoxicated with alcoholic beverage or other intoxicating substance ... if he commits an illegal act in this (intoxicated) condition for which he cannot be punished because, due to his intoxication he cannot be held criminally liable for the actual crime – he can be punished merely because he was in this condition.

4.27 By making provision for a special offence of negligent or intentional intoxication, the German criminal system recognises that although the important

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<sup>319</sup> *ibid.*

<sup>320</sup> B. Fischer and J. Rehm, *op. cit.*, pp 711-712.

<sup>321</sup> *ibid.*, p. 712.

<sup>322</sup> South African Law Commission, *op. cit.*, p. 80.

legal principles of capacity and voluntariness may be missing, intoxicated offenders must take responsibility for conduct committed while in that condition, given that such offenders had a choice whether to become intoxicated or not. The German criminal system recognises that the punishment of such offenders is legitimate. An intentionally or negligently intoxicated offender in German society may therefore find himself or herself convicted and punished in a manner similar to that of a non-intoxicated defendant who has committed the same type of offence. This special offence has been described as making the point that:<sup>323</sup>

social and utilitarian principles in regard to individual responsibility take priority over legal mechanisms of individual rights, especially in the context of an alteration of the state of consciousness being caused by one's own choices.

4.28 The German law is thus aimed at punishing the deliberate act of intoxication with its harmful consequences – even though the defendant is not liable under normal legal principles of criminal liability. By so doing:<sup>324</sup>

German law ideologically acknowledges the possible role of alcohol in criminal harmful behaviour as well as its potential effects in limiting the perpetrator's liability, but it effectively counters these dilemmas through its goal-oriented mechanisms.

## **Austrian and Swiss Law**

4.29 Austrian and Swiss criminal systems adopt the same approach as the German criminal system.<sup>325</sup> In other words in Austria and Switzerland, intoxication may constitute a defence to a criminal offence if it can be shown that a defendant acted involuntarily or lacked capacity. However both countries also make provision for a special offence of committing criminal acts while intoxicated – the provisions of these special offences are very similar to that of the German special offence. These special offences reflect the predominance of policy over legal principles, by placing greater value on the conviction and punishment of intoxicated offenders than on legal principles of criminal responsibility.

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<sup>323</sup> B. Fischer and J. Rehm, *op. cit.*, p. 719.

<sup>324</sup> *ibid.*, p. 726.

<sup>325</sup> South African Law Commission, *op. cit.*, pp. 80-82.

## The Netherlands

4.30 The Dutch legal system distinguishes between the guilt of a person of unsound mind and the guilt which must be proven under the normal elements of a criminal offence. Sub-section 39(1) of the Dutch Criminal Code deals with a person of unsound mind and it provides as follows:

A person is not punishable who commits an act which cannot be imputed to him because of defective development or morbid disturbance of his mental faculties.

4.31 Under sub-section 39(1), guilt does not have to be established but instead the judge has to determine whether a defendant can be held liable.<sup>326</sup> Where there is evidence of self-induced intoxication, that evidence would probably be rejected as a basis for unsound mind on the ground that the defendant's drunkenness was his or her own fault.<sup>327</sup>

4.32 When guilt must be established for a normal criminal offence, consideration will be given to proving criminal intent or negligence. Again, while theoretically a self-induced intoxicated defendant may lack the intent necessary to prove a criminal offence it is probable that a judge will assume intent on the basis that it is the defendant's fault for becoming drunk in the first place.<sup>328</sup>

4.33 Dutch law therefore takes quite a different approach to German, Swiss and Austrian law. Under the Dutch criminal system, evidence of self-induced intoxication is relevant to the mental element and may constitute an inability to establish that element, although from what has been said above, that would appear unlikely. In other words evidence of self-induced intoxication is unlikely to provide a defence under Dutch law, whereas under German, Swiss and Austrian law it can operate as a defence where it can be shown that a defendant lacked voluntariness or capacity. The other major difference is that Dutch law makes no provision for a special offence of committing a criminal act while intoxicated.

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<sup>326</sup> Parliament, Victoria, Law Reform Committee, *Correspondence*, Letter from the Royal Netherlands Embassy dated 23 Mar. 1999, p. 2.

<sup>327</sup> *ibid.*, p. 3.

<sup>328</sup> *ibid.*

## **Conclusion**

4.34 The major difference between the civil law jurisdictions and the common law jurisdictions that have retained the O'Connor principles is the precedence given to public policy over principles of criminal responsibility in the civil law jurisdictions. In the civil law jurisdictions, it can be seen that what is crucial is the need to hold accountable those persons who freely choose to become intoxicated and who subsequently commit a criminal offence. Such an offender is seen to be at fault for becoming intoxicated in the first place. In contrast, the common law jurisdictions which have kept the O'Connor principles do so on the basis that fundamental principles of criminal responsibility, that a defendant should not be convicted unless he or she acted voluntarily or intentionally, should override policy factors of moral responsibility and the protection of society. To do otherwise is seen in these common law jurisdictions as creating inequities and the potential for injustice in the operation of the criminal legal system.



## Psychological and Physiological Effects of Alcohol and Drugs

5.1 It is important to examine the psychological and physiological impact of drugs and alcohol in order to determine whether these can cause a person to act involuntarily or unintentionally. Drug and alcohol use is not a recent phenomenon—humans have a long history of using intoxicants to alter their feelings and thoughts. The comment was recently made:<sup>329</sup>

human kind is a drug taking species, and such historical examples as the use of wine and incense in biblical times; South American tribes chewing cocoa leaves, Pacific Islanders drinking kava; and the American Indian smoking tobacco are all testament to this assertion.

5.2 The neurobiological changes brought about by the use of intoxicants may include impaired self-control, hallucinations, unpredictable violent behaviour, fear, anxiety, psychotic behaviour and loss of memory.<sup>330</sup> What effect intoxicants will have on a particular individual varies because 'each psychoactive drug produces its own distinct array of neurobiological changes'.<sup>331</sup>

### Classes of Drugs

5.3 Intoxicants can be divided into various classes according to their pharmacological properties—central nervous system depressants, central nervous

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<sup>329</sup> P. Edwards, 'Drug misuses and its impact on law enforcement', paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia's Criminal Justice System*, convened by the Australian Institute of Criminology, Canberra, 22–23 Mar. 1999, p. 2.

<sup>330</sup> Dr S. Rajaratnam, Department of Psychology, Monash University; Dr M. Lenne, Turning Point Drug Centre; Associate Professor J. Redman, Department of Psychology, Monash University, *Submission No. 24*, p. 2 Dr S. Rajaratnam and Associate Professor J. Redman, Department of Psychology, Monash University, *Minutes of Evidence*, 29 Mar. 1999, p. 26 (hereafter 'Rajaratnam and Redman, *Evidence*').

<sup>331</sup> *ibid.*

system stimulants, opioids, cannabis, hallucinogens and anabolic steroids. The neurobiological impact varies between the classes.

5.4 Alcohol and benzodiazepines are examples of central nervous system depressants. Alcohol suppresses normal inhibitory processes in the brain, which explains why people often behave quite differently from normal.<sup>332</sup> Initially, the consumption of alcohol dulls memory and concentration and this may be followed by changes of mood and emotional outbursts.<sup>333</sup> There is general acceptance that people become impaired when blood alcohol concentrations reach 0.05 per cent and above.<sup>334</sup> The most aggressive behaviours usually occur during the period when the blood alcohol level is rising.<sup>335</sup> Because alcohol affects the memory, individuals who have consumed it are often unaware of their behaviour. Alcohol induced blackouts are not uncommon in chronic drinkers—this involves memory loss of all events that took place while intoxicated.<sup>336</sup> However, the individual may still be conscious and able to carry out complex tasks.<sup>337</sup>

5.5 Benzodiazepines (for example, sedative hypnotics and tranquillisers) also impair memory and may be accompanied by confusion and disorientation.<sup>338</sup> A good example of the loss of memory that may occur is the case of a neuroscientist who took triazolam in order to avoid jet lag. The neuroscientist flew from the United States to Europe and could not remember, among other things, going through customs, going to hotels and getting into taxis.<sup>339</sup>

5.6 Sedative hypnotics and tranquillisers generally reduce feelings of aggression, but occasionally produce an increase in aggression—even in normally non-violent

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<sup>332</sup> *Submission No. 24*, op. cit., p. 3; Australian Drug Foundation, *How Drugs Affect You: Alcohol*, p. 2, <http://www.adf.org.au/drughit/hday/hdayal.html>.

<sup>333</sup> *ibid.*

<sup>334</sup> *ibid.* See also Finnigan and R. Hammersley, 'The effects of alcohol on performance' in A. Smith & D. Jones (eds.), *Handbook of Human Performance*, vol. 2, Academic Press Ltd., London, 1992; H. Koelega, 'Alcohol and vigilance performance: A review', *Psychopharmacology*, 118, pp. 233–249.

<sup>335</sup> Rajaratnam & Redman, *Evidence*, 29 Mar. 1999, p. 27. See also, K. Miczek, J. DeBold, M. Hansy, J. Tidey, J. Vivian and B. Weerts, 'Alcohol, drugs of abuse, aggression and violence' in J. Reiss, and A. and J. Roth (eds.), *Understanding and Preventing Violence*, National Academy Press, Washington, DC, 1993.

<sup>336</sup> Rajaratnam & Redman, *Evidence*, 29 Mar. 1999, p. 27.

<sup>337</sup> *ibid.*

<sup>338</sup> *ibid.* See also, H. Curran, 'Tranquillising memories: A review of the effects of benzodiazepines on human memory', (1991) 23 *Biological Psychology* 179; R. Lister, 'The amnesic action of benzodiazepines in man', (1985) 9 *Neuroscience and Biobehavioral Reviews* 87.

<sup>339</sup> Rajaratnam & Redman, *Evidence*, 29 Mar. 1999, p. 31.

people.<sup>340</sup> It has also been shown that people with a history of violence may revert to violent behaviour.<sup>341</sup> However, there is no scientific consensus regarding the extent of such reaction.<sup>342</sup> Whether violent behaviour is induced depends on a number of factors including an individual's history of aggression, a person's expectations of the drug's effect, the dose and the social environment.<sup>343</sup>

5.7 Mr Peter Edwards from the Australian Bureau of Criminal Investigation recently commented that amongst prisoners abuse of prescription drugs is a very serious problem, with a great deal of aggressive behaviour resulting from the use by prisoners of benzodiazepines.<sup>344</sup> Very high doses may induce a toxic psychosis, which includes visual and auditory hallucinations and paranoid delusions.<sup>345</sup> A combination of alcohol and benzodiazepines may cause a person to go into an aggressive rage but have no memory of what was done during that time.<sup>346</sup>

5.8 Amphetamines and cocaine are examples of central nervous system stimulants. Cocaine may cause anxiety and panic attacks, even after the person has ceased using the drug.<sup>347</sup> Amphetamine produces feelings of wellbeing but may also cause anxiety, irritability, fear, confusion and hallucinations.<sup>348</sup> It is also possible to experience homicidal and suicidal tendencies.<sup>349</sup> Finally, it is also possible to experience a psychotic reaction, including paranoia, delusional thinking and episodes.<sup>350</sup>

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<sup>340</sup> *ibid.*, *Evidence*, 29 Mar. 1999, p. 27; *Submission No. 24*, p. 7.

<sup>341</sup> *Submission No. 24*, p. 7. See also, D. Paul, 'Drugs and aggression', (1975) 15 *Medicine Science and the Law* 16; M. Gossop and A. Roy, 'Hostility in drug dependent individuals: Its relation to specific drugs and oral or intravenous use', (1976) 128 *British Journal of Psychiatry* 188.

<sup>342</sup> *Submission No. 24*, p. 7. See also, M. Sheard, 'Clinical pharmacology of aggressive behaviour', (1984) 7(3) *Clinical Neuropharmacology* 173.

<sup>343</sup> *Submission No. 24*, p. 8.

<sup>344</sup> P. Edwards, *op. cit.*, p. 5.

<sup>345</sup> Rajaratnam & Redman, *Evidence*, 29 Mar. 1999, p. 27.

<sup>346</sup> *Submission No. 24*, p. 9. See also, J. Beasley, *Wrong Diagnosis, Wrong Treatment: The Plight of the Alcoholic in America*, Creative Informatics, New York, 1987.

<sup>347</sup> *Submission No. 24*, p. 9. See also, S. Satel, T. Kosten, M. Schuckit and M. Fischman, 'Should protracted withdrawal from drugs be included in DSM-IV?' (1993) 150(5) *American Journal of Psychiatry* 695.

<sup>348</sup> *Submission No. 24*, pp. 9–10. See also, R. Julien, *A Primer of Drug Action*, Williams and Willins, Baltimore, 1990.

<sup>349</sup> *Submission No. 24*, p. 10. See also, R. Derlet and B. Heischober, 'Methamphetamine: stimulant of the 1990's?' (1990) 153 *Western Journal of Medicine* 625; D. Beebe and E. Walley, 'Substance abuse: The designer drugs' (1991) 43 *American Family Physician* 1689.

<sup>350</sup> *Submission No. 24*, p. 10. See also, H. Kaplan and B. Sadock, *Pocket Handbook of Clinical Psychiatry*, Williams and Wilkins, Baltimore, 1990.

5.9 Heroin, morphine, methadone and codeine are examples of opioids and these act as nervous system depressants. They are primarily used for pain relief. Opioids have various effects including mood changes, drowsiness, dulling of mental senses.<sup>351</sup> While use of opioids is not normally associated with violent behaviour, chronic use may increase the incidence of violence.<sup>352</sup>

5.10 The effects of cannabis ingestion on the user will vary according to the dose, extent of prior use, the individual's current state of mind and the social environment in which it is ingested.<sup>353</sup> Initially, cannabis users experience mild anxiety and then increased sleepiness,<sup>354</sup> but the drug can also cause mood swings and impair short-term memory and attention.<sup>355</sup> Cannabis does not usually lead to violent behaviour, however, when combined with other drugs, it may produce that effect.<sup>356</sup>

5.11 Lysergic acid diethylamide (LSD), Phencyclidine (PCP) and ecstasy are examples of hallucinogens. LSD initially makes a person feel like laughing or crying, followed by hallucinations and then mood swings and panic.<sup>357</sup> LSD does not appear to cause violent behaviour, but it may aggravate an existing violent tendency.<sup>358</sup> PCP causes a decrease in inhibitions, anxiety and restlessness.<sup>359</sup> Acute and chronic use may induce a psychotic state and may lead to violent behaviour.<sup>360</sup> Ecstasy usually improves a person's feelings of self-esteem, however, users may experience hallucinations, anxiety, agitation and the final effects may include rage reactions and psychosis.<sup>361</sup>

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<sup>351</sup> *Submission No. 24*, p. 10.

<sup>352</sup> *Submission No. 24*, p. 12. See also, K. Miczek, et. al., loc. cit.

<sup>353</sup> *Submission No. 24*, p. 12. See also, W. Hall, N. Solowij and Lemon, *The Health and Psychological Consequences of Cannabis Use*, National Drug Strategy, Monograph Series No. 25, Australian Government Publishing Service, Canberra, 1994.

<sup>354</sup> *Submission No. 24*, p. 13.

<sup>355</sup> *ibid.* See also H. Kaplan, et. al., loc. cit.

<sup>356</sup> *Submission No. 24*, p. 14. See also, H.E. Doweiko, *Concepts of Chemical Dependency*, Brooks/Cole Publishing Co., Pacific Grove, 1999.

<sup>357</sup> *Submission No. 24*, p. 15.

<sup>358</sup> *Submission No. 24*, p. 15. See also, K. Miczek, et. al., loc. cit.

<sup>359</sup> *Submission No. 24*, p. 16.

<sup>360</sup> *Submission No. 24*, p. 15. See also, K. Miczek, et. al., loc. cit.

<sup>361</sup> *Submission No. 24*, p. 17. See also, G. Hayner & H. McKinney, 'MDMA: The dark side of ecstasy', (1986) 18(4) *Journal of Psychoactive Drugs* 341; S. Karch, *The Pathology of Drug Abuse*, CRC Press, New York, 1996; P. McGuire and T. Fahy, 'Chronic paranoid psychosis after misuse of MDMA', (1991) 302 *British Medical Journal* 697.

5.12 Anabolic steroid-abusers often experience an increase in violent or aggressive behaviour. Approximately 90 per cent of users experience this so called 'roid rage'.<sup>362</sup>

5.13 In summary, intoxicants have a substantial impact on human behaviour, but the nature of this impact varies 'between and within individual drug classes'.<sup>363</sup> It is difficult, therefore, to accurately predict the response of an individual to particular intoxicants, not only because of the distinct impact of the intoxicants themselves, but also because of the existence of other factors extraneous to drug type. Some of these other factors, which have an impact upon an individual's psychological response to intoxicants, include:

- (a) Dosage and how the intoxicant is taken. A large dose of a drug will have a greater effect than a small dose,<sup>364</sup> and a drug which is taken orally will be slower to take effect than if injected.<sup>365</sup>
- (b) Previous experience with drugs. A person's history or experience of taking a drug will effect how that person reacts to the drug. For example, regular amphetamine users can build up tolerance over a short period of time and will have to take a larger dose to get the same effect.<sup>366</sup>
- (c) Genetic factors. Genetic factors may, for example, influence the likelihood of an individual developing an alcohol abuse problem.<sup>367</sup> Some individuals, 50 per cent of whom are of Asian origin, have a genetic mutation which results in the liver not being able to manufacture sufficient enzymes required in the metabolism of alcohol, which results in an excess of a toxic by-product that causes flushing, increased heart rate and nausea.<sup>368</sup>
- (d) Psychological state. A person's current psychological state is also relevant, especially with hallucinogens. For example, whether the trip is enjoyable or frightening seems to reflect the mood of the user at the time.<sup>369</sup> It has been suggested that while a person who consumes alcohol in happy company is more likely to be happy, if something goes wrong, that person's behaviour may be far more unpredictable and impulsive, and the

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<sup>362</sup> *Submission No. 24*, p. 17 and P. Edwards, *op. cit.*, p. 5. See also, M. Johnson, 'Anabolic steroid use in adolescent athletes' (1990) 37 *Pediatric Clinics of North America* 1111.

<sup>363</sup> *Submission No. 24*, p. 18.

<sup>364</sup> Rajaratnam & Redman, *Evidence*, 29 Mar. 1999, p. 26.

<sup>365</sup> *ibid.*

<sup>366</sup> *ibid.*; Dr R. Vine, Forensic Psychiatrist, *Minutes of Evidence*, 29 Mar. 1999, p. 49.

<sup>367</sup> *ibid.*

<sup>368</sup> *ibid.*

<sup>369</sup> *ibid.*, p. 27; Dr R. Vine, Forensic Psychiatrist, *Minutes of Evidence*, 29 Mar. 1999, p. 48.

person may in fact become quite aggressive.<sup>370</sup> Another suggestion is that the effect of alcohol or drugs upon an individual may be influenced by that person's expectation of how drugs or alcohol affects them.<sup>371</sup> In other words, if a person drinks alcohol expecting to become sad, then that person will become sad; or if a person expects to become funny, then that person is more likely to become funny. A person may in fact take alcohol or drugs to obtain such a result.

5.14 It is impossible to accurately predict the impact of drugs and alcohol upon individuals. Another difficulty in assessing the effect of drugs or alcohol on an individual is often the considerable period of time between the crime and the assessment of the individual. In these circumstances, the best that can be offered is a post-event analysis of a person's mental state and behaviour, with corroborative evidence from witnesses.<sup>372</sup> The actual effect of alcohol or drugs upon a particular defendant can, therefore, only be partial if that defendant is not thoroughly examined shortly after the criminal offence.<sup>373</sup>

5.15 There is evidence that consumption of alcohol is widespread amongst the Australian community and that its consumption is accepted as a normal part of Australian culture, across a broad range of social groups.<sup>374</sup> While Australians have a high intake of alcohol,<sup>375</sup> a survey of over fifty countries by the Dutch based Commodity Board for the Distilled Spirits Industry indicated that on average

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<sup>370</sup> Dr R. Vine, Forensic Psychiatrist, *Minutes of Evidence*, 29 Mar. 1999, p. 48.

<sup>371</sup> Rajaratnam & Redman, *Evidence*, 29 Mar. 1999, p. 27; *Meeting Notes*, meeting with faculty staff, School of Criminology, Griffith University, Brisbane, 10 Feb. 1999. See also, J.M. White and R. Hummenuik, *Alcohol Misuse and Violence, Exploring the Relationship*, Report No. 2, National Symposium on Alcohol Misuse and Violence, Australian National University, 1994, pp. 75-76, which notes that while some studies have revealed the importance of the expectancy theory, other studies have concluded otherwise.

<sup>372</sup> Dr T. Watson-Munro, Forensic Psychologist, *Minutes of Evidence*, 30 Mar. 1999, p. 105.

<sup>373</sup> *ibid.*

<sup>374</sup> Australian Drug Foundation, *op. cit.*, p. 1; T. Makkai, *Alcohol & Disorder in the Australian Community: Part 1—Victims*, Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice, Dec. 1997, p. 1; T. Makkai and I. McAllister, *Patterns of Drug Use in Australia*, 1985-95, Commonwealth Department of Community Health and Family Services, Canberra, 1997; R. Homel and M. Bull, 'Under the influence: Alcohol, drugs and crime, in K. Hazelhurst (ed.), *Crime and Justice: Australian Textbook in Criminology*, The Law Book Company, Sydney, 1996; R. Room, 'The dialectic of drinking in Australian life: From the rum corps to the wine column' (1988) 7 *Australian Drug and Alcohol Review* 413; J. White and R. Hummenuik, *Alcohol Misuse and Violence, Exploring the Relationship*, Report No. 2, National Symposium on Alcohol Misuse and Violence, Australian National University, 1994, p. 1.

<sup>375</sup> J. White and R. Hummenuik, *op. cit.*, pp. 7 & 10 and National Drug Abuse Information Centre, *Statistics on Drug Abuse in Australia*, Australian Government Publishing Service, Canberra, 1992. See also, Australian Medical Association, *Submission No. 12*.

