

SUBMISSION TO NORTHERN TERRITORY LAW REFORM COMMITTEE ON THE RELATIONSHIP BETWEEN INTOXICATION AND CRIMINAL LIABILITY

OVERVIEW

The appropriate relationship between intoxication and criminal responsibility in terms of what constitutes 'good' public policy depends on one's perspective. Those who place the presumption of innocence until proved otherwise as the highest priority, will favour *R v O'Connor* where the circumstance of intoxication is but one factor in the evidence against the accused. Those who place the protection of the community above the rights of the individual where the accused voluntarily chooses to consume alcohol and/or drugs, will favour *DPP v Majewski* where offences are categorised into offences of specific or basic intent. This was the effective dividing line between the majority (4) and the minority (3) in *R v O'Connor*.

THE PRESENT TREATMENT OF INTOXICATION IN THE CRIMINAL CODE NT

The present treatment of intoxication in the *Criminal Code 1983* (NT) depends on whether or not the offence is listed in Schedule 1. If the offence is covered by Schedule 1, then the relevant section is s 43AS, if not, then s 7(1)(b) applies.

One of the essential characteristics of a Criminal Code is that the Code should be clear. The relevant section should be clear in its terms. Judged against this criterion, s 43AS is a spectacular failure as it contains so many qualifications as to be virtually meaningless. In practice, s 43AS comes closest to *R v O'Connor* notwithstanding it is entitled Intoxication – offences involving basic intent. This follows from the note for subsection (1) which states that a fault element of intention in relation to a result or circumstance is not a fault element of basic intent, and subsections (2) and (3) which do not prevent evidence of intoxication being taken into consideration in determining whether conduct was accidental or whether the person had a mistaken belief.

The original s 7 contained a reversal of the onus of proof such that there was a legal presumption that an intoxicated accused foresaw the natural and probable consequences of his or her conduct. After amendment in 1984, the present s 7(1)(b) makes the presumption evidential only, which means the Crown must show beyond reasonable doubt that the accused foresaw the possible consequences of his or her conduct as required by s 31 (*Charlie*). Confusingly, the amended provision relates only to foresight and not to intent, but in any event s 7(1)(b) and s 31 will become increasingly irrelevant if the plan to ultimately bring all offences under Part IIAA and therefore be included in Schedule 1 is maintained.

THE OPTIONS FOR THE NORTHERN TERRITORY LEGISLATURE

There are four main options open to the Northern Territory Legislature in amending s 43AS.

Option 1

To adopt the common law approach of Victoria and South Australia and follow *O'Connor*. The present s 43AS would have to be repealed and substituted with words to the effect that evidence of intoxication is always relevant for all offences in determining criminal liability for both *mens rea* and *actus reus*. The latter would also require the repeal of s 43AF(5) which states evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

Option 2

To adopt the approach of the Code States of Queensland and Western Australia, as well as New South Wales, by following *Majewski*. To avoid confusion as to which offences are categorised as specific or basic intent offences, the approach taken in s 428B of the *Crimes Act 1900* (NSW), which lists all the offences of specific intent, should be adopted. This would require the repeal of s 43AS and the substitution of the approach taken in Part 11A – Intoxication of the *Crimes Act 1900* (NSW) which completely replaces the common law for intoxication and criminal liability.

Option 3

To amend s 43AS to tighten up the language such that a strong version of *Majewski* is adopted within the nomenclature of the *Model Criminal Code* in Part IIAA. An example of the type of approach under this option is given below.

43AS Intoxication – offences involving basic intent

(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed, and the person is to be treated as having been aware of anything which the person would then have been aware of but for the intoxication.

(2) A fault element of basic intent is defined as not being a fault element of specific intent in subsection (3), such as a fault element that requires proof of recklessness.

(3) For the purposes of this section, a fault element of specific intent means an intention as to a result or circumstance (but not intention as to conduct)¹ or knowledge as to something (but not knowledge as to a risk which falls within the scope of recklessness as defined in s 43AK of this *Code*).²

¹ This follows the language of s AI Intention where a person has intention in relation to conduct if the person means to engage in that conduct; a person has intention in relation to a result if the person means to bring it about or is aware it will happen in the ordinary course of events; and a person has intention in relation to a

(4) However, evidence of self-induced intoxication cannot be considered in determining whether a fault element of intention or knowledge existed if the person had resolved before becoming intoxicated to do the relevant conduct, or became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

(5) The only offences in Schedule 1 to which subsection (3) applies are:

- (a) Section 156 Murder
- (b) Section 162 Assisting and encouraging suicide
- (c) Section 176A Drink or food spiking.

(6) Where evidence of self-induced intoxication is admitted under one of the specified fault elements operating as an exception to the general rule that a defendant should be treated as having been aware of anything which the defendant would then have been aware of but for the intoxication, the intoxicated person is presumed to have foreseen or intended the natural and probable consequences of his or her conduct unless the contrary is proved.

