

DRUNK AND DELIRIOUS DEFENCES: INTOXICATION AND INSANITY IN THE *CRIMINAL CODE* (WA)

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I, Gemma Mullins, declare that the material contained in this Honours dissertation, except where properly acknowledged and attributed, is the product of my own work carried out during the Honours year and has not previously been submitted for a degree or an award at any tertiary education institution.

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ABSTRACT

In *State of Western Australia v Herbert* [2017] WASC 101, the question whether s 28(2) of the *Criminal Code* (WA) ('Code') disentitles a concurrently insane and intoxicated accused from availing himself of the insanity defence arose for the first time in this jurisdiction. Critically, the current interpretation of the interaction between the insanity and intoxication defences in ss 27-28 of the Code disentitles an intoxicated accused from availing himself of the insanity defence irrespective of whether his intoxication had any connection to his loss of capacity.

This thesis analyses the interaction between the insanity and intoxication defences and suggests how those sections should be interpreted and operate. To that end, it seeks to address how the law should respond to cases such as *Herbert* where there is an operative mental impairment in circumstances where the accused is also intoxicated, in particular, in circumstances where intoxication is not necessarily connected to a loss of capacity.

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INTRODUCTION

On the evening of 28 August 2015 in Doubleview, Western Australia, Edward John Herbert entered his daughters' bedroom with a jerry can full of petrol. Mr Herbert proceeded to pour the contents of the jerry can over his youngest daughter's upper body while she was standing in her cot before igniting the petrol with a lighter. Mr Herbert then proceeded to pour petrol over his eldest daughter's upper body while she was lying in bed. At this point, a neighbour had run into the house, doused the flames engulfing the youngest daughter's head and torso and taken her from the cot. The neighbour then dragged the eldest daughter from her bed and took both daughters out of the house.¹ Mr Herbert was later charged with attempting to unlawfully kill each of his daughters.²

At trial, Mr Herbert made formal admissions in respect of each of the elements constituting the offences,³ including having had the intention to kill each of his daughters,⁴ but alleged that a mental impairment deprived him of the capacity to know that he ought not do those acts.⁵ Accordingly, the issue that remained for the trial judge's determination⁶ was whether Mr Herbert was not criminally responsible for his admitted acts on account of unsoundness of mind.⁷

Mr Herbert's behaviour in the days leading up to, the day of and the days and months following the offences could fairly be described as out of character and bizarre.⁸ It

¹ *State of Western Australia v Herbert* [2017] WASC 101 (10 April 2017) ('Herbert') [1], [111], [113]–[114].

² Pursuant to s 283 of the *Criminal Code* (WA) ('Code'). See *Herbert* [2017] WASC 101 (10 April 2017) [1].

³ Pursuant to the *Evidence Act 1906* (WA) s 32.

⁴ *Herbert* [2017] WASC 101 (10 April 2017) [5].

⁵ *Ibid* [7], [52].

⁶ Mr Herbert was tried by judge alone pursuant to the *Criminal Procedure Act 2004* (WA) s 118: *Herbert* [2017] WASC 101 (10 April 2017) [2].

⁷ *Ibid* [6].

⁸ Such behaviour included acting in an uncharacteristically violent and aggressive manner; reporting that people were 'analysing' him; hearing a voice whilst at the beach that said 'we've got your sister on the boat' which caused him to become panicked with the idea that he had to save his sister; hearing voices and seeing a temperature reading on a freezer at an ice cream shop that caused him to think 'cold, danger' with the renewed idea that he had to save his sister who

was accepted that on 28 August 2015 he was suffering from an organic⁹ mental illness, namely bipolar affective disorder,¹⁰ as well as an operative psychosis.¹¹ It was also the case that Mr Herbert was ‘intoxicated’ due to ingesting alcohol and cannabis that afternoon.¹²

Section 27 of the *Criminal Code* (WA) ('Code') provides that an accused who is deprived of the capacity to know that he¹³ ought not do the acts in question due to a mental impairment is not criminally responsible for those acts ('the insanity defence'). Sections 28(1)-(2) provide that s 27 applies to a person whose mind is disordered by intoxication 'caused without intention',¹⁴ but does *not* apply to a person who has 'intentionally caused himself to become intoxicated'¹⁵ ('the intoxication defence'). Consequently, a key issue at trial was whether Mr Herbert was unable to avail himself of the insanity defence, notwithstanding that he was in a psychotic state and suffering from an organic mental impairment, because he was intentionally intoxicated. This question had never arisen in Western Australia¹⁶ and

he thought was in the freezer; repeatedly reciting his sister's address under his breath; laughing and talking to himself; moving as though he was in 'slow motion'; stating that aliens were coming; shouting that the police were coming but that he wanted Pamela Anderson to come in place of the police; repeatedly stating that 'the werewolf is coming at 12 o'clock'; auditory hallucinations of several unknown voices; and believing that characters shown on the television were speaking to him.

⁹ The term 'organic' is used in this thesis to reflect the way that the law distinguishes between a mental state that is self-induced, for example through the voluntary ingestion of drugs or alcohol, and a mental state that is the product of an 'organic' condition that derives from some underlying deficit in the brain, whether congenital or acquired.

¹⁰ *Herbert* [2017] WASC 101 (10 April 2017) [32], [248], [286], [315].

¹¹ *Ibid* [315], [327]. See also World Health Organisation, *ICD-10: Classification of Mental and Behavioural Disorders*, Clinical descriptions and diagnostic guidelines (1994) 10, cited in Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017) 380 n 72: the descriptor 'psychotic' or a 'psychosis' indicates 'the presence of hallucinations, delusions, or a limited number of severe abnormalities of behaviour, such as gross excitement and overactivity, marked psychomotor retardation, and catatonic behaviour'.

¹² *Herbert* [2017] WASC 101 (10 April 2017) [330]–[332].

¹³ Male pronouns are used throughout this thesis, having been selected to reflect the current wording of ss 27–28 of the Code and the facts in *Herbert* [2017] WASC 101 (10 April 2017). This is done solely for the purpose of making the text easier to read and no offense or sexism is intended. See also *Interpretation Act 1984* (WA) s 10(a).

¹⁴ Code s 28(1).

¹⁵ *Ibid* s 28(2).

¹⁶ See *State of Western Australia v Lang [No 2]* [2016] WASC 206 (6 July 2016) [40] where

was not determinatively answered by the trial judge in *State of Western Australia v Herbert* ('Herbert').¹⁷

The insanity defence has been the subject of considerable academic attention, which is unsurprising given that it brings into sharp focus fundamental questions of criminal responsibility.¹⁸ However, there is little commentary discussing the intoxication defence beyond its relevance to the question whether an accused formed any requisite intent, which concerns only s 28(3) of the Code.¹⁹ Consequently, there is a deficiency in the literature considering the intoxication defence and, in particular, the interaction between intoxication and insanity in the Code.²⁰

The deficiency in the literature is somewhat surprising given the importance of the question as it relates to the imposition of criminal responsibility and the express

Jenkins J foreshadowed that '[o]ther issues may arise where it is suggested that at the relevant time the accused was both voluntarily intoxicated and mentally impaired.'

¹⁷ *Herbert* [2017] WASC 101 (10 April 2017) [67].

¹⁸ See, eg, Sir Owen Dixon, 'A Legacy of Hadfield, M'Naughten and Maclean' (1957) 31 *The Australian Law Journal* 255.

¹⁹ To that end, see, eg, Gerald Orchard, 'Drunkenness as a "Defence" to Crime – Part 1' (1977) 1 *Criminal Law Journal* 59; Gerald Orchard, 'Drunkenness as a "Defence" to Crime – Part 2' (1977) 1 *Criminal Law Journal* 132; Paul Ames Fairall, 'Majewski in Retreat' (1979) 3 *Criminal Law Journal* 211; Paul Ames Fairall, 'Majewski Banished' (1980) 4 *Criminal Law Journal* 264; Gordon Walker, 'Voluntary Intoxication: the Australian Response to Majewski's Case' (1979) 3 *Criminal Law Journal* 13; Gerald F Orchard, 'Criminal Responsibility and Intoxication – The Australian Rejection of Majewski' (1980) *New Zealand Law Journal* 532; Matthew Goode, 'Some Thoughts on the present state of the "Defence" of Intoxication' (1984) 4 *Criminal Law Journal* 104; Ian Leader-Elliott, 'Voluntariness, Intoxication and Fault' (1991) 15 *Criminal Law Journal* 112; Brent Fisse, *Howard's Criminal Law* (Law Book Company, 5th ed, 1990) 439–46.

²⁰ For example, Colvin and McKechnie have recognised the unresolved question of statutory construction the subject of this thesis: E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2012) 495. The Law Reform Commission of Western Australia's report, 'Review of the Law of Homicide', did not examine the intoxication defence, having stated in its Issues Paper that '[t]he Commission is not aware of any issues or problems in relation to intoxication': Law Reform Commission of Western Australia, *Final Report – Review of the Law of Homicide*, Project No 97 (2007) 5; Law Reform Commission of Western Australia, *Issues Paper – Review of the Law of Homicide*, Project No 97 (2005) 11. The difficulty that is presented in cases where both insanity and intentional intoxication are in issue has been acknowledged in respect of the Queensland Code, where some of the issues the subject of this thesis have been 'resolved' by legislative amendment: see, eg, Russ Scott, 'Amphetamine-Induced Psychosis and Defences to Murder: *R v Clough* [2010] QCA 120' 19(5) *Psychiatry, Psychology and Law* 615, 632. However, that small portion of the literature does not go on to consider how the law *should* in fact respond to those circumstances, or why it responds as it does.

relationship between the two defences.²¹ In addition, the circumstances in which the intoxication defence will or will not be available to an accused is significant in Western Australia where the Code does not recognise a defence of diminished responsibility.²² The interaction between insanity and intoxication is also of particular relevance due to the prevalence of alcohol²³ and drug²⁴ use, the incidence of mental illness among drug users,²⁵ and in light of the alleged ‘connection’ between substance use and crime.²⁶

²¹ While both intoxication and insanity are usually labeled as ‘defences’, it has been suggested that intoxication is not a true defence because it does not provide a separate ground of exculpation. This is not entirely correct to the extent that s 28(1) of the Code creates a true exculpatory defence by expanding the operation of s 27. However, it is also the case that the intoxication defence may restrict rather than expand the grounds of exculpation in s 28(2). In addition, it bears mentioning that the term ‘defence’ is somewhat undesirable insofar as it tends to suggest that a burden of proof is cast upon the accused, of which the insanity defence is one of the few exceptions to the common law rule that the burden remains on the prosecution: *Woolmington v R* [1935] AC 462. Nonetheless, the term ‘defence’ is a convenient term, so long as it does not obscure the onus that rests on the prosecution: *Taiapa v R* (2009) 240 CLR 95, 98. Accordingly, despite the difficulties attached to it, the term ‘defence’ is used throughout this thesis in order to make the text easier to read and avoid unnecessary complication.

²² In 2007, the Law Reform Commission of Western Australian did not recommend the enactment of a defence of diminished responsibility: Law Reform Commission of Western Australia, *Final Report - Review of the Law of Homicide*, Project No 97 (2007) 256–259.

²³ Australian Criminal Intelligence Commission, *National Wastewater Drug Monitoring Program*, Report 2 (2017) 6. See also Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 – Detailed Findings*, Drug Statistics Series No 31 (2017) 33–50.

²⁴ Methylamphetamine is the most used illicit substance in Australia, with its use being most prevalent in Western Australia and South Australia: Australian Criminal Intelligence Commission, *National Wastewater Drug Monitoring Program*, Report 2 (2017) 4, 7, 24. See also Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 – Detailed Findings*, Drug Statistics Series No 31 (2017) 51–76. Harmful drug use generally also continues to be a serious public health issue in Australia with 1,808 drug induced deaths registered in 2016 – the highest number in 20 years: Australian Bureau of Statistics, *3303.0 Causes of Death Australia* (2016).

²⁵ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 – Detailed Findings*, Drug Statistics Series No 31 (2017) 95, 111–2: 42 per cent of methamphetamine users, 28 per cent of cannabis users, 26 per cent of ecstasy users and 25 per cent of cocaine users in Australia have been diagnosed with, or treated for, a mental illness. See also The National Drug Research Institute and the Centre for Adolescent Health: Wendy Loxley et al, *The Prevention of Substance Use, Risk and Harm in Australia – A Review of the Evidence* (2004), 50.

²⁶ See, eg, Australian Institute of Criminology: Willow Bryant and Tracy Cussen, *Homicide in Australia: 2010-11 to 2011-12: National Homicide Monitoring Program report*, AIC Monitoring Report No 23 (2015) 14–15, Table 8; Shantha M W Rajaratnam, Jennifer R Redman and Michael G Lenne, ‘Intoxication and Criminal Behaviour’ (2000) 7(1) *Psychiatry, Psychology and Law* 59; Aaron A Duke et al, ‘Alcohol Dose and Aggression: Another Reason Why Drinking More is a Bad Idea’ (2011) 72 *Journal of Studies on Alcohol and Drugs* 34; Peter R Giancola, ‘Alcohol

In response to the issue that arose in *Herbert*, this thesis critically analyses the interaction between the insanity and intoxication defences and seeks to address how the law should respond to cases such as *Herbert* where there is an operative mental impairment in circumstances where the accused is also intoxicated; in particular, circumstances where intoxication is not necessarily connected to a loss of capacity. In so doing, it engages in doctrinal research by drawing on relevant legislation, case law and secondary sources to make connections between, and extract common concepts from, the source materials.

This thesis is three parts. Part One provides an overview of the relevant legal and policy frameworks to place the thesis in context. Part Two considers the concept of intoxication in detail and suggests the proper construction of that term. Part Three then concludes by providing proposals for reform as informed by the analysis engaged in, and conclusions drawn from, Part Two.

and Aggression: Theories and Mechanisms' in Mary McMurran (ed), *Alcohol-Related Violence: Prevention and Treatment* (Wiley-Blackwell, 2013) 37; Peter N S Hoaken and Sherry S Stewart, 'Drugs of Abuse and the Elicitation of Human Aggressive Behaviour' (2003) 28 *Addictive Behaviours* 1533; Sharon M Boles and Karen Miotto, 'Substance Abuse and Violence: A Review of the Literature' (2003) 8 *Aggression and Violent Behaviour* 155.

PART ONE

SOBRIETY: THE LEGAL AND POLICY BACKGROUND

This Part sets out the legal and policy framework against which the interaction between the insanity and intoxication defences are assessed in Part Two and informs the proposals for reform posited in Part Three. This Part concludes by considering whether those legal and policy frameworks align in order to position the approach to, and parameters of, the analysis in Part Two.

I THE LEGAL FRAMEWORK

At the outset, it is necessary to outline the legal framework relevant to the interaction between the insanity and intoxication defences in Western Australia by reference to: (A) the Code; (B) the decision in *Herbert*; and (C) the position in Queensland.

A *The Code*

1 *Section 26: The presumption of sanity*

The starting presumption in respect of an accused's capacity is, as set out in s 26 of the Code, that '[e]very person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved'. The accused has the onus of rebutting the presumption of sanity by proving on the balance of probabilities that he was not of sound mind¹ by establishing a mental state that engages the exculpatory effect of s 27, including by operation of s 28.²

2 *Section 27: The insanity defence*

Section 27 of the Code, 'Insanity', relevantly provides:

- (1) A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission

¹ *R v Porter* (1933) 55 CLR 182; *R v Iley* [2006] WASC 107 (9 June 2006).

