



**Justice**  
Sentencing Council

# Alcohol and drug fuelled violence

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August 2015



## **NSW Sentencing Council**

**August 2015**

www.sentencingcouncil.justice.nsw.gov.au  
Phone: 02 8061 9270  
Email: [sentencingcouncil@agd.nsw.gov.au](mailto:sentencingcouncil@agd.nsw.gov.au)  
GPO Box 6  
SYDNEY NSW 2001

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## Contributors

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### The Council

The Hon James Wood AO QC (Chairperson)

The Hon Anthony Whealy QC (Deputy Chair)

His Honour Acting Judge Paul Cloran

Mr Mark Jenkins APM

Mr Lloyd Babb SC

Mr Mark Ierace SC

Mr Nick Cowdery AM QC

Professor Megan Davis

Mr Howard Brown OAM

Mr Ken Marslew AM

Ms Tracey Booth

Ms Moira Magrath

Mr Peter Severin

Mr Wayne Gleeson

Ms Penny Musgrave (until 28 May 2015)

Professor David Tait

### The secretariat

Executive Officer: Mark Johnstone

Project staff: Joseph Waugh PSM

Effie Shorten

Anna Williams

Intern: James Banh

### Acknowledgements

We acknowledge with gratitude the assistance of all those who made submissions.



## Executive Summary

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- 0.1 On 5 March 2015, the then Attorney General, the Hon Brad Hazzard MP, wrote to the Chair of the Council requesting a report on alcohol and drug fuelled violence. The report was to focus on a number of proposals put forward by the Thomas Kelly Youth Foundation aimed at reducing alcohol and drug fuelled violence in the community.
- 0.2 The proposals were:
1. Introduce a mandatory aggravating factor 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. Define the concept of “conditional liberty” in s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999*.
  3. Expand the concept of “vulnerability” in s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* 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 cashier) or because of the victim being homeless”.
- 0.3 In addition, we were asked to undertake a general examination of possible sentencing measures to achieve deterrence and behaviour change 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.
- 0.4 We issued a short consultation paper on 30 March 2015 and called for submissions on the terms of reference by 24 April 2015. We received 12 submissions. Most stakeholders did not support any of the three proposals put forward.
- 0.5 We formed the view that the three proposals should not be supported, for the following reasons.
- 0.6 Given the frequently spontaneous nature of alcohol and drug fuelled violence, we are not convinced that the first proposal would have a significant impact on deterring such violence, and may have a number of negative unintended consequences.
- 0.7 We are particularly concerned that the first proposal would be difficult for the prosecution to prove, and add to the complexity of sentencing hearings. Its potential to reduce guilty pleas and distort agreed facts would also have significant negative consequences for the criminal justice system.
- 0.8 We do not support the second proposal, as the operation of s 21A(2)(j) has been unproblematic, and has satisfactorily evolved over time to encompass new forms of conditional liberty since its enactment. Defining conditional liberty carries with it risks of freezing the definition, inadvertently excluding future forms of conditional liberty that, where breached, should be counted as an aggravating factor.

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- 0.9 We do not support the third proposal because adding to the existing provision may add to the complexity of sentencing and increase the possibility of error through double counting or failing to mention a relevant factor.
- 0.10 We believe that a more appropriate provision would be one that simplifies the factors that a court must take into account in sentencing, including the personal circumstances and vulnerability of any victim arising because of the victim's age, occupation, relationship to the offender, disability or otherwise. This accords with the recommendations of the Law Reform Commission in its 2013 report, *Sentencing*.
- 0.11 Following our review of sentencing and non-sentencing measures in other jurisdictions, we recommend that the Government consider the following initiatives to help deter alcohol and drug fuelled violence and rehabilitate offenders:
- Education and treatment programs addressing both problematic alcohol consumption and underlying attitudes to violence, particularly directed at those who might have substance abuse problems.
  - Continuing and expanding diversion programs such as MERIT (including Alcohol MERIT) and the Drug Court.
  - Continuing to evaluate restrictions on access to alcohol through licensing measures.



# 1. Introduction

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## In brief

This chapter provides some context for the review, and the emergence of recent community concern about alcohol and drug fuelled violence. It also notes relevant reports by the Sentencing Council and the Law Reform Commission.

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## *R v Loveridge* 2013

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- 1.1 On 7 July 2012, Thomas Kelly was punched once, without warning, by Kieran Loveridge in Kings Cross. After hitting his head falling from the punch, Mr Kelly was taken to hospital, where he died two days later.
- 1.2 Mr Loveridge was heavily intoxicated, and assaulted a number of other people in the area that night, apparently at random. He was also subject to a good behaviour bond, having been previously convicted of assault occasioning actual bodily harm.
- 1.3 He was initially charged with murder, but later pleaded guilty to three charges of common assault, one charge of assault occasioning actual bodily harm and one charge of manslaughter by an unlawful and dangerous act. In October 2013, he was sentenced to 7 years and 2 months imprisonment, with a non-parole period of 5 years and 2 months for all the offences.<sup>1</sup> The nominal sentence for the manslaughter of Mr Kelly was 6 years, with a non-parole period of 4 years. In sentencing, Justice Campbell noted that the breach of conditional liberty that the offences represented was a matter aggravating the seriousness of the offending.<sup>2</sup>
- 1.4 The sentence received considerable public attention, with many in the community expressing concern that it was too lenient.

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1. *R v Loveridge* [2013] NSWSC1638.

2. *R v Loveridge* [2013] NSWSC1638 [59].

### *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW)*

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- 1.5 Following the death of another young person from a single punch assault on New Year's Eve 2013, the Government recalled Parliament early in 2014 to introduce and pass the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW)*.
- 1.6 The Act introduced a new offence of assault causing death with a maximum penalty of 20 years. A person is guilty of the offence if they unlawfully assault another person by intentionally hitting them and that assault causes the persons death.<sup>3</sup> The assault can cause the death even if the death results from the person hitting the ground or an object because of the assault.<sup>4</sup>
- 1.7 If an adult commits the offence while intoxicated, the maximum penalty is 25 years imprisonment,<sup>5</sup> with a mandatory minimum sentence of eight years imprisonment.<sup>6</sup>
- 1.8 Evidence of intoxication will be conclusive if the offender had 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood.<sup>7</sup>
- 1.9 The Act also amended s 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* to provide that in determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.<sup>8</sup>

### *R v Loveridge 2014*

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- 1.10 After the enactment of the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW)*, the Crown successfully appealed Mr Loveridge's sentence. In July 2014 the Court of Criminal Appeal resented Mr Loveridge to 13 years and 8 months imprisonment with a non-parole period of 10 years and 2 months.<sup>9</sup> The nominal sentence for the manslaughter of Mr Kelly was 10 years and 6 months with a non-parole period of 7 years.
- 1.11 The Court of Criminal Appeal found that the sentencing judge had failed to give proper weight to general deterrence, in particular in the context of an offence involving alcohol-fuelled violence in a public place.<sup>10</sup> The Court noted that:

...the commission of offences of violence, including manslaughter, in the context of alcohol-fuelled conduct in a public street or public place is of great concern to the community, and calls for an emphatic sentencing

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3. *Crimes Act 1900 (NSW)* s 25A (1).

4. *Crimes Act 1900 (NSW)* s 25A (3).

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

6. *Crimes Act 1900 (NSW)* s 25B (1).

7. *Crimes Act 1900 (NSW)* s 25A (6)(b).

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

9. *R v Loveridge* [2014] NSWCCA 120.

10. *R v Loveridge* [2014] NSWCCA 120 [107-109].

response to give particular effect to the need for denunciation, punishment and general deterrence.<sup>11</sup>

- 1.12 The Court noted that courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce an offender's culpability, and stated that Mr Loveridge's awareness of his aggression issues, in the context of alcohol use, meant that his intoxication could operate adversely to him on sentence.<sup>12</sup>
- 1.13 The Court also noted that Mr Loveridge was on conditional liberty at the time of the offence, which magnifies specific deterrence as a factor to be taken into account.<sup>13</sup>

## Terms of Reference

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- 1.14 On 5 March 2015, the then Attorney General, the Hon Brad Hazzard MP, asked the Sentencing Council to consider a number of proposals from the Thomas Kelly Youth Foundation to make amendments to the *Crimes (Sentencing Procedure) Act 1999* (NSW) aimed at deterring alcohol and drug fuelled violence. The Foundation was established in December 2012 after Thomas Kelly's death to foster a more responsible drinking culture and ultimately a safer and healthier community.
- 1.15 We were asked to prepare a report on alcohol and drug fuelled violence that addresses the following:
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 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.
- 1.16 We were asked to provide the report by 31 August 2015.
- 1.17 We note that the amendments proposed at 2 and 3 in the Terms of Reference would have an impact beyond offences involving alcohol-related violence.

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11. *R v Loveridge* [2014] NSWCCA 120 [216].

12. *R v Loveridge* [2014] NSWCCA 120 [220].

13. *R v Loveridge* [2014] NSWCCA 120 [218].

## Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

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- 1.18 Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) commenced on 1 February 2003. The section specifies the aggravating and mitigating factors that a court must take into account when determining the appropriate sentence for an offence.<sup>14</sup> The section does not exclude the application of common law principles, as the factors are to be considered in addition to any other matters that a court may or must take into account under any Act or rule of law.<sup>15</sup>

### *Sentencing for alcohol-related violence*

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- 1.19 In 2009, the Sentencing Council released its report *Sentencing for alcohol-related violence*. We had been asked to examine alcohol-related violent crime, including:
1. The current principles and practices governing sentencing for offences committed whilst the offender is intoxicated;
  2. The current principles and practices governing sentencing for alcohol related violence, including violence offences where a glass or bottle is used as a weapon (commonly known as ‘glassing’);
  3. Should the intoxication of the offender be added as an aggravating factor in sentencing under s 21A of the *Crimes (Sentencing Procedure) Act*;
  4. The identification of any changes required to penalties or sentencing practices to address the issue of ‘glassing’;
  5. The identification of any other changes required to penalties or sentencing practices to address alcohol related violence; and
  6. Any other relevant matter.
- 1.20 We conducted an extensive review of cases involving alcohol-related violence, and received a wide range of submissions. We considered a range of sentencing responses to alcohol-related violence, including adding intoxication as an aggravating factor or removing it as a mitigating factor, creating specific offences or aggravated forms of offences where the offender was intoxicated, increasing penalties for certain violence offences, requiring ‘glassing’ offences to be dealt with in the District Court, seeking a guideline judgment and extending diversionary programs.<sup>16</sup>
- 1.21 We reported that the courts had given appropriate guidance about sentencing offenders where intoxication is an issue, and that the relevant principles were neither in doubt nor overlooked by sentencing judges.<sup>17</sup>

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14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

16. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) ch 7.

17. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.4]-[7.5].

- 1.22 Accordingly, we did not make any formal recommendation to alter current sentencing laws and practices, or to enact any new offences to deal with alcohol-related violence. Nor did we recommend increasing the maximum penalties available for the offences examined, on the basis that we were satisfied that the maximum sentences were appropriate for the potential objective seriousness involved.<sup>18</sup>
- 1.23 We felt it was appropriate to retain a wide sentencing discretion, particularly given that many offenders were immature and with no prior convictions, who committed their offences spontaneously.<sup>19</sup>
- 1.24 We made recommendations about the processes for determining whether matters were prosecuted in the Local or District Court, and recommended further work on the jurisdiction of the Local Court and the process for setting standard non-parole periods, both of which became subsequent references to the Council.<sup>20</sup>
- 1.25 We concluded that the steps required to reduce the incidence of alcohol-related violence lay in the hands of the liquor industry and public education, rather than the criminal justice system. We supported stricter licensing laws to curb excessive drinking and higher standards for bar and security staff in licensed premises, as well as public education campaigns on the risks associated with alcohol and violence.<sup>21</sup>
- 1.26 In concluding that intoxication should not be an aggravating factor, we relied on a number of arguments:
- the existing law adequately provides for intoxication to be taken into account;
  - its adoption would give rise to inflexibility;
  - 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 Islanders, 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.<sup>22</sup>

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18. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.69].

19. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.69].

20. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.71]-[7.72]. See NSW Sentencing Council, *An examination of the sentencing powers of the Local Court of NSW* (2010), NSW Sentencing Council, *Standard non-parole periods: Final report* (2013).

21. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.74]-[7.75].

22. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.7]. These findings were noted in submissions - NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 2 and Law Society of NSW, *Submission ADFV12*, 2, 3.

### Law Reform Commission recommendations

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- 1.27 The NSW Law Reform Commission (LRC) gave considerable thought to the operation and future of s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in its 2013 report, *Sentencing*.
- 1.28 The LRC noted the history of the section, and criticisms of its operation, including the risk of error that it creates in terms of potential double counting of certain factors, applying factors contrary to the common law, and making no distinction between objective and subjective factors.<sup>23</sup>
- 1.29 The LRC recommended that the existing section be replaced by a new provision that includes a non-exhaustive list of the key factors that a court must take into account on sentencing, without dividing them into aggravating or mitigating factors.<sup>24</sup>
- 1.30 These factors should include:
- the nature, circumstances and seriousness of the offence
  - the personal circumstances and vulnerability of any victim arising because of the victim's age, occupation, relationship to the offender, disability or otherwise
  - the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security
  - the offender's character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment)
  - the extent of the offender's remorse for the offence, taking into account, in particular, whether:
    - the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
    - the offender has acknowledged any injury, loss or damage caused by his or her actions or voluntarily made reparation for such injury, loss or damage (or both)
  - the offender's prospects of rehabilitation.<sup>25</sup>
- 1.31 The LRC also recommended a number of stand-alone provisions identifying other issues that should be taken into account on sentencing, including the fact that the offender committed the offence while on conditional liberty.<sup>26</sup> This should be taken into account when assessing the need for the sentence to contain an additional

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

24. NSW Law Reform Commission, *Sentencing*, Report 139 (2013), Recommendation 4.1. A number of stakeholders noted this recommendation in submissions - NSW Bar Association, *Submission ADFV01*, 2, and NSW Police Force, *Submission ADFV13*, 1.

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

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

element of specific deterrence, denunciation and/or community protection, and also when assessing the offender's prospects for rehabilitation.

- 1.32 The LRC also recommended that the term conditional liberty be defined, although there was no commentary about what that definition might encompass.<sup>27</sup>

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





## 2. A new aggravating factor

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### In brief

This chapter examines the first limb of our terms of reference - whether a new mandatory aggravating factor should be introduced that applies where the offence involved violence because the offender was taking or affected by drugs or alcohol. We examine stakeholder views and recommend that such a factor should not be introduced.

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### Proposal

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- 2.1 We were asked to consider whether a mandatory aggravating factor should be introduced to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) 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.
- 2.2 This proposal would go significantly further than the existing s 21A(5AA) which provides that:
- in determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

### Stakeholder views

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- 2.3 Stakeholders raised a range of concerns about the proposal.

### Proving causation

- 2.4 A number of stakeholders pointed out that the proposal requires that the violence *be the result of* the offender taking, inhaling or being affected by the intoxicating

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substance.<sup>1</sup> This means that for the aggravating factor to apply, the prosecution would need to prove causation, which may pose some challenges.<sup>2</sup>

- 2.5 There is still significant debate on the extent to which alcohol causes violence.<sup>3</sup> While studies have shown a positive relationship between alcohol and violence, there are frequently other variables at play (such as tiredness, excitement, anger and fear). It is also highly problematic to assume that, because someone has consumed alcohol and they later engage in a violent act, it was the consumption of alcohol that caused the violent act.<sup>4</sup> The problem is further complicated by the fact that the proposal covers intoxicating substances other than alcohol, which may impact on the body in a variety of different ways.<sup>5</sup>
- 2.6 Further, it is unclear what degree of intoxication, if any, would be necessary for the factor to apply. The proposal covers circumstances where the offender is merely taking alcohol or another substance, leaving open the possibility that the offender need not be affected by the alcohol or other substance. This raises the question of how the prosecution could prove that the violence occurred because the person was taking the intoxicating substance.<sup>6</sup>
- 2.7 Stakeholders queried whether the factor would need to be accompanied by a deeming provision, similar to that used in s 25A(6)(b) of the *Crimes Act 1900* (NSW), which states that an accused is conclusively proved to be intoxicated by alcohol if the accused had a blood alcohol reading of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood.<sup>7</sup> Even if such a deeming provision was used, it would also need to deal with circumstances of intoxication by substances other than alcohol.

## Problematic culpability

- 2.8 Several stakeholders pointed out that the provision could result in offenders who violently assault others while sober being treated more leniently than those who do so when intoxicated.<sup>8</sup>
- 2.9 Taking this argument further, if the proposal were implemented, an offender with a history of violence may be able to argue during sentencing that the violence in the current case was not attributable to intoxication, given their tendency towards violence, and hence be dealt with more leniently than an offender with no history of violence but one drunken episode.<sup>9</sup>

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1. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 1.

2. NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 4, 5.

3. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 5.

4. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 6.

5. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 5, 6.

6. NSW Police Force, *Submission ADFV13*, 2.

7. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 6.

8. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 7, Law Society of NSW, *Submission ADFV12*, 2, NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 5, NSW Bar Association, *Submission ADFV01*, 4, and Wirringa Baiya, *Submission ADFV11*, 2 (particularly in a domestic violence context).

9. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 1.

- 2.10 Stakeholders also noted that the proposal makes no distinction between self-induced intoxication and otherwise, unlike the common law.<sup>10</sup>

### Unintended consequences

- 2.11 Concerns were raised that, as the proposal was described as a ‘mandatory’ aggravating factor, it may result in distorted agreed statements of fact following charge negotiations, because offenders may be unwilling to plead guilty if the facts refer to them being intoxicated.<sup>11</sup> This would reduce the transparency of the criminal justice system, and reduce any deterrence the proposal might achieve.
- 2.12 Stakeholders also expressed concern that the proposal may reduce the number of guilty pleas<sup>12</sup>, and even discourage the reporting of domestic violence incidents where intoxication is involved, especially by Aboriginal women.<sup>13</sup>
- 2.13 The Young Lawyers Criminal Law Committee noted that a 2005 study found that 69% of Indigenous male prisoners were under the influence of alcohol at the time of offending, and raised the concern that the proposal would be likely to have a disproportionate impact on the Indigenous incarceration rate.<sup>14</sup> Other stakeholders shared this concern, noting that the Indigenous incarceration rate is already significantly disproportionate to the Indigenous population.<sup>15</sup>
- 2.14 More generally, there was concern about the potential for the proposal to increase the prison population significantly, given the prevalence of alcohol in violent incidents, particularly in family violence matters.<sup>16</sup>
- 2.15 Stakeholders were also concerned about the likely added complexity that the proposal would bring to sentencing hearings, and the potential for more avenues of appeal, increasing the workload for the higher courts.<sup>17</sup>

### Unlikely to deter alcohol or drug fuelled crime

- 2.16 The Bar Association queried whether the proposal would actually achieve its aim of deterring alcohol and drug fuelled violence, noting the impulsive nature of alcohol or drug fuelled crime, where offenders are unlikely to take into account the consequences of offending, in particular the operation of this aggravating factor in sentencing.<sup>18</sup>

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10. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 3.

11. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 1.

12. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 9.

13. Wurringa Baiya, *Submission ADFV11*, 2.

14. NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 4.

15. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 1, NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 4, and Wurringa Baiya, *Submission ADFV11*, 2.

16. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 9.

17. Chief Magistrate of the Local Court, *Submission ADFV03*, 1, and NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 1.

18. NSW Bar Association, *Submission ADFV01*, 3.

### Unclear terminology

- 2.17 The proposed wording of the proposal also raises some concerns. It is unclear what is meant by the factor being 'mandatory'. Currently, a sentencing court 'is to take into account' the aggravating and mitigating factors found in s 21A.<sup>19</sup> Would making this particular factor mandatory raise its consideration above and beyond the other factors listed?<sup>20</sup>
- 2.18 Concern was also raised by the term 'take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance'. For consistency, it was suggested that the definition of intoxication found in s 428A of the Crimes Act 1900 (NSW) be used, that is, intoxication because of the influence of alcohol, a drug or any other substance.<sup>21</sup>

### Existing law inadequate or needs amendment in other ways

- 2.19 A number of stakeholders suggested that there was no need to change existing sentencing law to deal with alcohol and drug fuelled violent incidents. Some even suggested that the existing law had already improperly restricted judicial discretion.
- 2.20 The NSW Council for Civil Liberties and the Children's Court of NSW suggested that there was no demonstrated need for the change.<sup>22</sup> The Chief Magistrate and the NSW Police Force specifically noted that s 21A(5AA) already prevents self-induced intoxication being taken into account as a mitigating factor.<sup>23</sup>
- 2.21 Others, however, argued that s 21A(5AA) had improperly eroded sentencing discretion, and called for its repeal.<sup>24</sup>
- 2.22 Stakeholders also noted that the Court of Criminal Appeal had emphasised the importance of general deterrence when dealing with alcohol fuelled violence in *R v Loveridge*,<sup>25</sup> the case that arose from the death of Thomas Kelly.<sup>26</sup>

### Our view

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- 2.23 Noting the strong opposition to the proposal expressed by stakeholders, we are not convinced that the proposal would have a significant impact on deterring alcohol and drug fuelled violence. It may also have a number of negative unintended consequences, even if adjusted to take into account some of the more technical objections to the use of particular terms

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19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s21A(1).

20. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 2.

21. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 3.

22. NSW Council for Civil Liberties, *Submission ADFV07*, 2, and Children's Court of NSW, *Submission ADFV05*, 1.

23. Chief Magistrate of the Local Court, *Submission ADFV03*, 1, and NSW Police Force, *Submission ADFV13*, 2.

24. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 8, Law Society of NSW, *Submission ADFV12*, 2, and NSW Bar Association, *Submission ADFV01*, 5.

25. *R v Loveridge* [2014] NSWCCA 120 at [105] and [216].

26. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 8.

- 2.24 We are particularly concerned that the proposal would be difficult for the prosecution to prove, and add to the complexity of sentencing hearings. Its potential to reduce guilty pleas and distort agreed facts would also have significant negative consequences for the criminal justice system.
- 2.25 Even were it to be successfully applied in a significant number of cases, the real possibility that the proposal would increase the prison population, and impact disproportionately on Aboriginal people and Torres Strait Islanders, without having a significant impact on crime, means that we do not support the proposal.
- 2.26 In terms of reforming s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), we support the recommendations of the Law Reform Commission to replace the section with a simplified, non-exhaustive list of factors that a court must take into account on sentencing, that does not categorise the factors as ‘aggravating’ or ‘mitigating’.<sup>27</sup>

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27. See [1.27]-[1.28].



### 3. Defining conditional liberty

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#### In brief

This chapter examines the second limb of our terms of reference, whether conditional liberty should be defined. We examine stakeholder views and consider possible alternatives. We recommend that conditional liberty not be defined.

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#### Proposal

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3.1 Our terms of reference ask us to consider whether the concept of “conditional liberty” in s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be defined. Section 21A(2)(j) provides that where an offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence, this is an aggravating factor to be taken into account on sentence. Conditional liberty is not otherwise defined in the Act.

3.2 The common law makes it clear that conditional liberty under s 21A(2)(j) is not confined to circumstances where the index offence must be punishable by imprisonment.<sup>1</sup> It is well established that an offender who is subject to a good behaviour bond is subject to conditional liberty.<sup>2</sup> In *Porter v R*, McCallum J observed:

...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 behavior bond or a community service order or periodic detention or parole, constitutes an aggravating factor for the purpose of sentence. The essence of the provision is that the offender commits a further offence whilst subject to an order of a court in criminal proceedings requiring, amongst other things, that the offender be of good behavior.<sup>3</sup>

3.3 The common law also encompasses conditions imposed for protective purposes. In *Sivell v R*, Justice Fullerton held that while, in the case of protective orders, conditional liberty has not been granted to an offender “in relation to an offence or alleged offence” in a traditional sense, as required by s 21A(2)(j), the conditions on the person’s liberty have been imposed with the object of protecting against the risk of offences of a particular kind being committed where the potential victim is in a

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1. *Porter v R* [2008] NSWCCA 145 [85]-[86]; *Sivell v R* [2009] NSWCCA 286 [30].  
2. See, eg, *Porter v R* [2008] NSWCCA 145; *Frigiani v R* [2007] NSWCCA 81 [24].  
3. *Porter v R* [2008] NSWCCA 145 [86].