Australians consumed 7.5 litres of alcohol in 1996, giving Australia the twentieth position on the register of world alcohol consumption.<sup>376</sup> However, when it comes to consumption of beer, Australia moves to ninth place on the list with an average consumption in 1996 of 95.4 litres.<sup>377</sup> Evidence also indicates that alcohol is more likely to be consumed to an intoxicating level by young males.<sup>378</sup> Moreover, it has been suggested that many Australians drink hazardous amounts of alcohol, resulting in individual ill health and considerable cost to the community, financially and otherwise.<sup>379</sup> It seems that not only is there a problem with Australians consuming detrimental amounts of alcohol, but also many of them are ignorant of those damaging effects.<sup>380</sup>

## Relationship between alcohol and crime

5.16 In 1990 the National Committee on Violence said:<sup>381</sup>

a close association exists between alcohol and violence, but the relationship is complex. It is probably less a result of alcohol's pharmacological properties, but rather more a product of co-existing psychological, social and cultural factors.

5.17 The relationship between alcohol and violence<sup>382</sup> is complex. While overseas studies reveal that there is a link between alcohol and violence, the results of the research are not uniform and suffer from deficiencies.<sup>383</sup> There are variations in estimates of the strength of the relationship between alcohol and violence with some research indicating that the link is weak.<sup>384</sup> Some of the research focuses on convicted

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<sup>376</sup> *Herald Sun*, 5 Feb. 1998 and *The Age*, 5 Feb. 1998.

<sup>377</sup> *ibid.*

<sup>378</sup> J. White and R. Hummenuik, *op. cit.*, pp. 8–10; National Drug Abuse Information Centre, *loc. cit.*  
<sup>379</sup> Australian Medical Association, *Submission No. 12*; K. Youngs, *The Incidence and Prevalence of Alcohol Use and Violence in the Australian Community*, Report 1, National Symposium on Alcohol Misuse and Violence, 1994, p. 3; T. Makkai, *loc. cit.*

<sup>380</sup> Australian Medical Association, *Submission No. 12*.

<sup>381</sup> 'Violence: Directions for Australia' cited in K. Youngs, *op. cit.*, p. 17.

<sup>382</sup> In the context of this report, violence refers to criminal offences such as assault, homicide etc. This report is not concerned with motor vehicle violence or the use of violence to obtain money to support a drug or alcohol problem.

<sup>383</sup> J. White and R. Hummenuik, *op. cit.*, p. 7. Some of these overseas studies include—D. Murdoch, R. Pihl and Dr Ross, 'Alcohol and crimes of violence: Present issues', (1990) 25 *International Journal of Addiction* 1065; B. Roslund & C. Larson, 'Crimes of violence and alcohol abuse in Sweden', (1979) 14 *International Journal of Addiction* 1103; L. Gerson and D. Preston, 'Alcohol consumption and the incidence of violent crime' (1979) 40 *J. Stud. Alcohol* 307; R. Norton and M. Morgan, 'The role of alcohol in mortality and morbidity from interpersonal violence', (1989) 24 *Alcoholism* 565.

<sup>384</sup> J. White and R. Hummenuik, *op. cit.*, p. 6.

offenders, and in so doing does not necessarily reflect the extent of violence in the community. Evidence suggests that many violent offences go unreported,<sup>385</sup> which means that the prevalence of violence and alcohol may in fact be much higher than some studies suggest. Such studies remain useful as they indicate that alcohol plays a significant role in crimes of violence.

5.18 Australian research on the relationship between alcohol and violence suffers from similar limitations. In 1994, the National Symposium on Alcohol Misuse and Violence examined the relationship between alcohol and violence in Australia and found that the available research made it difficult to draw strong conclusions on the precise relationship between alcohol and violence.<sup>386</sup> Some of the problems highlighted included:

- (a) A paucity of information concerning alcohol consumption levels.
- (b) Failure to consider the relationship between alcohol levels and violence.
- (c) Lack of standard definitions of terms such as 'alcohol use prior to the offence', 'alcohol use around licensed premises' or 'alcohol-related violence'. 'Alcohol-related violence' may, for example, need to be broad enough to include a non-physical domestic violence situation. Without standard definitions it is difficult to make proper comparisons between jurisdictions and with other research reports. Similarly, failure to adopt uniform methodological approaches in the collection of criminal statistics and the conduct of research creates the same sort of difficulties.
- (d) A number of database systems were examined<sup>387</sup> and it was found that while these systems provided some assistance in understanding trends in alcohol consumption or trends in violence, few examined the relationship between the two, with the consequence that it was not really possible to 'assess with reliability the incidence or prevalence of alcohol use and violence nationally in Australia'.<sup>388</sup>

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<sup>385</sup> *ibid.*

<sup>386</sup> K. Youngs, *op. cit.*, p.105 and J. White and R. Hummenuik, *op. cit.*, p. 10.

<sup>387</sup> e.g., National Uniform Crime Statistics; Police Statistics; The National Homicide Monitoring Program; Police Custody Surveys; Court Statistics; Coronial Statistics; The National Injury Surveillance System; Sexual Assault Referral Centres; Victimization Surveys; The National Campaign Against Drug Abuse National Household Survey; The National Prison Census.

<sup>388</sup> K. Youngs, *op. cit.*, p.111.

5.19 Recently, Dr Adam Graycar, Director of the Australian Institute of Criminology confirmed that Australian data collection methods are not good.<sup>389</sup>

The data story in Australia is not a good story. Much of our data is of poor quality, our collections are inconsistent, glaringly obvious discrepancies defy explanation, and we have a very poor culture of data sharing.

In addition, evidence was given to the Committee during its public hearings that many people do not report violent crimes, which adds to the difficulty of analysing the extent of violence in the community and the extent to which alcohol plays a part in that violence.<sup>390</sup>

5.20 There is a strong community perception that alcohol causes violence.<sup>391</sup> Commissioner M.J. Palmer of the Australian Federal Police expressed the belief that alcohol was the biggest cause of violent behaviour in Australia.<sup>392</sup>

The relationship between alcohol and violence is well documented. In my opinion, despite the publicity given to illicit drugs, alcohol is unquestionably the biggest cause of criminal violence and anti-social behaviour in this country.

5.21 During its public hearings and inter-state visits the Committee was presented with overwhelming evidence of a strong link between alcohol and drugs and crimes of violence, with up to 90 per cent of crimes of violence involving some sort of consumption of alcohol and/or drugs.<sup>393</sup> It has also been found that where a large

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<sup>389</sup> 'Mapping the Boundaries of Australia's Criminal Justice System', paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia's Criminal Justice System*, convened by the Australian Institute of Criminology, Canberra, 22–23 Mar. 1999.

<sup>390</sup> Ms. F. Broughton, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999, p. 35; Centre Against Sexual Assault, *Minutes of Evidence*, 29 Mar. 1999, p. 41.

<sup>391</sup> Australian Capital Territory, Women's Legal Centre, *Submission No. 34*, p. 1. See also, J. White and R. Hummenuik, op. cit., p. 3; A. Wallace, et. al., *Violence Against Women and Children in the Home*, Report No. 4, National Symposium on Alcohol Misuse and Violence, Australian National University, 1994, p. 26.

<sup>392</sup> 'Police Policy', address to the Association of Australian Magistrates, 11<sup>th</sup> Biennial Conference, 6 Jun. 1998, p. 9.

<sup>393</sup> Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999; Rajaratnam & Redman, *Evidence*, 29 Mar. 1999; Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999; Centre Against Sexual Assault, *Minutes of Evidence*, 29 Mar. 1999; Mr J. Willis, Criminal Barrister, Lecturer, La Trobe University, *Minutes of Evidence*, 29 Mar. 1999; Officers from the Office of Director of Public Prosecutions (Vic.), *Minutes of Evidence*, 29 Mar. 1999; Victorian Aboriginal Legal Service Co-operative Ltd, *Minutes of Evidence*, 30 Mar. 1999; Victoria Legal Aid, *Minutes of Evidence*, 30 Mar. 1999; Victoria Police, *Minutes of Evidence*, 30 Mar. 1999; Dr B. McSherry, Senior Lecturer and Associate Dean, Law Faculty, Monash University, *Minutes of Evidence*, 30 Mar. 1999; Victorian Criminal Bar Association, *Minutes of Evidence*, 30 Mar. 1999; The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999; Dr A. Blankfield, *Submission No. 9*; Australian Medical Association Limited, *Submission No. 12*; Rajaratnam, Department of Psychology, Monash University; Dr M. Lenne, Turning Point Drug Centre; Assoc Prof J. Redman, Department of

number of intoxicated people are congregated together, violence is more likely to occur:<sup>394</sup>

Interestingly, levels of rate of intoxication didn't so much predict physical violence but non-physical aggression. That is, verbal abuse and arguments and things like that. But what did predict violence was mass intoxication induced by a lot of people getting drunk very quickly.

### ***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.***

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Psychology, Monash University, *Submission No. 24*, p. 4; *Meeting Notes*, meeting with Mr Andrew Haesler, New South Wales Attorney-General's Department, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with New South Wales Office of Director of Public Prosecutions, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with faculty staff, Institute of Criminology, Sydney University, Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with officers of New South Wales Legal Aid, Sydney, 9 Feb. 1999; *Meeting Notes*, meeting with New South Wales Magistrates, Sydney, 9 Feb. 1999; *Meeting Notes*, meeting with officers of Queensland Legal Aid and Public Defenders, Brisbane, 10 Feb. 1999; *Meeting Notes*, meeting with officers of the Queensland Department of Justice, Brisbane, 10 Feb. 1999; *Meeting Notes*, meeting with faculty staff Griffith University, Brisbane, 10 Feb. 1999; *Meeting Notes*, meeting with officers of the Office of Director of Public Prosecutions (Qld), Brisbane, 11 Feb. 1999; *Meeting Notes*, meeting with Matthew Goode, South Australian Attorney-General's Department, Adelaide, 6 Apr. 1999; *Meeting Notes*, meeting with officers of the Legal Services Commission (SA), Adelaide, 6 Apr. 1999; *Meeting Notes*, meeting with Dr Ian Leader-Elliott, Law Faculty, University of Adelaide, Adelaide, 6 Apr. 1999; *Meeting Notes*, meeting with officers of the South Australian Office of Director of Public Prosecutions, Adelaide, 6 Apr. 1999; *Meeting Notes*, meeting with Mr Greg Cavanagh, Magistrate, Darwin, 7 Apr. 1999; *Meeting Notes*, meeting with Mr Steve Southwood, President Northern Territory Law Society and Ms Maria Ceresa, Executive Officer, Darwin, 7 Apr. 1999; *Meeting Notes*, meeting with Sir William Kearney and Trevor Riley, Supreme Court Justices, Darwin, 8 Apr. 1999; *Meeting Notes*, meeting with officers of the Northern Territory Attorney-General's Department and Director of Public Prosecutions, Darwin, 8 Apr. 1999; *Meeting Notes*, meeting with officers of the Legal Aid Commission, Darwin, 8 Apr. 1999; *Meeting Notes*, meeting with officers of the Law Reform Committee, Darwin, 8 Apr. 1999. See also, D. Touhig, 'A British all-party committee view on alcohol and violence', *Alcohol and Alcoholism*, 33(1), pp. 89-91; D. Greenberg, 'Methodological issues in survey research on the inhibition of crime', *Journal of Criminal Law and Criminology*, 72, pp. 1094-1108; K. Miczek et al, loc. cit., and C. Cherpitel, 'Alcohol and injuries resulting from violence: A comparison of emergency room samples from two regions of the U.S.', *Journal of Addictive Diseases*, 16(1), pp. 25-40.

<sup>394</sup> G. Raffaele, 'Alcohol and Violence', (1995) 7(2) *Criminology Australia* 3, p. 5.

6.1 The way in which the criminal law should deal with self-induced intoxicated offenders has been much debated and has caused great difficulty for law reformers. Prior to the 19<sup>th</sup> century, the issue of self-induced intoxication was not problematic—the courts simply took the view that it was not an excuse for criminal behaviour. However, this approach was reconsidered in the 19<sup>th</sup> century when the courts realised that drunkenness could interfere with criminal intention. This enabled judges to avoid imposing the death penalty in homicide cases where a defendant was grossly intoxicated.

6.2 Gradually, a principle emerged which distinguished between offences of specific and basic intent. The first reference to the concept of specific intent was in 1838 by Mr Justice Patterson in *R. v. Cruse*<sup>395</sup> where he mentioned that murder required a ‘positive intention’.<sup>396</sup> The issue of specific intent was not raised again until 1849 in *R. v. Monkhouse*<sup>397</sup> where Mr Justice Coleridge stated that drunkenness would only result in an acquittal if a defendant was deprived of ‘the power of forming any specific intention’.<sup>398</sup>

6.3 The most important enunciation of this principle occurred in *Beard’s* case,<sup>399</sup> and it sparked a great deal of debate.<sup>400</sup> The distinction between offences of specific and basic intent, which is rationalised on public policy grounds, remains controversial. Some jurisdictions have adopted this principle as the most appropriate way of dealing with self-induced intoxicated offenders.<sup>401</sup>

6.4 In this chapter the following reform options will be examined:

(a) Option 1 – The Majewski Option

<sup>395</sup> (1838) 8 C & P 541.

<sup>396</sup> *ibid.*, 545.

<sup>397</sup> (1849) 4 Cox CC 55

<sup>398</sup> *ibid.*, 56.

<sup>399</sup> *DPP v. Beard* [1920] AC 479.

<sup>400</sup> For discussion of this debate, see *supra*, paras. 2.22–2.26.

<sup>401</sup> The Commonwealth of Australia, New South Wales, Queensland, Tasmania, Western Australia, Canada and the United Kingdom.

- (b) Option 2 – The Creation of a Special Offence
- (c) Option 3 – Intoxication as Mental Impairment
- (d) Option 4 – The O’Connor Principles
- (e) Option 5 – Intoxication as an Element in Criminal Trials
- (f) Option 6 – Jury to Hear all Indictable Offences if O’Connor Principles are Raised
- (g) Option 7 – Sentencing Options
- (h) Option 8 – Evidence of Propensity and Intoxication

## Option 1 – The Majewski Option

6.5 Under this proposal evidence of self-induced intoxication may be considered to determine whether a defendant acted voluntarily and intentionally in relation to offences of specific intent, but not for offences of basic intent. The distinction between offences of specific and basic intent has previously been explained in this Report.<sup>402</sup> *Majewski’s* case<sup>403</sup> adopts the principle of distinguishing between offences of specific and basic intent and this doctrine is reflected in the Criminal Codes of Western Australia, Queensland and in a slightly modified form in the Tasmanian Criminal Code. Recently, New South Wales<sup>404</sup> and the Commonwealth<sup>405</sup> have enacted similar legislation.

6.6 The principle of distinguishing between offences of specific and basic intent has been justified upon the following policy grounds:

1. It maintains community faith in the justice and fairness of the legal system by indicating that self-induced intoxicated offenders will be punished for criminal offences committed while in a state of gross intoxication.<sup>406</sup>
2. It is morally wrong to allow a defendant to avoid liability on the basis that he or she was so intoxicated that the act was involuntary or unintentional in

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<sup>402</sup> See *supra*, para. 1.7.

<sup>403</sup> *DPP v. Majewski*, [1977] AC 443.

<sup>404</sup> *Crimes Legislation Amendment Act 1996* (NSW).

<sup>405</sup> *Model Criminal Code Act 1995* (Cth) and the *Criminal Code Amendment Act 1998* (Cth).

<sup>406</sup> *Majewski’s* case, *op. cit.*, 475 per Lord Elwyn-Jones, 484 per Lord Salmon, 495 per Lord Edmund-Davies, 498 per Lord Russell of Killowen.

circumstances where it was the defendant's choice to embark 'on the course which led to his intoxication'.<sup>407</sup>

3. It seeks to protect community members from physical violence and property damage by sending a message to potential offenders that they will be held accountable for any criminal act committed while in a state of self-induced intoxication.<sup>408</sup>
4. It makes it difficult for self-induced intoxicated offenders to avoid liability, because defendants charged and acquitted of offences of specific intent are most likely to be convicted of some less serious offence, which does not require proof of specific intent. For example, a defendant acquitted of murder, will be likely to be found guilty of manslaughter or a defendant acquitted of causing injury intentionally is likely to be found guilty of conduct endangering life or negligently causing serious injury. There are of course specific intent offences, such as theft, for which there is no alternative offence of basic intent. In such circumstances, a defendant may be acquitted.

## Arguments Against Adopting this option

6.7 The difficulty of distinguishing between offences of specific and basic intent has been highlighted in submissions received and evidence taken by the Committee from members of the legal profession,<sup>409</sup> the judiciary<sup>410</sup> and academics.<sup>411</sup>

<sup>407</sup> *Majewski's case*, op. cit., 474–475 per Lord Elwyn-Jones, 482 per Lord Salmon, 495 & 496–497 per Lord Edmund-Davies, 498 per Lord Russell of Killowen; *R. v. O'Connor* (1980) 146 CLR 64, 110. See also Mr Whelan, Minister for Police, Criminal Legislation Further Amendment Bill 1995 (NSW), Second Reading Speech, *Hansard*, 6 Dec. 1995, p. 4279.

<sup>408</sup> *Majewski's case*, op. cit., 476–477 per Lord Simon of Glaisdale, 483–484 per Lord Salmon, 495 per Lord Edmund-Davies.

<sup>409</sup> Mr M. O'Brien, Victoria Legal Aid, *Submission No. 6* and *Minutes of Evidence*, 30 Mar. 1999; Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16* and *Minutes of Evidence*, 30 Mar. 1999; Mr R. Punshon, Vice-Chairman, Criminal Bar Association, *Submission No. 20* and *Minutes of Evidence*, 30 Mar. 1999; Mr R. Inglis, Chief Research Officer, Victorian Aboriginal Legal Service, *Submission No. 25*; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27* and *Minutes of Evidence*, 30 Mar. 1999; Ms M. Darcy, Centre Against Sexual Assault, *Submission No. 31* and Ms M. Heenan and Ms M. Darcy, *Minutes of Evidence*, 29 Mar. 1999; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Submission No. 33* and *Minutes of Evidence*, 29 Mar. 1999; Ms F. Hampel, QC, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999; Ms F. Broughton and Mr T. Wilmot, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999; Mr. G. Flatman, QC, Director of Public Prosecutions (Vic.), *Minutes of Evidence*, 29 Mar. 1999; Victoria, Parliament, Law Reform Committee, *Meeting Notes*, (hereafter '*Meeting Notes*') meeting with Mr N Cowdrey QC, Director of Public Prosecutions, Mr M. Blackmore, Deputy Director, Public Prosecutions and Ms R. Gray, Deputy Solicitor for Public Prosecutions (NSW), Sydney, 8 Feb. 1999. Two submissions that did support this proposal included those of the Department of Police and Public Safety, Tasmania, *Submission No. 22* and the Women's Legal Centre (ACT), *Submission No. 34*.

6.8 The Committee has found the distinction between offences of specific and basic intent to be utterly confusing,<sup>412</sup> even in the primary case of *Majewski* no guidance was given as to how to distinguish between offences of specific and basic intent and no attempt was made to collectively determine a systematic categorisation of such offences. In *O'Connor's* case, Barwick CJ commented on this distinction:<sup>413</sup>

With great respect to those who have favoured this terminology in a classification of crimes, it is to my mind not only inappropriate but it obscures more than it reveals.

6.9 The Committee has found that there is inconsistency regarding whether some extremely serious offences are treated as offences of basic or specific intent. For example, whether rape is an offence of specific or basic intent remains uncertain.<sup>414</sup> In the Committee's view an even greater absurdity exists in relation to attempts to commit crimes, because attempts are classified as offences of specific intent, even

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<sup>410</sup> For example, His Honour Chief Judge G. Waldron, County Court, Melbourne, *Submission No. 28*.  
<sup>411</sup> Dr B. McSherry, *Submission No. 15* and *Minutes of Evidence*, 30 Mar. 1999; Dr I. Leader-Elliott, *Submission No. 29*; *Meeting Notes*, meeting with faculty staff, Institute of Criminology, Sydney University, Sydney, 8 Feb. 1999. See also D. Stuart, *Canadian Criminal Law: a Treatise*, 2nd ed., Carswell, Agincourt, Ont., 1987; J.C. Smith and B. Hogan, *Criminal Law*, 7th ed., Butterworths, London, 1992; A. Mewett and M. Manning, *Criminal Law*, 2nd ed., Butterworths, Toronto, 1985; M. Goode, 'Some thoughts on the present state of the "defence" of intoxication', (1984) 8 *Crim. L.J.* 104; G. Orchard, 'Criminal responsibility and intoxication—The Australian rejection of *Majewski*', [1980] *N.Z.L.J.* 532; Judge G. Smith, 'Footnote to *O'Connor's* case', (1981) 5 *Crim. L.J.* 270; T. Quigley, 'Specific and general nonsense', (1987) 11 *Dalhousie L.J.* 7; G. Orchard, 'Surviving without *Majewski*—A view from down under', [1993] *Crim. L.R.* 426; S. Cavender, 'The lords against *Majewski* and the law', (1989) 21 *Bracton L.J.* 9; P. Schabas, 'Intoxication and culpability: towards an offence of criminal intoxication', (1984) 42 *U.T.Fac.L.Rev.* 147; G. Virgo, 'The Law Commission consultation paper on intoxication and criminal liability—(1) Reconciling principle and policy,' [1993] *Crim. L.R.* 415; S. Beaumont, 'Drunkenness and criminal responsibility—Recent English experience', (1976) 54 *Can. Bar. Rev.* 777; T. Quigley, 'Reform of the intoxication defence', (1987) 33 *McGill L.J.* 1.

<sup>412</sup> Dr B. McSherry, *Submission No. 15*, p. 2; Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, p. 7; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 4; Mr D. Curtain, QC, Chairman, Victorian Bar, *Submission No. 27*, p. 8; UK Law Commission, *Intoxication and Criminal Liability*, op. cit. Consultation Paper No. 127, HMSO, London, 1993, p. 34; New Zealand, Criminal Law Reform Committee, *Report on Intoxication as a Criminal Defence to a Charge*, 1984, p. 33; Ms F. Broughton, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999, p. 35; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999, p. 56; Mr T. Munro, Principal Legal Officer, Victorian Aboriginal Legal Service Co-operative Ltd., *Minutes of Evidence*, 30 Mar. 1999; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Minutes of Evidence*, 30 Mar. 1999, p. 110; South Australia, Attorney-General's Department, *Intoxication and Criminal Responsibility*, Discussion Paper, [Adelaide] Jul. 1998, p. 32.

<sup>413</sup> *O'Connor's* case, op. cit., 81.