² In *R v Falconer* (1990) 171 CLR 30, 46, Mason CJ, Brennan and McHugh JJ held that 'an accused who relies on any ground of defence under s 27 or s 28 must, by force of s 26, establish that ground'.

he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

For an accused to avail himself of the insanity defence, he must establish that at the time of doing the act or making the omission he was suffering from a ‘mental impairment’,³ which is defined in the Code as ‘intellectual disability, mental illness, brain damage or senility’.⁴ There is a further definition of ‘mental illness’ as meaning: ‘an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli’.⁵ Importantly, mental illness does *not* include a state of intoxication caused by drugs or alcohol because such a state is ‘the reaction of a healthy mind to extraordinary stimuli’.⁶

The accused must also prove that his mental impairment deprived him of any one of the three capacities set out in s 27:⁷ the capacity to understand what he was doing;

³ *Criminal Code (WA) s 27(1)* (‘Code’).

⁴ *Ibid* s 1 (definition of ‘mental illness’). The definition of mental illness in the Code reflects the concept of a ‘disease of the mind’ from the common law as explained in *Radford v The Queen* (1985) 42 SASR 266, 274-5 (King CJ) and approved by the High Court in *R v Falconer* (1990) 171 CLR 30, 53-4 (Mason CJ, Brennan and McHugh JJ).

⁵ Code s 1 (definition of ‘mental impairment’).

⁶ See *State of Western Australia v Herbert* [2017] WASCSR 139 (3 August 2017) [61]: ‘...mental impairment, which *by definition* does not include temporary intoxication by drugs and/or alcohol’ (emphasis added) (WASCSR denotes ‘Sentencing Remarks’, which are only available on the Supreme Court website to download for a period of one month following publication and are not subsequently available through traditional legal databases). See also *R v Falconer* (1990) 171 CLR 30, 53-4 (Mason CJ, Brennan and McHugh JJ) quoting *Radford v The Queen* (1985) 42 SASR 266, 274-5 (King CJ) where the Court accepted King CJ’s statement that ‘I do not think that a temporary disorder or disturbance of an otherwise healthy mind caused by external factors can properly be regarded as disease of the mind as that expression is used in the *M’Naghten Rules*’. Alcohol and drugs are ‘external factors’, as observed by Toohey J at 74: the ‘external factor’ test ‘excludes mental disease where the defect of reason derives from some cause originating outside the accused’s body, be it consumption of alcohol or a blow’. Although, it should be noted that Toohey J was critical of the ‘external factor’ test: at 75-77. See also *R v Martin (No 1)* (2005) 159 A Crim R 313, 317 (Bongiorno J) where it was held that a cannabis-induced psychosis is ‘a temporary disorder or disturbance of an otherwise healthy mind to external factors’.

⁷ The capacities will sometimes be referred to as ‘the relevant capacities’ collectively or ‘a relevant capacity’ to refer to any one of the relevant capacities.

the capacity to control his actions; or the capacity to know that he ought not do the act or make the omission constituting the alleged offence.⁸

3 *Section 28: The intoxication defence*

Intoxication is not of itself a defence in any Australian jurisdiction.⁹ However, s 28 of the Code, ‘Intoxication’, relevantly provides:

- (1) Section 27 applies to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor, or by any other means.
- (2) Section 27 does not apply to the case of a person who has intentionally caused himself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not.

There is no definition of ‘intoxication’¹⁰ in the Code. Rather, the definition of intoxication within the meaning of s 28 has developed through case law. It has been held that ‘the most appropriate definition of “intoxication” is “overpowering action or effect on the mind”’.¹¹ That definition is discussed further in Part Two.

(a) *Section 28(1): Unintentional intoxication*

Section 28(1) expands the operation of the insanity defence by adding a further category of unsoundness of mind, being a mind disordered by unintentional intoxication;¹² the requirement that an accused’s mind is in ‘such a state of mental

⁸ Code s 27(1).

⁹ See *R v O’Connor* (1980) 146 CLR 64, 71 (Barwick CJ), 106 (Mason J). See also Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017) 330 [12.3]; Eric J Edwards and Richard W Harding, *Cases on the Criminal Code* (The Law Book Company Ltd, 3rd ed 1984) 431.

¹⁰ Although s 28 refers to ‘intoxication and stupefaction’, the term ‘intoxication’ throughout this thesis is intended to capture both of those terms.

¹¹ *State of Western Australia v Brown [No 3] [2013]* WASC 349 (19 September 2013) [47] (Jenkins J); *State of Western Australia v Lang [No 2] [2016]* WASC 206 (6 July 2016) [35] (Jenkins J); *The State of Western Australia v Herbert [2017]* WASC 101 (10 April 2017) (‘Herbert’) [58]–[59] (Jenkins J).

¹² *R v Falconer* (1990) 171 CLR 30, 46 (Mason CJ, Brennan and McHugh JJ); *R v Bromage* [1991] 1 Qd R 1, 8 (McPherson J); *R v Smith* [1949] St R Qd 126, 130 (McCrossan J); Ian Weldon, *Annotated Criminal Legislation Western Australia* (LexisNexis Butterworths 2010) 121 [s 28.1].

impairment'¹³ is replaced with the requirement that his mind is 'disordered by intoxication or stupefaction caused without intention'.¹⁴ Where an accused's mind is disordered by unintentional intoxication so as to deprive him of a relevant capacity, he will come within the scope of the insanity defence and will be relieved of criminal responsibility on that basis.

(b) *Section 28(2): Intentional intoxication*

The role of s 28(2) is less clear. It has been suggested that the subsection does not add to the meaning of s 28(1), but rather emphasises or clarifies that the expanded application of the insanity defence is limited to intoxication 'caused without intention'.¹⁵ To that end, it is unclear whether the element of intention attaches to the *act* of ingesting intoxicating substances or the *result* of becoming intoxicated.

The construction that s 28(2) clarifies the application of s 28(1) was rejected in *Herbert* where it was held that s 28(2) instead conditions the application of s 27 so that the insanity defence is not available to an accused who has intentionally caused himself to become intoxicated, irrespective of any mental impairment.¹⁶ The interpretation in *Herbert* is discussed further in the following section.

B *The Decision in Herbert*

Based on the legal framework under the Code, it seems clear that an insane¹⁷ or unintentionally intoxicated accused who is deprived of a relevant capacity will be relieved of criminal responsibility, whereas an intentionally intoxicated accused – deprived of a relevant capacity due to his intoxication – will not be relieved of criminal responsibility. What is less clear is the position in cases where *both* insanity

¹³ Code s 27(1).

¹⁴ Ibid s 28(1).

¹⁵ Weldon, above n 12, 121 [s 28.1].

¹⁶ *Herbert* [2017] WASC 101 (10 April 2017) [66].

¹⁷ The term 'insane accused' is used in the thesis to refer to an accused who is *prima facie* entitled to rely on s 27 of the Code to relieve himself of criminal responsibility due to the presence of a mental impairment and the consequent loss of one of the relevant capacities. The word 'insane' is used, conscious of its pejorative connotations, simply because it reflects the wording of s 27.

and intentional intoxication are present, but not necessarily connected, as arose in *Herbert*.

In *Herbert*, the prosecution submitted that the plain words of s 28(2) exclude the operation of s 27 if the accused is intentionally intoxicated.¹⁸ Counsel for Mr Herbert noted that s 28(1) enlarges the application of s 27 to include a person whose mind is disordered by unintentional intoxication and submitted that the purpose of s 28(2) is to *clarify* that such a person does not include a person who has intentionally caused himself to become intoxicated.¹⁹ That construction would have the result that an accused who was concurrently mentally impaired and intentionally intoxicated

could still avail himself of the defence in s 27, as long as he could prove that his mental impairment (as opposed to his intoxication or a combination of his mental impairment and intoxication) deprived him of a relevant capacity.²⁰

Justice Jenkins accepted the construction urged by the prosecution and agreed that the plain words of s 28(2) provide that s 27 does not apply to an accused who has intentionally caused himself to become intoxicated so that

even where an accused can prove that his mental impairment deprived him of a relevant capacity, he will not be able to avail himself of the insanity defence if he was voluntarily intoxicated at the time he did the relevant acts.²¹

To the same end, her Honour noted that an intentionally intoxicated accused cannot avail himself of the insanity defence, ‘irrespective of whether his intoxication deprived him of a relevant capacity’.²² In *State of Western Australia v Lang [No 2] ('Lang')*,²³ her Honour had similarly observed in passing that ‘intentional

¹⁸ *Herbert* [2017] WASC 101 (10 April 2017) [8].

¹⁹ Ibid [63].

²⁰ Ibid [64].

²¹ Ibid [62].

²² Ibid [66].

²³ [2016] WASC 206 (6 July 2016).

intoxication disentitles, even a mentally impaired person, from relying on the defence of insanity'.²⁴

Accordingly, Jenkins J held that s 28(2) does not *clarify* the operation of s 28(1), but rather *conditions* the operation of s 27 so as not to apply to an intentionally intoxicated accused, irrespective of his state of mental impairment. To that end, her Honour relied²⁵ on the decision of the Queensland Court of Appeal in *R v Clough* ('Clough')²⁶ where it was held:

It can readily be seen from the plain words of s 27(1) that the sub-section applies only if it is the 'state of [mental impairment]',²⁷ which deprives the person of one of the specified capacities. Where a person is deprived of a relevant capacity by the effects of intoxication on a pre-existing condition, the pre-requisites for release from criminal responsibility are not engaged.²⁸

In reaching that view and rejecting the construction urged by counsel for Mr Herbert that s 28(2) clarifies the operation of s 28(1) rather than disentitling a concurrently insane and intoxicated accused from relying on s 27, Jenkins J noted two apparent problems with counsel's construction. First, her Honour observed that

it would be odd if s 28(2) excluded a person from relying on the [insanity defence] by reason of intentional intoxication, when s 27 and s 28(1) do not say or suggest that intoxication is a basis for the defence.²⁹

With respect, s 28(1) *does* say that intoxication (albeit unintentional) is a basis for the operation of the insanity defence, so that the comment should perhaps be understood as meaning that 's 27 and s 28(1) do not say or suggest that *intentional* intoxication is a basis for the defence'. However, the import of that reasoning is that

²⁴ *Ibid* [39] (Jenkins J).

²⁵ *Herbert* [2017] WASC 101 (10 April 2017) [60]–[62].

²⁶ [2010] QCA 120 ('Clough').

²⁷ Due to the difference in terminology (but not in meaning) as between the Code and the Queensland Code, the term 'mental disease or natural infirmity' is replaced with the term 'mental impairment' in this extract. See *Herbert* [2017] WASC 101 (10 April 2017) [60].

²⁸ *Clough* [2010] QCA 120 [26] (Muir JA).

²⁹ *Herbert* [2017] WASC 101 (10 April 2017) [65].

intoxication is not a basis for the operation of the insanity defence – as is made clear in the definition of mental illness noted above³⁰ – and s 28(1) does not suggest that intentional intoxication is a basis for its application. Second, her Honour observed that s 28(2) refers to s 27, not s 28(1), so that if the intention was to clarify the scope of s 28(1), then s 28(2) would have commenced with the words ‘Section 28(1) does not apply’.³¹

On a plain reading of ss 27-28,³² her Honour’s reasoning is compelling. However, that construction may, with respect, be inconsistent with some aspects of the statutory context when the historical drafting of those sections is considered.

The definitions of ‘mental impairment’ and ‘mental illness’ were not introduced into the Code until 1997.³³ Until that time, there was no clarification in the Code that intentional intoxication is not a basis for the insanity defence (whether by operation of s 27 or s 28(1)) because it is merely the ‘reaction of a healthy mind to extraordinary stimuli’.³⁴ In addition, to date,³⁵ the only amendment to s 28 occurred in 2009.³⁶ That amendment created three subsections (where previously the section comprised three unnumbered paragraphs) and replaced the opening words ‘The provisions of the last preceding section apply’ and ‘They do not apply’³⁷ with

³⁰ That is, because intoxication is the reaction of a healthy mind to extraordinary stimuli and, therefore, is not a ‘mental impairment’ within the meaning of s 27 as defined in s 1 of the Code. See above n 6 and accompanying text. See especially *State of Western Australia v Herbert* [2017] WASCSR 139 (3 August 2017) [61]: ‘...mental impairment, which *by definition* does not include temporary intoxication by drugs and/or alcohol’ (emphasis added).

³¹ *State of Western Australia v Herbert* [2017] WASCSR 139 (3 August 2017) [66].

³² Which, it must be acknowledged, is the proper starting point in the task of statutory construction, particularly in the context of a Code: *Brennan v The King* (1936) 55 CLR 253, 263; *Stuart v R* (1974) 134 CLR 426, 437; *Roberts v State of Western Australia* (2007) 34 WAR 1 [88]–[118]; *Campbell v State of Western Australia* (2016) 50 WAR 331 [252]–[259].

³³ *Mental Health (Consequential Provisions) Act 1996* (WA) s 6 inserted the definitions of ‘mental impairment’ and ‘mental illness’ into s 1 of the Code, which came into force on 13 November 1997.

³⁴ Code s 1 (definition of ‘mental impairment’) read with Code s 1 (definition of ‘mental illness’). See also above nn 6, 30 and accompanying text.

³⁵ As at November 2017.

³⁶ *Criminal Code Amendment Act (No. 2) 2009* (WA), which came into force on 4 December 2009.

³⁷ While it may be suggested that the phrase ‘They do not apply’ has the same effect as the phrase ‘Section 27 does not apply’, it is arguable that the less specific language in s 28 as originally enacted, which does not explicitly refer to s 27, is capable of being interpreted as clarifying the

‘Section 27 applies’ and ‘Section 27 does not apply’, respectively.³⁸ Consequently, prior to 2009, there was no opportunity in the structure of s 28 for s 28(2) to instead refer to s 28(1).³⁹

C *The Position in Queensland*

The Code in Western Australia was based on the *Criminal Code* (Qld) (‘Queensland Code’).⁴⁰ Accordingly, it is relevant to look to the position in Queensland in interpreting the Code in Western Australia and, as noted above, the decision in *Herbert* relied in part on Queensland authority.

Section 28 of the Code as originally enacted⁴¹ substantially mirrored the wording of s 28 as originally enacted in the Queensland Code.⁴² However, the Queensland Code was amended following the decision in *R v Bromage*.⁴³ In that case, the accused had been exposed to chemical pesticides in the course of his work over a period of months. The day after his last exposure, he killed his neighbour with whom he had spent the day drinking alcohol. It was held that the loss of capacity was not ‘caused by the mere addition of alcohol’,⁴⁴ nor by involuntary exposure to the pesticides

scope of the first paragraph of s 28 as then enacted, rather than conditioning the application of s 27. The absence of the specific reference to ‘the last preceding section’ in the second paragraph of s 28 as originally enacted should not be overlooked; where a different word or phrase is used in an Act where the same word or phrase could have been used, it is assumed that Parliament intended a different meaning, otherwise it would have used the same word or phrase: D Pearce and R Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 121.