## Alcohol and drug fuelled violence

position of vulnerability.<sup>4</sup> As such, it was held that conditions imposed on an offender's liberty with the aim of preventing certain offences where the victim is vulnerable, such as an order under the *Child Protection (Offenders Prohibition Orders) Act* or an apprehended violence order under the *Crimes (Domestic and Personal Violence) Act* should be treated the same way as a bond or suspended sentence for the purposes of s 21A(2)(j).

- 3.4 Even if such protective orders do not strictly fall under the provision, s 21A does not attempt to codify the law and does not operate as an exhaustive list of aggravating and mitigating factors.<sup>5</sup> This means a breach of conditions imposed other than in relation to an offence or alleged offence may still be treated in the same way as a breach of conditional liberty on sentence.<sup>6</sup>

## Stakeholder views

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- 3.5 Several stakeholders submitted that because the concept is well understood by the common law, no useful purpose would be served by defining it.<sup>7</sup> One stakeholder submitted that the existing law leaves “no doubt” that breaches of parole, suspended sentences and bonds can be taken into account under s 21A(2)(j).<sup>8</sup>
- 3.6 The Bar Association expressed the view that orders under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), or an apprehended violence order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) would not fall under s 21A(2)(j). However, the Association noted that, in any case, a breach of such protective orders would be treated as an aggravating factor in exactly the same way as a bond or suspended sentence under common law principles.<sup>9</sup>
- 3.7 Stakeholders noted that no practical difficulties have arisen with the application of s 21A(2)(j).<sup>10</sup> However, given the increase in self-represented litigants in the Local Court, there may be public benefit in defining conditional liberty to provide clarity for inexperienced litigants.<sup>11</sup>
- 3.8 Stakeholders who supported the proposal to define conditional liberty were of the view that it would ensure the term is understood to cover, in particular; parole, community service orders, intensive correction orders, home detention and extended supervision orders.<sup>12</sup>

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4. *Sivell v R* [2009] NSWCCA 286 [29].

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

6. *Sivell v R* [2009] NSWCCA 286 [30].

7. Director of Public Prosecutions, *Submission ADFV08*, 2; The Law Society of NSW, *Submission ADFV12*, 3; NSW Young Lawyers – Criminal Law Committee, *Submission ADFV10*, 6-7.

8. NSW Bar Association, *Submission ADFV01*, 5.

9. NSW Bar Association, *Submission ADFV01*, 5. This was also noted by the NSW Council for Civil Liberties, *Submission ADFV07*, 3.

10. Chief Magistrate of the Local Court, *Submission ADFV03*, 1; NSW Council for Civil Liberties, *Submission ADFV07*, 3.

11. Chief Magistrate of the Local Court, *Submission ADFV03*, 1.

12. Children's Court of NSW, *Submission ADFV05*, 2; NSW Police Force, *Submission ADFV13*, 2.



## Law Reform Commission recommendation

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- 3.9 In its 2013 report, *Sentencing*, the Law Reform Commission (LRC) made a recommendation that a new sentencing act include 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.<sup>13</sup>
- 3.10 While the LRC recommended that the terms "conditional liberty" and "unlawfully at large" be defined, it did not comment on how this should be done.<sup>14</sup>

## Options for codification

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- 3.11 If an attempt were made to codify conditional liberty, this could be done in one of the following ways:
- (1) expanding s 21A(2)(j) so that it covers conditional liberty in relation to an offence or alleged offence *and* in relation to conditions imposed for a protective purpose (that is, to prevent offences through child protection or apprehended violence orders)
  - (2) providing a non-exhaustive list of conditions within s 21A(2)(j), which would include: bail, parole, a good behaviour bond (which includes a suspended sentence), a community service order, home detention, intensive correction order, an extended supervision order, a child protection offender prohibition order and an apprehended violence order
  - (3) providing an exhaustive list of circumstances, either within s 21A(2)(j), or as a separate definition of conditional liberty within the interpretation provision of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 3.12 Option 1 would make it clear that orders that impose conditions for a protective purpose, but are not imposed in relation to a specific proven or alleged offence, are included in the provision. This would accord with the common law, but arguably extend the reach of the existing statutory provision. It would not represent full codification, as it would not specify all the orders to which it applies.
- 3.13 Option 2 would list those orders that are currently recognised by the common law, as well as a number of other orders recommended by stakeholders. It would not exclude the provision from applying to other types of orders, either existing or created in the future; this would be a matter for judicial interpretation.
- 3.14 However, given the absence of practical problems with the existing law, it could be argued that there is limited benefit in drafting a non-exhaustive definition.

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

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

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- 3.15 Option 3 would provide complete clarity as to what circumstances Parliament intends the Act to cover. However, it would also ‘freeze’ the interpretation of the provision such that new forms of conditional liberty that emerge in the future may fall outside the definition, as well as any existing circumstances that were not codified. We note that intensive correction orders, child protection offender prohibition orders, and extended supervision orders, for example, have emerged as new forms of conditional liberty since the original enactment of s21A(2)(j).

### Our view

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- 3.16 Currently, as conditional liberty is not defined, it is a matter for courts to interpret the provision and determine whether a particular matter before them attracts the operation of the provision. As stakeholders have indicated, there do not appear to have been any circumstances where that interpretation has been problematic, for example where an offender was subject to some form of conditional liberty when they committed an offence, but this was not held to be an aggravating factor at sentencing.
- 3.17 We do not support an exhaustive definition of conditional liberty. There are a range of circumstances where a person has conditions placed on their liberty that should be considered as an aggravating factor in sentencing if that person went on to commit an offence in breach of those conditions. The way such conditions might be imposed may change over time, and to freeze the definition of conditional liberty at a given point in time creates the risk of sentencing error if future restraints on liberty are legislated but not reflected in the definition.
- 3.18 We also do not support conditional liberty being defined to include protective orders. If an offender is being sentenced for an offence that involved a breach of an apprehended violence order, the fact that the offence was a breach would, appropriately, be taken into account on sentencing.
- 3.19 However, if an offender is subject to an apprehended violence order, but commits an offence that does not relate to the person protected by the order, it is unclear why the fact that the person was subject to such an order should be an aggravating factor in sentencing for an unrelated offence.
- 3.20 Further, apprehended violence orders can be made without a requirement to prove the facts supporting the order. It is therefore not appropriate to include them in a definition of conditional liberty for the purposes of s 21A(2)(j), as this would attach the risk of additional punishment for an offence that involved the breach of an order made without a test of the evidence in court.
- 3.21 We note stakeholder views regarding the largely unproblematic interpretation of the provision, and the fact that it has evolved to encompass new forms of conditional liberty as they have arisen.
- 3.22 We also note that defining conditional liberty would have an impact on the criminal justice system beyond alcohol-related violence.
- 3.23 We support the LRC’s recommendation that, if a new sentencing act were to be drafted, it should include a stand-alone provision requiring the court to take into

account offending on conditional liberty when assessing the need for the sentence to contain an additional element of specific deterrence, denunciation or community protection, and also when assessing the prospects of rehabilitation.

- 3.24 However, we do not support the LRC's recommendation that conditional liberty be 'defined'. Defining conditional liberty carries with it risks of freezing the definition and inadvertently excluding future forms of conditional liberty that, if breached, should be counted as an aggravating factor.



## 4. Expanding the definition of vulnerability

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### In brief

This chapter examines the third limb of our terms of reference, whether the definition of vulnerability should be expanded. We consider stakeholder views and recommend that the proposal should not be adopted.

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Our view.....	23

### Proposal

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- 4.1 We were asked to consider whether the concept of ‘vulnerability’ in s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) 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.
- 4.2 Currently, s 21A(2)(l) provides that a sentencing court must take into account, as an aggravating factor, that:
- the victim was 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),
- 4.3 The proposal would therefore expand the provision to cover explicitly any aspect of youth or age, sex, physical constraints, inability to escape, lack of knowledge of attack, abused trust or emotional impediment, and add cashier to the list of occupational vulnerabilities. We note that the existing provision is not an exhaustive list of circumstances where a victim may be considered vulnerable.

### Stakeholder views

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- 4.4 In general, stakeholders suggested that the proposal was unnecessary.<sup>1</sup>
- 4.5 A number of stakeholders noted that any vulnerability of a victim, whether or not it falls within the scope of s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) may increase the objective seriousness of an offence, and hence be considered in sentencing.<sup>2</sup> This was highlighted in the Court of Criminal Appeal decision of *R v Loveridge*, which explicitly noted that the offence was committed against a vulnerable, unsuspecting and innocent victim.<sup>3</sup>
- 4.6 Stakeholders also noted that the existing provision was non-exhaustive, making it clear that vulnerability is not limited to the examples already listed.<sup>4</sup>
- 4.7 The Bar Association concluded that expanding the scope of s 21A(2)(l) would only serve to increase risks of errors in sentencing, such as double counting, where a sentence is increased by taking into account an aggravating factor that has already been taken into account in sentencing as it is inherently an element of the offence.<sup>5</sup> Other stakeholders shared the concern that the proposal would further complicate the sentencing process.<sup>6</sup>
- 4.8 The Chief Magistrate also noted that the proposal may encourage further requests to expand the provision to cover vulnerable groups not already listed.<sup>7</sup>
- 4.9 The Council for Civil Liberties noted that the courts have rejected any approach that the mere fact that a victim is a female is a matter of specific vulnerability. Given that the courts may take into account any power imbalance between an offender and a victim, it is unclear why sex should be listed as a specific matter of vulnerability, as proposed.<sup>8</sup>
- 4.10 The Council for Civil Liberties also noted that the fact that an offender abused a position of trust is already an aggravating factor under s 21A(2)(k).<sup>9</sup>
- 4.11 On the other hand, the Children's Court supported the proposal, and noted that while s 21A(2)(l) was not-exhaustive, there may also be benefit in making it clear

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1. NSW Council for Civil Liberties, *Submission ADFV07*, 3, NSW Bar Association, *Submission ADFV01*, 6, NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 3, NSW Police Force, *Submission ADFV13*, 3, and NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 8.
  2. NSW Bar Association, *Submission ADFV01*, 6, Law Society of NSW, *Submission ADFV12*, 3, and NSW Council for Civil Liberties, *Submission ADFV07*, 4.
  3. [2014] NSWCCA 120 at [105], quoted in NSW Bar Association, *Submission ADFV01*, 6.
  4. NSW Council for Civil Liberties, *Submission ADFV07*, 3, NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 8, Law Society of NSW, *Submission ADFV12*, 3, NSW Police Force, *Submission ADFV13*, 2, Chief Magistrate of the Local Court, *Submission ADFV03*, 2.
  5. NSW Bar Association, *Submission ADFV01*, 7.
  6. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 3, NSW Police Force, *Submission ADFV13*, 3, and Chief Magistrate of the Local Court, *Submission ADFV03*, 2, Law Society of NSW, *Submission ADFV12*, 2.
  7. Chief Magistrate of the Local Court, *Submission ADFV03*, 2.
  8. NSW Council for Civil Liberties, *Submission ADFV07*, 3.
  9. NSW Council for Civil Liberties, *Submission ADFV07*, 4.

that a victim who is not physically as strong as the offender, or who has no means of escape, is also vulnerable.<sup>10</sup>

## Our view

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- 4.12 As pointed out by almost all stakeholders, the existing provision relating to vulnerability in s 21A is not exhaustive, and allows sentencing courts to take note of any circumstances in which a victim is vulnerable. A number of examples were given of the courts finding that a victim was vulnerable despite the circumstances not directly correlating with those listed in the subsection.
- 4.13 The list currently set out in s 21A(2)(l) is illustrative only, and to extend the list further might tend to suggest that Parliament was setting out to list exhaustively the types of vulnerability that should be recognised in sentencing.
- 4.14 As noted by stakeholders, adding to the list may also add to the complexity of sentencing and increase the possibility of error through double counting or failing to mention a relevant factor. We also note that, as with the proposal to define conditional liberty, the impact of the proposal, if implemented, would extend beyond sentencing for alcohol-related violence offences.
- 4.15 We do not support the proposal. A more appropriate provision would involve simplifying the factors that a court must take into account in sentencing, including the personal circumstances and vulnerability of any victim arising because of the victim's age, occupation, relationship to the offender, disability or otherwise. This accords with the recommendations of the Law Reform Commission in its 2013 report, *Sentencing*.<sup>11</sup>

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10. Children's Court of NSW, *Submission ADFV05*, 2.

