

RESPONSE TO ISSUES PAPERS 2, 3 & 4 OF THE SPECIAL COMMISSION OF INQUIRY INTO THE DRUG 'ICE'

Submission to Special Commission

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The NSW Young Lawyers Criminal Law Committee (Committee) makes the following submission in response to Issues Papers 2, 3 and 4, issued by the Special Commission of Inquiry into the Drug 'Ice' in relation Justice, Health and Community, and Data and Funding.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Criminal Law Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Submissions in response to Issues Paper 2: Justice

The following submissions respond to the specific questions posed in the Special Commission's Issues Paper 2.

Decriminalisation of prohibited drug offences in NSW

2.1.10 Should NSW consider the legalisation and/or the regulation and control of the supply of ATS?

The Committee does not support the legalisation of possession of amphetamine-type substances (**ATS**). Many of our Committee members are frequently confronted with the detrimental effect that these drugs have on users and the community more broadly. The Committee does however support some small steps, that would help support the rehabilitation of drug users and prevent them from incurring a lengthy criminal history for, what the Committee submits is best considered as, a health issue. Those steps are discussed below.

2.1.1-2.1.5 Use of Penalty Infringement Notices ('PINs')

The Committee supports the recent expansion of the Penalty Infringement Notice (**PIN**) scheme and urges its continuance. The prevalence of ATS in the community has resulted in a large number of users being charged with offences of possess or supply prohibited drug. Statistics prepared by the NSW Bureau of Crime Statistics and Research (**BOCSAR**) for the Special Commission of Inquiry, indicates that recorded incidents of amphetamine possession and supply rose 250% between 2009 to 2016. However, statistics prepared by the Judicial Commission of NSW reveal the majority of these matters do not result in a term of imprisonment or a good behaviour bond. These statistics indicate that 55.2% of offenders sentenced for drug possession by the Local Court received court-imposed fines while 28.4% received dismissals or bonds under s 10 *Crimes (Sentencing Procedure) Act 1999* (NSW). This is reflected in the BOCSAR statistics which show that 64% of offenders sentenced for possession of illicit drugs received a fine. Accordingly, the expansion of PINs can be expected to have a minor impact on the number of persons who suffer more serious penalties but will reduce the burden on the Local Court and support the rehabilitation of offenders.

While there has not yet been any data to confirm whether the recent expansion of the PIN scheme has freed up valuable court time and legal resources, the Committee submits the scheme would have such an effect, thereby enabling Courts and government funded organisations to deal with more serious types of offending.

The Committee notes that the imposition of PINs on impecunious substance users may be problematic and potentially futile, however supports their use where Work and Development Orders (**WDOs**) are imposed in circumstances where an offender fails to pay a PIN. The Committee submits that WDOs are an effective tool to encourage rehabilitation without being punitive. Numerous Committee members reported the positive impacts of WDOs on those issued with them. The Committee also notes the positive impacts of WDOs on the community generally.

The Committee strongly emphasises that there is a need for greater funding of and accessibility to rehabilitation services for drug users. Without these, the efficacy of PINs in protecting the broader community and supporting users is questionable.

2.1.12 What other innovative strategies should the Inquiry consider in relation to decriminalisation of ATS?

The Committee supports the conduct of further research on the use of ATS and, depending on the findings, an amendment to the trafficable quantity of ATS. Anecdotally, many offenders report using up to 1.5 grams of methylamphetamine per day. As the trafficable quantity of methylamphetamine is 3 grams, a person carrying two day's supply of a personal dosage could be charged with 'deemed' supply.

Substance testing and other innovative measures to reduce harm

Although not responsive to one of the targeted questions, the Committee is supportive of the creation of drug testing centres for ATS. The deployment of such centres in high-volume nightlife locales and festivals is a rational way to reduce the harm that many ATS cause to the community, particularly young people. The success of the ACT 'pill testing' trial and the anecdotal evidence that it discouraged some festival-goers from taking the ATS that they carried suggests that these centres not only reduce harm but discourage risky behaviour.

