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### Alcohol and drug fuelled violence - mandatory aggravating factor in sentencing

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## Alcohol and drug fuelled violence - mandatory aggravating factor in sentencing

### Abstract

1: We refer to the Attorney General's request for the Sentencing Council to consider a proposal from the Thomas Kelly Foundation to make amendments to the Crimes (Sentencing Procedure) Act 1999 ('the Act') aimed at deterring alcohol and drug fuelled violence.

### Keywords

alcohol, fuelled, violence, mandatory, factor, drug, sentencing, aggravating

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20 April 2015

The Hon James Wood AO, QC  
The Chair  
NSW Sentencing Council  
GPO Box 5199  
Sydney NSW 2001

By email: [sentencingcouncil@agd.nsw.gov.au](mailto:sentencingcouncil@agd.nsw.gov.au)

To: The Chair, The Hon James Wood AO, QC

**Re: Alcohol and Drug Fuelled Violence – Mandatory Aggravating Factor in Sentencing**

1. We refer to the Attorney General's request for the Sentencing Council to consider a proposal from the Thomas Kelly Foundation to make amendments to the *Crimes (Sentencing Procedure) Act 1999* ('the Act') aimed at deterring alcohol and drug fuelled violence. While there are four Terms of Reference this submission deals with the first:

1. Whether a mandatory aggravating factor should be introduced to s 21A of the *Crimes (Sentencing Procedure) Act 1999* that applies where the offence involved violence because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance.

However, we also comment on the broader subject matter of the reference, being 'The Sentencing Council is to prepare a report on alcohol and drug fuelled violence...', and comment briefly on Term of Reference 4.

2. Both in the form in which the aggravating factor has been framed in the Terms of Reference and in substance the authors are opposed to such an amendment to the Act.

3. Our interest in the subject matter of this reference is based on our collective expertise and previous research across a range of disciplines and topics, including criminal law and alcohol policy.<sup>1</sup> Together, we are currently engaged in a cross-disciplinary study of the multiple (and

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<sup>1</sup> Illustrative publications: J Quilter, "Populism and criminal justice policy: An Australian case study of non-punitive responses to alcohol related violence" (2015) 48(1) *Australia and New Zealand Journal of Criminology* 24; J Quilter, 'The Thomas Kelly case: Why a "one punch" law is not the answer' (2014) 38(1) *Criminal Law Journal* 16; J Quilter, 'One Punch Laws, Mandatory Minimums and "Alcohol-Fuelled" as an Aggravated Factor: Implications for NSW Criminal Law' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81; J Quilter, 'Responses to the death of Thomas Kelly: Taking populism seriously' (2013) 24(3) *Current Issues in Criminal Justice* 439; L McNamara & J Quilter, 'Public intoxication in NSW: the Contours of

inconsistent) ways in which criminal laws in Australia, including sentencing laws, attach significance to intoxication. Titled “Knowledges of ‘Intoxication’ and Australian Criminal Law: Implications for addressing Alcohol and Other Drug-Related Harms and Risks”, our research is funded by a 2015 Australian Institute of Criminology - Criminology Research Grant 20/14-15. This project will analyse *three typologies of knowledge* regarding the relationship between intoxication, anti-social behaviour and violence, and criminal responsibility, being knowledges: (i) embedded in criminal legislation; (ii) deployed in courtroom adjudication; and (iii) featuring in expert literatures. It will: identify areas of overlap, inconsistency, under-definition and lacunae; investigate how statutorily embedded assumptions about this relationship are operationalised in courtrooms; compare assumptions from law and practice with expert knowledges on intoxication-violence. It will identify opportunities for strengthening the criminal law’s capacity to meet community needs and expectations with respect to the attribution of criminal responsibility for alcohol-related problems.

4. Our submission addresses first a number of problems with the *form* of the reference; that is, issues arising from the terminology that has been employed. We then discuss a number of potential problems with the *substance* of the key proposal contained in the reference: that is, the suggestion that a causal relationship can and should be established between an offender’s violent behaviour and the fact that s/he had consumed alcohol or other drugs (‘AOD’).