³⁸ *Criminal Code Amendment Act (No. 2) 2009* (WA) s 10. Those minor amendments did ‘not affect the substance or policy of the law’: Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 November 2009, 2971 (Christian Porter, Attorney General):

The opportunity has also been taken to make some miscellaneous short amendments to the Code that will modernise the Code’s remaining old-form cross-references. These amendments do not affect the substance or policy of the law. For example, clause 10 provides that section 28 is amended to delete the reference to “the last preceding section” and insert a reference to ‘section 27’.

³⁹ Section 28 of the Code as originally enacted is set out in full at **Appendix A**.

⁴⁰ The Queensland Code is a Schedule to the *Criminal Code Act 1988* (Qld).

⁴¹ Set out in full at **Appendix A**.

⁴² Set out in full at **Appendix B**.

⁴³ [1991] 1 Qd R 1.

⁴⁴ *Ibid*, 12 (McPherson J, Moynihan and Byrne JJ agreeing).

alone,⁴⁵ but by ‘the effect of the *combined* involuntary ingestion of pesticides and voluntary consumption of alcohol’ such that the resulting state was ‘more than the summation of their separate effects’,⁴⁶ in effect producing an independent state of mental impairment. Consequently, the accused was relieved of criminal responsibility because his intentional intoxication was not the cause of his loss of capacity.

Subsequently, s 28 of the Queensland Code was amended to overcome the ‘anomaly’ created in *R v Bromage*, namely, allowing an intentionally intoxicated accused to be excused from criminal responsibility if he has ‘also consumed some other toxic agent and the substances *act in combination* on [his] mind’.⁴⁷ The amended s 28 excludes the operation of s 27 whenever an accused has ‘to any extent’ intentionally caused himself to become intoxicated, whether his mind ‘is disordered by the intoxication alone or *in combination* with some other agent’.⁴⁸

As discussed above, in *Herbert*, Jenkins J held that s 28(2) excludes reliance on the insanity defence if the accused is intentionally intoxicated, irrespective of whether he was also suffering from a mental impairment,⁴⁹ quoting the extract from *Clough* reproduced above in support.⁵⁰ However, the second sentence of that quote, which provides that an accused will not be able to rely on the insanity defence if he is ‘deprived of a relevant capacity *by the effects of intoxication* on a pre-existing condition’,⁵¹ is critical, and its import appears to have been overlooked. The facts in *Clough* were such that the accused ‘would not have been deprived of [a relevant capacity] *but for* the continuing effects on his mental state of the methylamphetamine which he had voluntarily consumed’⁵² so that *Clough* was distinguished from cases

⁴⁵ Ibid, 10 (McPherson J, Moynihan and Byrne JJ agreeing).

⁴⁶ Ibid, 12 (McPherson J, Moynihan and Byrne JJ agreeing) (emphasis added).

⁴⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, 4870 (Denver Beanland, Attorney General and Minister for Justice) (emphasis added).

⁴⁸ Queensland Code s 28(2).

⁴⁹ *Herbert* [2017] WASC 101 (10 April 2017) [62], [66]–[67] (Jenkins J).

⁵⁰ See above nn 25, 28 and accompanying text.

⁵¹ *Clough* [2010] QCA 120 [26] (Muir JA) (emphasis added).

⁵² Ibid [6], [34] (Muir JA) (emphasis added).

where ‘even excluding the effects of alcohol and other drugs, the patient was deprived of a relevant capacity’.⁵³ Accordingly, read in its proper context, the decision in *Clough* should be understood as authority for the proposition that an accused cannot avail himself of the insanity defence if intentional intoxication has played any contributing role in his deprivation of capacity.⁵⁴ In addition, the phrase ‘disordered by the effects of intentional intoxication’ in s 28(2) of the Queensland Code requires an effect of intoxication to be connected to a deprivation of capacity in some way in order to exclude reliance on the insanity defence.⁵⁵

It follows that the position in Queensland involves an enquiry as to the connection, if any, between concurrent insanity and intoxication. Intoxication of itself will not automatically disentitle an accused from availing himself of the insanity defence, as was held in *Herbert*; something more than the mere presence of intoxication is required.

This thesis prefers the interpretation of *Clough* and s 28(2) of the Queensland Code posited above insofar as it does not disentitle an accused from availing himself of the insanity defence due to nothing more than the fact of concurrent intoxication.⁵⁶ However, for the purpose of this thesis, it is accepted that *Herbert* is the authoritative statement of the operation of ss 27-28 of the Code in Western Australia.⁵⁷ The

⁵³ Ibid [6], [41] (Applegarth J). In that context, see *Re Plant* (unreported, Queensland Mental Health Tribunal, Dowsett J, 27 March 1998) where the accused was intoxicated with alcohol and affected by recent methamphetamine use, however, the expert evidence was to the effect that even excluding the effects of alcohol and other substances, the accused was suffering from a mental impairment at the time of the offence. See also *Re Neilsen* (unreported, Queensland Mental Health Tribunal, Dowsett J, 2 May 2001) where it was held that despite the accused’s use of amphetamines, ‘his separation from reality at the time of the offences was caused by his illness ... which deprived him of the capacity to know that what he did was wrong’.

⁵⁴ See Fairall and Barrett, above n 9, 358 [12.46].

⁵⁵ See also *Clough* [2010] QCA 120 [26] ‘deprived of a relevant capacity by the effects of intoxication on a pre-existing condition’ (Muir JA) (emphasis added).

⁵⁶ Fairall and Barrett seem to agree, noting that:

In Queensland, Western Australia and South Australia, the relevant statutory provisions focus on the contributory role of intoxication to the accused’s disturbed state. In those jurisdictions the insanity defence is not available if the accused’s mental impairment or disease of the mind was contributed to or triggered by the consumption of alcohol.

See Fairall and Barrett, above n 9, 357 [12.45].

⁵⁷ It should be noted that Jenkins J’s construction of s 28 is strictly obiter: see *Herbert* [2017]

question that remains is whether that outcome is the preferable position and, as a corollary, whether the Code is in need of reform. Those matters are further informed by the relevant policy framework, which is discussed in the following section.

II THE POLICY FRAMEWORK

Extreme intoxication can, like insanity, induce delusional states of mind. The story of the drunken nurse who mistook a baby for a log of wood and threw it on the fire at the christening party is probably apocryphal, but nonetheless illustrative. However, despite the similarities between insanity and intoxication, the policy rationales underlying each defence are dissimilar.

A loss of capacity due to mental impairment is considered an appropriate basis on which to relieve criminal responsibility because of ‘the moral assumption that it is wrong to punish those who, by reason of mental incapacity, are not capable of free and rational action’⁵⁸ and, from a utilitarian perspective, such persons are inappropriate vehicles for general or specific deterrence.⁵⁹ What is less settled is whether intoxication should be, like insanity, treated as an ‘altered state of mind that is morally neutral’⁶⁰ and, if so, whether that position is confined to unintentional intoxication.⁶¹

WASC 101 (10 April 2017) [67] (Jenkins J). However, there is no reason to presume, in the absence of an appeal, that her Honour or another judge would adopt a different interpretation in the future.

⁵⁸ P A Fairall and P W Johnston, ‘Antisocial Personality Disorder (APD) and the Insanity Defence’ (1987) 11 *Criminal Law Journal* 78, 79 quoted in Law Reform Commission of Western Australia, *Final Report – Review of the Law of Homicide*, Project No 97 (2007) 227.

⁵⁹ In *R v Porter* (1935) 55 CLR 182, 186 Dixon J observed that:

[I]t is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground on which the law proceeds.

⁶⁰ Julia Tolmie, ‘Intoxication and Criminal Liability in New South Wales: A Random Patchwork?’ (1999) 23 *Criminal Law Journal* 218, 218.

⁶¹ Kenneth J Arenson, ‘The Intoxication Defence: Toward a Better Understanding of Current Doctrine and Reform’ (2015) 89(3) *Australian Law Journal* 190, 190; Peter Gillies, *Criminal Law* (Law Book Company, 4th ed, 1997) 203–6; Brent Fisse, *Howard’s Criminal Law* (Law Book Company, 5th ed, 1990) 439–447; Ian Leader-Elliott, ‘Criminal Intoxication’ (1998) 22 *Criminal Law Journal* 321; Gerald Orchard, ‘Drunkenness as a “Defence” to Crime – Part 1’ (1977) 1 *Criminal Law Journal* 59, 69. See also the helpful discussion concerning involuntary

In *R v O'Connor* ('O'Connor'),⁶² Barwick CJ identified the policy concern to protect the public from the risks presented by intoxicated persons. His Honour observed that an intoxicated person might act in a manner, 'which in a sober state he would or might not have done'⁶³ and that 'the frequency with which intoxicated persons act violently poses a distinct threat to our social order and, indeed, at times, to personal safety'.⁶⁴ Such concerns are also reflected in the extent to which criminal laws attach significance to intoxication, either as an element of a criminal offence or as a 'basis for the exercise of a coercive power by the police';⁶⁵ reflecting the concern to provide mechanisms by which to protect the public from, and punish the undesirable consequences of, the conduct of intoxicated persons.

Those grievances are not without merit. There is a wealth of evidence suggesting that there is a causal connection between intoxication and violence.⁶⁶ The most recent data released by the Australian Institute of Criminology indicates that alcohol consumption or drug use was identified as a precipitating situational factor in 37 per cent and 21 per cent of homicide incidents, respectively.⁶⁷ Another recent study found that 67 per cent of police detainees being held for a violent offence tested

intoxication in Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017) 347-8 [12.27]–[12.30] and the cases cited therein.

⁶² (1980) 146 CLR 64.

⁶³ Ibid 71 (Barwick CJ).

⁶⁴ Ibid 86 (Barwick CJ).

⁶⁵ Of 64 provisions in Western Australian criminal law statutes attaching significance to intoxication, 27 (42 per cent) do so to provide a basis for the exercise of a coercive force by the policy or another state agency and 30 (46 per cent) include the fact of a person's intoxication as a core element of a criminal offence: see Julia Quilter et al, 'Criminal Law and the Effects of Alcohol and Other Drugs' (2016) 39(3) *UNSW Law Journal* 913, 918–9.

⁶⁶ See, eg, Aaron A Duke et al, 'Alcohol Dose and Aggression: Another Reason Why Drinking More Is a Bad Idea' (2011) 72 *Journal of Studies on Alcohol and Drugs* 34; Peter R Giancola, 'Alcohol and Aggression: Theories and Mechanisms' in Mary McMurran (ed), *Alcohol-Related Violence: Prevention and Treatment* (Wiley-Blackwell, 2013) 37; Peter N S Hoaken and Sherry S Stewart, 'Drugs of Abuse and the Elicitation of Human Aggressive Behaviour' (2003) 28 *Addictive Behaviours* 1533; Sharon M Boles and Karen Miotto, 'Substance Abuse and Violence: A Review of the Literature' (2003) 8 *Aggression and Violent Behaviour* 155.

⁶⁷ Australian Institute of Criminology: Willow Bryant and Tracy Cussen, *Homicide in Australia: 2010-11 to 2011-12: National Homicide Monitoring Program Report*, AIC Monitoring Report No 23 (2015) 14–15, Table 8.

positive to illicit substance use⁶⁸ and nearly half of all detainees self-reported that alcohol or drug use was a contributing factor in their offending.⁶⁹

The policy concern outlined above seems to stem from it being notorious that alcohol and other drugs impair judgment and loosen inhibitions so that the fact that intoxication has ‘led to impulsive, uncharacteristic or irrational behaviour’ should not provide a defence.⁷⁰ Consequently, an accused who ‘of his own volition takes a substance which causes him to cast off the restraints of reason and conscience’ should be held criminally responsible for any harm caused by him while in that condition.⁷¹

In addition, the criminal law often disentitles an accused from availing himself of a defence where his prior conduct has contributed to the circumstances forming the basis of a defence. For example, the defence of duress⁷² is not available to an accused in respect of acts carried out under threat if the threat is made by a person with whom the accused has voluntarily associated ‘for the purpose of prosecuting an unlawful purpose in which it is reasonably foreseeable that such a threat would be made’.⁷³ Similarly, the defence of provocation⁷⁴ is not available to an accused who has incited the provocation in order to ‘furnish an excuse for committing an

⁶⁸ Australian Institute of Criminology: Sarah Couglah et al, *Drug use monitoring in Australia: 2013–14 report on drug use among police detainees*, AIC Monitoring Report No 27 (2015) 30, Table 8.

⁶⁹ Ibid 31.

⁷⁰ Orchard, above n 61, 59. See also Victorian Law Reform Commission, *Criminal Responsibility: Intention and Gross Intoxication*, Report No 6 (1986); Victorian Law Reform Commission, *Mental Malfunction and Criminal Responsibility*, Report No 14 (1990); M Keiter, ‘Just Say No Excuse: The Rise and Fall of the Intoxication Defence’ (1997) 87 *The Journal of Criminal Law and Criminology* 482; Leader-Elliott, above n 61; Tolmie, above n 60.

⁷¹ *DPP v Majewski* [1976] 2 WLR 623, 633 (Lord Elwyn-Jones LC). See also Arenson, above n 61, 190; Julia Tolmie, ‘Intoxication and Criminal Liability’ (2001) 64 *Modern Law Review* 688, 694, 696; Keiter, above n 70; Leader-Elliott, above n 61; Tolmie, above n 60; Victorian Law Reform Commission, *Criminal Responsibility: Intention and Gross Intoxication*, Report No 6 (1986); Victorian Law Reform Commission, *Mental Malfunction and Criminal Responsibility*, Report No 14 (1990).

⁷² Code s 32 provides a defence to an accused who is compelled to act in some manner because the person believes that a threat has been made, which threat will be carried out, and the act is necessary to prevent the threat from being carried out.

⁷³ Ibid s 32(3).

⁷⁴ Ibid s 246.

assault'.⁷⁵ The Code also provides that an accused who has formed a common unlawful purpose and subsequently seeks to withdraw from its prosecution will only be relieved of criminal responsibility if he takes 'all reasonable steps to prevent the commission of the offence'.⁷⁶ On that basis, it stands to reason that part of the policy rationale in denying an intentionally intoxicated accused from availing himself of the insanity defence is due to his prior conduct in becoming intoxicated, which has contributed to the circumstances giving rise to reliance on the insanity defence because his intoxication has (presumably) deprived him of a relevant capacity.⁷⁷

It must be acknowledged that there may be other policy rationales underlying the exclusion of the insanity defence in circumstances where an accused is intentionally intoxicated, for example, general deterrence or a 'zero tolerance' policy directed towards intoxication. It is not possible to address the totality of the possible policy rationales underlying the operation of s 28(2) of the Code in this thesis. However, this thesis proceeds on the basis that the policy underlying the exclusion of the insanity defence where an accused is intentionally intoxicated is two-fold. First, it is predicated on a concern that intoxication causes a decrease in inhibition and an attendant increase in the risk of engaging in criminal conduct. Second, as a consequence, the criterion of 'intentionally' becoming intoxicated has been adopted as determinative and has the effect that the insanity defence is not available because of the accused's prior conduct in becoming intoxicated, which has contributed to the circumstances giving rise to a deprivation or impairment of capacity. Together, these concerns reflect the fact that it is considered to be 'contrary to public policy to allow

⁷⁵ Ibid s 245. See also Code s 248(5), which provides that a claim of self-defence is not available to an accused if he has used force in response to 'a harmful act that is lawful', thereby excluding reliance on self-defence where the accused has been the instigator of an altercation.

