

Alcohol and Drug Fuelled Violence: Call for Submissions

Terms of Reference

- 1.1 The Thomas Kelly Youth Foundation has made recommendations to the Attorney General which it believes will achieve cultural change and reduce alcohol and drug fuelled violence in the community, and increase public confidence in sentencing.
- 1.2 The Attorney General has asked the Sentencing Council to examine issues raised by the Foundation, and prepare a report on:
 - 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.
 - 2 Whether the concept of “conditional liberty” in s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* should be defined.
 - 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.
 - 4 Any other sentencing measures to deter and change behavior 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.
- 1.3 The Council is currently seeking submissions on the above terms of reference. The Council is asked to report by 31 August 2015.

Background material

- 1.4 Two recent reports from the NSW Law Reform Commission and Sentencing Council are relevant to the current reference. Both considered amendments to s 21A. The Sentencing Council report also considered broader sentencing measures which could have application to alcohol and drug fuelled violence offences.

NSW Law Reform Commission report on Sentencing

- 1.5 In 2013, the NSW Law Reform Commission submitted its report on sentencing to government.¹

1. NSW Law Reform Commission, *Sentencing*, Report 139 (2013). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013).

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- 1.6 The report contains a number of recommendations on s 21A. The Commission recommended that s 21A should be replaced with a non-exhaustive list of factors a court must take into account on sentencing, which would not be categorised into “aggravated” and “mitigating” factors.² The proposed list of six factors relevantly includes:
- the nature, circumstances and seriousness of the offence, and
 - the personal circumstances and vulnerability of any victim arising because of the victim’s age, occupation, relationship to the offender, disability or otherwise.³
- 1.7 The Commission noted stakeholder concerns that s 21A in its current form has made sentencing more complex and prone to appeal, but decided to retain a list of factors to ensure continued transparency and consistency of approach in sentencing.⁴
- 1.8 The Commission further recommended that there should be a stand-alone provision requiring the court to take into account the fact that an offence was committed while a person was on conditional liberty or unlawfully at large, when assessing the need for a sentence to contain an additional element of specific deterrence, denunciation or community protection, and also when assessing a person’s prospects of rehabilitation.⁵ While the Commission recommended that the terms “conditional liberty” and “unlawfully at large” be defined, it did not comment on how this should be done.⁶
- 1.9 Since the report was published, a special rule has been introduced to s 21A which has effect despite any rule of law to the contrary. The rule prevents self-induced intoxication from being treated as a mitigating factor.⁷

Sentencing Council report on Alcohol-related Violence

- 1.10 The Sentencing Council submitted its report on sentencing for alcohol-related violence to government in 2009.⁸
- 1.11 The Council considered a range of measures directed towards alcohol-related violence. It explicitly considered whether intoxication should be added as an aggravating factor in s 21A. It considered the introduction of specific offences such as committing a serious offence against a person while intoxicated, as well as aggravated forms of existing offences where the offender was intoxicated. Broader measures were also considered, such as whether diversionary programs should be extended to include offenders charged with or convicted of alcohol-related personal violence offences.⁹

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

3. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 4.2.

4. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 4.44.

5. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 4.7(1).

6. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 4.7(2).

7. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (5AA).

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

9. See NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) chapter 7.

- 1.12 The Council recommended no substantive change to sentencing laws and practices, and did not recommend the creation of new offences or amended penalties to deal with alcohol-related violence.¹⁰

Sentencing measures for deterring alcohol and drug fuelled violence

- 1.13 In addition to considering the proposed amendments to s 21A, the Council has been asked to generally examine and consider sentencing measures which aim to deter and change behaviour in relation to alcohol and drug fuelled violence. These could include:
- **Creating specific offences:** for example, NSW recently introduced the new offence of assault causing death when intoxicated.¹¹
 - **Increasing penalties:** for example, the element of self-induced intoxication could mean a higher maximum penalty applies to an offence, as it does for the offence of assault causing death.¹²
 - **Amending s 21A:** for example, a recent amendment to s 21A introduced a special rule for self-induced intoxication to the effect that it cannot be taken into account as a mitigating factor on sentence.¹³
 - **Mandatory minimum sentences:** for example, the offence of assault causing death when intoxicated carries a mandatory minimum sentence of 8 years.¹⁴
 - **Sentencing guidelines for the judiciary:** such guidelines could reinforce the need to deter alcohol and drug fuelled violent offences with consistent penalties at a level and of a type that reflects the NSW community's intolerance for these types of offences.
- 1.14 The Council will be investigating examples of these measures across different jurisdictions and will welcome views on any additional measures aimed at reducing alcohol and drug fuelled violence.

We invite submissions in relation to:

- (1) the specific proposals to amend s 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* set out in the points 1-3 of the terms of reference;**
- (2) the sentencing measures set out in paragraph 1.13, and whether these measures are effective in deterring alcohol and drug fuelled violence and changing behaviour; and**
- (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.**

Submissions are due by 24 April 2015.

10. See NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) 95-107, 113-114.

11. *Crimes Act 1900* (NSW) s 25A.

12. *Crimes Act 1900* (NSW) s 25A(2).

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (5AA).

14. *Crimes Act 1900* (NSW) s 25B.

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Make a submission

We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review.

To tell us your views you can send your preliminary submission by:

Post: GPO Box 5199, Sydney NSW 2001

DX: DX 1227 Sydney

Email: sentencingcouncil@agd.nsw.gov.au

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call (02) 8061 9270.

The closing date for submissions is 24 April 2015.

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