Note for subsection (6)

The presumption of foresight or intention of the natural and probable consequences of conduct applies only where evidence of intoxication is admitted and does not apply to any other defences.

It is possible to illustrate the operation of the proposed s 43AS above by looking at two offences that are in Schedule 1 of the *Criminal Code 1983* (NT) but are not listed as offences of specific intent in the proposed s 43AS(5) above. The first is s 192 Sexual intercourse without consent, and the second is s 240A Causing bushfires. Both of these offences specify the fault element of recklessness. Therefore, given the proposed s 43AS(3) above precludes evidence of intoxication being considered for a physical element where proof of recklessness is sufficient to satisfy the fault element, evidence of self-induced intoxication is inadmissible for both of these serious offences.

Option 4

To revert to the common law position pre 1920 and the watershed case of *DPP v Beard* [1920] AC 479 in which the House of Lords first recognised the distinction between offences of basic and specific intent, and exclude evidence of intoxication for all offences. This is sometimes referred to as the absolutist approach where the defendant's intoxicated understanding of the circumstances would always be replaced by the view the defendant would have taken if he or she had been sober. This would require the amendment of s 43AS

circumstance if the person believes that it exists or will exist. Thus, using the example of shoplifting, an offence requiring proof of ulterior intention, 'the shoplifter cannot rely on evidence of intoxication to support a denial of intention to appropriate the publication [but] that evidence *can* be considered, however, when the court comes to consider whether the publication was appropriated with intent to deprive permanently'. See I. Leader-Elliott for the Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code – A Guide for Practitioners* (2002) 149-151 (original emphasis).

² Section AJ Knowledge states: 'A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.'

to reflect the inverse of *O'Connor* such that evidence of intoxication is never part of the totality of evidence.

ANSWERS TO THE 10 QUESTIONS PUT BY THE ATTORNEY-GENERAL

The answers to the 10 questions put to the Northern Territory Law Reform Committee by the Attorney-General will reflect the option chosen. Thus, taking an approach that reflects either option 3 or option 4 above, the answers would be as follows.

1 Yes, there is a public policy benefit in holding persons criminally responsible for their actions whilst intoxicated, irrespective of whether they acted voluntarily or intentionally. The best way to achieve this is either to exclude evidence of intoxication completely (option 4) or to adopt the fault element of recklessness as the dividing line between offences of basic and specific intent (option 3).

2 This should apply to all offences (option 4) or all offences including offences of violence save for offences where the fault element is intention such as s 156 Murder (option 3).

3 The public policy benefit following the removal of the admissibility of evidence of self-induced intoxication will be achieved by making a person who is voluntarily intoxicated criminally responsible for any conduct he or she causes whilst in such a condition. Once the change in the law is widely disseminated and the drunkard's defence is no more, it can be anticipated that the number of acts of drunken violence will fall.

4 There should be no distinction between offences of basic and specific intent (option 4) or a distinction based on the fault element of recklessness (option 3).

5 The dividing line should be the fault element of intention or knowledge (evidence of intoxication allowed in) and recklessness (evidence of intoxication excluded).

6 The onus of proof should be reversed (see proposed 43AS(6) above in option 3) or is irrelevant (option 4).

7 A return to a version of the now repealed s 154 is not necessary under either option 3 or 4, but could be considered if either option 1 or 2 were selected.

8 Under either option 3 or 4 evidence of intoxication would be disregarded in relation to sexual offences such as s 192 Sexual intercourse and gross indecency without consent.

9 Of the two partial defences to murder, only diminished responsibility makes reference to intoxication in s 159(3). This subsection requires the impairment to be ignored so far as it

was attributable to self-induced intoxication. To the extent that such a distinction is practicable, given there may be an underlying condition of brain damage due to long term alcohol abuse, then it should be retained. The problems with the partial defence of diminished responsibility well exceed any tinkering with s 159(3). The same can be said of the partial defence of provocation. However, there would be merit in narrowing the scope of the defence by disregarding evidence of intoxication. Better still would be to follow Queensland's example and reverse the onus of proof for the whole partial defence as in s 304(7) of the *Criminal Code 1899* (Qld).

10 There are no other offences where evidence of self-induced intoxication should be disregarded under either option 3 or 4.

CONCLUSION

The current treatment of intoxication and criminal liability in s 43AS is wholly unsatisfactory and confusing. It can be readily amended under any of the four main options listed above. The final selection of the preferred option depends on a subjective set of values as 'good' public policy depends on one's perspective. One absolute point can be made: the legislature is duty bound to its citizens to clearly set out its policy position by way of legislation on the treatment of intoxication and criminal liability.