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Mr Mark Johnstone
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Dear Mr Johnstone

Possible amendments to the Crimes (Sentencing Procedure) Act 1999 aimed at deterring alcohol and drug fuelled violence

Thank you for your email dated 30 March 2015 inviting the New South Wales Bar Association to contribute to this important reference.

The Attorney General has asked the New South Wales Sentencing Council to consider a number of proposals from the Thomas Kelly Foundation to make amendments to the *Crimes (Sentencing Procedure) Act 1999* aimed at deterring alcohol and drug fuelled violence.

The Attorney has also asked the Council to undertake a general examination of possible sentencing measures to achieve deterrence and behaviour change in relation to alcohol and drug fuelled violence, including measures taken by other jurisdictions, the success of such measures and their possible suitability for New South Wales.

The specific proposals the Council has been asked to consider are:

> Whether a mandatory aggravating factor should be introduced to s 21A of the *Crimes (Sentencing Procedure) Act 1999* that applies where the offence involved violence because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance.
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> Whether the concept of 'conditional liberty' in s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* should be defined.
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> Whether the concept of 'vulnerability' in s 21A(2)(1) of the *Crimes (Sentencing Procedure) Act 1999* should be expanded to include the victim being unable or unlikely to defend themselves because of youth, age, sex, disability, physical constraints, inability to escape, lack of knowledge of attack, abused trust or emotional impediment as well as because of the victim's occupational vulnerability (such as a taxi driver, a bus driver, a public transport worker, a bank teller, a service station attendant or a cashier) or because of the victim being homeless.

The Association opposes these proposals. They will, if adopted, add even further complexity to sentencing law in this state for no foreseeable benefit. The Sentencing Council should reject these proposals and, instead, support the recommendations of the New South Wales Law Reform Commission for replacement of s 21A with a provision that does not list 'aggravating' and 'mitigating' factors.

In a Briefing Note prepared by the Association in 2014 in response to proposed legislation dealing with drug and alcohol-related violence, the Association supported proposals to reduce the availability of alcohol in certain areas. It supported steps to address the causes of intoxication, particularly public intoxication. However, as regards proposals to introduce mandatory minimum sentences for drug and alcohol-related violence as a 'deterrent' to drug and alcohol-related violence, the Association stated:

> Research has clearly established that tougher penalties do not deter offenders. For example, a 2012 NSW Bureau of Crime Statistics and Research study found that 'increasing the length of stay in prison beyond current levels does not appear to impact on the crime rate after accounting for increases in arrest and imprisonment likelihood' and concluded that policy makers should focus more attention on strategies that increase the risk of arrest and less on strategies that increase the severity of punishment (Wan W-Y et al, 'The effect of arrest and imprisonment on crime' *Crime and Justice Bulletin* 158, 2012).

> The very nature of drug and/or alcohol-related assaults is that they are impulsive. It is entirely unrealistic to assume that such offenders consider the likelihood of incarceration before they commit such crimes. No intoxicated offender is likely (before throwing a punch) to take into account this change in the law. That would require consideration of the risks associated with the use of force, the risk of apprehension by the police, the risk of successful prosecution and the risk that the mandatory minimum sentence would be higher than the sentence that would otherwise have been imposed. Is it at all plausible that, in the second or two before a punch is thrown by an intoxicated offender, he or she might take into account, let alone be deterred by, such considerations?

These observations have application to other 'possible sentencing measures to achieve deterrence and behaviour change in relation to alcohol and drug fuelled violence'. Quite simply, they will not achieve the outcome of general deterrence. Instead, they will add even further complexity to an already over-complex sentencing process. They will prolong sentencing proceedings and result in more successful appeals against sentence.

More generally, the Association supports the recommendation of the Law Reform Commission in Report 139 'Sentencing' that there should be 'replacement of s 21A by a new provision that lists six general factors that a court should consider in sentencing, leaving the detail to the common law' (Executive Summary, 1.10). This would simplify the sentencing process, while at the same time increasing the level of transparency and consistency in the factors the courts apply. It would avoid many of the problems that have been confronted by sentencing courts in applying s 21A (see NSWLRC 139 at 4.27 – 4.38). These problems include the risks of appeal that arise where there has been a double-counting or where a court has overlooked or not mentioned a relevant factor, or applied a factor contrary to the common law.

