

TASMANIA
LAW REFORM
INSTITUTE

Intoxication and Criminal Responsibility

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About this issues paper

This issues paper discusses reforming the law in relation to the law of intoxication and criminal responsibility in Tasmania. Any group or person is invited to respond to this issues paper. Following consideration of all responses it is intended that a final report will be published, containing recommendations.

How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. Questions are contained at the end of the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by **2 May 2005**.

If possible, responses should be sent by email to: **law.reform@utas.edu.au**

Alternately, responses may be sent to the Institute by mail or fax:

address: Tasmania Law Reform Institute
Private Bag 89,
Hobart, TAS 7001
fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquires should be directed to Jenny Rudolf, on the above contacts, or by telephoning (03) 62262069.

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

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), Mr Paul Turner (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).

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This issues paper was prepared by Dr Rebecca Bradfield, Professor Kate Warner and Jenny Rudolf.

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 paper 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 (indictable offences or summary offences to which the Criminal Code applies), the common law (summary offences to which the Code does not apply) or the Commonwealth Criminal Code (Commonwealth offences).

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. 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 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.

¹ (1998) 7 Tas R 293.

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.

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

² [1962] Tas SR 271.

³ (1991) 160 A Crim R 419.

⁴ [1987] 3 WLR 321.

section 8 of the *Criminal Code Act*. 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 *Criminal Code Act 1995* (Cth) apply to all Commonwealth offences. In relation to intoxication, the *Criminal Code Act 1995* (Cth) '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 can be argued 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.

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 rationale – 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

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.

⁷ *R v Beard* [1920] AC 479

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 an *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 *Criminal Code Act 1995* (Cth), a different set of rules applies to Commonwealth offences rather than the common law.⁹ In summary, for offences governed by the Criminal 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 *Criminal Code Act 1995* (Cth).

Question 1

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

Options for Reform

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.

⁸ (1994) 4 Tas R 376

⁹ See discussion below in Part 5.

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

This is to reaffirm the previously recognised *Criminal 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.

Question 2

Do you think that evidence of self-induced intoxication should only be admissible in relation to offences 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.

Question 3

Do you agree that if Option 1 were adopted the legislation should omit the reference to capacity?

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.

Question 4

Should self-induced intoxication be relevant to questions of intention, knowledge and dishonesty but not to questions of recklessness or voluntariness?

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

This is to adopt the *Criminal Code Act 1995* (Cth) 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 *Criminal Code Act 1995* (Cth) 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 Tasmanian 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/basis 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.

Question 5

Should the principles contained in the *Criminal Code Act 1995* (Cth) that deal with self-induced intoxication be adopted in Tasmania? This would mean that intoxication would be relevant to all states of mind other than section 13(1).

Option 4 – Evidence of self-induced intoxication is relevant to intention, knowledge, subjective recklessness and voluntariness.

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 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.

Question 6

Do you think that section 17 should be repealed and the common law approach adopted in Tasmania?

Option 5 – Create a special offence

If the limits on relying upon intoxication as an exculpatory factor were to be removed, in other words 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 sentencers 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. This has been done in the Northern Territory but has been widely criticised because of the way in which it extends criminal responsibility for conduct normally only tortious. A less contentious alternative would be to create an offence of causing grievous bodily harm or wounding by criminal negligence.

Question 7

If Option 4 is adopted should a separate offence of committing a dangerous act while intoxicated be created?

Question 8

If you consider a separate offence should be created, please indicate what you consider the elements of this offence should be.

Question 9

Do you agree that Tasmania should not introduce an offence modelled on section 154 of the Northern Territory's Criminal Code? If not, why?

Question 10

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?

Option 6 – Special treatment of involuntary intoxication

There are two alternatives: *either* 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* to merely provide that intoxication is relevant to negate any mental element including voluntariness (in other words to apply Option 4 to involuntary intoxication).

Question 11

Do you think that a separate defence of involuntary intoxication should be created?

OR

Question 12

Do you think that evidence of involuntary intoxication should be relevant to negate any mental element including involuntariness?

Option 7 – Procedural restrictions on the defence

In South Australia, intoxication is not to be left to 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.

Question 13

Do you think procedural rules requiring a defendant to specifically request a judge refer to intoxication and to prevent a defendant's right to appeal if such a request is not made should be adopted in Tasmania? If so, in what circumstances?

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.

Basically there are two options. *Either* to follow the United Kingdom position and provide that an intoxicated mistake is irrelevant to the accused's perception of the situation and the degree of force needed in response. *Or* to follow the position in New Zealand and under the *Criminal Code Act 1995* (Cth) and allow intoxication to be relevant to an assessment of the circumstances. There are a number of alternative ways of implementing this alternative which depend in part on which of a number of earlier options are adopted. For example, it may be sensible to adopt an approach similar to the Commonwealth provisions which make separate provisions for involuntary intoxication and basic intent crimes.

Question 14

Should the position in relation to self defence be clarified?

Question 15

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

Question 16

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

Question 17

Should there be a more general provision dealing with the relationship between intoxication and defences based on the Commonwealth model?

Part 1

Introduction

1.1.1 This paper 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. However, 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.¹⁰

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’.¹¹ 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.¹² As Tolmie notes, ‘alcohol is widely understood as removing normal restraints or inhibitions, impairing judgement and producing aggression or unexpected changes of mood’.¹³

1.1.3 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.¹⁴

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’.¹⁵ 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’.¹⁶ In relation to use of illicit drugs, Leader-Elliott suggest 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’.¹⁷

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.

¹⁰ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 238.

¹¹ (1980) 146 CLR 64 at 114.

¹² 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’.

¹³ Tolmie J, ‘Intoxication and Criminal Liability in New South Wales: A Random Patchwork?’ (1999) 23 *Criminal Law Journal* 218 at 220.

¹⁴ See Part 2.

¹⁵ Leader-Elliott I, ‘Intoxication Defences: The Australian Perspective’ in Yeo S (ed), *Partial Excuses to Murder*, Federation Press, NSW 1991, 236.

¹⁶ Paton-Simpson G, ‘The varied meanings of drinking and intoxication – a review’ (1996) 23 *Contemporary Drug Problems* 221 at 231.

¹⁷ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 63.

- (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.¹⁸

1.1.6 The resolution of the controversy has been considered by numerous law reform bodies in Australia and other common law jurisdictions,¹⁹ 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*.²⁰

1.2 Historical context

1.2.1 Historically, voluntary intoxication could never provide an offender with an excuse.²¹ 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'.²² These authorities culminated in the decision of House of Lords in *DPP v Beard*.²³ 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 *Criminal 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.²⁴

¹⁸ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 1.15.

¹⁹ Commonwealth - Criminal Law Officers Committee of the Standing Committee of Attorney-General's, *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 - Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility Report* 34, 1990; Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication: Report* 6, 1986; New Zealand - New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, 1984; UK - UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 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.

²⁰ (1980) 146 CLR 64. See statement of common law position at 3.2.

²¹ 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.

²² *R v O'Connor* (1980) CLR 64 at 106 per Mason J.

²³ [1920] AC 479.

²⁴ [1920] AC 479 at 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 and Beck S, & 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.

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"'.²⁵

1.2.4 Despite the controversial nature of the division of offences into the categories of 'specific' and 'basic' intent,²⁶ this statement of the law was affirmed by the House of Lords in *DPP v Majewski*.²⁷ 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 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'.²⁸

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* case²⁹ and in *DPP v Majewski*³⁰ has informed our understanding of section 17 of the *Criminal 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 Issues Paper. 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:³¹

- 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.

1.3.3 The external elements of a crime are found in the statutory definition of the offence.³²

²⁵ Orchard G, 'Drunkenness as a "Defence" to Crime – Part I' [1977] 1 Crim LJ 59 at 61.

²⁶ See discussion at 4.2.5.

²⁷ [1977] AC 443.

²⁸ [1977] AC 443 at 457.

²⁹ [1920] AC 479.

³⁰ [1977] AC 443.

³¹ This summary is taken from Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 161. See further 161 – 163.

Mental Element

1.3.4 A fundamental principle of the modern criminal law is the ‘notion of individual responsibility’.³³ As Bronitt and McSherry observe, ‘the modern criminal law is stamped throughout with liberal assumptions about “freewill” and “rationality” as measures of culpability’.³⁴ Individual responsibility is seen to be dependent on ‘the principle of capacity and a fair opportunity to act otherwise’.³⁵ The notion of individual responsibility has led to the centrality of the mental element (*mens rea*) as the basis of criminal responsibility.

1.3.5 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.³⁶ 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).³⁷ 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.

1.3.6 As discussed, criminal responsibility depends on subjective mental elements, and so it is necessary to ‘get into the mind of the accused’³⁸ 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.³⁹ In the absence of contrary evidence, the accused’s actions and words (‘the external features of the accused’s conduct’)⁴⁰ 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”’.⁴¹ 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’.⁴² 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’.⁴³ 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

1.3.7 The Crown must prove beyond reasonable doubt that the accused’s act was voluntary and intentional.⁴⁴ This means that the physical act of the accused must be the conscious product of a freely

³² Common law offences have been abolished in Tasmania (except contempt of Court: see section 10 of the *Criminal Code Act 1924*).

³³ Lacey N and Wells C, *Reconstructing Criminal Law*, 2nd ed, Butterworths, London 1998 at 39. Norrie A, *Crime, Reason and History: A Critical Introduction to Criminal Law*, Weidenfeld and Nicolson, London 1993.

³⁴ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 29.

³⁵ 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, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 147.

³⁶ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Press, Hobart 1997, 42.

³⁷ There are exceptions such as offences with a fault element of criminal negligence.

³⁸ *Peters* (1998) 151 ALR 51 at 93 per Kirby J.

³⁹ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 173. See *Peters* (1998) 151 ALR 51 at 93 per Kirby J; *Shepherd* (1990) 170 CLR 573 at 580 per Dawson J (with the concurrence of Mason CJ, Toohey and Gaudron JJ).

⁴⁰ 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.

⁴¹ Bruner J, *Acts of Meaning*, Harvard University Press, Cambridge, Mass 1990, 35.

⁴² *Parker* (1963) 111 CLR 610 at 648 per Windeyer J.

⁴³ 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.

⁴⁴ Section 13(1) and *Vallance* [1960] Tas SR 51.

operating will. It is an act that the accused was aware he or she was doing and meant to do.⁴⁵ 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'.⁴⁶

1.3.8 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'.⁴⁷

1.3.9 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.⁴⁸ 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'.⁴⁹ In Tasmania, as in some other jurisdictions,⁵⁰ a defence of automatism cannot be based on self-induced intoxication.

1.3.10 Under the *Criminal 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 *Criminal 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

1.3.11 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.⁵¹

1.3.12 Specific intention (in this context) refers to an intention or purpose to bring about a particular result.⁵² For example, section 170 of the *Criminal 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'.

1.3.13 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'.⁵³ 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 *Criminal 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 are stolen.⁵⁴

1.3.14 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 *Criminal Code*. The

⁴⁵ *Vallance* (1961) 108 CLR 56 at 64 - 65 per Kitto J and *Williams* [1978] Tas SR 98 at 102 per Neasey J.

⁴⁶ (1990) 171 CLR 30 at 40 per Mason CJ, Brennan and McHugh JJ.

⁴⁷ This summary is taken from Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 222.

⁴⁸ *R v Falconer* (1990) 171 CLR 30, *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, *William v The Queen* [1978] Tas SR 98.

⁴⁹ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 225.

⁵⁰ This is the position under Commonwealth law in Australia (see discussion at 3.3.3 and 6.3.4(3)) and in Canada (see discussion at 5.4.1).

⁵¹ Sometimes offences use the concept of criminal negligence, for example manslaughter and causing death by dangerous driving. This is an objective test.

⁵² This is called 'specific intent'. See discussion below.

⁵³ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 179.

⁵⁴ *R v Martin*, unreported Serial 58/1980, Supreme Court of Tasmania.

mental element is that the offender knew that their act or omission was likely to cause death in the circumstances.⁵⁵

1.3.15 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 *Criminal Code* is that the accused foresaw the likelihood of causing the wound as a possible consequence of their act.⁵⁶ 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.⁵⁷

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*⁵⁸ (*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.

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. These include:

- Option 1 – Allow evidence of self-induced intoxication to be relevant only to specific intention. This is to reaffirm the previously recognised *Criminal 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 *Criminal Code Act 1995* (Cth) section 8 position;
- Option 4 – Allow evidence of self-induced intoxication to be relevant to intention, knowledge, subjective recklessness and voluntariness. 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.

⁵⁵ 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 3.1.12.

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

⁵⁷ *Standish* (1991) 60 A Crim R 364, per Zeeman J.