Impacts on the criminal justice system

2.3.1 What is the impact of ATS use on the criminal justice system?

There is currently insufficient data to enable us to identify the impact of ATS use on the criminal justice system in isolation from the impact of the use of other prohibited drugs. Although the police record drug type for offences of possess or supply prohibited drug, a review of charges alone could not truly reflect the effect that ATS use has on the justice system. This is because of the interaction between ATS use and the commission of other offences, where often the link between them may not be established until subjective material is produced on sentence.

2.3.2 What can be done to improve the way that the impact is recorded?

The Committee suggests that an effective way to record this impact would be a quantitative survey of the work before a Court on a standard day. A review of Court files and submissions made would enable researchers to assess the overall effect of ATS use on the criminal justice system.

Justice Strategies

2.4.8 and 2.4.9 Are existing diversionary programs achieving positive outcomes for ATS users/ATS related Offending? Which diversionary programs have proven to be the most effective in NSW and in other jurisdictions?

The Committee supports the expansion of the Drug Court and the Magistrates Early Referral Into Treatment Program (**MERIT**). Our members report these services have a positive impact on defendants who have accessed these services. In particular, the Committee supports the way in which the Drug Court incorporates evidence-led practices, including swift and certain sanctions, a key feature of the (**HOPE**) program.

Regional members of the Committee report difficulties in accessing the MERIT program. It is often the case that where the sentencing Court is not a part of the program, Magistrates are reluctant to adjourn matters to MERIT courts to enable access to that Program. Whilst the Committee recognises that this type of adjournment might overly burden MERIT Courts, the lack of access in

regional areas disadvantages those defendants who are ATS users and does not promote their rehabilitation. This is particularly concerning considering the BOCSAR statistics prepared for this Special Inquiry which reflect a high level of use in the Far West, Orana, Murray and Riverina.

Submissions regarding rehabilitation

The Committee submits that access to rehabilitation services should remain a focal consideration when determining the best approach for reform. Access to effective rehabilitation services will benefit not only ATS users, but also the wider community.

The Committee submits that Courts appear aware of the importance of rehabilitation and are often accommodating of it when they consider it would have a positive impact on the rehabilitation of an accused person or offender. For example, lengthy adjournments, bail, and orders pursuant to s11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) were reported to be granted with relative ease, though generally evidence is required by the court before such an order is made, for instance, written approval for admission to a facility.

Despite the positive reception of the Courts, many of our members reported facing difficulties when seeking access for people with ATS-dependence to rehabilitation services. This is often attributed to under-resourcing which results in lengthy waiting lists, communication difficulties with under-staffed facilities and a lack of available services altogether.

Anecdotally, the following centres are commonly used but often have significant wait times: Calvary being between 4 and 8 months; Wayback between 2 and 4 months; Oolong between 2 and 3 months; and Orana between 2 and 3 Months. Although non-residential drug and alcohol services go some way towards filling this gap, the Committee submits they alone are unable to address the significant issues related to the use of ATS.

Many of our members described the requirement of complex and detailed admission procedures and checks being carried out before a person can gain a place in programs or facilities.

The Committee notes a constellation of factors amplified the difficulties described above and created an urgency in obtaining confirmation of admission and the corresponding court order. These factors include changing and unclear instructions from clients, clients experiencing

withdrawal or mental illness that impedes obtaining instructions, homelessness of clients, difficulties in communicating with clients in correctional facilities on remand or awaiting appeals, and the reported general availability of ATS in correctional facilities, leading to relapse.

Of specific concern to the Committee is the availability of programs and facilities in regional areas, noting that people in regional areas are approximately 2.5 times as likely to use ATS as their city counter-parts. The Committee was heartened to see that the Inquiry's Issues Paper 3 notes the scarcity of residential rehabilitation in regional areas and their under-resourcing where they are available. The Committee further notes that many clients cannot access rehabilitation centres further away from regional centres due to not being able to self-fund travel to those centres.

The Committee takes some comfort from, and acknowledges, that the NSW Government supported, or supported in principle, 11 of the 12 recommendations of the 2018 NSW Parliamentary Inquiry into Drug Rehabilitation. However, the Committee submits that the \$4 million provided by the NSW government over 4 years from 2015 has not manifested sufficient rehabilitation services for regional NSW. The Committee notes that that funding ends this year, at which time the primary funding for regional facilities will return to block-funding grants. The Committee recommends that urgent action be taken on the 2018 recommendations and that funding be tied to actual levels of demand. The Committee recommends that the NSW Government guarantees at least 4 further years of targeted funding for rehabilitation programs and facilities in regional NSW.

