Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Justice Legislation Amendments (Criminal Responsibility) Bill 2019

Submission to the Tasmanian Department of Justice

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to comment on the Justice Legislation Amendments (Criminal Responsibility) Bill 2019.

2. The ALA's comments are confined to the substantive portions of the Bill that govern criminal responsibility and the issue of self-induced intoxication as a mitigating factor.

Criminal responsibility

3. The general provisions of criminal responsibility are provided for in s13 of the Criminal Code. This provision applies to all offences, summary and indictable, under Tasmanian law. It follows that any amendment of this provision will potentially affect criminal responsibility whenever a charge is laid for an offence under Tasmanian law.

4. The proposed amendment would do away with the 'chance event' provision in s13(1), and replace it with a two-fold test of foreseeability, both objective and subjective.

5. The ALA considers that an amendment to bring about this general object is desirable, and that such a change would mirror the equivalent provision in *the Criminal Code 1899* (Qld) s23.

6. Some refinement of the wording is nonetheless desirable. The equivalent Queensland provision is clearer in its wording. It omits the expression, 'except as hereinafter provided', before establishing its two-fold foreseeability test. The significance of this is that s13 (1) governs basic intent: ie, the basic level of intent and voluntariness attaching to physical actions. Its purpose is not to affect the specific intent requirements that exist in respect to some of the crimes in the Code. For example, in the case of the crime of murder, for a person to be guilty, they must satisfy s13 (1) by having performed a physical action that is voluntary and intentional, and under the provisions specific to the crime of murder, one of the three limbs of intent must additionally be satisfied.

7. In cases such as murder, there will be no room for doubt that s13 (1) does not affect the specific intent requirement, but those requirements are expressly stated. But in the case of an offence such as assault, wounding, or causing grievous bodily harm, while there is no express provision of intent, courts have in cases such as a *Vallance v R* (1961) 108 CLR 56 read a requirement beyond the basic intent provision in s13 (1) into the wording of the sections creating particular offences. On one view, that additional intent requirement is not

'hereinafter provided', and an argument would potentially arise that the amendment to s13 (1) has excluded the applicability of those decisions as to the elements of particular offences.

8. Assuming that parliament has not intended to exclude several decades' worth of jurisprudence on particular offences and to leave the law in a state of uncertainty, this ambiguity could be resolved by omitting the words from the amended s13 (1), 'except as hereinafter provided'. This would make the amended provision closer to the effect of the equivalent Queensland provision.

Intoxication as a mitigating factor

9. The ALA is opposed to an amendment to the *Sentencing Act* in the manner described. It introduces unnecessary rigour and deprives the courts of necessary flexibility to deal with intoxication. Self-induced intoxication is rarely in itself mitigatory as the law presently stands. The courts have acknowledged that it may in some cases indirectly mitigate sentence. It can do so in several ways:

    a. in support of the characterisation of the offender's conduct as 'out of character': *Hasan v R* (2010) 222 A Crim R 306*; GWM v R* [2012] NSWCCA 240;

    b. in support of the characterisation of the offender's conduct as spontaneous/unplanned: *GWM v R* [2012] NSWCCA 240;

    c. where the offender's use and intoxication on the occasion in question is associated with mental illness or cognitive impairment: *Chandler v R* [2012] NSWCCA 135; *Bennett v R* [2011] VSCA 253; and

    d. where the offender's intoxication is located in a wider context of disadvantage, specifically, Indigenous community disadvantage: *Bugmy v R* (2013) 249 CLR 571; *Munda v R* (2013) 249 CLR 600.

10. More direct use of intoxication as a mitigating factor is rare, but occasionally arises as a causative explanation for offending: *Bourke v R* [2010] NSWCCA 22, [11], [26]; *Mendes v R* (2012) 221 A Crim R 161, [44]; *Williams*; *Ex parte Attorney-General* (Qld) (2014) 247 A Crim R 250; *Wilson v R* (2011) 30 NTLR 51; *Taylor v R* (2010) 303 A Crim R 302*; Williams v R* [2014] ACTCA 30). Such approaches are rare and are usually reflective of the case being unusual in

some respect, such as because the substance that was consumed produced an atypical reaction that was not foreseen, such as extreme disinhibition.

11. The purpose of leaving such matters to the sentencing judge or magistrate is to allow a careful assessment to be made in the circumstances of each case. Parliament cannot contemplate all of the circumstances that may arise and design a carefully worded section that adequately accounts for all future eventualities without causing injustice.

12. For this reason the ALA urges that the *Sentencing Act* amendment not be passed.

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