LEGISLATIVE ASSEMBLY FOR

THE AUSTRALIAN CAPITAL TERRITORY

The Crimes (Amendment) Bill No. 4 1998

Report No. 10 of the

Standing Committee on Justice and Community Safety

May 2000

Resolution of Appointment

That—

The following general purpose standing committees be established to inquire into and report on matters referred by the Assembly or, matters that are considered by the committee to be of concern to the community...

...a Standing Committee on Justice and Community Safety to examine matters related to administration of justice, legal policy and services, registrar and regulatory services, electoral services, consumer affairs, corrective, emergency and police services and fair trading and any other related matter .[1]

Terms of Reference

Consider whether the Crimes (Amendment) Bill No.4 provides an appropriate and effective response to the availability of the so-called 'drunk's defence' in the ACT criminal law. [2]

That if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its Report to the Speaker or, in the absence of the Speaker, to the Deputy Speaker who is authorised to give directions for its printing, circulation and publication; and [3]

The foregoing provisions of this resolution have effect notwithstanding anything contained in the Standing Orders.[4]

Committee Membership

Paul Osborne MLA (Chair)

John Hargreaves MLA (Deputy Chair)

Harold Hird MLA

Trevor Kaine MLA

Secretary: Fiona Clapin

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1 Legislative Assembly for the ACT, Minutes of Proceedings, No.2, 28 April 1998, p 15 as amended in Minutes of Proceedings, No.70, 25 November 1999, p 622.

2 Legislative Assembly for the ACT, Minutes of Proceedings, No.16, 27 August 1998, p130.

3 Legislative Assembly for the ACT*, Minutes of Proceedings,* No.85**,** 30 March 2000, p 811.

4 ibid

Table of Contents

RECOMMENDATIONS

Recommendation 1

The committee recommends that the ACT Legislative Assembly support the passage of the Crimes (Amendment) Bill No.4.

Recommendation 2

The committee recommends that the ACT Government closely monitor the impact of the Bill and report back to the ACT Legislative Assembly on its impact within three years of it being enacted.

1.INTRODUCTION

Background

1.1.In October 1997, an ACT magistrate accepted a defence plea that Noa Nadruku, a member of the ACT Raiders Football team, could not be held criminally liable for assaulting two women. The magistrate declared that Mr Nadruku '…did not know what he did and did not form any intent as to what he was doing' as a result of being in an alcoholic blackout.

1.2.Noa Nadruku's defence is known colloquially as the 'drunks defence'.

1.3.The ACT magistrate's decision attracted widespread community outrage, both in the ACT and nationally. It prompted calls for changes to the law to prevent a defendant being able to rely on the 'defence' of excessive intoxication to avoid criminal liability.

1.4.In response to the adverse community reaction, the ACT Government introduced a Bill into the ACT Legislative Assembly in November 1997 which removes the drunks defence. That Bill elapsed with the expiry of the term of the Assembly but was subsequently reintroduced as the Crimes (Amendment) Bill No. 4 1998 in May 1998.

1.5.On 27 August 1998, the ACT Legislative Assembly resolved that the Standing Committee on Justice and Community Safety should consider whether the Crimes (Amendment) Bill No. 4 1998 provides an appropriate and effective response to the so-called 'drunks defence'.

Conduct of inquiry

1.6.The committee advertised in January 1999 for public input and also wrote directly to individuals and organisations thought to have an interest in the issue. Ten submissions were received.

1.7.The report for this inquiry has been delayed longer than the committee would have liked due to concentration on other more urgent inquiries such as the prison inquiry, the Emergency Management Bill 1998 inquiry and the draft budget inquiry.

1.8.The committee decided it was not necessary to hold public hearings as the issues were well explained in the written submissions.

Elements of Criminal Offences

1.9.The elements of a criminal offence need to be understood when considering this Bill. At common law a criminal offence consists of:

- an *actus reus*, or guilty act (the conduct element); and
- a *mens reus* or guilty intention (the mental element).

1.10.Both these elements must be present at the same time for a person to be guilty of a criminal offence. The conduct element requires either a positive act or an omission to act and it also requires that a defendant acted voluntarily.

The Crimes (Amendment) Bill No.4 1998

1.11.The Bill introduced by the ACT Attorney General is intended to implement provisions of the Model Criminal Code being developed for the Standing Committees of Attorneys General (SCAG). The Bill implements the provisions of subsection 4.2(60) of the Commonwealth Act in relation to self-induced intoxication and voluntariness and the provisions of subsections 8.2(1) and (2) in relation to self-induced intoxication and intent.

1.12.The approach taken in the Model Criminal Code is to identify the elements of an offence, the physical elements and the fault element which attaches to each physical element. The three physical elements are conduct, the circumstances in which conduct occurs and the result or consequences of conduct.

1.13.The Bill will prevent consideration of evidence of self-induced intoxication to show a lack of intent or voluntariness in relation to conduct only. This means that the 'drunks defence' cannot be used to show a lack of intent to commit the conduct, but can be used in relation to intent of the results of the conduct.

