

TASMANIA
LAW REFORM
INSTITUTE

Intoxication and Criminal Responsibility

FINAL REPORT NO 7

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Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

Acknowledgments

This report was prepared by Dr Rebecca Bradfield, Professor Kate Warner and Ms Jenny Rudolf. The Institute would like to acknowledge the assistance of Mr Glen Gibbs in providing drafting advice.

Background to this report

The publication of this final report is made following consultation with the public and participants in the Criminal Justice System. The consultation was performed by the release of an Issues Paper on this topic in March 2005. The Issues Paper examined the law of intoxication and criminal responsibility, in particular the extent to which an accused person should be able to rely upon intoxication caused by alcohol or drugs to negate criminal responsibility. The Issues Paper argued that the law in Tasmania in relation to intoxication was uncertain, illogical, inconsistent, unprincipled and unduly complex, and therefore in need of reform. Several options for reform were discussed in the Issues Paper:

- Option 1 – Allow evidence of self-induced intoxication to be relevant only to specific intention. This is to reaffirm the previously recognised *Criminal Code* (Tas) position in accordance with *Snow's case*;
- Option 2 – Allow evidence of self-induced intoxication to be relevant to intention and knowledge;
- Option 3 – Allow evidence of self-induced intoxication to be relevant to intention, knowledge and subjective recklessness. This is to adopt the *Criminal Code Act 1995* (Cth) section 8 position;
- Option 4 – Allow evidence of self-induced intoxication to be relevant to negate any subjective mental element, including section 13(1) voluntary and intentional act. This is to adopt the Australian common law position.

Other possible reforms include:

- Option 5 – Create a special offence;
- Option 6 – Special treatment of involuntary intoxication;
- Option 7 – Procedural restrictions on the defence;
- Option 8 – Clarify the relationship between intoxication and the defences.

The following people responded to the Issues Paper:

The Hon Chief Justice Underwood AO,

Ms K Baumeler – Chair, Criminal Law Sub-committee of the Law Society of Tasmania,

Mr M Miller – Principal Legal Officer, Tasmania Police,

Mr D G Coates SC – Assistant Director of Public Prosecutions, Office of the Director of Public Prosecutions,

Mr J Blackwood (oral submission) – Senior Lecturer, Faculty of Law University of Tasmania,

Anonymous – name and address provided to Institute.

In the preparation of this report detailed consideration has been given to all responses.

We thank these people for taking the time and effort to respond.

This final report is available on the Institute's web page at: www.law.utas.edu.au/reform or can be sent to you by mail or email.

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Summary of recommendations

Recommendation 1

It is recommended that legislation be enacted to clarify the law of intoxication in Tasmania.

Recommendation 2

It is not desirable to enact in Tasmania legislation that restricts the relevance of self-induced intoxication to crimes of specific intent.

Recommendation 3

If legislation is adopted in Tasmania that restricts the relevance of self-induced intoxication to crimes of specific intent, it is recommended that the legislative provision does not refer to ‘capacity’ to form the specific intent.

Recommendation 4

It is not desirable to introduce in Tasmania legislation that restricts evidence of self-induced intoxication to questions of intention and actual knowledge.

Recommendation 5

It is not desirable to introduce in Tasmania legislation that restricts evidence of self-induced intoxication to questions of intention, knowledge and subjective recklessness.

Recommendation 6

It is recommended that evidence of intoxication should be relevant to the requirement in section 157(1)(c) as to whether the accused ‘ought to have known’ that his or her act was likely to cause death in the circumstances.

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

Recommendation 7

It is recommended that Option 4 be adopted. This means that evidence of intoxication would be relevant to any mental element, including intention, knowledge (including whether the person ought to have known), foresight of the consequences, and whether the act was voluntary and intentional, (section 13(1)).

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

Recommendation 8

It is not desirable to enact a specific offence of criminal intoxication.

Recommendation 9

The law of involuntary intoxication should be clarified.

Recommendation 10

Option 4 should also be applied to involuntary intoxication. This means that evidence of intoxication would be relevant to any mental element, including intention, knowledge (including whether the person ought to have known), foresight of the consequences, and whether the act was voluntary and intentional, (section 13(1)).

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

Recommendation 11

It is recommended that procedural restrictions in relation to evidence of intoxication should not be adopted in Tasmania.

Recommendation 12

It is recommended that the relationship between evidence of intoxication and self-defence be clarified.

Recommendation 13

It is recommended that the law specifying the relationship between evidence of intoxication and the criminal defences should reflect the general principle that intoxication is relevant as an exculpatory factor to any subjective test, to any partially subjective test but not to any wholly objective test.

(Refer to draft sections 17(2) – (6) *Criminal Code* in the Appendix).

Executive summary

Australian studies - self reports by prisoners and detainees, analysis of urine samples within 48 hours of arrest and victim surveys - suggest that many offenders commit crime while under the influence of alcohol and/or drugs. Moreover, criminal assaults are common in and around licensed premises. Together with increased scientific knowledge about the effects of alcohol and drugs on behaviour and mental state, this indicates that intoxication has the potential to be a relevant consideration in criminal trials.

This Report is not concerned with alcohol and drugs as a cause of crime, but with the question of the extent to which an accused person should be able to rely upon intoxication caused by alcohol or drugs as a defence to a criminal charge. Historically, the criminal law did not provide a drunken offender with any exemption from criminal responsibility. And while no common law jurisdiction provides a separate defence for self-induced or voluntary intoxication, if intoxication causes a condition inconsistent with criminal responsibility, the prosecution may not be able to prove all the elements of the crime. The extent to which an accused is permitted to rely upon intoxication in this way differs between jurisdictions. It is a controversial question which requires the balancing of competing factors, primarily, the extent to which principle and logic should give way to policy considerations.

The current law in Tasmania

There are three separate sets of rules applying to self-induced intoxication in Tasmania depending on whether the offence is one which is governed by the *Criminal Code* (Tas) (the ‘Code’) (indictable offences or summary offences to which the Code applies), the common law (summary offences to which the Code does not apply) or the *Criminal Code Act 1995* (Cth) (Commonwealth offences) (the ‘Commonwealth Code’).

Crimes and summary offences with a Code parallel

If the Code applies, section 17(2) provides that intoxication is a defence to crimes of ‘specific intent’ if by reason of intoxication the accused is *incapable of forming the specific intent*. A specific intent crime is a crime which requires the Crown to prove an intent to produce a particular result. Examples include murder on the basis of section 157(1)(a) (which requires an intent to kill) or committing an unlawful act intended to cause bodily harm contrary to section 170. There is an exception created by section 14A(2), which creates a category of specific intent crimes (attempts to commit certain sexual offences) where an accused cannot rely on evidence of self-induced intoxication to deny that he or she acted with the requisite specific intent for the attempted crime. Section 17(1) provides that if intoxication produces insanity, the accused can rely upon the defence of insanity in section 16.

Since the decision of the Court of Criminal Appeal in 1998 in *Weiderman (Attorney-General’s Reference No 1 of 1996)*,¹ the accused may also rely upon intoxication to explain absence of knowledge as to consequences or circumstances but not imputed knowledge. An example of a crime which requires proof of knowledge as to consequences is murder on the basis of section 157(1)(b). This requires, in addition to a specific intent to cause bodily harm, actual knowledge that death was a likely consequence. An example of a crime requiring specific knowledge as to circumstances is receiving stolen property. For this crime the Crown must prove that the defendant received stolen property with actual knowledge that it was stolen. Under the *Weiderman* defence any degree of intoxication is relevant. The issue is not lack of capacity but lack of knowledge. Murder on the basis of the second limb of section 157(1)(c) is a crime of imputed knowledge, as it requires proof of an unlawful act which the accused ought to have known to be likely to cause death. An accused cannot escape criminal responsibility for murder under this provision if by reason

¹ (1998) 7 Tas R 293.

of his intoxicated state it could not be said he ought to have known death was a consequence of his actions. In deciding what he ought to have known his intoxicated condition must be ignored.

The decision in *Weiderman* confirmed the decision in *Snow*² that intoxication cannot be relied upon to deny section 13 intent (the requirement that the accused's act be voluntary and intentional). So in a case of rape for example, an accused cannot argue that the act of sexual intercourse was not a willed act. However, the decision gives no guidance as to the relevance of intoxication in relation to crimes like wounding or arson which require recklessness (foresight or awareness of the consequences).

Intoxication and other defences

As well as being relevant to the issue of intent, there are a number of defences to which the issue of intoxication could in theory be relevant, particularly self-defence. Section 46 of the *Code* provides that a person is justified in using, in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use. This can be divided into two requirements:

- the subjective belief of the accused in the need for self-defence;
- the objective assessment of whether the force was reasonable in the circumstances believed to exist by the accused.

Intoxication is clearly *potentially* relevant to both of these requirements, however it is unclear to what extent the current law permits it to be taken into consideration.

As the first requirement is subjective, it should logically follow that any evidence relating to the defendant's mental state is relevant. Thus the first requirement of the defence could be established by a genuine, though drunken and mistaken, belief in the need for self-defence. This interpretation is supported by:

- the amendment of section 46 (the section formerly required that the belief in the need for self-defence also be 'reasonable');
- the fact that since *Weiderman* section 17 does not cover the field;
- the holding in *Walsh*³ that evidence of a mental disease not amounting to insanity is relevant to the first limb of the test (this supports the general proposition that anything that is logically relevant to the accused's state of mind should be admissible).

On the other hand it can be argued that evidence of intoxication should not be admissible in this way because:

- the amendment removing the requirement that the belief be 'reasonable' was made in 1987, when it was the accepted view that section 17 covered the field and so it was unlikely to have been anticipated that this amendment would have made intoxication relevant to self-defence;
- comments by former Chief Justice Cox in *Weiderman*: 'I find it hard to imagine that Parliament ever contemplated the possibility that this might be the case and intended it to be so.'
- on policy grounds – people should not be allowed to escape criminal responsibility because of voluntarily induced drunkenness. In the English case of *O'Grady*⁴ the courts declared evidence of mistake of fact induced by voluntary intoxication to be irrelevant to self-defence (thus creating an exception to the general rule that mistake of fact is so relevant).

The second requirement is that the force must be objectively reasonable 'in the circumstances as D believed them to be'. Obviously then, the decision as to whether or not evidence of intoxication can be taken into account in considering 'the circumstances as D believed them to be', will be determinative of whether evidence of intoxication is relevant to this second requirement.

² [1962] Tas SR 271.

³ (1991) 160 A Crim R 419.

⁴ [1987] 3 WLR 321.

Involuntary intoxication

Intoxication produced by trickery or fraud, the unforeseen side effects of a drug, or unwitting inhalation of fumes or gas is generally regarded as being governed by less restrictive rules than self-induced intoxication. However, how involuntary intoxication should be dealt with in Tasmania is unclear. It seems likely that it could be regarded as being governed by the common law by virtue of the saving of common law defences in section 8 of the *Criminal Code Act 1924* (Tas). Alternatively, the *Code* could be interpreted as providing no obstacle to using involuntary intoxication to explain absence of any requisite intent. The third possibility is that the same rules could be applied to involuntary intoxication as are applied to self-induced intoxication.

Summary offences

The common law applies to summary offences that have no parallel offence. This means that the High Court's decision in *O'Connor*⁵ applies and any degree of intoxication is relevant to the issue of the accused's possession of the requisite intent, whether the intent is specific intent, knowledge, recklessness or the issue is whether the accused's physical act was voluntary and intentional.

Commonwealth offences

The principles of criminal responsibility in the *Commonwealth Criminal Code* apply to all Commonwealth offences. In relation to intoxication, the *Commonwealth Criminal Code* 'imposes relatively few limits on the purposes for which prosecution and defence may rely on evidence of intoxication'.⁶ The main restriction is that self-induced intoxication is not to be taken into account in determining issues of voluntariness and 'basic' intent.

The need for reform

It is the view of the Institute that the law in Tasmania relating to intoxication is *uncertain, illogical, inconsistent, unprincipled and unduly complex* and that this constitutes persuasive grounds for reform.

Uncertainty

Analysis of the law relating to intoxication demonstrates the uncertainty of the law in relation to the following issues:

1. The relevance of intoxication to subjective recklessness: it is by no means clear whether the decision in *Weideman* could be extended to allow intoxication to deny the intent required for common crimes and summary offences like grievous bodily harm, wounding, arson, damage to property and assault.
2. The law relating to involuntary intoxication is unsettled.
3. It is unclear whether a drunken mistake is relevant to the defence of self-defence.

⁵ *R v O'Connor* (1980) 146 CLR 64.

⁶ Leader-Elliott I, *The Commonwealth Criminal Code: A Guide for Practitioners*, Commonwealth Attorney-General's Department, 2002, 137 (hereafter I Leader-Elliott, 2002).

Unprincipled, illogical, inconsistent and unduly complex

There are fundamental flaws in section 17 of the Code

There are a number of oft-repeated criticisms of intoxication laws based on *Beard's Case*,⁷ the case from which section 17 of the *Code* is derived. First, that it is contrary to fundamental principles of criminal responsibility to allow an offender to be convicted despite the absence of a guilty mind. Secondly, that the division between specific and basic intent is arbitrary and its rational – that of acquittal for a more serious offence and conviction for a less serious offence – does not apply consistently. Nor does the distinction necessarily distinguish between serious and less serious crimes. Moreover, the courts have found the distinction difficult to apply and important questions, such as whether or not attempted rape is a crime of ‘specific intent’, are not easily answered. Thirdly, the criticism of the emphasis of section 17(2) on incapacity is unanswerable. It is contrary to fundamental principle to insist that it is only evidence of *incapacity* to form the specific intent which can be considered by the jury, rather than evidence which may be capable of raising a reasonable doubt about whether the accused had the requisite specific intent.

Decisions of the Court of Criminal Appeal have compounded the complexity of the law

Decisions of the Court of Criminal Appeal in *Weiderman* and *Hawkins (No 3)*⁸ add two aspects of inconsistency and complexity to the intoxication rules:

First, since the decision in *Weiderman's case*, there are now two sources of intoxication rules, to which different degrees of intoxication are relevant: incapacity for specific intent and any degree of intoxication for knowledge. This creates an anomaly in section 157(1)(b) of the *Code* (a category of murder) where different degrees of intoxication are relevant to the specific intent element (intent to cause bodily harm) and the knowledge element (actual knowledge that death is likely). Moreover, if intoxication is relevant to subjective recklessness, the different rules of intoxication may mean that intoxication is not relevant to a more serious crime (such as wounding with intent contrary to section 170) but is relevant to a less serious crime (such as wounding contrary to section 172). It is contrary to the traditional rationale for ameliorating the intoxication rules that intoxication should be available for less serious rather than more serious crimes.

Secondly, there are practical problems with applying the law when there is evidence of intoxication and mental disorder. In the case of murder contrary to section 157(1)(c), the combined effect of *Weiderman's case* and *Hawkins (No 3)* is that the jury would need to be directed that evidence of *mental disease* (falling short of providing a defence under section 16 of the *Code*) is relevant to the question of whether the accused ought to have known his or her act was likely to cause death but any evidence of *intoxication* must be disregarded. From a psychiatric point of view, it is difficult if not impossible to separate the effect of the two factors. This is an illustration of the criticism that the law fails to take account of scientific knowledge in relation to intoxication.

Different rules for some summary offences and Commonwealth offences

Compounding the complexity and inconsistency of the intoxication laws is the fact that different rules apply to indictable offences and summary offences with a *Code* parallel (the *Code* rules) and summary offences with no *Code* parallel (the common law). This means that an offender charged with a series of summary offences could have three different intoxication rules applying: the common law, section 17(2) and *Weiderman's case*. Moreover, since the enactment of the *Commonwealth Criminal Code*, a different set of rules applies to Commonwealth offences rather than the common law.⁹ In summary, for offences governed by the *Code* there are dual sources of intoxication rules; for summary offences without a *Code* parallel the common law applies; and Commonwealth offences are governed by the *Commonwealth Criminal Code*.

⁷ *R v Beard* [1920] AC 479.

⁸ (1994) 4 Tas R 376.

⁹ See discussion below in 3.3.

Recommendation 1

It is recommended that legislation be enacted to clarify the law of intoxication in Tasmania.

Options for reform and recommendations

As outlined in the Issues Paper, there are four basic reform options. These can be viewed as a continuum with a graduated removal of limits placed on purposes for which the defence can rely upon evidence of self-induced intoxication to deny the requisite mental element of an offence.

Option 1 – Evidence of self-induced intoxication is relevant only to specific intention.

This is to reaffirm the previously recognised *Code* position in accordance with *Snow's case*. This would mean that intoxication could not be relied upon by the accused to deny the following states of mind: knowledge, subjective recklessness and voluntariness (section 13(1) intent).

In favour of this option it can be argued that it meets community expectations that harm doers will be penalised, that limiting the defence will be a deterrent so the community will thereby be protected, and respect for the law will be maintained. Against, it is argued that the distinction between specific and basic intent crimes is uncertain and arbitrary, and is not necessarily related to offence seriousness. Moreover, to disallow evidence of intoxication to deny any requisite mental element of an offence contravenes basic principles of criminal responsibility because it enables the Crown to prove guilt without proving the requisite mental element. It can be argued that policy grounds do not justify such an approach as general deterrence is unlikely to affect potential offenders. It has also been argued that the distinction between basic and specific intent crimes leads to complexity of trials when both crimes of specific intent and basic intent are left to the jury, and to artificiality and unreality in jury decision-making.

Option 1 was supported by the Office of the Director of Prosecution and Tasmania Police.

Recommendation 2

It is not desirable to enact in Tasmania legislation that restricts the relevance of self-induced intoxication to crimes of specific intent.

Option 1 is also open to the objection that it embraces the standard of *capacity* rather than lack of intent so that an accused person could be convicted despite absence of intent if they were not blind drunk or lacking the capacity to form the specific intent. Therefore, if Option 1 were to be adopted there is the question of whether or not the test of incapacity should be abandoned.

Recommendation 3

If legislation is adopted in Tasmania that restricts the relevance of self-induced intoxication to crimes of specific intent, it is recommended that the legislative provision does not refer to 'capacity' to form the specific intent.

Option 2 – Evidence of self-induced intoxication is relevant to intention and knowledge.

This would confirm the decision in *Weiderman* that intoxication is relevant to knowledge as well as specific intent and clarify the situation in relation to subjective recklessness by making it inadmissible in relation to questions of recklessness, as well as section 13 intent.

In favour of this option is the argument that it avoids the criterion of specific intent as the determining criterion for the operation of the defence. To draw the line between knowledge and recklessness is justifiable because intoxication involves a risk of blundering or recklessness and ceases to make any consequential harm unexpected so one should not be exonerated from a drunken blunder. In other words there is principle underpinning the line. Against, it can be argued that this option does not answer the criticism of the specific/basic intent dichotomy's failure to rationally grade offences according to seriousness, social consequences or prevalence of intoxication in their commission.

There was no support in the responses for this option.

Recommendation 4

It is not desirable to introduce in Tasmania legislation that restricts evidence of self-induced intoxication to questions of intention and knowledge.

Option 3 – Evidence of self-induced intoxication is relevant to intention, knowledge and recklessness.

This is to adopt the *Commonwealth Criminal Code* section 8 position. The only limit on the admissibility of evidence of intoxication is in relation to voluntariness and 'basic intent' which equates with the first limb of section 13 – the accused's act must be voluntary and intentional. There is an exception (section 8.1.3) when conduct is 'accidental' – evidence of intoxication can be taken into account in determining whether conduct is accidental. This does not mean accidental in the 'chance event' sense (see the second limb of s 13(1)), but accidental in the sense that the act was not a willed act.

The obvious advantage of adopting the *Commonwealth Criminal Code* provisions on intoxication is that it would further the goal of unification. If this position were to be adopted for summary offences as well, it could also be argued that this would simplify the law by having one set of intoxication rules applying to all offences, indictable or summary; federal or state. On grounds of public policy it can be argued there are sound reasons for placing some limits on a plea of involuntariness by disallowing a denial of voluntariness on the basis of self-induced intoxication.

Despite these advantages, there are problems with this option. First, there is the difficulty of importing into the *Code* part of the *Commonwealth Criminal Code* which depends on meanings of intention, knowledge and recklessness and which refers to accident in terms that are foreign. Moreover, the Commonwealth solution is still open to the criticism of the specific/basic intent dichotomy – that the division is not rationally related to any policy considerations such as offence seriousness, social consequences or the prevalence of intoxication in their commission.

While there was no support in the responses received for this option, it is the view of the Institute that Option 3 has merit. It achieves uniformity with the Commonwealth position and also provides a compromise position. However, ultimately Option 3 is rejected as it is complex and contrary to fundamental principles of criminal responsibility.

Recommendation 5

It is not desirable to introduce in Tasmania legislation that restricts evidence of self-induced intoxication to questions of intention, knowledge and subjective recklessness.

Option 4 – Allow evidence of self-induced intoxication to be relevant to negate any subjective mental element, including section 13(1) voluntary and intentional act.

This option is to adopt the Australian common law position so that intoxication would be relevant to any mental element.

It accords with fundamental principles of criminal responsibility and logic, and is consistent with the common law that already applies to many summary offences. In jurisdictions where it operates it has not led to a spate of acquittals, nor is the defence frequently invoked. In practice therefore, it is unlikely to give rise to a public outcry, nor, as argued against Option 1, is public protection likely to be compromised. Finally, the change would be simple to implement and simple to explain and apply and it fits best with scientific knowledge of the effects of intoxication.

Option 4 was supported by the Chief Justice of Tasmania, the Criminal Law Sub-committee of the Law Society of Tasmania and Mr John Blackwood.

It is the view of the Institute that this should be the position adopted in Tasmania.

The Institute also considered the relevance of intoxication to the issue of imputed knowledge (that is, whether the accused ‘ought to have known’ that his or her unlawful act or omission was likely to cause death in the circumstances) contained in section 157(1)(c) of the *Code*. The relevance of intoxication was considered by the Court of Criminal Appeal in *Weiderman* and it was held (by majority) that intoxication was not relevant to ‘ought to have known’.¹⁰ While *Weiderman* is clear on this point, in view of the reforms suggested in this Report (that is, to adopt the common law approach that intoxication is relevant to negate any mental element), it was desirable to consider whether the *Weiderman*’s position should continue.

There are two possible approaches:

- (a) **intoxication is admissible as being relevant to the capacity/knowledge actually possessed by the accused.** This was the view of the minority (Crawford and Zeeman JJ) in *Weiderman*.
- (b) **intoxication is not relevant as ‘ought’ permits the introduction of a policy that self-induced intoxication should be left out.** This was the majority view (Cox CJ, Underwood and Wright JJ) in *Weiderman*.

It is the view of the Institute that evidence of intoxication should be available to the jury in their determination of what an accused ‘ought to have known’. This means that the Institute adopts the minority view in *Weiderman*.

Recommendation 6

It is recommended that evidence of intoxication should be relevant to the requirement in section 157(1)(c) as to whether the accused ‘ought to have known’ that his or her act was likely to cause death in the circumstances.

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

Recommendation 7

It is recommended that Option 4 be adopted. This means that evidence of intoxication would be relevant to any mental element, including intention, knowledge (including whether the person ought to have known), foresight of the consequences, and whether the act was voluntary and intentional, (section 13(1)).

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

¹⁰ (1998) 7 Tas R 293.

Option 5 – Create a special offence

If the limits on relying upon intoxication as an exculpatory factor were to be removed, in other words if Option 4 were to be adopted, it has been argued that an offence of dangerous intoxication should be enacted to ensure that the intoxicated offender does not go unpunished. Problems with such an approach include that it may encourage plea bargaining and that it would impose a difficult sentencing scenario for judges in dealing with those convicted. A rather different option has been to create a more general offence of doing an act or making an omission that creates a danger which ought to have been foreseen. Case law supports the existence of an offence of causing grievous bodily harm or wounding by criminal negligence and the creation of a specific offence of causing grievous bodily harm or wounding by criminal negligence in possession of a weapon is outside the scope of this Report.

Recommendation 8

It is not desirable to enact a specific offence of criminal intoxication.

Option 6 – Special treatment of involuntary intoxication

There are three alternatives: (1) to add a separate defence of involuntary intoxication similar to that in the *Commonwealth Criminal Code* which would provide a defence to a person if their conduct was a result of intoxication that was not self-induced, or (2) to merely provide that intoxication is relevant to negate any mental element including voluntariness (in other words to apply Option 4 to involuntary intoxication) or (3) to apply the insanity provisions in the *Code* (ie section 16) to involuntary intoxication.

The Criminal Law Sub-committee of the Law Society of Tasmania and the anonymous response addressed the need to clarify the law in relation to involuntary intoxication and both responses supported alternative (1); that is to enact a separate defence of involuntary intoxication.

After considering the alternatives for reform, the Institute's view is that alternative (2) is the preferred model. This alternative provides that evidence of involuntary intoxication is relevant to negate any mental element, including voluntariness. This view holds regardless of the approach to reform in relation to self-induced intoxication. The Institute has recommended Option 4 (adopt the common law position) as the preferred model for reform to the law of self-induced intoxication. If this recommendation were adopted, it would merely involve applying Option 4 to involuntary intoxication as well as self-induced intoxication.

Recommendation 9

The law of involuntary intoxication should be clarified.

Recommendation 10

Option 4 should also be applied to involuntary intoxication. This means that evidence of intoxication would be relevant to any mental element, including intention, knowledge (including whether the person ought to have known), foresight of the consequences, and whether the act was voluntary and intentional, (section 13(1)).

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

Option 7 – Procedural restrictions on the defence

In South Australia, intoxication is not to be left to the jury unless requested by the defence and in the absence of such a request a defendant is prevented from using intoxication as a ground of appeal.

Recommendation 11

It is recommended that procedural restrictions in relation to evidence of intoxication should not be adopted in Tasmania.

Option 8 – Clarify the relationship between intoxication and the defences.

For the defence of self-defence, there is uncertainty as to whether an intoxicated mistake can be taken into account in assessing the reasonableness of force in the circumstances as the accused believed them to be. Mr John Blackwood, the Criminal Law Sub-committee of the Law Society of Tasmania, and the Office of the Director of Public Prosecution all agreed in their responses that the position in relation to self-defence should be clarified.

After considering the alternatives for reform, the Institute's view is that for the purposes of self-defence, evidence of intoxication may be considered:

- (a) for the purpose of assessing the accused's belief in the need for self-defence;
- (b) for the purpose of determining the circumstances as the accused believes them to be; and
- (c) as a physical characteristic of the accused in determining whether the response was reasonable.

In formulating its recommendations on this issue, the Institute considered that it was sensible to include the provision relating to the relationship between self-defence and evidence of intoxication in the general provision dealing with intoxication and criminal responsibility. The Institute also considered that it was desirable to frame its recommendations in a form that allowed for the more general application of the principles enunciated, so that the reforms clarified the relationship between intoxication and criminal defences generally.

Recommendation 12

It is recommended that the relationship between evidence of intoxication and self-defence be clarified.

Recommendation 13

It is recommended that the law specifying the relationship between evidence of intoxication and the criminal defences should reflect the general principle that intoxication is relevant as an exculpatory factor to any subjective test, to any partially subjective test but not to any wholly objective test.

(Refer to draft sections 17(2) – (6) *Criminal Code* in the Appendix).

Part 1

Introduction

1.1.1 This report is concerned with the relevance of intoxication to criminal responsibility. ‘Intoxication’ in this context includes intoxication caused by alcohol or drugs. Intoxication is not a separate defence. A person charged with an offence cannot merely say, ‘I was drunk’ and create a defence that is recognised by law. In fact, Bronitt and McSherry write of evidence of intoxication operating as a double-edged sword:

[intoxication] may negate the elements of a crime if it causes a condition inconsistent with criminal responsibility. Evidence of intoxication may be damaging for the defence as it may invite an inference of intention or motive from the very fact that the accused was intoxicated.¹¹

1.1.2 This was recognised in *R v O’Connor (O’Connor’s case)* by Murphy J who commented that the ‘inferences to be drawn from intoxication are not all one way: evidence of intoxication may result ... in a more ready acceptance that the fault element exists on the supposition that intoxication reduces inhibition’.¹² In other words, evidence of intoxication may be damaging to an accused as it may provide an explanation as to why a person may commit a crime.¹³ Leader-Elliott comments that:

The issue [of intoxication and criminal responsibility] is most likely to arise in charges involving injury to the person or damage to property. In general evidence of intoxication tends to reinforce the case for the prosecution. If the defendant was under the influence of alcohol, the most likely inference is that injury was inflicted intentionally or damage done intentionally as a consequence of drunken aggression.¹⁴

The potential danger to an accused in relying on evidence of intoxication is reflected in the relatively small number of offenders who rely on evidence of intoxication at trial when compared to the number of offenders who commit crimes while under the influence of drugs or alcohol.¹⁵ There is support for this sentiment in the response of Tasmania Police who observed that intoxication is not often relied upon: ‘it is apparent that intoxication is very rarely raised to negate criminal responsibility in either the Criminal Court or the Magistrates Court’. In the response of the Office of the Director of Public Prosecutions (DPP), it was stated that:

I know of no trials in the past 12 months where intoxication has been raised as a defence to negate criminal responsibility. Indeed in my 18 years of being a Crown counsel I believe intoxication has been raised on relatively few occasions.

1.1.3 This may be because as the Criminal Law Sub-committee of the Law Society of Tasmania observes ‘it is very easy to say I was drunk and I can not remember, but proving intoxication is another matter entirely’. However, evidence of intoxication is relevant to criminal responsibility. Intoxication ‘impairs the capacities to perceive and interpret reality and to coordinate actions to achieve objectives. These incapacities can have an obvious bearing on criminal responsibility when the prosecution must prove that the defendant was aware of a risk or intended a consequence’.¹⁶ Although in some jurisdictions intoxication is relevant to voluntariness, it is not often raised ‘... partly because of the difficulty in getting a

¹¹ Bronitt S and McSherry B, *Principles of Criminal Law*, 2nd ed, Thomson, 2005, 242.

¹² (1980) 146 CLR 64, 114.

¹³ Skene L, ‘Medical Aspects of Intoxication’ in Yeo S (ed), *Partial Excuses to Murder*, Federation Press, NSW 1991, 248 – 249, referring to the words of a Victorian County Court judge: ‘the defence will never raise intoxication except in the most desperate case, because the Crown will immediately say: we know now why this offence was committed – the defendant’s ordinary inhibitions were released by his drinking. We also know why he cannot answer a lot of questions he could previously answer because then he was drunk and now he’s sober. Drunkenness is lovely stuff for prosecutions’.

¹⁴ Leader-Elliott I, above n 6, 135.

¹⁵ See Part 2.

¹⁶ Leader-Elliott I, above n 6, 135.

jury to accept that the accused could carry out often complicated conduct, yet claim that this conduct was unwilling due to intoxication.¹⁷

1.1.4 In Australia, generally speaking, attitudes to alcohol (mis)use have been fairly relaxed. Leader-Elliott suggests that in most Australian communities, ‘no serious moral blame attaches to individuals who set out to become intoxicated: at all social levels over-indulgence in alcohol is an exceedingly common expression of good fellowship’.¹⁸ In general, research suggests that ‘the interpretation of intoxicated behaviour appears to have been more tolerant than interpretations of sober behaviour. A greater latitude of behaviour is generally accepted’.¹⁹ In relation to use of illicit drugs, Leader-Elliott suggests that ‘the degree of blame attributed to individuals who use illicit drugs for recreational intoxication varies according to the nature of the drug and the circumstances of its use’.²⁰

1.1.5 In contrast, the admissibility of evidence of intoxication in relation to the question of criminal responsibility has proved a highly controversial issue. The Victorian Law Reform Committee described the conflict in the following terms:

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.²¹

1.1.6 In addition, there is a ‘belief that people who do harm whilst intoxicated are blameworthy’.²² The resolution of the controversy has been considered by numerous law reform bodies in Australia and other common law jurisdictions,²³ including the report of the Law Reform Commissioner of Tasmania in 1989 that recommended the repeal of section 17 to bring the law in Tasmania into line with the leading Australian common law decision of *R v O’Connor*.²⁴

¹⁷ Bronitt S and McSherry B, above n 11, 247.

¹⁸ Leader-Elliott I, ‘Intoxication Defences: The Australian Perspective’ in Yeo S (ed), *Partial Excuses to Murder*, Federation Press, NSW 1991, 236.

¹⁹ Paton-Simpson G, ‘The varied meanings of drinking and intoxication – a review’ (1996) 23 *Contemporary Drug Problems* 221, 231.

²⁰ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 63.

²¹ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, (hereafter VLRC 1999) para 1.15.

²² Ashworth A, *Principles of Criminal Law*, Oxford University Press, 2003, 250.

²³ Commonwealth - Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: General Principles of Criminal Responsibility Final Report*, 1992; The Gibbs Committee, *Review of Commonwealth Criminal Law Interim Report: Principles of Criminal Responsibility and Other Matters*, AGPS, Canberra 1990; South Australia - Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998; Victoria – VLRC 1999, above n 21; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34, 1990; Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication*, Report No 6, 1986 (hereafter LRCV 1986); New Zealand - New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, 1984; United Kingdom - United Kingdom (UK) Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995 (hereafter ‘UK Law Commission 1995’); Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person*, Cmnd 7844, 1980; UK Law Commission, *Intoxication and Criminal Liability*, Consultation Paper No 127, 1993 (hereafter ‘UK Law Commission 1993’).

²⁴ (1980) 146 CLR 64. See statement of common law position at 3.2.

1.2 Historical context

1.2.1 Historically, voluntary intoxication could never provide an offender with an excuse.²⁵ In the 19th century, there was a shift in approach with more attention being placed on the mental element for offences and on the offender's subjective culpability. A line of English cases accepted that evidence of intoxication was relevant to the issue of whether 'the accused lacked a guilty mind, at least in cases in which the offence charged involved a specific intent'.²⁶ These authorities culminated in the decision of House of Lords in *DPP v Beard*.²⁷ In *Beard's* case, the defendant raped and killed a girl of 13 by placing his hand over her mouth and pressing her throat to stop her crying out. In his defence, the defendant relied upon intoxication to deny the mental element for murder. The defendant was convicted of murder and successfully appealed to the Court of Criminal Appeal. The Crown appealed to the House of Lords where the conviction for murder was restored.

1.2.2 The summary of the law on intoxication and criminal responsibility by Lord Birkenhead in *Beard's* case provides the genesis for section 17 of the *Code*. In his summary, Lord Birkenhead identified three principles:

That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.

That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.²⁸

1.2.3 *Beard's* case is authority for the proposition that evidence of intoxication causing incapacity to form a specific intent can be taken into account when considering an accused's criminal liability in 'specific' intent offences but must be disregarded in respect of 'basic intent' offences. Orchard has commented that this 'was not an authority for any enlargement of the "defence", but rather confirmed and defined its limitation to offences requiring a "specific intent"'.²⁹

1.2.4 Despite the controversial nature of the division of offences into the categories of 'specific' and 'basic' intent,³⁰ this statement of the law was affirmed by the House of Lords in *DPP v Majewski*.³¹ In this case, the accused was involved in a brawl in a pub where he assaulted a number of people. He also assaulted the police officer who arrested him, another police officer while being driven to the police station and a police inspector in the prison cells. He was charged with assault occasioning bodily harm and assault of a police officer in the execution of his duty. His defence was that he had committed the offences while under the influence of drugs and alcohol. The trial judge directed the jury that the offence of assault did not require a specific intent to be proved and so intoxication was not a defence and was to be ignored in their verdict. The accused was convicted and appealed on the point of law: 'whether a defendant properly may

²⁵ For a detailed consideration of the history of intoxication and criminal responsibility, see Singh R, 'History of the Defence of Drunkenness in English Criminal Law' (1933) 49 *Law Quarterly Review* 528; McCord D, 'The English and American History of Voluntary Intoxication to Negate *Mens Rea*' (1992) 11 *Journal of Legal History* 372.

²⁶ *R v O'Connor* (1980) CLR 64, 106 per Mason J.

²⁷ [1920] AC 479.

²⁸ [1920] AC 479, 500 - 502. There is a wealth of commentary in respect of the case. See, for example, Orchard G, 'Drunkenness as a "Defence" to Crime - Part I' [1977] 1 *Criminal Law Journal* 59; Walker G, 'Intoxication at the Crossroads' [1977] *New Zealand Law Journal* 401; E Colvin 'A Theory of the Intoxication Defence' (1981) 59 *Canadian Bar Review* 750; Beck S and Parker G, 'The Intoxicated Offender - A Problem of Responsibility' (1966) 44 *Canadian Bar Review* 563. The decision is also extensively discussed in *R v O'Connor* (1980) 146 CLR 64.

²⁹ Orchard G, above n 28, 61.

³⁰ See discussion at 4.2.5.

³¹ [1977] AC 443.

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'.³²

1.2.5 The House of Lords dismissed the appeal and affirmed the division between crimes of specific intent and crimes of basic intent. Intoxication can be taken into account in determining whether an offender formed the intention for specific intent crimes but for crimes of basic intent, evidence of self-induced intoxication cannot be taken into account to determine whether the offender's act was voluntary and intentional. The English common law position set out in *Beard's case*³³ and in *DPP v Majewski*³⁴ has informed our understanding of section 17 of the *Code*.

1.3 General principles of criminal responsibility

1.3.1 This section provides an overview of the ingredients of an offence and the concept of the 'mental element' and 'voluntariness'. This discussion will only briefly address these complex general principles of criminal responsibility to provide a foundation for the discussion of intoxication in this Final Report. In general terms, an offender is only guilty of an offence if the prosecution can prove that he or she committed a prohibited act with the requisite state of mind. The elements of offences can be divided into 2 components: (1) the external or physical elements and (2) the mental or fault elements.

External elements

1.3.2 An essential element of a crime is that an event or state of affairs prohibited by the criminal law is caused by the accused's conduct. The external elements of an offence may refer to:³⁵

- a specified form of conduct (act, omission or state of affairs). For example, in the case of assault, it is the action of applying force to the victim that is prohibited;
- conduct that occurs in specified circumstances. For example, rape is sexual intercourse that occurs in a specified circumstance namely without the person's consent; or
- the results or consequences of conduct. For example, it is causing the death of another person that is prohibited in the case of murder.

The external elements of a crime are found in the statutory definition of the offence.³⁶

Mental element

1.3.3 A fundamental principle of the modern criminal law is the 'notion of individual responsibility'.³⁷ As Bronitt and McSherry observe, 'the modern criminal law is stamped throughout with liberal assumptions about "freewill" and "rationality" as measures of culpability'.³⁸ Individual responsibility is seen to be dependent on 'the principle of capacity and a fair opportunity to act otherwise'.³⁹ The notion of individual responsibility has led to the centrality of the mental element (*mens rea*) as the basis of criminal responsibility.

³² [1977] AC 443, 457.

³³ [1920] AC 479.

³⁴ [1977] AC 443.

³⁵ This summary is taken from Bronitt S and McSherry B, above n 11, 161. See further 161 – 163.

³⁶ Common law offences have been abolished in Tasmania (except Contempt of Court, see section 10 of the *Criminal Code Act 1924*).

³⁷ Lacey N and Wells C, *Reconstructing Criminal Law*, 2nd ed, Butterworths, London 1998, 39; Norrie A, *Crime, Reason and History: A Critical Introduction to Criminal Law*, Weidenfeld and Nicolson, London 1993.

³⁸ Bronitt S and McSherry B, above n 11, 32.

³⁹ Wells C, 'Provocation: The Case for Abolition', in Ashworth A and Mitchell B (eds), *Rethinking English Homicide Law*, Oxford University Press, Oxford 2000, 105. See Hart HLA, *Punishment and Responsibility*, Clarendon Press, Oxford 1984. Bronitt and McSherry write that '[t]he principles that underlie the criminal law are dependent on the idea of a person as a rational being, capable of making choices between right and wrong and the ability to control conscious actions', Bronitt S and McSherry B, above n 11, 147.

1.3.4 Generally, a person is not criminally responsible for an act unless the act is accompanied by a guilty mind. In other words, an accused's prohibited conduct must be accompanied by the prescribed state of mind.⁴⁰ It is important to remember that we are concerned with the accused's subjective state of mind (what was in the particular accused's mind) rather than an objective state of mind (what might be in the mind of an ordinary or reasonable person's mind).⁴¹ For this reason, in this paper, it is more appropriate to talk of the 'mental' element rather than the 'fault' element because the concept of 'fault' element includes negligence.

1.3.5 As discussed, criminal responsibility depends on subjective mental elements, so it is necessary to 'get into the mind of the accused'⁴² to determine the accused's subjective state of mind at the time of the alleged offence. If the accused does not make an admission, it is necessary to draw inferences from the circumstances of the case and on this basis attribute a state of mind to the accused.⁴³ In the absence of contrary evidence, the accused's actions and words ('the external features of the accused's conduct')⁴⁴ are taken to be indicative of the accused's state of mind. The attribution of intention based on the act of killing reflects our common sense understanding of human behaviour and our everyday sense of 'what makes people "tick"'.⁴⁵ In some cases, the act of the accused 'may be so strong as to compel an inference of what his intent was, no matter what he may say about it afterwards'.⁴⁶ For example, 'a loaded gun directed at the victim's heart and discharged at point blank range indicates that the accused *intended* to kill the victim'.⁴⁷ Although motive (the reason for acting) and intention (the desired outcome of the action) are separate concepts, the presence of a motive can also enable inferences as to an accused's intention to more readily be drawn.

Voluntariness and automatism

1.3.6 The Crown must prove beyond reasonable doubt that the accused's act was voluntary and intentional.⁴⁸ This means that the physical act of the accused must be the conscious product of a freely operating will. It is an act that the accused was aware he or she was doing and meant to do.⁴⁹ In *R v Falconer*, the High Court held that:

The requirement of a willed act imports no intention or desire to effect a result by the doing of the act, but merely a choice, consciously made, to do an act of the kind done. In this case, a choice to discharge a gun'.⁵⁰

1.3.7 An act may be involuntary for three reasons:

- the criminal act was accidental;
- the criminal act was caused by reflex action; or
- when an accused who acts without conscious volition is said to operate in a state of 'automatism'.⁵¹

1.3.8 If a defendant alleges automatism, there must be evidence capable of raising a reasonable doubt about the voluntariness of the act, which is attributed to a condition that is not a mental disease.⁵²

⁴⁰ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Law Press, Hobart 2006, 66.

⁴¹ There are exceptions such as offences with a fault element of criminal negligence.

⁴² *Peters* (1998) 151 ALR 51 at 93 per Kirby J.

⁴³ Bronitt S and McSherry B, above n 11, 173. See *Peters* (1998) 151 ALR 51, 93 per Kirby J; *Shepherd* (1990) 170 CLR 573 at 580 per Dawson J (with the concurrence of Mason CJ, Toohey and Gaudron JJ).

⁴⁴ Hunter J and Barga J, 'Diminished Responsibility: "Abnormal" Minds, Abnormal Murderers and What the Doctor Said', in Yeo S (ed), *Partial Excuses to Murder*, The Federation Press, Sydney 1991, 126.

⁴⁵ Bruner J, *Acts of Meaning*, Harvard University Press, Cambridge, Mass 1990, 35.

⁴⁶ *Parker* (1963) 111 CLR 610, 648 per Windeyer J.

⁴⁷ Hunter J and Barga J, above n 44, 126.

⁴⁸ Section 13(1) and *Vallance* [1960] Tas SR 51.

⁴⁹ *Vallance* (1961) 108 CLR 56, 64 - 65 per Kitto J and *Williams* [1978] Tas SR 98, 102 per Neasey J.

⁵⁰ (1990) 171 CLR 30, 40 per Mason CJ, Brennan and McHugh JJ.

⁵¹ This summary is taken from Bronitt S and McSherry B, above n 11, 226.

⁵² *R v Falconer* (1990) 171 CLR 30, *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, *William v The Queen* [1978] Tas SR 98.

Automatism ‘may be caused by concussion from a blow to the head, sleep disorders, the consumption of alcohol or other drugs, neurological disorders, hypoglycaemia ... or dissociation arising from extraordinary stress’.⁵³ In Tasmania, as in some other jurisdictions,⁵⁴ a defence of automatism cannot be based on self-induced intoxication.

1.3.9 Under the *Code*, for some crimes the only mental element that the Crown is required to prove beyond reasonable doubt is that the accused’s act was voluntary and intentional. For example, the elements for the offence of rape contrary to section 185 of the *Code* are (1) the fact of sexual intercourse (external element), (2) without consent (external element), and (3) that the act of sexual intercourse was voluntary and intentional (mental element).

