

## Submission to the New South Wales Sentencing Council

## **Submission to the NSW Sentencing Council: The sentencing of offenders convicted of alcohol-related violence offences**

### **ADCA and the AOD sector – Who we are and what we do**

The Alcohol and other Drugs Council of Australia (ADCA) is the national peak body for the alcohol and other drugs (AOD) sector, providing an independent voice for the people working to reduce the harm caused by alcohol and other drugs. ADCA is a non-government, not-for-profit organisation principally funded through the Australian Government's Community Sector Support Scheme and the National Drug Strategy Program. Some additional funding is provided through membership fees, subscriptions and project activities.

As the national peak body, ADCA has a key role in advocating for adequate infrastructure support and funding for the delivery of evidence based alcohol and other drug initiatives. In this regard, ADCA represents the interests of a broad group of service providers and individuals concerned with prevention, early intervention, treatment, supply reduction and research. At 1 March 2008, ADCA's membership covering Associate Organisations, and individuals totalled 353 covering organisations, services, agencies and individual professionals, practitioners engaged in alcohol and other drug services throughout Australia, major university research centres, tertiary institutions offering courses in addiction studies and other programs for alcohol and other drug workers, law enforcement and criminal justice systems, policy development and analytical areas, and administration. ADCA's broad and diverse membership base across all jurisdictions provides input on key strategic issues through active participation as members of ADCA's Working Groups.

ADCA, with unanimous support from the AOD and NGO sectors, is committed to the principles of harm minimization and ensuring that the dangers associated with alcohol and its misuse are highlighted and managed by government, treatment services, health professionals, the community and parents to significantly reduce the number of alcohol-related problems facing Australians. ADCA welcomes the opportunity to contribute to this review.

### **Background**

In response to the perceived surge of alcohol-related violence the NSW state government is conducting a review of sentencing of offenders convicted of alcohol-related violence offences. In particular it is considering removing 'intoxication as a defence or a mitigating factor in crime – particularly assaults' (NSW Parliamentary E-Brief 1/08). This latter consideration would be in line with New Zealand's *Sentencing Act* 2002, s9 (3) which states that intoxication *cannot* be treated as a mitigating factor in sentencing decisions.

Under this principle, intoxication would become an 'aggravating factor' in sentencing.

Notwithstanding the obvious point that the criminal justice system and the punishment structure (police, courts and sentences) are essential for maintaining social control and discouraging most people from criminal activity, the real issue for sentencing generally is whether or the severity of a sentence has a deterrent effect and whether alternative strategies to address criminal activity may have more efficacy.

In addition, there is the issue as to whether an offender who (for example) is addicted to alcohol will be better served by a justice system that recognizes his/her problems and provides a series of sentencing alternatives that may address those problems. If the intoxication of an offender was considered under law as an aggravating factor in sentencing, the options available to those

offenders with drug and alcohol problems may be reduced. It is ADCA's position that mitigating factors should remain an option in sentencing.

ADCA and the AOD sector are committed to finding alternative strategies to imprisonment. These strategies would emphasis treatment and prevention, health, education and a stronger collaborative approach to dealing with the issue of alcohol availability and the licensing context generally. We know from extensive and robust research that there are steps governments can take to improve the licensing environment which may in the long term alleviate the need for harsher sentences and formal reviews of this kind (Fleming 2008).

This submission specifically addresses numbers one and three of the NSW Sentencing Council's terms of reference and provides some bibliographical information on other penalties and sentencing practices in addressing alcohol-related violence. It does not offer or provide specific legal comment.

## 1. The current principles and practices governing sentencing for offences committed whilst the offender is intoxicated

Sentencing is 'the process by which people who have been found guilty of offending against the criminal law have sanctions imposed upon them in accordance with that law' (Tasmania Law Reform Institute Final Report, June 2008).

Current principles and practices governing sentencing for offences committed while the offender is intoxicated in NSW allow for the judiciary to weigh up all factors in a case and consider intoxication as either a mitigating or aggravating factor. Offences where intoxication is treated as an aggravating factor such as driving under the influence of alcohol, causing death by dangerous driving while under the influence of alcohol are generally recognized by substantive law and accepted by the public as a 'public good'. Allowing the judiciary to consider intoxication as a mitigating circumstance in other contexts however does preserve judicial independence and provide opportunities for some initial tolerance towards those who have never offended before and/or those individuals for whom alcohol has become a problem in terms of their health (e.g. addiction) and subsequent behaviour patterns. It is clear however that at the present time the 'law rarely regards voluntary intoxication by alcohol as a mitigating factor when sentencing for serious criminal offences' (*R v Thomas* [2004] NSWCCA 291) such as violence.

