

**NORTHERN TERRITORY LAW**  
**REFORM COMMITTEE:**  
**REPORT ON**  
**SELF-INDUCED INTOXICATION**

Report No. 39

December 2013

**MEMBERS OF THE NORTHERN TERRITORY LAW REFORM  
COMMITTEE**

The Hon Austin Asche AC QC	Professor Les McCrimmon
Mr Peter Shoyer	Mr Nikolai Christrup
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**MEMBERS OF THE NORTHERN TERRITORY LAW REFORM  
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## TERMS OF REFERENCE

I JOHAN WESSEL ELFERINK, Attorney-General, ask the **Northern Territory Law Reform Committee** to investigate, examine and report on law reform in relation to the effect intoxication has on criminal liability.

### **Matters for the Committee to Consider**

1. Is there a public policy benefit in holding persons criminally responsible for their actions whilst intoxicated, irrespective of whether they acted voluntarily or intentionally? If so, how is the best way to achieve this policy initiative?
2. Should this apply only to certain offences, say, to driving offences and not to offences of violence?
3. Will removing the admissibility of evidence of self-induced intoxication in relation to the commission of an offence achieve the purported public policy benefit, by limiting the use a tribunal of fact may make of such evidence?
4. Should there be a distinction between offences of basic intent and specific intent for the purposes of the use of evidence of self-induced intoxication?
5. If admissibility of evidence of self-induced intoxication is to be limited, for which fault elements should this rule apply?
6. Should the onus of proof of fault elements be reversed when self-induced intoxication is sought to be admitted so as to deny criminal responsibility?
7. Should a specific offence of committing a dangerous or criminal act, similar to the provisions previously found in the now repealed section 154 of the Criminal Code be reintroduced into the Northern Territory?
8. To what extent should evidence of self-induced intoxication be disregarded in relation to sexual offences?
9. To what extent should evidence of self-induced intoxication be disregarded for the purposes of determining the partial defences of provocation and/or diminished responsibility?
10. Are there other offences where evidence of self-induced intoxication should be inadmissible or disregarded by virtue of the charge?

For the purposes of this report, intoxication is taken to mean the temporary action of a chemical substance (whether illicit or lawful) upon the physiological and mental sobriety of a person, resulting in a toxic, abnormal condition.

In formulating this report the Committee ought to consider the applicability of *R v O'Connor* (1980) 146 CLR 64 and *DPP v Majewski* [1977] AC 443. I request the committee present to me a completed report along with a draft bill prepared with the assistance of Parliamentary Counsel by 30 June 2013.

The Attorney-General, the Hon John Eleferink subsequently requested that the report of the committee be completed by 31 December 2013.

## CRIMINAL LAW – INTOXICATION

### PLUS CA CHANGE....

Dr Bill Wilson came to Australia after an early career in the British Army. He joined the NT Police Force and rose to the rank of Assistant Police Commissioner. On retiring he continued the academic interests he had already commenced at the NT University (now Charles Darwin University) and became a lecturer there in history and politics. In 2001 he was awarded a PhD for his thesis “A Force Apart – a History of the NT Police Force 1870-1926”. This is clearly the definitive history of the Police Force NT during those years.

Competence in research, coupled with active service in the Police Force over 27 years, must necessarily add special weight to any pronouncement of his on NT Police duties and activities from the commencement of the Force under Inspector Foelsche in 1870 and thereafter.

In December 1999 Dr Wilson spoke at a conference convened by the Australian Institute of Criminology in Canberra. His subject was “*An Analysis of Drunkenness, Disorder and Drug Offences in the NT 1870-1926*”. In his opening paragraph he emphasised that “*Ever since Europeans permanently settled the NT in 1870, drunkenness, social disorder and drug offences have all posed problems for law enforcement officers*”.

## PUBLIC POLICY

The Reference asks whether there is a “public policy benefit in holding persons criminally responsible whilst intoxicated irrespective of whether they acted voluntarily or intentionally?”

Any “public policy” must necessarily flow from and be consistent with the attitude of society towards drunkenness generally. It fails without public support.

But public support differs at various times and in various societies. A policy of total prohibition of alcoholic drinks failed in the USA because ultimately public support failed, and the policy was repealed. On the other hand, the same policy of prohibition has for many hundreds of years and still today succeeded in Muslim countries based on the prevailing religion accepted by the public.

Numerous examples of public policy varying from total prohibition to, perhaps, over-tolerance can be found throughout the world both in ancient and modern times; but, save as to note this obvious fact, this Committee does not consider, nor is it equipped to present, a sociological study of these variations. It accepts, for the purpose of this Reference, that there is a broad public policy in Australia on the question of intoxication, which can be simply put as:

- (a) Toleration and acceptance of moderate consumption of alcoholic beverages;  
(Note particularly the views set out in Appendix 1 herein)
- (b) Social condemnation of drunkenness per se, but, (now), no legal prohibition;<sup>1</sup>
- (c) Support of statute law applying sanctions against anti-social behaviour or anti-social actions arising out of intoxication.

Accepting the above as public policy (and acknowledging that some minority groups would disagree), this Committee is asked to consider whether there is a “benefit” to be derived from certain specific legislation which might differ from that which presently prevails. Again, this Committee notes that the expression “benefit” might ultimately encompass an extra-legal enquiry as to whether the legislation suggested would or could produce the social benefits desired. Nevertheless, a survey of the present legislation and a consideration of how, if at all, that legislation should be varied, will necessarily involve views as to the benefits of such changes as might be proposed. Such views drawn from the experience of members of this Committee, and the experience of lawyers and others involved in the field might, it is hoped, provide at least a rational legislative policy as an effective basis from which to build up further research if desired; such further non-legal research being outside the bounds of this Committee’s expertise.

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<sup>1</sup> Drunkenness per se was once a statutory offence; but now repealed in all States and Territories. Pursuant to s.128 of the Police Administration Act of the NT a member of the Police Force may take a person into custody if that person is intoxicated and certain other matters appear as set out in that section



## THE CRIMINAL LAW AND INTOXICATION

The earlier common law had no problem with intoxication as an element in any particular crime. It was irrelevant save, possibly, to aggravate the seriousness of the offence. The position is stated clearly enough in Beverley's Case 4 Coke 125a 1603.

*"Lastly, though he who is drunk is, for the time, non compos mentis, yet his drunkenness does not extenuate his act, nor turn it to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time".<sup>2</sup>*

Nevertheless the alternative view, that drunkenness could be an excuse, was no doubt as prevalent then as it had been in earlier Chaucerian times when the Miller had succinctly pronounced:

*"that I am dronke, I knowe wel by my soun;  
And therefore if that I mys-speke or seye,  
Wyte it the ale of Southwerk, I you praye"<sup>3</sup>*

Thus, centuries ago, the battle lines were drawn. Drunkenness condemns; or drunkenness excuses. The debate continues to this day.

The court in Beverley's case is making no distinction between the actus reus and the mens rea. If the accused did the prohibited act and the question was whether he intended to do so, then a state of drunkenness was irrelevant to examining the intent. Yet such an absolute approach may be considered by many, to be unrealistic since it is clear, from common observations that drunkenness may affect the mind of the accused in various ways, depending on the extent of the intoxication. It may in fact enhance the element of intent if it appears that the accused deliberately took alcohol to "screw his courage to the sticking place", and give him the determination to do what he intended to do<sup>4</sup>; or it may indicate a condition where drunkenness has affected his capacity to form the intent; or it may be no more than a condition where the drunkenness may be a fact but not ultimately a fact of any relevance to the alleged offence.