Additional mental element

1.3.10 In addition, depending on the construction of the statute, the Crown may be required to prove an additional mental element beyond a voluntary and intentional act as required by section 13(1). The most common ones are specific intention, knowledge and recklessness.⁵⁵

1.3.11 Specific intention (in this context) refers to an intention or purpose to bring about a particular result.⁵⁶ For example, section 170 of the *Code* requires the act to be done with a specific intent to ‘maim, disfigure, or disable any person, or to do any grievous bodily harm to any person’.

1.3.12 Knowledge refers to the defendant’s state of knowledge ‘that a particular circumstance exists or awareness that a particular consequence will result from the performance of the conduct’.⁵⁷ An example of an offence requiring knowledge that a particular circumstance exists is the crime of receiving stolen property contrary to section 258 of the *Code*. The mental element is that the accused know that the property was stolen. This means that the prosecution must prove beyond reasonable doubt that the accused knew the goods were stolen. It is not enough that the accused ought to have known that the goods were stolen but it is sufficient to show there was a real belief induced in the accused by the circumstances that the goods were stolen.⁵⁸

1.3.13 An example of an offence requiring an awareness that a particular consequence will result from the performance of the act is murder contrary to the first limb of section 157(1)(c) of the *Code*. The mental element is that the offender knew that their act or omission was likely to cause death in the circumstances.⁵⁹

1.3.14 Subjective recklessness refers to foreseeing the consequence of an act as likely. For example, the additional mental element for wounding contrary to section 172 of the *Code* is that the accused foresaw the likelihood of causing the wound as a possible consequence of their act.⁶⁰ It does not require that the accused foresaw causing a wound to the particular person actually injured. It is sufficient if the accused foresaw causing a wound to some person.⁶¹

⁵³ Bronitt S and McSherry B, above n 11, 228.

⁵⁴ This is the position under Commonwealth law in Australia (see discussion at 3.3.4 and 6.4) and in Canada (see discussion at 5.4.1).

⁵⁵ Sometimes offences use the concept of criminal negligence, for example manslaughter and causing death by dangerous driving. This is an objective test.

⁵⁶ This is called ‘specific intent’. See discussion at 3.1.6.

⁵⁷ Bronitt S and McSherry B, above n 11, 178.

⁵⁸ *R v Martin*, unreported Serial 58/1980, Supreme Court of Tasmania.

⁵⁹ This is discussed in detail in relation to *Attorney-General’s Reference No 1 of 1996* (1998) 7 Tas R 293. Actual knowledge is to be contrasted with imputed knowledge, see discussion at 3.1.10 - 3.1.23.

⁶⁰ *Vallance* (1961) 108 CLR 56, 63 per Kitto J and at 67 per Taylor J.

⁶¹ *Standish* (1991) 60 A Crim R 364, per Zeeman J.

1.4 Outline of paper

Part 2 of this paper looks at the relationship between alcohol and crime.

Part 3 examines the current law in Tasmania.

Part 4 examines the need for reform. It is argued that the decision of the Court of Criminal Appeal in *Attorney-General's Reference No 1 of 1996*⁶² (*Weiderman's case*) creates uncertainty as to the application of the law of intoxication and so legislative intervention is required to clarify the law. In addition, it is argued that the law of intoxication in Tasmania is inconsistent, illogical and unprincipled. Recommendation 1 is that legislation be enacted to clarify the law of intoxication in Tasmania.

Part 5 looks at the law of intoxication in other Australian jurisdictions and considers the position in the United Kingdom, Canada and New Zealand.

Part 6 examines the options for reform and makes recommendations for reform. The options for reform include:

- Option 1 – Allow evidence of self-induced intoxication to be relevant only to specific intention. This is to reaffirm the previously recognised *Code* position in accordance with Snow's case;
- Option 2 – Allow evidence of self-induced intoxication to be relevant to intention and knowledge;
- Option 3 – Allow evidence of self-induced intoxication to be relevant to intention, knowledge and subjective recklessness. This is to adopt the *Commonwealth Criminal Code* section 8 position;
- Option 4 – Allow evidence of self-induced intoxication to be relevant to negate any subjective mental element, including section 13(1) voluntary and intentional act. This is to adopt the Australian common law position;

Other possible reforms include:

- Option 5 – Create a special offence;
- Option 6 – Special treatment of involuntary intoxication;
- Option 7 – Procedural restrictions on the defence;
- Option 8 – Clarify the relationship between intoxication and the defences.

⁶² (1998) 7 Tas R 293.

Part 2

Alcohol, Drugs and Crime

2.1.1 The purpose of this Part is to provide a context for the discussion of intoxication and principles of criminal responsibility that follows. This Part will provide a brief overview of the relationship between alcohol, drugs and crime, as well as providing an outline of the psychological and physiological impact of drugs and alcohol.

2.2 An overview of drug and alcohol use in Australia

2.2.1 This part provides a snapshot of alcohol and drug use in Australia. While it is difficult to obtain an accurate picture of the extent of alcohol and drug use, several recent studies have examined the issue in Australia.

2.2.2 Alcohol consumption is widespread in Australia. The *2001 National Drug Strategy Household Survey* found that five out of six Australians aged 14 years and over had consumed alcohol in the past 12 months. Approximately one in 10 Australians reported drinking at levels considered risky or high risk for both short-term and long-term harm.⁶³ Other statistics on drug use in Australia in 2002 reveal higher levels of ‘at risk’ drinking:

One in three persons (39% of males, 30% of females) consumed alcohol in a manner that put themselves at risk of alcohol-related harm in the short term on at least one day in the last 12 months. For those aged 20–29 years, the proportion was 64% of males and 57% of females. Around 10% of males and 9% of females consumed alcohol in a way that put themselves at risk of alcohol-related harm in the long term.⁶⁴

2.2.3 A study of alcohol consumption in Australia between 1990 and 2001 using health, road safety, industry and survey data concluded that ‘alcohol consumption in excess of the NHMRC Australian Alcohol Guidelines is the norm in Australia with the great majority (at least 80%) of all alcohol being consumed in ways that put the drinker at risk of acute and/or chronic alcohol-related harm’.⁶⁵

2.2.4 As suggested in Part 1, the use and misuse of alcohol is (generally) culturally accepted in Australia. For example, the Australian Institute of Health and Welfare wrote in 2004 that:

Alcohol is accepted as an important part of Australian life and culture. It is consumed at religious and cultural ceremonies, at social and business functions, and in conjunction with celebrations and recreational activities. For many Australians, ‘having a drink’ is synonymous with socialization and ‘mateship’.⁶⁶

⁶³ Australian Institute of Health and Welfare, *2001 National Drug Strategy Household Survey: detailed findings*, AIHW, Canberra 2002 (hereafter AIHW 2001 Drugs Survey), at xx.

⁶⁴ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), xiv.

⁶⁵ Chikritzhs et al, *Australia Alcohol Indicators: Patterns of Alcohol Use and Related Harms for Australian States and Territories 1990 – 2001*, National Drug Research Institute, Western Australia 2003, xiv.

⁶⁶ AIHW 2001 Drugs Survey, above n 63.

2.2.5 This view is endorsed by the recent findings of a survey commissioned by the Salvation Army that:

[w]e see the promotion of ... drinking to excess at all levels of society, in the media especially in conjunction with sporting victories. We have seen major headlines about sporting heroes [sic] getting very drunk and being convicted of major crimes while drunk, yet we have as a community encouraged this excessive drinking and the young men and women concerned are led to believe that this behaviour is admired.⁶⁷

2.2.6 Attitudes to alcohol consumption were examined in the 2001 *National Drug Strategy Household Survey*. It was found that 'alcohol was the drug most likely to be approved of by Australians aged 14 years and over for the regular use by an adult' (81.4% of males and 68% of females).⁶⁸ Respondents were also asked to 'name the first two drugs they thought of when talking of a "drug problem"'.⁶⁹ The Survey found that 7.9% of male respondents and 7.7% of female respondents listed alcohol in response to that question. Excessive alcohol consumption was the 'second most likely form of drug use to be nominated' (behind heroin use) as a form of drug use considered to be of most serious concern for the general community (20% of males and 24.6% females).⁷⁰

2.2.7 Research suggests that the use of illicit drugs in Australia is less prevalent than alcohol use. The 2001 *National Drug Strategy Household Survey* found (in self-reports) that illicit drugs had been used by approximately 17% of Australians aged 14 years and over in the past 12 months (less than one in five).⁷¹ In 2001, 37.7% of Australians aged 14 and over had used an illicit drug in their lifetime.⁷² In the Survey, illicit drugs included illegal drugs (eg marijuana, cocaine), prescription drugs (eg pain killers, tranquillisers) that are used for non-medical purposes and other substances used inappropriately (eg inhalants).

2.2.8 In Australia, the most commonly used illicit drug was marijuana/cannabis. It was found that 12.9% of people aged 14 years and over had used it in the last 12 months, 7.8% in the last month and 5.6% in the last week.⁷³ In their lifetime, about one-third of the Australian population have used marijuana/cannabis.⁷⁴ It was found:

[i]n 2001, the five most common illicit drugs ever used in order of descending prevalence were marijuana/cannabis (33.1%), amphetamines (8.9%), hallucinogens (7.6%), ecstasy/designer drugs (6.1%) and pain-killers/analgesics for non-medical purposes (6.0%).

The five most common illicit drugs used in the last 12 months in order of descending prevalence were marijuana/cannabis (12.9%), amphetamines (3.4%), pain-killers/analgesics for non-medical purposes (3.1%), ecstasy/designer drugs (2.9%) and cocaine (1.3%).⁷⁵

2.2.9 As suggested in Part 1, community attitudes to illicit drugs are dependent on the type of drug involved. In the 2001 Survey, 27.4% of males and 20.1% of females approved of regular marijuana/cannabis use.⁷⁶ It has been suggested that there is evidence that 'an increasing proportion of the general population believe that the use of marijuana should not be illegal'.⁷⁷

2.2.10 In contrast, it would appear that heroin use is viewed very unfavourably. Although heroin, methadone and/ or other opiates were used by only 0.5% of the Australian population in the 12 months preceding the 2001 Survey, it found that heroin was most commonly nominated as a drug associated with a

⁶⁷ *Alcohol Awareness Study* conducted for the Salvation Army by Roy Morgan Research, August 2004, 6, <http://www.salvationarmy.org.au/reports/Alcohol_Awareness_Survey2004.pdf> at 28 July 2006.

⁶⁸ AIHW 2001 Drugs Survey, above n 63, 8.

⁶⁹ *Ibid* 3.

⁷⁰ *Ibid* 5.

⁷¹ *Ibid* xxi.

⁷² *Ibid* 36.

⁷³ Australian Institute of Health and Welfare, above n 64, xiv.

⁷⁴ AIHW 2001 Drugs Survey, above n 63, 45.

⁷⁵ Australian Institute of Health and Welfare, above n 64, 16.

⁷⁶ AIHW 2001 Drugs Survey, above n 63, 8.

⁷⁷ Makkai T, 'Drug Trends and Policies' in Chappell D and Wilson P (eds), *Crime and the Criminal Justice in Australia: 2000 and Beyond*, 63.

‘drug problem’ (50.6% of males, 49.6% of females).⁷⁸ Heroin was also nominated as the form of drug use considered to be of the most serious concern to the general community (36.6% of males and 33% of females).⁷⁹ Only 1.5% of males and 0.6% of females approved of regular heroin use.

2.3 Relationship between alcohol, drugs and crime

2.3.1 This section provides an overview of the relationship between alcohol, drugs and crime. It does not attempt to define the broader question of the cause of crime or embark on an analysis of the controversial issue of whether substance abuse ‘causes’ crime.⁸⁰ However, it is useful to place the discussion of intoxication and criminal responsibility in a broader context and to observe that while many offenders are under the influence of alcohol and/or drugs at the time of the offence, evidence of such intoxication is not often successful in negating criminal responsibility.

2.3.2 Australian research suggests that many offenders commit crime while under the influence of alcohol and/or illicit drugs. There have been recent studies that have considered the use of drugs by offenders. As shown by Table 1, 53.1% of violent offenders, 65.7% of property offenders and 62.5% of other offenders self-reported using alcohol and/or illicit drugs at the time of the offence.

Table 1: Proportion of male prisoners (a) who used alcohol and/ or illicit drugs at time of offence (b) by type of offence, Australia 2001.⁸¹

| Type of offence | Type of drug | | | |
|-----------------|--------------|-------------------|---------------------------|----------------------------------|
| | Alcohol | Illicit drugs (c) | Alcohol and illicit drugs | Neither alcohol or illicit drugs |
| Violent | 20.1 | 15.8 | 17.2 | 46.8 |
| Property | 13.7 | 35.8 | 16.2 | 34.3 |
| Other offences | 22.1 | 27.8 | 12.6 | 37.5 |
| All offences | 19.4 | 22.3 | 15.9 | 42.4 |

(a) of adult male sentenced inmates in correctional facilities in the Northern Territory, Queensland, Tasmania and Western Australia.

(b) Self-reported use.

(c) Any illicit drug includes marijuana/cannabis, heroin, amphetamines, cocaine, hallucinogens / ecstasy, inhalants, street methadone, benzodiazepines, morphine and steroids.

2.3.3 The Australian Institute of Criminology (funded by the National Illicit Drug Strategy) has undertaken a monitoring system called the Drug Use Monitoring in Australia (DUMA). This ‘project measures drug use among males and females who have been recently apprehended by police, through interviews and analysis of urine samples taken within 48 hours of arrest’.⁸² It found in cases of violence that 67% of offenders detained by police tested positive to any drug and 81% of offenders detained for property offences tested positive to any drug.⁸³ In 2001, it was found that 69.5% of male detainees tested positive to any illicit drug with the following breakdown by type of drug: 56.6% tested positive to marijuana/cannabis, 30.0% to amphetamines, 16.8% to opiates and 5.6% to cocaine’.⁸⁴

⁷⁸ AIHW 2001 Drugs Survey, above n 63, 3.

⁷⁹ Ibid 5.

⁸⁰ See for example, Weatherburn D, ‘What Causes Crime?’, *Crime and Justice Bulletin Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research, 2001.

⁸¹ This information is taken from Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), Table 10.11, 79.

⁸² Australian Institute of Health and Welfare, above n 64, 75.

⁸³ Makkai T and McGregor K, *Drug Use Monitoring in Australia (DUMA) 2002 Annual Report on Drug Use Among Police Detainees*, Australian Institute of Criminology Research and Public Policy Series No 47, 20 – 21.

⁸⁴ Australian Institute of Health and Welfare, above n 64, 75.

2.3.4 Another study examined the drug use and criminal histories of incarcerated offenders. The preliminary results of the Drug Use Careers of Offenders (DUCO) 2001 study showed that:

[o]ne in three male offenders reported being under the influence of alcohol at the time of their offence, while one in four reported being under the influence of marijuana/cannabis, one in five under the influence of amphetamines/cocaine, one in seven under the influence of heroin and one in fifteen under the influence of hallucinogens/ecstasy.⁸⁵

2.3.5 In addition to the general research about drugs and offending, there has been specific consideration of the relationship between drugs and violence, particularly alcohol and violence. It has been suggested that several ‘convergent lines of evidence [exist] suggesting that alcohol consumption, at least in certain circumstances, directly increases the risk of criminal violence’.⁸⁶ These are summarized as follows:

Firstly, alcohol has been shown in behavioural experiments to increase aggression. Secondly, heavy drinkers are more likely to report committing alcohol-related violent offences than light drinkers or non-drinkers. Thirdly, criminal assaults tend to cluster around licensed premises. Fourthly, areas with high rates of alcohol consumption tend to have high rates of violence.⁸⁷

2.3.6 It has been suggested that there is a ‘complex but powerful link between many incidents of public violence and the social process of collective drinking’.⁸⁸

2.3.7 Homicide research shows that alcohol is an important factor with 36% of male offenders and 29% of female offenders being under the influence of alcohol alone at the time of the incident.⁸⁹ In 1999 – 2000, 40% of homicide offenders were recorded as being under the influence of alcohol at the time of the offence and 15% of offenders under the influence of illicit drugs, with the most common drug being cannabis.⁹⁰

2.3.8 Data from the 2001 *National Drug Strategy Household Survey* showed that in the 12 months prior to the survey ‘Australians aged 14 years and over were more likely to have been abused by someone affected by alcohol than someone affected by illicit drugs’.⁹¹

- 26.5% of respondents had been verbally abused by someone who was affected by alcohol and 11.3% had been verbally abused by someone affected by illicit drugs;
- 13.7% of respondents had been put in fear by someone who was affected by alcohol and 8.7% had been put in fear by someone affected by illicit drugs;
- 4.9% had been physically abused by someone affected by alcohol and 2.2% had been physically abused by someone affected by illicit drugs.⁹²

2.3.9 Alcohol has also been implicated in domestic violence. The International Violence Against Women Survey (IVAWS) observed that:

Research has found that abusive males with alcohol or drug problems inflict violence against their partners more frequently, are more apt to inflict serious injuries, are more likely to be

⁸⁵ Ibid 78.

⁸⁶ Weatherburn D, ‘What Causes Crime?’, *Crime and Justice Bulletin Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research, 2001, 5.

⁸⁷ Ibid.

⁸⁸ Tomsen S, ‘A Top Night: Social Protest, Masculinity and the Culture of Drinking Violence’ (1997) 37 *British Journal of Criminology* 90, 100.

⁸⁹ Mouzos J, *Homicidal Encounters: A Study of Homicide in Australia 1989 – 1999*, AIC, Canberra 2000, 62. This study examined homicides between 1996/97 – 1998/99.

⁹⁰ Ibid 5.

⁹¹ AIHW 2001 Drugs Survey, above n 63, 84.

⁹² Ibid 84 – 85.

sexually assaultive, and are more likely to be violent outside the home than abusers without a history of substance abuse.⁹³

2.3.10 The IVASW surveyed 6677 women between the ages of 18 and 69 about their experiences of violence and asked (in cases of domestic violence) whether or not their male partner was drinking or using drugs at the most recent incident of partner violence. The response was that ‘50% of women indicated that their partner was neither drinking or using drugs; 35% reported he was drinking alcohol, 4% said he was using drugs, and 6% reported that he was both drinking alcohol and using drugs’.⁹⁴

2.3.11 The Rape Evaluation Project (conducted in Victoria) found a link between rape and intoxication. In the study of 242 cases involving 255 accuseds, it was found that 20% of those accused of rape were allegedly intoxicated at the time of the offence.⁹⁵

2.3.12 More anecdotally, the Victorian Law Reform Committee reported that it was ‘presented with overwhelming evidence of the 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’.⁹⁶ The NSW Summit on Alcohol Abuse 2003 reported that ‘research indicates that almost 80% of domestic violence and street incidents (assaults, offensive behaviour or conduct, malicious damage and noise complaints) are alcohol-related’.⁹⁷

2.4 Psychological and physiological effects of alcohol and drugs

2.4.1 The law of intoxication has largely developed without consideration of the body of scientific knowledge on intoxication. Criticisms have been directed at this failure of most law reform bodies, courts and legislatures to take account of the growing body of scientific knowledge in relation to intoxication.⁹⁸ An examination of the psychological and physiological effects of alcohol and drugs was included in the Victorian Law Reform Committee report on *Criminal Liability for Self-induced Intoxication*.⁹⁹ The discussion of the effects of alcohol and drugs in this part of the Issues Paper is a summary of this information and the information contained in an article considering the relationship between intoxication and criminal behaviour by Rajaratnam et al.¹⁰⁰

Classes of drugs

2.4.2 Drugs can be classified according to their effects on the central nervous system. There are three main classes of drugs affecting the central nervous system. These are depressants, stimulants and

⁹³ Mouzos J and Makkai T, *Women’s Experiences of Male Violence: findings from the Australian component of the International Violence Against Women Survey*, AIC, Canberra 2004 at 58 citing Browne A ‘Violence in Marriage: Until death do us part’ in Cardarelli A (ed), *Violence between intimate partners: patterns, causes and effects*, Allyn and Bacon, MA 1997.

⁹⁴ Mouzos J and Makkai T, *Women’s Experiences of Male Violence: findings from the Australian component of the International Violence Against Women Survey*, AIC, Canberra 2004, 58.

⁹⁵ Heenan M and McKelvie H, *Crimes (Rape) Act 1991: An Evaluation Report*, 1997, 32.

⁹⁶ VLRC 1999, above n 21, para 5.21.

⁹⁷ *NSW Summit on Alcohol Abuse 2003 Interim Report*, NSW Government, 2003, 3.

⁹⁸ Rajaratnam S, et al, ‘Intoxication and Criminal Behaviour’ (2000) 7 *Psychiatry, Psychology and Law* 59, 59 – 60 (hereafter Rajaratnam et al). See Room R, ‘Drinking, violence, gender and causal attribution: a Canadian case study in science, law and policy’ (1996) 23 *Contemporary Drug Problems* 649, who notes that ‘one striking aspect of the legal discussion of the intoxication defence has been the relative lack of attention to developments of scientific knowledge about intoxication and its effects. Courts often resort to language that sounds scientific, as in the discussions of automatism, but do not seem particularly concerned about how well the language and arguments would stand up to scientific scrutiny’.

⁹⁹ VLRC 1999, above n 21, para 5.1 – 5.15. The Victorian Law Reform Committee was a joint investigatory committee of the Victorian Parliament and during its investigation, it took evidence at public hearings. Information about the psychological and physiological effects of alcohol and drugs was delivered by oral evidence and written submissions from several experts. These included Dr S Rajaratnam and Associate Professor J Redman, Department of Psychology, Monash University, Dr R Vines, Forensic Psychiatrist, Dr T Watson-Munro, Forensic Psychologist and the Australian Medical Association.

¹⁰⁰ Rajaratnam S et al, above n 98.

hallucinogens.¹⁰¹ Although particular drugs have recognised effects and ‘intoxication with any of these drugs may produce an abnormal state of mind, with perception, cognition and behaviour affected to varying degrees’,¹⁰² the effect of a drug on an individual depends on a number of factors including:

- quantity of drug taken;
- method of drug use;
- a person’s physical characteristics;
- psychological state;
- previous experience with drugs;
- genetic factors;
- poly drug use (other drugs used).¹⁰³

2.4.3 This means that ‘[i]t is impossible to accurately predict the impact of drugs and alcohol upon individuals’.¹⁰⁴ The task of assessing the effect of alcohol and other drugs on an individual is made more difficult as there is usually a lapse of time between the alleged offence and the assessment. In these circumstances, the assessment is ‘a post-event analysis of a person’s mental state and behaviour, with corroborative evidence from witnesses’.¹⁰⁵

Central Nervous System Depressants

2.4.4 Depressants are ‘drugs that slow down the functions of the central nervous system’.¹⁰⁶ Examples of nervous system depressants include alcohol, cannabis, opiates and opioids (heroin, codeine, methadone, pethidine, morphine), benzodiazepines (Rohypnol, Valium, Serepax, Mogadon) and GHB (Gamma-hydroxybutrate).¹⁰⁷

2.4.5 Alcohol has the effect of suppressing the normal inhibitory processes in the brain.¹⁰⁸ Alcohol use is associated with feelings of ‘euphoria, changes in mood and increasing sensory impairment’.¹⁰⁹ It also ‘impairs a range of behaviours and skills, including reaction time, memory, and the capacity to divide and sustain attention’.¹¹⁰ Alcohol also affects reflexes, coordination and muscle control.¹¹¹ As discussed above, alcohol use is linked with violent behaviour. It is reported that the ‘period when blood alcohol level is rising is when violent behaviour is more likely to occur’.¹¹² Alcohol affects the memory and so ‘individuals who have consumed it are often unaware of their behaviour’.¹¹³ Some users of alcohol may experience blackouts where there is memory loss of events that occurred while intoxicated.¹¹⁴ However, during this time a person ‘may still be conscious and able to carry out complex tasks’.¹¹⁵ Alcohol blackout alone is not sufficient to raise a reasonable doubt that a person’s actions were voluntary and intentional.¹¹⁶

2.4.6 The effects of cannabis can be viewed as a two-phase reaction:

¹⁰¹ Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 1 – 2.

¹⁰² Rajaratnam S et al, above n 98.

¹⁰³ This list is taken from Drug Info Clearinghouse, above n 101, 2 – 3; VLRC 1999, above n 21, para 5.13.

¹⁰⁴ VLRC 1999, above n 21, para 5.14.

¹⁰⁵ Ibid para 5.14.

¹⁰⁶ Drug Info Clearinghouse, above n 101, 1.

¹⁰⁷ Ibid.

¹⁰⁸ VLRC 1999, above n 21, para 5.4; Rajaratnam S et al, above n 98, 61.

¹⁰⁹ Rajaratnam et al, above n 98, 62.

¹¹⁰ Ibid.

¹¹¹ Australian Drug Foundation, *Alcohol*, <http://druginfo.adf.org.au/article.asp?ContentID=alcohol#effects%20of%20alcohol>.

¹¹² Rajaratnam et al, above n 98, 62.

¹¹³ VLRC 1999, above n 21, para 5.4.

¹¹⁴ Rajaratnam et al, above n 98, 62.

¹¹⁵ VLRC 1999, above n 21, para 5.4.

¹¹⁶ *R v O'Connor* (1980) 146 CLR 64 at 72 per Barwick CJ. See further discussion in Part 6 Option 4.

In the first phase, the person experiences euphoria and relaxation. During the second phase, cannabis users typically report increased sleepiness, and in some cases perceptual alterations, mood swings and intensification of ordinary sensory experiences.¹¹⁷

Cannabis is not typically associated with violent behaviour.¹¹⁸ However, ‘when cannabis is used in conjunction with other drugs, such as the hallucinogen PCP, violent behaviour may be triggered in some users’.¹¹⁹ Cannabis use is associated with decreased coordination and balance.¹²⁰

2.4.7 Opiates and Opioids that operate as central nervous system depressants include morphine, heroin, methadone and codeine. These are narcotic analgesics (pain killers) that ‘have various effects including mood changes, drowsiness, dulling of mental senses’.¹²¹ These drugs are not usually ‘associated with violent behaviours. However, increased violent behaviour may occur during withdrawal from opiates’.¹²²

2.4.8 Benzodiazepines include sedative hypnotics and tranquillisers (Rohypnol, Valium, Serepax, Mogadon). They have the effect of impairing memory and may be accompanied by confusion and disorientation. These drugs ‘have a sedative effect [and] ... generally reduced feelings of hostility and aggressive impulses, although level of aggression may increase during withdrawal’.¹²³ There has been research that shows that occasionally benzodiazepines may induce violent behaviour – ‘even in normally non-violent people’.¹²⁴ It appears that ‘people with a history of aggressive behaviour may once again show such behaviour under the influence’ of benzodiazepines.¹²⁵ It has been suggested that ‘very high doses may induce a toxic psychosis, which includes visual and auditory hallucinations and paranoid delusions’.¹²⁶ In addition, ‘[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’.¹²⁷ The physical effects of benzodiazepines include lethargy, dizziness, poor coordination and blurred or double vision.¹²⁸

Central Nervous System Stimulants

2.4.9 Stimulants ‘act on the central nervous system to speed up messages to and from the brain’.¹²⁹ Examples of stimulants include amphetamines and cocaine.¹³⁰

2.4.10 Amphetamines and cocaine have similar effects. In new and chronic users, there is a risk of a psychotic reaction. The symptoms of this reaction may include suspicion and hypervigilance, ‘confusion, hallucinations, paranoia, delusions, rage reactions and violent assaultative behaviour’.¹³¹ There are also reports of suicidal and homicidal tendencies.¹³² Very high quantities of amphetamines cause blurred vision and loss of coordination,¹³³ as can greater quantities of cocaine.¹³⁴

¹¹⁷ Rajaratnam et al, above n 98, 63.

¹¹⁸ Ibid.

¹¹⁹ Ibid 64.

¹²⁰ Australian Drug Foundation, *Cannabis*, <http://druginfo.adf.org.au/article.asp?ContentID=cannabis#effects>.

¹²¹ VLRC 1999, above n 21, para 5.9.

¹²² Rajaratnam et al, above n 98, 63.

¹²³ Ibid 62.

¹²⁴ VLRC 1999, above n 21, para 5.6.

¹²⁵ Rajaratnam et al, above n 98, 62.

¹²⁶ VLRC 1999, above n 21, para 5.7.

¹²⁷ Ibid.

¹²⁸ Australian Drug Foundation, *Benzodiazepines*, <http://druginfo.adf.org.au/article.asp?ContentID=benzodiazepines#effects>.

¹²⁹ Drug Info Clearinghouse, above n 101, 2.

¹³⁰ Ibid.

¹³¹ Rajaratnam et al, above n 98, 63.

¹³² Ibid.

¹³³ Australian Drug Foundation, *Amphetamines*, <http://druginfo.adf.org.au/article.asp?ContentID=amphetamines&ContainerID=459#effects>.

¹³⁴ Australian Drug Foundation, *Cocaine*, http://druginfo.adf.org.au/article.asp?ContentID=cocaine_info#effects.

Hallucinogens

2.4.11 Hallucinogens ‘affect perception. People who have taken them may believe they see or hear things that aren’t really there, or what they see may be distorted in some way’.¹³⁵ Hallucinogens may cause poor coordination.¹³⁶ Examples of hallucinogens include Lysergic acid diethylamide (LSD), Phencyclidine (PCP) and Ecstasy.

2.4.12 The initial effects of LSD include laughing, crying and feelings of euphoria. This is followed by perceptual distortions, mood swings and panic.¹³⁷ It is suggested that ‘LSD does not appear to trigger violent behaviour, but it may aggravate the effects of pre-existing psychopathology, including violent outbursts’.¹³⁸ There is a case example where an accused had taken LSD and was convicted of manslaughter rather than murder. In *R v Lipman*,¹³⁹ the accused suffocated the deceased while experiencing a hallucination that he was being attacked by snakes. The accused gave evidence that:

he had the illusion of descending to the centre of the earth and being attacked by snakes, which he had fought. It was not seriously disputed that he had killed the victim in the course of the experience, but he said that he had no knowledge of what he was doing and no intention to harm her’.¹⁴⁰

2.4.13 The usual effects of PCP include ‘feelings of euphoria, decreased inhibitions, feelings of power, increased pain threshold and perceptual distortions’.¹⁴¹ The effect of PCP depends on the dose and method of use. For low doses of PCP, the effects are similar to ‘alcohol intoxication, and may also include depression, anxiety, hallucinations and sudden violent outbursts’.¹⁴² High doses of PCP may induce extreme reactions, including ‘hypertension, severe psychotic reactions similar to schizophrenia and unconsciousness for up to days’.¹⁴³ There have been reports of violent behaviour following acute and chronic PCP use.¹⁴⁴

2.4.14 Ecstasy (MDMA) is associated with euphoria and improved self-esteem.¹⁴⁵ Other effects include ‘visual hallucinations, agitation, panic attacks, depression and the feeling of “reliving” past memories, which may be painful or frightening’.¹⁴⁶ There is also evidence that the ‘residual effects of MDMA usage include rage reactions and psychosis’.¹⁴⁷

Anabolic steroids

2.4.15 There is evidence that anabolic steroid users ‘often experience an increase in violent or aggressive behaviour’.¹⁴⁸ This has been reported to affect up to 90 per cent of users.¹⁴⁹

¹³⁵ Drug Info Clearinghouse, above n 101, 2.

¹³⁶ Australian Drug Foundation, *Hallucinogens*, <http://druginfo.adf.org.au/article.asp?ContentID=ecstasy#effects>.

¹³⁷ VLRC 1999, above n 21, para 5.11; Rajaratnam et al, above n 98, 64.

¹³⁸ Rajaratnam et al, above n 98, 64.

¹³⁹ (1970) 1 QB 152.

¹⁴⁰ *Ibid* 155.

¹⁴¹ Rajaratnam et al, above n 98, 64.

¹⁴² *Ibid*.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid* 64 – 65.

¹⁴⁷ *Ibid* 65.

¹⁴⁸ VLRC 1999, above n 21, para 5.12.

¹⁴⁹ *Ibid*; Rajaratnam et al, above n 98, 65.

Part 3

The Current Law in Tasmania

In Tasmania, the relevant principles governing criminal responsibility and intoxication are dependent upon whether the person is charged with a crime or a summary offence that has a *Code* parallel,¹⁵⁰ a summary offence that does not have a parallel offence or a Commonwealth offence.

3.1 Crimes and summary offences with a *Code* parallel

3.1.1 The principles of criminal responsibility that apply to crimes and summary offences with *Code* parallels are those contained in the *Code*.¹⁵¹ There are a number of ways in which evidence of intoxication may be potentially relevant to an accused's criminal responsibility:

1. In accordance with section 17 of the *Code*;
2. By virtue of the extension to the admissibility of evidence of intoxication contained in the decision of the Tasmanian Court of Criminal Appeal in *Weiderman's case*;¹⁵²
3. By reason of the defence of involuntary intoxication; and
4. Because it may be relevant to a defence that the accused relies upon such as mistake or self-defence.

Section 17 of the Code

3.1.2 Section 17 provides —

(1) The provisions of section 16 shall apply to a person suffering from disease of the mind caused by intoxication.

(2) 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 that intent.

(3) Evidence of intoxication not amounting to any such incapacity as aforesaid shall not rebut the presumption that a person intends the natural and probable consequences of his acts.

Traditionally, section 17 was seen to enact limited exceptions to the general common law principle that drunkenness cannot be relied on as an exculpatory factor. Section 17 is substantially an enactment of Lord Birkenhead's summary of the common law in England as set out in *Beard's case*.¹⁵³ As discussed in the Introduction, Lord Birkenhead in *DPP v Beard*¹⁵⁴ set out the rule that, unless the accused's intoxication produces insanity, evidence of self-induced intoxication is only relevant to the issue of whether the accused had the requisite intent in 'specific' intent crimes and not to the question of intent in 'basic' intent crimes.

¹⁵⁰ A summary offence has a *Code* parallel if it is sufficiently similar to a crime in the *Code*, see *Gow v Davies* (1992) 1 Tas R 1 per Slicer J.

¹⁵¹ Section 36 *Acts Interpretation Act 1931* (Tas).

¹⁵² (1998) 7 Tas R 293. This is discussed in detail below.

¹⁵³ See Blackwood J and Warner K, above n 40, 249 - 251.

¹⁵⁴ [1920] AC 479.

Insanity

3.1.3 Section 17(1) recognises the common law principle that an accused's intoxication may produce insanity. The accused must establish that intoxication caused a mental disease and that this condition has caused one of the incapacities in section 16, either:

- it must render the accused incapable of understanding the physical character of the act (section 16(1)(a)(i));
- it must render the accused incapable of knowing that the act was one which he or she ought not do (section 16(1)(a)(ii)); or
- the act or omission is done under an impulse which by reason of mental disease the accused was in substance deprived of any power to resist (section 16(1)(b)).

3.1.4 Such a case may arise where intoxication has caused 'physical deterioration of the brain and the onset of disease in the conventional sense',¹⁵⁵ for example delirium tremens¹⁵⁶ or alcoholic paranoid psychosis.¹⁵⁷ In their text, Blackwood and Warner refer to the case of *Palmer*¹⁵⁸ as an example of an attempt to rely on section 17(1) of the *Code*. They write:

D had struck V approximately ten blows with an axe causing his death. There was evidence to show that he was a frequent abuser of alcohol and that he had drunk a considerable quantity on the day he killed V. His main defence was that he suffered from Korsakoff's Syndrome, a mental disease produced by intoxication and that he was for that reason in substance deprived of any power to resist the impulse to strike V in the way he did. The Crown, while conceding the existence of mental disease, denied that it was Korsakoff's Syndrome and that it produced any state of mind that would satisfy section 16. The accused was convicted and his appeal related to section 17(2).¹⁵⁹

3.1.5 Although cases arising under section 17(1) are rare, Blackwood and Warner comment, 'they are probably not as rare as in jurisdictions where the defence of intoxication is available to basic intent crimes'.¹⁶⁰

Incapacity and specific intent

3.1.6 The key elements of the defence under section 17(2) are –

- (1) the offence must be an offence requiring a specific intent. A crime of specific intent is a crime in which 'an intent to bring about a particular result is upon the true construction of the provision of the *Code* or statute creating the offence an element of the charge',¹⁶¹ and
- (2) there must be an advanced state of drunkenness as the test deals with *capacity to form the specific intent* rather than *actual intention*.¹⁶² As Burbury CJ and Cox J said in *Snow*, 'there must be intoxication so gross as to result in the incapacity to form the intention'.¹⁶³ It is 'not an "under the influence" provision or a "drink taken" provision but a "blind drunk" provision'.¹⁶⁴

¹⁵⁵ *Laws of Australia*, Criminal Law Principles 9.3, [155].

¹⁵⁶ *Davis* (1881) 14 Cox CC 563.

¹⁵⁷ *Reilly*, unreported Supreme Court of Tasmania No 62/1979.

¹⁵⁸ [1985] Tas R 138.

¹⁵⁹ Blackwood J and Warner K, above n 40, 294.

¹⁶⁰ *Ibid.*

¹⁶¹ *Snow* [1962] TAS SR 271, 293 per Burbury CJ and Cox J. For example, murder on the basis of section 157(1)(a), (b) or (d), wounding with intent to bring about particular results contrary to section 170 and aiding rape. Although the definition of a crime of specific intent is easily stated, there is uncertainty as to its practical application.

¹⁶² There has been considerable criticism on the requirement that the accused's level of intoxication render him or her incapable of forming the requisite intent. See discussion at 4.2.15.

¹⁶³ [1962] Tas R 271, 282.

¹⁶⁴ *Palmer v The Queen* [1985] Tas R 128, 146.

3.1.7 Section 17 no longer applies to all specific intent crimes. While an attempt to commit a crime is generally considered to be a crime of specific intent (as the mental element is an intention to commit the requisite offence),¹⁶⁵ recent legislative reform in the area of consent and sexual offences precludes reliance on self-induced intoxication for attempts to commit certain sexual offences. These are attempts to commit the offences of sexual intercourse with a young person (section 124), indecent act with young person (section 125B), aggravated sexual assault (section 127A) and rape (section 185).¹⁶⁶ The effect is that an accused can no longer rely on evidence of self-induced intoxication to deny that he or she acted with the requisite specific intent for these attempted crime.

3.1.8 Although section 17 does not refer to crimes that do not require a specific intent (such as voluntariness, subjective recklessness or knowledge), it had been generally accepted that intoxication was not relevant to these states of mind and that the admissibility of evidence of intoxication was restricted to crimes of specific intent. In *Snow*, Burbury CJ and Cox J stated that:

Section 17 must ... be taken to assume the general principle of law as firmly established at the time the *Code* was passed is that drunkenness cannot be relied upon as exculpatory factor and we think it must be interpreted as defining exhaustively the limited exceptions to this principle. Section 17 was unquestionably intended to declare the common law as expressed in *Beard's Case*. It ... must be taken to be intended to 'cover the field' as to drunkenness in relation to *mens rea*.¹⁶⁷

A clear line of Tasmanian authority followed *Snow*¹⁶⁸ and held that section 17(2) and (3) of the *Code* covered the field as to the exculpatory effect of voluntary intoxication (*Martin*,¹⁶⁹ *Arnol*,¹⁷⁰ *Palmer*¹⁷¹ and *Bennett*¹⁷²). In other words, evidence of intoxication was only admissible in cases requiring a specific intent and it was not admissible in all other cases.

3.1.9 In *Weiderman's* case,¹⁷³ the Court of Criminal Appeal rejected this previously well-established proposition and held that section 17 does not 'cover the field' in regard to the relevance of intoxication as an exculpatory factor.¹⁷⁴

Attorney-General's Reference No 1 of 1996 (Weiderman's case)

3.1.10 The respondent, Weiderman, killed his father by shooting him. The deceased was suffering from Alzheimer's disease at the time. He was unable to care for himself and had previously expressed an intention to commit suicide. The Crown argued that Weiderman killed his father either as a mercy killing or to evade the burden of caring for him. Weiderman argued that he had no recollection of pulling the trigger and had no intention of killing his father. He said that he had accompanied his father to the place where he was shot, believing that his father intended to take his own life and that he wished to be present when that occurred.

¹⁶⁵ There has been uncertainty in relation to the mental element for attempted rape. For a discussion of the mental element of attempted rape, see Bronitt S and McSherry B, above n 11, 441; Clough J and Mulhern J, *Butterworths Tutorial Series: Criminal Law*, Butterworths, Sydney 1999, 209; Fisse B, *Howard's Criminal Law 5th ed*, Law Book Company, Sydney 1990, 388 – 389; Ashworth A, above n 22, 449 – 450; Williams G, 'The Problem of Reckless Attempts' [1983] *Criminal Law Review* 365; Buxton R, 'Circumstances, Consequences and Attempted Rape' [1984] *Criminal Law Review* 25. This debate is circumvented in the Tasmanian context by the enactment of section 14A(2).

¹⁶⁶ *Criminal Code*, section 14A(2).

¹⁶⁷ [1962] Tas SR 271, 283.

¹⁶⁸ *Ibid*.

¹⁶⁹ [1979] Tas R 211.

¹⁷⁰ [1980] Tas R 222.

¹⁷¹ [1985] Tas R 138.

¹⁷² [1990] Tas R 71.

¹⁷³ (1998) 7 Tas R 293.

¹⁷⁴ *Zeeman*, *Wright* and *Crawford JJ*. Note also that *Underwood J* accepts that section 17 covers the field only in regard to consequence crimes.

3.1.11 Weiderman was charged with murder and the Crown relied on three of the possible bases for murder contained in section 157 of the *Code*: (1) an intention to cause death (section 157(1)(a)); (2) an intention to cause bodily harm which the offender knew to be likely to cause death in the circumstances (section 157(1)(b)); and (3) an unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances (section 157(1)(c)).

3.1.12 There was psychiatric evidence that Weiderman was suffering from a mental illness, namely an adjustment disorder, at the time of the killing. The adjustment disorder was not a mental disease capable of satisfying section 16 and accordingly it could not support the defence of insanity. The disorder would have altered the respondent's impulse control and was relevant to a consideration of whether the respondent had one or more of the specific intentions contained in section 157(1)(a) or (b) of the *Code*,¹⁷⁵ and also to whether he had the actual or imputed knowledge specified in section 157(1)(c) of the *Code*.¹⁷⁶

3.1.13 In addition, there was evidence that prior to the killing, Weiderman had consumed a considerable amount of alcohol. The expert opinion evidence was that the consumption of alcohol would have affected his ability to monitor his own behaviour. This meant that the consumption of alcohol and the adjustment disorder had a compounding effect of reducing the respondent's ability to regulate his own behaviour.

3.1.14 The trial judge ruled that evidence of Weiderman's intoxication was relevant for the purposes of determining whether, under the first limb of section 157(1)(c), he knew his act was likely to cause death. In addition, the trial judge ruled that evidence of intoxication was relevant to the issue arising under the second limb of section 157(1)(c) as to whether the respondent ought to have known that his act was likely to cause death but only to the extent that it interacted with a mental disorder.

3.1.15 The respondent was found not guilty of murder but guilty of manslaughter. The Attorney-General referred a question of law to the Court of Criminal Appeal in relation to the issue of knowledge and intoxication. The live issue for the Court of Criminal Appeal was the relevance of intoxication to the actual and imputed knowledge contained in section 157(1)(c). The majority of the Court of Criminal Appeal (Wright, Crawford and Zeeman JJ; Cox CJ and Underwood J dissenting) held that intoxication was relevant to the question whether the respondent 'knew' his act or omission was likely to cause death (actual knowledge). However, a majority (Cox CJ, Underwood and Wright JJ; Crawford and Zeeman JJ dissenting) held that intoxication was not relevant to whether the respondent 'ought to have known' that his act or omission was likely to cause death (imputed knowledge).

3.1.16 The Court of Criminal Appeal also accepted that intoxication was relevant to the crime of receiving stolen property contained in section 258 of the *Code* in regard to the issue of whether the defendant knew the goods were stolen.¹⁷⁷

Actual knowledge and intoxication

3.1.17 The majority (Zeeman, Wright and Crawford JJ) held that intoxication was relevant to the question whether the respondent 'knew' his act or omission was likely to cause death. The minority (Cox CJ and Underwood J) adhered to the traditional position that section 17 limits the circumstances in which self-induced intoxication has an exculpatory effect: 'the only circumstances in which drunkenness will operate with exculpatory effects are those spelled out in section 17 as expounded by *Beard*¹⁷⁸ and *Majewski*.¹⁷⁹ This is the policy the Tasmanian Parliament intended to enact'.¹⁸⁰

¹⁷⁵ See *R v Hawkins* (1994) 179 CLR 500.