The legal sources-O'Connor, Beard and Majewski

1.14.There is more than one legal authority for judges and magistrates to base their decisions in cases such as Mr Nadruku's. The main authorities are *O'Connor* (Australian High Court), *Beard* (UK) and *Majewski* (UK).

O'Connor

1.15.The law cited by the magistrate who discharged Mr Nadruku on charges of assault is from a decision of the High Court made on 21 June 1979 in the case of R v O'Connor. In this decision the High Court declared the following:

a) an intent to do the physical act involved in a crime is indispensable to criminal responsibility;

b) acts the subject of a criminal charge must be voluntary; that is, done pursuant to an exercise of the will of the accused;

c) if intoxication is at such a level that a person's actions are involuntary that person is not criminally culpable even if that intoxication is self-induced.

d) the intent that is necessary for the alleged crime must exist at the time of the doing of the relevant act; and

e) if a person does not later remember what he did, then that does not necessarily indicate that his will did not go with what he did do or that he did not have the necessary intent.

1.16.This decision established the common law on criminal responsibility and self induced intoxication in Australia. It therefore became the law in the common law jurisdictions-the Commonwealth, NSW, Victoria, South Australia and the ACT. In the other jurisdictions, criminal codes-called Griffith Codes-reflecting a position close to the English law on self induced intoxication, apply.

1.17.The decision in *O'Connor* marked a departure from the English common law position. The two most significant English decisions for the purpose of a basic understanding of the English law are *Beard*[5] and *Majewski*[6].

Beard

1.18.In Beard's case, the accused, who was intoxicated at the time of the offence, was charged with murder. Beard's case entrenched the approach which distinguishes between crimes of 'specific intent' and 'basic intent'. The House of Lords held that an accused could use evidence of self induced intoxication to show a lack of 'specific intent' for 'specific intent' offences but could not use evidence of self induced intoxication to show a lack of 'basic intent' for 'basic intent' offences.

Majewski

1.19.In 1977, the House of Lords in *Majewski*, upheld a conviction for assault (categorised as an offence of basic intent) in circumstances where the accused had been found guilty of violent assault in a bar after taking a combination of alcohol and drugs leading to a gross degree of intoxication. The Lords considered a challenge to the *Beard* rules, primarily on the basis that the rules were inconsistent with general principles of criminal responsibility. While the House of Lords upheld the conviction they did so on the basis of policy rather than a strict application of the *Beard* rules.

1.20.The High Court of Australia's decision in *O'Connor* clearly rejects the *Beard* and *Majewski* position in favour of consistency with general principles of common law.

Competing views about the need for legislative reform

1.21.This issue is complex. There is no consensus in the legal community about what is the most appropriate and effective response to the 'drunks defence' and Australian jurisdictions have developed different responses to this issue.

[5] [1920] AC 479
[6] [1977] AC 443

1.22.The ACT Attorney General advised that the vast majority of representations to him following the Nadruku decision were to the effect that the law should be changed. However representations from the legal profession urged some caution on disturbing fundamental principles of the criminal law, pointing to how rare and exceptional are the circumstances in which the O'Connor defence succeeds.[7]

1.23.The submissions to this inquiry also reflect this divergence of views between the legal profession and other submitters. For example, both the Bar Association and Legal Aid (ACT) opposed the Government's Bill while it was supported by the Australian Institute of Criminology, the Women's Electoral Lobby and the Victims of Crime Coordinator.

1.24.There appears to be a conflict between fundamental legal principles and general community attitudes. A recent report by the Victorian Parliament describes as 'a conflict between the principles of criminal law and public policy':

> It is a fundamental element of **criminal responsibility** that a person should be held accountable for criminal conduct if that person acted voluntarily and intentionally. 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.[8]

1.25.The committee has considered this issue carefully. To draw conclusions on whether the Government's Bill provides an appropriate and adequate response to the 'drunks defence' requires balancing the competing interests of community views/public policy against the need to maintain fundamental legal principles of criminal law. It also requires a balancing of the rights of those accused of criminal acts with victims of those crimes.

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[7] ACT Government, First Submission

[8] Victorian Law Reform Committee, (May 1999) *Criminal Liability for Self-Induced Intoxication*, p6.

2.OTHER JURISDICTIONS

The Commonwealth

Legislative framework

2.1.The Commonwealth's response to the *Nadruku* decision was to announce its intention to commence the relevant part of the Commonwealth Criminal Code dealing with principles of criminal responsibility. A report to the Standing Committee of Attorneys General (SCAG) favoured retention of the O'Connor position. This was rejected by SCAG in 1994 and officers were required to devise a statutory regime similar to the *Beard/Majewski* rules.

2.2.The relevant Commonwealth provision does not distinguish between crimes of 'specific intent' and crimes of 'basic intent'. Rather there is an attempt to define 'basic intent' and provide that self-induced intoxication cannot be used to deny that.

