ODPP
New South Wales

NSW Sentencing Council

Alcohol and drug fuelled violence: call for submissions

Submission by the Office of the Director of Public Prosecutions (ODPP)

The criminal justice system has a role to play in achieving cultural change that will address the problems associated with alcohol and drug fuelled violence in the community. While research shows[1] that imprisonment has very little impact on offending specific deterrence and general deterrence, it is still important that sentences that are communicated to the public send a strong signal that criminal and offensive behaviour associated with the consumption of drugs and alcohol is not tolerated and will be denounced by the court. However sentencing is a complex task and a number of competing considerations need to be weighed by the sentencer. It is in our view of equal importance that balance and context is maintained in the sentencing exercise without disproportionate emphasis on punishment for the use of drugs or alcohol and that there is appropriate focus on rehabilitation to address the underlying causes of individual and societal alcohol use.

Amending section 21A

The ODPP does not support amending section 21A. We envisage a number of problems with the proposal to introduce a mandatory aggravating factor where the offence involved violence "because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance".

Firstly the prosecution would need to prove beyond reasonable doubt the nexus between alcohol and the violence. If for instance the offender had a history of violent conduct it may be arguable that the violence was not attributable to intoxication. As a consequence that violent offender may be dealt with more leniently than an offender who has no history of violence and has one episode of drunken violence.

Secondly what degree of intoxication would be caught by the provision? Is it intended that the grossly intoxicated are treated the same as someone who has 2 or 3 drinks. People react differently to drugs and alcohol, to prove how and to what degree the substance has influenced the offender the parties would have to rely on pharmacological reports. This type of evidence would prolong sentencing proceedings and add to the overall complexity and expense.

Thirdly as the law presently stands the fact of intoxication is used by the offender as an explanation (not an excuse) for their conduct. If section 21A were amended to aggravate the conduct then this may lead to the court hearing distorted version of the facts, either as a result of plea negotiations and/or the inability of prosecution to prove the aggravation.

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[1] See for instance Sentencing Advisory Council, Victoria Does Imprisonment Deter? A review of the Evidence April 2011

Fourthly, an amendment of this nature is likely to have a disproportionate impact on the indigenous incarceration rate.

We note that the Sentencing Council has already considered this issue and in its report of March 2009 relied on the following points in concluding that intoxication should not be included as an aggravating circumstance:

- the existing law adequately provides for intoxication to be taken into account;
- its' adoption would give rise to inflexibility;
- it would offend against the principle of equality of the act;
- it would risk having a disproportionate effect on disadvantaged members of the community, particularly Aboriginal and Torres Strait Islanders, the homeless and those with cognitive or mental impairment;
- it would give rise to a practical difficulty in its application, having regard to the problems in identifying a particular level of 'intoxication' at which such a provision would apply, and in securing an objective measurement of an off ender's level of intoxication at the time of the offence, and
- it would be illogical to require an intoxicated offender who was likely to have reacted spontaneously and without premeditation, to face a potentially longer sentence than a sober offender who committed the same act.[2]

Conditional Liberty

In our view no useful purpose would be served by defining conditional liberty. Conditional liberty is a concept understood by the common law and its meaning confirmed in *R v Porter* [2008] NSWCCA 145 by Johnson J:

> "[86] ...Nevertheless, it seems to me that the purpose of s.21A(2)(j) is to capture the common law principle that an offence committed whilst a person is subject to conditional liberty, whether on bail or whilst subject to a good behaviour bond or a community service order or periodic detention or parole, constitutes an aggravating factor for the purpose of sentence. The essence of the provision is that the offender commits a further offence whilst subject to an order of a court in criminal proceedings requiring, amongst other things, that the offender be of good behaviour. I do not consider that the term *"conditional liberty"* in the section is confined to circumstances where the foundational offence giving rise to the conditional liberty is one which itself must be punishable by imprisonment.
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> 87. Even if this view was wrong, however, the common law principle remains applicable given that s.21A does not purport to codify the law in this area: s.21A(1). Even if the commission of the offences whilst the Applicant was subject to a s.10 good behaviour bond for trespass did not constitute the statutory aggravating factor, it would constitute an available aggravating factor at common law. I approach the sentencing of the Applicant upon the basis that his commission of these offences, whilst being subject to a good behaviour bond, was an aggravating factor on sentence...."

[2] NSW Sentencing Council, Sentencing for Alcohol related Violence (2009) pp96-97.

Vulnerability

The meaning of "vulnerability" has recently been confirmed in the decision of *R v Betts* [2015] NSWCCA 39 at paragraph 28, RS Hulme JA said

> "The authorities make clear that sub-paragraph (l) "is concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender" and that "the examples set out in the sub-paragraph suggest that it is vulnerability of a particular kind that attracts its operation" and the fact that a victim does not have the characteristics of a powerful offender with violent tendencies does not make the victim vulnerable within the meaning of sub-paragraph (l) – see *R v Williams* [2005] NSWCCA 99 at [40], [41]; *R v Tadrosse* [2005] NSWCCA 145; (2005) 65 NSWLR 740 at [26], [27]. The paragraph looks to the circumstances of groups or classes of victims inherent in their situation or characteristics as such divorced from any actions of an offender."

