

# SENTENCING FOR ALCOHOL- RELATED VIOLENCE

NSW SENTENCING COUNCIL

March 2009

## A report of the NSW Sentencing Council

A report of the NSW Sentencing Council pursuant to section 100J (1) (c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council—Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW). Published in Sydney by the:

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## EXECUTIVE SUMMARY

The NSW Sentencing Council has considered the incidence of and response to alcohol-related violent crime, pursuant to terms received from the Attorney General in October 2008. Specific attention was paid to an assessment of the current principles and practices governing sentencing for offences committed whilst an offender is intoxicated, as well as those 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’).

The Council directed its attention to a consideration of those offences primarily related to the infliction of physical harm. The notable offences examined comprise assaults occasioning death (murder and manslaughter); assaults involving wounding or the infliction of grievous bodily harm with intent; reckless grievous bodily harm or wounding; assaults occasioning actual bodily harm; and common assault. Consideration was given to a number of decisions, at first instance and on appeal, concerning offenders charged with these offences.

Submissions were received from 18 agencies or bodies, including the Chief Magistrate, Ministry for Police / Commissioner for Police, Office of the Director for Public Prosecutions, New South Bar Association, NSW Department of Health, and the Alcohol and Other Drugs Council of Australia. Additionally, a number of studies dealing with alcohol-related crime were reviewed, and reference made to statistics available on the Judicial Commission of New South Wales’ Judicial Information Research System (JIRS) database. Additional information, including incidents and outcomes of ‘glassing’ cases; alcohol-related offences by weapon type, and non-alcohol-related offences by weapon type, over time, was provided by the NSW Bureau of Crime Statistics and Research (BOCSAR), the Local Court and also by the Office of the Director of Public Prosecutions.

Based on the submissions received and from consultations, as well as an assessment of statistical material, caselaw and literature in this field, the Council has given consideration to a range of sentencing responses directed towards alcohol-related violence. These include the following options:

- a) adding the fact of intoxication as an aggravating factor in sentencing under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Act);
- b) amending s 21A of the Act by providing that evidence of intoxication is not to be taken into account as a mitigating factor in sentencing;
- c) leaving current sentencing law and practice untouched in relation to alcohol (or drug) related personal violence offences;
- d) creating a specific offence in relation to glassing (ie, offences where a personal injury is inflicted with the use of a glass or bottle);
- e) creating a specific offence such as the commission of a serious offence against a person while intoxicated or committing a dangerous act while intoxicated;
- f) creating an aggravated form of offence in relation to the existing personal violence offences where there is evidence that, at the time of the offence, the offender was under the influence of intoxicating liquor or a drug, with an increased penalty;
- g) recommending an increase in the maximum available penalty / and or standard non parole period in relation to the offences considered in this report;
- h) recommending that prosecutions for personal violence offences involving the use of a glass or bottle proceed on indictment;
- i) recommending that the Local Court be given the power to refer a matter to the District Court where the offence involved the use of a glass or bottle as a weapon and where it is concerned that the

jurisdictional limit of the Local Court will prevent it from imposing an adequate sentence;

- j) recommending that a guideline judgment be sought from the Court of Criminal Appeal on the principles to be applied in relation to sentencing an offender for an offence of personal violence where intoxication is an issue, or where the offence involves glassing; and
- k) extending Diversionary Programs to include offenders charged with or convicted of alcohol related personal violence offences.

The Council was satisfied that the courts have given guidance in relation to the sentencing of offenders where intoxication is an issue, and the relevant principles are neither in doubt nor overlooked by sentencing judges. Accordingly, it has not made any formal recommendation for the alteration of current sentencing laws and practices, or for the creation of any new offences to deal with alcohol related violence. Nor has it made any recommendations for an increase in the maximum penalties available for the offences examined, since it is satisfied these maximum sentences are appropriate for the potential objective seriousness involved.

It observes that for many offenders, whose immaturity and poor anger control contribute to their involvement in incidents occurring spontaneously at licensed premises, and who have no prior record of criminality, it is appropriate to preserve the existing wide sentencing discretion that will allow each case to be dealt with on its merits. It is otherwise satisfied that, for repeat offenders who have a record for violence while intoxicated, the existing sentencing laws and practice permit the imposition of appropriately condign sentences.

The Council does however recommend that careful consideration be given by the Police and the Office of the Director of Public Prosecutions, in any case involving a significant injury to the victim, to the making of an election, in accordance with the provisions of the Criminal Procedure Act, to ensure that any case for which a sentence might be

expected that would exceed the jurisdictional limit of the Local Court, is brought in the District Court (or in the Supreme Court, where the charge is one of murder).

The Council also recommends that there be an ongoing review of cases finalised in the Local Court to determine whether there is any significant body of personal violence cases, prosecuted in that Court, where its jurisdictional limit (imposition of a sentence of imprisonment of up to two years) has led to the imposition of sentences that are not commensurate with the objective seriousness of the offence and the subjective circumstances of the offender. Depending on the outcome of that review, further consideration could be given, following consultation with relevant stakeholders and examination of the likely impact on the caseloads of the Local and District Courts, to the possibility of increasing the jurisdiction of the Local Court.

The Council recommends, consistently with its previous reports, that it be given a reference to examine the procedure by which standard non parole periods should be set, and in the course thereof, to review the existing SNPPs, including those of relevance for offences embraced within the current reference.

The Council intends to monitor current cases involving alcohol related violence offences, with a view to better informing itself as to whether a guideline judgement should be sought. In support of such work it seeks the assistance of the Local and District Courts in either publishing relevant sentencing judgments or in producing copies thereof to the Council.

Otherwise, the Council takes the view that the response to alcohol related violence, and the steps required to reduce its incidence, lie more in the hands of those involved in the liquor industry and in public education, than in the criminal justice system. In this respect, it supports the introduction of strict licensing laws that will curb excessive drinking, and that will impose professional standards on bar and security staff of the kind that will allow timely and effective intervention in the kinds of

incidents, on such premises, that can erupt into violence. It also supports public education campaigns on the risks attaching to the combination of alcohol and violence, and on the destructive consequences for those who are convicted of offences in that context.



Chapter 1

**Introduction**

1.1 Following some well publicised incidents of people being attacked with glasses or bottles ('glassed') and with other implements, in licensed premises, or in the near vicinity of such premises, accompanied by the emergence of concerns as to an apparent increase in public drunkenness and binge drinking by the young, the NSW Sentencing Council was given the current reference on 30 October 2008.

## TERMS OF REFERENCE

1.2 Pursuant to s 100J of the *Crimes (Sentencing Procedure) Act 1999* (NSW) the Sentencing Council is to examine alcohol-related violent crime in accordance with the following terms of reference:

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.

## SCOPE OF THE INQUIRY

1.3 Although the terms of reference are specifically related to offences committed by persons affected by alcohol, very similar if not identical issues arise where the offender's intoxicated state is due to the



ingestion of unlawful drugs. Accordingly, in considering the relevance of intoxication in relation to the issue of guilt, and in relation to its impact on sentencing, the Council has had regard to the decisions of the courts concerning each cause of intoxication, even though their effects may not always be identical. In some instances, both causes of intoxication may be present.

1.4 In most instances the state of intoxication will arise as the result of the voluntary use of alcohol or drugs by an offender, and will answer the description of self-induced intoxication. In less frequent cases, however, the state of intoxication may arise unwittingly, so far as the offender is concerned, and be attributable to the acts of a third party either ‘spiking’ a drink with drugs or serving an alcoholic drink in the guise of a non-alcoholic drink.

1.5 The question whether the offender’s state of intoxication was self induced has a potential relevance in relation to the selection of an appropriate charge, and consequently, for the determination of guilt and for the fixing of an appropriate sentence. The inquiry of the Council is confined to the consideration of intoxication in relation to sentencing. Its relevance in relation to the issue of guilt is outside the terms of the reference given to the Council.

1.6 The offences which the Council has considered are primarily those related to the infliction of physical harm, but consideration has also been given, in passing, to the relevance of an offender’s sobriety, or lack thereof, in relation to a number of other offences.

1.7 In summary, the offences which have been the subject of specific attention, as particularised in more detail in Annexure A to this Report comprise:

- assaults occasioning death (murder<sup>1</sup> and manslaughter<sup>2</sup>);

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1. *Crimes Act 1900* (NSW) s 18.

2. *Crimes Act 1900* (NSW) s 19.

- assaults involving wounding or the infliction of grievous bodily harm with intent;<sup>3</sup>
- reckless grievous bodily harm or wounding;<sup>4</sup>
- assaults occasioning actual bodily harm;<sup>5</sup> and
- common assault.<sup>6</sup>

## METHODOLOGY

1.8 The Council invited and received submissions from 18 agencies or bodies, including the Chief Magistrate, Ministry for Police / Commissioner for Police, Office of the Director for Public Prosecutions, New South Bar Association, NSW Department of Health, and the Alcohol and Other Drugs Council of Australia. A list of the submissions received is set out in Annexure B to this Report, and where appropriate, the arguments which were advanced are noted in the succeeding chapters of this Report.

1.9 Additionally, the Council has reviewed a number of studies dealing with alcohol-related crime and has had the benefit of the statistics available on the Judicial Commission of New South Wales' Judicial Information Research System (JIRS) database and as provided by the NSW Bureau of Crime Statistics and Research (BOCSAR). It is also aware of the data arising from the Alcohol Linking Program data kept by the NSW Police Force.

1.10 In order to obtain a more detailed understanding of the incidence of alcohol-related violence, it sought and obtained additional information from the Local Court and also from the Office of the Director of Public Prosecutions, in the latter case in relation to the number of 'glassing' cases referred to that office.

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3. *Crimes Act 1900* (NSW) s 33.

4. *Crimes Act 1900* (NSW) s 35.

5. *Crimes Act 1900* (NSW) s 59.

6. *Crimes Act 1900* (NSW) s 61.

1.11 An analysis of that information is contained in Chapter Two of this Report, as the Council was concerned to ascertain whether or not there has in fact been an increase in alcohol-related violence, as well as to establish a profile of that form of criminality, in order to determine whether reform of the relevant sentencing law and practice is justified.

1.12 At the Council's request BOCSAR generated some general data detailing alcohol-related offences by weapon type, and non-alcohol-related offences by weapon type, over time, based on categories identified by NSW Police. This data enabled tentative conclusions to be drawn regarding general trends in prevalence of alcohol-related glassing matters, for example, but did not permit an analysis of trends pertaining to specific offences.

1.13 BOCSAR has advised the Council that its statistics are generated by reference to data provided by NSW Police, which depends upon police determinations of whether an offence involved alcohol and whether an incident took place on licensed premises. In contrast, the NSW Police Alcohol Linking Program data is based on reports from offenders who have been asked a series of questions about their drinking habits. This captures incidents that also occur outside licensed premises and enables a more precise picture of the geographical location of alcohol 'hotspots'. However, it is also the case that the figures recorded are likely to overstate the number of cases where the offence was linked to the offender's intoxication, since the terms 'alcohol-related' cases includes those matters where alcohol may have been merely present but had not played an integral or determinative factor in the commission of the offence.

1.14 The Council notes further that the Police Alcohol Linking Data is not publicly available, and is not the formally accepted method of recording crime data. For these reasons, it has relied upon the BOCSAR data in its subsequent analysis.

1.15 The JIRS statistics serve only to provide a broad indication of the sentence imposed for violence-related offences, and are, in any event, subject to individual differences dependent on the objective seriousness of any offence which has been included in the database, and on the subjective circumstance applicable in that case. Moreover they comprise all of the cases recorded on the database whether dealt with following conviction after trial, or following a plea of guilty, and whether or not alcohol or a weapon relevant for present purposes was used.

1.16 Where any additional information is available specific to the offences of immediate concern for this reference, particularly ‘glassing’ and the use of other offensive weapons in or near licensed premises, then these are mentioned later in this Report. The Council has not, however, overlooked the fact that a good deal of alcohol-related violence occurs in a domestic setting, and that special considerations, including alternative approaches in accordance with the domestic violence strategy, may apply.

1.17 The Council has similarly not overlooked that a wide range of weapons, answering the category of an ‘offensive weapon’, as defined in the *Crimes Act 1900* (NSW)<sup>7</sup> may be used by an intoxicated person to inflict bodily injury. In addition to a glass, or bottle (which may be deliberately smashed before use or broken during the attack), a pool cue, bar stool,<sup>8</sup> knife or other form of cutting instrument, boot or fist,<sup>9</sup> head butt,<sup>10</sup> dart, gun or any other object that may be close at hand, may be used. Depending on the force and ferocity of the attack, and whether

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7. ‘Offensive weapon or instrument means: (a) a dangerous weapon, or (b) any thing that is made or adapted for offensive purposes, or (c) any thing that, in the circumstances, is used, intended for use or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm’: *Crimes Act 1900* (NSW) s 4(1). ‘Dangerous weapon means: (a) a firearm (within the meaning of the *Firearms Act 1996*), or (b) a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*, or (c) a spear gun’: *Crimes Act 1900* (NSW) s 4(1).

8. See, eg, *R v Gunes* [1999] NSWSC 130.

9. See, eg, *R v O’Hare* [2003] NSWSC 652.

10. See, eg, *R v Carroll* [2008] NSWCCA 218.

or not it is sustained, equivalent injuries may be inflicted irrespective of the weapon used. The Office of the Director of Public Prosecutions also advised the Council of a number of ‘glassing’ cases where there is no reference to the offender being intoxicated.<sup>11</sup>

1.18 In those circumstances, it may well be the case that little is to be achieved by framing a law or sentencing principle dependent simply on the nature of the weapon used. This is an issue examined in a little more detail in the Report.

1.19 It is however observed that, insofar as there is any difference between the offence of ‘glassing’ and the other forms of assault mentioned, the former almost invariably involves an attack to the victim’s head or face. The result is a cutting wound that can result in a particularly serious injury, including the potential loss of an eye and/or disfiguring facial scarring and even death. Moreover the use of these weapons is often spontaneous and unpremeditated, the glass or bottle already being held by the offender when whatever incident leads to the attack occurs. In some cases the offender may be the original aggressor. In other cases the use of the glass or bottle or other weapon may involve excessive self defence. Each of these factors will be relevant for the sentencing process.

1.20 The Council notes that its work on this reference needs to be considered in the context of the Alcohol Summit held in 2003 and in the light of the development of a large number of strategies by the Government, that have been directed at the reduction of alcohol abuse and related violence. Some of these strategies target specific communities, including in particular the Aboriginal and Torres Strait Islander community. Some have a particular focus on domestic violence,

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11. *Ahmad v The Queen* [2004] NSWCCA 460; *R v Zamagias* [2002] NSWCCA 17; *R v La Praik* [2000] NSWCCA 273; *R v Henness* [2004] NSWCCA 50; *R v Ambrosoli* (2002) 55 NSWLR 603; *R v Willett* (Unreported, NSW Court of Criminal Appeal, 21 August 1998).

where alcohol abuse can play a significant role, while others have a more general focus on the responsible use of alcohol.

1.21 By reason of the wide reaching and on-going development of initiatives of this kind and of the increasing use of diversionary strategies for those whose criminality is related to alcohol or other substance abuse, their existence is noted, but is not the subject of specific attention by the Council, being outside its term of reference. However, for convenience of reference, a limited review of some of the diversionary programs and other strategies is included as Annexure D to the Report.

Chapter 2

**Incidence of  
Alcohol-related  
Violence**

2.1 In this chapter, the Council summarises the results of its review of the statistical and other information provided to it by the Bureau of Crime Statistics and Research (BOCSAR), the Office of the Director of Public Prosecutions (ODPP) and the Local Court, for the purpose of attempting to identify the scope of alcohol-related violence, and to note any discernable trends in its incidence.

2.2 Necessarily this review is limited, since much of the analysis is dependent on the sufficiency of the source material collected by the NSW Police. Additionally, the BOCSAR statistics are broken down into broad versions of offence and weapon categories, rather than into specific weapon or individual offence categories.

2.3 The material provided by the ODPP in relation to offences which involved the use of a glass or bottle has been back-captured from its database over a limited period (of 12 months). This material does not indicate with any degree of certainty the extent to which alcohol or other substance use was a contributing factor, although it does provide some general indication of the most common offences dealt with by that Office and how they were prosecuted.

2.4 The information provided from the Local Court is even more limited. It does not maintain any database that would permit a back-capture of the offences, dealt with in that Court, of immediate relevance for this Reference, or of their outcomes. As a result, only a relatively small number of cases have come to light, principally following inquiry of the Court by the Council following its review of media sources for cases of possible interest.

2.5 The Council recognises that any statistically valid analysis would require a much more detailed breakdown of weapon and offence categories and identification of the contribution of alcohol or drugs in each case, and it does not offer the analysis in this chapter as meeting any such standard.



2.6 Notwithstanding these qualifications, some very general trends are discernible as to the incidence of alcohol-related violence, and as to the sentencing outcomes which are reviewed in Part B of this chapter.

## **PART A: REVIEW OF STATISTICAL AND OTHER INFORMATION**

### **Incidence of alcohol-related criminal incidents in NSW compared to criminal incidents which are not alcohol-related**

2.7 The Council considered the statistics provided by BOCSAR with respect to the number of criminal incidents recorded by NSW Police and flagged as being alcohol-related. The criminal incidents are divided into three categories being; non-domestic violence related assaults, domestic violence related assaults and offensive behaviour. This data is then compared with the total number of recorded criminal incidents of non-domestic violence related assaults, domestic violence related assaults and offensive behaviour which is not specifically flagged as being alcohol-related.

2.8 The data spans a four-year period between January 2004 and December 2007. With respect to this data, the NSW Police define offensive behaviour as including both offensive conduct and offensive language.<sup>1</sup> Non-domestic related assaults and domestic related assaults are not defined and presumably are self explanatory. The data does not include assaults which occur in a custodial institution.

2.9 This data would suggest that in NSW there has been an increase in the number of alcohol-related criminal incidents between 2004 and 2007.<sup>2</sup>

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1. NSW Recorded Crime Statistics 2007: Number of criminal incidents of Non Domestic Violence related assault, Domestic Violence related assault, Offensive behaviour recorded by NSW Police that were flagged as alcohol related, by Local Government Area, (2004-2007).
  2. NSW Recorded Crime Statistics 2007: Number of criminal incidents of Non Domestic Violence related assault, Domestic Violence related assault, Offensive behaviour recorded by NSW Police that were flagged as alcohol related, by Local Government Area, (2004-2007).

## Non domestic violence related assaults

2.10 Between 2004 and 2007, alcohol-related incidents of non domestic violence related assaults increased, according to this data, by an average annual rate of 7.8% in NSW.<sup>3</sup>

## Domestic violence related assaults

2.11 Between 2004 and 2007, alcohol-related incidents of domestic violence related assaults increased, according to this data, by an average annual rate of 8.2% in NSW.<sup>4</sup>

## Offensive behaviour

2.12 Between 2004 and 2007, alcohol-related incidents of offensive behaviour increased, according to this data, by an average annual rate of 11.9% in NSW.<sup>5</sup>

## Alcohol-related violence in the Sydney Local Government Area (LGA)

2.13 In the Sydney LGA alone, 57.5% of the total number of *non domestic violence related assaults* are identified as being alcohol-related. Between 2004 and 2007 the rate of alcohol-related *non domestic violence related assaults* in Sydney LGA has experienced an average annual increase of 11.1%.<sup>6</sup> In relation to *domestic violence related assaults* in the Sydney LGA, 50.1% of all incidents are identified as being alcohol-related. Between 2004 and 2007 Sydney has experienced an average annual increase of 26.4% of alcohol-related *domestic violence related assaults*.<sup>7</sup> In relation to

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3. NSW Recorded Crime Statistics 2007: Incidents of non domestic violence related assault recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

4. NSW Recorded Crime Statistics 2007: Incidents of domestic violence related assault recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

5. NSW Recorded Crime Statistics 2007: Incidents of offensive behaviour recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

6. NSW Recorded Crime Statistics 2007: Incidents of non domestic violence related assault recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

*offensive behaviour*, in the Sydney LGA, 72.5% of all recorded offences of this kind are identified as being alcohol-related. Between 2004 and 2007 the Sydney LGA experienced a 22.4% average annual increase in the rate of alcohol-related incidents of *offensive behaviour*.<sup>8</sup>

## Alcohol-related offences compared with non-alcohol-related offences in NSW

2.14 Just under 47% (46.9%) of the total number of *non domestic violence related assaults* in 2007 were identified by Police as being alcohol-related.<sup>9</sup> Of the total number of *domestic violence related assaults* in 2007, Police identified 43.7% as being alcohol-related.<sup>10</sup> Almost three-quarters (73.7%) of the total number of *offensive behaviour* offences in 2007 were identified by Police as being alcohol-related.<sup>11</sup>

## Violence in licensed premises

2.15 The NSW Police also record the number of criminal incidents of domestic violence related assaults and *non domestic violence related assaults* and *offensive behaviour* occurring in licensed premises<sup>12</sup> according to the particular type of licensed premises.<sup>13</sup> These incidents are not flagged as being specifically alcohol-related. This information

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7. NSW Recorded Crime Statistics 2007: Incidents of domestic violence related assault recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

8. NSW Recorded Crime Statistics 2007: Incidents of offensive behaviour recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

9. NSW Recorded Crime Statistics 2007: Incidents of non domestic violence related assault recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

10. NSW Recorded Crime Statistics 2007: Incidents of domestic violence related assault recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

11. NSW Recorded Crime Statistics 2007: Incidents of offensive behaviour recorded by NSW Police by Local Government Area and alcohol related status: Number, proportion, rate and trend.

12. This does not include offences occurring just outside the licensed premises.

13. NSW Recorded Crime Statistics 2004-2007: Number of criminal incidents of assault and offensive behaviour, recorded by NSW Police as occurring on licensed premises by Local Government Area and type of licensed premises.

is recorded according to each Local Government Area and to various types of licensed premises. The study compares the number of criminal incidents occurring in bottle shops, clubs, hotel/pubs, licensed restaurants, nightclubs, wine bars and a non classified category.

2.16 The data suggests that there has been a decrease in the number of incidents of assaults in 2007 compared to 2004, in the following types of licensed premises:<sup>14</sup> clubs (with an approximate decrease of 16.5%), licensed restaurants (with an approximate decrease of 18.6%), nightclubs (with an approximate decrease of 6.5%) and winebars (with an approximate decrease of 22%).<sup>15</sup> The number of criminal incidents of assaults has however increased in number in 2007 compared to 2004 in both hotels/pubs (with an approximate increase of 21.6%), and in bottle shops (with an approximate increase of 4%).

2.17 With respect to offensive behaviour, the data suggests that there has been an increase in the total number of incidents of offensive behaviour in 2007 compared to 2004 in the following types of licensed premises<sup>16</sup>: clubs (with an approximate increase of 15.7%), hotels/pubs (with an approximate increase of 26.7%), licensed restaurants (with an approximate increase of 30%<sup>17</sup>), nightclubs (with an approximate increase of 5.2%). The incidence of offensive behaviour in winebars and bottle shops remained the same in 2007 compared to 2004.

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14. Note the following percentages have been calculated using the figures provided by BOCSAR for 2004 as compared to figures provided for 2007. They do not account for average annual percentage change during the four-year period which is a more accurate representation of change.

15. Though the sample size is small, it represents a decrease of from nine incidents in 2004 to seven incidents in 2007.

16. Note the following percentages have been calculated using the figures provided by BOCSAR for 2004 as compared to figures provided for 2007. They do not account for average annual percentage change during the four-year period which is a more accurate representation of change

## Incidence of criminal activity according to weapon type

2.18 Statistics dealing with the commission of criminal activity, analysed with reference to the type of weapon involved in the offence, were generated by the BOCSAR and provided to the Sentencing Council.

2.19 These statistics were generated by BOCSAR again using data recorded by New South Wales police in relation to criminal activity, grouped annually over the period October 2003 to September 2008. The statistics divided activity into those incidents occurring first in Sydney<sup>18</sup> and then in New South Wales, and the incidents were further grouped by way of 'weapon type'<sup>19</sup> and 'offence'.<sup>20</sup> The statistics also further grouped those offences which were considered to be 'alcohol-related', and those not considered to fall into this category. Finally, the statistics measured the average annual percentage change over the last 24 months (October 2006-September 2007 to October 2007-September 2008) and the average annual percentage change over the last 60 months (October 2003 to September 2008) for the particular groups of offences.<sup>21</sup> The data excluded incidents recorded as occurring in prisons.

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17. Though the sample size is small, it represents an increase from 10 incidents in 2004 to 13 incidents in 2007.

18. 'Sydney' refers to the Sydney Statistical Division and includes the following 43 Local Government Areas: Botany Bay, Leichhardt, Marrickville, Sydney, Randwick, Waverley, Woollahra, Hurstville, Kogarah, Rockdale, Sutherland Shire, Bankstown, Canterbury, Fairfield, Liverpool, Camden, Campbelltown, Wollondilly, Ashfield, Burwood, Canada Bay, Strathfield, Auburn, Holroyd, Parramatta, Blue Mountains, Hawkesbury, Penrith, Blacktown, Hunters Hill, Lane Cove, Mosman, North Sydney, Ryde, Willoughby, Baulkham Hills, Hornsby, Ku-ring-gai, Manly, Pittwater, Warringah, Gosford, Wyong.

19. Weapons accounted for in the statistics were divided into the following categories: boomerang; bow & arrow/crossbow/blow gun; brick/rock/stone/misile; club/iron bar/pipe; fists/feet/body; glass/bottle; hammer/spanner/wrench; knife/sword/scissors/screwdriver; oleoresin capicum spray; other prohibited weapon/dangerous article; rope/wire/whip etc; syringe.

20. Offences accounted for in the statistics were divided into the following categories: murder; non DV related assault; DV related assault; sexual assault; indecent assault/acts of indecency and other sexual offences; robbery without a weapon; robbery with a weapon not a firearm; malicious damage to property.

21. Where there was not a significant upward or downward trend BOCSAR has indicated that the trend was 'stable'; where the number of incidents recorded was too small for a reliable trend test to be performed, BOCSAR has recorded 'nc'.

## Offences involving the use of a glass/bottle

2.20 In general terms, a statistical increase in criminal offences involving the use of a glass or a bottle emerged over the period October 2003 to September 2008 both in Sydney and in NSW in relation to alcohol-related offences (some categories).

### *Alcohol-related criminal incidents involving the use of a glass/bottle in the Sydney SD*

2.21 In Sydney, over the period reviewed there was an increase in the incidence of alcohol-related domestic violence (DV) related assault, Non-DV related assault and Robbery with a weapon not a firearm:

- *DV related assaults* increased from 21 incidents in October 2003-September 2004 to 67 incidents in October 2007-September 2008, with a 33.6% annual percentage change over the last 60 months;
- *Non-DV related assaults* increased from 250 incidents in October 2003-September 2004 to 417 incidents in October 2007-September 2008, with a 13.6% annual percentage change over the last 60 months;
- *Robbery with a weapon not a firearm* increased from 21 incidents in October 2003-September 2004 to 39 incidents in October 2007-September 2008, and a 16.7% annual percentage change over the last 60 months.
- It should be noted however, that while the annual percentage change for these three categories increased over the last 60 months, the average percentage change for each over the last 24 months was stable.

2.22 With respect to crimes of alcohol-related *malicious damage to property*, the average annual percentage change over the last 24 months, and the average annual percentage change over the last 60 months was

calculated as stable.<sup>22</sup> The incidence of alcohol-related sexual assault was not statistically significant (two incidents were recorded in the period October 2004-September 2005).

*Non alcohol-related criminal incidents involving the use of a glass/bottle in the Sydney SD*

2.23 There was not a similar increase in the incidence of non-alcohol-related crime involving a glass or bottle in Sydney. In fact two offence categories were analysed as showing a decrease in the average annual percentage change:

- *DV related assault* (not alcohol-related) was analysed as showing a decrease of 18.2% in the average annual percentage change over last 60 months<sup>23</sup> and as being stable over the last 24 months.<sup>24</sup>
- *Non-DV related assault* (not alcohol-related) was analysed as showing a stable average annual percentage change over last 60 months<sup>25</sup>, however there was a decrease of 23.4% in average annual percentage change over the last 24 months.<sup>26</sup>
- *Robbery with a weapon not a firearm* (not alcohol-related) was analysed as being stable over the last 24 months<sup>27</sup> and over the last 60 months.<sup>28</sup>

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22. 41 instances in the period October 2003-September 2004, 46 instances in the period October 2006-September 2007, 27 instances in the period October 2007-September 2008.

23. 58 instances in the period October 2003-September 2004, 26 instances in the period October 2007-September 2008.

24. 23 instances in the period October 2006-September 2007 and 26 instances in the period October 2007-September 2008.

25. 131 instances in the period October 2003-September 2004 and 105 instances in the period October 2007-September 2008.

26. 137 instances in the period October 2006-September 2007 and 105 instances in the period October 2007-September 2008.

27. 50 instances in the period October 2006-September 2007 and 51 instances in the period October 2007-September 2008.

28. 45 instances in the period October 2003-September 2004 and 51 instances in the period October 2007-September 2008.

- *Malicious damage to property* (not alcohol-related) was also analysed as being stable over the last 24 months<sup>29</sup> and over the last 60 months.<sup>30</sup>

2.24 The number of incidents in the categories of *murder* and *sexual assault* were too few and not statistically significant.

#### *Alcohol-related criminal incidents involving the use of a glass/bottle in NSW*

2.25 *Non DV related assault* was the only offence group in this category where there was a statistical increase in the average annual percentage change, representing an increase of 9.6% in the average annual percentage change over the last 60 months<sup>31</sup> however it was assessed as remaining stable over the last 24 months.<sup>32</sup>

2.26 *Malicious damage to property* was the only offence group in this category where there was a decrease in the average annual percentage change. The incidence of alcohol-related malicious damage to property was analysed as decreasing by 28.8% in the average annual percentage change over the last 24 months,<sup>33</sup> however it was assessed as remaining stable over the last 60 months.<sup>34</sup>

2.27 *DV related assault* remained stable over the last 24 months<sup>35</sup> and remained stable over the last 60 months.<sup>36</sup>

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29. 79 instances in the period October 2006-September 2007 and 83 instances in the period October 2007-September 2008.