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





## 5. Other measures

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### In brief

This chapter examines the fourth limb of our terms of reference, considering other sentencing measures to deter and change behaviour in relation to alcohol and drug fuelled violence. We consider stakeholder views and note both sentencing and non-sentencing measures that the Government might further explore.

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### Introduction

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- 5.1 Our terms of reference ask us to consider 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.

## Alcohol and drug fuelled violence

- 5.2 In our call for submissions released on 30 March 2015, we canvassed a number of different sentencing measures that stakeholders might comment on, including creating specific offences, increasing penalties, amending s 21A, and introducing mandatory minimum penalties or sentencing guidelines.<sup>1</sup> Stakeholder comments are included, where relevant, in the following paragraphs.
- 5.3 In addition to considering a number of sentencing measures, we have also briefly considered and provided an overview of non-sentencing measures that may merit further examination in the context of deterring and changing behaviour in relation to alcohol and drug fuelled violence.
- 5.4 Although many of these measures are outside our expertise, we put them forward for consideration by Government given many statements by stakeholders that the most effective means to address alcohol and drug fuelled violence, including through a focus on prevention, may be achieved outside of the sentencing process.

## Sentencing measures

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- 5.5 In considering some of the options below, we note the Chief Magistrate's observation that the difficulties that arise for a mandatory circumstance of aggravation for violence offences where alcohol is a contributing factor (see chapter 2), also arise in considering specific offences, increased penalties or mandatory minimums. Such situations pose difficulties of proof for prosecutors, create incentives to plead not guilty, and create a situation where sober offenders are treated more leniently than intoxicated offenders.<sup>2</sup> The Office of the Director of Public Prosecutions (ODPP) also noted these problems.<sup>3</sup>

## Enacting specific offences

- 5.6 One example of a specific offence is NSW's recently introduced offence of assault causing death when intoxicated.<sup>4</sup>
- 5.7 In our 2009 report on alcohol-related violence, we considered whether to recommend introducing specific offences that include intoxication as an element.<sup>5</sup>
- 5.8 We noted that such specific offences would underline community concerns about alcohol-related crime.<sup>6</sup> On the other hand, arguments against introducing specific offences included:
- existing offences are sufficient to deal with intoxicated offenders and there may be inconsistent results if offenders can be dealt with under either general or specific offences

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1. NSW Sentencing Council, *Alcohol and drug fuelled violence: Call for submissions* (2015) [1.13]

2. Chief Magistrate of the Local Court, *Submission ADFV03*, 2-3.

3. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 3.

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

5. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.6]-[7.7].

6. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.31].

- sentencing should focus on an offence/act rather than on the offender’s moral culpability and/or intoxicated state, and
- most people do not commit violent acts when intoxicated and do not need to be deterred with specific offences.<sup>7</sup>

5.9 We saw no advantage in enacting specific offences and were satisfied with the operation of the current law. We noted that changes would likely introduce complexity into charging and charge negotiation as well as risking inconsistent sentencing outcomes.<sup>8</sup>

### Increasing maximum penalties or SNPPs

5.10 Provisions could be introduced to impose higher maximum penalties for offences where there is an element of self-induced intoxication, as is now the case for the offence of assault causing death.<sup>9</sup>

5.11 The application of such provisions may not result in courts paying special attention to the fact that the offender was intoxicated, however. For example, the now repealed s 154 of the *Criminal Code* (NT) established the offence of an act or omission that “causes serious, actual or potential danger to the lives, health or safety of the public or to any member of it in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission” and provided for a further penalty of 4 years imprisonment if, at the time, the offender was “under the influence of an intoxicating substance”.

5.12 Having noted concerns that the provision could lead to intoxication being counted twice in some circumstances (especially in cases where the offending behaviour would not have occurred without intoxication), the High Court held:

In our opinion, s 154(4) is a clear expression of concern by the legislature over the effect of intoxication on the level of crime in the community in the context of dangerous acts or omissions lacking an intention to cause a specific result. It does not require a court to engage in a two-stage approach to sentencing with separate consideration being given to the fact that an offender was under the influence of an intoxicating substance. But, in such a case, it does require a court to have regard to the higher maximum penalty resulting from the cumulative effect of s 154(4) on the other sub-sections of the section.<sup>10</sup>

5.13 The task of the sentencing court, in the case before it, was:

to evaluate the circumstances of the offence in their entirety, including the influence of alcohol, and to determine an appropriate term of imprisonment having regard to the prescribed [combined] maximum of eleven years and to the possible range of offences to which it applied.<sup>11</sup>

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7. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.32].

8. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.33]-[7.34].

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

10. *Baumer v The Queen* (1988) 166 CLR 51 [56].

11. *Baumer v The Queen* (1988) 166 CLR 51 [56].

## Alcohol and drug fuelled violence

- 5.14 Our 2009 report considered that maximum sentences for personal violence offences were adequate. We noted that judicial discretion to move above or below the standard non-parole period was important, given the wide variety of circumstances in which offenders may be charged with the same offence, particularly different degrees of deliberateness or spontaneity.<sup>12</sup>
- 5.15 Some stakeholders raised the issue of deterrence in this context.
- 5.16 Several stakeholders noted that evidence suggests that longer sentences do not deter crime, particularly alcohol-related crime, but an increased risk of arrest or imprisonment does.<sup>13</sup>
- 5.17 However, one submission noted that while swift, certain and small punishments may have a deterrent effect, for example, for drink driving, the deterrent effect may be reduced, or even non-existent, for young people, a key demographic for alcohol and drug fuelled violence.<sup>14</sup>
- 5.18 NSW Young Lawyers noted that sentencing measures, such as abstinence monitoring, which do not relate to sentence length, may be more effective in reducing crime rates.<sup>15</sup>
- 5.19 The Law Society of NSW was of the view that harsher punishments are not an effective deterrent. Measures to address alcohol and drug-related violence in a sustainable way should focus on education, transport and restricting access.<sup>16</sup>

## Amending the factors to be taken into account when sentencing

- 5.20 There are two basic approaches to amending the factors that courts must take into account when sentencing to deal with intoxication:
- make intoxication an aggravating factor (dealt with in chapter 2), and/or
  - remove the possibility of intoxication being a mitigating factor.
- 5.21 In NSW a recent amendment to the factors to be taken into account on sentencing introduced a rule that sentencing courts cannot take self-induced intoxication into account as a mitigating factor.<sup>17</sup>
- 5.22 Similar provisions have been enacted in other jurisdictions.<sup>18</sup>
- 5.23 The Northern Territory also specifies that voluntary intoxication is not an exceptional circumstance for the purposes of avoiding the operation of its mandatory minimum sentence provisions.<sup>19</sup>

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12. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.43].

13. NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 3, Law Society of NSW, *Submission ADFV12*, 3 and NSW Bar Association, *Submission ADFV01*, 2.

14. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 10 and Law Society of NSW, *Submission ADFV12*, 10.

15. NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 10.

16. Law Society of NSW, *Submission ADFV12*, 4.

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

18. *Penalties and Sentences Act 1992* (Qld) s 9(9A).

- 5.24 It is questionable whether such provisions have changed the law. The Court of Criminal Appeal (CCA) has noted that the law before the NSW provision was enacted was to similar effect - that an offender's intoxication could explain an offence, but ordinarily did not mitigate the sentence - and that "courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce an offender's culpability".<sup>20</sup>
- 5.25 Finally, we note the NSW Law Reform Commission's (LRC) report on sentencing contains a number of recommendations on s 21A (made before the new provision on intoxication was introduced). The LRC 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.<sup>21</sup> The proposed list of six factors did not include express mention of intoxication but relevantly includes "the nature, circumstances and seriousness of the offence".<sup>22</sup>
- 5.26 The LRC 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.<sup>23</sup>

### Mandatory minimum penalties

- 5.27 An example of a mandatory minimum penalty in NSW is the offence of assault causing death when intoxicated carries a mandatory minimum sentence of 8 years.<sup>24</sup>
- 5.28 The NSW Council for Civil Liberties also noted that anecdotal evidence from the Northern Territory and similar places suggests that mandatory sentences for offences have been unsuccessful in reducing crime rates.<sup>25</sup> The ODPP also expressed its opposition to mandatory sentencing.<sup>26</sup>

### Additional orders as punishment

- 5.29 This option involves a provision that allows or requires the sentencing court to impose a specific order in addition to any other penalty imposed by the court, where intoxication was involved.
- 5.30 For example s 108B of the *Penalties and Sentences Act 1992* (Qld) provides that a court must make a community service order if the offender has committed a "prescribed offence" in a public place "while the offender was adversely affected by

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19. *Sentencing Act* (NT) s 78DI(4)(a).

20. *R v Loveridge* [2014] NSWCCA 120 [220]. See also *Bourke v R* [2010] NSWCCA 22 [26], *Keeley v R* [2014] NSWCCA 139 [85].

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

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

23. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [4.44].

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

25. NSW Council for Civil Liberties, *Submission ADFV07*, 4.

26. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 3.

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an intoxicating substance”.<sup>27</sup> The prescribed offences are affray, grievous bodily harm, wounding, assault, assault occasioning bodily harm, and assaulting, hindering or obstructing a police or other public officer.<sup>28</sup> The order is made in addition to any other sentence, including a sentence of imprisonment, which suspends the operation of the order for the time the offender is imprisoned.<sup>29</sup> However, the court is not required to make such an order if it is satisfied that the offender is not capable of complying with the order because of “any physical, intellectual or psychiatric disability”.<sup>30</sup> The provisions were introduced by the *Safe Night Legislation Amendment Act 2014* (Qld) and have not yet been subject to judicial scrutiny.

- 5.31 In the Northern Territory, a court that finds an offender guilty of a specified offence may, on its own initiative or on application of the Director of Public Prosecutions or a police officer, make an exclusion order if the court:
- (a) is satisfied the specified offence was committed wholly or partly in a designated area; and
  - (b) does not sentence the offender to a term of imprisonment of 12 months or more in relation to the specified offence; and
  - (c) is satisfied that making the exclusion order would be an effective and reasonable way of preventing the offender from committing a further specified offence in the designated area.<sup>31</sup>
- 5.32 An exclusion order must, subject to some exceptions, exclude the offender from a relevant place for a period of not more than 12 months and may also be made subject to other conditions as the court considers appropriate.<sup>32</sup>

### Specific conditions of community based sentences aimed at rehabilitation

- 5.33 Specific conditions can be added to community based orders that are aimed at addressing the causes of alcohol and drug-induced offending, for example, abstinence, participation in programs, and submission to treatment. The programs under these orders would be similar to diversionary programs.

#### *Current law in NSW*

- 5.34 Many of the current community based sentences in NSW can include such conditions.
- 5.35 For example, the standard conditions of a home detention order include that the offender not consume alcohol or prohibited drugs, submit to searches and drug testing, and engage in personal development activities or treatment programs if

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27. Proof of, and defences to, the aggravating circumstance are dealt with in the *Criminal Code* (Qld) ch 35A.

28. *Penalties and Sentences Act 1992* (Qld) s 108A.

29. *Penalties and Sentences Act 1992* (Qld) s 108D.

30. *Penalties and Sentences Act 1992* (Qld) s 108B(2A).

31. *Liquor Act* (NT) s 120S(1).