⁷⁶ Code s 8(2)(c).

⁷⁷ As to the concept of an accused 'creating the conditions of his defence' and the policy arguments that may be engaged as a result, see Paul H Robinson, 'Causing the Conditions of One's Own Defence: A Study in the Limits of Theory in Criminal Law Doctrine' (1985) 71(1) *Virginia Law Review* 1; Edward W Mitchell, 'Culpability for Inducing Mental States: The Insanity Defence of Dr. Jekyll' (2004) 32(1) *The Journal of the American Academy of Psychiatry and the Law* 63; Edward W Mitchell, 'Madness and Meta-Responsibility: The Culpable Casuation of Mental Disorder and the Insanity Defence' (1999) 10(3) *The Journal of Forensic Psychiatry* 597; Herbert Finaglette and Ann Finaglette Hasse, *Mental Disabilities and Criminal Responsibility* (University of California Press, 1979).

a person to become highly intoxicated of his or her own volition, and then rely upon their irresponsible conduct as a means of absolving themselves of criminal liability'.⁷⁸

Having outlined the legal and policy framework, it is necessary to consider the interaction of the insanity and intoxication defences against that background to determine whether the legal framework aligns with, and gives effect to, the policy concerns identified above.

III WHETHER THE LEGAL AND POLICY FRAMEWORKS ALIGN

Both the insanity and intoxication defences are concerned with the issue of a disordered mind and enquire as to the presence (or, perhaps more accurately, absence) of a relevant capacity. The intoxication defence incorporates that inquiry through the opening words of s 28(1), which specify that the insanity defence ‘applies’ to instances of unintentional intoxication;⁷⁹ expressly averting to the possibility than an accused may be deprived of a capacity on account of intoxication rather than mental impairment. It follows that if states of insanity and intoxication are compared by reference to their effect on culpability, they present the same potential for impairment of an accused’s capacity to ‘understand what he is doing’, to ‘control his actions’, or to ‘know that he ought not do the act or make the omission’.⁸⁰

Despite the shared concern, the nature and scope of the enquiry as to any loss of capacity between the insanity and intoxication defences is dissimilar. The insanity defence⁸¹ enquires as to the alleged *cause* of a loss of capacity (mental impairment or unintentional intoxication),⁸² but also requires a determination of the actual – not just

⁷⁸ Kenneth J Arenson, ‘The Intoxication Defence: Toward a Better Understanding of Current Doctrine and Reform’ (2015) 89(3) *Australian Law Journal* 190, 190.

⁷⁹ Code s 28(1).

⁸⁰ *Ibid* s 27(1).

⁸¹ Whether by operation of s 27 or s 28(1) of the Code.

⁸² The question whether a particular mental state amounts to a ‘mental impairment’ is a question of law for the judge: *R v Falconer* (1990) 171 CLR 30, 49, 51 (Mason CJ, Brennan and McHugh JJ), 84 (Gaudron J); *R v Kemp* [1957] 1 QB 399.

potential – *effect* of the mental impairment or unintentional intoxication on the accused’s capacity at the time of the offence.⁸³ By contrast, s 28(1) of the Code is directed only to a *potential cause* of a loss of capacity (the presence of intentional intoxication), without any enquiry as to the actual *effect* of that intoxication.⁸⁴ Consequently, it appears that the insanity defence is excluded in cases of intentional intoxication because of an apparent presumption as to the cause of a loss of capacity without any enquiry as to the actual effect of intoxication on the accused’s capacity and without establishing any connection between the two. Given that states of insanity and intoxication present the same potential for depriving an accused of a relevant capacity, and there is no basis to suggest that they are mutually exclusive, the difference in the legal framework must be influenced by policy.

As discussed and adopted above, the policy rationale in excluding reliance on the insanity defence where an accused is intentionally intoxicated is directed to the concern that alcohol and other drugs are notorious in causing a person’s inhibitions to be lowered such that they might commit offences that they would not commit if they were sober.⁸⁵ As a consequence, an accused should not be able to avail himself of the insanity defence where his prior conduct in becoming intoxicated has contributed to the circumstances giving rise to his loss of capacity.⁸⁶

The policy rationale excluding the operation of the insanity defence when an accused is intentionally intoxicated appears, at first blush, logically sound. However, the difficulty is that to the extent that the policy concern is incorporated into the legal framework, it collapses two distinct inquiries by assuming the existence of both

⁸³ An accused may suffer from a mental impairment satisfying the definition of that term, but it is also necessary that the effect of that mental impairment at the time of the offence was such as to deprive him of a relevant capacity. The question whether an accused suffered from the alleged mental impairment at the time of the offence and the effect of that mental impairment, that is, whether it deprived the accused of a relevant capacity, are both questions of fact for the trier of fact: *R v Falconer* (1990) 171 CLR 30, 60 (Deane and Dawson JJ), 84 (Gaudron J). See also Fairall and Barrett, above n 61, 374 [13.10].

⁸⁴ That is, proceeding on the basis that the interpretation in *Herbert* [2017] WASC 101 (10 April 2017) outlined above is correct.

⁸⁵ See above n 70 and accompanying text.

⁸⁶ See above nn 73–75 and accompanying text.

cause and effect whenever intentional intoxication is present; any loss of capacity is presumed to be the result of intentional intoxication, without establishing whether there is any connection between the two. The chain of reasoning is to the effect that: intoxication is capable of depriving an accused of a capacity; the accused was deprived of a capacity while intentionally intoxicated; therefore, the deprivation of capacity is attributable to the accused's intentional intoxication. This linear progression argument jumps effortlessly from one conclusion to the next in a chain of reasoning that, by linear extension, characterises any loss of capacity while intoxicated as a consequence of intoxication, irrespective of any evidence of other causes, and deprives an accused of the opportunity to prove otherwise or test the veracity of that presumption.

If the policy rationale underlying s 28(2) is predicated on a concern to manage the risks associated with alcohol and drug use, this chain of reasoning lacks power; nowhere in the current legal framework is there any requirement for a connection between intoxication and any of the policy outcomes sought to be avoided. The fact that a loss of capacity occurs during a state of intoxication does not establish that the latter caused the former.⁸⁷

The disjunct between the underlying policy rationale and the current legal framework will be the focus of the analysis in Part Two and the proposals for reform in Part Three. It is submitted that there is scope to incorporate the policy concerns into the current legal framework in a way that strikes an appropriate balance between affording fairness to the accused while maintaining concern for, and protection of, community safety.

⁸⁷ See, in the civil context, the comments of Kenneth Martin J in *Marsh v Baxter* [2014] WASC 187 (28 May 2014) [763] where his Honour observed that:

From a viable causation perspective, the mere fact some event of damage follows after a preceding event will not establish legal causation. Courts these days mostly now eschew Latin. But the phrase 'post hoc, ergo propter hoc' (meaning 'after it, therefore because of it') has not generally been a governing or sufficient criteria under the common law of causation under any accepted legal test. The logical deficiencies from a bare post hoc, ergo propter hoc approach are obvious. They can even be viewed as convincingly exposed by President Bartlett in popular culture, in an early episode of 'The West Wing' carrying that descriptor (see YouTube <http://www.youtube.com/watch?v=HLvHDjG5Vvk>).

PART TWO

INEBRIATION: THE CONTENT AND SCOPE OF INTOXICATION

This Part analyses the meaning of ‘intoxication’ and suggests the proper construction of its definition in the context of the Code in order to provide the necessary background for the proposals for reform posited in Part Three. This Part then concludes by proposing that the content and scope of intoxication is sufficiently malleable to incorporate the policy concern identified in Part One and identifies how that end might be achieved.

I THE MEANING OF ‘INTOXICATION’

In order to address the meaning of ‘intoxication’, it is necessary to consider: (A) the physiology of intoxication; (B) the definition of ‘intoxication’; and (C) the criterion of ‘intentional’ intoxication.

A *The Physiology of Intoxication*

The Code does not distinguish between alcohol-induced intoxication and intoxication caused by other drugs.¹

Alcohol intoxication is a physiological state caused by alcohol entering the bloodstream faster than it can be metabolised by the liver. Intoxication may suppress inhibitory processes in the brain² and ‘impair a range of behaviours and skills, including reaction time, memory and the capacity to sustain and divide attention’.³ Similarly, the ingestion of drugs causes physiological changes in the body, affects

¹ As to the opinion that such a distinction should be drawn, see Shantha M W Rajaratnam, Jennifer R Redman and Michael G Lenne, ‘Intoxication and Criminal Behaviour’ (2000) 7(1) *Psychiatry, Psychology and Law* 59.

² See Rajaratnam, Redman and Lenne, above n 1, 61 citing TW Rall, ‘Hypnotics and Sedatives: Ethanol’ in AG Gilman et al (eds) *The Pharmacological Basis of Therapeutics* (McGraw Hill Inc, 1992) 81.

³ Rajaratnam, Redman and Lenne, above n 1, 62 citing F Finnigan and R Hammersley, ‘The Effects of Alcohol on Performance’ in AP Smith and DM Jones (eds) *Handbook of Human Performance* (Academic Press Ltd, 1992) 73–125.

the functioning of the central nervous system and may alter perception, mood and consciousness.⁴

The quantity of alcohol or drugs required to affect an individual, and the nature of the effect, varies according to the type of substance consumed,⁵ the method of consumption,⁶ and the personal characteristics of the user.⁷

B *The Definition of Intoxication*

In both legal⁸ and colloquial⁹ parlance the lexicon of intoxication is not uniform. Consequently, the meaning of the term ‘intoxication’ is not self-evident; it ‘is a widely used term with no consistent or formally agreed definition’.¹⁰

⁴ Rajaratnam, Redman and Lenne, above n 1, 62.

⁵ For example, central nervous system depressants such as alcohol suppress normal inhibitory processes and can impair behaviours and skills such as reaction time, coordination and memory. Central nervous system stimulants such as cocaine and amphetamines may cause a psychotic reaction, heightened alertness, enhance self-confidence, hallucinations, paranoia, violent behaviours and delusions. Opiates such as heroin and morphine may cause drowsiness, analgesia, changes in mood and impaired psychomotor and cognitive functioning. Cannabis often causes a state of euphoria and relaxation but may also cause perceptual alterations, mood swings and the intensification of ordinary sensory experiences. Hallucinogens such as lysergic acid diethylamine-25 (LSD) generally cause alterations in perception, cognition and mood. See Rajaratnam, Redman and Lenne, above n 1, 60–65.

⁶ See Rajaratnam, Redman and Lenne, above n 1, 61. For example, intravenous use of drugs produces a strong and rapid onset and requires less volume of a substance to produce the same effect as if it were ingested orally.

⁷ See Dr Russ Scott and Dr William Kingswell, ‘Amphetamines, Psychosis and the Insanity Defence: Disturbing Trends in Queensland’ (2003) 23 *The Queensland Lawyer* 151, 152; Shantha M W Rajaratnam, Jennifer R Redman and Michael G Lenne, ‘Intoxication and Criminal Behaviour’ (2000) 7(1) *Psychiatry, Psychology and Law* 59, 61.

⁸ See Julia Quilter et al, ‘Criminal Law and the Effects of Alcohol and Other Drugs’ (2016) 39(3) *UNSW Law Journal* 913, 922–926 for a detailed study of the definitions of intoxication by alcohol and other drugs used in Australian legislation. For example, legislation in Western Australia uses a number of words and phrases, of varying degrees of specificity, to describe the state of being intoxicated or the effects produced by the consumption of alcohol and other drugs including: ‘intoxicated’, ‘drunk’, ‘under the influence’, ‘adversely affected by intoxicating liquor or drugs’, ‘the person’s speech, balance, co-ordination or behaviour appears to be noticeably impaired’, and ‘affected by … an intoxicant to such an extent that there is a significant impairment of judgment or behaviour’.

⁹ Colloquialisms have developed over time to describe differing states of intoxication ranging from ‘happy’ or ‘tipsy’ to ‘smashed’, ‘plastered’ and ‘paralytic’: Harry Gene Levine, ‘The Vocabulary of Drunkenness’ (1981) 42 *Journal of Studies on Alcohol* 1038, 1042. See also Julia Quilter et al, ‘Criminal Law and the Effects of Alcohol and Other Drugs’ (2016) 39(3) *UNSW Law Journal* 913, 935; Thomas Barbor et al, *Lexicon of Alcohol and Drug Terms* (World Health Organisation, 1994).

In its ordinary usage, the word ‘intoxicated’, or ‘drunk’ as it is used colloquially, indicates that a person’s self-control is affected by alcohol to a noticeable degree. The *Macquarie Dictionary* defines ‘intoxication’ as follows:

1. inebriation; drunkenness.
2. *Pathology* poisoning.
3. the act of intoxicating.
4. overpowering action or effect upon the mind.¹¹

Further, ‘intoxicated’ is defined to mean ‘drunk; excited mentally beyond reason or self-control’.¹² ‘Drunk’ is then defined as ‘intoxicated with alcoholic drink’.¹³ These definitions are somewhat circular, however, the touchstone is an impact upon a person’s mental or physical faculties due to the ingestion of an intoxicating substance.

As noted in Part One, the meaning of ‘intoxication’ as that term is used in s 28 is not defined in the Code,¹⁴ but has instead developed through case law and has been held to mean ‘overpowering action or effect on the mind’.¹⁵ That definition was first propounded by Jenkins J in *State of Western Australia v Brown [No 3]*,¹⁶ adopting

¹⁰ Julia Quilter et al, ‘Criminal Law and the Effects of Alcohol and Other Drugs’ (2016) 39(3) *UNSW Law Journal* 913, 940 citing National Health and Medical Research Council, ‘Australian Alcohol Guidelines: Health Risks and Benefits’ (Guidelines, October 2017) 27. See also National Health and Medical Research Council, ‘Australian Guidelines to Reduces Health Risks from Drinking Alcohol’ (Guidelines, February 2009).

¹¹ Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Intoxication’, quoted in *State of Western Australia v Lang [No 2] [2016]* WASC 206 (6 July 2016) [35] (Jenkins J); *State of Western Australia v Brown [No 3] [2013]* WASC 349 (19 September 2013) [45]; *Herbert [2017]* WASC 101 (10 April 2017) [58].

¹² Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Intoxicated’.

¹³ Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Drunk’.

¹⁴ The lack of definition is not unusual. 41 per cent of criminal law provisions in Australia attaching significance to alcohol contain no definition of intoxication or a very limited definition – typically, to simply include the effects of other drugs as well as alcohol: Julia Quilter et al, ‘Criminal Law and the Effects of Alcohol and Other Drugs’ (2016) 39(3) *UNSW Law Journal* 913, 922.

¹⁵ *State of Western Australia v Brown [No 3] [2013]* WASC 349 (19 September 2013) [47]; *State of Western Australia v Lang [No 2] [2016]* WASC 206 (6 July 2016) [35]; *Herbert [2017]* WASC 101 (10 April 2017) [58].

¹⁶ [2013] WASC 349 (19 September 2013).

the phrase from the *Macquarie Dictionary* definition above.¹⁷ Her Honour adopted the same definition in *Lang*¹⁸ and again, most recently, in *Herbert*.¹⁹ There has not been any further judicial elaboration on, or consideration or approval of, the definition.²⁰ Consequently, it is necessary to consider the components of the definition in more detail.