¹⁷⁶ See *R v Hawkins (No 3)* (1994) 4 Tas R 376.

¹⁷⁷ It is noted that Underwood J's adherence to the 'cover the field' position is contradicted by his acceptance that section 17 does not apply to circumstance crimes. His Honour makes a distinction between 'consequence crimes', where the accused has knowledge of the consequence of his actions, and 'circumstance crimes', such as receiving stolen goods that require that the accused know that the goods are stolen.

¹⁷⁸ [1920] AC 479.

¹⁷⁹ (1977) AC 443.

¹⁸⁰ (1998) 7 Tas R 293, 310 – 311 per Underwood J.

3.1.18 The public policy that Parliament intended to enact was that where a person by the voluntary consumption of alcohol and drugs deprives themselves of the capacity to ascertain a ‘risk of which he would have been aware had he been sober, [then] such unawareness is immaterial’.¹⁸¹

3.1.19 In contrast, the majority explicitly rejected the basic rationale of *Snow*¹⁸² that section 17 ‘covers the field’. In providing a basis for extending the relevance of evidence of intoxication to crimes of specific knowledge (independently of section 17), Crawford J looked at the wording of section 17(2) and (3) and relied on the dissenting judgment in *Snow* to conclude that ‘the *Code* was silent as to the effect of evidence of intoxication on crimes not requiring a specific intent’.¹⁸³ Similarly, Zeeman J (with whom Wright J agreed on this issue) concluded that section 17 is not concerned with questions of knowledge. Zeeman J considered that the principles in *Beard’s* case and *Majewski* embodied in section 17 of the *Code* were limited to questions of intent as neither case says anything about crimes where knowledge is an ingredient of the crime.

Imputed knowledge and intoxication

3.1.20 It is settled law in Tasmanian that the requirement under section 157(1)(c) that the respondent ‘ought to have known’ that his act or omission was likely to cause death in the circumstances is a two fold test. The starting point is to consider ‘what the particular accused, with his or her actual knowledge and capacity, ought to have known in the circumstances in which he or she was placed’.¹⁸⁴ In addition, the jury must be satisfied that ‘if the particular accused had stopped to think to the extent he ought to have, the result would, as a matter of fact, have been that he or she would have known or appreciated that the relevant act or acts were likely to cause death’.¹⁸⁵

However, the question has arisen on several occasions as to whether this is a wholly subjective test and whether all the circumstances of the accused are relevant to the consideration of what he or she ‘ought to know’. In this case, the issue was whether intoxication might be a relevant factor.

3.1.21 The majority of the Court of Criminal Appeal (Cox CJ, Underwood and Wright JJ; Crawford and Zeeman JJ dissenting) held that intoxication was not relevant to the question of whether the respondent ‘ought to have known’ his act was likely to cause death in the circumstances. The majority held that although the test is a subjective one in the sense that it requires a consideration of what the particular accused ought to have known, it is not a wholly subjective test. The majority relied on the dissenting judgment of Brennan J in *Boughey v The Queen*¹⁸⁶ to find that Parliament has incorporated ‘an objective standard of sobriety’ into the test of whether the accused ought to have known.¹⁸⁷ It was thought that on this point the majority of the High Court in *Boughey* was not in conflict with the opinion of Brennan J.

3.1.22 In contrast, Crawford J’s conclusion that intoxication is relevant to imputed knowledge was based on a different interpretation of *Boughey*. His Honour considered that:

... it was clear from the judgments of the majority of the High Court ... that in an appropriate case an accused’s state of intoxication at the relevant time may be considered along with all the other evidence which may be relevant to the question of what he or she ought to have known.¹⁸⁸

Crawford J also drew support for his conclusion from the decision of the Court of Criminal Appeal in *Hawkins (No 3)*,¹⁸⁹ that evidence of a mental disease was relevant to the existence of imputed knowledge.

¹⁸¹ *R v Majewski* [1977] AC 443, 465 per the Lord Chancellor. The policy basis for the distinction between specific and basic intent crimes is discussed in Parts 5 and 6.

¹⁸² [1962] Tas R 271.

¹⁸³ (1998) 7 Tas R 293, 323.

¹⁸⁴ *Boughey v The Queen* (1986) 161 CLR 10 at 28 per Mason, Wilson and Deane JJ.

¹⁸⁵ *Ibid.*

¹⁸⁶ (1986) 161 CLR 10, 29, 45.

¹⁸⁷ See Cox CJ, 302 – 304, Underwood J, 313, and Wright J, 318 – 319.

¹⁸⁸ (1998) 7 Tas R 293, 325.

¹⁸⁹ (1994) 4 Tas R 376.

Similarly, Zeeman J was of the view that it would be inconsistent to allow evidence of mental disease to be taken into account while not allowing evidence of intoxication to be taken into account.¹⁹⁰ His Honour thought that to require the jury to consider evidence of mental disease and

at the same time to ignore another factor concurrently operating on the mind, intoxication, is to ask the jury to engage in an exercise in metaphysics which should have no place in the criminal law and which would be calculated to bring the law into disrepute.¹⁹¹

Summary

3.1.23 In summary, the Court held that:

- (1) Section 17 does not cover the field in relation to the relevance of intoxication as an exculpatory factor.
- (2) Section 17(2) of the *Code* is only concerned with ‘specific intent’ and is not concerned with actual knowledge;
- (3) Intoxication is relevant to a consideration of the question of actual knowledge, that is whether the accused ‘knew’ his act or omission was likely to cause death;
- (4) Intoxication is not relevant to the question of imputed knowledge, that is whether the accused ‘ought to have known’ his act was likely to cause death in section 157(1)(c);
- (5) If intoxication is relevant to actual knowledge then *any* degree of intoxication is relevant. This means that the issue is not capacity but whether the accused lacked the requisite knowledge.

3.1.24 The Court also held that intoxication is relevant to the crime of receiving as to whether the accused knew that the goods were stolen because section 17(2) and (3) only apply to consequence crimes.

Involuntary intoxication

3.1.25 Involuntary intoxication ‘embraces a wide number of cases, such as intoxication produced by trickery or fraud; by duress or coercion; by the unforeseen side-effects of a drug; or by unwitting inhalation of fumes or gas’.¹⁹²

3.1.26 The treatment of evidence of involuntary intoxication under the *Code* has not been authoritatively decided. A distinction does not appear to be made in section 17 of the *Code* between self-induced and involuntary intoxication. However, in *Snow*, Burbury CJ and Cox J suggested that the defence of involuntary intoxication might still be available in Tasmania by virtue of section 8 of the *Criminal Code Act 1924*. Section 8 has the effect of saving common law defences except to the extent that they are inconsistent with the *Code*.¹⁹³ Although a separate defence of involuntary intoxication no longer exists at common law (evidence of *any* intoxication can be used to deny any mental element: *O’Connor*), the holding in *Weiderman* that section 17 does not cover the field strengthens the argument that section 8 could be used to import the common law defence of intoxication so far as it relates to involuntary intoxication (i.e. evidence of *any* intoxication can be used to deny any mental element: *O’Connor*).

3.1.27 In the United Kingdom, the House of Lords in *Kingston*¹⁹⁴ rejected the proposition that a special defence of involuntary intoxication existed. In other words, the House of Lords held that an accused cannot rely on involuntary intoxication as a defence if the elements of the offence (external elements and mental element) are made out. However, it was accepted that (unlike self-induced intoxication) evidence of involuntary intoxication was relevant to negative intent in cases of both specific and basic intent (contrary to the *Majewski* approach).¹⁹⁵

¹⁹⁰ (1998) 7 Tas R 293, 337.

¹⁹¹ *Ibid.*

¹⁹² O’Connor D and Fairall P, *Criminal Defences*, Butterworths, Australia 1996, [12.27].

¹⁹³ [1962] Tas SR 271, 278.

¹⁹⁴ [1994] 3 WLR 514.

¹⁹⁵ See Ashworth A, above n 22, 219.

3.1.28 The difficulties that may exist with recourse to a common law defence via section 8 of the *Code* do not necessarily preclude a broader role for involuntary intoxication in Tasmania. Blackwood and Warner write (in relation to *Snow*):

... [I]f (as the majority stated) section 17 covers the field as to self-induced intoxication only, or (as Crawford J stated) section 17 only deals with the relevance of self-induced intoxication to crimes of specific intent, and the *Code* is otherwise silent as to the relevance of intoxication, there would be no need to rely upon section 8 to allow involuntary intoxication to negative intent. Involuntary intoxication could, quite apart from any defence at common law, be used to explain involuntariness or absence of intent of D's physical act or to explain the absence of any other requisite intention, specific or otherwise. Thus without recourse to the common law through section 8 involuntary intoxication negating intent would be a defence.¹⁹⁶

This argument is strengthened by the conclusion of the majority of the Court of Criminal Appeal in *Weiderman's* case that section 17 does not cover the field in respect of the exculpatory effect of intoxication.

3.1.29 If involuntary intoxication is available as an independent ground of exculpation, the principles that would govern the operation of the defence are unclear. Does it allow evidence of involuntary intoxication to have further relevance than *Weiderman's* case would allow in respect of self-induced intoxication? In other words, could evidence of involuntary intoxication be used to negate voluntariness or to explain the absence of any other requisite intention, specific or otherwise?¹⁹⁷ It is noted that in some jurisdictions, a separate defence of involuntary intoxication exists which means that evidence of involuntary intoxication can operate to excuse an accused who has the requisite mental element for an offence but who only formed the intent as a result of involuntary intoxication.¹⁹⁸

3.1.30 If an accused is charged with a summary offence to which common law principles apply, there is no separate defence of involuntary intoxication. At common law, intoxication, whether involuntary or self-induced, is relevant to negate any mental element.¹⁹⁹

3.1.31 An accused can still rely on involuntary intoxication to deny that he or she acted with the requisite intent in relation to attempts to commit offences against sections 124 (sexual intercourse with a young person), 125B (indecent act with young person), 127A (aggravated sexual assault) and 185 (rape) as section 14A(2) refers specifically to 'self-induced' intoxication.

Intoxication and other defences

Mistake

3.1.32 The defence of an honest and reasonable mistake of fact is contained in section 14 of the *Criminal Code*:

Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence.

Thus the defence of mistake of fact only applies where the accused's mistake relates to an external element of the crime. For example, in Tasmania, the mental element for rape is a voluntary and intentional act of sexual intercourse. Lack of consent to the intercourse is an external element of the crime – a factual

¹⁹⁶ Blackwood J and Warner K, above n 40, 295.

¹⁹⁷ As discussed above, this is the position in the United Kingdom where involuntary intoxication is an exception to the *Majewski* principle.

¹⁹⁸ This appears to be the position under the Commonwealth *Criminal Code 1995*, section 8.5, the ACT *Criminal Code 2002*, section 34 and in New South Wales under the *Crimes Act 1900*, section 428G(2). See discussion in 5.1.

¹⁹⁹ See discussion at 3.2.

circumstance that must exist for the crime to occur. This means that if an accused claims that he mistakenly believed that the person was consenting, he (or she) is claiming to be mistaken about an external element of the crime, and so the defence of mistake of fact in section 14 applies, and the mistake must be an honest and reasonable one.

3.1.33 There is authority that evidence of intoxication is relevant to an assessment of whether an accused's belief was honest, but not to whether the accused's belief was reasonable.²⁰⁰ In *McCullough v The Queen*, the Tasmanian Court of Criminal Appeal commented (in the context of self-defence) that:

The criterion of reasonableness is in its nature an objective one, and in our view it would be incongruous and wrong to contemplate the proposition that a person's exercise of judgement might be unreasonable if he was sober, but reasonable because he was drunk.²⁰¹

So, an intoxicated mistake cannot be a reasonable mistake. Therefore evidence of intoxication is largely irrelevant to the defence of mistake of fact in section 14.

3.1.34 In other situations an accused may make a mistake of fact that relates to the mental element of an offence rather than one of the external elements. Section 14 does not apply in such cases. For example, the mental element for murder is an intention to cause death.²⁰² If an accused mistakenly believes a gun to be unloaded and fires it at a victim killing them, the accused's mistake can be used as evidence to support their claim that they did not intend to kill the victim. It does not matter whether their mistake was reasonable – the issue is simple whether or not they had specific intent to kill (although in practice if such a mistake is unreasonable the a jury may be reluctant to believe that it was an honest mistake). In such cases, in accordance with section 17 and *Weiderman*, evidence of intoxication will only be admissible to help explain such a mistake if the crime charged is a specific intent crime and the accused did not have the capacity to form that intent, or if the mental element is actual knowledge (and possibly subjective recklessness).

3.1.35 In relation to intoxicated mistake and sexual offences, it should be noted that the *Criminal Code Amendment (Consent) Act 2004* amends the definition of consent in the *Code* and inserts section 14A. Section 14A provides that:

In proceedings against section 124, 125B, 127, 127A or 185, a mistaken belief of the accused is not honest or reasonable if the accused –

(a) was in a state of self induced intoxication and the mistake was not one which the accused would have made if not intoxicated;

This provision is based on the section 273.2 of the Canadian *Criminal Code*. In the second reading speech, the Attorney-General and Minister for Justice and Industrial Relations said that the section would clarify 'the law in relation to intoxication and the defence of "mistake", as it clearly indicates that a mistake occasioned by the defendant's self-induced intoxication is not a reasonable mistake'.²⁰³

3.1.36 The relevance of an accused's intoxication to a mistaken belief in consent in cases of sexual offences was recently considered by the Victorian Law Reform Commission.²⁰⁴ The recommendation of the VLRC in relation to self-induced intoxication and mistake also draws on the Canadian model. The recommendation was that the defence of honest belief in consent should not be available where an accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting. In considering the question of whether an accused took such reasonable steps,

²⁰⁰ See *McCullough v The Queen* [1982] Tas R 43, 53 per Green CJ, Neasey and Everett JJ in relation to self-defence.

²⁰¹ [1982] Tas R 43, 53.

²⁰² *Code* section 157(1)(a).

²⁰³ House of Assembly Tasmania, *Hansard*, Wednesday 3 December 2003, 27 – 96.

²⁰⁴ Victorian Law Reform Commission, *Sexual Offences Final Report*, 2004, 431 – 439.

the jury is not to have regard to any evidence of an accused's self-induced intoxication.²⁰⁵ The approach is a variation of the Canadian approach by making it clear that:

self-induced intoxication is not a threshold issue for the trial judge. It is relevant only once the defence of mistaken belief in consent has been put to the jury. At this stage the trial judge will instruct the jury that in considering whether the accused took reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting, any evidence of self-induced intoxication should be disregarded.²⁰⁶

3.1.37 In Canada, there seems to be some confusion regarding the question of whether the accused took reasonable steps forms part of the threshold test for the judge or whether it is an issue of fact for the jury to consider once the defence has been left to them.²⁰⁷ Of course, the Tasmanian position differs from both the Canadian model and the VLRC's recommended model because the mistake defence has its source in section 14 of the *Code* and must therefore be an honest and reasonable belief in consent in the case of sexual offences. The VLRC has followed the Canadian model of making an honest belief in consent a defence to rape.²⁰⁸

Claim of right

3.1.38 A drunken mistake may be relevant if an accused asserts a claim of right. A claim of right is defined in section 1 of the *Code* as 'a claim of right which is made in good faith'. It is a belief of legal entitlement and a mistaken but sincere belief will suffice.²⁰⁹ A claim of right is relevant to the offences in Chapter XXXI of the *Code* headed 'Arson and other Unlawful Injuries to Property'.²¹⁰ For example, if a person damages property under an honestly held but mistaken apprehension that the property belongs to them, the person could assert a claim of right.

3.1.39 If an accused's mistake as to his or her legal entitlement is caused by intoxication, it is argued that it is unnecessary that reasonable grounds exist for any mistaken belief and intoxication is relevant. In other words, evidence of intoxication can be taken into account because a claim of right only requires an honestly held belief. While there is no direct authority, in the context of self-defence, the Tasmanian Court of Criminal Appeal in *McCullough v The Queen* considered that intoxication was relevant to the determination of whether a belief was honestly held.²¹¹ This principle would also appear relevant to claim of right.²¹²

Self-defence

3.1.40 Section 46 of the *Code* provides that a 'person is justified in using, in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use'. There are two requirements:

- (1) the subjective belief of the accused in the need to use defensive force; and
- (2) the objective assessment of whether in view of the circumstances that the accused believed to exist the force used was reasonable.²¹³

²⁰⁵ Ibid 422.

²⁰⁶ Ibid 435.

²⁰⁷ Ibid 427, footnote 1120.

²⁰⁸ Ibid 421-422.

²⁰⁹ *Walden v Hensler* (1987) 29 A Crim R 85; *Lopatta* (1983) 35 SASR 101, 107 per White J and at 121 per Legoe J.

²¹⁰ See section 267(3) *Criminal Code*.

²¹¹ [1982] Tas R 43, 53.

²¹² Note section 5(2)(a) *Criminal Damage Act 1971* (UK) which provides a defence that 'at the time of the act or acts alleged to constitute the offence [the defendant] believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage of the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances'. Section 5(3) provides that 'it is immaterial whether a belief is justified or not if it is honestly held'. In *Jaggard v Dickinson* [1981] QB 527, the Divisional Court held that the defendant was entitled to rely on her intoxicated belief for the purposes of this defence.

²¹³ *Walsh* (1991) 60 A Crim R 419, 423 per Slicer J.

Intoxication is clearly *potentially* relevant to both of these matters. However, it is unclear to what extent an accused will be permitted to rely on evidence of intoxication to explain his or her mistaken belief in the need for self-defence. Similarly, it is unclear whether an accused's intoxication forms part of the 'circumstances as the accused believed to exist' for the purposes of objectively assessing the degree or amount of force used.

3.1.41 As the first requirement is subjective, it should logically follow that any evidence relating to the defendant's mental state is relevant. Thus the first requirement could be established by a genuine, though drunken and mistaken, belief in the need for self-defence. This interpretation is supported by:

- the 1987 amendment of section 46 (the section formerly required that the belief in the need for self-defence also be "reasonable");
- the fact that since *Weiderman* section 17 does not cover the field; and
- the holding in *Walsh* that evidence of a mental disease not amounting to insanity is relevant to the first limb of the test.

On the other hand it can be argued that evidence of intoxication should not be admissible to establish a mistaken belief in the need for self-defence because:

- section 17 covered the field at the time of the 1987 amendment;
- comments by former Chief Justice Cox in *Weiderman*; and
- on policy grounds.

3.1.42 The 1987 amendment: Before the amendment to the law of self-defence in 1987, self-defence took into account reasonable apprehension and beliefs based on reasonable grounds. There was little scope for intoxication as a matter relevant to self-defence. In *McCullough v The Queen*,²¹⁴ decided under old provisions, the Tasmanian Court of Criminal Appeal held that the accused's state of intoxication was only relevant to whether or not the accused had an apprehension and belief (the subjective test), but not to whether that apprehension or belief was reasonable or held on reasonable grounds, (the objective test).²¹⁵ In other words, the court said that the jury could consider intoxication for the purpose of considering if the accused actually held a particular belief, but not for whether that belief was based on reasonable grounds.

It has been argued by Blackwood and Warner that:

with the repeal of s 46(2) and the objective test of reasonableness, the position in Tasmania should, logically, have changed: now, provided D holds a belief in the necessity for self-defence, it is quite immaterial as to how or why he had that belief.²¹⁶

Therefore, an accused could rely on a mistaken belief caused by intoxication. This would be in accordance with the position in *McCulloch v The Queen*.²¹⁷

3.1.43 On the other hand, it could be argued that *McCulloch* was wrong on this point, and that in 1987, when the requirement that the belief be "reasonable" was removed, it was the accepted view that section 17 covered the field in relation to intoxication under the *Code*, and therefore it was not even contemplated that the amendment would make intoxication relevant to self-defence. This is supported by the fact that the second reading speech of the 1987 amending Bill does not refer to intoxication.²¹⁸

3.1.44 However, although it does not appear to have been contemplated by the legislature that the 1987 amendment would make intoxication relevant to self-defence, since the holding in *Weiderman* that section 17 does not cover the field it is difficult to find any argument, other than those based exclusively on policy,

²¹⁴ [1982] Tas R 43.

²¹⁵ *Ibid* 53.

²¹⁶ Blackwood J and Warner K, above n 40, 318.

²¹⁷ [1982] Tas R 43.

²¹⁸ Attorney-General (Mr Bennett), Tasmania, House of Assembly, *Parliamentary Debates (Hansard)*, Vol IX, No 2, 8/4/1987, 1247.

why intoxication should not be relevant to the subjective test in section 46. A plain reading of the section indicates the purely subjective nature of this first requirement.²¹⁹ This is also reflected by the holding in *Walsh* that evidence of mental disease (not amounting to insanity) is relevant to the question of whether there was an honest belief in the need for self-defence.

3.1.45 However, the power of policy grounds cannot be disregarded when it comes to the issues of intoxication. In England, where the objective test of reasonableness has also been abandoned in favour of the purely subjective enquiry as to whether D's belief in self-defence was honestly held, intoxication has been held to be an exception to the proposition that an accused can be mistaken as to nature of the threat faced. In *R v O'Grady*,²²⁰ the accused and his friend had been out together and had consumed a huge quantity of alcohol. They had a fight and the friend died. At trial, the accused relied on both provocation and self-defence. The trial judge directed the jury that intoxication was relevant with reference to the accused's belief in the existence of an attack but not relevant in considering whether there had been a mistake as to the severity of the attack. He was acquitted of murder but convicted of manslaughter. The accused appealed arguing that it was crucial that the reasonableness of his response should be assessed on the basis of the facts as he believed them to be. Therefore, if because of his intoxication, he had mistaken the severity of his friend's attack, the jury should have been told to consider that when considering self-defence. The Court of Appeal rejected the accused's argument and said that 'a defendant was not entitled to rely, so far as self-defence is concerned, upon a mistake of fact which has been induced by voluntary intoxication'.²²¹

3.1.46 Although the decision in *O'Grady* 'has been trenchantly criticised as abandoning consistency and logic',²²² it has been followed by the UK Court of Appeal in *O'Connor*,²²³ where the Court expressed the view that intoxication was not relevant to an accused's belief in the need to act in self-defence.

Clearly policy considerations are important. The same policy considerations that motivated the decision in *O'Grady* have strong historical support in Tasmania, as reflected by the initial enactment of section 17 (and its clear intention to enact the position in *Beard*) and its subsequent interpretation in *Snow*. The strength that such policy considerations may yet have in Tasmania can be seen in comments of the former Chief Justice in *Weiderman* regarding the possibility that intoxication might be relevant to self-defence:²²⁴

I find it hard to imagine that Parliament ever contemplated the possibility that this might be the case and intended it to be so.

It remains to be seen whether the current Tasmanian Bench would apply similar policy considerations if this issue arose before them.

3.1.47 It is also unclear how the issue of intoxication relates to the objective component of the test for self-defence. Can the fact that an accused's understanding of their situation is affected by alcohol be taken into account in determining whether the force used was reasonable? Of course this largely depends on the answer to the previous issue, namely, is intoxication relevant to the subjective part of the test – determining what the defendant believed the circumstances to be. If intoxication is relevant to the first requirement, then it follows that a drunken mistake as to the need for self-defence or the severity of an attack will also be relevant in determining whether the amount of force used was reasonable in the circumstances as the defendant believed them to be.

3.1.48 The simple fact that a defendant was intoxicated could also be relevant to the objective assessment of whether the force they used was reasonable. For example, an intoxicated person who is being attacked, say in a fist fight in a bar, may find that due to their intoxicated state (slow reactions, poor co-ordination, body movements etc) they may not be able to adequately defend themselves by using the degree of force

²¹⁹ Section 46 is based on section 48 of the NZ Criminal Code.

²²⁰ [1987] 3 WLR 321.

²²¹ *Ibid* 326.

²²² *Conlon* (1993) 69 A Crim R 92, per Hunt CJ at 100.

²²³ [1991] Crim LR 135.

²²⁴ (1998) 7 Tas R 293, 302.

that would be adequate if they were not intoxicated (ie joining in the fist fight or simply running away), therefore they may need to use more force to defend themselves (eg pulling out a knife or gun). Can this reduced capacity and consequent need to use a larger degree of force be taken into account in assessing whether the force used was reasonable? Certainly if the reduced capacity were caused by some other circumstance of the defendant (for example that they were already wounded) it would be part of the actual circumstances and would be relevant to the assessment of whether the force used was reasonable. But do policy considerations prevent it being considered?

3.2 Summary offences

3.2.1 The common law applies to summary offences that have no parallel offence contained in the *Code*.²²⁵ The common law principles governing the relevance and admissibility of evidence of intoxication are found in the leading High Court decision in *R v O'Connor*.²²⁶ In that case, the majority of the High Court (Barwick CJ, Stephen, Murphy and Aickin JJ; Gibbs, Mason and Wilson JJ dissenting) held that evidence of intoxication is relevant in determining whether an act of the accused was voluntary. This means evidence of intoxication may be relied upon to negate any mental element, including voluntariness, intention, knowledge or subjective recklessness.²²⁷

3.2.2 The respondent, O'Connor, broke into a police officer's car and removed a map holder and a knife. He was confronted by the police officer and he ran away. The police officer caught up with him to arrest him. During the course of the arrest, the respondent opened the blade of the knife he had taken from the car and stabbed the police officer. He was charged with theft, wounding with intent to resist arrest and unlawful wounding (as an alternative charge).

At trial, the respondent gave evidence that he had taken a particular drug and had been drinking alcohol for a substantial part of the day and that he had no recollection of what had occurred with the police officer or the police officer's car. There was medical evidence that the drug the respondent had claimed to have taken was hallucinatory and in association with alcohol could have rendered the respondent incapable of reasoning and of forming an intent to steal or wound. The trial judge directed the jury that they could take into account the evidence of the respondent's intoxication when considering the charges of theft and or wounding with intent to resist arrest, but not when they were considering the alternative charge of unlawful wounding.

3.2.3 The respondent was acquitted of theft and wounding with intent but was convicted of the alternative charge of wounding. He successfully appealed to the Court of Criminal Appeal of Victoria. The Crown's appeal to the High Court was unsuccessful. In reaching its conclusion, the majority of the High Court (Barwick CJ, Stephen, Murphy and Aickin JJ) refused to apply the English position on intoxication as set out in *DPP v Majewski*²²⁸ on the basis that:

- (1) the distinction between crimes of specific and basic intent was illogical;
- (2) it was important to maintain 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'.²²⁹

²²⁵ Section 4(3) *Criminal Code Act 1924* and *Gow v Davies* (1992) 1 Tas R 1.

²²⁶ (1980) 146 CLR 64.

²²⁷ See Barwick CJ at 87 – 88, Stephen J at 105, Murphy J at 113 – 114 and Aickin J at 125 – 126.

²²⁸ [1977] AC 443.

²²⁹ VLRC 1999, above n 21. See also Bronitt S and McSherry B, above n 11, 244 - 245.

In contrast, the minority of the High Court preferred to follow the English position based on public policy. As Mason J stated:

[T]here are two strands of thought whose thrust is to deny that drunkenness is an excuse for the commission of crime. One is essentially a moral judgment – that 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 other is a social judgment – that society legitimately expects for its protection that the law will not allow to go unpunished an act which would be adjudged to be a serious criminal offence but for the fact that the perpetrator is grossly intoxicated.²³⁰

3.2.4 At common law, any degree of intoxication that is relevant to the issue of whether the accused's act was voluntary or to whether the accused possessed the requisite intent for the offence is admissible.

3.3 Commonwealth offences

3.3.1 Prior to the commencement of the *Commonwealth Criminal Code*, the common law position applied to Commonwealth offences.²³¹

3.3.2 In its consideration of general principles of criminal responsibility, the Criminal Law Officers Committee recommended that the principles in *R v O'Connor*²³² be maintained as:

the *Code* should be based on principle and ... it would be inconsistent to maintain that our system of criminal responsibility is based on free will and then impose responsibility in a situation where the defendant lacked free will in the most fundamental way, namely the will to act – even though that situation was the result of gross intoxication.²³³

The Criminal Law Officers Committee rejected a distinction between specific and basic intent as such a distinction 'does not provide a principled basis for determining when arguments based on intoxication should be allowed'.²³⁴

However, this recommendation was not followed when the *Commonwealth Criminal Code* was enacted. The Commonwealth approach to self-induced intoxication codifies the division between basic and specific intent. In the second reading speech, the Minister for Justice stated:

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.²³⁵

3.3.3 By way of background to the intoxication provisions of the *Commonwealth Criminal Code*, it is important to understand that under the structure of the *Code*, a fault (mental) element for a particular physical element may be intention, knowledge, recklessness or negligence.²³⁶ In addition, under the *Code*, an important distinction is made between *conduct* and *circumstances* or *results*.²³⁷ Criminal liability is dependent on proof of proscribed conduct (an act, omission or state of affairs). In some offences, 'the fault

²³⁰ (1980) 146 CLR 64, 110. See also Gibbs J at 93 and Wilson J at 133 – 134.

²³¹ Section 4 *Crimes Act 1914* (Cth) as amended by *Crimes Amendment Act 1995* (Cth) section 3. The provisions in Chapter 2 which deal with intoxication were extended to all Commonwealth offences from 13 April 1998, *Criminal Code Amendment Act 1998* (Cth).

²³² (1980) 146 CLR 64.

²³³ Criminal Law Officers Committee of the Standing Committee of Attorneys-General, above n 23, 17.

²³⁴ Ibid 45.

²³⁵ Mr Duncan Kerr, Australian Minister for Justice, House of Representatives, *Debates*, 1 March 1995, 1333 – 1334.

²³⁶ Section 5.1(1). This discussion of the operation of the *Criminal Code Act 1995* (Cth) draws heavily on Leader-Elliott I, above n 6.

²³⁷ See Leader-Elliott I, above n 6, 49 – 53.

element for the conduct elements of the offence will be specified'.²³⁸ For example, section 270.3 provides that a person who 'intentionally ... possessed a slave' is guilty of the offence of slavery. Often 'the fault elements for conduct are not specified',²³⁹ and in these circumstances the Crown must prove that the 'act, omission or state of affairs was intentional'.²⁴⁰ Usually, the Crown will also be required to prove additional circumstances or results to constitute the offence.²⁴¹ For example, the offence of causing harm to a Commonwealth public official contained in section 147.1 'requires proof of an intentional act which results in harm to the official [intention in relation to conduct] and an intention to cause that harm [intention in relation to results]'.²⁴²

3.3.4 The *Commonwealth Criminal Code* 'imposes relatively few limits on the purposes for which prosecution and defence may rely on evidence of intoxication'.²⁴³ The restriction (that applies to defence and prosecution) is that self-induced intoxication is not to be taken into account in determining issues of voluntariness and 'basic' intent.²⁴⁴ Section 4.2(6) provides that 'evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary'.²⁴⁵ This means 'evidence in support of a plea of involuntariness must be consistent with ... sobriety'.²⁴⁶ It follows that evidence of self-induced intoxication cannot support a defence of automatism. Furthermore, section 8.2(1) provides that evidence of self-induced intoxication cannot be taken into account in determining whether a fault element of 'basic intent' exists. Section 8.2(2) gives 'basic intent' a restricted definition: 'a fault element of basic intent is a fault element for a physical element that consists only of conduct'. An example of a 'basic' intent offence is section 149.1 (Obstruction of Commonwealth Public Officials). This provides that it is an offence to obstruct, hinder, intimidate, or resist Commonwealth officials in the performance of their duties. The Crown must prove that the person was a public official and '[s]ince no other fault element is specified, the prosecution must prove an intentional act of obstruction'.²⁴⁷ The offence is 'a "physical element that consists only of conduct"',²⁴⁸ and so evidence of intoxication would not be admissible.

3.3.5 While evidence of intoxication cannot be considered in determining whether the conduct of the accused was intentional, evidence of intoxication can be considered when determining fault relating to circumstances or results.²⁴⁹ This can be illustrated by way of an example. Section 71.8 of the *Commonwealth Criminal Code* provides for the offence of unlawful sexual penetration with a United Nations (UN) person or associated person. It provides that a person is guilty of an offence if:

- (a) the person sexually penetrates another person without the consent of that person; and
- (b) that other person is a UN or associated person; and
- (c) the UN or associated person is engaged in a UN operation that is not a UN enforcement action; and
- (d) the first-mentioned person knows about, or is reckless as to, the lack of consent.

The Crown must prove an intentional act of sexual penetration and knowledge or recklessness as to lack of consent. Under section 8.2, an accused could not rely on evidence of intoxication to argue that the act of penetration was not intentional (conduct).²⁵⁰ However, the accused could argue that as a result of intoxication, he did not know about or was not reckless as to absence of consent (circumstance).

²³⁸ Ibid 147.

²³⁹ Ibid.

²⁴⁰ Section 5.6(1) discussed in Leader-Elliott I, above n 6, 147.

²⁴¹ Ibid 145 – 147.

²⁴² Ibid 147.

²⁴³ Ibid 137.

²⁴⁴ Section 8.2(1).

²⁴⁵ Section 4.2(6).

²⁴⁶ Leader-Elliott, above n 6, 39.

²⁴⁷ Ibid 165.

²⁴⁸ Ibid.

²⁴⁹ Ibid 145.

²⁵⁰ It is difficult to conceive a case where an accused could physically penetrate a person and at the same time assert that they were so drunk that their physical act was not intentional.

3.3.6 There is an exception to ‘the general rule that evidence of self-induced intoxication has no part to play when the defendant denies that conduct was intended’.²⁵¹ Section 8.1(3) allows evidence of self-induced intoxication to be taken into account in determining whether conduct is accidental.²⁵² This means that if an offender argues that he or she did not intend conduct because it was an accident, then he or she can rely on intoxication. For example, a ‘drunk who stumbles into another person lying on the street [can rely on intoxication] as opposed to the drunk who kicks the other person’.²⁵³ Leader-Elliott suggests that this provision will not be often used for Commonwealth offences as ‘[a]ccident is a more characteristic excuse in offences which involve the gross physicality of damage or injury’.²⁵⁴

3.3.7 Section 8.4 of the *Commonwealth Criminal Code* sets out the relevance of evidence of intoxication to the defences available under the *Commonwealth Criminal Code*. If a defence requires a reasonable belief (except in the case of involuntary intoxication), the belief must be one that a reasonable and sober person might have held.²⁵⁵ Defences that require a reasonable belief are reasonable mistake of fact (section 9.2), duress (section 10.2) and sudden and extraordinary emergency (section 10.3). Evidence of self-induced intoxication can be taken into account in determining whether a person had a mistaken belief of fact in a defence of reasonable mistake of fact.²⁵⁶ However, as the defence will fail if a mistake is not also reasonable, it is unlikely that the defence will succeed.²⁵⁷

3.3.8 Self-defence (section 10.4) and claim of right (section 9.5) are exceptions as they are defences that permit defendant’s to make unreasonable mistakes. This means that a defendant is entitled to rely on an intoxicated and unreasonable mistake for the purposes of claim of right and self-defence. However, there is a limit contained in section 8.4(4). Section 8.4(4) has the effect of excluding evidence of intoxication in relation to defences of self-defence or claim of right to ‘basic intent’ crimes.²⁵⁸ This means that a defendant cannot rely on an intoxicated belief for the purposes of self-defence where ‘each physical element has a fault element of basic intent’.²⁵⁹

3.3.9 The *Commonwealth Criminal Code* contains a defence of involuntary intoxication for which there is not a corresponding common law defence.²⁶⁰ Section 8.5 provides that ‘a person is not criminally responsible for an offence if the person’s conduct constituting the offence was as a result of intoxication that was not self-induced’. Intoxication is defined as self-induced unless it came about ‘(a) involuntarily; or (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force’.²⁶¹ This is ‘a true defence ... which excuses a defendant though the prosecution proves voluntary commission of the physical elements of the offence and the fault elements, if any, required for conviction’.²⁶² The defendant bears the evidentiary burden for the defence of involuntary intoxication.²⁶³

It is noted that under the *Commonwealth Criminal Code*, the provisions limiting the use of evidence of intoxication apply equally to the defence and the prosecution.²⁶⁴

²⁵¹ Leader-Elliott, above n 6, 151.

²⁵² Section 8.2(3). See commentary in Leader-Elliott, above n 6, 151- 153.

²⁵³ The Parliament of the Commonwealth of Australia, Senate, *Criminal Code Bill 1994 Explanatory Memorandum* cited in Legislative Assembly for the Australian Capital Territory, *Criminal Code 2002 Explanatory Memorandum*.

²⁵⁴ Leader-Elliott, above n 6, 151 - 153

²⁵⁵ Ibid 161. In the case of involuntary intoxication, the standard is similar to offences of negligence involving involuntary intoxication: ‘in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned’, section 8.4(3).

²⁵⁶ Section 8.2(4). See commentary in Leader-Elliott, above n 6, 153.

²⁵⁷ See commentary in Leader-Elliott, above n 6, 153.

²⁵⁸ Ibid 161 – 163.

²⁵⁹ Section 8.4(4).

²⁶⁰ See commentary in Leader-Elliott, above n 6, 167 – 169.

²⁶¹ Section 8.1. See commentary in Leader-Elliott, above n 6, 139 – 141.

²⁶² Ibid 167.

²⁶³ Section 13.3.

²⁶⁴ See Leader-Elliott, above n 6, 137.

Part 4

The Need for Reform

This part argues that the Tasmanian law relating to intoxication and criminal responsibility is in need of reform because it is:

- (1) uncertain; and
- (2) unprincipled, illogical, inconsistent and unduly complex

4.1 Uncertainty

4.1.1 It is important for the operation of the criminal justice system and for public confidence in the legal system that the law is accessible and clear. It is argued that the law in Tasmania as it currently stands concerning the relevance of intoxication to criminal responsibility is uncertain. These uncertainties concern:

- (1) the relevance of intoxication to subjective recklessness;
- (2) the law of involuntary intoxication; and
- (3) the relationship between intoxication and other defences.

Consequently, it is difficult for non-lawyers to have an understanding of how the law of intoxication operates. In the absence of a clear statement from the court as to the application of the law of intoxication, it is also difficult for judges, magistrates and legal practitioners to consistently interpret and apply the law. In these circumstances, a clear legislative statement is required.

(1) the relevance of intoxication to subjective recklessness

4.1.2 Although *Weiderman's* case²⁶⁵ dealt with the relevance of intoxication to knowledge, the implications of rejecting the 'cover the field' interpretation of section 17 of the *Code* are much wider. In particular, the relevance of intoxication to subjective recklessness is uncertain following *Weiderman's* case. It was accepted in *Weiderman's* case that intoxication was relevant to actual knowledge in section 157(1)(c), that is whether the respondent knew that the act was likely to cause death. This is similar to the test of foreseeability applicable to subjective recklessness. The test of foreseeability is whether the accused foresaw the consequence of his act as being likely. There is a close connection between what an accused knew to be likely (knowledge of likely consequences) and what an accused foresaw to be likely (foresight of likely consequences).²⁶⁶ And so there is a strong argument that intoxication should be relevant to what the accused foresaw as likely if it is relevant to what he knew to be likely.²⁶⁷

4.1.3 An informal survey of the judges of the Supreme Court of Tasmania indicates that a number of judges allow intoxication to be taken into account for crimes of subjective recklessness. The jury would be directed to consider the accused's intoxication along with all the other evidence to determine whether the accused was aware of the likely consequences of his or her act. However, there is no authoritative

²⁶⁵ (1998) 7 Tas R 293.

²⁶⁶ The terms knowledge and foresight have at times been used interchangeably, even in the High Court, see for example *Pemble v R* (1971) 124 CLR per McTiernan and Menzies JJ, and *R v Crabbe* (1985) 156 CLR 464, in a joint judgement by the court, at 471.

²⁶⁷ Knowledge is more clearly distinguished from recklessness in the *Criminal Code Act 1995* (Cth), where knowledge means knowledge that something will happen in the ordinary course of events: section 5.3. There is also a clear distinction drawn in the United Kingdom between knowledge and recklessness: see UK Law Commission 1995, above n 23, 58 discussed below, see 5.2.6 - 5.2.9.

statement which allows this and it is by no means clear that all judges invariably so instruct juries. Moreover, it is unsatisfactory that the *Code* appears to say one thing on its face, but is interpreted by the courts as saying something else. The uncertainty in relation to the subjective recklessness is highlighted by the view of the Office of Director of Public Prosecutions that the law remains clear that intoxication is not relevant to subjective recklessness. In the response of the DPP, it was stated that ‘the case of *Weiderman* only purported to discuss crimes involving knowledge, and certainly did not purport to override the Court of Appeal’s decision in *R v Bennett* [1990] Tas R 72’. The decision in *Bennett* is authority for the following:

- the mental element for unlawfully causing grievous bodily harm (or wounding) contrary to section 172 is an intention to cause bodily harm of that kind (a wound) or foresight as to likelihood that such harm (wound) may be caused;
- that unlawfully causing grievous bodily harm (or wounding) is not a crime of specific intent for the purposes of section 17.

4.1.4 It is accepted that *Weiderman’s* case does not challenge the accuracy of these propositions. However, uncertainty remains as to the implications of rejecting the ‘cover the field’ interpretation of section 17. In his response, Justice Underwood stated that *Weiderman’s* case ‘did little to solve the problems associated with intoxication and knowledge. ... [T]hese problems arise on a daily basis in the Court, particularly in the case of crimes such as wounding and causing grievous bodily harm’. As a consequence, his Honour expressed the view that the ‘review of this area of the law and [the] recommendations are timely’.

4.1.5 A further uncertainty is that if the principle in *Weiderman’s* case is extended to subjective recklessness in cases of wounding and causing grievous bodily, does it also extend to cases of assault? The mental element for assault by application of force is an intention to apply force or subjective recklessness in relation to the application of force.²⁶⁸ In the case of a drunken brawl, there is little room for an accused to argue that he or she did not intend to apply force where they ‘squared up’ and hit the victim. The dilemma for the courts would arise in ‘throwing type’ of cases. For example, in a case where the accused was drunk and threw a bottle over a wall that hit a child on the head, the act of throwing the bottle was clearly voluntary and intentional (section 13(1)). However, the accused could argue that, as a result of intoxication, he or she did not intend to apply force nor did they foresee the likelihood of applying force. In such a case, would the court direct that intoxication was relevant?

(2) *the law of involuntary intoxication*

4.1.6 As discussed above, there is also uncertainty concerning the relevance of involuntary intoxication to criminal responsibility. Although a plausible argument exists that involuntary intoxication should be treated differently from self-induced intoxication under the *Code*, there has not been an authoritative determination in Tasmania. In addition, the principles that would govern the operation of involuntary intoxication are unclear.

(3) *the relationship between intoxication and other defences*

4.1.7 A further uncertainty is the relationship between the law of intoxication and other defences.²⁶⁹ For example, it is unclear whether a drunken mistake is relevant to the defence of self-defence. If a drunken mistake is relevant to self-defence, it has been argued that there is a fundamental inconsistency in restricting the ‘admissibility to evidence of self-induced intoxication where it relates to the mens rea for an offence which is not an offence of specific intent, but allowing it to be considered when it relates to a plea of self-defence in relation to such an offence’.²⁷⁰ It would be desirable to clarify this relationship.

²⁶⁸ *Wilkinson* Unreported Serial No 43/1985; *Vallance* [1960] Tas SR 51 per Nettlefold J.

²⁶⁹ See discussion at 3.1.32 - 3.1.48.

²⁷⁰ Brown D et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, Federation Press, 2001, 678.

4.2 Unprincipled, illogical, inconsistent and unduly complex

4.2.1 The second reason for reform is that the law of intoxication in Tasmania is unprincipled, illogical, inconsistent and unduly complex. There are a number of anomalies in the practical application of the law of intoxication. At a fundamental level, there are criticisms that:

- the underlying rationale of section 17 of the *Code* is contrary to fundamental principles of criminal responsibility;
- the division between specific and basic intent is flawed; and
- the emphasis on incapacity in section 17 is contrary to fundamental principle.

4.2.2 In addition, the decisions of the Court of Criminal Appeal in *Weiderman's* case and *Hawkins (No 3)*²⁷¹ add further anomalies, inconsistencies and complexity to the intoxication rules by creating a different standard of relevance for actual knowledge (any degree of intoxication rather than lack of capacity) and an unsatisfactory interaction between mental disorder and intoxication. Further, section 14B(2) creates a class of specific intent offences (attempts to commit certain sexual offences) for which an accused cannot rely of self-induced intoxication to negate intent.