32. *Liquor Act* (NT) pt 10AB div 4.

directed by a supervisor.<sup>33</sup> Under such an order, a court can also impose additional conditions.<sup>34</sup>

- 5.36 The standard conditions of an intensive correction order include that the offender submit to searches, alcohol and drug testing, participate in rehabilitative activities if directed, and submit to medical examination by a specified practitioner.<sup>35</sup> A court can impose additional conditions such as conditions that prohibit the offender consuming alcohol, non-association and place restriction conditions, as well as any other conditions that the court considers necessary to reduce the likelihood of reoffending.<sup>36</sup>
- 5.37 In the case of suspended sentences, a court can specify additional conditions, including those requiring the offender to submit to supervision from Corrective Services NSW or participate in an intervention program and to comply with any intervention plan arising out of the program.<sup>37</sup>
- 5.38 A s 9 bond, subject to certain restrictions, can include any condition that the court considers appropriate.<sup>38</sup> Examples of additional conditions include attending counselling for drug and/or alcohol abuse, or residing at a particular rehabilitation centre.<sup>39</sup>

### *Other jurisdictions*

- 5.39 Other jurisdictions also provide for conditions that can be imposed as part of a community based order. Some make express provision for conditions that relate specifically to alcohol or drug use and treatment.
- 5.40 For example, in the Northern Territory, the court must impose at least one of the following conditions on a community based order:
- (b) the offender must:
    - (i) undergo assessment and treatment for misuse of alcohol or drugs; or
    - (ii) submit to medical, psychological or psychiatric assessment and treatment as directed by the Commissioner;
  - (c) the offender must not consume or purchase alcohol or a drug (other than as prescribed by a medical practitioner or other health practitioner).<sup>40</sup>
- 5.41 In Victoria, a court imposing a community correction order can attach a treatment and rehabilitation condition which may include “any assessment and treatment

33. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 200.

34. *Crimes (Administration of Sentences) Act 1999* (NSW) s 103(2), (3).

35. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175.

36. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 176; *Crimes (Administration of Sentences) Act 1999* (NSW) s 81.

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A(1).

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c). See also *R v Bugmy* [2004] NSWCCA 258 [61] (Kirby J).

39. Judicial Commission of NSW, *Sentencing Bench Book* [4-740].

40. *Sentencing Act* (NT) s 39F(1)(b). For community custody orders: see *Sentencing Act* (NT) s 48E(2)(b) and (5)(b) and s 48F(1)(b).

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(including testing)” for drug or alcohol abuse or dependency.<sup>41</sup> A court can also impose an alcohol exclusion order as a condition attached to a community correction order (see below).<sup>42</sup>

### *Abstinence monitoring*

5.42 In England and Wales, alcohol abstinence monitoring requirements may be imposed as part of a community order, or a suspended sentence order.<sup>43</sup> The requirement is that the offender for a specified period not exceeding 120 days must either:

- abstain from consuming alcohol, or, “not consume alcohol so that at any time during a specified period there is more than a specified level of alcohol in the offender’s body”, and
- submit to monitoring (including by electronic monitoring and other means).<sup>44</sup>

5.43 The conditions that must be met before a court can make such an order are:

- the consumption of alcohol is an element of the offence or was a factor that contributed to the offence
- the offender is not dependent on alcohol (that is, the provision is not aimed at those in need of specialist support)
- the court has not included an alcohol treatment requirement in the order, and
- monitoring is available in the relevant local justice area.<sup>45</sup>

5.44 A 12 month pilot scheme under these provisions was launched in July 2014 in four south London boroughs, with testing being carried out by a transdermal alcohol monitoring tag fitted around the ankle.

5.45 The pilot has not been evaluated but an interim summary report found a compliance rate of 94% for the 51 orders imposed over the first six months.<sup>46</sup> A final report of the evaluation is due by November 2015.

5.46 NSW Young Lawyers proposed an alcohol abstinence monitoring requirement be incorporated into intensive correction orders in NSW.<sup>47</sup>

5.47 NSW currently has mandatory interlock orders that courts can apply to people found guilty of specified offences under the *Road Transport Act 2013* (NSW). The interlock orders apply for a minimum period of 1-4 years (depending on the offence) after a period of licence disqualification during which an offender must have his or her vehicle fitted with an interlock device which prevents a vehicle from being

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41. *Sentencing Act 1991* (Vic) s 48D(3).

42. *Sentencing Act 1991* (Vic) s 48J.

43. *Criminal Justice Act 2003* (UK) s 177(1)(ja), s 190(1)(ja).

44. *Criminal Justice Act 2003* (UK) s 212A(1), (7).

45. *Criminal Justice Act 2003* (UK) s 212A(9)-(12).

46. M Pepper and P Dawson, *Alcohol Abstinence Monitoring Requirement: A mid-point process review of the proof of concept pilot - summary, Evidence and Insight* (Mayor of London’s Office for Policing and Crime, 2015) 2.

47. NSW Young Lawyers Criminal Law Committee, *Submission ADFV10*, 10-11.



started if it detects more than a certain concentration of alcohol in a breath sample.<sup>48</sup>

### *Law Reform Commission proposals*

5.48 The LRC proposed replacing the existing community based sentences with a more flexible range of custodial and non-custodial sentencing orders – community detention orders, community correction orders and conditional release orders. Each type of order involves an appropriate level of mandatory and optional conditions relating to:

- personal restrictions (for example, alcohol and drug abstention, and place and non-association restrictions),
- program participation (for example, drug and alcohol counselling and treatment) and
- supervision (for example, drug and alcohol testing).<sup>49</sup>

### **Individual bans**

5.49 In some jurisdictions, a sentencing court can ban individuals from accessing alcohol. Such bans could include prohibitions on purchasing alcohol or on frequenting particular licenced premises. Such bans could be imposed automatically on conviction, or by court order either as a sentence in its own right, or as a condition on another sentence. Bans may also be imposed outside of the sentencing context.

5.50 In Victoria, a court, when making a community correction order, may attach an alcohol exclusion condition to address the role of alcohol in the offending behaviour. The condition prevents the offender from entering or remaining in certain licensed premises or consuming alcohol in certain licensed premises.<sup>50</sup> The Director of Public Prosecutions or a police officer may also apply for an alcohol exclusion order (imposing the same restrictions as an alcohol exclusion condition), in addition to any other sentence, where the offender has, while intoxicated, committed one of a range of serious offences involving violence and sexual assault. In such cases the order takes effect when it is made in the case of a non-custodial sentence and when the offender is released if made in conjunction with a custodial penalty. Breach of such an order carries a maximum sentence of 2 years imprisonment.<sup>51</sup>

5.51 In Queensland a court can impose a banning order, on application by the prosecution or on its own motion, as part of a sentence imposed for an offence relating to violence in, or in a public place in the vicinity of, a licensed venue.<sup>52</sup> A banning order is:

48. *Road Transport Act 2013* (NSW) pt 3.3, p 7.4 div 2. See also *Road Safety Act 1986* (Vic) pt 5.

49. NSW Law Reform Commission, *Sentencing*, Report 139 ch 11 and ch 13.

50. *Sentencing Act 1991* (Vic) s 86J(2).

51. *Sentencing Act 1991* (Vic) s 89DC-89DH. See also exclusion orders under *Liquor Control Reform Act 1998* (NSW) pt 8A div 3.

52. See *Penalties and Sentences Act 1992* (Qld) pt 3B. Inserted by *Liquor and Other Legislation Amendment Act 2010* (Qld) s 1, pt 7.

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an order that prohibits an offender, for a stated period, from doing, or attempting to do, any of the following—

- (a) entering or remaining in stated licensed premises or a stated class of licensed premises;
- (b) entering or remaining in, during stated hours, a stated area that is designated by its distance from, or location in relation to, the stated licensed premises or stated class of licensed premises mentioned in an order made under paragraph (a);
- (c) attending or remaining at a stated event, to be held in a public place, at which liquor will be sold for consumption.<sup>53</sup>

5.52 Penalties for breach of a banning order are a maximum penalty of 1 year imprisonment or a fine of \$4,000.

5.53 The Criminal Justice Research Branch of the Queensland Department of the Premier and Cabinet conducted an evaluation of the first two years of the scheme in 2013.<sup>54</sup> The review found that, in the first two years of operation, courts issued 664 banning orders, and 410 were made on police application. Only 10 breaches of banning orders were detected.

5.54 The review found that stakeholders welcomed banning orders as an additional penalty for serious offenders and a useful tool for keeping troublemakers out of areas. Some stakeholders, however, noted that offenders who breach a banning order were unlikely to be detected unless their subsequent behaviour attracts police attention or they are recognised by police or others involved in the original incident that led to the ban. The review observed:

This could be viewed as a substantial limitation on the enforceability of the banning orders. On the other hand, the fact that only a small number of banning order breaches has been detected may indicate that, even if these offenders breach their banning order, they are behaving appropriately so as not to attract the attention of police.<sup>55</sup>

5.55 The review particularly noted the practical difficulties for police identifying a person in breach of an order if they did not have personal knowledge of the person and the ban.<sup>56</sup> The task of identifying people subject to a ban would be more effectively carried out by licensed venue staff, but the review found these were hampered by the limited information that police were able to supply and the practical problems for licensees maintaining records of banned drinkers in the absence of a centralised database. The review considered that the consistent use of ID scanners in drink safe precincts would assist greatly in enforcing banning orders. However, it did also

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53. *Penalties and Sentences Act 1992* (Qld) s 43I.

54. Queensland, Department of the Premier and Cabinet, Criminal Justice Research, *Drink Safe Precincts, Final evaluation: 24 Months of the trial* (2013).

55. Queensland, Department of the Premier and Cabinet, Criminal Justice Research, *Drink Safe Precincts, Final evaluation: 24 Months of the trial* (2013) 118-119.

56. Queensland, Department of the Premier and Cabinet, Criminal Justice Research, *Drink Safe Precincts, Final evaluation: 24 Months of the trial* (2013) 255-256.

note privacy concerns, costs concerns and questioned the usefulness of such technology for smaller venues with no history of trouble.<sup>57</sup>

### Seeking guideline judgments

- 5.56 Guideline judgments could be sought to reinforce the need to deter alcohol and drug fuelled violent offences by setting out consistent penalties at a level and of a type that reflects the NSW community's intolerance for these types of offences.
- 5.57 The *Crimes (Sentencing Procedure) Act 1999* (NSW) allows the CCA to issue guideline judgments.<sup>58</sup> Guidelines can apply generally, or to particular courts or classes of courts, or particular offences or classes of offences, or particular penalties or classes of penalties, or to particular classes of offenders.<sup>59</sup> Guideline judgments can be qualitative and define the relevant factors to be taken into account<sup>60</sup> - an approach that is adopted where there is a significant diversity in the circumstances in which the offence can be committed.
- 5.58 The courts have made it clear that while, in accordance with the *Crimes (Sentencing Procedure) Act 1999* (NSW), courts are to "take into account" guidelines when sentencing an offender,<sup>61</sup> they operate as a "check", or "sounding board", and not as a "rule" or "presumption".<sup>62</sup> However, where a guideline is not applied, it is expected that reasons would be stated:
- so that the public interest in the perception of consistency in sentencing decisions can be served and [the CCA] can be properly informed in the exercise of its appellate jurisdiction.<sup>63</sup>
- 5.59 The Judicial Commission of NSW has evaluated the impact of three of the guideline judgments. In each case it found significant effects on penalty levels (mostly involving increases in penalties) as well as indications of improved consistency.<sup>64</sup>
- 5.60 The Chief Magistrate supported developing a guideline judgment for alcohol and drug fuelled violence.<sup>65</sup>
- 5.61 The ODPP also supported the option of sentencing guidelines, which could serve a dual purpose of promoting a consistent message and of being able to be used to educate the community, thereby assisting in influencing cultural change. However,

57. Queensland, Department of the Premier and Cabinet, Criminal Justice Research, *Drink Safe Precincts, Final evaluation: 24 Months of the trial* (2013) 255-259.

58. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 4.

59. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36.

60. See, eg, *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327.

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36.

62. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [113].

63. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [73], [114].

64. L Barnes, P Poletti and I Potas, *Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice*, Monograph Series No 21 (Judicial Commission of NSW, 2002); L Barnes and P Poletti, *Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in R v Henry*, Sentencing Trends and Issues No 26 (Judicial Commission of NSW, 2003); and P Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues No 35 (Judicial Commission of NSW, 2005).

