



NEW SOUTH WALES

THE CHIEF MAGISTRATE OF THE LOCAL COURT

21 April 2015

NSW Sentencing Council
GPO Box 5199
SYDNEY NSW 2001

Attention: Mark Johnstone, Executive Officer

By email: sentencingcouncil@agd.nsw.gov.au

Dear Mr Johnstone

Re: Alcohol and Drug Fuelled Violence: Call for Submissions

I refer to your email of 30 March 2015, in which you called for submissions addressing a number of issues raised in the Consultation Paper, to include the Terms of Reference outlined therein. I respond in form as follows:

1. The specific proposals to amend s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("Act") set out in the following points i – iii of the terms of reference:

- i. **Whether a mandatory aggravating factor should be introduced to s 21A of the Act** 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

This is ultimately a matter for Government. However, s 21A(5AA) of the Act adequately provides a transparent measure against improperly mitigating sentences for offences committed in a state of self-induced intoxication. To then introduce offences involving violence because of a state of self-induced intoxication as a mandatory aggravating factor to s 21A of the Act, adds to the already complex sentencing exercise and opens more avenues for appeals and, accordingly, will have a greater impact on the District Court and the Court of Criminal Appeal than the Local Court.

- ii. **Whether the concept of "conditional liberty" in s 21A(2)(j) of the Act should be defined**

The concept of "conditional liberty" is well understood by the Courts and legal practitioners. Given, however, the increase in self-represented litigants appearing before the Local Court, there may be some public benefit in defining "conditional liberty" for the more inexperienced litigant, providing greater clarity.

- iii. **Whether the concept of “vulnerability” in s 21A(2)(l) of the Act 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 the attack*, abused trust or emotional impediment as well as because of the victim’s occupation 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 is ultimately a matter for Government and sectional interest groups; which may open the floodgates to other sectional interest groups whose interests are not presently identified in the terms of reference above (see italicised text above for concepts expanded from those presently prescribed in s 21A(2)(l) of the Act).

At present, the concept of “vulnerability” is otherwise well-settled and non-exhaustive. Expanding the concept of “vulnerability” (particularly, to include “unable or unlikely to defend themselves”, “inability to escape” and “lack of knowledge of the attack”) will instead increase the opportunity for a factual contest on sentence; further burdening the Court, adding to the prosecutor’s burden of proof and causing more occasions for victims to be brought before Court to give evidence.

2. The sentencing measures set out in paragraph 1.13 of the Consultation Paper (outlined below), and whether these measures are effective in deterring alcohol and drug fuelled violence and changing behaviour:
 - i. **Creating specific offences** (ie. assault occasioning death when intoxicated: s 25A CA)
 - ii. **Increasing penalties** (ie. element of self-induced intoxication could mean higher maximum penalty as per offence of assault causing death: s 25A(2) CA)
 - iii. **Amending s 21A** (ie. self-induced intoxication cannot be taken into account as a mitigating factor on sentence: s 21A(5AA) CSP Act)
 - iv. **Mandatory minimum sentences** (ie. assault causing death when intoxicated carries a mandatory minimum sentence of 8 years: s 25B CA)
 - v. **Sentencing guidelines for the judiciary** (to reinforce consistent penalties at a level and of a type that reflects the NSW community’s intolerance)

The deterrent effect of sentencing measures has always been the subject of debate, particularly for crimes of passion (*Munda v Western Australia* (2013) 87 ALJR 1035 at [54]). Sentencing measures specifically targeting alcohol and drug fuelled violence by creating specific offences, increasing penalties and imposing mandatory minimum sentences, provides no exception. It is also anomalous that an offender who assaulted someone in a state of sobriety could somehow be viewed as less culpable than had the offender committed the same act whilst intoxicated; aside, of course, from the arguably more exceptional case of offenders who self-induce

themselves into a state of intoxication to gain the courage to commit that act. It also raises an evidentiary difficulty in proving the offender's state of intoxication at the time of the offence, given the unlikelihood of any offender disclosing same when doing so would be against their self-interest for a more lenient penalty.

A sentencing guideline judgment for alcohol and drug fuelled violence, however, provides a mechanism for greater consistency in sentences and deterrence, and is supported (Spigelman CJ in *R v Wong* (1999) 48 NSWLR 340 at [127] – [128]). I refer to my aforementioned comments at 1(i) regarding amendments to s 21A of the Act.

3. **Any other sentencing measures** aimed at deterring alcohol and drug fuelled violence and views on the effectiveness of such measures in relation to deterrence and behaviour change (also point iv of the terms of reference).

The expansion and greater funding for existing Local Court diversion programs is supported; such as the Magistrates Early Referral into Treatment Program ("MERIT"), particularly the expansion of Alcohol MERIT which is presently available in six of 65 Local Court locations offering MERIT; and to some extent, the Court Referral of Eligible Defendants into Treatment (CREDIT) and Life on Track.

MERIT is presently available at the following locations: Albion Park; Ballina; Bankstown; Bathurst (includes Alcohol MERIT); Blacktown; Balyney; Broken Hill (includes Alcohol MERIT); Burwood; Byron Bay; Camden; Campbelltown; Casino; Cessnock; Coffs Harbour; Cooma; Downing Centre; Dubbo (includes Alcohol MERIT); Fairfield; Forbes; Gosford; Grafton; Hornsby; Junee; Katoomba; Kempsey; Kiama; Kogarah; Kyogle; Lismore; Liverpool; Maclean; Maitland; Manly; Milton; Mt Druitt; Mullumbimby; Murwillumbah; Muswellbrook; Newcastle; Newtown; North Sydney; Nowra; Oberon; Orange (includes Alcohol MERIT); Parkes; Parramatta; Penrith; Port Kembla; Port Macquarie; Queanbeyan; Raymond Terrace; Ryde; Singleton; Sutherland; Tamworth; Toronto; Tweed Heads; Wagga Wagga; Wauchope; Waverley; Wellington (includes Alcohol MERIT); Wilcannia (includes Alcohol MERIT); Wollongong; Woy Woy; and Wyong.

CREDIT is presently available at Burwood and Tamworth. Life on Track is presently available at the following locations: Ballina; Bankstown; Casino; Kogarah; Kyogle; Lismore and Sutherland.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate