

The Public Defenders

29 April 2019

Special Commission of Inquiry
Into the Drug "Ice"

By email: inquiry@iceinquiry.nsw.gov.au

Dear Commissioners,

Re: Submissions on behalf of the Public Defenders

The Public Defenders welcome the opportunity to make a submission to the Commission.

The Commission has called for submissions on a wide range of matters relating to amphetamine-type stimulants ("ATS"). We are in a position to make submissions about some of those matters, while many are outside our experience and/or expertise. We therefore propose to focus upon the matters raised in *Issues Paper 2: Justice*.

For an excellent overview of the issues involved in drug law reform, the Public Defenders commend to the Commission the NSW Bar Association's discussion paper on Drug Law Reform dated November 2014.

https://www.nswbar.asn.au/docs/webdocs/Drugs_DP_final1.pdf

Legal framework – the international conventions

Australia is a signatory to the three major international drug conventions mentioned in the discussion paper:

1. The *Single Convention on Narcotic Drugs of 1961* ("the 1961 convention");
2. The *Convention on Psychotropic Substances of 1971* ("the 1971 convention");
3. The *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* ("the 1988 convention").

Legalisation of drugs such as ATS for non-medical purposes would appear to be inconsistent with the terms of those conventions. Decriminalisation does not appear to be. Please note that the Public Defenders are not experts in international law and any opinions expressed are based entirely on a reading of the conventions themselves. We encourage the Commission to take advice from experts in international law.

From their provisions, it is clear that each of the conventions is concerned with harm minimisation and permits a treatment and harm minimisation approach to abusers of drugs who have committed drug offences. (See below.)

Compliance with the conventions is not achieved simply by creating, prosecuting and punishing drug offences. (Although this is part of what is required.) Each of the conventions requires measures to be taken to address the problem of drug abuse by the treatment and rehabilitation of drug abusers.

Article 38 of the 1961 convention provides:

Article 38. Measures against the abuse of drugs

1. The Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends.

Article 20 of the 1971 convention is in almost identical terms. Further, resolution II to the 1961 convention reads as follows:

The Conference,

Recalling the provisions of article 38 of the Convention concerning the treatment and rehabilitation of drug addicts,

1. *Declares* that one of the most effective methods of treatment for addiction is treatment in a hospital institution having a drug free atmosphere;

2. *Urges* Parties having a serious drug addiction problem, and the economic means to do so, to provide such facilities.

The requirement to give special attention to and take *all* practicable measures is an onerous one. In NSW there are extremely limited places in residential rehabilitation programs, especially for those seeking bail or coming out of custody, and there are very long waiting lists in custody for AOD programs and treatment. There are particularly limited numbers of positions for those suffering from a dual diagnosis of drug dependence and mental illness. There are limited places in programs such as the Drug Court. This suggests that, in this State, there is a possibility that we might not be complying with the requirements of the conventions in this regard.

The conventions require parties to legislate for, prosecute and punish drug offences but they also provide for diversion of *offenders who are drug abusers* into treatment as an alternative to criminal sanctions.

Article 36 of the 1961 convention provides (emphasis added):

Article 36. Penal provisions

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) Notwithstanding the preceding subparagraph, *when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration* in conformity with paragraph 1 of article 38.

Article 22 of the 1971 convention is in similar terms. The 1988 convention provides for the creation of trafficking and related offences and for offences of possession *for the purposes of* trafficking and for imprisonment as punishment. (See paragraph 1 of Article 3.) This convention also deals with possession and cultivation for personal use (paragraph 2 of Article 3). It has a somewhat more punitive approach to trafficking offences. However, even for trafficking offences, it provides for diversion from criminal sanctions, including conviction, where they are of a “minor nature”. (Paragraph 4(c) of Article 3.) It provides for diversionary alternatives for personal use offences. (Paragraph 4(d) of Article 3.)

In summary, the conventions:

1. Require signatories to take all practicable measures to provide treatment and rehabilitation for drug abusers (including offenders);
2. Require signatories to legislate for, prosecute and punish drug offences; and
3. Permit the signatories to divert offenders into treatment in addition to, or in lieu of, criminal convictions and penalties.