4.2.3 Finally, there are different rules for indictable offences, summary offences and Commonwealth offences, adding further complexity to the law.

Contrary to fundamental principles of criminal responsibility

4.2.4 A fundamental principle of criminal responsibility is that a person is not guilty of a criminal offence unless that person acted with the requisite guilty mind. This means that the prosecution must prove that an accused's act or omission was voluntary and intentional. The statement of this principle is found in section 13(1) of the *Code*. In addition, the prosecution must prove any additional mental element required such as intention, subjective recklessness or knowledge. In limiting the admissibility of evidence of intoxication to cases of specific intent, section 17 can be challenged on the basis that, contrary to fundamental principles of criminal responsibility, it allows an offender to be convicted despite the absence of a guilty mind.

Criticism of the division between specific and basic intent

4.2.5 The division of offences into the categories of specific intent and basic intent was created by courts in an attempt to limit the admissibility of evidence of voluntary intoxication.²⁷² This division has been the source of sustained criticism.²⁷³ The criterion of specific intent to determine if evidence of intoxication can be taken into account has been attacked as lacking a clear rationale or principle.²⁷⁴ The operation of the law of intoxication in relation to an attempt to commit a crime highlights the arbitrariness of the distinction. As Bronitt and McSherry write:

It is ... very difficult to find any rationale for holding that intoxication is relevant to certain offences and not to others. For example, why should intoxication be taken into account in relation to an attempt to commit an offence of basic intent and yet not in relation to the latter? The division is often arbitrary and inconsistent without any guiding principles or rationale'.²⁷⁵

4.2.6 Previously in Tasmania, for example, in the case of rape, an accused could not rely on evidence of intoxication to negate the mental element for rape under section 17 because it is a basic intent crime.

²⁷¹ (1994) 4 Tas R 376

²⁷² Horder J, 'Sobering Up? The Law Commission on Criminal Intoxication' (1995) 58 *Modern Law Review* 534.

²⁷³ See for example, Quigley T, 'Specific and General Nonsense' (1987) 11 *Dalhousie Law Journal* 75. See also discussion at 6.2.

²⁷⁴ See Bronitt S and McSherry B, above n 11, 250 – 251.

²⁷⁵ *Ibid* 251.

However, if the accused was charged with attempted rape, then evidence of intoxication could have been taken into account to determine whether the accused had the requisite mental element.²⁷⁶ As Stephen J observed in *O'Connor*, 'since the seriousness of the crime or its social consequence does not play any part in determining whether or not a crime is one of specific intent, it is hardly surprising that the operation of the principle may seem haphazard'.²⁷⁷ The inconsistency between attempts and the completed crime has now been resolved as evidence of self-induced intoxication is no longer relevant to deny the mental element for attempted rape.²⁷⁸

4.2.7 An aim of the division between specific and basic intent was to prevent an intoxicated offender 'walking free' and escaping conviction altogether. This was premised on the faulty notion that most serious offences were 'specific' intent crimes and that for each serious offence there existed a lesser 'basic' intent alternative. It was thought that while an accused might be acquitted of the more serious offence (the 'specific' intent crime) where intoxication could be taken into account, he or she would be convicted of a lesser offence (the 'basic' intent crime) where intoxication could not be taken into account.²⁷⁹ This reasoning is faulty in two ways: (1) the division of offences into specific and basic intent crimes does not reflect the seriousness of offences (as the example of attempts to commit crimes shows),²⁸⁰ and (2) not all 'specific' intent crimes have a lesser alternative.²⁸¹

4.2.8 The distinction may also cause unnecessary complexity when an accused is charged with a number of crimes, some of which are basic intent and some of which are specific intent crimes. Leader-Elliott summarises this criticism: 'no jury should be expected to engage in the kind of mental gymnastics required to consider evidence of intoxication when one crime is in issue and ignore it when they consider another, closely related offence'.²⁸²

4.2.9 As a practical matter, the lack of an underlying rationale makes it difficult to classify offences as basic and specific intent offences. The Court of Criminal Appeal's decision in *Hodgson*²⁸³ illustrates the difficulties inherent in the distinctions of crimes of specific intent and other crimes. In this case, the respondent broke into a seaside house and set fire to some flammable material which in turn set fire to the house itself, causing considerable damage. He was charged with arson contrary to section 268 of the *Code*. He gave evidence that he had consumed a considerable quantity of liquor and marijuana. He broke into the house and remembered seeing flames, but he could not explain them. He had no recollection of lighting the fire.

4.2.10 The trial judge directed the jury that in order to convict the respondent of arson they would have to be satisfied beyond reasonable doubt that he unlawfully set fire to the building with the intention of bringing about that result. He further directed the jury that the respondent could not be convicted unless they were satisfied beyond reasonable doubt that at the time he set fire to the building (if he did) that he was not intoxicated by drink and/or drugs to the extent that he was incapable of forming the intention of setting fire to the building. The directions given by the trial judge assumed that arson was a crime of specific intent and therefore that the defence of intoxication in section 17(2) was a defence to such a crime.

4.2.11 The respondent was acquitted, and the Crown appealed on the ground that the trial judge erred in failing to direct the jury that they could convict if they were satisfied that he had deliberately done a willed act, aware at the time that he did it that the result charged in the indictment was a likely consequence of his act. Ground 4 stated that the trial judge erred in law in failing to direct the jury that they could convict the

²⁷⁶ See discussion in Issues Paper at 4.2.18 - 4.2.19. This issue no longer arises because of *Code* section 14A(2).

²⁷⁷ (1980) 146 CLR 64, 102.

²⁷⁸ *Code* section 14A(2).

²⁷⁹ See *R v O'Connor* (1980) 146 CLR 64, 101 – 102 per Stephens J. See also VLRC 1999, above n 21, 6.6; New Zealand Criminal Law Reform Committee, above n 23, 33.

²⁸⁰ In *R v O'Connor* (1980) 146 CLR 64, Stephen J wrote that there 'are instances where the facts of a particular criminal incident might seem to call for some gradation, but the gradation which in fact results may run the wrong way', at 101 – 102.

²⁸¹ See *R v O'Connor* (1980) 146 CLR 64, 101 – 102 per Stephen J. See also New Zealand Criminal Law Reform Committee, above n 23, 33; LRCV 1986, above n 23, para 33.

²⁸² Leader-Elliott I, above n 20, 102 – 103.

²⁸³ [1985] Tas R 75.

respondent if they were satisfied beyond reasonable doubt that he was not intoxicated by drink and/or drugs to the extent that he was incapable of forming the intent to set fire to the building or of being aware that it was a likely result. So, it was assumed that intoxication would be relevant to such an intent – namely subjective recklessness.

4.2.12 The Court of Criminal Appeal held (by a majority with Cosgrove J dissenting) that the crime of arson required that the respondent did a voluntary and intentional act which resulted in setting fire to the building foreseeing that his act might have that effect but recklessly taking the risk. The grounds of the appeal (Grounds 3 and 4) which related to the direction of intoxication were not argued because counsel for the Crown submitted that they were ancillary to the first two grounds (which related to the mental element for arson). Although the Court decided that recklessness would suffice for arson, it did not have to decide whether it was a crime of specific or basic intent.

4.2.13 If, as *Hodgson* decided, arson does not require an intent to set fire to a building but merely a voluntary and intentional act which the accused foresees as likely to produce that result, it is not a crime of specific intent (an intent to bring about a particular result) and intoxication is not relevant by virtue of section 17(2) of the *Code*. The point is that the Crown appeared to think that arson was a crime of specific intent whether or not it required an intent to set fire to a building or merely recklessness. This highlights the difficulty of applying the distinction between specific and basic intent. In Tasmania, it is fair to say that our understanding of the classification of offences is assisted more by case law than by an appreciation of the underlying concepts.²⁸⁴

4.2.14 In an attempt to circumvent this problem, New South Wales has included in its legislation dealing with intoxication a list of offences that are classified as specific intent offences. There are numerous listed offences, including murder, wounding with intent to do bodily harm or resist arrest, causing a grievous bodily disease, assault with intent to have sexual intercourse and kidnapping.²⁸⁵ Brown et al have suggested that the list looks like ‘[s]omeone [had] simply gone through the Act and picked out offences containing the words “with intent to”’.²⁸⁶ The point has been made that the legislation provides no guidance as to how to classify offences that are not listed and that the treatment of issues of knowledge and recklessness remains unclear.²⁸⁷

Criticism of the emphasis on ‘incapacity’

4.2.15 A further criticism directed at section 17 of the *Code* is the emphasis on ‘incapacity’. As discussed above, the test for intoxication deals with *capacity to form the specific intent* rather than *actual intention*. Section 17(2) provides that evidence of intoxication is relevant to the issue of whether an accused was ‘incapable of forming the specific intent essential to constitute the offence’. In other words, evidence of intoxication falling short of evidence of incapacity is inadmissible for section 17. It is argued this is ‘contrary to fundamental principle to disallow evidence of intoxication where the jury may be satisfied [the defendant] had the capacity to form the specific intent but is not satisfied beyond reasonable doubt that he had formed the actual intent’.²⁸⁸

²⁸⁴ This point is made by Smith and Hogan who write that given that the classification of offences into the category of specific intent is based on policy and not principle ‘[i]n order to know how a crime should be classified for this purpose we can only look to the decision of the courts’, Smith J, *Smith and Hogan Criminal Law*, 10th ed, Butterworths Lexis Nexis, 2002, 243. Goode makes a similar point. He comments that ‘in practice ... the classification of offences into those of “specific intent”, where the accused could argue intoxication, and those of “basic intent”, where the accused could not argue intoxication, was done by simply listing all the offences which had been the subject of judicial decision. Over the years, the courts had decided a great number of appeals on the subject and, while the general principles were unintelligible, authority decided the classification of the offence. If there was not authority, one waited for it’, South Australia - Attorney-General’s Department, above n 23, para 5.14.

²⁸⁵ See *Crimes Act (NSW)* section 428B(2).

²⁸⁶ Brown D et al, above n 270, 676.

²⁸⁷ See VLRC 1999, above n 21, paras 6.10, 6.12; Tolmie J, ‘Intoxication and Criminal Liability in New South Wales: A Random Patchwork?’ (1999) 23 *Criminal Law Journal* 218, 222; South Australia - Attorney-General’s Department, above n 23, para 5.21.

²⁸⁸ Blackwood J and Warner K, above n 40, 278 - 279.

Different standards of relevance of intoxication

4.2.16 The dual source for the law of intoxication created by *Weiderman's* case (section 17 of the *Code* and *Weiderman's* case) also creates inconsistencies and illogicalities. Under section 17(2) of the *Code*, the issue is whether the accused had the capacity to form the requisite specific intent. As mentioned earlier, this requires an advanced stage of intoxication and evidence of intoxication falling short of this degree of intoxication is not relevant. In contrast, following *Weiderman's* case,²⁸⁹ where the accused's knowledge is in issue, the question will not be one of capacity but rather whether the respondent had that *actual knowledge*. In this case, any degree of intoxication may be relevant to explain the lack of knowledge. Aside from murder contrary to section 157(1)(c) which was the section under consideration in *Weiderman's* case, other examples of crimes of knowledge include receiving stolen property contrary to section 258 of the *Code* and assaulting a pregnant woman contrary to section 184A of the *Code*.

4.2.17 The existence of different standards of relevance of intoxication potentially creates a number of anomalies. First, there is the example of section 157(1)(b) of the *Code* where the section requires that the accused 'intend' to cause bodily harm [specific intent] which the offender 'knew to be likely to cause death in the circumstances [actual knowledge]'. A jury will need to engage in 'mental gymnastics' in order to apply two different standards of intoxication. In regard to the intention to cause bodily harm, the jury would be directed in accordance with section 17 of the *Code* that intoxication is only relevant if it induces incapacity to form the specific intent. However, concerning the defendant's knowledge of the likelihood of death, the jury would be directed that *any degree of intoxication* would be relevant.

4.2.18 Secondly, the differing standards of intoxication under section 17 and *Weiderman's* case means that intoxication may not be taken into account in relation to a more serious 'specific intent' offence while it may be taken into account in respect of a lesser 'basic intent' offence. It is contrary to the rationale for the division between specific and basic intent that an accused may be convicted of a more serious offence while avoiding liability on a lesser charge.²⁹⁰ For example, *if* intoxication is relevant to subjective recklessness,²⁹¹ this may occur in the case of wounding under sections 170 and 172 of the *Code*. Wounding under section 170 is the more serious offence requiring that the accused cause a wound with the 'intent' to do 'any grievous bodily harm'. This is a specific intent crime and so section 17 would apply. The accused would need to be 'blind drunk' before intoxication could be taken into account. For the charge of wounding under section 172, the mental element is subjective recklessness in relation to causing a wound.²⁹² This is not a specific intent crime. The situation may arise where an accused is not affected by alcohol to such a degree as to create an incapacity to form the specific intent in section 170 and so evidence of the accused's intoxication is not relevant to criminal responsibility. However, under section 172, any degree of intoxication relevant to the accused's awareness may be taken into account and so the accused may be sufficiently intoxicated to be unable to foresee causing a wound. It is anomalous that an offender's state of intoxication cannot be taken into account for the more serious offence but may be regarded for the lesser offence. The result is that an intoxicated offender may be guilty of the more serious charge where he or she would not be guilty of the lesser crime in the same circumstances.

4.2.19 Another anomalous situation arises in the case of attempts to commit basic intent crimes. For example, consider the situation of attempted arson. In this case, a lesser degree of intoxication may be relevant for the completed crime – lighting the fire – (the more serious offence) than for the attempt – attempting to light the fire – (the lesser offence). An attempt (at least for a consequence crime) is by definition a specific intent crime. This means section 17 and the incapacity test applies, so that the accused must be 'blind drunk' before evidence of intoxication can be taken into account. However, if the accused successfully commits the crime, then according to *Weiderman's* case, any degree of intoxication related to the accused's subjective state of mind would be relevant. It does not matter that the accused was not blind drunk. This appears contrary to the supposed rationale for the division between specific and basic intent.

²⁸⁹ (1998) 7 Tas R 293.

²⁹⁰ See 4.2.7.

²⁹¹ See 4.1.2.

²⁹² *Vallance* (1961) 108 CLR 56; *Hodgson* [1985] Tas R 75; *Bennett* [1990] Tas R 71; *Standish* (1991) 60 A Crim R 364.

4.2.20 Further, there is additional complexity with the creation of a category of attempts (attempts to commit certain sexual offences) for which an accused cannot rely on evidence of self-induced intoxication to negate intent. As noted above, section 14A(2) of the *Code* precludes reliance on self-induced intoxication in relation to attempts to commit the offences of sexual intercourse with a young person (section 124), indecent act with young person (section 125B), aggravated sexual assault (section 127A) and rape (section 185). This adds another (and different) way in which the rules of intoxication relate to the mental element for an offence and potentially creates the need to give another direction to the jury in relation to intoxication raising the possibility of jury confusion.

4.2.21 In Tasmania, there are now four different rules that potentially govern the relevance of intoxication to the accused's subjective state of mind:

- there are offences to which section 17 applies (relevant to specific intent offences except as provided by section 14A(2)). The standard of intoxication is 'blind drunk';
- there are offences to which section 14A(2) applies (not relevant to deny the mental element for attempts to commit certain sexual offences);
- there are offences to which *Weiderman's* case applies (relevant to specific knowledge and possibly subjective recklessness). The standard is any degree of intoxication relevant to negate the mental element for the offence;
- there are offences to which the common law applies (relevant to deny any mental element). The standard is any degree of intoxication relevant to negate the mental element for the offence.

Unsatisfactory relationship between mental disease and intoxication

4.2.22 A further area where the law of intoxication is unsatisfactory is in its interaction with the rules governing the relevance of evidence of mental disease. In the case of murder contrary to section 157(1)(c), the combined effect of *Weiderman's* case and *Hawkins v The Queen (No 3)*²⁹³ is that the jury would need to be directed that evidence of mental disease (falling short of providing a defence of insanity under section 16 of the *Code*) is relevant to the question of whether the accused 'ought to know' that the act was likely to cause death. However, when considering this question of what the accused 'ought to know' the jury must disregard evidence of intoxication. It is argued that this makes the law confusing and difficult to apply.

4.2.23 The practical complications were averted to by Zeeman J in *Weiderman's* case, where the accused had a mental disorder (falling short of section 16) and was under the influence of alcohol at the time he shot his father:

Logic would demand that if intoxication is to be irrelevant [to the question of 'ought to have known'], it would remain irrelevant whether or not the offender suffers from a mental disorder which is relevant on the basis referred to in *Hawkins v The Queen (No 3)*. Yet to require a jury to consider whether an offender ought to have known of the relevant consequences taking into account one factor operating on the mind, a mental disorder, and at the same time to ignore another factor concurrently operating on the mind, intoxication, is to ask the jury to engage in an exercise of metaphysics which should have no place in the criminal law and which would be calculated to bring the law into disrepute.²⁹⁴

4.2.24 In that case, psychiatric evidence highlighted the difficulty of separating the effect of the two factors operating on the mind. Evidence was given that the accused's adjustment disorder and his intoxication were likely to have a similar and compounding effect and that 'the two are likely to be so intermixed that if you were to say is that aspect due to alcohol or is this aspect due to adjustment disorder I would have extreme difficulty separating the two'.²⁹⁵ And yet, the jury would be required to separate the effect of the mental disorder and intoxication in determining the accused's criminal responsibility.

²⁹³ (1994) 4 Tas R 376.

²⁹⁴ (1998) 7 Tas R 293, 337.

²⁹⁵ *Ibid* 329.

Different rules for indictable, summary and Commonwealth offences

4.2.25 In addition to the two sources of intoxication rules in the *Code* creating different standard of relevance, there is also the inconsistency between applicable principles of criminal responsibility and intoxication applying to summary offences (common law) and to crimes governed by the *Code* (section 17 of the *Code* and *Weiderman's* case). It could be argued that in the interest of consistency, the same principles of intoxication should govern all offences committed in Tasmania – whether summary or indictable. The current law must be particularly complex to apply in a case where an accused is charged with a summary offence with no *Code* parallel and one with a *Code* parallel. For example, it is possible to envisage a situation where an accused is charged with:

- trespass contrary to section 14B of the *Police Offence Act 1935*;
- damage to property contrary to section 37 of the *Police Offence Act 1935*;
- assaulting a police officer (by attempt) contrary to section 34(1)(a)(i) of the *Police Offence Act 1935*.

4.2.26 Trespass has no *Code* parallel and so the common law set out in *O'Connor* would apply. This means that evidence of intoxication is relevant to negate any mental element including voluntariness. In contrast, damage to property has a *Code* parallel (section 273 *Code*) and *Code* principles apply. This is not an offence of specific intent, as the mental element is subjective recklessness, and so the principles set out in *Weiderman's* case may apply. This means any degree of intoxication which would explain the lack of foresight may be relevant. Assaulting a police officer has a *Code* parallel (section 114 *Code*) and so *Code* principles of criminal responsibility again apply. However, assault by attempt is a crime of specific intent and so section 17(2) applies. This means that evidence of intoxication falling short of an incapacity to form a specific intent is not admissible.

4.2.27 The legal situation regarding intoxication in Tasmania is further complicated by the fact that the common law position on intoxication no longer applies to Commonwealth offences. Since the *Commonwealth Criminal Code* came into effect, a new set of rules applies to intoxication which differs from the rules in the *Code* and the common law as expounded in *O'Connor's* case. So as well as the dual rules under the *Code* and the common law rules, we now have the rules under the *Commonwealth Criminal Code*.²⁹⁶

Response to discussion point

4.2.28 The Issues Paper asked the question:

1. Do you agree that legislation should be enacted to clarify the law of intoxication in Tasmania? If not, please explain why not.

4.2.29 In those responses that addressed this question, there was generally consensus that reform was necessary. The Chief Justice stated '[the] review of this area of the law and ... [the] recommendations are timely'. This view was endorsed by John Blackwood who considered that there was a very obvious need for reform for two main reasons (a) the uncertainty in the existing law of intoxication and (b) the different principles of intoxication that applied to *Code* offences, summary offences and Commonwealth offences, as well as the principle laid down in *Weiderman*.

Although the Office of Director of Public Prosecution considered that the issues raised in the Issues Paper about the current law of intoxication were in practice 'a non-issue' and that the 'current law [generally] lead to just outcomes', it was 'concede[d] that legislation enacting the minority judgment of Chief Justice Cox and Justice Underwood would clarify the law, simplify it and make it consistent with other offences'. The Principal Legal Officer for Tasmania Police concurred with the view expressed in the response of the Office of the Director Public Prosecution.

²⁹⁶ See Part 5, 3.3.

Recommendation 1

It is recommended that legislation be enacted to clarify the law of intoxication in Tasmania.

This recommendation is made for the following reasons:

- the law of intoxication is uncertain; and
- the law of intoxication is unprincipled, illogical, inconsistent and unduly complex.

Part 5

Law in Other Jurisdictions

This part considers the law in relation to intoxication and criminal responsibility in other Australian jurisdictions. It also examines the state of the law in the United Kingdom, Canada and New Zealand. Since the research was conducted for the Issues Paper, there has been a change to the law of intoxication in South Australia and a change proposed for the Northern Territory. These are discussed below.

5.1 Australia

Common law

5.1.1 The common law only applies in Victoria. As discussed above, *R v O'Connor*²⁹⁷ is the leading Australian common law decision concerning intoxication and criminal responsibility. At common law, evidence of intoxication may be relied upon to negate any mental element, including voluntariness, intention, knowledge or subjective recklessness.

5.1.2 In *O'Connor*, the High Court (by a majority of 4 to 3) rejected the distinction drawn in *Majewski* between offences of specific intent and offences of basic intent. The High Court held that evidence of intoxication may be taken into account in determining whether the accused's act was voluntary and whether the accused possessed the requisite intent for the offence.

5.1.3 The majority of the High Court considered that the distinction between offences of specific intent and offences of basic intent was illogical. In determining whether evidence of intoxication was admissible or inadmissible, Stephen J considered that the criterion of specific intent was inadequate:

[Specific intent is] a point neither clearly defined nor easily recognisable, the selection of which does not reflect or give effect to any coherent attitude either as to the relative wrongfulness of particular conduct or the degree of social mischief which that conduct is thought to involve; it seems an inappropriate response to natural concern lest intoxication be used as a device to escape punishment for crime.²⁹⁸

5.1.4 The majority considered that the principle of criminal responsibility that the accused should not be convicted unless the act was voluntary and the accused possessed the requisite state of mind was too important to be subject to such an unprincipled exception. Aickin J commented on the inappropriateness of the situation that arises in basic intent cases where 'a jury must be told they may (perhaps must) convict in circumstances in which it has not been proved that the accused had the relevant intention, and indeed where it may have been shown that he did not have such intention'.²⁹⁹

5.1.5 The fear of a large number of acquittals of drunken offenders following the abandonment of *Majewski* was unfounded, as it did not reflect the Victorian experience.³⁰⁰

²⁹⁷ (1980) 146 CLR 64.

²⁹⁸ *R v O'Connor* (1980) 146 CLR 64 per Stephen J at 104.

²⁹⁹ *Ibid* 122.

³⁰⁰ In Victoria, some judges had been allowing evidence of self-induced intoxication to be admitted in relation to basic and specific intent offences prior to *O'Connor's case* since approximately 1964. See *R v O'Connor* (1980) 146 CLR 64, 99 per Stephen J.

5.1.6 In contrast, the minority relied on the policy reasons underpinning the principles in *Majewski*. The minority acknowledged the importance of the general principle of criminal responsibility but considered that it was subject to an exception in the case of intoxication. The division between specific and basic intent offences was a compromise. As Mason J explained (at 110-111):

The common law gives expression to a policy which is a compromise between various considerations. On the one hand, there are two strands of thought whose thrust is to deny that drunkenness is an excuse for the commission of crime. One is essentially a moral judgment — that 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 other is a social judgment — that society legitimately expects for its protection that the law will not allow to go unpunished an act which would be adjudged to be a serious criminal offence but for the fact that the perpetrator is grossly intoxicated. The point was made in *Majewski* that the courts would expose themselves to stern and justified criticism if the law was so declared that a man in Lipman's situation could escape unpunished. It will be recalled that Lipman when under the influence of LSD, an hallucinatory drug, killed a girl by suffocating her when suffering from the illusion that on a trip to the centre of the earth he was attacked by snakes from which he was defending himself. He was convicted of manslaughter and acquitted of murder (*R v Lipman* [1970] 1 QB 152; [1969] 3 All ER 410). On the other hand, there is the force of the general principle of criminal responsibility that a criminal act needs to be voluntary. The law as declared by *Beard* and explained by *Majewski* reflects a compromise between these factors. Although the law which results from this compromise is lacking in logic and symmetry, the suggested price to be paid for a remedy — the adoption of a universal rule that the act must be willed at the time when it is done — is the abandonment of two very important values on which the existing law is based. In my view it is an exorbitant price to pay.

5.1.7 The High Court's decision was controversial; it has 'often been labelled as a drunk's defence' and, as such, is apt to incite community hostility and distrust'.³⁰¹ As a consequence the law has been reviewed in all of the common law jurisdictions with New South Wales and the Australian Capital Territory abandoning *O'Connor*. In Victoria, the Law Reform Committee reviewed the law relating to criminal responsibility and self-induced intoxication and released its report in 1999.³⁰² After an extensive study, the Committee recommended that the decision of the High Court in *R v O'Connor* should continue to state the law in Victoria.³⁰³ The Committee's view was that the common law principles embodied a fundamental principle of criminal law 'that a person is not guilty of a criminal offence unless that person acted intentionally and voluntarily'.³⁰⁴ However, the Committee made five recommendations for procedural change:³⁰⁵

- (1) 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;
- (2) 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;
- (3) where a defendant charged with an indictable offence seeks to rely on evidence of self-induced intoxication as a ground for acquittal, the charge must not be dealt with summarily, but shall be tried before a judge and jury;

³⁰¹ VLRC 1999, above n 21, para 6.69.

³⁰² VLRC 1999, above n 21.

³⁰³ Ibid recommendation 3.

³⁰⁴ Ibid para 6.84.

³⁰⁵ Ibid recommendations 4 – 9.

- (4) 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.
- (5) 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.

5.1.8 In the Government Response to the recommendations of the Law Reform Committee, the recommendations in relation to the role of the trial judge in relation to evidence of intoxication and the restrictions on appeals (listed as (1) and (2) above) were rejected as they were seen to have the potential to undermine common law safeguards for a fair trial.³⁰⁶ Similarly, the Government did not accept the recommendation in relation to jury trials (listed as (3) above). The recommendations relating to sentencing have been taken up in the examination of the Government's drug strategy by the Drug Policy Expert Committee (listed as (4) above). The Government indicated that it would continue to monitor the operation of the rules in relation to propensity (listed as (5) above).

5.1.9 It may be that the law of self-induced intoxication may be up for consideration again in Victoria. In the Victorian Law Reform Commission report on *Defences to Homicide*, it was noted that the law of self-induced intoxication (and particularly the relevance of self-induced intoxication to manslaughter) was beyond the scope of the paper. However, it was recommended that 'this issue be considered as part of the broader review of the *Crimes Act 1958* (Vic) recently announced by the Attorney General [of Victoria]'.³⁰⁷ It appears that, as yet, this review has not taken place.

Commonwealth

5.1.10 The Commonwealth position is governed by the *Commonwealth Criminal Code*. This is discussed in detail above at 3.3.

Australian Capital Territory

5.1.11 The common law position applied in the Australian Capital Territory until the commencement of the relevant provisions of the *Criminal Code Act 2002* (ACT) on 1 January 2003. The law dealing with intoxication and criminal responsibility in the ACT is now essentially the same as the position under the *Commonwealth Criminal Code*. Evidence of self-induced intoxication cannot be taken into account in determining whether a fault element of 'basic intent' exists, that is whether the act or omission is voluntary.³⁰⁸ However, self-induced intoxication may be used to deny 'intent, knowledge or recklessness with respect to circumstances or consequences'.³⁰⁹ Similarly, evidence of self-induced intoxication can be taken into account in determining whether conduct was accidental³¹⁰ and in determining whether a person had a mistaken belief of fact.³¹¹

5.1.12 In the Australian Capital Territory, evidence of self-induced intoxication could be taken into account in relation to the following offences: rape (section 54 *Crimes Act 1900*), damage to property

³⁰⁶ Victorian Department of Justice, *Government Response to the Report of the Law Reform Committee on Criminal Liability for Self-Induced Intoxication*, Melbourne 2000, 2 – 3.

³⁰⁷ Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 3.171 fn 381 referring to Department of Justice (Vic), *New Directions for the Victorian Justice System 2004 – 2014: Attorney General's Justice Statement 2004*. The VLRC made recommendations concerning the relationship between evidence of intoxication and the defences, see recommendations 20 – 22. These have been incorporated in the *Crimes Act 1958* (Vic) section 9AJ inserted by *Crimes (Homicide) Act 2005* 77/2005.

³⁰⁸ Section 31(1) *Criminal Code 2002* (ACT). The provisions of the *Criminal Code 2002* (ACT) were considered in *R v Collins* (2004) ACTSC (18 June 2004).

³⁰⁹ Legislative Assembly for the Australian Capital Territory, *Criminal Code 2002 Explanatory Memorandum* at 17 citing The Parliament of the Commonwealth of Australia, Senate, *Criminal Code Bill 1994 Explanatory Memorandum*.

³¹⁰ Section 31(2) *Criminal Code 2002* (ACT).

³¹¹ Section 31(3) *Criminal Code 2002* (ACT).

(section 404 *Criminal Code 2002*) and wounding (section 21 *Crimes Act 1900*). These are not crimes of ‘basic’ intent (as defined). An example of a crime of basic intent is common assault (section 26 *Crimes Act 1900*). This section provides that a person who assaults another is guilty of a crime. This offence consists of conduct only (the act of assault) and as no fault element is specified, the Crown must prove that the act was intentional.³¹² Evidence of self-induced intoxication is not admissible in the case of common assault.

5.1.13 The common law position had been controversial since the decision of the Australian Capital Territory Magistrates’ Court in *Nadraku*.³¹³ In that case, the defendant was a well-known rugby league player. He had been drinking heavily and assaulted two women. He relied on his state of intoxication and he was acquitted by the magistrate who commented that ‘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’.³¹⁴ The acquittal of *Nadraku* resulted in considerable pressure to change the law of intoxication. For example, the Commonwealth Attorney-General issued a press release calling for the abolition of the common law ‘drunk’s defence’ as ‘[t]he use of this defence has sent a disturbing message 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’.³¹⁵

5.1.14 There had been previous attempts to alter the law of intoxication in the ACT before the enactment of the *Criminal Code Act 2002* (ACT). The *Crimes (Amendment) Bill (No 6) 1997* (ACT) and the *Crimes (Amendment) Bill (No 4) 1998* (ACT) both sought to prevent the application of the common law principles of intoxication.

Northern Territory

5.1.15 The law of intoxication in the Northern Territory has recently been reformed with the enactment of the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005*.³¹⁶ Significant changes are contained in this Act (which has not yet commenced), which is the first stage in the progressive reform of the Northern Territory criminal law. As explained in the Second Reading Speech, the purpose of the Act is two fold.³¹⁷ First, it enacts new general principles of criminal responsibility (including intoxication provisions) based (with only minor alternation) on the general principles of criminal responsibility set out in the *Commonwealth Criminal Code*.³¹⁸ Secondly, the Act repeals the existing provisions in the Northern Territory *Criminal Code* that provide for the offences of manslaughter and dangerous act.³¹⁹ These offences are replaced by new provisions that provide for the offences of manslaughter, endangerment and negligence as to serious harm and harm and causing death or serious harm by dangerous driving.

5.1.16 Under the changes, the law dealing with intoxication and criminal responsibility in the Northern Territory will be essentially the same as the position under the *Commonwealth Criminal Code*.³²⁰ The only substantive difference is found in the definition of self-induced intoxication, which extends the Commonwealth definition to include drugs taken in accordance with prescription or (if no prescription is required) in accordance with manufacturer instructions.³²¹ However, an accused cannot rely these

³¹² Section 22(1) *Criminal Code 2002* (ACT).

³¹³ *S.C. Small v Noa Kurimalawai*, Australian Capital Territory Magistrates’ Court, Matter No CC97/01904, 22 October 1997.

³¹⁴ Magistrate Shane Madden cited in VLRC 1999, above n 21, para 1.11.

³¹⁵ Williams D, ‘States urged to drop drunk’s defence’, *Press Release (Attorney-General)*, 29 October 1997.

³¹⁶ No 37/2005. Assent 22/11/05.

³¹⁷ Dr Toyne, Northern Territory Attorney General, *Hansard*, Tenth Assembly, First Session, 29 June 2005.

³¹⁸ See Parliament of the Northern Territory of Australia, *Criminal Code Amendment (Criminal Responsibility) Act 2005 Explanatory Memorandum*. This was recommended in the 2004 review of the Northern Territory criminal law: see Fairall, P, *Review of Aspects of the Criminal Code of the Northern Territory*, March 2004, recommendation 3.

³¹⁹ This is discussed further at 6.6.

³²⁰ See discussion at 3.3.

³²¹ *Criminal Code Amendment (Criminal Responsibility) Act 2005* (NT), section 43AR(1)(c) and (d).

provisions if they knew or had reason to believe that when a person took the drug, the drug would significantly impair the person's judgment or control.³²²

5.1.17 Until the commencement of the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005*, there is no express provision in the Northern Territory *Criminal Code* specifying that intoxication could negate the mental element of an offence. It appears that the approach to intoxication in the Northern Territory embraces the *O'Connor* principles,³²³ so that the question was 'whether the defendant intended the act, omission or event or foresaw it as a possible consequence of his conduct. Intoxication is one of the factors the jury will consider in assessing this question'.³²⁴ However, there is an evidentiary presumption that intoxication is voluntary and that, unless intoxication is involuntary, the accused foresaw the natural and probable consequences of his act.³²⁵ Under section 318 of the *Criminal Code*, a person found not guilty of murder, manslaughter or any other offence against the person because of intoxication may have been found guilty of an alternative offence in section 154 that provides for dangerous acts or omissions.

New South Wales

5.1.18 Until 1996, the common law governed the admissibility of evidence of intoxication in New South Wales. The *Crimes Legislation Amendment Act 1996* (NSW) inserted Part 11A into the *Crimes Act 1900* (NSW) which abolished the common law relating to self-induced intoxication.³²⁶ The position in New South Wales now reflects the English approach with evidence of intoxication only to be 'taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent'.³²⁷ Self-induced intoxication may not be taken into account in determining whether an accused possessed the requisite mental element for an offence not requiring a specific intent³²⁸ or for determining whether an accused's act was voluntary.³²⁹

5.1.19 An 'offence of specific intent' is defined as 'an offence of which an intention to cause a specific result is an element'.³³⁰ Section 428B(2) provides a non-exhaustive list of offences as examples of offences of specific intent. Common examples include murder (section 19A *Crimes Act 1900* (NSW))³³¹ and wounding with intent to do grievous bodily harm or resist arrest (section 33 *Crimes Act 1900* (NSW)). Self-induced intoxication can be taken into account in determining whether the accused possessed the requisite specific intent in these cases. Offences not listed as offences of specific intent include sexual assault (section 61I *Crimes Act 1900* (NSW)), maliciously destroying or damaging property (section 195 *Crimes Act 1900* (NSW)) or malicious wounding or infliction of grievous bodily harm (section 35 *Crimes Act 1900* (NSW)). It would appear these are not crimes of specific intent and so self-induced intoxication is not relevant.³³²

³²² *Criminal Code Amendment (Criminal Responsibility) Act 2005* (NT), section 43AR(2).

³²³ See McSherry B and Naylor B, *Australian Criminal Laws: Critical Perspectives*, Oxford University Press, 2004, 523; VLRC 1999, above n 21, para 3.64 citing meeting notes with Northern Territory Attorney-General's Department and the Office of the Director of Public Prosecutions. Cf Bronitt S and McSherry B, above n 11, at 243 who suggest that section 7(1)(b) setting out the presumption that a person foresaw the natural and probable consequences of his or her conduct unless the intoxication was involuntary 'seems to suggest that self-induced intoxication is irrelevant to the question of intention'.

³²⁴ Gray S, *Criminal Laws Northern Territory*, Federation Press, NSW 2004, 80 citing *Charlie* (1998) 7 NTLR 152, 170 – 171 per Angel J and on appeal to the High Court in *Charlie* (1999) 199 CLR 387.

³²⁵ *Criminal Code* (NT) section 7.

³²⁶ *Crimes Act 1900* (NSW), section 428H. For a critique of Part 11A, see Tolmie J, above n 287; Editorial, (1998) 22 *Criminal Law Journal* 137.

³²⁷ *Crimes Act 1900* (NSW), section 428C.

³²⁸ *Crimes Act 1900* (NSW), section 428D.

³²⁹ *Crimes Act 1900* (NSW), section 428G.

³³⁰ *Crimes Act 1900* (NSW), section 428B(1).

³³¹ In the case of *R v Grant* [2002] NSWCCA 243, the issue was whether murder by reckless indifference under section 18 of the *Crimes Act 1900* (NSW) was a crime of specific intent. It was held that it was a crime of specific intent.

³³² D Brown, D Farrier, S Egger and L McNamara, *Criminal Laws*, 3rd edition, Federation Press, NSW, 2001, 677.

5.1.20 The pressure for legislative reform in New South Wales arose from the media attention on the ‘intoxication defence’ following the case of *R v Paxman*,³³³ where Paxman was convicted of manslaughter and received a sentence of three years imprisonment.³³⁴ In the second reading speech, the Minister for Police commented that:

The preference for the *Majewski* approach is based on important public policy considerations. The Standing Committee of Attorneys-General, in particular, took the view 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. The standing committee considered that if a person voluntarily takes a risk of getting intoxicated then he or she should be responsible for his or her actions. This Government agrees with and strongly supports this approach.³³⁵

5.1.21 The New South Wales provisions make a distinction between self-induced intoxication and intoxication that was not self-induced. Self-induced intoxication is defined to mean:

any intoxication except intoxication that:

- (a) is involuntary, or
- (b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or
- (c) results from the administration of a drug for which a prescription is required, or of a drug from which no prescription is required administered for the purpose, and in accordance with the dosage level recommended, in the manufacturer’s instructions.³³⁶

5.1.22 In relation to crimes of specific intent, section 428C applies regardless of whether the intoxication was self-induced or otherwise. This means that evidence of involuntary intoxication can be taken into account to determine whether the accused possessed the requisite specific intent. In cases other than those involving a specific intent offence, intoxication that is not self-induced may be taken into account whereas evidence of self-induced intoxication is not relevant.³³⁷

5.1.23 There is also a separate provision that provides for a defence of involuntary intoxication. Section 428G provides that ‘a person is not criminally responsible for an offence if the relevant conduct resulted from intoxication that was not self-induced’. This is similar to the provision contained in the *Commonwealth Criminal Code*.

South Australia

5.1.24 Under the banner of ‘drunks defence excuse abolished’,³³⁸ the *Criminal Law Consolidation (Intoxication) Amendment Act 2004* (SA), which commenced on 25 November 2004, made fundamental changes to the law of intoxication by overriding the common law. No longer is intoxication relevant to deny any mental element. The relevance of intoxication to criminal responsibility is more restrictive. The *Criminal Law Consolidation Act 1935* (SA), section 268(2) creates a presumption that an accused possesses the necessary mental element in the case of basic intent. The intended effect is that:

³³³ New South Wales District Court, 21/6/1995.

³³⁴ See further discussion in VLRC 1999, above n 21, para 3.16 – 3.18.

³³⁵ Mr Whelan, New South Wales Minister for Police, *New South Wales Parliamentary Debates*, Legislative Assembly, 6 December 1995.

³³⁶ Section 428A.

³³⁷ Section 428D(b).

³³⁸ Hon M Atkinson, ‘Drunks Defence Excuse Abolished’, *News Release*, 26 November 2004.

If (a) the prosecution establishes the physical elements of the offence against the accused (called in this Act the objective elements of the offence) and (b) the accused is grossly impaired by self-induced intoxication, then (c) the conduct (act, omission or state of affairs) is assumed to be both intentional and voluntary.³³⁹

5.1.25 In respect of offences in which it necessary to prove that the defendant foresaw the consequences of his or her conduct or was aware of the circumstances surrounding his or her conduct, the presumption does not apply and an accused is able to rely on evidence of self-induced intoxication.³⁴⁰ For example:

A, whose consciousness is impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, beats B up and B dies of the injuries. In this case, A could be convicted of manslaughter but not of murder (because A is taken to have intended to do the act that results in death but not the death).³⁴¹

5.1.26 This reflects the approach of the Commonwealth, under the *Commonwealth Criminal Code*, where self-induced intoxication cannot be taken into account to deny fault as to conduct. In other words, evidence of self-induced intoxication is not relevant to deny that the act was voluntary and intentional but can be taken into account to deny any other fault element.³⁴²

5.1.27 A defendant's consciousness is taken to have been impaired to the point of criminal irresponsibility at the time of the alleged offence if it is impaired to the extent necessary at common law for an acquittal by reason only of the defendant's intoxication.³⁴³

5.1.28 While previous law reform proposals have considered and rejected the creation of a special offence of criminal intoxication,³⁴⁴ the recent reforms in South Australia have also enacted provisions that provide a 'fall-back offence' of criminal negligence in respect of offences against the person.³⁴⁵ The *Criminal Law Consolidation Act 1935* (SA), section 268(3) creates an offence of manslaughter where an offender causes death by criminal negligence and section 268(4) creates an offence of causing serious harm by criminal negligence.³⁴⁶

5.1.29 These reforms only apply to self-induced intoxication, which is defined as 'intoxication resulting from the recreational use of a drug'.³⁴⁷ Consumption of a drug (which means alcohol or any other substance that is capable of influencing mental functioning) is considered to be 'recreational use' unless it is administered against the will, or without the knowledge of the person who consumes it, consumed accidentally, consumed under duress, as a result of fraud or reasonable mistake, or consumed therapeutically.³⁴⁸ 'Therapeutic' consumption is defined as consumption that is prescribed and taken in accordance with doctor's instructions (in the case of prescription drugs) or if the drug is a non-prescription drug that is available from registered pharmacists, then consumed for a purpose recommended by the manufacturer and in accordance with manufacturer's instructions.³⁴⁹ In the case of involuntary intoxication, there is no separate defence and common law principles would continue to apply.

5.1.30 In South Australia, the political disquiet associated with the common law of self-induced intoxication had seen several previous attempts at legislative reform³⁵⁰ as well as a Discussion Paper produced by the Attorney-General's Department.³⁵¹ The first legislative response was the enactment of the

³³⁹ The Hon MJ Atkinson (Attorney-General), House of Assembly South Australia, *Hansard*, Monday 23 February 2004.

³⁴⁰ *Criminal Law Consolidation Act 1935* (SA), section 268(3).

³⁴¹ *Criminal Law Consolidation Act 1935* (SA), section 268(3).

³⁴² See discussion of Commonwealth position at 3.3.

³⁴³ *Criminal Law Consolidation Act 1935* (SA), section 268(6).

³⁴⁴ See discussion at 6.4.

³⁴⁵ *Criminal Law Consolidation (Intoxication) Amendment Act 2004* (SA), section 268 (4) and (5).

³⁴⁶ See discussion at 6.6.

³⁴⁷ *Criminal Law Consolidation Act 1935* (SA), section 267A(2).

³⁴⁸ *Criminal Law Consolidation Act 1935* (SA), section 267A(1).

³⁴⁹ *Criminal Law Consolidation Act 1935* (SA), section 267A(1).

³⁵⁰ See *Criminal Law Consolidation (Intoxication) Amendment Bill 1996* (SA) and *Criminal Law Consolidation (Intoxication) Amendment Bill 1997* (SA). See discussion in VLRC 1999, above n 21, para 3.35 – 3.44.

³⁵¹ South Australia, Attorney-General's Department, above n 23.

Criminal Law Consolidation (Intoxication) Amendment Act 1999 (SA). This preserved the principles of self-induced intoxication set out in *O'Connor* but introduced procedural restrictions on the circumstances in which evidence of intoxication could be left for the consideration of the jury: the issue of intoxication was not to be raised unless the defendant specifically asks the judge to address the jury on the question of intoxication.³⁵² This provision is retained with amendments that take into account the changes to the substantive law.

