THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

Submission to the Sentencing Council of NSW

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The Sentencing Council
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Preface

New South Wales Young Lawyers is a division of the Law Society of New South Wales. Members include legal practitioners in their first five years of practice and/or under the age of 36 and law students. There are currently over 15,000 members.

The NSW Young Lawyers Criminal Law Committee (the Committee) is responsible for the development and support of members of NSW Young Lawyers who practice in or are interested in criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

The Committee is grateful for the opportunity to make this submission to the Sentencing Council.

2. Initial Comments

As a general rule, the Committee is opposed to further amendment of s21A of the *Crimes (Sentencing Procedure) Act 1999*.

The section is practical and helpful in that it clearly sets out what factors should be regarded as aggravating or mitigating an offence. The Committee's concern however, based upon our combined experiences, is that s21A can lead to a "check-box" approach to sentencing.

There is a long line of authority that calls on judges to engage in instinctive synthesis of the various relevant factors. Section 21A impedes this process and pushes judicial officers towards a purely arithmetic style of sentencing.

The Committee is also concerned about the implied goal of these potential amendments. The Committee is concerned that it may be the intention to increase penalties imposed on offenders who are considered to not receive sufficiently stern penalties.

There is a considerable body of evidence which claims lengthier sentences do not, in general, deter crime. The NSW Bureau of Crime Statistics and Research (BOCSAR) has reported as follows:

> "Our results suggest that the criminal justice system does exert a significant effect on crime but some elements of the criminal justice system exert much stronger effects than others. Increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the length of prison sentences exerts no measurable effect at all".[1]

[1] Contemporary Issues in Crime and Justice Number 158 February 2012 *The effect of arrest and imprisonment on crime* Wai-Yin Wan, Steve Moffatt, Craig Jones and Don Weatherburn

3. 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 introduction of an "alcohol aggravating feature" has a number of significant, unintended, negative consequences.

Impact on Indigenous Offenders

A 2005 study found that 69% of Indigenous male prisoners were under the influence of alcohol at the time of offending[3]. The Australian Institute of Criminology has found that in 70% of indigenous homicides both the offender and the victim had been drinking, as opposed to 22.5% of non-Indigenous homicides[4].

As a consequence, the proposed amendment is likely to further entrench the disparity in imprisonment rates between indigenous and non-indigenous offenders. As at December 2014, indigenous persons made up 2.5% of the population of NSW[5], but constituted approximately 24% of the incarcerated population[6].

Impact on Mentally Ill persons

The Committee further notes the rates of intoxication during commission of offences by people with a mental illness. There are already a high proportion of prisoners in NSW with a mental illness, with some data suggesting 31% of inmates have a mental disorder[7].

A mental ill person who abuses substances increases the likelihood that he or she will offend[8]. As a consequence, introducing intoxication as a mandatory aggravating factor would be likely to increase the incarceration rate of offenders with a mental illness.

The Criminal Culpability of an Intoxicated Offender

On a more fundamental level, it difficult to comprehend how the proposed amendment could be implemented. As presented in the issue paper, it would be necessary for the Crown to prove beyond a reasonable doubt that the offence occurred "because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other

[3] "Indigenous Australians, Incarceration and the Criminal Justice System" Senate Select Committee on Regional and Remote Indigenous Communities p28

[4] "Indigenous Australians, Incarceration and the Criminal Justice System" Senate Select Committee on Regional and Remote Indigenous Communities p28

[5] NSW Aboriginal Health Fact Sheet 2013, NSW Ministry of Health

[6] NSW Custody Statistics, December 2014, BOCSAR

[7] 2010 National Prisoner Health Census

[8] "A Review of the Relationship between Mental Disorders and the Offending Behaviours and on the Management of the Mentally Abnormal Offenders in and Health and Criminal Justice Services" Criminology Research Council, Table 2

intoxicating substance." This would be challenging to prove to the requisite standard.

A possible solution would be to amend the proposal so that it mirrored the new offence created soon after the sentencing of Thomas Kelly's killer, such that it would be simply an aggravating factor is the offender was affected at the time of the offence.

This raises a number of new problems. Why should the mere affectation of the offender be an aggravating factor? In what way would this limit the occurrence of "alcohol fuelled violence"? Why should someone who is intoxicated when they commit an offence (and therefore has reduced judgment and self-awareness) be regarded as more criminally culpable than someone who commits the offence with a clear mind?