30. 85 instances in the period October 2003-September 2004 and 83 instances in the period October 2007-September 2008.

31. 474 instances in the period October 2003-September 2004 and 683 instances in the period October 2007-September 2008.

32. 612 instances in the period October 2006-September 2007 and 683 instances in the period October 2007-September 2008.

33. 104 instances in the period October 2006-September 2007 and 74 instances in the period October 2007-September 2008.

34. 99 instances in the period October 2003-September 2004 and 74 instances in the period October 2007-September 2008.

35. 145 instances in the period October 2006-September 2007 and 143 instances in the period October 2007-September 2008.

36. 110 instances in the period October 2003-September 2004 and 143 instances in the period October 2007-September 2008.



2.28 *Robbery with a weapon not a firearm* also remained stable over the last 24 months,<sup>37</sup> and remained stable over the last 60 months.<sup>38</sup>

2.29 The number of incidents in the categories of *murder* and *sexual assault* were too few and therefore not statistically significant.

*Non alcohol-related criminal incidents involving the use of a glass/bottle in NSW*

2.30 None of the offence categories were assessed as having an increase in average annual percentage over a period.

2.31 *DV related assault* was shown to have a decrease by 15.3% in average annual percentage change over the last 60 months<sup>39</sup> however it remained stable over the last 24 months.<sup>40</sup> *Non DV related assault* was found to have a decrease by 22.1% in average annual percentage change over the last 24 months,<sup>41</sup> however it remained stable over the last 60 months.<sup>42</sup>

2.32 *Robbery with a weapon not a firearm* remained stable over the last 24 months<sup>43</sup> and also remained stable over the last 60 months.<sup>44</sup>

2.33 The number of incidents in the categories of *murder*, *sexual assault*, and *other sexual offences* were too few and therefore not statistically significant.

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37. 42 instances in the period October 2006-September 2007 and 49 instances in the period October 2007-September 2008.

38. 29 instances in the period October 2003-September 2004 and 49 instances in the period October 2007-September 2008.

39. 74 instances in the period October 2003-September 2004 and 38 instances in the period October 2007-September 2008.

40. 40 instances in the period October 2006-September 2007 and 38 instances in the period October 2007-September 2008.

41. 195 instances in the period October 2006-September 2007 and 152 instances in the period October 2007-September 2008.

42. 180 instances in the period October 2003-September 2004 and 152 instances in the period October 2007-September 2008.

43. 57 instances in the period October 2006-September 2007 and 56 instances in the period October 2007-September 2008.

44. 48 instances in the period October 2003-September 2004 and 56 instances in the period October 2007-September 2008.

Other categories of weapon where significant change was observed

2.34 Generally speaking, it appears that offences involving weapon types other than a glass or bottle have remained fairly stable over the period reviewed, or that the number of instances of the offence in the period are too few to permit the detection of a statistically significant trend. The only weapon type where there has been a significant statistical increase over the past 60 months includes those that involved the use of a knife/sword/scissors/screwdriver as well as alcohol-related offences of robbery with a weapon in NSW.

## **PART B: REVIEW OF SENTENCES IN 'GLASSING' CASES - COMPARISON WITH JIRS STATISTICS**

2.35 The Council was provided with details of a number of personal violence cases by the Office of the Director of Public Prosecutions and the Chief Magistrate's Office. The 50 matters identified were all finalised within the last 12 months and all involved the use of a glass or bottle as a weapon. The offenders were charged with a range of offences, from wounding or causing grievous bodily harm with intent to cause grievous bodily harm,<sup>45</sup> through to the less serious charge of assault occasioning actual bodily harm.<sup>46</sup> The cases involved matters finalised both in the District Court and in the Local Court, as well as a small number of matters finalised in the Children's Court.

2.36 The Council compared the outcome in these matters with the statistics for comparable offences generated by the JIRS database. It is noted that the JIRS data records the outcome for all matters dealt with under each section, and does not distinguish between offences involving the use of a glass or bottle, or other form of weapon, or between those in which intoxication was or was not a factor.

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45. *Crimes Act 1900* (NSW) s 33.

46. *Crimes Act 1900* (NSW) s 59.

2.37 Although the Council recognises that a suspended sentence and a sentence of periodic detention are each encompassed within the concept of a sentence of imprisonment, for simplicity the expression ‘imprisonment’, when used in the analysis hereunder, applies (according to context) only to sentences of full-time imprisonment. Sentences involving periodic or suspended sentences are separately recorded.

### **s 33-Wounding or Grievous Bodily Harm with intent**

2.38 The offence of wounding or infliction of grievous bodily harm with intent carries a maximum penalty of imprisonment for 25 years,<sup>47</sup> and has a standard non-parole period (SNPP) of seven years.<sup>48</sup> Section 33 is a strictly indictable offence that is dealt with in the higher courts.

JIRS statistics<sup>49</sup>

2.39 There were 135 offenders sentenced for s 33 offences committed prior to 1 February 2003. One hundred and twenty-seven (127) offenders (or 94%) received sentences of full-time imprisonment. The midpoint for the term of sentence (consecutive and non-consecutive terms) was six years (17% or 21 offenders) and the midpoint for the non-parole period (NPP)/fixed term (non-consecutive terms only) was 36 months (15% or 15 offenders).

2.40 Three offenders received a suspended sentence with supervision, one offender received a suspended sentence without supervision; two offenders received periodic detention; one offender received home detention and one offender received a s 9 bond with supervision.

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47. *Crimes Act 1900* (NSW) s 33.

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D Table.

49. JIRS statistics have been obtained for offences committed before 1 February 2003 (that is before the SNPP became relevant) covering the period January 2001 to December 2007. Judicial Commission statistics have also been obtained for offences committed on or after 1 February 2003, covering the period February 2003 to December 2007. JIRS has not divided its statistics into ‘former’ and ‘new’ statistics for s 33. It is noted that the section continues to carry the same maximum penalty in its new form. Accordingly, this analysis has also not differentiated in the sample between ‘former’ and ‘new’ with respect to the s 33 charge. Shoot at, accessory, attempt, conspiracy and incite offences have been excluded from the analysis.

2.41 There were 138 offenders sentenced for offences committed on or after 1 February 2003. One hundred and twenty-seven (127) offenders (or 92%) received sentences of full-time imprisonment. The midpoint for the term of sentence (consecutive and non-consecutive terms) was six years (18% or 23 offenders), and the midpoint for the NPP/fixed term (non-consecutive terms only) was 42 months (8% or eight offenders).

2.42 Four offenders received periodic detention; three received a s 9 bond with supervision; two received a suspended sentence with supervision; one received a suspended sentence without supervision and one offender received a community service order.

#### Glassing cases reviewed by the Council

2.43 Five glassing cases were considered by the Council. These included matters brought under both the new and the former s 33. All five offenders received a sentence of full-time imprisonment of between three years and four years and 10 months. One offender received a sentence of full-time imprisonment for four years and 10 months with a NPP of two years. One offender received a sentence of full-time imprisonment for four years with a NPP of two years. Two offenders received sentences of three years full-time imprisonment with a NPP of two years. These terms were less than the JIRS midpoint according to the JIRS statistics, though still within the statistical range.

2.44 One matter was the subject of an appeal. This offender received a two-year suspended sentence in the District Court (as well as a community service order for a breach of an unrelated s 9 bond) which on a Crown appeal to the Court of Criminal Appeal (CCA) was increased to a sentence of imprisonment for four years with a two-year NPP.

## **‘Former’ s 35(1)(a) Malicious Wounding & s 35(1)(b) Maliciously Inflict Grievous Bodily Harm**

2.45 As outlined in Chapter 4, the former s 35 offence comprised malicious wounding (s 35(1)(a)) and malicious causing of grievous bodily harm (s 35(1)(b)), which carried a maximum penalty of seven years. Section 35(2) covered offences of malicious wounding or malicious infliction of grievous bodily harm in company, and carried a maximum penalty of 10 years. The section operated for offences committed on or before 27 September 2007 and did not carry a SNPP.<sup>50</sup>

### **s 35(1)(a)-Malicious wounding**

JIRS statistics <sup>51</sup>

2.46 There were 402 offenders sentenced in the Higher Courts under the former malicious wounding offence. Two hundred and fifty-nine (259) offenders (or 64%) received terms of full-time imprisonment. The midpoint for the term of the sentence was 36 months (32% or 84 offenders) (consecutive and non-consecutive terms), and the midpoint for the NPP/fixed term (non-consecutive terms only) was 18 months (32% or 72 offenders).

2.47 Sixty-eight offenders (17%) received suspended sentences with supervision and 13 offenders received suspended sentences without supervision; 22 offenders received periodic detention; 19 offenders received a s 9 bond with supervision and seven offenders received a s 9 bond without supervision; 11 offenders received a community service order; two offenders received a s 10 bond; and one offender was sentenced to ‘rising of the court’.

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50. *Crimes Act 1900* (NSW), s 35 (prior to amendments); *Crimes Sentencing Procedure Act 1999* (NSW) s 54D Table (prior to amendments).

51. Judicial Commission statistics have been obtained with respect to sentences for s 35(1)(a) and s 35(1)(b) offences in the Higher Courts covering the period January 2001 to December 2007, and in the Lower Courts covering the period July 2004 to June 2008. Aid and abet, accessory and attempt offences have been excluded from analysis.

2.48 There were 657 offenders sentenced in the Local Court. Seventy-nine (79) offenders (or 12%) received a suspended sentence with supervision. An additional 59 offenders (9%) received a suspended sentence without supervision.

2.49 Sentences of full-time imprisonment were imposed on 233 offenders (35%). The midpoint for the term of sentence was 12 months (78 offenders or 33%), and the midpoint for the NPP/fixed term was nine months. Other sentences included periodic detention (38 offenders or 6%); community service orders (84 offenders or 13%); s 9 bond with supervision (70 offenders or 11%); s 9 bond without supervision (74 offenders or 11%); fine (seven offenders or 1%); s 10 bond (11 offenders or 2%); s 10 dismissal (one offender); and 'rising of the court' (one offender).

#### Glassing cases reviewed by the Council

2.50 With respect to the cases analysed by the Council, only four offenders came within this charge category. The outcomes were respectively as follows:

- Local Court-s 9 bond (12 months) and a fine of \$1500;<sup>52</sup>
- Local Court-imprisonment for 12 months with a four month NPP. Reduced on a District Court appeal and dealt with under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW);<sup>53</sup>
- Local Court-imprisonment for two years with a 15-month NPP; and
- District Court-two years six months periodic detention with 18-month NPP.<sup>54</sup>

2.51 The term of imprisonment in the Local Court above was higher than the JIRS midpoint term for offences of the same kind.

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52. A fine of \$500 was imposed for an offence of assault occasioning actual bodily harm.

53. It is unclear from the material forwarded if this was with or without a bond.

54. A matter was taken into account on a Form 1, and a 6 month fixed term for two counts of common assault and one count of assault occasioning actual bodily harm.

## s 35(1)(b)-Maliciously inflict grievous bodily harm

### JIRS statistics

2.52 There were 362 offenders sentenced in the Higher Courts under the former maliciously inflict grievous bodily harm offence. Two hundred and forty six (246) offenders (or 68%) were sentenced to full-time imprisonment. The midpoint for the term of the sentence was 36 months (24% or 59 offenders) (consecutive and non-consecutive terms), and the midpoint for the NPP/fixed term (non-consecutive terms only) was 18 months (25% or 51 offenders).

2.53 Other sentences included suspended sentences with supervision (41 offenders or 11%); suspended sentences without supervision (17 offenders or 5%); periodic detention (40 offenders or 11%); community service orders (10 offenders or 3%); s 9 bond with supervision (six offenders or 2%); s 9 bond without supervision (one offender); and s 10 bond (one offender).

2.54 There were 617 matters dealt with in the Local Court. Seventy-five (75) offenders (or 12%) received a suspended sentence with supervision. Sentences of full-time imprisonment were imposed on 214 (or 35%) offenders. The midpoint for the term of imprisonment was at 16 months and the midpoint for the NPP/fixed term was nine months.

2.55 Other sentences included: suspended sentences without supervision (43 offenders or 7%); periodic detention (70 offenders or 11%); community service orders (100 offenders or 16%); s 9 bonds with supervision (32 offenders or 5%); s 9 bonds without supervision (65 offenders or 11%); fine (10 offenders or 2%); s 10 bond (six offenders or 1%); and s 10 dismissal (two offenders).

### Glassing cases reviewed by the Council

2.56 With respect to the cases analysed by the Council, only four offenders came within this charge category. A sentence of full-time imprisonment was imposed on two offenders who were sentenced as follows:

- District Court-six years imprisonment with a NPP of four years.<sup>55</sup>
- District Court-five years imprisonment with a NPP of three years. This sentence was reduced by the NSW CCA to a head sentence of three years nine months with a NPP of two years and three months.

2.57 Both of these terms of imprisonment were above the JIRS midpoint for similar types of offences.

2.58 The final two offenders analysed were sentenced in the Local Court. One offender received a sentence of 100 hours community service, and the other offender received a s 9 bond of 19 months (and a fine of \$750 for an assault occasioning actual bodily harm).

### **s 35(2)-Malicious wounding/grievous bodily harm in company**

JIRS statistics <sup>56</sup>

2.59 Higher Court statistics with respect to the former s35(2) malicious wounding in company contained a sample of 57 offenders. Thirty one offenders (or 54%) received sentences of full-time imprisonment. The midpoint for the term of sentence (consecutive and non-consecutive terms) was 30 months (19% or six offenders), and the midpoint for the NPP/fixed term (non-consecutive terms only) was 18 months (33% or nine offenders).

2.60 Other sentences included: suspended sentence with supervision (12 offenders or 21%); suspended sentence without supervision (five offenders or 9%); periodic detention (six offenders or 11%); community service order (one offender or 2%); s 9 bond with supervision (one offender); and s 9 bond without supervision (one offender).

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55. The offender's appeal to the CCA was dismissed and this sentence was confirmed by the Court.

56. Judicial Commission statistics have been obtained with respect to sentences for these offences in the Higher Courts covering the period December 2001 to December 2007, and in the Lower Courts covering the period July 2004 to June 2008. Accessory offences have been excluded from analysis.



2.61 Higher Court statistics with respect to the former offence of maliciously inflict grievous bodily harm in company show that of a sample of 69 offenders, 42 (or 61%) received sentences of full-time imprisonment. The midpoint for the term of sentence (consecutive and non-consecutive terms) was 36 months (26% or 11 offenders), and the midpoint for the NPP/fixed term (non-consecutive terms only) was 18 months (28% or 10 offenders). Other sentences included: suspended sentence without supervision (four offenders or 6%); suspended sentence with supervision (14 offenders or 20%); periodic detention (seven offenders or 10%); and community service order (two offenders or 3%).

2.62 Lower Court statistics with respect to the former offence of malicious wounding in company show that of a sample of 40 offenders a sentence of full-time imprisonment was imposed on 14 offenders (35%). Of those who received sentences of imprisonment the midpoint for the term of sentence was 12 months (43% or six offenders), and the midpoint for the non-parole/fixed terms was nine months (36% or five offenders). Other sentences included: suspended sentence without supervision (six offenders or 15%); periodic detention (four offenders or 10%); community service orders (five offenders or 13%); s 9 bond with supervision (one offender or 3%); and a fine was imposed on one offender.

2.63 Lower Court statistics with respect to the former offence of maliciously inflict grievous bodily harm in company, show that of a sample of 30, 19 offenders (63%) received sentences of full-time imprisonment. The midpoint for the term of sentence was 16 months (11% or two offenders) and the midpoint for NPP/fixed term was 11 months (5% or one offender).

2.64 Other sentences included: suspended sentence without supervision (three offenders or 10%); suspended sentence with supervision (one offender or 3%); periodic detention (two offenders or 7%); community service order (three offenders or 10%); and a s 9 bond was imposed on two offenders (7%).

## Glassing cases reviewed by the Council

2.65 Two District Court matters were considered by the Council. One offender was sentenced to a period of full-time imprisonment for four years with a NPP of 22 months, and the other offender was sentenced to a period of full-time imprisonment for two years 10 months with a NPP of 18 months. Both of these terms of imprisonment were above the JIRS midpoint for similar types of offences.

## New s 35(4)-Reckless wounding

2.66 The new s 35(1) recklessly cause grievous bodily harm in company carries a maximum penalty of 14 years and a SNPP of five years. The new s 35(2) recklessly cause grievous bodily harm carries a maximum penalty of 10 years and a SNPP of four years. The new s 35(3) reckless wounding in company carries a maximum penalty of 10 years and a SNPP of four years. The new s 35(4) reckless wounding carries a maximum penalty of seven years and a SNPP of three years.<sup>57</sup>

## JIRS statistics<sup>58</sup>

2.67 At the time of writing JIRS statistics were not available for the Higher Courts with respect to the new s 35(4) reckless wounding offence. Similarly there are no statistics available with respect to the Higher Courts in relation to the new s 35(1) reckless grievous bodily harm in company, s 35(2) reckless grievous bodily harm, or s 35(3) reckless wounding in company offences.

2.68 Lower Court statistics with respect to the new s 35(4) reckless wounding show that of a sample of 43 offenders, sentences of full-time imprisonment were imposed on 18 offenders (or 42%), with a midpoint for the term of sentence of 15 months (three offenders or 17%) and a midpoint for NPP/fixed term of nine months (five offenders or 28%).

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57. *Crimes Act 1900* (NSW), s 35; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D Table.

58. Judicial Commission statistics have been obtained with respect to sentences for these offences in the Lower Courts covering the period September 2007 to June 2008.

Other sentences included: suspended sentence with supervision (three offenders or 7%); suspended sentence without supervision (two offenders or 5%); periodic detention (one offender or 2%); community service order (four offenders or 9%); s 9 bond with supervision (three offenders or 7%); s 9 bond without supervision (seven offenders or 6%). One offender received a s 10 bond.

### Glassing cases reviewed by the Council

2.69 Twenty-one matters were considered in this charge category. They included ten matters that were dealt with to finality in a summary jurisdiction (Local Court and Children's Court)<sup>59</sup> and ten matters that were finalised in the District Court, either at first instance or on appeal. One matter considered on appeal was dealt with by way of a Griffiths Remand pursuant to s 11 of the *Crimes (Sentencing Procedure) Act*. The Council is not aware of the final sentence.

2.70 Ten matters were finalised in the District Court. Seven of these matters were dealt with at first instance in the District Court. Five of the seven offenders were sentenced to terms of full-time imprisonment. The sentences ranged from terms of imprisonment of three years and nine months to terms of 23 months. Non parole periods ranged from two years to eight months. The remaining two offenders were sentenced to a s 12 suspended sentence of two years, and to periodic detention for 20 months with a NPP of 10 months, respectively.

2.71 Three of the matters finalised in the District Court were by way of appeal as follows:

- Local Court-community service order of 100 hours. Reduced on appeal to a s 9 bond of 15 months.
- Local Court-s 9 bond which was breached and for which the offender was sentenced to a six months full-time imprisonment: this was reduced on appeal to a term of imprisonment of five months.

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59. Included in this number is one matter where the offender was sentenced in the Local Court and whose appeal was withdrawn at the District Court.

- Local Court-12 months with a NPP of eight months, reduced on appeal to a s 12 suspended sentence of 11 months.

2.72 Of the ten offenders who were dealt with to finality in the Local Court or Children’s Court, four offenders were sentenced to terms of full-time imprisonment ranging from 15 to 20 months, with non-parole periods ranging from six months to 15 months. These terms were equal to and above the JIRS midpoint for similar types of offences. Other sentences included: suspended sentences (two offenders) of nine months and 12 months respectively; community service orders (two offenders) of 150 and 200 hours respectively; s 9 bonds (two offenders) of 30 months and a \$1000 fine, and two years, respectively.

### **s 35(1), s 35(2), s 35(3) offences**

2.73 There is limited data with respect to the new s 35(1), s 35(2), and s 35(3) offences. No matters were forwarded in relation to s 35(3) reckless wounding in company; only two cases related to s 35(2) recklessly cause grievous bodily harm; only two cases related to s 35(1) recklessly cause grievous bodily harm in company.

#### **Glassing cases reviewed by the Council**

2.74 The offenders in the two cases considered under s 35(1) were sentenced to a term of full-time imprisonment at first instance. One matter was the subject of an appeal to the District Court as a result of which the sentence was reduced to a term of periodic detention of two years with a NPP of 18 months. The second offender was sentenced in the Local Court to an 18-month s 12 suspended sentence which was later breached. As a consequence the offender was sentenced to a term of full-time imprisonment of 18 months with a NPP of four months.

2.75 The offenders in the two cases considered under s 35(2) were sentenced to a term of full-time imprisonment by the District Court. The first offender was sentenced to a term of full-time imprisonment of four years with a NPP of 22 months. The second offender was sentenced

to a term of full-time imprisonment of two years 10 months with a NPP of 18 months.

### **s 59-Assault occasioning actual bodily harm**

2.76 The offence of assault occasioning actual bodily harm<sup>60</sup> carries a maximum penalty of imprisonment for five years. The offence does not attract a SNPP.<sup>61</sup>

JIRS statistics <sup>62</sup>

2.77 Higher Court statistics with respect to assault occasioning actual bodily harm show that of a sample of 463 offenders a sentence of full-time imprisonment was imposed on 44% or 203 offenders, with a midpoint for the term of sentence (consecutive and non-consecutive terms) of 24 months (51 offenders or 25%) and the midpoint for the NPP/fixed term (non-consecutive terms only) of 12 months (77 offenders or 45%).

2.78 Other sentences included: suspended sentence without supervision (24 offenders or 5%); periodic detention (16 offenders or 3%); community service order (37 offenders or 8%); s 9 bond with supervision (61 offenders or 13%); s 9 bond without supervision (33 offenders or 7%); s 10 bond (nine offenders or 2%); fine (two offenders); s 10 dismissal (eight offenders); and 'rising of the court' (two offenders).

2.79 Lower Court statistics show that of a sample of 8014 offenders, a sentence of full-time imprisonment was imposed on 1205 offenders (15%). Of those who received a sentence of imprisonment, the midpoint for the term of the sentence was 12 months (349 offenders or 29%) and the midpoint for the NPP/fixed term was 6 months (337 offenders or 28%). Other sentences included: suspended sentence with supervision

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60. *Crimes Act 1900* (NSW) s 59 (1).

61. *Crimes Act 1900* (NSW) s 59; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D Table.

62. Judicial Commission statistics have been obtained for the Higher Courts for the period January 2001 to December 2007 (s 59(1)), and December 2001 to December 2007 (s 59(2)), and for the Lower Courts for the period July 2006 to June 2008 (s 59(1)) and July 2004 to June 2008 (s 59(2)).

(571 offenders or 7%); suspended sentence without supervision (288 offenders or 4%); periodic detention (138 offenders or 2%); community service order (631 offenders or 8%); s 9 bond without supervision (2229 offenders or 28%); fine (871 offenders or 11%); s 10 bond (690 offenders or 9%); and s 10 dismissal (101 offenders or 1%). Thirteen offenders received a s 10A dismissal, six offenders were sentenced to 'rising of the court' and one offender received a sentence of home detention.

#### Glassing cases reviewed by the Council

2.80 With respect to the cases analysed by the Council, eight matters were considered in this charge group. One of these matters was finalised in the Local Court by way of a community service order of 250 hours. The remaining seven matters were finalised by way of a severity appeal to the District Court in the following manner:

- Local Court sentence of three months periodic detention reduced on appeal to s 12 suspended sentence of nine months.
- Local Court sentence of six months periodic detention reduced on appeal to s 12 suspended sentence of 12 months.
- Local Court sentence of 200 hours community service order reduced on appeal to a fine of \$500.
- Local Court sentence of a \$750 fine reduced on appeal to a s 10 bond.
- Local Court s 12, suspended sentence of two years which was breached and replaced by a term of full-time imprisonment of two years with a NPP of 12 months, reduced on appeal to a term of two years full-time imprisonment with a NPP of seven months.
- In two matters the appeals to the District Court were dismissed and the Local Court sentences were confirmed-comprising a sentence of 12 months full-time imprisonment with a NPP of six months, and a sentence of 21 months full-time imprisonment with a NPP of 12 months.

## s 59(2)-Assault occasioning actual bodily harm in company

2.81 Assault occasioning actual bodily harm in company<sup>63</sup> carries a maximum penalty of 7 years. The offence does not attract a SNPP.<sup>64</sup>

### JIRS statistics

2.82 There were 133 matters dealt with in the Higher Courts. Almost half of these offenders received a sentence of full-time imprisonment (62 offenders or 47%). Of those who received sentences of imprisonment, the midpoint for the term of sentence (consecutive and non-consecutive terms) was 18 months (11 offenders or 18%) and the midpoint for the NPP/fixed term (non-consecutive terms only) was 12 months (28 offenders or 55%).

2.83 Other sentences included: periodic detention (11 offenders or 8%); suspended sentence with supervision (20 offenders or 15%); suspended sentence without supervision (six offenders or 5%); community service order (nine offenders or 7%); s 9 bond without supervision (11 offenders or 8%); a s 9 bond with supervision (nine offenders or 7%); and a s 10 bond (three offenders or 2%). One offender received a s 10 dismissal, and one offender was sentenced to 'rising of the court'.

2.84 Lower Court statistics of a sample of 299 indicate that sentences of full-time imprisonment were imposed on 63 offenders (21%). Other sentences included: suspended sentence with supervision (33 offenders or 11%); suspended sentence without supervision (17 offenders or 6%); periodic detention (17 offenders or 6%); community service order (65 offenders or 22%); s 9 bond with supervision (27 offenders or 9%); s 9 bond without supervision (57 offenders or 19%); fine (15 offenders or 5%); s 10 bond (four offenders or 1%) and one offender received a s 10 dismissal.

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63. *Crimes Act 1900* (NSW) s 59 (2).

64. *Crimes Act 1900* (NSW) s 59; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D Table.

### Glassing cases reviewed by the Council

2.85 Only two matters were available for analysis in this charge category. Both matters were finalised in the Local Court. One offender was sentenced to 12 months imprisonment with a nine-month NPP, and the second offender was sentenced to a community service order of 150 hours.<sup>65</sup>

### Other charges

2.86 There were two remaining sentence matters considered by the Council, as follows:

- Affray-one offender was sentenced in the Local Court to a s 9 bond of 18 months (and with respect to a breach of s 10 bond was sentenced to a s 9 bond for 12 months).
- Affray-one offender was sentenced in the Local Court to a s 12 suspended sentence of 12 months. This was reduced on a District Court appeal to a s 9 bond of 10 months.

## OBSERVATIONS

2.87 The data provided to the Council from BOCSAR suggests that alcohol-related offending has increased significantly over the past four years. Alcohol is involved in almost half of all of the identified assault offences and almost three-quarters of all offensive behaviour incidents. It is difficult to know to what extent alcohol has contributed to the commission of the offence as there is no information provided by the data collated by BOCSAR and collected by the Police, as to the level of intoxication in each incident.

2.88 The rate of alcohol-related criminal incidents involving the use of glass or a bottle as a weapon, according to the data collated by BOCSAR, has increased significantly over the past 60 months. This is particularly the case with respect to domestic violence related offences.

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65. This offender was also sentenced to a s 9 bond for two years for an affray charge.



This has not been matched by increases in criminal incidents involving the use of other weapons (apart from those involving knives/swords/scissors/screwdrivers).

2.89 It is acknowledged that the sample of glassing cases available to the Council was very small and therefore drawing conclusions from the data is inherently problematic. A general overview of the glassing cases considered demonstrates that sentences were imposed which ranged from a s 10 through to full-time imprisonment. However, it should be noted that the s 10 option was rarely used, as of the 50 matters analysed only two offenders were dealt with in this way. In one of the matters where a written judgment was available it is noted that in making its determination with respect to a s 10(1)(b) the Court referred to a range of factors including the appellant's good character, lack of antecedents, the fact of the appellant's profession as a nurse, and her good prospects of rehabilitation.<sup>66</sup>

2.90 Half of the offenders in the glassing cases analysed (25 of the 50 offenders), were sentenced to terms of full-time imprisonment. In relation to the most serious charge of s 33, all of the offenders in the glassing cases were sentenced to terms of full-time imprisonment for periods in excess of two years. This is consistent with the JIRS statistics which showed that 94% of offenders sentenced for offences committed before 1 February 2003 and 92% of offenders sentenced for offences committed on or after 1 February 2003 received sentences of full-time imprisonment for offences under this section.

2.91 Considering sentences in the context of the jurisdictional limits of the Local Court, it can be seen that only two of the glassing cases examined received a sentence at the level of the maximum jurisdictional limit of two years imprisonment. Of these two offenders, the first received a NPP period of seven months and the other offender received a NPP of 15 months.<sup>67</sup> The remaining terms of imprisonment for those

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66. *Re Hunt* (Unreported, Wagga Wagga District Court 28 August 2008).

who were sentenced within the summary jurisdiction (either finalised summarily or on appeal to the District Court) ranged between five months and 21 months.

2.92 In approximately 84% of matters<sup>68</sup> (21 of the 25 matters) where terms of full-time imprisonment were handed down, special circumstances must have been found as the ratio between the balance of the term and the non-parole period departed from the statutory ratio.<sup>69</sup>

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67. An additional offender received a sentence of the maximum unit of two years periodic detention (with a non parole period of 18 months periodic detention).

68. One of the 25 matters where a term of full-time imprisonment was handed down was a fixed term of imprisonment.

69. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

Chapter 3

**Intoxication  
Principles**

3.1 Intoxication can have a relevance both in relation to guilt, and in relation to sentence. The applicable principles are summarised in this chapter, as required by the terms of reference.