Western Australia and Queensland

5.1.31 Under the Griffith Code, evidence of intoxication is admissible for the purpose of determining whether the accused had the intention to cause a specific result. For example, section 28(3) of the Queensland *Criminal Code* provides that:

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.³⁵³

5.1.32 In *Kusu*, the Queensland Court of Criminal Appeal (by majority) held that section 28 ‘covered the field’ as to the liability for criminal acts committed by intoxicated persons.³⁵⁴ This means that evidence of intoxication is not admissible for the purpose of determining whether an accused’s act was voluntary.

5.1.33 Unintentional intoxication is recognised as a defence in Western Australia and Queensland. This applies to all offences. Section 28(1) of the Queensland *Criminal Code* provides that:

The provisions of section 27 apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his or her part by drugs or intoxicating liquor or by any other means.³⁵⁵

5.1.34 The provisions of section 27 deal with insanity. This means that an accused is not criminally responsible if, as a result of unintentional intoxication, the accused is deprived of the capacity to understand what they were doing, or of the capacity to control their actions or of the capacity to know that they ought not to have done the act or omission.

5.1.35 In the recently released Issues Paper, *Review of the Law of Homicide*, the Law Reform Commission of Western Australia stated that it was ‘not aware of any issues or problems in relation to intoxication’.³⁵⁶

5.2 United Kingdom

5.2.1 As discussed in the Introduction, the principles applying to intoxication and criminal responsibility in the United Kingdom are set out in *Beard’s* case and *Majewski’s* case. In a unanimous decision of the House of Lords in *Majewski’s* case,³⁵⁷ it was affirmed that voluntary intoxication can be taken into account in determining whether an offender formed the intention for specific intent crimes but cannot be taken into account for basic intent crimes. The policy considerations that underpinned the decision are summarised as follows:

(1) that the law should provide protection against unprovoked violent conduct of intoxicated offenders;

³⁵² *Criminal Law Consolidation Act 1935* (SA), section 269.

³⁵³ Section 28 para 3 of the Western Australian *Criminal Code* is the same. See further discussion in Kenny R, *An Introduction to Criminal Law in Queensland and Western Australia 6th ed*, LexisNexis Butterworths, Australia 2004, 161, 163 - 164.

³⁵⁴ [1981] Qd R 136, 140 per Campbell J.

³⁵⁵ Section 28(2) is also relevant for involuntary intoxication. Section 28 paras 1 and 2 of the Western Australian *Criminal Code* deal with involuntary intoxication. See further discussion in Kenny R, above n 353, 161 – 163.

³⁵⁶ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Issues paper, 2006.

³⁵⁷ [1977] AC 443.

- (2) that it is morally just to hold intoxicated offenders responsible for criminal conduct, given that they freely chose to become intoxicated.³⁵⁸

5.2.2 For example, Lord Elwyn-Jones LC says:

I do not for my part regard that general principle as either unethical or contrary to the principles of natural justice. 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 conduct in reducing himself by drugs or 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.³⁵⁹

5.2.3 In the United Kingdom, there has been considerable uncertainty in relation to the categorisation of an offence as one of ‘basic’ or ‘specific’ intent.³⁶⁰ The UK Law Commission concluded following its examination of the law that ‘there is no general agreement on the test which should be applied in order to distinguish between offences of basic and of specific intent’.³⁶¹ In fact, the Commission agreed with a leading textbook that:

the designation of crimes as requiring, or not requiring, specific intent is based on no principle at all, and that, in order to know how a crime should be classified for this purpose, ‘we can look only to the decisions of the court’.³⁶²

5.2.4 Examples of crimes of specific intent are murder, wounding or causing grievous bodily harm with intent, handling stolen goods, theft and robbery.³⁶³ Examples of offences that have been held to be basic intent offences (and so evidence of self-induced intoxication is not admissible) are rape, maliciously wounding or inflicting grievous bodily harm, various assaults, including assault on a constable and assault occasioning actual bodily harm, arson and causing criminal damage contrary to section 1(2) of the *Criminal Damage Act 1971* (UK) where recklessness to endanger life is relied on.³⁶⁴

5.2.5 It appears that an offence which requires proof of subjective recklessness is a crime of basic intent. However, the classification of offences which require ‘proof of knowledge or belief’ as either a crime of specific or basic intent is not entirely clear.³⁶⁵ While the offence of handling stolen goods appears to be a crime of specific intent, the Law Commission says it is not clear whether this is because the accused ‘must be proved to have known or believed that the goods in question are stolen’ or ‘because it also requires proof of dishonesty’.³⁶⁶ Despite this uncertainty, the Law Commission’s view was that, as a general principle, an offence of knowledge or belief should be classified as an offence of specific intent:

there is a great deal of difference between an allegation that the defendant was *aware of a risk* that something might be the case, or that he was *reckless* as to that possibility, and an allegation that he *knew or believed* it to be the case. The latter requires proof of a state of mind bordering on certainty.³⁶⁷

³⁵⁸ VLRC 1999, above n 21, para 2.30.

³⁵⁹ [1977] AC 443, 474 – 475.

³⁶⁰ The Law Commission identified a number of possible theories as to the meanings of the terms, and the categorisation of offences. These are discussed in UK Law Commission 1995, above n 23, 26 – 30. See also Smith J, above n 284, 241 – 246.

³⁶¹ UK Law Commission 1995, above n 23, 29.

³⁶² Ibid 29, referring to Smith J and Hogan B, *Criminal Law*, 1992, 221. This point is made above in Part 4.

³⁶³ These offences are listed (with other offences) in UK Law Commission 1995, above n 23, 29.

³⁶⁴ These offences are listed (with other offences) in *ibid* 30.

³⁶⁵ *Ibid* 57.

³⁶⁶ *Ibid*.

³⁶⁷ *Ibid* 58.

5.2.6 The *Majewski* approach to voluntary intoxication has been the subject of several law reform projects in the United Kingdom.³⁶⁸ In its consideration of the operation of intoxication and criminal responsibility in *Legislating the Criminal Code: Intoxication and Criminal Liability*, published in 1995, the Law Commission recommended that evidence of intoxication should be taken into account in determining whether the allegation has been proved if the prosecution alleges any intention or purpose, knowledge or belief, or fraud or dishonesty. However, if the prosecution alleges subjective recklessness, voluntary intoxication is not to be taken into account and the defendant should be treated of having been aware of anything of which he would have been aware but for his intoxication. The reason that subjective recklessness is treated differently is that the Commission felt that ‘it should be no defence that the defendant, owing to voluntary intoxication, failed to appreciate a risk which he would have appreciated had he been sober’.³⁶⁹ Similarly, it was recommended that evidence of self-induced intoxication could not be taken into account in determining whether the accused’s act was voluntary.³⁷⁰

5.2.7 The position outlined in the final report is a change in position from that put forward in its consultation paper. In the consultation paper, the Law Commission’s provisional position was that *Majewski* be abolished and replaced with a new offence of causing harm while intoxicated.³⁷¹ There were essentially three reasons for the change in position:

- (1) the perceived public outrage in allowing a defendant to escape conviction for any offence as a result of self-induced intoxication;
- (2) the increased opportunity for a defendant to raise a spurious defence; and
- (3) the consultations of the Law Commission revealed that perceived difficulties with *Majewski* approach in practice were not founded.³⁷²

5.2.8 In 1998, the United Kingdom Home Office released a consultation paper concerning non-fatal offences against the person.³⁷³ A draft bill was annexed to the paper which provided that self-induced intoxication is not to be taken into account in respect of either recklessness or knowledge or belief in circumstances.³⁷⁴ The Committee stated that ‘there should be no loophole in the law which excuses violent behaviour simply because an attacker chose to become intoxicated and run the risks that entails’.³⁷⁵

5.2.9 It does not appear that the recommendations of the Law Commission in relation to intoxication or the draft Bill have been enacted in legislation. The Law Commission is currently undertaking a review of the issues associated with the codification of the general principles of criminal responsibility. As part of this review, it intends to publish in 2006 a separate consultation paper on the law of intoxication.³⁷⁶ This paper was not available as at the date of publication of this Report.

5.2.10 In the United Kingdom, the strict *Majewski* approach does not appear to apply where the defendant’s intoxication is attributable to non-dangerous drugs. This limited exception to the *Majewski* principle applies if two conditions are satisfied: (1) the drug is determined by the court to be not ‘dangerous’ and (2) the accused was not reckless in taking the drug.³⁷⁷ Reckless in this context means ‘that

³⁶⁸ See Criminal Law Revision Committee, above n 23; UK Law Commission 1993, above n 23; UK Law Commission 1995, above n 23; UK Home Office, *Violence: Reforming the Offences Against the Persons Act 1861*, The Stationary Office, London 1998.

³⁶⁹ UK Law Commission 1995, above n 23, 55.

³⁷⁰ *Ibid* 64.

³⁷¹ UK Law Commission 1993, above n 23.

³⁷² See UK Law Commission 1995, above n 23, 45 – 48.

³⁷³ UK Home Office, above n 368.

³⁷⁴ *Ibid* Chapter 4 and clause 19. The draft Bill was based on the proposals in UK Law Commission, ‘*A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill*’, Law Com No 177, 1989 and not Law Com no 229, 1995. See Home Office, *Violence: Reforming the Offences Against the Person Act 1861* (1998), draft Bill clause 19 discussed in Ashworth A, above n 22, 221.

³⁷⁵ UK Home Office, above n 368, 3.23.

³⁷⁶ UK Law Commission, <http://www.lawcom.gov.uk/codification.htm>, 11 July 2005.

³⁷⁷ See discussion in UK Law Commission 1995, above n 23, 32 – 33 in relation to *Hardie* [1985] 1 WLR 64. This case concerned valium.

the defendant appreciated the risk that his taking the intoxicant might lead to aggressive, unpredictable or uncontrollable conduct, and nevertheless deliberately ran the risk or otherwise disregarded it'.³⁷⁸

5.2.11 As discussed above, the *Majewski* approach does not apply to involuntary intoxication.³⁷⁹ If an accused's intoxication is involuntary, evidence of intoxication is relevant to negate intent in cases of specific and basic intent. In other words, it could be used to negate voluntariness or to explain the absence of any other requisite intention, specific or otherwise.³⁸⁰

5.3 New Zealand

5.3.1 The leading decision in New Zealand establishing the principles of criminal responsibility and intoxication is the decision of the Court of Appeal in *R v Kamipeli*.³⁸¹ In *Kamipeli*, the general principle was established that 'evidence of voluntary intoxication may be relied upon to support a defence that the accused lacked a mens rea component required by the definition of the crime, or that she acted unconsciously'.³⁸² This approach is consistent with the approach of the High Court of Australia in *O'Connor's case*.

5.3.2 The Court rejected the previously accepted distinction between specific and basic intent and commented that:

Intoxication is not a defence of itself. Its true relevance by way of defence ... is that when a jury is deciding whether an accused has the intention or recklessness required by the charge, they must regard all the evidence including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than the capacity for intent which must be the subject of inquiry'.³⁸³

5.3.3 The approach of the Court of Appeal in *Kamipeli* was endorsed by the New Zealand Criminal Law Reform Committee in its consideration of the law relating to intoxication and criminal responsibility.³⁸⁴

5.3.4 As there is no distinction between specific and basic intent offences in New Zealand, there is no need for a special provision dealing with involuntary intoxication as the 'law simply asks, whatever the reason, *did*, D have mens rea?'³⁸⁵ In New Zealand (as at common law in Australia), intoxication is never a defence. However, 'there may be a defence if a mental element required for the offence was absent as a result of intoxication'.³⁸⁶

5.4 Canada

5.4.1 In Canada, a distinction is made between crimes of specific intent and crimes of general intent (rather than basic intent). General intent offences 'are those that have as their mental element an intent to commit the immediate act, without reference to producing any specific consequences. For these offences, it is thought that the mental element is so minimal as to require only basic voluntariness'.³⁸⁷ Specific intent is

³⁷⁸ UK Law Commission 1995, above n 23, 32.

³⁷⁹ See discussion in Part 3.

³⁸⁰ See also *Public Order Act 1986*, section 6(5).

³⁸¹ [1975] 2 NZLR 610.

³⁸² Simester A and Brookbank W, *Principles of Criminal Law*, Brook's, Wellington 2002, 360.

³⁸³ *R v Kamipeli* [1975] 2 NZLR 610, 616.

³⁸⁴ Criminal Law Reform Committee New Zealand, above n 23. The Committee did note that there may be an exception in the case of manslaughter, para 29. This issue still awaits an authoritative ruling from the Court of Appeal.

³⁸⁵ Simester A and Brookbank W, above n 382, 363. See also Robertson B (ed), *Adams on Criminal Law*, Brookers Ltd, 2005, 90–91.

³⁸⁶ Robertson B (ed), above n 385, 89.

³⁸⁷ Sheehy E, 'The Intoxication Defence in Canada: Why Women should Care' (1996) 23 *Contemporary Drug Problems* 595.

defined ‘as one which involves the performance of the *actus reus*, coupled with an intent or purpose going beyond the performance of the questioned act’.³⁸⁸ Traditionally, the Canadian criminal law followed the *Majewski/Beard* principle that evidence of intoxication could be taken into account for crimes of specific intent but not when considering an accused’s criminal responsibility for crimes of basic intent.³⁸⁹ This was altered by the decision of the Supreme Court of Canada in *R v Daviault*.³⁹⁰ This case involved the sexual assault of an elderly and disabled woman who was dragged from her wheelchair and sexually assaulted. The accused was charged with sexual assault. Sexual assault has been held to be a basic intent crime. The mental element for sexual assault is an intention to ‘touch, knowing or being reckless of or wilfully blind to, lack of consent, either by words or actions, from the person being touched’.³⁹¹ The trial judge acquitted the accused on the basis of a reasonable doubt as to whether he possessed the requisite intent. The acquittal was overturned by the Court of Appeal. It held that the defence of self-induced intoxication resulting in a state equal to or akin to automatism was not available as a defence to a general intent crime. On appeal, the Supreme Court of Canada (by majority) held that the *Canadian Charter of Rights and Freedoms* (sections 7 and 11(d))³⁹² required an exception to the *Majewski/Beard* principle. This limited exception would permit evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the accused possessed the mental element for crimes of general intent.

5.4.2 It should be noted that the Supreme Court of Canada did not go as far as to adopt ‘the full blown *O’Connor* position ... and ruled that drunkenness could only negate liability for basic intent crimes where it produced effects akin to automatism or insanity’.³⁹³ In addition, the majority held that ‘the burden is on the accused to prove the defence on the balance of probabilities and the accused’s testimony would have to be supported by expert evidence’.³⁹⁴

5.4.3 The decision in *Daviault’s* case ‘provoked an immediate public outcry’.³⁹⁵ In relation to the community outrage in response to the case, Gough comments that:³⁹⁶

the notion that Daviault’s conduct was *blameworthy* was probably the central insight to emerge from public scrutiny of the Supreme Court’s ruling. As a sexual assault case by a drunk man against a vulnerable disabled woman, the case focused – even symbolised – Canadian concerns about gendered violence, and in that context which theorist would care to explain to the outraged feminist lobby that Daviault’s conduct was a “tragic accident”?

5.4.4 The legislative response was the enactment of section 33.1 of the Canadian *Criminal Code*, which limits the availability of the defence of intoxication in cases of violence where an accused person departs markedly from the standard of care generally recognised by Canadian society.³⁹⁷ Section 33.1 provides:

³⁸⁸ *R v Bernard* [1988] 2 SCR 833, 863 per McIntyre J.

³⁸⁹ See *Leary* [1978] 1 SCR 27.

³⁹⁰ [1994] 3 SCR 63.

³⁹¹ Abell J and Sheehy E, *Criminal Law and Procedure: Proof, Defences and Beyond*, Captus Press, 2004, 189. See *R v Leary* [1978] 1 SCR 27; *R v Bernard* [1988] 2 SCR 833; *R v Daviault* [1994] 3 SCR 63.

³⁹² Section 7 of the *Charter* provides that ‘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.’ Section 11(d) provides that ‘any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal’. In relation to the decision, Gough comments that ‘foreign lawyers should tread carefully when interpreting another jurisdiction’s fundamental principles, but with all respect to the Supreme Court it is not obvious that the 1982 Canadian Charter of Rights and Freedoms – upon which the parties had not themselves sought to rely – mandated this re-evaluation of *Leary*’, Gough S, ‘Surviving without *Majewski*?’ [2000] Crim LR 719, 727.

³⁹³ Gough S, above n 392, 728.

³⁹⁴ *Martin’s Criminal Code* 2004, CC/87.

³⁹⁵ Gough S, above n 392, 729. For example, Isabel Grant observes ‘the suggestion that someone could be too drunk to be convicted of sexual assault shocked the public’s sense of justice and common sense. The facts of the case, that the victim was elderly and disabled, and that she was literally dragged from her wheelchair and sexually assaulted, brought the issue into stark focus for the public’, Grant I, ‘Second Chances: Bill C –72 and the Charter’ (1995) 33 *Osgoode Hall Law Journal* 379, 383.

³⁹⁶ Gough S, above n 392, 730.

³⁹⁷ Holland has observed that there is a possibility that section 33.1 may not survive a constitutional challenge based on the Charter of Rights section 7 (dealing with the right to liberty and the right not to be deprived thereof except in accordance with principles of fundamental justice). This issue has not yet been dealt with by the Supreme Court of Canada. See Holland’s contribution to Law Commission UK, *The Law of Murder: Overseas Comparative Studies*, 2005, 34 – 35.

(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 recognised 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.

5.4.5 As a result of *Daviault's* case and section 33.1 of the *Criminal Code*, the position concerning the admissibility to evidence of intoxication in criminal trials remains divided between offences of specific intent and general intent. However, the division is not a strict application of the *Majewski* principles. The current position in Canada can be summarised as follows:

(1) specific intent offences – evidence of intoxication is taken into account with all the other evidence to determine whether the accused had the requisite specific intent. Robbery, theft, assault with intent to wound and possession of stolen property have been held to be specific intent offences.³⁹⁸ Evidence of intoxication has also been relied on to negate the mental element for second degree murder (the mental element is causing bodily harm knowing it is likely to cause death and nevertheless being reckless whether death ensues)³⁹⁹ and arson (the mental element is wilfully setting the fire, that is subjective recklessness).⁴⁰⁰

(2) general (basic) intent offences – if the accused reaches a state of extreme drunkenness akin to insanity or automatism, then intoxication is a defence. This rule is limited by section 33.1 of the *Criminal Code* in cases where subsection (3) applies (offences of violence) if the person departs markedly from the standard of care as described in subsection (2). So in relation to offences of basic intent, if an accused falls within section 33.1 or if an accused does not reach such an advanced stage of drunkenness as to be akin to insanity or automatism, then intoxication is not a defence. Offences of general intent include common assault, rape, sexual assault, indecent assault and assault occasioning bodily harm.⁴⁰¹

5.4.6 Section 33.1 of the *Criminal Code* does not apply to intoxication that is not self-induced. Self-induced intoxication means that ‘the accused intended to become intoxicated, either by voluntarily ingesting a substance knowing or having reasonable grounds to know it might be dangerous, or by recklessly ingesting the substance’.⁴⁰²

³⁹⁸ These offences are taken from Stuart D, *Canadian Criminal Law A Treatise*, Thomson Publishing 1995, 390 – 391.

³⁹⁹ *R v Cooper* [1993] 1 SCR 146.

⁴⁰⁰ *R v Buttar* [1989] 2 SCR 1429.

⁴⁰¹ These offences are taken from Stuart D, above n 398, 391.

⁴⁰² *Martin's Criminal Code*, 2004, CC/87 referring to *R v Vickberg* (1998) 16 CR (5th) 164.

Part 6

Options for Reform

6.1.1 Recommendation 1 was that legislation be enacted to clarify the law of intoxication in Tasmania. The Law Reform Institute is of the view that the present law lacks clarity and is unprincipled, illogical, inconsistent and unduly complex, and is therefore in need of reform. The more difficult question to answer is – how should the law of intoxication, as it relates to criminal responsibility, be reformed? In considering the issue, the Institute recognises that this is an area where there is not an easy answer. The legal approach to the issue of intoxication and criminal responsibility can (broadly speaking) be divided into two broad positions. The first is the common law approach which regards evidence of intoxication as a factor relevant to an assessment of whether the accused had the requisite mental element for the offence. Under this approach, intoxication is ‘morally neutral’.⁴⁰³ Fairall and Yeo describe the alternate approach as one of ‘containment that seeks to limit the exculpatory force of intoxication to certain (usually serious) crimes’.⁴⁰⁴ Under this approach, ‘people who commit crimes under the influence of self-induced intoxication [are] morally accountable. Adherents of this position regard these people as criminally responsible for getting dangerously intoxicated’.⁴⁰⁵ As noted earlier, reforming the law of intoxication raises controversial issues involving the balancing of competing factors, primarily, the extent to which principle and logic should give way to policy considerations. Difficulties and disagreements arise because ‘there is no clear-cut answer to the question whether the law should regard becoming intoxicated as morally neutral or blameworthy’.⁴⁰⁶

6.1.2 Recent reforms in other Australian jurisdictions (other than Victoria) have reflected the ‘containment’ approach and have been policy driven, where legislative amendments restricting the relevance of intoxication have been accompanied by rhetoric reflecting a ‘law and order’ and ‘tough on crime’ approach. While the relationship between alcohol, drugs and crime is always likely to excite strong emotions, the stance taken to reform in this Report aims to reflect a principled and non-emotive approach to the issue.

6.1.3 The Issues Paper raised a number of options for reform:

- Option 1 – Evidence of self-induced intoxication is relevant only to specific intention. This is to reaffirm the previously recognised *Code* position in accordance with *Snow’s case*.
- Option 2 – Evidence of self-induced intoxication is relevant to intention and knowledge. This is to extend the legislation to recognise the position in *Weiderman*.
- Option 3 – Evidence of self-induced intoxication is relevant to intention, knowledge and subjective recklessness. This position reflects the approach of the *Commonwealth Criminal Code*.
- Option 4 – Allow evidence of self-induced intoxication to be relevant to negate any subjective mental element, including section 13(1) voluntary and intentional act. This is to adopt the Australian common law position. The common law now only applies in Victoria.

6.1.4 Options 1 – 4 can be viewed on a continuum with a graduated removal of the limits placed on the purposes for which the defence can rely on evidence of self-induced intoxication. In Tasmanian criminal legislation, the most commonly encountered mental states are specific intent, knowledge, recklessness and voluntariness. Option 1 would only allow evidence of self-induced intoxication in relation to specific intent. Option 2 would allow evidence of self-induced intoxication in relation to specific intent and knowledge. Option 3 would allow evidence of self-induced intoxication in relation to specific intent, knowledge and subjective recklessness. It would not allow evidence of intoxication in relation to the issue

⁴⁰³ Fairall P and Yeo S, *Criminal Defences in Australia (4th ed)*, Lexis Nexis, Australia, 2005, 219.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid* 220.

⁴⁰⁶ *Ibid* 247.

of whether the accused's act was voluntary and intentional or to deny 'basic intent'. Option 4 would not place a restriction on the purposes for which the defence could rely on evidence of intoxication in relation to mental states. However, under Option 4 intoxication would still not be relevant to deny the mental element in respect of driving offences.⁴⁰⁷

6.1.5 Responses to the Issues Paper were polarised on the appropriate direction for reform. The Office of the Director of Public Prosecutions and the Tasmania Police favoured the adoption of the most restrictive option - Option 1, which if adopted would reaffirm the previously recognised *Code* position in accordance with *Snow's case*. This would mean that evidence of self-induced intoxication would only be relevant to specific intention.

6.1.6 There was no discussion in any of the responses in relation to Options 2 or 3.

6.1.7 The Chief Justice of the Supreme Court of Tasmania, the Criminal Law Sub-committee of the Law Society of Tasmania and Senior Lecturer John Blackwood favoured the adoption of Option 4, that is to adopt the Australian common law position. If this position were adopted, it would mean that evidence of self-induced intoxication is relevant to intention, knowledge, subjective recklessness and voluntariness.

6.1.8 Other possible reforms raised in the Issues Paper included:

- Option 5 – Creation of a special offence;
- Option 6 – Special rules for involuntary intoxication;
- Option 7 – Procedural restrictions on the defence;
- Option 8 – Clarify the relationship between intoxication and the defences.

6.1.9 Responses received addressed Option 5, Option 6 and Option 8. In summary:

- In the view of the Office of the Director of Public Prosecution Option 5 was unnecessary, as the existing law adequately dealt with this issue. Tasmania Police agreed with the views expressed in the response of the Office of the DPP. This view no doubt is linked with the principal recommendation that intoxication be only available in respect of specific intent offences;
- The Criminal Law Sub-committee of the Law Society of Tasmania and the anonymous submission supported the adoption of Option 6.
- There was support in the response from the John Blackwood, the Office of the Director of Public Prosecution and the Criminal Law Sub-committee of the Law Society of Tasmania's response for the clarification of position on self-defence. Tasmania Police agreed with the views expressed in the response of the Office of the DPP.

6.2 Option 1 - Allow evidence of self-induced intoxication to be relevant only to specific intention.

6.2.1 Option 1 raised in the Issues Paper was to reaffirm the previously recognised *Code* position in accordance with *Snow's case*⁴⁰⁸ and to reject the approach of the Court of Criminal Appeal in *Weiderman's case*.⁴⁰⁹ In other words, evidence of voluntary intoxication would only be relevant to negate criminal responsibility in the limited category of crimes of specific intent. These are crimes that require intent to bring about a particular result. This would mean that evidence of self-induced intoxication could not be relied upon by the defendant in relation to other states of mind, such as: subjective recklessness, knowledge and voluntariness (section 13(1)). This is more restrictive than the current Tasmanian law on intoxication, as it returns to the pre-*Weiderman* position. This was the option preferred by the Office of the Director of

⁴⁰⁷ See discussion at 6.5.

⁴⁰⁸ [1962] Tas SR 271.

⁴⁰⁹ See discussion in Part 3.

Public Prosecution and Tasmania Police. The Office of the Director of Public Prosecution was in favour of maintaining the ‘status quo’ as its view was that the existing law worked well in practice, and that any liberalisation of the law would have resource implications for the Courts, Legal Aid and the Office of the Director of Public Prosecution by leading to more trials. In addition, it was suggested that it would be an added burden for trial judges who would have another direction to give to the jury about the relevance of intoxication to the mental element of the offence, and also burdensome to the jury who would have this additional direction to consider when arriving at a verdict.

Arguments in favour

6.2.2 (1) The distinction between specific and basic intent crimes limits reliance on evidence of intoxication and achieves the perceived socially desirable result of maintaining community faith in the criminal justice system. Although intoxicated offenders may rely on intoxication for specific intent crimes, they are not able to rely on intoxication for basic intent crimes and so do not totally escape criminal liability. It is argued that ‘this meets community expectations that wrongdoers will be penalised for offences and maintains community respect for the law’.⁴¹⁰ This view was endorsed by the Office of the Director of Public Prosecution who commented that ‘[t]he law at present generally leads to a person being convicted of the crime that the community and victim believe that the offender should be convicted of, leaving the issue of intoxication to the sentencing process’. Further, the view was expressed that ‘allowing a more “liberal” intoxication law will lead to a disillusionment of the justice system by victims of serious criminal conduct and their families’. The response of the Office of the Director of Public Prosecution was endorsed by the Tasmania Police.

6.2.3 (2) The restriction placed on the use of evidence of intoxication reflects a moral judgment that it is ‘wrong to allow a defendant to avoid liability on the basis that he or she was so intoxicated that the act was involuntary and unintentional’ in circumstances where this outcome was a result of the defendant’s choice to drink or take drugs.⁴¹¹ This argument is set out by Mason J in *O’Connor’s case*:

there are two strands of thought whose thrust is to deny that drunkenness is an excuse for the commission of crime. One is essentially a moral judgment – that it is wrong that a person should escape responsibility for his [or her] actions merely because he [or she] is so intoxicated by drink or drugs that his [or her] act is not willed when by his [or her] own voluntary choice he [or she] embarked on the course which led to his [or her] intoxication.⁴¹²

Imposing criminal responsibility on a person who is very drunk when they cause harm is not just a reflection of a ‘tough on crime’ policy, as there is moral point in operation – that a person is morally blameworthy for their (voluntarily) intoxicated conduct. There is an element of prior fault in the defendant’s conduct – that is ‘taking drinks or drugs to such an extent as to lose control over his behaviour’.⁴¹³ And, as Ashworth asserts, it is this ‘element of culpability in intoxication cases which serves to distinguish them not only from insanity cases (which arise without fault) but also from many cases of simple absence of *mens rea*’.⁴¹⁴

6.2.4 (3) Restricting the use of evidence of intoxication to specific intent crimes is seen to protect the community from violence and property damage. It is seen to act as a deterrent to potential offenders by ‘sending a message ... that they will be held accountable for any criminal act committed while in a state of self-induced intoxication’.⁴¹⁵ This view is also expressed by Mason J in *O’Connor’s case*:

⁴¹⁰ Victorian Law Reform Committee, *Inquiry into criminal liability for self-induced intoxication Issues Paper No 1, 2*.

⁴¹¹ VLRC 1999, above n 21, para 6.6.

⁴¹² (1980) 146 CLR 64, 110.

⁴¹³ Ashworth A, above n 22, 217.

⁴¹⁴ *Ibid.*

⁴¹⁵ VLRC 1999, above n 21, para 6.6.

The other [strand of thought] is a social judgment – that society legitimately expects for its protection that the law will not allow to go unpunished an act which would be adjudged to be a serious criminal offence but for the fact that the perpetrator is grossly intoxicated.⁴¹⁶

6.2.5 (4) The Office of the Director of Public Prosecution considered that any liberalisation of the law of intoxication ‘would lead to more trials as defence counsel would be bound to run intoxication type defences. This would have resource issues for the Courts, Legal Aid and this Office’. This view was endorsed by Tasmania Police.

6.2.6 (5) The Office of the Director of Public Prosecution considered that any liberalisation of the law would be an added ‘burden for juries and trial judges with yet another direction where they have a multitude in most cases already to deal with’. This view was endorsed by Tasmania Police. It should be noted that this has not been the experience in Victoria. Rather, in the Victorian Law Reform Committee’s report, several expert witnesses raised the likely difficulties with jury directions if the *Majewski* approach (akin to the *Snow* position) were adopted.⁴¹⁷ These witnesses included the Director of Public Prosecutions (Vic), the Chairman, Criminal Law Section, Law Institute of Victoria, the Vice-Chairman, Victorian Criminal Bar Association, the Chairman, the Victorian Bar, and His Honour Judge P Mullaly, County Court of Victoria.

Arguments Against

6.2.7 (1) As discussed above, the distinction between specific and basic intent is uncertain and arbitrary.⁴¹⁸ The distinction is not related to seriousness of the offence. It does not always achieve its aims as some offences of specific intent do not have a suitable lesser offence of general intent so that the specific intent rule does not always ensure intoxicated offenders are not completely acquitted.⁴¹⁹

6.2.8 (2) In restricting the use of evidence of intoxication, the division between basic and specific intent contravenes basic principles of criminal responsibility in that a person may be convicted of crime but not have formed the necessary intention.⁴²⁰ In a report in 1989, the Tasmanian Law Reform Commissioner concluded that the distinction between crimes of specific intent and crimes of basic intent was unjustifiable and represented ‘a departure from fundamental principles of the common law’.⁴²¹ The argument is that it is not appropriate that ‘the blameworthiness that may be attached to the accused’s behaviour in becoming intoxicated in the first place should ... be superimposed over the criminal conduct so as to presume that the accused acted voluntarily and intentionally’.⁴²² In offences of basic intent, there may be reasonable doubt as to guilt because the mental element is absent because of intoxication. However, as the defendant’s intoxication cannot be taken into account the Crown is in effect relieved of the duty of proving the requisite mental element. There is support for this argument in the response of the Chief Justice of the Supreme Court of Tasmania who observed that ‘the common law position is consistent with current principles of criminal responsibility’. The Chief Justice stated that ‘the world has moved on a long way since 1920 (*Director of Public Prosecutions v Beard* [1920] AC 479) and Parliament should reflect reasoned and settled societal views’. This argument was also supported in the submission of Mr John Blackwood.

6.2.9 (3) The justification for denying the relevance of intoxication to basic intent crimes presented in *Majewski’s case* was:

⁴¹⁶ (1980) 146 CLR 64, 110.

⁴¹⁷ VLRC 1999, above n 21, para 6.13 fn 27.

⁴¹⁸ See discussion in Part 4, at 4.2.5. See also UK Law Commission 1993, above n 23, 27 – 34.

⁴¹⁹ See LRCV, above n 23, para 33. See also discussion in Part 4.

⁴²⁰ Orchard G, ‘Criminal Responsibility and Intoxication – the Australian Rejection of *Majewski*’ [1980] *The New Zealand Law Journal* 532, 533. See VLRC 1999, above n 21, para 6.14, New Zealand Criminal Law Reform Committee, above n 23, 37.

⁴²¹ Law Reform Commissioner of Tasmania, *Insanity, Intoxication and Automatism* Report no. 61, 1989, 13.

⁴²² McSherry B and Naylor B, above n 323, 528 referring to Barwick CJ in *The Queen v O’Connor* (1980) 146 CLR 64, 87.

[either] the recklessness theory (that in becoming drunk the accused was reckless and may thus be convicted of any crime for which recklessness is a sufficient basis for liability) or by saying that the state of mind of a person who voluntarily becomes intoxicated is “as wrongful as” the state of mind of a person who foresees and intends the consequences of his acts.⁴²³

It has been argued that these grounds are illogical and not justified on policy grounds.⁴²⁴ It has been suggested that it is ‘very difficult to find any rationale for holding that intoxication is relevant to certain offences and not to others’.⁴²⁵

6.2.10 In his consideration of the distinction between specific and basic intent, Leader-Elliott argues that the distinction is indefensible when fault is in issue. Consider the following scenario where Dennis faces two charges, one of reckless and one of intentional infliction of serious injury:

Dennis and Victor were drinking together in a beer garden. Witnesses say they were visibly drunk. They quarrelled. The witnesses say that Victor threw the contents of his glass at Dennis who retaliated by picking up the beer jug and throwing it at Victor. The jug hit Victor on the temple and fractured his skull. Dennis testifies that he only meant to throw beer over Victor. The jug was slippery and he was drunk. It was an accident he says. It slipped from his grasp.

Evidence of intoxication is clearly relevant to both charges. If Dennis *meant* to throw the jug, he may also have meant to inflict serious injury. Or, if he did not intend serious injury, it is not difficult to conclude that he realised that there was a risk of serious injury. But his evidence of intoxication lends credibility to his denial that he meant to throw the jug.⁴²⁶

As Leader-Elliott argues, ‘what possible reason could there be for requiring the trier of fact to consider drunkenness when determining intention [as to causing serious injury], but to ignore it when recklessness [as to causing serious injury] is in issue?’⁴²⁷ The only reason is a policy decision that evidence of intoxication should not be relevant to subjective recklessness.

6.2.11 (4) It has been suggested by the Victorian Law Reform Committee that the adoption of a distinction between specific and basic intent would lead to an increase in the complexity of trials and have the ‘potential for inconsistent and unjust verdicts.’⁴²⁸ In certain cases, the jury would need to be instructed that they could consider intoxication in relation to one offence and then ignore it and treat the offender as if he or she were sober in relation to other offences. Dr David Neal (affiliated with the Victorian Bar) observed:

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 qualifications 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 become a nightmare scenario.⁴²⁹

⁴²³ Fairall P, ‘Majewski Banished’ [1980] 4 *Criminal Law Journal* 264, 265 citing: *Majewski* [1977] AC 443, 480.

⁴²⁴ *Ibid.* Cf Gardner S, ‘The Importance of Majewski’ (1994) 14 *Oxford Journal of Legal Studies* 279.

⁴²⁵ McSherry B and Naylor B, above n 323, 528. Cf Horder J, above n 272, 536 – 542. Horder suggests that ‘a theory of criminal wrongs ... provides the foundation for the distinction to be drawn between basic and specific intent on the question of admissibility of intoxication evidence’, at 539. Horder’s argument is that for basic intent crimes, the wrong is committed when the defendant commits the act, whatever his degree of fault whereas for specific intent crimes, the defendant’s state of mind is intrinsically bound up in the nature and definition of the wrong. It is for this reason that evidence of intoxication is relevant to specific intent crimes as it is ‘relevant to whether or not a wrong of the kind alleged took place, proof of mens rea being intrinsic to this question’, at 539. This is not the case in crimes of basic intent, as a ‘wrong of the kind alleged can take place whether or not D was subjectively aware of the possible consequences’, at 539. However, the definition of specific intent relied upon by Horder is different from the definition used in Tasmania as it extends beyond crimes that require a specific purpose and encompasses other states of mind such as knowledge.

⁴²⁶ Leader-Elliott I, ‘Voluntariness, Intoxication and Fault’ (1991) 15 *Criminal Law Journal* 112, 123.

⁴²⁷ *Ibid.*

⁴²⁸ VLRC 1999, above n 21, para 6.15.

⁴²⁹ *Ibid* para 6.13.

The Victorian Law Reform Committee has suggested that the difficulty of explaining the issues to the jury may result in a plea of guilty by an accused where the accused might not otherwise have entered a plea.⁴³⁰ However, the response of the Office of Director of Public Prosecution in Tasmania considered that ‘juries readily understand that intoxication is only relevant if it goes to capacity to lack a specific intent’.

6.2.12 (5) It is argued that the division between specific and basic intent offences brings artificiality and unreality to jury’s decision making process. As a practical matter, it has been asked, ‘how can a judge seriously tell a jury to decide whether D *did* intend to do ... [the act] – ignoring the undisputed evidence that he was unconscious at the time?’⁴³¹ For example, in the case of *R v Egan*,⁴³² the defendant took her 11 month old son to bed while she was intoxicated and rolled onto him, suffocating and killing him. She was charged and convicted of manslaughter. On appeal, the defendant was acquitted as evidence of self-induced intoxication ‘indicate[d] that the defendant had no intention to commit the act’.⁴³³ If the evidence of self-induced intoxication had not been admitted, ‘then the defendant would undoubtedly have been found guilty of a crime which she committed involuntarily and unintentionally’.⁴³⁴

6.2.13 (6) Restricting the defence of intoxication on the grounds that it is necessary for the protection of the public from violence and the preservation of order by the deterrent effect of strictly limiting the intoxication defence can be challenged. Deterrence, if it operates at all, will not do so at the time of the offence but at the earlier time when drugs or alcohol are consumed or taken. At this stage the deterrent effect of the law’s denial of the defence of intoxication for any possible crime committed subsequently is most unlikely to act as a discouragement to excessive intoxication.⁴³⁵

6.2.14 (7) The traditional approach of *Beard’s case* and section 17 of the *Code* fail to take account of the significant advances in scientific understanding concerning the impact of intoxicants of a person’s level of functioning.⁴³⁶ The approach is subject to the criticism that the law should reflect modern science.

Conclusion

6.2.15 After carefully considering the arguments in favour and against Option 1, it is the view of the Institute that this Option should not be adopted. The Office of the Director of Public Prosecutions and Tasmania Police expressed the view that evidence of self-induced intoxication should only be admissible in crimes of specific intent as:

- The current law leads to just outcomes as it generally leads to a person being convicted of a crime that the community and victim believe the offender should be convicted of, leaving the issue of intoxication to the sentencing process;
- Any liberalisation would lead to a disillusionment of the justice system by victims of serious criminal conduct and their families;
- Any liberalisation of the law would lead to more trials as defence counsel would be bound to run intoxication type defences;
- Increased burden to juries and trial judges by creating another direction.

While these are powerful concerns, it is the view of the Institute that (if the law is liberalised) any direction on intoxication is not likely to be particularly onerous as evidence of self-induced intoxication will be one of the factors that may be taken into account in determining whether the accused had the requisite intent (with all the other circumstances of the case). In many cases, the more likely conclusion is that the defendant possessed the requisite intent – a drunken intention is still (nevertheless) an intent. In any event, the jury direction will be less complicated than the complexity that exists under the current law. Further, it

⁴³⁰ VLRC 1999, above n 21, para 6.13.

⁴³¹ Smith J, above n 284, 245.

⁴³² (1897) 23 VLR 159.

⁴³³ VLRC 1999, above n 21, para 6.18.

⁴³⁴ Ibid.

⁴³⁵ *O’Connor* (1980) 146 CLR 64, per Stephen J at 102-103.

⁴³⁶ See discussion in 2.4.

is argued that the specific intent/basic intent division is unduly complex and offends fundamental principles of criminal responsibility.

Recommendation 2

It is not desirable to enact in Tasmania legislation that restricts the relevance of self-induced intoxication to crimes of specific intent.

6.2.16 If, contrary to the Institute's view, Option 1 were to be adopted, it is the view of the Institute that the legislation should not contain any reference to 'capacity'. This would bring the Tasmanian position into line with the position in other Australian jurisdictions and the United Kingdom.⁴³⁷ As stated in Part 3, section 17(2) currently refers to intoxication that renders the 'accused incapable of forming the specific intent'. This is undesirable as it is the view of the Institute that the focus of the legal inquiry must be on whether the accused actually formed the requisite specific intention and not whether the accused was capable of forming the intention. The emphasis on capacity has been criticised on the ground that it is contrary to fundamental principle to hold that evidence of intoxication not amounting to incapacity is irrelevant to criminal responsibility in crimes requiring a specific intent. Proof of capacity is not proof of intent and should not be elevated to proof of intent by the operation of the presumption that a person intends the natural and probable consequences of his or her acts. It is contrary to fundamental principles to disallow the defence of intoxication in cases where the jury may be satisfied the defendant had the capacity to form the specific intent but are not satisfied beyond reasonable doubt that he or she had formed the actual intent.

6.2.17 This issue was not addressed in the responses received. It remains the view of the Institute (as indicated in the Issues Paper) that if Option 1 is adopted, the legislative provision should not refer to 'capacity' to form the specific intent. It should be clear that the issue is whether the accused formed the requisite specific intent (not whether he or she had the capacity to form it).

Recommendation 3

If legislation is adopted in Tasmania that restricts the relevance of self-induced intoxication to crimes of specific intent, it is recommended that the legislative provision does not refer to 'capacity' to form the specific intent.

6.3 Option 2 – Allow evidence of self-induced intoxication to be relevant to intention and knowledge

6.3.1 Option 2 would allow evidence of intoxication to be relevant to intention and knowledge but not to subjective recklessness or to the issue of whether the accused's act was voluntary and intentional act (section 13(1)). This would accord with the decision in *Weiderman's case*, namely that intoxication is relevant to the issue of specific knowledge. Offences that have a mental element of knowledge (and for which evidence of self-induced intoxication would be admissible) include:

- murder contrary to the first limb of section 157(1)(c) of the *Code*, that the accused knew that their act or omission was likely to cause death in the circumstances;
- receiving stolen property contrary to section 258, that the accused knew that the property was stolen;
- assaulting a pregnant woman contrary to section 184A, that the accused knew that the woman was pregnant.

There was no discussion of Option 2 in the responses received to the Issues Paper.

⁴³⁷ See Leader-Elliott I, above n 20, 78 – 79.

6.3.2 If this Option were adopted, it is suggested that the focus of the inquiry should be on the mental state for the particular offence and not on whether the crimes are classified as crimes of ‘specific’ or ‘basic’ intent. In other words, reference should be made to actual mental states (such as intention, knowledge, recklessness and section 13(1) voluntary and intentional act) rather than to the more general concepts of ‘specific’ or ‘basic’ intent.⁴³⁸

Arguments in favour

6.3.3 (1) The focus on the allegations of particular states of mind avoids the concepts of ‘specific’ and ‘basic’ intent which do not have a place in the *Code* otherwise than in relation to intoxication. It focuses on actual mental states (such as intention, knowledge or recklessness) that are central concepts in the criminal law.