The leading case, for many years was DPP v Beard (1920) AC 470, which grappled with the question of intent and intoxication, and made it clear that in some rare cases intoxication might lead on to apparent insanity, in which case the tests for insanity would become relevant. Beard's case has been modified or interpreted in various ways, both in case-law and statute. For the purpose of this Reference it may be more useful to consider the two classic cases which embody developments after

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<sup>2</sup> See also Holdsworth Vol VIII p.441 "The rule laid down in the 16<sup>th</sup> Century was short and clear – drunkenness was no excuse for crime, but rather an aggravation of the offence"

<sup>3</sup> Chaucer – Canterbury Tales "The Mylles Tale"

<sup>4</sup> See the discussion on "Dutch Courage" in Bronitt and McSherry – "Principles of Criminal Law" 4.185. The quotation is from "Macbeth" Act 1 Scene 7.

Beard, and stand at either end of the question of drunkenness as a defence in criminal law; and demand a consideration as to which end is preferable or whether there may be a middle course.

The cases of Majewski (1977) AC 443 and O'Connor (1980) 146 CLR 64, both acknowledge that drunkenness may be taken into account in considering whether, in an offence requiring a specific intent, (that is, an intent specifically required by common law or by the appropriate section of a statute), that intent has been proved. They differ as to whether it is necessary or appropriate to consider the question of intoxication upon an offence of "basic" intent. Majewski – "No" O'Connor – "Yes".

In DPP v Morgan (1976) AC 182 at 216 Lord Simon says:

*"By 'crimes of basic intent', I mean those crimes whose definition expresses (or more often implied) a mens rea which does not go beyond the actus reus. The actus reus generally consists of an act and some consequences. The consequence may be very closely connected with the act, or more remotely connected with it; but with a crime of basic intent the mens rea does not extend beyond the act and its consequences, however remote, defined in the actus reus."*

But common sense, or reasonably common experience,<sup>5</sup> indicate that a state of intoxication may affect even the "basic" intent of the accused to do the particular act with which he or she is charged. Should this not be considered in determining guilt?

The reply is robustly given by Lord Elwyn-Jones L.C in Majewski:

*"If a man of his own volition takes a substance which causes him to cast off a the restraints of reason, no wrong is done to him by holding him answerable criminally for any injury he may do in that condition. His course of conduct in reducing himself by drugs or drink to that condition supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent".* (1977) AC at 474-5.

The direct approach of Lord Elwyn-Jones was followed by Lord Kilbrandon, Lord Diplock and Lord Edmund-Davies. Lord Edmund-Davies was equally positive:-

*"The established law then, was and is now that self-induced intoxication, however gross, cannot excuse crimes of basic intent such as that giving rise to this appeal" (p.491).*

Other Law Lords acknowledged some illogicality in this approach but nevertheless affirmed it on the grounds of public policy.

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<sup>5</sup> It is remotely possible that some members of this Committee may have encountered some of the milder effects of intoxication but, of course, many years before the attainment of their present dignified and responsible positions.

Thus Lord Russell of Killowen says:-

*“A man who has no knowledge of what he does cannot, it is said be a guilty man, whatever may have deprived him of such knowledge. There is at least superficially logic in that approach: but logic in criminal law must not be allowed to run away with common sense, particularly when the preservation of the Queens Peace is in question”. (p.498)*

Lord Salmon conceded the illogically, but he, too, justified it on the basis of public policy.

*“As I understand it, the argument runs like this: Intention whether special or basic (or whatever fancy name you choose to give it) is still intention. If voluntary intoxication by drink or drugs can, as it admittedly can, negative the special or specific intention necessary for the commission of crimes such as murder and theft, how can you justify in strict logic the view that it cannot negative a basic intention, eg the intention to commit offences such as assault and unlawful wounding. The answer is that in strict logic this view cannot be justified. But this is the view that has been adopted by the common law of England which is founded on common sense and experience rather than strict logic” (p.482).*

Again (Lord Salmon)

*“my Lords , I am satisfied that this rule accords with justice, ethics and common sense, and I would leave it alone even if it does not comply with strict logic. It would, in my view, be disastrous to allow men who did what Lipman<sup>6</sup> did to go free. It would shock the public, it would rightly bring the law into contempt and it would increase one of the really serious menaces facing society today. This is too great a price to pay for bringing solace to those who believe that, come what may, strict logic should always prevail” (p.484).*

This reasoning led one commentator to conclude that the Majewski approach has become “unassailable”. Alan Dashwood-1977- Criminal Law Review puts it thus:

*“The House of Lords in Majewski has clearly confirmed the rule that, except in the case of offences of specific intent, the effects of self-induced intoxication upon the mind of the accused at material time, however extreme, (short of insanity) they may be do not constitute a defence to criminal liability. Thus, however doubtful its provenance, the rule would now appear to be unassailable short of legislation” (p.532).*

If the word “unassailable” seemed uncomfortably close to “infallible”, it was not long before heresy raised its ugly head in the Southern Hemisphere. In *The Queen v O’Connor* (1980) 146 C.L.R 64 the High Court (by majority) refused to follow the reasoning of their lordship in Majewski. The head note to the case states it clearly:-

*“At the trial of any criminal charge, evidence of intoxication self-induced by the voluntary taking of drink or drugs, is relevant and admissible in*

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<sup>6</sup> The reference is to R v Lipman (1970) 1 QB 152

*determining whether the accused has the mental element the law has prescribed for the commission of the offence charged”.*

*(Barwick C.J) “Thus, if evidence of intoxication is supposed to raise a doubt as to voluntariness or as to the presence of requisite intent, I can see no logical ground for determining its admissibility upon a distinction between a crime which specifies only the immediate result of the proscribed act or a crime which in addition requires a further result dependant on purpose” (p.85).*

In the court below, (1980) VR 635 the judges of the Victorian Court of Criminal Appeal had likewise differed from the view of their Lordships in *Majewski* and Starke J commented:

*“In this state, in my own experience until Majewski’s case, intoxication has always been left to juries as relevant to the issues of both general and specific intent”.*

Starke J also commented:

*“Over nearly 40 years experience in this State I have found juries very slow to accept a defence based on intoxication” (p.647).*

Barwick C.J referred to these remarks and added,

*“I do not share the fear held by many in England that, if intoxication is accepted as a defence as far as a general intent is concerned, the floodgates will open and hordes of guilty men will descend on the community” (p.79).*

Stephen J said this:

*“No doubt even principles of the common law as fundamental as the insistence of proof of mental element are subject to exceptions and criticism founded upon a lack of logic may readily enough be met by a principled exception. But a suggested exception which operates by means of uncertain criteria, in a manner not always rational and which serves an end which I regard as doubtful of attainment is one which I view with suspicion.*

*I regard the Majewski principle as suffering from just such effects” (p.101).*

Schloenhardt in “Queensland Criminal Law” 2<sup>nd</sup> Ed 2011 at p.555 comments:

*“Queensland, Tasmania, WA and NSW have followed the English approach of “Beard and Majewski by dividing offences into those where evidence of intoxication may be relevant (specific intent offences) and those where it is irrelevant (general intent offences)”.*

NSW seems to have taken this to extremes by providing some 95 examples of specific offences and assuring us that the list is not yet closed – Crimes Act s. 428B. (See Appendix 2).

As to crimes of basic intent, opinion is divided into three camps:

1. Intoxication is not relevant, it never was, and it never should be; and there is nothing illogical about this statement.
2. It is admittedly illogical to dismiss intoxication for crimes of basic intent, but public policy demands that villains should not escape the consequences of their villainy by claiming that intoxication bereft them of the capacity to know what they were doing.
3. Intoxication, if properly raised, must necessarily and logically be considered, as much when the crime is of basic intent, as when it is of specific intent.

If it can be shown that by reason of, say, a blow to the head, or some other traumatic shock, or in a hypnotic trance, or sleepwalking, a person lacks the capacity of form the intent, he cannot be convicted of a crime of basic intent. Obviously these are events over which a person has no control and for which he cannot be held criminally responsible. The same cannot be said for intoxication.