## PROBLEMS WITH THE TERMINOLOGY IN THE FRAMING OF THE REFERENCE

5. Term of Reference 1 is currently framed as ‘a *mandatory* aggravating factor’. It is unclear what is intended by the word ‘mandatory’ in the context of s 21A of the Act. The current aggravating factors in s 21A(2) are drafted as factors the courts *is* to take into account in determining the appropriate sentence for an offence (see the Act s 21A(1) and (2)). Is it intended that by framing Term of Reference 1 with the word ‘mandatory’ that an additional factor of ‘the offence involved violence because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance’ is to be included in the list of factors in s 21A(2), or is another meaning to be attributed to ‘mandatory’ – such as to have a specific effect on the sentence? If the term ‘mandatory’ is meant to have a specified effect on the sentence, this would not only be contrary to s 21A(5), we would oppose such an inclusion for the reasons set out below (at [11]-[19]). In this context of uncertainty surrounding the meaning of the term ‘mandatory’, it is also unclear how the proposed amendment might interact with other components of s 21A. What might happen, for instance,

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Criminalisation’ (2015) 37(1) *Sydney Law Review* 1; D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter & M Schwartz, *Criminal Laws: Materials and commentary on Criminal Law and Process in NSW* (Federation Press, 6<sup>th</sup> ed, 2015); K Seear, ‘What do we really know about the “effects” of drugs? An argument for doping effects as co-constituted “phenomena”’ (2013) 2(4) *Performance Enhancement and Health* 201; K Seear & D Moore (eds), ‘Complexity: Researching Alcohol and Other Drugs in a Multiple World (Conference Special Issue)’ (2014) 41(3) *Contemporary Drug Problems* 293; A Laslett, J Mugavin, H Jiang, E Manton, S Callinan, S MacLean & R Room, *The Hidden Harm: Alcohol’s Impact on Children and Families* (Foundation for Alcohol Research and Education, 2015); C Wilkinson & R Room ‘Alcohol and violence: Relationships, causality, and policy’ (2011) 38 *Contemporary Drug Problems* 185; R Room, ‘Drinking, violence, gender and causal attribution: a Canadian case study in science, law and policy’ (1996) 23 *Contemporary Drug Problems* 649; R Room & I Rossow, ‘The share of violence attributable to drinking’ (2001) 6 *Journal of Substance Use* 218.

if a person was simultaneously intoxicated within the meaning of the proposed amendment and provoked by the victim, or acting under duress? Each of these is a relevant mitigating factor under s 21A(3), and could lead to very complex and inconsistent approaches to agency, capacity, responsibility and sentence.

6. Term of Reference 1 refers to an aggravating factor ‘*where the offence involved violence because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance*’. It is unclear if the phrase ‘where the offence involved violence because’ refers to ‘categories’ of offences involving violence or the ‘violence’ is ‘*because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance*’. If it is meant that the aggravating factor only applies to categories of offences involving violence it may be difficult to isolate the categories of offences to which such an aggravating factor may apply. For instance, is the meaning of ‘offence involved violence’ meant to pick up the meaning of ‘offence involving violence’ in s 94 of the *Criminal Procedure Act 1986* (NSW)? This is different to an aggravating factor such as s 21A(2)(b) which does not confine the offence category to which the factor applies but rather to how the offence was committed (ie it ‘involved the actual or threatened use of violence’). The factor is open, however, to the other reading that ‘the offence involved violence *because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance*’. If such a meaning is the intent of the reference, it is opposed for the reasons set out at [11]-[19]. The phrasing appears to be based on s 21A(2)(cb) of the Act where the factor that aggravates the offence is the offender causing the victim to ‘take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance’. Such a factor makes sense as an aggravating feature because it involves a further ‘invasion’ or violation of the integrity of the victim; the same cannot be said for Term of Reference 1.