Further, the Committee is concerned with the common structures of residential rehabilitation which have the effect of deterring ATS-dependent people, or increasing the likelihood of failure in completing the rehabilitation.

For example, committee members described the unavailability of rehabilitation facilities and programs that were able to effectively treat 'dual diagnoses' of complex mental illness and ATS-dependence. As the Inquiry's Issues Paper 3 identifies, it is the common experience of committee members that:

...due to the physical and mental health comorbidities associated with drug use, detoxification often occurs in the mainstream health service system when patients present for acute ATS-related physical and mental health problems.

The mainstream health service system does not support long-term residential rehabilitation following detoxification, and committee members described a gap in treatment for the ATS-dependence following treatment of the presenting physical or mental health problems. Further, committee members reported a reluctance on behalf of rehabilitation facilities and programs to admit clients presenting with or following an acute physical or mental health problem, despite often being ATS-related. In the words of one committee member, “more often than not, residential rehabilitation simply cannot treat dual diagnoses despite their prevalence”.

The Committee also notes the additional difficulty for female clients in accessing residential rehabilitation that prevents children from being accommodated. Committee members described experiences of female ATS-dependent clients not having adequate familial support to supervise children for the complete length of residential rehabilitation programs. The Committee was not aware of any facilities that permitted co-habitation of dependent children at residential rehabilitation facilities.

Although these barriers affect all accused persons applying for rehabilitation services, there are significantly greater barriers for clients applying for rehabilitation from custody. Our members reflect that the period on remand is the most effective time for accused people to access these services, having the assistance of a solicitor during the application process and permitting the Courts to mandate compliance with rehabilitation through bail conditions.

Previously, Drug and Alcohol Assessment Reports were ordered by the court in order to have persons in custody assessed for suitability to full time residential rehabilitation. The initial assessment was carried out in custody and facilitated by an arm of corrective services known as Service and Program Officers (**SAPOS**). It involved the person in custody meeting with a psychologist and then assessing their individual need for rehabilitation.

As at 2018, these reports could no longer be ordered by the Local or District Court; the Supreme Court stopped ordering these from 15 April 2019.

The most important part of this process was the role of corrective services as an intermediary between the client and the rehabilitation centre. They would make initial contact and organise an assessment, field admissibility issues and fill out applications. Once the assessment took place

they would assist by relaying information and updates about the application and forwarding relevant documentation to the rehabilitation centres.

Corrective Services can no longer organise any of the above. If a person in custody wants to attend rehabilitation they must personally make contact the centre. Immediate problems that arise are:

- Persons in custody have 6-minute increments on the prison phone system to make calls. The average rehabilitation assessment takes 15-30 minutes;
- Remandees do not have access to fax or email to send relevant documents to centres;
- Some prisoners are illiterate and unable to deal with the complexities of applications without the support of a SAPO;
- Prisoners are unable to make calls without money loaded onto their account, disadvantaging impecunious prisoners;
- Prisoners have no control over the prison system, muster or lock ins and are therefore often unable to meet their appointments;
- When phone calls are organised between the legal representation and persons in custody they are not given a pen or paper;
- Calls cannot be booked or facilitated for clients directly to rehabilitation centres under the *Justconnect* phone booking system that is used by ALS and Legal Aid solicitors, this prevents these organisations from directly organising assessments; and
- If something goes wrong, an appointment is missed or call does not go through, it can take several weeks to arrange a second appointment, significantly delaying bail applications.

Whilst family members and solicitors can make some applications on behalf of a person in custody, many rehabilitation centres will not provide a bed without a phone assessment from custody.

The inability to order such reports means that Courts are not able to make bail determinations with a complete understanding of the prospects of the accused person, but also creates a disparity in the system where persons in custody with underlying drug and alcohol issues are less able to access rehabilitative services than those in the community.

The Committee submits that the re-introduction of Drug and Alcohol Assessment Reports and the creation and funding of further drug rehabilitation centres, are crucial to the NSW governments efforts in fighting ATS abuse.