1 ‘Overpowering’

The consumption of a sufficient volume of drugs or alcohol will have an ‘action or effect on the mind’, even if only minimally.²¹ The definition ‘overpowering action or effect on the mind’ reflects this by acknowledging that the consumption of drugs or alcohol will have an ‘action or effect’ on the mind, and the term ‘intoxication’ is reserved for occasions when that action or effect is ‘overpowering’; the adjective ‘overpowering’ conditions the phrase ‘action or effect on the mind’.

The *Macquarie Dictionary* notes ‘overpowering’ as being the adjectival version of ‘overpower’ and is defined simply as: ‘that overpowers; overwhelming’.²² ‘Overpower’ is defined as a transitive verb to mean:

to overcome, master, or subdue by superior force; to overcome or overwhelm in feeling ... to overmaster the bodily powers or mental faculties of: *overpowered with wine*; to furnish or equip with excessive power.²³

Further, ‘overcome’ is defined to mean:

to get the better of ... conquer; defeat; to prevail over; to surmount ... to overpower (a person, etc.) in body or mind, or affect in an overpowering or paralyzing way, as liquor, a drug, excessive exertion, violent emotion, or the like does.²⁴

¹⁷ *State of Western Australia v Brown [No 3] [2013]* WASC 349 (19 September 2013) [47].

¹⁸ *State of Western Australia v Lang [No 2] [2016]* WASC 206 (6 July 2016) [35].

¹⁹ *Herbert* [2017] WASC 101 (10 April 2017) [58].

²⁰ That is, in Western Australian cases for which written reasons are available (decisions of the Court of Appeal and trials by judge alone).

²¹ See above nn 5–7 and accompanying text.

²² Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Overpowering’.

²³ Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Overpower’.

The import of the above definitions is that when used as a verb, ‘overpower’ means ‘to overcome’ or ‘prevail over’, which involves an enquiry as to the factor that is *in control*, rather than a merely contributing, but not ultimately controlling, factor. Accordingly, in its adjectival form, ‘overpowering’ is an adjective of degree and requires that the factor in question be *in excess* of some other factor or factors.

Whether the term ‘overpowering’ requires that the factor in question is *in control* or *in excess* is significant in the context of concurrent insanity and intoxication because it raises the question whether the state of intoxication needs to be ‘overpowering’ as compared with the effects of a concurrent mental impairment; that is, whether the state of intoxication must be a controlling, rather than merely contributing, factor in the accused’s deprivation of capacity. This issue appears to have been overlooked, or perhaps not articulated, in *Herbert*.²⁵ If so, that construction would have the result that an accused who was concurrently insane and intentionally intoxicated could still avail himself of the insanity defence if he could prove that his intoxication was not a controlling factor in depriving him of a relevant capacity.

2 ‘Action or effect’

The requirement for an ‘action or effect’ in the definition of intoxication is a quantitative enquiry and determines whether there was in fact a result – an action or effect – produced by the ingestion of an intoxicating substance. By contrast, the criterion ‘overpowering’ is qualitative and enquires as to the nature or degree of an action or effect to determine whether it meets the threshold of being ‘overpowering’. Accordingly, an ‘action or effect’ is a necessary, but not of itself sufficient, component of intoxication as that term is used in s 28.

²⁴ Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Overcome’.

²⁵ While Jenkins J found that Mr Herbert was ‘intoxicated’, there is no discussion of the element of ‘overpowering’ in coming to that conclusion. It may be that her Honour took the ordinary meaning of that word into account in making her factual findings. However, if so, it is not articulated in the reasons. Given the potentially high bar that ‘overpowering’ may command if it is accepted that intoxication needs to be ‘controlling’ or ‘in excess’, it stands to reason that there would have been some discussion of that element if that were the case.

However, the significance of the requirement for an action or effect should not be overlooked. This component of the definition creates the need for a connection between a state of intoxication and a result, namely, an action or effect *on* the mind. Accordingly, it is necessary to determine the meaning and content of the term ‘the mind’.

3 ‘*On the mind*’

As the definition of intoxication is concerned with an ‘action or effect *on the mind*’, it raises the question whether it speaks of ‘the mind’ in a general sense, or whether it is directed at certain functions of, or types of effects on, the mind; this question has not been addressed in the case law to date.

As noted above, a state of intoxication may affect a person in a multiplicity of ways²⁶ and may also affect persons to varying degrees.²⁷ In *O'Connor*, Barwick CJ observed that ‘a person may be intoxicated in the sense that his personality is changed, his will is warped, his disposition is altered, or his self-control weakened’.²⁸ Accordingly, intoxication may have an action or effect that overpowers different aspects of ‘the mind’ as a broad concept.²⁹

In the context of the insanity and intoxication defences, this thesis suggests that the reference to ‘the mind’ in the definition of intoxication should be understood as referring to those functions of the mind connected to an accused’s capacity to ‘understand what he is doing’, ‘to control his actions’, or ‘to know that he ought not to do the act or make the omission’.³⁰ That is because the Code makes clear that

²⁶ See above nn 5–7 and accompanying text.

²⁷ See *R v O'Connor* (1980) 146 CLR 64, 71 where Barwick CJ observed that the ‘state of drunkenness or intoxication can vary very greatly in degree’. The Code also expressly averts to the existence of degrees of intoxication in s 28(3) which concerns ‘intoxication, whether complete or partial’.

²⁸ (1980) 146 CLR 64, 71. In that case, His Honour was speaking of intoxication as relevant to the issue of intent, which is codified in s 28(3) of the Code as speaks of ‘intoxication, whether complete or partial’. His Honour’s comments are not to be understood as speaking to the meaning of intoxication in ss 28(1)–(2) of the Code.

²⁹ That is, not confined to the interpretation of the term ‘the mind’ posited in the preceding section.

³⁰ Code s 27(1).

unintentional intoxication becomes a defence once a person has been deprived of a relevant capacity; that is the threshold at which unintentional intoxication is deemed to have an overpowering action or effect on the mind and, therefore, excuses criminal responsibility. This is made clear through the opening words in s 28(1), ‘Section 27 applies’, which imports the requirement for a deprivation of one of the relevant capacities.³¹

Once that position is accepted, there is no reason to apply a different interpretation of intoxication as between unintentional intoxication in s 28(1) and intentional intoxication in s 28(2); that is, the functions of the mind on which intoxication must have an overpowering action or effect in order to amount to ‘intoxication’. That interpretation is further buttressed when it is borne in mind that the application of s 27, including by operation of s 28,³² is concerned with ‘unsoundness of mind’³³ and the need to rebut the presumption that the accused is ‘of sound mind’.³⁴

Based on the above analysis, the effect of an intoxicating substance should only amount to ‘intoxication’ if it has an overpowering action or effect on ‘the mind’ in the sense of a relevant capacity. To that end, it is instructive to briefly consider some of the different ways intoxication may have an ‘action or effect on the mind’ to put this interpretation in its broader context.

For example, an accused might be intoxicated to such a degree that, where he would usually be shy, meek and reserved, he becomes confident, aggressive and boisterous; indicating that intoxication has had an overpowering action or effect on his personality and the emotional faculties of the mind. Likewise, an accused may be intoxicated to such a degree that he is unable to walk steadily and struggles to manipulate objects because of a lack of co-ordination; indicating that intoxication has had an overpowering action or effect on those parts of the mind controlling gross

³¹ Ibid s 28(1) read with s 27.

³² Whether through the expanded application of defence pursuant to s 28(1) of the Code, or the limitation on the application of the defence pursuant to s 28(2) of the Code.

³³ Code s 27(1).

³⁴ Ibid s 26.

motor skills. Contrast both of those scenarios, however, with an accused who is intoxicated to such a degree that he is in the throws of a psychosis marked by severe abnormalities of behaviour, psychomotor retardation, paranoid delusions, impaired reality testing, abnormalities of perception, persecutory beliefs and auditory and visual hallucinations;³⁵ indicating that intoxication may have had an overpowering action or effect on parts of the mind connected to his capacity to understand what he is doing, to control his actions, or to know that he ought not do an act or make an omission.

In the first two examples, the overpowering action or effect of intoxication is not directed to the mind in terms of the capacities in s 27. Accordingly, it would be inappropriate to deny an accused the benefit of the insanity defence in those circumstances because his intoxication has not had an overpowering action or effect on a relevant capacity (so long as a concurrent organic mental impairment caused a loss of capacity attracting the operation of s 27). By contrast, the overpowering action or effect of intoxication in the third example is capable of affecting the mind in terms of the capacities in s 27 and, if so, should be characterised as an ‘overpowering action or effect on the mind’, which would engage s 28(2) and thereby exclude reliance on the insanity defence.

Consequently, intoxication falling short of having an overpowering action or effect on the functions of the mind directed to the capacities in s.27 should not come within the scope of s 28(2). Rather, the operation of s 28(2) should be directed to instances where intoxication has had an overpowering action or effect on a relevant capacity and, therefore, was in some way connected to a loss of capacity. How that operation might be more clearly achieved in the legal framework is addressed in Part Three.

³⁵ See World Health Organisation, *ICD-10: Classification of Mental and Behavioural Disorders*, Clinical descriptions and diagnostic guidelines (1994) 10, cited in Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017) 347-8, 380 fn 72; Dr Russ Scott and Dr William Kingswell, ‘Amphetamines, Psychosis and the Insanity Defence: Disturbing Trends in Queensland’ (2003) 23 *The Queensland Lawyer* 151, 152 citing S F Asnis and R C Smith, ‘Amphetamine Abuse and Violence; (1978) 10 *Journal of Psychedelic Drugs* 371.

C ‘*Intentional*’ Intoxication

As discussed in Part One, the criterion of intoxication being ‘intentional’ has been adopted as determinative of the question whether an intoxicated accused will be able to avail himself of the insanity defence. This seems to stem directly from the policy concern that – as discussed in detail in Part One – an accused’s conduct in becoming intentionally intoxicated should not provide a basis for a defence to criminal responsibility whereas that policy concern does not arise in respect of unintentional intoxication due to a lack of prior fault on the part of the accused.

In *O’Connor*,³⁶ Barwick CJ identified the difficulties inherent in the concept of intentional intoxication, observing that many people become intoxicated, having intentionally consumed an intoxicating substance, but ‘without any intention of so becoming’.³⁷ For example, in the case of a ‘person who at dinner does not observe the frequency with which the waiter tops up his glass’.³⁸ Likewise, where a person drinks beer in which another has inserted whisky without his knowledge.³⁹ In those circumstances it could be said that the accused did not intend the result of becoming intoxicated, notwithstanding his intentional act of consuming an intoxicating substance.⁴⁰

³⁶ (1980) 146 CLR 64.

³⁷ *R v O’Connor* (1980) 146 CLR 64, 74 (Barwick CJ).

³⁸ *Ibid.*

³⁹ Matthew Goode, ‘On Subjectivity and Objectivity in Denial of Criminal Responsibility: Reflections on Reading Radford’ (1987) 11 *Criminal Law Journal* 131, 148. See also the apparently common occurrence of a ‘friend’ putting shots of vodka into a drink, unbeknownst to the accused who, while intentionally drinking alcohol, did not intend to drink the additional shots of vodka. In *DPP v Bone* [2005] 64 NSWLR 735, the accused drank five or six schooners of full strength beer over a three hour period. The last three drinks were bought by a friend and, unbeknownst to the accused, a shot of vodka was poured into each of those drinks. See also the New Zealand case of *Flyger v Auckland City Council* [1979] 1 NZLR 161, the accused in that case had ‘a couple of shandies’ as well as ‘four or five half pints of what he believed to be coca cola’. However, unbeknownst to him, vodka had been put in the glasses of coca cola before they were given to him. McMullin J observed, at 163, that the ‘interesting and unusual feature’ of the case was that the accused ‘had not willingly consumed *all* the intoxicating liquor which left him with a blood alcohol level which exceeded [the legal limit]’ (emphasis added).

⁴⁰ Whether s 24 of the Code may play any role in such circumstances is beyond the scope of this thesis. Rather, these examples serve to illustrate the distinction between an intention to consume and intoxicating substance and an intention to become intoxicated.

The plain words of s 28(1), namely, ‘intoxication or stupefaction caused without intention’,⁴¹ raise the question whether the term ‘intention’ attaches to the *act* of ingesting an intoxicating substance or the *result* of becoming intoxicated. That is, whether it is necessary that the accused intended to become intoxicated, rather than simply intending to ingest an intoxicating substance.⁴² If the former construction were accepted, an accused who intentionally consumed alcohol or drugs without the intention of becoming intoxicated may have a defence if he otherwise fell within the ambit of the insanity defence.⁴³

Unintentional intoxication in s 28(1) captures circumstances where an accused has become intoxicated without intending to consume anything intoxicating, ‘for example, because his drink has been “surreptitiously laced”, or because, against his will, a drug has been forcibly administered to him’.⁴⁴ These examples tend to demonstrate a lack of intention attaching to the *act* of ingesting an intoxicating substance. However, unintentional intoxication also includes, for example, the unforeseen *results* of drugs prescribed by a medical professional and taken in accordance with their instructions,⁴⁵ and the *results* of unwitting exposure to chemicals.⁴⁶

Consequently, while intoxication may, in some circumstances, be an unintended result because of a lack of intention attaching to the act of consuming an intoxicant – such as where a drink is ‘surreptitiously laced’ – it appears that the preferable interpretation is that the criterion of ‘unintentional’ in s 28(1) attaches to the *result* of

⁴¹ Code s 28(2).

⁴² See R S O'Regan, 'Intoxication and Criminal Responsibility Under the Queensland Code' (1977) 10(1) *University of Queensland Law Journal* 70, where this question was raised in the context of the Queensland Code before the amendments following the decision in *R v Bromage* [1991] 1 Qd R 1. See also M Murray QC, *The Criminal Code: A General Review* (Department of the Attorney General, Volume 1, 1983) 44–45; Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017) 349 [12.32].

⁴³ See Fairall Barrett, above n 42, 349 [12.32].

⁴⁴ *R v O'Connor* (1980) 146 CLR 64, 92 (Barwick CJ).

⁴⁵ See, eg, *State of Western Australia v Brown [No 3]* [2013] WASC 349 (19 September 2013) [50], [482]–[483].

⁴⁶ *Re Bromage* (unreported Queensland Mental Health Tribunal Ryan J, 14 December 1989); *R v Bromage* [1991] 1 Qd R 1, 8 (McPherson J); *R v Clough* [2010] QCA 120 [19] (Muir JA).

intoxication. This construction also accords with the physiology of intoxication; intoxication is a physiological state, it is the *result* of ingesting of intoxicants faster than they can be metabolised, rather than the *act* of so doing.⁴⁷

Accepting that the element of ‘unintentional’ in s 28(1) attaches to the result of intoxication, there is no reason to prefer a different outcome as concerns ‘intentional’ intoxication in s 28(2). In addition, this construction accords with the plain words of s 28(2), which refer to an accused who has ‘*become* intoxicated’ and would allay some of the concerns identified by Barwick CJ in *O’Connor*.⁴⁸

II THE ABILITY FOR AMBIGUITIES IN THE LEGAL FRAMEWORK TO ACCOMMODATE THE POLICY CONCERNs

Based on the analysis of the meaning and content of ‘intoxication’, it appears that there are two areas of ambiguity that align with the disjunct between the legal and policy frameworks identified in Part One. As a result, there is scope within those ambiguities to give effect to the policy outcomes sought to be avoided in a way that, in the author’s view, maintains an appropriate balance between the interests of an accused and the protection of the public.