S. 43AF provides:

***Voluntariness***

- (1) Conduct can only be a physical element if it is voluntary.
- (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

*Examples of conduct that is not voluntary:*

- (1) *A spasm, convulsion or other unwilled bodily movement.*
- (2) *An act performed during sleep or unconsciousness.*
- (3) *An act performed during impaired consciousness depriving the person of the will to act.*
- (3) An omission to perform an act is only voluntary if the act omitted is an act the person can perform.
- (4) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (5) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

Clearly, therefore, the distinction is drawn between events over which a person has no control (subsection (2)) and self-induced intoxication which is a condition brought about by the direct will and conduct of the person (Subsection 5).

The distinction between basic intent and specific intent is emphasised in the remarks already quoted from Majewski and O'Connor and elsewhere. Broadly (but one must be careful here) those distinctions are equivalent to the physical elements and the fault elements, which are now the preferred terms in Part II AA the NT Criminal Code. See s.43AB(1), 43AC and 43ACA.

Part IIAA of the Code commences under the heading:

**Part IIAA – Criminal responsibility for Schedule 1 offences and declared offences**

Then follows s.43AA, and it is important to set it out in full:

**43AA Application of Part**

- (1) *This Part applied only in relation to Schedule 1 offences, and declared offences, committed on or after the commencement of the Part.*
- (2) *The following provisions of Part I do not apply in relation to Schedule 1 offences, or declared offences, committed on or after the commencement of this Part:*
  - (a) *Section 1 (Definitions), definitions of **act, duress, knowingly** and **involuntary intoxication**;*
  - (b) *Section 2 (Commission of offence);*
  - (c) *Section 3 (Division of offences);*
  - (d) *Section 4 (Attempts to commit offences);*
  - (e) *Section 7 (Intoxication);*
  - (f) *Section 8 (Offences committed in prosecution of common purpose);*
  - (g) *Section 9 (Mode of execution different from that counselled);*
  - (h) *Section 12 (Abettors and accessories before the fact);*
  - (i) *Section 15 (Application of criminal laws);*
  - (j) *Section 16 (Offences counselled or procured in the Territory to be committed out of the Territory)*
- (3) *The following provisions of this Code do not apply in relation to Schedule 1 offences, or declared offences, committed on or after the commencement of this Part:*
  - (a) *Part II (Criminal Responsibility);*
  - (b) *Section 277 (Attempts to commit offences);*
  - (c) *Section 278 (Punishment of attempts to commit offences);*

(d) Section 280 (*Attempts to procure commission of criminal offences*);

(e) Section 282 (*Conspiracy to commit crimes*).

*Note for section 43AA*

*A term defined in this Part has the meaning given to it for the purposes of this Part and the Schedule 1 provisions. For example, the meaning given to the term **conduct** in section 43AD(1) applies for the purposes of the partial defence of provocation to a charge of murder (a Schedule 1 offence) – see the signpost definition of the term in section 1.*

(Schedule 1 appears in Appendix 3).

“Declared offence” is defined in s1 as:

*“declared offence means an offence against a law of the Territory that, under an Act is declared to be an offence to which Part IIAA applies.”*

All Schedule I offences come under Part IIAA. Other offences can be “declared” and will then also come under Part IIAA.

## THE TRANSITION FROM PART 11 TO PART 11AA

Part 11AA clearly introduces a regime of criminal responsibility different from the provisions of Part II. See s.43AA(3)(a).

This Committee understands that ultimately it is intended to bring all offences under Part IIAA.

For the reasons hereinafter set out, that would involve that the NT Code basically adopts the “Model Criminal Code” already adopted by the Commonwealth and the legislature of the ACT.

Commonwealth Criminal Code s.8. ACT Criminal Code s.31

Meanwhile, however, offences other than Schedule 1 offences remain under Part II of the code, so that, at present two different regimes for criminal offences apply in the Territory. This is plainly an undesirable state of affairs, and, we understand, recognised as such.

Obviously uniformity can be achieved in only 2 ways:

- (a) By reverting to the original provisions of Part II for all offences; or
- (b) By proceeding onwards to declare all offences to be governed by Part IIAA.

We understand that the second option is the one favoured by the legislature and is strongly supported by the members of this Committee.

Indeed, it would seem strange now to step backwards after the research and debate which led to the adoption of Part IIAA. 4. Or, to echo Macbeth, “returning were as tedious as go o’er.” (Act 3, Sc.4).

The Legislative intention is summarised by Fairall and Oliver in the paper. “Finding Fault – Reform of the NT Criminal Code” delivered to the 10<sup>th</sup> Biennial Conference of the Criminal Lawyers Association of the Northern Territory at Bali in July 2005.

*The purpose of the Criminal Code Amendment (Criminal Responsibility Reform) Bill 2005 (“the Bill”) was to insert a new criminal responsibility Part (Part II AA) into the NT Criminal Code to substantially enact the criminal responsibility provisions set by the Commonwealth Criminal Code and to apply those provisions immediately to offences created by or amended by the Bill.*

*Proposed Part II AA for the NT Criminal Code is based on Chapter 2 of the Commonwealth Criminal Code. The Bill represented the first stage of a reform that would eventually see the present criminal responsibility provisions (Part II – Criminal Responsibility) repealed and new criminal responsibility provisions then have application to all offences. The reform process is envisaged to take some years, as it will necessitate a review of the offences in each individual part of the Code and the re-drafting of these in accordance with the Model Code style and requirements for specification of fault*



*elements. The reform process will provide an opportunity for consideration of existing offence and the fault levels applicable to them”.*

Until all indictable offences come under Part II AA, it becomes an important first step in considering any offence under the NT Criminal Code to ascertain whether it is governed by Part II or Part II AA. “Criminal Laws Northern Territory” by Gray & Blokland (pps 98-99):

*“It is important at the outset to ascertain whether a particular offence is governed by the original Part II of the Criminal Code, or by Part II AA. This requires, first, checking to see whether the offence is listed in Schedule 1. Secondly, it requires checking in the legislation creating the offence to see whether the offence is a “declared” offence to which the provisions of Part II AA apply”.*

One important difference between these two legislative regimes is that s.31 of the Code still applies to offences under Part II, but does not apply to those under Part II AA.

S.31 is headed “Unwilled Act etc and accident”. Sub-section 1 then reads:

*“(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct”.*

This is a uniquely NT provision which, according to Fairall & Oliver has attracted “no shortage of unfavourable comment”. The learned authors put the criticism this way:

*“Under s.31(1) intention and foresight are necessary preconditions for criminal responsibility; reckless indifference or wilful ignorance will not sustain a conviction unless at least the “act, omission or event” constituting the crime was foreseen as a possible consequence of the accused’s conduct. This rule sets a higher standard for criminal responsibility than either the law or the other Code states, both of which recognise negligence as a sufficient basis for criminal responsibility, even for serious crimes such as homicide”.*

The difference between the two approaches may be illustrated by the case of Kidd v Malogorski a Magistrate’s decision which went, on appeal, to the Chief Justice of the NT Supreme Court; being then referred back to the Magistrate on the basis that the Magistrate had not sufficiently disclosed his reasoning process. The Magistrate then set out his reasons in considerable detail.

The evidence was that the accused had taken “two little tabs of acid” and then smoked marijuana. He became aggressive at times, calmed down and then became aggressive again. According to witnesses he was “freaking out”, and on one of these occasions he quite seriously assaulted a woman by punching her in the face and throwing her to the ground. The defence was, in effect, that owing to the drugs he had taken, he was in a state where he could not have formed the intention to do what he did and what he did was not foreseen by him.

The Magistrate gave a very detailed judgement in which he carefully examined the evidence of a number of witnesses.