7. We take exception to the phrasing ‘take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance’ in Term of Reference 1. This appears to be modelled on s 21A(2)(cb) - a context in which the phrasing makes sense. However, Term of Reference 1 uses this phrase in a very different way: as part of an assertion that a causal connection can be made between the taking/inhaling, or being affected by the relevant substance, and the violent offending. *If* a new aggravating factor is to be added to the Act, symmetry with other criminal law concepts is desirable, and usage of the more common term of ‘intoxication’, as defined in s 428A of the *Crimes Act 1900*, is preferable: ‘... intoxication because of the influence of alcohol, a drug or any other substance’ where a drug includes one within the meaning of the *Drugs Misuse and Trafficking Act 1985* and a poison, restricted substance or drug of addiction within the meaning of the *Poisons and Therapeutic Goods Act 1966*.

8. In the context of criminal law, the word ‘narcotic’ is antiquated and rarely used. (We note that the World Health Organization (WHO) is also critical of the use of the term ‘narcotic’ imprecisely ‘to mean illicit drugs, irrespective of their pharmacology’, and has recommended avoidance of the term altogether.<sup>2</sup>) The word ‘narcotic’ is not used in the *Drugs Misuse and Trafficking Act 1985* to describe any category of drugs. It only appears once in the *Crimes Act 1900*, as part of the definition of ‘intoxicating substance’ in s 4: ‘includes alcohol or a narcotic drug or any other substance that affects a person’s senses or understanding’. The

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<sup>2</sup> World Health Organization, *Lexicon of alcohol and drug terms published by the World Health Organization*, Available at: [http://www.who.int/substance\\_abuse/terminology/who\\_lexicon/en/](http://www.who.int/substance_abuse/terminology/who_lexicon/en/).

phrase ‘intoxicating substance’ is used exclusively as part of the definition of a small number of offences where an element of the offence is the administration of alcohol, narcotics or other drugs by the offender to the victim. The express inclusion of narcotic drugs in this context may be regarded as making sense, because the focus is on the administration of substances to a person that will make them vulnerable to victimisation. This use reflects the distinctive characteristics of narcotic drugs as defined by the WHO: ‘A chemical agent that induces stupor, coma, or insensibility to pain’.<sup>3</sup> The emphasis on narcotic drugs in the context of causing a victim to take such a substance in s 21A(2)(cb) makes sense, but not in the context where the reference relates to the offender and a connection being made with offences of violence.

9. An additional problem with the intoxication terminology used in Term of Reference 1 is that no distinction is drawn between ‘self-induced intoxication’ and intoxication that is not self-induced. On the face of it, the proposed new aggravating factor may apply in both situations, an outcome which would appear to be inconsistent with the policy underlying the proposal: to treat a person who voluntarily consumes AOD and commits a violent offence as more culpable than a person who commits the same offence absent AOD consumption. The distinction is made in Pt 11A of the *Crimes Act 1900* (NSW). Section s 428A defines ‘self-induced intoxication’ as ‘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 registered nurse whose registration is endorsed under the Health Practitioner Regulation National Law as being qualified to practise as a nurse practitioner, a registered midwife whose registration is endorsed under the Health Practitioner Regulation National Law as being qualified to practise as 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.

10. The proposal is also problematic for failing to recognise that in some situations it may be the interaction between prescribed medications and the consumption of non-prescribed AOD that is implicated in offending behaviour. Two recent cases are noted: *Henderson*<sup>4</sup> and *Martin*.<sup>5</sup> Although we draw no conclusions as to the appropriateness or otherwise of the outcomes in these cases we note them because they illustrate the importance of considering the interaction between prescription drugs taken for a medical purpose and intoxicating substances when determining the appropriate sentence for an offender.

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<sup>3</sup> Ibid; see also J Perl, ‘The physiology of alcohol and substance abuse’ (2012) 24(8) *Judicial Officers Bulletin* 63.

<sup>4</sup> *R v Henderson*, 2012 MBCA 9.

<sup>5</sup> *Tasmania v Martin (No 2)* (2011) 213 A Crim R 226. Although *Martin* is not about intoxication, it raises questions about the effects of prescribed medications. For a more detailed discussion of the case, see: F Bartlett, A Carter, W Hall, ‘Voluntariness and Causation for Criminal Offending Associated with Treatment of Parkinson’s Disease’ (2013) 37 (5) *Criminal Law Journal* 330-341.

## CAUSAL RELATIONSHIP ASSUMED IN THE FRAMING OF THE REFERENCE

11. The usage of the word ‘because’ in Term of Reference 1 appears to assume a *causal relationship* between the offence (of violence) and the offender ‘taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance’. Similarly, the overall Terms of Reference refer to ‘alcohol and drug *fuelled* violence’ (our emphasis), nomenclature which arguably assumes a particular kind of causal relationship between AOD and violence (where AOD are the catalyst for violent behaviour). We have concerns about any approach that assumes such a relationship, for the reasons we outline below.

12. There are four problems with *assuming* such a relationship or oversimplifying its nature:

- i. a simple causal relationship between AOD and violence is not supported by the literature;
- ii. there will be significant practical problems with proving the aggravating factor;
- iii. the inclusion of such an aggravating factor is likely to produce complexity and a lack of coherence in sentencing and in the criminal law more generally; and
- iv. the inclusion of such an aggravating factor may impact on guilty pleas, with a range of other potential unintended consequences.

13. First, the scientific and social scientific research literature on the nature of the relationship between AOD, on the one hand, and violence, on the other, is the subject of considerable debate and disagreement.<sup>6</sup> Importantly, as well, different substances have different pharmacological properties with complex and multifactorial biological interactions with humans, each of which need to be taken into account when assessing the nature of the relationship with violence.<sup>7</sup>

14. A large body of epidemiological evidence at the population level does suggest a significant positive *relationship* between alcohol and violence.<sup>8</sup> Importantly, however, population-level findings from epidemiological research regarding the alcohol-crime nexus need to be treated with caution. Even though epidemiological research may suggest the involvement of alcohol as *a* cause of violence this ‘does not mean that, at the level of particular events, the relationship is ... necessary or sufficient’.<sup>9</sup>

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<sup>6</sup> C Duff, ‘The social life of drugs’ (2013) 24(3) *International Journal of Drug Policy* 167; C Smyth, ‘Alcohol and violence – exploring the relationship’ (2013) 13(4) *Drugs and Alcohol Today* 258.

<sup>7</sup> For a discussion, see, for example: AJ Heinz, A Beck, A Meyer-Lindenberg, P Sterzer and A Heinz, ‘Cognitive and neurobiological mechanisms of alcohol-related aggression’, (2011) 12(7), *Nature Reviews, Neuroscience*, 400-413; J Kuhns, T Clodfelter, ‘Illicit drug-related psychopharmacological violence: The current understanding within a causal context’, (2009) 14 *Aggression and Violent Behavior*, 69-78; S Boles, K Miotto, ‘Substance abuse and violence: A review of the literature’, (2003), 8 *Aggression and Violent Behavior*, 155-174; P Hoaken, S Stewart, ‘Drugs of abuse and the elicitation of human aggressive behaviour’, 28 *Addictive Behaviors*, (2003) 1533-1554.

<sup>8</sup> D Weatherburn, “What causes crime?”, BOCSAR, *Contemporary Issues in Criminal Justice* (No 54, 2001) at 5; I Borowsky et al, ‘Adolescent sexual aggression: risk and protective factors’ (1997) 100 *Pediatrics* 71; J Grunbaum et al, ‘Association between violent behaviors and substance use among Mexican-American and non-Hispanic white high-school students’ (1998) 23 *Journal of Adolescent Health* 153; K Oriel & M Fleming, ‘Screening men for partner violence in a primary care setting: a new strategy for detecting domestic violence’ (1998) 46 *Journal of Family Practice* 493-498; I Rossow et al, ‘Young, wet and wild? Associations between alcohol intoxication and violent behaviour in adolescence’ (1999) 94 *Addiction* 1017.

<sup>9</sup> R Room & I Rossow, ‘The share of violence attributable to drinking’ (2001) 6 *Journal of Substance Use* 218, 219.

15. It is likely that the ‘association between alcohol and aggression may be the result of a complex interaction of a number of variables’<sup>10</sup> including the social and environmental *context* for a particular instance of violence.<sup>11</sup> In other words, and in recognition of this complexity, it is more appropriate to speak about AOD as conditional causes for violence. If the proposed amendment assumes a simplistic causal link between AOD and violence, as we suggest it does, then the response may serve to *over-emphasise* the role of alcohol and/or other drugs and *under-emphasise* the role of other factors.

16. There are variations between individuals in the effects of a given dose of AOD, and the effects will be affected by ‘set and setting’;<sup>12</sup> that is, the socioculturally-influenced expectancies of the AOD consumer and the social context of consumption and what follows.<sup>13</sup> Further, different drugs have different pharmacological properties.<sup>14</sup> Therefore, care must be taken in developing policy and law reform responses to complex and potentially unpredictable phenomena, such as violence, especially where those responses are overly simplistic and reductionist. Where policy, legislative and other justice responses are ‘designed to address a “problem” based on a set of [potentially] unsustainable assumptions or assertions regarding cause and effect’ they may be ineffective.<sup>15</sup> Indeed, policy and legislative responses may end up generating yet new problems, additional harms and other unintended consequences, rather than ameliorating them.<sup>16</sup> In addition, by disproportionately focusing upon AOD as the origin of harms, other potentially significant factors might be neglected.

17. Secondly, there will be significant difficulties in proving the proposed aggravating factor. We identify three reasons:

- a) First of all, there is no indication of what level of intoxication will be required before the aggravating factor is triggered. We note similar problems associated with the failure to define ‘intoxication’ in the new aggravated assault causing death offence in s 25A(2) *Crimes Act 1900*. For this offence, while not defining intoxication the legislature has provided a ‘presumptive conclusion’ in relation to an accused’s intoxication by alcohol where ‘... there was present in the accused’s breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood’ (s 25A(6)(b)).<sup>17</sup> It is also unclear whether there will be different tests and/or thresholds for different substances? If particular levels of intoxication are required, including, perhaps, different levels for different substances, what is the evidence base for same?

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<sup>10</sup> A Morgan & A McAtamney, *Key issues in alcohol-related violence: Summary Paper No. 4* (Australian Institute of Criminology, 2009), 4.

<sup>11</sup> R Parker & K Auerhahn, ‘Alcohol, drugs, and violence’ (1998) 24 *Annual Review of Sociology* 291.

<sup>12</sup> NE Zinberg, *Drug, Set, And Setting: The Basis for Controlled Intoxicant Use* (Yale University Press, 1984).

<sup>13</sup> A Hart & D Moore, ‘Alcohol and alcohol effects: Constituting causality in alcohol epidemiology’ (2014) 41 *Contemporary Drug Problems* 393.

<sup>14</sup> J Perl, ‘The physiology of alcohol and substance abuse’ (2012) 24(8) *Judicial Officers Bulletin* 63.

<sup>15</sup> K Seear, ‘What do we really know about the “effects” of drugs? An argument for doping effects as co-constituted “phenomena”’ (2013) 2(4) *Performance Enhancement and Health* 201.

<sup>16</sup> K Lancaster K et al, ‘More than problem-solving: Critical reflections on the “problematisation” of alcohol-related violence in Kings Cross’ (2012) 31 *Drug and Alcohol Review* 925; S Fraser & K Seear, *Making disease, making citizens: The politics of hepatitis C* (Ashgate, 2011).

<sup>17</sup> See J Quilter, ‘One Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravated Factor: Implications for NSW Criminal Law’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81.