## INTOXICATION AND GUILT

### Common law

3.2 At common law it was the case that evidence of self-induced intoxication was relevant in relation to any criminal offence to determine whether a defendant acted voluntarily and intentionally.<sup>1</sup>

### *Crimes Act 1900* (NSW)

3.3 The common law relating to self-induced intoxication was abolished following the amendment of the *Crimes Act 1900* (NSW) by the introduction of Part 11A,<sup>2</sup> in relation to self-induced intoxication.

3.4 Intoxication is defined for the purposes of that Part to mean, 'intoxication because of the influence of alcohol, a drug or any other substance'; while self-induced intoxication is defined to mean any intoxication except intoxication that:

- a) is involuntary, or
- b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or
- c) results from the administration of a drug for which a prescription is required in accordance with the prescription of a medical practitioner, a person authorised under the *Nurses and Midwives Act 1991* to practise as a nurse practitioner or a midwife practitioner, or dentist, or of a drug for which no prescription is required administered for the purpose, and in accordance with the dosage level recommended, in the manufacturer's instructions.<sup>3</sup>

3.5 A distinction is drawn in this part between 'offences of specific intent', being offences 'of which an intention to cause a specific result is

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1. *R v O'Connor* (1980) 146 CLR 64, although the correctness of that view was challenged by the House of Lords in *R v Majewski* [1977] AC 443.

2. *Crimes Act 1900* (NSW) s 428H.

3. *Crimes Act 1900* (NSW) s 428A.

an element',<sup>4</sup> of which examples are provided in a Table to the Act,<sup>5</sup> and other offences.<sup>6</sup>

3.6 The effect of the distinction is to render self-induced intoxication irrelevant in relation to mens rea for the second group of offences,<sup>7</sup> while preserving the relevance of intoxication as a matter going to intention for offences of specific intent, unless the offender has 'resolved before becoming intoxicated to do the relevant conduct, or became intoxicated in order to strengthen his or her resolve to do the relevant conduct'.<sup>8</sup>

3.7 Otherwise the Act provides that evidence of self-induced intoxication cannot be taken into account in determining whether an offender's conduct was voluntary.<sup>9</sup>

3.8 Specific provision is made in relation to murder and manslaughter, the effect of which is that if the offender is acquitted of murder by reason of evidence of his or her intoxication, then that evidence cannot be taken into account in determining whether the offender has the requisite mens rea for manslaughter, where the intoxication is self-induced.<sup>10</sup>

3.9 While the Council is not concerned to inquire into the appropriateness of this scheme in relation to the issue of guilt, it does have a relevance for sentencing. That arises by reason of the fact that these provisions may result in an offender whose intoxication was self-induced being acquitted of a crime of specific intent and convicted

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4. *Crimes Act 1900* (NSW) s 428B.

5. The offences of current relevance involving personal violence identified in this Table include murder and associated offences involving acts done with intent to murder or attempt (*Crimes Act 1900* (NSW) 19A, ss 27-30); wounding or grievous bodily harm with intent (s 33); assault with intent to have sexual intercourse (s 61K).

6. *Crimes Act 1900* (NSW) s 428D such as reckless grievous bodily harm or wounding (s 35), causing grievous bodily harm (s 54), assault occasioning actual bodily harm (s 59) or common assault (s 61).

7. *Crimes Act 1900* (NSW) s 428D.

8. *Crimes Act 1900* (NSW) s 428C.

9. *Crimes Act 1900* (NSW) s 428G.

10. *Crimes Act 1900* (NSW) s 428E.

of an alternative and lesser offences of basic or general intent (e.g. manslaughter rather than murder, or reckless grievous bodily harm or wounding rather than wounding or grievous bodily harm with intent). The result will be to attract a lower maximum penalty and usually a lesser sentence.

3.10 It may be noted, in passing, that the effects of self-induced intoxication are disregarded for the purpose of determining whether a person is or is not liable for murder by reason of the defence of substantial impairment by abnormality of the mind.<sup>11</sup>

3.11 Where there is an underlying pathological infirmity of the mind that is triggered by intoxication producing a mental state consistent with the M'Naughten rules the defence of mental illness will be available.<sup>12</sup>

3.12 In relation to self defence, intoxication remains relevant for the question whether it is reasonably possible that the accused believed it was necessary to do what was done in self defence, but not to the question whether the response was a reasonable response in the circumstances as perceived by the accused.<sup>13</sup>

3.13 In relation to sexual assault offences,<sup>14</sup> self-induced intoxication is not relevant when determining whether the accused knew that the victim did not consent to sexual intercourse.<sup>15</sup>

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11. *Crimes Act 1900* (NSW) s 23A(3) and *R v Ryan* (1995) 90 A Crim R 191.

12. *R v Falconer* (1990) 171 CLR 30 and *R v Derbin* [2000] NSWCCA 361; cf the provisions in force in South Australia pursuant to the *Criminal Law Consolidation Act 1935* (SA) s 269A, in the Northern Territory (*Criminal Code Act 1984* (NT) ss 43A and 43C), Queensland (*Mental Health Act 2000* (Qld) s 10 and *Criminal Code Act 1899* (Qld) ss 27-28), Western Australia (*Criminal Code Act 1913* (WA) s 28), and in Tasmania (*Criminal Code Act 1924* (Tas) s 17(1)).

13. *R v Katarzynski* [2002] NSWSC 613, in which it was held that the current provisions of Part 11A required a departure from the common law as determined in *Zecevic v DPP* (Vic) (1987) 162 CLR 645 and considered in *R v Conlon* (1993) 69 A Crim R 92.

14. Specifically those arising under ss 61I, 61J, 61JA.

15. *Crimes Act 1900* (NSW) s 61HA(3).

3.14 As a further factor in ensuring that evidence of intoxication is not inappropriately used to the advantage of an offender, the Act provides:

If, for the purposes of determining whether a person is guilty of an offence, it is necessary to compare the state of mind of the person with that of a reasonable person, the comparison is to be made between the conduct or state of mind of the person and that of a reasonable person who is not intoxicated.<sup>16</sup>

### Intoxication as an element of the offence

3.15 Intoxication can also be an element of an offence. For example, under s 52A(1)(a) of the *Crimes Act*, dangerous driving occasioning death, and s 52A(3)(a), dangerous driving occasioning grievous bodily harm, the fact that the driver was 'under the influence of intoxicating liquor or of a drug' constitutes an element of the offence. These are offences of strict liability, and therefore mens rea is not required. Moreover the Act provides for aggravated forms of these offences, with a consequent increase in the maximum penalty,<sup>17</sup> one of the relevant circumstances of aggravation being that at the time of impact causing death or grievous bodily harm 'the prescribed concentration of alcohol was present in the accused's breath or blood.'<sup>18</sup>

3.16 This form of provision provides a potential precedent for legislating for a separate offence that would include the fact of intoxication as an element or that would alternatively provide for an aggravated form of the offence, in each instance exposing the offender to a potential increase in the maximum available sentence, and/or as a circumstance attracting a standard non parole period.<sup>19</sup>

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16. *Crimes Act 1900* (NSW) s 428F.

17. *Crimes Act 1900* (NSW) ss 52A(2), (4).

18. *Crimes Act 1900* (NSW) s 52A(7)(a).

19. It may however be noted that a defence is available if the death or grievous bodily harm occasioned by the impact was not in any way attributable to the fact that the person charged was under the influence of intoxicating liquor or of a drug or combination of drugs: *Crimes Act 1900* (NSW) s 52A(8).

## RELEVANT SENTENCING PRINCIPLES

### Introduction

3.17 Assuming that the offender has been convicted, either of an offence of specific or general intent, the fact of intoxication can have a relevance both as an aggravating or mitigating factor. It is not specifically mentioned in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), nevertheless it may become a factor bearing upon the presence or otherwise of one or more of the aggravating or mitigating factors mentioned in that section; and also upon an assessment of whether an offence falls in the mid-range of objective seriousness, where the offence attracts a standard non-parole period.

3.18 As a general proposition it may be recognised that in most instances, except in circumstances where acute intoxication or long standing abuse has resulted in some form of permanent mental abnormality or state of automatism, intoxication will not deprive a person of the capacity to form an intention to perform an act or to achieve an identifiable result. Generally, its effect is to reduce inhibition, impulse control and judgment. It may also affect an individual's understanding of the position in which he finds himself. On occasions it might excite feelings of bravado or bravery which lead the person to carry out some act which they would not contemplate when sober.

3.19 Intoxication is not confined to persons of poor character or criminal disposition. Many persons of otherwise good character do abuse alcohol from time to time, not all of whom go on to commit criminal offences when intoxicated.

3.20 It is against this backdrop and the several strategies outlined in subsequent chapters that have been directed towards responsible alcohol use and safety in licensed premises through the presence of security staff, restrictions on the provision of alcohol to intoxicated persons, varying closing hours, and serving drinks in plastic cups, that the issues in this reference need to be addressed.



## Intoxication as a mitigating or aggravating factor

3.21 Assuming the offender has been convicted, either of an offence of specific or general intent, the fact of intoxication can have a relevance both as an aggravating or mitigating factor. In a decision regularly cited in this context, Hunt J observed:

Only one matter of general principle was debated, and that was the extent to which the appellant was entitled to have his intoxication at the time of this offence taken into account in mitigation. The degree of deliberation shown by an offender is usually a matter to be taken into account; such intoxication would therefore be relevant in determining the degree of deliberation involved in the offender's breach of the law. In some circumstances, it may aggravate the crime because of the recklessness with which the offender became intoxicated; in other circumstances, it may mitigate the crime because the offender has by reason of that intoxication acted out of character. (I have not intended by those examples to limit the extent to which intoxication may be taken into account: see, generally, *Regina v Sewell* (1981) 5 A Crim R 204 at 207.) Where the reason for the offender's intoxication is a self-administered drug rather than alcohol, the cases suggest that that fact may well be more likely to aggravate than to mitigate.<sup>20</sup>

3.22 Additionally it has been recognised that on occasions it may be a neutral factor being relevant only to explain the context in which the offence occurred.<sup>21</sup>

3.23 This can apply, for example, in the case of an offender who regularly consumes alcohol and whose overreaction or reflex action to a perceived threat was induced by alcohol.<sup>22</sup>

3.24 It may also be noted that in *R v Thomas*, Howie J observed:

The law rarely regards voluntary intoxication by alcohol as a mitigating factor when sentencing for serious criminal offences. Even more rarely, if at all, does it take into account, by way of

20. *Coleman v The Queen* (1990) 47 A Crim R 306, 327 (Finlay and Allen JJ agreeing).

21. *R v Fletcher-Jones* (1994) 75 A Crim R 381; *Mackey v The Queen* [2006] NSWCCA 254; *R v Davies* [2007] NSWCCA 178, [27]; *R v Russell* (Unreported, NSW Court of Criminal Appeal, 21 June 1996); *R v Orth* [2000] NSWCCA 126, [16]; *R v Risteski* [1999] NSWSC 1248; *R v O'Hare* [2003] NSWSC 652.

22. *R v Davies* [2007] NSWCCA 178, [27].

mitigation, that the offender was intoxicated by reason of his or her voluntary consumption of illegal drugs.<sup>23</sup>

3.25 Additionally it is appropriate to note the caution given in *R v Mitchell*:

Violence on the streets especially by young men in company and under the influence of alcohol or drugs is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence.<sup>24</sup>

3.26 This was a case involving a sustained and brutal attack by two offenders in which the Court noted that the serious nature of the injury sustained was relevant to the assessment of the objective seriousness of the offence and the sentence. It may also be noted that McCellan CJ at CL in *R v Carroll*, a case of manslaughter in which the death of the victim was caused by a headbutt by an offender affected by alcohol observed:

Indiscriminate acts of violence of the type committed by the respondent which lead to the death of another deserve severe punishment. It will be a rare case where the appropriate punishment for a manslaughter committed in these circumstances does not involve a term of full time custody. This was not such a rare case. The community has a justifiable concern about the level of violence associated with young people and alcohol in our community. Where that violence results in a death of another the community rightly expects the courts to impose a sentence which not only provides appropriate punishment but which will unequivocally send a message that violence is unacceptable.<sup>25</sup>

## Intoxication as a mitigating factor

3.27 Intoxication may mitigate the objective criminality of the offence where it indicates that the capacity of the offender to exercise judgment was impaired or where it indicates impulsivity and lack of planning in the commission of the offence.

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23. *R v Thomas* [2004] NSWCCA 291, [52].

24. *R v Mitchell* (2007) 177 A Crim R 94, [29]; and see also *R v Henderson* (Unreported, NSW Court of Criminal Appeal, 5 November 1997); *R v Mitchell* (2007) 177 A Crim R 94, [34].

25. *R v Carroll* [2008] NSWCCA 218, [21]. Leave to appeal to the High Court granted 13 February 2009.

3.28 In *Waters v The Queen* the Court found that the applicant was highly intoxicated at the time of committing the offences, which the sentencing judge had assessed as being 'at the lower end of the scale'.<sup>26</sup>

James J (with whom the other members of the Court agreed) stated:

The fact that an offender was intoxicated at the time of committing an offence is not of itself a reason for mitigating the sentence which should be imposed on the offender. However, the fact that an offender was intoxicated at the time of committing the offence may be taken into account as mitigating the objective criminality of the offence, insofar as it indicates that the offence was impulsive and unplanned and that the offender's capacity to exercise judgment was impaired. See *R v Henry* (1999) 46 NSWLR 346 per Wood CJ at CL at 397-398 (273). In the present case, it is clear that, by reason of his state of intoxication, the applicant's conduct was impulsive and unplanned and his capacity to exercise judgment was seriously impaired.<sup>27</sup>

3.29 Similarly, it may mitigate the objective seriousness of the offence where the offender was uncharacteristically drunk and acted irrationally by reason of the effects of his intoxication.<sup>28</sup>

3.30 Where the offence can be said not to have been out of character, it will not, however, automatically follow that the fact of intoxication will amount to a factor of aggravation. In some such cases<sup>29</sup> this fact will be neutral. Whether or not it will be regarded as an aggravating factor will depend on considerations of the kind next mentioned.

### Intoxication as an aggravating factor

3.31 Intoxication may constitute an aggravating factor where an offender has a history of committing alcohol-related offences, and is aware of his propensity for violence in those circumstances.

3.32 In one such case, involving an offence of manslaughter McInerney J observed:

26. *Waters v The Queen* [2007] NSWCCA 219, [25].

27. *Waters v The Queen* [2007] NSWCCA 219, [38].

28. See, eg, *Stanford v The Queen* [2007] NSWCCA 73, [56]; *R v Mostyn* (2004) 145 A Crim R 304; *XY v The Queen* [2007] NSWCCA 72, [28]-[31].

29. *Coleman v The Queen* (1990) 47 A Crim R 306; *R v Gordon* (1994) 71 A Crim R 459; *R v Henderson* (Unreported, NSW Court of Criminal Appeal, 5 November 1997).

It is quite clear that the applicant was aware of his alcohol problem. It was open to his Honour to conclude on the evidence that he had the foresight to know that drinking alcohol had caused him to assault the victim on a previous occasion, and, despite that knowledge, and even allowing for the fact that his self control is not that of an ordinary individual, his Honour in my view was clearly entitled to come to the conclusion on the facts of the case before him that it was reckless for him in those circumstances to again drink considerably to excess. As his Honour found, he had consumed an extraordinarily large amount of alcohol and by doing so he had aggravated the seriousness of his offence.

This was not a case of a person not given to an excessive consumption of alcohol on an occasion drinking alcohol and committing a crime. This was a case of a man who quite clearly had a considerable problem with alcohol who must have realised, and did realise, that when drinking he could lose his self-control; he had done so on previous occasions and particularly in respect to this victim. In those circumstances, it is my view that it was clearly open to his Honour to conclude, as he did, having regard to all the facts, that it was reckless on the part of the applicant to consume an extraordinarily large amount of alcohol and by doing so aggravated the offence. In my view, there is no substance in this ground of appeal.<sup>30</sup>

3.33 Other illustrations of courts following this course can be seen in the case of offenders with significant histories of alcohol abuse and offending, whose recklessness or deliberateness in repeating that behaviour has been regarded as a factor of aggravation.<sup>31</sup>

## Nature of weapon

3.34 Sentencing courts have recognised that the nature of the weapon used has a direct relevance to the objective seriousness of the offence, and hence to the fixing of an appropriate sentence. In this respect, it is well settled that the use of a knife in the commission of a crime is regarded with particular abhorrence, and will attract a significant sentence.<sup>32</sup>

30. *R v Carlson* (Unreported, NSW Court of Criminal Appeal, 25 November 1996).

31. *R v Hines* (Unreported, NSW Court of Criminal Appeal, 25 May 1998); *Wright v The Queen* [2008] NSWCCA 282.

32. *R v Doorey* [2000] NSWCCA 456; [26], *R v Underhill* (Unreported, NSW Court of Criminal Appeal, 9 May 1986) and *R v Rothapel* (Unreported, NSW Court of Criminal Appeal, 4 August 1992).

3.35 There is no reason in principle why a similar approach should not be taken in relation to the use of a glass or a bottle to inflict an injury, having regard to the manner in which such implements are used, and the nature of the facial or head injuries which are likely to result.<sup>33</sup>

## Intoxication and Aboriginal Australians

3.36 The relevance of intoxication for the sentencing of indigenous offenders was considered in *R v Fernando*<sup>34</sup> where the following propositions were stated:

(a) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.

(b) The relevance of the aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

(c) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(d) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(e) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can

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33. See further discussion in this respect in Chapter 4 of this Report.

34. *R v Fernando* (1992) 76 A Crim R 58.

and should be taken into accounts as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(f) That in sentencing persons of aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(g) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

(h) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.<sup>35</sup>

3.37 On occasions, it has been held that this factor should be taken into account as a mitigating factor.<sup>36</sup>

## Impact of rehabilitation

3.38 The fact that an offender who committed an offence while intoxicated has a problem with alcohol can be relevant for the issue of rehabilitation, particularly where efforts have been made to address that issue, although it is only one of several factors to be taken into account.<sup>37</sup>

35. *R v Fernando* (1992) 76 A Crim R 58, 62-3.

36. See, eg, *Rogers v The Queen* (1989) 44 A Crim R 301, 305; *Juli v The Queen* (1990) 50 A Crim R 31, 36.

37. *R v Mitchell* (2007) 177 A Crim R 94, [34]; *R v Jerrard* (1991) 56 A Crim R 297, 302-3; *R v Fryar* [2008] NSWCCA 171, [49].

## Special circumstances

3.39 The extent to which the offender's state of intoxication can be taken into account in determining whether special circumstances should be found, justifying a variation in the statutory ratio between the non-parole period and the balance of the term<sup>38</sup> was considered in *R v Fryar* where Fullerton J observed:

I am satisfied that in the process of what must be seen to be a forced detoxication from alcohol the respondent has a clearer insight into the precursors to his serious criminal offending and the impact of his behaviour upon others, most importantly upon the victim. Although his prospects of rehabilitation must be somewhat guarded, and the reduced risk of his re-offending wholly dependent upon an acknowledgement of his dependence on alcohol and a determination to embrace a fresh approach to social integration in the future with the personal and public responsibilities that this entails, I do consider it should be afforded weight in the sentencing exercise.

I am also satisfied that a finding of special circumstances is warranted since the sentence he is currently serving is his first custodial sentence, and there is a need for extended supervision on his release in order to address his alcohol dependency and his related mental health issues. I note in that connection the recommendation of the Probation and Parole officer that his pre-release case management should include an assessment for the violent offenders therapeutic program which is facilitated from Long Bay Correctional Centre. That is consistent with the view of that officer that the respondent was suitable for medium level intervention upon his release including strategies to address alcohol dependency and related mental health conditions such as anger management issues.<sup>39</sup>

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38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

39. *R v Fryar* [2008] NSWCCA 171, [50]-[51].





Chapter 4

**Review of Decisions  
in Relation to  
Alcohol-related  
Violence**

4.1 In this chapter, the Council examines a number of cases where the offender has been charged with an alcohol-related personal violence offence. The review does not purport to be an analysis of all such cases dealt with in recent times. It is primarily concerned with offences committed with the use of a glass or bottle, however several other decisions are examined, in recognition of the fact that the use of other offensive weapons, and the act of punching or kicking another, can result in serious personal injury or even death.

4.2 In this review the Council has not overlooked the fact that intoxication may also have a direct impact on the commission of offences relating to property and public order, as well as a variety of offences involving fraud and dishonesty. However, while noting that the principles summarised in Chapter 3 concerning the relevance of intoxication to sentencing are of general application, it regards the latter group of offences as being outside its terms of reference. Accordingly, it has not undertaken any further review of offences other than those involving personal violence.

## MURDER AND MANSLAUGHTER

4.3 For murder the maximum available sentence is life imprisonment.<sup>1</sup> A standard non-parole period (SNPP) ranging between 20 and 25 years applies, depending on the age and occupation of the victim. For manslaughter the maximum available sentence is 25 years.<sup>2</sup>

4.4 An illustration of a glassing murder committed by a juvenile offender is provided the case of *R v MB*.<sup>3</sup> In this matter the juvenile offender and a group of youths from a local football team, some of whom had brought alcohol with them, became involved in an altercation in the street with the deceased and a friend of the deceased. The Court found that the group of youths were the aggressors and instigators of

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1. *Crimes Act 1900* (NSW) s 19A.

2. *Crimes Act 1900* (NSW) s 24.

3. *R v MB* [2006] NSWSC 1164.

the altercation, and that the deceased had been victorious in an initial fist fight with the offender.<sup>4</sup> At this point the offender who had taken a bottle from another member of his group

bent down to break it on the road and then ran at the deceased striking him with the broken bottle in the neck. The blow was downward in a stabbing motion and with such force that it chipped one of the deceased's bones in his face. It severed his throat and he bled to death while his friend tried vainly to administer aid to him to stem the loss of blood.<sup>5</sup>

4.5 The Court described the attack in the following terms:

The offence is a serious example of homicide notwithstanding the Crown's concession. The offender must at least have intended to inflict grievous bodily harm of a very severe kind. He might not have intended to strike the deceased in the throat, but he armed himself with what was a very dangerous weapon and struck at the deceased with a forceful blow in the direction of his torso. The consequences of such a blow could have only been very serious injury indeed and the offender must have intended this result when he deliberately broke the bottle.<sup>6</sup>

4.6 The Court found that the incident was not provoked,<sup>7</sup> that it was not planned,<sup>8</sup> and that the offender was not intoxicated to any significant degree.<sup>9</sup> It was held to have fallen within the mid-range of objective seriousness, and but for the youth of the offender and prospects of rehabilitation, it would have attracted the standard non-parole period.

4.7 Howie J described the use of the glass bottle in the following terms:

Although the offender was not going about in public armed, he did obtain a very dangerous weapon intending to attack the deceased when the deceased was unprepared and unable to defend himself. It was an act that was as cowardly as it was brutal. The offence was in company, and it was committed in circumstances giving

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4. *R v MB* [2006] NSWSC 1164, [6], [7], [10], [25].

5. *R v MB* [2006] NSWSC 1164, [10].

6. *R v MB* [2006] NSWSC 1164, [25].

7. *R v MB* [2006] NSWSC 1164, [22], [25].

8. *R v MB* [2006] NSWSC 1164, [26].

9. *R v MB* [2006] NSWSC 1164, [27].

rise to a considerable affront to public order in general and to the ordinary members of the public who were lawfully in the vicinity of the club.<sup>10</sup>

4.8 His Honour denounced the type of behaviour exhibited throughout the incident and stated:

It should be of considerable concern to this community that supposedly worthwhile young men, members of a local football team, under the legal drinking age can be out at night in a group consuming alcohol in a public place and acting aggressively to some perfectly innocent citizens who they happen to come across. Unfortunately this type of behaviour is not uncommon and the sentence imposed upon the offender must to a significant degree denounce public violence by drunken youths and act as a deterrent to others who might think it appropriate to act in a similar way.<sup>11</sup>

4.9 The importance of general deterrence in sentencing public violence offences involving the use of a glass or bottle was emphasised as follows:

I have already indicated my opinion that general deterrence is important in dealing with offences of public violence committed by groups of young males. Further the use of bottles or glasses to inflict serious injuries on other persons in places where alcohol is being consumed is itself all too common. Therefore the court should clearly denounce such conduct and seek to deter it by the imposition of severe sentences where the injuries inflicted are grave.<sup>12</sup>

4.10 The sentence imposed was one of imprisonment comprising a non-parole period (NPP) of 15 years and six months, and a balance of term of six years and six months.

4.11 This can be compared with several cases of manslaughter committed by young offenders who became involved unexpectedly in incidents in public, and responded spontaneously but aggressively although without any specific intention to kill or cause grievous bodily harm. In most instances those offenders had been initially charged with

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10. *R v MB* [2006] NSWSC 1164, [26].

11. *R v MB* [2006] NSWSC 1164, [23].

12. *R v MB* [2006] NSWSC 1164, [28].

murder, but were sentenced for manslaughter after pleading guilty to that lesser offence.

4.12 Some of these cases involved a punch or head butt by an offender, when affected by alcohol, with the devastating although not uncommon consequence of an inter-cranial haemorrhage. They include:

- *R v Risteski*,<sup>13</sup> in which a sentence of imprisonment for five years and six months with a NPP of three years and six months was imposed;
- *R v O'Hare*,<sup>14</sup> in which a sentence of imprisonment for six years with a NPP of three years and six months was imposed;
- *R v Kwon*,<sup>15</sup> in which a sentence of imprisonment for two years and eight months with a NPP of one year and eight months was held on a Crown appeal to have been too lenient, but allowed to stand, in the exercise of the Court's discretion; and
- *R v Carroll*,<sup>16</sup> in which a sentence of imprisonment comprising a NPP of 18 months with a balance of term of 18 months, which was directed to be served by way of periodic detention, was varied, upon a Crown appeal, to require the NPP to be served by way of full-time custody.

4.13 Another offence involved the use of a bar stool which was picked up by the offender in the course of a brawl involving him and a number of other persons in a hotel bar, which resulted in a sentence of imprisonment for three years, with a NPP of one year and six months.<sup>17</sup>

4.14 Otherwise a useful review of the principles and decisions relating to the sentencing of young offenders for manslaughter, arising as the result of fighting in public places, in this case involving a single

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13. *R v Risteski* [1999] NSWSC 1248.

14. *R v O'Hare* [2003] NSWSC 652.

15. *R v Kwon* [2004] NSWCCA 456.

16. *R v Carroll* [2008] NSWCCA 218.

17. *R v Grenenger* [1999] NSWSC 380.

punch causing the head of the victim to strike the ground, but not being a case in which the offender was affected by alcohol or drugs, is provided in the dissenting judgment of McClellan CJ in *KT v The Queen*.<sup>18</sup> The majority held that the sentence of six years imprisonment, with a NPP of four years imposed in that case was within the proper discretionary exercise of the sentencing judge.

4.15 These cases serve to demonstrate the manner in which the courts have dealt with young persons, more often than not affected by alcohol and drugs, whose irresponsible, although unplanned, conduct has had fatal consequences. A review of the decisions underlines the extent to which the Court has found it necessary to concentrate on the varying subjective circumstances of the offenders, and particularly on the interests of rehabilitation, which underlie the concept of individualised sentencing.

4.16 It can be seen that the sentence imposed for manslaughter, in the limited number of cases reviewed, fell well short of the statutory maximum, and was also on the low side of the range of the sentences imposed for that offence generally.<sup>19</sup> They have also tended to be below the sentences imposed for alcohol-related s 33 offences.

4.17 The explanation for this is likely to be reflected in the fact that the s 33 offences included the element of intent to cause grievous bodily harm, whereas the manslaughter cases did not depend upon specific intent, and were likely to have been the result of some spontaneous act with unexpectedly serious consequences.

4.18 Additionally, manslaughter encompasses such a wide variety of objective conduct and subjective circumstance that little assistance can be provided by comparing individual cases, or by reference to the statistics (other than as a very broad historical review of the range of sentences imposed).

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18. *KT v The Queen* [2008] NSWCCA 51.

19. As disclosed by the JIRS statistics.

4.19 The one case of murder by glassing reviewed would seem to have been well within the range, and although the NPP fell below the SNPP the sentencing judge made it clear that it would have been imposed but for the offender's age and the need to promote his rehabilitation.

## WOUNDING OR GRIEVOUS BODILY HARM WITH INTENT TO CAUSE GRIEVOUS BODILY HARM

4.20 This offence is now charged under the current version of s 33 of the *Crimes Act*, which applies to offences committed after 15 February 2008; earlier offences were charged under the former s 33, the mental element for which required the act to be carried out maliciously and with intent to cause grievous bodily harm. The offence carries a maximum penalty of imprisonment for 25 years, and a SNPP of seven years applies.

4.21 There have been a number of glassing cases prosecuted under the section or its predecessor, occurring spontaneously, in licensed premises, and in circumstances where the offender was affected by alcohol or had, at least, consumed alcohol before committing the offence. They include:

- *R v Zamagias*<sup>20</sup> in which the NSW Court of Criminal Appeal on a Crown appeal, quashed a suspended sentence of imprisonment for two years and replaced it with one of imprisonment for three years with a NPP of two years and three months;
- *R v Henness*<sup>21</sup> in which the sentence imposed and confirmed on appeal with an adjustment to the commencement date, was one of eight years with a NPP of six years;
- *Heron v The Queen*<sup>22</sup> in which the Court reduced the original sentence of imprisonment for seven years and six months with a NPP of five

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20. *R v Zamagias* [2002] NSWCCA 17.

21. *R v Henness* [2004] NSWCCA 50.

22. *Heron v The Queen* [2006] NSWCCA 215.

years and six months, to one of imprisonment for seven years with a NPP of four years;

- *Mackey v The Queen*<sup>23</sup> in which the Court confirmed the sentence of 10 years and eight months with a NPP of eight years; and
- *R v Jenkins*<sup>24</sup> in which the Court held that although lenient, the sentence of imprisonment for five years with a NPP of two years and six months was within the permissible range.