If the cohort of vulnerability was expanded it would potentially cause issues with double counting and thereby increasing the prospect of error, as it would mean that matters that would normally elevate the objective seriousness (for example targeting a victim who was alone) would be classified as aggravating factors. In our view it is unquestionable that the circumstances of an offence are objectively more serious where a victim is unable to defend themselves and it is not necessary for there to be a specific provision to reflect this.

Other possible sentencing measures for deterring alcohol and drug fuelled violence

Creation of specific offences

The ODPP does not support the creation of further specific offences targeting offenders under the influence of drugs or alcohol.

Creating aggravated versions of existing offences has had unintended consequences, for example a break and enter aggravated by the fact that two offenders entered the premises is a strictly indictable offence, and is often charged by police even though there may have been no one at home at the time of the break in, this in turn this has led to an increase of work for the ODPP and the District Court. Given the prevalence of alcohol and drug related offending, creation of aggravated versions of offences inevitably increase workload of the ODPP and trial work in the District Court.

Further the prosecution would be required to prove the ingestion of, the extent of the influence of and the nexus between the influence of the substance and the offending to prove the offence. At the very least this would usually require some form of expert evidence. If the offender was not arrested shortly after the offence then proof of intoxication may require calling witnesses, who may also have been intoxicated, which would have a compounding effect on the length of a trial.

Creation of specific offences would also be likely to disproportionately impact on indigenous communities.

Mandatory minimum sentences

The ODPP does not support the introduction of mandatory minimum sentences. The arguments against mandatory sentencing are well articulated by the Law Council of Australian in their policy and

discussion papers issued in May 2014[3]. In particular the ODPP is concerned about the impact that mandatory sentencing potentially can have on individuals who may receive a harsh and disproportionate sentence and how it may impact the criminal justice system as a whole in terms of reputation and resources.

Sentencing Guidelines for the judiciary

The ODPP supports the option of sentencing guidelines as a clear statement of policy that could be regularly enunciated by the courts and then reported in the media as it would have the dual impact promoting a consistent message and of being able to be used to educate the community, and thereby assist in influencing cultural change. However, because of the breadth of this issue we have a number of reservations as to how a guidelines should be promulgated, specifically:-

- What level of offending is sought to be addressed is it for common assaults generally, or AOABH, or recklessly cause GBH, or should it be limited to offences heard in the District Court or
- Is the offending to be limited to say street offences or domestic violence, or
- There are a number of specific types of alcohol and drug fuelled violence that may lend themselves to a guideline judgment where otherwise ordinary objects become weapons such "glassings" and assaults using pool cues.
- The Crown would need to establish that assaults under the influence (however narrow the scope of the guideline is defined) are *demonstrably* resulting in sentences that are, firstly, inconsistent, and secondly, manifestly inadequate and, for the purposes of an application by the DPP, this would need to be established primarily by Crown appeals and there have been very few of these.
- Further, the other criteria for a Guideline would be prevalence (or perceptions of prevalence) and the need for general deterrence, all of which result in the *need* to give guidance to sentencing judges so as to facilitate a consistency of approach.

Finally, we consider that it is imperative that any sentencing guidelines issued should be part of a co-ordinated campaign designed to promote cultural change.

Other sentencing measures

The recently published paper "Reducing adult reoffending" from the NSW Parliamentary Research Service [4] reviews current research on reoffending. The paper significantly concludes that the types of sentences that address re-offending are the court based interventions, custodial and community based rehabilitation and post release support, such as MERIT and the Drug Court. Similarly the NSW Law Reform Commission has made a number of recommendations in recent reports about expanding court based interventions and diversionary options. The paper concludes with a reference to Don Weatherburn's book "Arresting incarceration: pathways out of Indigenous imprisonment"[5] and the four key priorities for reducing indigenous recidivism. Key to the first two priorities is that there is support supervision and treatment for prisoners released from custody and effective programs designed to target violent offending.

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[3] Law Council of Australia Mandatory Sentencing Policy May 2014 and Policy Discussion Paper on Mandatory Sentencing May 2014

[4] Briefing Paper No 2/15

[5] Aboriginal Studies Press, 2014, pgs 157 -8

We consider the most significant way that sentencing can contribute to cultural change is through rehabilitation, and accordingly support the expansion and enhancement of current programs to specifically address cultural attitudes towards drinking.

Other ways to bring about cultural change

Longer sentences and more onerous proofs in our view would have limited impact in bringing about cultural change in this area and would be likely to produce unintended consequences. Recent research and reports strongly indicate that where sentencing can add value is by promoting change through the rehabilitation of offenders.

In her paper "Understanding behaviour in the Australian and New Zealand night-time economies. An anthropological study"[6] Dr Anne Fox reports on research that focussed on the socio cultural aspects of night time drinking. As a result of the study she makes 25 recommendations about how cultural change may be achieved. Significantly, the first recommendation is to "Stop focusing on "alcohol-fuelled" violence and concentrate instead on violence, its causes and triggers. Address the cultural reinforcers of violence, misogyny, and aggressive masculinity in all its cultural expressions from schoolyards to sports fields, politics and pubs, movies and media". The key message from the other recommendations in the report is that change can only be achieved by a co-ordinated response from Government and other key stakeholders in the community. The role of law enforcement is only one part of this picture.

Office of the Director of Public Prosecutions

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[6] January 2015