



New South Wales  
Council for Civil Liberties

**Submission to the NSW  
Sentencing Council  
Review of Alcohol and Drug  
Fuelled Violence**

**24<sup>th</sup> April 2015**

## THE NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION

The NSW Council for Civil Liberties (the NSW CCL) welcomes the opportunity to make a submission to the NSW Sentencing Council's review of proposals relating to sentencing provisions for alcohol and drug fuelled violence.

### Detailed comments

#### **Issue 1**

*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.*

**The NSW Council for Civil Liberties submits that S21A should not be amended/ added to as proposed.**

- i. There is no established need to introduce the suggested factor, particularly elevated in importance as a mandatory aggravating factor;
- ii. The NSW CCL is opposed in principle to any legislative interference that further fetters the discretion of a sentencing judge in the proper exercise of his/her sentencing function;

At present sentencing Courts, consistent with long established principles, take intoxication into account on sentencing. Depending on the circumstances, intoxication may be taken into account as an aggravating factor eg becoming intoxicated to develop "Dutch courage" to commit the offence or where the offender has committed the same type of offence before when intoxicated and thus been reckless in consuming to the point of intoxication. On the other hand, again depending on the circumstances, the Courts have accepted that intoxication may be relevant in respect to the culpability of an offender where it causes him/her to act out of character or where it affects the deliberateness of his/her act. The amendments made by S 5AA of 21A that "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" would appear to have already eliminated that aspect of a judge's sentencing discretion.

- iii. The suggested amendment would cover all persons who knowingly or unwittingly took or inhaled a narcotic drug, or any other intoxicating substance which could include innocent concoctions such as cough mixture any many prescription drugs; furthermore as drafted it would not require the person to have been affected in any way.

#### **Issue 2**

*Whether the concept of "conditional liberty" in s 21A (2)(j) of the Crimes (Sentencing Procedure) Act 1999 should be defined.*

**The NSW Council for Civil Liberties does not oppose the defining of "conditional liberty" as proposed.**

- i. The Council is not aware of any difficulties having been experienced by the Courts with respect to understanding “conditional liberty” Usually it relates to being on bail, on a bond or suspended sentence, or subject to a parole order. In so far as the term might not encompass orders such as those under the Offenders Prohibition Orders Act or an AVO the Council’s view is that these can and are accommodated under 21A(1). “The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the [court](#) under any Act or rule of law”.
- ii. That said there may be matters where a definition would assist.

### Issue 3

*Whether the concept of “vulnerability” in s 21A(2)(l) 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 NSW CCL submits that S21A (2) A should not be amended/ added to as proposed.**

- i. There is no established need to expand the range and concept of vulnerability by further defining it as suggested;
- ii. Vulnerability, which means in effect the inability to defend themselves at least adequately, is already writ large in the act :- i. 21 A (2) (l) specifically covers victims who are very young, very old or have a disability. The wording of the ss:- “ *the victim was vulnerable, for example, because the victim was very young or very old or had a disability*” makes it plain that vulnerability is not restricted to these examples and it has been so interpreted by the Courts ( even in some cases where the age of a child victim in a sex assault offence where age was an element of the offence). Examples are a person travelling on a train late at night; or a Japanese student with limited English travelling alone;
- iii. Occupational vulnerability has already been picked up as a specific an aggravating factor in 21 A (2) (a) and (l)-(a) “*the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation or voluntary work*”, and (l), “*because of the victim’s occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)*”,
- iv. Sex -The Courts in sentencing may take into account generally the imbalance in strength that may exist between a male offender and woman or female child. However that does not and should not mean that the sex (female) of the victim should be inserted as a matter of specific vulnerability. That approach has specifically been rejected by the courts in cases such as Doolan 160 A Crim R 54.

- v. Abused trust is specifically covered under 21A (2) (k) of the Act;
- vi. The balance of the matters referred to are matters which a sentencing Court would take into account, if not specifically under the heading of vulnerability, then as part of the matrix of facts which would go into the assessment of objective criminality.

#### **Issue 4**

*Any other sentencing measures to deter and change behavior in relation to alcohol and drug fuelled violence, including measures taken by other jurisdictions, the success of such measures and their possible suitability for NSW.*

***The NSW CCL does not consider that it has sufficient information before it to make a positive submission, but notes that anecdotal evidence from such places as the Northern Territory suggests that mandatory sentences for offences committed under the influence of alcohol (intoxication) appear to have been totally unsuccessful in reducing their incidence.***

#### **The NSW Law Reform Commission Report on Sentencing**

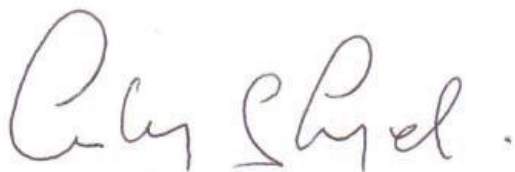
The NSW CCL notes the NSW Law Reform Sentencing Report' which is referenced in the Sentencing Council's background material, was completed in 2013. We are unaware of any response from the Government to its recommendations though they are centrally relevant to the issues referred to the Sentencing Council.

**The NSW CCL considers it would be appropriate if, in the context for this review, the Government provided a response to the Commission's recommendations.**

This submission was prepared by members of the NSW CCL Criminal Justice and Police Powers Action Group.

The NSW CCL is available to discuss these matters further with the Sentencing Council.

With regards



**Dr Lesley Lynch  
Secretary NSW Council for Civil Liberties**

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## **About the NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

## **Contact NSW Council for Civil Liberties**

<http://www.nswccl.org.au>

[office@nswccl.org.au](mailto:office@nswccl.org.au)

Street address: Suite 203, 105 Pitt St, Sydney, NSW 2000, Australia

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Phone: 02 8090 2952

Fax: 02 8580 4633