The first ambiguity arises in respect of the issue of ‘intentional’ intoxication. It is submitted that there is scope within the existing criterion of *intentionally* becoming intoxicated to more effectively incorporate the policy concern that an accused’s conduct in becoming intentionally intoxicated should not provide a basis for a defence to criminal responsibility. To that end, the principle of intention is utilised in Part Three in an attempt to remedy some of the disjunct between the policy concerns and the legal framework identified in Part One.

The second ambiguity relates to the requirement for a connection between intoxication and a loss of capacity and, in particular, the degree of that connection. As outlined in Part One, at present, there is no requirement in the legal framework as currently drafted and interpreted by the courts for any connection between

⁴⁷ See the discussion at Part Two: I(A) above.

⁴⁸ See above nn 37-38 and accompanying text.

intoxication and a loss of capacity. However, as discussed in Part Two, the preferable interpretation of ‘intoxication’ does in fact require such a connection. It is submitted that there is scope within the term ‘overpowering’ for the requisite degree of any connection between intoxication and a loss of capacity to be identified in a way that gives effect to the policy concerns identified in Part One but does not deny an accused the opportunity to prove that his concurrent intoxication was not connected to any loss of capacity.

PART THREE

REHABILITATION: RECOMMENDATIONS FOR REFORM

As identified in the preceding section, this Part considers how the policy concerns identified in Part One might be incorporated into the areas of ambiguity identified in Part Two in order to align the policy and legal frameworks and improve the operation of, and interaction between, the insanity and intoxication defences. This Part concludes by proposing reforms that might be implemented in order to achieve that end.

It is necessary to note that the analysis in this Part adopts the interpretation of the definition of intoxication posited in Part Two, so that any reference to intoxication should be understood as meaning an overpowering action or effect on those parts of the mind connected to the capacities in s 27 and that the element of intention attaches to the *result* of intoxication.

I INTENTION

As has been identified earlier in this thesis, the issue of intention is critical to the interaction between the insanity and intoxication defences; whether an accused is ‘intentionally’ intoxicated determines whether he can avail himself of the insanity defence. However, the law as currently drafted and interpreted is unclear in respect of the precise content and scope of the issue of intention as it influences the interaction between the insanity and intoxication defences.

The following analysis seeks to elucidate the proper or preferable construction of the criterion of intention in s 28 of the Code. The analysis commences with a brief discussion of principles of intention before analysing the preferable application of those principles in the context of the interaction between insanity and intoxication.

A *Principles of Intention*

Intention is a state of mind that accompanies an act. An accused intends a result

when the purpose of achieving it provides the reason for acting.¹ This is characterised as ‘purpose’ or ‘direct’ intention (‘direct intention’). However, intention is not limited to direct intention; the law also recognises ‘indirect’ or ‘knowledge’ intention (‘knowledge intention’). An accused is said to have knowledge intention in respect of a result where he ‘does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur’, even though the act may have had a different purpose.²

As concerns the concept of intention in the context of intoxication, it should be acknowledged that it is perhaps a matter of common knowledge that the act of consuming a sufficient volume of drugs or alcohol will result in a state of intoxication and an accused who does so knows that that result is certain or virtually certain to occur. For example, in *Parker v R*,³ it was held that an accused who drinks to excess chooses to reach a state of intoxication. However, with respect, there is no principle in criminal law that people always intend the natural consequences of their actions, and to approach questions of criminal responsibility in that way is an error.⁴ As is discussed further below, the concept of ‘intentional intoxication’ may not always be as straightforward as an accused intentionally drinking to excess.

B *The Preferable Application of the Element of 'Intention'*

Returning to the plain words of s 28(2) of the Code, that section makes clear that the insanity defence does not apply to an accused ‘who has intentionally caused himself

¹ *Peters v The Queen* (1998) 192 CLR 493, 521–2 (McHugh J): ‘No doubt, when a person intends to do something, ordinarily he or she acts in order to bring about the occurrence of that thing’. See also *R v Willmot (No 2)* (1985) 18 A Crim R 42, 46 (Connolly J).

² See, eg, *Peters v The Queen* (1998) 192 CLR 493, 522 (McHugh J); *Vallance v The Queen* (1961) 108 CLR 56, 61 (Dixon CJ), 64–6 (Kitto J).

³ (1915) 17 WALR 96.

⁴ See *O'Connor v R* (1980) 146 CLR 64; *Parker v R* (1963) 111 CLR 610; *Viro v R* (1978) 141 CLR 88; *Vallance v The Queen* (1961) 108 CLR 56, 82 (Windeyer J).

to become intoxicated ... *whether in order to afford excuse for the commission of an offence or not*'. The reference to an 'excuse' is a reference to the insanity defence.⁵

Against that background, and in light of the principles of intention discussed above, it is necessary to consider the preferable application of the element of intention in s 28.

1 *Intention to become intoxicated*

Intentional intoxication will capture circumstances where an accused consumes intoxicating substances with the direct intention of becoming intoxicated, or with knowledge intention that such consumption is certain or virtually certain to result in a state of intoxication, bearing in mind that the definition of 'intoxication' incorporates the capacities in s 27 and therefore is directly linked to the 'excuse' referred to in s 28(2).

The ambit of a direct intention to become intoxicated is relatively straightforward; if an accused intends to become intoxicated within the meaning of that term in s 28, he has made a deliberate decision to assume the risk of incurring an impairment to, or deprivation of, a relevant capacity and, therefore, he should bear the consequences of any offence he commits while in that state. This outcome accords with the policy concerns identified in Part One.

As concerns knowledge intention, intoxication will still be intentional even if the accused had a different purpose in consuming intoxicating substances – such as using drugs or alcohol as a form of self-medication or recreation – so long as the accused was certain or virtually certain that such consumption would have a deleterious effect on his capacity. This construction gives proper effect to the latter portion of the italicised text above; that is, an accused will still be intentionally intoxicated, even if he did not have any purpose or design to be afforded an excuse for the commission

⁵ The insanity defence is an 'excuse' rather than a justification or authorisation because s 27 provides that an accused 'is not criminally responsible' for acts done whilst deprived of a relevant capacity: see *R v Prow* (1989) 42 A Crim R 343.

of an offence, so long as he knew that ingesting the intoxicant in question would have an overpowering action or effect on his mind.

However, the scope of knowledge intention in this context is prone to complexity. For instance, persons with pre-existing mental impairments are likely to use alcohol or drugs for the purposes of self-medication⁶ but such substance use has the potential to precipitate or exacerbate the presentation of symptoms of an underlying mental impairment.⁷ To that end, a difficulty arises because an accused may use an intoxicating substance which they find ordinarily ‘alleviates their specific psychiatric symptoms’,⁸ but, on this occasion, instead *triggers* the presentation of those symptoms. In those circumstances, it may be inaccurate to allege that the accused had the intention of becoming intoxicated; the accused may have intended to *relieve* deleterious symptoms, rather than *cause* them.

In addition, the accused may not have had any foresight of the intoxicants having an adverse effect in precipitating or exacerbating any symptoms of an underlying mental impairment, for example, if the intoxicants combined with an underlying, developing psychosis of which he was unaware (and the symptoms of which may have been the impetus for his intention to self-medicate in the first place). However, if such substance use for the purpose of self-medicating had caused deleterious effects in the past, even if they were not identical to those produced on this occasion, the accused might still be said to have knowledge intention depending on the

⁶ The National Drug Research Institute and the Centre for Adolescent Health: Wendy Loxley et al, *The Prevention of Substance Use, Risk and Harm in Australia – A Review of the Evidence* (2004), 50. See also Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 – Detailed Findings*, Drug Statistics Series No 31 (2017) 95, 111–2: ‘It can be difficult to isolate to what degree drug use causes mental health problems, and to what degree mental health problems give rise to drug use, often in the context of self-medication’.

⁷ The National Drug Research Institute and the Centre for Adolescent Health: Wendy Loxley et al, *The Prevention of Substance Use, Risk and Harm in Australia – A Review of the Evidence* (2004), 50.

⁸ Susan B Quello, Kathleen T Brady and Susan C Sonne, ‘Mood Disorders and Substance Abuse Disorder: A Complex Comorbidity’ (2005) 3(1) *Science & Practice Perspectives* 13, 14. See also James M Bolton, Jennifer Robinson and Jitender Sareen, ‘Self-medication of mood disorders with alcohol and drugs in the National Epidemiologic Survey on Alcohol and Related Conditions’ (2009) 115(3) *Journal of Affective Disorders* 367; Kenneth R Conner, Martin Pinquart and Stephanie A Gamble, ‘Meta-analysis of depression and substance abuse among individuals with alcohol use disorders’ (2009) 37(2) *Journal of Substance Abuse treatment* 127.

particular circumstances of the case. The issue of intoxicants triggering an underlying mental impairment is addressed further in the following section.

2 *Intention to trigger a mental impairment*

Because of the incorporation of the capacities in s 27 into the criteria of ‘the mind’ in the definition of intoxication, it is necessary to consider circumstances where an accused intends to trigger a mental impairment.

It has been observed that:

Nobody, it is usually argued ... wants to become mad nor knows how to invite madness – they are not rightly held responsible for falling prey to it. It seems to follow that if we know more about madness, so that the power to predict and prevent its onset lay with those it afflicts, then we would no longer regard them as the blameless victims we do today.⁹

The scope of intentional intoxication should be understood as being wider than simply concerning the ingestion of intoxicating substances; intoxication may be caused ‘by drugs or intoxicating liquor, or by any other means’.¹⁰ Accordingly, in the context of the proper interpretation of the definition of intoxication, intentional intoxication may also arise where an accused triggers a quiescent mental impairment by failing to take medication prescribed for its control and management.¹¹ In those circumstances, if the accused knew that a failure to take his medication was certain or virtually certain to result in, for example, the presentation of psychotic symptoms that would impair a relevant capacity, there is no basis on which to suggest that such conduct does not amount to intentional ‘intoxication’. Consequently, when the proper construction of the term intoxication in s 28 is understood and acknowledged

⁹ Jennifer Radden, *Madness and Reason* (George Allen and Unwin, 1985) 8-9, quoted in Edward W Mitchell, ‘Culpability for Inducing Mental States: The Insanity Defence of Dr. Jekyll’ (2004) 32(1) *The Journal of the American Academy of Psychiatry and the Law* 63, 64.

¹⁰ Code s 28(1) (emphasis added).

¹¹ See generally Edward W Mitchell, ‘Culpability for Inducing Mental States: The Insanity Defence of Dr. Jekyll’ (2004) 32(1) *The Journal of the American Academy of Psychiatry and the Law* 63.

– as outlined in Part Two – it becomes apparent that the descriptor is perhaps apt to mislead.

Looked at through the prism of an accused's culpable conduct in bringing about a loss of capacity, the practical difference between an accused who is intentionally intoxicated through the use of drugs or alcohol and an accused who has omitted to take prescribed medication is that the former has actively ingested a substance, thereby removing the capacity for self-control and reason, while the latter has omitted the ingestion of a substance with potentially similar, if not identical or worse, consequences.¹² On that basis, it can be said that an accused may be held to have intended a state of 'intoxication' where he acts with knowledge of a pre-existing mental impairment and does not make allowance for that impairment, in knowledge of the likely consequences.

Somewhat similarly, abstinence from, rather than the ingestion of, illicit drugs may also cause a loss of capacity. In *R v Sebalj*,¹³ the accused killed his girlfriend whilst in a psychotic state. However, the accused's symptoms had presented, not in the context of his continued amphetamine use, but rather during the period of withdrawal after the accused had taken steps to combat his drug addiction;¹⁴ the accused's psychosis 'resulted from the *cessation* of amphetamine use'.¹⁵ In those circumstances, unless it could be said that the accused intended to become intoxicated by ceasing to consume intoxicants, it would not seem appropriate to classify the resulting psychosis as an instance of intentional intoxication.

3 Unintentional combination of intoxication and mental impairment

The issue of knowledge intention also creates some complexity in circumstances where intoxication combines with a mental impairment.

¹² *Ibid*, 64.

¹³ [2004] VSC 212.

¹⁴ *Ibid* [29].

¹⁵ *Ibid* [2] (emphasis added).

In *R v Perkins* ('Perkins'),¹⁶ the accused suffered from frontal lobe damage to his brain, which was characterised as a 'mental impairment' within the meaning of the insanity defence,¹⁷ and was also intoxicated by alcohol at the time of the murder with which he was charged. Psychiatric evidence was adduced that the appellant's brain injury interacted 'dramatically with alcohol, leading to states of potentially dangerous, uncontrolled aggression' and

the effect of a small quantity of alcohol which in a normal person would produce practically no change, in a man with damage to the frontal lobes it would be potentially capable of drastic change, so that if that threshold were exceeded, then it would not matter very much whether he had two beers or thirty beers.¹⁸

The Western Australian Court of Criminal Appeal observed that the accused's intoxication 'had a direct bearing on the insanity issue'¹⁹ and it would be necessary for the jury to determine whether the accused had established 'that he was insane within the meaning of s 28 of the Code'.²⁰ The judgment does not make the position plain, but it can be surmised that the reference to s 28 must be a reference to s 28(1) because an accused cannot seek to establish that he is insane within the meaning of s 28(2).²¹ It follows that the defence of unintentional intoxication may have arisen, notwithstanding the appellant's intentional ingestion of alcohol, because of the way in which alcohol interacted dramatically with his mental impairment, causing a state of intoxication that was not an intended result.

Accordingly, where intentional intoxication interacts in an unintended and unexpected way with a mental impairment, or unintentional intoxication that would

¹⁶ [1983] WAR 184.

¹⁷ Ibid, 187.

¹⁸ Ibid, 186.

¹⁹ Ibid, 187 (Burt CJ, Wickham and Kennedy JJ agreeing) (emphasis added).

²⁰ *R v Perkins* [1983] WAR 184, 188 (Burt CJ, Wickham and Kennedy JJ agreeing).

²¹ This decision was handed down before the amendments to s 28 of the Code in 2009. Consequently, the references to s 28(1) and s 28(2) should be understood as referring to the first and second paragraphs of s 28 as then enacted. See *Criminal Code Amendment Act (No. 2) 2009* (WA) s 10, which came into force on 4 December 2009.

otherwise attract the operation of s 27 as occurred in *R v Bromage*,²² it cannot be said that the resulting state of intoxication was foreseen or intended. Consequently, such states of intoxication should not be characterised as intentional and therefore should not fall within the scope of s 28(2) so as to exclude reliance on the insanity defence. To that end, it is necessary to note that the Code has not been amended to reflect the position in the Queensland Code following the decision in *R v Bromage*,²³ and in light of the interpretation of intoxication posited in Part Two and the current drafting of ss 27-28 of the Code, the Code need not align – and, indeed, in this instance, does not – with the position in the Queensland Code.