*His conclusion was that “on the whole of the evidence I am unable to be satisfied beyond reasonable doubt that the defendant was not at the material time suffering from hallucinations – that is false sensory perceptions in the absence of any external stimulus (visual hallucinations). Nor am I able to be satisfied beyond reasonable doubt that the defendant knew at the material time that JM (the victim) was in the path of his bodily movements which resulted in the application of force to her”.....*

*“On the whole of the evidence, including the evidential presumption created by s.7(1)(b) of the Code, I am unable to be satisfied beyond reasonable doubt that when the defendant performed the various bodily actions and movements ascribed to him, he foresaw as a possible consequence of his conduct the application of force to JM as an identified person”.*

The Magistrate therefore dismissed the charges.

The point about this was that the charges of assault and related charges, not being Schedule 1 or declared, remained under Part II of the Code. Hence His Honour was applying s.31 and, upon the very positive findings he made, the finding of “not guilty” necessarily followed.

The decision caused much public concern because many saw it as an unjustified attack upon an innocent person by a perpetrator who had been acquitted because of circumstances caused by his personal decision to act illegally by taking drugs. It is evidence of at least a strong view in many members of the public that intoxication should be no excuse for a criminal act. In a similar case, the defendant had punched two women in the face, but had been acquitted because the Magistrate considered that “the degree of intoxication is so overwhelming to the extent that the defendant, in my view, did not know what he was doing and did not form any intent as to know what he was doing”. A Committee of the Legislative Assembly for the ACT noted that “the Magistrate’s decision attracted widespread community outrage, both in the ACT and nationally” prompting calls for legislative reform to prevent a defendant being able to rely on the “defence” of excessive intoxication to avoid criminal responsibility.

Fairall and Oliver have commented that s.31 “is fairly biased on subjectivist notions of fault in the sense that guilt is predicated upon a conscious awareness of the possible outcomes of particular behaviour. The guilt of a person is determined by the state of his mental awareness”.

Would the decision have been different under the more objective approach of Part II AA? There may be considerable debate about this in view of a very detailed judgement; but at least the comment could be made that, insofar as the judgement considered the defendant’s conduct could have been involuntary, s.43AF(5) provides that “Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary”.

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<sup>7</sup> The details are taken from a paper by Andrew Hemming in the University of Tasmania Law Review – Vol 29 No. 1 2010 p 13

## **Part IIAA of the NT Criminal Code**

The “Explanatory Statement” introducing the “Criminal Code Amendment (Criminal Responsibility Reform) (No.2) Bill 2005” to the NT Legislative Assembly commences with the following paragraphs:

### **General Outline**

*The Criminal Code Amendment (Criminal Responsibility Reform) Bill (No.2) 2005 (“the Bill”) is the first stage in the progressive reform of the Northern Territory’s Criminal Code. The Bill sets out, with some minor modifications, the general principles of criminal responsibility in Chapter of the Model Criminal Code (the Model Code”) developed by the national Model Criminal Code Officers Committee (“MCCOC”), established by the Standing Committee of Attorneys-General (SCAG”) and as modified by SCAG. This Chapter has been enacted both by the Commonwealth and by the Australian Capital Territory. The Bill comprises Part IIAA based on Chapter 2 and also proposes new offences based on the Model Code to replace offences that are to be repealed by this Bill.*

*Part IIAA of the Bill sets out the general principles of criminal responsibility, which will eventually apply to all Northern Territory offences. The principles will not apply to all offences immediately. There will be staged approach because a large number of amendments will be required in relation to existing criminal offences because existing offences are drafted on the basis of different principles. The staged approach should also assist practitioners and courts to adjust to the changed approach and minimise confusion. The criminal responsibility principles will first apply to offences contained in this Bill and thereafter to offences that are added to Schedule 1 or offences declared to be ones to which Part IIAA applies. The existing criminal responsibility provisions of Part II will cease to apply to Schedule 1 offences or declared offences. Some of the provisions of the existing Part 1 will no longer apply to Schedule 1 or declared offences because these matters are now provided for in Part 11AA.”*

The “Explanatory Statement” notes that the Commonwealth had already enacted Chapter 2 of Model Criminal Code, as had the Australian Capital Territory.

In the article previously mentioned, headed “*Finding Fault - Reform of the NT Criminal Code*” delivered to the 10<sup>th</sup> Biennial Conference of the Criminal Lawyers Association of the Northern Territory at Bali in July 2005, Professor Paul Farrell of Adelaide University and Sue Oliver, then of the Department of Justice of the NT, now a NT Magistrate, carefully examined in detail the effect Part IIAA would have on the NT Criminal Code if enacted. They commented that “*it will mark the end of a distinctive and, we think, problematical fault standard, and the adoption of a different and, we believe, fairer standard adopted from federal law already in force in the Territory*”.

The learned authors concluded their paper with the following sentence:

*“The general principles of criminal responsibility set by the Commonwealth Criminal Code provides the opportunity to address what we consider to be*

*fundamental flaws in the NT Code in relation to serious personal harm offences”.*

Part IIAA has now become Part IIAA of the NT Criminal Code.

It is not proposed to discuss in detail the matters already examined by Professor Fairall and Sue Oliver since this Committee assumes that because of the arguments and recommendations there put forward, and with the guidance of the Clause Notes in the “Explanatory Statement”, the Parliament of the Northern Territory accepted those recommendations, as appropriate. Obviously also, parliament has adopted the general principle that the NT Criminal Code should ultimately be basically in line with the Commonwealth legislation.

The significance for this Committee is that the NT Parliament indicates that the expression “public policy” or “public policy benefit” should be construed primarily within such guidelines as can be ascertained by the Commonwealth legislation, although this Committee accepts that it is free to suggest other approaches if appropriate.

### **Intoxication and the Criminal Code of the Northern Territory**

So far as Part IIAA of the NT Criminal Code is concerned with the question of intoxication, it appears to steer a middle course between Majewski (voluntary intoxication no defence to an act of basic intent, but can be raised regarding an act of specific intent); and O'Connor (intoxication can be raised as affecting either an act of basic intent or of specific interest).

S.7 of the Code provides:

- (1) *In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence:*
  - (a) *it shall be presumed that, until the contrary is proved, the intoxication was voluntary; and*
  - (b) *unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct.*

But, by s.43AA(2)(e) this section does not now apply to Part IIAA which now contains its own code in relation to intoxication.

S.43AB divides offences into “physical elements” and “fault elements”. Broadly (though one must be careful here) this division mirrors the previous division between “basic” and “specific” intent.

S.43AR is similar to the original s.7 but in greater detail as to the circumstances of intoxication.

#### **43AR Self-induced intoxication**

- (1) *Intoxication is 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; or*
  - (c) *From the use of a drug for which a prescription is required and that was used in accordance with the directions of the medical practitioner or dentist who prescribed it; or*
  - (d) *From the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.*
- (2) *However, intoxication is self-induced if a person using a drug as referred to in subsection (1)(c) or (d) knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgement or control.*

S.43 AS then becomes the operative section, containing the circumstances in which intoxication may or may not be considered as a defence.

#### **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.*

*Note for subsection (1)*

*A fault element of intention in relation to a result or circumstance is not a fault element of basic intent.*

- (2) *This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.*
- (3) *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.*
- (4) *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."*

This section is almost precisely similar to s.8.2 of the Model Criminal Code save that 2.8.2(2) provides that, *“A fault element of basic intent is a fault element intention for a physical element that consists only of conduct”*.

(Presumably those drafting s.43AS of the NT Code felt that the subsection was superfluous in the light of the note to s.43AS(1) & (2)).

S.43AS is not without its difficulties although the intent is plain enough that, generally, intoxication per se is to be no defence to any charge involving a “physical element,” or basic intent, save for two exceptions. The two exceptions are then given as “accident” or “mistaken belief”. If either of these circumstances are raised evidentially the onus would then be on the prosecution to negate them. Otherwise, the general principles of criminal responsibility applies to “fault elements”, ie specific intent, but the fault elements identified are “the only fault elements of the offence”. S.43ACA(3).

On the question of negligence while in a state of intoxication, s. 43 AT is clear and rational.