<sup>414</sup> *R. v. Hornbuckle* [1945] VLR 281 (specific intent). Compare: *Holman v. The Queen* [1970] WAR 2; *R. v. Thompson* [1961] Qd R 503; *Snow v. The Queen* [1962] Tas SR 271; *R. v. Leary* (1977) 74 DLR 3d 103. See also comments made by Gibbs J in *O'Connor's* case, op. cit., 91.

where the commission of the completed offence would constitute a crime of basic intent. This means that in relation to an attempt to commit an offence of basic intent evidence of self-induced intoxication may be taken into account, but if the basic intent offence is actually committed, evidence of self-induced intoxication is not relevant. Consequently a defendant who has committed the completed offence may be acquitted, but a defendant who has merely attempted to commit the same offence may be convicted. The Committee believes that such anomalous outcomes would not be conducive to greater confidence in the law.

6.10 Another problem arises with the offence of receiving stolen property, which is an offence of basic intent. While at first glance it appears that possession of the property is sufficient to establish the offence, an examination of the definition indicates that knowledge that the property is stolen must also be established. New South Wales legislation that distinguishes between offences of specific and basic intent has inadequately addressed the relevance of evidence of self-induced intoxication to the issue of knowledge. The rationale behind such a distinction has been questioned.<sup>415</sup> Moreover there is no relationship between the seriousness of an offence and whether the crime is one of basic or specific intent. Manslaughter, for example, is a crime of basic intent and yet is a very serious offence.<sup>416</sup> The courts have been described as adopting 'a Humpty Dumpty attitude' to the categorisation of offences.<sup>417</sup> The allocation of offences into those of specific and basic intent can therefore only be described as arbitrary leaving little wonder at the inconsistencies which occur.

6.11 New South Wales has sought to resolve the practical problem of distinguishing between offences of specific and basic intent by including in its legislation a definition of and a list of examples of offences of specific intent.<sup>418</sup> Where an offence has been allocated to the category of specific intent, it is simply a matter for the courts to apply the law. However, the listing of some sixty examples and the categorisation of offences of specific intent is not exhaustive, leaving offences which are not listed in the legislation the subject of judicial categorisation. Furthermore, no guidance has been given to the courts as to the basis for classification of offences which have not been categorised. The evidence taken by the Committee indicates that

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<sup>415</sup> Mr W. Severino, Assistant Commissioner, Victoria Police, *Submission No. 14*, p. 3; Dr B. McSherry, Academic, *Submission No. 15*, p. 2; Ms F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 17.

<sup>416</sup> UK, Law Commission, *Intoxication and Criminal Liability*, op. cit., p. 30.

<sup>417</sup> G. Williams, *Textbook of Criminal Law*, Stevens & Sons, London, 1978, p. 428.

<sup>418</sup> *Crimes Act 1900* (NSW), s. 428B.

the degree of uncertainty in classifying offences is a cause for concern amongst practitioners in New South Wales.<sup>419</sup>

6.12 This option also fails to ‘take into account the rapid modern development of the concept of “recklessness” as an alternative to intention’.<sup>420</sup> The New South Wales Legislation does not deal with recklessness, leaving doubt as to how this concept should be dealt with and in particular, whether evidence of self-induced intoxication may be considered where recklessness is an element of an offence.

6.13 Several expert witnesses criticised the distinction maintaining that it creates practical difficulties and unfair results.<sup>421</sup> When a defendant is charged with offences of both specific and basic intent and intoxication is an issue, a judge in charging a jury ‘will need to give different directions on the relevance of intoxication evidence depending on the classification of the offences as being of specific or general intent’.<sup>422</sup> This places juries in the difficult position of considering evidence of self-induced intoxication for one charge, but not for another. To ask juries to do this is to immerse them in complexities that they should not be called upon to consider and there exists the possibility that juries may, become confused and thereby, reach incorrect findings. Dr David Neal from the Victorian Bar commented:<sup>423</sup>

It is a simple thing for a jury to understand that we want to punish only those who intentionally do the wrong thing. If we have to submerge them in the minutia and detail of all of the qualification and rules – unrealistic rules in many cases – when the jury is told it must not consider intoxication in coming to its conclusion of this or that aspect of the offence, it becomes a nightmare scenario.

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<sup>419</sup> *Meeting Notes*, meeting with Mr N Cowdrey QC, Director of Public Prosecutions, Mr M. Blackmore, Deputy Director, Public Prosecutions and Ms R. Gray, Deputy Solicitor for Public Prosecutions (NSW), Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with New South Wales Magistrates - Mr C. Gilmore, Mr D. Price, Mr P. Cloran, Ms L Horler, Ms D. Sweeney and Mr J. Garbett, 9 Feb. 1999.

<sup>420</sup> South Australia, Attorney-General’s Department, *op. cit.*, p. 31.

<sup>421</sup> Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, p. 7; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 4; Mr D. Curtain, Chairman, The Victorian Bar, *Submission No. 27* p. 8; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Submission No. 33*, p. 1; UK Law Commission, *Intoxication and Criminal Liability*, *op. cit.* p. 34; South Australia, Attorney-General’s Department, *op. cit.*, p. 32; His Honour Judge P. Mullaly, County Court of Victoria, *Minutes of Evidence*, 15 Mar. 1999, p. 7; Ms F. Hampel, QC, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 17; Mr. G. Flatman, QC, Director of Public Prosecutions (Vic), *Minutes of Evidence*, 29 Mar. 1999, p. 6.

<sup>422</sup> Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 8. This comment was also made by Mr R Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 4 and His Honour Chief Judge G. Waldron, County Court of Victoria, *Submission No. 28*, p. 1.

<sup>423</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 122.

6.14 Ironically, it allows juries to consider evidence of self-induced intoxication for more serious specific intent offences, when really the policy aim of the distinction is to remove from consideration evidence of self-induced intoxication. Moreover, in relation to offences of basic intent it forces a jury to consider how a defendant would have acted if that defendant had been sober; a task described in the submission of the Victorian Criminal Bar Association as ‘impossible and artificial’.<sup>424</sup> This means that it is possible for a defendant to be convicted of a crime even though that defendant never formed the state of mind required by the definition of the crime charged.<sup>425</sup> In its discussion paper, the South Australian Attorney-General's department indicated that the application of this principle means:<sup>426</sup>

the voluntariness of any act would be assessed on the fictional basis that the accused was sober, and hence it would be presumed that the accused acted voluntarily, and further it would be presumed that the accused was sober for the purpose of determining fault in relation to crimes of ‘basic intent’ but not for crimes of ‘specific intent’.

6.15 While such a conviction may be justified on public policy grounds, it has been described as morally objectionable because it allows a defendant to be held liable where it is not possible to prove the relevant elements of criminal liability.<sup>427</sup> The difficulty of explaining these issues to juries may lead to a plea of guilty by a defendant where otherwise no such plea would have been entered. Mr Andrew Haesler of the New South Wales Attorney-General's department,<sup>428</sup> in giving evidence to the Committee, indicated that he had a case where a self-induced intoxicated defendant stabbed the victim. The defendant was charged with malicious wounding with intent to cause grievous bodily harm and malicious wounding. Under the New South Wales Legislation, which distinguishes between specific and basic intent, the defendant's intoxication could be considered for the former charge, but not the latter charge. Defence counsel and the prosecution decided that it was too complicated to explain these differences to the jury and agreed that the defendant would plead guilty to the lesser charge of malicious wounding. The Committee believes that the distinction between offences of specific and basic intent can only be

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<sup>424</sup> Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 4.

<sup>425</sup> Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, p. 7; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 3; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 8; New Zealand, Criminal Law Reform Committee, *Report on Intoxication as a Criminal Defence to a Charge*, Mar. 1984, p. 37.

<sup>426</sup> South Australia, Attorney-General's Department, *op. cit.*, p. 28.

<sup>427</sup> Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 4; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 7; South Australia, Attorney-General's Department, *op. cit.*, p. 32.

<sup>428</sup> *Meeting Notes*, meeting with Mr A. Haesler, Criminal Law Review Division, New South Wales Attorney-General's Department, Sydney, 8 Feb. 1999.

described as making trials more complex and has the potential for inconsistent and unjust verdicts.

6.16 Guilty intention and the coincidence of that intention with the relevant criminal act constitute two fundamental principles of criminal law. The distinction between basic and specific intent offences has been criticised for cutting into both of these principles. Firstly, the act of self-induced intoxication does not usually coincide with the criminal act, normally occurring at some earlier point of time. Mr Roy Punshon on behalf of the Victorian Bar described this approach as contravening ‘the basic requirement at criminal law of coincidence of act and intent’.<sup>429</sup>

6.17 Additionally this approach is seen as equating the act of self-induced intoxication with the intention to commit the particular crime.<sup>430</sup> For example, in *Majewski’s* case, Lord Elwyn-Jones LC said:<sup>431</sup>

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent.

The Lord Chancellor makes it clear that in the case of offences of basic intent, self-induced intoxication itself amounts to criminal intent or recklessness. Not only has this conclusion been criticised as unfair but it has been described as an ‘ethical absurdity’ because it allows ‘the very conduct which prevents the defendant from forming the necessary criminal intent to be itself presumed to be that intent’.<sup>432</sup> In other words it allows the act of intoxication or the choice to consume the alcohol or drugs to constitute the intention.

6.18 An example of this is the case of *R. v. Egan*<sup>433</sup> where the intoxicated defendant was charged with the manslaughter of her 11 month old son. The defendant took the child to bed and slept on it, causing it to suffocate. The trial judge directed the jury to find the defendant guilty. On appeal, however, it was held that evidence of self-induced intoxication indicated that the defendant had slept on the child by mischance, which was insufficient to support a charge of manslaughter. The evidence of self-induced

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<sup>429</sup> Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 8.

<sup>430</sup> Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 3; Mr D. Curtain, Chairman, The Victorian Bar, *Submission No. 27*, p. 7.

<sup>431</sup> *Majewski’s* case, op. cit., pp. 474–476. A similar comment was also made by Lord Edmund Davies, pp. 496–497 and Lord Russell, p. 498.

<sup>432</sup> Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 7.

<sup>433</sup> (1897) 23 VLR 159.

intoxication indicates that the defendant had no intention to commit the act. However, if the evidence of self-induced intoxication had not been considered, then the defendant would undoubtedly have been found guilty of a crime which she committed involuntarily and unintentionally.

6.19 Mr Justice Hunt in *R. v. Coleman*<sup>434</sup> commented that the proposition that self-induced intoxication amounts to criminal intent comes 'dangerously close to reintroducing the presumption that every person intends the natural and probable consequences of his acts', a presumption which was clearly rejected by the High Court in 1963 in *Parker v. The Queen*.<sup>435</sup>

6.20 One of the policy aims of the distinction between offences of specific and basic intent is to deter intoxicated persons from committing criminal offences. In *Majewski's* case, Lord Salmon commented:<sup>436</sup>

I believe that the main object of our legal system is to preserve individual liberty. One important aspect of individual liberty is protection against physical violence. If there were to be no penal sanction for any injury unlawfully inflicted under the complete mastery of drink or drugs, voluntarily taken the social consequence could be appalling.

An important issue, therefore is whether the enactment of legislation distinguishing between offences of specific and basic intent would deter the use of intoxicants and criminal offences. In *O'Connor's* case, Mr Justice Stephen pointed out that the Victorian community had for some time lived under a relaxed alcohol regime and that he was unaware of evidence that the incidence of crime was higher in Victoria than in other jurisdictions where the *Majewski* principles applied.<sup>437</sup> The Committee has not been presented with any evidence showing that a person will be deterred from becoming intoxicated 'by the knowledge that his state of intoxication could not be relied upon if he committed an offence of general intent'.<sup>438</sup>

6.21 And so the question arises should legislation be enacted in Victoria which distinguishes between offences of specific and basic intent? It is interesting to note that after its investigation the United Kingdom Law Commission concluded that the distinction should only be maintained if no alternative could be found<sup>439</sup> and described the codification of the distinction between specific and basic intent offences

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<sup>434</sup> (1990) 19 NSWLR 467, 480.

<sup>435</sup> (1963) 111 CLR 610.

<sup>436</sup> *Majewski's* case, op. cit., 484.

<sup>437</sup> *O'Connor's* case, op. cit., 100.

<sup>438</sup> D. O'Connor and P. Fairall, *Criminal Defences*, 3rd ed., Butterworths, Sydney, 1996, p. 230 & *O'Connor's* case, ibid.

<sup>439</sup> UK, Law Commission, *Intoxication and Criminal Liability*, op. cit., p. 37.

as removing ‘some of the uncertainty as to the exact content of the Majewski rule,’ but failing to address any other uncertainties.<sup>440</sup>

6.22 The Committee accepts that the classification of offences as requiring specific or basic intent is artificial, arbitrary and confusing. Rather than making the law simpler and easier to apply, it would require Victorian juries to grapple with unnecessarily complex issues and subtle distinctions thereby increasing the possibility of unjust decisions. It would erode fundamental principles of criminal law by deeming a defendant to be sober when in fact the defendant was intoxicated.

6.23 The Committee notes that the Commonwealth Government has enacted legislation distinguishing between offences of specific and basic intent and that it has requested those jurisdictions where the O’Connor principles remain in place to urgently review the law in this area with a view to enacting similar legislation. It is the Committee’s opinion that the fact that other jurisdictions have adopted particular legal principles does not mean that Victoria should follow the same course, unless it can be shown that the adoption of those principles will benefit the administration of justice in the Victorian community.

6.24 Accordingly the Committee concludes that not only is the distinction between offences of specific and basic intent unnecessarily complex and confusing, it also constitutes a serious departure from fundamental principles of criminal law. To depart from fundamental principles of criminal law and to introduce technical legal complexities to an already complex legal system is seen by the Committee as insupportable.

### *Conclusion*

*The Committee concludes that legislation adopting the principle which distinguishes between offences of specific and basic intent should not be enacted in Victoria.*

## **Option 2 – The Creation of a Special Offence**

6.25 The Committee has been specifically requested to consider whether to introduce an offence of committing a dangerous act while grossly intoxicated. The majority justices in *O’Connor’s* case suggested that rather than interfere with fundamental principles of criminal justice, a separate offence could be introduced to

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<sup>440</sup> *ibid.*, p. 39.

deal with grossly intoxicated offenders.<sup>441</sup> Mr Justice Murphy, for example, commented:<sup>442</sup>

The problem should be resolved not by distorting the theory of mens rea but by leaving it to the legislature to deal with the unacceptable conduct of intoxicated persons. A person who injures another, after deliberately allowing himself to become intoxicated with the awareness that when intoxicated he may well injure others, may be dealt with either logically, within the traditional notions of mens rea...or else, by legislation, be made liable for an aggravated form of unlawful injury while intoxicated.

The rationale behind the creation of a separate statutory offence is the public policy generated objective of protecting the community from criminal conduct committed by grossly intoxicated offenders and to ensure that such persons do not escape liability for harm created while in that state.

## Previous Proposals for the Creation of a Separate Statutory Offence

6.26 Over the years there has been a number of suggestions made by courts, members of the legal profession, law reform bodies and academic commentators recommending the creation of a special statutory offence.<sup>443</sup>

### The Butler Committee (UK)

6.27 In 1975 the Butler Committee<sup>444</sup> considered the creation of a special statutory offence of committing a dangerous act while intoxicated. This report was published a few months before the decision in *Majewski's* case. The Butler Committee understood English law at the time to allow evidence of intoxication to be considered for any offence charged,<sup>445</sup> a view subsequently shown to be incorrect by *Majewski's* case. The focus of the Butler Committee's proposal was upon 'dangerous' offences, that is,

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<sup>441</sup> *O'Connor's* case, op. cit., 87 per Barwick CJ, 103 per Stephen J, 113 per Murphy J & 126 per Aickin J.

<sup>442</sup> *O'Connor's* case, ibid., pp. 113–114 per Murphy J.

<sup>443</sup> UK, Home Office, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244 (1975) pp. 235–237; UK, Criminal Law Revision Committee, *Offences Against the Person*, Fourteenth Report, (1980) (minority) pp. 112–114; A. Ashworth, 'Reason, Logic and Criminal Liability (1975) 91 *LQR* 102 p. 117–118; Bugg, 'Intoxication and Liability: A Criminal Law Cocktail', (1985) *Auckland Law Review* 144; L. Skene, *Drugs, Alcohol and Crime* (1986) 5 *Australian Drug and Alcohol Review* 279; Quigley, 'Reform of the Intoxication Defence' (1987) 33 *McGill Law Journal* 1, pp. 30–47. Lord Elwyn-Jones LC (p. 475) and Lord Edmund-Davies (p. 496) in *Majewski's* case supported the creation of a separate statutory offence. Canada: Mr Justice Dickson (dissenting) in *R. v. Leary* (1977) 33 CCC (2d) 472, 495 and again in his dissenting judgment in *R. v. Bernard* (1988) CCC (3d.) 1, 18.

<sup>444</sup> UK, Home Office, op. cit., paras. 18.54–18.59.

<sup>445</sup> ibid., paras. 18.52–18.53.

offences involving injury or death, sexual attack or endangering life by destruction or damage to property.<sup>446</sup> The Butler Committee was anxious to ensure that habitually intoxicated and violent persons be held criminally responsible for their conduct and believed that the courts should be given statutory power to convict such offenders, preferably by persuading them to accept some form of treatment.<sup>447</sup>

6.28 Under the Butler Committee's proposal the special statutory offence would be an included offence, that is a defendant would not be charged with this special offence at first instance and could only be convicted of such an offence after being acquitted of the principal offence charged. Thus, at first instance the principal offence would be charged, but if evidence of intoxication was raised, the jury would be directed that if they acquitted the defendant of the offence charged, they could find the defendant guilty of the offence of dangerous intoxication if they were satisfied that there was evidence of self-induced intoxication, and if there was doubt as to whether the defendant formed the requisite mental element for the offence charged.<sup>448</sup>

6.29 The Butler Committee defined 'voluntary intoxication' as:<sup>449</sup>

intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect; provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug.

This meant that a defendant would not be liable for committing a 'dangerous' act if the defendant was unaware that the intoxicant might have an intoxicating effect. The offence suggested was one of strict liability not requiring proof of the mental element for the principal offence charged. All that was required to establish the mental element of the proposed offence was proof of self-induced intoxication.<sup>450</sup> In addition, a mistaken belief in a circumstance of excuse would only be a defence if a sober person would have made the same mistake.<sup>451</sup>

6.30 The Butler Committee expressed concerns that a severe penalty for the special offence would be unjust but that a light penalty would encourage defendants to seek conviction of the special offence:<sup>452</sup>

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<sup>446</sup> *ibid.*, para. 18.56.

<sup>447</sup> *ibid.*, para. 18.53.

<sup>448</sup> *ibid.*, para. 18.54.

<sup>449</sup> *ibid.*, para. 18.56.

<sup>450</sup> *ibid.*, para. 18.57.

<sup>451</sup> *ibid.*

<sup>452</sup> *ibid.*, para. 18.58.

in cases such as wounding with intent to cause grievous bodily harm...the existence of a 'fall-back' verdict will encourage time-consuming unsuccessful defences to be run in inappropriate cases.

The Butler Committee recommended that indictable offences carry a maximum penalty of one year's imprisonment for the first offence and three years for a second or subsequent offence. For summary offences, the maximum sentence of imprisonment was six months.

6.31 The Butler Committee's proposals had the advantage of preventing the 'unacceptable' acquittal of intoxicated offenders and avoided the necessity of distinguishing between offences of specific and basic intent, a distinction which is complex and often difficult to draw.

6.32 However there were a number of drawbacks to the Butler Committee's proposed special offence:

1. The penalty suggested by the Butler Committee was in fact considerably less severe and would have encouraged self-induced intoxicated offenders to raise evidence of intoxication more frequently in the hope of being acquitted of a more serious principal offence.
2. The proposed special offence was unfair because it placed all intoxicated offenders in one category. A defendant found liable under the proposed offence would be convicted of a 'dangerous' offence which meant that the criminal record of that person would not specify the gravity of the act committed, for example, assault occasioning minor injury or grievous bodily harm.
3. The proposed penalty was not sufficient for serious offences such as killing or rape with the potential that a defendant acquitted of the principal offence but found guilty of the special offence could have received a fairly light sentence for serious criminal conduct.
4. Juries would have had to consider more issues, leading to trials involving intoxication and criminal offences becoming more complex. For example, a trial would have been more difficult where intoxication was not the only factor which placed in doubt whether the defendant formed the required mental element. The Butler Committee provided no explanation as to how to determine which factor played the most significant part in a defendant's inability to form the required mental intent. Furthermore, if a defendant pleaded mistake, the jury would have had to determine whether the defendant would have made the

same mistake if the defendant had been sober. Such a task can only be described as speculative and complex.

5. The extent of intoxication was not specified which meant that even the slightest level of intoxication, would be sufficient to fall within the proposed statutory offence. This appears to be unfair.
6. The Law Commission commented that the proposed new offence gave no consideration to the issue of a divided jury where half the jurors believed the defendant was intoxicated and lacked the mental element for the principal offence charged and where the other half believed that the defendant was intoxicated but still had the required mental intent.<sup>453</sup> In such circumstances the defendant would likely be acquitted of both offences, there being no majority view on the jury regarding either the principal or special statutory offence.

### **Minority Proposal of the Criminal Law Revision Committee (UK)<sup>454</sup>**

6.33 In 1980, the Criminal Law Revision Committee produced a report<sup>455</sup> in which the majority of its members rejected a proposal for the creation of a special statutory offence. However, Professors Smith and Williams agreed with the Butler Committee that there should be a special statutory offence, but they felt that aspects of the Butler Committee's proposed offence should be changed. They considered that a verdict should distinguish between reckless and non-reckless conduct, that is between the person who considers the risk and chooses to ignore it and the person who was unaware of any risk because of intoxication. The fault of a person who considers the risk and chooses to ignore it lies in that person's recklessness, whereas, the fault of the person who is unaware of the risk lies in becoming intoxicated. The professors suggested that a court should have the option of imposing the same maximum penalty for reckless and non-reckless conduct, because occasions would arise where an intoxicated offender who had not acted recklessly posed a serious threat to the community and therefore required the imposition of a higher penalty.

6.34 Professors Smith and Williams argued that:<sup>456</sup>

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<sup>453</sup> UK, Law Commission, *Intoxication and Criminal Liability*, op. cit., p. 71.

<sup>454</sup> Professor J. Smith and Professor G. Williams supported the creation of a new statutory offence. They represented a minority opinion of the Criminal Law Revision Committee in its Report, *Offences Against the Person*, Fourteenth Report, Cmnd 7844, 1980.

<sup>455</sup> *ibid.*

<sup>456</sup> *ibid.*, para. 263.

1. Evidence of intoxication should be taken into account when considering whether a defendant had formed the intention of the offence charged.
2. Where evidence of self-induced intoxication was raised and the jury were satisfied that all elements of the offence had been proved except for the fault elements and the defendant would have been aware of the risk if he had been sober, then the defendant would be not guilty of the principal offence but guilty of the special statutory offence of committing criminal conduct while in a state of self-induced intoxication.
3. Where a defendant relied on evidence of self-induced intoxication to show that he held a mistaken belief and the jury were satisfied that the defendant:
  - (a) may have held that belief;
  - (b) the belief was mistaken; and
  - (c) that the defendant would not have held the belief if sober,the jury would find that defendant not guilty of the principal offence but guilty of committing a criminal act while in a state of self-induced intoxication.

6.35 The penalty suggested for the proposed offence was the same as for the principal offence charged. This suggestion would undoubtedly have avoided the problem of an increased number of defendants pleading intoxication because there would have been no significant advantage to be gained from making such a plea, at least in terms of the penalty to be imposed. This stands in contrast to the Butler Committee's proposal where a defendant who successfully pleaded intoxication would have been able to obtain a benefit of the smaller penalty imposed under the special statutory offence. However it could be argued that the minority proposal may still have encouraged a defendant to plead to this special statutory offence. A defendant may have felt that this was a less serious offence to be convicted of than, for example, rape. It could be argued that the imposition of a penalty equivalent to that for the principal offence would be harsh given that the mental element of the principal offence had not been proved and that the defendant may in fact have lacked the required mental intent. The New Zealand Criminal Law Reform Committee suggested that an equivalent penalty is only probably necessary when a defendant habitually consumes intoxicants and commits criminal acts or when a defendant has an alcohol or drug addiction problem.<sup>457</sup>

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<sup>457</sup> New Zealand, Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, Mar. 1984, para. 67.

6.36 The proposal put forward by Professors Williams and Smith was designed to improve upon the Butler Committee proposals. However, many similar criticisms can be made. In particular, trials would probably have been longer and more complex given that juries would have had to consider and understand more issues. It would have required juries to address unrealistic questions such as how a defendant would have acted if sober. In addition, the creation of a special statutory offence carrying an equivalent penalty to the principal offence seems artificial and pointless, given that a defendant convicted of the special offence would be likely to incur a similar penalty to that which would have been imposed under the principal offence, and that the extra time and work involved in proving the special statutory offence would not be justified.

### **The United Kingdom Law Commission: Intoxication and Criminal Liability**

6.37 More recently, the enactment of a special statutory offence was favoured by the United Kingdom Law Commission (the Law Commission).<sup>458</sup>

6.38 Under the Law Commission's proposed special offence a defendant would be liable where that defendant was deliberately intoxicated to a substantial extent and caused the harm prohibited by one of the offences 'listed' by the Law Commission.<sup>459</sup> This would be so even if the defendant was in a state of automatism.<sup>460</sup> If the Law Commission had not included automatism in its proposed offence, the policy objective of punishing those who cause harm whilst in a state of self-induced intoxication would have been defeated where an intoxicated offender was in such a state.<sup>461</sup>

6.39 An important aspect of the Law Commission's special offence was that a defendant could be liable even if that defendant had the intent for the particular

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<sup>458</sup> UK, Law Commission, *Intoxication and Criminal Liability*, op. cit., para. 6.31.

<sup>459</sup> *ibid.*, para. 6.31. The listed offences included—homicide, bodily harm, criminal damage, rape, indecent assault, buggery, assaulting a constable, and resisting or obstructing a constable, in the execution of his duty; offences under the *Public Order Act 1986* of violent disorder, affray and putting in fear of or provoking violence and causing danger to road-users—para. 6.41.

<sup>460</sup> *ibid.*, para. 6.31.

<sup>461</sup> G. Virgo, 'Law Commission Consultation Paper', [1993] *Crim.L.R.* 415, p. 421.

'listed' offence.<sup>462</sup> What the proposed offence required was that the defendant be substantially intoxicated but not so intoxicated that he or she was unable to form the intent of the particular offence charged. In this way the Law Commission wanted to make clear that a defendant would be liable for the harm actually caused. As one commentator indicated, a further advantage of this was that if a jury was divided as to whether a defendant formed the mental element for the listed offence, the defendant could still be convicted of the special offence as long as the jury was satisfied that the defendant foresaw a substantial risk of intoxication.<sup>463</sup>

6.40 The special offence provided that intoxication would arise where a person consumed anything which caused that person's awareness or understanding or control to be substantially impaired.<sup>464</sup> The Law Commission's definition of 'intoxication' meant that a glue sniffer overcome by vapour could be 'intoxicated' for the purposes of the proposed offence. The inclusion of 'substantial' impairment was aimed at ensuring that only those offenders who were significantly intoxicated would be prosecuted under the special offence. The Law Commission's aim was to:<sup>465</sup>

remove any possibility of prosecutors taking the easy course of proceeding for the intoxication offence rather than for the underlying offence simply on the basis that the defendant had ingested a small amount of intoxicant.

6.41 The Law Commission preferred 'deliberate' rather than 'voluntary' intoxication. Its members believed that those who consumed medicines were really voluntarily consuming those medicines which would mean that it was confusing as to whether such persons were liable under a special statutory offence. 'Deliberate' on the other hand made it clear that persons who had voluntarily taken medicines had an excuse and would not be liable under the proposed offence. 'Deliberate' intoxication was defined as willingly consuming the intoxicant and being aware that the amount of the intoxicant consumed might cause the person to become intoxicated.<sup>466</sup> Intoxication was not 'deliberate' if the defendant consumed it solely for medicinal, sedative or soporific purposes. This meant that persons who caused criminal harm while under the influence of a sedative, even if that sedative was not medically prescribed, would not be liable. However persons who consumed a combination of drugs, sedatives or other drugs for the thrill of it were clearly caught by the proposed special offence.

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<sup>462</sup> UK, Law Commission, *Intoxication and Criminal Liability*, op. cit., para. 6.46.

<sup>463</sup> G. Virgo, op. cit., p. 423.

<sup>464</sup> UK, Law Commission, *Intoxication and Criminal Liability*, op. cit., para. 6.31.

<sup>465</sup> *ibid.*, para. 6.50.

<sup>466</sup> *ibid.*, para. 6.31.

6.42 The Law Commission made clear that its policy objective was to prevent violent or dangerous conduct by intoxicated offenders and that an offence of ‘dangerous’ conduct would be too wide unless it applied to specifically defined offences. The Law Commission’s proposal was limited to certain types of harm, namely ‘substantial harm to the person, to the physical safety of property, or to public order’.<sup>467</sup> The application of the proposed offence to intoxicated persons who destroyed property or who were involved in public affrays or violent disorder took the Law Commission’s proposal beyond the scope of the special offence outlined by the Butler Committee where the type of harm was restricted to offences against the person. However attempts to commit any of the listed offences and offences involving dishonesty were excluded from the ambit of the proposed special offence. Criminal responsibility for an attempt is established by showing that a defendant’s act was accompanied by a particular intention. Many acts may be inherently neutral. For example, a person who throws a cricket ball may be doing no more than participating in a legitimate game or alternatively, may have deliberately meant to cause harm to another person. Where a defendant is intoxicated it may be difficult to show that the defendant formed a particular criminal intention. If the special offence applied to attempts, its application would have been unnecessarily wide because there would have been occasions when the offence applied to neutral conduct where there was an absence of criminal intention. Similarly, with theft, an intoxicated defendant who simply picked up another person’s property would immediately fall within the ambit of the offence which would make the law unnecessarily vague and oppressive.<sup>468</sup>

6.43 The Law Commission rejected the penalties suggested by both the Butler Committee and the minority of the Criminal Law Revision Committee. In particular, the Law Commission commented that it would not be right in principle to attach the same maximum penalty to the special offence as was attached to the principal offence. This is because a defendant who intentionally or recklessly commits a criminal offence is much more culpable than a defendant whose fault lies in becoming intoxicated.<sup>469</sup> The Law Commission recommended that the penalty imposed be set at two thirds that of the principal offence charged.<sup>470</sup> In this way the defendant’s punishment would be related to the nature and extent of the harm caused.

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<sup>467</sup> *ibid.*, para. 6.41.

<sup>468</sup> *ibid.*, para. 6.40.

<sup>469</sup> *ibid.*, para. 6.43.

<sup>470</sup> *ibid.*, para. 6.47.

6.44 The offence suggested by the Law Commission showed some compromise upon the recommendations of the Butler Committee and the minority of the Criminal Law Revision Committee. Unlike the Butler Committee's proposal, it imposed a penalty which reflected the nature of the offence committed. The Law Commission's special offence also made clear that the offender must be significantly intoxicated, whereas, the Butler Committee's proposal suggested that any degree of intoxication was sufficient. Another difference was that the Law Commission's proposal did not place all intoxicated offenders in the one category, but rather it related the intoxication specifically to the criminal conduct engaged in by the defendant. The Law Commission's recommendation, that a maximum penalty of two thirds of the principal offence be imposed on a defendant, avoided the artificiality of the minority's suggestion in the Criminal Law Revision Committee Report that an equivalent penalty be imposed. As with the recommendations of the Butler Committee and the minority of the Criminal Law Revision Committee, the special offence proposed by the Law Commission would probably have prevented unacceptable acquittals of intoxicated offenders. Offenders found guilty of the special offence would be punished appropriately with the aim that such punishment act as a deterrence, if not generally, at least in relation to the particular offender.

6.45 As with previous suggestions for a special statutory offence, the Law Commission's proposed offence would probably have been perceived by defendants as an opportunity to plead to a less serious offence. Again, trials would have been lengthier and more complex as there would have been more issues which would need to be dealt with.

6.46 Interestingly, in its final report, the Law Commission decided against the creation of a separate statutory offence on the basis that the overwhelming majority of submissions received by the Commission rejected such a proposal. These submissions were received from judges of the Queens Bench Division and the Birmingham Crown Court, the Law Society and the Legal Committee, the Criminal Bar Association, the Bar Council and JUSTICE.<sup>471</sup> These groups were opposed to a special statutory offence because it was thought that it would make trials more complex by raising more issues for consideration and it would lead to more trials because defendants would think they had a chance of being convicted of the less serious offence.<sup>472</sup> The Law Commission therefore concluded.<sup>473</sup>

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<sup>471</sup> UK, Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com No 229, HMSO, London, 1995, paras. 5.8–5.9.

<sup>472</sup> *ibid.*, para. 5.10.

<sup>473</sup> *ibid.*, para. 5.18.

In the present instance, consultation has persuaded us that the new offence would, in practice, be likely to lead to more contested cases and to longer and more difficult trials.

## Law Reform Commission of Victoria 1986

6.47 In 1986, the Law Reform Commission of Victoria considered the enactment of an offence of committing a dangerous act while grossly intoxicated,<sup>474</sup> but was divided with only half its members supporting such a recommendation. The members who rejected the proposal did so because they believed it would make trials unnecessarily complex with the possibility of compromise verdicts and that it would breach fundamental principles of criminal law by making a defendant criminally answerable when that defendant had acted involuntarily or unintentionally.<sup>475</sup>

6.48 The argument was that the offence be one of strict liability and that it be a lesser included offence, so that a defendant would only be convicted of this special statutory offence if acquitted of the principal offence.<sup>476</sup>

6.49 As with proposals for special statutory offences considered in other jurisdictions, a major reason put forward in support of this proposal was that it would meet the community expectation that grossly intoxicated offenders be held criminally responsible for their conduct given that such offenders had freely chosen to become intoxicated in the first place.<sup>477</sup> A special offence would make it difficult for an offender to completely escape liability because if acquitted of the principal offence, a defendant would still be likely to be convicted of this separate lesser included offence. In its Discussion Paper, the Victorian Law Reform Commission went so far as to suggest that liability should be imposed on intoxicated defendants even if they were inexperienced and knew little of the effect of alcohol or drugs.<sup>478</sup> This suggestion was based on the belief that persons who consume intoxicants have chosen to put themselves in that position and that it is common knowledge that an intoxicated person may become violent. A further factor suggested in support of enacting a

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<sup>474</sup> Victoria, Law Reform Commission, *Criminal Responsibility: Intention and Gross Intoxication*, Report no. 6, Melbourne, 1986.

<sup>475</sup> *ibid.*, p. 31.

<sup>476</sup> *ibid.*, p. 28.

<sup>477</sup> It was noted in the report of the Law Reform Commission of Victoria, Report, *op. cit.*, p. 28 that many of the submissions received stated that the law needed to be changed to deal with grossly intoxicated offenders.

<sup>478</sup> Victoria, Law Reform Commission, *Intoxication and Criminal Responsibility*, Discussion Paper, Melbourne, 1984, p. 13.

special statutory offence was that courts could be given the specific power to order rehabilitation and treatment for an offender.<sup>479</sup>

6.50 The Law Reform Commission of Victoria found that a major argument against enacting a special offence was the fact that intoxication rarely resulted in the acquittal of a defendant because juries are reluctant to find that a defendant was so intoxicated that he or she acted unintentionally or involuntarily.<sup>480</sup> Another argument against enacting a special statutory offence was that defendants might be encouraged to plea bargain and plead guilty to a less serious statutory offence in order to avoid the conviction and penalty for the more serious offence.<sup>481</sup> It was suggested that the potential for plea bargaining could be partially dealt with by setting a penalty for the special statutory offence similar to the penalty for the principal offence and by the imposition of penalties which reflect the seriousness or otherwise of the offence committed.<sup>482</sup> It was also suggested that there would be an increase in the number of compromise jury verdicts.<sup>483</sup> In other words, it was suggested that where juries were unable to agree on whether a defendant formed the mental element for the principal offence, it would be simpler for the jury to find a defendant guilty of the special statutory offence.

6.51 Like the United Kingdom Law Commission before it, the Law Reform Commission of Victoria also found that a special statutory offence would make trials lengthier and more complex.<sup>484</sup> Juries would be required to consider more issues and in some cases those issues would be more difficult and complex. Difficulties would arise, for example, where intoxication was not the only factor which contributed to a defendant's inability to form the intention of the principal offence charged. Explaining to the jury to what extent each factor contributed to a defendant's condition would be a complex and challenging task.

6.52 Finally, the Law Reform Commission questioned the ethical basis of imposing criminal responsibility under a special statutory offence.<sup>485</sup> It suggested that while the impact of alcohol or drugs is generally known, the risk that a person may commit a

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<sup>479</sup> *ibid.*, p. 16.

<sup>480</sup> *ibid.*, p. 29. Victoria, Law Reform Commission, Report, *op. cit.*, p. 28. The Commission noted that its investigations revealed approximately thirty cases in which intoxicated defendants were totally acquitted, most of which were in the Magistrates' courts and most of which were minor offences.

<sup>481</sup> *ibid.*, p. 29.

<sup>482</sup> *ibid.*

<sup>483</sup> *ibid.*

<sup>484</sup> *ibid.*, p. 30.

<sup>485</sup> *ibid.*, p. 29.

dangerous act while intoxicated is extremely rare, so rare that a person should not have to abstain from consuming intoxicants merely because the possibility exists that he or she might afterwards engage in criminal conduct.<sup>486</sup>

## Section 154(1) of the Criminal Code (NT)

6.53 Section 154(1) of the *Criminal Code 1983* (NT) has been discussed in some detail in Chapter 3 of this Report. It does not create a special statutory offence as such but it creates a fall-back provision so that any self-induced intoxicated defendant acquitted of an offence against the person may be charged with an offence under section 154(1), which provides that it is an offence for a person to commit an act, or omit to do an act which causes danger, or potential danger to any person. Evidence of intoxication becomes particularly relevant in relation to the penalty imposed on a defendant who is convicted under this section. Where a defendant who is not intoxicated is convicted, that defendant will be liable to a period of imprisonment that varies according to the nature of the offence. However, where the defendant is intoxicated, an additional period of four years imprisonment may be imposed. The overwhelming evidence received by the Committee indicated that section 154 was not a very satisfactory provision and that it would be absolutely inappropriate for Victoria to enact such legislation.<sup>487</sup>

## Current Consideration of the Enactment of a Special offence of Committing a Dangerous and Criminal Act while Grossly Intoxicated

6.54 While some submissions made to the Law Reform Committee's current inquiry favour the enactment of a special statutory offence,<sup>488</sup> the vast majority of

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<sup>486</sup> *ibid.*, p. 28.

<sup>487</sup> *Meeting Notes*, meeting with Mr G. Cavanagh, SM, Magistrate (NT), Darwin, 7 Apr. 1999; *Meeting Notes*, meeting with Mr S. Southwood, President NT Law Society and Ms. M. Ceresa, Executive Officer, Darwin, 7 Apr. 1999; *Meeting Notes*, meeting with Ms E. Kelly and Ms Z. Marcham, Northern Territory Attorney-General's Department and Mr R. Wild, QC, Director of Public Prosecutions (NT), Darwin, 8 Apr. 1999; *Meeting Notes*, meeting with Sir William Kearney and Mr Justice Trevor Riley, Supreme Court (NT), Darwin, 8 Apr. 1999; *Meeting Notes*, meeting with Mr R. Coates, Director, Legal Aid Commission (NT), 8 Apr. 1999.

<sup>488</sup> Dr A. Blankfield, *Submission No. 9*; Mr W. Severino, Assistant Commissioner, Victoria Police, *Submission No. 14*; Ms M. Darcy, Centre Against Sexual Assault, *Submission No. 31*; Ms F. Broughton, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999, p. 34. Dr B. McSherry, *Submission No. 15* also expresses some support for this option but only if the Committee decides that it is necessary to introduce a special offence in order to hold self-induced intoxicated offenders accountable.

submissions reject this proposal.<sup>489</sup> A prominent criminal law academic in his submission suggested that:<sup>490</sup>

Proposals for a special offence for individuals who commit crime whilst intoxicated are a perennial favourite among law reformers...Though often proposed, criminal intoxication has rarely won a place in the statute books. Section 154 of the Northern Territory Criminal Code is a rare, if not unique, exception.

6.55 Those who support the enactment of a statutory offence believe that the imposition of criminal responsibility is justified on the basis that intoxicated offenders have freely chosen to become intoxicated and that the effect of alcohol or drugs upon a person is common knowledge. Under such circumstances a person should be responsible for his or her conduct. Another argument in favour of this proposal is that a statutory offence would ensure that intoxicated offenders acquitted of the principal offence are still accountable for their conduct. The Centre Against Sexual Assault submitted that:<sup>491</sup>

The creation of a separate offence, although likely to carry a lesser penalty, would ensure that men accused of sexual assault, even if severely intoxicated, will be held accountable for their behaviour.

However that same submission indicates that the imposition of a lesser penalty for an offence, particularly offences of sexual assault, may be perceived by 'women in the community as diminishing the seriousness of the crime committed'.<sup>492</sup>

6.56 The Victoria Police also favour this option recommending the enactment of an offence similar to that proposed by the Butler Committee. The offence favoured by the Victoria Police would carry a lesser penalty than the principal offence, would be an offence of strict liability and would only be considered by a jury where intoxication raised a doubt as to whether a defendant intended to commit the principal offence charged. The Victoria Police suggest that a major advantage of creating a special offence is not only ensuring that an intoxicated offender does not avoid responsibility, but that it also focuses attention on the real offence, that is committing a criminal act while in a state of self-induced intoxication.

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<sup>489</sup> Mr M. O'Brien, Victoria Legal Aid, *Submission No. 6*; Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*; Dr I. Leader-Elliott, *Submission No. 29*; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Submission No. 33*; Mr G. Flatman, QC, Director of Public Prosecutions (Vic), *Minutes of Evidence*, 29 Mar. 1999.

<sup>490</sup> Dr I. Leader-Elliott, *Submission No. 29*.

<sup>491</sup> Ms M. Darcy, Centre Against Sexual Assault, *Submission No. 31*.

<sup>492</sup> *ibid.*

6.57 Many of the arguments raised with the Committee against enacting a special statutory offence are similar to those raised in 1986 when the Law Reform Commission of Victoria considered this option.

6.58 The evidence suggests that a special offence might encourage defendants to plea bargain, especially if the special offence carries a much lesser sentence.<sup>493</sup> This could be so even if the special offence provided for the imposition of a penalty similar to that for the principal offence. Defendants may still view this special offence as a less serious offence, preferring to have on the record a conviction for this special offence rather than a conviction for the principal offence. It is also suggested that defendants who are slightly intoxicated and who are currently unable to avoid criminal liability may be encouraged to plead guilty to the special offence in order to avoid liability for the more serious offence.<sup>494</sup> However, this problem could be avoided if the special offence could only be considered once there was doubt as to whether a defendant acted intentionally or voluntarily and if the special offence required gross or substantial intoxication.

6.59 A special offence might increase the number of compromise jury verdicts; that is, juries may find it easier to convict a defendant of the special offence if they are unable to agree about the principal offence.<sup>495</sup> This may lead to a decrease in the number of defendants convicted of more serious offences where those defendants are intoxicated. Alternatively it may mean that some defendants who would have been acquitted will be held criminally liable under the special offence.<sup>496</sup> In the Northern Territory, for example, a defendant who is acquitted of any offence against another person, may still be found liable of committing a dangerous act.<sup>497</sup> In discussions with officers of the Northern Territory Attorney-General's Department and the Northern Territory Director of Public Prosecutions, the comment was made that where juries find it difficult to discriminate between the evidence of the various parties, they find

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<sup>493</sup> Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, p. 9; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 7; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 9; Mr J. Willis, *Submission No. 33*, p. 1; South Australia, Attorney-General's Department, *op. cit.*, pp. 39–40.

<sup>494</sup> Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, p. 9.

<sup>495</sup> Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, Criminal Bar Association, *Submission No. 20*, p. 7; pp. 9–10; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 9; Mr J. Willis, *Submission No. 33*, p. 1; South Australia, Attorney-General's Department, *op. cit.*, p. 39.

<sup>496</sup> Mr T. Munro, Principal Legal Officer, Victorian Aboriginal Legal Service Co-operative Ltd., *Minutes of Evidence*, 30 Mar. 1999, p. 72; *Meeting Notes*, meeting with Mr R. Coates, Director, Legal Aid Commission (NT), Darwin, 8 Apr. 1999.

<sup>497</sup> See *supra*, paras. 3.69–3.72 for a discussion of s. 154.

it easier to convict a defendant of committing a dangerous act.<sup>498</sup> Like the United Kingdom Law Commission, they too concluded that trials would be longer and more complex.<sup>499</sup> Juries would be required to consider more issues and expert evidence on the extent of a defendant's intoxication would have to be led.