⁵⁸ (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.⁵⁹ 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.⁶⁰

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’.⁶¹

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’.⁶²

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 hero’s [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.⁶³

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

⁵⁹ Australian Institute of Health and Welfare, *2001 National Drug Strategy Household Survey: detailed findings*, AIHW, Canberra 2002 (here after AIHW 2001 Drugs Survey), at xx.

⁶⁰ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), xiv.

⁶¹ 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.

⁶² AIHW 2001 Drugs Survey.

⁶³ *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.

and over for the regular use by an adult' (81.4% of males and 68% of females).⁶⁴ Respondents were also asked to 'name the first two drugs they thought of when talking of a "drug problem"'.⁶⁵ 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).⁶⁶

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).⁶⁷ In 2001, 37.7% of Australians aged 14 and over had used an illicit drug in their lifetime.⁶⁸ 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.⁶⁹ In their lifetime, about one-third of the Australian population have used marijuana/cannabis.⁷⁰ 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%).⁷¹

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.⁷² 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'.⁷³

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 'drug problem' (50.6% of males, 49.6% of females).⁷⁴ 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).⁷⁵ Regular heroin use was approved of by only 1.5% of males and 0.6% of females.

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.⁷⁶ However, it is useful to place the discussion of

⁶⁴ AIHW 2001 Drugs Survey, 8.

⁶⁵ AIHW 2001 Drugs Survey, 3.

⁶⁶ AIHW 2001 Drugs Survey, 5.

⁶⁷ AIHW 2001 Drugs Survey, xxi.

⁶⁸ AIHW 2001 Drugs Survey, 36.

⁶⁹ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), xiv.

⁷⁰ AIHW 2001 Drugs Survey, 45.

⁷¹ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), 16.

⁷² AIHW 2001 Drugs Survey, 8.

⁷³ Makkai T, 'Drug Trends and Policies' in Chappell D and Wilson P (eds), *Crime and the Criminal Justice in Australia: 2000 and Beyond*, 63.

⁷⁴ AIHW 2001 Drugs Survey, 3.

⁷⁵ AIHW 2001 Drugs Survey, 5.

⁷⁶ 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.

intoxication and criminal responsibility in a broader context and to observe that 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.

2.3.3 Table 1: Proportion of male prisoners (a) who used alcohol and/ or illicit drugs at time of offence (b) by type of offence, Australia 2001.⁷⁷

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.

2.3.4 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'.⁷⁸ 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.⁷⁹ 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'.⁸⁰

2.3.5 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.⁸¹

2.3.6 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'.⁸² These are summarised:

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,

⁷⁷ 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.

⁷⁸ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), 75.

⁷⁹ 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.

⁸⁰ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), 75.

⁸¹ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2002*, AIHW (Drug Statistics Series no. 12), 78.

⁸² Weatherburn D, 'What Causes Crime?', *Crime and Justice Bulletin Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research, 2001 at 5.

criminal assaults tend to cluster around licensed premises. Fourthly, areas with high rates of alcohol consumption tend to have high rates of violence.⁸³

2.3.7 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’.⁸⁴

2.3.8 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.⁸⁵ 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.⁸⁶

2.3.9 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’.⁸⁷

- 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.⁸⁸

2.3.10 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 sexually assaultive, and are more likely to be violent outside the home than abusers without a history of substance abuse.⁸⁹

2.3.11 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’.⁹⁰

2.3.12 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.⁹¹

2.3.13 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’.⁹² The NSW Summit on Alcohol Abuse 2003 reported that ‘research indicates that almost 80% of domestic violence and

⁸³ Weatherburn D, ‘What Causes Crime?’, *Crime and Justice Bulletin Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research, 2001 at 5 (references omitted).

⁸⁴ Tomsen S, ‘A Top Night: Social Protest, Masculinity and the Culture of Drinking Violence’ (1997) 37 *British Journal of Criminology* 90 at 100.

⁸⁵ 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.

⁸⁶ Mouzos J, *Homicide in Australia 1999 – 2000*, AIC, Canberra 2000, 5.

⁸⁷ AIHW 2001 Drugs Survey, 84.

⁸⁸ AIHW 2001 Drugs Survey, 84 – 85.

⁸⁹ 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 & Bacon, MA 1997.

⁹⁰ 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.

⁹¹ Heenan M and McKelvie H, *Crimes (Rape) Act 1991: An Evaluation Report*, 1997, 32.

⁹² at 73, 5.21

street incidents (assaults, offensive behaviour or conduct, malicious damage and noise complaints) are alcohol-related'.⁹³

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.⁹⁴ 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*.⁹⁵ 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.⁹⁶

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 hallucinogens.⁹⁷ 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',⁹⁸ 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).⁹⁹

2.4.3 This means that '[i]t is impossible to accurately predict the impact of drugs and alcohol upon individuals'.¹⁰⁰ 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

⁹³ NSW Summit on Alcohol Abuse 2003 Interim Report, NSW Government, 2003, 3.

⁹⁴ Rajaratnam S, et al, 'Intoxication and Criminal Behaviour' (2000) 7 *Psychiatry, Psychology and Law* 59 at 59 – 60. See Room R, 'Drinking, violence, gender and causal attribution: a Canadian case study in science, law and policy' (1996) 23 *Contemporary Drug Problems* 649 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'.

⁹⁵ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, 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.

⁹⁶ Rajaratnam S et al, 'Intoxication and Criminal Behaviour' (2000) 7 *Psychiatry, Psychology and Law* 59 (hereafter 'Rajaratnam').

⁹⁷ Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 1 – 2.

⁹⁸ Rajaratnam, at 65.

⁹⁹ This list is taken from Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 2 – 3 and Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 5.13.

¹⁰⁰ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999 (hereafter 'VLRC 1999'), para 5.14.

circumstances, the assessment is ‘a post-event analysis of a person’s mental state and behaviour, with corroborative evidence from witnesses’.¹⁰¹

Central Nervous System Depressants

2.4.4 Depressants are ‘drugs that slow down the functions of the central nervous system’.¹⁰² 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).¹⁰³

2.4.5 Alcohol has the effect of suppressing the normal inhibitory processes in the brain.¹⁰⁴ Alcohol use is associated with feelings of ‘euphoria, changes in mood and increasing sensory impairment’.¹⁰⁵ It also ‘impairs a range of behaviours and skills, including reaction time, memory, and the capacity to divide and sustain attention’.¹⁰⁶ 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’.¹⁰⁷ Alcohol affects the memory and so ‘individuals who have consumed it are often unaware of their behaviour’.¹⁰⁸ Some users of alcohol may experience blackouts where there is memory loss of events that occurred while intoxicated.¹⁰⁹ However, during this time a person ‘may still be conscious and able to carry out complex tasks’.¹¹⁰ Alcohol blackout alone is not sufficient to raise a reasonable doubt that a person’s actions were voluntary and intentional.¹¹¹

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

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.¹¹²

Cannabis is not typically associated with violent behaviour.¹¹³ However, ‘when cannabis is used in conjunction with other drugs, such as the hallucinogen PCP, violent behaviour may be triggered in some users’.¹¹⁴

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’.¹¹⁵ These drugs are not usually ‘associated with violent behaviours. However, increased violent behaviour may occur during withdrawal from opiates’.¹¹⁶

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’.¹¹⁷ There has been research that shows that occasionally benzodiazepines may induce violent behaviour – ‘even in normally non-violent people’.¹¹⁸ It appears that ‘people with a history of aggressive behaviour may once again show

¹⁰¹ VLRC 1999, para 5.14.

¹⁰² Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 1.

¹⁰³ Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 1.

¹⁰⁴ VLRC 1999, para 5.4 and Rajaratnam, at 61.

¹⁰⁵ Rajaratnam, at 62.

¹⁰⁶ Rajaratnam, at 62.

¹⁰⁷ Rajaratnam, at 62.

¹⁰⁸ VLRC 1999, para 5.4.

¹⁰⁹ Rajaratnam, at 62.

¹¹⁰ VLRC 1999, para 5.4.

¹¹¹ *R v O'Connor* (1980) 146 CLR 64 at 72 per Barwick CJ. See further discussion in Part 6 Option 4.

¹¹² Rajaratnam, at 63.

¹¹³ Rajaratnam, at 63.

¹¹⁴ Rajaratnam, at 64.

¹¹⁵ VLRC 1999, para 5.9.

¹¹⁶ Rajaratnam, at 63.

¹¹⁷ Rajaratnam, at 62.

¹¹⁸ VLRC 1999, para 5.6.

such behaviour under the influence' of benzodiazepines.¹¹⁹ It has been suggested that 'very high doses may induce a toxic psychosis, which includes visual and auditory hallucinations and paranoid delusions'.¹²⁰ 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'.¹²¹

Central Nervous System Stimulants

2.4.9 Stimulants 'act on the central nervous system to speed up messages to and from the brain'.¹²² Examples of stimulants include amphetamines and cocaine.¹²³

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'.¹²⁴ There are also reports of suicidal and homicidal tendencies.¹²⁵

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'.¹²⁶ 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.¹²⁷ 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'.¹²⁸ There is a case example where an accused had taken LSD and was convicted of manslaughter rather than murder. In *R v Lipman*,¹²⁹ 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'.¹³⁰

2.4.13 The usual effects of PCP include 'feelings of euphoria, decreased inhibitions, feelings of power, increased pain threshold and perceptual distortions'.¹³¹ 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'.¹³² High doses of PCP may induce extreme reactions, including 'hypertension, severe psychotic reactions similar to schizophrenia and unconsciousness for up to days'.¹³³ There have been reports of violent behaviour following acute and chronic PCP use.¹³⁴

2.4.14 Ecstasy (MDMA) is associated with euphoria and improved self-esteem.¹³⁵ Other effects include 'visual hallucinations, agitation, panic attacks, depression and the feeling of "reliving" past memories, which

¹¹⁹ Rajaratnam, at 62.

¹²⁰ VLRC 1999, para 5.7.

¹²¹ VLRC 1999, para 5.7.

¹²² Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 2.

¹²³ Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 2.

¹²⁴ Rajaratnam, at 63.

¹²⁵ Rajaratnam, at 63.

¹²⁶ Drug Info Clearinghouse, *Fact sheet for workers: Drugs and their effects*, April 2003, 2.

¹²⁷ VLRC 1999, para 5.11 and Rajaratnam, at 64.

¹²⁸ Rajaratnam, at 64.

¹²⁹ (1970) 1 QB 152.

¹³⁰ (1970) 1 QB 152 at 155.

¹³¹ Rajaratnam, at 64.

¹³² Rajaratnam, at 64.

¹³³ Rajaratnam, at 64.

¹³⁴ Rajaratnam, at 64.

¹³⁵ Rajaratnam, at 64.

may be painful or frightening'.¹³⁶ There is also evidence that the 'residual effects of MDMA usage include rage reactions and psychosis'.¹³⁷

Anabolic steroids

2.4.15 There is evidence that anabolic steroid users 'often experience an increase in violent or aggressive behaviour'.¹³⁸ This has been reported to affect up to 90 per cent of users.¹³⁹

¹³⁶ Rajaratnam, at 64 – 65.

¹³⁷ Rajaratnam, at 65.

¹³⁸ VLRC 1999, para 5.12.

¹³⁹ VLRC 1999, para 5.12 and Rajaratnam, at 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,¹⁴⁰ a summary offence that does not have a parallel offence or a Commonwealth offence.

3.1 Crimes and Summary Offences with a Code parallel

The principles of criminal responsibility that apply to crimes and summary offences with Code parallels are those contained in the *Criminal Code*.¹⁴¹ 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 *Criminal 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;¹⁴²
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.

1. Section 17 of the Criminal Code

3.1.1 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.¹⁴³ As discussed in the Introduction, Lord Birkenhead in *DPP v Beard*¹⁴⁴ 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.

Insanity

3.1.2 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:

¹⁴⁰ 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.

¹⁴¹ Section 36 *Acts Interpretation Act 1931*(Tas).

¹⁴² (1998) 7 Tas R 293. This is discussed in detailed below.

¹⁴³ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Press, Hobart 1997, 249 – 252.

¹⁴⁴[1920] AC 479.

- 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)).

3.1.3 Such a case may arise where intoxication has caused ‘physical deterioration of the brain and the onset of disease in the conventional sense’,¹⁴⁵ for example delirium tremens¹⁴⁶ or alcoholic paranoid psychosis.¹⁴⁷ In their text, Blackwood and Warner refer to the case of *Palmer*¹⁴⁸ as an example of an attempt to rely on section 17(1) of the *Criminal 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).¹⁴⁹

3.1.4 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’.¹⁵⁰

Incapacity

3.1.5 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’,¹⁵¹ 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*.¹⁵² 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’.¹⁵³ It is ‘not an “under the influence” provision or a “drink taken” provision but a “blind drunk” provision’.¹⁵⁴

3.1.6 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

¹⁴⁵ *Laws of Australia*, CRIMINAL LAW PRINCIPLES 9.3 at [155].