6.3.4 (2) Supporters of this approach argue that the distinction between recklessness and intention and knowledge can be justified on the grounds of policy and principle. The public policy argument can be summarised as follows: ‘[w]hy should this defendant, who lacked the foresight or awareness required by the mens rea of the offence, be convicted of anything? Answer: because he would have been aware if he had not been drunk’.⁴³⁹ This argument is presented in a more sophisticated manner by Horder who argues:

the principle underpinning the distinction is that, because intoxication involves a risk of blunting one’s sensitivity to the consequences of one’s admittedly voluntary conduct – in short, to make one liable to blunder – the voluntary intoxication will not be admissible evidence where a crime may be and is alleged to have been committed largely by blundering; for admissibility in such circumstances would make little moral sense. Part of what is excusatory about blundering into harm is that it is unexpected. The harm done will have surprised the blunderer as much as the victim. The more spontaneous and unexpected the blunder, the greater the claim (other things being equal) to excuse. But my blundering into harm can hardly be said to be spontaneous or unexpected if I have knowingly done that which is – as is taken to be common knowledge – liable to make me blunder.⁴⁴⁰

In short, the reason why subjective recklessness is treated differently is that a person should not be able to rely on a self-induced state of intoxication as a basis for saying that they failed to appreciate a risk that they would have appreciated if they had been sober.⁴⁴¹

Arguments against

6.3.5 (1) Option 2 is subject to the same criticisms as those directed at the *Beard/Majewski* distinction between crimes of specific and basic intent. Although Option 2 does not use the terms ‘specific’ and ‘basic’ intent, Option 2 has the same effect as Option 1 as it separates offences into categories for the purpose of determining whether evidence of self-induced intoxication is admissible. As with Option 1, it is argued that this will produce anomalous results and that the criterion for separating offences into these groups is not rationally related to policy considerations such as seriousness of the offence or its social consequences or prevalence of intoxication in its commission.⁴⁴² It is argued that it is ‘wrong both in principle and in policy to equate the moral, non-legal “recklessness” of becoming intoxicated with the subjective awareness of risk required by the definition of certain specific offences’.⁴⁴³

⁴³⁸ This approach is based on the approach of the *Criminal Code Act 1995* (Cth) and the UK Law Commission in its report on Intoxication and Criminal Liability. It also reflects the approach in the US Model Penal Code.

⁴³⁹ UK Law Commission 1995, above n 23, 63 quoting the submission of Professor Sir John Smith.

⁴⁴⁰ Horder J, above n 272, 537.

⁴⁴¹ This accords with the view of Wright J in *Weideman’s case* (1998) 7 Tas R 293: ‘If, by getting drunk, a man precludes himself from awareness of the danger which his voluntary and intentional act may pose to another person he cannot be heard to say, “I didn’t know and I can’t be blamed”. Common sense seems to dictate the appropriate response to that proposition, viz, “If you weren’t drunk and had been able to think about your deed, you would or should have realised the risk ... inherent in that conduct”, at 315.

⁴⁴² South Australia, Attorney-General’s Department, above n 23, 35.

⁴⁴³ UK Law Commission 1993, above n 23, 44.

6.3.6 (2) Option 2 makes a distinction between crimes of actual knowledge or belief and crimes of recklessness. In Tasmania, the concept of ‘specific’ intent has been interpreted in such a way that neither crimes of knowledge or recklessness are classified as crimes of specific intent. As has been discussed in Part 4, there is an argument that there is a close connection between questions of knowledge (what the accused knew to be likely) and questions of recklessness (what the accused foresaw to be likely). In this context, the question arises whether it is now appropriate to make a policy distinction between knowledge and recklessness.

Conclusion

6.3.7 After considering the arguments in relation to the adoption of Option 2, it is the view of the Institute that legislation should not be enacted that restricts evidence of self-induced intoxication to questions of intention and knowledge. It is not desirable to create a distinction (for the purposes of self-induced intoxication) between knowledge and recklessness.

Recommendation 4

It is not desirable to introduce in Tasmania legislation that restricts evidence of self-induced intoxication to questions of intention and knowledge.

6.4 Option 3 – Allow evidence of self-induced intoxication to be relevant to intention, knowledge and subjective recklessness

6.4.1 Option 3 is to adopt the approach of the *Commonwealth Criminal Code* provisions dealing with self-induced intoxication. The approach of the *Commonwealth Criminal Code* has been adopted in the recent reforms in South Australia, the Australian Capital Territory and the Northern Territory.⁴⁴⁴ There was no discussion in the responses received to the Issues Paper in relation to this option. As discussed in Part 3, this approach imposes two main restrictions on the use of evidence of self-induced intoxication:

- Evidence of self-induced intoxication cannot support a plea of automatism. In other words, an accused cannot rely on self-induced intoxication to deny the voluntariness of his or her act (section 4.2(6)).
- Evidence of self-induced intoxication cannot be taken into account to determine whether a fault element of ‘basic intent’ exists (section 8.2(1)).

6.4.2 In order to understand the Commonwealth approach to intoxication (and Option 3), it is important to bear in mind that the meaning of ‘basic’ intent under the Commonwealth legislation is fundamentally different from the concept of ‘basic’ intent as it has been traditionally understood in Tasmania. In Tasmania, ‘basic’ intent has been understood to mean all states of mind other than specific intent,⁴⁴⁵ including section 13(1) (voluntary and intentional act), recklessness or knowledge. Under the Commonwealth legislation, the concept of ‘basic’ intent is much more limited. Basic intent is defined as ‘a fault element for a physical element that consists only of conduct’.⁴⁴⁶ As discussed earlier, the physical element of an offence may be conduct (act, omission or state of affairs), the circumstances in which conduct occurs or the result of conduct.⁴⁴⁷ On this analysis, self-induced intoxication cannot be taken into account to deny the intention with which the act was done, but is relevant to deny fault in relation to circumstances and the result of conduct. As discussed below, a difficulty exists in determining what is ‘conduct’ on one hand and ‘circumstances or the result of conduct’ on the other hand.

⁴⁴⁴ See discussion in Part 5.

⁴⁴⁵ See 3.1.6 for meaning of specific intent.

⁴⁴⁶ Section 8.2(2).

⁴⁴⁷ See discussion in Part 1.

6.4.3 A further difference is that under the Commonwealth approach, offences are not classified as ‘basic intent’ or ‘specific intent’ offences. Rather, the focus is on the individual fault elements of an offence, and on classifying those fault elements – so an offence may have a fault element of ‘basic intent’ and a fault element in relation to results or circumstances.⁴⁴⁸

6.4.4 Self-induced intoxication may be taken into account in determining intention, knowledge, recklessness, negligence or any other fault element relating to an incriminating circumstance or result. Of course, in relation to negligence, ‘evidence of self-induced intoxication will ... almost invariably favour the prosecution case’.⁴⁴⁹ Evidence of self-induced intoxication can also be taken into account if a defendant argues that his or her conduct was accidental. The *Commonwealth Criminal Code* provisions apply equally to the defence and the prosecution.

6.4.5 In Tasmania, the concept of voluntariness in section 4.2 of the *Commonwealth Criminal Code* is reflected in section 13(1): ‘No person shall be criminally responsible for an act, unless it was voluntary and intentional’. Section 13(1) also reflects the concept of ‘basic intent’ found in section 8.2 of the *Commonwealth Criminal Code*, in that it requires that an accused’s physical act be intentional.

6.4.6 If the Commonwealth approach were adopted in Tasmania, evidence of self-induced intoxication would be able to negate intention, knowledge and subjective recklessness in relation to circumstances or the result of conduct. However, an accused could not rely on self-induced intoxication to deny that his or her act was voluntary and intentional, as required by section 13(1). In other words, an accused could not rely on self-induced intoxication to found a plea of automatism. An accused could also not rely on self-induced intoxication to deny that the physical act (not extending to the result or consequences) was intentional.

Arguments in favour

6.4.7 (1) This option may represent an acceptable political compromise between policy and principles of criminal responsibility. Under this option, an accused cannot rely on self-induced intoxication to deny that the act was voluntary or ‘basic’ intent, that is that the physical act was intentional. This means that the law can be seen to reflect policy arguments that have been used to restrict the use of evidence of intoxication – the moral and social argument in relation to the protection of the community from drunken criminal conduct.⁴⁵⁰ However, the practical operation of the rule in Tasmania will be limited. Under the *Code*, few offences require proof only of ‘basic intent’, that is that the act was voluntary and intentional. Commonly encountered examples are manslaughter, rape (section 185), sexual intercourse with a young person (section 124) and indecent act with a young person (section 125B). It is unclear (see below) whether assault would be an offence that only has a fault element of ‘basic intent’. Evidence of self-induced intoxication would be relevant to any additional mental element in relation to circumstances or results (such as intention, recklessness or knowledge). For offences where the prosecution has to establish such an additional mental element, the issue of voluntariness will have little practical significance, as it is easier for an accused to assert that he or she did not possess that additional mental element than to rely on involuntariness.

6.4.8 (2) It has been argued that public policy has dictated the development of automatism and that there are sound reasons for limiting the circumstances in which such a plea can be raised. Leader-Elliott argues that the circumstances in which a plea of involuntariness is allowed are based on judgments of social policy. For example, it is appropriate to allow post traumatic automatism and by analogy psychological blow automatism but not to recognise automatism resulting from overwhelming terror or anger.⁴⁵¹ He argues that claims to extend the reach of the involuntariness defence must be justified on its own merits and

⁴⁴⁸ However, in relation to the use of evidence of self-induced intoxication, the practical effect of section 8.2(1) ‘appears confined to offences which do not require proof of fault with respect to a result of conduct’, Leader-Elliott I 2002, above n 6, 147. Note also Leader-Elliott’s analysis of ulterior intentions, 147.

⁴⁴⁹ Ibid 145.

⁴⁵⁰ These are canvassed at 6.2.

⁴⁵¹ Leader-Elliott I, above n 20, 90 – 91.

that there are ‘reasons both of policy and principle for insisting that we remain responsible for our actions though they may be uncharacteristic of our better selves and, in retrospect, bitterly regretted’.⁴⁵² Leader-Elliott argues that ‘no principle of logic or morality requires analogies to be drawn between somnambulism [sleep walking] or post-traumatic automatism [concussion] and violence inflicted during episodes of self-induced intoxication’.⁴⁵³

6.4.9 (3) The adoption of the Commonwealth approach to intoxication would further the aim of having unified criminal laws in Australia. The Commonwealth provisions on intoxication have already been adopted in the Australian Capital Territory and in the Northern Territory (with minor modifications).⁴⁵⁴ In South Australia, while the wording of the new provisions differ from the *Commonwealth Criminal Code*, both at the Commonwealth level and in South Australia there is reliance on the concept of ‘basic’ intent rather than ‘specific’ intent as the analytical tool to provide the limits that apply to evidence of self-induced intoxication.⁴⁵⁵ Of relevance to criminal law in Tasmania, the ‘unification project’ has seen Tasmania adopt uniform evidence laws.⁴⁵⁶

6.4.10 (4) If the Commonwealth position were to be adopted and applied to all summary offences as well as offences to which the *Code* applies, there would be one set of intoxication rules applying to offences whether indictable, summary, state or federal. In the Northern Territory, one of the reasons for the reform to the criminal law was the desire for ‘uniformity of standards in the criminal laws that apply’ to Territory and Commonwealth offences’.⁴⁵⁷

6.4.11 (5) In very broad terms, the Commonwealth position is not dissimilar from the current practical operation of self-induced intoxication in Tasmania. As discussed, evidence of self-induced intoxication is currently available to negate intention, knowledge and probably subjective recklessness.⁴⁵⁸ However, self-induced intoxication is not able to found a plea of automatism.

6.4.12 (6) This option provides greater parity between the relevance of mental illness and intoxication to criminal responsibility. In either case (the existence of a mental disease or intoxication), an accused cannot rely on it to found a plea of automatism.

Arguments against

6.4.13 (1) If Option 3 were to be adopted, the terminology of ‘basic intent’ may impose new uncertainties. While it avoids the problems associated with the meaning of ‘specific intent’, it may create new problems associated with the meaning of ‘basic intent’. In the context of the Commonwealth legislation, it has been said that it will introduce an analytical problem of ‘determining what is meant by intention in relation to conduct and then distinguishing what is not’.⁴⁵⁹ It is suggested that the approach of the Commonwealth is more sophisticated than the ‘specific intent’ rules but that ‘precisely for that reason, is more difficult to understand’.⁴⁶⁰ As Gough argues, the definition of basic intent means that ‘[t]he specific-basic distinction consequently turns on a distinction between acts, circumstances and consequences that many would consider highly problematical’.⁴⁶¹ The concepts of fault elements in relation to conduct, circumstances and results typically are not used as analytical tools to interpret the *Tasmanian Criminal Code*. This may create difficulties in deciding whether an element of an offence involves a ‘basic intent’, that is whether the fault element for a physical element is one that consists only of conduct. In applying the definition of basic intent, difficulties may exist in determining what is ‘conduct’ on one hand and what are ‘circumstances or the result of conduct’ on the other hand.

⁴⁵² Ibid 91.

⁴⁵³ Ibid.

⁴⁵⁴ See discussion in Part 5.

⁴⁵⁵ See discussion in Part 5.

⁴⁵⁶ *Evidence Act 2001* (Tas).

⁴⁵⁷ Dr Toyne, above n 317.

⁴⁵⁸ See discussion in Part 4 for the relevance of intoxication to subjective recklessness in Tasmania.

⁴⁵⁹ South Australia, Attorney-General’s Department, above n 23, 33.

⁴⁶⁰ Ibid 35.

⁴⁶¹ Gough S, above n 392, 722 fn 18 referring to Duff A, *Criminal Attempts*, Clarendon Press, Oxford 1996.

6.4.14 This difficulty can be seen from a consideration of the offence of assault by application of force. The physical element of assault is the unlawful application of force. Is this an offence whether the fault element for a physical element is one that consists only of conduct? Or does it also have a mental element in relation to the ‘result’ of conduct? Under the structure of the *Commonwealth Criminal Code*, assault would be classified as an offence that involves only a ‘basic intent’. Assault is an offence ‘where the only intention required is the intention to carry out the proscribed conduct, eg an intention to strike a person’.⁴⁶² This would mean that under the *Commonwealth Criminal Code* intoxication would not be relevant to whether the accused intended to strike the victim. In Tasmania, the interpretation of elements of assault in section 182 and the meaning of ‘act’ in section 13(1) mean that this may not be an offence that only has a fault element of ‘basic’ intent. Consider the case of a person who throws a bottle over a fence hitting a person who is walking past on the other side of the fence. In order to prove assault by application of force, the Crown must prove a voluntary and intentional act (eg throwing the bottle) and also an additional mental element, namely an intention to apply force or recklessness as to its application. In this case, it is clear that the actual application of force is the ‘result’ of the accused’s conduct (eg throwing the bottle), and so the mental element in relation to the application of force is a fault element in relation to results (and so evidence of self-induced intoxication admissible).

6.4.15 Self-induced intoxication would certainly be admissible in relation to wounding under section 172 of the *Code*, where the prosecution must prove the act that causes the wound and an additional mental element in relation to the result of conduct, that is causing a wound (intention or subjective recklessness). Under the Commonwealth approach, an accused could not rely on self-induced intoxication to deny the voluntary and intentional act (a fault element of basic intent) but could rely on it to deny that he or she foresaw the likelihood of causing a wound (a fault element in relation to results).

6.4.16 (2) There may be difficulties in extracting a small section of the Commonwealth legislation divorced from the framework of the whole act and marrying it into the existing *Code* (Tas). The Commonwealth provisions dealing with self-induced intoxication are closely tied to the meanings of accident, intention, knowledge and recklessness contained in the *Commonwealth Criminal Code*. For example, the operation of the intoxication provisions depend on the definition of basic intent as a ‘fault element of intention for a physical element that consists only of conduct’ in section 8.2(2). This definition relates to the meaning of intention in section 5.2 that provides for intention with respect to conduct, circumstance and result, so that it is clear that evidence of self-induced intoxication may be considered when determining fault relating to circumstances or results. These terms are not defined in the *Code*. This leaves room for more appeals as the application of the new intoxication provisions are worked through.

6.4.17 It is not suggested that these difficulties are insurmountable as it would certainly be possible to adopt the broad principles from the Commonwealth legislation and adapt them to the existing *Code*. However, legislative drafting will need to be mindful of the meaning ascribed to the terminology in the *Commonwealth Criminal Code*.

6.4.18 For example, section 8.1(3) of the *Commonwealth Criminal Code* provides that an accused can rely on evidence of self-induced intoxication to support a claim that the conduct was an accident. Under the *Commonwealth Criminal Code*, there is no defence of accident and an accused’s claim that conduct was accidental amounts to a denial that the conduct was intended.⁴⁶³ So, a drunk who stumbles and falls hitting the victim can rely on evidence of self-induced intoxication to support the claim that he or she did not intend their physical act compared with a drunk who squares up and hits the victim.⁴⁶⁴ In Tasmania, accidental events are specifically dealt with by the second limb of section 13(1), which provide that a person cannot be criminally responsible ‘for an event which occurs by chance’. This means that the consequence must be unintended, unforeseen and unforeseeable by an ordinary person similarly circumstanced.⁴⁶⁵ This contains an objective element and the accused’s state of intoxication would not be a characteristic of the accused that would be ascribed to the ordinary person. In any event, there is no scope

⁴⁶² Norberry J, ‘Criminal Code Amendment Bill 1997’, *Bill Digest*, 3 December 1997.

⁴⁶³ Leader-Elliott I, 2002, above n 6, 151.

⁴⁶⁴ See discussion in *ibid*, 151 - 153.

⁴⁶⁵ *Kapronovski* (1973) 133 CLR 209; *Falconer* (1990) 108 CLR 30, 38.

for ‘chance event’ to apply in relation to assault under the *Code*. As explained below, the mental element for assault is: (1) a voluntary and intentional act; (2) intention to apply force or subjective recklessness in relation to the application of force. In these circumstances, an intoxicated accused who stumbled and fell into the victim would argue that he or she did not intend to apply force and was not reckless as to its application (rather than that the act was not voluntary and intentional or that contact with the victim was a ‘chance event’).

6.4.19 As discussed (in relation to assault), legislation dealing with self-induced intoxication modelled on the Commonwealth legislation may not achieve the same result when applied to offences contained in the Tasmanian *Code*.

6.4.20 The recently enacted intoxication provisions contained in *Criminal Law Consolidation Act 1935* (SA) section 268 provides an example of attempt to integrate the Commonwealth approach of ‘basic intent’ within an existing criminal law framework that does not utilise that concept. Section 268 is a complicated provision that provides (in part) that:

(2) If the objective elements of an alleged offence are established against a defendant but the defendant's consciousness was (or may have been) impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, the defendant is nevertheless to be convicted of the offence if the defendant would, if his or her conduct had been voluntary and intended, have been guilty of the offence.

(3) However, subsection (2) does not extend to a case in which it is necessary to establish that the defendant—

(a) foresaw the consequences of his or her conduct; or

(b) was aware of the circumstances surrounding his or her conduct.

Example—

A, whose consciousness is impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, beats B up and B dies of the injuries. In this case, A could be convicted of manslaughter but not of murder (because A is taken to have intended to do the act that results in death but not the death).

Several definitions apply to these provisions, including that a defendant's consciousness is taken to have been impaired to the point of criminal irresponsibility at the time of the alleged offence if it is impaired to the extent necessary at common law for an acquittal by reason only of the defendant's intoxication.⁴⁶⁶ The terms ‘consciousness’ and ‘alleged offence’ are also defined,⁴⁶⁷ as are intoxication⁴⁶⁸ and self-induced.⁴⁶⁹ The objective element of an offence ‘means an element of the offence that is not a subjective element’.⁴⁷⁰ The subjective element of an offence means ‘voluntariness, intention or knowledge or some other mental state that is an element of the offence’.⁴⁷¹ There are also provisions that deal with criminal negligence resulting in death⁴⁷² and serious injury.⁴⁷³

6.4.21 The aim of this provision was to use the concept of basic intent to restrict the circumstances in which intoxication can be relied upon to negate criminal responsibility, as explained in the second reading speech:

⁴⁶⁶ *Criminal Law Consolidation Act 1935* (SA), section 268(6).

⁴⁶⁷ *Criminal Law Consolidation Act 1935* (SA), section 267A(1).

⁴⁶⁸ *Criminal Law Consolidation Act 1935* (SA), section 269A.

⁴⁶⁹ *Criminal Law Consolidation Act 1935* (SA), section 267A(2), (3).

⁴⁷⁰ *Criminal Law Consolidation Act 1935* (SA), section 267A(1).

⁴⁷¹ *Criminal Law Consolidation Act 1935* (SA), section 267A(1).

⁴⁷² *Criminal Law Consolidation Act 1935* (SA), section 268(4).

⁴⁷³ *Criminal Law Consolidation Act 1935* (SA), section 268(5).

The Model Criminal Code Officers Committee was directed by the Standing Committee of Attorneys General to devise a solution [to the problems created by reliance on the concept of specific intent created in Beard's case]. It did so. It has an effect similar to the Beard rules, but not identical. The basis of this solution is an attempt to define basic intent rather than try to define the slippery notion of specific intent. The result is that self-induced intoxication cannot be taken into account to deny voluntariness and the intention with which the act was done, but can be taken into account to deny any other fault element, whatever that might be. It is this approach to reinstating a version of the Beard rules that forms the basis of the amendments proposed by this Bill.⁴⁷⁴

This reflects the Commonwealth approach. However, it appears that the Commonwealth approach to accident has not been included, so the drunken stumbler is not dealt with under the South Australian provisions. Further, the adoption of the Commonwealth approach creates practical difficulties in the division of act/conduct on the one hand and the result/consequence of conduct. The Attorney General (SA), the Hon M J Atkinson, recognised this difficulty in the second reading speech (particularly as it applied to wounding and assault). After analysing the offence of malicious wounding as an offence that can be viewed in two distinct ways – an offence where the relevant act is the wounding (an offence where under the legislative scheme evidence of self-induced intoxication would not be available) or as an offence where the act is separated from ‘its result the causing of the wound’⁴⁷⁵ (an offence under the legislative scheme where evidence of intoxication would be available). He expressed the view that the first view (that is, that the relevant act is the wounding) was the correct view, as:

Wounding and assault should be treated as if they simply required an intentional and voluntary act, namely to wound and assault respectively, for the purposes of the drunk's defence, whatever may be the position as to liability for reckless behaviour. That has always been the position under the Beard rules and is intended to be restored under this Bill.

Whatever may have been the intention of Parliament, it is argued that it is contrary to accepted legal principles to interpret the mental element for wounding in this way. While common assault under the common law has been accepted as a ‘basic intent’ offence, (as discussed above) this conclusion is not clear-cut in Tasmania.

6.4.22 (3) The limits imposed on the use of evidence of intoxication by the ‘basic intent’ restriction are subject to the same criticism as *Beard/Majewski*.⁴⁷⁶ The argument is that it produces anomalous results and that the criterion for separating offences into groups is ‘not rationally related to any policy consideration such as the seriousness of the offence or its social consequences, or the prevalence of intoxication in its commissions’.⁴⁷⁷

6.4.23 (4) Unless the amendment to the rules of intoxication is made to cover all summary offences in addition to offences governed by the *Code*, then different principles of intoxication will still apply for summary offences (common law). It is desirable that fundamental principles of criminal responsibility are the same for all criminal offences committed in Tasmania.

Conclusion

6.4.24 It is the view of the Institute that Option 3 has real merit, as it would achieve uniformity with the position at the Commonwealth level. It also provides a compromise position. Nevertheless, the Institute's view is that this Option should not be adopted in Tasmania. The reason for this rejection is its complexity and that it is contrary to the fundamental principle of criminal responsibility that an accused's act or omission must be voluntary and intentional.

⁴⁷⁴ The Hon MJ Atkinson (Attorney-General), House of Assembly South Australia, *Hansard*, Monday 23 February 2004.

⁴⁷⁵ *Ibid*.

⁴⁷⁶ See Option 1 at 6.2.

⁴⁷⁷ South Australia, Attorney-General's Department, above n 23, 35.

6.4.25 Further, the Commonwealth approach (particularly the concepts of basic intent and accident) does not sit comfortably with the *Code* provisions relating to criminal responsibility. The South Australian experience suggests that it is difficult to draft legislation that extracts a small section of the Commonwealth legislation divorced from the framework of the whole act and marry it into the existing criminal law, and that the resulting legislation may not achieve the results that Parliament intends.

Recommendation 5

It is not desirable to introduce in Tasmania legislation that restricts evidence of self-induced intoxication to questions of intention, knowledge and subjective recklessness.

6.5 Option 4 – Allow evidence of self-induced intoxication to be relevant to negate any subjective mental element.

6.5.1 Option 4 is to adopt the common law position set out in *O'Connor's case*. This would mean that evidence of intoxication would be relevant to any mental element, including intention, knowledge, recklessness and voluntariness, (section 13(1)). The accused's state of intoxication would be taken into account with all the other evidence in determining whether the Crown had established beyond reasonable doubt that the accused possessed the necessary mental element. This was the preferred preliminary position of the Institute. It was also supported by the submission received from the Chief Justice of Tasmania, the Criminal Law Sub-committee of the Law Society of Tasmania and Mr John Blackwood. In his response, the Chief Justice of Tasmania wrote: 'I am in no doubt that the option to be preferred is an amendment to the *Code* that would bring the law in this State into line with the common law as expounded in *R v O'Connor*'.

6.5.2 In order to allow evidence of intoxication to be relevant to any subjective mental element, section 17 of the *Code* would need to be repealed. A proposed replacement provision is recommended (see the Appendix).

Arguments in favour

6.5.3 (1) Option 4 accords with the fundamental principle of criminal responsibility which is that a person is not criminally responsible unless their act is voluntary and intentional and they possess any additional mental element required for the offence. In his response, the Chief Justice of Tasmania observed that the common law position is consistent with current principles of criminal responsibility. In recommending the *O'Connor* position, the Criminal Law Officers Committee of the Standing Committee of Attorneys-General wrote that '[d]espite the Committee's concern about the weighty policy considerations in the area, it concluded that the need to base the *Code* on a consistent and rational set of principles – especially in the fundamentals of criminal responsibility – was of paramount importance'.⁴⁷⁸

6.5.4 (2) The *O'Connor* approach is a 'simple solution compatible with the ordinary and "inexorable" logic of the liability rules'.⁴⁷⁹ This means that evidence of intoxication is merely one of the factors taken into account (with all other relevant factors) in determining whether the accused is criminally responsible. This argument was endorsed by John Blackwood in his submission.

6.5.5 (3) This approach will align the principles dealing with intoxication for summary offences and crimes in Tasmania. This means that a single principle will operate at all levels of criminal justice in Tasmania (with the exception of Commonwealth offences). This argument was endorsed by John Blackwood in his submission.

⁴⁷⁸ Criminal Law Officers Committee of the Standing Committee of Attorneys-General, above n 23, 15.

⁴⁷⁹ Ashworth A, above n 22, 220.

6.5.6 (4) The *O'Connor* approach has not led to a spate of acquittals or an increase in crime in those jurisdictions where it operates and so cannot be said to hinder the protection of individuals and community.⁴⁸⁰ The Chief Justice of Tasmania, in his response, commented that:

there is no longer any suggestion abroad that adoption of the 'O'Connor approach' will result in unjustified acquittals or give licence to drunken criminal behaviour. As the Issues Paper observes at 88, 'a drunken intent is still an intent'. I think that today's juror understands that very well; that has been my experience.

6.5.7 These comments are supported by a study conducted of approximately 510 trials held in the District Court of New South Wales in the year after *O'Connor*. Judge Smith found that:

[the] figures disclose that a 'defence' of intoxication which could not have been relied upon pre-*O'Connor* was raised in eleven cases or 2.16% of the total. Acquittals followed in three cases or 0.59% of the total, but only in one case or 0.2% of the total could it be said with any certainty that the issue of intoxication was the factor which brought about the acquittal.⁴⁸¹

From these figures, Judge Smith concluded that 'inquiries would indicate that the decision in *O'Connor's* case, far from opening any floodgates has at most permitted an occasional drip to escape from the tap'.⁴⁸²

6.5.8 In its consideration of intoxication and criminal liability, the Victorian Law Reform Commission conducted a study into the number and type of cases in which people charged with criminal offences were acquitted because they could not be proved to have acted voluntarily and with criminal intent because of gross intoxication. The information for the study was obtained from 3 sources:

- (i) by sending a questionnaire to judges, magistrates, crown prosecutors and barristers and solicitors;
- (ii) a prospective study of files of the Director of Public Prosecutions from October 1982 - February 1984;
- (iii) articles published in the Law Institute Journal.

The Commission also commissioned a study into the extent of alcohol and drug use by offenders. It was found that 'a very large percentage of people claimed to have been intoxicated when committing criminal offences'.⁴⁸³ However, defendants infrequently relied upon intoxication to allege that the act was done involuntarily or without the necessary intent and that acquittals based on intoxication were very rare.⁴⁸⁴

6.5.9 These studies appear to confirm the difficulty of establishing a successful defence based on self-induced intoxication. It needs to be remembered that a drunken intent is still an intent. As Goode observed:

It is one thing to allow that, as a matter of principle, involuntariness produced by the consumption of alcohol is to be treated in the same way as involuntariness produced by any other cause. It is quite another to persuade the jury that the accused was extremely drunk – so drunk that he or she could not be said to have acted at all!⁴⁸⁵

6.5.10 The difficulty of successfully relying on evidence of intoxication to negate intention or voluntariness reflects the reality that '[i]n practice the behaviour of most defendants who allege intoxication will show some elements of intention, knowledge, or awareness'.⁴⁸⁶ This only needs to be momentary. As a practical matter, if an accused can describe the relevant events then 'juries will be reluctant to believe that he acted involuntarily or without intent whereas, if he claims to have no

⁴⁸⁰ New Zealand Criminal Law Reform Committee, above n 23, 29 – 30.

⁴⁸¹ Smith G, 'Footnote to O'Connor's case' (1981) *Criminal Law Journal* 270, 277.

⁴⁸² Ibid.

⁴⁸³ LRCV, above n 23, para 44.

⁴⁸⁴ Ibid para 55.

⁴⁸⁵ M Goode 'Some thoughts on the present state of the "Defence" of Intoxication' (1984) 8 *Criminal Law Journal* 104, 112.

⁴⁸⁶ Ashworth A, above n 22, 220 referring to Shiner R 'Intoxication and Responsibility' (1990) 13 *International Journal of Law and Psychiatry* 9, Mitchell C, 'The Intoxicated Offender – refuting the Legal and Medical Myths' (1998) 11 *International Journal of Law and Psychiatry* 77.

recollection, he will be unable to make any effective denial of facts alleged by the Crown'.⁴⁸⁷ In the response of the Criminal Law Sub-committee of the Law Society of Tasmania, the practical difficulties of proving intoxication were discussed:

Any accused, due to their intoxication, will never be able to say how much alcohol they consumed; people with them are usually equally intoxicated and bar staff do not keep count and couldn't give evidence of intoxication levels. Unlike mental disease, intoxication wears off so it is impossible to have an accused assessed as to how their thought processes are impaired by alcohol.

Even the Office of the Director of Public Prosecution (who did not support this Option) agreed that if the law moved to reflect *O'Connor's* case, it 'probably would not lead to more acquittals'. In its response, it was recognised that 'in most cases, even if a person was intoxicated, it is hard to believe they could commit the offence without having the appropriate mental element'. The concern expressed by the Office of the Director of Public Prosecution was that there would be more trials as defence counsel would be bound to run intoxication type defences.

6.5.11 (5) The scientific literature about the effects of intoxication reveals 'no basis for legislation which distinguishes between offences of specific and basic intent'.⁴⁸⁸ Scientific literature suggests (to the contrary) that the most appropriate law would be one that allows 'the degree of intoxication [to] ... be assessed according to the facts of each individual case'.⁴⁸⁹ In determining whether a person acted with the requisite intent (including voluntariness), 'it is crucial to consider the type of drug(s) taken, as well as the dose and route of administration, the person's history of drug-taking and the person's psychological state'.⁴⁹⁰ This is best reflected in the *O'Connor* approach.

Arguments against

6.5.12 (1) The perception that the *O'Connor* approach to intoxication may lead to undeserved acquittals is often cited as the main objection.⁴⁹¹ It is argued that 'a person who has chosen to become intoxicated has no moral right to be acquitted and must be accountable for his or her actions'.⁴⁹² The argument is that to hold otherwise 'seems to yield the anti-social maxim "more intoxication, less liability" ... It gives no weight to the elements of choice and risk involved in getting drunk'.⁴⁹³ As observed in the consideration of Option 1, the response of Office of the Director of Public Prosecutions stated that:

I generally believe the current law leads to just outcomes in criminal cases. The law at present generally leads to a person being convicted of the crime that the community and victim believe the offender should be convicted of, leaving the issue of intoxication to the sentencing process.

The response of the Office of the Director of Public Prosecution was endorsed by the Tasmania Police.

6.5.13 (2) Community outrage at acquittals of intoxicated offenders and the related issue of public perception of the law have been cited as objections to the *O'Connor* approach. This view is summarised as follows:

Parliaments tend to the opinion that letting defendants such as Mr Nadruku escape the criminal sanction is scandalous and should not be allowed to happen. In this they may well be representing the views of the public as a general proposition – certainly a vocal section of the general public.⁴⁹⁴

⁴⁸⁷ Smith G, above n 481, 277.

⁴⁸⁸ Rajaratnam et al, above n 98, 65.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ See South Australia, Attorney-General's Department, above n 23, 24.

⁴⁹² Victorian Law Reform Committee, above n 410, 2.

⁴⁹³ Ashworth A, above n 22, 220.

⁴⁹⁴ See South Australia, Attorney-General's Department, above n 23.

This view held sway with the UK Law Commission who commented on concern,

about the effect of even one high profile case where there was an acquittal because the alleged offender was too drunk to form the required intent. ... such an acquittal would be viewed by the public as another example of the law, and inevitably the judges who apply that law, being out of touch with public opinion and public perception of fault.⁴⁹⁵

Although adopting the *O'Connor* approach may not lead to very many acquittals, this view is that even one acquittal on the grounds of intoxication is too many. As observed in the consideration of Option 1, the Office of the Director of Public Prosecutions considered that ‘allowing a more “liberal” intoxication law will lead to a disillusionment with the justice system by victims of serious criminal conduct’. The Tasmania Police endorsed the response of the Office of the Director of Public Prosecution.

6.5.14 (3) A further objection is the ‘risk that defendants might easily and readily concoct the excuse that they did not have the [mental element] for the offence charged because they were intoxicated, particularly as a result of taking perception-altering or hallucinogenic drugs’.⁴⁹⁶ The UK Law Commission was concerned that disputed expert evidence would lead to uncertainty on the part of the jury and lead to an acquittal.⁴⁹⁷

6.5.15 (4) There is no evidence in decided cases that the current law in Tasmania has given rise to grave injustice. In the response of the Office of the Director of Public Prosecution, it was stated that ‘generally ... the current law lead to just outcomes in criminal cases’.

6.5.16 (5) There is an argument that self-induced intoxication causing ‘involuntariness’ should be distinguished from the other causes of involuntariness.⁴⁹⁸ Leader-Elliott has argued that *O'Connor* involuntariness is ‘incongruent with other involuntariness defences’ based on somnambulism or post-traumatic automatism’.⁴⁹⁹ ‘it is simply not true that logic, justice or morality compels us to treat self-induced intoxication in exactly the same way as somnambulism or post-traumatic automatism’.⁵⁰⁰ Further, an accused that suffers from a mental illness is not able to rely on that condition to deny voluntariness and receive an unqualified acquittal. Leader-Elliott argues that ‘[t]he contrast between the rules for the mentally impaired and the indulgence extended to individuals who induce a state of mental impairment by recreational drug use is striking and, on any commonsense view of morality, indefensible’.⁵⁰¹

6.5.17 (6) Although Barwick CJ’s judgment in *O'Connor* is said to rest on grounds of fundamental principle, as Barwick CJ ‘accepted, indeed invited, legislative intervention to overcome the problem of unmerited acquittals’ there ‘cannot be much of value in a principle which invites legislative reversal’.⁵⁰²

6.5.18 (7) The Office of the Director of Public Prosecutions raised the concern that:

a move away from the current law (apart from clarifying *Weiderman*) would also appear inconsistent with Parliament’s enactment of s 14A of the *Criminal Code* which removes intoxication as a defence in respect of mistake of fact in relation to consent in sexual offences, whilst s 14A(2) removes it as a defence in respect of attempting to commit various sexual offences which are obviously crimes of specific intent’.

It is the view of the Institute that the common law approach is not inconsistent with section 14A(1) and (2). Section 14A(1) clarifies the law in relation to intoxicated mistake, as it clearly indicates that a mistake occasioned by a defendant’s self-induced intoxication is not a reasonable mistake.⁵⁰³ So for the purposes of

⁴⁹⁵ UK Law Commission 1995, above n 23, 45.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Leader-Elliott I, above n 20, 139.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.* 140.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.* 91 – 92.

⁵⁰³ See discussion in Part 3.

rape, an accused could not argue that he had an honest and reasonable mistake in consent, if this mistake was not one which he would have made if he were sober. The restriction on the relevance of evidence of intoxication created by section 14A(1)(a) is in essence a clarification of the existing law in relation to the defence of honest and reasonable mistake in section 14 as it applies to sexual offences. It relates to a mistake as to the external circumstances of the crime – consent. With respect, this provision does not contradict a rule that holds that evidence of self-induced intoxication is relevant to assessing an accused’s subjective state of mind. A distinction can be drawn between the assessment of an honest and reasonable mistake that incorporates an objective test and an assessment of the accused’s subjective state of mind. For example, this is done under the *Commonwealth Criminal Code*, in relation to the relevance of intoxication to the defences, where evidence of self-induced intoxication is relevant to assess the existence of actual knowledge or belief.⁵⁰⁴ However, if any part of a defence is based on a reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.⁵⁰⁵

6.5.19 Under the existing law, an accused may make a mistake of fact that relates to the mental element of an offence rather than one of the external elements. This is not governed by section 14 and such a mistake amounts to a denial of the mental element of the offence. Currently, evidence of intoxication is admissible to explain such a mistake if the crime charged is a specific intent crime and the accused did not have the capacity to form that intent, or if the mental element is actual knowledge (and possibly subjective recklessness).⁵⁰⁶ If Option 4 were adopted, evidence of intoxication would be admissible to explain any mistake that related to the mental element of the offence.

6.5.20 In regard to section 14A(2) of the *Code*, as discussed earlier, this section restricts reliance on self-induced intoxication in relation to certain specific intent offences. Section 14A(2) precludes reliance on self-induced intoxication in relation to attempts to commit the offences of sexual intercourse with a young person (section 124), indecent act with young person (section 125B), aggravated sexual assault (section 127A) and rape (section 185). It is argued that recently Parliament has seen fit to enact this section, and it would be inappropriate to disturb it. Rather, the law should continue to disallow evidence of self-induced intoxication in these circumstances. This is not inconsistent with adopting the *O’Connor* approach. In the view of the Institute, it is appropriate to have an overriding *O’Connor* approach to the relevance of intoxication to criminal responsibility, to which Parliament may wish to make principled exceptions. Section 14A(2) would be such an exception. It is argued that this differs from the current approach to intoxication in Tasmania where there is no coherent general approach.

‘Ought to have known’ section 157(1)(c) of the Code

6.5.21 A further matter for consideration is the relevance of intoxication to the issue of imputed knowledge (that is, whether the accused ‘ought to have known’ that his or her unlawful act or omission was likely to cause death in the circumstances) contained in section 157(1)(c) of the *Code*. The relevance of intoxication to an assessment of the accused’s circumstances arises in relation to this question as well as to a consideration of whether intoxication is relevant to self-defence.⁵⁰⁷ Both involve the imposition of an objective standard that is applied to the circumstances of the accused.

6.5.22 The requirement of ‘ought to have known’ was considered by the High Court in *Boughey*,⁵⁰⁸ where it was made clear that ‘ought to have known’ does not involve a consideration of the notional knowledge and capacity of some hypothetical person but involves a consideration of ‘what the particular accused, with

⁵⁰⁴ Section 8.4(1). See discussion in Part 3 and 6.9.

⁵⁰⁵ Section 8.4(2). See discussion in Part 3 and 6.9.

⁵⁰⁶ See Part 3.

⁵⁰⁷ See at 6.9.

⁵⁰⁸ *Boughey v The Queen* (1986) 161 CLR 10.

his or her actual knowledge and capacity, ought to have known in the circumstances in which he or she was placed':⁵⁰⁹ In the words of Mason, Wilson and Deane JJ:

The jury must be persuaded, on the criminal onus in the context of a murder trial, that the established circumstances were such that the particular accused, with the knowledge and the capacity which he or she actually possessed, ought to have thought about the likely consequences of his or her action. They must also be persuaded, again on that onus and in the context of such a trial, that if the particular accused had stopped to think to the extent that he ought to have, the result would as a matter of fact, have been that he or she would have known or appreciated that the relevant act or acts were likely to cause death.⁵¹⁰

6.5.23 The Court of Criminal Appeal in *Weiderman* considered the relevance of intoxication and it was held (by majority) that intoxication was not relevant to 'ought to have known'.⁵¹¹ While *Weiderman* is clear on this point, in view of the reforms suggested by this Report (that is, to adopt the common law approach that intoxication is relevant to negate any mental element), it is desirable to consider whether the *Weiderman* position should continue.

6.5.24 There are two possible approaches:

(a) **intoxication is admissible as being relevant to the capacity/knowledge actually possessed by the accused.** This was the view of the minority (Crawford and Zeeman JJ) in *Weiderman*.

- Crawford J considered that a person's capacity was one of the circumstances in which he was placed and relevant to what he or she 'ought to have known'.⁵¹² This is said to be supported by the majority judgment of the High Court in *Boughey* that makes it clear that in an appropriate case an accused's state of intoxication at the relevant time may be considered along with all the other evidence which may be relevant to the question of what he or she ought to have known. While this is a different reading of *Boughey* from Cox CJ's and Wright J's in *Weiderman* (see below), it is supportable as the majority in *Boughey* (as extracted above) stresses that it was the circumstances of the individual accused with the knowledge and capacity which he or she actually possessed. It should be noted that intoxication was not an issue in the case and Brennan J was the only judge to refer to it. He rejected the relevance of intoxication to the 'ought to have known' inquiry.

Crawford J's view is also supported by the approach to intoxication and self-defence advocated below, that is that intoxication is relevant to the issue of the 'circumstances as the accused believes them to be' and an assessment of the force used in those circumstances.

- The question of what an accused ought to have known is a question of fact for the jury and it is inappropriate for the Court to make rules which will fetter the determination of juries by excluding a category of evidence from their consideration.⁵¹³
- The policy justification for excluding self-induced intoxication from the consideration of what the accused 'ought to have known' is that underlying *Beard's* case. This policy has been rejected by the High Court in *O'Connor* which indicates that it would be contrary to the relevant principles of criminal law to exclude evidence of intoxication.⁵¹⁴ It is also a policy that the Institute has rejected by its adoption of Option 4 (that is, adoption of the common law approach).

⁵⁰⁹ Ibid 28 per Mason, Wilson and Deane JJ.

⁵¹⁰ Ibid 29.

⁵¹¹ (1998) 7 Tas R 293.

⁵¹² Ibid 325.

⁵¹³ Ibid 327 per Crawford J.

⁵¹⁴ Ibid 337 per Zeeman J.

6.5.25 (b) **intoxication is not relevant as ‘ought’ demands the introduction of a policy that self-induced intoxication should be left out.** This was the majority view (Cox CJ, Underwood and Wright JJ) in *Weiderman*.