The views of the Law Reform Commission are hardly isolated. In *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [129], the High Court cautioned against labelling circumstances as either 'aggravating' or 'mitigating' where this leads to automatic consequences. The Judicial Commission's Sentencing Bench Book describes the characterisation of a sentencing factor as either aggravating or mitigating as being 'too simplistic and sometimes unhelpful' (Judicial Commission of NSW, Sentencing Bench Book [9-720]). In each of its 1988 and 2006 reports on sentencing, the Australian Law Reform Commission recommended against adopting any distinction between aggravating and mitigating factors (Australian Law Reform Commission, *Sentencing*, Report 44 (1988) rec 94; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.150]-[6.159], rec 6-4).

The Association also notes that the NSW Joint Select Committee on Sentencing of Child Sexual Assault Offenders, in its 2014 Report, recommended 'the replacement of section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with an amended section containing a non-exhaustive set of sentencing factors listed in recommendation 4.2 of the New South Wales Law Reform Commission Report 139 *Sentencing*'.

As regards the specific proposal to introduce a mandatory aggravating factor that applies where the offence involves violence and the offender was intoxicated, the Association rejects the view that intoxication should always be regarded as an aggravating factor. Is it seriously suggested that an offender who becomes intoxicated and commits an offence that is completely out of character as a result of that intoxication should be dealt with more harshly than an offender who commits the same type of offence whilst sober? The moral culpability of the intoxicated offender may be significantly less than that of the sober offender. The intoxicated offender may have much better prospects of rehabilitation (if the intoxication issues are addressed) and much less need for specific deterrence than the sober offender. Given that a harsher sentence for the intoxicated offender will not have a deterrent impact, there is simply no justification for the proposal.

The Law Reform Commission concluded that intoxication should not be listed as a sentencing factor at all in the *Crimes (Sentencing Procedure) Act 1999*, bearing in mind that the courts have a developed jurisprudence in respect of it. Further, it was observed that it 'might be aggravating, mitigating or neutral depending on the circumstances' (NSWLRC 139 at 4.21), a recognition that it would be quite unjust to regard it as always aggravating.

Under general sentencing principles developed by the courts, intoxication may be aggravating where, for example, it can be characterised as involving reckless conduct (see *MDZ v R* [2011] NSWCCA 243 at [77](4); *Mendes v R* [2012] NSWCCA 103, 221 A Crim R 161 at [75]; *Ward v R* [2013] NSWCCA 46 at [227]). Where an offender is aware that he or she has engaged in similar conduct to that constituting the physical elements of the offence when intoxicated, the fact of intoxication would generally be regarded as involving reckless conduct that may aggravate the seriousness of the offence. Even an awareness of what the offender was capable of doing might be characterised as recklessness and could involve a degree of aggravation.

On the other hand, the courts have acknowledged that, in exceptional circumstances, intoxication may be mitigating, even where it is self-induced. It may support a conclusion that the offence was impulsive and un-premeditated, rather than planned. If the intoxication had a significant causal role in the commission of the offence (by, for example, substantially diminishing the offender's self-control, capacity to make reasoned or ordered judgments, awareness of the likely consequences of his or her conduct or appreciation of the wrongfulness of the conduct, or of its moral culpability) then the intoxication can reduce the seriousness of the offence if the intoxication was

not voluntary or the offender had no particular reason to foresee that he or she might commit the offence. Thus, intoxication 'may mitigate the crime because the offender has by reason of that intoxication acted out of character' (*Coleman* (1990) 47 A Crim R 306 at 327; *Gordon* (1994) 71 A Crim R 459 at 467). Where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised (for example, some Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand) this should be taken into account as a mitigating factor (*Fernando* (1992) 76 A Crim R 58 at 62-3, cited with apparent approval in *Bugmy v R* [2013] HCA 37, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [38]).

Of course, the New South Wales Parliament acted in 2014 to over-ride that common law authority by enacting sub-section 5AA in s 21A ('In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor'). The full implications of that new provision are yet to be determined by the courts but the Association considers that it should be repealed. As the courts have recognised, there will be exceptional circumstances where self-induced intoxication should be taken into account because it reduces the moral culpability of the offender or shows that that there is a reduced need for specific deterrence or enhanced prospects of rehabilitation. It is inconsistent with the goal of individualised justice to prevent a sentencing court from taking into account such circumstances in an appropriate case.