6.60 Where consideration has been given to the creation of a special offence, the suggested penalties for such an offence have varied. The Butler Committee suggested a penalty of one year's imprisonment for a first offence and for a second and subsequent offence, three years. The Law Commission suggested that the penalty should be set at two thirds of that of the principal offence.<sup>500</sup> The Canadian Law Reform Commission and the minority proposal of the Criminal Law Revision Committee (UK) recommended the imposition of the same penalty as the principal offence.<sup>501</sup> It has been suggested that the difficulty with imposing a penalty under a special offence, is that such a penalty fails to distinguish appropriately between serious and less serious criminal offences.<sup>502</sup> Usually defendants are charged with various offences. How would one select which offence is to form the basis for the imposition of a penalty under a special offence and why should a penalty be measured by reference to an offence which the prosecution has failed to prove the defendant committed?

6.61 A crucial concern to those who reject the creation of a special offence is that it undermines fundamental principles of criminal responsibility.<sup>503</sup> The Law Institute of Victoria, for example, submitted that:<sup>504</sup>

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<sup>498</sup> *Meeting Notes*, meeting with Mr R. Wild, QC, Director of Public of Public Prosecutions (NT) and with Ms E. Kelly and Ms Z. Markam, NT Attorney-General's Department, Darwin, 8 Apr.1999.

<sup>499</sup> Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, p. 10; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 7; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 9; South Australia, Attorney-General's Department, *op. cit.*, p. 40; *Meeting Notes*, meeting with Mr P. Rofe, QC, South Australian Director of Public Prosecutions and Ms G. Davison, Senior Prosecutor, Adelaide, 6 Apr. 1999.

<sup>500</sup> UK, Law Commission, Report, *op. cit.*, para. 6.47.

<sup>501</sup> Canadian Law Reform Commission, *Recodifying Criminal Law*, Report No 31, 1987, p. 31; Subcommittee of the Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Criminal Code, *First Principles: Recodifying the General Part of the Criminal Law Canada*, 1993. This special offence was not enacted.

<sup>502</sup> Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 9; Dr I. Leader Elliott, *Submission No. 29*.

<sup>503</sup> Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20* and Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*; Ms F. Hampel, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999; Mr G. Flatman, QC, Director of Public Prosecutions and Mr W. Morgan-Payler, Senior Prosecutor, *Minutes of Evidence*, 29 Mar. 1999; Mr M. O'Brien and Mr M. Dicconson, Victoria Legal Aid and Mr C. Mandy, Criminal Law Section, Law Institute of Victoria, *Minutes of Evidence*, 30 Mar. 1999. Dr I. Leader Elliott, *Submission No. 29* argues that it undermines the principle that a defendant cannot be convicted

Where the elements for these offences have not been satisfied beyond reasonable doubt, it is inequitable to then create one offence which can operate as an alternative. Such an offence cannot possibly accommodate complex criminal law principles integral to our system of liability and the sentencing process.

The difficulty pointed to is that a defendant will be held accountable under a special offence even though that defendant may have acted unintentionally or involuntarily. The special offence is thus seen as being particularly harsh given that the usual principles of criminal responsibility could not be made out. It is also unfair in the sense that it allows a defendant to rely on evidence of self-induced intoxication for the principal offence and then uses that very evidence of self-induced intoxication as the basis of liability for the special offence. Ms Felicity Hampel, QC, President, Liberty Victoria commented:<sup>505</sup>

You say, 'You are entitled to the defence that you were in a state of automatism by reason of alcohol; however, we will hit you with something else'. So the very thing a person is entitled to rely on and adduce evidence on to support his or her defence is the very thing that is then turned against that person and used to convict him or her of another offence.

6.62 It may be argued also that the real aim of a special offence is to make sure a defendant who has freely chosen to become intoxicated does not avoid criminal liability. Mr Robert Richter, QC, from The Victorian Bar noted:<sup>506</sup>

It seems to me that looking at a new offence is saying, 'Look, you are not guilty of the crime, but we will punish you for the crime anyway under a different guise and a different name'.

Ultimately there is no denying that what a special offence really does is to punish a person for becoming intoxicated.

## Conclusion

6.63 The Committee has carefully considered the evidence and believes that it is inappropriate to enact a special statutory offence of committing a dangerous and criminal act while intoxicated. The Committee supports the view that to create an

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of a crime unless he or she acted intentionally. However he suggests that voluntariness is not a fundamental principle of criminal law and that legislation could be introduced disallowing consideration of evidence of self-induced intoxication for the issue of voluntariness. Mr J. Willis, Criminal Law Barrister, *Submission No. 33* also supports this suggestion.

<sup>504</sup> Mr. D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*, p. 9.

<sup>505</sup> *Minutes of Evidence*, 29 Mar. 1999, p. 17.

<sup>506</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 118.

offence of committing a dangerous or criminal act while intoxicated is simply legislating against stupidity<sup>507</sup> and that it is punishing people for moral irresponsibility, that is consuming alcohol or drugs, when the real focus of the law should be on 'punishing people for their breaches of the law'.<sup>508</sup> It would ensure that a defendant is penalised for becoming intoxicated regardless of whether that defendant has acted voluntarily or intentionally. It would have the potential to encourage plea bargaining and compromise verdicts and consequently to make trials involving evidence of self-induced intoxication longer and more complicated. The overwhelming evidence presented to the Committee is that juries are very reluctant to accept evidence that a defendant was so grossly intoxicated that he or she should be acquitted of the offence charged and that defendants are very rarely acquitted on that ground.<sup>509</sup>

6.64 The evidence presented to the Committee convinced it that the current system is working satisfactorily, and that careful consideration must be given to implementing any changes, given that the practical effect of any change may be to

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<sup>507</sup> *Meeting Notes*, meeting with Mr Doug Humphreys, Ms. Clare Farnan, Ms. Siobhan Mullany; Mr M. Marshall from the New South Wales Legal Aid Commission and Mr J. Nicholson from the Public Defender's Office, Sydney, 9 Feb. 1999.

<sup>508</sup> Judge Mullaly, County Court of Victoria, *Minutes of Evidence*, 15 Mar. 1999, p. 10.

<sup>509</sup> Mr W. Severino, Assistant Commissioner, Victoria Police, *Submission No. 14*, p. 3; Dr B. McSherry, *Submission No. 15*, p. 3, Law Institute of Victoria, *Submission No. 16*, p. 9; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*, p. 5; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, p. 6. Ms Felicity Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 16; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999, p. 58; Mr G. Flatman, QC, Director of Public Prosecutions (Vic.), *Minutes of Evidence*, 29 Mar. 1999, p. 63; Mr T. Munro, Principal Legal Officer, Victorian Aboriginal Legal Service Co-operative Ltd, *Minutes of Evidence*, 30 Mar. 1999; Mr M. O'Brien and Mr M. Dicconson, Victoria Legal Aid and Mr. C. Mandy, Criminal Law Section, Law Institute of Victoria, *Minutes of Evidence*, 30 Mar. 1999, pp. 80–81; Dr B McSherry, Academic, *Minutes of Evidence*, 30 Mar. 1999, p. 96; Dr Watson-Munro, Forensic Psychologist, *Minutes of Evidence*, 30 Mar. 1999, p. 104; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Minutes of Evidence*, 30 Mar. 1999, p. 110; Mr R. Richter, QC, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999, p. 117; *Meeting Notes*, meeting with Mr N. Cowdrey QC, Director of Public Prosecutions, Mr M. Blackmore, Deputy Director, Public Prosecutions and Ms R. Gray, Deputy Solicitor for Public Prosecutions (NSW), Sydney, 8 Feb. 1999; *Meeting Notes*, meeting with Mr D. Humphreys, Ms. C. Farnan, Ms. S. Mullany; Mr M. Marshall from the New South Wales Legal Aid Commission and Mr J. Nicholson from the Public Defender's Office, (NSW), Sydney, 9 Feb. 1999; *Meeting Notes*, meeting with Mr M. Goode, Legal Officer, Policy and Legislation Branch, Attorney-General's Department, (SA) Adelaide, 6 Apr. 1999; *Meeting Notes*, meeting with Mr B. Braithwaite, Chief Legal Counsel, Ms H. Wighton, Legal Resources, Training and Policy Co-ordinator and Mr P Haskett, Acting Director, Legal Services Commission, (SA) Adelaide, 6 Apr. 1999; *Meeting Notes*, meeting with Mr P. Rofe, QC, Director of Public Prosecutions and Ms G. Davison, Senior Prosecutor, (SA) Adelaide, 6 Apr. 1999; *Meeting Notes*, meeting with Mr G Cavanagh, SM, Magistrate, Northern Territory, 8 Apr. 1999; *Meeting Notes*, meeting with Mr A. Asche, Chairman NT Law Reform Committee and other members of that Committee, Darwin, 8 Apr. 1999.

erode fundamental principles of criminal law and principles of fairness and justice. The acquittal of an intoxicated person is perceived by some in the community as unjust. The decision of the High Court in *R. v. Martin*<sup>510</sup> indicates that evidence of intoxication can be used to obtain an acquittal even in the more serious case of homicide. The Committee acknowledges that the fact that a principle of law rarely causes problems does not in itself justify keeping that principle of law. However, the Committee believes that decisions such as that of the magistrate in the *Nadraku* case and that of Bryan Raymond Cables,<sup>511</sup> are an aberration, and that unusual decisions do not warrant changes to well established principles of law or the introduction of a special offence, which would seriously undermine the ethical principles which currently form the foundation of the Victorian criminal justice system.

### ***Recommendation 2***

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

## **Option 3 – Intoxication as Mental Impairment**

6.65 It was suggested that another way of dealing with self-induced intoxicated offenders would be to allow such offenders to be acquitted either on the basis of alcohol-induced automatism<sup>512</sup> or by reason of insanity.<sup>513</sup> The two proposals are similar, however an acquittal by reason of insanity would fall within the ambit of existing legislation, namely *the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) (Mental Impairment Act)*, whereas, acquittal on the basis of alcohol-induced automatism would require new legislation.

6.66 Section 20 of the *Mental Impairment Act* allows a defendant to be acquitted if it can be shown that the defendant was mentally impaired. As the Act does not define ‘mental impairment’, it has been suggested that the Act could be amended to define ‘mental impairment’ so that it includes gross intoxication.<sup>514</sup> In this way a self-induced intoxicated defendant would be able to argue that he or she was entitled to be acquitted on the basis of ‘mental impairment’. The advantage of this is that once a

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<sup>510</sup> (1984) 51 ALR 540

<sup>511</sup> The case was heard by Magistrate Jim Hanrahan on 21, 22, 23 and 29 April 1997.

<sup>512</sup> Ms. F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 18.

<sup>513</sup> Dr B McSherry, *Minutes of Evidence*, 30 Mar. 1999, p. 97.

<sup>514</sup> *ibid.*

defendant is found to be mentally impaired within the meaning of the *Mental Impairment Act*, the court has various sentencing options to choose from. A defendant may, for example, be committed to custody in an approved mental service or the defendant may be released under special supervisory conditions. Dr McSherry suggests that another option could be added, namely that those found not guilty of indictable property offences on the basis of gross self-induced intoxication be nevertheless obliged to pay compensation and make restitution.<sup>515</sup>

6.67 Similarly, the suggestion that a defendant be acquitted on the basis of alcohol-induced automatism would also allow for rehabilitation of intoxicated defendants. The real advantage in both proposals is that rather than punishing self-induced intoxicated offenders by imprisonment, which arguably would have little effect, these 'special' verdicts would allow treatment orders to be imposed. Treatment authorities could be given discretion to assess the continuing risk of defendants, so that if there was an indication that a defendant posed a serious threat to the community, some action could be taken to impose a stricter treatment regime on the defendant.

6.68 The Committee agrees that these proposals offer real advantages, in that, allowance is made for rehabilitation and treatment of self-induced intoxicated offenders. There would be many advantages to be derived from both of these proposals, especially if treatment authorities were given discretion to impose a stricter treatment regime on defendants who continued to or who suddenly imposed a threat to the community. However, given the Committee's ultimate conclusions and recommendations, it does not recommend the adoption of this option.

#### **Option 4 - The O'Connor Principles**

6.69 The principles enunciated in *O'Connor's* case allow evidence of intoxication to be raised to show that the defendant acted unintentionally and involuntarily at the time of committing a criminal offence. This evidentiary principle has often been labelled as a 'drunk's defence' and, as such, is apt to incite community hostility and distrust. From the outset it must be kept in mind that evidence of intoxication is not a defence but rather the 'real defence is that the action was not voluntary or alternatively that there was no intent to cause the offence as charged'.<sup>516</sup>

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<sup>515</sup> Dr B McSherry notes that such an order is available under section 383 of the *Criminal Code* 1983 (NT), *Submission No. 15*, p. 4.

<sup>516</sup> Mr R. Richter, QC, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999, p. 117.

6.70 The vast majority of the submissions made to the Committee were in favour of retaining the legal principle in *O'Connor's* case as the law in Victoria.<sup>517</sup> Other submissions, while not suggesting the abolition of *O'Connor's* case, supported the enactment of a special statutory offence, which would be available if a defendant was acquitted on the basis of the *O'Connor* principles.<sup>518</sup> For the reasons discussed earlier in this chapter, the Committee considers that the introduction of a special statutory offence is not warranted.

## Arguments Against the *O'Connor* Principles

6.71 Some submissions suggested that evidence of self-induced intoxication should not be taken into account when determining whether a defendant was guilty of the offence charged.<sup>519</sup> An example of this view was put by Mr Ray Pinkerton who commented:<sup>520</sup>

people know what alcohol does and if they become self-intoxicated, then they should have to answer fully for every crime or misdemeanour that they commit. Pity there can't be another fine for being an idiot as well!

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<sup>517</sup> Mr M. O'Brien, Victoria Legal Aid, *Submission No. 6*; Dr B McSherry, Monash University, *Submission No. 15*; Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*; Mr R. Inglis, Chief Research Officer, Victorian Aboriginal Legal Services Co-operative Ltd, *Submission No. 25*; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*; Chief Judge's Chambers, County Court, *Submission No. 28*; Mr J. Willis, Criminal Barrister, *Submission No. 33*. Dr I. Leader-Elliott, Academic, *Submission No. 29* also agrees but suggests that legislation should be enacted to deny evidence of intoxication for any plea of voluntariness. Most of those who appeared before the Committee to give evidence over two days of public also supported the retention of the *O'Connor's* principles – *Minutes of Evidence*, 29 Mar. 1999: Ms F. Hampel, QC, President, Liberty Victoria; Dr S Rajarantnam and Associate Professor J. Redman, Department of Psychology, Monash University; Mr J. Willis, Criminal Barrister and Lecturer, La Trobe University; Mr G. Flatman, QC, Director of Public Prosecutions (Vic) and Mr W. Morgan-Payler, Senior Prosecutor for the Queen; *Minutes of Evidence*, 30 Mar. 1999: Mr T. Munro, Principal Legal Officer and Mr R. Inglis, Chief Research Officer, Victorian Aboriginal Legal Service Co-operative Ltd; Mr M. O'Brien and Mr M. Dicconson, Victoria Legal Aid; Mr C. Mandy, Criminal Law Section, Law Institute of Victoria; Dr Bernadette McSherry, Academic; Dr T. Watson-Munro, Forensic Psychologist; Mr R. Punshon and Mr R. Bourke, Victorian Criminal Bar Association and Mr R. Richter, QC, Dr D. Neal and Mr J. Morrow, The Victorian Bar.

<sup>518</sup> Mr W. Severino, Assistant Commissioner, Victoria Police, *Submission No. 14*; Ms M. Darcy, Acting Manager, Victorian Community Council Against Violence, *Submission No. 26*; Centre Against Sexual Assault, *Submission No. 31*.

<sup>519</sup> Mr R. Miller, QC, Director of Public Prosecutions (Qld), *Submission No. 8*; Mr A. Proudfoot, Secretary, The Public Policy Assessment Society, *Submission No. 13*; Ms D. Baker, Academic, *Submission No. 19*; Ms M. Darcy, Acting Manager, Centre Against Sexual Assault, *Submission No. 31*; Mr B. Ruxton, State President, RSL, *Submission No. 30* and various submissions from individuals.

<sup>520</sup> Mr R. Pinkerton, *Submission No. 6*.

6.72 Those who support this option believe that defendants who freely choose to become intoxicated must be held accountable for criminal conduct committed while in that state. People who drink or take drugs have a choice whether or not to continue consuming the intoxicant and they generally know how the alcohol or drugs will affect their behaviour. Those who support this view maintain that a person who knows they have a propensity to commit criminal acts when intoxicated, should abstain from becoming intoxicated.<sup>521</sup>

6.73 It has been suggested that there is a community perception that those convicted of criminal offences often do not receive an appropriate sentence and that there is a bias in the legal system in favour of criminals.<sup>522</sup> It is also suggested that the existence of the O'Connor principles indicates a lack of thought as to how a victim feels when a defendant is acquitted. The victim is left with both physical and emotional scars.<sup>523</sup>

While many people's physical injuries will disappear over a relatively short time, the emotional scars may stay with them for a very long time. The offender goes free, the innocent victim is the one paying the sentence. Something is not quite right.

6.74 There is also the argument that there is a need to send a strong message to potential self-induced intoxicated offenders, that criminal acts committed while in that condition will not be tolerated. There is a belief that failure to hold such offenders accountable may indicate that the community is prepared to tolerate criminal conduct by self-induced intoxicated offenders. Ms. F. Broughton of the Victorian Community Council Against Violence said that there must 'be a consistent message from the law about how it will deal with alcohol-induced violence or injury'.<sup>524</sup> It was also pointed out by Ms. Broughton that the law should not distinguish between those who commit drink-driving offences and self-induced intoxicated offenders who commit criminal offences.<sup>525</sup> To maintain this distinction is to send the wrong message to the community and is to condone morally unacceptable behaviour.<sup>526</sup>

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<sup>521</sup> Ms D. Baker, Academic, *Submission No. 19*.

<sup>522</sup> *ibid.* In support of this proposition Ms D. Baker cites a report produced by the Victorian Council Against Violence, *Community Knowledge and Perceptions of Sentencing in Victoria*, 1997.

<sup>523</sup> *ibid.*

<sup>524</sup> *Minutes of Evidence*, 29 Mar. 1999, p. 36. Similar sentiments were also expressed by the Ms M. Darcy and Ms M. Heenan, Centre Against Sexual Assault, *Minutes of Evidence*, 29 Mar. 1999 and Chief Inspector T. Cartwright and Superintendent K. Stephens, Victoria Police, *Minutes of Evidence*, 30 Mar. 1999.

<sup>525</sup> Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999, p. 36.

<sup>526</sup> Ms F. Broughton, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999, p. 36.

6.75 A major policy concern in *Majewski's* case was to provide adequate protection to members of the community, in particular protection against violent offenders. By leaving scope for self-induced intoxicated offenders to be acquitted, it could be argued that the criminal law is protecting the rights of those 'who do not necessarily deserve it in such large doses'.<sup>527</sup> In other words, there may be a perception amongst some members of the community that the criminal law is operating unfairly by giving greater protection to criminal defendants than it is to their victims.

6.76 The prosecution of any criminal offence involves the competing interests of punishing those who are guilty and ensuring that those who are innocent are not convicted of a criminal offence. In punishing criminal offenders, the criminal law aims to achieve deterrence, rehabilitation and retribution. The object of retribution is to punish a person for wrongdoing while rehabilitation aims at reforming the criminal offender – putting the offender back on the right track so that he or she can become a 'good' member of the community. Finally, deterrence achieved by inflicting punishment either to indicate to others that they should not commit criminal acts or to deter the particular offender from committing criminal acts in the future.

6.77 Those who favour the abolition of the O'Connor principles argue that the overriding aim of the criminal law is to punish the wrongdoer so that the community can be properly protected. They argue that the real focus of the criminal law should be on the crime itself and a suitable punishment.<sup>528</sup> Many commentators would reject this suggestion and instead argue that 'no mature legal system punishes solely on the basis of harm done'.<sup>529</sup> However those who focus on the crime itself argue that a person who becomes intoxicated and commits a criminal act must be held criminally responsible for that act. While those who adhere to this viewpoint do not deny the importance of fundamental principles of criminal law, they point to the injustice in allowing a defendant the possibility of acquittal on the basis of evidence of self-induced intoxication, when that defendant has, in fact, committed a criminal act.

## Arguments For Retaining O'Connor

6.78 It is by no means an easy task to show that a defendant was so intoxicated that he or she was unable to act voluntarily and intentionally. Ms. Felicity Hampel, QC, made the comment:<sup>530</sup>

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<sup>527</sup> *ibid.*

<sup>528</sup> Ms D. Baker, Academic, *Submission No. 19*, p. 7.

<sup>529</sup> South Australian Attorney-General's Department, *op. cit.*, p. 27.

<sup>530</sup> Ms. F. Hampel, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 16.

Experience shows that although an enormous amount of crime is alcohol related, very few people actually get to the stage of saying, 'I was so affected by alcohol as to be not in control of my actions and not committing willed actions in the legal sense'. Of those, even fewer actually succeed in having a decision-maker accept, therefore that...the acts have not been able to be established as willed or intentional.

6.79 Evidence presented to the Committee indicates that the O'Connor argument is not very often used and, when it is argued, it is very rarely accepted.<sup>531</sup> If it can be shown, from all the surrounding circumstances, that an intoxicated defendant was aware of what he or she was doing, that defendant will undoubtedly be held accountable for his or criminal conduct. Mr Mark Dicconson of Victoria Legal Aid indicated to the Committee that if a defendant remembers pertinent details, for example, the amount of alcohol consumed, conversations, events, and other like detail, magistrates, judges and in particular juries are very unlikely to accept that the defendant was so intoxicated as to be unable to act intentionally and voluntarily.<sup>532</sup> In its 1986 Report, the Victorian Law Reform Commission found thirty cases of acquittal on the basis of self-induced intoxication.<sup>533</sup> Most of these cases were in the magistrates' courts and involved minor offences, although some were more serious offences, such as assault with a weapon and infliction of grievous bodily harm.<sup>534</sup> The Commission concluded that juries, in particular, are reluctant to accept evidence of self-induced intoxication as an excuse for a criminal offence.<sup>535</sup>

6.80 The Committee was convinced that on the whole juries, judges and magistrates take a common sense approach, tending to be reluctant to allow a self-induced intoxicated defendant to be acquitted simply on the basis of evidence of intoxication.<sup>536</sup> If it is accepted that the O'Connor principles are operating fairly and

<sup>531</sup> President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999; Mr G. Flatman, QC, Director of Public Prosecutions (Vic) and Mr W. Morgan-Payler, Senior Prosecutor, *Minutes of Evidence*, 29 Mar. 1999; Mr T. Munro, Principal Legal Officer and Mr R. Inglis, Chief Research Officer, Victorian Aboriginal Legal Service Co-operative Ltd, *Minutes of Evidence*, 30 Mar. 1999; Mr M. O'Brien and Mr M. Dicconson, Victoria Legal Aid and Mr C. Mandy, Criminal Law Section, Law Institute of Victoria, *Minutes of Evidence*; 30 Mar. 1999; Dr B. McSherry, Monash University, *Minutes of Evidence*, 30 Mar. 1999; Dr T. Watson-Munro, Forensic Psychologist, *Minutes of Evidence*, 30 Mar. 1999; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Minutes of Evidence*, 30 Mar. 1999; Mr R. Richter, QC, Dr. D. Neal and Mr J. Morrow, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999.