65. Chief Magistrate of the Local Court, *Submission ADFV03*, 3.

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the Office also noted some difficulty in developing such guidelines, including which offences it would apply to, whether it would include all offences, or only those committed in public places, and demonstrating that existing sentences are inconsistent or inadequate, and the offence is prevalent, to justify issuing such a guideline.<sup>66</sup>

- 5.62 In our 2009 report, we decided against seeking a guideline judgment from the CCA on the principles to be applied in sentencing an offender in circumstances where intoxication is an issue. There was no identified “pattern of inconsistency or misapplication of principle” to justify seeking such a judgment.<sup>67</sup>

## Non-sentencing measures

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- 5.63 We have also considered a range of non-sentencing measures that might be implemented to deter alcohol and drug fuelled violence and change behaviour.

- 5.64 A report funded by the National Drug Law Enforcement Research Fund, and published in 2015, has assessed the evidence for the effectiveness of, and support for, interventions for reducing alcohol supply, alcohol demand and alcohol-related harm.<sup>68</sup>

- 5.65 The report identified 90 general and specific interventions for alcohol supply, demand and harm reduction across Australia, including: voluntary and mandatory liquor licensing regulations; advertising and promotion restrictions; education campaigns and warning labels; limits on alcohol content; diversion programs; local government regulation; banning orders; security measures; community action projects; policing measures; transport measures; price measures and venue management.

- 5.66 The report concluded:

Use of alcohol contributes substantially to the burden of disease and harm in society. Some evidence suggests it can be reduced through applying a combination of regulatory, early-intervention, and harm reduction approaches. The diversity of research knowledge and practical experience often leads to confusing messages for practitioners wishing to reduce alcohol-related harm in their community. Much of the evidence remains of poor quality and is often of limited relevance to multiple settings. Further, a plethora of interventions have not yet been evaluated. Although great progress has been made over the past three decades, many interventions still only have evidence of efficacy, and need to be evaluated in real-world settings to establish effectiveness.<sup>69</sup>

- 5.67 We refer to some of the report’s conclusions about types of interventions that are discussed in the following paragraphs.

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66. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 4.

67. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.62]-[7.64].

68. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015).

69. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 6.

## Diversion programs

- 5.68 Diversion programs are a means of redirecting an offender who has committed an alcohol or drug-related crime away from the justice system to alternative systems such as alcohol and drug treatment programs with the aim of rehabilitating and treating their alcohol or drug abuse and/or addiction.<sup>70</sup>
- 5.69 While these diversion programs are not implemented for the general purpose of deterring individuals from alcohol and drug fuelled violence, they can address a key contributor to violent behaviour, which in turn may reduce the likelihood of reoffending.<sup>71</sup> These sorts of programs have both an educational focus as well as a focus on the treatment of offenders, with the primary aim of preventing further crime.
- 5.70 A number of diversion programs already operate in NSW (see below).
- 5.71 In our 2009 report, we considered whether to recommend extending diversionary programs to include offenders charged with or convicted of alcohol-related personal violence offences. We decided not to recommend this because most relevant offences would be too serious and/or violent for diversion, at least for adult offenders.<sup>72</sup>
- 5.72 The Chief Magistrate supported expanding and increasing funding for existing diversionary programs such as Magistrate's Early Referral into Treatment (MERIT), Court Referral of Eligible Defendants Into Treatment (CREDIT) and Life on Track.<sup>73</sup>
- 5.73 Several stakeholders noted research suggesting that the types of approaches that address re-offending successfully are court based interventions, rehabilitation and post release support programs, such as MERIT and the Drug Court.<sup>74</sup> Stakeholders also supported expanding and enhancing current programs specifically to address cultural attitudes towards drinking.<sup>75</sup>
- 5.74 The Law Society supports drug and alcohol rehabilitation services and diversionary options to deal with the underlying causes of offending, particularly MERIT and the Drug Court.<sup>76</sup>

### *Magistrates' Early Referral into Treatment (MERIT)*

- 5.75 The MERIT program is a pre-plea voluntary diversion program for Local Court defendants with drug problems. In some locations it has been extended to include defendants with alcohol problems. Alcohol MERIT developed from the Rural Alcohol Diversion pilot at Bathurst and Orange Local Court, using the MERIT model.

70. Australian Institute of Health and Welfare 2014, *Alcohol and other drug treatment and diversion from the Australian criminal justice system 2012-13*, Bulletin no. 125 (2014) 2-3.

71. T McSweeney and others, "Tackling 'drug-related' crime: Are there merits in diverting drug-misusing defendants to treatment? Findings from an Australian Case Study (2015) 0 *Australian & New Zealand Journal of Criminology* 1, 2.

72. NSW Sentencing Council, *Sentencing for Alcohol-related Violence* (2009) [7.67].

73. Chief Magistrate of the Local Court, *Submission ADFV03*, 3.

74. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 4 and Law Society of NSW, *Submission ADFV12*, 4.

75. NSW Office of the Director of Public Prosecutions, *Submission ADFV08*, 4.

76. Law Society of NSW, *Submission ADFV12*, 4.

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5.76 The program aims to reduce criminal offending associated with drug or alcohol use by allowing participants to engage in drug or alcohol treatment and rehabilitation.

5.77 Defendants can be referred for MERIT assessment by:

- police after arrest; on their own initiative or that of their legal representatives;
- a magistrate; or
- any other person (for example, a health professional, a probation and parole officer, family member or friend of the defendant).

To participate in MERIT the defendant must be a known or suspected adult drug user; while for Alcohol MERIT, the defendant must have an alcohol problem.

5.78 The Local Court's criminal practice note records:

On sentence, the successful completion of the MERIT program is a matter of some weight to be taken into account in the defendant's favour. At the same time, as the MERIT program is a voluntary opt in program, its unsuccessful completion should not, on sentence, attract any additional penalty.<sup>77</sup>

5.79 Evaluations of MERIT have found that it:

- reduces offending;<sup>78</sup>
- reduces drug use;<sup>79</sup>
- is cost effective;<sup>80</sup> and
- attracts a high level of judicial satisfaction.<sup>81</sup>

5.80 The Auditor-General's 2009 report was generally favourable, although it noted that it had not reached enough Aboriginal or Torres Strait Islander defendants.<sup>82</sup>

5.81 The LRC's sentencing report noted widespread satisfaction with the MERIT program and its ability to reduce reoffending, and considered that its operation should be broadened, including by providing Alcohol MERIT in more locations.<sup>83</sup>

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77. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.8](b).

78. R Lulham, *The Magistrates Early Referral Into Treatment Program: Impact of Program Participation on Re-offending by Defendants with a Drug Use Problem*, Crime and Justice Bulletin No 131 (NSW Bureau of Crimes Statistics and Research, 2009) 8-9.

79. NSW Health, *The Magistrates Early Referral Into Treatment (MERIT) Program: Health Outcomes* (2007) 25.

80. L Bartels, *Challenges in Mainstreaming Specialty Courts*, Trends and Issues in Crime and Criminal Justice No 383 (Australian Institute of Criminology, 2009) 3, citing Northern Rivers University Department of Health, *Evaluation of the Lismore MERIT Pilot Program - Final Report* (NSW Attorney General's Department, 2003).

81. L Barnes and P Poletti, *MERIT: Magistrates Early Referral Into Treatment Program – A Survey of Magistrates*, Monograph 24 (Judicial Commission of NSW, 2004) 50.

82. NSW, Auditor General, *Helping Aboriginal Defendants through MERIT*, Auditor-General's Report, Performance Audit (2009) 2.

83. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [16.40] and rec 16.3.

### *Life on Track program and Court Referral of Eligible Defendants Into Treatment (CREDIT)*

- 5.82 Some other pre-plea programs in the Local Court have concentrated on defendants with the highest risk of reoffending.
- 5.83 CREDIT, a pilot scheme that commenced in August 2009, provides Local Court defendants at two locations with access to a wide range of treatment options and services to assist them to reduce their likelihood of re-offending. The program directs defendants into treatment and other services including drug or alcohol assessment, treatment or support.
- 5.84 A new case management service delivered by Mission Australia under contract, Life on Track, commenced in August 2013 servicing the Local Court at seven locations. Life on Track aims to identify and address the issues that contribute to a defendant's likelihood of reoffending.

### *Drug Court*

- 5.85 The Drug Court was established under the *Drug Court Act 1998* (NSW). It manages offenders in two ways:
- It can accept offenders into the Drug Court program which, following sentence, allows the court to impose a number of conditions<sup>84</sup> that will permit the offender to remain in the community during the term of the order.<sup>85</sup>
  - It can, after a sentence of imprisonment has been imposed, order that an offender serve the sentence by way of compulsory drug treatment detention in a compulsory drug treatment correctional centre.<sup>86</sup>
- 5.86 A 2008 BOCSAR evaluation indicated that the NSW Drug Court was more cost effective and more successful at lowering the rate of recidivism than prison.<sup>87</sup>
- 1.1 BOCSAR also found that Drug Court participants, when compared with drug dependent offenders who were imprisoned, were
- 17% less likely to be convicted of a new offence;
  - 30% less likely to be reconvicted of a violent offence; and
  - 38% less likely to be reconvicted of a drug offence at any point during the follow up period (which averaged at 35 months).<sup>88</sup>
- 5.87 Compulsory drug treatment detention is an intensive program for offenders with a high risk of recidivism. It was not intended for first time offenders. An evaluation of compulsory drug treatment orders published in 2010 reported that 26 participants in

84. *Drug Court Act 1998* (NSW) s 7A(2)(e), (5)(a).

85. *Drug Court Act 1998* (NSW) s 7A(5)(b).

86. *Drug Court Act 1998* (NSW) s 18C.

87. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 12.

88. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 8-9.

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a sample size of 54 were released to parole while 26 had their CDTOs revoked.<sup>89</sup> The authors noted that, while the program appeared to be successful in effectively treating drug dependency, it was not possible, in the absence of a suitable control group, to assess whether it had successfully reduced the likelihood of relapse.<sup>90</sup>

- 5.88 Submissions to the LRC's sentencing review supported extending the Drug Court program to alcohol-addicted offenders.<sup>91</sup> The LRC did not recommend expanding the program to offenders who present with alcohol addiction but no other drug dependency because the dynamic of alcohol dependency and its contribution to criminality requires a separate response that could be dealt with through diversionary schemes such as MERIT and CREDIT and in corrections-based programs. The ODPP specifically opposed any change because alcohol addiction is often associated with violent offending, and including these offenders could significantly change the profile of offenders in the Drug Court program.<sup>92</sup>

### Individual bans

- 5.89 We have already considered individual alcohol bans in the sentencing context. Alcohol bans can also be imposed outside of any sentencing regime. For example, police officers can issue short term or temporary banning orders in prescribed or specified areas in a number of Australian jurisdictions, including NSW.<sup>93</sup>
- 5.90 Also, in NSW, long-term banning orders can be issued by the Independent Liquor and Gaming Authority in relation to high risk venues.<sup>94</sup>
- 5.91 In South Australia, under the *Liquor Licensing Act 1997 (SA)* the Commissioner of Police may, on any reasonable ground, issue an order barring a person for an indefinite or specified period from entering or remaining in specified licensed premises, licensed premises of a specified class, or licensed premises or a class of licensed premises within a specified area.<sup>95</sup> Police officers may also issue orders, subject to certain restrictions and considerations, on the authorisation of a senior police officer.<sup>96</sup>
- 5.92 In the Northern Territory, a police officer may also issue an alcohol protection order where an adult has been arrested, summonsed or served with a notice to appear in court in respect of an alleged offence of breaching an alcohol protection order or an offence punishable by imprisonment for 6 months or more and the officer believes that the adult was affected by alcohol at the time of the offence. The order prohibits

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89. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 20-21.

90. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 42.

91. Public Defenders, *Submission SE36*, 2; Law Society of NSW, *Submission SE43*, 4.

92. NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 4.

93. For example, *Liquor Act 2007* (NSW) s 116AD and s 116F, *Liquor Act* (NT) pt 10AB div 3, *Liquor Control Reform Act 1998* (Vic) pt 8A div 2.

94. *Liquor Act 2007* (NSW) s 116AE and s 116G.

95. *Liquor Licensing Act 1997* (SA) s 125A.