2.3.The Model Code provisions mean that self-induced intoxication cannot be taken into account to deny voluntariness and the intention with which physical conduct (an act or omission) occurs. But self-induced intoxication can be taken into account to deny any voluntariness or intent as to any other physical element of an offence, such as a result.

Criticisms

2.4.A 1998 South Australian report criticised the Commonwealth approach on the grounds that it is:

> subject to the same criticisms that may be made of the *Beard/Majewski* rule from which it sprang. It gives rise to anomalous results and the criterion for separating the offences into one or the other of the two groups is not rationally related to the seriousness of the offence or its social consequences, or the prevalence of intoxication in its commission. It is more certain, rational and sophisticated than either the "specific intent" or "special intent" (Griffith Code model) rules, but, precisely for that reason, is more difficult to understand. Depending upon where one stands in the policy debate, it has the advantage (or disadvantage) of strictly limiting the plain artificialities of the restrictive rule to the minimum number of cases.[9]

2.5.More recently, the Victorian Law Reform Committee rejected the Commonwealth approach with the following comments:

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[9] SA Attorney General's Office, (July 1998) *Intoxication and Criminal Responsibility*

> the Committee wishes to make quite clear that it is not prepared to follow other state or federal jurisdictions by enacting legislation which distinguishes between offences of specific and basic intent, simply on the basis that it has been requested by the Commonwealth to do so…the Committee has concluded that the adoption of legislation similar to that suggested by the Commonwealth is absolutely inappropriate for Victoria.[10]

New South Wales

Legislative framework

2.6.NSW legislated in 1996 to prevent evidence of self-induced intoxication being taken into account to determine whether a person has the *mens rea* (the mental element) for an offence, other than an offence of specific intent. Its model relies on the *Beard/Majewski* distinction between crimes of basic intent and crimes of specific intent. This legislation, the *Crimes Legislation Amendment Act 1996*, makes it clear that the *O'Connor* principles do not apply in NSW.

2.7. The NSW legislation provides that 'an offence of specific intent is an offence of which an intention to cause a specific result is an element' and sets out an extensive list of offences which are offences of specific intent. These include murder, wounding with intent, use of a weapon to resist arrest, using chloroform to commit an offence and trustees fraudulently disposing of property. Specific intent offences can be broadly described as offences where a particular result or purpose is intended as part of the offence- the intent to do a physical act simpliciter (eg strike a person) is what is described as basic intent.

Criticisms

2.8.According to the ACT Government submission, one of the difficulties with the NSW model is that the distinction between specific intent and basic intent offences is sometimes difficult to make.[11] The Women's Legal Centre also argued that the distinction between basic and specific intent offences is artificial and logically difficult to justify.[12] In their view, because a number of offences do not fit neatly into these two categories, the application of the distinction can lead to anomalous and arbitrary outcomes.[13]

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[10] Victorian Law Reform Committee, (May 1999) *Criminal Liability for Self-Induced Intoxication*, p128.
[11] ACT Government, First Submission
[12] Women's Legal Centre, Submission
[13] ibid

2.9.The Victorian Law Reform Committee noted that while examples of specific intent are provided in the NSW legislation, the list is not exhaustive and leaves the courts with the responsibility of determining the nature of offences not included in the legislation.[14] The Victorian Law Reform Committee further noted that this is not an easy task because the distinction between offences of basic and specific intent is artificial, unclear and arbitrary.[15]

Victoria

2.10.In response to the *Nadruku* decision, the Victorian Attorney General, Jan Wade announced she would not be drawn into a 'knee-jerk' reaction to the matter. She noted that it raised issues at the very heart of criminal responsibility and that the 'defence' was rarely raised in Victoria and even more rarely successful.[16]

Legislative framework

2.11.At the time of writing, Victoria has not passed legislation addressing the 'drunk's defence' issue and still relies on the O'Connor principles.

Recent policy review

2.12. In May 1999 the Victorian Law Reform Committee released its report, *Criminal Liability for Self-Induced Intoxication*. This Victorian parliamentary committee's report contains a very detailed analysis of the issues, including historical information and consideration of eight options for addressing the drunk's defence issue. Essentially the report identifies the key issue as a conflict between the principles of criminal law and public policy and comes down in favour of maintaining the principles of criminal law, by supporting the *O'Connor* principles.

2.13. The Victorian report argues that the *O'Connor* decision is correct in principle and it should continue to state the law in Victoria. The Victorian committee considered that lower courts were misapplying *O'Connor* leading to inappropriate acquittals. As a result the Victorian report recommends that where a defendant charged with an indictable offence proposes to rely on the intoxication 'defence' the matter must not be dealt with summarily but by way

[14] Victorian Law Reform Committee, (May 1999) *Criminal Liability for Self-Induced Intoxication*, p33.
[15] ibid
[16] ACT Government, Submission

of trial before judge and jury. The report rejects the proposal to introduce an offence of committing a dangerous act while grossly intoxicated. The report proposes a procedural change to prevent a defendant from failing to raise self-induced intoxication at trial but then seeking to rely on it as the grounds for an appeal. The report also recommends that if the 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. The report recommends a greater use of anger management and alcohol and drug programs in sentencing offenders.