- As a matter of policy, self-induced intoxication which is reckless and indifferent conduct should be excluded as a factor excusing a failure to advert to consequences as the accused ought to have known.⁵¹⁵
- Parliament intended that ‘ought to have known’ includes a standard of objective sobriety: the criterion to be applied is whether any sober and reasonable man, having the accused’s knowledge, experience and acumen, would have adverted to the possibility that his actions might cause death. This is the view of Cox CJ and Wright J based on the judgment of Brennan J in *Boughey*.⁵¹⁶ In Brennan J’s words:

The character of the act, the fact that it was likely to cause death (as the accused would have known if he had thought about it) and the surrounding circumstances are material to a finding ... as to whether the accused ‘ought to have known’. The criterion to be applied to these facts is whether any sober and reasonable man, having the accused’s knowledge, experience and acumen, would have adverted to the possibility that his actions might cause death and adverted to that possibility, would have known that his action was likely to cause death. If the hypothetical sober and reasonable man would have known, it is right to find that the accused ought to have known that his action was likely to cause death.⁵¹⁷

- While it is right that a person with an abnormal mental condition for which he or she was in no way responsible to have that condition taken into account (*Hawkins v The Queen (No 3)*),⁵¹⁸ there is no justification for excusing a person’s failure to observe the standard if the reduction of the person’s capacity is induced by reason of intoxicants, knowingly and willingly taken.⁵¹⁹
- If intoxication was taken into account there would be no room for the operation of ‘ought to have known’ as imposing a normative standard. This was expressed by Cox CJ who commented that:

the adoption of a wholly subjective test in which not only the accused’s intelligence, mentality, knowledge and experience is taken into account, but also self-induced intoxication and ingrained habits of misanthropy, thoughtlessness and indifference to the effect of one’s actions on others, would render the second limb of para(c) completely ineffectual.⁵²⁰

Wright J expressed a similar view that it was appropriate to exclude temporal self-created obstacles, otherwise ‘it would be virtually impossible to conceive of a situation in which it could be said that an accused person who did not actually know of the probable consequences of his conduct ‘ought to’ have had that knowledge’.⁵²¹

Conclusion on ‘ought to have known’

6.5.26 It is the view of the Institute that evidence of intoxication should be available to the jury in their determination of what an accused ‘ought to have known’. In determining whether evidence of intoxication can be relied on by an accused as an exculpatory factor, the Institute’s view is that a distinction should be made between purely objective tests and tests which are not wholly objective. For example, manslaughter committed by ‘an act commonly known to be likely to cause death or bodily harm’, (section 156(2)(a)) is a purely objective test and it is clear that intoxication should have no part in explaining what is ‘commonly known’. This can be contrasted with a test that specifically takes into account the particular accused’s state

⁵¹⁵ Ibid 303 per Cox CJ.

⁵¹⁶ Ibid 303 - 304 per Cox CJ and 317 - 319 per Wright J.

⁵¹⁷ *Boughey v The Queen* (1986) 161 CLR 10, 45.

⁵¹⁸ (1994) 4 Tas R 376.

⁵¹⁹ (1998) 7 Tas R 293, 304 - 305 per Cox CJ.

⁵²⁰ Ibid.

⁵²¹ Ibid 319 per Wright J.

of knowledge, such as whether the accused ‘ought to have known’ that the unlawful act or omission was likely to cause death in the circumstances. Or whether (in self-defence) the accused’s use of force was reasonable in the circumstances as he or she believed them to be.⁵²²

6.5.27 As discussed above, while ‘ought to have known’ imposes an objective test, it is not detached from the particular accused and his or her circumstances. In *Boughy*, the High Court attempted to water down the objectivity of the ‘ought to have known’ requirement and make it as subjective as possible. It must not be forgotten that ‘ought to have known’ is the mental element for murder and the provision allows a person to be convicted of murder in circumstances where the accused did not intend to cause death or know that death was likely. Section 157(1)(c) has been the subject of a considerable criticism and the Tasmanian Law Reform Commission recommended its repeal in 1988.⁵²³

6.5.28 In *Weiderman*, Cox CJ and Wright J expressed concern that if evidence of intoxication were taken into account in determining what an accused ‘ought to have known’, then this would render the normative function ineffectual. The Institute’s view is that the normative standard in ‘ought to have known’ is preserved as it a question of fact for the jury whether the particular accused with his or her capacity/knowledge ‘ought to have known’ that his/her act was likely to cause death. An accused’s state of intoxication at the relevant time is only one of the factors that may be considered along with all the other evidence which may be relevant to the question of what he or she ought to have known.

Recommendation 6

It is recommended that evidence of intoxication should be relevant to the requirement in section 157(1)(c) as to whether the accused ‘ought to have known’ that his or her act was likely to cause death in the circumstances.

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

Conclusion

6.5.29 After carefully considering the responses received, and the debate in the academic literature and law reform papers, it is the view of the Institute that Option 4 should be adopted in Tasmania. If this recommendation were adopted, the accused’s state of intoxication could be taken into account with all the other evidence in determining whether the Crown had established beyond reasonable doubt that the accused possessed the necessary subjective mental element. In other words, evidence of intoxication would be relevant to negate any subjective mental element, including section 13(1) voluntary and intentional act. Although in other Australian jurisdictions (with the exception of Victoria), recent reforms to the law of intoxication have restricted the ways in which evidence of intoxication can be used to negate criminal responsibility, it is the view of the Institute that this approach should not be adopted in Tasmania. Legislative reforms at the Commonwealth level (and adopted in the ACT and proposed in the Northern Territory), in New South Wales and South Australia have seen ‘[l]aw and order politics ... dictate that governments ignore legal principle in favour of policy’.⁵²⁴ The reforms have been (to a certain extent) ‘knee jerk’ reactions to individual cases.⁵²⁵ As the Victorian Law Reform Committee commented, ‘[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’.⁵²⁶ It is the Institute’s view that the possibility of a ‘bad’ decision should not prevent the adoption of the common law position. The common law approach to intoxication encapsulates such an important principle of criminal justice – that an accused person should not be convicted of an offence unless that person possessed the requisite intent – that it should form the basis of criminal law in Tasmania. As the Chief Justice of Tasmania says in his

⁵²² See below at 6.9.

⁵²³ Law Reform Commission of Tasmania, *Report on s157(1)(c) of the Criminal Code Act 1924*, 1988.

⁵²⁴ Bronitt S and McSherry B, above n 11, 259.

⁵²⁵ See Part 5 and also VLRC 1999, above n 21, paras 3.16, 3.29 – 3.31, 3.32.

⁵²⁶ *Ibid* para 6.81.

response, ‘the world has moved on a long way since 1920 (*Director of Public Prosecutions v Beard* [1920] AC 479) and Parliament should reflect reasoned and settled societal views’. This means that evidence of intoxication should be available to negate any mental element, including voluntariness.

6.5.30 In a response to a question about whether the jury should be directed that intoxication must be taken into account when they consider what knowledge or foresight the accused had as to the consequences of his or her physical act in a hypothetical wounding or grievous bodily harm case (for example, in a hotel glassing case where the accused was drunk and forgot s/he had a glass in her/his hand), Justice Crawford’s argument/point is compelling:

In a case of wounding or grievous bodily harm, the jury should be directed that what the accused intended or foresaw as likely is a question of fact. It should not be decided by a fiction that the accused was not intoxicated. There could be no justice and it would be ridiculous to make a false finding that although a person had forgotten that he or she had a glass in hand nevertheless that person foresaw that the glass would wound someone. The High Court rid the common law of such fictions in *R v O’Connor* (1980) 146 CLR 64 and they should not be returned to the law of this State.

The Institute endorses His Honour’s view.

6.5.31 Although the *O’Connor* approach has often been labelled as a ‘drunk’s defence’ and, as such, is apt to incite community hostility,⁵²⁷ there is no suggestion that the common law approach has led to a spate of acquittals. As Mr John Blackwood said in his oral submission, ‘where is the evidence from the common law that intoxication amounts to a “drunk’s charter”?’ The evidence does not exist. Indeed, the common law already applies in Tasmania in relation to summary offences with no *Code* parallel and there has not been any suggestion that drunken offenders are unduly escaping conviction as a consequence. In the response of Tasmania Police, it was confirmed that ‘with all Tasmania Police Prosecution Divisions ... that intoxication is very rarely raised as a defence’. Other responses to the Issues Paper identified the practical difficulties encountered by an accused relying on the intoxication to negate criminal responsibility. The Chief Justice of Tasmania, in his response to the Issues Paper, wrote ‘there is no longer any suggestion abroad that adoption of the “*O’Connor* approach” will result in unjustified acquittals or give licence to drunken criminal behaviour’. This is the view of the Institute.

6.5.32 An area where intoxicated offenders cause great loss of life and physical harm to others is on the roads.⁵²⁸ However, Option 4 will not affect the criminal responsibility of offenders charged with causing death by dangerous driving, causing grievous bodily harm by dangerous driving, dangerous driving or exceeding the prescribed limit. Fairall and Yeo write:

There are *dicta* in some cases which suggest that an apparent act of driving may be deprived of its voluntary character by, for example, automatism or unconsciousness.⁵²⁹ But where intoxication is the gist of the offence, the legal position appears to be that intoxication causing automatism should not be allowed to operate by way of defence.⁵³⁰

It would certainly be ‘an act of extreme bravery or desperation to base a defence upon acute intoxication’ in such cases,⁵³¹ and a defence that would be unlikely to succeed. For example, in *Maher v Russell*,⁵³² Cox J

⁵²⁷ VLRC 1999, above n 21, para 6.69.

⁵²⁸ See for example, Chikritzhs T et al, ‘Alcohol-caused deaths and hospitalisations in Australia 1990 – 1997’, National Alcohol Indicators, Bulletin No 1, National Drug Research Institute, 1999; Ridolfo, B and Stevenson, C, *The quantification of drug-caused mortality and morbidity in Australia, 1998*, Australian Institute of Health and Welfare, Canberra 2001; Chikritzhs T et al, *Australian Alcohol Indicators, 1990 – 2001 Patterns of alcohol use and related harms for Australian states and territories*, National Drug Research Institute, 2003.

⁵²⁹ Fairall P and Yeo S, above n 403, 241 referring to *Jiminez* (1992) 173 CLR 572; *Kroon* (1990) 55 SASR 476. See further fn 123.

⁵³⁰ Fairall P and Yeo S, above n 403, 241 referring to *August v Fingleton* [1964] SASR 22; *Barker v Burke* [1970] VR 884; *Missingham v Rogers*; *Ex Parte Missingham* (1985) 2 MVR 367; *Penno* [1990] 2 SCR 865, 899; *Ministry of Transport v Strong* [1987] 2 NZLR 295, 303.

⁵³¹ Fairall P and Yeo S, above n 403, 241.

⁵³² Unreported, Supreme Court of Tasmania A98/1993.

had no difficulty identifying an act of voluntary and intentional driving where the accused was charged with driving with a blood alcohol level exceeding .05 (.182 per cent). The accused had been drinking alcohol and had also mistakenly taken a Rohypnol tablet. It was argued for the accused that he was in a state of automatism as a result of the accentuated effect of the involuntarily taken Rohypnol tablet on the alcohol voluntarily consumed. In looking at the entirety of the journey driven, Cox J considered that ‘no tribunal of fact could have reasonably entertained as anything but conjecture and speculation the hypothesis that the respondent's driving throughout the journey was involuntary and unintentional’.⁵³³

6.5.33 In regard to offences involving criminal negligence (such as wounding or causing grievous bodily harm by criminal negligence⁵³⁴ or manslaughter by criminal negligence),⁵³⁵ there is an objective standard and evidence of intoxication will not exculpate an accused or alter the standard of behaviour to which the accused must conform. Rather, intoxication may well be relevant to the Crown case to explain the accused’s failure to conform to the standard of care expected as ‘intoxication tends to diminish awareness of risks, concern that risks might eventuate and the capacity to avoid harmful outcomes’.⁵³⁶

Recommendation 7

It is recommended that Option 4 be adopted. This means that evidence of intoxication would be relevant to any mental element, including intention, knowledge (including whether the person ought to have known), foresight of the consequences, and whether the act was voluntary and intentional, (section 13(1)).

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

6.6 Option 5 – the creation of a specific offence

6.6.1 Option 5 is to create a new offence that punishes an offender for his or her dangerous actions while intoxicated. Option 5 is linked to the acceptance of Option 4 that would remove the limits that restrict the circumstances in which a defendant can rely on self-induced intoxication as an exculpatory factor. A preferable alternative to the creation of a special offence for intoxication would be to create an offence of general application for negligently causing grievous bodily harm.

Offence of dangerous or criminal intoxication

6.6.2 Against the trend of authority where previous law reform proposals on the relationship between intoxication and criminal responsibility have considered and rejected the creation of a special offence of criminal intoxication,⁵³⁷ the recent reforms in South Australia have enacted a provision that provides a ‘fall-back offence’ of criminal intoxication in respect of serious offences against the person (death and serious harm).⁵³⁸ The creation of a special offence was also suggested by some of the judges of the High Court in *O’Connor*.⁵³⁹

6.6.3 There have been a number of proposed models for a special offence of dangerous or criminal intoxication advanced in the United Kingdom. The Butler Committee first suggested the creation of a special offence in 1975⁵⁴⁰ and it was also suggested by the minority of the Criminal Law Revision

⁵³³ Ibid 10.

⁵³⁴ See below at 6.5.

⁵³⁵ *Code*, section 156(2)(b).

⁵³⁶ Leader -Elliott I, above n 6, 155.

⁵³⁷ See UK Law Commission 1995, above n 23; VLRC 1999, above n 21, New Zealand Criminal Law Reform Committee, above n 23, South Australia, Attorney-General’s Department, above n 23.

⁵³⁸ *Criminal Law Consolidation Act 1935*, section 268(4) – death and section 268(5) – serious injury.

⁵³⁹ (1980) 146 CLR 64, 87 per Barwick CJ, at 103 per Stephen J, at 113 - 114 per Murphy J and 126 per Aickin J.

⁵⁴⁰ UK Home Office, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244, 1975.

Committee in 1980.⁵⁴¹ The United Kingdom Law Commission advanced a revised proposal in its consultation paper on intoxication and criminal responsibility in 1993.⁵⁴² Under this model:

In summary, the offence would be committed by a person who, when deliberately intoxicated to a substantial extent, caused the harm proscribed by a ‘listed’ offence; it would be immaterial that he lacked the mens rea of the offence in question or even that at the material time he was in a state of automatism.⁵⁴³

It was considered that the offences should be ‘limited to substantial harms to the person, to the physical safety of property, or to public order’.⁵⁴⁴ The listed offences were all offences involving harm to the person (except minor assaults), sexual assault, damage or destruction of property, or public order (such as affray). The creation of a special offence was subsequently rejected in its 1995 Report.⁵⁴⁵

6.6.4 There has also been consideration of the issue in Canada where the Law Reform Commission recommended the creation of a special offence ‘of criminal intoxication leading to conduct prohibited by the [Criminal Code] (for example, criminal intoxication leading to assault; criminal intoxication leading to robbery and so on).⁵⁴⁶ This recommendation has not been adopted.

Arguments in favour

6.6.5 (1) The creation of a special offence reflects public policy concerns to punish those who commit offences while under the influence of alcohol. The view is that:

The intoxicated defendant deserves to be punished ... for something that approximates his or her true offence against society, which is becoming intoxicated to such a high degree and doing something wrong while so heavily intoxicated.⁵⁴⁷

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’.⁵⁴⁸

6.6.6 (2) A separate offence ensures that offenders do not avoid criminal liability if they do not possess the mental element for the principal offence.⁵⁴⁹ In this way, it addresses community concerns about perceived unjustified acquittals.⁵⁵⁰

Arguments against

6.6.7 (1) The creation of a special offence is seen to undermine the fundamental principle that an accused should only be convicted of an offence if the offence was committed voluntarily and intentionally. This view was expressed in submissions to the Victorian Law Reform Committee by the Victorian Criminal Bar Association, the Law Institute of Victoria, the Victorian Bar, the Director of Public Prosecutions, Victoria Legal Aid and Liberty Victoria. For example, the Law Institute of Victoria submitted that:

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 sentencing.⁵⁵¹

⁵⁴¹ Criminal Law Revision Committee, above n 23.

⁵⁴² UK Law Commission 1993, above n 23.

⁵⁴³ Ibid 76.

⁵⁴⁴ Ibid 79.

⁵⁴⁵ UK Law Commission 1995, above n 23.

⁵⁴⁶ *First Principles: Recodifying the General Part of the Criminal Law of Canada* (1993) in Leader-Elliott I, above n 20, 153.

⁵⁴⁷ South Australia, Attorney-General’s Department, above n 23, 39.

⁵⁴⁸ VLRC 1999, above n 21, para 6.54.

⁵⁴⁹ LRCV 1986, above n 23, para 74.

⁵⁵⁰ Ibid.

⁵⁵¹ VLRC 1999, above n 21, para 6.61.

6.6.8 (2) The ethical basis of a special offence of dangerous intoxication is questionable: ‘although the possible effects of alcohol and other drugs may be generally known, it is still the case that most people do not commit dangerous acts even when grossly intoxicated’.⁵⁵² As the Victorian Law Reform Committee observes, ‘[u]ltimately there is no denying that what a special offence really does is to punish a person for becoming intoxicated’.⁵⁵³

6.6.9 (3) A special offence is seen to encourage plea bargaining⁵⁵⁴ and potentially increase the number of jury compromise verdicts.⁵⁵⁵ If an accused relied on evidence of intoxication to deny that the harm was done with the requisite mental state, then the trial judge would be required to leave the lesser alternative of the special offence to the jury.⁵⁵⁶ A jury may be unable to decide whether the accused possessed the necessary state of mind and so may invite the jury to agree on a ‘middle ground’ compromise.

6.6.10 (4) The introduction of a special offence is seen to increase the complexity of the trial process and the number of issues that a jury is required to consider.⁵⁵⁷ The New Zealand Law Reform Commission considered that the creation of a special offence might increase the occasions on which a defendant raises the issue of intoxication as ‘the possibility of convicting a defendant of an offence, albeit one involving only qualified fault, might well make such pleas more acceptable to a jury or a judge, and therefore more attractive to defendants’.⁵⁵⁸

6.6.11 (5) Many objections to the creation of a special offence have focussed on the difficulty that would arise in sentencing offenders convicted of the offence.⁵⁵⁹ This difficulty arises because the offence ‘lacks any coherent penal rationale because self-induced intoxication is simply not a reliable index of criminal blameworthiness’.⁵⁶⁰ Difficulties arise as a ‘consequence of the fact that the offence is aimed at a class of individuals defined by no more definite criteria than the fact that they are substantially intoxicated when they cause injury to another’.⁵⁶¹

6.6.12 (6) An offence of ‘criminal intoxication is an unnecessary innovation’.⁵⁶² As discussed below, a more appropriate response is to utilise an offence of general application that applies to negligently causing grievous bodily harm or wounding. In the Issues Paper, the Institute expressed a preliminary view that creating an offence of criminal intoxication would be an inappropriate way of responding to such behaviour which is a social problem demanding a broader response than criminalisation. The responses to the Issues Paper did not address this question, and it remains the view of the Institute that a special offence of criminal intoxication is not appropriate.

Recommendation 8

It is not desirable to enact a special offence of criminal intoxication.

Offence of general application

6.6.13 An alternative to the creation of a special offence directed at dangerous acts committed while intoxicated is to create an offence of general application that applies to negligently causing grievous bodily harm or wounding (not just in cases of intoxication).

⁵⁵² LRCV 1986, above n 23, para 78.

⁵⁵³ VLRC 1999, above n 21, para 6.62.

⁵⁵⁴ *Ibid* para 6.58.

⁵⁵⁵ VLRC 1999, above n 21; New Zealand Criminal Law Reform Committee, above n 23, 45; Leader-Elliott I, above n 20, 150.

⁵⁵⁶ Leader-Elliott I, above n 20, 150.

⁵⁵⁷ New Zealand Criminal Law Reform Committee, above n 23, 45.

⁵⁵⁸ *Ibid*.

⁵⁵⁹ *Ibid* 46; South Australia, Attorney-General’s Department, above n 23; Leader-Elliott I, above n 20, 150, 153 – 154; VLRC 1999, above n 21, para 6.60.

⁵⁶⁰ South Australia, Attorney-General’s Department, above n 23, 40.

⁵⁶¹ Leader-Elliott I, above n 20, 150.

⁵⁶² Fairall P, above n 318, para 32.

6.6.14 Case authority in Tasmania supports the existence of an offence of wounding or causing grievous bodily harm by culpable negligence in the use of dangerous things.⁵⁶³ In the Issues Paper, the Law Reform Institute asked the question:

Do you think that the Law Reform Institute should undertake a project considering the introduction of an offence such as negligent wounding? Would you like to make any preliminary comments in relation to such a project?

This question was addressed in the response of the Office of the Director of Public Prosecutions and Mr Blackwood. The Office of the Director of Public Prosecutions considered that this was an unnecessary innovation, as the crime of causing grievous bodily harm or wounding by culpable negligence:

already exist as a result of a combination of s 172 and s 152 of the *Criminal Code* - see *McDonald* [1965] Tas SR 263. Indeed relatively recently a person was convicted for causing grievous bodily harm by culpable negligence in respect of a shooting of his partner.

Mr Blackwood expressed the view that *Bennett*⁵⁶⁴ should have been appealed to the High Court and that there was scope for negligence to play a bigger role in the *Code*.

6.6.15 The current law in Tasmania is that sections 150 and 152 operate to create an offence of wounding and causing grievous bodily harm by criminal negligence. Section 150 imposes a duty to take reasonable care in the use or management of a dangerous thing so as to avoid danger to human life. Section 152 provides that a person who omits to perform any of the duties mentioned in Chapter XVI shall be criminally responsible if the omission endangers his life or permanently injures his health. Contrary to academic opinion about the effect of *Bennett*,⁵⁶⁵ the recent case of *Tasmania v Nelligan*⁵⁶⁶ supports the Crown view. In that case, Underwood CJ accepted the Crown submission that an offence exists of wounding or causing grievous bodily harm by criminal negligence by virtue of section 150, 152 and 172. In his judgment, Underwood CJ indicated that he intended to follow the decision of Burbury CJ in *R v McDonald* where it was accepted that sections 150 and 152 do apply to the crime of wounding.⁵⁶⁷ In *R v McDonald*, Burbury CJ expressed the view that:

Having regard to the whole question in the light of the judgment of the High Court in *Evgeniou v R* (1964) 37 ALJR 508, I have come to the firm conclusion that s 152 as applied to the several sections in Ch 16 of the *Code* (including s 150) creates an exception to the principles of criminal responsibility expressed in s 13(1) and (2). In other words, the provisions of ss 152 and 150 of the *Code* do constitute provisions 'otherwise expressly provided' for the purpose of s 13(1) and (2). That is to say that if the accused is guilty of culpable negligence in the common law sense, he is not exculpated because the injury occurs by chance or because his omission was not intentional.⁵⁶⁸

The argument of the Crown was that *Vallance* and *Bennett* were concerned with an intentional act by the accused (discharging a firearm) and did not consider the concept of wounding or causing grievous bodily harm by negligent omission as prescribed by section 152. This argument was accepted by Underwood CJ, who stated that while *Bennett* was binding in relation to the mental element in the crime of causing grievous bodily harm or wounding, 'there is also no doubt ... that neither the High Court in *Vallance* nor the Court of Appeal in *Bennett* considered whether those crimes could also be committed by a failure to comply with the duty imposed by the *Code*, s 152'.⁵⁶⁹ It was accepted that section 152 was an express exception to the requirement in section 13(2) that an accused's omission be intentional, that is, if the Crown relied on section 152, the accused's omission need not be intentional.

⁵⁶³ See below.

⁵⁶⁴ [1990] Tas R 72.

⁵⁶⁵ Leader-Elliott I, above n 20, 135; Blackwood J and Warner K, above n 40, 539 – 541.

⁵⁶⁶ [2005] TASSC 94.

⁵⁶⁷ [1966] Tas SR 263.

⁵⁶⁸ *Ibid* 268.

⁵⁶⁹ [2005] TASSC 94, [7].

6.6.16 This issue was also considered by the Court of Appeal in *Vallance*,⁵⁷⁰ where the Crown argued that the trial judge should have directed the jury that Vallance could be convicted of unlawful wounding under section 172 if the provisions of sections 150 and 152 were satisfied. Burbury CJ did not deny that in an appropriate case where, for example, there is a doubt whether the gun was discharged accidentally, a direction under sections 150 and 152 might be called for. But where, on the facts before him, it was not disputed that the gun was discharged intentionally, such a direction was inappropriate.⁵⁷¹ Crisp J also considered that the provisions of the *Code* dealing with criminal omissions might be relevant to the crime of wounding. However, he also was not convinced that the circumstances of the case called for any such direction. Only Crawford J was of the view that in the circumstances of *Vallance's* case a direction under section 150 or section 152 was required.⁵⁷²

6.6.17 While case authority supports the existence of wounding or causing grievous bodily harm by criminal negligence under section 172, this is difficult to reconcile with the existence of subjective recklessness as the mental element. It should be noted that there is no dispute with the finding that the courts in *Vallance* and *Bennett* were not concerned with an omission by the accused (and so did not consider the issue). However, an examination of the reasons given by the judges in *Vallance* for their conclusion that subjective recklessness was the requisite mental element reveals the dilemma. If the mental element is derived from section 13 (and it is accepted that section 152 is an exception to section 13), it is possible for section 152 to operate concurrently with subjective recklessness. That is, if section 13 applies – the mental element is intention or subjective recklessness in relation to the wound or grievous bodily harm, and if section 150 and 152 apply (in which case section 13 does not apply), there is no need to prove a subjective mental element and the Crown can rely on culpable negligence. Six of the eight judges who decided *Vallance* held that a subjective direction was required for conviction and found the basis for this conclusion in section 13. However, these reasons are no longer correct:

- Burbury CJ, Crisp, Crawford and Menzies JJ supported a subjective direction on the basis that the words 'chance event' in s13(1) imposed a subjective test of foreseeability.⁵⁷³ This is no longer correct, for as Gibbs J remarked in *Kaporonowski*, 'it must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.'⁵⁷⁴
- Dixon CJ and Windeyer J adopted a 'broad' view of act: in *Vallance* the act of shooting and consequent wounding.⁵⁷⁵ Current Tasmanian authority clearly rejects this view.

6.6.18 On this basis, it would appear clear that the mental element of subjective recklessness for section 172 cannot be found in section 13. If the mental element is not found in the words of the section 13, where else can it come from? The view of Mr Justice Kitto is the only rationale that has not been shown clearly to be wrong.⁵⁷⁶ His Honour imported the subjective direction from the words of section 172 itself – the requirement of 'unlawfully wounds' 'seems ... to connote a mental element attending the doing of an act which causes a wound'.⁵⁷⁷ Support for this interpretation is found in some of the judgments in *Arnol*⁵⁷⁸ and *Hodgson*.⁵⁷⁹ If the mental element of subjective recklessness is implied in the words of section 172, it is

⁵⁷⁰ [1960] Tas SR 51.

⁵⁷¹ Ibid 76 – 77.

⁵⁷² Ibid 129 – 132.

⁵⁷³ [1960] Tas SR 51.

⁵⁷⁴ (1973) 133 CLR 209, 310.

⁵⁷⁵ (1973) 133 CLR 209.

⁵⁷⁶ An alternative basis was the view of Taylor J in *Vallance* who relied upon the use of the word 'unlawfully' in *Code* section 172 and upon section 8 of the *Criminal Code Act* to import the common law principles of *mens rea* in relation to wounding into section 172. It can be cogently argued however that this use of section 8 is impermissible. Section 8 preserves common law defences not inconsistent with the *Code* and it should not be used to supply a mental element to a crime where none is expressly provided.

⁵⁷⁷ (1961) 108 CLR 56, 63. It should be noted that in *Bennett* [1990] Tas R 72, Neasey J rejected the Crown argument that Kitto J was the only judgment in *Vallance's Case* 'which bears scrutiny and is still supportable in the light of subsequent authority'.

⁵⁷⁸ [1981] Tas SR 157, 169 – 170 per Neasey J.

⁵⁷⁹ [1985] Tas R 75, 94 per Cosgrove J and at 100 – 101 per Cox J.

difficult to see how it can be ‘read out’ in some circumstances so that section 152 can operate. If it is implied in the words, surely it is always implied.

6.6.19 In view of this dilemma, all that can be said is that the courts have accepted that subjective recklessness is essential when section 13(1) applies, but it is not clear where the requirement of subjective recklessness comes from. In *Bennett*, the Court of Appeal canvassed the criticisms of the judgments in *Vallance* but did not actually say that the reason why the mental element was subjective recklessness was because it was implied in the words grievous bodily harm. Ultimately, the resolution of this dilemma is best left for another day.

6.6.20 While the legal reasoning underpinning the existence of the offence is open to scrutiny, it appears that case law supports the existence of an offence of wounding or causing grievous bodily harm by culpable negligence (via section 150 and 152). It is the Institute’s view that such an offence is necessary, particularly in the case of the reckless use of firearms. In *Quarrell*,⁵⁸⁰ the accused accidentally discharged a gun in circumstances where he had consumed alcohol and smoked cannabis. The loaded rifle discharged when he was reaching for it behind the seat in his motor vehicle. It was known to the accused that the rifle was liable to accidentally fire if bumped. The case of *Adams*⁵⁸¹ involved a ‘*Vallance*’ type situation, where the accused fired several times at a trespasser. He claimed that he intended to fire over the trespasser’s head, but in fact shot him several times. In *Holmes*,⁵⁸² the accused was convicted of causing grievous bodily harm by criminal negligence. The injuries were inflicted in the course of an armed robbery and it was accepted that the accused did not know that the gun was loaded.⁵⁸³ In *Nelligan*,⁵⁸⁴ the accused discharged three shots from a 12 gauge shotgun as the complainant approached him. The first shot was fired in the air as a warning and the other two were not. A pellet from one of the other two shots entered the complainant’s eye. There was no suggestion that the gun had been accidentally discharged.

6.6.21 There are several offences under the *Firearms Act 1996* that relate to the unsafe management and use of a firearm⁵⁸⁵ and there is a specific offence of handling or using a firearm while under the influence of alcohol or any other drug.⁵⁸⁶

6.6.22 As indicated, while case law supports the existence of an offence of wounding or causing grievous bodily harm by culpable negligence, there is some uncertainty in relation to the legal basis for the offence. The Institute endorses the need for such an offence to exist, however considers that the issue of a creation of a specific offence of causing grievous bodily harm or wounding by criminal negligence in possession of a weapon to be outside the scope of this Report.

6.7 Option 6 – special treatment of involuntary intoxication

6.7.1 It was the preliminary view of the Institute that the position in relation to involuntary intoxication needed to be clarified.⁵⁸⁷ As discussed in Part 3, the treatment of evidence of involuntary intoxication under the *Code* has not been authoritatively decided. In the Issues Paper, two alternatives for reform were identified:

⁵⁸⁰ *R v Dion William Quarrell*, unreported, 24 September 2003, Evans J (trial).

⁵⁸¹ *R v Brian John Adams*, unreported, 18 February 1994, Crawford J (guilty plea).

⁵⁸² *R v Peter Alan Holmes*, unreported, 30 November 1994, Zeeman J (trial).

⁵⁸³ Holmes’ co-accused, Graham Hancock, was also convicted of causing grievous bodily harm on the basis of culpable negligence on the basis that there was no evidence that he intended to shoot the victim.

⁵⁸⁴ [2005] TASSC 94.

⁵⁸⁵ Eg section 111 – possession of a loaded firearm in a public place; section 112 – discharge of a firearm in a public place; section 113 – recklessly discharging a firearm.

⁵⁸⁶ Section 120 – the prescribed penalty is a fine not exceeding 50 penalty units or imprisonment not exceeding a term of 2 years or both.

⁵⁸⁷ See discussion of the current law on involuntary intoxication at 3.1.25 ff.

(1) to enact a separate defence of involuntary intoxication similar to the Commonwealth, Australian Capital Territory, Northern Territory and New South Wales position. There is also a defence of involuntary intoxication under the *Codes* in Western Australia and Queensland; or

(2) to provide that evidence of involuntary intoxication is relevant to negate any mental element, including voluntariness. If Option 4 were adopted this would merely involve applying Option 4 to involuntary intoxication as well as self-induced intoxication.

A further option would be:

(3) to enact a defence of involuntary intoxication similar to the position under the *Criminal Codes* in Western Australia and Queensland. This approach would apply the insanity provisions in section 16 of the *Code* to involuntary intoxication.

6.7.2 The Criminal Law Sub-committee of the Law Society of Tasmania and the anonymous submission addressed the need to clarify the law in relation to involuntary intoxication and both responses supported alternative (1), that is to enact a separate defence of involuntary intoxication. The anonymous response provided a personal perspective on the operation of the law of involuntary intoxication. He explained that he had pleaded guilty to two counts of indecent assault and one of aggravated assault. On the day of the assault, he had consumed both Ativan and Codeine, the combination of which (unknown to him) had a disinhibiting effect. In the sentencing comments, His Honour Chief Justice Cox observed that:

[w]hile there is no suggestion he did not know what he was doing to the complainant nor that he was incapable of resisting any temptation to do it, the disinhibiting effect of this combination of medication, innocently taken would appear to be the explanation for his departure that night from the constraints which were natural to him'.⁵⁸⁸

Under the alternatives for reform considered in this Report, this man would not have a defence under alternative (2), as there is nothing in the sentencing comments to suggest that his conduct was involuntary or that he lacked the requisite intent for the assault. It is also unlikely that involuntary intoxication under alternative (3) would have provided a defence. However, under alternative (1), he may have had a defence, if his conduct was the result of involuntary intoxication. The scope of this defence is discussed below.

Separate defence (alternative 1)

6.7.3 As discussed above, the *Commonwealth Criminal Code* contains a separate defence of involuntary intoxication.⁵⁸⁹ This is a defence without a common law precedent. Section 8.5 provides that:

A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

6.7.4 This is 'a true defence, like duress or self-defence, which excuses a defendant though the prosecution proves voluntary commission of the physical elements of the offence and the fault elements, if any, required for conviction'.⁵⁹⁰ In other words, the effect of this provision is that a defendant claims a defence where he or she admits both the external elements and the mental element, 'on the grounds that the defendant was led by the intoxication to do something he would not otherwise have done'.⁵⁹¹ For example, an accused could argue that as a result of consuming a drink spiked with a hallucinogen, he behaved in a way that he would not ordinarily and raped the complainant. He agrees that he intended to have sexual

⁵⁸⁸ Reference withheld to preserve anonymity.

⁵⁸⁹ See 5.1. This is the position in the Australian Capital Territory (*Criminal Code Act 2002*, section 31) and New South Wales (*Crimes Act 1900*, section 428G). The proposed amendments to the Northern Territory *Criminal Code* also reflects the Commonwealth position, (*Criminal Code Amendment (Criminal Responsibility Reform) Bill 2005*, section 43AW). In Western Australia and Queensland, the defence is more limited as the relevant Code provisions (*Criminal Code* (WA) section 28 paras 1 and 2; *Criminal Code* (Qld) section 28(1) and (2)) apply the insanity provisions to involuntary intoxication.

⁵⁹⁰ Leader-Elliott I 2002, above n 6, 167.

⁵⁹¹ Horder J, above n 272, 546.

intercourse with the complainant and that there was no consent, but claims that he behaved in an entirely uncharacteristic way because of the effects of the drugs unwittingly taken. Or as in *Kingston*, a man with paedophilic homosexual tendencies sought to argue that drugs surreptitiously given to him by a third party lowered his ability to resist temptation so far that his desires overrode his ability of control them. This was a case of disinhibition – the drugs caused the offender to give into temptation rather than creating the desire.⁵⁹²

6.7.5 A defendant cannot merely assert that his or her conduct was the result of involuntary intoxication. A defendant would need to raise an evidentiary foundation for the defence.⁵⁹³ In the Practitioners' Guide to the Commonwealth *Criminal Code Act*, it is stated that:

The effects of involuntary intoxication and the potential for that state to cause uncharacteristic conduct are well outside the bounds of common knowledge. In practice, expert testimony will almost certainly be required in all cases to lay an evidentiary basis for the defence. The claim that criminal conduct was caused by involuntary intoxication involves, as a necessary corollary, an implied claim that the conduct is not characteristic of the accused and would not have occurred, but for the state of intoxication. To that extent, a defendant who relies on the defence places their character in issue.⁵⁹⁴

6.7.6 The central issue is causation – ‘that intoxication *cause* the conduct which constitutes the offence’.⁵⁹⁵ Although the precise scope of this requirement is not specified, Leader-Elliott suggests that the issue would likely be resolved according to the principles of causation contained in the *Commonwealth Criminal Code*⁵⁹⁶ and that ‘involuntary intoxication might be said to *result* in criminal conduct if it *substantially contributes* to the commission of the offence in question’.⁵⁹⁷ In Tasmania, the issue of causation is likely to be dealt with in the same way.

Arguments in favour

6.7.7 (1) A person should not be held accountable for their actions while intoxicated, if their criminal behaviour was caused by intoxication arising through no fault of their own. The ‘principles governing criminal responsibility have been concerned to ensure that only a person who is considered “blameworthy” should be convicted of a crime’.⁵⁹⁸ A person who does not voluntarily become intoxicated is not considered morally blameworthy, and should not be held accountable for their conduct while in that state.⁵⁹⁹ In *R v Kingston*, Lord Mustill stated that there is ‘instinctive attraction in the proposition that a retributory system of justice should not visit penal consequences on acts which are the ultimate consequence of an event outside the volition of the actor’.⁶⁰⁰ However, the House of Lords (overturning the Court of Appeal decision allowing the defence) considered that a specific defence of involuntary intoxication did not exist. In his consideration of the position of non-voluntary intoxication under English law, Ashworth comments that:

⁵⁹² *R v Kingston* [1995] 2 AC 355, 364 per Mustill LJ.

⁵⁹³ *Criminal Code Act 1995* (Cth), section 13.3.

⁵⁹⁴ Leader-Elliott I 2002, above n 6, 169.

⁵⁹⁵ *Ibid* 169.

⁵⁹⁶ For example, section 146.2 provides (in the context of causing harm) that a person’s conduct is taken to cause harm if it substantially contributes to harm.

⁵⁹⁷ Leader-Elliott I 2002, above n 6, 169.

⁵⁹⁸ Bronitt S and McSherry B, above n 11, 148.

⁵⁹⁹ See the comments of Gibbs J in *R v O'Connor* (1980) 146 CLR 64, 92.

⁶⁰⁰ [1995] 2 AC 355, 363. This point is supported by Sullivan GR, ‘Current Topic: Involuntary Intoxication and Beyond’ [1994] Crim LR 273. The Court of Appeal decision was also welcomed by Gardner S, ‘Uncontrollable Intention in Criminal Law’ (1996) 110 LQR 8. The Court of Appeal decision ([1993] 4 All ER 373) was overturned by the House of Lords decision ([1995] 2 AC 355).

The House of Lords in *Kingston* overlooked D's absence of fault in bringing about the condition, and adopted an implausibly narrow view of excuses premised on the presence or absence of *mens rea*. G R Sullivan has argued that courts should be prepared to look to D's character and destabilized condition in order to determine whether or not he was blameworthy, and that if they find he was not blameworthy they should allow a defence. Involuntary intoxication certainly provides a fine opportunity for a character-based excuse.⁶⁰¹

Sullivan observed that '[o]ne's status as a non-convicted person is, perhaps, the most important civic asset one can have. To forfeit it in circumstances not of the agent's making and where compliance was rendered very much more difficult is to punish beyond just deserts'.⁶⁰² There was support for this argument in the response of the Criminal Law Sub-committee of the Law Society of Tasmania where it was observed that 'it seems a basic principle of fairness that an individual who for example, has had their drink spike[d], should not be criminally or civilly responsible for what they do later'. The anonymous response also supported this view.

6.7.8 (2) This accords with the *Commonwealth Criminal Code*. If the Commonwealth position were adopted and applied to all summary offences as well as offences to which the *Code* applied, there would be one set of involuntary intoxication rules applying to all offences in Tasmania.

Arguments against

6.7.9 (1) The existence of a separate defence for intoxication that is not self-induced is based on the view that 'a person who becomes unintentionally intoxicated is not blameworthy, compared with the person who makes a free choice to become intoxicated'.⁶⁰³ While this may be true in relation to the fact of becoming intoxicated, it is argued that it does not extend to a person's conduct while intoxicated. Although a person may not have voluntarily become intoxicated, once that person has knowledge of their intoxication, it is their responsibility to monitor their behaviour. As Horder writes, 'it is knowledge of intoxication, not its involuntariness, that is the key in such cases'.⁶⁰⁴ If a person knows that they are intoxicated then special effort may be required 'to see and avoid risks, but that is no more than is expected, for example, when (through no fault of my own) I am tired'.⁶⁰⁵ If a person is so intoxicated that they are unable to make special efforts, then it amounts to a denial of voluntariness.⁶⁰⁶ A person should be able to rely on involuntary intoxication to negate any mental element (see alternative 2 below) but should not be able to rely on intoxication as a defence if the required mental element is made out.

6.7.10 (2) Although a person whose intoxication is not self-induced is less morally blameworthy, this is a relevant mitigatory factor in sentencing. It should not provide a 'basis for excluding responsibility for intentional criminal conduct'.⁶⁰⁷

6.7.11 (3) It is incongruous with the approach of the criminal law to mental illness to allow a defence that provides a complete defence where although the act was intentional, the intent itself arose out of circumstances of involuntary intoxication.⁶⁰⁸ While it is accepted that an accused who is involuntarily intoxicated is not to blame for becoming intoxicated, an accused who is mentally ill is no more to blame for that condition.

⁶⁰¹ Ashworth A, above n 22, 219 – 220 referring to Sullivan GR, 'Making Excuses', in Simester A P and Smith A T H (eds), *Harm and Culpability*, Oxford University Press, 1995.

⁶⁰² Sullivan GR, above n 601, 141. In his paper, Sullivan proposed a defence that would apply in the case of involuntary intoxication. This defence had limits: the state of disequilibrium must be exceptional, it must be 'sufficiently radical as to give rise to conduct which would not have occurred had the agent not been destabilized' (at 141), the D must be of previously good character which means the absence of relevant previous convictions or relevant character based acquittals, the defence would not be available for serious crimes and the burden of proof (arguably) should be on the D.

⁶⁰³ Bronitt S and McSherry B, above n 11, 257.

⁶⁰⁴ Horder J, above n 272, 543.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

⁶⁰⁷ Fairall P and Yeo S, above n 403, 231 – 232.

⁶⁰⁸ See Smith J, 'Case and Comment: R v Kingston' [1993] Crim LR 784 (CA).

6.7.12 (4) The defence is based on the assertion that a person would not have acted as they did if they had not been involuntarily intoxicated. As Sullivan points out, there are other ‘states of being – anger, apprehension, fatigue, etc – [that] may arise quite involuntarily and provide a necessary condition for conduct that otherwise would not have occurred’.⁶⁰⁹ And, these conditions usually afford no more than mitigation.

6.7.13 (5) The creation of a special defence of involuntary intoxication may have resource implications, as the availability of the defence will involve greater reliance on expert evidence to raise evidentiary foundation. As Leader-Elliott comments, ‘in practice, expert testimony will almost certainly be required in all cases to lay an evidentiary basis for the defence’.⁶¹⁰ In *Kingston*, the House of Lord identified serious practical difficulties with the defence:

Before the jury could form an opinion on whether the drug might have turned the scale witnesses would have to give a picture of the defendant's personality and susceptibilities, for without it the crucial effect of the drug could not be assessed; pharmacologists would be required to describe the potentially disinhibiting effect of a range of drugs whose identity would, if the present case is anything to go by, be unknown; psychologists and psychiatrists would express opinions, not on the matters of psychopathology familiar to those working within the framework of the Mental Health Acts but on altogether more elusive concepts.⁶¹¹

6.7.14 (6) The ease with which a defendant could construct a spurious defence and the difficulty for the prosecution disproving the defence have been raised as objections to the defence:⁶¹²

By recognising a defence of involuntary intoxication despite the presence of *mens rea*, the court would have to address the question whether the defendant would have committed the act but for the surreptitious administration to him of drink or drugs. It would be impossible to answer this hypothetical and speculative question with any certainty.⁶¹³

Once the defendant has raised the evidentiary foundation, the difficult task for the prosecution would be to establish beyond reasonable doubt that the offence would have been committed without the involuntary intoxication.

Involuntary intoxication relevant to negate any mental element (alternative 2)

6.7.15 If restrictions were placed on the use of evidence of self-induced intoxication (that is, if either option 1, 2 or 3 were adopted), this alternative would clarify the position in relation to involuntary intoxication. It would allow evidence of involuntary intoxication to have a wider role than evidence of self-induced intoxication, as it would be relevant to negate any mental element including voluntariness. This is in accordance with the English common law position on involuntary intoxication.⁶¹⁴ If Option 4 were adopted this would merely involve applying Option 4 to involuntary intoxication as well as self-induced intoxication. This would reflect the common law in Australia.

Arguments in favour

6.7.16 (1) This approach accords with the purported rationale for limiting the circumstances in which self-induced intoxication is relevant, that is the blameworthiness of the accused in becoming intoxicated. There is no justification for any limitation in circumstances where the accused was not at fault in becoming

⁶⁰⁹ Sullivan G, ‘Making Excuses’, in *Harm and Culpability*, Simester A and Smith A (eds), Clarendon Press, 1996, 133. It should be noted that Sullivan supported the adoption of a defence of involuntary intoxication in limited circumstances.