As regards the proposal to define the concept of 'conditional liberty' in s 21A(2)(j), the Association opposes it. There is no doubt under existing jurisprudence that it would include a breach of a bond, suspended sentence or breach of parole. It would not include conditions on a person's liberty that have been imposed not 'in relation to an offence or alleged offence', such as an order under the *Child Protection (Offenders Prohibition Orders) Act*, or an apprehended violence order under the *Crimes (Domestic and Personal Violence) Act* but that is a matter of no importance because s 21A(2) is not an exclusive list of factors that may result in a heavier sentence and there is no doubt that breach of such orders may be treated in precisely the same way in accordance with common law principles. In *Sivell v R* [2009] NSWCCA 286, McClellan CJ at CL stated at [29]–[30]:

> 29 For my part, I can see no justification in treating a breach of a bond, suspended sentence or breach of parole for the purposes of s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act* any differently from a breach of an order under the *Child Protection (Offenders Prohibition Orders) Act*, or for that matter, a breach of an apprehended violence order under the *Crimes (Domestic and Personal Violence) Act*. While in the former category conditional liberty has clearly been granted to an offender 'in relation to an offence or alleged offence', thereby attracting the operation of s 21A(2)(j) by that designation, in the latter category the conditions on the person's liberty have been imposed with the object of protecting against the risk of offences of a particular kind being

committed where the potential victim is in position of vulnerability by age, in the case of the child protection legislation, or vulnerable by their social or domestic circumstances in the case of women or others at risk of personal violence.

30 I draw support for this view, as did the sentencing judge, from the observations of Johnson J in *Porter v R* [2008] NSWCCA 145. In that case his Honour had occasion to consider whether an offence committed whilst subject to a good behaviour bond but imposed for an offence which did not provide for imprisonment, was committed while the offender was subject to conditional liberty as provided for s 21A(2)(j). His Honour did not consider that the term 'conditional liberty' in the section was confined to circumstances where the foundational crime must be punishable by imprisonment. He took the view that the operation of the section embraces the common law principle that an offence committed whilst a person is subject to an order of the court to be of good behaviour is the aggravating conduct for sentencing purposes. His Honour went on to say that even if he were wrong in his construction of the section the common law principle remains applicable given that the enactment of s 21A did not purport to codify the law. I would also add that the commission of a registrable offence by this applicant is a blatant repudiation of a sentencing order imposed in 2002 which provided for a non-parole period with a view to his rehabilitation, and is a further basis for regarding his conduct in possessing child pornography as relevantly aggravated (see *R v Cicekdag* [2004] NSWCCA 357; 150 A Crim R 299 at [53]).

As regards the proposal to expand the concept of 'vulnerability' in s 21A(2)(1), there is no doubt that any 'vulnerability' of a victim, whether or not it falls within the scope of the term in s 21A(2)(1), may increase the objective seriousness of the offence and, thereby 'aggravate' the offending. For example, if a victim is punched without any warning that will undoubtedly increase the objective seriousness of the offence, because of the greater risk of serious harm (or death) arising from that lack of warning, and increase the need for a deterrent sentence. Whether or not such vulnerability falls within the scope of s 21A(2)(l), it may properly be taken into account in determining an appropriate sentence. The case of *R v Loveridge* [2014] NSWCCA 120 demonstrates that very point. The Court of Criminal Appeal stated at [105]:

> The use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol-fuelled aggression accompanied, as it was, by other non-fatal attacks by the Respondent upon vulnerable, unsuspecting and innocent citizens in the crowded streets of King Cross on a Saturday evening, called for the express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case.

Expansion of the scope of s 21A(2)(j) and s 21A(2)(1) will only serve to increase the risk of the kinds of problems highlighted by the NSWLRC, including the risks of double-counting or where a court has overlooked or not mentioned a relevant factor, or applied a factor contrary to the common law.

In conclusion, the Association agrees with the analysis of the Law Reform Commission. Section 21A should be replaced by a new provision that lists general factors that a court should consider in sentencing, leaving the detail to the common law. No simplistic approach to sentencing is appropriate. Everything should depend on the particular circumstances of the case. The courts should be left to apply general sentencing principles to ensure individualised justice. The Association invites the Sentencing Council to support the Law Reform Commission recommendations with respect to s 21A and to recommend against introduction of any new 'aggravating' factors. In addition, the Association invites the Sentencing Council to recommend repeal of s 21A(5AA).

Should you or your officers have any queries in relation to this submission, please do not hesitate to get in touch with the Association's Executive Director, Philip Selth on [redacted] or at [redacted]

Kind regards

Jane Needham SC
President