Criticisms

2.14. Arguments against relying on the *O'Connor* principles are:

- people who freely choose to become intoxicated should be held accountable for criminal conduct committed in that state;
- it promotes a community perception that there is a bias in the legal system in favour of criminals at the expense of victims;
- the principles do not recognise the impact of crime on the victims; and
- the principles do not send a strong message to potential self-induced intoxicated offenders that criminal acts committed in this condition will not be tolerated

2.15. The ACT Government does not believe that the *O'Connor* decision should continue to state the law in the ACT. The ACT Government does not accept the recommendation to require self-induced intoxication matters to be tried by judge and jury because this would add to the costs of the criminal justice system by pushing matters which would have been tried summarily to the higher cost Supreme Court. The ACT Government is not persuaded that there is any value in the Victorian report's suggestion that if the 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.[17]

[17] ACT Government, Second Submission

South Australia

2.16.At the time of the *Nadruku* decision, the South Australian Attorney General expressed caution on any change to the law, noting that there was no record in South Australia of the 'defence' being successfully used.[18]

Policy review and Legislative framework

2.17.In 1998, a South Australian Discussion Paper included three possible models for Bills. Following community consultation on these models a Bill was introduced into the SA Parliament at the end of 1998. The Bill requires a defendant to be found guilty of an offence, where the objective elements of the offence are established but the defendant's consciousness was (or may have been) impaired by intoxication to the point of criminal irresponsibility but only if it is established that:

- the defendant formed an intention to commit the offence before becoming intoxicated; and
- consumed intoxicants in order to strengthen his or her resolve to commit the offence.

2.18.This resulted in the *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA). Without disturbing the *O'Connor* principles, the legislation:

- makes it clear that if a defendant becomes intoxicated in order to strengthen his or her ability to commit a criminal offence, then that defendant will not be able to rely on evidence of self-induced intoxication; and
- introduces a procedural change under which a trial judge only has to direct a jury on the issue of intoxication where the defence specifically requests the trial judge to address the jury on that issue.

Criticisms

2.19.The ACT Government has criticised this approach on the grounds that it will not prevent reliance upon self-induced intoxication other than where it can be shown that the defendant drank to build up Dutch courage to commit an

[18] ACT Government, First Submission

offence. The Government notes it does not go as far as the NSW, Griffith Code or Model Criminal Code models in preventing reliance on the 'drunk's defence'.[19]

Queensland, Tasmania, Western Australia and the Northern Territory

2.20.The non common law jurisdictions-Queensland, Tasmania, WA and the NT- have different versions of what is known as the Griffith Code (a criminal code drafted largely by Sir Samuel Griffith at the end of last century). The Griffith codes contain a version of the *Beard/Majewski* rules. For example, the Queensland Criminal Code provides:

> 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.

2.21.As a result, intoxication can be used as evidence that an intention to cause a specific result did not exist but cannot be used as evidence that any other mental element of an offence did not exist. This is referred to as 'special 'intent' as opposed to specific intent.

Criticisms

2.22.The ACT Government notes that as with the *Beard/Majewski* rules, the distinction between 'special intent' and other types of offences is anomalous and not based on considerations such as the seriousness of the offences.[20]

International jurisdictions

2.23.Canada has legislated to address concerns about a reliance upon a 'defence' of voluntary intoxication. In 1995 a law was enacted in Canada to create a 'standard of care' that would be breached by a person who became extremely intoxicated and caused harm to another person while in that state. A person who departed from the standard of care would be unable to rely on the defence of extreme intoxication.[21]

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[19] ACT Government, First Submission
[20] ACT Government, First Submission
[21] ACT Government, First Submission

2.24.Generally civil law jurisdictions (such as Germany, Austria, Switzerland and the Netherlands) have given more weight to ‘public policy’ considerations over principles of criminal responsibility than the common law jurisdictions (such as Canada, New Zealand and the UK).[22]

[22] Victorian Law Reform Committee, (May 1999) *Criminal Liability for Self-Induced Intoxication*, p63.

3.CONCLUSIONS

Competing interests

3.1.This issue requires the committee to balance competing interests. These competing interests have been characterised as: 'public policy' considerations versus fundamental principles of criminal law; and the rights of victims of crime versus the rights of those charged with criminal offences.

3.2.The ACT Attorney-General has acknowledged that the defence of excessive intoxication is rarely used and rarely succeeds and that it is only made out in the most exceptional circumstances, with the level of intoxication such as to render the defendant into a state of automatism.[23] Despite this, the Attorney General has proposed legislation to avoid the *O'Connor* defence. Significantly, he stated:

> The very fact that it had been raised in an ACT court and had succeeded could have encouraged more defendants to attempt to avoid responsibility for their conduct in reliance on the 'defence'.[24]

3.3.The committee agrees with the Attorney General's reasoning. The fact that it is rarely used may make it easier for some jurisdictions without recent experience of it to decide against a legislative response. While it is fresh in the minds of members of the ACT public, just one incident is one too many.