¹⁴⁶ *Davis* (1881) 14 Cox CC 563.

¹⁴⁷ *Reilly*, unreported Supreme Court of Tasmania No 62/1979.

¹⁴⁸ [1985] Tas R 138.

¹⁴⁹ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Press, Hobart 1997, 302.

¹⁵⁰ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Press, Hobart 1997, 302.

¹⁵¹ *Snow* [1962] TAS SR 271 at 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.

¹⁵² 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 4.2.20.

¹⁵³ [1962] Tas R 271 at 282.

¹⁵⁴ *Palmer v The Queen* [1985] Tas R 128 at 146.

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*.¹⁵⁵

A clear line of Tasmanian authority followed *Snow*¹⁵⁶ and held that that section 17(2) and (3) of the *Criminal Code* covered the field as to the exculpatory effect of voluntary intoxication (*Martin*,¹⁵⁷ *Arnol*,¹⁵⁸ *Palmer*¹⁵⁹ and *Bennett*¹⁶⁰). In other words, evidence of intoxication was only admissible in cases requiring a specific intent and it was not admissible in all other cases.

In *Weiderman's* case,¹⁶¹ 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.¹⁶²

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

3.1.7 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. It was the Crown case 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.

3.1.8 Weiderman was charged with murder and the Crown relied on three of the possible bases for murder contained in section 157 of the *Criminal 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)).

3.1.9 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 *Criminal Code*,¹⁶³ and also to whether he had the actual or imputed knowledge specified in section 157(1)(c) of the *Criminal Code*.¹⁶⁴

3.1.10 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.

3.1.11 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.

¹⁵⁵ [1962] Tas R 271 at 283.

¹⁵⁶ [1962] Tas SR 271.

¹⁵⁷ [1979] Tas R 211.

¹⁵⁸ [1980] Tas R 222.

¹⁵⁹ [1985] Tas R 138.

¹⁶⁰ [1990] Tas R 71.

¹⁶¹ (1998) 7 Tas R 293.

¹⁶² *Zeeman, Wright and Crawford JJ*. Note also that *Underwood J* accepts that section 17 covers the field only in regard to consequence crimes.

¹⁶³ See *R v Hawkins* (1994) 179 CLR 500.

¹⁶⁴ See *R v Hawkins (No 3)* (1994) 4 Tas R 376.

3.1.12 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).

The Court of Criminal Appeal also accepted that intoxication was relevant to the crime of receiving stolen property contained in section 258 of the *Criminal Code* in regard to the issue of whether the defendant knew the goods were stolen.¹⁶⁵

Actual knowledge and intoxication

3.1.13 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*¹⁶⁶ and *Majewski*.¹⁶⁷ This is the policy the Tasmanian Parliament intended to enact’.¹⁶⁸

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’.¹⁶⁹

3.1.14 In contrast, the majority explicitly rejected the basic rationale of *Snow*¹⁷⁰ 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’.¹⁷¹ 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 *Criminal 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

3.1.15 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’.¹⁷² 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,

¹⁶⁵ 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.

¹⁶⁶ [1920] AC 479.

¹⁶⁷ (1977) AC 443.

¹⁶⁸ (1998) 7 Tas R 293 at 310 – 311 per Underwood J.

¹⁶⁹ *R v Majewski* [1977] AC 443 at 465 per the Lord Chancellor. The policy basis for the distinction between specific and basic intent crimes is discussed in Parts 5 and 6.

¹⁷⁰ [1962] Tas R 271.

¹⁷¹ (1998) 7 Tas R 293 at 323.

¹⁷² *Boughey v The Queen* (1986) 161 CLR 10 at 28 per Mason, Wilson and Deane JJ.

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'.¹⁷³

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.

3.1.16 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*¹⁷⁴ to find that Parliament has incorporated 'an objective standard of sobriety' into the test of whether the accused ought to have known.¹⁷⁵ 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.

3.1.17 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.¹⁷⁶

Crawford J also drew support for his conclusion from the decision of the Court of Criminal Appeal in *Hawkins (No 3)*,¹⁷⁷ that evidence of a mental disease was relevant to the existence of imputed knowledge.

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.¹⁷⁸ 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.¹⁷⁹

Summary

3.1.18 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 Criminal 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.

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.

¹⁷³ *Boughey v The Queen* (1986) 161 CLR 10 at 29 per Mason, Wilson and Deane JJ.

¹⁷⁴ (1986) 161 CLR 10 at 29 at 45.

¹⁷⁵ See Cox CJ at 302 – 304, Underwood J at 313, Wright J at 318 – 319.

¹⁷⁶ (1998) 7 Tas R 293 at 325.

¹⁷⁷ (1994) 4 Tas R 376.

¹⁷⁸ (1998) 7 Tas R 293 at 337.

¹⁷⁹ (1998) 7 Tas R 293 at 337.

3. Involuntary Intoxication

3.1.19 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’.¹⁸⁰

3.1.20 The treatment of evidence of involuntary intoxication under the *Criminal Code* has not been authoritatively decided. A distinction does not appear to be made in section 17 of the *Criminal 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 *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.¹⁸¹ 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*).

3.1.21 In the United Kingdom, the House of Lords in *Kingston*¹⁸² 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).¹⁸³

3.1.22 The difficulties that may exist with recourse to a common law defence via section 8 of the *Criminal 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.¹⁸⁴

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.

3.1.23 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?¹⁸⁵ 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.¹⁸⁶

¹⁸⁰ O’Connor D and Fairall P, *Criminal Defences*, Butterworths, Australia 1996, [12.27].

¹⁸¹ [1962] Tas SR 271 at 278.

¹⁸² [1994] 3 WLR 514.

¹⁸³ See Ashworth A, *The Principles of Criminal Law*, Oxford University Press, Oxford 1999, 224 – 225.

¹⁸⁴ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Press, Hobart 1997, 302 – 303.

¹⁸⁵ As discussed above, this is the position in the United Kingdom where involuntary intoxication is an exception to the *Majewski* principle.

¹⁸⁶ 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 below in Part 5.

3.1.24 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.¹⁸⁷

4. Intoxication and other defences

Mistake

3.1.25 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 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.

3.1.26 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.¹⁸⁸ 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.¹⁸⁹

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.

3.1.27 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.¹⁹⁰ 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 *Weideman*, 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).

3.1.28 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 *Criminal 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;

¹⁸⁷ See discussion at 3.2.

¹⁸⁸ See *McCullough v The Queen* [1982] Tas R 43 at 53 per Green CJ, Neasey and Everett JJ in relation to self-defence.

¹⁸⁹ [1982] Tas R 43 at 53.

¹⁹⁰ Code s 157(1)(a).

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’.¹⁹¹

3.1.29 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.¹⁹² 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, the jury is not to have regard to any evidence of an accused’s self-induced intoxication.¹⁹³ 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.¹⁹⁴

3.1.30 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.¹⁹⁵ 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.¹⁹⁶

Claim of right

3.1.31 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 *Criminal 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.¹⁹⁷ A claim of right is relevant to the offences in Chapter XXXI of the *Criminal Code* headed ‘Arson and other Unlawful Injuries to Property’.¹⁹⁸ 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.

3.1.32 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.¹⁹⁹ This principle would also appear relevant to claim of right.²⁰⁰

¹⁹¹ House of Assembly Tasmania, *Hansard*, Wednesday 3 December 2003, 27 – 96.

¹⁹² Victorian Law Reform Commission, *Sexual Offences Final Report*, 2004, 431 – 439.

¹⁹³ Victorian Law Reform Commission, *Sexual Offences Final Report*, 2004, 422.

¹⁹⁴ Victorian Law Reform Commission, *Sexual Offences Final Report*, 2004, 435.

¹⁹⁵ Victorian Law Reform Commission, *Sexual Offences Final Report*, 2004, 427, footnote 1120.

¹⁹⁶ Victorian Law Reform Commission, *Sexual Offences Final Report*, 2004, 421-422.

¹⁹⁷ *Walden v Hensler* (1987) 29 A Crim R 85; *Lopatta* (1983) 35 SASR 101 at 107 per White J and at 121 per Legoe J.

¹⁹⁸ See section 267(3) *Criminal Code*.

¹⁹⁹ [1982] Tas R 43 at 53.

²⁰⁰ 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.

Self-defence

3.1.33 Section 46 of the *Criminal 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.²⁰¹

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.

3.1.34 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.

3.1.35 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*,²⁰² decided under the old provision, 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).²⁰³ 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.²⁰⁴

Therefore, an accused could now rely on a mistaken belief caused by intoxication. This would be in accordance with the position in *McCulloch v The Queen*.²⁰⁵

3.1.36 On the other hand, it could be argued that *McCulloch* was wrong on this point (because at that time it was accepted that section 17 covered the field). Further, in 1987 when the requirement that the belief be

²⁰¹ *Walsh* (1991) 60 A Crim R 419 at 423 per Slicer J.

²⁰² [1982] Tas R 43.

²⁰³ [1982] Tas R 43 at 53.

²⁰⁴ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Press, Hobart 1997, 330.

²⁰⁵ [1982] Tas R 43.

“reasonable” was removed, because it was the accepted view that section 17 covered the field in relation to intoxication under the Code, 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.²⁰⁶

3.1.37 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, 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.²⁰⁷ 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.

3.1.38 However, the power of policy grounds cannot be disregarded when it comes to the issue 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 the nature of the threat faced. In *R v O’Grady*,²⁰⁸ 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. O’Grady 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’.²⁰⁹

3.1.39 Although the decision in *O’Grady* ‘has been trenchantly criticised as abandoning consistency and logic’²¹⁰ it has been followed by the UK Court of Appeal in *O’Connor*,²¹¹ 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 *Wiederman* regarding the possibility that intoxication might be relevant to self defence –²¹²

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.

3.1.40 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

²⁰⁶ Attorney-General (Mr Bennett), Tasmania, House of Assembly, *Parliamentary Debates (Hansard)*, Vol IX, No 2, 8/4/1987, at 1247.

²⁰⁷ Section 46 is based on s 48 of the NZ Crim Code. In New Zealand intoxication appears to be relevant to whether the accused had a drunken mistake in the need for self defence (*R v Boardman* [2003] NZCA 247) however this would probably be the case regardless, because New Zealand has the broad com law/*O’Connor* position in regards to intoxication generally.

²⁰⁸ [1987] 3 WLR 321.

²⁰⁹ [1987] 3 WLR 321 at 326.

²¹⁰ *Conlon* (1993) 69 A Crim R 92, per Hunt CJ at 100.

²¹¹ [1991] Crim LR 135.

²¹² (1998) 7 Tas R 293, at 302.

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.

3.1.41 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 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 *Criminal Code*.²¹³ 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*.²¹⁴ 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.²¹⁵

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*²¹⁶ 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'.²¹⁷

²¹³ Section 4(3) *Criminal Code Act 1924* and *Gow v Davies* (1992) 1 Tas R 1.

²¹⁴ (1980) 146 CLR 64.

²¹⁵ See Barwick CJ at 87 – 88, Stephen J at 105, Murphy J at 113 – 114 and Aickin J at 125 – 126.

²¹⁶ [1977] AC 443.

²¹⁷ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999. See also Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 240 - 241.

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.²¹⁸

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

Prior the commencement of the *Criminal Code Act 1995* (Cth), the common law position applied to Commonwealth offences.²¹⁹

3.3.1 In its consideration of general principles of criminal responsibility, the Criminal Law Officers Committee recommended that the principles in *R v O'Connor*²²⁰ 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.²²¹

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'.²²²

However, this recommendation was not followed when the *Criminal Code Act 1995* (Cth) 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.²²³

3.3.2 By way of background to the intoxication provisions of the *Criminal Code Act 1995* (Cth), 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.²²⁴ In addition, under the *Code*, an important distinction is made between *conduct* and *circumstances* or *results*.²²⁵ Criminal liability is dependent on proof of proscribed conduct (an act, omission or state of affairs). In some offences, 'the fault element for the conduct elements of the offence will be specified'.²²⁶ For example, section 270.3 provides

²¹⁸ (1980) 146 CLR 64 at 110. See also Gibbs J at 93 and Wilson J at 133 – 134.

²¹⁹ 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).

²²⁰ (1980) 146 CLR 64.

²²¹ Criminal Law Officers Committee of the Standing Committee of Attorney-General's, *Chapter 2: General Principles of Criminal Responsibility Final Report*, 1992, 17.

