



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Professor Dan Howard SC  
Commissioner  
Special Commission of Inquiry into the Drug 'Ice'  
GPO Box 5341  
SYDNEY NSW 2001

By email: [submissions@iceinquiry.nsw.gov.au](mailto:submissions@iceinquiry.nsw.gov.au)

Dear Professor Howard,

**The Special Commission of Inquiry into the Drug 'Ice' – Issues Paper 2: Justice**

The Law Society welcomes the opportunity to respond to the Special Commission's Issues Paper 2: Justice. Please find the submission enclosed.

We have not responded to all of the specific questions in the Issues Paper, but instead focussed on the issues most relevant to the expertise of our members. We have also used the term "ATS", which is used in the Issues Paper, in the submission to refer to all amphetamine-type stimulants.

Members of the Law Society's Criminal Law Committee have contributed to the attached submission, and would welcome the opportunity to meet with you to discuss their experiences further.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at [rachel.geare@lawsociety.com.au](mailto:rachel.geare@lawsociety.com.au).

Yours sincerely,

Elizabeth Espinosa  
**President**



## Decriminalisation and legislation

### Decriminalisation

We note that in its final report, the Commonwealth Parliamentary Joint Committee on Law Enforcement, *'Inquiry into crystal methamphetamine (ice)'* concluded that the current prohibitionist approach in Australia is not working.<sup>1</sup> Law enforcement agencies made it clear to the Joint Committee that Australia cannot arrest its way out of the ATS problem.<sup>2</sup> We agree with the Joint Committee's position that the focus on ATS should shift from a law enforcement problem to a health issue where treatment and support are readily available.<sup>3</sup> This will require a commitment from the NSW Government to substantially increase resources to improve services and support for ATS and other illicit drug users.

While the Law Society does not have a policy position on the decriminalisation of ATS or other illicit drugs (for use or possession for personal use), we do consider that models of decriminalisation are worth exploring further.

What is clear from the Portuguese model<sup>4</sup> (and other decriminalised systems), is the overwhelming recognition that decriminalisation itself is only a small part of the process; overcoming the stigma of drug use, and promoting access to and provision of support services, are fundamental parts of the "total package" that flows from decriminalisation, which requires a significant cultural shift both from Government and the community.

### Penalty notices

In January 2019 the *Criminal Procedure Regulation 2017* was amended to enable the issuing of a penalty notice of \$400 under section 333 of the *Criminal Procedure Act 1986* for the offence of possession of a small quantity of a prohibited drug (excluding possession of cannabis leaf). It is too early to predict what impact the introduction of penalty notices for the use and possession of ATS will have on the volume of prosecutions for these offences and the prevalence of ATS use.

Issuing a penalty notice is an administrative exercise and not a criminal proceeding. Paying a penalty notice is not an admission of guilt. We therefore do not support a requirement to attend compulsory counselling or education programs for those issued with a penalty notice.

## The current legal framework and options for change

### Categorisation of drugs

We consider the current approach of categorising prohibited drugs and penalising according to quantities in Schedule 1 of the *Drug Misuse and Trafficking Act 1985* a crude indicator of harm. The admixture provisions demonstrate the problem with this approach, as the gross

<sup>1</sup> Parliamentary Joint Committee on Law Enforcement, *'Inquiry into crystal methamphetamine (ice)'*, Final Report, March 2018, p158.

<sup>2</sup> *Ibid*, p3.

<sup>3</sup> *Ibid*, p158.

<sup>4</sup> In 2001, Portugal decriminalised the use and possession of all illicit drugs. The Portuguese government implemented decriminalised drug laws alongside a substantial investment and expansion of treatment services aimed at drug users, and a broader expansion of the Portuguese welfare state.

quantity (which is the relevant amount in NSW) may bear no correlation to the actual amount of the drug.

We suggest that there should be transparent criteria by which quantity amount is determined e.g. method of administration, typical quantities and harm. Consideration would need to be given to how this would operate with the admixture provisions. We also support a review of the threshold amounts for drug quantities in Schedule 1.

### Data

As discussed in the Issues Paper, there is clearly a gap in current ATS-related crime and justice data. This data could be collected by either the courts or the prosecution and would need to be undertaken on two levels. First, if a drug is particularised e.g. in a supply or import matter, data as to what that drug is. The second level is more difficult, which is what, if any, drug contributed to the offending. This would need to be extracted from sentencing remarks and will be limited in its usefulness given that it may not always be referenced. Both types of data would assist in the development of policy and the proper allocation of limited resources to address the role of ATS in offending. However, it is likely that consistent reporting and collation of relevant data would require resources which are not presently available to either courts or the prosecution.