96. *Liquor Licensing Act 1997* (SA) s 125B.



the adult from possessing or consuming alcohol or (subject to some exceptions) entering or being in licensed premises.<sup>97</sup>

- 5.93 The Queensland evaluation of the Drink Safe Precincts reforms looked at the South Australian model, but considered that existing powers to impose conditions on bail and other policing powers were sufficient to deal with the problem. The review also considered it “appropriate that such a major limitation on a person’s freedom is imposed by a court upon conviction of a relevant offence and that the courts should continue to have a level of discretion about whether a banning order should be imposed in the particular circumstances of the case before them, rather than a banning order being mandatory upon conviction”.<sup>98</sup>
- 5.94 The report on interventions recommended further research on the use of banning orders for problem patrons:

Most states operate some system of banning orders for problem patrons. These systems vary widely and there is substantial doubt about which system works best. A further program of research around these orders is recommended, especially in relation to using this measure for domestic violence offenders.<sup>99</sup>

### Mandatory treatment

- 5.95 Mandatory treatment regimes take a medical rather than criminal approach to the problem of alcohol abuse, usually as a last resort.
- 5.96 For example, under the *Drug and Alcohol Treatment Act 2007* (NSW), involuntary detention and treatment can occur when an accredited medical practitioner issues a dependency certificate.<sup>100</sup>
- 5.97 The *Alcohol Mandatory Treatment Act* (NT) is also a last resort for people who are impaired by their misuse of alcohol and the misuse is a risk to the health, safety or welfare of the person or others. A mandatory community treatment order requires a person to undergo treatment and bans the person from possessing, consuming or purchasing alcohol. It can also require the person to undergo testing and can impose association and place restrictions.<sup>101</sup>

### Education and research

- 5.98 Educating the public about the harms associated with excessive alcohol consumption and illicit drug use often complements other related measures. It aims to change society’s attitude and culture towards substance abuse and, in particular,

97. *Alcohol Protection Orders Act* (NT) s 5 and s 6.

98. Queensland, Department of the Premier and Cabinet, Criminal Justice Research, *Drink Safe Precincts, Final evaluation: 24 Months of the trial* (2013) 254.

99. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 84.

100. The full operation of the *Drug and Alcohol Treatment Act 2007* (NSW) rendered unnecessary the *Inebriates Act 1912* (NSW) which also included provisions that operated on sentencing. The *Inebriates Act 1912* (NSW) was repealed by *Courts and Other Legislation Further Amendment Act 2013* (NSW) sch 1.13.

101. *Alcohol Mandatory Treatment Act* (NT) s 11. See also s 12 re mandatory residential treatment orders.

## Alcohol and drug fuelled violence

to address the need to encourage a culture which does not tolerate alcohol and drug-related violence.

5.99 A number of stakeholders drew our attention to a recent anthropological study of alcohol-related violence in both Australia and New Zealand suggested that culture plays a significant role in dictating the way in which people act while under the influence of alcohol.<sup>102</sup> While acknowledging that alcohol has obvious physiological effects, the study notes that it does not inherently disinhibit people to the point of violence - it does not produce violence where it doesn't already exist.<sup>103</sup> For this reason, the study suggests that the best way to address the issue of alcohol fuelled violence is to change a violent culture. This can occur through:

- targeting individuals who may have a general predisposition to violence by making sure families have a support mechanism to help reduce the likelihood of abusive and violent parenting,
- changing societal attitudes to what is acceptable when intoxicated to remove the link between alcohol and aggression, and
- educating young men about appropriate behaviours so as to reduce violence when they are intoxicated.<sup>104</sup>

5.100 The NSW Audit Office recently examined the cost to government services caused by alcohol abuse. The Performance Audit Report noted:

A range of key performance indicators show that, in general, alcohol-related incidents are declining. For example, alcohol-related assaults have decreased 23 per cent since 2008. This is a good result which may be due to proactive policing, changes to licensing laws, public education campaigns, and a range of other government initiatives.

5.101 In this context, the Office recommended that the Government:

consider additional education strategies for people, whose alcohol abuse requires a response from government services, including compulsory attendance at a course on responsible drinking or counselling sessions.<sup>105</sup>

5.102 Recent education campaigns have included the Commonwealth Government's "Be the influence" campaign (2012-2014) which aimed to change behaviours around binge drinking.<sup>106</sup> Other recent alcohol initiatives supported by the Commonwealth Department of Health<sup>107</sup> have included:

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102. Dr A Fox "Understanding behaviour in the Australian and New Zealand night-time economies – An anthropological study" (2015) *Lion*, 1, 5.

103. Dr A Fox "Understanding behaviour in the Australian and New Zealand night-time economies – An anthropological study" (2015) *Lion*, 13 and 45.

104. Dr A Fox "Understanding behaviour in the Australian and New Zealand night-time economies – An anthropological study" (2015) *Lion*, 96-98.

105. Audit Office of NSW, *Cost of alcohol abuse to the NSW Government*, Performance Audit Report (2013) 13.

106. <http://www.tacklingbingeddrinking.gov.au/>

107. <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-publth-strateg-drugs-alcohol-index.htm>

- Hello Sunday Morning which is developing a suite of evidence-based online programs that support people to make a long-term 40% reduction in their overall alcohol consumption.<sup>108</sup>
  - The Australian Drug Foundation’s Good Sports program which is a progressive, three level accreditation program that helps clubs set standards around key health issues, principally relating to alcohol but also smoking, obesity and mental health.<sup>109</sup>
- 5.103 In New Zealand, a government body, the Health Promotion Agency (HPA), provides alcohol-related advice and research and aims to reduce alcohol-related harm by national marketing campaigns, providing advice, resources and tools, supporting community action and policy advice and research.<sup>110</sup>
- 5.104 The New Zealand government established the Agency in 2012 under amendments to the *New Zealand Public Health and Disability Act 2000* (NZ). The Agency's functions, duties and powers are set out in the Act:
- (1) HPA must lead and support activities for the following purposes:
    - (a) promoting health and wellbeing and encouraging healthy lifestyles:
    - (b) preventing disease, illness, and injury:
    - (c) enabling environments that support health and wellbeing and healthy lifestyles:
    - (d) reducing personal, social, and economic harm.
  - (2) HPA has the following alcohol-specific functions:
    - (a) giving advice and making recommendations to government, government agencies, industry, non-government bodies, communities, health professionals, and others on the sale, supply, consumption, misuse, and harm of alcohol so far as those matters relate to HPA’s general functions:
    - (b) undertaking or working with others to research the use of alcohol in New Zealand, public attitudes towards alcohol, and problems associated with, or consequent on, the misuse of alcohol.<sup>111</sup>
- 5.105 HPA’s alcohol-related work is funded from a levy on alcohol produced or imported for sale in New Zealand.
- 5.106 The report on interventions specifically recommended that the National School Education Curriculum should “adopt a consistent approach to including alcohol education in schools, as part of the focus on health and wellbeing” on the basis that:
- Solid education can provide an important basis for healthier behaviour later in life and a consistent approach is strongly recommended in light of the current evidence.<sup>112</sup>

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108. <https://www.hellosundaymorning.org/>

109. <http://goodsports.com.au/>

110. <http://www.alcohol.org.nz/about-us>

111. *New Zealand Public Health and Disability Act 2000* (NZ) s 58.

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- 5.107 The report on interventions also supported mandating public messages about alcohol and its associated harms on the basis that:

Current levels of awareness and knowledge of the harms of alcohol and levels of least risk drinking remain poor. Several strategies are required to address this to ensure consumers are given adequate levels of information from which to inform their behaviour.<sup>113</sup>

### Licensing restrictions

- 5.108 Licensing restrictions, which aim to restrict access to, and the availability of, alcohol, can take a variety of forms, including lockout laws and changes in trading hours. They are common measures which have been implemented in many jurisdictions as a means of addressing alcohol and drug fuelled violence.
- 5.109 Licensing restrictions can take the form of statutory provisions or regulations. They can also take the form of codes of practice backed by legislation. For example, in South Australia, licensees must comply with the Liquor and Gambling Commissioner's codes of practice.<sup>114</sup> The codes of practice must be published in the Gazette and "without limiting the matters that may be included in a code of practice, a code of practice may include measures that can reasonably be considered appropriate and adapted to the furtherance of the objects of [the *Liquor Licensing Act 1997 (SA)*]"<sup>115</sup> A number of codes have been promulgated in South Australia, including the Commissioner's General Code of Practice,<sup>116</sup> and the Commissioner's Late Night Trading Code of Practice.<sup>117</sup> The Late Night Trading Code covers a range of matters including providing information about public transport, queue management, drink marshals, first aid, lock outs between 3am and 7am, metal detectors between 12 midnight and 3am, digital closed circuit television, preventing the supply of free alcohol between 4am and 7am, restrictions on promoting rapid or excessive consumption between 4am and 7am, service in tempered or polycarbonate glassware between 4am and 7am.

### Lock outs

- 5.110 Lockout laws stipulate the latest time of entry licenced venues will be allowed to welcome patrons onto their premises. These laws aim to prevent crime and increase safety in the areas around licensed premises as it will normally leave heavily intoxicated individuals and anyone else with the choice of remaining in the one venue or going home.

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112. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 80.

113. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 81.

114. *Liquor Licensing Act 1997 (SA)* s 42(1).

115. *Liquor Licensing Act 1997 (SA)* s 11A.

116. *Liquor Licensing (General Code of Practice) Amendment Notice 2014 (SA)* sch 1: *South Australian Government Gazette*, 27 February 2014, 1148.

117. *Liquor Licensing (Late Night Trading Code of Practice) Notice 2013 (SA)* sch 1: *South Australian Government Gazette*, 6 June 2013, 2491.

- 5.111 One study looked at the impact of implementing lockout policies in licensed premises on the Gold Coast by requiring first response operational police, during their normal operational shifts, to record details of their attendance at all events, including incidents which they believed involved alcohol, illicit drugs, and other substances. They did this for a four week period before a 3am lockout was introduced and for a four week period after. The study found that:

both the total number of incidents, as well as specific alcohol-related incidents were proportionally reduced after the introduction of the lockout hours' policy.<sup>118</sup>

- 5.112 More specifically, it revealed:

significant reductions during peak alcohol times such as on Saturday nights (9.5%) and between 3 and 6 a.m. (12.3%). ... alcohol-related disturbances were reduced by 6.2%, street disturbances by 12.3%, and sexual offences requiring police attendance dropped by 33.7%. These changes cannot be attributed to any decline that may have occurred due to corresponding trends in offence rates as offences remained relatively stable during the study period and in particular alcohol-related violence has remained consistently stable for a lengthy period.<sup>119</sup>

- 5.113 The effect of lock-out laws around Australia has been the subject of some debate. One commentator has noted the limited evidence available and suggested that "there is no obvious systemic correlation between the introduction of lockout laws and a reduction in incidences of alcohol-related violence".<sup>120</sup> For example, in South Australia, a report issued 3 months after the introduction of the Commissioner's Late Night Trading Code of Practice reported a 29% decrease in alcohol-related admissions to the Royal Adelaide Hospital and 25% reduction in alcohol-related violence and bad behaviour in Adelaide. In Victoria, on the other hand, a 2am lockout was abolished because of an alleged increase in violence. It has also been noted that research into this question has been complicated by the host of other initiatives that are often introduced along with lockouts, including increased police presence in trouble spots.<sup>121</sup>

- 5.114 The report on interventions recommended that lockouts should be comprehensively reviewed, noting that:

Lockouts are widely used throughout Australia. However, most current research remains unclear about the benefits, or suggests that the benefits may be counter-balanced by harms.<sup>122</sup>

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118. G Palk, and others, "The impact of a lockout policy on levels of alcohol-related incidents in and around licensed premises" (2010) 11 *Police Practice and Research* 5, 11.

119. G Palk, and others, "The impact of a lockout policy on levels of alcohol-related incidents in and around licensed premises" (2010) 11 *Police Practice and Research* 5, 11.

120. M Giancaspro, "Late Night Lockout Laws: Evaluating responses to alcohol-fuelled violence" (2015) 40 *Alternative Law Journal* 118, 121.