²²² Criminal Law Officers Committee of the Standing Committee of Attorney-General's, *Chapter 2: General Principles of Criminal Responsibility Discussion Draft*, 1992, 45.

²²³ Mr Duncan Kerr, Australian Minister for Justice, House of Representatives, *Debates*, 1 March 1995, 1333 – 1334.

²²⁴ Section 5.1(1). This discussion of the operation of the *Criminal Code Act 1995* (Cth) draws heavily on Leader-Elliott I, *The Commonwealth Criminal Code A Guide for Practitioners*, Commonwealth Attorney-General's Department, 2002.

²²⁵ See Leader-Elliott I, *The Commonwealth Criminal Code A Guide for Practitioners*, Commonwealth Attorney-General's Department, 2002 (here after 'Leader-Elliott, 2002'), 49 – 53.

²²⁶ Leader-Elliott, 2002, 147.

that a person who ‘intentionally ... possessed a slave’ is guilty of the offence of slavery. Often ‘the fault elements for conduct are not specified’²²⁷ and in these circumstances the Crown must prove that the ‘act, omission or state of affairs was intentional’.²²⁸ Usually, the Crown will also be required to prove additional circumstances or results to constitute the offence.²²⁹ 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]’.²³⁰

3.3.3 The *Criminal Code Act 1995* (Cth) ‘imposes relatively few limits on the purposes for which prosecution and defence may rely on evidence of intoxication’.²³¹ 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.²³² Section 4.2(6) provides that ‘evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary’.²³³ This means ‘evidence in support of a plea of involuntariness must be consistent with ... sobriety’.²³⁴ 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’.²³⁵ The offence is ‘a “physical element that consists only of conduct”’²³⁶ and so evidence of intoxication would not be admissible.

3.3.4 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.²³⁷ This can be illustrated by way of an example. Section 71.8 of the *Code* provides for the offence of unlawful sexual penetration with a 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).²³⁸ 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).

3.3.5 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’.²³⁹ Section 8.1(3) allows evidence of self-induced intoxication to be taken into account in determining whether conduct is accidental.²⁴⁰ This means that if an

²²⁷ Leader-Elliott, 2002, 147.

²²⁸ Section 5.6(1) discussed in Leader-Elliott I, *The Commonwealth Criminal Code A Guide for Practitioners*, Commonwealth Attorney-General’s Department, 2002, 147

²²⁹ Leader-Elliott, 2002, 145 – 147.

²³⁰ Leader-Elliott, 2002, 147.

²³¹ Leader-Elliott, 2002, 137.

²³² Section 8.2(1).

²³³ Section 4.2(6).

²³⁴ Leader-Elliott, 2002, 39.

²³⁵ Leader-Elliott, 2002, 165.

²³⁶ L Leader-Elliott, 2002.

²³⁷ Leader-Elliott, 2002, 145.

²³⁸ 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.

²³⁹ Leader-Elliott, 2002, 151.

²⁴⁰ Section 8.2(3). See commentary in Leader-Elliott, 2002, 151- 153.

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’.²⁴¹ 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’.²⁴²

3.3.6 Section 8.4 of the *Criminal Code Act 1995* (Cth) sets out the relevance of evidence of intoxication to the defences available under the *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.²⁴³ 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.²⁴⁴ However, as the defence will fail if a mistake is not also reasonable, it is unlikely that the defence will succeed.²⁴⁵

3.3.7 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.²⁴⁶ 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’.²⁴⁷

3.3.8 The *Criminal Code Act 1995* (Cth) contains a defence of involuntary intoxication for which there is not a corresponding common law defence.²⁴⁸ 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’.²⁴⁹ 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’.²⁵⁰ The defendant bears the evidentiary burden for the defence of involuntary intoxication.²⁵¹

It is noted that under the *Criminal Code Act 1995* (Cth), the provisions limiting the use of evidence of intoxication apply equally to the defence and the prosecution.²⁵²

²⁴¹ 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*.

²⁴² Leader-Elliott, 2002, 151 - 153

²⁴³ Leader-Elliott, 2002, 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).

²⁴⁴ Section 8.2(4). See commentary in Leader-Elliott, 2002, 153.

²⁴⁵ See commentary in Leader-Elliott, 2002, 153.

²⁴⁶ See Leader-Elliott, 2002, 161 – 163.

²⁴⁷ Section 8.4(4).

²⁴⁸ See commentary in Leader-Elliott, 2002, 167 – 169.

²⁴⁹ Section 8.1. See commentary in Leader-Elliott, 2002, 139 – 141.

²⁵⁰ Leader-Elliott, 2002, 167.

²⁵¹ Section 13.3.

²⁵² See Leader-Elliott, 2002, 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 (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* case²⁵³ dealt with the relevance of intoxication to knowledge, the implications of rejecting the 'cover the field' interpretation of section 17 of the *Criminal 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).²⁵⁴ 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.²⁵⁵

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 statement which allows this and it is by no means clear that all judges invariably so instruct juries. Moreover, it is unsatisfactory that the *Criminal Code* appears to say one thing on its face, but is interpreted by the courts as saying something else.

²⁵³ (1998) 7 Tas R 293.

²⁵⁴ 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.

²⁵⁵ 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, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995, 58; discussed below, see 5.2.5 - 5.2.6.

4.1.4 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.²⁵⁶ 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 the 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*

4.1.5 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 *Criminal 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*

4.1.6 A further uncertainty is the relationship between the law of intoxication and other defences.²⁵⁷ 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'.²⁵⁸ It would be desirable to clarify this relationship.

4.2 (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 *Criminal 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)*²⁵⁹ 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.

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

²⁵⁶ *Wilkinson* Unreported Serial No 43/1985; *Vallance* [1960] Tas SR 51 per Nettlefold J.

²⁵⁷ See discussion above at 3.1.25.

²⁵⁸ Brown D et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, The Federation Press, 2001, 678.

²⁵⁹ (1994) 4 Tas R 376

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 *Criminal 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.²⁶⁰ This division has been the source of sustained criticism.²⁶¹ 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.²⁶² 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'.²⁶³

4.2.6 In Tasmania, for example, in the case of rape, an accused cannot rely on evidence of intoxication to negate the mental element for rape because it is a basic intent crime. However, if the accused is charged with attempted rape, then evidence of intoxication can be taken into account to determine whether the accused had the requisite mental element.²⁶⁴ 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'.²⁶⁵

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.²⁶⁶ 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),²⁶⁷ and (2) not all 'specific' intent crimes have a lesser alternative.²⁶⁸

²⁶⁰ Horder J, 'Sobering Up? The Law Commission on Criminal Intoxication' (1995) 58 *Modern Law Review* 534.

²⁶¹ See for example, Quigley T, 'Specific and General Nonsense' (1987) 11 *Dalhousie Law Journal* 75. see also discussion below in Part 6 Option 1.

²⁶² See Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 247.

²⁶³ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 247.

²⁶⁴ Although, see below for discussion of mental element of attempted rape.

²⁶⁵ (1980) 146 CLR 64 at 102.

²⁶⁶ See *R v O'Connor* (1980) 146 CLR 64 at 101 – 102 per Stephens J. See also Victorian Law Reform Committee, Criminal Liability for Self-Induced Intoxication Report. Government Printer, Melbourne 1999, 6.6, New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, 1984, 33.

²⁶⁷ 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.

²⁶⁸ See *R v O'Connor* (1980) 146 CLR 64 at 101 – 102 per Stephen J. See also New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, 1984, 33, Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication Report* 6, November 1986, para 33.

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’.²⁶⁹

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*²⁷⁰ 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 *Criminal 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 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 *Criminal Code* provides no defence. 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.²⁷¹

²⁶⁹ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 102 – 103.

²⁷⁰ [1985] Tas R 75.

²⁷¹ This point is made by Smith & 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 & Hogan Criminal Law*, Butterworths Lexis Nexis, 2002 at 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,

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.²⁷² 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"'.²⁷³ 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.²⁷⁴

4.2.15 This ad hoc classification method means that there are offences for which uncertainty exists about whether they are classified as crimes of basic or specific intent. For example, the mental element for attempted rape is unclear and so its classification as a crime of basic or specific intent is similarly uncertain. An attempt is generally considered a crime of specific intent, as the mental element is an intention to commit the requisite offence. For example, the mental element for attempted murder is an intention to kill.²⁷⁵ However, 'the position is less clear regarding attempted crimes where the physical element requires conduct to be performed in specified circumstances'.²⁷⁶ Bronitt and McSherry pose the following questions:

For attempted rape, does the fault element have to have an intention to sexually penetrate another *knowing* that the other person is not consenting? Alternatively, is it sufficient that the accused intend to sexually penetrate another being *reckless* as to whether the other person is consenting or not?²⁷⁷

4.2.16 As discussed in the Introduction, rape is sexual intercourse (conduct), which occurs without the other person's consent (specified circumstances). In these circumstances, it is possible that a fault element lower than a specific intention to commit the act of sexual intercourse without consent may be sufficient for the attempt.

4.2.17 In *R v Bell*, Neasey J considered that for attempted rape under the *Criminal Code* the Crown had to prove that the accused was aware of non-consent or else realised that there might not be consent and determined to have intercourse whether there was consent or not.²⁷⁸ In the South Australian case of *R v Evans*, the Court of Appeal held that the mental element for attempted rape is an intention to have sexual intercourse knowing that the victim does not consent or with reckless indifference as to consent. It was not necessary to prove that the accused intended to have sexual intercourse without consent but was sufficient to prove reckless indifference as to consent.²⁷⁹ In his judgment, King CJ made a distinction between result crimes and crimes involving circumstances. His Honour commented that:

The state of facts, the existence of which renders the act of sexual penetration criminal, is the non-consent of the person penetrated. The mental state of the accused in relation to that state of facts, required by the definition of the crime ... includes reckless indifference to its existence. There cannot be an attempt to commit a crime involving particular consequences where those consequences are not intended, because the notion of unintended consequences is inconsistent with the notion of attempt to bring about those consequences. That reasoning does not apply, however, to an accused's state of mind as to the existence of circumstances which render an act criminal.²⁸⁰

while the general principles were unintelligible, authority decided the classification of the offence. If there was not authority, one waited for it', Attorney-General's Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, at para 5.14.

²⁷² See *Crimes Act (NSW)* section 428B(2).

²⁷³ Brown D et al, *Criminal Laws Materials and Commentary on Criminal Law and Process in New South Wales*, The Federation Press, 2001, 676.

²⁷⁴ See Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, at paras 6.10 and 6.12; Tolmie J, 'Intoxication and Criminal Liability in New South Wales: A Random Patchwork?' (1999) 23 *Criminal Law Journal* 218 at 222 and Attorney-General's Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, at para 5.21.

²⁷⁵ *Catlin* [1961] Tas R 191. At common law, see the High Court decision in *Knight v The Queen* (1992) 175 CLR 495 at 501.

²⁷⁶ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 443.

²⁷⁷ Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 443.

²⁷⁸ [1972] Tas SR 147 at 131 – 132.

²⁷⁹ (1987) 48 SASR 35.

²⁸⁰ (1987) 48 SASR 35 at 41. For a critique of the case, see Goode M, 'Case and Comment' (1988) 12 *Criminal Law Journal* 109.

4.2.18 The English Court of Appeal in *Khan* also accepted that recklessness as to consent would suffice as the mental element for attempted rape.²⁸¹

4.2.19 In Tasmania, if recklessness as to consent will suffice, then applying the accepted definition of a specific intent crime, attempted rape under the *Criminal Code* would not be a crime of specific intent.²⁸²

Criticism of the emphasis on ‘incapacity’

4.2.20 A further criticism directed at section 17 of the *Criminal 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’.²⁸³

Different standards of relevance of intoxication

4.2.21 The dual source for the law of intoxication created by *Weiderman’s* case (section 17 of the *Criminal Code* and *Weiderman’s* case) also creates inconsistencies and illogicalities. Under section 17(2) of the *Criminal 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,²⁸⁴ 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.

4.2.22 This situation potentially creates a number of anomalies. First, there is the example of section 157(1)(b) of the *Criminal 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 *Criminal 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.

4.2.23 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.²⁸⁵ For example, if intoxication is relevant to subjective recklessness,²⁸⁶ this may occur in the case of wounding under sections 170 and 172 of the *Criminal 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

²⁸¹ [1990] 2 All ER 783. For further discussion of the mental element of attempted rape, see Bronitt S and McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney 2001, 443 – 444; 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, *Principles of Criminal Law 3rd ed*, Oxford University Press, Oxford 1999, 464 – 465; Williams G, ‘The Problem of Reckless Attempts’ [1983] *Criminal Law Review* 365; Buxton R, ‘Circumstances, Consequences and Attempted Rape’ [1984] *Criminal Law Review* 25.

²⁸² See definition above in Part 3.

²⁸³ Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases*, Volume 1, University of Tasmania Press, Hobart 1997, 297.

²⁸⁴ (1998) 7 Tas R 293.

²⁸⁵ See 4.2.7.

²⁸⁶ See 4.1.2.

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.²⁸⁷ 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.

4.2.24 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.

Unsatisfactory relationship between mental disease and intoxication

4.2.25 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)*²⁸⁸ 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 *Criminal 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.

4.2.26 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.²⁸⁹

4.2.27 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'.²⁹⁰ And yet, the jury would be required to separate the effect of the mental disorder and intoxication in determining the accused's criminal responsibility.

Different rules for indictable, summary and Commonwealth offences

²⁸⁷ *Vallance* (1961) 108 CLR 56, *Hodgson* [1985] Tas R 75, *Bennett* [1990] Tas R 71 and *Standish* (1991) 60 A Crim R 364.

²⁸⁸ (1994) 4 Tas R 376.

²⁸⁹ (1998) 7 Tas R 293 at 337.

²⁹⁰ (1998) 7 Tas R 293 at 329.

4.2.28 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 *Criminal Code* (section 17 of the *Criminal 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 charged with a summary offence with no *Criminal Code* parallel and one with a *Criminal 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*.

4.2.29 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 negative any mental element including voluntariness. In contrast, damage to property has a *Code* parallel (section 273 *Criminal Code*) and *Criminal 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 *Criminal Code*) and so *Criminal 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.

4.2.30 The legal situation regarding intoxication in Tasmania is further complicated by the fact the common law position on intoxication no longer applies to Commonwealth offences. Since the *Criminal Code Act 1995* (Cth) came into effect, a new set of rules applies to intoxication which differs from the rules in the Tasmanian Criminal Code and the common law as expounded in *O'Connor's case*. So as well as the dual rules under the Tasmanian Criminal Code and the common law rules, we now have the rules under the Commonwealth Criminal Code.²⁹¹

Question

Please explain the reasons for your views as fully as possible

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

²⁹¹ See Part 5, 3.3.

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.

5.1 Australia

Common law

5.1.1 The common law applies in Victoria and South Australia.²⁹² As discussed above, *R v O'Connor*²⁹³ is the leading Australian common law decision concerning intoxication and criminal responsibility. At common law, evidence of intoxication may be relied upon to negative 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.²⁹⁴

5.1.4 The majority considered that the principle of criminal responsibility that the accused's 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'.²⁹⁵

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.²⁹⁶

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 between competing considerations. As Mason J explained:

²⁹² Note that in South Australia, the *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA) makes procedural changes in relation to evidence of intoxication.

²⁹³ (1980) 146 CLR 64.

²⁹⁴ Stephen J at 104.

²⁹⁵ At 122.

²⁹⁶ 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 at 99 per Stephen J.

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'.²⁹⁷ 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 1999.²⁹⁸ 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.²⁹⁹ 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'.³⁰⁰ However, the Committee made five recommendations for procedural change:³⁰¹

- (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;
- (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.³⁰² Similarly, the Government did not accept the

²⁹⁷ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, at para 6.69.

²⁹⁸ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, (here after 'VLRC Report').

²⁹⁹ VLRC Report, recommendation 3.

³⁰⁰ VLRC Report, at para 6.84.

³⁰¹ Recommendations 4 – 9.

³⁰² Victorian Department of Justice, *Government Response to the Report of the Law Reform Committee on Criminal Liability for Self-Induced Intoxication*, Melbourne 2000 at 2 – 3.

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 Similarly in South Australia, the political disquiet associated with the common law on self-induced intoxication has seen several attempts at legislative reform³⁰³ as well as a Discussion Paper produced by the Attorney-General's Department.³⁰⁴ The legislative response was the enactment of the *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA), which preserves the principles of self-induced intoxication set out in *O'Connor* but introduces a procedural restrictions on the circumstances in which evidence of intoxication can be left for the consideration of the jury: the issue of intoxication is not to be raised unless the defendant specifically asks the judge to address the jury on the question of intoxication.³⁰⁵

Commonwealth

5.1.10 The Commonwealth position is governed by the *Criminal Code Act 1995* (Cth). 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).

5.1.12 The common law position had been controversial since the decision of the Australian Capital Territory Magistrates' Court in *Nadraku*.³⁰⁶ 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'.³⁰⁷ 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'.³⁰⁸

5.1.13 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.

5.1.14 The sections of the *Criminal Code Act 2002* (ACT) concerning the criminal responsibility of person who are intoxicated commenced on 1 January 2003 with the effect that the law dealing with intoxication and criminal responsibility in the ACT is essentially the same as the position under the *Criminal Code Act 1995* (Cth). 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.³⁰⁹ However, self-induced intoxication may be used to deny 'intent, knowledge or recklessness with respect to circumstances or

³⁰³ See *Criminal Law Consolidation (Intoxication) Amendment Bill 1996* (SA) and *Criminal Law Consolidation (Intoxication) Amendment Bill 1997* (SA). See discussion in VLRC Report, 3.35 – 3.44.

³⁰⁴ South Australia, Attorney-General's Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998.

³⁰⁵ *Criminal Law Consolidation Act 1935* (SA), section 269.

³⁰⁶ *S.C. Small v Noa Kurimalawai*, Australian Capital Territory Magistrates' Court, Matter No CC97/01904, 22 October 1997.

³⁰⁷ Magistrate Shane Madden cited in Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, 1.11.

³⁰⁸ Williams D, 'States urged to drop drunk's defence', *Press Release (Attorney-General)*, 29 October 1997.

³⁰⁹ Section 31(1) *Criminal Code 2002* (ACT).

consequences'.³¹⁰ Similarly, evidence of self-induced intoxication can be taken into account in determining whether conduct was accidental³¹¹ and in determining whether a person had a mistaken belief of fact.³¹²

5.1.15 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 (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.³¹³ Evidence of self-induced intoxication is not admissible in the case of common assault.

New South Wales

5.1.16 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.³¹⁴ 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'.³¹⁵ 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 intent³¹⁶ or for determining whether an accused's act was voluntary.³¹⁷

5.1.17 An 'offence of specific intent' is defined as 'an offence of which an intention to cause a specific result is an element'.³¹⁸ 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)) 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.³¹⁹

5.1.18 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*,³²⁰ where Paxman was convicted of manslaughter and received a sentence of three years imprisonment.³²¹ In the second reading speech, the Minister for Police commented that:

The preference for the *Majewski* approach is based on important public policy consideration. 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

³¹⁰ 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*.

³¹¹ Section 31(2) *Criminal Code 2002* (ACT).

³¹² Section 31(3) *Criminal Code 2002* (ACT).

³¹³ Section 22(1) *Criminal Code 2002* (ACT).

³¹⁴ *Crimes Act 1900* (NSW), section 428H. For a critique of Part 11A, see Tolmie J, 'Intoxication and Criminal Liability in New South Wales: A Random Patchwork?' (1999) 23 *Criminal Law Journal* 218 and Editorial, (1998) 22 *Criminal Law Journal* 137.

³¹⁵ *Crimes Act 1900* (NSW), section 428C.

³¹⁶ *Crimes Act 1900* (NSW), section 428D.

³¹⁷ *Crimes Act 1900* (NSW), section 428G.

³¹⁸ *Crimes Act 1900* (NSW), section 428B(1).

³¹⁹ D Brown, D Farrier, S Egger & L McNamara, *Criminal Laws*, 3rd edition, The Federation Press, NSW, 2001, at 677.

³²⁰ New South Wales District Court, 21/6/1995.

³²¹ See further discussion in Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, 3.16 – 3.18.

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.³²²

5.1.19 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.³²³

5.1.20 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.³²⁴

5.1.21 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 *Criminal Code Act 1995* (Cth).

Western Australia and Queensland

5.1.22 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.³²⁵

5.1.23 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.³²⁶ This means that evidence of intoxication is not admissible for the purpose of determining whether an accused's act was voluntary.

5.1.24 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.³²⁷

5.1.25 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.

³²² Mr Whelan, New South Wales Minister for Police, *New South Wales Parliamentary Debates*, Legislative Assembly, 6 December 1995.

³²³ Section 428A.

³²⁴ Section 428D(b).

³²⁵ 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.

³²⁶ [1981] Qd R 136 at 140 per Campbell J.

³²⁷ 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, *An Introduction to Criminal Law in Queensland and Western Australia 6th ed.*, LexisNexis Butterworths, Australia 2004, 161 - 163.

Northern Territory

5.1.26 The approach to intoxication in the Northern Territory *Criminal Code* is different from the Queensland and Western Australian Codes and the Tasmanian Code. There is no express provision in the Northern Territory *Criminal Code* specifying that intoxication may negate the mental element of an offence. It appears that the approach to intoxication in the Northern Territory embraces the *O'Connor* principles,³²⁸ so that the question will be ‘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’.³²⁹ 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.³³⁰ 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 be found guilty of an alternative offence in section 154 that provides for dangerous acts or omissions.³³¹

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,³³² 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;
- (2) that it is morally just to hold intoxicated offenders responsible for criminal conduct, given that they freely chose to become intoxicated.³³³

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.³³⁴

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.³³⁵ 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’.³³⁶ In fact, the Commission agreed with a leading textbook that:

³²⁸ See McSherry B and Naylor B, *Australian Criminal Laws: Critical Perspectives*, Oxford University Press, 2004, 523 and Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, 3.64 citing meeting notes with Northern Territory Attorney-General’s Department and the Office of the Director of Public Prosecutions.

³²⁹ Gray S, *Criminal Laws Northern Territory*, Federation Press, NSW 2004, 80 citing *Charlie* (1998) 7 NTLR 152 at 170 – 171 per Angel J and on appeal to the High Court in *Charlie* (1999) 199 CLR 387.

³³⁰ *Criminal Code* (NT) section 7.

³³¹ See further discussion at 6.5.6.

³³² [1977] AC 443.

³³³ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, 2.30.

³³⁴ [1977] AC 443 at 474 – 475.

³³⁵ 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, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995, 26 – 30. See also Smith J, *Smith & Hogan Criminal Law*, 10th ed, Butterworths LexisNexis, 2002, 241 – 246.

³³⁶ UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995 (here after ‘UK Law Commission, 1995’), 29.

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’.³³⁷

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.³³⁸ 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.³³⁹

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.³⁴⁰ 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’.³⁴¹ 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.³⁴²

5.2.6 The *Majewski* approach to voluntary intoxication has been the subject of several law reform projects in the United Kingdom.³⁴³ 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’.³⁴⁴ 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.³⁴⁵

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.³⁴⁶ 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.³⁴⁷

³³⁷ UK Law Commission, 1995, 29 referring to Smith J & Hogan B, *Criminal Law*, 1992, 221. This point is made above in Part 4.

³³⁸ These offences are listed (with other offences) in UK Law Commission, 1995, 29.

³³⁹ These offences are listed (with other offences) in UK Law Commission, 1995, 30.

³⁴⁰ UK Law Commission, 1995, 57.

³⁴¹ UK Law Commission, 1995, 57.

³⁴² UK Law Commission, 1995, 58.

³⁴³ See Fourteenth Report, *Offences Against the Person*, Cmnd 7844, 1980; UK Law Commission, *Intoxication and Criminal Liability*, Consultation Paper no 127, 1993; UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995; UK Home Office, *Violence: Reforming the Offences Against the Persons Act 1861*, The Stationary Office, London 1998.

³⁴⁴ UK Law Commission, 1995, 55.

³⁴⁵ UK Law Commission, 1995, 64.

³⁴⁶ Law Commission UK, *Intoxication and Criminal Responsibility*, Consultation Paper No 127, 1993.

³⁴⁷ See UK Law Commission, 1995, 45 – 48.

5.2.8 In 1998, the United Kingdom Home Office released a consultation paper concerning non-fatal offences against the person.³⁴⁸ 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.³⁴⁹ 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’.³⁵⁰

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.

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.³⁵¹ Reckless in this context means ‘that 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’.³⁵²

5.2.11 As discussed above, the *Majewski* approach does not apply to involuntary intoxication.³⁵³ 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.³⁵⁴

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*.³⁵⁵ 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’.³⁵⁶ 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’.³⁵⁷

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.³⁵⁸

³⁴⁸ UK Home Office, *Violence: Reforming the Offences Against the Person Act 1861*, The Stationary Office, London, 1998.

³⁴⁹ UK Home Office, *Violence: Reforming the Offences Against the Person Act 1861*, The Stationary Office, London, 1998, 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 See Home Office, *Violence: Reforming the Offences Against the Person Act 1861* (1998), draft Bill clause 19 discussed in Ashworth A, *Principles of Criminal Law*, Oxford University Press, 2003 at 221.