- b) More fundamentally, by what means will it be established that the ‘the offence involved violence *because* the offender was ... [intoxicated]’? Presumably it will be insufficient to merely show that the offender had consumed AOD prior to the violent act in question. A causal relationship must be established. The aggravating factor will be legally and operationally unworkable because it will be near impossible to prove that the ‘offence involved violence’ *because* the offender was intoxicated. How could the sentencing court be satisfied that the offence of violence occurred for this reason, and not for some other reason (for example, tiredness, excitement, anger, fear and so on)?<sup>18</sup>
- c) In a related sense, how will questions of temporality be taken into account, if at all? Term of Reference 1 refers to the offender ‘*taking, inhaling or being affected* by’ alcohol or other drugs, with substantial ambiguity about when such consumption needs to have taken place in order for the proposed aggravating factor to be engaged. This uncertainty is of course compounded by the absence of any guidance as to how intoxication is to be established and/or what level, if any, of intoxication is required, as above. In any event, and to be clear, it is our strong view that legislative responses to violence should be sufficiently open and flexible to accommodate the fact that acts of violence are sometimes perpetrated by individuals who have consumed AOD at some time prior to the commission of those acts, but on other occasions the consumption is merely coincidental or incidental to the offending in question. In this regard, the recent case of the Irish brothers Barry and Patrick Lyttle is noted. Both had consumed alcohol before Barry punched Patrick in the head putting him into a coma. Reports repeatedly indicated that alcohol was not a factor in the violence.<sup>19</sup>

18. Thirdly, the inclusion of the proposed aggravating factor is likely to produce complexity and a lack of coherence in sentencing and in the criminal law more generally. Three potential problems are highlighted here.

- a) The aggravating factor in Term of Reference 1 treats violence perpetrated while intoxicated as more serious and culpable than violence perpetrated while sober. This is problematic, in light of the expert literature (discussed above at [13]-[16]), and may also be regarded as adding inconsistency to NSW criminal law, which currently recognises that AOD can impair brain and bodily functions and that this may be relevant to the assessment of criminal responsibility. The possible cognitive impairment effects of AOD are accommodated via the ‘defence’ of intoxication in Part 11A of the *Crimes Act 1900*. Thus, evidence of intoxication may be used by a defendant as a defence to a charge of an offence of specific intent (being ‘an offence of which an intention to cause a specific result is an element’: *Crimes Act 1900* s 428B). Many offences of specific intent may be categorised as offences involving violence. In practice, the interaction between the proposed Term of Reference 1 aggravating factor and Part 11A may be challenging. The following scenario would appear to be possible. A defendant on trial for an offence of specific intent might avail

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<sup>18</sup> See J Quilter, ‘One Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravated Factor: Implications for NSW Criminal Law’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81.

<sup>19</sup> For example, see R Olding, ‘Alcohol not a factor in tourist’s alleged one-punch attack’, *The Sydney Morning Herald*, 5 January 2015 available at: <http://www.smh.com.au/nsw/alcohol-not-a-factor-in-tourists-alleged-onepunch-attack-20150104-12hnmw.html>

him/herself of the defence of intoxication to deny that the relevant specific intent was formed (*Crimes Act 1900* s 428C); that is, as exculpation. If the defence was unsuccessful and the defendant was convicted, or if the defence was successful but the defendant was convicted of a lesser specific or general intent crime, evidence of his/her intoxication could nonetheless, and perversely in our view, be relied upon to invoke the proposed aggravating factor during sentencing.

- b) The aggravating factor would also remove the common law's more nuanced approach to the sentencing of offenders who were intoxicated at the time of the commission of the offence. Historically, sentencing principles have recognised the diversity of ways intoxication may be characterised in the sentencing process: it 'might be aggravating, mitigating or neutral depending on the circumstances'.<sup>20</sup> We note that in 2014 s 21A of the Act was amended to include s 21A(5AA) which now prevents reliance on self-induced intoxication as a mitigating factor. The introduction of the proposed aggravating factor would further erode the more nuanced and context-sensitive approach of traditional sentencing law and practice.
- c) The proposal also addresses matters that have recently been considered by the NSW Court of Criminal Appeal on the sentencing principles applicable to cases involving public 'alcohol fuelled violence': *R v Loveridge* [2014] NSWCCA 120 and *R v Wood* [2014] NSWCCA 184. At a minimum, consideration should be given to whether the proposed intoxication aggravating factor is necessary in light of the sentencing principles articulated by the CCA in relation to general deterrence. In these recent cases the NSWCCA has indicated that significant weight should be given to the element of general deterrence<sup>21</sup> when sentencing for matters involving fatal alcohol-fuelled violence in public. In *Loveridge* the NSWCCA stated:

104 This Court has emphasised that the principles of general deterrence and denunciation of crimes serve as a means of protection of the public: *R v AEM* [2002] NSWCCA 58 at [92].

105 The use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol-fuelled aggression accompanied, as it was, by other non-fatal attacks by the Respondent upon vulnerable, unsuspecting and innocent citizens in the crowded streets of King Cross on a Saturday evening, called for the express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case. ...

216 Secondly, the commission of offences of violence, including manslaughter, in the context of alcohol-fuelled conduct in a public street or public place is of great concern to the community, and calls for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence. The United Kingdom decisions involve statements of serious concern by the courts of the type expressed in this State in *Hopley v R*, *R v Carroll* and *Pattalis v R* concerning a similar form of violent offending.

In *Wood* the NSWCCA confirmed this approach and expanded the need for general deterrence relating to unprovoked violence on public streets particularly where the victim is elderly:

66 The need for general deterrence is not confined to alcohol fuelled violence but includes gratuitous, unprovoked violence on the streets, whether in city centres, or residential areas. People have the right to expect that their streets will be safe ...

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<sup>20</sup> NSW Law Reform Commission, *Sentencing*, Report No 139 (2013), [4.21].

<sup>21</sup> It is also noted that the NSWCCA also found that the sentencing judge had failed to take account of the strong need for specific deterrence in this matter: *Loveridge* [2014] NSWCCA 120 at [120]-[131].

67 This expectation gathers importance as the number of aged and vulnerable persons in our community increases. It must be clearly understood that violence towards the elderly will not be tolerated. In the circumstances of the present offence, a strong element of general deterrence was called for.<sup>22</sup>

In both cases the sentences were significantly increased.

19. Analysis of NSW Bureau of Crime Statistics and Research (BOCSAR) recorded crime statistics suggests that nearly 40% of the approximately 65,000 recorded incidents of assault in NSW in 2013 were categorised as ‘alcohol related’.<sup>23</sup> These BOCSAR data do not include other drugs, meaning that estimates of assault where alcohol or other drugs were somehow ‘related’ may be even higher. In our submission, it is essential to consider the likely implications of a response to these phenomena that, while designed to deter alcohol and drug related violence, may instead produce other problems. We identify at least three possibilities here:

- a) Depending on the particular approach taken, there could be significant implications for sentencing. A very broad and complex range of offences are likely to be captured under the proposed amendment, including complex phenomena such as family violence. Again, depending on the nature of the amendment proposed, one possible implication could be a significant increase in the size of the prison population.
- b) The inclusion of intoxication as a mandatory aggravating factor may have the effect of discouraging guilty pleas, and reducing the availability of agreed statements of facts in which the offender stipulates to the nature or quantum of his/her AOD consumption leading up to the commission of the offence or other potentially relevant factors. Given that some 40,000 assault and aggravated assault charges are finalised in NSW courts annually,<sup>24</sup> a reduction in guilty pleas would have negative implications for the timely administration of justice, and would be inconsistent with the objective of encouraging more, not less, guilty pleas.<sup>25</sup>
- c) Another possibility is that guilty pleas might instead be offered only if agreed statements of fact are amended to exclude reference to AOD (especially if, as we have suggested, there is ambiguity or uncertainty around issues such as the level of intoxication required and the stakes in terms of sentencing are even higher). Depending on one’s perspective, this may be undesirable from a policy perspective, with implications, as well, for sentencing, if indeed the prosecution sought to argue that alcohol or other drugs might be aggravating.

