TASMANIA

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr D G Coates SC
OUR REF: 13033 *(Please quote in reply)*
YOUR REF:

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Dear Professor Warner

7TH ISSUES PAPER – *"INTOXICATION AND CRIMINAL RESPONSIBILITY"*

I refer to your letter to Mr Ellis SC dated 18 March 2005. Mr Ellis has asked me, due to his absence overseas, to respond on behalf of this Office.

If I can start by answering the questions raised in your final paragraph. I know of no trials in the past 12 months where intoxication has been raised as a defence to negate criminal responsibility. Indeed in my 18 years of being a Crown counsel I believe intoxication has been raised on relatively few occasions. I realise the law with regard to intoxication generates considerable academic debate, however it is my experience that in practice it is a non-issue. The crimes where it has been raised have generally been such crimes as attempted murder, attempted rape and aggravated burglary. Generally such defences have been unsuccessful.

I generally believe the current law leads to just outcomes in criminal cases. The law at present generally leads to a person being convicted of the crime that the community and victim believe the offender should be convicted of, leaving the issue of intoxication to the sentencing process. Juries readily understand that intoxication is only relevant if it goes to capacity to lack a specific intent.

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I do not believe the current state of the law regarding intoxication affects the decision to prosecute or which offences to charge. If the law moved to a more liberal "O'Connor" type situation then exactly the same decision in respect to prosecute would be made and then the State would argue to the jury that the accused had the appropriate mental element. Indeed, in most cases, even if a person was intoxicated, it is hard to believe they could commit the offence without having the appropriate mental element. Although I accept the argument this probably would not lead to more acquittals, I believe it would lead to more trials as defence counsel would be bound to run intoxication type defences. This would have resource issues for the Courts, Legal Aid and this Office. It would also burden juries and trial judges with yet another direction where they have a multitude in most cases already to deal with.

A move away from the current law (apart from clarifying *Weiderman*) would also appear to be inconsistent with Parliament's enactment of s 14A of the *Criminal Code* which removes intoxication as a defence in respect of mistake of fact in relation to consent in sexual offences, whilst s 14A(2) removes it as a defence in respect of attempting to commit various sexual offences which are obviously crimes of specific intent.

Further allowing a more "liberal" intoxication law will lead to a disillusionment of the justice system by victims of serious criminal conduct and their families.

I don't believe *Weiderman* has been of significant effect in the law because if there is evidence of intoxication "knew" in s 157C of the *Criminal Code* is not left to the jury. Further other such knowledge offences like possession of stolen property are not conducive to such an intoxication defence although I would concede legislation enacting the minority judgment of Chief Justice Cox and Justice Underwood would clarify the law, simplify it and make it consistent with other offences.

I would also accept legislation clarifying the position for self defence and mistake of fact would be useful. Again to be consistent with s 14A of the *Criminal Code* and the remainder the scheme intoxication should not be a defence.

It has been suggested that since *Weiderman* the law has been unclear in respect of crimes involving a subjective reckless mental element. I do not believe that is the case *Weiderman* only purported to discuss crimes

involving knowledge. It certainly did not purport to override the Court of Criminal Appeal's decision in *R v Bennett* [1990] Tas R 72.

Finally the issues paper discusses the possibility of enacting a crime of causing grievous bodily harm or wounding by culpable negligence. Those crimes already exist as a result of a combination of s 172 and s 152 of the *Criminal Code* - see *McDonald* [1965] Tas SR 263. Indeed relatively recently a person was convicted for causing grievous bodily harm by culpable negligence in respect of a shooting of his partner.

Yours sincerely

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ASSISTANT DIRECTOR OF PROSECUTIONS