³⁵⁰ UK Home Office, *Violence: Reforming the Offences Against the Person Act 1861*, The Stationary Office, London, 1998, 3.23.

³⁵¹ See discussion in UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995, 32 – 33 in relation to *Hardie* [1985] 1 WLR 64. This case concerned valium.

³⁵² UK Law Commission, 1995, 32.

³⁵³ See discussion in Part 3.

³⁵⁴ See also *Public Order Act 1986*, section 6(5).

³⁵⁵ [1975] 2 NZLR 610.

³⁵⁶ Simister A and Brookbank W, *Principles of Criminal Law*, Brook’s, Wellington 2002, 360.

³⁵⁷ *R v Kamipeli* [1975] 2 NZLR 610 at 616.

³⁵⁸ Criminal Law Reform Committee New Zealand, *Report on Intoxication as a Defence to a Criminal Charge*, Wellington 1984. 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.

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?*’³⁵⁹

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’.³⁶⁰ Specific intent is 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’.³⁶¹ 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.³⁶² This was altered by the decision of the Supreme Court of Canada in *R v Daviault*.³⁶³ 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’.³⁶⁴ 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))³⁶⁵ 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’.³⁶⁶ 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’.³⁶⁷

5.4.3 The decision in *Daviault’s* case ‘provoked an immediate public outcry’.³⁶⁸ In relation to the community outrage in response to the case, Gough comments that:³⁶⁹

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

³⁵⁹ Simister A and Brookbank W, *Principles of Criminal Law*, Brook’s, Wellington 2002, 363.

³⁶⁰ Sheehy E, ‘The Intoxication Defence in Canada: Why Women should Care’ (1996) 23 *Contemporary Drug Problems* 595.

³⁶¹ *R v Bernard* [1988] 2 SCR 833 at 863 per McIntyre J.

³⁶² See *Leary* [1978] 1 SCR 27.

³⁶³ [1994] 3 SCR 63.

³⁶⁴ Abell J and Sheehy E. *Criminal Law & Procedure: Proof, Defences and Beyond*, Captus Press 2004, 189. See *R v Leary* [1978] 1 SCR 27, *R v Bernard* [1988] 2 SCR 833 and *R v Daviault* [1994] 3 SCR 63.

³⁶⁵ 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 at 727.

³⁶⁶ Gough S, ‘Surviving without *Majewski?*’ [2000] *Crim LR* 719 at 728.

³⁶⁷ *Martin’s Criminal Code* 2004 at CC/87.

³⁶⁸ Gough at 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 at 383.

³⁶⁹ Gough at 730.

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. Section 33.1 provides:

- (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.³⁷⁰ 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)³⁷¹ and arson (the mental element is wilfully setting the fire, that is subjective recklessness).³⁷²
- (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.³⁷³

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’.³⁷⁴

³⁷⁰ These offences are taken from Stuart D, *Canadian Criminal Law A Treatise*, Thomson Publishing 1995, 390 – 391.

³⁷¹ *R v Cooper* [1993] 1 SCR 146.

³⁷² *R v Buttar* [1989] 2 SCR 1429.

³⁷³ These offences are taken from Stuart D, *Canadian Criminal Law A Treatise*, Thomson Publishing 1995, 391.

³⁷⁴ *Martin’s Criminal Code*, 2004, CC/87 referring to *R v Vickberg* (1998) 16 CR (5th) 164.

Part 6

Options for Reform

In this Part the following options for reform are examined:

- Option 1 – Evidence of self-induced intoxication is relevant only to specific intention. This is to reaffirm the previously recognised *Criminal Code* position in accordance with *Snow's case*.
- Option 2 – Evidence of self-induced intoxication is relevant to intention and knowledge.
- Option 3 – Evidence of self-induced intoxication is relevant to intention, knowledge and subjective recklessness. This is to adopt the *Criminal Code Act 1995* (Cth) section 8 position.
- Option 4 – Evidence of self-induced intoxication is relevant to intention, knowledge, subjective recklessness and voluntariness. This is to adopt the Australian common law position.

Other possible reforms include:

- Option 5 – Creation 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

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 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. 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.

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

Option 1 is to reaffirm the previously recognised *Criminal Code* position in accordance with *Snow's case*³⁷⁵ and to reject the approach of the Court of Criminal Appeal in *Weiderman's case*.³⁷⁶ 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)).

6.1.1 Arguments in favour

(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'.³⁷⁷

³⁷⁵ [1962] Tas SR 271.

³⁷⁶ See discussion above in Part 3.

³⁷⁷ Victorian Law Reform Committee, *Inquiry into criminal liability for self-induced intoxication Issues Paper No 1, 2*.

(2) The restriction placed on the use of evidence of intoxication reflects a moral judgement 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.³⁷⁸ 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. 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.³⁷⁹

(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’.³⁸⁰

6.1.2 Arguments Against

(1) As discussed above, the distinction between specific and basic intent is uncertain and arbitrary.³⁸¹ 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.³⁸²

(2) In restricting the use of evidence of intoxication, the division between basic and specific intent is said to contravene basic principles of criminal responsibility in that a person may be convicted of crime but not have formed the necessary intention.³⁸³ 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’.³⁸⁴ 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’.³⁸⁵ 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.

(3) The justification for denying the relevance of intoxication to basic intent crimes presented in *Majewski’s case* was either:³⁸⁶

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

³⁷⁸ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.6.

³⁷⁹ (1980) 146 CLR 64 at 110.

³⁸⁰ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.6.

³⁸¹ See discussion in Part 4, at 4.2.5. See also UK Law Commission, *Intoxication and Criminal Liability*, Consultation Paper no 127, HMSO, London 1993, 27 – 34.

³⁸² See Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication: Report 6*, 1986, para 33. See also discussion above Part 4.

³⁸³ Orchard G, ‘Criminal Responsibility and Intoxication – the Australian Rejection of *Majewski*’ [1980] *The New Zealand Law Journal* 532 at 533. See Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.14, New Zealand Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, Wellington 1984, 37.

³⁸⁴ Law Reform Commissioner of Tasmania, *Insanity, Intoxication and Automatism Report* no. 61, 1989, at 13.

³⁸⁵ McSherry B and Naylor B, *Australian Criminal Laws: Critical Perspectives*, Oxford University press, 2004, 528 referring to Barwick CJ in *The Queen v O’Connor* (1980) 146 CLR 64 at 87.

³⁸⁶ Fairall P, ‘*Majewski* Banished’ [1980] 4 *Criminal Law Journal* 264 at 265.

voluntarily becomes intoxicated is “as wrongful as” the state of mind of a person who foresees and intends the consequences of his acts: Lord Simon’s theory.³⁸⁷

It has been argued that these grounds are illogical and not justified on policy grounds.³⁸⁸ 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’.³⁸⁹

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.³⁹⁰

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?’³⁹¹ The only reason is a policy decision that evidence of intoxication should not be relevant to subjective recklessness.

(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.’³⁹² 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. The Victorian Law Reform Committee have 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.³⁹³

(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?’³⁹⁴ For example, in the case of *R v Egan*,³⁹⁵ 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

³⁸⁷ Citing: *Majewski* [1977] AC 443, at 480.

³⁸⁸ Fairall P, ‘Majewski Banished’ [1980] 4 *Criminal Law Journal* 264 at 265. Cf Gardner S, ‘The Importance of Majewski’ (1994) 14 *Oxford Journal of Legal Studies* 279.

³⁸⁹ McSherry B and Naylor B, *Australian Criminal Laws: Critical Perspectives*, Oxford University press, 2004, 528. Cf Horder J, ‘Sobering Up? The Law Commission on Criminal Intoxication’ (1995) 58 *Modern Law Review* 534 at 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.

³⁹⁰ Leader-Elliott I, ‘Voluntariness, Intoxication and Fault’ (1991) 15 *Criminal Law Journal* 112 at 123

³⁹¹ Leader-Elliott I, ‘Voluntariness, Intoxication and Fault’ (1991) 15 *Criminal Law Journal* 112 at 123

³⁹² Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.15.

³⁹³ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.13.

³⁹⁴ Smith J, *Smith & Hogan Criminal Law 10th ed*, Butterworths, 2002, 245.

³⁹⁵ (1897) 23 VLR 159.

‘indicate[d] that the defendant had no intention to commit the act’.³⁹⁶ 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’.³⁹⁷

(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.³⁹⁸

Question

Please explain the reasons for your views as fully as possible

2. Should evidence of self-induced intoxication be admissible only in relation to offences of specific intent?

6.1.3 If 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.³⁹⁹ 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. 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.

Question

Please explain the reasons for your views as fully as possible

3. If Option 1 were the preferred option, do you agree that the legislation should omit the reference to ‘capacity’?

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

6.2.1 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.

6.2.2 It is suggested that if this Option is adopted, 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

³⁹⁶ VLRC Report, 1999, para 6.18.

³⁹⁷ VLRC Report, 1999, para 6.18.

³⁹⁸ *O’Connor* (1980) 146 CLR 64, Stephen J at 102-103.

³⁹⁹ See Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 78 – 79.

‘specific’ or ‘basic’ intent. This is based on the approach of the UK Law Commission in its report on Intoxication and Criminal Liability.⁴⁰⁰

6.2.3 Arguments in favour

(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 *Criminal 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.

(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 is summed up 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’.⁴⁰¹ 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.⁴⁰²

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 to say that they failed to appreciate a risk that they would have appreciated if they had been sober.⁴⁰³

6.2.4 Arguments against

(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.⁴⁰⁴ 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’.⁴⁰⁵

(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.

⁴⁰⁰ This also reflects the approach in the US Model Penal Code.

⁴⁰¹ UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995, 63 quoting the submission of Professor Sir John Smith.

⁴⁰² Horder J, ‘Sobering Up? The Law Commission on Criminal Intoxication’ (1995) 58 *Modern Law Review* 534 at 537.

⁴⁰³ This accords with the view of Wright J in *Weiderman’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.

⁴⁰⁴ South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, 35.

⁴⁰⁵ UK Law Commission, *Intoxication and Criminal Liability*, Consultation Paper no 127, HMSO, London 1993, 44.

Question

Please explain the reasons for your views as fully as possible

4. Should self-induced intoxication be relevant to questions of intention, knowledge and dishonesty but not to questions of recklessness or voluntariness?

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

6.3.1 Option 3 is to adopt the *Criminal Code Act 1995* (Cth) provisions dealing with self-induced intoxication. These are contained in the Appendix. As discussed in Part 5, the *Criminal Code Act 1995* (Cth) makes a distinction between offences of basic intent and other intent. Under the *Criminal Code Act 1995* (Cth) the distinction is created by the use of the terminology of ‘basic intent’ rather than a reference to ‘specific intent’.

6.3.2 The operation of the intoxication provisions contained in the *Criminal Code Act 1995* (Cth) has been explained in Part 3. In essence, self-induced intoxication is not to be taken into account in determining issues of voluntariness and basic intent. Section 4.2(6) provides that intoxication cannot be considered in determining whether conduct is voluntary. Section 8.2(1) provides that evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed. Basic intent is defined as ‘a fault element for a physical element that consists only of conduct’.⁴⁰⁶ In practical terms, this means that section 8.2(1) ‘appears confined to offences which do not require proof of fault with respect to a result of conduct’.⁴⁰⁷

6.3.3 In Tasmania, the concepts of ‘basic intent’ in section 8.2 of the *Criminal Code Act 1995* (Cth) and voluntariness in section 4.2 of the *Criminal Code Act 1995* (Cth) are combined in section 13(1): ‘No person shall be criminally responsible for an act, unless it was voluntary and intentional’. Under the *Criminal Code Act 1995* (Cth) evidence of intoxication can be considered when determining fault relating to circumstances or results. 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’.⁴⁰⁸ Evidence of self-induced intoxication can also be taken into account if a defendant argues that his or her conduct was accidental. The *Criminal Code Act 1995* (Cth) provisions apply equally to the defence and the prosecution.

6.3.4 Arguments in favour

(1) The adoption of the Commonwealth position on 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.⁴⁰⁹ The ‘unification project’ has seen Tasmania adopt uniform evidence laws.⁴¹⁰

(2) 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.

(3) In 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

⁴⁰⁶ Section 8.2(2).

⁴⁰⁷ Leader-Elliott I, *Commonwealth Criminal Code A Guide for Practitioners*, 147. Note also Leader-Elliott’s analysis of ulterior intentions, 147.

⁴⁰⁸ Leader-Elliott I, *Commonwealth Criminal Code A Guide for Practitioners*, 145.