In relation to rehabilitation the Committee makes the following recommendations:

1. Significant additional resources be allocated to the creation or expansion of rehabilitation programs and facilities;
2. Additional resources be concentrated on ensuring the availability of rehabilitation facilities and programs in regional areas;
3. The Inquiry consider reviewing the common admission procedures of facilities with a view to recommending a simplification, where possible, of the information and procedures required before an approval for admission is granted;
4. The allocation of resources to create innovative rehabilitation facilities and programs designed to:
 - a. accommodate dependent children; and
 - b. treat dual diagnoses; and
5. That resources be allocated to the Department of Corrective Services to enable them to recommence their organisational role in facilitating rehabilitation assessments.

Submission in response to Issues Paper 4: Data and Funding

The following submissions respond primarily to question 4.1.2 posed in the Special Commission of Inquiry's Issues Paper 4 and relate mainly to data.

4.1.2 What new data sets need to be developed to inform appropriate policy development in relation to ATS use?

The Committee notes and welcomes the data presented recently by BOCSAR to the Special Commission of Inquiry. That data notwithstanding, the Committee submits further data sets need to be developed to inform policy development.

Throughout the consultation conducted by the Committee, it became apparent that a lack of certain data impeded our ability to come to a firm view on the likely effectiveness of decriminalising ATS and the appropriate policing strategies. As a result, the Committee can only speculate on the likely

populations affected by current criminalisation and policing strategies. Such speculation is primarily based on anecdotal evidence. The Committee submits this approach is an inadequate basis from which to form sound policy, particularly policies on decriminalisation given their capacity to have significant consequences.

For instance, as previously mentioned, the Committee is concerned that extending the use of PINs for ATS possession may adversely affect people from lower socio-economic backgrounds and result in “PIN build-up”. This concern is based on the Committee’s understanding that ATS possession is an offence more often committed by people from low socio-economic backgrounds. Accordingly, the Committee submits new data sets need to be developed in order to assist in determining whether ATS use is more common in low socio-economic populations or whether this conception is as a result of other phenomena, such as the difference in visibility of illicit drug possession between different socio-economic populations. The Committee further notes that the amendments to the *Criminal Procedure Act 1986* (NSW) are too recent to have produced insightful data on the effectiveness of PINs for drug possession generally. Accordingly, the Committee is reluctant to recommend an increase in the use of PINs for ATS possession, without raising concerns regarding PIN build-up.

Further, the anecdotal experiences of Committee members was that ATS possession is rarely charged in isolation. Offences of ATS possession committed by people from low socio-economic backgrounds were often accompanied by charges of property and violence offences. The Committee considers it highly unlikely that in such circumstance PINs will be issued.

The Committee notes that BOCSAR specifically disclaimed its criminal justice system data as capturing the actual prevalence of ATS use and possession. BOCSAR explained this was because the data is “influenced by policing priorities and law enforcement practices”. Further, BOCSAR noted that ATS use and possession are unlikely to be reported by the public. Noting the Committee’s concern outlined above that use and possession is more visible in lower socio-economic populations as it is often detected by virtue of other concurrent offences (which themselves are more visible and more likely to be reported or policed in lower socio-economic populations), the Committee believes the current data on use and possession is likely to be significantly skewed. Relying on the current data to inform policy development would, in the Committee’s submission, be likely to adversely affect vulnerable populations.

Further, the Committee notes the finding of the 2015 National Ice Taskforce that “existing data and research does not provide a sufficiently comprehensive evidence base to support optimal policy-making on ice and to measure the effectiveness of these responses.”

The Committee recognises the challenges associated with gathering such data; however, it supports the Inquiry’s focus on innovation in data collection, and measures such as the AOD Early Intervention Innovation Fund. The Committee also strongly supports further collaboration between bodies such as BOCSAR; the Australian Institute of Health and Welfare, particularly in relation to the National Drug Strategy Household Survey; and the Australian Criminal Intelligence Commission, particularly in relation to the National Wastewater Drug Monitoring Program. The Committee reiterates the importance of developing policies from a position informed and supported by data as well as experience.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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