Each was a case where the offender was convicted after trial.

4.22 Other cases, involving punches or kicks, again occurring spontaneously and in circumstances where the offenders were affected to some degree by alcohol and/or drugs, which were dealt with after guilty pleas, may be noted:

- *R v Henderson*<sup>25</sup> in which a sentence of imprisonment for 11 years with a minimum of eight years was confirmed on appeal;
- *R v Jione*<sup>26</sup> in which on a Crown appeal, the original sentence of imprisonment for five years with a NPP of five years was increased to one of imprisonment for 12 years with a NPP of eight years; and
- *R v Mitchell*<sup>27</sup> in which original sentences of eight years with a NPP of four years (Mitchell), and five years two months with a NPP of two years and six months (Gallagher), were increased respectively to sentences of imprisonment for 12 years with a NPP of seven years (Mitchell), and for nine years and four months with a NPP of five years (Gallagher).

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23. *Mackey v The Queen* [2006] NSWCCA 254.

24. *R v Jenkins* [2006] NSWCCA 412.

25. *R v Henderson* (Unreported, NSW Court of Criminal Appeal, 5 November 1997).

26. *R v Jione* [2007] NSWCCA 170.

27. *R v Mitchell* (2007) 177 A Crim R 94.



## RECKLESS GRIEVOUS BODILY HARM OR WOUNDING

4.23 This offence is now charged under the current version of s 35 of the *Crimes Act 1900* (NSW) which applies to offences committed after 27 September 2007, and carries maximum penalties ranging from imprisonment for seven years with a SNPP of three years for reckless wounding<sup>28</sup>, 10 years with a SNPP of four years for reckless wounding in company<sup>29</sup> and for reckless grievous bodily harm<sup>30</sup> and 14 years with a SNPP of five years for reckless grievous bodily harm in company.<sup>31</sup> Earlier offences were charged under the previous version of s 35 of the *Crimes Act*, the mental element for which required the offence to be carried out maliciously, and which attracted lesser maximum sentences for maliciously inflicting grievous bodily harm, namely imprisonment for seven years<sup>32</sup> or for 10 years where the offence was committed in company.<sup>33</sup>

4.24 In *Sayin v The Queen*,<sup>34</sup> Howie J noted the difference between s 33 and s 35 offences in that while under s 35 there may be an intention to injure, what is required under s 33 is a specific intention to cause grievous bodily harm.<sup>35</sup> His Honour noted, additionally in relation to sentencing for an offence of reckless grievous bodily harm:

The offence, popularly known as “glassing”, is becoming so prevalent in licensed premises that there are moves on foot to stem the opportunity for the offence to be committed by earlier closing times and the use of plastic containers. The courts clearly must impose very severe penalties for such offenders, but of course within the limits afforded by the prescribed maximum penalty. In light of the fact that the maximum penalty for an offence under s35(2), recklessly inflict grievous bodily harm, is now 10 years imprisonment, the increased maximum penalty should result in a marked increase in the penalty for offences of this nature.<sup>36</sup>

28. *Crimes Act 1900* (NSW) s 35(4).

29. *Crimes Act 1900* (NSW) s 35(3).

30. *Crimes Act 1900* (NSW) s 35(2).

31. *Crimes Act 1900* (NSW) s 35(1).

32. *Crimes Act 1900* (NSW) s 35(1).

33. *Crimes Act 1900* (NSW) s 35(2).

34. *Sayin v The Queen* [2008] NSWCCA 307.

35. *Sayin v The Queen* [2008] NSWCCA 307, [9].

36. *Sayin v The Queen* [2008] NSWCCA 307, [47].

4.25 *Sayin* was a case in which the victim was punched in the face while drinking at a hotel with a glass that shattered, occasioning an injury to his eye and two front teeth, a fractured nose and lacerations, leaving him with facial scarring and possible neural damage. The sentence initially imposed of five years and nine months imprisonment with a NPP of three years was reduced on appeal to one of imprisonment for three years and nine months with a NPP of two years and three months, error having been found in that the sentencing judge punished the offender for a specific intent that would have been relevant for a s 33 offence but not for a s 35 offence.

4.26 Some illustrations of unpremeditated and spontaneous glassing cases occurring in licensed premises where the offender was affected by alcohol, or after leaving such premises while still affected, prosecuted under these provisions can be noted:

- *R v Willett*<sup>37</sup> in which a sentence of imprisonment of 20 months with a minimum term of five months was confirmed on appeal;
- *R v Mendez*<sup>38</sup> in which a sentence of four years imprisonment with a NPP of two years and three months was confirmed on appeal;
- *R v Mauri*<sup>39</sup> in which a sentence of four years imprisonment with a NPP of nine months was reduced on appeal to one of three years imprisonment with a NPP of nine months;
- *Andrews v The Queen*<sup>40</sup> where a sentence of imprisonment for two years and three months with a NPP of one year and eight months was confirmed on appeal;
- *R v Davies*<sup>41</sup> where a suspended sentence of imprisonment for 10 months was held to be within the range of sentencing discretion for the particular circumstance of the case;

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37. *R v Willett* (Unreported, NSW Court of Criminal Appeal, 21 August 1998).

38. *R v Mendez* [2002] NSWCCA 415.

39. *R v Mauri* [2005] NSWCCA 272.

40. *Andrews v The Queen* [2007] NSWCCA 68.

41. *R v Davies* [2007] NSWCCA 178.

- *Wright v The Queen*<sup>42</sup> where a sentence of imprisonment of six years with a NPP of four years was confirmed on appeal; and
- *Nowak v The Queen*<sup>43</sup> where a sentence of imprisonment of three years with a NPP of one year was confirmed on appeal.

4.27 A close reading of these decisions points to the wide variation in the objective and subjective circumstances which led to the range of sentencing outcomes noted, including for example cases where the offender had not consciously used a glass in his hand when striking the victim.<sup>44</sup>

## SEXUAL ASSAULT

4.28 Although peripherally within the reference, it is commonly the experience in the cases of sexual assault charges under one or more of the provisions contained in Part 3 Division 10 of the *Crimes Act*, that the offender was affected by alcohol and/or drugs at the time of the commission of any such offence.

4.29 As noted previously, voluntary intoxication in these cases is irrelevant in relation to the voluntariness of the offender's act, or as to his knowledge as to whether the victim was or was not consenting to it (ie, where absence of consent or knowledge is an element).

4.30 Its relevance for sentencing was considered in *R v Russell*,<sup>45</sup> a Crown appeal against the leniency of the sentence of imprisonment for six years with a minimum term of four years, that was imposed upon the respondent following his plea of guilty to charges of aggravated sexual assault without consent and of attempted aggravated sexual assault without consent.<sup>46</sup> Each offence occurred in the early hours of the morning after the respondent forced his way into the flat of the victim who had previously been unknown to him. The sexual assault

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42. *Wright v The Queen* [2008] NSWCCA 282.

43. *Nowak v The Queen* [2008] NSWCCA 89.

44. *R v Mauri* [2005] NSWCCA 272.

45. *R v Russell* (Unreported, NSW Court of Criminal Appeal, 21 June 1996).

46. Contrary to *Crimes Act 1900* (NSW) s 61J.

was sustained and the victim received a number of physical injuries. The offender had a criminal history as well as an alcohol and drug addiction.

4.31 The sentencing judge found that there was some mitigation called for because the offences were out of character being the offender's first offences of a sexual or violent nature, and because the present offences were committed whilst he was under the influence of drugs and alcohol.

4.32 On appeal the Court held that the ingestion of drugs and alcohol by the offender should not have been treated as having any mitigating effect. In this respect it was noted that, at the time of the offence, the offender was subject to a parole condition requiring him to undertake drug and alcohol rehabilitation, and that he must have been aware that drugs and alcohol has led him into criminal conduct in the past.

4.33 Taking into account the aggravating factors attributable to the element of home invasion, injury and terror to the victim, and the degrading nature of the assault, after allowance for the double jeopardy involved in a crown appeal, the sentence was increased to one of eight years imprisonment with a NPP of five and a half years.

4.34 While intoxication may reduce the inhibitions, or even enhance the libido, of a sexual offender, it would be a rare case where the fact of intoxication could be properly taken into account as a mitigating factor, as subsequent decisions suggest.<sup>47</sup>

4.35 Offences of this kind, while sometimes impulsive, are unlikely to occur in circumstances corresponding to the spontaneous use of a glass or bottle by an intoxicated offender in a hotel altercation. Very often they will be premeditated and, where involving children they will on occasions be motivated by paedophilic tendencies. In those circumstances it is likely that the presence of intoxication will be regarded as a neutral factor, unless the offender has a record for similar

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47. See *R v Kite* [2008] NSWDC 7 – a case involving the sexual assault of a 6 year old girl.

offending whilst affected by alcohol, which would deny him any claim to having acted out of character.<sup>48</sup>

## OTHER OFFENCES

4.36 While the offences of murder, manslaughter, wounding or grievous bodily harm with intent and reckless grievous bodily harm or wounding, are likely to be the most common offences charged where an offender affected by alcohol causes significant injury to another person with a glass or bottle, or other weapon, or with a fist, boot or head butt, clearly there are other offences which can be charged where an injury occasioned by one or other of these weapons is less serious and not of a permanent nature, or where the objective criminality is either likely to be less than that required for the offences above mentioned or is such as to require a deterrent sentence (eg, in relation to assaulting police). These include:

- assault occasioning actual bodily harm,<sup>49</sup> which attracts a maximum penalty of imprisonment for five years or seven years when committed in company, and for which there is no SNPP;
- common assault<sup>50</sup> which attracts a maximum penalty of two years imprisonment;
- causing grievous bodily harm by unlawful or negligent act or omission,<sup>51</sup> which attracts a maximum penalty of two years imprisonment; and
- assaults in relation to police and other law enforcement officers<sup>52</sup> including:
  - assaulting (or throwing a missile at ...) a police officer in the execution of that officer's duty, where actual bodily harm is not

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48. See, eg, *R v Fletcher-Jones* (1994) 75 A Crim R 381; *R v Orth* [2000] NSWCCA 126.

49. *Crimes Act 1900* (NSW) s 59.

50. *Crimes Act 1900* (NSW) s 61. The offence carries a maximum of 12 months if prosecuted in the Local Court.

51. *Crimes Act 1900* (NSW) s 54.

52. *Crimes Act 1900* (NSW) ss 60–60A.

occasioned, which attracts a maximum penalty of five years imprisonment, and seven years imprisonment if this occurs during a public disorder;<sup>53</sup>

- assaulting a police officer in the execution of that officer's duty where actual bodily harm is occasioned, which attracts a maximum penalty of seven years imprisonment, and nine years imprisonment if this occurs during a public disorder;<sup>54</sup>
- reckless wounding or grievous bodily harm to a police officer in execution of that officer's duty which attracts a maximum penalty of 12 years imprisonment, and 14 years imprisonment if this occurs during a public disorder;<sup>55</sup>
- assaulting (or throwing a missile at ... ) a law enforcement officer in the execution of that officer's duty, where actual bodily harm is not occasioned, which attracts a maximum penalty of five years imprisonment, and seven years imprisonment where actual bodily harm is occasioned;<sup>56</sup> and
- reckless wounding or grievous bodily harm to a law enforcement officer in execution of that officer's duty which attracts a maximum penalty of 12 years.<sup>57</sup>

4.37 Additionally there are a range of other offences, which might be committed by an intoxicated person, involving the use of a glass or bottle, including for example:

- use or possession of an offensive weapon or threatening injury, with intent to commit an indictable offence, or with intent to resist arrest etc;<sup>58</sup>
- throwing objects at vehicles or vessels;<sup>59</sup>

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53. *Crimes Act 1900* (NSW) ss 60(1), 60(1A).

54. *Crimes Act 1900* (NSW) s 60(2), s 60(2A).

55. *Crimes Act 1900* (NSW) ss 60(3)–60(3A).

56. *Crimes Act 1900* (NSW) ss 60A(1), 60A(2).

57. *Crimes Act 1900* (NSW) s 60A(3).

58. *Crimes Act 1900* (NSW) s 33B.

59. *Crimes Act 1900* (NSW) s 49A.

- affray;<sup>60</sup> and
- destroying or damaging property and associated offences.<sup>61</sup>

4.38 Additionally there are any number of other offences relating to damage to property, offences in relation to transport services, arson and setting bushfires, as well as serious driving offences and the stealing or hijacking of motor vehicles, in relation to the commission of which intoxication may have been a contributing factor.

4.39 The Council has regarded these other offences as being outside its terms of reference, although it notes that the general sentencing principles in relation to the relevance of intoxication will apply to them. It also cautions that any significant amendment to the sentencing law or practice in relation to intoxication in the context of a particular physical setting, or involving the use or possession of a particular weapon, may have to be considered in the light of its potential impact upon a number of other offences.

## **SOME ADDITIONAL CONSIDERATIONS RELATING TO GLASSING OFFENCES**

4.40 In addition to the general principles outlined in Chapter 2, which impact on the relevance of intoxication for personal violence offences, several principles established by the Court of Criminal Appeal (CCA) specific to glassing offences, or observations concerning these offences, may be mentioned.

### **Judicial comments with respect to the seriousness of using 'glass' in the commission of offences**

4.41 There has been considerable judicial comment with respect to the seriousness of using a glass or bottle in the commission of personal violence offences.

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60. *Crimes Act 1900* (NSW) s 93C.

61. *Crimes Act 1900* (NSW) ss 195–196.

4.42 In *R v Bradford*<sup>62</sup> (an appeal against conviction and sentence in relation to an assault occasioning actual bodily harm occurring in the early hours of the morning at a hotel, where the applicant ‘grabbed one side of the complainant’s head and struck him with a glass in the neck’, inflicting a ‘nasty gash’ prior to the commencement of a short fight), the CCA commented that the sentencing judge was correct in taking a ‘dim view of a man using a glass on another person in the course of a dispute and fight’. The Court later stated, ‘[a]n attack using a glass is serious’.<sup>63</sup>

4.43 In *R v Brown*<sup>64</sup> (a matter involving an appeal against sentence with respect to an offence of assault occasioning actual bodily harm by an offender who, having consumed an amount of alcohol as well as valium, became involved in an altercation with the victim, struck him with the jagged end of a bottle of port occasioning a wound that required suturing),<sup>65</sup> Sharpe J stated:

Whilst recognising that the major offence could not be described as the most seriousness in this category, an assault involving the use of the jagged end of a broken bottle must be considered as a grave offence and one calling for a custodial sentence.<sup>66</sup>

4.44 In *R v Zamagias*<sup>67</sup> (a case concerned with the use of broken glass in the commission of an offence of malicious wounding with intent to cause grievous bodily harm that occurred in the early hours of the morning at a hotel), the CCA stated:

the importance of the fact that the offence occurred without significant premeditation is diminished, in my view, by the intention with which the wound was inflicted. The respondent deliberately armed himself with broken glass either before or during his attack upon the victim. He was prepared to use a weapon capable of inflicting life-threatening injuries with the intention of inflicting really serious injury on a person who was unarmed and virtually unable to defend himself from such an attack.<sup>68</sup>

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62. *R v Bradford* (Unreported NSW Court of Criminal Appeal, 14 February 1995).

63. *R v Bradford* (Unreported NSW Court of Criminal Appeal, 14 February 1995).

64. *R v Brown* (Unreported, NSW Court of Criminal Appeal, 30 May 1990).

65. *R v Brown* (Unreported, NSW Court of Criminal Appeal, 30 May 1990), 3, 4.

66. *R v Brown* (unreported, NSW Court of Criminal Appeal, 30 May 1990), 7.

67. *R v Zamagias* [2002] NSWCCA 17.

68. *R v Zamagias* [2002] NSWCCA 17, [14].



4.45 *R v Pakalani*<sup>69</sup> was a Crown appeal against sentence in a case where the respondent physically attacked the victim, a bouncer, outside a hotel premises and then followed the bouncer into the hotel where he obtained a broken beer bottle which he then proceeded to smash into the face of the victim, causing ‘very serious damage and nearly costing the victim an eye’.<sup>70</sup> The respondent was under the influence of alcohol and was sentenced with respect to malicious wounding with intent to cause grievous bodily harm.

4.46 McInerney J commented on the seriousness of this type of offence and the importance of considerations of general deterrence and stated:

As the presiding judge has pointed out, this was an unprovoked and vicious attack on the victim. It must be clearly understood that people who indulge in unprovoked violence such as this must realise that if they are caught they will receive a significant prison sentence. The use of a broken bottle to hit the victim was a most serious matter and will not be tolerated in this State.

Furthermore, it is quite clear from the reasons that his Honour has advanced for the merciful judgment that he gave, that he failed to have proper regard, in my view, to the question of general deterrence, which is so important in crimes of this nature. It must be clearly borne in mind that the respondent was charged with malicious wounding with intent to do grievous bodily harm.<sup>71</sup>

## Glass be treated as a weapon and as an aggravating factor

4.47 Section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) includes as an aggravating circumstance the fact that the offence involved the actual or threatened use of a weapon.<sup>72</sup>

4.48 In *Nowak v The Queen*<sup>73</sup> the applicant, while heavily affected by alcohol, swung a 700 ml glass vodka bottle at the victim, which shattered when it came into contact with the victim’s face. The use by him of a glass bottle in an offence of malicious wounding under the former s 35

69. *R v Pakalani* (Unreported, NSW Court of Criminal Appeal, 12 November 1996).

70. *R v Pakalani* (Unreported, NSW Court of Criminal Appeal, 12 November 1996).

71. *R v Pakalani* (Unreported, NSW Court of Criminal Appeal, 12 November 1996).

72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(A)(2)(c).

73. *Nowak v The Queen* [2008] NSWCCA 89.

was held to have been treated properly as an aggravating factor under s 21A(2)(c) without infringing upon the principle that additional regard is not to be had to an aggravating factor if it is an element of an offence, or if it is an inherent characteristic of an offence.

4.49 Similarly, in *R v Jenkins*,<sup>74</sup> a s 33 offence in which the offender pushed a glass at the victim's face, causing it to impact and shatter around the victim's eye, the CCA, while not specifically referring to s 21A(2)(c), stated that it took into account as an aggravating feature the fact that the offence involved the use of a weapon.<sup>75</sup>

4.50 In the matter of *R v Mendez*,<sup>76</sup> the CCA similarly categorised the use of a glass ashtray as a weapon in the commission of an assault.

While not specifically referring to s 21A(2), Howie J stated:

The applicant used a weapon to inflict serious and permanent injuries resulting in a significant deterioration in the victim's enjoyment of life. The applicant obviously armed herself with a weapon capable of inflicting serious injuries and pursued the unarmed and injured victim when she attempted to flee.<sup>77</sup>

4.51 Conversely, the court may take the view that the circumstances of a case are such that it is not appropriate to view the use of the glass or bottle, in the commission of the assault, as involving the use of a weapon.

4.52 The matter of *R v Mauri*,<sup>78</sup> involving an offence of malicious wounding under the former s 35(1) provides an example, it being accepted that the offender had not consciously used the glass, which he had in his hand when striking the victim, as a weapon.

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74. *R v Jenkins* [2006] NSWCCA 412.

75. *R v Jenkins* [2006] NSWCCA 412, [13].

76. *R v Mendez* [2002] NSWCCA 415.

77. *R v Mendez* [2002] NSWCCA 415, [18].

78. *R v Mauri* [2005] NSWCCA 272.

## The nature and extent of the victim's injuries

4.53 The nature and extent of the victim's injuries can operate as a circumstance of aggravation in certain circumstances, namely where their nature or severity are such as to be well beyond that which would be expected to result from the commission of the particular type of offence. Section 21A(2) of the *Crimes (Sentencing Procedure) Act* nominates as a feature of aggravation, that the injury, emotional harm, loss or damage caused by the offence was substantial.<sup>79</sup>

4.54 In *R v Jenkins* the CCA determined that the injuries were of such degree that a circumstance of aggravation could be found. While not specifically referring to s 21A(2) the Court stated:

The extent of the victim's injury significantly exceeded the minimum necessary to qualify as grievous bodily harm and consequently of itself constituted an aggravating factor.<sup>80</sup>

4.55 In *Nowak v The Queen*<sup>81</sup> the victim's injuries comprised bruises and swelling to the face, and lacerations to the forehead, nose and cheeks which had required suturing. The victim had also undergone nasal surgery.<sup>82</sup> The CCA stated:

Earlier the sentencing judge had observed that "the offence itself is an objectively serious one, demonstrating a significant degree of violence, resulting in substantial injuries to the victim". No criticism was, or could be, raised in respect of those observations. A sentencing court is entitled to have regard to the extent of the injuries in assessing the objective seriousness of a particular offence so long of course as the principles in *The Queen v De Simoni* (1981) 147 CLR 383 are not infringed: see, for example, *R v Way* (2004) 60 NSWLR 168 at pars 106–107. However, to treat as an additional aggravating factor that the injury was substantial in an offence of the present type does bespeak error of the kind referred to in *Cramp* (supra): see also *R v Jammeh* [2004] NSWCCA 327 at par 23; *R v Murphy* [2005] NSWCCA 182 at pars 22–25.<sup>83</sup>

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79. *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 21A(2)(g).

80. *R v Jenkins* [2006] NSWCCA 412, [13].

81. *Nowak v The Queen* [2008] NSWCCA 89.

82. *Nowak v The Queen* [2008] NSWCCA 89, [4], [5].

83. *Nowak v The Queen* [2008] NSWCCA 89, [22].

4.56 The Court determined that, on the evidence of that case, an additional finding of aggravation could not be made as the injuries sustained were to be regarded as an element of the offence charged.<sup>84</sup>

### The nature of the attack: unprovoked attack

4.57 The unprovoked nature of an attack is a relevant factor when assessing the objective seriousness of an offence.<sup>85</sup> In *R v Jenkins*, a glassing offence charged under s 33 of the *Crimes Act*, the CCA referred to the fact that the attack was unprovoked as a matter of aggravation.<sup>86</sup> This offence occurred in the early hours of the morning at a tavern in circumstances where, in response to the victim laughing at someone on the dance floor who, as it transpired, was the respondent's boyfriend, the respondent confronted the victim verbally, shoulder-charged her, tipped the contents of a glass over her head, and then struck her with the glass.<sup>87</sup>

### Intoxication as a circumstance of aggravation

4.58 In *Wright v The Queen*<sup>88</sup> the applicant and his friend, who had been consuming alcohol for a number of hours, became involved in an altercation with the victim and a friend in the early hours of the morning at a hotel. After the applicant's friend punched the victim's friend, the applicant struck the victim in the face with the glass occasioning severe injuries resulting in a substantial loss of sight.<sup>89</sup>

4.59 The applicant was sentenced for the offence of maliciously inflict grievous bodily harm under the former s 35 of the *Crimes Act*. The

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84. *Nowak v The Queen* [2008] NSWCCA 89, [25].

85. Judicial Information Research System, *Sentencing Bench Book* (online), 'Assault, Wounding and Related Offences—Common Aggravating Factors under s 21A and the Common Law—Unprovoked Offence' <http://jirs/>. See also *Mackey v The Queen* [2006] NSWCCA 254 and *R v Harris* [2003] NSWCCA 177, [17] as other examples of matters where the courts referred to the glassing as being unprovoked as a relevant feature.

86. *R v Jenkins* [2006] NSWCCA 412, [13].

87. *R v Jenkins* [2006] NSWCCA 412, [8]–[9].

88. *Wright v The Queen* [2008] NSWCCA 282.

89. *Wright v The Queen* [2008] NSWCCA 282, [7], [8].

intoxication of the applicant was held to be an aggravating feature due to his history of committing violent offences whilst intoxicated,<sup>90</sup> which had included an incident in which he had assaulted a person in the face with a bottle. He had acknowledged being aware of his problems with alcohol and violence.<sup>91</sup>

4.60 The Court noted as a further matter of aggravation his ‘continuing attitude of disobedience of the law’ in accordance with s 21A(2)(d) as disclosed by the fact of his several prior convictions for offences in the nature of assault or wounding, including three instances involving the applicant being armed with a glass.<sup>92</sup>

4.61 When considering the appropriateness of the sentence, the CCA referred to the importance of personal deterrence in such a case:

Whilst the offence may not have been in the worst category, it was certainly at the high end. His Honour did not impose the maximum. He did, nonetheless, include an element of personal deterrence and that was entirely appropriate, given Mr Wright’s continuing attitude of disobedience to the law.<sup>93</sup>

### **Intoxication placing the offence in context, relevant to the issue of spontaneity: no mitigation**

4.62 *Mackey v The Queen*<sup>94</sup> concerned an offence under s 33 which occurred in the context of a verbal altercation between the applicant and the victim in a hotel at approximately 5 am. The applicant had been holding two schooner glasses filled with beer when the victim put his hand on the applicant’s chest to create some distance between them. The applicant ‘swung his right hand at the left side of the victim’s face (while) still holding a schooner glass ... The glass and the offender’s right hand impacted with the left cheek and left eye area ... of the victim’.<sup>95</sup>

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90. *Wright v The Queen* [2008] NSWCCA 282, [12].

91. *Wright v The Queen* [2008] NSWCCA 282, [13].

92. *Wright v The Queen* [2008] NSWCCA 282, [14]–[22].

93. *Wright v The Queen* [2008] NSWCCA 282, [34].

94. *Mackey v The Queen* [2006] NSWCCA 254.

95. *Mackey v The Queen* [2006] NSWCCA 254, [5].

4.63 The CCA observed, confirming the approval of the sentencing judge:

His Honour noted that the applicant abused alcohol and used drugs. However the issue of intoxication was not relied on in the sentencing proceedings as a mitigating factor but rather as placing the offence in context and also went to the issue of the spontaneity and lack of planning of the offence. His Honour held the offence was a spontaneous and unplanned act resulting from a sudden and violent outburst of anger at a time when the applicant was intoxicated.<sup>96</sup>

### **Intoxication causing the offender to act out of character**

4.64 *R v Davies*<sup>97</sup> was a Crown appeal against sentence with respect to an offence of malicious wounding contrary to s 35. The offence occurred during the evening at a hotel and in the context of a verbal altercation involving the victim in which the respondent ultimately became involved. The respondent, who acknowledged that he was moderately to well affected by alcohol, having consumed 15 schooners of beer, was holding a glass of beer. After one of the men involved in the altercation attempted to move him away, he 'struck the victim causing the beer glass he was holding to shatter on impact'.<sup>98</sup>

4.65 The Court of Criminal Appeal found that it was open to the sentencing judge to conclude as he did, that the respondent had acted in response to what he interpreted as a threat by the victim and had not used the glass intentionally.<sup>99</sup>

4.66 The CCA observed:

It would appear that the sentencing judge was satisfied on the basis of the evidence before him that it was both the fact and the degree of intoxication that caused the respondent to act out of character. Even if it was not perhaps uncharacteristic for this offender to be subject to the influence of alcohol given the regularity with which he consumes it, his Honour was entitled to the view that the respondent's overreaction or reflex action to the perceived threat was induced by the alcohol he had consumed and, whilst

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96. *Mackey v The Queen* [2006] NSWCCA 254, [27].

97. *R v Davies* [2007] NSWCCA 178.

98. *R v Davies* [2007] NSWCCA 178, [8].

99. *R v Davies* [2007] NSWCCA 178, [12].

the intoxication might not of itself be used as a mitigating factor, neither was it an aggravating factor in the relevant sense.<sup>100</sup>

4.67 A further example of an offender who was found to have responded uncharacteristically and was given the benefit of his prior record and of the consequences of the conviction for his career as a naval officer can be seen in *R v Willett*.<sup>101</sup>

### Considering intoxication in the context of a prior history of the commission of violent offences whilst intoxicated

4.68 *R v Mendez*<sup>102</sup> was an appeal by the offender against the severity of sentence for an offence of maliciously inflict grievous bodily harm contrary to s 35, in circumstances where an ashtray was used by the applicant to assault the victim to her face and head. The applicant was intoxicated at the time of the offence, having consumed approximately eight middies of beer at a hotel. The offence occurred outside the premises of the applicant's ex-husband, where the applicant encountered the partner of her ex-husband. The applicant swung the ashtray into the victim's face, and then pursued her, using it repeatedly to strike the victim to her head and body.<sup>103</sup>

4.69 Howie J noted the applicant's history of alcohol abuse and her violent behaviour, and stated:

Although the applicant's behaviour might have been explained by her abuse of alcohol, it did not follow, having regard to her history of violence when intoxicated, that this was a mitigating factor. It was not incumbent upon his Honour, in my view, to determine that no or little regard should be had to general deterrence in the present case. In any event, the most important factors in determining the appropriate sentence were to denounce the applicant's use of a weapon to the face and head of the victim in circumstances in which the victim had no opportunity to protect or defend herself and specific deterrence in relation to the applicant's repeated use of violence.<sup>104</sup>

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100. *R v Davies* [2007] NSWCCA 178, [27].

101. *R v Willett* (Unreported, NSW Court of Criminal Appeal, 21 August 1998).

102. *R v Mendez* [2002] NSWCCA 415.

103. *R v Mendez* [2002] NSWCCA 415, [3]–[4].

104. *R v Mendez* [2002] NSWCCA 415, [9], [17].

## Intoxication and special circumstances

4.70 In *Andrews v The Queen*<sup>105</sup> the issue on appeal was whether the sentencing judge erred in declining to find special circumstances. The offence was one of malicious wounding contrary to s 35, and the offence occurred whilst the applicant was intoxicated. The incident occurred in the context of a domestic dispute over a child. The applicant had been drinking at a hotel and at the time of the offence he was carrying a bottle of rum, the contents of which he had partially consumed, and which he used to strike the victim's head. When she attempted to run away he hit her face with a long necked bottle of beer, and then proceeded to kick her as she lay on the ground.<sup>106</sup> He had a 'significant substance abuse problem' and a criminal history comprising predominantly of offences of violence and dishonesty.<sup>107</sup>

4.71 The CCA found that the sentencing judge had acted appropriately in taking into account the applicant's previous failed attempts to use the opportunities given by the courts to address his drug and alcohol issues as a factor of relevance when determining that a finding of special circumstances with a subsequent reduction in non-parole period should not be made.<sup>108</sup>

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105. *Andrews v The Queen* [2007] NSWCCA 68.

106. *Andrews v The Queen* [2007] NSWCCA 68, [6]–[7].

107. *Andrews v The Queen* [2007] NSWCCA 68, [10], [15].

108. *Andrews v The Queen* [2007] NSWCCA 68, [24].



Chapter 5

**Submissions  
Forwarded in  
Response to  
Reference**

5.1 For the most part, the submissions favoured the view that the existing provisions of the *Crimes Act 1900* (NSW) and the *Crimes (Sentencing Procedure) Act 1999* (NSW), and current sentencing practice provide a sufficient response to offences involving alcohol-related violence. In summary, the reasons for that response included the following:

- an inflexible rule that intoxication is to be treated as an aggravating factor would be likely to lead to unjust results, as would occur if an intoxicated offender who engaged in a completely uncharacteristic course of behaviour was to receive a heavier sentence than an offender who soberly and deliberately injured a victim because of a grudge;<sup>1</sup>
- the courts have developed well settled principles in dealing with the issue of intoxication and sentencing, which have not been questioned, and which also reflect the principle of individualised sentencing with its focus on fixing a sentence in the light of the objective and subjective circumstances of each case;<sup>2</sup>
- the principal personal violence offences that are likely to arise in the case of glassing or similar conduct by an intoxicated offender, namely reckless grievous bodily harm or wounding (*Crimes Act* s 35) and wounding or grievous bodily harm with intent (*Crimes Act* s 33) attract sentences (and standard non-parole periods) that are sufficiently lengthy to cater for most cases, and any increase would not necessarily reduce the impact of intoxication on the social problems with which it is associated;<sup>3</sup>

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1. Submission 1: New South Wales Bar Association (with whose submission Submission 3: Law Society of New South Wales, and Submission 2: Public Defenders Office New South Wales agreed); Submission 9: Chief Magistrate of the Local Court.

2. Submission 1: New South Wales Bar Association (with whose submission Submission 3: Law Society of New South Wales, and Submission 2: Public Defenders Office New South Wales agreed); Submission 5: Office of the Director of Public Prosecutions New South Wales.

3. Submission 1: New South Wales Bar Association (with whose submission Submission 3: Law Society of New South Wales, and Submission 2: Public Defenders Office New South Wales agreed); Submission 5: Office of the Director of Public Prosecutions New South Wales.

- practical changes to licensing laws that would reduce the incidence of drunkenness and resulting violence would be more effective than the blunt response of an inflexible sentencing principle, including legislating for and enforcing earlier closing times, requiring drinks to be served in plastic glasses, precluding the sale of drinks in bottles, enforcing with more vigour the legal responsibility of bar staff and publicans in refraining from serving intoxicated customers, providing greater skills training to bar and security staff in dealing with patrons affected by alcohol without unnecessary resort to force, improved monitoring of the responsible service of alcohol, fostering an education program on the dangers of alcohol, establishing restrictions on the advertising and marketing of alcohol and so on.<sup>4</sup>

5.2 Several other submissions drew attention to the need for a wider response of the kind last mentioned that would address the problem of alcohol abuse and encourage rehabilitation, including amendment of the eligibility criteria for the MERIT program and for the Drug Court to include people whose primary dependence is alcohol and to embrace violent offences (Drug Court) and serious violent offences (MERIT program).<sup>5</sup>

5.3 Concern was expressed by the Chief Magistrate of the Local Court that, since the introduction of Table Offences as part of the 1995 Criminal Procedure amendments there has been a steady increase in the number of personal violence offences, including those that have involved the use of a weapon and 'glassing' offences, that have proceeded to finality in the Local Court. In support of this concern the Chief Magistrate provided the tables contained in Annexure C to this Report, showing the increases in the number of relevant offences finalised in the Local and District Courts between 1993 and 2006.

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4. Submission 1: New South Wales Bar Association (with whose submission Submission 3: Law Society of New South Wales, and Submission 2: Public Defenders Office New South Wales agreed); Submission 16: NSW Department of Health; Submission 7: Alcohol and Other Drugs Council of Australia.
  5. Submission 3: Law Society of New South Wales; Submission 16: NSW Department of Health; Submission 12: St Vincent de Paul Society NSW; Submission 15: Council of Social Service of New South Wales.

5.4 The limits of the sentencing jurisdiction of that Court (imprisonment for up to two years for Table offences or five years by way of accumulation for multiple offences),<sup>6</sup> it was suggested, sometimes had led to sentences which were not considered appropriate for the objective seriousness of the offences involved. In this respect it was noted that according to settled principle, the relevant penalty was to be assessed by reference to the maximum available for the subject offence, and that the jurisdictional limit operated only in relation to the sentence finally passed.<sup>7</sup>

5.5 It remains the case that, in the absence of an election to have a Table offence dealt with on indictment, it will generally not be possible for a magistrate to refer such a case to a superior court,<sup>8</sup> notwithstanding any concerns that may be entertained that continuation of the proceedings in the Local Court will result in an inadequate sentence.

5.6 A number of submissions expressed concern that any change in sentencing law and practice, for example making intoxication an aggravating circumstance for the purposes of s 21A of the *Crimes (Sentencing Procedure) Act*, would risk having a disproportionate effect on the disadvantaged groups of offenders who shared the experiences of homelessness, intellectual or mental impairment, and/or economic and social deprivation, which contributed to alcohol abuse and criminal offending.

5.7 Specifically, these submissions related to:

- Aboriginal and Torres Strait Islander women;<sup>9</sup>
- homeless persons;<sup>10</sup>
- intellectually disabled offenders;<sup>11</sup> and

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6. *Criminal Procedure Act 1986* (NSW) s 267 and s 268.

7. *R v Doan* (2000) 50 NSWLR 115, [35].

8. By reason of *Criminal Procedure Act 1986* (NSW) s 263.

9. Submission 8: SHINE for Kids; Submission 15: Council of Social Services of New South Wales.

10. Submission 13: Homeless Persons' Legal Service.

11. Submission 4: NSW Department of Ageing, Disability and Home Care.

- offenders with mental illness;<sup>12</sup>

5.8 Implicit in those submissions was support for preserving the existing judicial discretion, that would permit allowance to be made for the individual circumstance of those within these groups and that would take into account the limited programs and opportunities which existed in the community to address their areas of disadvantage.

5.9 An arbitrary or inflexible sentencing rule, that would require intoxication to be treated as an aggravating circumstance, it was suggested, would be likely to increase the rate of imprisonment, and the length of sentences for these groups which already are disproportionately represented in the prison population.

5.10 The Department of Corrective Services (DCS) submission expressly did not deal with the relevant principles and practices governing the sentencing of those convicted of alcohol-related offences. Its submission concentrated on the actuarial risk assessment which it uses in support of the nature and intensity of the case plan interventions, which it develops in relation to offenders serving a sentence in custody or on parole, and which take into account any relevant history of drug/ alcohol abuse and dependency.

5.11 Its primary concern was to note that appropriate case planning can be hindered by the practice of some courts maintaining specific programs that an offender must attend, when full assessment indicates that such programs or services are not suitable either due to the offender's assessed risk level or offence-related needs. It recommended, accordingly, that in lieu of nominating specific programs or services in DCS-managed court orders, conditions should be imposed which require the offender to

attend programs and services that directly relate to the offending behaviour as directed by the Probation and Parole Officer, at a level of intensity deemed appropriate by the Probation and Parole Officer.

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12. Submission 10: Homelessness NSW; Submission 12: St Vincent de Paul Society NSW.

5.12 The Council received only two submissions that proposed any change in the way in which intoxication should be taken into account in relation to guilt, or in relation to sentence.

5.13 Firstly, the NSW Police portfolio submission suggested that there were areas concerning the treatment of voluntary (self-induced) intoxication in sentencing, and as a defence, that required reform. It contended that:

By retaining a role for intoxication as a partial defence or a factor in mitigation, the criminal law is both out of step with contemporary understanding of personal responsibility and gives succour to the anti-social minority that believes that being intoxicated is justification enough for violent and destructive behaviour.

and recommended that

the *Crimes Act 1900* and the *Crimes (Sentencing Procedure) Act 1999* be amended to remove voluntary intoxication as a matter that may be considered either as

1. a defence or partial defence for some crimes (crimes of 'specific intent') or
2. a factor in mitigation on sentencing and to make it rather a factor of aggravation, as is the case in the United Kingdom.

5.14 It also submitted that a defence or partial defence arising from voluntary (self-induced) intoxication should not be available in relation to the following offences:

- murder,
- acts done with intent to murder,
- discharging loaded arms with intent,
- use of weapon to resist arrest,
- causing grievous bodily disease,
- attempts to choke,
- assault with intent to have sexual intercourse,
- breaking, entering and assaulting with intent to murder,

- entering dwelling house,
- being armed with intent to commit offence,
- maliciously destroying or damaging property with intent to injure a person,
- maliciously destroying or damaging property with intent to endanger life, and
- various ‘assault with intent’ offences, including child sexual assault (to the extent that an element of the offence requires a person to intend the specific result necessary for the offence).

5.15 In summary the position of the NSW Police portfolio is that the distinction between offences of specific and general or basic intent is illogical, and that the law should ‘clearly mark society’s disapproval of those who voluntarily or recklessly become intoxicated and then assault or harm others’.

5.16 As noted previously the submissions concern the possible reform of the substantive criminal law, that would require significant amendment of Part 11A of the *Crimes Act*, and are outside the Council’s terms of reference. The submissions in relation to the manner in which intoxication should be treated for sentencing purposes have been taken into account.

5.17 Secondly, the Australian Hotels Association noted its position of ‘maintaining the obligation of personal responsibility in respect to alcohol related violence offences’. It supported the imposition of severe penalties for such offences and ‘the removal of intoxication as a defence to such offences or to mitigate penalties’.

5.18 In this regard it suggested that the range of sentences imposed for glassing attacks was very wide, ranging from non-custodial options to substantial terms of imprisonment, and were generally lighter than the community would be entitled to expect, given the violence and the lasting and disfiguring injuries inflicted. The existence of the partial defence to a charge under s 33 of the *Crimes Act* and the availability

of an alternative verdict under s 35, and the suggested tendency to charge offenders under the latter provision, rather than with the more serious offence, were said to be areas of concern, inviting consideration of ways to close this suggested 'loophole', for example, by introducing an offence that dealt 'with the realities of glassing'. Legislation that would provide for a severe penalty, it suggested, was 'the more appropriate method to inform and deter the public', in relation to this form of conduct.

5.19 Additionally it proposed that s 21A of the *Crimes (Sentencing Procedure) Act* be amended by expressly excluding intoxication as a factor that could be taken into account by way of mitigation. Alternatively it suggested that a guideline judgment be sought in relation to the issues which arise in relation to these cases.

5.20 Otherwise, it opposed the introduction of additional restrictions on licensed premises that would indicate a move away from placing responsibility on adult drinkers for their own tendencies and actions.



Chapter 6

**Other Jurisdictions**

6.1 The Council has conducted a limited review of sentencing strategies adopted in other jurisdictions concerning alcohol-related violent crime.

## THE UNITED KINGDOM

### Sentencing guidelines with respect to intoxication

6.2 The *Criminal Justice Act 2003* (UK) (the Act) introduced a new sentencing framework which altered the nature of both community-based and custodial sentences. In response, the Sentencing Guidelines Council (the Council) issued guidelines to assist courts in the sentencing exercise applicable in England and Wales. The Act provides that the sentencing court is to have regard to any guideline that is relevant to the offender's case.<sup>1</sup> The guidelines apply only to sentences passed with respect to adults, with some limited relevance to offenders under the age of 18.

6.3 In 2004 the Council published a guideline which established the principles to be applied in determining the seriousness of an offence.<sup>2</sup> It provides that a court must pass a sentence that takes into account the seriousness of the offence with reference to two main parameters: culpability and harm caused or risk being caused by the offence. In determining the culpability and harm caused by the offence the court is to have regard to any aggravating factors that may increase the culpability of the offender or cause a greater than usual harm.<sup>3</sup> Among the aggravated factors identified was the commission of an offence while under the influence of alcohol or drugs.<sup>4</sup>

6.4 The guideline does not provide any guidance as to the weight to be placed on any particular factor if present, nor does it give any indication as to the weight to be placed on the presence of intoxication

1. *Criminal Justice Act 2003* (UK) s 172.

2. UK Sentencing Guidelines Council, *Overarching Principles: Seriousness; Guideline* (2004).

3. Unless the aggravating factor is already reflected as an element of the offence.

4. UK Sentencing Guidelines Council, *Overarching Principles: Seriousness; Guideline* (2004) [1.22].

in the commission of an offence. The Sentencing Advisory Panel has stated that the list is not comprehensive or exhaustive nor are the aggravating factors listed in order of priority.<sup>5</sup>

6.5 Notwithstanding the Council's guideline, commentators have argued that the operation of s 166(1) of the Act, which requires a court to take into account any factor that it considers relevant in mitigation of sentence, effectively means that intoxication can continue to be a mitigating factor at sentence,<sup>6</sup> for example, when the offence is out of character.

### Guideline judgment regarding personal violence matters

6.6 The Council recently provided a definitive guideline with respect to assaults and other offences against the person.<sup>7</sup> The guideline refers to the application of the Seriousness Guideline<sup>8</sup> in addition to other aggravating and mitigation factors with particular application to personal violence offences.

6.7 The guideline establishes that the use of a weapon, whether of a traditional type such as an iron bar, baseball bat or knife, or the use of a part of the body such as the head or shod foot, will usually increase the seriousness of an offence. The use of a weapon such as a broken glass, which raises a high risk of personal injury, was regarded as increasing the culpability of the offender.<sup>9</sup>

6.8 The guideline also set out the starting point and sentencing range for a range of violent offences where a weapon is used or where the victim is particularly or gravely injured. For example, causing grievous bodily harm with intent or wounding with intent to do

5. UK Sentencing Advisory Panel, *New Sentences—Criminal Justice Act 2003* (2004) [52].

6. Dingwall, G., *Alcohol and Crime* (2006) 157–9.

7. UK Sentencing Guidelines Council, *Assault and Other Offences against the Person; Definitive Guideline* (2008).

8. UK Sentencing Guidelines Council, *Overarching Principles: Seriousness; Guideline* (2004).

9. United Kingdom Sentencing Guidelines Council, *Assault and Other Offences against the Person; Definitive Guideline*, February 2008, 6, [22].

grievous bodily harm, which carries a possible maximum sentence of life imprisonment,<sup>10</sup> has as its starting point under the guideline a sentence of four years imprisonment, with an appropriate range of imprisonment for 3–5 years. The appropriate starting point increases under the guideline to imprisonment for 13 years (with a sentencing range of 12–16 years) in cases where the

victim suffered a life-threatening injury or particularly grave injury from a pre-meditated wounding or [grievous bodily harm] involving the use of a weapon acquired prior to the offence and carried to the scene with a specific intent to injure the victim.<sup>11</sup>

6.9 Similarly, assault occasioning actual bodily harm, which carries a statutory maximum of imprisonment for five years,<sup>12</sup> has under the guideline a starting point of imprisonment for 30 months, and a sentencing range of 2–4 years, where it involved a pre-meditated assault involving the use of a weapon.<sup>13</sup>

6.10 The guideline also lists specific actions which will aggravate the sentence for certain offences. Head butting, kicking or biting are additional aggravating factors<sup>14</sup> with respect to the offences of assault with intent to resist arrest,<sup>15</sup> and assault on a police constable in the execution of his duty,<sup>16</sup> and these actions, as well as attempted strangulation, aggravate the offence of common assault.<sup>17</sup> Picking up a weapon is an aggravating factor in respect of the two first mentioned offences, and using a weapon to threaten or harm a victim likewise aggravates an offence of common assault.<sup>18</sup>

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10. *Offences Against the Person Act 1861* (UK) s 18.

11. United Kingdom Sentencing Guidelines Council, *Assault and Other Offences against the Person; Definitive Guideline*, (2008) 13.

12. *Offences Against the Person Act 1861* (UK) s 47.

13. United Kingdom Sentencing Guidelines Council, *Assault and Other Offences against the Person; Definitive Guideline*, (2008) 17.

14. United Kingdom Sentencing Guidelines Council, *Assault and Other Offences against the Person; Definitive Guideline*, (2008) 19-23.

15. *Offences Against the Person Act 1861* (UK) s 38.

16. *Police Act 1996* (UK) s 89.

17. *Criminal Justice Act 1988* (UK) s 39.

18. United Kingdom Sentencing Guidelines Council, *Assault and Other Offences against the Person; Definitive Guideline*, (2008) 23.

6.11 The Court of Appeal has previously delivered a guideline judgment in respect of appropriate penalties where a wounding offence involved the use of a glass or bottle. In *Attorney General's Reference (No 23 of 1990), Re (1990–91)*,<sup>19</sup> a Crown appeal on an offence of wounding with intent to cause grievous bodily harm which involved the offender striking the victim to the back of the head with a bottle and then pushing the broken bottle into his cheek and towards the side of his neck, the Court held that a sentence of imprisonment for 18 months was unduly lenient. It observed that the minimum sentence in instances where the defendant had pleaded not guilty would be imprisonment for four years, and noted that a strong message needed to be given to the public that glassing offences would not be tolerated. The Court referred to the case of *Harwood* where Lord Chief Justice, Lord Widgery commented:

Nowadays one cannot really recognise anything less than three years as being right for deliberate glassing.<sup>20</sup>

and also noted the observations of Lawton LJ in *R v James*:

This is about as bad a case of what has come to be known as 'glassing' as it is possible to imagine. It was vicious conduct of a kind which the courts must do their best to stop. The only way that society can show that it will not tolerate this kind of conduct is by the courts passing severe sentences. Anything less than severe sentences may give the public the impression that the courts are willing to accept this kind of conduct. Heilbron J. has pointed out to us (and she is right) that this is the kind of conduct in which older people do not indulge; but it is rife amongst youths and youngsters. The fact that the offenders are young is not a reason why they should not be punished severely when they behave in this vicious way.<sup>21</sup>

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19. *Attorney General's Reference (No 23 of 1990) (1990–91)* 12 Cr. App. R. (S) 575.

20. *R v Harwood (1979)* 1 Cr App R(S) 354, 355.

21. *R v James (1981)* 3 Cr App R (S) 233, 234.

## Repeat offenders

6.12 Under s 143(2) of the Act, a court is to treat as an aggravating factor an offender's previous offences, if it is reasonable to do so 'having particular regard to the nature of the previous offence, its relevance to the current offence and the time that elapsed between the two'.

6.13 It has been argued that this section would permit a heavier sentence being imposed on an intoxicated offender who has a record of intoxicated offending, provided it is considered to be a relevant offence.<sup>22</sup>

6.14 The Council notes that the former Sentencing Advisory Panel expressed concern over the implications of s 143(2) in its advice to the Sentencing Guidelines Panel in 2004, stating the at that time unproclaimed provision:

has the potential to distort the determination of offence seriousness and result in offenders being sent to prison on the basis of repeat offending and not because they have committed serious offences.<sup>23</sup>

## Court-ordered treatment

6.15 The United Kingdom has moved to specifically address the rehabilitation needs of offenders with alcohol-related problems. Pursuant to ss 177 (1)(j) and 212(1) of the Act, an offender can be required by order of the court to submit, during a specified period, to treatment with the view to the reduction or elimination of the offender's dependency on alcohol.

6.16 When making such an order, the court must be satisfied that a) the offender is dependent on alcohol; b) that the dependency is of the nature that requires treatment and will respond to it; c) that the

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22. Dingwall, G., *Alcohol and Crime* (2006) 156–7.

23. UK Sentencing Advisory Panel, *New Sentences—Criminal Justice Act 2003* (2004) [50].

treatment ordered can be provided or that arrangements can be put in place to facilitate it; and d) that the offender is willing to comply with the requirements of the order.<sup>24</sup>

## NORTHERN TERRITORY

### Additional provisions for offences involving intoxication

6.17 Until the end of 2006, s 154 of the *Criminal Code Act 1983* (NT) provided inter alia, that an offender who committed an act or omission that caused serious danger, actual or potential, to the lives, health or safety of the public in circumstances where the danger was clearly foreseeable, would be liable to imprisonment for five years.<sup>25</sup> The section provided for imprisonment of seven years where grievous harm was occasioned to any person,<sup>26</sup> and a maximum penalty of ten years where death was occasioned to any person.<sup>27</sup> A maximum of imprisonment for up to an additional four years was provided for if the offender was under the influence of an intoxicating substance.<sup>28</sup>

6.18 The section was repealed by the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT), as part of a wider reform of the principles of criminal liability, including those relating to intoxication. In its place new offences were created including a revised manslaughter provision, as well as provisions with respect to reckless endangerment, negligent harm and culpable driving.<sup>29</sup>

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24. *Criminal Justice Act 2003* (UK) ss 212(2) and 212(3). See also Dingwall, G., *Alcohol and Crime* (2006) 142 for commentary on the operation of these provisions.

25. *Criminal Code Act 1983* (NT) s 154(1).

26. *Criminal Code Act 1983* (NT) s 154(2).

27. *Criminal Code Act 1983* (NT) s 154(3).

28. *Criminal Code Act 1983* (NT) s 154(4).

29. Explanatory Statement, *Criminal Code Amendment (Criminal Responsibility Reform) (No 2) Bill 2005* (NT), 'Notes on Clauses' cl 9.

## NEW ZEALAND

### Intoxication as a mitigating or aggravating factor

6.19 Section 9 of the *Sentencing Act 2002* (NZ) provides:

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case: ...

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding ...

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance ...

6.20 This section broadened the prohibition originally contained in the former s 12A of the *Criminal Justice Act 1985* (NZ), which prohibited the fact of the consumption of alcohol or drugs being considered as a mitigating factor in sentencing for offences involving violence or causing danger. The s 9 amendment extended this principle to cover any offence,<sup>30</sup> but it does not preclude the Court from taking into account the offender's previous good character.

6.21 It has been held that the consumption of alcohol or drugs does not, however, normally justify an increase in the starting point.<sup>31</sup> Section 9(1), which identifies the aggravating factors which are to be taken into account, does not include in that list the fact that the offender was intoxicated when committing the offence.

6.22 The Act also provides that the Court is not prohibited from taking into account 'any other aggravating or mitigating factor that the Court thinks fit'.<sup>32</sup>

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30. Thomson Brookers, *Adams on Criminal Law- Sentencing*, vol 1 (at 5 March 2009) [SA 9.26].

31. *R v Finau* [2003] NZCA 129, [16].

32. *Sentencing Act 2002* (NZ) s 9(4).



## Guideline judgment regarding personal violence matters

6.23 The New Zealand Court of Appeal discussed the principles applicable to crimes of personal violence in *R v Hereora*,<sup>33</sup> a matter concerning an offence of wounding with intent to cause grievous bodily harm, committed in the context of an inter-gang confrontation. The Court made comment with respect to offences of wounding or causing grievous bodily harm with intent in the context of assessing the adequacy of the particular sentence in that case:

For crimes comparable but rather less serious than these, this Court has upheld sentences of imprisonment for from three to five years. ... In England it is said, as to cases of wounding or causing grievous bodily harm with intent, that commonly an impulsive act of violence involving the use of a weapon or intent to inflict serious injury will attract a sentence within the bracket of three to five years; and that from five to eight years is reserved for cases exhibiting a combination of aggravating features. Up to 12 years is imposed there when unusually grave aggravating features are present<sup>34</sup>

6.24 In *R v Taueki*<sup>35</sup> the New Zealand Court of Appeal took the opportunity to review the decision in *Hereora* and to formulate new guidelines.<sup>36</sup> The guidelines were intended for offences under s 188(1)<sup>37</sup> of the New Zealand *Crimes Act* (also referred to as ‘grievous bodily harm offences’ or ‘grievous bodily harm offending’), however the Court indicated that it anticipated the guidelines would be adapted and applied to s 191(1) and other offences of serious violence.<sup>38</sup>

6.25 The Court stated that almost all grievous bodily harm offences will require a sentence of a term of imprisonment.<sup>39</sup> The Court also set out factors which were to be taken into account by the sentencing court

33. *R v Hereora* [1986] 2 NZLR 164.

34. *R v Hereora* [1986] 2 NZLR 164, 170.

35. *R v Taueki* [2005] 3 NZLR 372.

36. *R v Taueki* [2005] 3 NZLR 372, [1], [60].

37. *Crimes Act 1961* (NZ) s 188(1): ‘Wounding with intent: 188(1) Everyone is liable to imprisonment for a term not exceeding 14 years who, with intent to cause grievous bodily harm to any one, wounds, maims, disfigures, or causes grievous bodily harm to any person’.

38. *R v Taueki* [2005] 3 NZLR 372, [9].

39. *R v Taueki* [2005] 3 NZLR 372, [27].

when assessing the starting point for a sentence. The Court noted that among the factors which should not be seen as reducing the seriousness of the offence, was that of intoxication, in accordance with s 9(3) of the *Sentencing Act*.<sup>40</sup>

6.26 The Court then set out bands providing ranges of starting points (not final sentences), for offending.<sup>41</sup>

## WESTERN AUSTRALIA

6.27 Although not specifically related to alcohol-related offences, the Sentencing Council notes that Western Australia has responded to the ‘one punch causing death’ cases by the introduction of a provision in its *Criminal Code*, as follows:

281. Unlawful assault causing death

(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.

(2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.<sup>42</sup>

6.28 The Council understands that the Criminal Law Review Division has given consideration to this provision, and also understands that some consideration has been given to the introduction of a similar provision in Queensland. Although strictly outside its terms of reference, the Council has concerns that, on the one hand, such a provision risks being an overreaction to the kind of entirely unintended consequence of an altercation leading to a blow which causes the victim to strike his head on a hard surface, or to suffer a haemorrhage from an underlying but unknown medical condition and on the other hand it might weaken the case for a more serious charge of manslaughter where that would be better suited to the circumstances of the assault.

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40. *R v Taueki* [2005] 3 NZLR 372, [33]: the other two matters were domestic situation and victim’s plea.

41. *R v Taueki* [2005] 3 NZLR 37 [34]–[40].

42. *Criminal Code Act Compilation Act 1913* (WA). This section was inserted into the *Criminal Code* (WA) by virtue of the *Criminal Law Amendment (Homicide) Act 2008* (WA).

Chapter 7

**Conclusions**

7.1 Arising out of its review of the available statistical information, current sentencing statistics and the submissions received, the Council has given consideration to the following options:

- a) adding the fact of intoxication as an aggravating factor in sentencing under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Act);
- b) amending s 21A of the Act by providing that evidence of intoxication is not to be taken into account as a mitigating factor in sentencing;
- c) leaving current sentencing law and practice untouched in relation to alcohol (or drug) related personal violence offences;
- d) creating a specific offence in relation to glassing (ie, offences where a personal injury is inflicted with the use of a glass or bottle);
- e) creating a specific offence such as the commission of a serious offence against a person while intoxicated or committing a dangerous act while intoxicated;
- f) creating an aggravated form of offence in relation to the existing personal violence offences where there is evidence that, at the time of the offence, the offender was under the influence of intoxicating liquor or a drug, with an increased penalty;
- g) recommending an increase in the maximum available penalty and / or standard non parole period in relation to the offences considered in this report;
- h) recommending that prosecutions for personal violence offences involving the use of a glass or bottle proceed on indictment;
- i) recommending that the Local Court be given the power to refer a matter to the District Court where the offence involved

the use of a glass or bottle as a weapon and where it is concerned that the jurisdictional limit of the Local Court will prevent it from imposing an adequate sentence;

- j) recommending that a guideline judgment be sought from the Court of Criminal Appeal on the principles to be applied in relation to sentencing an offender for an offence of personal violence where intoxication is an issue, or where the offence involves glassing;
- k) extending diversionary programs to include offenders charged with or convicted of alcohol-related personal violence offences.

## AMENDING CURRENT SENTENCING LAW AND PRACTICE

7.2 Under this heading, consideration is given to options (a) to (c).

7.3 The Council has concluded that there is no occasion to amend s 21A(2) or (3) of the Act, or to recommend any revision of current sentencing law or practice for personal violence offences where intoxication is a factor in their commission.

7.4 In coming to this conclusion the Council is satisfied that there is sufficiently settled and appropriate guidance provided by the decision in *Coleman v The Queen*<sup>1</sup> and in the subsequent decisions identified in Chapter 3. It recognises that there have been a number of appeals in relation to glassing and similar acts of violence committed on or in the vicinity of licensed premises, or occurring after an offender has returned home from such premises, but notes that the settled principles have been consistently applied in those appeals.

7.5 There have been individual cases where unduly lenient sentences have been allowed to stand in the exercise of the appellate court's discretion, as well as cases where the court has intervened to increase the sentence. Similarly, there have been cases where sentences

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1. *Coleman v The Queen* (1990) 47 A Crim R 306, 327.

have been reduced. However, overall there does not appear to have been any obvious pattern of sentencing error. Nor have the courts overlooked the gravity of the act of glassing, or the need for general and personal deterrence in such cases, even though the possibility of a prosecution leading to a significant sentence of imprisonment is unlikely to have been within the immediate contemplation of an intoxicated person.

7.6 In relation to the possibility of adding intoxication as an *aggravating factor*, the Council observes that the following arguments have been advanced in support of such proposition:

- the use of alcohol as a mitigating factor in sentencing some suggest, is widespread and inappropriate;
- current sentencing practices do not adequately address community expectations regarding the seriousness with which such offences should be treated;
- the prevalence of alcohol-related violent offences warrant special treatment; and
- the inclusion of intoxication in the table of s 21A factors would send a strong message to potential offenders that crimes involving intoxication will not be tolerated.

7.7 The arguments to the contrary of this proposition are as follows:

- 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.

7.8 The Council finds the contrary arguments persuasive. In particular, it considers that 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.

7.9 While it may be the case that a sober offender would be more likely to face a charge involving specific intent than an intoxicated offender, it remains the case that a number of intoxicated offenders are charged with an offence of specific intent.

7.10 The Council also regards the difficulty of establishing a clear dividing line for those cases where alcohol use, before the commission of an offence, would constitute ‘intoxication’ for the purpose of being a statutorily defined factor of aggravation, as significant. It is within common experience that alcohol can affect people in different ways and to a different extent. Fixing a prescribed level of alcohol concentration, ascertained through a breath or blood test, even if such a test could be administered in a sufficiently timely way, would be an unduly crude approach. Otherwise, an assessment by police or by patrons or bar staff in licensed premises, of the condition of the offender, would give rise to all of the problems and factual issues previously faced when dealing with drink driving offences.

7.11 In similar vein, difficult factual issues could arise concerning the extent to which the offender’s alcohol consumption played a role in the commission of the offence. Was it the pivotal factor or one of a variety of factors, including for example, the age or gender of the offender?

7.12 Adoption of this submission could also lead to an inconsistency if intoxication was allowed to operate as a factor mitigating the criminality of conduct capable of being charged as an offence of specific intent, and then as a factor aggravating the criminality if the offence was charged as one of general or basic intent.

7.13 Finally, the Council notes that current sentencing law provides a clear basis for the imposition of condign sentences for those offenders who have a record of committing personal violence offences, and who know that their use of alcohol predisposes them to violence.

7.14 In relation to the exclusion of intoxication as a *mitigating factor*, the Council notes that the law rarely regards voluntary intoxication as a mitigating factor when sentencing for serious criminal offences.<sup>2</sup> It also notes the existence of a precedent for this kind of provision in New Zealand.

7.15 The Council recognises the concerns that exist in relation to alcohol-related violence, and the need for such offences, particularly when committed in licensed premises, to attract custodial sentences of some magnitude. However, consistently with its views in relation to treating intoxication as an aggravating factor, it is of the view that the proposed amendment is not warranted.

7.16 Primarily its concern is to retain the sentencing discretion which would permit uncharacteristic behaviour by a person of prior good reputation, and particularly that of young or immature offenders, to be given appropriate weight. Any other view would provide too blunt a response particularly in circumstances where very often, through misfortune, the actual consequences of the kinds of conduct that result in charges of the kind considered in this report, are well in excess of that which might have been anticipated. In any event restricting the discretion would run into similar practical and factual problems in identifying a point at which an offender's level of alcohol use before an

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2. *R v Thomas* [2004] NSWCCA 291, [52] (Howie J).



offence would qualify as ‘intoxication’ for the purpose of excluding its presence as a mitigating factor.

## CREATING A SPECIFIC OFFENCE OR OFFENCES

7.17 Under this heading, consideration is given to options (d) to (f).

### Specific offence of ‘glassing’

7.18 In relation to glassing, the Council is unaware of any legislative precedent for isolating it as the subject of a specific offence with its own statutory maximum or standard non-parole period.

7.19 Some precedent exists in relation to other forms of activity, the occurrence of which had attracted public concern followed by the introduction of specific offences. For example:

- Specific provision has been made in relation to throwing objects or dropping objects onto motor vehicles and vessels, which followed upon incidents of rocks being dropped onto vehicles from bridges or overpasses. Where such conduct occurs in circumstances where there is a person in the vehicle or vessel and the safety of any person is at risk, an offence is committed that attracts a maximum penalty of imprisonment for five years.<sup>3</sup>
- Specific provision has also been made in related to the possession or use, in a public place, of a laser pointer.<sup>4</sup> This offence attracts a maximum penalty of imprisonment for two years and 50 penalty units, and was similarly introduced after several incidents of laser pointers being directed for example, at aircraft, which led to concerns that they might interfere with the vision of aircrew.

7.20 Otherwise there are a number of offences in relation to specific forms of dangerous conduct that might occasion personal harm, but which might have been charged under more general provisions applicable to offences against the person, including for example:

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3. *Crimes Act 1900* (NSW) s 49A.

4. *Summary Offences Act 1988* (NSW) s 11FA.

- the use of explosive substances or corrosive fluids, to cause harm;<sup>5</sup>
- setting traps;<sup>6</sup>
- causing a dog to inflict personal harm;<sup>7</sup>
- using intoxicating substances to commit an indictable offence;<sup>8</sup>
- spiking drinks;<sup>9</sup>
- using or administering poison, intoxicating substances or other destructive or noxious thing to cause harm;<sup>10</sup>
- causing danger with a firearm or spear-gun;<sup>11</sup>
- destroying or damaging property with intent to cause injury or to endanger life;<sup>12</sup>
- damaging or destroying an aircraft or vessel, or prejudicing its safe operation.<sup>13</sup>

7.21 While glassing could be made the subject of a specific provision, with appropriate maximum penalties, dependent, for example, on whether the offence was committed with intent to cause grievous bodily harm or recklessly, this would raise the obvious and important question whether such conduct is any more heinous than conduct involving other weapons such as a knife, firearm, syringe, pool cue, bar stool or any other object that may be used offensively, or than a punch, kick or head butt (particularly where sustained and brutal).

7.22 The creation of a specific offence for glassing would only seem to be justified if it was a unique way of inflicting injury or occasioning death for which the existing penalties were somehow inappropriate. The Council considers, in this respect, that unlike the use of a laser

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5. *Crimes Act 1900* (NSW) ss 46–48.

6. *Crimes Act 1900* (NSW) s 49.

7. *Crimes Act 1900* (NSW) s 35A.

8. *Crimes Act 1900* (NSW) s 38.

9. *Crimes Act 1900* (NSW) s 38A.

10. *Crimes Act 1900* (NSW) ss 39–41A.

11. *Crimes Act 1900* (NSW) s 93G.

12. *Crimes Act 1900* (NSW) ss 196, 198.

13. *Crimes Act 1900* (NSW) ss 204–210.

pointer, or a hidden trap, for example, it is not a unique method of occasioning injury in the context of the location and circumstances in which a glass or bottle is likely to be used.

7.23 Nor does the Council consider that there is an insufficiency of available offences under which such conduct can be charged, dependent on the existence respectively of recklessness or specific intent to cause grievous bodily harm, and on the extent and nature of the harm caused, which might range from the relatively trivial harm or threat constituting a common assault, to actual bodily harm, grievous bodily harm or death.

7.24 The Council notes that the available maximum sentences for the offences in relation to which glassing is currently charged are substantial, and it is not persuaded that it is either a novel form of conduct or an activity which cannot be adequately punished under the several provisions identified in the previous chapters in this Report.

7.25 Additionally, the creation of a specific offence for glassing would risk a disproportionate outcome for conduct in a case that led to a relatively minor injury without any permanent consequences for the victim. Moreover, its potential value as a general deterrent would be limited if it were known that the use of another form of weapon attracted a lesser maximum penalty, even assuming that those who abuse alcohol in licensed premises do avert to the likely consequences of their conduct or to a choice of weapon. That needs to be understood in the context that most glassing offences occur spontaneously in licensed premises, and in circumstances where little thought is given to action before it occurs.

7.26 As current sentencing practice applies, the court can and does take into account the nature of the weapon used and the nature and extent of any injuries inflicted. In this regard there are clear illustrations of the courts regarding the use of a glass or bottle as abhorrent and as requiring a significant sentence, although without considering its relativity to any other weapon.

7.27 In these circumstances the Council does not see any merit in creating a specific glassing offence, although it does recognise that such conduct carries with it a high risk of serious personal injury.

### **Offences including intoxication as an element or a factor of special aggravation**

7.28 Options (e) and (f) give rise to similar considerations.

7.29 A number of law reform commissions and other bodies have given consideration to the creation of a separate fall back or special offence dealing with the liability of intoxicated offenders who commit a criminal act, the purpose of which would be to ensure that offenders who are intoxicated continue to be criminally liable, and to protect the public from their actions.<sup>14</sup>

7.30 These reports have primarily been concerned with amending the common law so as to prevent offenders relying on voluntary intoxication as a complete defence. As this has already been addressed in New South Wales the reports are of limited relevance, save so far as they might incidentally raise matters concerned with sentencing.

7.31 An argument in favour of their adoption is that the existence of a special offence would serve to underline the community concerns in relation to alcohol-related crime, and to provide an appropriate maximum penalty that would allow intoxication to be regarded as an aggravating circumstance or element. In this respect it could be seen as a public declaration of the community expectation that sentencing, in this context, should have a positive element of deterrence.

7.32 Arguments against the introduction of a special offence include the following:

- The existing provisions of the *Crimes Act 1900* (NSW) provide for a range of offences which, when dealt with in accordance with

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14. Parliament of Victoria Law Reform Committee, *Criminal Liability for Self-Induced Intoxication* (1999) [6.25]. See also [6.27] referring to UK Home Office, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244 (1975) [18.53].

current sentencing law and practice, provide a sufficient basis for an intoxicated offender to be convicted and appropriately sentenced.

- The creation of a special offence that includes intoxication either as an element, or as an aggravating element, risks punishing the offender for being intoxicated or for their moral irresponsibility, while the true focus of sentencing should be on the act committed by the offender while intoxicated.<sup>15</sup>
- The introduction of a special offence could lead to confusion, and to inconsistent outcomes, if the conduct in question could also be charged under more general provisions, particularly if they differed in relation to the maximum available sentences.
- Similar practical and factual problems to those mentioned earlier arise in defining the level of intoxication that would be encompassed within the basic element or element of aggravation, and then in establishing its presence to the requisite criminal standard.
- Similarly, questions of principle and potential unfairness could arise, if the mere fact of a particular level or state of intoxication was established, yet it was of limited relevance for the commission of the offence, or only a minor factor in its commission.
- There is no reason for introducing a special provision, since most people do not commit violent or dangerous acts when intoxicated, and do not require any specific deterrent to moderate their behaviour.
- Under current New South Wales law there would logically continue to be a need to respect and preserve the distinction between offences of specific intent and general or basic intent, unless a policy decision was made to eliminate that distinction whenever the intoxication was self-induced.

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15. Parliament of Victoria Law Reform Committee, *Criminal Liability for Self-Induced Intoxication* (1999) [6.62].

7.33 The Council sees no advantage in creating a specific offence that would include intoxication as an element, or as an aggravating element. In summary it is satisfied that the current law permits those offenders who are intoxicated to be held criminally liable for their actions, and for the fact of intoxication to be given appropriate weight in the individual circumstances of each case.

7.34 Any revision of the law in accordance with this option would only introduce unnecessary complexity in relation to charging, and charge negotiation, decisions and would risk inconsistency in sentencing.

7.35 The Council is also of the view that the situation of a repeat offender, ie, one who has committed previous personal violence offences while intoxicated, is adequately addressed by current sentencing law and practice. As noted previously where an offender has a history of acting with violence when intoxicated, this has been regarded as a circumstance of aggravation in so far as it may establish that the offence was not out of character.<sup>16</sup>

7.36 Moreover the existence of a record of previous convictions for personal violence offences is expressly stated to be an aggravating factor by s 21A(2)(d) of the *Crimes (Sentencing Procedure) Act* where the offender is being sentenced for a serious personal violence offence, although this does need to be taken into account within the confines of the *Veen* considerations.<sup>17</sup> It is an aggravating factor, not in relation to the objective seriousness of the offence; rather it is an aggravating factor in sentencing in that the prior offences may require a more severe sentence to be imposed by way of retribution, deterrence or protection of the community.

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16. *Coleman v The Queen* (1990) 47 A Crim R 306, 327 (Hunt J, Finlay and Allen JJ agreeing); *R v Davies* [2007] NSWCCA 178, [27]; *R v Fletcher-Jones* (1994) 75 A Crim R 381; *R v Mackey* [2006] NSWCCA 254.

17. *Veen v The Queen (No 2)* (1988) 164 CLR 465; *R v Johnson* [2004] NSWCCA 76; *R v Wickham* [2004] NSWCCA 193; *R v McNaughton* (2006) 66 NSWLR 566.

7.37 Regarded in this way current sentencing law and practice answer the objection that to introduce a law providing for the availability of an enlarged maximum sentence where the offender has committed a repeat personal violence offence, risks double sentencing or re-sentencing an offender for offences with which the court has previously dealt.<sup>18</sup>

7.38 The current statutory maximum penalties for the most relevant offences would seem to preserve a sufficient margin for sentencing a repeat offender, appropriately, in accordance with these provisions.

### POSSIBLE INCREASE IN MAXIMUM PENALTIES OR IN STANDARD NON-PAROLE PERIODS (SNPPs)

7.39 Under this heading consideration is given to option (g).

7.40 The Council notes that the current maximum penalties and SNPPs that apply to the most relevant offences are as follows:

*Table 1: Current maximum penalties and standard non parole periods*

Section	Offence	Maximum	SNPP
s 33	(wounding or grievous bodily harm)	25 years	7 years
s 35	(reckless wounding)	7 years	3 years
	(reckless wounding in company)	10 years	4 years
	(reckless, grievous bodily harm)	10 years	4 years
	(reckless grievous bodily harm in company)	14 years	5 years
s 59	(assault occasioning actual bodily harm, basic offence)	5 years	-
	(assault occasioning actual bodily harm in company)	7 years	-
s 61	(common assault)	2 years <sup>19</sup>	-
s 54	(grievous bodily harm by unlawful or negligent act or omission)	2 years <sup>20</sup>	-
s 19A	(murder)	Life	20–25 years
s 24	(manslaughter)	25 years	-
s 93C	(affray)	10 years	-

18. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2008) vol 3, Chapter 10.

19. The offence carries a maximum of imprisonment for 12 months if prosecuted in the summary jurisdiction.

20. The offence carries a maximum of imprisonment for 12 months if prosecuted in the summary jurisdiction.

7.41 The Council is generally of the view that the maximum sentences available are adequate, and do not require any increase. It is of the view that any concerns in relation to the level of sentencing are more likely to have been due to the fact that where intoxication was a substantial issue, individual offences tend to have been dealt with, either from the outset, or following charge negotiations, as an offence of general or basic intent rather than as one of specific intent. Otherwise, and particularly where the sentencing relates to an offence attracting a SNPP, the relevant issue has substantially revolved on where it fell within the range of objective seriousness.

7.42 In relation to the SNPPs the Council repeats its concerns expressed in previous reports<sup>21</sup> as to the significant variations, between individual offences, in the ratio between the SNPP and the maximum sentences. In this instance, they range between 28% (s 33) and 42.85% (s 35(4)). It remains of the view that there is a strong case for a review of the procedure to be adopted for the fixing of SNPPs generally, including an identification of the factors properly to be taken into account, and of the respective weight to be given to them. In these circumstances, it does not consider it advisable at this stage to express any concluded view in this respect in relation to the SNPPs identified above.

7.43 In general terms however it sees no immediate need for amendment in the light of current sentencing trends, and the discretion reserved to judges to move below or above the SNPP by reference to the provisions of s 54B(2) and (3) of the *Crimes (Sentencing Procedure) Act* in relation to sentencing after trial and otherwise to have regard to the SNPP as a guidepost for cases dealt with after a plea of guilty.<sup>22</sup> In this respect it is influenced by the wide variety of circumstances that can give rise to the offences which can be charged under the provisions

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21. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2008) vol 1, [3.21]; NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007* (2007) 32–5.

22. *R v Way* (2004) 60 NSWLR 168; *R v Davies* [2004] NSWCCA 319; *Mulato v The Queen* [2006] NSWCCA 282.



mentioned, which can range from particularly serious deliberate and prolonged attacks on a victim, to spontaneous simple assaults with unexpected serious consequences.

## PROCEDURAL ASPECTS

7.44 Under this heading the Council deals with options (h) and (i).

7.45 The Council notes the concerns expressed by the Chief Magistrate as to the prosecution of personal violence cases in the Local Court, where their seriousness, and the nature of the injuries inflicted, might be such as to prevent the imposition of a sufficiently severe sentence, by reason of the limit on that court in imposing sentences of imprisonment for a single offence, in excess of two years.

7.46 The case cited as providing an example was that of *Director of Public Prosecutions (NSW) v Houn*,<sup>23</sup> in which an intoxicated offender struck the victim in the face with a broken bottle in the early hours of the morning, while she was using a public phone in a street near her residence. The victim suffered a number of facial lacerations that required suturing. The attack was entirely unprovoked, and the offender was charged with malicious wounding.<sup>24</sup> The offence was found by Magistrate Maloney to have been one that should have attracted a head sentence of three and a half years with a non-parole period in the order of two years, after allowing for the offender's mental condition and subjective circumstances. However by reason of the jurisdictional limit of the Court the sentence imposed was one of two years' imprisonment with a non-parole period of 15 months.

7.47 The Council notes that a s 33 offence is strictly indictable and can only be dealt with in the Supreme Court or District Court. A charge of murder arising from the use of a weapon will invariably be dealt with in the Supreme Court; a charge of manslaughter will commonly be determined in the District Court; although it will be dealt with in

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23. *DPP (NSW) v Houn* [2008] NSWLC 16.

24. *Crimes Act 1900* (NSW) s 35(1)(a).

the Supreme Court where the offender was indicted on a charge of murder and has either been acquitted of that charge and found guilty of manslaughter, or has pleaded guilty to manslaughter following committal for trial in the Supreme Court.

7.48 However s 35, s 54 and s 93C (affray) offences are Table 1 offences, while s 59 and s 61 offences are Table 2 offences. These offences can be dealt with in the Local Court unless the prosecutor or person charged elects otherwise for a Table 1 offence, or unless in the case of a Table 2 offence the prosecutor otherwise elects.<sup>25</sup>

7.49 The statistics provided by the Chief Magistrate noted earlier covering the period 1993 to 2006 do show an increase in relation to the numbers of cases finalised in the Local Court involving charges of assault occasioning actual bodily harm (s 59), reckless grievous bodily harm or wounding or its predecessor (s 35), with a corresponding decline in the numbers of such cases finalised in the District Court. They similarly show an increase over the period in the number of cases of affray finalised in the Local Court; as well as a decrease in the percentage of cases referred to the Office of the Director of Public Prosecutions (ODPP) by police that proceeded in the District Court, following election by that office.<sup>26</sup>

7.50 Absent a more comprehensive database which would allow a dissection of the raw figures, so as to identify any trend in relation to glassing offences, or in relation to cases where intoxication was present, and absent the capacity to explore the reasons for the absence of an election in relation to the large number of cases involved, it is difficult to reach any firm conclusion as to whether any significant body of offenders are receiving inadequate sentences.

7.51 In this respect the Council recognises the importance of giving proper respect to the prosecutorial discretion, to the desirability of the

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25. The maximum penalty that may be imposed in the Local Court for either a s 54 or s 61 offence is imprisonment for twelve months.

26. 28.14% in 2006 compared with 63.29% in 2000: see Annexure C.

system allowing for legitimate charge bargaining which may justify preferring a lesser charge in return for a plea, to the workload of the ODPP, and to the policy considerations which have justified the transfer to the Local Court of an enlarged criminal jurisdiction.

7.52 Three matters do however arise in relation to the Chief Magistrate's concerns. First, the Council considers that it would be desirable for glassing cases and similar cases of personal violence involving the use of an instrument as a weapon to proceed in the District Court where they result in a significant injury, unless there are persuasive reasons to the contrary. This would have the advantage of ensuring that the issue of intoxication, where it arises, was appropriately addressed, in accordance with settled principles, allowing for review by the New South Wales Court of Criminal Appeal if error occurred in this respect. It would also overcome the problems of the current jurisdictional limit of the Local Court in dealing with cases which the community can legitimately regard as involving serious offences.

7.53 Secondly, if the first approach is not adopted, then consideration may need to be given to increasing the jurisdictional limit of the Local Court for selected personal violence offences (for example, ss 35, 54 and 59 offences as well as for s 33B (use weapon to commit offence, resist arrest etc) and s 60 et seq offences relating to assaults on police and other law enforcement officers). In this respect it notes that the Local Court jurisdictional limit is one of five years imprisonment in Tasmania (for a second offence) and in the Northern Territory,<sup>27</sup> although in three of those states and territories there is not an intermediate equivalent of the NSW District Court.<sup>28</sup>

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27. *Sentencing Act 1997* (Tas) s 13; *Sentencing Act 1995* (NT) s 122. Cf the statutory restriction for a sentence of imprisonment in a court of summary jurisdiction is two years in Victoria, South Australia and the ACT; and three years in Queensland: *Sentencing Act 1991* (Vic) s 113; *Criminal Law (Sentencing) Act 1988* (SA) s 19; *Crimes Act 1900* (ACT) s 375(12); *Criminal Code Act 1899* (Qld) s 552H. In Western Australia, the current maximum sentence of imprisonment for a simple offence or an indictable offence dealt with summarily is three years: see, eg, *Criminal Code Compilation Act 1913* (WA) ss 68, 145(2), 313(1)(a).

28. Namely, Tasmania, the ACT and the Northern Territory.

7.54 The Council has also given consideration to the possibility of conferring a power in the Local Court to refer matters to the District Court where it is of the view that its jurisdictional limit will prevent the imposition of an appropriate sentence.

7.55 The Council has concerns in relation to this option last mentioned, inter alia, having regard to the potential for unfairness in relation to an accused who has entered a plea of guilty on the understanding that the matter will be determined in the Local Court and that a sentence will be passed within its jurisdictional limits.

7.56 Additionally, there would appear to be both practical and jurisdictional difficulty in the application of any such power.

- First, the involvement in a magistrate in any such decision could require a degree of prejudgment which might conflict with the normal judicial role, particularly where the ODPP and Defence have had an opportunity of considering the appropriate venue.
- Secondly, there could be practical problems in determining whether the case should be elevated to the District Court without hearing all of the evidence, including any defence case concerning the offender's personal circumstances.

7.57 The Council considers that the preferred course is for the ODPP to be given an adequate opportunity to consider the exercise of its election, in relation to any personal violence offence, where an instrument is used as a weapon and where a significant injury is occasioned. This means that the NSW Police prosecutors should refer all such cases to the ODPP in sufficient time to allow the case to be considered, and the election exercised if appropriate. If given this opportunity then the referral possibility should not become an issue since the ODPP should give consideration to the possible penalty when considering whether or not to elect, as it currently must do so in relation to SNPP offences, all of which carry SNPPs of at least three years.

7.58 The Council notes that there is some force in an argument that the problem identified by the Chief Magistrate could be met by an increase in the jurisdiction of the Local Court. Any such change could however have a significant impact on the respective workloads of the two Courts, and could not be sensibly considered without a detailed inquiry into that impact. This would require consultation with the head of each jurisdiction, members of the legal profession including, obviously the ODPP and Public Defenders Office, but also the Police Prosecution Branch.

7.59 It would also require careful consideration as to whether any such increase in jurisdiction should be confined to certain offences, or should be applied across the board, a decision that would also have a direct impact on the extent to which the jurisdiction should be lifted. An alternative approach, if it were thought desirable to limit the occasion for summary trial, would be to amend the Table to the *Criminal Procedure Act 1986* (NSW) to exclude selected personal violence offences.

7.60 The Council is not in a position to express any firm conclusions in this respect. For it to do so, it would need to engage in detailed consultations with the parties identified above, and to have brought to its attention specific examples of concern beyond the one matter of immediate relevance to the present Report that was identified in the Chief Magistrate's submission.

7.61 It observes finally in this respect that any additional transfer of cases to the Local Court to accommodate the increased jurisdiction would require examination of two questions:

- should such cases be prosecuted by ODPP staff;
- if not, would it be necessary to subject police prosecutors to similar codes of conduct and potential disciplinary action commensurate with that applicable to members of the legal profession.

## SEEKING A GUIDELINE JUDGMENT

7.62 Under this heading, the Council deals with option (j).

7.63 The power of the Court of Criminal Appeal to deliver a guideline judgment is derived under s 37 of the *Crimes (Sentencing Procedure) Act*, and encompasses the areas considered in particular in *R v Henry*<sup>29</sup> and in *R v Whyte*.<sup>30</sup> In some instances guidelines have been provided in numerical terms, and in others the concentration has been on identifying the relevant factors for consideration, although in each case with the recognition that a guideline is not to be taken as a rule or presumption, but rather as a check or guide to be applied within the discretion of the sentencing court.<sup>31</sup>

7.64 The Council is not persuaded, at this time, of any need for a guideline judgment. There have been insufficient serious cases demonstrating any obvious pattern of inconsistency or misapplication of principle to warrant that course. Such variations in outcome as are evident reflect the significant differences in objective and subjective circumstances that apply, and the Court of Criminal Appeal has already given clear guidance as to the applicable principles. The Council will however continue to monitor these cases, as part of its annual review, in case any persistent error or anomaly in sentencing patterns emerges.

## DIVERSIONARY PROGRAMS

7.65 Under this heading, the Council deals with option (k).

7.66 The Council does not recommend extension of the current diversionary programs, the details of which are summarised briefly in Annexure D, to include offenders charged with or convicted of alcohol-related personal violence offences.

7.67 In most instances, the offences will be too serious for diversion, at least in the case of adult offenders. Additionally, the reasons noted

29. *R v Henry* (1999) 46 NSWLR 346.

30. *R v Whyte* (2002) 55 NSWLR 252.

31. *R v Whyte* (2002) 55 NSWLR 252, [146]–[147].

in Annexure D for not extending the Drug Court to offenders where conduct is alcohol rather than drug-related appear to be sound.

7.68 Rehabilitation can appropriately be provided for this group through the standard programs available in custody, or in the community following release on parole or on a bond. The Council supports, in general terms, the introduction of alcohol abuse reduction initiatives, but makes no further comment in this respect, as the matter falls outside its terms of reference and expertise.

## SUMMARY AND RECOMMENDATIONS

7.69 In the light of the foregoing analysis, the Council does not make any formal recommendation for the alteration of current sentencing laws and practices, or for the creation of any new offences to deal with alcohol-related violence. It observes that for many offenders, whose immaturity and poor anger control contribute to their involvement in incidents occurring spontaneously at licensed premises, and who have no prior record of criminality, it is appropriate to preserve the existing wide sentencing discretion that will allow each case to be dealt with on its merits. It is otherwise satisfied that, for repeat offenders who have a record for violence while intoxicated, the existing sentencing laws and practice permit the imposition of appropriately condign sentences.

7.70 The Council does however recommend that careful consideration be given by the Police and the Office of the Director of Public Prosecutions, in any case involving a significant injury to the victim, as to the making of an election, in accordance with the provisions of the *Criminal Procedure Act*, to ensure that any case for which a sentence might be expected that would exceed the jurisdictional limit of the Local Court, is brought in the District Court (or in the Supreme Court, where the charge is one of murder).

7.71 The Council also recommends that there be an ongoing review of cases finalised in the Local Court to determine whether there is any significant body of personal violence cases, prosecuted in that Court,

where its jurisdictional limit has led to the imposition of sentences that are not commensurate with the objective seriousness of the offence and the subjective circumstances of the offender. Depending on the outcome of that review, further consideration could be given, following consultation with relevant stakeholders and examination of the likely impact on the caseloads of the Local and District Courts, to the possibility of increasing the jurisdiction of the Local Court.

7.72 The Council recommends, consistently with its previous reports, that it be given a reference to examine the procedure by which standard non parole periods should be set, and in the course thereof, to review the existing SNPPs, including those of relevance for offences embraced within the current reference.

7.73 The Council intends to monitor current cases involving alcohol-related violence offences, with a view to better informing itself as to whether a guideline judgement should be sought. In support of such work it seeks the assistance of the Local and District Courts in either publishing relevant sentencing judgments or in producing copies thereof to the Council.

7.74 Otherwise, the Council takes the view that the response to alcohol-related violence, and the steps required to reduce its incidence, lie more in the hands of those involved in the liquor industry and in public education, than in the criminal justice system.

7.75 In this respect, it supports the introduction of strict licensing laws that will curb excessive drinking, and that will impose professional standards on bar and security staff of the kind that will allow timely and effective intervention in the kinds of incidents, on such premises, that can erupt into violence.

7.76 It also supports public education campaigns on the risks attaching to the combination of alcohol and violence, and on the destructive consequences for those who are convicted of offences in that context.



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## Annexures

## Annexure A: Offences Considered by this Report

Section	Offence	Maximum	Standard Non-parole Period
s 33	Wounding or grievous bodily harm	25 years	7 years
s 35(2)	Reckless / grievous bodily harm	10 years	4 years
s 35(3)	Reckless wounding in company	10 years	4 years
s 35(4)	Reckless wounding	7 years	3 years
s 35(1)	Reckless grievous bodily harm in company	14 years	5 years
s 59(1)	Assault occasioning actual bodily harm, basic offence	5 years	-
s 59(2)	Assault occasioning actual bodily harm in company	7 years	-
s 61	Common assault	2 years	-
s 54	Grievous bodily harm by unlawful or negligent act or omission	2 years	-
s 19A	Murder	Life	20–25 years
s 24	Manslaughter	25 years	-
s 93C	Affray	10 years	-

## **Annexure B: Submissions**

Submission 1 – New South Wales Bar Association

Submission 2 – Public Defenders Office New South Wales

Submission 3 – Law Society of New South Wales

Submission 4 – NSW Department of Ageing, Disability and Home Care

Submission 5 – Office of the Director of Public Prosecutions New South Wales

Submission 6 – Australian National Council on Drugs

Submission 7 – Alcohol and Other Drugs Council of Australia

Submission 8 – SHINE for Kids

Submission 9 – His Honour G. Henson, Chief Magistrate of the Local Courts of New South Wales

Submission 10 – Homelessness NSW

Submission 11 – Australian Hotels Association (NSW)

Submission 12 – St Vincent de Paul Society NSW

Submission 13 – Homeless Persons' Legal Service

Submission 14 – The Returned & Services League of Australia (New South Wales Branch)

Submission 15 – Council of Social Service of New South Wales

Submission 16 – Mental Health and Drug and Alcohol Office, NSW Department of Health

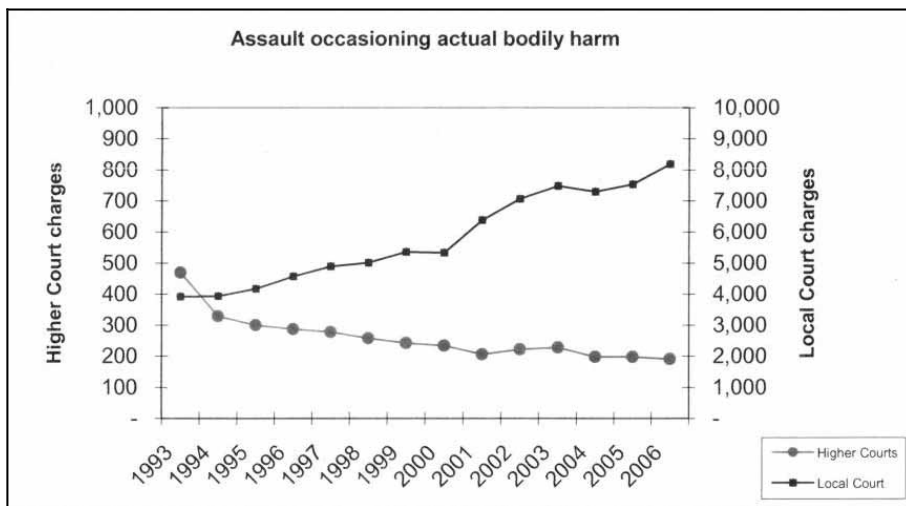
Submission 17 – NSW Police Portfolio

Submission 18 – NSW Department of Corrective Services

## Annexure C: Statistics provided by the Chief Magistrate

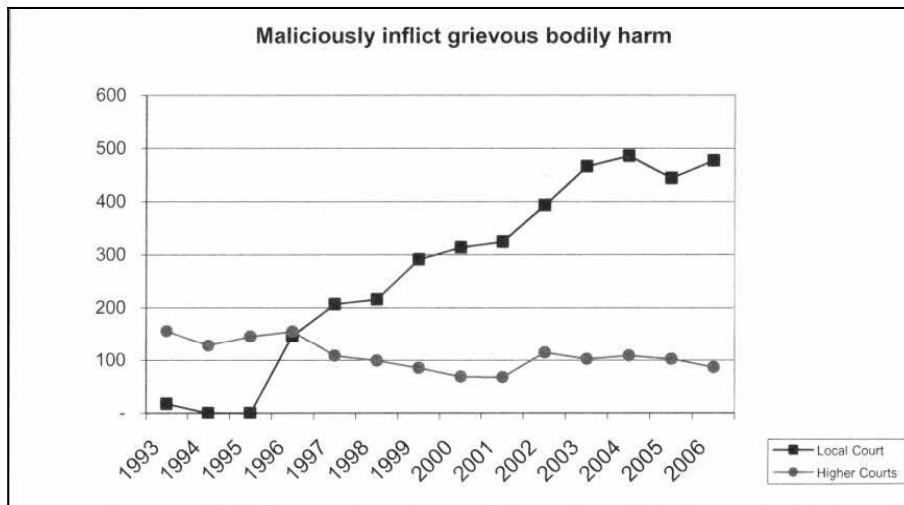
### Assault occasioning actual bodily harm

1.1 Assault occasioning actual bodily harm is an offence under section 59(1) of the *Crimes Act 1900* (NSW) carrying a maximum penalty of five years imprisonment. In 1993 3,920 charges were finalised in the Local Court. In 2006 this had increased to 8,184. Over the same period charges finalised in the District Court declined from 469 to 191.



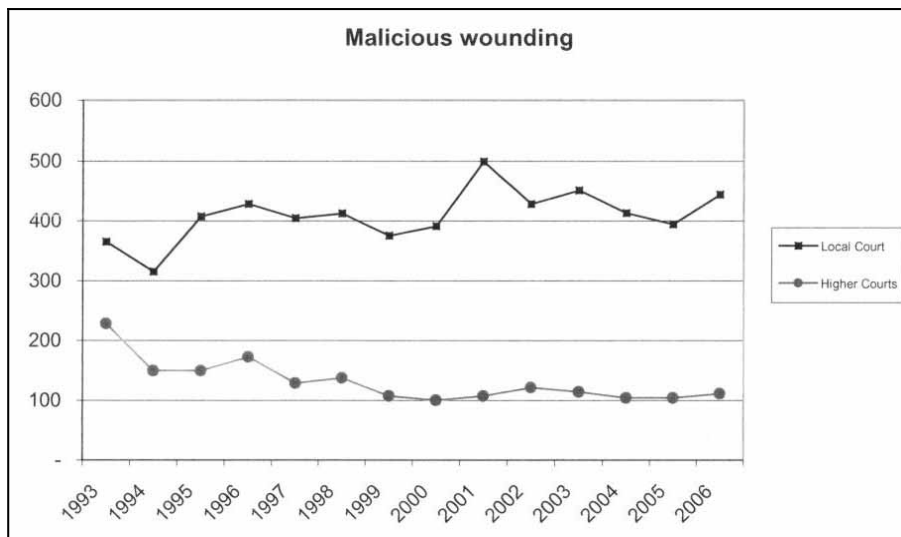
### Maliciously inflict grievous bodily harm

1.2 Maliciously inflict grievous bodily harm and malicious wounding, are offences under section 35 of the *Crimes Act 1900* (NSW) attracting maximum penalties of 10 years imprisonment and 7 years imprisonment respectively. The number of maliciously inflict bodily harm charges finalised in the Local Court, increased between 1993 and 2006 from 18 to 477, whilst the number of charges finalised in the District Court nearly halved in that same period.



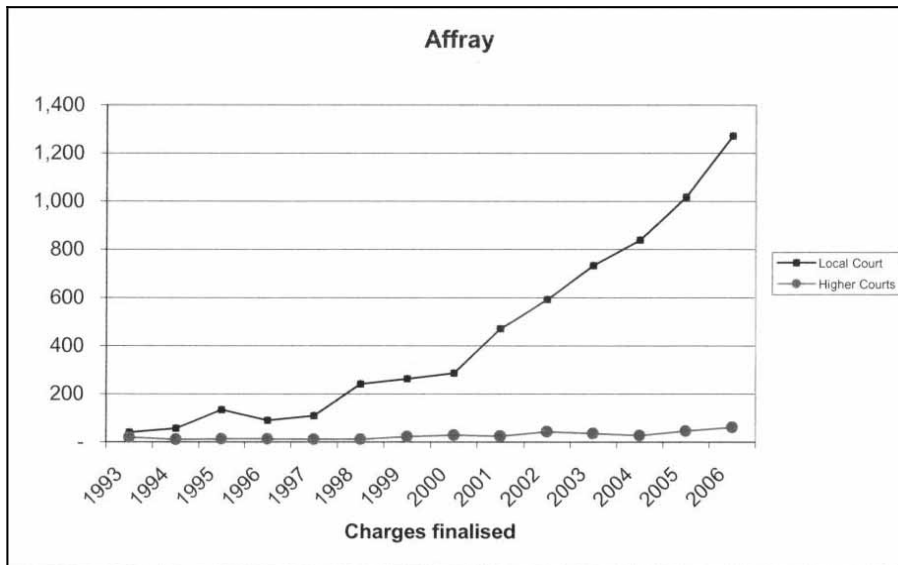
## Malicious wounding

1.3 In the same period the number of charges of Malicious Wounding, which carries a maximum penalty of 7 years imprisonment, finalised in the Local Court increased by 22% whilst the number finalised in the District Court reduced by 51%.



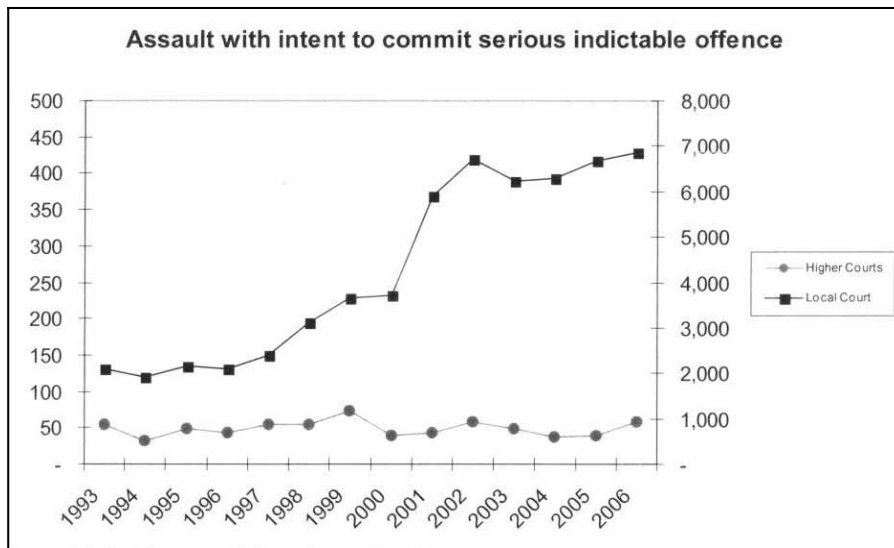
## Affray

1.4 The offence of Affray under section 93C(1) of the *Crimes Act 1900* (NSW) carries a maximum penalty of 10 years imprisonment. The number of charges finalised in the Local Court between 1993 and 2006 increased from 40 to 1,272 whilst the number of charges finalised in the District Court has only marginally increased from 20 to 62.



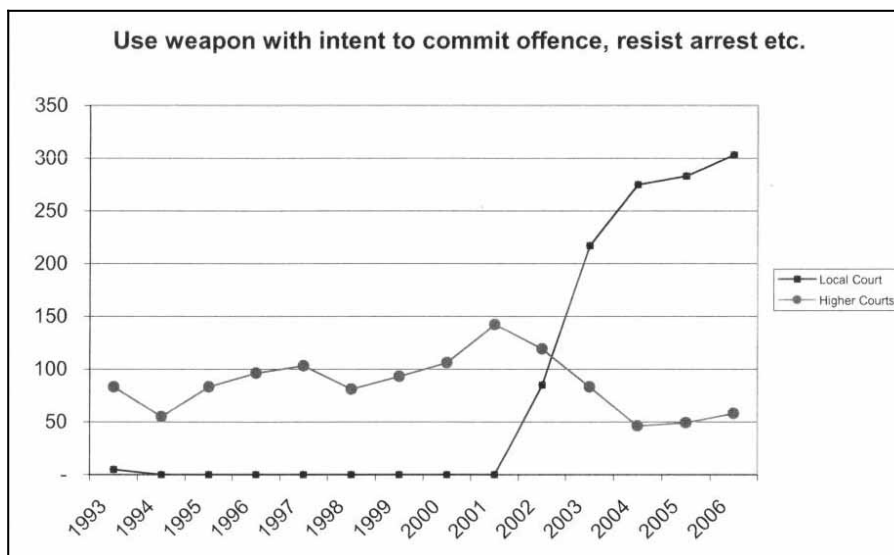
## Assault with intent to commit serious indictable offence

1.5 The offence of Assault with Intent to Commit Serious Indictable Offence is an offence under section 58 of the *Crimes Act 1900* (NSW) and carries a maximum penalty of 5 years imprisonment. The number of charges finalised in the Local Court between 1993 and 2006 has increased from 2,085 to 6,862. The number of charges finalised in the District Court has not increased at all in that time.



**Use a weapon to commit offence, resist arrest etc.**

1.6 The offence under section 33B of the *Crimes Act 1900* (NSW) in relation to using a weapon with intent to commit offence, resist arrest etc. carries a maximum penalty of 12 years imprisonment. In the period between 1993 and 2006, the number of charges finalised in the Local Court has increased by 5,960% since 2001, whilst the number of charges finalised in the District Court has declined by 30%.



## Annexure D: Alcohol abuse reduction and diversionary programs

### INTRODUCTION

1.1 In August 2003, the New South Wales Government Summit on Alcohol Abuse ('the Alcohol Summit'), gave consideration to existing and alternative approaches to the problems caused by alcohol abuse.<sup>1</sup> In response to that Summit there have been a number of initiatives developed directed towards reducing alcohol-related violence and the criminalisation of persons who resort to such behaviour. In this annexure a limited review is provided of current diversionary arrangements along with a reference to some of the initiatives which have been developed to encourage the responsible use of alcohol and to reduce dependence on it.

### A PRE-SENTENCE DIVERSIONARY PROGRAMS

1.2 There are currently a number of diversionary programs in New South Wales that deal specifically with people with a drug and/or alcohol problem, although in accordance with current eligibility criteria they have little (if any) application for offenders charged with personal violence offences of the kind considered in this Report.

#### Magistrates Early Referral Into Treatment (MERIT)

1.3 MERIT is a diversionary program for drug crimes that began as a pilot in Lismore and surrounding courts in 2000.<sup>2</sup> It is currently operating in 61 Local Courts across New South Wales.<sup>3</sup> It aims to assist

1. NSW Alcohol Summit03, *About the Summit* <[http://www.alcoholsummit.nsw.gov.au/about\\_the\\_summit](http://www.alcoholsummit.nsw.gov.au/about_the_summit)> at 8 January 2009; NSW Summit on Alcohol Abuse 2003, *Communiqué*, 29 August 2003.
2. Australian Government and New South Wales Government, 'Illicit Drug Diversion Initiatives & MERIT' <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/DrugDiversion\\_Factsheet.pdf/\\$file/DrugDiversion\\_Factsheet.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/DrugDiversion_Factsheet.pdf/$file/DrugDiversion_Factsheet.pdf)> at 7 January 2009.
3. Matruglio, T., 'Magistrates Early Referral Into Treatment: An Overview of the MERIT Program from July 2000 to December 2007', (Crime Prevention Issues No 2, NSW Attorney General's Department, 2008); Magistrates Early Referral Into Treatment, New South Wales, *MERIT Courts* <<http://www.merit.org.au/Court1.aspx>> at 7 January 2009.



adult defendants with an illicit drug use problem to break the cycle of drug dependency and crime by providing them with an opportunity to undergo drug treatment voluntarily.<sup>4</sup> Funding is provided under the Illicit Drug Diversion Initiative Funding Agreement between the Commonwealth and New South Wales Governments.<sup>5</sup>

1.4 Participants in the MERIT program undergo supervised drug treatment as a condition of bail usually for three months.<sup>6</sup> Treatment is provided through Area Health Services or selected non-government agencies.<sup>7</sup>

1.5 The New South Wales Attorney General's Department acts as the lead agency for the program. The New South Wales Department of Health (NSW Health) is responsible for coordinating health services with the New South Wales Police Force, the Legal Aid Commission of New South Wales, the Probation and Parole Service, and Local Court officers.<sup>8</sup>

1.6 To be eligible for the program, a defendant must:

- be an adult who has a demonstrable and treatable illicit drug problem;
- be suitable for, and willing to consent to, drug treatment;
- be suitable for release on bail; and

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4. See Magistrates Early Referral Into Treatment, New South Wales, *About the MERIT Program* <<http://www.merit.org.au/AboutMerit.aspx>> at 7 January 2009.

5. Magistrates Early Referral Into Treatment, New South Wales, *About MERIT* <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit\\_aboutus](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit_aboutus)> at 7 January 2009.

6. Magistrates Early Referral Into Treatment, New South Wales, *About MERIT* <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit\\_aboutus](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit_aboutus)> at 7 January 2009.

7. Chief Magistrate Patricia J Staunton AM, *Local Court Practice Note No 5: Magistrates Early Referral into Treatment (MERIT) Programme*, 20 August 2002, [11.1]; Magistrates Early Referral Into Treatment, New South Wales, *About the MERIT Program* <<http://www.merit.org.au/AboutMerit.aspx>> at 7 January 2009.

8. Magistrates Early Referral Into Treatment, New South Wales, *About the MERIT Program* <<http://www.merit.org.au/AboutMerit.aspx>> at 7 January 2009.

- have received approval by the magistrate to enter the program.<sup>9</sup>

1.7 Defendants are ineligible for the program if they are or have been involved in offences related to physical or sexual assault, or in matters that will be heard in the District Court.<sup>10</sup>

1.8 Before 2004, defendants were not considered for the program if alcohol use was their primary problem.<sup>11</sup> As a response to the Alcohol Summit, the program was extended to offenders with alcohol-related problems.<sup>12</sup> MERIT became open to defendants with alcohol problems in Broken Hill from June 2004 and Wilcannia from May 2005.

## Rural Alcohol Diversion (RAD) Pilot Program

1.9 The RAD pilot program commenced operation in December 2004.<sup>13</sup> It is modelled on the MERIT program but caters only for adult defendants with an alcohol problem.<sup>14</sup> It is currently being trialled at Orange and Bathurst Local Courts.<sup>15</sup>

1.10 Eligibility for entry into the RAD program is essentially the same as for MERIT with the difference being that the precondition for entry concerns the existence of a demonstrable and treatable alcohol problem, rather than involving an illicit drug problem.

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9. Chief Magistrate Patricia J Staunton AM, *Local Court Practice Note No 5: Magistrates Early Referral into Treatment (MERIT) Programme*, 20 August 2002, [8]; Magistrates Early Referral Into Treatment, New South Wales, *About the MERIT Program* <<http://www.merit.org.au/AboutMerit.aspx>> at 7 January 2009.
  10. Chief Magistrate Patricia J Staunton AM, *Local Court Practice Note No 5: Magistrates Early Referral into Treatment (MERIT) Programme*, 20 August 2002, [8]; Magistrates Early Referral Into Treatment, New South Wales, *About the MERIT Program* <<http://www.merit.org.au/AboutMerit.aspx>> at 7 January 2009.
  11. Magistrates Early Referral Into Treatment, New South Wales, *About the MERIT Program* <<http://www.merit.org.au/AboutMerit.aspx>> at 7 January 2009.
  12. New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 227.
  13. Magistrates Early Referral Into Treatment, New South Wales, *Welcome to the Magistrates Early Referral Into Treatment (MERIT) Website* <<http://www.lawlink.nsw.gov.au/merit>> at 9 January 2009.
  14. Email from Karen Patterson (Crime Prevention Division, NSW Attorney General's Department) to Katherine McFarlane (NSW Sentencing Council), 4 March 2009.
  15. NSW Attorney General's Department Crime Prevention Division, *CPD Projects—Rural Alcohol Diversion (RAD) Pilot Program* <[http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/pages/CPD\\_projects#rad](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/CPD_projects#rad)> at 7 January 2009.

1.11 Defendants are similarly not considered for the program if they are or have been involved in serious violent or sexual offences, or in matters to be heard in the District Court.<sup>16</sup>

1.12 The management regime and subsequent Court disposition substantially mirror that applicable to the MERIT program.

## Wellington Options

1.13 Wellington Options is a specialist program modelled on MERIT for the Wellington community which began in June 2002. The program accepts adult and young offenders with alcohol or illicit drug use problems appearing at the Wellington Local Court before the entering of a plea.<sup>17</sup>

## Drug Court

1.14 The Drug Court of New South Wales was established by the *Drug Court Act 1998* (NSW) and has Local Court and District Court jurisdiction.<sup>18</sup> It specialises in assisting offenders with drug dependency problems in both their drug dependence and their offending.<sup>19</sup> The Drug Court's target population are more serious offenders facing a prison sentence.<sup>20</sup>

1.15 A person is eligible for the Drug Court if he or she is at least 18 years of age<sup>21</sup> and is an 'eligible person' or an 'eligible convicted

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16. Magistrates Early Referral Into Treatment, *Rural Alcohol Diversion Program* <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit\\_rad](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit_rad)> at 7 January 2009.

17. New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 225.

18. *Drug Court Act 1998* (NSW) ss 19, 24.

19. Drug Court of New South Wales, *About the Drug Court of New South Wales* <[http://www.lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/adrgcrt\\_aboutus](http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/adrgcrt_aboutus)> at 8 January 2009.

20. Australian Institute of Criminology, *Australian Responses to Illicit Drugs: Drug Courts* <[http://www.aic.gov.au/research/drugs/responses/drug\\_courts.html](http://www.aic.gov.au/research/drugs/responses/drug_courts.html)> at 9 January 2009.

21. *Drug Court Act 1998* (NSW) s 18D(1)(b)(i); Drug Court of New South Wales, *About the Drug Court of New South Wales* <[http://www.lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/adrgcrt\\_aboutus](http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/adrgcrt_aboutus)> at 8 January 2009.

offender' as defined by the *Drug Court Regulation 2005* (NSW). Persons charged with an offence involving violent conduct or sexual assault are excluded.

1.16 Once accepted into the program, a defendant who is an eligible person is remanded into custody for detoxification and assessment for up to two weeks. After the assessment, the defendant must plead guilty and will receive a suspended sentence. The defendant then undertakes the three-phase treatment program for at least 12 months.<sup>22</sup>

1.17 The Drug Court may impose sanctions or reward the defendant with privileges during the program.<sup>23</sup> When a program is completed or terminated, the Court may confirm the initial sentence, or replace it with another sentence as appropriate.<sup>24</sup> The final sentence cannot be more severe than the initial sentence.<sup>25</sup> In reconsidering the sentence, the Court may take into account the nature of the offender's participation in the program, any sanctions that have been imposed and any time spent in custody during the program.<sup>26</sup>

1.18 Successful completion of the program usually will result in a non-custodial sentence.

1.19 The Alcohol Summit recommendation for the extension of the Drug Court to include offenders with alcohol problems was not accepted for a number of reasons, including the following:<sup>27</sup>

22. Drug Court of New South Wales, *About the Drug Court of New South Wales* <[http://www.lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/adrgcrt\\_aboutus](http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/adrgcrt_aboutus)> at 8 January 2009; Australian Institute of Criminology, *Australian Responses to Illicit Drugs: Drug Courts* <[http://www.aic.gov.au/research/drugs/responses/drug\\_courts.html](http://www.aic.gov.au/research/drugs/responses/drug_courts.html)> at 9 January 2009.

23. *Drug Court Act 1988* (NSW) s 16. Rewards and sanctions may involve: the conferral or withdrawal of privileges; the imposition of, or a reduction in the amount of, monetary penalty; or changes in the frequency of counselling or other treatment, the degree of supervision, the frequency of drug tests, or the nature or frequency of vocational and social services attendance: *Drug Court Act 1988* (NSW) ss 16(1), (2). In addition, as a sanction participants may be imprisoned in a correctional centre for up to 14 days for any one instance of non-compliance: *Drug Court Act 1988* (NSW) s 16(2)(f).

24. *Drug Court Act 1988* (NSW) s 12(3).

25. *Drug Court Act 1988* (NSW) s 12(4).

26. *Drug Court Act 1988* (NSW) s 12(2).

27. NSW Summit on Alcohol Abuse 2003, *Communiqué*, 29 August 2003, Recommendation 9.12.

- drug dependent offenders dealt with by the Drug Court commit non-violent and primarily acquisitional crimes, while offenders with an alcohol problem facing custodial sentences usually have committed violent crimes, including domestic violence and repeated drink driving;
- alcohol-related offenders require different types of treatment interventions and ought not to be combined with drug dependent offenders; and
- there already are existing court-based intervention programs for some groups of alcohol-related offenders.

### Youth and Alcohol Drug Court (YDAC)

1.20 The YDAC is a pilot program that was developed in response to recommendations of the 1999 New South Wales Drug Summit and that commenced operation in July 2000. It is administered by the Children's Court and conducted from the Parramatta, Campbelltown and Bidura Children's Courts.<sup>28</sup> The YDAC aims to rehabilitate and reduce reoffending by young people with alcohol or drug problems, by addressing the broader health and welfare issues relating to their drug or alcohol use and associated criminal activities.<sup>29</sup>

1.21 Young persons who are charged with an offence before the Children's Court may be referred to the YDAC program upon application by the young person or on the Court's own motion.<sup>30</sup>

1.22 During the first appearance before the YDAC, the magistrate assesses the legal eligibility of young person to participate in the program. At this stage, the magistrate has a discretion to exclude a legally eligible young person, on the basis that: the monthly quota has been reached; a caution or youth justice conference is more appropriate;

28. Children's Court of New South Wales, *Practice Direction No 27: Practice Direction for the Youth Drug and Alcohol Court*, 16 May 2007, [3].

29. Youth Drug and Alcohol Court, *About Us* <[http://www.lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/ydrgrt\\_aboutus](http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgrt_aboutus)> at 8 January 2009.

30. Children's Court of New South Wales, *Practice Direction No 27: Practice Direction for the Youth Drug and Alcohol Court*, 16 May 2007, [4]–[5].

a control order would not be imposed; or the seriousness of the young person's offence or history of offending is such that a period of control is likely to be imposed even if he or she completed the YDAC program successfully.<sup>31</sup>

1.23 At the young person's second appearance before the YDAC, a potential program plan is submitted to the magistrate, who will determine whether the young person should be accepted into the YDAC program.<sup>32</sup> Where an appropriate program plan cannot be developed for a young person, the matter is sent back to the referring court for sentence.<sup>33</sup>

## Youth Rural Residential Rehabilitation Centres

1.24 The Youth Rural Residential Rehabilitation Centres were established under a program for rural and regional young offenders who are either within the juvenile justice system or at risk of entering the system because of their drug and alcohol abuse. The aim of the program is to assist young people who are in the later stages of detoxification or in post-detoxification.<sup>34</sup>

1.25 Young offenders may be diverted to the Program for Adolescent Life Management (PALM) residential drug rehabilitation centres at Coffs Harbour and Dubbo, both of which are operated by the Ted Noffs Foundation under the supervision of the Department of Juvenile Justice (DJJ).<sup>35</sup>

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31. Children's Court of New South Wales, *Practice Direction No 27: Practice Direction for the Youth Drug and Alcohol Court*, 16 May 2007, [8.4].

32. Youth Drug and Alcohol Court, *Policy and Programs* <[http://www.lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/ydrgcrt\\_policy](http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_policy)> at 8 January 2009.

33. Children's Court of New South Wales, *Practice Direction No 27: Practice Direction for the Youth Drug and Alcohol Court*, 16 May 2007, [9.3].

34. NSW Health, *Youth Rural Residential Rehabilitation Centres* <[http://www.druginfo.nsw.gov.au/diversion/young\\_offenders\\_drug\\_diversion\\_programmes/youth\\_rural\\_residential](http://www.druginfo.nsw.gov.au/diversion/young_offenders_drug_diversion_programmes/youth_rural_residential)> at 9 January 2009.

35. NSW Health, *Youth Rural Residential Rehabilitation Centres* <[http://www.druginfo.nsw.gov.au/diversion/young\\_offenders\\_drug\\_diversion\\_programmes/youth\\_rural\\_residential](http://www.druginfo.nsw.gov.au/diversion/young_offenders_drug_diversion_programmes/youth_rural_residential)> at 9 January 2009; Ted Noffs Foundation, PALM <<http://www.noffs.org.au/programs/palm.shtm>> at 9 January 2009.

1.26 The eligibility criteria for the Youth Rural Residential Rehabilitation Centres are derived from the eligibility criteria for diversion under the *Young Offenders Act*.

1.27 In addition, a young person is eligible for entry into PALM, if he or she: is between 14 and 18 years of age; has a history of drug abuse; has socio-cultural or familial connection with Dubbo and surrounding areas of the DJJ South West Region or DJJ Northern Region, north of Taree; and has completed an initial alcohol and other drug assessment.<sup>36</sup>

### Rural and Regional Drug and Alcohol Counselling

1.28 Young offenders in rural and regional New South Wales may also be diverted from the criminal justice system to DJJ's drug and alcohol counsellors in 17 rural locations.<sup>37</sup> Referrals may be made at different stages of the criminal justice process, including: from the courts directly; from youth justice conferences under the *Young Offenders Act*; through probationary and community orders under the *Children (Criminal Proceedings) Act*; and through early release from custody under s 24(1)(c) of the *Children (Detention Centres) Act 1987* (NSW).<sup>38</sup>

1.29 Young people are also eligible to access the Young Offenders Rural and Regional Counselling program if they have been convicted of

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36. York, L. et al, 'The Effectiveness of the Illicit Drug Diversion Initiative in Rural and Remote Australia' (Drug Statistics Series No 19, Australian Institute of Health and Welfare, 2008) 155.

37. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 17, attached to Submission 16: NSW Department of Health. Examples of the rural locations include Lismore, Kempsey, Tamworth, Gosford, Bateman's Bay/Queanbeyan, Riverina, Orange, Broken Hill and Dubbo: NSW Health, *Rural and Regional Drug & Alcohol Counsellors* <[http://www.druginfo.nsw.gov.au/diversion/young\\_offenders\\_drug\\_diversion\\_programmes/rural\\_and\\_regional\\_drug\\_and\\_alcohol\\_counsellors](http://www.druginfo.nsw.gov.au/diversion/young_offenders_drug_diversion_programmes/rural_and_regional_drug_and_alcohol_counsellors)> at 9 January 2009.

38. NSW Health, *Rural and Regional Drug & Alcohol Counsellors* <[http://www.druginfo.nsw.gov.au/diversion/young\\_offenders\\_drug\\_diversion\\_programmes/rural\\_and\\_regional\\_drug\\_and\\_alcohol\\_counsellors](http://www.druginfo.nsw.gov.au/diversion/young_offenders_drug_diversion_programmes/rural_and_regional_drug_and_alcohol_counsellors)> at 9 January 2009.

an offence and are under the supervision of the DJJ, or are participating in conferencing.<sup>39</sup>

## B OTHER OFFENDER SPECIFIC PROGRAMS

### 'Your Choice'

1.30 'Your Choice' is a diversionary program run by the New South Wales Police Force and funded by the Alcohol Education and Rehabilitation Foundation. Where underage persons are detected possessing or consuming alcohol in public by the police, they and their parents are invited to attend an educational seminar on the health, social and legal issues concerning underage drinking.<sup>40</sup>

1.31 In addition, there is an Aboriginal-specific pilot version of the program - the Aboriginal Your Choice pilot - located at Shoalhaven Local Area Command.<sup>41</sup>

### Programs for Aboriginal offenders

#### 'Our Journey to Respect'

1.32 'Our Journey to Respect' is a mandatory community-based intergenerational violence prevention group work program for Aboriginal males aged between 14 and 18 years who have committed, or are at risk of committing, violent crimes,<sup>42</sup> run by the DJJ in association

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39. York, L. et al, 'The Effectiveness of the Illicit Drug Diversion Initiative in Rural and Remote Australia' (Drug Statistics Series No 19, Australian Institute of Health and Welfare, 2008) 157.

40. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08 (2008)*, 15, attached to Submission 16: NSW Department of Health; AER Foundation Ltd, 'AER Welcomes Prime Minister's \$53 million to Tackle Binge Drinking' (Press Release, 11 March 2008).

41. New South Wales, *Questions and Answers No 57*, Legislative Council, 17 June 2008, 2197–8 (Question No 1681: Police—"Your Choice" and Cannabis Cautioning Scheme).

42. NSW Department of Juvenile Justice, *Annual Report 2004–2005 (2005)* 29; NSW Summit on Alcohol Abuse 2003, *Communiqué*, 29 August 2003, Recommendation 9.16; New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW (2004)* 229; Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007 (2008)* 367.



with the Gilgai Aboriginal community organisation.<sup>43</sup> This psycho-educational program involves challenging participants about their offending and is delivered in a culturally appropriate way.<sup>44</sup>

1.33 The New South Wales Government response to the Alcohol Summit advised that the program would be made progressively available across the State and would be extended to include female young offenders.<sup>45</sup>

#### ‘No More’

1.34 ‘No More’ is a community-based mandatory diversionary group treatment program for Aboriginal male young offenders under community-based supervision.<sup>46</sup> It was developed by the DJJ in collaboration with the Daruk Aboriginal community<sup>47</sup> and aims to address the involvement of Aboriginal young offenders in alcohol-related violence.<sup>48</sup> The New South Wales Government response to the Alcohol Summit advised that the program would be expanded to cover female young offenders.<sup>49</sup>

#### ‘Step Out From The Shadows’

1.35 ‘Step Out From The Shadows’ is a specialist alcohol and drugs program trialled in 2006–07 by the DJJ for Aboriginal young offenders.<sup>50</sup>

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43. NSW Department of Juvenile Justice, *Annual Report 2004–2005* (2005) 10.

44. NSW Department of Juvenile Justice, *Annual Report 02/03* (2003) 10.

45. New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 229.

46. NSW Summit on Alcohol Abuse 2003, *Communiqué*, 29 August 2003, Recommendation 9.16; New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 132, 228–31.

47. Parliament of New South Wales, *Question and Answer at the Aboriginal Affairs Budget Estimates Hearing of 28 August 2006*.

48. NSW Summit on Alcohol Abuse 2003, *Communiqué*, 29 August 2003, Recommendation 9.16; New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 228–9.

49. New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 230–1.

50. NSW Department of Juvenile Justice, *Annual Report 2006–2007* (2007) 35.

### 'Walking Together'

1.36 'Walking Together' is a community-based group program that aims to assist offenders in addressing their violence, alcohol and drug problems,<sup>51</sup> and was developed in consultation with the Redfern community, Aboriginal agencies, other government and non-government bodies, and Aboriginal offenders.<sup>52</sup> The program utilises Aboriginal cultural awareness to deal with relevant social issues.

1.37 Aboriginal male and female offenders who are supervised by the DCS's Community Offender Services at the Probation and Parole Service in Redfern and Newtown may be eligible to participate in the program.<sup>53</sup>

1.38 DCS has advised that it has established a parallel program for Aboriginal female offenders to target the issue of domestic violence.<sup>54</sup> It is in the process of developing a further program, 'Walking Together—Controlling Alcohol Abuse', for Aboriginal male and female offenders with an alcohol abuse problem in Newtown, designed to address the harm caused by alcohol abuse, and provide the necessary skills and strategies to promote safe drinking.<sup>55</sup>

### 'Dthina Yuwali'

1.39 'Dthina Yuwali' is an alcohol and other drugs group work program designed for Indigenous young people. The program, which was trialled in 2007–08, was developed by the DJJ's Aboriginal staff to address substance abuse by Aboriginal young people and associated offending.

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51. New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 230–1.

52. New South Wales Department Of Corrective Services, *Annual Report 2003/04* (2004) 41–2.

53. Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008) 367.

54. New South Wales Department Of Corrective Services, *Annual Report 2006/07* (2004) 43.

55. New South Wales Department Of Corrective Services, *Annual Report 2006/07* (2004) 43.

## Programs dealing with traffic offenders

1.40 Although of marginal relevance to the present reference, the Council notes that there are a number of programs directed towards the diversion or rehabilitation of those persons who have been convicted of drink driving offences. They include:

- the Traffic Offender Intervention Program (TOIP);
- the Sober Driver Program; and
- the Alcohol Interlock Program.

## Programs for offenders with a cognitive impairment

1.41 In response to the Alcohol Summit's recommendation that there should be support for, and increased availability of, programs to manage high risk repeat offenders with an alcohol abuse problem,<sup>56</sup> the Government has advised that a new program concerning alcohol use has been developed for adult offenders with an intellectual disability.

### Biyani Cottage

1.42 Biyani Cottage, which began operation in 1994, is a diversionary program for female offenders who have a mental health disorder or mild intellectual disability together with alcohol and drug abuse problems. The program provides accommodation and assistance to female offenders to stabilise their mental health and substance abuse issues and to access long-term community-based residential rehabilitation programs or resources.

1.43 Female offenders who are at a correctional centre on remand before sentencing, or who have breached their parole conditions and are serving the remainder of their parole, may be eligible for entry into the program, if they meet the criteria which require that they have a non-acute mental health disorder or mild intellectual disability; have a history of alcohol or other drug dependency; are detoxified; are on

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56. NSW Summit on Alcohol Abuse 2003, *Communiqué*, 29 August 2003, Recommendation 9.19.

an order by a sentencing court or the State Parole Authority; have no further matters pending in court; and are willing to participate in rehabilitation programs.<sup>57</sup>

## C POST-SENTENCE ALCOHOL-RELATED TREATMENT PROGRAMS

### Post-sentence programs for adult offenders

NSW Department of Corrective Services

1.44 The DCS operates a number of programs to assist offenders to address their alcohol abuse problems, including:<sup>58</sup>

- the Alcohol and Other Drugs (AOD) Awareness programs;
- the Alcohol and Violence Prevention Program;<sup>59</sup>
- Drink Driving Prevention course;
- Drug and Alcohol Addiction and Relapse Prevention programs;<sup>60</sup>
- Sober Driver;
- Aboriginal-specific AOD one-day information session;
- Aboriginal Alcohol Awareness;

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57. New South Wales Department Of Corrective Services, *Biyani* <[http://www.dcs.nsw.gov.au/offender\\_management/offender\\_program\\_development/biyani/index.asp](http://www.dcs.nsw.gov.au/offender_management/offender_program_development/biyani/index.asp)> at 9 March 2009.

58. The list of programs (except the Grog and Driving program) is obtained from: Offender Programs Unit, NSW Department of Corrective Services, *Alcohol and Other Drug Programs* (2005) <[http://www.dcs.nsw.gov.au/offender\\_management/Offender\\_Services\\_and\\_Programs/Strategic%20Summary%20AOD%20Nov%20005.pdf](http://www.dcs.nsw.gov.au/offender_management/Offender_Services_and_Programs/Strategic%20Summary%20AOD%20Nov%20005.pdf)> at 11 March 2009.

59. This is a custodial treatment program that assist offenders in learning strategies to change their behaviours in relation to alcohol use: New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 133.

60. These programs aim to assist alcohol dependent offenders in identifying factors that may trigger relapse and in developing strategies to moderate their behaviour through cognitive behaviour therapy and motivational interviews: New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 133.

- Aboriginal Alcohol and Violence Program;<sup>61</sup> and
- the Brain Story; and
- the Grog and Driving program.<sup>62</sup>

1.45 The DCS also administers two residential programs that provide alcohol and/or drug treatment, including:

- Ngara Nura, a 12-week pre-release therapeutic program at Long Bay Correctional Centre; and
- Bolwara House, a transitional program for female offenders in Emu Plains providing alcohol and drug treatment in a semi-secure community environment.<sup>63</sup>

1.46 In addition, the DCS hosts the Alcohol Anonymous 12 Step Program.<sup>64</sup> The DCS has also established the SMART Recovery Groups, a cognitively based self-help program that complements Alcohol Anonymous and Narcotic Anonymous, in two correctional centres.<sup>65</sup>

1.47 When offenders enter a correctional centre, they are assessed as to their risk of recidivism<sup>66</sup> and screened for their need for substance

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61. Offender Programs Unit, NSW Department of Corrective Services, *Alcohol and Other Drug Programs* <[http://www.dcs.nsw.gov.au/offender\\_management/Offender\\_Services\\_and\\_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf](http://www.dcs.nsw.gov.au/offender_management/Offender_Services_and_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf)> at 11 March 2009.

62. The aim of this program to raise the awareness of Aboriginal and Torres Strait Islander offenders of drink driving behaviours within the Aboriginal community: New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 133.

63. Offender Programs Unit, NSW Department of Corrective Services, *Alcohol and Other Drug Programs* <[http://www.dcs.nsw.gov.au/offender\\_management/Offender\\_Services\\_and\\_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf](http://www.dcs.nsw.gov.au/offender_management/Offender_Services_and_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf)> at 11 March 2009.

64. New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 230–1.

65. Offender Programs Unit, NSW Department of Corrective Services, *Alcohol and Other Drug Programs* <[http://www.dcs.nsw.gov.au/offender\\_management/Offender\\_Services\\_and\\_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf](http://www.dcs.nsw.gov.au/offender_management/Offender_Services_and_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf)> at 11 March 2009. See also Offender Programs Unit, NSW Department of Corrective Services, *Program Update—April 2006* <[http://www.dcs.nsw.gov.au/offender\\_management/offender\\_services\\_and\\_programs/April%202006.pdf](http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/April%202006.pdf)> at 11 March 2009.

66. Submission 18: NSW Department of Corrective Services, 1.

detoxification.<sup>67</sup> Any offender who has been assessed as requiring substance detoxification is referred to an AOD worker for further assessment and development of a case plan.<sup>68</sup>

## Justice Health

1.48 Justice Health operates four residential detoxification facilities at Parklea, Grafton and Bathurst Correctional Centres, and at the Metropolitan Remand and Reception Centre in Silverwater.<sup>69</sup>

## Post-sentence programs for young offenders

### DJJ's Alcohol And Other Drug (AOD) Programs

1.49 The DJJ's AOD programs are specialist clinical programs that aim to assist young offenders who have committed relatively serious offences in reducing their substance abuse.<sup>70</sup> The programs include a Family Counsellor Program in the metropolitan region; and two rural residential drug rehabilitation services at Dubbo and Coffs Harbour administered by the Ted Noffs Foundation (discussed above).<sup>71</sup>

1.50 AOD Counsellors in juvenile justice centres provide treatment services, including assessment, counselling and group work, to young people in the community as well as those in juvenile justice centres.<sup>72</sup>

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67. Offender Programs Unit, NSW Department of Corrective Services, *Alcohol and Other Drug Programs* <[http://www.dcs.nsw.gov.au/offender\\_management/Offender\\_Services\\_and\\_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf](http://www.dcs.nsw.gov.au/offender_management/Offender_Services_and_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf)> at 11 March 2009.

68. Offender Programs Unit, NSW Department of Corrective Services, *Alcohol and Other Drug Programs* <[http://www.dcs.nsw.gov.au/offender\\_management/Offender\\_Services\\_and\\_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf](http://www.dcs.nsw.gov.au/offender_management/Offender_Services_and_Programs/Strategic%20Summary%20AOD%20Nov%202005.pdf)> at 11 March 2009; Submission 18: NSW Department of Corrective Services, 2.

69. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 17–8, attached to Submission 16: NSW Department of Health.

70. Collaborative Research Unit, NSW Department of Juvenile Justice, 'Clinical Characteristics of Australian Juvenile Sex Offenders: Implications for Treatment' (Monograph Series No 2, 1999, NSW Department of Juvenile Justice, 1999).

71. NSW Department of Juvenile Justice, *Annual Report 2007–2008* (2008) 33.

72. NSW Department of Juvenile Justice, *Annual Report 2007–2008* (2008) 24, 40. The DJJ provides funding to community organisations to deliver the AOD programs to young offenders who have received community-based penalties: NSW Department of Juvenile Justice, *Annual Report 2007–2008* (2008) 33.

Registered nurses are also employed in juvenile justice centres to provide support to young offenders with an alcohol or drug problem.<sup>73</sup>

1.51 The Council has been advised that the DJJ is developing an AOD program to assist Aboriginal offenders to understand the connection between substance use and offending behaviour, through cultural learning and the involvement of Aboriginal elders. The proposed program would be available to offenders in the community as well as those in custody.<sup>74</sup>

#### Juvenile Justice Community Release Treatment Scheme

1.52 The Juvenile Justice Community Release Treatment Scheme pilot is a scheme jointly developed by the DJJ and Justice Health in Dubbo. The pilot was established as a result of a recommendation by the Alcohol Summit.<sup>75</sup> The aims of the pilot is to assist young people by:

- improving their access to health services, including AOD and mental health treatment, immediately following their release from custody;
- engaging their families and carers in the young people's health issues;
- promoting their compliance with treatment; and
- minimising the harm caused by their alcohol and drug issues.<sup>76</sup>

1.53 In 2007–08, the DJJ has expanded the pilot to cover Gosford and Wagga Wagga.<sup>77</sup>

73. NSW Department of Juvenile Justice, *Annual Report 2007–2008* (2008) 24, 46.

74. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 17, attached to Submission 16: NSW Department of Health.

75. The Alcohol Summit recommended that the pilot be modelled on the existing Correctional Centre Release and Treatment Scheme for adult offenders: NSW Summit on Alcohol Abuse 2003, *Communiqué*, 29 August 2003, Recommendation 9.17. This recommendation was supported by the Government: New South Wales Government, *Outcomes of the NSW Summit on Alcohol Abuse: Changing the Culture of Alcohol Use in NSW* (2004) 229.

76. NSW Department of Juvenile Justice, *Annual Report 2007–2008* (2008) 33; NSW Justice Health, *Annual Report 2006/2007* (2007) 33.

77. NSW Department of Juvenile Justice, *Annual Report 2007–2008* (2008) 33.

### Pacific Offending Program

1.54 The Pacific Offending Program is a program for Pacific Island young offenders administered by the Blacktown Juvenile Justice Community Services. The program is an initiative of the Government's Youth Partnership with Pacific Communities that addresses AOD, anger management and conflict resolution issues.<sup>78</sup>

### Community Integration Team

1.55 The Community Integration Team, which began operation in April 2008, is a program established by Justice Health for young offenders with an emerging or serious mental disorder and/or a substance use problem at the time of their release from custody. The objective of the program is to ensure that there is a continuation of care for the young person immediately before or after his or her release.<sup>79</sup>

## D PRACTICAL INITIATIVES TO CURB ALCOHOL ABUSE AND OFFENDING

1.56 Following the Summit on Alcohol Abuse, policy has been developed that is aimed at promoting an increased awareness and responsibility with regard to alcohol use, and at identifying and altering situational factors associated with high levels of alcohol-related personal violence.<sup>80</sup> In particular, the *2006 State Plan: A New Direction for NSW* has established risk drinking as an actionable priority. This section aims to contextualise criminal justice initiatives within the broader direction of alcohol policy in New South Wales.

1.57 The Council notes that various studies have highlighted the relationship between 'public' alcohol-related violence and circumstances conducive to aggressive behaviour, including, generally: permissiveness

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78. NSW Department of Juvenile Justice, *Annual Report 2004–2005* (2005) 29.

79. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 20, attached to Submission 16: NSW Department of Health.

80. Submission 16: NSW Health.



of bar staff, aggressive security personnel, crowding, high levels of intoxication, temporal factors (assaults are more likely to occur late at night, and on weekends) and geographical factors (assaults are more likely to occur in areas with a concentration of licensed venues).<sup>81</sup> The Council further notes that these understandings inform current non-sentencing approaches to decreasing the costs to the community of alcohol abuse and alcohol-related offending in New South Wales.

## Initiatives targeting perceptions and provision of alcohol in New South Wales

### Law enforcement and licensing restrictions

1.58 The New South Wales Police Force has an active role in preventing public violence. Relevantly, the Government has invested in ‘high visibility’ police in entertainment districts on Friday and Saturday nights, and increased the police availability to respond to outbreaks of anti-social behaviour in alcohol-related violence ‘hot spots’.<sup>82</sup> Further, the amendment of s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) December 2007 empowers police to disperse groups of intoxicated people in public places where their behaviour is likely to cause injury to others, damage to property or constitutes a risk to public safety.

81. Graham, K. and Wells, S., ‘Somebody’s Gonna Get Their Head Kicked in Tonight!’ (2003) 43(3) *The British Journal of Criminology* 546; Graham, K. and Wells, S., ‘Aggression Among Young Males in the Social Context of the Bar’ (2001) 9(3) *Addiction Research and Theory* 193; Tomsen, S., Homel, R. and Thommeny, J., ‘The Causes of Public Violence: Situational ‘versus’ Other Factors in Drinking Related Assaults’ in Chappel, D., Grabosky, P., and Strang, H. (eds), *Australian Violence: Contemporary Perspectives* (Australian Institute of Criminology, 2001) 177; Homel, R. and Clark, J., ‘The Prediction and Prevention of Violence in Pubs and Clubs’ (Crime Prevention Studies No 3, Griffith University, 1995); Homel, R., ‘Preventing Violence: A Review of the Literature on Violence and Violence Prevention: a Report Prepared for the Crime Prevention Division of the NSW Attorney General’s Department. (2001); Briscoe, S. and Donnelly, N., ‘Assaults on licensed premises in inner-urban areas’ *Alcohol Studies Bulletin* Curtin University of Technology, NSW BOC SAR, Issue 2, October 2001; Briscoe, S. and Donnelly, N., ‘Temporal and Regional Aspects of Alcohol-Related Violence and Disorder’ *Alcohol Studies Bulletin* No 1, May 2001.

82. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements – 2003/04–2007/08* (2008), 14–5, attached to Submission 16: NSW Department of Health.

1.59 The New South Wales Parliament has introduced legislation in relation to licensing, advertising and capacity restrictions for venues and liquor stores selling alcohol. The *Liquor Legislation Amendment Act 2008* (NSW) and the *Liquor Act 2007* (NSW) (effective 1 July 2008) provide for:

- a six-hour closure period on all new liquor licence from 30 October 2008;
- no increases to standard trading hours for hotels and liquor stores;
- expanded powers to restrict irresponsible liquor promotions, and the requirement that responsible drinking messages accompany promotions offering substantial discounts on alcohol products; and
- the ability to declare lock-outs and curfews in problem areas.<sup>83</sup>

1.60 Further, the New South Wales Alcohol Linking Program reports on New South Wales venues that evidence an abnormally high incidence of alcohol-related violence.<sup>84</sup> The New South Wales Parliament has passed the *Liquor Amendment (Special Licence Conditions) Regulation 2008* (NSW), which imposes special licence conditions, effective from midnight, on declared premises.<sup>85</sup> These require that:

- there is to be no entry after 2 am;
- beverages are to be served in non-breakable glasses; and
- drinks associated with binge or risky drinking are not to be sold, sale of alcohol is to cease for 10 minutes each hour and alcohol service is to cease 30 minutes before closure.

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83. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 13–4, 19, attached to Submission 16: NSW Department of Health.

84. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 14, attached to Submission 16: NSW Department of Health

85. Venues to which these conditions apply are specified in Schedule 3 of the regulations, and mirror the target premises identified by the NSW Alcohol Linking Program.

1.61 There has been significant discussion of the benefits of serving drinks in plastic or tempered glass containers in the United Kingdom, where injuries caused by bar glasses account for 10–15% of all assault related injuries.<sup>86</sup> An evaluation of a citywide ban on glassware trialled in Glasgow, Scotland launched in 2008 reported a significant reduction in emergency presentations from ‘glassing’ incidents at Glasgow hospitals within six months.<sup>87</sup>

#### Responsible service of alcohol

1.62 The 2003 Alcohol Summit recommended the implementation of measures to encourage licensees to comply strictly with Responsible Service of Alcohol guidelines.

1.63 It is obligatory for all liquor licensees, staff and security personnel employed in licensed operations to undertake Responsible Service of Alcohol training.<sup>88</sup> Further, since 2004 licensed venues are required have free, or reasonably priced drinking water available.<sup>89</sup> A 2007 study highlights improvements in the experience of responsible service practice between 2002 and 2006, particularly with regard to overtly intoxicated patrons.<sup>90</sup>

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86. Clarke, R. and Newman, G., ‘Modifying Criminogenic Products: What Role for the Government?’ (2005) 18 *Crime Prevention Studies* 7, 49–51; Shepherd, J., ‘Violent Crime: The Role of Alcohol and New Approaches to the Prevention of Injury’ (1994) 29(1) *Alcohol and Alcoholism* 5, 7; Shepherd, J., ‘Preventing Injuries From Bar Glasses: Temper the Nonik’ (1994) 308 *British Medical Journal* 932; Shepherd, J., ‘Editorial: The Circumstances and Prevention of Bar-Glass Injury’ (1998) 93(1) *Addiction* 5.

87. Forsyth, A., ‘Banning Glassware from Nightclubs in Glasgow (Scotland): Observed Impacts, Compliance and Patron’s Views’ (2008) 43(1) *Alcohol and Alcoholism* 111, 111.

88. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 2, attached to Submission 16: NSW Department of Health.

89. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 4, attached to Submission 16: NSW Department of Health.

90. Scott, L. et al, ‘Young Adult’s Experience of Responsible Service Practice in NSW: An Update’ (Alcohol Studies Bulletin No 9, NSW Bureau of Crime Statistics and Research, 2007).

## Dissemination of information to the community

1.64 In 2008–09, the New South Wales Government has launched two significant responsible drinking advertising campaigns, ‘Be part of it, not out of it’ and ‘What are you doing to yourself?’ targeted at challenging 16–20 year olds to examine their attitudes to binge drinking and risky alcohol use.<sup>91</sup>

1.65 Moreover, in collaboration with the Commonwealth Government and the alcohol industry, national standard drink logos have been introduced on alcoholic beverage labels, as a means of promoting informed and responsible alcohol consumption.<sup>92</sup>

## Initiatives targeting at risk constituents

### Youth programs and school-based intervention

1.66 The New South Wales Government has developed resources to educate young people in New South Wales about the risks of irresponsible drinking, the consequences of anti-social behaviour and the relationship between intoxication and road accidents. These target students in years 3–6, school leavers, and students of driving age through their schools.<sup>93</sup> In a similar vein, New South Wales Police have allocated student liaison police officers to attend New South Wales high schools and provide advice on drugs, alcohol and crime in a setting which is casual and conducive to open discussion.<sup>94</sup>

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91. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 1, attached to Submission 16: NSW Department of Health.

92. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 1, attached to Submission 16: NSW Department of Health.

93. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 5–6, attached to Submission 16: NSW Department of Health.

94. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 5, attached to Submission 16: NSW Department of Health.

### Mentally ill persons

1.67 The Manage Your Addiction and Mental Illness program provides specific assistance to clients managing mental health and alcohol dependence problems in the Sydney West Area.<sup>95</sup>

### Emergency presentations

1.68 Drug and alcohol consultation liaison pilot projects have been established at the Sydney South West Area Health Service, the John Hunter Hospital and Children’s Hospital Westmead. These aim to facilitate early intervention for the drug and alcohol problems of patients presenting at emergency departments, to increase referrals to drug and alcohol treatment, to improve the ability of non-specialist staff to deal with drug and alcohol issues and to reduce repeat admissions. The project commenced in 2007–08 and will be evaluated in 2010–11.<sup>96</sup>

### Mature drinkers

1.69 NSW Health has launched ‘Rethink Your Drink’, a program that provides correspondence and online support for people who are trying to control the amount and frequency of their alcohol consumption.<sup>97</sup>

## E DOMESTIC VIOLENCE AND ALCOHOL ABUSE

1.70 Although the connection between alcohol abuse and domestic violence is a separate issue outside the scope of this current Reference, the Council notes that alcohol use has been found to be a significant risk factor in domestic violence.<sup>98</sup>

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95. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 9, attached to Submission 16: NSW Department of Health.

96. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 9, attached to Submission 16: NSW Department of Health.

97. Mental Health and Drug and Alcohol Office, NSW Department of Health, *Alcohol Achievements—2003/04–2007/08* (2008), 9, attached to Submission 16: NSW Department of Health.

98. Mouzos, J. and Smith, L., ‘Partner Violence among a Sample of Police Detainees’ (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, 2007) 4–5.

1.71 There is evidence that alcohol use contributes to aggressive behaviour.<sup>99</sup> In New South Wales, a significant proportion of domestic violence incidents were related to alcohol consumption.<sup>100</sup> Accordingly, any government action to deal with alcohol-related violence also must include strategies concerning domestic and family violence, especially in Aboriginal communities, which has been identified as a priority issue.<sup>101</sup>

1.72 Since 1981, the New South Wales Government has implemented numerous major strategies to deal with family and domestic violence, supported by initiatives and strategies at the federal level.<sup>102</sup> In February 2008, the New South Wales Government announced a new approach to addressing domestic and family violence to further the work commenced under its Violence Against Women Strategy, as well

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99. People, J., 'Trends and Patterns in Domestic Violence Assaults' (Contemporary Issues in Crime and Justice No 89, NSW Bureau of Crime Statistics and Research, 2005) 5–6; Finney, A. 'Alcohol and Intimate Partner Violence: Key Findings from the Research' (Home Office Findings No 216, UK Home Office, 2004); Stevenson, R., *The Impact of Alcohol Sales on Violent Crime, Property Destruction And Public Disorder* (NSW Bureau of Crime Statistics and Research, 1996).

100. An analysis of the data recorded by the NSW Police for 2004 showed that 36.2% of the domestic violence incidents recorded were marked by police as related to alcohol. It was commented that the actual number of alcohol-related assaults may be higher because of inconsistent practice in flagging an assault as alcohol related: People, J., 'Trends and Patterns in Domestic Violence Assaults' (Contemporary Issues in Crime and Justice No 89, NSW Bureau of Crime Statistics and Research, 2005) 6. See also Mouzos, J. and Smith, L., 'Partner Violence among a Sample of Police Detainees' (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, 2007).

101. Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"*: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007); Wood, J., *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, ch 18; NSW Department of Premier and Cabinet Office for Women's Policy, *Discussion Paper on NSW Domestic and Family Violence Strategic Framework* (2008) 67–9.

102. These include: the NSW Taskforce on Domestic Violence, the NSW Premier's Statement on Domestic Violence, the NSW Domestic Violence Strategic Plan, the NSW Domestic Violence Advisory Council and the NSW Strategy to Reduce Violence Against Women. These are supported by Australian Government initiatives that include: the Australian Government National Agenda for Women public education campaigns, the National Strategy on Violence Against Women, the Australian Government Partnerships Against Domestic Violence, the Australian Government Women's Safety Agenda and the Australian Government Domestic and Family Violence and Sexual Assault Initiatives: ARTD Pty Ltd, *Coordinating NSW Government Action against Domestic and Family Violence: Final Report* (2007) 4–10.

as \$2.9 million annual funding to support partnership projects with non-government organisations.<sup>103</sup> As part of the Government's new approach, a Violence Prevention Coordination Unit has been established within the Office for Women's Policy, the Department of Premier and Cabinet, to coordinate a whole-of-government approach to family and domestic violence.<sup>104</sup>

1.73 Current New South Wales Government initiatives that address domestic and family violence include, for example, the Domestic Violence Intervention Court Model, the Staying Home Leaving Violence framework, the Integrated Domestic and Family Violence Services Program, the Women's Domestic Violence Court Assistance Program, the Risk Assessment Tool project and the Domestic Violence Line.<sup>105</sup> There also are strategies that identify Aboriginal family violence as a specific component of the services provided, such as the Aboriginal Family Health Strategy, the Education Centre Against Violence and the Intersectoral training project.<sup>106</sup> Non-government organisations also provide various services in relation to domestic and violence, primarily through federal and state government funding.<sup>107</sup>

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   NSW Police Alcohol Linking Program ..... [1.9]; [1.13]–[1.14] Annexure D [1.60]  
   Office of the Director of Public Prosecutions New South Wales ..... [1.10]; [2.3]  
 comparison of JIRS with glassing cases: background ..... [2.35]–[2.37]  
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**Table offences** ..... [5.3]–[5.5]; [7.48]; [7.59]

Sentencing for Alcohol-related Violence

**Treatment programs, alcohol-related**

pre-sentence - see *Diversion*

post-sentence

for Aboriginal offenders ..... - Annexure D [1.51]

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**UK Sentencing Advisory Panel** ..... [6.4]

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**Weapon**

glass or bottle ..... [1.17]; [7.1]; [7.22]; see also *Glassing and Murder*

offensive ..... [1.17]

other weapons ..... [1.17]; [3.34]; [4.13]; [6.10]; [7.19]–[7.22]

type of ..... [1.12]; [1.17]–[1.18]; [6.7]; [7.21]; [7.25]–[7.26]

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**Wellington Options** – see *Diversion*

**Wounding/grievous bodily harm**

**malicious/reckless (s 35)** ..... [1.7]; [5.1]; [4.23]; [7.49]; [7.21]; [7.23]; [7.49]; Annexure A

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**other jurisdictions** ..... [6.8]; [6.11]; [6.23]; [6.24]; [6.25]

**Youth and Alcohol Drug Court (YDAC)** - see *Diversion*

**Youth Rural Residential Rehabilitation Centres** - see *Diversion*