20. Finally, although we have confined ourselves to Term of Reference 1 in this submission, we want to briefly touch upon Term of Reference 4 by way of conclusion. The overall aim of the proposed amendment (Term of Reference 1) appears to be deterrence and so the question

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<sup>22</sup> See also *Attorney General’s Reference No 60 of 2009 (Appleby and Ors)* [2010] 2 Cr App R.

<sup>23</sup> D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter & M Schwartz, *Criminal Laws: Materials and commentary on Criminal Law and Process in NSW* (Federation Press, 6<sup>th</sup> ed, 2015), 589-590.

<sup>24</sup> *Ibid*, 591. In 2013, 44,204 charges for non-fatal violence crimes were finalised in NSW: BOCSAR, *NSW Criminal Courts Statistics 2013* (revised ed, 2014)).

<sup>25</sup> See NSWLRC, *Encouraging Appropriate Early Guilty Pleas - Models for Discussion*, CP15 (2013). The Commission’s final report on this reference was submitted to Government in December 2014, but has not yet been publicly released.

of the extent to which the proposed amendment might deter violence, if at all, is a crucial one. As well as our concerns about the assumptions embedded in the proposed amendment and the over-simplification inherent to the proposed response, the international literature suggests that deterrence works to some extent under some conditions, for some kinds of offences and some kinds of populations, particularly when the punishment is swift and certain and relatively small, with the drink-driving literature being a useful case in point.<sup>26</sup> Importantly, however, deterrence is less often seen with marginalised and young adult populations – in fact often not at all.<sup>27</sup> Some of the most effective strategies for changing drinking behaviour and intervening in alcohol-related harms include changes to the price of alcohol, alcohol outlet density and liquor licensing.<sup>28</sup> We would encourage a consideration of other approaches. In this regard, we note the NSW Bureau of Crime Statistics and Research recent report indicating that the 2014 lockout and last drinks laws ‘were associated with immediate and substantial reductions in assault in Kings Cross and less immediate but substantial and perhaps ongoing reductions in the Sydney CBD.’<sup>29</sup>

We are available for further consultation on our past and current research, or in any other way that we can be of assistance to the Council in its work on this important reference.

Yours sincerely

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<sup>26</sup> H Ross, *Detering the drinking driver: Legal policy and social control* (Lexington Books, 1984); W Evans, D Neville & J Graham, ‘General deterrence of drunk driving: evaluation of recent American policies’ (1991) 11(2) *Risk Analysis* 279; R Homel, ‘Drivers who drink and rational choice: random breath-testing and the process of deterrence’ in R Clarke & M Felson (eds), *Routine Activities and Rational Choices* (Transaction, 2004; first published 1993); and T Babor, R Caetano, S Casswell, G Edwards, N Giesbrecht, K Graham, J Grube, L Hill, H Holder, R Homel, M Livingston, E Österberg, J Rehm, R Room, and I Rossow, *Alcohol: No Ordinary Commodity - Research and Public Policy* (Oxford University Press, 2<sup>nd</sup> ed, 2010), Ch 11.

<sup>27</sup> See, eg, R Room, B Fischer, W Hall, S Lenton and P Reuter, *Cannabis Policy: Moving beyond Stalemate* (Oxford University Press, 2010); and JP Shepherd ‘Criminal deterrence as a public health strategy’ (2001) 358 *The Lancet* 1717.

<sup>28</sup> M Livingston, ‘To reduce alcohol-related harm we need to look beyond pubs and nightclubs’ (2013) 32(3) *Drug and Alcohol Review* 113; M Livingston, ‘A longitudinal analysis of alcohol outlet density and domestic violence’ (2011) 106 *Addiction* 919; M Livingston, ‘Alcohol outlet density and harm: comparing the impacts on violence and chronic harms’ (2011) 30 *Drug and Alcohol Review* 515.

<sup>29</sup> P Menendez et al ‘Lockouts and last drinks: The impact of the January 2014 liquor licence reforms on assaults in NSW, Australia’ *Crime and Justice Bulletin* No 183, April 2015, 8.