#### **S. 43 AT**

*“(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.”*

Simply put, this means that as negligence is breach of a duty of care, an intoxicated person owes the same standard of care to others as does a non-intoxicated person; ie negligence is negligence.

#### **EXTENSION OF PART II AA**

At a recent Conference (21 May 2013), convened by the Attorney-General and comprising members of the Department and members of the legal profession, the question was debated whether the Code should revert to its original form, ie prior to the introduction of Part II AA, or proceed from Part II AA to further amendment in line with the Model Criminal Code as enacted in the Commonwealth Criminal Code. It was resolved that the latter alternative was to be preferred.

This was not surprising because the amendments had already been adopted by parliament after careful consideration and it would have been somewhat of an anti-climax to back-pedal. Furthermore, the introduction of Part II AA led onwards towards uniformity of the criminal law in the Commonwealth, the ACT, and the NT; with the hope that the other “Code” States of Queensland, Western Australia and Tasmania would sufficiently amend their codes to bring them into line with the Model Code, and thus achieve practical uniformity throughout these jurisdictions. The best argument for the Model Code is the immense discussion and research over many years of those drafting the Model Code, under the original chairmanship of Sir Harry Gibbs, former Chief Justice of the High Court; and after various meetings of committees of Attorneys-General and their legal advisers.

Realistically it must be accepted that the Model Code will not agree in every particular with all other Codes. Inevitably some variation due to local circumstances or preference will remain. But these should be limited and not opposed to the general thrust of the legislation.

Realistically, it must also be conceded that the states of NSW, Victoria and South Australia are firmly devoted to the common law rather than codification; and here is no chance that they will change their position. The possibility of a Criminal Code accepted throughout Australia is remote. It is fruitless to argue which system is better since neither are pure examples of the induction or deduction they purport to represent. An element of the common law can be "codified" by statute and the provisions of a Criminal Code are frequently clarified by case law. Furthermore, the High Court, as the final court of appeal in both jurisdictions, encourages a common or close acceptance of a particular interpretation of similar concepts.

## **“PUBLIC POLICY BENEFIT”**

It is in the light of the above discussion that this Committee turns to the question of “public policy benefit” as referred to in Question 1 of the Terms of Reference. Clearly enough this Committee is not set up to conduct Gallup polls as to public opinion. On the question of intoxication, we consider that the public policy is what we have already set out, that is toleration unless the behaviour becomes anti-social or threatening to the ordinary citizen. We accept also that public policy towards criminal law as represented by Parliament has decreed that the administration of criminal law in the Territory should be by way of Code; and that Code should move towards uniformity under the Model Code.

Coupled with this, however, it should be recognised that (as shown, for instance, by public reaction to the Malogorski decision), many members of the public consider that a person who voluntarily commits an anti-social or criminal act by taking alcohol or drugs to a point which affects his behaviour, should not be entitled to use that wrongful act as an excuse or defence for a further wrongful act. Nor could that be suggested as, in any way, an unreasonable reaction and, as has already been noted is a position supported by some judges.

To some extent this concern is now answered by the terms of s.43AS confining the exceptions to basic intent or “physical elements” in self-induced intoxication to accidental conduct or mistaken belief.

This is the basis of certain judgements in Majewski already referred to, but encapsulated in the remark of Lord Salmon which are repeated here for ease of reference.

*“my Lords, I am satisfied that this rule accords with justice, ethics and common sense, and I would leave it alone even if it does not comply with strict logic. It would, in my view, be disastrous to allow men who did what Lipman did to go free. It would shock the public, it would rightly bring the law into contempt and it would increase one of the really serious menaces facing society today. This is too great a price to pay for bringing solace to those who believe that, come what may, strict logic should always prevail”. (p.484)*

It is plain that contrary views on the question of intoxication as it affects criminal conduct cannot be easily reconciled. It is equally obvious that such views either for or against will continue to be held strongly on both sides.

S.43AS may be regarded as an uneasy but practical compromise.

S.43AS may be the best compromise possible, permitting intoxication as a factor of basic intent to be considered in pleas of accident or mistaken belief, but not otherwise. These are accepted defences which, if raised on an appropriate evidential basis, must be rebutted by the prosecution, but otherwise, and as a matter of public policy, the defendant is not permitted to rely on his own self-induced behaviour in this respect.

S.43AS is the result of a vast amount of conference and discussion over many years, and, although that does not render it conclusive, it does give pause before



suggesting an alternative. It may also be regarded as a long term benefit if, ultimately, it creates a common policy within the “Code” States and Territories.

We acknowledge that s.43AS is not without its difficulties, but the harsh reality is that there is no perfect solution to the question as to how far, if at all, intoxication may be a defence to a criminal charge. This is because, as we have already mentioned, there will always be conflicting views based either upon logic or public perception where in the two do not always meet. For instance, the Victorian and South Australian approach, as in O’Connor has the virtue of simplicity but has not been adopted in other States and Territories presumably because many citizens regard it as offensive for a wrongdoer to rely upon one wrongful act to excuse a second wrongful act. The approach in the other States and Territories has been Majewski (with variations).

S.43AS did not receive any serious criticism from such members of the legal profession of the NT as this Committee consulted, nor does it appear to have caused any particular difficulties so far in the Commonwealth or ACT courts applying it. We acknowledge, however, that an appropriate situation may not yet have occurred.

The terms of s.43AS do not therefore seem to raise any particular problem so far as instruction to a jury is concerned.

This Committee is particularly influenced by the fact that, to adopt Part 11AA will bring the NT in line with two other jurisdictions with the advantage of uniformity, which entails including the advantage of judicial decisions from any of the three jurisdictions being relevant and important in the development of all.

Finally, the “*Background Paper*” already referred to contains the following information:

*The National Criminal Law Reform Committee is currently reviewing the Chapter 2 of the Model Criminal Code. As part of that process, the Committee consulted with legal stakeholders around Australia to obtain views on problems relating to the operation of Chapter 2 of the Criminal Code. The Committee is currently considering the issues raised by stakeholders and at this stage is expected to report on the review in late 2013.*

Any results of this review which need to be translated into amending legislation will, no doubt be adopted by the Commonwealth and the ACT and, true to the principle of uniformity the NT will no doubt follow.

The enactment of s.43AS is likewise in conformity with the whole plan of Part IIAA. This is the road upon which the NT is advancing, and there seems little to be gained by divergence or halting at this stage.

This Committee is therefore of the opinion that, out of all alternatives, the greater advantage and the greater public policy benefit under question 1 is to continue as planned.

## **Legislative Policy**

On the question of how the law should deal with intoxication as a circumstance in a criminal charge, the debate still ranges (& rages) from allowing intoxication, if properly raised, to be always considered in determining whether the accused had the appropriate intent (basic or specific); to the other extreme, (reverting back to earlier days) that it should never be allowed as a defence to any indictable offence.<sup>8</sup>

The common law approach may seem by some as too favourable to an accused who escapes conviction by relying on his own reprehensible conduct. The alternative of denying the defence at all would have its supporters, not only by members of the public enraged by what appears to be cases in which a wrongdoer can rely upon his own wrongdoing as a defence, but also by distinguished judges, c.f Majewski.

Obviously public policy requires some form of control against criminal activities in which alcohol or drugs figure as part of the scene. Equally obviously the public policy “benefit” lies in the success or otherwise of the control. However, as noted, the law has been ambivalent in how these controls should be imposed.

So far as this Committee can ascertain, no particular statutory or common law process can be regarded as “superior” to any other.

It therefore becomes a matter of legislative policy to determine which of the various statutory or common law provisions should be chosen. Victoria and South Australia have adopted the common law doctrine favoured by O’Connor. The other states and territories have adopted, in various forms, the approach outlined by Majewski.

## **Criticisms of s. 43AS**

### **(a) Background Restated**

S.43AS of the NT Criminal Code is copied, with some minor variations which do not affect the substance of the section, from s.8.2 of the Model Criminal Code prepared by the Model Criminal Code Officers Committee and published in December 1992.