<sup>532</sup> Mr M. Dicconson, Victoria Legal Aid, *Minutes of Evidence*, 30 Mar. 1999, p. 81.

<sup>533</sup> Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication*, op. cit., pp. 19 & 22.

<sup>534</sup> *ibid.*

<sup>535</sup> *ibid.*

<sup>536</sup> Ms F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999; p. 18; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999, p. 59; Mr W. Morgan-Payler, QC, Senior Crown Prosecutor (Vic.), *Minutes of Evidence*, 29 Mar. 1999, p. 67; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Minutes*

that, on the whole, it is very rare for defendants to be acquitted on that basis, that is a good reason for retaining the current system. As mentioned by a number of witnesses ‘O’Connor’s case works well in this state and if it ain’t broke I see no reason to fix it’.<sup>537</sup>

6.81 A principle of law should not be abolished simply because the possibility exists that a judge, jury or magistrate may make an incorrect decision on the facts of an individual case. For example, Mr Geoff Flatman, Victorian Director of Public Prosecutions, said:<sup>538</sup>

it is undesirable that the principle of law be changed because of the possibility of a perverse decision by a magistrate. We will have perverse decisions by magistrates and juries in a whole range of things. We have to live with that.

It goes without saying that any reform of the law must be based on ethical legal principle and must not simply be a ‘knee jerk’ reaction to concern by some members of the community over an unusual decision. Ms Felicity Hampel, QC, commented:<sup>539</sup>

it is important...for legislators, to try to sit back and measure it against principle rather than measure it against the immediate reaction to the facts of particular cases. That often means making hard decisions in the face of what appear to be particularly unpopular acts.

6.82 It needs to be recognised that the media can play a role in inflaming public sentiment against a particular decision and consequentially incite community mistrust of a particular legal principle by not reporting the decision in neutral terms and by failing to give the legal profession the opportunity of providing a rationale explanation. For example, on 25 October 1997, the headline in *The Canberra Times* read – ‘How Nadruku tackled the law – and made it an ass’, a headline aimed at creating public interest. The journalist, Mr Roderick Campbell, went on to say that if a grossly intoxicated defendant ‘had thumped two women’ outside a night club in Brisbane, Sydney or Perth, that defendant would undoubtedly have been convicted of assault

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*of Evidence*, 30 Mar. 1999, p. 110; Mr R. Richter, QC, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999, p. 118.

<sup>537</sup> Mr W. Morgan-Payler, QC, Senior Crown Prosecutor (Vic.), *Minutes of Evidence*, 29 Mar. 1999, p. 64; Dr T. Watson-Munro, Forensic Psychologist, *Minutes of Evidence*, 30 Mar. 1999, p. 104 and Mr R. Richter, QC, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999, p. 117.

<sup>538</sup> *Minutes of Evidence*, 29 Mar. 1999, p. 68. Similar comments were also made by Judge Mullaly, County Court of Victoria, *Minutes of Evidence*, 15 Mar. 1999, p. 13; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999, p. 58 and Mr R. Richter, QC, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999, p. 119.

<sup>539</sup> Ms F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 16.

whereas if the defendant had done the same thing in Adelaide or Melbourne 'he would have avoided that fate, just as he did in Canberra on Wednesday'.<sup>540</sup> By failing to provide the community with a rational explanation of judicial decisions, this sort of media reporting may contribute to community misunderstanding of the operation of the law and the legal principles involved. If decisions are reported in neutral terms, members of the community will be able to evaluate decisions for themselves and will be more likely to reach a rational understanding of legal decisions. If the Nadruku decision had been reported more appropriately without the use of inflammatory language, those members of the ACT community who were outraged by the decision, may have had a completely different understanding of the case. At the public hearings Mr Colin Mandy referred to this problem:<sup>541</sup>

The responsibility in the Nadruku decision rests with the media, which responded to that decision in the way that it did. Had the media asked for a judicial or a legal point on the foundation of that decision or on the foundation of the O'Connor defence, we would have been perfectly happy to discuss it with them at length.

6.83 It is also important to bear in mind that the law is not and should not be regarded as perfect, mistakes may occur but this does not mean that the law is wrong, nor does this constitute a sound basis for changing the law. One of the problems with abolishing the O'Connor principles is that a criminal offence could be committed by a grossly self-induced intoxicated defendant who was unable to form the intention or to act voluntarily but who was convicted of that offence, being unable to raise evidence of self-induced intoxication to show that he or she acted involuntarily or unintentionally. Once again we are faced with the competing principles of punishing criminal offenders and ensuring that those who are innocent are not convicted of criminal offences. We are presented with the choice between one inappropriate acquittal or one inappropriate conviction. Surely, the presumption that a fair and just legal system should always err on the side of a defendant to prevent the conviction of an innocent person should be paramount in our society. The Victorian Director of Public Prosecutions made clear that:<sup>542</sup>

Abhorrent results in high-profile cases usually have enormous effects on the community, but it must be remembered that they occur all the time within the system, because the system is geared so that when errors are made they always go the way of the accused. That is the way it has to be. So we have to accept that from time to time there will be inappropriate acquittals.

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<sup>540</sup> R. Campbell, *The Canberra Times*, 25 Oct. 1997.

<sup>541</sup> Criminal Law Section, Law Institute of Victoria, *Minutes of Evidence*, 30 Mar. 1999, p. 80.

<sup>542</sup> Mr G. Flatman, QC, Director of Public Prosecutions (Vic.), *Minutes of Evidence*, 29 Mar. 1999, p. 66.

6.84 A major argument in favour of retaining the principles enunciated in *O'Connor's* case is that it is a fundamental principle of criminal law that a person is not guilty of a criminal offence unless that person acted intentionally and voluntarily.<sup>543</sup> This principle is based on 'an ethical principle generally shared in our society that a person should only be held responsible for decisions which are made voluntarily and with intention to do the acts prohibited'.<sup>544</sup> To exclude evidence of self-induced intoxication from consideration of the finder of fact (be it a jury, magistrate or judge) is to seriously erode this ethical principle. It would mean that a voluntarily intoxicated defendant's ability to act intentionally and voluntarily would be evaluated hypothetically and any decision would, if the defendant was grossly intoxicated, be based on a legal fiction. Mr G. Flatman, QC, the Victorian Director of Public Prosecutions emphasised the importance of taking evidence of voluntary intoxication into account:<sup>545</sup>

From our perspective we are quite happy to live with the intoxication as a fact that the jury can take into account along with all the other facts because we find that, as a matter of reality, intoxication is two-edged. Once it is raised it also raises very clearly the fact that it reduces a person's inhibitions. It makes people less likely to have the capacity to have the same self-control that they might have when sober; and it might explain to a jury why someone might do something that otherwise would be quite out of character.

6.85 Punishment in an ethical legal system is not based on the harm done but is dependent on a person having committed criminal acts voluntarily and intentionally. While we, as a community, may be extremely angered and upset by the criminal act committed, such a feeling does not justify departure from the principle that person is not guilty of a crime unless that person acted intentionally and voluntarily. Mr M. O'Brien, from Victoria Legal Aid commented:<sup>546</sup>

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<sup>543</sup> Mr M. O'Brien, Victoria Legal Aid, *Submission No. 6*; Dr B McSherry, Academic, *Submission No. 15*; Mr D. Grace, QC, Chairman, Criminal Law Section, Law Institute of Victoria, *Submission No. 16*; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Submission No. 20*; Mr R. Inglis, Chief Research Officer, Victorian Aboriginal Legal Service Co-operative Ltd, *Submission No. 25*; Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*; Chief Judge's Chambers, County Court, *Submission No. 28*; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Submission No. 33*; Ms F. Hampel, QC, President, Liberty Victoria, *Submission No. 35*; Dr S. Rajaratnam and Associate Professor J. Redman, Department of Psychology, Monash University, *Minutes of Evidence*, 29 Mar. 1999; Ms F. Broughton, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999; Mr G. Flatman, QC, Director of Public Prosecutions and Mr. W. Morgan-Payler, QC, Senior Prosecutor for the Queen, *Minutes of Evidence*, 29 Mar. 1999; Dr T. Watson-Munro, Forensic Psychologist, *Minutes of Evidence*, 30 Mar. 1999.

<sup>544</sup> Mr D. Curtain, QC, Chairman, The Victorian Bar, *Submission No. 27*, 9 Feb. 1999, p. 1.

<sup>545</sup> *Minutes of Evidence*, 29 Mar. 1999, p. 63.

<sup>546</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 77.

Frequently when we see some tragic situation the invariable response is that someone should pay for it. However, very few, if any, would agree that the someone should be a person who in no real sense was responsible for the tragic situation giving rise to the cause for retribution.

6.86 In fact most members of the community would undoubtedly feel repugnance at the proposition that a person who was not responsible for a criminal offence could nonetheless be held accountable and punished for it in some way. The imposition of criminal responsibility in an ethical legal system is based on a defendant having a sufficiently guilty mind. A defendant who acts unintentionally or contrary to his or her will does not have a sufficiently guilty mind to impose criminal liability. The question must be asked how can a defendant be punished for a criminal offence which he or she did not intend to commit or which was a product of an involuntary act? Mr D. Grace, QC, Chairman of the Criminal Law Section of the Law Institute of Victoria pointed out:<sup>547</sup>

This means that a person who acts involuntarily and unintentionally, does not have the level of culpability required to be criminally liable. He/she does not have a sufficiently guilty mind to be convicted of the offence relating to the physical act in question. Retribution and denunciation are therefore inapplicable to such persons.

In other words it amounts to unjust attribution of criminal responsibility.

6.87 It is also an aim of the criminal justice system to deter individuals and people generally from engaging in criminal conduct. If a defendant did not intend to commit the criminal act or acted involuntarily, how can deterrence have any impact on such a defendant? As stated by Mr. M. O'Brien from Victoria Legal Aid:<sup>548</sup>

Retribution and denunciation of a person not personally responsible for an act is not only illogical and unjust but also calculated to call the law into disrepute and engender in the community disrespect for such a system. Such punishment will not deter persons from engaging in prohibited conduct but rather deter right-thinking members of the community from having respect for a legal system so inherently unjust and illogical.

6.88 Failure to consider evidence of self-induced intoxication also destroys the principle of equality before the law. The criminal law recognises that those who commit criminal offences unintentionally or involuntarily should not be held accountable for their actions. This principle underlies a finding of liability for all criminal offences. If the O'Connor principles were abolished it would mean that evidence of self-induced intoxication could not be raised to show that a person acted unintentionally or involuntarily. It would allow, for example, a defendant who was sleepwalking, convulsing, suffering psychological shock or in a diabetic coma, to rely

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<sup>547</sup> *Submission No. 16, 29 Jan. 1999, p. 1.*

<sup>548</sup> Mr M. O'Brien, Victoria Legal Aid, *Minutes of Evidence*, 30 Mar. 1999, p. 77.

on that evidence to show that he or she acted unintentionally or involuntarily whereas a self-induced intoxicated defendant would not be able to rely on evidence of that intoxication to explain his or her behaviour and to show why the conduct complained of was involuntary or unintentional. Should the law distinguish between the causes of involuntariness and unintentional conduct? Arguably it is inappropriate to differentiate between the various causes of impairment; what remains crucial is a defendant's inability to act voluntarily or intentionally.<sup>549</sup> Two psychologists from Monash University commented:<sup>550</sup>

the criminal law has recognised that people who commit crimes under various abnormal states of mind that fall short of a diagnosable mental disease should not be held responsible for their actions. These include sleepwalking, spasms or convulsions, concussion and, more controversially, reflex actions and hysterical disassociation. We believe it is not possible to distinguish between the mental impairment that is induced under these situations and the mental impairment induced by intoxicants in the context of forming criminal intent.

6.89 If the law were to distinguish between the causes of mental impairment it would be treating defendants differentially and consequently unequally. There is no legal principle which supports differential treatment of defendants and in fact to do so is to move away from a legal system based on fairness and neutrality and to import into that system pre-conceived value-laden judgments. As Ms F Hampel, QC, from Liberty Victoria indicated:<sup>551</sup>

it does not matter whether it is because you are a schizophrenic and you do not take your medication, or you are a diabetic and drink when you know you should not, or you are a victim of torture and suffer post-traumatic stress disorder ... We do not make a value judgment about how they tripped into the automatism or the state; we don't want to make a judgment about the cause.

It is crucial to the maintenance of community respect in the justice and fairness of the legal system that defendants continue to be treated equally.

6.90 Equally important is the need to ensure that a change to the law does not cause further disadvantage to already disadvantaged groups or individuals in our community. Mr. T. Munro, Principal Legal Officer with the Victorian Aboriginal Legal Service indicated to the Committee that about 92 per cent of aboriginal

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<sup>549</sup> Ms F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999; Dr S. Rajaratnam and Associate Professor J. Redman, Department of Psychology, Monash University, *Minutes of Evidence*, 29 Mar. 1999; Mr G. Flatman, QC, Director of Public Prosecutions and Mr. W. Morgan-Payler, QC, Senior Prosecutor for the Queen, *Minutes of Evidence*, 29 Mar. 1999; Mr M. O'Brien and Mr M. Dicconson, Victoria Legal Aid, *Minutes of Evidence*, 30 Mar. 1999; Mr C. Mandy, Criminal Law Section, Law Institute of Victoria, *Minutes of Evidence*, 29 Mar. 1999.

<sup>550</sup> Dr S. Rajaratnam and Associate Professor J. Redman, Department of Psychology, Monash University, *Minutes of Evidence*, 29 Mar. 1999, p. 29.

<sup>551</sup> Ms F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 22.

defendants charged with substantive offences are affected by alcohol.<sup>552</sup> Mr Munro from the Aboriginal Legal Service expressed concern at any possible change to the principles enunciated in *O'Connor's* case.<sup>553</sup>

Although it is clear that this defence is not the main shield in the Aboriginal Legal Service's armoury, we are concerned at its abolition because of the clear relationship between Aboriginal offending and alcohol abuse. We thus believe it is a defence relevant to the Aboriginal community, and although it is not one that has been used we would not support its removal because of that relationship.

6.91 It is crucial to evaluate any change to the *O'Connor* principles not only in terms of the benefit to be derived by the broader community but also to consider the impact of change on marginalised groups and individuals. If such an evaluation indicates that in changing the law no real benefit will be derived by the broader community but that some disadvantaged groups will suffer further detriment, then no change should be made to the existing law. Mr R. Inglis, Chief Research Officer with the Victorian Aboriginal Legal Service concluded:<sup>554</sup>

To introduce changes to the law that would worsen outcomes for indigenous people would thus be unfair given the historic and structural contributions to present patterns of intoxication and incarceration. Such changes would also be highly likely to be ineffective in reducing alcohol consumption or increasing community safety.

6.92 Victoria, South Australia and the ACT are the only common law jurisdictions in Australia where the *O'Connor* principles continue to operate. Pressure has been brought to bear on these common law jurisdictions by the Commonwealth Attorney-General, who has requested the abandonment of the *O'Connor* principles and the adoption of the Commonwealth's approach.<sup>555</sup> As previously discussed, South Australia has chosen to keep the *O'Connor* principles in order to preserve fundamental tenets of common law, but has taken steps to prevent evidence of self-induced intoxication being used as a basis for unnecessary and costly appeals.<sup>556</sup>

6.93 The Committee believes that pressure from the Commonwealth alone is not a sufficient basis for changing the law and that it intends to recommend change only when there is a sound basis for doing so, namely, when current legal principles are

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<sup>552</sup> Mr T. Munro, Principal Legal Officer, Victorian Aboriginal legal Service Co-operative Ltd, *Minutes of Evidence*, 30 Mar. 1999, p. 71.

<sup>553</sup> *ibid.*

<sup>554</sup> Victorian Aboriginal Legal Service, *Submission No. 25*, p. 9.

<sup>555</sup> Australia, the Hon. Daryl Williams, AM, QC, MP, Attorney-General, 'States Urged to Dump Drunk's Defence', *Media Release*, 29 Oct. 1997.

<sup>556</sup> See *supra*, paras. 3.41-3.43.

fundamentally flawed leading to injustice and unfairness. It is vital that Victoria does not simply react to pressure from other jurisdictions and in so doing make changes which constitute a basic departure from sound ethical principles:<sup>557</sup>

The fact that other people, for various reasons, have produced unsatisfactory alternatives, by which they are jumping off some fundamental principles of our criminal justice system does not convince me that we ought to go the same way.

6.94 As previously stated, evidence from a number of different sources would indicate that, the introduction by New South Wales and the Commonwealth of legislation which distinguishes between offences of specific and basic intent would only serve to make the law concerning evidence of self-induced intoxication more complicated and confusing. Victoria's choice not to follow suit does not mean that Victoria has been left behind or that it has failed to adequately address a serious legal problem. As noted by Mr Richter QC of the Victorian Bar Council:<sup>558</sup>

I would like to think that Victoria is better placed than other places and we are not stampeded into silly things like the English and various others can be from time to time for various reasons...The real answer lies in the fact that we have a system that has intellectual integrity. That is not the be-all and end-all and it can and should be changed if sufficient cause is shown to depart from that sort of intellectual rigour of analysis.

6.95 The Committee believes that it is crucial that legal principles be applied consistently and simply and on the basis of evidence available. The Committee concludes that the proposition arising from *O'Connor's* case, that a person should not be held criminally responsible for an unintended or involuntary act is logical, easy to apply and makes good sense.<sup>559</sup>

6.96 When considering the *O'Connor* principles and the rare aberrations such as *Nadruku*, it is easy to think only of the harm caused to the victim and the moral wrong committed by the defendant. Foremost in our thoughts is the need for such a defendant to be held responsible for what he or she has done. If that defendant were mentally ill or sleepwalking or in some other similar state not brought about by self-induced intoxication, most people would consider that such a defendant should not be subject to the imposition of criminal liability. However, once the issue of self-

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<sup>557</sup> Mr M. O'Brien, Victoria Legal Aid, *Minutes of Evidence*, 30 Mar. 1999, pp 79–80.

<sup>558</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 119.

<sup>559</sup> Mr G. Flatman, QC, Director of Public Prosecutions (Vic) and Mr W. Morgan-Payler, QC, Senior Prosecutor for the Queen, *Minutes of Evidence*, 29 Mar. 1999; Mr M. O'Brien and Mr. M. Dicconson, Victoria Legal Aid and Mr C. Mandy, Criminal Law Section, Law Institute of Victoria, *Minutes of Evidence*, 30 Mar. 1999; Mr R. Punshon, Vice-Chairman, Victorian Criminal Bar Association, *Minutes of Evidence*, 30 Mar. 1999 and Mr R. Richter, QC, Dr D. Neal and Mr J. Morrow, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999.

induced intoxication arises, considerations of logic, simplicity and consistency disappear.<sup>560</sup>

When the person concerned is mentally ill, sleepwalking or suffering from automatism, no-one would seriously contend that they should be held criminally liable for that act, let alone be subject to criminal sanctions in respect of it. However, somehow when the unintentional involuntary perpetrator of the act is blind drunk, logic and fairness go out of the window.

### ***Recommendation 3***

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

## **Option 5 – Intoxication as an Element in Criminal Trials**

6.97 On occasions counsel for the defence may make passing reference to evidence of self-induced intoxication, without raising it as a real issue at a trial. Once the suggestion is made a trial judge is required to give a jury appropriate directions on that evidence. Failure to direct a jury on evidence of intoxication, even though little has been made of such evidence during the course of a hearing, has led to appeals by the defence on the basis of inadequate directions.<sup>561</sup>

6.98 In *The Queen v. Paul EV Costa*,<sup>562</sup> the defendant employer was charged with indecent assault and rape of his employee. Both had been out to a work dinner and returned to the workplace after the function, where they both fell asleep. Both had been drinking and the defendant had consumed almost an entire bottle of vodka. Sometime later the complainant awoke to find the defendant sexually assaulting her. Part of the defence argument was that the defendant was not aware that the complainant was not consenting or might not be consenting. Counsel for the defendant made little of the evidence of intoxication during the first trial.

6.99 The defendant was convicted of indecent assault and rape and subsequently appealed. One of the grounds of appeal was that the trial judge had failed to adequately direct the jury on the element of intent in relation to the charge of rape – the argument being that evidence of intoxication was relevant to the defendant's

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<sup>560</sup> Mr M. O'Brien, Victoria Legal Aid, *Minutes of Evidence*, 29 Mar. 1999, p. 78.

<sup>561</sup> *The Queen v. Paul EV Costa*, No. 177 of 1995. For a recent South Australian example refer to footnote 95, para. 3.41, *supra*.

<sup>562</sup> *ibid.*

awareness of the absence of consent and the trial judge had failed to make that clear to the jury. It was noted by Justices Callaway and Southwell that:<sup>563</sup>

In this case, as will be seen, the subject received but passing mention by counsel for the applicant. However, if the evidentiary basis be present, the trial judge must give appropriate directions to the jury.

6.100 Even though the evidence of intoxication at the first trial was not obvious and not vigorously pursued at the first trial, the Court of Appeal was prepared to conclude that the trial judge had given inadequate instructions to the jury as to the effect of the evidence of intoxication and the defendant's awareness of the victim's consent. In recent public hearings held by the Committee, Superintendent K.D. Stephens noted that the defendant could not have been said to be grossly intoxicated, as required by the O'Connor principles and that in fact the defendant 'was able to undertake and complete the act of sexual intercourse' and 'able to recall in some detail what he asserts happened on the night in question and specifically how the complainant had co-operated with him'.<sup>564</sup> It was the unanimous decision of the Court of Appeal, that the defendant's conviction of the charges of rape be quashed and that the matter be sent back for retrial.