The Committee submits that it is unlikely that the incidence of "alcohol fuelled violence" would be reduced by the introduction of this amendment. Given the significant potential negative consequences of the proposed amendment, the Committee is opposed the amendment.

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

The Committee is not aware of any confusion as to what should be regarded as conditional liberty.

It appears that the proposal is intended to ensure that being subject to a bond to be of good behaviour is covered by the term conditional liberty and is therefore an aggravating factor under s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999*.

The leading cases suggest that being subject to a bond to be of good behaviour is already unambiguously included within the definition of conditional liberty under s21A(2)(j). In *Porter v R* NSWCCA 145 [2008], Johnson J (with whom McCallum J and Bell JA agreed) concluded:

> 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.9

That decision extended a line of authority that being subject to a bond to be of good behaviour is a breach of conditional liberty10 which has been approved in a number of subsequent decisions in the Court of Criminal Appeal.11

In those cases it has been found that being subject to a bond to be of good behaviour, whether under sections 9, 10 or 12 of the *Crimes (Sentencing Procedure) Act 1999*, is within the definition of conditional liberty under s 21A(2)(j). It has also been found that the option of revoking a community service order (CSO) upon breach meant that the offender was subject to conditional liberty during the term of the CSO12. Further, being subject to a child protection prohibition order that has criminal sanctions for non-compliance has also been found to fall within the definition of conditional liberty13.

In any event, even if being subject to a bond to be of good behaviour were not included in the definition of conditional liberty and therefore not an aggravating factor under s21A(2)(j), a breach of a bond to be of good behaviour is an aggravating factor under the

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[9] [2008] NSWCCA 145 at 86

[10] *Frigiani v R* [2007] NSWCCA 81 at 24.

[11] *Currie v R* [2013] NSWCCA 267 at 79 (offender subject to a suspended sentence); *R v Grover* [2013] NSWCCA 149 (offender on suspended sentence); *Ryan Gurney v Regina; Bowden v Regina* [2009] NSWCCA 45 at 61-63 (offender subject to good behaviour bond); *Sivell, Andrew John v R* [2009] NSWCCA 286 at 29 (offender subject to child protection prohibition order); *R v Lockett* [2013] NSWSC 1555 (offender subject to suspended sentence); *R v Cicekdag* [2004] NSWCCA 357; 150 A Crim R 299 (offender subject to community service order).

[12] *R v Cicekdag* [2004] NSWCCA 357; 150 A Crim R 299 (offender subject to community service order).

[13] *Sivell, Andrew John v R* [2009] NSWCCA 286 at 29 (offender subject to child protection prohibition order.

common law.14

The Committee could not identify any instances where being subject to a good behaviour bond was not considered to be an aggravating factor.

The Committee is therefore of the view that there is no need to provide a definition of conditional liberty for the purpose of clarifying that being subject to a bond to be of good behaviour means that one is subject to conditional liberty.

The Committee does not support adding further to s21A unless doing so would address an identified issue, and we consequently oppose the amendment.

If it was decided that a definition should be included, the Committee adopts the previous recommendation of the NSW Law Reform Commission15 that the definition should include being subject to an order that allows the offender to serve a community service order.

[14] *Porter v R* [2008] NSWCCA 145 at 86; *R v Fernando* [2002] NSWCCA 28 at 41; R v Tran NSWCCA [2009] 109 at 15.

[15] Report 139 of the NSW Law Reform Commission (2013) at 4.161.

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.

As with the above discussion of condition liberty, the Committee is not aware of any difficulties with the present operation of s21A(2)(l).

Anecdotally, the state's judicial officers appear to be properly and carefully considering the concept of vulnerable victims. The categories of vulnerable victims listed in the proposed amendment can already be taken into account under s21A. The Committee has not identified any examples were offenders are receiving sentences not proportional to the offending as a result of a lack of specificity in s21A(2)(l).

For example, in *Perrin v R* [2006] NSWCCA 64 at [35]:

> The test is that the victim was vulnerable. Some examples are then given but they are not exhaustive. The judge relies on two factors to establish that she was vulnerable, namely, her age of 18 and her being affected by drugs and/or alcohol. I do not regard the age of 18 as being very young. That is the age of adulthood. However, she was vulnerable as a result of what she had drunk. That lowered markedly what she could appreciate and what she could do.

