



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:JErg956491

1 May 2015

The Hon. James Wood AO QC
Chair
New South Wales Sentencing Council
GPO Box 5199
SYDNEY 2001

Dear Mr Wood,

Alcohol and drug fuelled violence

I write to you on behalf of the Criminal Law Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on criminal law issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee has reviewed and responded to the questions raised by the Sentencing Council in the attached submission.

Should you have any questions please contact the policy lawyer with responsibility for this matter, Rachel Geare, who is available on [REDACTED] or by email at [REDACTED].

Yours sincerely,

John F. Eades
President

Alcohol and drug fuelled violence

The Committee's position on section 21A

The Committee supports the repeal of section 21A of the *Crimes (Sentencing Procedure) Act 1999*. All of the factors in section 21A are to be read in conjunction with the common law. The section 21A factors were routinely taken into account by application of the common law principles prior to the enactment of section 21A. This renders section 21A superfluous and creates unnecessary complexity. The repeal of section 21A would simplify the sentencing process.

The use of section 21A as a checklist can result in courts attempting to apply factors where they are not relevant to the particular case. The checklist approach can result in the aggravating and mitigating factors assuming a disproportionate importance above the overall sentencing exercise which should involve an instinctive synthesis approach.

The Committee notes that in its 2013 report on sentencing, the NSW Law Reform Commission recommended section 21A be replaced by a new provision that would list six general factors that a court should consider in sentencing, leaving the detail to the common law.¹

Consultation questions

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 Committee does not support adding intoxication as an aggravating factor in sentencing.

An offence is not, necessarily, more objectively serious because a person was intoxicated. For example, a person who makes an offensive remark while drunk might be accepted to be entirely unlikely ever to do so again. It is illogical to mandate that a person who does such a thing whilst drunk is more culpable than someone who does it when completely sober. Conversely, a person who has a tendency to become violent when drunk, and regularly drinks, might well be in a position where the consumption of alcohol makes the act more serious.

Section 21A(5AA), which prohibits courts from taking voluntary intoxication into account as a mitigating factor, in the Committee's view, already inappropriately binds the court's hands in considering the role intoxication plays in offending.

The Committee notes that in its 2009 review of sentencing for alcohol related violence, the Sentencing Council concluded that there was no need to amend subsections 21A(2) or (3) of the Act, or to recommend any revision of current sentencing law or practice for personal violence offences where intoxication is a factor in their commission.²

The Sentencing Council did not support the possibility of adding intoxication as an aggravating factor to section 21A. The Council found the following arguments against the proposal persuasive:

- the existing law adequately provides for intoxication to be taken into account;
- its adoption would give rise to inflexibility;

¹ NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 4.1

² NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009), p95.

- 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 Islander people, 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 offender'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.³

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

The Committee sees no benefit in defining "conditional liberty". The Committee is unaware of anything that could be considered "conditional liberty" being routinely excluded from consideration in respect of this issue.

It is not necessary for an offender to be within a neatly-circumscribed category of "conditional liberty" in order for a court to find that someone who had only just been placed on a Community Service Order is to be dealt with more harshly than if they had last been dealt with years ago.

3. 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.

This proposal appears to be proffered on the basis that if a particular victim does not fall within section 21A(2)(1) then the offence cannot be more serious. In the Committee's view, that is a misapprehension. It is axiomatic that an offence in which a victim is unable to defend themselves is more objectively serious than one in which they can defend themselves. It is not necessary to advert to a particular section to state that it is more serious to assault an entirely-innocent bystander who had no knowledge they were about to be attacked, than to assault someone who is ready and willing to fight.

The Committee notes that the classes of persons set out in the section are not closed: *Perrin v R* [2006] NSWCCA 64 at [35]; *Ollis v R* [2011] NSWCCA 155 at [96]. Adding to the categories is likely to lead to complication and litigation about the meaning of the section.

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 is of the view that it is ineffective to attempt to "deter" drunk people from being violent by threatening to punish them more harshly. To change a person's behaviour, measures should be implemented to address public drunkenness prior to its occurrence. The Committee agrees with the view of the Sentencing Council that '...the response to

³ Ibid., pp96-97.

alcohol related violence, and the steps required to reduce its incidence, lie more in the hands of those involved in the liquor industry and in public education, than in the criminal justice system'.⁴

Reducing alcohol and drug related violence in a sustainable way needs to be addressed through measures such as restricting access, education, transport etc. An evaluation of the new restrictions relating to lockouts and cessation of alcohol service have been associated with immediate and substantial reductions in assault in Kings Cross and less immediate but substantial reductions in the Sydney CBD.⁵

The Committee supports drug and alcohol rehabilitation services and diversionary options to deal with the underlying causes of offending. The Committee strongly supports the Magistrates Early Referral into Treatment (MERIT) program as an effective pre-sentence diversionary program. Research by the Bureau of Crime Statistics and Research has shown that MERIT has had great success in reducing rates of reoffending.⁶ The MERIT program receives a high level of judicial support and provides positive outcomes for both offenders and the community. The Committee consider that the demonstrated success of MERIT in reducing recidivist behaviour, and the associated benefits this creates for the community, justifies the allocation of substantial resources to the program, including funding for the expansion of Alcohol MERIT which would provide the Courts with an additional tool to combat anti-social drunken behaviour.

The Drug Court aims to treat health issues as well as justice and social issues for these people, to prevent them causing harm to the community by committing offences as a result of their drug dependencies. Many of the offenders the Drug Court deals with have serious issues that would otherwise see them continue to offend in the community. Imprisonment has often failed to deter them from committing crime. Studies by the NSW Bureau of Crime Statistics and Research have found that the Drug Court program is more cost-effective than prison in reducing drug-related crime.⁷ Evaluations of the Drug Court demonstrate that the intensive use of justice system resources in the community, and the evaluation and monitoring of an offender, who gets treatment for drug dependency, is effective in changing lives and is evidence based.

⁴ NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009), pxx.

⁵ NSW Bureau of Crime Statistics and Research, *Lockouts and last drinks: The impact of the January 2014 liquor licence reforms on assaults in NSW, Australia*, Crime and Justice Bulletin No. 183, April 2015, p8.

⁶ 'Magistrates Early Referral Into Treatment Program', Bureau of Crime Statistics and Research, Crime and Justice Bulletin, Number 131, July 2009, p11.

⁷ 'Intensive judicial supervision and drug court outcomes: Interim findings from a randomised controlled trial', Bureau of Crime Statistics and Research, Crime and Justice Bulletin, Number 152 November 2011; 'The NSW Drug Court: A re-evaluation of its effectiveness', Bureau of Crime Statistics and Research, Crime and Justice Bulletin, Number 121, September 2008; 'New South Wales Drug Court evaluation: Cost effectiveness', Bureau of Crime Statistics and Research 2002.