3.4.When balancing the rights of victims of crime against the rights of those charged with criminal behaviour, the committee supports a legislative response which supports victims of crime. The legislative framework for alcohol-related crime must ensure that:

- people who freely choose to become intoxicated will be held accountable for criminal conduct committed in that state;
- a strong message is communicated to potential self-induced intoxicated offenders that criminal acts committed in this condition will not be tolerated;
- adequate recognition is given to the impact of crime on the victims of crime; and

[23] ACT Government First Submission
[24] ibid

- the community is protected from violent, intoxicated individuals.

Rejection of O'Connor Principles

3.5.The committee found that a continued reliance on the *O'Connor* principles would not meet any of the above criteria for its preferred legislative framework. It would therefore not be satisfactory for the ACT to continue to rely on *O'Connor*. The community outrage which occurred following the *Nadruku* decision was justifiable and demands an appropriate legislative response from Government. Any continuation of the status quo would undoubtedly lead to another *Nadruku* type decision some time in the future along with widespread community anger.

3.6.In rejecting the option of allowing the *O'Connor* principles to state the law on self-induced intoxication, the committee acknowledges the ACT would be taking a different approach to the recommendations of the Victorian parliamentary committee. The Victorian committee undertook a very thorough consideration of eight options to address the problem of the 'drunk's defence' and concluded that the *O'Connor* principles should continue to state the law in Victoria, thus recognising the importance of fundamental criminal law principles over 'public policy' considerations.

3.7. The committee was not convinced by the legal argument against the Bill. This legal argument assumes that excluding evidence of self-induced intoxication erodes the fundamental principle of criminal law that a person is not guilty of a criminal offence unless that person acted intentionally and voluntarily. The committee considers that individuals make choices to imbibe alcohol and drugs and should be held responsible for these choices. In taking this position, the committee was reassured that, the Government's Bill, while not enjoying the full support of legal experts, was developed by lawyers within the Department of Justice and Community Safety, is based on Commonwealth-sponsored model legislation and its main proponent is the legally-qualified ACT Attorney-General.

3.8.Despite the lack of support by lawyers, the committee expects its approach to be welcomed by the general community. The law is not just the realm of lawyers; it should reflect general community standards and require individuals to be accountable for their behaviour. When individuals choose to take alcohol and drugs they should understand they are responsible for their behaviour and will be held accountable for their behaviour.

Consideration of Alternatives to the Government's Bill

3.9.The committee gave careful consideration to alternatives to the Government's Bill. These alternatives were raised by the Scrutiny of Bills Committee, submissions to this inquiry and in the Victorian Law Reform Committee's report *Criminal Liability for Self-Induced Intoxication*.

3.10.This committee has previously considered the Bill in its role as a Scrutiny of Bills and Subordinate Legislation Committee.[25] In its report, the committee drew attention to the fact that the definition of self-induced intoxication will still enable defendants to rely on his or her being in a state of intoxication to argue he or she did not have the requisite *mens rea*. An example would be when intoxication was 'involuntary' such as when a defendant's drinks have been 'spiked' by someone else. A more problematic case would be where intoxication was the result of 'fraud' or 'reasonable mistake'. For example, where a defendant claims not to observe the frequency in which a waiter tops up a glass or a where a defendant claims not to have appreciated the potency of a drink or a drug. The committee acknowledges that the Bill leaves open the potential for a 'drunks defence' in such cases but at this stage prefers to leave the Bill as it is. The legislation could be amended in the future if necessary.

3.11.Submissions also included suggestions for improving the Bill such as:

- addressing whether intoxication should be a mitigating or aggravating factor (or neither) in relation to penalty[26];
- extending the Bill to cover circumstances and consequences as well as conduct[27]; and
- adding a provision dealing with the scenario where the offender forms the intent to commit the offence and then consumes intoxicants to stiffen his resolve.[28]

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[25] Standing Committee on Justice and Community Safety (Incorporating Scrutiny of Bills), *Report No. 3 1998.*

[26] ACT Ombudsman, Submission

[27] Women's Electoral Lobby, Submission

[28] Women's Legal Centre, Submission

3.12.Again, the committee is not inclined to recommend amendments to the Bill to address the above concerns, at this stage. These suggestions could be considered by Government when it reviews the impact of the legislation in two-three years time.

3.13.Other alternatives were raised in the Victorian parliamentary committee's report.[29] The Victorian committee considered that lower courts were misapplying *O'Connor* and that these cases be dealt with by trial before judge and jury. The committee does not support this option because it would be too costly. The committee also does not support the report's suggestion that if the 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.[30]

3.14.The Victorian report's proposed procedural change to prevent a defendant from failing to raise self-induced intoxication at trial but then seeking to rely on it as the grounds for an appeal is dealt (their recommendation 5) may have some merit. The ACT Government agrees that this is a sensible procedural change and the committee suggests the Government give it further consideration.