It is often 'taken for granted' that rising and unacceptable levels of crime can be ameliorated by tougher sentencing practices. As a rule, criminological researchers caution against such reasoning because a clear causal link between crime rates and harsher sentencing practices is not supported by empirical evidence. The belief that sentencing can reduce crime is based on assumptions that this can be achieved through general deterrence, incapacitation (you cannot offend if you are in prison), specific deterrence (increasing penalties may reduce reconviction rates of repeat offenders) and rehabilitation.

The evidence of the general deterrent effect of harsher penalties is limited and provides no basis for the notion that such penalties will reduce the crime rate. A likelihood of apprehension and the availability of punishment clearly has some deterrent effect but whether a potential offender rationally weighs up the odds of being caught and takes into account the severity of a potential sentence is a moot point. The issue is further clouded when the offender is clearly intoxicated at the time of the offence. As a recent Sentencing Report has suggested, 'the fact that so many sentenced prisoners re-offend (between one-half and two-thirds) casts doubt upon imprisonment as a deterrent'. The evidence is that there is no discernible difference for example between reconviction rates for prison and for community penalties (Tasmania Law Reform Institute Final Report, June 2008; Dingwall 2006).

Without straying into the legal principles of *actus reus* (intention) and *mens rea* (guilty mind) we know that 'intoxicated persons cannot function within their normal range of physical/cognitive abilities' (NAS 2006-2009). This is, as many commentators have noted, the reason that deterrence makes little difference to criminal activity. Basing the sentencing of offenders convicted of alcohol related violence offences on an assumption of deterrence will in all likelihood do little for crime rates.

If criminal justice and sentencing policy is to be evidence-based, then increased sentence severity with the aim of reducing crime and 'reducing the incidence of intoxication among drinkers' (National Alcohol Strategy 2006-2009) is not an appropriate response.

### 3. Should the intoxication of the offender be added as an aggravating factor in sentencing under s 21A of the Crimes (Sentencing Procedure) Act 1999

Currently, the NSW *Criminal Legislation Further Amendment Act* (1994) is informed by the House of Lords decision in *Reg v Majewski* [1977] AC 443 that was based on principles of public policy, namely: (i) that the law should provide protection against unprovoked violent conduct of intoxicated offenders; and (ii) that it is morally just to hold intoxicated offenders responsible for criminal conduct, given that they freely choose to become intoxicated. This principle is at odds with *R v O'Connor* (1980) 29 ALR 449 which upheld the principles of common law that evidence of self-induced intoxication (either by alcohol or drugs, or both) is relevant in relation to any criminal offence to determine whether a defendant acted voluntarily or intentionally (NSW Parliamentary E-Brief 1/08). However, at the present time intoxication still legitimately forms part of a defence or a mitigating factor in crime, although violent acts (such as glassings for example) are invariably punished by imprisonment in Australian courts (see bibliography below).

In line with all Australian states and territories (except Tasmania), Section 5 (1) of the *Crimes Sentencing Procedure Act* 1999 (NSW) provides that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives that no penalty other than imprisonment is appropriate. This is consistent with the acknowledgement of imprisonment as a sentence of last resort (National Standards and Guidelines for Corrections in Australia 2004). Such consideration is also consistent with the principles of harm minimization that emphasises the importance/efficacy of treatment and other non-custodial strategies over imprisonment.

As the NAS points out, 'the social and physical context affects the potential for harm from intoxication, hence strategies are needed that protect the drinker by altering the drinking context'. It is clear that alcohol-related violence and anti-social behaviour generally is associated with the increasing availability of alcohol and 'social acceptability' of drinking as a social norm. It is equally clear that strategies outside of the criminal justice system may well be more influential in protecting the drinker and indeed the community generally (Fleming 2008).

As ADCA has suggested elsewhere (2008) the abuse of alcohol and its anti-social potential needs to be addressed by all Australian governments as a priority. In its submission to the Senate Inquiry for the Alcohol Toll Reduction Bill (2007) ADCA strongly recommended:

- the introduction of health warning labels on all alcohol products
- establishing restrictions on the way alcohol is advertised and marketed to young people
- pre-approval and rigorous testing of alcohol advertisements and promotions
- establishing a nation-wide education program to raise awareness of the dangers of alcohol.