### Drug driving

We are opposed to the increase in the maximum penalties for driving under the influence of drugs ("DUI offences") to reflect maximum fines, prison terms and disqualification periods available and applied to high range Prescribed Concentration of Alcohol ("PCA") drink driving offences introduced by the *Road Transport Legislation Amendment (Road Safety) Act 2018*.<sup>5</sup>

We have serious concerns with equating a DUI offence with a high range PCA offence. A high range PCA offence involves a high degree of intoxication, and therefore affectation, by alcohol. In contrast, a DUI requires only affectation to some material degree, no matter how slight. In fact, a DUI offence does not require that the accused's ability to drive a motor vehicle is impaired to any extent at all (see *Director of Public Prosecutions (NSW) v Kirby* [2017] NSWSC 1754 at [17] to [21]). It is therefore an affront to justice to treat all DUI offences as involving the same level of criminal culpability as high range PCAs.

A DUI offence covers a wide range of offending from the relatively minor to the very serious while a high range PCA offence is, by definition, serious. Therefore, in recognition of the fact that the range of offending covered by a DUI offence is much broader than a high range PCA, the range of available disqualifications ought to be commensurately broad.

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<sup>5</sup> The legislation increased the maximum penalty available in the case of a first offence to 30 penalty units or imprisonment for 18 months or both. The automatic disqualification period has been increased to three years, with a minimum disqualification period of 12 months. For a second or subsequent offence, the maximum penalty has been increased to 50 penalty units or imprisonment for two years, or both. The automatic disqualification period has been increased to five years, with a minimum disqualification period of two years. The amendments double both the maximum term of imprisonment and the minimum disqualification period for the offence of driving under the influence.

## Diversionsary programs

### Resources

Drug use is a significant underlying issue for a large proportion of people who come into contact with the criminal justice system. The Law Society has continually urged the NSW Government to take measures to invest in community-based health treatment such as drug and alcohol rehabilitation centres, and introduce reforms to better enable courts to impose alternatives to full time imprisonment, where appropriate, to help address this issue. A significant increase in investment in drug rehabilitation services is required, particularly in regional, rural and remote areas of NSW. We strongly support the recent Legislative Council Committee recommendation that the NSW Government significantly increase funding to drug and alcohol-related health services, and establish more residential rehabilitation and detoxification services throughout regional NSW, including facilities for women and children, Aboriginal people, and young people.<sup>6</sup>

The NSW Government currently devotes significant resources to the detection and policing of drug and alcohol related offences, but does not provide sufficient resources for the provision of residential drug and alcohol rehabilitation facilities to address the underlying issues.

The Law Society is strongly of the view that more community services are essential. In the absence of properly funded services that are accessible across NSW, additional diversionary programs, post release support or other preventative measures are not capable of being carried out.

### The Drug Court of NSW

The Drug Court treats health issues as well as justice and social issues. The Drug Court aims to reduce a person's dependency on drugs and by doing so reduce their need to resort to criminal activities to support that dependency. Many of the offenders the Drug Court deals with have serious issues that would otherwise see them continue to offend in the community. Imprisonment has often failed to deter them from committing crimes.

Studies by the NSW Bureau of Crime Statistics and Research have found that the Drug Court program is more cost-effective than prison in reducing drug-related crime.<sup>7</sup> Evaluations of the Drug Court demonstrate that the intensive use of justice system resources in the community, and the evaluation and monitoring of an offender who gets treatment for drug dependency, is effective in changing lives and is evidence based.

The Drug Court currently sits at Parramatta, Toronto and Sydney. The Law Society supports the expansion of the Drug Court beyond the current catchment areas, and strongly endorses

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<sup>6</sup> 'Provision of drug rehabilitation services in regional, rural and remote New South Wales', Legislative Council Portfolio Committee No. 2 - Health and Community Services, August 2018, Recommendation 2.