3.15.In summary, the committee found no evidence of superior alternatives to the Government's Bill and has therefore concluded that the Crimes (Amendment) Bill No. 4 is an appropriate and effective response to the availability of the so-called 'drunks defence' in the ACT.

Recommendation 1

3.16.The committee recommends that the ACT Legislative Assembly support the passage of the Crimes (Amendment) Bill No.4.

3.17.However, because of the lack of support from the legal fraternity and the variation in responses from other Australian jurisdictions, it is suggested that the Government monitor the impact of the legislation.

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[29] Victorian Law Reform Committee, (May 1999) *Criminal Liability for Self-Induced Intoxication*.

[30] ACT Government, Second Submission

Recommendation 2

3.18.The committee recommends that the ACT Government closely monitor the impact of the Bill and report back to the ACT Legislative Assembly on its impact within three years of it being enacted.

3.19.Broader issues concerning alcohol and crime were highlighted in this inquiry. While there is a strong community perception that alcohol causes violence, there are inadequacies in the Australian research and data collection on the relationship between alcohol and crime.[31] The committee encourages the Government to devote more attention to this area. The Government should also introduce strategies to reduce alcohol-related crime in the ACT. It would be useful if the ACT Government could develop a costing of alcohol-related crime in the ACT. It is also suggested that the Government take advantage of the publicity opportunity to highlight the societal costs of excessive alcohol consumption when the *Crimes (Amendment) Bill No. 4 1998* is put before the Assembly again.

Paul Osborne MLA

Chair

1 May 2000

[31] Victorian Law Reform Committee, (May 1999) *Criminal Liability for Self-Induced Intoxication*, pp72-3.

APPENDIX A-SUMMARY OF SUBMISSIONS

ACT Bar Association

The Bar Association claimed that the rationale behind the current law, is perfectly sound. In their view 'voluntariness' should underpin criminal liability.

The Bar Association suggested that for the sake of clarification, the onus of 'voluntariness' should be made abundantly clear that it is the civil onus. And from a sentencing point of view, it should be made clear that self-induced intoxication shall be one of the matters a Court may consider in determining the appropriate penalty.

Australian Institute of Criminology

The Institute supports the implementation of the Model Criminal Code and congratulates the Attorney General for acting on the recommendations of the Model Criminal Code Committee in regard to the defence of intoxication. The Institute notes that the community does not consider intoxication to be an appropriate defence to criminal conduct, particularly where the conduct results in the victimisation of an innocent third party. In their view, removing the defence of intoxication is likely to receive the support of victims of crime, who wish to see offenders held responsible for their conduct, even where the offender was intoxicated during the commission of the offence.

Legal Aid Office (ACT)

Legal Aid noted that the 'drunks defence' is one of those areas of the criminal law which receives a public notoriety well beyond its prevalence. The defence is rarely proffered and even more rarely accepted. Legal Aid notes that 'the criminal law has never been generous to defendants who attempt to assert that they were so intoxicated that they were unable to form a culpable mind when their acts were culpable. It could well be that the case which led to the production of this Bill was very much a "once in a lifetime" occurrence.'

Legal Aid suggested that it is in the interests of the ACT community to have criminal laws consistent with those of other jurisdictions although fairness and propriety should also prevail.

Legal Aid suggested there is an appropriate balance in the common law as it exists to avoid cases such as Nadruku. The High Court indicated in the leading case on this topic that presumptions of regularity will apply and that an accused person will have great difficulty in showing self induced intoxication led to an absence of will. Legal Aid believes the judgement in the O'Connor case was proper. It maintained 'the appropriate public order criteria which had been in our justice system for over a thousand years, namely that for most criminal acts to be proven an accused must have intended the wrong he or she committed.'

Legal Aid pointed out that Bill will simply provide more facets for lawyers to consider when advising the accused of their position.

Commonwealth Ombudsman

The Ombudsman did not wish to comment on the policy underlying the Bill but did provide the following comments concerning the drafting of the Bill:

- it should address specifically intoxication arising from an interaction between or combination of alcohol, drugs and other substances;

- as well as addressing whether intoxication is to be a defence, the Bill should address whether it should be a mitigating or aggravating factor (or neither) in relation to penalty.

The Ombudsman also questioned whether the Bill would deal well with cases where it is difficult to distinguish between intention to carry out an individual act which is a component of an offence and intention to commit an offence as a whole. It would be unfortunate if unwarranted results occurred because it was too difficult to satisfy a jury of a matter (the precise object of subjective intention) uniquely within the knowledge of the accused.

Australian Federal Police

The Australian Federal Police (AFP) supports the Bill and its removal of self-induced intoxication to establish that the person did not have the intent to commit an act or omission which constitutes an element of a criminal offence or that the person's act was not voluntary.

