



**NSW Police Force**

**OFFICE OF THE COMMISSIONER**

Mr Mark Johnstone  
Executive Officer  
NSW Sentencing Council  
Department of Justice  
GPO Box 5199  
SYDNEY NSW 2001

Our ref: D/2015/176169

Dear Mr Johnstone,

I refer to your email dated 30 March 2015 inviting submissions on a number of proposals submitted by the Thomas Kelly Foundation to amend the *Crimes (Sentencing Procedure) Act 1999*, aimed at deterring alcohol and drug related fuelled violence.

The NSW Police Force position on the issues raised in the Terms of Reference is as follows:

1. Whether a mandatory aggravating factor should be introduced to section 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.

**Proposal 1 is not supported**

Section 21A has already been criticised by the Court of Criminal Appeal as making the task of sentencing courts “more difficult, or at least more prone to error”. In 2013 The Law Reform Commission recommended replacing the entire section with a simpler, non-exhaustive list of factors which would not be categorised into aggravating and mitigating factors. The Commission’s Report<sup>ii</sup> noted broad stakeholder support for this proposal. The NSW Judicial Commission’s Sentencing Benchbook describes the current binary approach of section 21A as being “too simplistic and sometimes unhelpful”<sup>iii</sup>. The High Court has cautioned against labelling circumstances as either aggravating or mitigating where this leads to automatic consequences<sup>iv</sup>.

The NSW Police Force considers the wording of the proposal creates risks from a prosecution point of view. The prosecution would have to prove that the offence involved violence “because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance” in order for this aggravating factor to be



considered by the court. There is no definition of narcotic drug or ‘other intoxicating substance’ in the Act, and the phrase “or being affected by” is very broad and open to argument. If an offender was not apprehended immediately or shortly after the commission of the offence, proof of such matters by police would be very difficult unless police were to be given powers to take samples to prove that the offender had taken, inhaled, or was affected by the specified substances. Finally, it should be noted that section 5AA of the Act already removes self-induced intoxication as a mitigating factor (in relation to any offence, not simply offences involving violence) and it is arguable that this is the appropriate weight to be given to it as part of a sentencing exercise.

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

**Proposal 2 is supported**

The commission of offences by persons on “conditional liberty” has been considered by the courts at both common law and under section 21A(2)(j) as an aggravating feature, and has been held to include suspended sentences, periodic detention, community service orders, and good behaviour bonds, as well as parole and bail.<sup>v</sup> However, no explicit mention has been made of intensive correction orders, imprisonment by home detention, or supervision orders under the *Crimes (High Risk Offenders) Act 2006*.

While there is little doubt that these are all forms of conditional liberty, codification of the phrase would avoid any doubt. The proposal is also consistent with the Ministry for Police and Emergency Services’ (MPES) recent submission to the Sentencing Council in relation to adding to the list of “show cause” offences under section 16B of the *Bail Act 2013*. Currently, sections 16B(h) and (i) of that Act render certain offences as ‘show cause’ offences if committed by accused persons on bail, parole, or subject to supervision orders. MPES’ submission of 3 November 2014 sought to include serious indictable offences committed by persons on good behaviour bonds subject to supervision or conditions, community service orders, home detention orders, suspended sentences, and intensive correction orders as show cause offences.

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.

**Proposal 3 is not supported**

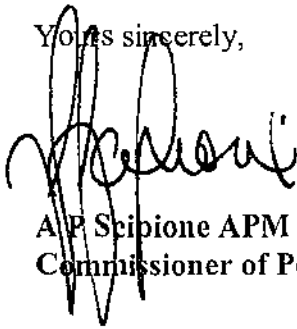
Vulnerability is not exhaustively defined in the present section 21A(2)(1), which states that it is an aggravating factor if the victim is ‘vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim’s occupation (such as a

taxi driver, bus driver or other public transport worker, bank teller or service station attendant)”.

The proposed new subsection is far broader and contains some amorphous terms which will inevitably add to the complications referred to in relation to proposal 1, such as the increased likelihood of judicial error and the lodgement of appeals, as well as the difficulties for prosecutors in proving such undefined elements – *“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 attendance or a cashier) or because of the victim being homeless”*.

Section 21A)(1)(c) in the Act already makes provision for 'any other objective or subjective factor that affects the relative seriousness of the offence', so mentioning additional types of vulnerability is not considered necessary.

Yours sincerely,



**A.P. Scipione APM**  
**Commissioner of Police**

<sup>i</sup> Elyard v R [2006] NSWCCA 43 AT [39]

<sup>ii</sup> NSW Law Reform Commission, Sentencing, Report 139 at Chapter 4 para 4.18

<sup>iii</sup> Judicial Commission of NSW, Sentencing Bench Book [9-720]

<sup>iv</sup> Wong v The Queen [2001] HCA 64

<sup>v</sup> Judicial Commission of NSW, Sentencing Bench Book [10-550] and [11-550]