⁶¹⁰ Leader-Elliott I 2002, above n 6, 169.

⁶¹¹ *R v Kingston* [1995] 2 AC 355, 376 per Mustill LJ.

⁶¹² *Ibid* 377 per Mustill LJ; Boland F, ‘Involuntary Intoxication is not a Defence’ [1994] 4 WebJCLI, <http://webjcli.ncl.ac.uk/articles4/boland4.html>; Spencer JR ‘Involuntary Intoxication is a Defence’ (1994) 53 *Cambridge Law Journal* 6.

⁶¹³ Boland F, above n 612.

⁶¹⁴ See UK Law Commission 1993, above n 23, 21; Smith J, above n 284, 240; *R v Kingston* [1995] 2 AC 355.

intoxicated. As Smith and Hogan note, if a defendant does not have the mental element then ‘the offence has not been committed and there is absolutely no reason why the law should pretend that it has’.⁶¹⁵

6.7.17 (2) As compared with Alternative 1, this option accords with the principle of criminal responsibility that a person who commits an act or makes an omission with the requisite state of mind is guilty of an offence. While it is readily conceded that a person who is involuntarily intoxicated is not responsible for their condition that is not the issue.⁶¹⁶ Once intoxicated, the issue should be whether an accused possessed the requisite mental element, and not how they became intoxicated. Their lack of fault in becoming intoxicated should be a matter for sentencing.

6.7.18 (3) It reflects a contemporary view of alcohol and intoxication. While government policy may be concerned about the impact on individuals and communities of the abuse of drugs and alcohol, it is to a large degree at odds with the way in which Australians drink and our attitudes to excessive drinking.⁶¹⁷ Leader-Elliott argues that the distinction between unintentional intoxication and intentional intoxication is arbitrary as:

In most Australian communities, no serious moral blame attaches to individuals who set out to become intoxicated: at all social levels over-indulgence in alcohol is an exceedingly common expression of good fellowship.⁶¹⁸

In addition, the line between involuntary and voluntary intoxication is difficult to draw. Ashworth points out that there is ‘no sharp distinction between the voluntary and the non-voluntary [intoxication]: rather there is a continuum of states in which D has more or less knowledge about the properties of what it is he is consuming’.⁶¹⁹

Arguments against

6.7.19 (1) It is arguable that the defence of involuntary intoxication should be wider than absence of intent because a person should not be liable if their behaviour was caused through no fault of their own.⁶²⁰

6.7.20 (2) This alternative would not be in line with the Commonwealth law relating to involuntary intoxication.

Insanity provisions apply to involuntary intoxication (alternative 3)

6.7.21 Under the *Criminal Code* in Queensland and Western Australia, the criteria for insanity are applied to determine the effect of involuntary intoxication on criminal responsibility.⁶²¹ The defence is only considered where the prosecution has established the elements of an offence – including the requirement that an accused act with the necessary mental element.⁶²² In Tasmania, the application of section 16 to involuntary intoxication would mean that an offender would not be criminally responsible if he or she made an act or omission:

(a) when afflicted with involuntary intoxication to such an extent as to render him incapable of:

- understanding the physical character of such act or omission; or
- knowing that such act or omission was one which he ought not to do or make; or

(b) when such act or omission was done or made under an impulse which, by reason of involuntary intoxication, he was in substance deprived of any power to resist.

⁶¹⁵ Smith J, above n 284, 240.

⁶¹⁶ See Smith J, above n 608.

⁶¹⁷ See Part 2.

⁶¹⁸ Leader-Elliott I, above n 18, 236.

⁶¹⁹ Ashworth A, above n 22, 218.

⁶²⁰ See discussion above in arguments in favour of alternative 1.

⁶²¹ See discussion above in 5.1.

⁶²² Leader-Elliott I, above n 18, 236.

This defence is historically based of the views in Sir James Stephen's *Digest of the Criminal Law* that the impact of mental illness and intoxication on culpability 'present the same potential for impairment of the capacities for self-control or rational appreciation of moral consequence'.⁶²³ While policy precluded reliance on self-induced intoxication (as deserving 'condemnation for voluntarily relinquishing self-control'),⁶²⁴ this did not apply to those who were accidentally or involuntarily intoxicated.

Arguments in favour

6.7.22 (1) This places a greater onus on an accused person who is involuntary intoxicated to monitor their behaviour and 'see and avoid' risks. Under alternative 2, any degree of involuntary intoxication would be relevant to the issue of whether the accused possessed the necessary state of mind. Under alternative 3, it would only be intoxication of an advanced stage.

6.7.23 (2) As compared with alternative 1 (complete defence of involuntary intoxication), there is a 'disincentive' to fabricate the excuse given that an accused who successfully relies on involuntary intoxication does not necessarily 'walk free' from court. The *Criminal Justice (Mental Impairment) Act 1999*, section 21 provides that where a jury acquit an accused person on the ground of insanity the court must declare that the person is liable to supervision under Part 4 of the Act. Under Part 4, courts have a number of options:

- Unconditional release;
- A supervision order;
- A community treatment order; or
- A continuing care order.

6.7.24 However, the more restrictive orders (community treatment order and continuing care order) would not apply to a person who committed an offence while involuntarily intoxicated. The sentencing alternatives available under the Part 4 are designed to provide options in the case of persons found not guilty on the grounds of insanity, and as such are directed towards the release or detention of persons with mental disease. This raises an issue in relation to the relevance of these options to a person who has committed an offence while involuntarily intoxicated. Such a person would not be eligible for a community treatment order or a continuing care order within the meaning of the *Mental Health Act 1996*, and nor would such an order would be appropriate (in any event). It is unclear that a person who was intoxicated involuntarily would be eligible for a supervision order (where the court releases the defendant on such conditions as it thinks fit). This may mean that the only real option for the court would be an unconditional release. This means that there is an incentive to fabricate involuntary intoxication. In the context of the Queensland provisions, Leader-Elliott suggests that it may be the uncertain consequences of relying on a defence of involuntary intoxication that explains its infrequent use.⁶²⁵ He expresses surprise that the defence is not relied upon more frequently, for 'though unintentional intoxication followed by criminal behaviour may not be common in fact, the excuse can be fabricated easily if there is something to gain by doing so'.⁶²⁶

6.7.25 (3) Applying the insanity provisions to involuntary intoxication accords with the principle that 'both the insanity and intoxication defences depend on the defendant's excusable incapacity for rational appreciation of meaning, consequences or wrongful nature of the conduct in question'.⁶²⁷ As Gibbs J said in *O'Connor*:

a person who has become intoxicated without any intention to consume anything intoxicating – for example, because his drink has been 'surreptitiously laced', or because against his will, a drug has been forcibly administered to him – is no more morally responsible for what he does than is a psychopath or a very young child.⁶²⁸

⁶²³ Leader-Elliott I, above n 20, 92.

⁶²⁴ Ibid.

⁶²⁵ Leader-Elliott I, above n 18, 236.

⁶²⁶ Ibid.

⁶²⁷ Leader-Elliott I, above n 20, 163.

⁶²⁸ (1980) 146 CLR 64, 92.

Arguments against

6.7.26 (1) Evidence of involuntary intoxication would only be admissible in the limited circumstances allowed by the provisions of the insanity defence (contained in section 16 of the *Code*), that is when it:

(a) renders the accused incapable of:

- understanding the physical character of such act or omission; or
- knowing that such act or omission was one which he or she ought not to do or make; or

(b) when such act or omission was done or made under an impulse which, by reason of involuntary intoxication, he or she was in substance deprived of any power to resist.

This would mean that evidence of involuntary intoxication would not be admissible in circumstances where an accused could rely on evidence of mental disease to deny criminal responsibility. As discussed earlier, under the *Code*, evidence of mental disease is relevant beyond the insanity provisions in section 16. Evidence of mental disease not amounting to insanity is relevant to the issue of whether the accused possessed the requisite intent for an offence, at least in relation to any of the states of mind in section 157(1) – known as the *Hawkins* defence.⁶²⁹ It is also possible that this principle extends to recklessness as well as to intent.⁶³⁰ There appears to be no justification for this disparity between evidence of involuntary intoxication and evidence of mental disease.

6.7.27 (2) This alternative is not appropriate if option 4 is adopted (as recommended by this Report) as it would place a stricter standard of intoxication on involuntary intoxication (incapacity test) compared with intoxication that is self-induced.

6.7.28 (3) The insanity provisions have been controversial and for this reason it is undesirable to extend them to involuntary intoxication. In 1989, the Law Reform Commissioner of Tasmania produced a report recommending that the insanity defence be abolished.⁶³¹ However, in recent years some of the heat has gone out of the debate with the introduction of flexible dispositional options.⁶³² The *Commonwealth Criminal Code* contains a modern version of the M’Naghten Rules, referred to as the defence of ‘mental impairment’.

6.7.29 (4) The limited sentencing options available to the judge may provide an incentive to fabricate a claim of involuntary intoxication (see discussion above).

Conclusion

6.7.30 After considering the alternative for reform, the Institute’s view is that alternative 2 is the preferred model. This alternative provides that evidence of involuntary intoxication is relevant to negate any mental element, including voluntariness. The Institute is not persuaded that it is appropriate for involuntary intoxication to be a separate defence. Aside from the practical objections raised (questions of causation, the need for expert evidence and the difficulty of disproving the defence), the Institute considers that while the person may not be blameworthy in becoming intoxicated (and considerable sympathy may be felt for such a person), it is their ability to control their actions and form intentions that is the issue when attributing criminal responsibility. And, in determining whether an accused possessed the requisite mental element, the way in which the accused became intoxicated is not relevant. The issue is whether the accused actually formed the requisite intent. A separate defence of involuntary intoxication would potentially allow a total defence to somebody whose (mis)behaviour was out of all proportion to their level of intoxication. Clearly, the blameworthiness of the accused in becoming intoxicated would be relevant to sentencing (if convicted). As Horder has asserted, ‘if the defendant’s condition simply resulted in difficulties in exercising self-

⁶²⁹ *Hawkins v The Queen (no 3)* (1994) 4 Tas R 376. See 4.2.25 above.

⁶³⁰ Leader-Elliott, I ‘Case note – Insanity, Involuntariness and the Mental Element in Crime’ (1994) 18 *Crim LJ* 347, 351-352.

⁶³¹ See Law Reform Commission of Tasmania, Report No 61, *Insanity, Intoxication and Automatism*, (1989) and discussion in (1990) 14 *Crim LJ* 213.

⁶³² See discussion at 6.7.23.

restraint or maintaining standards of care which the defendant failed to overcome, this might be a matter to take account of in sentencing but cannot affect guilt unless it amounts to a denial of mens rea'.⁶³³

6.7.31 This view holds regardless of the approach to reform in relation to self-induced intoxication. The Institute has recommended Option 4 (adopt the common law position) as the preferred model for reform to the law of self-induced intoxication. If this recommendation were adopted, it would merely involve applying Option 4 to involuntary intoxication as well as self-induced intoxication.

Recommendation 9

The law in relation to involuntary intoxication should be clarified

Recommendation 10

Option 4 should also be applied to involuntary intoxication. This means that evidence of intoxication would be relevant to any mental element, including intention, knowledge (including whether the person ought to have known), foresight of the consequences, and whether the act was voluntary and intentional, (section 13(1)).

(Refer to draft sections 17(1) and (2) *Criminal Code* in the Appendix).

6.8 Option 7 – Procedural restrictions on the defence

6.8.1 In South Australia, the defence of intoxication cannot be relied on by the jury unless a direction is specifically requested by the defendant or the prosecution and a defendant is prevented from appealing against a failure to direct the jury in relation to evidence of intoxication where it was not directly relied upon at trial.⁶³⁴ Section 269 of the *Criminal Law Consolidation Act 1935* (SA) provides that:

(1) On the trial of a defendant who was (or may have been) intoxicated at the time of the alleged offence, the question whether the defendant's consciousness was, or may have been, impaired by intoxication to the point of criminal irresponsibility—

- (a) is not to be put to the jury by the judge, the prosecutor or the defendant; and
- (b) if raised by the jury itself, is to be withdrawn from the jury's consideration,

unless the defendant or the prosecutor specifically asks the judge to address the jury on that question.

6.8.2 The Victorian Law Reform Committee made a recommendation for a similar provision.⁶³⁵ As discussed in Part 5, the Victorian Law Reform Committee recommended:

⁶³³ These comments were made in the context of a discussion of how the criminal law may accommodate with PTSD, PMT, Pathological Alcoholic Intoxication and hypoglycaemia, see Horder J 'Pleading Involuntary Lack of Capacity' (1993) 52 CLJ 298, 315 – 316. These observations also seem applicable to involuntary intoxication.

⁶³⁴ See discussion above in Part 5.

⁶³⁵ VLRC 1999, above n 21, recommendation 4. See discussion above in Part 5.

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.

This means that defendants cannot 'downplay intoxication at trial in favour of more attractive defences but appeal in the event of conviction on the basis that their intoxication defence was not adequately considered'.⁶³⁶

6.8.3 These procedural rules have been viewed as a qualification of the *O'Connor* principle, and so may not be necessary or appropriate in Tasmania if the *O'Connor* position is not adopted.⁶³⁷

Arguments in favour

6.8.4 (1) It is argued that appeals on the ground of inadequate or incorrect directions on evidence of self-induced intoxication in these circumstances 'are unreasonable, unfair and unnecessarily costly and have the potential to cause the public to lose respect in the legal system'.⁶³⁸

Arguments against

6.8.5 (1) Procedural rules are a matter for judges to make by way of Rules of Court. The *Criminal Code Act 1924* section 12 empowers judges to make rules of court to give effect to the provisions of the *Code*, and as such procedural rules of this nature should not be a matter for the political process.

6.8.6 (2) The use of procedural rules as an indirect way of limiting the practical operation of evidence of intoxication means that the law on intoxication is still subject to a lack of consistent and transparent rationale. Gough comments that 'Victorian and South Australian lawyers seem to be endorsing subjective principles the practical implications of which they do not entirely accept, and resorting to procedural rules as an indirect way to square this circle'.⁶³⁹

6.8.7 (3) The use of special procedural rules may impact on unrepresented defendants. There exists the potential for 'inequity before the law for an unrepresented accused who does not have knowledge of such procedures or lacks the skills to invoke them'.⁶⁴⁰

6.8.8 (4) The use of the procedural rules has the potential to undermine the common law safeguards against unfair trials. The Victorian Government did not accept the recommendations of the Victorian Law Reform Committee that would limit the trial judge's role in relation to directions on intoxication and limit the accused's right of appeal on this ground.

6.8.9 (5) Such restrictions do not exist in relation to other defences, and would be contrary to the general duty on a judge to instruct the jury in relation to any defence that is reasonably available on the facts of the case.

6.8.10 (6) The perceived concerns in relation to appeals on the ground of intoxication may be overstated as such appeals do not appear to arise very often. In an analysis of criminal appeals in Victoria between 1985 and 1999, 'a failure to direct a jury adequately or at all in relation to intoxication is rarely pursued as a

⁶³⁶ Gough S, above n 392, 724.

⁶³⁷ However, since the amendments to the law of intoxication in South Australia, restrictions on the relevance of intoxication to criminal responsibility now coexist with procedural restrictions.

⁶³⁸ VLRC 1999, above n 21, para 6.101.

⁶³⁹ Gough S, above n 392, 726.

⁶⁴⁰ Bowman M, 'Dealing with the Drunk's Defence' (1999) 24 *Alternative Law Journal* 233, 235; Konstantopoulos V, 'Review of Criminal Liability for self-Induced Intoxication' (1999) *Law Institute Journal* 60, 63.

ground of appeal and, when pursued, is almost never successful'.⁶⁴¹ In Tasmania, a survey of criminal appeals between 1985 and 2004 revealed only one case where an accused successfully appealed his conviction on the ground of intoxication.⁶⁴² This was an appeal from a decision of a magistrate on the ground that common law principles of intoxication should apply rather than the *Code* principles.⁶⁴³

6.8.11 It was the preliminary view of the Institute that such procedural restrictions should not be introduced. There was no support in any of the responses to the Issues Paper for the adoption of Option 7. Accordingly, the Institute does not recommend that Option 7 be adopted in Tasmania.

Recommendation 11

It is recommended that procedural restrictions in relation to evidence of intoxication should not be adopted in Tasmania.

6.9 Option 8 – Clarify relationship between intoxication and the defences

6.9.1 As discussed in Part 3, there is uncertainty as to the relationship between intoxication and the requirements of self-defence. Section 46 of the *Code* provides that a 'person is justified in using, in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use'. As discussed, there are two requirements:

- (1) the subjective belief of the accused as to the need to use defensive force; and
- (2) the objective assessment of whether in view of the circumstances that the accused believed to exist the force used was reasonable.

6.9.2 In the Issues Paper, it was argued that it was unclear to what extent an accused will be permitted to rely on evidence of intoxication to explain his or her mistaken belief in the need for self-defence. In addition, it was said that it was unclear how the issue of intoxication related to the objective component of the test for self-defence, that is, whether an accused's intoxication could be taken into account in assessing the reasonableness of the force used in 'circumstances as the accused believes them to be'.

6.9.3 In the Issues Paper, the following questions were asked:

- *Should the position in relation to self-defence be clarified?*
- *Should the Code provide that an intoxicated belief is irrelevant to assessing an accused's perception of the need for self-defence and the response?*
OR
- *Should the Code provide that an intoxicated belief is relevant to an assessment of the circumstances as the accused believed them to be in section 46?*
OR
- *Should there be a more general provision dealing with the relationship between intoxication and defences based on the Commonwealth model?*

⁶⁴¹ Victorian Department of Justice, above n 306, 2.

⁶⁴² The survey was conducted by using the Australian Legal Information Institute database and Butterworths Unreported Judgments. It revealed five cases in which intoxication was raised: 2 were successful Crown appeals (*Attorney-General's Reference No 1 of 1996* (1998) 7 Tas R 293; *Maher v Russell* (1993) 70 A Crim R 17), two were unsuccessful appeals by the accused (*Plumstead v The Queen*, unreported, Tasmania Court of Criminal Appeal, 157/1997; *Kringle v Lowe*, unreported, Supreme Court of Tasmania, A46/1986) and one was a successful appeal by an accused (*Gow v Davies* (1992) 1 Tas R 1)

⁶⁴³ *Gow v Davies* (1992) 1 Tas R 1.

6.9.4 These questions were addressed in the responses of Mr John Blackwood, the Criminal Law Sub-committee of the Law Society of Tasmania, and the Office of the Director of Public Prosecutions. Tasmania Police expressed support for the views of the Office of the Director of Public Prosecution. These responses all agreed that the position in relation to self-defence should be clarified. It is the view of the Institute that the law should be clarified.

Recommendation 12

The relationship between the law of self-defence and intoxication should be clarified.

6.9.5 In the Issues Paper, the Institute identified two main alternatives for reform:

(A) to provide that an intoxicated mistake is irrelevant for the purposes of assessing an accused's perception of the circumstances and the response. This is to follow the United Kingdom position. This was the view of the Office of the Director of Public Prosecution (and endorsed by Tasmania Police) that 'to be consistent with s 14A of the *Code* and the remainder of the scheme intoxication should not be a defence'. This was the view of Cox CJ in *Weiderman*.⁶⁴⁴

OR

(B) to provide that evidence of intoxication is relevant to an assessment of the 'circumstances as the accused believes them to be'. This was the view of Mr John Blackwood, who considered that intoxication ought to be relevant to any subjective state of mind, including whether the accused subjectively perceived a self-defence situation. In the response of the Criminal Law Sub-committee of the Law Society of Tasmania, it was stated that 'in terms of self defence, given the subjective component of circumstances as the accused believes them to be I would argue that how that belief comes about is irrelevant. The belief might be mistaken, but what causes that belief is of little note'.

6.9.6 If intoxication is relevant to an assessment of the 'circumstances as the accused believes them to be', evidence of intoxication would be relevant to explain an accused's belief in the need for self-defence, including any mistaken belief of the accused (a subjective test). It is necessary for that purpose to decide what the circumstances were as the accused believed them to be. Did he or she honestly or genuinely believe they were acting in self-defence? This question is purely subjective. The jury must put themselves in the position of the accused and ascertain what he or she thought the danger was.

6.9.7 The Institute considers that intoxication is clearly relevant to the accused's subjective belief. This is concerned with the accused's perceptions of his or her circumstances. It is difficult to find any argument, other than those based exclusively on policy, why intoxication should not be relevant to the subjective test in section 46. A plain reading of the section indicates the purely subjective nature of this requirement.

6.9.8 Further, intoxication would also be relevant to the test of whether in the circumstances as the accused believed them to be, the force used was reasonable. Under section 46 of the *Code*, the question is not whether the accused considered the force used was reasonable (a subjective test), but whether it was reasonable on an objective basis. It is for the jury to say, therefore, whether the reaction of the accused was a reasonable and an acceptable one to the situation as he or she believed it to be, or whether he or she went too far – whether the force used was excessive. However, the question of the reasonableness of the defendant's response is not a purely objective test, but is whether the defendant acted reasonably in the circumstances as he or she believed them to be and not on the facts as they actually were (a hybrid objective/subjective test).

6.9.9 Approached in this way, the objective test for self-defence has two components:

⁶⁴⁴ (1998) 7 Tas R 293, 302.

- (1) a determination of what were the circumstances as the accused believed them to be which may be taken into account for the purposes of the objective test (a subjective test).
- (2) whether the force used was, in those circumstances, reasonable (an objective test).

What were the circumstances as the accused believed them to be which may be taken into account for the purposes of the objective test (a subjective test)?

6.9.10 It is the Institute's view that intoxication should be relevant and admissible in addressing this question. When the fact finder is assessing whether the force used by the accused was objectively reasonable, the fact finder takes into account the accused's view of the circumstances, including any mistaken belief in the need for self-defence or the severity of the attack faced arising from a state of intoxication.

6.9.11 This would accord with the interpretation of an identical self-defence provision in New Zealand. Section 46 of the *Code* is identical to the self-defence provision contained in section 48 *Crimes Act 1961* (NZ). In their consideration of the relationship between intoxication and mistake in New Zealand, Simester and Brookbank observe that the general rule is that 'if a reasonable sober person would not have made the same mistake, D cannot call his intoxication in aid to explain *why* he made the mistake'.⁶⁴⁵ However, in relation to self-defence, they write:

There are exceptions to this rule governing defences, which typically arise from the statutory wording of specific defences. For example, where an accused person relies on a mistaken belief in relation to self-defence, the statutory definition of self-defence in s 48 *Crimes Act 1961* justifies such defensive force as is reasonable 'in the circumstances as the accused believes them to be'. ... This statutory formula overrides the general rule, and allows a defendant to rely on a mistaken view of circumstances even when the mistake is attributable to self-induced intoxication.⁶⁴⁶

6.9.12 Similarly, in Tasmania, the wording of section 46 makes it clear that the reasonableness of the force is to be assessed 'in the circumstances as the accused believes them to be'. If intoxication is admissible to establish a genuine, though drunken and mistaken, belief in the need for self-defence (the subjective test), then it follows that a drunken mistake should also be taken into account in determining the circumstances as the accused believes them to be for the purposes of the objective test (that is, for the purposes of determining whether the force used was reasonable 'in the circumstances as the accused believes them to be').

6.9.13 This approach would also accord with the law in the other Australian jurisdictions that have similar self-defence provisions to the law of self-defence in Tasmania (the Commonwealth, the Australian Capital Territory and New South Wales, as well as the proposed position in the Northern Territory). In these jurisdictions, intoxication is relevant to explain the 'circumstances as the accused believed them to be' for the purposes of the objective test of reasonable force.

6.9.14 The test for self-defence under the *Commonwealth Criminal Code* is similar to the requirements under section 46 of the *Code*. Section 10.4(2) of the *Commonwealth Criminal Code* provides that:

a person carries out conduct in self-defence if and only if he or she believes the conduct is necessary to defend himself or herself or another person and the conduct is a reasonable response in the circumstances as he or she perceives them.

⁶⁴⁵ Simester A and Brookbank W, above n 382, 358.

⁶⁴⁶ Ibid. See also *R v Thomas* [1991] 3 NZLR 141. In *Adams on Criminal Law*, it is stated that 'although the question does not appear to have been directly discussed in the Court of Appeal, there have been cases where the defence has been held to be available, although it seems clear that the accused was intoxicated when he or she used force, and was or may have been mistaken as to the circumstances: *R v Ranger* (1988) 4 CRNZ 6; *R v Thomas* [1991] 3 NZLR 141', Robertson B (ed), above n 385, 128.

As the Model Criminal Code Officers Committee explained:

the test as to necessity is subjective but the test as to proportion is objective. It requires the response of the accused to be objectively proportionate to the situation which the accused subjectively believed she or he faced (the words “as perceived by him or her” were added to make this clear).⁶⁴⁷

6.9.15 The *Commonwealth Criminal Code* also provides for the relationship between evidence of intoxication and the defences. Section 8.4 provides:

- (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

Under the *Commonwealth Criminal Code*, a claim of self-defence is based on the accused’s perception in the need for self-defence (the accused’s belief that the conduct is necessary to defend himself or herself or another person). This means that the necessity for self-defence falls within 8.4(1), as it is a part of a defence that is based on the accused’s actual belief in the need for self-defence. In the *Commonwealth Criminal Code A Guide for Practitioners*, Leader-Elliott explains the relationship between self-defence and intoxication in the following way:

a plea of self-defence can ... be based on an unreasonable belief and mistaken belief. Self-defensive action is excused if it is a reasonable response to the threat which the defendant perceived, no matter how unreasonable that perception. Evidence that the defendant was intoxicated can lend credibility to the claim that force was used against another in the mistaken belief that harm was threatened.⁶⁴⁸

In other words, a drunken mistake would be taken into account in determining the circumstances as the accused believes them to be.

6.9.16 Section 8.4(2) applies to the defences that are available ‘only if the defendant held a *reasonable* belief in the existence of facts which provide a basis for the defence’, such as reasonable mistake of fact (section 9.2), duress (section 10.2) and sudden or extraordinary emergency (section 10.3).⁶⁴⁹ Section 8.4 appears not to deal with the relevance of intoxication to the issue of the ‘reasonable response’ in self-defence. Section 8.4(2) is concerned with those parts of a defence that are based on reasonable belief (and not reasonable response).

6.9.17 The *Commonwealth Criminal Code* provisions dealing with self-defence and intoxication are the same as the provisions in the Australian Capital Territory⁶⁵⁰ and the proposed amendments in the Northern Territory.⁶⁵¹

6.9.18 In New South Wales, the requirements for self-defence as contained in section 418(1) and (2) of the *Crimes Act 1900* (NSW) are the same as the equivalent self-defence provisions in section 10.4(1) and (2) of the *Commonwealth Criminal Code*.⁶⁵² In *R v Katarzynski*,⁶⁵³ Howie J held that:

⁶⁴⁷ Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapters 1 and 2 General Principles of Criminal Responsibility*, Report, December 1992, 71.

⁶⁴⁸ Leader-Elliott I 2002, above n 6, 161.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Criminal Code Act 2002* (ACT), section 33 (intoxication) and section 42 (self-defence).

⁶⁵¹ *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005*, section 43AB (intoxication) and section 43AU (self-defence).

⁶⁵² The NSW provisions have two fundamental departures from the Commonwealth provisions - the NSW provisions reintroduce the concept of excessive self-defence in relation to murder (section 421) and also differs from the Commonwealth provisions in relation to the extent of the right to defend property (section 420).

[t]he questions to be asked by the jury under s418 are: (1) is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and (2) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.⁶⁵⁴

Howie J considered that the question concerning the belief of the accused ‘is determined from a completely subjective point of view’ while the question of whether the conduct was reasonable ‘is determined by an entirely objective assessment of the proportionality of the accused’s response to the situation the accused subjectively believed that he or she faced’.⁶⁵⁵

6.9.19 The intoxication provisions contained in the *Crimes Act 1900* (NSW) do not address the relationship between evidence of intoxication and the defences.⁶⁵⁶ In New South Wales, there is no equivalent of section 8.4 of the *Commonwealth Criminal Code*. The relevance of the accused’s intoxication to the requirements for self-defence as contained in section 418 was also considered by Howie J in *R v Katarzynski*. His Honour’s Order was that:

... I directed the jury to the effect that they must take into account the accused’s intoxication when considering whether he might have believed that it was necessary to act as he did in defence of himself and when considering the circumstances as he perceived them, but not when assessing whether his response to those circumstances was reasonable.⁶⁵⁷

As with the Commonwealth position, intoxication may be taken into account when determining the accused’s subjective perception of the circumstances. This means that intoxication may be considered in determining the accused’s belief in the need for self-defence and also when considering what were ‘the circumstances as the accused believed them to be’ for the purposes of the objective test. An example of the operation of this principle would be where the accused (mistakenly and drunkenly) believed he was being attacked with an iron bar when in fact his attacker was wielding a wooden rake, the accused’s response to the attack would be judged on the facts as he believed them to be and he would be entitled to use such force as is objectively reasonable to an attack with an iron bar rather than with a wooden rake.

Whether the force used was, in those circumstances, reasonable (an objective test)?

6.9.20 A further issue is whether intoxication can be taken into account for the purposes of determining whether the force used by the accused was reasonable. It is the view of the Institute that, in appropriate cases, the physical fact of intoxication should be taken into account in the assessment of whether the force used was objectively reasonable. Usually, it is the impact of alcohol/drugs on the accused’s mental state – perception and judgment – that is the focus of legal inquiries into the relationship between intoxication and criminal responsibility. As discussed in Part 2.4, alcohol and other drugs may operate to produce an abnormal state of mind. It is the view of the Institute that the standard of reasonableness is NOT altered by an accused’s distorted perceptions or judgment caused by intoxication. The Institute firmly believes that ‘it would be incongruous and wrong to contemplate the proposition that a person’s exercise of judgment might be unreasonable if he was sober, but reasonable because he was drunk’.⁶⁵⁸ However, alcohol/drugs do not only affect perception. They also have an effect on a persons’ physical capacities/capabilities – coordination and motor skills – and it this aspect of intoxication that should (in the appropriate case) be taken into account in determining whether the force used was reasonable.

6.9.21 This distinction can be understood by way of an example. Take the situation of an intoxicated person who is attacked by an aggressive person with punches to his head, who finds that due to their intoxicated state (slow reactions, poor co-ordination, body movements etc) they may not be able to defend

⁶⁵³ [2002] NSWSC 613.

⁶⁵⁴ Ibid [22]. This was cited in the NSW Court of Appeal decision in *R v Burgess; Saunders* [2005] NSWCCA 52.

⁶⁵⁵ [2002] NSWSC 613, [23].

⁶⁵⁶ The New South Wales provisions have been criticised on this basis, see Tolmie J, above n 287.

⁶⁵⁷ [2002] NSWSC 613, [28].

⁶⁵⁸ *McCullough v The Queen* [1982] Tas R 43, 53 per the Court.

themselves adequately by using the degree of force that would be adequate if they were not intoxicated (ie joining in the fist fight or simply running away), therefore they may need to use more force to defend themselves (eg striking him with a bottle). This is a case where the accused has not made a mistake about the circumstances as a result of intoxication (unlike the situation discussed above). Rather, this is where the accused's state of intoxication reduces his/her physical capacities as a matter of fact. Certainly if the reduced physical capacity were caused by some other circumstance of the defendant (for example that they were already wounded) it would be part of the actual circumstances and would be relevant to the assessment of whether the force used was reasonable. It is the Institute's view that (in cases such as this) the reduced physical capacity attributable to intoxication should also be taken into account, by the fact finder, as part of the actual circumstances in determining whether the force used was reasonable.

6.9.22 In the New South Wales decision of *Katarzynski*,⁶⁵⁹ Howie J considered that the accused's intoxication was irrelevant to the assessment of the reasonableness of the response. His Honour observed that:

It will be a matter for the jury to decide what matters it should take into account when determining whether the response of the accused was reasonable in the circumstances in which he or she found himself or herself. The jury is not assessing the response of the ordinary or reasonable person but the response of the accused. In making that assessment it is obvious that some of the personal attributes of the accused will be relevant just as will be some of the surrounding physical circumstances in which the accused acted. So matters such as the age of the accused, his or her gender, or the state of his or her health may be regarded by the jury. Whether or not some particular personal characteristics of the accused is to be considered will depend largely upon the particular facts of the case.

But in my opinion one matter that must be irrelevant to an assessment of the reasonableness of the accused's response is his or her state of sobriety. ... Apart from *Conlon*, I am not aware of any other decision that has held that intoxication is a matter relevant to an evaluation of the reasonableness of conduct or belief of a person.⁶⁶⁰

6.9.23 The view of Howie J finds support in the view of the Victorian Law Reform Commission that:

to allow self-induced intoxication to be taken into account in determining the reasonableness of the accused's actions would be to risk absolving a person of criminal responsibility simply on the basis that he or she was drunk, or under the influence of drugs, at the time of the offence. Self-defence ... [is] a complete defence to murder. In the Commission's view, this justifies a requirement that where an accused kills while intoxicated and that intoxication is self-induced, the reasonableness of his or her actions should be considered against that of a person who is not intoxicated.⁶⁶¹

The Commission recommended that the approach of *Katarzynski* be adopted in Victoria.⁶⁶²

6.9.24 While mindful of the fact that self-defence is a complete defence, the Institute disagrees with the conclusion that intoxication must necessarily be irrelevant to the assessment of the reasonableness of the force used by the accused. With respect, this view is misleading. The Institute's view is that intoxication can be relevant to the issue of whether the force used was reasonable as a physical characteristic of the accused (along with other relevant factors) while still maintaining the objective standard. The Institute agrees that the requirement of 'reasonableness' allows the jury to apply community standards to the accused's conduct and that 'reasonableness' must remain the standard of the hypothetical reasonable (and sober) person. The Institute's approach to self-defence and intoxication does not remove this objective standard.

⁶⁵⁹ [2002] NSWSC 613.

⁶⁶⁰ Ibid [25] – [26].

⁶⁶¹ Victorian Law Reform Commission, above n 307, 125.

⁶⁶² Ibid 126.

6.9.25 In considering the issue of the reasonableness of the response in self-defence, the jury does not alter the standard to be applied to accord with the accused's perception of what was reasonable. As stated above, 'it would be incongruous and wrong to contemplate the proposition that a person's exercise of judgment might be unreasonable if he was sober, but reasonable because he was drunk'.⁶⁶³ It is not an answer for an accused to say 'I thought the force used was reasonable'. It is not enough that the accused believed the force used was reasonable – it must be objectively reasonable. The jury may consider what the accused believed his or her options were, but this is not determinative. The Institute stresses that the force must be objectively reasonable in the circumstances as the accused believed them to be. And, in some cases, the accused's intoxication may be relevant as a physical characteristic (in the same way as the age of the accused, his or her gender, or the state of his or her health may be regarded by the jury) in assessing whether the force used was reasonable.

6.9.26 In coming to this view, the Institute found the comments of Justice Crawford to be very sensible and persuasive. In his response to the Institute, His Honour indicated that:

For the purposes of the issues of self-defence, the jury should be directed that:

(a) when considering the circumstances as the accused believed them to be, the jury should consider whatever throws light on that issue. There is no special rule in that regard concerning evidence of intoxication. What the accused believed is a question of fact. That he or she may have been intoxicated may throw some light on the determination;

(b) when determining whether the degree of force used by the accused was unreasonable in the circumstances as he or she believed them to be, it is once again a question of fact for the jury. If the jury accept that the accused may have believed that he or she was too drunk to do any good with his or fists, that is a determination of the circumstances as the accused believed them to be. The jury's next assessment will be whether it considers that the degree of force used was unreasonable in those circumstances. There should be no hard and fast rule for the application of evidence of intoxication. The decision to use a weapon, such as a gun or knife, might be unreasonable even if the accused believed he or she was too intoxicated to do any good with fists alone. Then again, it might not be.

I point out that an accused might have been a solitary drinker who, through circumstances not of his or her own making, became involved in the dispute of someone else and had to act in self-defence. It might be unfair to exclude evidence of intoxication.

It is the view of the Institute that the fact that an accused's physical ability to respond to their situation was affected by alcohol should be taken into account in determining whether the force used was reasonable.

Conclusion

6.9.27 In summary, the Institute's view is that for the purposes of self-defence, intoxication may be considered:

- (a) for the purpose of assessing the accused's belief in the need for self-defence;
- (b) for the purpose of determining the circumstances as the accused believes them to be; and
- (c) as a physical characteristic of the accused in determining whether the response was reasonable.

6.9.28 In formulating its recommendations on this issue, the Institute considered that it was sensible to include the provision relating to the relationship between self-defence and evidence of intoxication in the general provision dealing with intoxication and criminal responsibility (see draft section 17 in the Appendix). The Institute also considered that it was desirable to frame its recommendations in a form that allowed for the more general application of the principles enunciated, so that the reforms to the law of

⁶⁶³ *McCullough v The Queen* [1982] Tas R 43, 53 per the Court.

intoxication clarified the relationship between intoxication and criminal defences generally. In determining whether evidence of intoxication can be relied on by an accused as an exculpatory factor, the Institute's view is that a distinction should be made between purely objective tests and tests which are not wholly objective. The general principle supported by the Institute is that intoxication is relevant as an exculpatory factor to any subjective test, to any partially subjective test but not to any wholly objective test.

Wholly subjective tests

6.9.29 This would mean that intoxication would be relevant to support the defences of claim of right and compulsion (section 20 *Code*) as these defences are wholly subjective as they depend only on the accused's belief. As explained in Part 3, the defence of claim of right is a belief of legal entitlement and a mistaken but sincere belief will suffice. A claim of right is relevant to the offences in Chapter XXXI of the *Code* headed 'Arson and other Unlawful Injuries to Property'. Section 20 of the *Code* provides for a limited defence of compulsion. There must be compulsion by threats of immediate death or grievous bodily harm, from a person actually present at the commission of the offence. In addition, the accused must believe that the threat will be executed. This imposes a wholly subjective requirement. There is no requirement that the accused's belief be reasonable or based on reasonable grounds.

Partially subjective tests

6.9.30 As explained above, the view of the Institute is that evidence of intoxication should be relevant to self-defence as it contains a hybrid subjective/objective test (the force used is reasonable in the circumstances as the accused believed them to be).

Wholly objective tests

6.9.31 Subjective or partially subjective tests can be distinguished from those defences, available under the *Code*, which contain tests that are wholly objective. According to the model for reform recommended by the Institute, an accused could not rely on evidence of intoxication in relation to a wholly objective test.

6.9.32 Under section 14 of the *Code*, honest and reasonable mistake in relation to every external element of a crime is a defence, unless it is expressly or impliedly excluded in the definition of the crime. A mistake must be both honest and reasonable to provide the accused with a defence. Thus, while an accused could rely on evidence of intoxication in support of the honestly held belief, evidence of intoxication would not be relevant to whether the accused's belief was reasonable. This accords with the current law in Tasmania. In relation to intoxicated mistakes and sexual offences, it should be noted that section 14A of the *Code* provides that 'in proceedings against section 124, 125B, 127, 127A or 185, a mistaken belief of the accused is not honest or reasonable if the accused was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated'. As explained at 6.4, section 14A(1) clarifies the law in relation to intoxicated mistake, as it clearly indicates that a mistake occasioned by a defendant's self-induced intoxication is not a reasonable mistake.⁶⁶⁴

6.9.33 Other defences where an accused could not rely on intoxication to support reasonable grounds would include the requirement that the belief of the accused be based on 'reasonable grounds' in the defences concerned with defence of property. These are the defence of dwelling house (section 40), defence of premises against trespasses: removal of disorderly persons (section 41), defence of possession of real property with claim of right (section 42), and defence of movable property against trespassers (section 43). These defences provide that it is lawful for a person to use such force as the person 'believes on reasonable grounds to be necessary'. The Institute's view is that this test is different from the test for self-defence (reasonable in the circumstances as the accused believed to exist) as it is not solely concerned with the accused's subjective perception of the circumstances but whether there was an honest belief (a wholly subjective test) and whether there were reasonable grounds for the belief (a wholly objective test).⁶⁶⁵

⁶⁶⁴ See discussion in Part 3.

⁶⁶⁵ Note the common law decision of *R v Conlon* (1993) 69 A Crim R 92, where Hunt CJ held that intoxication was relevant at common law to the issue of whether the accused had a belief in the need to use force and also whether the accused had reasonable grounds for that belief.

6.9.34 This distinction is justified on policy grounds, as it is appropriate to allow a greater degree of objectivity when force is used to defend property as opposed to the person. This distinction has been clearly recognised in the wording of the *Criminal Code*. As explained, section 46 provides that a person is justified in using in self-defence (or in defence of another) such force as ‘in the circumstances as he believes them to be, it is reasonable to use’. This provision replaced an earlier provision (the former section 46(2)) that required the accused to ‘act with reasonable apprehension of death or grievous bodily harm and believe on reasonable grounds that he cannot otherwise preserve himself’. While the requirement for reasonable grounds have been removed from the self-defence provisions, ‘reasonable grounds’ remains the test for defence of property.

6.9.35 Similarly, intoxication could not be relied upon by the accused in relation to the defence of domestic discipline in section 50 of the *Code*. The section provides that ‘it is lawful for a parent or a person in the place of a parent to use, by way of correction, any force towards a child in his or her care that is reasonable in the circumstances’. The requirement of reasonableness is not concerned with the accused’s state of knowledge or belief in circumstances – it is a wholly objective test.

Recommendation 13

It is recommended that the law specifying the relationship between evidence of intoxication and the criminal defences should reflect the general principle that intoxication is relevant as an exculpatory factor to any subjective test, to any partially subjective test but not to any wholly objective test.

(Refer to draft sections 17(2) – (6) *Criminal Code* in the Appendix).

Appendix

Draft Section 17 Intoxication

(1) This section applies both to self-induced intoxication and to intoxication that is not self-induced.

Section 17(1) makes it clear that the provision applies to self-induced and involuntary intoxication. This reflects recommendation 10.

(2) In determining whether a person is guilty of an offence, except as otherwise provided, evidence of that person's intoxication must be taken into account in determining —

Section 17(2) reflects Recommendations 6, 7, 10 & 13. It is intended to reflect the common law position as set out in *R v O'Connor* (1980) 146 CLR 64. See 6.5 and 6.7. The words 'Except as otherwise provided' are added to provide for s14A(1) of the *Code*.

(a) whether an act of that person was voluntary and intentional;

The reference to knowledge or belief in ss2(b) includes actual belief/knowledge in the defences of compulsion, claim of right and self-defence. See 6.9.5 - 6.9.7, 6.9.29.

(b) any question as to what the person knew, ought to have known, believed, intended or foresaw; and

It is noted that the defences could be dealt with in a separate subsection that could read 'Except as otherwise provided, if any part of a defence relies on a person having actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed'. This is based on the *Criminal Code Act 1995* (Cth) s8.4(1).

(c) any other question as to the state of mind of the person, or as to any mental element of the offence.

(3) If any part of a defence relies on a person having reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

Section 17(3) is based on the *Criminal Code Act 1995* (Cth) s8.4 (2) and the *Crimes Act 1958* (Vic) s9AJ(1). It would apply to s14 (mistake) of the *Code*. It reflects Recommendation 13. See 6.9.32. It is noted that draft subsections (3), (4) and (5) could possibly be combined.

(4) If any part of a defence relies on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard must be had to the standard of a reasonable person who is not intoxicated.

Section 17(4) is based on the *Crimes Act 1958* (Vic) s9AJ(2). It would apply to the defence of property provisions in the *Code*, ss40, 41, 42, and 43. It reflects Recommendation 13. See 6.9.33.

(5) If any part of a defence relies on reasonable response in the circumstances, in determining whether that response was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.

Section 17(5) is based on the *Crimes Act 1958* (Vic) s9AJ(3). It would apply to s50 (the defence of domestic discipline) of the *Code*. It reflects Recommendation 13. See 6.9.35.

(6) If any part of a defence relied on a reasonable response in the circumstances as the accused believes them to be, intoxication may be considered —

Section 17(6) reflects the approach taken to self-defence (see Recommendation 13 and 6.9, particularly 6.9.8 - 6.9.28. It may be that ss6(b) is already covered in ss6(a). However, it is included separately to highlight the approach of the Institute.

(a) for the purpose of determining the circumstances as the accused believes them to be;

(b) as a physical characteristic of the accused in determining whether the response was reasonable.

(7) In this section, 'intoxication' means intoxication because of the influence of alcohol, a drug or any other substance.

Section 17(7) makes it clear that intoxication is as a result of alcohol or drug use.