<sup>7</sup> 'Intensive judicial supervision and drug court outcomes: Interim findings from a randomised controlled trial', Bureau of Crime Statistics and Research, Crime and Justice Bulletin, Number 152 November 2011; 'The NSW Drug Court: A re-evaluation of its effectiveness', Bureau of Crime Statistics and Research, Crime and Justice Bulletin, Number 121, September 2008; 'New South Wales Drug Court evaluation: Cost effectiveness', Bureau of Crime Statistics and Research 2002.



the Legislative Council Committee recommendation that the NSW Government pilot a Drug Court in Dubbo in parallel with an increase in rehabilitation services for the area.<sup>8</sup>

Expanding the Drug Court will help to ensure that a greater number of drug-dependent offenders are offered the most appropriate treatment and rehabilitation which will assist in reducing recidivism. This will require appropriately funded and resourced detoxification and rehabilitation services to support the work of Drug Courts.

Ideally, the Drug Court should be available to all those who need it throughout NSW. As this appears unlikely to occur, we consider that the next best option is equitable access across NSW by mainstreaming the Drug Court approach. To do so, a critical review needs to be undertaken of what makes the Drug Court successful and the best way to take its most effective elements and roll them out across NSW. We consider this a good exercise to undertake in the context of the Inquiry.

#### The Magistrates Early Referral into Treatment ("MERIT") program

The Law Society has long supported MERIT as an effective pre-sentence diversionary program. MERIT is a voluntary, pre-plea scheme available in most Local Courts for defendants with drug problems. MERIT enables defendants to engage in drug treatment and rehabilitation, for the purpose of removing or substantially alleviating drug dependency and reducing drug-related crime, as part of the bail process.

The program takes a holistic approach as to the causal connection between substance abuse, homelessness, unemployment, lack of income and refers these offenders to ongoing support agencies. When the matter is finalised in the Local Court at the completion of the MERIT program, defendants can demonstrate participation in a program of rehabilitation, and future referrals to community support; these subjective factors can then be taken into account by the judicial officer in sentencing proceedings.

Research by the Bureau of Crime Statistics and Research has shown that MERIT is having great success in reducing rates of reoffending.<sup>9</sup> Among MERIT participants in 2016, there were considerable reductions in both the frequency and intensity of all forms of self-reported substance use at program exit compared to program entry. The largest reductions recorded were for cannabis and amphetamines usage.<sup>10</sup>

The MERIT program receives a high level of judicial support and provides positive outcomes for both offenders and the community. The Law Society considers that the demonstrated success of MERIT in reducing recidivist behaviour, and the associated benefits this creates for the community, justifies the allocation of substantial resources to the program.

#### MERIT for young offenders

Diversionary options in NSW Children's Courts are largely restricted to the measures legislated in the *Young Offender Act 1997*, that is, police cautioning or youth justice

<sup>8</sup> *Provision of drug rehabilitation services in regional, rural and remote New South Wales*, Legislative Council Portfolio Committee No. 2 - Health and Community Services, August 2018, Recommendation 5.

<sup>9</sup> *'Magistrates Early Referral Into Treatment Program'*, Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 131, July 2009, p11.

<sup>10</sup> The Magistrates Early Referral into Treatment (MERIT) Report, Annual Report 2016, p9.

conferencing. There is a gap in the provision of pre-sentence programs that focus on issues such as drug and alcohol abuse, that contribute substantially to their offending. For those children and young people who are not diverted from the Children's Court into youth justice conferencing, there appears to be no clear way to address these welfare issues at the pre-sentence stage.

Legal practitioners who have experience working with young adults in the Local Court jurisdiction have reported that the MERIT program can have a substantial and positive impact on their path toward rehabilitation. Although MERIT is a three-month program, and successful rehabilitation can take a longer time for young adults presenting with complex issues, often the program provides an entry point for these offenders to community programs and later referral to appropriate agencies at the completion of MERIT. For example, a young adult presenting with substance abuse problems may also have underlying trauma or undiagnosed mental health issues. The MERIT program may provide an opportunity for these underlying issues that are linked to drug and alcohol abuse to be identified and appropriate referrals for treatment to be made.

MERIT is an effective pre-sentence program of rehabilitation that often sets young adults with complex criminogenic issues on a path to recovery, and diverts many young adults from the criminal justice system into community-based support. The Law Society submits that consideration should be given to introducing a pre-sentence program such as MERIT in the Children's Court for children and young people with drug and alcohol dependency problems.