⁴⁰⁹ See discussion in Part 5.

⁴¹⁰ *Evidence Act 2001* (Tas).

to negate intention, knowledge and probably subjective recklessness.⁴¹¹ However, self-induced intoxication is not able to found a plea of automatism.

(4) 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.⁴¹² He argues that claims to extend the reach of the involuntariness defence must be justified on its own merits and 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’.⁴¹³ 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’.⁴¹⁴

6.3.5 Arguments against

(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’. It will introduce an analytical problem of ‘determining what is meant by intention in relation to conduct and then distinguishing what is not’.⁴¹⁵ 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’.⁴¹⁶ 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’.⁴¹⁷ The concepts of fault elements in relation to conduct, circumstances and results typically are not used as analytical tools to interpret the *Criminal Code* (Tas).

(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 *Criminal 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 *Criminal Code Act 1995* (Cth). 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 *Criminal Code* (Tas). This leaves room for more appeals as the application of the new intoxication provisions are worked through.

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 *Criminal Code* (Tas). For example, the legislation could simply state that ‘evidence of self-induced intoxication cannot be considered in determining whether the accused’s act was voluntary and intentional as required by section 13(1)’. In any event, legislative drafting will need to be mindful of the meaning ascribed to the terminology in the *Criminal Code Act 1995* (Cth).

(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*.⁴¹⁸ The argument is that it produces anomalous results and that the

⁴¹¹ See discussion in Part 4 for the relevance of intoxication to subjective recklessness in Tasmania.

⁴¹² Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 90 – 91.

⁴¹³ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 91.

⁴¹⁴ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 91.

⁴¹⁵ South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, 33.

⁴¹⁶ South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, 35.

⁴¹⁷ Gough S, ‘Surviving without *Majewski*?’ [2000] *Criminal Law Review* 719 at 722 fn 18 referring to Duff A, *Criminal Attempts*, Clarendon Press, Oxford 1996.

⁴¹⁸ See Option 1.

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’.⁴¹⁹

(4) Unless the amendment to the rules of intoxication is made to cover all summary offences in addition to offences governed by the *Criminal 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.

Question

Please explain the reasons for your views as fully as possible

5. Should the principles contained in the *Criminal Code Act 1995* (Cth) that deal with self-induced intoxication be adopted in Tasmania? This would mean that intoxication would be relevant to all states of mind other than section 13(1).

6.4 Option 4 – Allow evidence of self-induced intoxication to be relevant to intention, knowledge, subjective recklessness and voluntariness.

6.4.1 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. 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 is the preferred preliminary position of the Institute.

6.4.2 Arguments in favour

(1) Option 4 accords with the fundamental principle of criminal responsibility 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.

(2) The *O’Connor* approach is a ‘simple solution compatible with the ordinary and “inexorable” logic of the liability rules’.⁴²⁰ 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.

(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.

(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 aid the protection of individuals and community.⁴²¹ In 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.⁴²²

⁴¹⁹ South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, 35.

⁴²⁰ Ashworth A, *Principles of Criminal Responsibility 4th ed*, Oxford University Press, Oxford 2003, 220.

⁴²¹ New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, Wellington, 1984, 29 – 30.

⁴²² Smith G, ‘Footnote to O’Connor’s case’ (1981) *Criminal Law Journal* 270 at 277.

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’.⁴²³

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 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’.⁴²⁴ 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.⁴²⁵

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!⁴²⁶

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’.⁴²⁷ 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 recollection, he will be unable to make any effective denial of facts alleged by the Crown’.⁴²⁸

(5) The scientific literature about the effects of intoxication reveals ‘no basis for legislation which distinguishes between offences of specific and basic intent’.⁴²⁹ 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’.⁴³⁰ 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’.⁴³¹ This is best reflected in the *O’Connor* approach.

6.4.3 Arguments against

(1) The perception that the *O’Connor* approach to intoxication may lead to undeserved acquittals is often cited as the main objection.⁴³² 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’.⁴³³ The argument is that to hold

⁴²³ Smith G, ‘Footnote to *O’Connor’s* case’ (1981) *Criminal Law Journal* 270 at 277.

⁴²⁴ Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication: Report 6*, 1986, para 44.

⁴²⁵ Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication: Report 6*, 1986, para 55.

⁴²⁶ M Goode ‘Some thoughts on the present state of the “Defence” of Intoxication’ (1984) 8 *Criminal Law Journal* 104 at 112.

⁴²⁷ Ashworth A, *Principles of Criminal Responsibility* 4th ed, Oxford University Press, Oxford 2003, 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.

⁴²⁸ Smith, G ‘Footnote to *O’Connor’s* case’ (1981) *Criminal Law Journal* 270 at 277.

⁴²⁹ Rajaratnam S et al, ‘Intoxication and Criminal Behaviour’ (2000) 7 *Psychiatry, Psychology and Law* 59 at 65.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² See South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, 24.

⁴³³ Victorian Law Reform Committee, *Inquiry into criminal liability for self-induced intoxication Issues Paper No 1, 2.*

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’.⁴³⁴

(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.⁴³⁵

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.⁴³⁶

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.

(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’.⁴³⁷ 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.⁴³⁸

(4) There is no evidence in decided cases that the current law in Tasmania has given rise to grave injustice.

Question

Please explain the reasons for your views as fully as possible

6. Do you think that section 17 should be repealed and the common law approach to intoxication be adopted in Tasmania?

6.5 Option 5 – the creation of a specific offence

6.5.1 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. An alternative to a special offence for intoxication may be to create an offence of general application for negligently causing grievous bodily harm.

Offence of dangerous or criminal intoxication

6.5.2 In a number of previous law reform proposals on the relationship between intoxication and criminal responsibility, the creation of a special offence has been considered and rejected.⁴³⁹ The creation of a special offence was suggested by some of the judges of the High Court in *O’Connor*.⁴⁴⁰ There have been a number

⁴³⁴ Ashworth A, *Principles of Criminal Responsibility* 4th ed, Oxford University Press, Oxford 2003, 220.

⁴³⁵ See South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998.

⁴³⁶ UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995, 45.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ See UK Law Commission, 1995, Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, NZ Criminal Law Reform Committee, South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998.

⁴⁴⁰ (1980) 146 CLR 64 at 87 per Barwick CJ, at 103 per Stephen J, at 113 - 114 per Murphy J and 126 per Aickin J.

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 1975⁴⁴¹ and it was also suggested by the minority of the Criminal Law Revision Committee in 1980.⁴⁴² The United Kingdom Law Commission advanced a revised proposal in its consultation paper on intoxication and criminal responsibility in 1993.⁴⁴³ 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.⁴⁴⁴

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'.⁴⁴⁵ 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.⁴⁴⁶

6.5.3 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).⁴⁴⁷ This recommendation has not been adopted.

6.5.4 Arguments in favour

(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.⁴⁴⁸

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'.⁴⁴⁹

(2) A separate offence ensures that offenders do not avoid criminal liability if they do not possess the mental element for the principal offence.⁴⁵⁰ In this way, it addresses community concerns about perceived unjustified acquittals.⁴⁵¹

6.5.5 Arguments against

(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.⁴⁵²

⁴⁴¹ UK Home Office, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244, 1975.

⁴⁴² UK Law Commission, *Offences Against the Person*, Fourteenth Report, 1980.

⁴⁴³ UK Law Commission, *Intoxication and Criminal Liability*, Consultation Paper no 127, HMSO, London 1993.

⁴⁴⁴ *Ibid.*, at 76.

⁴⁴⁵ *Ibid.*, at 79.

⁴⁴⁶ UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, Law Com no 229, 1995.

⁴⁴⁷ *First Principles: Recodifying the General Part of the Criminal Law of Canada* (1993) cited in Leader-Elliott I, 153.

⁴⁴⁸ South Australia, Attorney-General's Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, 39.

⁴⁴⁹ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.54.

⁴⁵⁰ Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication: Report 6*, 1986, para 74.

⁴⁵¹ Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication: Report 6*, 1986, para 74.

⁴⁵² Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.61.

(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’.⁴⁵³ 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’.⁴⁵⁴

(3) A special offence is seen to encourage plea bargaining⁴⁵⁵ and potentially increase the number of jury compromise verdicts.⁴⁵⁶ 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.⁴⁵⁷ 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.

(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.⁴⁵⁸ The New Zealand Law Reform Commission considered that the creation of a special offence might increase the occasions on which a defendant raises issue of intoxication.⁴⁵⁹

(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.⁴⁶⁰ This difficulty arises because the offence ‘lacks any coherent penal rationale because self induced intoxication is simply not a reliable index of criminal blameworthiness’.⁴⁶¹ 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’.⁴⁶²

It is the preliminary view of the Institute that creating such an offence would be an inappropriate way of responding to such behaviour which is a social problem demanding a broader response than criminalisation.

Questions

Please explain the reasons for your views as fully as possible

7. If Option 4 is adopted, should a separate offence of committing a dangerous act while intoxicated be created?
8. If you consider that a separate offence should be created, please indicate what you consider the elements of this offence should be.

Offence of general application

⁴⁵³ Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication: Report 6*, 1986, para 78.

⁴⁵⁴ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.62.

⁴⁵⁵ VLRC Report, 1999, para 6.58.

⁴⁵⁶ VLRC Report, 1999; New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, 1984, 45. Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 150.

⁴⁵⁷ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 150.

⁴⁵⁸ New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge*, 1984, 45.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.* at 46; South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1999, Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 150, 153 – 154 and Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.60.

⁴⁶¹ South Australia, Attorney-General’s Department, *Intoxication and Criminal Responsibility Discussion Paper*, July 1998, 40.

⁴⁶² Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 150.

6.5.6 An alternative to the creation of a special offence directed at dangerous acts committed while intoxicated is to create an offence of general application. A model for such an offence is found in Section 154 of the *Criminal Code* (NT):

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

...

(4) If at the time of doing or making such an act or omission he [or she] is under the influence of an intoxicating substance he [or she] is liable to further imprisonment for 4 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section.

6.5.7 Under the Northern Territory model, evidence of intoxication is made expressly relevant to the imposition of sentence imposed under section 154. Section 154 has been used in a broad range of cases including discharging a firearm across a public park in the direction of houses, holding a man over a second-floor balcony, swinging and striking a person with a nulla nulla, throwing a lid of a paint tin at vehicles travelling on the road and applying a choke hold to a partner during consensual sexual intercourse.⁴⁶³

6.5.8 Advantages

(1) The offence applies to intoxicated and sober offenders, so that there are no special rules of criminal liability for intoxicated offenders.

6.5.9 Disadvantages

There have been many criticisms directed at the Northern Territory model. As Leader-Elliott observes, the ‘most striking feature of the Code provision is the enormous extension of the criminal law to penalise injurious conduct which, until now, has been left to the processes of civil litigation’.⁴⁶⁴ The Victorian Law Reform Committee found that ‘the overwhelming evidence received by the Committee indicated that section 154 was not a very satisfactory provision and that it would be absolutely inappropriate for Victoria to enact such legislation’.⁴⁶⁵

(1) A major criticism of section 154 is its unprecedented extension of criminal liability for accidental infliction of injury or illness. ‘Accidental injuries caused by motor vehicles, guns, electric drills, lawn mowers, vacuum cleaners and stepladders are treated alike, for the purposes of this provision’.⁴⁶⁶

(2) The standard of care required for the offence appears no different to the civil standard.⁴⁶⁷

(3) Criminal liability is imposed under section 154 even though no harm is done – the risk of harm is sufficient.⁴⁶⁸

In view of these criticisms and the evidence received by the Victorian Law Reform Committee from senior people in the Northern Territory Criminal Justice system,⁴⁶⁹ it is the preliminary view of the Institute that if a new offence is created, it should not be modelled on the Northern Territory provision.

⁴⁶³ These examples are taken from Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 3.70 fn 137.

⁴⁶⁴ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 155.

⁴⁶⁵ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.53.

⁴⁶⁶ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 156.

⁴⁶⁷ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 156.

⁴⁶⁸ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 156 – 157.

⁴⁶⁹ See Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, fn 93.