II OVERPOWERING

In Part One, it was identified that the legal framework as currently drafted and interpreted does not require any connection between intoxication and a loss of capacity. However, in light of the analysis of the component parts of the definition ‘overpowering action or effect on the mind’ in Part Two,²⁴ it is submitted that the requirement for a connection between intoxication and a loss of capacity (an ‘action or effect’ *on* ‘the mind’) and the sufficiency of the degree of that connection (whether it is ‘overpowering’) are both critical to the proper construction of s 28(2). While the interpretation of the elements ‘action or effect’ and ‘the mind’ that this thesis submits are appropriate have been identified in Part Two, the proper construction of the term ‘overpowering’ is less clear. The interpretation and

²² [1991] 1 Qd R 1, 10–12 (McPherson J, Moynihan and Byrne JJ agreeing).

²³ That is, to the extent that the outcome in *R v Perkins* [1983] WAR 184 was contingent on the way in which alcohol interacted dramatically with his mental impairment, producing a mental state that would not ordinarily have arisen in the absence of his mental impairment, this is the same logic that was applied in *R v Bromage* [1991] 1 Qd R 1 prior to the amendments to s 28 of the Queensland Code. The facts in *R v Perkins* [1983] WAR 184 would not attract the operation of the insanity defence in Queensland following the amendment to s 28 because the accused’s intoxication was a necessary contributing factor in the deprivation of capacity, rather than the frontal lobe damage being sufficient by itself to deprive the accused of a relevant capacity. However, the Code in Western Australia has not been amended to the same effect and so, arguably, the facts in *Perkins* may be consistent with relying on the insanity defence in Western Australia unless and until such an amendment is made. At the moment, the interpretation in *Herbert* [2017] WASC 101 operates as a barrier to that outcome.

²⁴ See the discussion at Part Two: I(B) above.

application of that term is significant in the context of the interaction between the insanity and intoxication defences and is the focus of this section.

If the term ‘overpowering’ is identified as a constituent part of the definition of intoxication and applied accordingly, triers of fact would, in the absence of any judicial interpretation or clarification, be instructed to give that term its ordinary meaning and apply it to the particular circumstances of each case. However, as outlined in Part Two, the word ‘overpowering’ carries a number descriptors in its definition including ‘overcome, master, or subdue by superior force … to overmaster the bodily powers or mental faculties of’²⁵ and ‘conquer; defeat … affect in an overpowering or paralysing way’.²⁶ It follows that, if it is accepted that the plain meaning of ‘overpowering’ means ‘to overcome’ or ‘prevail over’, then a trier of fact would need to determine whether a state of intoxication was *in control*, rather than a merely contributing, but not ultimately controlling, factor as compared to the effects of any concurrent mental impairment or unintentional intoxication. Consequently, the term ‘overpowering’ may command a high standard.

For example, an accused may be experiencing florid psychotic symptoms attributable in part to an organic mental impairment alongside *comparatively minor* intoxication, even though that state of intoxication may have been significant if considered in isolation and may have played a role in ‘triggering’ the psychosis. In that instance, the state of intoxication would undeniably have had an ‘action or effect on the mind’. However, if the term ‘overpowering’ is applied in line with its ordinary meaning in those circumstances, the accused would still likely be able to rely on the insanity defence despite the contribution of intoxication to the loss of capacity because the action or effect of intoxication would not meet the threshold of ‘overpowering’ due to being ‘comparatively minor’ in the context of other factors acting on the mind. In those circumstances, the element of intention would not fall for consideration because intoxication has not been established, even though the accused may have intended to become intoxicated in one of the ways outlined in the preceding section.

²⁵ Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Overpower’.

²⁶ Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Overcome’.

In light of those considerations, it is suggested that the term ‘substantial’ may be preferable to the term ‘overpowering’. Substantial does not mean total, nor does it mean trivial or minimal.²⁷ The *Macquarie Dictionary* defines ‘substantial’ as: ‘real or actual … an ample or considerable amount’.²⁸ In other areas of law, it has been interpreted to mean ‘real or of substance, as distinct from nominal’²⁹ and ‘in a relative sense, considerable’.³⁰ Those definitions tend to direct attention to a balancing exercise, considering the role that a factor may have played within a particular context.

In addition, the term ‘substantial’ is already familiar to the criminal law as concerns the law of causation. In that context, causation requires that an act or omission was a ‘substantial’ cause of a result.³¹ In *Arulthilakan v The Queen*,³² the High Court clarified that the ‘substantial cause’ test is slightly more onerous than the ‘but for’ test.³³ To that end, a substantial cause is more than a negligible cause; it is something more than ‘*de minimis*’.³⁴

Consequently, it is submitted that the term substantial may be more appropriate than overpowering because it requires a ‘real or actual’ connection between intoxication

²⁷ See, eg, *Reg v Lloyd* [1967] 2 QB 175, 179–180.

²⁸ Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2017) ‘Substantial’.

²⁹ *Tillmanns Butcheries Pty Ltd v Australiasian Meat Industry Employees’ Union* (1979) 27 ALR 367, as defined in Ray Finklestein QC et al (eds) *Australian Legal Dictionary* (LexisNexis, 2nd ed 2016) 1495.

³⁰ *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557, as defined in Ray Finklestein QC et al (eds) *Australian Legal Dictionary* (LexisNexis, 2nd ed 2016) 1495.

³¹ *Royall v The Queen* (1991) 172 CLR 378, 398 (Brennan J), 411 (Deane and Dawson JJ), 441 (Toohey and Gaudron JJ). The substantial cause test was adopted in the Western Australian context in *Krakouer v Western Australia* (2006) 161 A Crim R 347 [30] (Steytler P, Wheeler JA agreeing) [77] (McLure JA).

³² (2003) 203 ALR 259.

³³ Ibid [35] (Gleeson CJ, Gummow, Hayne, Callinan and Haydon JJ). See also Jennifer Porter, ‘The Implications of Uncertainty in the Law of Criminal Causation for the One-Punch Homicide Offence in Western Australia’ (2015) 27(1) *Bond Law Review* 5, 7.

³⁴ *Royall v The Queen* (1991) 172 CLR 378, 442 (McHugh J) quoting *R v Hennigan* (1971) 3 All ER 133, 135 (Lord Parker CJ), 449 (McHugh J) and quoted with approval in *Krakouer v Western Australia* (2006) 161 A Crim R 347 [28]–[29], [31] (Steytler P, Wheeler JA agreeing); *Arulthilakan v The Queen* (2003) 203 ALR 259 [35] (Gleeson CJ, Gummow, Hayne, Callinan and Haydon JJ). See also Jennifer Porter, ‘The Implications of Uncertainty in the Law of Criminal Causation for the One-Punch Homicide Offence in Western Australia’ (2015) 27(1) *Bond Law Review* 5, 7.

and a loss of capacity, rather than a negligible connection or mere presence. However, the threshold is not so high as to engender a concern that it would ‘allow a person to become highly intoxicated of his or her own volition, and then rely upon their irresponsible conduct as a means of absolving themselves of criminal liability’.³⁵ Rather, the threshold is comparatively low, but still commands an actual connection, which, as discussed in Part One, is something that the current legal framework is lacking. In addition, due to its current application in the criminal law of causation, the meaning of the term may be more amenable to being explained to juries in a way that is capable of being easily understood and applied.

III PROPOSED REFORMS

As a consequence of the interpretation of intoxication posited in Part Two and as further clarified above, and in light of the preceding analysis as to how the element of intention should be interpreted, amendments to the Code giving effect to that analysis may provide much-needed clarity in this area. This section proposes potential reforms to the Code, briefly discussing their merit and the implications that might flow if they were to be enacted.

A *Defining ‘intoxication’*

An accused’s state of intoxication is central to the operation of the intoxication defence and, in respect of s 28(2), the potential exclusion of the insanity defence. Consequently, it is surprising that the Code and the cases do not provide any detailed explanation of the term. Clarity as to the meaning and content of the term is necessary so that defence counsel can meaningfully advise their clients and make appropriate and informed forensic decisions, particularly in light of the High Court³⁶ and Court of Appeal’s³⁷ confirmation that an accused is bound by the forensic

³⁵ Kenneth J Arenson, ‘The Intoxication Defence: Toward a Better Understanding of Current Doctrine and Reform’ (2015) 89(3) *Australian Law Journal* 190, 190.

³⁶ *R v Baden-Clay* (2016) 258 CLR 308 [48] (the Court); *Stanoevski v R* (2001) 202 CLR 115 [21] (Gaudron, Kirby and Callinan JJ); *TKWJ* [2002] HCA 46 [8], [16]–[17] (Gleeson CJ), [95] (McHugh J), [107] (Hayne J, Gummow J agreeing); *Ratten v R* (1974) 131 CLR 510, 517; *Doggett v R* (2001) 208 CLR 343 [1].

³⁷ *McMahon v Western Australia* [2010] WASCA 143 [24]–[27] (McLure P).

decisions made by his trial counsel. To that end, the combination of a lack of statutory definition in the Code and the ambiguity in the definition that has been developed through case law is undesirable in circumstances where a finding of intoxication has the potential to be determinative of, or have a significant bearing on, an accused's criminal responsibility.

Based on the analysis above, the current definition of an 'overpowering action or effect on the mind' is capable of being interpreted so as to better give effect to the need for a connection between intoxication and the policy outcomes sought to be avoided. However, as discussed above, it may be the case that the term 'overpowering' is an unduly onerous threshold that may not give sufficient weight to the need to protect the community. It is suggested that the term 'substantial' is a more appropriate qualifier. Accordingly, there may be utility in introducing a definition of intoxication into s 1 of the Code as follows:

The term **intoxication** means a substantial action or effect on a person's soundness of mind, caused by drugs or alcohol or by any other means.

This definition makes clear that it is necessary for intoxication to be linked to the capacities in s 27 of the Code through the reference to 'a person's soundness of mind'. The clause 'caused by drugs or alcohol or by any other means' reflects the current wording of s 28(2) and ensures that the term is capable of being applied in instances where an accused intentionally triggers a mental impairment. To that end, it is acknowledged that the descriptor of 'intoxication' in that instance is perhaps apt to mislead. Consequently, it may be appropriate to subsume the intoxication defence into a general provision concerning 'impairments' which would include intoxication. However, this would require a substantial rewrite of ss 26-28 of the Code as well as the definitions of mental impairment and mental illness in s 1. As this thesis has not engaged with the insanity defence or the presumption of sanity in the same detail as it has engaged with the intoxication defence, this thesis is not the appropriate vehicle by which to consider such sweeping changes.

B *Clarifying the Element of Intention in the Intoxication Defence*

In order to make clear that the element of intention in the intoxication defence attaches to the result of intoxication, rather than the act of consuming an intoxicating substance, ss 28(1)-(2) of the Code could be amended as follows:

- (1) Section 27 applies to a person who, at the time of doing an act or making an omission, is in a state of unintentional intoxication.
- (2) Subsection (2) does not apply to the case of a person who is in a state of intentional intoxication.

Because of the incorporation of the definition of intoxication proposed above, the provisions are capable of being expressed in much shorter form than they are at present. Section 28(2) refers to s 28(1) rather than s 27 in order to avoid any doubt as to the interaction between the insanity and intoxication defences.

This proposed amendment maintains the connection to s 27 rather than standing alone because this thesis has not addressed the issue of dispositions following a verdict of unsoundness of mind under s 28. Consequently, in the absence of the opportunity to give sufficient consideration to that matter, the status quo in that regard is maintained.³⁸

C *Implications*

The amendments to the Code proposed above would have the effect that an accused would not be denied the benefit of the insanity defence due to the mere presence of intoxication. Rather, consideration would be directed to the question whether an accused's intoxication was connected to his loss of capacity and, if so, whether that connection was sufficiently strong to justify denying him the benefit of the insanity defence.

³⁸ In that regard, see, eg, Colvin, E and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2012) 496 [18.10].

It must be acknowledged that a potential consequence of these amendments may be that where particular circumstances might otherwise have resulted in a conviction because the accused would not have been able to avail himself of the insanity defence, these amendments will have the effect that an accused may instead be acquitted on account of unsoundness of mind because his intoxication will not be a bar to entering such a plea. Consequently, allowing the insanity defence to operate in circumstances where the accused was intentionally intoxicated may create a public concern as to increasing the scope for an accused who poses a danger to the public being acquitted. However, it must be remembered that if an accused is acquitted of a charge on account of unsoundness of mind,³⁹ the court must deal with him under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).⁴⁰ The accused may, in certain circumstances, be released.⁴¹ However, in the case of certain serious offences, including murder and manslaughter, the accused *must* be made subject to indefinite detention⁴² and, as a consequence, is detained at the Governor's pleasure.⁴³

In addition, as noted by Deane and Dawson JJ in *R v Falconer*:

The law is possibly open to the criticism that it envisages the release of a person who may, on the balance of probabilities, be violently insane. That is, however, a matter to be dealt with by the means otherwise available for protecting the community from such persons and, if those means are thought to be inadequate, by legislative intervention.⁴⁴

Where there is *prima facie* evidence of intoxication, a trier of fact, properly instructed, will likely be slow to rebut the presumption of sanity in the face of

³⁹ The accused may plead not guilty on account of unsoundness of mind: *Criminal Procedure Act 2004* (WA) s 126(1)(d). If the question whether he is not guilty on account of unsoundness of mind subsequently arises during the course of the trial, the trial judge must direct the jury that if it finds the accused not guilty on account of unsoundness of mind, it must return a special verdict to that effect: *Criminal Procedure Act 2004* (WA) s 113(1). If an accused is found not guilty on account of unsoundness of mind, the court must record a judgment of 'acquittal on account of unsoundness of mind': *Criminal Procedure Act 2004* (WA) s 147(2).

⁴⁰ *Criminal Procedure Act 2004* (WA) s 149(1).

⁴¹ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 22(1)(a)-(b).

⁴² *Ibid* s 21(a), Schedule 3.

⁴³ *Ibid* ss 24(1), 35.

⁴⁴ *R v Falconer* (1990) 171 CLR 30, 63.

evidence tending to establish that intoxication played a substantial role in the loss of capacity, bearing in mind that ‘substantial’ is not a particularly high threshold and the accused bears the onus of proving unsoundness of mind on the balance of probabilities.

CONCLUSION

Following trial, Mr Herbert was sentenced by Jenkins J to a total effective sentence of 17 years imprisonment.¹

It should be noted that an issue arose in *Herbert* as to the admissibility of much of the evidence relating to the psychosis affecting Mr Herbert at the relevant time.² The deficiency in admissible evidence relevant to that issue is perhaps the reason Jenkins J found that Mr Herbert failed to prove that his mental impairment deprived him of a relevant capacity³ and yet observed that:

[Mr Herbert's] conduct on the evening of 28 August 2015 indicates that he was in a very disordered mental state which is quite inexplicable in a person who was otherwise a loving father and not an abusive husband. This behavior does raise a strong suspicion that [he] would not have committed the relevant acts unless his mental state deprived him of the capacity to know that he ought not do the acts.⁴

¹ That sentence comprised 12 years imprisonment for attempting to unlawfully kill his youngest daughter and 5 years imprisonment for attempting to unlawfully kill his eldest daughter, with those sentences ordered to be served cumulatively. Mr Herbert was also sentenced to 2 years imprisonment for making a threat to unlawfully kill his de facto spouse, and 3.5 years for doing an act as a result of which the life, health or safety of another was or was likely to be endangered – these offences were also committed on 28 August 2015 during the time that Mr Herbert alleged he was deprived of the capacity to know that he ought not do the acts constituting the offences. The latter two sentences were ordered to be served concurrently with the sentences imposed in respect of the attempts to unlawfully kill each of his daughters. Mr Herbert was made eligible for parole and will first be eligible for release after serving 15 years of his sentence. See *State of Western Australia v Herbert* [2017] WASCSR 139 (3 August 2017) [103], [110]–[111].