Similar sections appear in the Commonwealth Criminal Code s.8 and the ACT Criminal Code s.31.

The Model Criminal Code was prepared by experienced lawyers, after lengthy discussion and debate, and after considering written submissions by various persons and bodies with the practical and background competence to make such submissions. In addition, it is stated that “lengthy consultation” took place between members of the Committee and persons prominent in the law. (See – Appendix to the 1992 Report).

One must commence, therefore, with the view that the resultant Code is a carefully prepared document by competent lawyers drawing on their own experience and on the experience of others equally competent. One may also reasonably assume that such difficulties as are presently being mentioned were equally before the

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<sup>8</sup> Hemming – University of Tasmania Law Review – Vol 29 No. 1 2010

Committee at the time of preparation of the Model Code and comprehended within the final version.

The “great name” argument does not give the document the form of Holy Writ, but it must dictate careful consideration before amendment.

In a Background Paper to the Legal Profession Forum convened by the Honourable the Attorney General of the Northern Territory, it was stated that:

*“Part IIAA (being based on Chapter 2 of the Model Criminal Code) reflects modern standards of criminal responsibility, consistent with other jurisdictions in the common law world”.*

This Committee notes also the matters raised for discussion in the paper as to possible disadvantages.

The Background Paper refers to criticisms of Spigelman C.J. as to the general concept and language of the Model Code. His views are sufficiently emphatic to demand, in effect, a redrafting so drastic as to produce a new and different Code; or to return to common law. It is not our province to consider such alternatives since they do not seem contemplated by those parliaments which have adopted the Model Criminal Code. This Committee must necessarily be pragmatic.

We proceed on the practical basis that, while there may be some amendments required to Part IIAA, it will remain basically in its present form.

We note that in the recent review of Chapter 2 by the Law Council of Australia (23 March 2012), no specific comment was made about the provisions as to intoxication and there appears so far to have been no judicial comment in the Supreme Court of the ACT about the provisions of s.31 of the ACT Code; although we concede that an appropriate case may not yet have occurred.

We note however that a review of Part IIAA is being conducted; and we note the Conclusion to the Report of the Law Council of Australia (2012):

*“The Law Council considers that the current review of Chapter 2 of the Model Criminal Code being conducted by the National Criminal Law Reform Committee provides an important opportunity to address a number of outstanding and current issues in relation to the implementation of Chapter 2 of the Model Criminal Code”.*

We deal therefore, with the position as it presently exists, but draw attention to certain criticisms presently raised.

#### **(b) Some Adverse Reasoning**

In a carefully reasoned paper headed “Banishing Evidence of Intoxication in Determining Whether a Defendant Acted Voluntarily and Intentionally”<sup>9</sup> Andrew Hemming, Lecturer in Law at the University of Southern Queensland has

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<sup>9</sup> The University of Tasmania Law Review Vol. 29 No. 1 2010 pp1-28

cast doubt on the effectiveness of s.43AS in dealing with the question of intoxication. His introductory remarks state:

*“The analysis is conducted through the relevant intoxication provisions in the Criminal Code 1995 (Cth) and the Criminal Code 1983 (NT). The argument is made that these two Codes have the weakest and least effective version of the Majewski principle of all Australian jurisdictions such that the relevant basic intent provisions make the prohibition virtually meaningless. Revised provisions dealing with intoxication have been proposed for s.43AS Criminal Code 1983 (NT). The overriding objective of these redrafted provisions is to strengthen the reach of s.43AS, and to make these provisions the strongest and most effective version of the Majewski principle in Australia”.*

His contention is that “evidence of intoxication should be inadmissible for all offences including murder. Such an argument is justified on public policy grounds, and by the proposition that principles of criminal law relating to voluntariness and intention should be secondary to the morally correct position that a person who is voluntarily intoxicated is criminally responsible for any conduct he or she causes while in such a condition”.

He does discuss alternatives if his basic proposition is not accepted; but it is clear that his primary argument is as set out. He submits that the distinctions between basic and specific intent are confusing and unnecessary, and s. 43AS could be simply amended to read:

*“Evidence of self-induced intoxication cannot be considered in determining whether a fault element of specific intent or of basic intent existed”.*

Thus he ranges himself firmly on the side of those who consider it a matter of public policy that intoxication should be relegated to the question of sentencing; where the court could properly consider whether, in the circumstances, it aggravated or ameliorated the offence.

In a submission to this Committee, Mr Hemming again emphasised his argument:

*“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”.*

He suggests various alternatives including a re-drafting of s.43AS somewhat different to that suggested in his original article but “within the nomenclature of the Model Criminal Code in Part IIAA”.

Associate Professor Mark Nolan of the ANU College of Law also draws attention to some difficulties of s.43AS. In a memorandum to the President of this NT Committee he states:

*“I try to make the point in the presentations that the Cth Criminal Code (CCC) and ACT Criminal Code approach to intoxication shifts the determination of basic and specific intent, and therefore the relevance of intoxication evidence*

*under a Majewski approach, from the offence level (as in NSW) to the level of the physical element and fault element pair. Depending on the elements analysis done according to CCC elements analysis, principles, there may be one or many pairs of different types in the one offence. If the pairs are of different types (ie some basic intent pairs and some specific intent pairs) then the intoxication rules that apply within the same offence will be different. For example, common assault, that is typically characterised as a basic intent crime, could under the CCC approach have both basic intent and specific intent intoxication rules operation. I also give an example using the CCC espionage offence. That is surely difficult for juries to manage when the ACT or the NT are completely codified on the CCC model. However, there are also potential drawbacks with NSW's implementation of Majewski and its offence-level characterisation of basic and specific intent.*

*As I mentioned, the act is still partially-codified on the CCC model until 1 July 2017, However, the codified intoxication rules currently apply to all offences in the ACT (relevant for the military discipline jurisdiction too).*

*As I said, a case search I did not too long ago did not throw up ACT cases where this (un)intended consequence attracted judicial comment. However, it would be good to do such a case search again."*

This Committee, however, proceeds on the basis, and for the reasons hereinbefore set out, that any proposed amendment might cause more difficulties that it purport to resolved and that the section should remain as presently drafted; and alternative pathways inconsistent with Part IIAA and the goal of uniformity should not be considered.

## THE QUESTIONS OF THE REFERENCE

The Reference contains a series of “Matters for the Committee to consider” posed in the form of questions. This Committee answers them as follows:

1. **Is there a public policy benefit in holding persons criminally “responsibility” (sic – presumably “responsible”) for their actions whilst intoxicated irrespective of whether they acted voluntarily or intentionally. If so, how is the best way to achieve this policy initiative?**

ANSWER: A public policy “benefit” is one that benefits the community. There seems no doubt that the community considers it a benefit if self-induced intoxication, leading to activities against the law, and committed with the relevant intent should be subject to criminal sanctions. If, however, the question is raised as to whether the extent of intoxication deprived an accused person of the capacity to form the requisite intent, there are conflicting views in various jurisdictions, past and present. They range from the view that it should be no defence at all, to the view that at all times, and whether the intent is basic or specific, the effect of intoxication on intent should be considered. Intermediate views appear in various state and territory jurisdictions. The provisions of Part IIAA of the NT Criminal Code appears at least as effective in dealing with the problem as in other jurisdictions, and has the additional advantage of uniformity with the Model Criminal Code. These provisions can in the circumstances, be considered “the best way to achieve this policy initiative”. Intoxication, not self induced, does not attract criminal responsibility. S43AV.

This does not mean that other approaches, not necessarily involving criminal sanctions, should not be explored.

2. **Should this apply only to certain offences, say, to driving offences and not to offences of violence?**

ANSWER: No. The provisions of Part IIAA are general and should apply to all criminal charges other than those imposing strict or absolute liability. Note that certain driving offences depend on intoxication itself as the prohibited act.