Even more relevantly on the issue of changing s21A(2)(l), the CCA has made it clear that the kinds of victims presently listed in the section are not an exhaustive list.

In *CVITAN, Zdenko Stipe v R; R v Zdenko Stipe CVITAN* [2009] NSWCCA 156 at [60]:

> By s54B(3), the reasons for which a court may depart from the standard non-parole period are confined to those referred to in s 21A. Section 21A sets out, in catalogue form, the aggravating and mitigating factors that a court is to take into account in sentencing. It is little (if anything) more than a statutory enactment of common law principles, and, by reason of the suffix to s 21A(1), is effectively open-ended.

As a further example, in *Ollis v R* [2011] NSWCCA 155 at [96]

> As the terms of s.21A(2)(e) make clear, the provision does not purport to be an exhaustive list of circumstances of vulnerability for the purpose of sentence: *Perrin v R* [2006] NSWCCA 64 at [35]. A combination of factors may operate, in a particular case, to render a victim vulnerable for the purposes of sentence. The fact that the complainant in this case was 17 years of age and not, in that sense, "very young" does not mean that she cannot be a vulnerable victim.

The list provided in s21A(2)(l) is non-exhaustive. The Committee submits that the proposed amendment assumes that judicial officers need to have such a list inserted into the legislation because it would not occur to them that the persons listed are “vulnerable”. This fundamentally underestimates the capability of the State’s judicial officers.

The strength of the system is the discretion entrusted to Judicial Officers to identify those vulnerable members of the community that might not squarely fall into the brackets set by parliament.

4. Any other sentencing measures to deter and change behaviour 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 Committee submits that there are a number of sentencing measures that do not relate to sentence length, which may be more effective in reducing the incidence of crime.

Alcohol Abstinence Monitoring Requirement

The first measure the Committee proposes is an Alcohol Abstinence Monitoring Requirement similar to that employed in the SCRAM sobriety pilot.

The SCRAM sobriety pilot was a scheme run from July 2014 in parts of London. It allowed courts to require offenders to be abstinent from alcohol for a fixed period of up to 120 days, and worked by requiring an offender to wear a monitor which measures the level of alcohol in their perspiration.

The measure was aimed at people who binge drink and become involved in alcohol fuelled violence, rather than people who are alcohol dependant and in need of specialist treatment.

The sentence consists of this monitoring instead of incarceration. The success of the proposal has not yet been evaluated as the pilot is incomplete. However an interim summary report has been released. Of particular relevance is the following:

> Fifty-one AAMR orders were imposed over the first six months of the pilot with an average length of 79 days. Twenty-six of these orders have been completed, whilst the remaining are currently live. The AAMR had a compliance rate of 94% over the first six months, a figure considerably higher than other orders (albeit based on relatively small numbers). For example, analysis by the National Probation Service (NPS) in 2014 reviewing all community based orders managed by the NPS and Community Rehabilitation Companies (CRC) estimated a compliance rate of approximately 61%. Over the AAMR pilot so far there have been a total of 2,382 monitored days during which 118,395 alcohol readings were taken (at an average of 2,321 readings per order), indicating that the technology underpinning the AAMR is working as intended.16

South Dakota 24/7 program

The 24/7 program in South Dakota formed the basis for the SCRAM sobriety pilot discussed above.

This program targets serial drink driving offenders with the goal of "sobriety 24 hours per day, 7 days per week". This incorporated an ignition interlock system, bracelets, urine testing and drug patch testing, all with high compliance rates, ranging from 80% to

[16] The full report is available here:
http://www.london.gov.uk/sites/default/files/AAMR%20summary%20report.pdf

99.7% compliance17.

Any and all of these initiatives could be incorporated into Intensive Correction Orders (ICOs) in NSW, at significantly less cost than incarceration, and with the desired results of reducing drug and alcohol intoxication and therefore alcohol-fuelled violence.

[17] The 24/7 website with relevant links is here: http://apps.sd.gov/atg/dui247/247stats.htm

5. Conclusion

The Committee thanks the Council for the opportunity to comment on this important issue.

Any request for further comment should be made to:

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Sincerely,

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