² There was evidence to suggest that Mr Herbert was developing, and ultimately suffered from, a psychosis in the days leading up to 28 August 2015 based on observations made by others including family and neighbours; information contained in his hospital and prison medical records; and statements made by Mr Herbert to psychiatrists, medical professionals and prison staff following the events in question. However, Mr Herbert elected not to give evidence personally, resulting in much of the evidence of what he said out of court being inadmissible to prove the truth of those statements, subject to the exception to the rule against hearsay concerning statements made by a person about his bodily feelings and symptoms contemporaneously to the time when his state of health is in issue: *Ramsay v Watson* (1961) 106 CLR 642, 647. Accordingly, anything said by Mr Herbert after his admission to prison at about 6.15 pm on 29 August 2015 – approximately 27 hours after the events in question – was ruled as inadmissible: *Herbert* [2017] WASC 101 (10 April 2017) [19]–[25].

³ *Herbert* [2017] WASC 101 (10 April 2017) [67], [325], [330].

⁴ *Ibid* [324].

However, had the deficiency in admissible evidence not posed a bar to a finding that Mr Herbert was deprived of the capacity to know that he ought not do the acts due to his mental impairment, he still would have been refused the benefit of availing himself of the insanity defence due to the current drafting and interpretation of ss 27-28 of the Code.

This thesis has attempted to shed some light on the reasons why that should not be the ultimate outcome in cases such as *Herbert*. At the very least, an accused should be afforded the opportunity to prove that his intoxication did not play a sufficient – or any – role in his loss of capacity, rather than falling foul of what is, in the author’s view, and unjustified presumption that any loss of capacity while intoxicated is a consequence of intoxication.

At present, there is no requirement in the legal framework for a connection between intoxication and any of the policy concerns sought to be avoided. Consequently, there does not appear to be any sufficient justification for refusing an accused the opportunity to avail himself of the insanity defence for no reason other than the fact that he was intoxicated at the relevant time. On that basis, the operation of s 28(2) is open to the criticism of being haphazard and arbitrary. However, if the construction of the intoxication defence suggested in this thesis is adopted, that criticism might be avoided.

APPENDIX A

Sections 27-28 of the *Criminal Code* (WA), as originally enacted on 1 January 1914, provided:

Insanity

27. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.

Intoxication

28. The provisions of the last preceding section apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor, or by any other means.

They do not apply to the case of a person who has intentionally caused himself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not.

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.

APPENDIX B

The *Criminal Code 1988* (Qld) ss 28(1)-(2) previously provided:

28. Intoxication
 - (1) The provisions of section 27 apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on the person's part by drugs or intoxicating liquor or by any other means.
 - (2) They do not apply to the case of a person who has intentionally caused himself or herself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not.

Following *Bromage*, ss 28(1)-(2) was amended to provide:

28. Intoxication
 - (1) The provisions of section 27 apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on the person's part by drugs or intoxicating liquor or by any other means.
 - (2) They do not apply to the case of a person who has, to any extent intentionally caused himself or herself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not and whether his or her mind is disordered by the intoxication alone or in combination with some other agent.

BIBLIOGRAPHY

A Articles / Books / Reports

Arenson, Kenneth J, ‘The Intoxication Defence: Toward a Better Understanding of Current Doctrine and Reform’ (2015) 89(3) *Australian Law Journal* 190

Asnis, S F and R C Smith, ‘Amphetamine Abuse and Violence; (1978) 10 *Journal of Psychedelic Drugs* 371

Australian Bureau of Statistics, 3303.0 – *Causes of Death in Australia* (2016)

Australian Criminal Intelligence Commission, *National Wastewater Drug Monitoring Program*, Report 2 (2017)

Australian Institute of Criminology: Sarah Couglah et al, *Drug use monitoring in Australia: 2013–14 report on drug use among police detainees*, AIC Monitoring Report No 27 (2015)

Australian Institute of Criminology: Willow Bryant and Tracy Cussen, *Homicide in Australia: 2010-11 to 2011-12: National Homicide Monitoring Program Report*, AIC Monitoring Report No 23 (2015)

Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 – Detailed Findings*, Drug Statistics Series No 31 (2017)

Barbor, Thomas et al, *Lexicon of Alcohol and Drug Terms* (World Health Organisation, 1994)

Boles, Sharon M and Karen Miotto, ‘Substance Abuse and Violence: A Review of the Literature’ (2003) 8 *Aggression and Violent Behaviour* 155

Bolton, James M, Jennifer Robinson and Jitender Sareen, ‘Self-medication of mood disorders with alcohol and drugs in the National Epidemiologic Survey on Alcohol and Related Conditions’ (2009) 115(3) *Journal of Affective Disorders* 367

Butler, Susan (ed), *Macquarie Dictionary* (online ed, at 5 November 2017)

Colvin, E and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2012)

Conner, Kenneth R, Martin Pinquart and Stephanie A Gamble, 'Meta-analysis of depression and substance abuse among individuals with alcohol use disorders' (2009) 37(2) *Journal of Substance Abuse treatment* 127

Dixon, Sir Owen, 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *The Australian Law Journal* 255

Duke, Aaron A et al, 'Alcohol Dose and Aggression: Another Reason Why Drinking More Is a Bad Idea' (2011) 72 *Journal of Studies on Alcohol and Drugs* 34

Edwards, Eric J and Richard W Harding, *Cases on the Criminal Code* (The Law Book Company Ltd, 3rd ed 1984)

Fairall, P A and P W Johnston, 'Antisocial Personality Disorder (APD) and the Insanity Defence' (1987) 11 *Criminal Law Journal* 78

Fairall, Paul A and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017)

Fairall, Paul Ames, 'Majewski Banished' (1980) 4 *Criminal Law Journal* 264

Fairall, Paul Ames, 'Majewski in Retreat' (1979) 3 *Criminal Law Journal* 211

Finaglette, Herbert and Ann Finaglette Hasse, *Mental Disabilities and Criminal Responsibility* (University of California Press, 1979)

Finnigan, F and R Hammersley, 'The Effects of Alcohol on Performance' in AP Smith and DM Jones (eds) *Handbook of Human Performance* (Academic Press Ltd, 1992)

Fisse, Brent, *Howard's Criminal Law* (Law Book Company, 5th ed, 1990)

Giancola, Peter R, 'Alcohol and Aggression: Theories and Mechanisms' in Mary McMurran (ed), *Alcohol-Related Violence: Prevention and Treatment* (Wiley-Blackwell, 2013)

Gillies, Peter, *Criminal Law* (Law Book Company, 4th ed, 1997)

Goode, Matthew, ‘On Subjectivity and Objectivity in Denial of Criminal Responsibility: Reflections on Reading Radford’ (1987) 11 *Criminal Law Journal* 131

Goode, Matthew, ‘Some Thoughts on the present state of the “Defence” of Intoxication’ (1984) 4 *Criminal Law Journal* 104

Goodman, Ellen and Deirdre O’Connor, ‘Diminished Responsibility – Its Rationale and Application’ (1977) 1 *Criminal Law Journal* 204

Hoaken, Peter N S and Sherry S Stewart, ‘Drugs of Abuse and the Elicitation of Human Aggressive Behaviour’ (2003) 28 *Addictive Behaviours* 1533

Jones, T H ‘Insanity, Automatism and the Burden of Proof on the Accused’ (1995) 111 *Law Quarterly Review* 475

Keiter, M ‘Just Say No Excuse: The Rise and Fall of the Intoxication Defence’ (1997) 87 *The Journal of Criminal Law and Criminology* 482

Law Reform Commission of Western Australia, *Final Report – Review of the Law of Homicide*, Project No 97 (2007)

Law Reform Commission of Western Australia, *Issues Paper – Review of the Law of Homicide*, Project No 97 (2005)

Leader-Elliott, Ian, ‘Criminal Intoxication’ (1998) 22 *Criminal Law Journal* 321

Leader-Elliott, Ian, ‘Voluntariness, Intoxication and Fault’ (1991) 15 *Criminal Law Journal* 112

Levine, Harry Gene, ‘The Vocabulary of Drunkenness’ (1981) 42 *Journal of Studies on Alcohol* 1038

Mitchell, Edward W, ‘Culpability for Inducing Mental States: The Insanity Defence of Dr. Jekyll’ (2004) 32(1) *The Journal of the American Academy of Psychiatry and the Law* 63

Mitchell, Edward W, ‘Madness and Meta-Responsibility: The Culpable Casuation of Mental Disorder and the Insanity Defence’ (1999) 10(3) *The Journal of Forensic Psychiatry* 597

Murray, M, *The Criminal Code: A General Review* (Department of the Attorney General, Volume 1, 1983)

National Health and Medical Research Council, ‘Australian Alcohol Guidelines: Health Risks and Benefits’ (Guidelines, October 2017)

National Health and Medical Research Council, ‘Australian Guidelines to Reduces Health Risks from Drinking Alcohol’ (Guidelines, February 2009)

O'Regan, R S, ‘Intoxication and Criminal Responsibility Under the Queensland Code’ (1977) 10(1) *University of Queensland Law Journal* 70

Orchard, Gerald F, ‘Criminal Responsibility and Intoxication – The Australian Rejection of Majewski’ (1980) *New Zealand Law Journal* 532

Orchard, Gerald, ‘Drunkenness as a “Defence” to Crime – Part 1’ (1977) 1 *Criminal Law Journal* 59

Orchard, Gerald, ‘Drunkenness as a “Defence” to Crime – Part 2’ (1977) 1 *Criminal Law Journal* 132

Pearce, D and R Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011)

Porter, Jennifer, ‘The Implications of Uncertainty in the Law of Criminal Causation for the One-Punch Homicide Offence in Western Australia’ (2015) 27(1) *Bond Law Review* 5

Quello, Susan B, Kathleen T Brady and Susan C Sonne, ‘Mood Disorders and Substance Abuse Disorder: A Complex Comorbidity’ (2005) 3(1) *Science & Practice Perspectives* 13

Quilter, Julia et al, ‘Criminal Law and the Effects of Alcohol and Other Drugs’ (2016) 39(3) *UNSW Law Journal* 913

Radden, Jennifer, *Madness and Reason* (George Allen and Unwin, 1985)

Rajaratnam, Shantha M W, Jennifer R Redman and Michael G Lenne, 'Intoxication and Criminal Behaviour' (2000) 7(1) *Psychiatry, Psychology and Law* 59

Rall, TW, 'Hypnotics and Sedatives: Ethanol' in AG Gilman et al (eds) *The Pharmacological Basis of Therapeutics* (McGraw Hill Inc, 1992)

Robinson, Paul H, 'Causing the Conditions of One's Own Defence: A Study in the Limits of Theory in Criminal Law Doctrine' (1985) 71(1) *Virginia Law Review* 1

Scott, Dr Russ and Dr William Kingswell, 'Amphetamines, Psychosis and the Insanity Defence: Disturbing Trends in Queensland' (2003) 23 *The Queensland Lawyer* 151

Scott, Russ, 'Amphetamine-Induced Psychosis and Defences to Murder: *R v Clough* [2010] QCA 120' 19(5) *Psychiatry, Psychology and Law* 615

The National Drug Research Institute and the Centre for Adolescent Health: Wendy Loxley et al, *The Prevention of Substance Use, Risk and Harm in Australia – A Review of the Evidence* (2004)

Tolmie, Julia 'Intoxication and Criminal Liability' (2001) 64 *Modern Law Review* 688

Tolmie, Julia, 'Intoxication and Criminal Liability in New South Wales: A Random Patchwork?' (1999) 23 *Criminal Law Journal* 218

Victorian Law Reform Commission, *Criminal Responsibility: Intention and Gross Intoxication*, Report No 6 (1986)

Victorian Law Reform Commission, *Mental Malfunction and Criminal Responsibility*, Report No 14 (1990)

Walker, Gordon, 'Voluntary Intoxication: the Australian Response to Majewski's Case' (1979) 3 *Criminal Law Journal* 13

Weldon, Ian, *Annotated Criminal Legislation Western Australia* (LexisNexis Butterworths 2010)

World Health Organisation, *ICD-10: Classification of Mental and Behavioural Disorders*, Clinical descriptions and diagnostic guidelines (1994)

B Cases

Arulthilakan v The Queen (2003) 203 ALR 259

Doggett v R (2001) 208 CLR 343

DPP v Bone [2005] 64 NSWLR 735

DPP v Majewski [1976] 2 WLR 623

Flyger v Auckland City Council [1979] 1 NZLR 161

Krakouer v Western Australia (2006) 161 A Crim R 347

Lee v New South Wales Crime Commission (2013) 251 CLR 196

Marsh v Baxter [2014] WASC 187

McMahon v Western Australia [2010] WASCA 143

Parker v R (1915) 17 WALR 96

Parker v R (1963) 111 CLR 610

Peters v The Queen (1998) 192 CLR 493

R v Baden-Clay (2016) 258 CLR 308

R v Bromage [1991] 1 Qd R 1

R v Clough [2010] QCA 120

R v Falconer (1990) 171 CLR 30

R v Hennigan (1971) 3 All ER 133

R v Iley [2006] WASC 107

R v Kemp [1957] 1 QB 399

R v Martin (No 1) (2005) 159 A Crim R 313

R v Mullen (1938) 59 CLR 124

R v O'Connor (1980) 146 CLR 64

R v Perkins [1983] WAR 184

R v Porter (1933) 55 CLR 182

R v Prow (1989) 42 A Crim R 343

R v Sebalj [2004] VSC 212

R v Smith [1949] St R Qd 126

Radford v The Queen (1985) 42 SASR 266

Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1982) 44 ALR 557

Ratten v R (1974) 131 CLR 510

Re Bromage (unreported Queensland Mental Health Tribunal Ryan J, 14 December 1989)

Re Claybourn (unreported Queensland Mental Health Tribunal Dowsett J, 27 March 1998)

Re Neilsen (unreported, Queensland Mental Health Tribunal, Dowsett J, 2 May 2001)

Re Plant (unreported, Queensland Mental Health Tribunal, Dowsett J, 27 March 1998)

Reg v Lloyd [1967] 2 QB 175

State of Western Australia v Brown [No 3] [2013] WASC 349

State of Western Australia v Herbert [2017] WASCSR 139

State of Western Australia v Lang [No 2] [2016] WASC 206

Taiapa v R (2009) 240 CLR 95

Tillmanns Butcheries Pty Ltd v Australiasian Meat Industry Employees' Union
(1979) 27 ALR 367

TKWJ [2002] HCA 46

Vallance v The Queen (1961) 108 CLR 56

Viro v R (1978) 141 CLR 88

Woolmington v R [1935] AC 462

C Legislation

Criminal Code (WA)

Criminal Code Act 1988 (Qld)

Criminal Code Amendment Act (No. 2) 2009 (WA)

Criminal Procedure Act 2004 (WA)

Evidence Act 1906 (WA)

Interpretation Act 1984 (WA)

Mental Health (Consequential Provisions) Act 1996 (WA)

Mental Health Act 2016 (Qld)

D Other

Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996

Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 November
2009