6.101 The Committee considers that appeals on the grounds of inadequate or incorrect directions on evidence of self-induced intoxication, in circumstances in which the argument has either not been put or where that evidence has been barely mentioned, are unreasonable, unfair and unnecessarily costly and have the potential to cause the public to lose respect in the legal system. The Committee therefore considers that it is appropriate to introduce a procedural change, similar to that recently introduced in South Australia,<sup>565</sup> to the effect that the trial judge is obliged to direct a jury on the issue of intoxication only when the defence specifically requests the trial judge to direct on that issue. The Committee also wishes to draw attention to proposed changes to the conduct of criminal trials under the Crimes (Criminal Trials) Bill 1999, under which both the prosecution and the defence will, to comply with the new rules, have to summarise the facts, acts, matters and circumstances relied upon.<sup>566</sup> These amendments will prevent either side from being ambushed with facts not thought to be at issue. It will, for example, mean that if the defence wants to rely on evidence of intoxication, it will have to raise it as an issue prior to the commencement of the trial. The Committee believes that proposed changes to the

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<sup>563</sup> *ibid.*, p. 16.

<sup>564</sup> Superintendent K. Stephens, Victoria Police, *Minutes of Evidence*, 30 Mar. 1999, p. 87.

<sup>565</sup> *Criminal Law Consolidation (Intoxication) Amendment Act 1999 (SA)*, s. 269.

<sup>566</sup> Crimes (Criminal Trials) Amendment Bill 1999 (Vic), sections 6 and 7.

conduct of criminal trials together with its proposal concerning appeals and evidence of intoxication will improve the efficiency of the conduct of criminal trials and will prevent unnecessary and costly appeals.

#### **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 might 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.***

### **Option 6 – Jury to Hear all Indictable Offences if O'Connor Principles are Raised**

6.102 As previously indicated,<sup>567</sup> the evidence taken by the Committee establishes that the argument that the defendant should be acquitted because he or she lacked intent due to self-induced intoxication is rarely pleaded, and when argued, is rarely accepted by a jury. Generally the approach taken by judges, magistrates and juries to the issue of self-induced intoxication is realistic, demonstrating a reluctance to accept the argument of self-induced intoxication.<sup>568</sup>

6.103 The Committee heard that the decision in the *Nadraku* case was unusual and a similar result would probably not have occurred in Victoria. Mr John Willis commented:<sup>569</sup>

I cannot think of any magistrates who would have worn it down here, either. I appear frequently before magistrates. Were I to stand there and run that line they would look at me

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<sup>567</sup> See *infra*, paras. 6.79-6.80.

<sup>568</sup> Ms F Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 18, Mr J. Willis, Criminal Barrister, *Minutes of Evidence*, 29 Mar. 1999, p. 59; Mr W. Morgan-Payler, QC, Senior Crown Prosecutor (Vic.), *Minutes of Evidence*, 29 Mar. 1999, p.67; Mr R. Punshon, Victorian Criminal Bar Association, *Minutes of Evidence*, 30 Mar. 1999, p. 110; Mr R. Richter, QC, The Victorian Bar, *Minutes of Evidence*, 30 Mar. 1999, p. 118.

<sup>569</sup> Criminal Barrister, *Minutes of Evidence*, 29 Mar. 1999, p. 59. A similar comment was made by Judge Mullaly, County Court of Victoria, *Minutes of Evidence*, 15 Mar. 1999, p. 13.

and think, 'I will work on my correspondence until he finishes'. I might be wrong but you would not get anywhere.

Despite the confidence of Mr Willis, the possibility of acquittal still remains as evidenced by, for example, the Nadruku case and that of Bryan Raymond Cables.<sup>570</sup> It appears however that when a magistrate makes what is perceived and reported by the media as an unusual decision, the appropriateness of the law is questioned by some members of the community, more so than a similarly perverse decision by a jury. This gives rise to the suggestion that the community may gain more solace from such decisions being made by a jury of their peers and a jury representative of that same community.

6.104 The Committee recognises that at times unusual or bizarre decisions will be handed down and cannot be prevented, and considers it desirable to limit the potential for such decisions as far as is practical. It is important for the community to have confidence in the judicial system. Mr Geoff Flatman, Victorian Director of Public Prosecutions, said:<sup>571</sup>

There is no reason why we should not have confidence in the magistrates in Victoria – it is undesirable that the principle of law be changed because of the possibility of a perverse decision by a magistrate. We will have perverse decisions by magistrates and juries in a whole range of things. We have to live with that.

6.105 The Committee accepts those comments and acknowledges the ability of magistrates and the judiciary to perform their onerous tasks well. However, the Committee has concluded that where the issue of self-induced intoxication and indictable offences is raised on the hearing of an indictable offence, the jury as the conscience of the community should determine the issue as to whether the defendant was capable of forming the necessary intent to commit the proscribed act and to have done so voluntarily.

6.106 Mr Roy Punshon, from the Victorian Criminal Bar was, in fact, prepared to concede that the public may, at times, feel more satisfied in having a matter determined by a jury:<sup>572</sup>

I can understand anyone saying that they would have more confidence in a jury of 12 people than a magistrate deciding these issues because they are more representative of the community than a magistrate.

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<sup>570</sup> Portland Magistrates' Court, 21, 22, 23 and 29 Apr. 1997, before Magistrate Hanrahan.

<sup>571</sup> Mr G. Flatman, QC, Director of Public Prosecutions, *Minutes of Evidence*, 29 Mar. 1999, p. 68.

<sup>572</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 114.

## **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.**

## **Option 7 – Sentencing Options**

6.107 Recently, Dr A. Graycar, Director of the Australian Institute of Criminology, commented:<sup>573</sup>

Reducing crime through changes in legislation, pressuring the judiciary to give longer sentences and constructing new prisons will not necessarily reduce the hurt and harm to people. What is needed is the creation of an environment in our society where conflicts are settled in a civil way.

6.108 The Committee believes that while one of the aims of any criminal justice system is to punish those who have committed criminal offences, it is crucial not to lose sight of the need to rehabilitate and provide treatment for criminal offenders so that they can, if possible, be ‘more easily absorbed back into the community’.<sup>574</sup> The current Victorian criminal justice systems focuses on rehabilitation-based imprisonment. Ms. Felicity Hampel, emphasised the importance of treating convicted criminal offenders with some dignity, so that they are not locked away and forgotten. She argued that such offenders should be provided with appropriate treatment so that they will not offend again.<sup>575</sup> Imprisonment of itself does little to stop offenders from recidivism.<sup>576</sup> A report by the Council of Australian Governments released earlier this year indicated that the rate of crimes against the person in Victoria is the lowest rate throughout Australia.<sup>577</sup> In Victoria there were 483 crimes against the person per 100,000 whereas nationally the rate was 868.<sup>578</sup> The Committee finds these figures interesting especially given the stronger emphasis on law and order and the imposition of harsher penalties in other Australian states and territories. This indicates that the threat of imprisonment and the imposition of harsher penalties

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<sup>573</sup> ‘Mapping the Boundaries of Australia’s Criminal Justice System’, paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia’s Criminal Justice System*, convened by the Australian Institute of Criminology, Canberra, 22–23 Mar. 1999, p. 9.

<sup>574</sup> *ibid.*, p. 11.

<sup>575</sup> Ms. F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 22.

<sup>576</sup> Dr R. Vine, Forensic Psychiatrist, *Minutes of Evidence*, 29 Mar. 1999, p. 53.

<sup>577</sup> quoted in *Police Life*, 9 Mar. 1999.

<sup>578</sup> *ibid.*

does not necessarily reduce the crime rate. As the New South Wales Director of Public Prosecutions commented:<sup>579</sup>

We try to use the criminal law to regulate behaviour and to keep behaviour within socially acceptable limits. The criminal law cannot make people be good or moral but it can set boundaries for behaviour.

6.109 The Committee has concluded that the criminal law must not be used as an instrument to punish those who have committed criminal acts unintentionally or unconsciously. In the Committee's view the use of the law as a blunt instrument does not contribute to the prevention of crime and does not provide greater protection to the community against criminal offenders. It is, therefore, important to examine other options as avenues available to judges and magistrates in sentencing offenders with alcohol or drug related problems with a view to decreasing the likelihood of repeat offending.

6.110 The Committee heard evidence that current sentencing options are inadequate in the case of alcohol-related offenders.<sup>580</sup> Ms. Felicity Hampel argued that alcohol-related offenders should have as an option a treatment and rehabilitation program included as an essential part of their sentence.<sup>581</sup> Other evidence received by the Committee suggested that current sentencing options were sufficient to provide for treatment and rehabilitation of those convicted of alcohol or drug related criminal offences.<sup>582</sup>

6.111 The Committee believes that although treatment and rehabilitation may not always be successful in assisting a convicted offender to overcome an alcohol or drug related problem or to resume a normal, the motivation plays a significant role in the successful treatment and rehabilitation of convicted offenders. Associate Professor Redman from the Department of Psychology at Monash University, conceded the general perception of the usefulness of rehabilitation programs, but noted that the

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<sup>579</sup> *Meeting Notes*, meeting with Mr N. Cowdrey, Director of Public Prosecutions (New South Wales); Mr M. Blackmore, Deputy Director of Public Prosecutions (New South Wales) and Ms. R. Gray, Deputy Solicitor for Public Prosecutions (New South Wales), Sydney, 8 Feb. 1999.

<sup>580</sup> Ms F. Hampel, QC, President, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 23; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999, p. 61.

<sup>581</sup> *ibid.*, p. 23.

<sup>582</sup> Ms F. Broughton, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999, p. 36; Mr G. Flatman, QC, Director of Public Prosecutions (Vic.), *Minutes of Evidence*, 29 Mar. 1999, p. 64.

success rate will be less favourable if a person has been forced to attend that rehabilitation, compared with the case where a person chooses to receive treatment.<sup>583</sup>

6.112 There will always be ethical dilemmas in forcing a convicted offender to undertake any treatment or rehabilitation programs and despite some cynicism, the Committee accepts the comments of Dr R. Vine, a forensic psychiatrist who said:<sup>584</sup>

Even though treatment of alcoholism has a high rate of relapse, it also has a level of success....Historically there have been many different patterns of treatment of those dependent on alcohol....My own view is that none of the treatment programs stands out as amazingly better than any other, but they all have their value.

6.113 While it is undeniable that treatment may not be as successful if an individual lacks motivation, it is still vital to ensure that rehabilitation programs be made available for self-induced intoxicated offenders, notwithstanding that some individuals take a long time to benefit from such treatment. Dr T. Watson-Munro, a forensic psychologist, gave evidence to the Committee concerning the treatment he provided, approximately 20 years ago, to prisoners at Paramatta gaol.<sup>585</sup>

There is no argument that their initial motivation to get involved in the program was that they saw it as a means of getting additional privileges and rorting the system. It was an interesting dynamic to observe over a period of months. They eventually got switched on by it and started to get their own therapeutic benefits out of being involved in the programs.

6.114 Evidence taken by the Committee suggests that there is currently a shortage of rehabilitation and treatment programs in Victoria.<sup>586</sup> For example, Mr C. Mandy, representing the criminal law section of the Law Institute of Victoria commented:<sup>587</sup>

The rehabilitation mechanisms in the community are not sufficient for either alcohol users or users of other drugs. St. Vincent's Hospital has been upgraded since Cresswell and Pleasant View closed, but since the restructuring the number of beds in places such as Odyssey House and Winlaton Youth Training Centre have reduced. More education and resources are required for drug and alcohol rehabilitation.

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<sup>583</sup> *Minutes of Evidence*, 29 Mar. 1999, p. 32. See also Dr B. McSherry, Senior Lecturer and Associate Dean, Faculty of Law, Monash University, *Minutes of Evidence*, 30 Mar. 1999, p. 98.

<sup>584</sup> *Minutes of Evidence*, 29 Mar. 1999, p. 53.

<sup>585</sup> Forensic Psychologist, *Minutes of Evidence*, 30 Mar. 1999, p. 106.

<sup>586</sup> Ms F. Hample, Liberty Victoria, *Minutes of Evidence*, 29 Mar. 1999, p. 22; Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999, p. 61; Mr M. O'Brien and Mr M. Dicconson, Victoria Legal Aid and Law Institute of Victoria, *Minutes of Evidence*, 30 Mar. 1999, p. 82

<sup>587</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 82.

6.115 Victoria Legal Aid has provided the Committee with a list of the Drug Rehabilitation Programs available in Victoria.<sup>588</sup> Many of the programs have extensive waiting lists, some are private facilities and charge fees for the treatment services provided and some only provide for a short term stay. Mr Mark Dicconson from the criminal law division of Victoria Legal Aid pointed out that not only is there a shortage of places but there is also less information available about what services do in fact exist:<sup>589</sup>

Services are much more fragmented and it is more difficult to find out what is available, whether it is publicly or privately funded. Some services which are not publicly funded require the client to have financial resources to utilise them ... We seem to have a shrinking array of places where our clients can go to address their problems, as well as a shrinking amount of information about the existence of services and to what extent they are able to take more clients.

6.116 The evidence of a shortage of rehabilitation and treatment programs and the demands on the existing services lead the Committee to conclude that there is a need to examine and evaluate the nature, extent and demand for rehabilitation services and to provide further facilities.

6.117 The Committee also believes that treatment of those convicted of alcohol-related offences should include courses focusing on anger management. Mr John Willis, a criminal barrister with many years experience argued that the Committee should consider anger management courses as a part of sentencing when he said:<sup>590</sup>

Similarly, I am in favour of anger management if for no other reason than some of those turkeys will be forced to actually sit down and have a think about what they have done.

Anger management courses would seek to educate offenders that it is inappropriate to relieve anger by violence towards other members of the community and that there are other means for controlling and dealing with those frustrations.

6.118 Mr Roy Punshon, Chairman of the Criminal Bar drew the attention of the Committee to the benefits of early intervention with addicts:<sup>591</sup>

There has been a strong move in recent times about drug offences, particularly those associated with heroin, to try to identify people in the early stages of addiction, to move them away from the criminal process and to try to encourage them to undergo programs of

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<sup>588</sup> refer Appendix D.

<sup>589</sup> *ibid.*

<sup>590</sup> Mr J. Willis, Criminal Barrister and Lecturer in Law La Trobe University, *Minutes of Evidence*, 29 Mar. 1999, p. 61.

<sup>591</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 112. Dr Watson-Munro also emphasised the importance of early treatment. See *Minutes of Evidence*, 30 Mar. 1999, p. 106.

rehabilitation and reformation so that the problem does not develop. If there were thought to be those sorts of problems with particular people and alcohol or other drugs, we would say that that is by far the better way of dealing with it.

6.119 Implementation of an early intervention program would not be easy and would require co-operation between various government departments, welfare agencies, doctors and other organisations and individuals who are in contact with people with an alcohol or drug problem. The Committee accepts that there are a number of valuable general education programs currently in place aimed at decreasing violence in the community, for example, the National Campaign Against Violence.<sup>592</sup> There is also an innovative pilot project called Credit Referral and Evaluation for Drug Intervention and Treatment ('CREDIT'), jointly funded from the Victorian Law Enforcement Drug Fund and the Department of Human Services in relation to illicit drugs for offenders on bail.<sup>593</sup> The Committee believes that such programs should not only be broad in scope, but should operate in different environments. Dr T. Watson-Munro, Forensic Psychologist confirmed that it is crucial:<sup>594</sup>

to catch people when they are younger, before the horse has bolted, and get them involved in treatment plans...a lot of the problem relates to the fact that quite often when these people present for treatment their substance abuse problem has existed for many years beforehand. I guess what I am advocating is a bit like the day-in-gaol scheme – if you get people earlier on that career path the likelihood of a positive clinical prognosis is enhanced tremendously.

### **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.***

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<sup>592</sup> Mr T. Wilmot, Victorian Community Council Against Violence, *Minutes of Evidence*, 29 Mar. 1999, p. 38. The Committee was also informed that the Education Department is conducting a number of programs, such as peer education, self management and management of group behaviour.

<sup>593</sup> The Hon Jan Wade, MP, Attorney-General, 'New Drug Treatment Program for Offenders on Bail', *News Release*, 9 Sept. 1998.

<sup>594</sup> *Minutes of Evidence*, 30 Mar. 1999, p. 106.

## Option 8 - Evidence of Propensity and Intoxication

6.120 Superintendent K. Stephens, a prosecutor with Victoria Police drew the attention of the Committee to the case brought against Bryan Raymond Cables who was acquitted in the Portland Magistrates' Court of charges of intentionally causing serious injury and recklessly causing injury on the basis that he lacked intent.<sup>595</sup>

6.121 On 4 October 1996, the night of the assault, the defendant had already been banned from entering the hotel, but nonetheless determined to ignore that ban.<sup>596</sup> In fact the night before the assault, the defendant visited the hotel premises and threatened the victim.<sup>597</sup> When the defendant was asked to leave the Hotel by the Crowd Controller, he took two pieces of paper out of his pocket and claimed that he had seen a solicitor and that he had a right to be on the premises and refused to leave.<sup>598</sup> The Crowd Controller signalled to another employee to arrange for the police to be called and then moved away from the defendant, who was in an agitated state.<sup>599</sup> The defendant approached the Crowd Controller again, showing a piece of paper and claiming entitlement to a free meal. The defendant then kissed the Crowd Controller on the lips but was pushed away and fell to the floor where he lay with legs open and arms out.<sup>600</sup> Subsequently the defendant punched the Crowd Controller in the jaw, gouged his left eye, bit his nose and kneed him in the testicles.<sup>601</sup> As a consequence the Crowd Controller suffered injury to his eye, bumps to the forehead and temple, a swollen lip on the left side and a bite mark on his nose.<sup>602</sup> The facts indicate that the defendant was reasonably aware of what he was doing and that he was able to form the intention to commit the offences. The defendant was able to indicate that he had a legal right to be on the premises; he was able to point to the voucher and show that he was entitled to a meal; he was sufficiently conscious to constantly pursue the Crowd Controller, not attacking any other persons on the premises and after falling to the floor he was shortly after able to get up and attack the Crowd Controller.

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<sup>595</sup> The case was heard by Magistrate Jim Hanrahan on 21, 22, 23 and 29 Apr. 1997.

<sup>596</sup> Peter Kennett, *Police Statement*, 4 October 1996, p. 2.

<sup>597</sup> The Prosecutor, Bryan Raymond mentioned this in a telephone conversation on 13 May 1999 with Jenny Baker, Research Officer, Law Reform Committee.

<sup>598</sup> Peter Kennett, *Police Statement*, op. cit., p. 2; Kirsty Davies, *Police Statement*, 9 October 1996, p. 1; Melenie McCabe, *Police Statement*, 16 October 1996, p. 1.

<sup>599</sup> Peter Kennett, *ibid.*

<sup>600</sup> *ibid.*; Michael Archer, *Police Statement*, 4 October 1996, p. 2; Wendy Hunter, *Police Statement*, 4 October 1996, p. 1; Kirsty Davies, op. cit., p. 1.

<sup>601</sup> Peter Kennett, op. cit., pp. 2-3; Michael Archer, *ibid.*, p. 2.

<sup>602</sup> *ibid.*, p. 3.

6.122 The defendant gave evidence that at the time of the incident he was taking prescribed anti-depressants and painkillers, including kapolon, naprosyn, neulactil, aropaz, amitriptyline and zovirax and in addition the defendant was extremely drunk.<sup>603</sup> The defendant argued that he was so intoxicated that he had no recollection of the night in question.

6.123 The prosecution called Dr M. Martin who gave evidence that the effect of the various medications and alcohol was 'entirely speculative', but Dr Martin conceded in cross-examination that he would defer to the opinion of the psychologist as to the defendant's mental state.<sup>604</sup>

6.124 The defence called Mr Jeffrey Cummins, clinical psychologist, who gave evidence that on the night in question there was a high degree of probability that the defendant was acting as an automaton and therefore could not form the guilty intention necessary to commit either of the criminal offences charged.<sup>605</sup> The psychologist's assessment of the defendant was not made until 17 April 1997, a significant period of time after the night of the assault. The Committee notes that in evidence received at its public hearings from Dr T. Watson-Munro, an assessment of a person after such a lapse of time is extremely difficult and is really only a post-event analysis of a person's mental state.<sup>606</sup> Magistrate Hanrahan dismissed the charges on the basis that evidence of intoxication had been raised and the prosecution had failed to prove intent.<sup>607</sup>

6.125 The defendant had a history of becoming intoxicated and causing problems.<sup>608</sup> The Managing Director of the Richmond Henty Hotel made a statement to the police in which he indicated that the defendant had been involved in the following incidents – fighting, biting and being abusive; removed from hotel premises for being intoxicated and argumentative; ejected for punching another patron; head butting people on various occasions; threatening staff; banned for 12 months for fighting; spitting in a person's eye; removed by police after forcing entry to the hotel.<sup>609</sup>

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<sup>603</sup> *Dismissal of Charges and/or Award of Costs*, 29 Apr. 1997, p. 3.

<sup>604</sup> *ibid.*, p. 2.

<sup>605</sup> *ibid.*

<sup>606</sup> Forensic Psychologist, *Minutes of Evidence*, 30 Mar. 1999, p. 105.

<sup>607</sup> *Dismissal of Charges and/or Award of Costs*, 29 Apr. 1997, p. 2.

<sup>608</sup> Robert Hunt, *Police Statement*, 20 October 1996, pp. 1–2.

<sup>609</sup> *ibid.*

However none of this evidence of consistent prior misconduct was admissible, and therefore the magistrate could not consider this evidence when reaching a decision.<sup>610</sup>

6.126 In relation to propensity evidence, the prosecution cannot lead evidence of the character or misconduct of the defendant to show that the defendant had a propensity to commit crime, or crime of a particular kind or that he or she was the sort of person likely to have committed the crime charged. The landmark case in this area is *Makin v. Attorney-General (NSW)*.<sup>611</sup> In that case the defendant and his wife were accused of murdering a baby. The prosecution wished to adduce evidence to show that the defendant had received babies from other mothers and that the bodies of 13 other babies had been found at three sets of premises occupied by the defendant at one time or another. The case ultimately went to the Privy Council where Lord Herschell explained the principle as follows:<sup>612</sup>

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charge in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

6.127 In summary four important principles emerge:<sup>613</sup>

1. Evidence of propensity must be relevant or it will be excluded.
2. Propensity on its own is not relevant and without more will be excluded.
3. Where the evidence is relevant but incidentally reveals propensity it will be excluded unless it is probative of a matter at issue.
4. If the probative value is insufficient having regard to the prejudice which a defendant will suffer, then the propensity evidence may be excluded by the exercise of a trial judge's general discretion to exclude admissible evidence. In fact, Judge Mullaly from the Victorian County Court indicated to the Committee that magistrates are generally reluctant to admit propensity

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<sup>610</sup> The Prosecutor, Bryan Raymond mentioned this in a telephone conversation on 13 May 1999 with Jenny Baker, Research Officer, Victorian Law Reform Committee.