121. M Giancaspro, "Late Night Lockout Laws: Evaluating responses to alcohol-fuelled violence" (2015) 40 *Alternative Law Journal* 118, 121.

122. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 84.

### *Trading hour restrictions*

- 5.115 The report on interventions recommended that further trading hour restrictions should be “applied consistently across regions to ensure businesses can compete on a level playing field”. The report noted, in support of its recommendation:

The research evidence covered in this review shows that alcohol-related intoxication and harm increases by between 15 and 20 percent every hour of trading after midnight ... This review has also found that the most evidence-based approach to reducing intoxication levels is through closing all venues earlier ... Research has also shown that when trading hours restrictions are applied widely, they can lead to positive changes in drinking culture.<sup>123</sup>

### *Kings Cross and Sydney CBD reforms*

- 5.116 The Government introduced a range of reforms in January 2014. Some were general reforms, for example the ban on takeaway alcohol sales after 10pm across NSW. Other reforms were applied only to two designated areas - the Sydney CBD and Kings Cross - and involved a 1:30am lockout, 3:00am last drinks, and temporary banning orders for designated “trouble makers”. The Bureau of Crime Statistics and Research studied the effects of the reforms:

The results show that the January 2014 reforms were associated with immediate and substantial reductions in assault in Kings Cross and less immediate but substantial and perhaps ongoing reductions in the Sydney CBD. ... There is little evidence that assaults were displaced to areas adjacent to these Precincts or to entertainment areas within easy reach of these Precincts. The only exception to this was The Star casino, where the number of assaults increased following the January 2014 reforms. As we have already noted, the increase in assaults around the casino was much smaller in absolute terms than the fall in assaults in the Kings Cross and Sydney CBD Entertainment Precincts. The net result, therefore, appears to have been a ‘diffusion of benefits’.<sup>124</sup>

- 5.117 It is possible that the reforms and adverse publicity may have discouraged people from going to the two designated precincts and that this, rather than a reduction in alcohol consumption, may have been responsible for the reductions:

The January 2014 reforms appear to have reduced the incidence of assault in the Kings Cross and CBD Entertainment Precincts. The extent to which this is due to a change in alcohol consumption or a change in the number of people visiting the Kings Cross and Sydney Entertainment Precincts remains unknown.<sup>125</sup>

### *Improved enforcement of licensing restrictions*

- 5.118 The report on interventions recommended that greater resources should be directed to enforcing liquor licensing laws, noting in particular that:

responsible service of alcohol (RSA) measures are evidently insufficient and require more stringent regulation and more comprehensive and systematic enforcement regimes.

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123. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 82. References omitted.

124. P Menendez, and other, *Lockouts and last drinks: The impact of the January 2014 liquor licence reforms on assaults in NSW, Australia*, Crime and Justice Bulletin No 183 (2015) 8.

125. P Menendez, and other, *Lockouts and last drinks: The impact of the January 2014 liquor licence reforms on assaults in NSW, Australia*, Crime and Justice Bulletin No 183 (2015) 1.

... Police and other regulatory bodies need strong legislative frameworks to allow them to act on venues that fail to implement RSA. Relevant state legislation must allow for the straightforward identification of people who are too intoxicated to be on licensed premises (specifically defined according to evidence based signs) or served alcohol. Subsequent liquor licensing commission and judicial processes need to be streamlined so that there are significant, actual consequences for venues breaching RSA laws and that their penalties are enacted quickly. A further need exists for standardised, systematically collected, publicly available data about specific venues. This would facilitate the identification of those failing to meet their licence conditions and enable appropriate responses where required (Wiggers, 2007). It is recommended that a user-pays system of risk-based licensing be adopted in all states that incorporates a specific element for the funding of more police to enforce liquor licensing laws.<sup>126</sup>

## Pricing

- 5.119 A number of stakeholders noted that measures that address the price and availability of alcohol may be more effective than sentencing measures.<sup>127</sup> This can be achieved by direct and indirect price control and by changes to taxation and excise.
- 5.120 In the Northern Territory, indirect price control was achieved by liquor licensing restrictions that were introduced in Alice Springs. The restrictions banned the two cheapest available forms of alcohol - table wine in containers of more than 2 litres and fortified wine in containers of more than 1 litre. The National Drug Research Institute conducted a longitudinal study into the restrictions. The study showed that the consumption of alcohol significantly reduced in the region and demonstrated “the effectiveness of using a minimum unit pricing approach to achieve a planned substitution to more expensive, less harmful forms of alcohol”.<sup>128</sup>
- 5.121 The report on interventions recommended regulations to reduce discount alcohol sales, in particular, bans on “bulk-buys, two-for-one offers, shop-a-dockets and other promotions based on price”. The report noted:
- To reduce demand for alcohol, promotions used to encourage consumption will require further regulation. A wide range of research has identified the impact of such promotions in terms of increasing people’s consumption beyond their intended levels.<sup>129</sup>
- 5.122 Another study examined the effect of tax decreases and increases on the harms associated with ready to drink beverages (“alcopops”). The decrease in tax occurred with the introduction of the goods and services tax in 2000 and the increase in tax occurred when the alcopops tax was introduced in 2008. The study

126. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 82.

127. J Quilter, L McNamara, K Seear, and R Room, *Submission ADFV02*, 10 and Law Society of NSW, *Submission ADFV12*, 10 and Law Society of NSW, *Submission ADFV12*, 4.

128. National Drug Research Institute, *Alcohol Control Measures: Central Australia and Alice Springs* (paper, Appendix C to Submission 24 to Legislative Assembly of the Northern Territory Committee on Foetal Alcohol Spectrum Disorder, 2014) 4.

129. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 79.

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used the Emergency Department Data Collection of the NSW Ministry of Health. The study demonstrated a:

statistically and practically significant increased trend in the rate of acute alcohol [emergency department] presentations among 18-24 year old females following the introduction of the GST. ...

Following the alcopops tax, there were statistically significant decreased trends in the rate of acute alcohol ED presentations among males and females aged 15-50 years, and females aged 15-65 years. The greatest change was in 18-24 year old females with at least 1350 presentations avoided during the subsequent 44 months, followed by 18-24 year old males with 514 presentations avoided.<sup>130</sup>

- 5.123 Price interventions are not necessarily successful in all environments. One study, published in the *Medical Journal of Australia*, looked at whether the alcopops tax had an impact on the harms associated with alcohol consumption by examining the proportion of alcohol-related emergency department presentations at two public hospitals in the Gold Coast Health District. The study noted that initial data had suggested that there had been a substantial fall in the sales of alcopops, with a smaller shift to other beverages and a net reduction in overall sales. The study found that the proportion of alcohol-related emergency department presentations for 15–29-year-olds did not significantly fall after the introduction of the tax when compared with alcohol-related presentations in an older age group, or with non-alcohol-related presentations in the same age group. The study offered the following possible interpretations of the results:

Given the strong evidence of the effectiveness of taxation on overall alcohol consumption, one interpretation of these findings is that price influences average consumption of all drinks, but not risky consumption on a single occasion. A second is that raising the price of just one type of drink may not reduce alcohol-related harms in tourist destinations such as the Gold Coast. If the latter were true, this may raise questions about generalising from the effects of overall increases in alcohol tax or duty to initiatives that target one type of drink. If our findings hold across other health services and populations, more comprehensive approaches may be required, combining fiscal measures such as volumetric taxation for all alcoholic beverages, along with other supply and demand initiatives. These could include incentives to encourage mid-strength and low-strength beer, restrictions on the availability of drinks with a high alcohol content, more effective regulation of advertising, and increasing the age at which it is legal to drink alcohol.<sup>131</sup>

- 5.124 The report on interventions supported the reform of alcohol taxes and excises. The report observed:

Consistent with several reviews of taxation and public health, the most evidence-based measure to reduce alcohol consumption is to increase the price of alcohol. Alcohol consumption is price sensitive and even small increases in price can result in decreases in consumption and decreases in harm. Diverse models exist for reforming taxation of alcohol. A volumetric taxation system would increase price as alcohol content of beverages increases, encouraging the production and consumption of lower strength beverages. Revenue could go into general taxation. However, various indicators suggest that the community

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130. M Gale, and others, "Alcopops, taxation and harm: a segmented time series analysis of emergency department presentations" (2015) 15 *BMC Public Health* 468, 471.

131. S R Kisely, and other, "Effect of the increase in 'alcopops' tax on alcohol-related harms in young people: a controlled interrupted time series" (2011) 195 *Medical Journal of Australia* 690, 692.



would be more likely to support such a measure if it were ring-fenced to support prevention and treatment effort.<sup>132</sup>

## Regulating private events

- 5.125 Queensland has enacted provisions in the *Police Powers and Responsibilities Act 2000* (Qld) to deal with events that become “out-of-control” events.
- 5.126 Under these provisions, a police officer, once authorised to use out-of-control event powers by a senior officer, can take action to stop the event, disperse the people associated with it and identify the organisers and people involved in out-of-control conduct. The provisions also make it an offence to organise an event that becomes an out-of-control event or, as a parent, to give permission for a child to organise such an event.<sup>133</sup>
- 5.127 An event becomes an out-of-control event if:
- (a) 12 or more persons are gathered together at a place (an event); and
  - (b) 3 or more persons associated with the event engage in out-of-control conduct at or near the event; and
  - (c) the out-of-control conduct would cause a person at or near the event—
    - (i) to reasonably fear violence to a person or damage to property; or
    - (ii) to reasonably believe a person would suffer substantial interference with their rights and freedoms or peaceful passage through, or enjoyment of, a public place.
- 5.128 The Act sets out what out of control conduct is. It includes:
- (b) behaving in a disorderly, offensive, threatening or violent way ...
  - (l) being intoxicated in a public place;
  - (m) conduct that would contravene the *Liquor Act 1992*, part 6;
  - (n) conduct that would contravene the *Drugs Misuse Act 1986*, part 2.<sup>134</sup>
- 5.129 Part 6 of the *Liquor Act 1992* (Qld) contains an array of obligatory provisions and offences that apply to licenced premises and licensees, including provisions intended to ensure responsible service, supply and promotion of liquor and the preservation of local amenity. Part 2 of the *Drugs Misuse Act 1986* (Qld) sets out various offences of supply and possession as well as offences of permitting a place to be used for such activities.

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132. P Miller, A Curtis, T Chikritzhs and J Toumbourou, *Interventions for reducing alcohol supply, alcohol demand and alcohol-related harm: Final Report*, Monograph Series No 57 (National Drug Law Enforcement Research Fund, 2015) 79.

133. *Police Powers and Responsibilities Act 2000* (Qld) pt 7.

134. *Police Powers and Responsibilities Act 2000* (Qld) s 53BC.

- 5.130 The Queensland Police has developed a Party Safe Program that provides information for hosts, guests and parents and allows hosts to register their party with local police.<sup>135</sup>

### Our view

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- 5.131 In our 2009 report on sentencing for alcohol-related violence, we concluded that the courts had given sufficient guidance for sentencing offenders where intoxication was an issue, and did not recommend altering any sentencing laws or practices, creating new offences or increasing any maximum penalties.<sup>136</sup>
- 5.132 Subject to the LRC's recommendations for reform to the community-based custodial and non-custodial sentencing orders that can emphasise program participation and supervision, we remain of the view that, on the whole, current sentencing law adequately meets the challenges that are posed when sentencing offenders for offences that involve intoxication.
- 5.133 However, it is clear that the issue of alcohol and drug fuelled violence remains of great concern to the community. We therefore encourage the Government to consider a range of opportunities to reduce the incidence of such violence, ideally through prevention. In particular, we consider the following measures, which were supported by stakeholders, have the potential to deliver significant benefits:
- Education and treatment programs addressing both problematic alcohol consumption and underlying attitudes to violence, particularly directed at those who might have substance abuse problems.
  - Continuing and expanding diversion programs such as MERIT (including Alcohol MERIT) and the Drug Court.
  - Continuing to evaluate restrictions on access to alcohol through licensing measures.

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135. <https://www.police.qld.gov.au/programs/cscp/personalSafety/youth/partySafe/>

136. NSW Sentencing Council, *Sentencing for Alcohol- related Violence* (2009) [7.69].