More generally and in line with NAS provisions, ADCA believes that governments need to:

- Increase community awareness and understanding of the extent and impacts of intoxication
- Improve enforcement of liquor licensing regulations
- Ensure the inclusion of Aboriginal and Torres Strait Islander groups to identify specific responses for Aboriginal and Torres Strait Islander communities
- Implement strategies to reduce the outcomes of intoxication and associated harm in and around late night (extended hours) licensed premises and outlets
- Recognise that licensed premises have a role to play in minimising incidents
- To develop and disseminate best practice guidelines on alcohol consumption in public and private settings
- To increase capacity of local government and communities to respond to alcohol problems

Such activities would perhaps alleviate the necessity to continuously update sentencing conditions, consider harsher penalties and identify changes to sentencing practices.

While public opinion and governments generally support intoxication as an aggravating factor in sentencing, if enshrined, this would sit uneasily with current legal principles and practice. Dingwall has persuasively made the argument that uniformity in approach in sentencing is problematic.

## References/Additional Reading

Articles re sentencing for glassing offences:

<http://www.pfes.nt.gov.au/index.cfm?fuseaction=viewMediaRelease&pID=9027&y=2008&mo=11>  
- magistrate suggests plastic glasses for certain times and certain venues  
[http://www.geelongadvertiser.com.au/article/2008/02/15/11361\\_news.html](http://www.geelongadvertiser.com.au/article/2008/02/15/11361_news.html) - youth with problem with alcohol- good example of a type of offender (presumably no priors, youth) suited to treatment  
<http://www.pinknews.co.uk/news/articles/2005-2453.html> - from the UK. Youth sentenced for four years in young offenders institution. Homophobic element to the crime.  
<http://www.thedaily.com.au/news/2008/jul/31/opposition-call-ban-glass-bars/> - opposition calls for plastic glasses, example of a 21 yr old sentenced for 2 years  
<http://www.news.com.au/story/0,23599,24423754-421,00.html> – 80% of glassing victims between 18 and 25, increased in instances of glassings  
<http://www.thedaily.com.au/news/2008/jul/31/glassing-man-cops-two-year-jail-term/> - 21 year old sentenced for 2 years, 5 prior offences committed when intoxicated  
<http://www.thedaily.com.au/news/2007/aug/30/beer-glass-attacks-worry-police/> - police call for licencees to enforce RSA, example of a 28 yr old charged with wounding.  
[http://www.bournemouthecho.co.uk/news/2143383.women\\_in\\_glassing\\_attacks\\_locked\\_up/](http://www.bournemouthecho.co.uk/news/2143383.women_in_glassing_attacks_locked_up/) - UK example- 21 yr old women sentenced to 12 months detention  
<http://www.standard.net.au/news/local/news/general/woman-banned-from-pubs-for-glassing/1347884.aspx> - 19 yr old female offender, fined \$2000 and banned from area.  
<http://www.greatyarmouthmercury.co.uk/content/yarmouthmercury/news/story.aspx?brand=GYMOnline&category=news&tBrand=GYMOnline&Category=news&itemid=NOED24%20Nov%202008%2009%3A21%3A55%3A343> – UK example of 19 yr old offender, 16 months in youth facility  
<http://www.theherald.com.au/news/local/news/general/spate-of-region-glassing-assaults/1325636.aspx> - few reports of glassings, a couple of older females involved, some younger men  
<http://www.abc.net.au/news/stories/2008/07/31/2319886.htm> - anna bligh says look at RSA practice

### Liquor Licensing and Public Disorder: Review Of Literature on the Impact of Licensing and other Controls

<http://www.scotland.gov.uk/Publications/2003/02/16292/17662>

### National Standards and Guidelines for Corrections in Australia 2004

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Prisons+in+Victoria/Prison+Management/JUSTICE+-+National+Standard+Guidelines+for+Corrections+in+Australia+-+2004>

ADCA (2008) Submission to the Senate Inquiry for Alcohol Toll Reduction Bili 2007,  
<http://www.adca.org.au/images/publications/6%20may%202008%20adca%20submission%20to%20the%20alcohol%20toll%20reduction%20bill%202007.pdf>

Dingwall, G (2006) *Alcohol and Crime*, Willan Publishing, Devon

Fleming, J (2008) Rules of Engagement: Policing Anti-social Behaviour and Alcohol-Related Violence in and around Licensed Premises, *Bureau of Crime Statistics and Research*, 1-49 - December

Griffith G (2008) 'Intoxication and the Criminal Law', NSW Parliamentary E-Brief (2008) 1/08, October

Tasmanian Institute of Law Reform Institute (2008) *Sentencing, Final Report 11*, June,  
<http://www.law.utas.edu.au/reform/projects/documents/completeA4.pdf>