<sup>611</sup> [1894] AC 57.

<sup>612</sup> *ibid.*, 65.

<sup>613</sup> J. Heydon, *Cross on Evidence*, Butterworths, 1996, p. 568.

evidence because of its prejudicial nature and because of their inexperience in dealing with that sort of evidence.<sup>614</sup>

6.128 These principles have been affirmed by the High Court in *Perry v. The Queen*,<sup>615</sup> *Sutton v. The Queen*<sup>616</sup> and *Harriman v. The Queen*<sup>617</sup> As a practical exercise the court must weigh the probative value of the propensity evidence against the prejudice of that evidence to the defendant, which Lord Herschell in *Makin v. Attorney-General (NSW)* noted was no easy task.<sup>618</sup>

6.129 The Committee believes that it is important that evidence which shows that a defendant has previously been intoxicated and been involved in misconduct or committed criminal offences be admissible in a court. Given the difficulty of establishing the admissibility of evidence of propensity, the Committee has concluded that where the issue of intoxication is raised, the propensity rule discussed above should be varied to the extent that evidence of prior misconduct or the commission of criminal offences will be automatically admitted.

### ***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 drugs to be admissible.***

## Conclusion

6.130 The Committee has travelled extensively throughout Australia and has taken evidence at public hearings in Melbourne as well as other capital cities. The Committee consulted with members of the judiciary, lawyers, academics, public servants and the community.

6.131 The Committee understands the community concern that arises out of decisions such as *Nadraku*. In that case the defendant, who in a violent act of thuggery assaulted two women, was acquitted on the basis that he was so intoxicated that he acted unintentionally and involuntarily. The Committee has concluded that the decision in that case is unusual, but it acknowledges that it is not an isolated

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<sup>614</sup> Meeting Notes, meeting with Judge Mullaly, 10 May 1999.

<sup>615</sup> (1982) 150 CLR 580.

<sup>616</sup> *Sutton v. The Queen* (1984) 152 CLR 528.

<sup>617</sup> (1989) 167 CLR 590.

<sup>618</sup> [1894] AC 57, 65.

incident or aberration. While the Nadruku case hit the newspaper headlines, undoubtedly because the defendant was a well-known rugby player, there are other cases of which no-one is aware, such as the acquittal of Bryan Raymond Cables in Victoria.

6.132 The Committee has been involved in the process of balancing community concern against the preservation of the fundamental principles that constitute the basis of our criminal system. While the Committee acknowledges that acquittal on the basis of evidence of self-induced intoxication is not a mere aberration, the overwhelming evidence was that on the whole, acquittal is relatively rare.

6.133 The vast majority of submissions made to the Committee indicated the absolute importance of preserving fundamental principles of criminal law; to do otherwise would be to throw open our criminal system to unfairness, injustice and inequality. The Committee is absolutely adamant that the operation of the criminal system in Victoria must continue to have as its foundation sound, ethical principles that provide equality and justice for all who come within its bounds.

6.134 Furthermore, the Committee wishes to make quite clear that it is not prepared to follow other state or federal jurisdictions by enacting legislation which distinguishes between offences of specific and basic intent, simply on the basis that it has been requested by the Commonwealth to do so. The Committee has undertaken an extensive study of intoxication and criminal liability so that its members could reach their own conclusions. It has done so independent from extraneous pressure and as a consequence of this intensive review, the Committee has concluded that the adoption of legislation similar to that suggested by the Commonwealth is absolutely inappropriate for Victoria.

6.135 In refusing to recommend the enactment of legislation that distinguishes between specific and basic intent offences, the Committee has also recognised the strong public opinion that acquittal on the basis of excessive consumption of alcohol is unacceptable. Importation into the Victorian criminal system of illogical and artificial distinctions would not necessarily address the perceived mischief but could make the operation of the criminal system more complex, inefficient and unfair.

6.136 The Committee also carefully considered the introduction of a special offence of committing a dangerous and criminal act while intoxicated. The closest any jurisdiction in Australia has come to introducing a special offence of that type is the Northern Territory. In that jurisdiction the defendant, acquitted of any offence against the person, may be charged with committing a dangerous act under section

154(1) of the Criminal Code 1983 (NT). This provision is not a special offence that deals specifically with intoxicated offenders but rather it is a 'fall-back' provision under which offenders, whether intoxicated or not, may be held criminally responsible.

6.137 This provision however has been severely criticised, as have all other suggestions of creating a special offence. The Committee has concluded that to introduce a special offence would have the practical effect of eroding principles of fairness and justice, would create inequalities and again make the criminal system more complex. Ultimately the Committee finds itself unable to view the enactment of a special offence as anything but legislating against stupidity.

6.138 After carefully evaluating all the evidence, the Committee has determined that the sound ethical principles that constitute the foundation of the criminal system must be maintained and that the O'Connor case should continue to state the law in Victoria.

6.139 However, the Committee also believes that it is of the utmost importance that community concern regarding the acquittal of intoxicated offenders be addressed. The Committee has carefully considered and evaluated this community concern. It has determined that the best way of addressing the issue of intoxicated offenders is to preserve fundamental principles of criminal law but to recommend some procedural changes that will finally put to rest the issue of acquittal of intoxicated offenders.

6.140 The recommendation that places a requirement on the defence to request the jury be charged on the issue of self-induced intoxication, if a future appeal is intended, will prevent unnecessary and costly appeals.

6.141 Furthermore, the Committee believes that it is vital that a judge and jury try indictable offences where there is an issue of self-induced intoxication. In this way the issue will be able to heard and determined by the conscience of the community.

6.142 The Committee's attention was also drawn to the importance of the admissibility of evidence of prior intoxicated conduct where self-induced intoxication is an issue. The Committee therefore recommends that the rules of evidence be varied to allow evidence of prior conduct or criminal history involving alcohol or drugs to be admitted in evidence when in issue. Such an amendment will ensure that evidence of this type is not excluded.

6.143 Finally the Committee is concerned that intoxicated offenders receive appropriate treatment and rehabilitation, in particular, anger management training,

so that those who behave violently after consuming alcohol or drugs learn new ways of managing that anger. The Committee believes that it is vital that all current and any new programs be properly assessed for their effectiveness in treating such offenders; it is only in this way that truly effective programs can be put in place.

6.144 The Committee has found the issue of intoxication and criminal responsibility extremely interesting and has been conscious of the need to address all the concerns raised. It has not been an easy task but has involved the careful evaluation of our criminal system and the ethical principles that form its foundation, as against the strongly held view of the community on such matters.

6.145 The Committee believes that its recommendations achieve a delicate balance and will, through procedural change, prevent the criticism the decisions of Nadruku and Cables drew from the profession, the media and the community. It believes that this will be achieved without abrogating long established and accepted criminal justice principles. The Committee therefore hopes that its report will be welcomed by all sections of the community and looks forward to the implementation of its recommendations.

## APPENDIX A

## LIST OF SUBMISSIONS

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
1	27 November 1998	Mr A. Klys	Private Citizen
2	3 December 1998	Ms J. Mattei	Private Citizen
3	3 December 1998	Mr R. Purje	Private Citizen
4	11 December 1998	Mr J. R. Vanselow	Private Citizen
5	9 December 1998	Mr R. Pinkerton	Private Citizen
6	14 December 1998	Mr M. O'Brien	Victoria Legal Aid
7	14 December 1998	Ms M. Lyons	NT Attorney-General's Department
8	14 December 1998	Mr R. Miller QC	Director Public Prosecutions - Qld
9	18 January 1999	Dr A. Blankfield	Private Citizen
10	7 January 1999	Ms H. Wighton	Legal Services Commission - SA
11	18 January 1999	Mr P. Nerri	Middle Australia
12	22 January 1999	Dr S. Hacker	Australian Medical Association
13	23 January 1999	Mr A. Proudfoot	Public Policy Assessment Society Inc.
14	27 January 1999	Mr W. J. Severino	Victoria Police
15	29 January 1999	Dr B. McSherry	Faculty of Law, Monash University
16	29 January 1999	Mr D. Grace	Criminal Section, Law Institute of Victoria
17	29 January 1999	Mr A. T. Kenos	Private Citizen
18	29 January 1999	Ms E. Pica	Access Employment Sunraysia Inc
19	29 January 1999	Ms D. Baker	Private Citizen
20	29 January 1999	Mr R. Punshon	Criminal Bar Association
21	29 January 1999	Mr J. Seeley	Private Citizen

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
22	1 February 1999	Mr L. R. Prins	Department of Police and Public Safety - Tas
23	1 February 1999	Mr P. Carter	Royal Australasian College of Surgeons
24	1 February 1999	Dr S. Rajaratnam, Dr M. Lenne and Assoc. Prof. J. Redman	Department of Psychology, Monash University
25	4 February 1999	Mr R. Inglis	Victorian Aboriginal Legal Service
26	2 February 1999	Mr E. Walker	Victorian Community Council Against Violence
27	9 February 1999	Mr D. Curtain	The Victorian Bar
28	17 February 1999	Chief Judge Waldron	County Court Of Victoria
29	5 March 1999	Dr I. Leader-Elliot	Private Citizen
30	12 March 1999	Mr B. C. Ruxton	Returned Services League of Australia - Victorian Branch
31	19 March 1999	Ms M. D'Arcy	CASA House
32	19 March 1999	Mr N. Barlow	Barlow & Co, Solicitors & Attorneys
33	16 April 1999	Assoc. Prof. J. Willis	School of Law and Legal Studies, LaTrobe University
34	16 April 1999	Ms J. Burnett	Women's Legal Centre - ACT
35	29 March 1999	Ms F. Hampel	Liberty Victoria

## APPENDIX B

## LIST OF WITNESSES

<i>No.</i>	<i>Date of Hearing</i>	<i>Witness</i>	<i>Affiliation</i>
1	15 March 1999	Judge Mullaly	County Court, Victoria
2	29 March 1999	Ms F Hampel, QC	President, Liberty Victoria
3	29 March 1999	Dr S Rajaratnam Prof J Redman	Department of Psychology, Monash University
4	29 March 1999	Ms F Broughton Mr T Wilmot	Victorian Community Council Against Violence
5	29 March 1999	Ms M Darcy Ms M Heenan	Centre Against Sexual Assault
6	29 March 1999	Dr R Vine	Forensic Psychiatrist
7	29 March 1999	Mr J Willis	Criminal Barrister and Lecturer, La Trobe University
8	29 March 1999	Mr G Flatman, QC Mr W Morgan-Payler, QC	Director of Public Prosecutions Senior Prosecutor for the Queen
9	30 March 1999	Mr T Munro Mr R Inglis	Principal Legal Officer Chief Research Officer Victorian Aboriginal Legal Service Co-operative Ltd
10	30 March 1999	Mr M O'Brien Mr M Dicconson Mr C Mandy	Criminal Law Division, Victoria Legal Aid Criminal Law Section, Law Institute of Victoria
11	30 March 1999	Chief Inspector T Cartwright Superintendent K Stephens	Strategic Development Department Prosecutor Victoria Police
12	30 March 1999	Dr B McSherry	Senior Lecturer and Associate Dean, Faculty of Law, Monash University
13	30 March 1999	Dr T Watson-Munro	Forensic Psychologist
14	30 March 1999	Mr R Punshon Mr R Bourke	Victorian Criminal Bar Association

<i>No.</i>	<i>Date of Hearing</i>	<i>Witness</i>	<i>Affiliation</i>
15	30 March 1999	Mr R Richter, QC Dr D Neal Mr J Morrow	The Victorian Bar

## APPENDIX C LIST OF INTERSTATE MEETINGS

<i>No.</i>	<i>Date of Meeting</i>	<i>Representative</i>	<i>Affiliation</i>
1	8 February 1999 Sydney	Mr A Haesler	Attorney-General's Department Criminal Law Division
2		Mr N Cowdrey, QC Mr M Blackmore Ms R Gray	Director Public Prosecutions Deputy Director Deputy Solicitor Public Prosecutions Office
3		Assoc. Prof. M Findlay Assoc. Prof J Stubbs Ms M Kaye Mr G Coss	Institute of Criminology Sydney University
4	9 February 1999 Sydney	Judge Shillington Judge Flannery	District Court of NSW
5		Mr D Humphreys Mr M Marshall Ms C Farnan Ms S Mullany	Manager Solicitor Advocate Senior Solicitor Solicitor Criminal Law Division, Legal Aid
6		Mr J Nicholson, S.C.  Mr C Gilmore Mr D Price Mr P Cloran Ms L Horler Mr J Garbett Ms D Sweeney	Deputy Senior Public Defender  Magistrate's Court
7	10 February 1999 Brisbane	Mr M Shanahan Mr B Devereaux	Public Defender Acting Deputy Public Defender Legal Aid Queensland
8		Mr P Byrnes Mr J Costanzo	Executive Director Principal Legal Consultant Department of Justice
9		Prof. R Homel Dr R Wortley Assoc. Prof. K Daly Dr A Stewart Ms J Ransley Mr S Smallbone	School of Criminology, Griffith University

<i>No.</i>	<i>Date of Meeting</i>	<i>Representative</i>	<i>Affiliation</i>
10	11 February 1999 Brisbane	Mr R Miller, QC Mr M Byrne, QC	Director Deputy Director of Public Prosecutions
11	6 April 1999 Adelaide	Mr M Goode	Legal Officer Attorney-General's Department
12		Mr B Braithwaite Ms H Wighton	Chief Legal Counsel Legal Resources, Training and Policy Co-ordinator
		Mr P Haskett	Acting Director Legal Services Commission
13		Mr I Leader-Elliott	Senior Lecturer/Faculty of Law University of Adelaide
14		Mr P Rofe, QC Ms G Davison	Director of Public Prosecutions Senior Prosecutor
15		Mr Kenneth Trevor Griffin, LLM, MLC	Attorney-General (SA)
16	7 April 1999 Darwin	Mr G Cavanagh, SM	Magistrate, NT Magistrates Court
17		Mr S Southwood Ms M Ceresa	President Executive Officer NT Law Society
18	8 April 1999 Darwin	Sir William Kearney Mr T Riley	Supreme Court Justices (NT)
19		Mr R Wild, QC Ms E Kelly Ms Z Marcham	Director Public Prosecutions (NT) Northern Territory Attorney-General's Department
20		Mr R Coates	Director, Legal Aid Commission (NT)
21		Mr A. Asche Mr P. Jamieson Mr J. Hughes Mr C. Boyce Ms N. Babic Mr D. de Zwart	Chairman Executive Officer Solicitor Solicitor Solicitor Solicitor Law Reform Committee (NT)

## APPENDIX D - DRUG REHABILITATION PROGRAMS

Name	Phoned	Catchment	Age	Term	Assessment & Cost	Charges	Details
Bridge (at Warnambool)	(03) 55614453	All	No limit	Long term (3 months)	<ul style="list-style-type: none"> <li>No assessment</li> </ul>	\$220 per fortnight	<ul style="list-style-type: none"> <li>Very strict condition</li> <li>8 bed unit</li> <li>waiting list is not specified</li> <li>program may involve support agency such as VOSACOATS</li> <li>Need to fill in an application form or can rely on profile report from a welfare worker or a chaplain</li> </ul>
Moreland Hall	9386 2876	Northern region	Over 16	6 days fixed period	<ul style="list-style-type: none"> <li>Have to come down for assessment</li> <li>No cost</li> </ul>	Not specified	<ul style="list-style-type: none"> <li>Waiting period is 7 to 10 days for a bed</li> <li>Only for detoxification purposes</li> </ul>
Odyssey	9510 5394	All	No limit	Long term	<ul style="list-style-type: none"> <li>In custody assessment is possible, cost is \$80</li> <li>Other assessment is \$20</li> </ul>	Social security	<ul style="list-style-type: none"> <li>To make appointment need to ring at 4-5 PM</li> <li>Long waiting list</li> <li>Usually starts with meetings for 2 weeks and then the program continues until completely withdrawn from drugs.</li> </ul>
Open Door <i>Steve Golding</i>	9329 6988	All	Over 18	Long term, not specified	<ul style="list-style-type: none"> <li>In custody assessment can be arranged within 24 hours</li> <li>No cost</li> </ul>	\$224 per fortnight	<ul style="list-style-type: none"> <li>32 bed centre that provides <b>only</b> for homeless men interested to improve long term option</li> <li>prefer those who are desperate</li> <li>single room</li> <li>24 hours staffed</li> <li>client will be linked and expected to work with a social worker</li> <li>appropriate for post custodial work</li> </ul>

							<ul style="list-style-type: none"> <li>• very strict requirement</li> </ul>
St Vincent Hospital (De Paul house)	9228 2624	All	No limit	Short term (7 days)	no cost, has to come down for assessment	Medicare	<ul style="list-style-type: none"> <li>• Call at 7 PM for phone pre-assessment</li> <li>• Mostly for detoxification purposes</li> </ul>
Teen Challenge (Gate-houses) <i>Malcolm Doswell</i>	(03) 5968 6824	All	18 – 55	12 months residency	Maybe prepared to assess in custody	\$200 admin. Fee & approx. \$300 for first week, after that its free	<ul style="list-style-type: none"> <li>• Very strict program</li> <li>• Christian based program</li> <li>• The gatehouse is at Emerald, but the rehabilitation farm is at Kyabirn, close to Shepparton.</li> <li>• Normal intake usually involves 4 to 5 interviews which will take approximately 4 weeks</li> <li>• Waiting list is 4-5 weeks</li> </ul>
The Basin (run by Salvation Army)  Ross Webster	9762 1166	All	No limit	Long term (3 months minimum, no maximum)	<ul style="list-style-type: none"> <li>• In custody assessment by Salvation Army officer</li> <li>• No cost</li> </ul>	\$210 per fortnight (can be taken from gov. benefits)	<ul style="list-style-type: none"> <li>• Waiting period is approximately 1 week</li> <li>• 26 bed centre</li> </ul>
Western Port Drugs and Alcohol Detox	9792 0044	Southern suburbs	No limit	Short term (4-7 days)	Not specified	Not specified	<ul style="list-style-type: none"> <li>• only available for <b>detoxification</b>, a person who has been in custody for more than 4 days (the time it takes to withdraw) will not be eligible.</li> <li>• Not a rehabilitation centre</li> </ul>
Windana	9529 7669	All	No limit	Long term	<ul style="list-style-type: none"> <li>• Has to come down for assessment (approx. 1 hour)</li> <li>• Cost \$20</li> </ul>	78% of income	<ul style="list-style-type: none"> <li>• To make appointment need to ring at 10 am on: Monday for appointment of Wednesday and Thurs. Wednesday for appointment on Thurs. and Frid. Friday for appointment on Monday and Tuesday</li> <li>• Average waiting list approximately 3 months, but different beds available for different region.</li> </ul>
VOSACOATS Hugh Tighe	9328 4999	All	No limit	Referral service only,	No cost		<ul style="list-style-type: none"> <li>• Victorian Offenders Support Agency Community Offenders Advice and</li> </ul>

				from the court or correction officer			<p>Treatment Service'</p> <ul style="list-style-type: none"> <li>• Can prepare a pre-sentence report if the Magistrate asked for it</li> <li>• Can make referral after assessing client that has been referred to by the court, ie. Condition of the court order.</li> </ul>
YSAS line (24 hours)	9244 2450	All	12 to 21	Depends on each client	No cost	No cost	<ul style="list-style-type: none"> <li>• Youth Substance Abuse Services</li> <li>• Need to call the 24 line in order to get a referral to a drug rehabilitation program</li> <li>• The program is based on individual client, therefore, there is no average time limit.</li> </ul>
Upton House	9895 3333 (Hospital) (98953348( Direct line)	Eastern Metropolitan Region	No limit	7 day stay in residential unit. No cost. Medication is \$20.00	<ul style="list-style-type: none"> <li>• Assessment based. No cost. Free service. If client needs medication \$20</li> </ul>	No charges for any of the services. Normal charges apply for pharmaceuticals.	<ul style="list-style-type: none"> <li>• Residential withdrawal.</li> <li>• Home Withdrawal</li> <li>• Outpatient withdrawal</li> <li>• On-going counselling of client and family.</li> <li>• Waiting period. To be assessed the waiting period is about 2 days.</li> </ul>
MRK & Associates	9571 49990 Fx: 9571 4990 Mobile: 0413 313 543	Greater Melbourne areas	No age limit	Detox period of around 5 – 14 days. Depends on what client needs	<ul style="list-style-type: none"> <li>• Assessment based service. Fee for Court report \$200. Court report to be written - \$400.</li> </ul>	Overall charge of \$2,200 (due to travelling costs). If in the area, costs are about \$300 - \$400	<ul style="list-style-type: none"> <li>• Very personalised service.</li> <li>• No waiting period. Prefer to get client in as soon as they request help.</li> <li>• Overall charge of \$2,200, includes assessment fee. First day MRK will spend five hours with client and thereafter approximately a couple of hours per day.</li> </ul>
Outreach	9735 4188	Eastern area ie: Yarra, Knox	Adults 17 & up	No fixed term. Depends on client.  Non residential service.	<ul style="list-style-type: none"> <li>• No cost. Donation based organisation</li> <li>• Assessment based interview – no fee</li> </ul>	N/A – non residential	<ul style="list-style-type: none"> <li>• Donation based (accept donations of \$5.00 and up)</li> <li>• Non residential service. Clients to attend on a voluntary basis and counselled individually.</li> <li>• VOSA COATS worker attends service</li> <li>• Waiting period sometimes up to 3 weeks.</li> </ul>

					<ul style="list-style-type: none"><li>• If a Court report is required there is a fee.</li></ul>		<ul style="list-style-type: none"><li>• Emergencies will be dealt with within a week.</li><li>• When phoning ask for the duty worker.</li><li>• Also act as a referral service, deal with pre-detox and post detox counselling.</li></ul>
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