3. **Will removing the admissibility of evidence of self-induced intoxication in relation to the commission of the offence achieve the purported public policy benefit, by limiting the use a tribunal may make of such evidence?**

ANSWER: Part IIAA does not “remove” the admissibility of evidence of self-induced intoxication. It controls it. Thus a tribunal of fact in the NT will balance the right of the community for protection against offences in which intoxication is a consideration with a limited right of the accused to raise circumstances whereby he should not be convicted (eg mistake of fact or accident).

If the question is specifically directed to a situation where the admissibility of evidence of self-induced intoxication were entirely removed, the tribunal of fact would no doubt find it easier to convict. But if that meant that occasionally a

person with a proper defence would be deprived of that defence it would be doubtful if this could be regarded as a public policy benefit.

4. **Should there be a distinction between offences of basic intent and specific intent for the purposes of the use of evidence of self-induced intoxication?**

ANSWER: As previously discussed there is an irreconcilable difference of views ranging from O'Connor (no distinction) to Majewski (distinction recognised). It would be unwise – and fruitless – to argue that one view is more satisfactory than the other. But since most Australian states & territory jurisdictions and the Model Criminal Code have adopted some versions of Majewski, it would be more practical, and in line with the principle of uniformity for the NT Code to follow the Model Criminal Code, as it has done in Part IIAA. The argument in Majewski is essentially, that if one accepts that an intoxicated person should not be allowed to defend his own criminal conduct by relying on his earlier criminal conduct, this can be achieved, at least in part, by denying him that defence in basic intent. One cannot, however, exclude the defence in specific intent because a defined offence which uses the expression “with intent”, or where a specific intent is embodied in its definition, would otherwise be meaningless. Hence, for instance, the care which the NSW legislation takes to set out those offences to which specific intent applies. The answer to the question, for the purposes of the NT Criminal Code is “yes”.

5. **If admissibility of evidence of self-induced intoxication is to be limited, for which fault elements should this rule apply”?**

ANSWER: For the reasons previously given, the fault elements which should apply to offences of basic intent are accident and mistaken belief. S.43AS(2) & (3).

6. **Should the onus of proof of fault elements be reversed when self-induced intoxication is sought to be admitted so as to deny criminal responsibility”?**

ANSWER: It is a serious matter to interfere with the basic concept of criminal law that the prosecution must prove its case beyond reasonable doubt, and this Committee would certainly not recommend any such reversal here. However, it is accepted that the accused must do more than merely say “I was intoxicated”. He must at least raise an “evidential basis” for his allegation, that is, he does not have the onus of proving intoxication but he must bring the question properly before the court by evidence. See S.43BU. Once he has done this and the court is satisfied that sufficient evidence exists, the onus remains on the prosecution to negate the allegation and do so beyond reasonable doubt. Note S.43BR(1) & (2).

7. **Should a specific offence of committing a dangerous or criminal act, similar to the provisions previously found in the now repealed section 154 of the Criminal Code be reintroduced into the Northern Territory?**

ANSWER: No. One of the reasons for introducing Part IIAA of the NT Criminal Code was the unsatisfactory nature of s.154. For a detailed explanation, see the article by Professor Fairall and Sue Oliver SM referred to previously.

8. **To what extent should evidence of self induced intoxication be disregarded in relation to sexual offences?**

ANSWER: To no extent other than as set out in the Code. The distinction, as in other cases, depends on the distinction between basic or specific intent (or physical or fault elements) insofar as that distinction appears in the elements of a particular offence; but subject to the exceptions set out in s.43AS(2) & (3).

9. **To what extent should evidence of self-induced intoxication be disregarded for the purposes of determining the partial defences of provocation and/or diminished responsibility?**

ANSWER: To put this question into perspective, it is appropriate to quote the remarks from Gray & Blockland – Criminal Laws NT – 2<sup>nd</sup> Ed – 2012 at p.131.

*This chapter is concerned with two so-called ‘partial defences’ – provocation and diminished responsibility. Both defences operate in the Northern Territory only to reduce murder to manslaughter. They do not apply to any other crimes. Both defences have been significantly altered in recent years. Diminished responsibility operates only in some Australian jurisdictions, and the Model Criminal Code Officers Committee (MCCOC) has called for its abolition. Provocation has been particularly controversial in recent years, and has been abolished within the last decade in Tasmania, Western Australia and most recently in Victoria. Again the MCCOC has called for its abolition. The Northern Territory legislature, however, has clearly decided that there are good reasons in the Territory not to heed this call.*

*Provocation and diminished responsibility are called ‘partial defences’ therefore, because they reduce but do not completely eliminate an accused person’s criminal responsibility for murder.”*

Diminished responsibility was unknown to the common law which, in this area of mental competence or otherwise, confined itself to the defence of insanity. “Diminished responsibility” was no doubt thought suitable for borderline cases not reaching to insanity and was introduced by statute in England in 1957.



According to an English authority the object was:

*“to avoid persons not fully entitled to be acquitted on the ground of insanity suffering the capital penalty for murder. With the abolition of capital punishment for murder, the doctrine has lost much of its importance”.*<sup>10</sup>

Similarly the provision lost its importance in states and territories where capital punishment was abolished and courts were given discretion in sentencing for murder, so that diminished responsibility could be reflected in the sentence. It would still be important in the Northern Territory, since the sentence remains mandatory as imprisonment for life (s.157); although parole is possible after a 20 year period.<sup>11</sup>

S.159 (3) provides:

*(3) If the defendant’s impairment is attributable in part to an underlying condition and in part to self-induced intoxication, then, for deciding whether a defence of diminished responsibility has been established, the impairment must be ignored so far as it was attributable to self-induced intoxication.*

However, intoxication must still be considered on any crime of specific intent, because a finding of diminished responsibility does not mean acquittal, but merely converts the finding to one of manslaughter, not murder. The jury must therefore first determine if a specific intent has been proved because if it has not been proved the accused is entitled to a complete acquittal. Only if the jury are satisfied that the offence alleged against the accused has been proved, do they then turn to the question of whether the actions of the accused may warrant a finding of diminished responsibility (for which the accused bears the onus of proof).

If the Northern Territory ultimately follows the other States and Territories, and allows judicial discretion in sentencing for murder, it will then become inevitable to relegate diminished responsibility to its appropriate place as part of the sentencing process.

Provocation – is a defence now relating only to the crime of murder<sup>12</sup> and does not involve an acquittal but only a conversion from a finding of guilty of murder to a finding of guilty of manslaughter.

Since murder involves a specific intent to kill, the question of intent may involve consideration of the effect of intoxication on intent. Bronitt & McSherry – Principles of Criminal Law – 3<sup>rd</sup> Ed – p.279, comment:

*“s.31(1) of the Criminal Code ACT and s. 43AS(1) of the Criminal Code NT provide that self-induced intoxication may not be taken into account*

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<sup>10</sup> Oxford Comparison to Law” 1980 Edition. See also: Bronitt & McSherry – 3<sup>rd</sup> Ed. pp293-4

<sup>11</sup> Sentencing (Crime of Murder) & Parole Reform Act 2003

<sup>12</sup> S.34 of the NT Criminal Code allowed provocation in other circumstances but has now been repealed.