The AFP notes the Bill will not significantly affect police operations but will assist in some prosecutions.

Women's Electoral Lobby

The Women's Electoral Lobby (WEL) notes that the definition of self-induced, as opposed to involuntary or unintended intoxication is an important step in that it places responsibility for ingestion of intoxicating substances onto the individual who ingests them, rather than on the substance per se. Since it is quite clear that people do have a choice as to whether or not to indulge in any form of behaviour under normal circumstances, intoxication ought to be considered an act of choice, which under ordinary circumstances can be avoided by choice.

WEL notes that delineation under the Model Criminal Code of an offence into the three constituent parts of conduct, circumstances and consequences seems stronger than the proposed focus in the Bill on conduct alone. While people generally may suffer, under intoxication, from a diminished ability to formulate reasonable intentions or to consider the consequences of their actions, focus on cause alone is unlikely to change attitudes which lead to those actions. This applies particularly to sexual assault.

WEL highlights the issue of domestic violence and its effect on children. WEL suggests that if the intent of the Bill is encourage people to become fully responsible for their behaviour, the Bill should include consequences for domestic violence.

WEL suggests a cultural change is required to successfully challenge community tolerance of domestic violence. The Bill is an opportunity to contribute to that change in the ACT. WEL more responsibility should be taken by providers of alcohol to refuse service, drinkers to control consumption through consideration of consequences and the Government to provide resources for public education into the societal costs of intoxication.

Women's Legal Centre

The Women's Legal Centre (WLC) recognises that while evidence of self-induced intoxication is rarely used, leaving such an avenue of argument open to defendants undermines the role of the law as a regulator of acceptable modes of social behaviour. For this reason they support amending the existing law on intoxication.

The WLC drew attention to numerous studies suggesting a link between violence and alcohol, particularly for violent crimes in which victims are primarily women, such as domestic violence and sexual assault.

The WLC suggested it is counter-intuitive that defendants should escape criminal responsibility and counterproductive in light of the links between violence and alcohol.

The Bill adopts the distinction outlined in Majewski between specific and basic intent offences. This approach would permit evidence of intoxication to be introduced to show an absence of intent or voluntariness in relation to specific but not basic intent offences if it related to a failure to comprehend the circumstances surrounding an offence. The WLC sees this as positive because of the links between certain crimes and alcohol and the continuing high incidence of violence against women. It is desirable that the law discourage irresponsible consumption of intoxicants.

The WLC is concerned the Bill excludes evidence of intoxication as it relates to intention or voluntariness only for basic intent offences. The potential remains for acquittal on the basis of intoxication when the defendant is charged with a specific intent offence. On balance, the WLC accepts this may be necessary to protect the rights of the accused but remain concerned about the consequences of this for victims and for society generally. They would welcome a provision enabling judges to require those acquitted of offences purely on the basis of self-induced intoxication to seek treatment.

The WLC notes the distinction between basic and specific intent offences is artificial and logically difficult to justify. Because a number of offences do not fit neatly into these two categories, the application of the distinction can lead to anomalous and arbitrary outcomes.

The WLC would like to see the addition of a provision dealing with the scenario where the offender forms the intent to commit the offence and then consumes intoxicants to stiffen his resolve. S 428C (2) of the NSW Criminal Legislation Amendment Act 1996 No.6 is a good example of a way of avoiding this kind of loophole.

The WLC suggests the creation of a schedule of specific intent offences as was done by the NSW Criminal Legislation Amendment Act 1996 No.6 s428B. This would provide greater opportunity to view the Crimes Act 1900 (ACT) as a functioning whole rather than the courts deciding the matter in an ad hoc fashion.

Problems in the logical consistency in the specific/basic intent distinction with regard to intention are magnified in the case of voluntariness. Ryan v R (1967) 121 CLR 205 Barwick CJ holds that the defendant's act would be involuntary if it did not involve 'the exercise of the will to act'. If there is no exercise of will involved in the perpetrator's actions, the relative complexity of the requisite intent for a particular offence seems wholly irrelevant, and its being the determining factor (as it will be in the proposed Bill) as to whether an act attracts criminal culpability, seems wholly unreasonable.

The WLC is concerned the Bill may have a knock on effect for some excusory defences. By not permitting evidence of intoxication to negative the voluntariness of the offence, the amendment imposes a constructive fault for basic intent offences. If the premise that an act must be voluntary to attract criminal responsibility is undermined, defences such as automatism, which rely on the same principle, may be weakened. There is some qualitative difference between making a choice to become so intoxicated that one's actions are no longer voluntary, and behaving involuntarily in response to a circumstance over which one has no control. This difference insulates these defences from the reasoning applied to intoxication.

The WLC supports an information campaign informing the community about these changes to the law which promotes the view that intoxication is no excuse for domestic violence, sexual assault or other forms of violent crime.