#### Reinstatement of the Youth Drug and Alcohol Court

The Youth Drug and Alcohol Court was closed in 2012. The objectives of the Court were to reduce the alcohol and drug dependency of children, to promote the re-integration of such drug dependent children into their families and the community, and to reduce the need for such drug dependent children to resort to criminal activity to support their drug dependencies.

The Law Society supports the reinstatement of the Youth Drug and Alcohol Court with modifications to the previous model. Legal practitioners held concerns that under the previous legislative regime, the 'failure' to complete the program could potentially result in a greater sentence being handed down to young offenders, than if the matter had not proceeded through the Youth Drug and Alcohol Court. This was due to the scheme operating as a 'pre-sentence' program allowing the court to exercise flexibility in handing down the final sentence. Conversely, in the adult Drug Court, the program operates as a 'post-sentence' scheme (as an alternative to prison). At the end of the adult Drug Court program, the participant will not be penalised with an increased sentence if their participation in the program was inadequate, whereas in the Youth Drug and Alcohol Court it was possible for a young offender to receive a harsher sentence than if they had not participated in the program at all. The Law Society submits that if reinstated, legislative protections will be required to ensure that children do not receive a greater sentence if they fail to complete the program, than if they had not participated in the program at all.

#### Increased drug and alcohol age-appropriate rehabilitation services

Diversions efforts require increased funding for age-appropriate alcohol and drug rehabilitation services, including 'dual diagnosis' rehabilitation services (for the many

instances where mental health and dependency issues overlap). It is concerning that most alcohol and drug addicted teenagers in NSW who want to undergo detoxification must do so at home or wait for a bed in a public hospital or an adult detoxification facility.

The 12-week Triple Care Farm youth rehabilitation and treatment program in Robertson, NSW, is a holistic program for young people with co-occurring mental illness and drug and alcohol problems. Reported outcomes from that program have been positive.<sup>11</sup> In June 2017, a new facility (on the same property as Triple Care Farm) called David Martin Place was opened as a youth drug and alcohol detoxification facility, which was the first of its kind in New South Wales.<sup>12</sup> Currently both of these programs have very limited places and a greater level of funding of these and similar programs is needed to reach more young people in NSW.

### **ATS use and custody**

Access to alcohol and drug residential rehabilitation programs from custody is not easy, as there are only a small number of vacancies available. The assessment process usually requires a lengthy telephone assessment, and this process is now more difficult following the withdrawal of the service previously provided by Services and Programs Officers ("SAPOs"). SAPOs previously assisted inmates with the facilitation of telephone assessments.

SAPOs will only assist with assessments for unrepresented inmates; in all other instances, Corrective Services now expect legal practitioners to arrange phone assessments through JustConnect.

It is our strong view that transferring the role of rehabilitation assessments from SAPOs to legal practitioners through JustConnect is unsustainable and an inefficient use of already scarce criminal justice resources for reasons including:

- Private practitioners on legal aid grants are not funded to undertake this role.
- Legal Aid and Aboriginal Legal Service practitioners do not have adequate funding or time to undertake this role.
- Some of the rehabilitation centres we have contacted have expressed issues including:
  - They are being inundated with calls from legal practitioners seeking information about admission (as opposed to a fewer number of SAPOs who have more experience with the rehabilitation centre and their eligibility criteria).
  - They have long standing, good relationships with SAPOs which makes their assessment process more efficient, including the assessment, and communications whilst the inmate is waiting for a bed to become available.
  - One prominent rehabilitation centre informed us that the JustConnect service would not work because there are a number of admission officers and it is not possible with their system to pre-arrange who would be assessing a particular inmate.

Our concerns with regards to SAPOs withdrawing this service are as follows:

- The need for this service to assist inmates to access intensive community based treatment (relevant to bail and sentencing decisions).

<sup>11</sup> Sir David Martin Foundation, *Triple Care Farm Outcomes 2016*, available at: <https://www.sdmf.org.au/news-events/news/238-triple-care-farm-outcomes-2016>

<sup>12</sup> Sir David Martin Foundation, *David Martin Place*, available at: <https://www.sdmf.org.au/youth-programs/david-martin-place>

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- The potential increase in the prison population through reduced diversion to programs on bail or at sentence in the Local and District Courts.

We appreciate that SAPOs are under significant pressure to facilitate their tasks and have been stretched in undertaking the rehabilitation assessment role. An alternative option would be for the Government to consider creating the position of a “diversion officer” funded for each correctional centre to undertake rehabilitation and diversion work.