*in determining whether “a fault element of basic intent exists” – by implication, these provisions allow its consideration for specific intent offences”.*

S.158 of the Code deals with “the partial defence of provocation:

**158 Trial for murder – partial defence of provocation**

- (1) *A person (the **defendant**) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.*
- (2) *The defence of provocation applies if:*
  - (a) *the conduct causing death was the result of the defendant’s loss of self-control induced by conduct of the deceased towards or affecting the defendant; and*
  - (b) *the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.*

Gray & Blockland comment: -

*“Provocation must be distinguished from lack of intent”. It may be difficult at times to distinguish between a person who has lost self-control because of provocation yet still intends to kill, and a person who, because of extreme stress partly caused by provocation, kills without intent. The law, however, draws such a distinction. In the first case the accused may be guilty of manslaughter only because of the provocation. In the second case the accused would be not guilty of murder under s.156 of the Criminal Code because of lack of the necessary intent”.*

Thus, the lack of self-control must be as the result of the provocation. Gray & Blockland point out that *“the accused may have lost self-control for some reason other than the provocation; for example, because of intoxication”.*

See also Bonnitt & McSherry – *“the loss of self-control must have been caused by the provocation rather than another factor such as intoxication”.*

Thus, by s.158(2)(b) of the Code – *“The conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased”.*

See also s.43AF(5) - *“(5) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary”.*

The test is the reaction of an “ordinary person” not “an intoxicated ordinary person”. If the conduct of the deceased was provocative within the definition, it is irrelevant whether the accused was intoxicated or not. In other words, the accused cannot rely upon intoxication as allowing him to react more than an ordinary person would react, but he may allege that, whether he was intoxicated or not, the provocation justified his reaction.<sup>13</sup>

The final comment to this question is that the partial defences of provocation or diminished responsibility will remain relevant in jurisdictions which retain mandatory life sentences for murder – as in the Northern Territory. The trend – and the more logical one in jurisdictions which allow discretion in sentencing is to relegate these “defences” to consideration in sentencing.

10. **Are there other offences where evidence of self-induced intoxication should be inadmissible or disregarded by virtue of the charge”?**

ANSWER: Not to the knowledge of this Committee.

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<sup>13</sup> See Masciantonio v Queen (1995) 183 CLR 58 of 67. “The test involving the hypothetical ordinary person is an objective test”.

## **CONCLUSIONS**

It follows, from the matters discussed in this Reference that the Northern Territory should continue with the process, already commenced, of equating the NT Criminal Code with the Model Criminal Code presently adopted by the Commonwealth and the ACT.

Arguments can be put that other methods of dealing with self-induced intoxication have been adopted in other jurisdictions, but, to take a completely objective test, it can be said that the approach in the Model Criminal Code as researched over many years by many eminent authorities is at least comparable and, some would say, more comprehensive than the alternatives. In any event, the adoption of the Model Criminal Code in the Northern Territory provides unanimity of approach in at least three jurisdictions. Furthermore, the High Court, as the ultimate arbiter between all jurisdictions, will continue to interpret the various forms of expression used in different jurisdictions into a form more acceptable to all.

As we have mentioned, the difficulty of dealing with self-induced intoxication in criminal law is the result of the conflict between two irreconcilable points of view, namely:

- (1) Intoxication is an aggravation not an excuse. He who becomes intoxicated by his own volition should not be allowed to use his own reprehensible conduct to excuse further reprehensible and criminal conduct; or
- (2) A person may become so intoxicated as to lose the capacity to intend or carry out the criminal actions he does and, in such a case, must be acquitted.

The Majewski approach steers a middle course between these two views, and, in various forms has been adopted in States and Territories other than Victoria and South Australia. Insofar as it is a compromise, it will satisfy neither of the two extreme views at opposite ends of the pole. But it appears to be an appropriate and workable compromise and this Committee sees no reason to suggest alternatives which themselves might import more difficulties than they purport to cure.

The conclusion of this Committee is that the NT should continue the course it is presently pursuing of importing the Model Criminal Code into the provisions of the NT Criminal Code.

## **RECOMMENDATION**

That the Northern Territory continue as soon as practicable to complete the present process of adopting the Model Criminal Code into Part IIAA of the NT Criminal Code.

## APPENDIX 1



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## APPENDIX 2

### NSW - Crimes Act 1900

#### 428B Offences of specific intent to which Part applies

- (1) An *offence of specific intent* is an offence of which an intention to cause a specific result is an element.
- (2) Without limiting the generality of subsection (1), the offences referred to in the Table to this section are examples of offences of specific intent.

#### Table

- (a) an offence under the following provisions of this Act:

19A	Murder
27	Acts done to the person with intent to murder
28	Acts done to property with intent to murder
29	Certain other attempts to murder
30	Attempts to murder by other means
33	Wounding or grievous bodily harm with intent
33A	Discharging firearm etc with intent
33B	Use of weapon to resist arrest etc
37	Attempts to choke etc (garrotting)
38	Using chloroform etc to commit an offence
41	Administering poison etc to injure or to cause distress or pain
41A	Poisoning etc of water supply
47	Using etc explosive substance or corrosive fluid etc
48	Placing gunpowder near a building etc
49	Setting trap etc
55	Possessing etc gunpowder etc with intent to injure the person
61K	Assault with intent to have sexual intercourse
82	Administering drugs etc to herself by woman with child
83	Administering drugs etc to woman with intent
86	Kidnapping
87	Child abduction
99	Demanding property with intent to steal
110	Breaking, entering and assaulting with intent to murder etc
111	Entering dwelling-house
113	Breaking etc into any house etc with intent to commit serious indictable offence
114 (a) (c) (d)	Being armed etc with intent to commit offence
158	Destruction, falsification of accounts etc by clerk or servant
172	Trustees fraudulently disposing of property
174	Directors etc omitting certain entries
175	Director etc wilfully destroying etc books of company etc
176	Director or officer publishing fraudulent statements
178BB	Obtaining money etc by false or misleading statements
179	False pretences etc

180	Causing payment etc by false pretences etc
181	False pretence of title
184	Fraudulent personation
185	Inducing persons by fraud to execute instruments
190	Receiving etc cattle unlawfully killed, or carcass etc
196	Destroying or damaging property with intent to injure a person
198	Destroying or damaging property with intention of endangering life
199	Threatening to destroy or damage property
200	Possession etc of explosive or other article with intent to destroy or damage property
202 (c)	Interfering or damaging etc bed or bank of river with intent of obstructing etc navigation
205	Prejudicing the safe operation of an aircraft or vessel
210 (b)	Acting with intention of destroying etc aids to navigation
211	Criminal acts relating to railways
249C	Misleading documents or statements used or made by agents
249D	Corrupt inducements for advice
298	Demanding property on forged instruments
300	Making or using false instruments
301	Making or using copies of false instruments
302	Custody of false instruments etc
302A	Making or possession of implements for making false instruments
314	False accusations etc
315	Hindering investigation etc
317	Tampering etc with evidence
318	Making or using false official instrument to pervert the course of justice
319	General offence of perverting the course of justice
321 (1)	Corruption of witnesses and jurors
322	Threatening or intimidating judges, witnesses, jurors etc
323	Influencing witnesses and jurors
328	Perjury with intent to procure conviction or acquittal
333 (2)	Subornation of perjury

(b) an offence under the following provisions of this Act to the extent that an element of the offence requires a person to intend to cause the specific result necessary for the offence:

57	(assault on persons preserving wreck)
58	(assault with intent to commit serious indictable offence on certain officers)
66B	(assaulting with intent to have sexual intercourse with child under 10)
66D	(assaulting with intent to have sexual intercourse with child between 10 and 16)
78I	(assault with intent to have homosexual intercourse with male under 10)
78L	(assault with intent to have homosexual intercourse with male between 10 and 18)
78O	(assault with intent to have homosexual intercourse with pupil etc)
91	(taking child with intent to steal)
94	(assault with intent to rob person)
95	(assault with intent to rob in circumstances of aggravation)
96	(assault with intent to rob with wounding)
97	(assault with intent to rob with arms)

- 98 (assault with intent to rob)
  - 109 (entering with intent, or stealing etc in dwelling-house and breaking out)
  - 126 (killing with intent to steal)
  - 139 (destroys, damages, breaks with intent to steal)
  - 140 (destroys, damages, breaks with intent to steal)
  - 197 (dishonestly destroying or damaging property with a view to gain)
  - 204 (destruction of, or damage to, an aircraft or vessel with intent)
- (c) any other offence by or under any law (including the common law) prescribed by the regulations.



## APPENDIX 3



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