It appears to the Institute that it is important that any offence of general application is linked to the concept of criminal negligence rather than any lesser standard of care. An alternative to a provision based on section 154 is to create an offence of causing grievous bodily harm or wounding by criminal negligence. This is not a novel concept as in several Australian jurisdictions 'it has long been an offence to *cause serious bodily injury by gross negligence*'.⁴⁷⁰ For examples, see section 24 *Crimes Act 1958* (Vic), section 24 *Crimes Act 1900* (ACT), section 54 *Crimes Act 1900* (NSW) and section 328 of the *Criminal Code* in Western Australia and Queensland. Leader-Elliott suggests that section 172 of *Criminal Code* (Tas) was intended to apply in such circumstances, however, subsequent interpretation gave the section a narrower application.⁴⁷¹ The Model Criminal Code Officer's Committee recommended the inclusion of an offence of negligently causing serious harm in the Model Criminal Code.⁴⁷² If such an offence were created in Tasmania, arguably there would be no need for a special offence of dangerous intoxication. Although the creation of such an offence is beyond the scope of this paper, the Institute may in the future undertake a law reform project considering this and some related issues.⁴⁷³

Questions

Please explain the reasons for your views as fully as possible

9. Do you agree that Tasmania should not introduce an offence modelled on section 154 of the Northern Territory's Criminal Code? If not, why?
10. 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?

6.6 Option 6 – special treatment of involuntary intoxication

It is the preliminary view of the Institute that the position in relation to involuntary intoxication needs to be clarified.⁴⁷⁴

There are two alternatives:

- (1) to enact a separate defence of involuntary intoxication similar to the Commonwealth, Australian Capital Territory and New South Wales position; 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.

Separate defence (alternative (1))

6.6.1 As discussed above, the *Criminal Code Act 1995* (Cth) contains a separate defence of involuntary intoxication.⁴⁷⁵ 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.

⁴⁷⁰ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 135 (emphasis in original).

⁴⁷¹ Leader-Elliott I, *Alcohol Misuse and Violence 6B Legal Approaches to Alcohol-related Violence: the Reports*, Commonwealth, 1993, 135 fn 20.

⁴⁷² *Non-Fatal Offences Against the Person*, Discussion Paper, 1996, 33.

⁴⁷³ Such as the definitions of murder and manslaughter and potential difficulties with causation in s 154.

⁴⁷⁴ See discussion of the current law on involuntary intoxication at 3.1.19.

⁴⁷⁵ See Part 5. This is the position in the Australian Capital Territory (*Criminal Code Act 2002*, s 31) and New South Wales (*Crimes Act 1900*, s 428G).

6.6.2 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’.⁴⁷⁶ 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’.⁴⁷⁷

Arguments in favour

- (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.
- (2) This accords with the *Criminal Code Act 1995* (Cth).

Arguments against

- (1) 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’.⁴⁷⁸ A person should be able to rely on involuntary intoxication to negate any mental element (see below) but should not be able to rely on intoxication as a defence if the required mental element is made out.

Question

Please explain the reasons for your views as fully as possible

11. Do you think that a separate defence of involuntary intoxication should be created?

Involuntary intoxication relevant to negate any mental element (alternative 2)

6.6.3 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.⁴⁷⁹

Advantages

- (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 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’.⁴⁸⁰

Disadvantages

- (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.
- (2) This would not be in line with the Commonwealth law relating to involuntary intoxication.

⁴⁷⁶ Leader-Elliott I, *The Commonwealth Criminal Code A Guide for Practitioners*, Commonwealth Attorney-General’s Department, 2002, 167.

⁴⁷⁷ Horder J, ‘Sobering Up? The Law Commission on Criminal Intoxication’ (1995) 58 *Modern Law Review* 534 at 546.

⁴⁷⁸ Horder J, ‘Sobering Up? The Law Commission on Criminal Intoxication’ (1995) 58 *Modern Law Review* 534 at 543.

⁴⁷⁹ See UK Law Commission, *Intoxication and Criminal Liability*, Consultation Paper no 127, HMSO, London 1993, 21; Smith J, *Smith & Hogan Criminal Law 10th ed*, Butterworths, 2002, 240.

⁴⁸⁰ Smith J, *Smith & Hogan Criminal Law 10th ed*, Butterworths, 2002, 240.

Question

Please explain the reasons for your views as fully as possible

12. Do you think that evidence of involuntary intoxication should be relevant to negate any mental element, including voluntariness?

6.7 Option 7 – Procedural restrictions on the defence

6.7.1 In South Australia, 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.⁴⁸¹ 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 specifically asks the judge to address the jury on that question.
- (2) A defendant's consciousness is taken to have been impaired to the point of criminal irresponsibility as the time of an alleged offence if, because of impairment of consciousness, a subjective element for the alleged offence cannot be established against the defendant.

Section 267A defines 'consciousness' to include volition, intention, knowledge and any other mental state or function relevant to criminal liability. 'Subjective element' of an offence is defined as 'a mental element of the offence and includes voluntariness'.

6.7.2 A recommendation for a similar provision was made by the Victorian Law Reform Committee.⁴⁸² As discussed in Part 5, the Victorian Law Reform Committee recommended:

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'.⁴⁸³

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.

6.7.3 Arguments in favour

(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'.⁴⁸⁴

⁴⁸¹ See discussion above in Part 5.

⁴⁸² Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, recommendation 4. See discussion above in Part 5.

⁴⁸³ Gough S, 'Surviving without *Majewski*' [2000] Crim LR 719 at 724.

6.7.4 Arguments against

(1) 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’.⁴⁸⁵

(2) 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’.⁴⁸⁶

(3) 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.

(4) Such restrictions do not exist in relation to other defences, and would be contrary to the general duty on a judge instruct the jury in relation to any defence that is reasonably available on the facts of the case.

(5) 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 ground of appeal and, when pursued, is almost never successful’.⁴⁸⁷ 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.⁴⁸⁸ 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.⁴⁸⁹

It is the preliminary view of the Institute that such procedural restrictions should not be introduced.

⁴⁸⁴ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.101.

⁴⁸⁵ Gough S, ‘Surviving without *Majewski*’ [2000] Crim LR 719 at 724at 726.

⁴⁸⁶ Bowman M, ‘Dealing with the Drunk’s Defence’ (1999) 24 *Alternative Law Journal* 233 at 235; Konstantopoulos V, ‘Review of Criminal Liability for self-Induced Intoxication’ (1999) *Law Institute Journal* 60 at 63.

⁴⁸⁷ Victorian Department of Justice, *Government Response to the Report of the Law Reform Committee on Criminal Liability for Self-Induced Intoxication*, Melbourne 2000, 2.

⁴⁸⁸ 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)

⁴⁸⁹ *Gow v Davies* (1992) 1 Tas R 1.

⁴⁸⁹ Smith J, *Smith & Hogan Criminal Law 10th ed*, Butterworths, 2002, 240.

⁴⁸⁹ See discussion above in Part 5.

⁴⁸⁹ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, recommendation 4. See discussion above in Part 5.

⁴⁸⁹ Gough S, ‘Surviving without *Majewski*’ [2000] Crim LR 719 at 724.

⁴⁸⁹ Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication Report*, Government Printer, Melbourne 1999, para 6.101.

⁴⁸⁹ Gough S, ‘Surviving without *Majewski*’ [2000] Crim LR 719 at 724at 726.

⁴⁸⁹ Bowman M, ‘Dealing with the Drunk’s Defence’ (1999) 24 *Alternative Law Journal* 233 at 235; Konstantopoulos V, ‘Review of Criminal Liability for self-Induced Intoxication’ (1999) *Law Institute Journal* 60 at 63.

⁴⁸⁹ Victorian Department of Justice, *Government Response to the Report of the Law Reform Committee on Criminal Liability for Self-Induced Intoxication*, Melbourne 2000, 2.

⁴⁸⁹ The survey was conducted by using the Australian Legal Information Institute database and Butterworths Unreported Judgments. It revealed 5 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), 2 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 1 was a successful appeal by an accused (*Gow v Davies* (1992) 1 Tas R 1).

⁴⁸⁹ *Gow v Davies* (1992) 1 Tas R 1.

Questions

Please explain the reasons for your views as fully as possible

13. Do you think procedural rules requiring a defendant to specifically request a judge refer to intoxication and to prevent a defendant's right to appeal if such a request is not made should be adopted in Tasmania? If so, in what circumstances?

6.8 Option 8 – clarify relationship between intoxication and the defences

6.8.1 As discussed in Part 3, there is uncertainty as to the relationship between intoxication and the defence of self-defence. In particular, it is unclear whether an intoxicated mistake can be taken into account in assessing the degree of force used in 'circumstances as the accused believes them to be'.

6.8.2 It appears that there are two main options:

(1) to follow the United Kingdom position which holds that an intoxicated mistake is irrelevant for the purposes of assessing an accused's perception of the circumstances and the response;

(2) to follow the position in New Zealand and under the *Criminal Code Act 1995* (Cth) that evidence of intoxication is relevant to an assessment of the 'circumstances as the accused believes them to be'.

6.8.3 If option (2) is adopted, a sensible step may be to enact legislation similar to the legislative clarification of the relationship between intoxication and the defences found in the *Criminal Code Act 1995* (Cth). 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.

(3) If a person's intoxication is not self-induced, 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.

(4) If, in relation to an offence:

(a) each physical element has a fault element of basic intent; and

(b) any part of a defence is based on actual knowledge or belief;

evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.

(5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.⁴⁹⁰

6.8.4 In essence, sections 8.4(1) and (2) mean that evidence of intoxication is relevant for the purpose of assessing the accused's perception of the circumstances for defences such as self-defence and claim of right. However, in relation to defences that require an honest and reasonable belief to found the defence, then an accused can only rely on a mistake that might have been made by a sober person. This means that '[w]henver reasonable belief is required for a defence, sober and intoxicated defendants are held to have the same standard of reasonableness, so long as the state of intoxication was self-induced'.⁴⁹¹

6.8.5 Under the *Criminal Code* (Tas), an accused could rely on an intoxicated and unreasonable mistake for defences such as self-defence (section 46), claim of right and compulsion (section 20). However, a

⁴⁹⁰ The operation of section 8 is thoroughly discussed in the Leader-Elliott I, *Commonwealth Criminal Code A Guide for Practitioners*, 159 – 165.

⁴⁹¹ Leader-Elliott I, *Commonwealth Criminal Code A Guide for Practitioners*, 161.

defendant could only rely on an intoxicated mistake for a defence such as reasonable mistake (section 14) if the mistake was one that a reasonable sober person might have made.

6.8.6 The inclusion of section 8.4(3), in relation to involuntary intoxication, would depend on the position taken in Option 6 (above). As discussed above, the Commonwealth has a separate defence of involuntary intoxication. There is also a variation in the standard for offences of negligence in cases of involuntary intoxication. Section 8.4(3) provides that, in the case of involuntary intoxication, ‘the measure of reasonableness ... is that of a reasonable person intoxicated to the same extent as the defence’.⁴⁹² If there were no special defence of involuntary intoxication, then such a provision would not be appropriate.

6.8.7 Section 8.4(4) is an exception to the general position set out in section 8.4(1) that evidence of intoxication may be considered in determining when a defence is based on the defendant’s beliefs.⁴⁹³ Leader-Elliott writes that:

The exception was intended as a symmetrical counterpart to s 8.2(1), which bars consideration of self-induced intoxication when a fault element of “basic intent” is in issue. Section 8.4(4) excludes evidence of self-induced intoxication from consideration when defences to ‘crimes of basic intent’ are in issue’.⁴⁹⁴

6.8.8 As explained above, in the Tasmanian context, basic intent crimes would be those for which the only mental element required is a voluntary and intentional act, section 13(1). This would mean that an accused could not rely evidence of self-induced intoxication to support a claim of a defence based on a mistaken belief in offences where the only mental element is a voluntary and intentional act, section 13(1).

Questions

Please explain the reasons for your views as fully as possible

14. Should the position in relation to self defence be clarified?
15. 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
16. Should the Code provide that an intoxicated belief is relevant to an assessment of the circumstances of as the accused believed them to be in section 46?
- OR
17. Should there be a more general provision dealing with the relationship between intoxication and defences based on the Commonwealth model?

⁴⁹² Leader-Elliott I, *Commonwealth Criminal Code A Guide for Practitioners*, 161.

⁴⁹³ Leader-Elliott I, *Commonwealth Criminal Code A Guide for Practitioners*, 161.

⁴⁹⁴ Leader-Elliott I, *Commonwealth Criminal Code A Guide for Practitioners*, 161.

Appendix

CRIMINAL CODE ACT 1995 (Cth)

Section 4.2 Voluntariness

...

- (6) Evidence of self-induced intoxication cannot be considered in considering whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
 - (c) involuntarily; or
 - (d) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

Section 8.2 Intoxication (offences involving basic intent)

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.
- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Section 8.3 Intoxication (negligence as fault element)

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

Section 8.4 Intoxication (relevance to defences)

- (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.

- (3) If a person's intoxication is not self-induced, 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.
- (4) If, in relation to an offence:
- (a) each physical element has a fault element of basic intent; and
 - (b) any part of a defence is based on actual knowledge or belief;
- evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.
- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.
- Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

Section 8.5 Involuntary intoxication

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.