The WLC believe the Bill is a reasonable compromise between the rights of victims and perpetrators. The WLC recommend that the impact of the changes be monitored so that problems can be dealt with promptly.

Victims of Crime Coordinator and Domestic Violence Coordinator

The VoCC and the DVC are aware there may be limited circumstances where lack of intent or voluntariness to commit an act or omission which constitutes an element of a criminal offence may be argued. This could not be said when a person sets out of their own free will to becomes so intoxicated by alcohol or any other substance as to render him/herself insensible as to their subsequent actions or to the consequences of their actions.

In the case which gave rise to the proposed amendment, it could be argued that the defendant rendered himself so intoxicated as to be considered reckless. Some could argue that such action and such recklessness may even infer intent. The defendant was apparently still capable of choosing two particular women to assault, to assault in particular ways and in two particular occasions.

The Bill appears to satisfactorily account for certain specific circumstances in which evidence of self-induced intoxication may reasonably be used in defence. The VoCC and the DVC support the Bill.

ACT Government

First submission

The Attorney-General does not dispute the proposition the 'defence' of excessive intoxication will only be made out in the most exceptional

circumstances. The level of intoxication required is such as to render the defendant into a state of automatism. His view is that there was a need to avoid the use of the O'Connor 'defence', notwithstanding that it is rarely used and rarely succeeds. The very fact that it had been raised in an ACT court and had succeeded could, in his view, have encouraged more defendants to attempt to avoid responsibility for their conduct in reliance on the 'defence'.

The law which permitted the discharge of Mr Nadruku is based on the High Court decision in The Queen vs O'Connor (1980). The Court rejected the proposition that fundamental principles of criminal responsibility should be qualified where a lack of intent resulted from self-induced intoxication. This decision established the common law on criminal responsibility and self induced intoxication in Australia. The O'Connor decision marked a departure from the English common law position. The two most significant English decisions for the purpose of a basic understanding of the English law are Beard and Majewski.

While there was a public outcry at the Nadruku decision, representations from the legal profession urged caution in disturbing fundamental principles of the criminal law. Some members of the legal profession have indicated that the Bill is undesirable, preferring to maintain the common law, while some criminal justice agencies and members of the judiciary advised that they considered the Bill would achieve its stated purpose.

The submission outlines models used in NSW and other states.

The public policy considerations involved in legislative reform in this area are complex and a perfect solution is unachievable.

The Government is open to consideration of alternative approaches to that in the Bill.

Second submission

This submission responds to recommendations of the Victorian Law Reform Committee's report Criminal Liability for Self-Induced Intoxication. It notes that none of the recommendations have been implemented in Victoria.

The Victorian report's response is that the O'Connor decision is correct in principle and it should continue to state the law in Victoria. The Victorian committee considered that lower courts were misapplying O'Connor leading to inappropriate acquittals. As a result the Victorian report recommends that where a defendant charged with an indictable offence proposes to rely on the intoxication 'defence' the matter must not be dealt with summarily but by way of trial before judge and jury. The ACT Government considers this would add to the costs of the criminal justice system by pushing matters which would have been tried summarily to the higher cost Supreme Court and does not advocate implementation of this recommendation in the ACT.

The Victorian report rejects the proposal to introduce an offence of committing a dangerous act while grossly intoxicated and the ACT Government also does not propose to do this. The ACT Government does not agree that the O'Connor decision should continue to state the law in the ACT.

The ACT Government agrees that the Victorian report's proposed procedural change to prevent a defendant from failing to raise self-induced intoxication at trial but then seeking to rely on it as the grounds for an appeal is a sensible, procedural change which could avoid costly appeals and retrials. However it is not an issue which the Government's legislation addresses and would warrant further consultation with relevant criminal justice stakeholders.

The Victorian report recommends a greater use of anger management and alcohol and drug programs in sentencing offenders. The ACT Government notes these programs are already in place in the ACT.

The Victorian report recommends that if the 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. The ACT Government is not persuaded that there is any value in the type of provision suggested by this recommendation.

REPORTS PRESENTED BY THE STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY IN THE FOURTH ASSEMBLY

1 Children's Services (Amendment) Bill 1998. (December 1998).

2 Victims of Crime (Financial Assistance) (Amendment) Bill 1998. (June 1999).

3 Interim Report No. 1 (Prison series) – Inquiry into the establishment of an ACT Prison: justification and siting. (July 1999).

4 Interim Report No. 2 (Prison series) – Proposed ACT Prison Facility Philosophy and Principles. (October 1999).

5 Emergency Management Bill 1998. (November 1999).

6 Agents (Amendment) Bill 1998. (December 1999).

7 Joint Emergency Services Centre (JESC) Proposal. (December 1999).

8 1998-99 Annual and Financial Reports – Department of Justice and Community Safety and Related Agencies. (February 2000).

9 The 2000/01 Draft Budget of the Department of Justice and Community Safety and Related Agencies (March 2000)

10 Crimes (Amendment) Bill No. 4 (May 2000)