It is submitted that the international legal framework creates very significant obligations upon signatory developed countries such as ours to provide adequate treatment and rehabilitation. We suggest that it would be appropriate for the Commission to investigate the extent to which this State is complying with these obligations. While the drug laws of NSW may be consistent with the conventions (*Issues Paper 2* at p3), it is possible that the extent of provision of treatment and rehabilitation may not be.

It is further submitted that the international legal framework also allows significant scope for decriminalisation, by diversion, of possession of illicit drugs such as ATS and for diversion of offenders into treatment, even for some trafficking offences. Under the *Drug Misuse and Trafficking Act 1985*, offences of supplying less than commercial quantities have recently been listed as Table 1 offences under the *Criminal Procedure Act 1986*. It is submitted that these offences could be considered, for the purposes of the 1988 convention, to be of a “minor nature” and could be subject to diversionary programs.

Further, many drug abusers commit “drug-related” offences: i.e. offences committed under the influence of, or in order to obtain, drugs. Nothing in the international convention prevents diversion of such offenders into treatment.

Decriminalisation, diversion and harm minimisation

The Public Defenders endorse the observations of the former law enforcement officials and agencies that “Australia cannot arrest its way out of the methamphetamine problem” (*Issues Paper 2* p6) and support the adoption of a suite of alternative, diversionary and harm minimisation approaches including:

- Discretionary cautioning schemes such as the Cannabis Cautioning Scheme (but with clear guidelines and safeguards).

- Penalty notices for drug possession, but with the level of fines set based upon a person's income (particularly for young persons and people on government benefits). Penalty notices could be accompanied by information and/or a referral for an assessment for treatment. Second or subsequent penalty notices could be tied to a requirement to undergo an assessment for treatment.
- Greater use of warnings, cautions and conferences under the Young Offenders Act 1997 (consideration of amendments to permit some supply offences to be dealt with in this way).
- Further expansion of the Drug Court.
- Medically Supervised Injecting Centres (which are proven to be effective in harm minimisation).
- Needle and syringe programs (with an educational / health advice component where possible).
- Pill and capsule testing (with an educational / health advice component).
- Substantially increasing the availability of all kinds of treatment and rehabilitation programs for drug abusers and those with a dual diagnosis, including pharmacological treatments.
- In particular, dramatically increase the availability of residential and intensive drug treatment programs (including dual diagnosis programs), particularly for offenders and people on bail.
- Providing for diversionary programs which, in appropriate cases, result in no conviction or further punishment. (eg upon successful completion of MERIT)
- Prioritising ATSI people in the provision of all of these approaches - particularly in rural and remote areas.

Observations on trends in prosecution and the social cost of drugs

According to *Issues Paper 2* (p5), the rate of dealing/trafficking remains stable but the rate of arrest for use/possession is increasing. This is of concern, since the users are the main persons whom these laws are designed to protect. Arrest and charging stigmatises and criminalises people, some of whom may not have had previous contact with the criminal justice system. The fact of a conviction for a drug offence, even a very minor one, can have a lifelong impact upon a person. The reality of this is no doubt reflected in the very high rate at which possession offences have been dealt with under s10 of the *Crimes (Sentencing Procedure) Act 1999*.

It is of significant concern that **one in twenty five cases of possession** of amphetamines in the Local Court results in a sentence of full time imprisonment. This is apparent from the Judicial Commission statistics referred to in *Issues Paper 2* at p4. Further analysis of these statistics on that database reveals that most of the sentences were for less than 6 months but some were for 12 months or more. The detrimental

impact of imprisonment, and in particular short sentences, is well documented. (See eg *Report 139: Sentencing*, NSW Law Reform Commission July 2013 at p161)

Consideration might be given to whether the offence of simple possession of a prohibited drug (i.e. other than for supply) should continue to be punishable by imprisonment. It does not appear that the international conventions require it to be so punishable.

The estimates of the National Drug Research Institute in *Issues Paper 3* at p20 indicate that by far the greatest costs attributable to methamphetamine use are related to crime (including police, courts, prisons and victim costs). This is estimated to be \$3.2 billion, compared with the healthcare costs which are estimated at \$200 million. If a harm minimisation approach were adopted in manner focussed upon treatment, one might expect a significant reduction in justice costs and an increase in healthcare spending. From the discussion in *Issues Paper 4* at pp14-16, it would appear that very little of the funds obtained from confiscated proceeds of crime is being channelled into treatment and rehabilitation of drug abusers and that most is being spent on law enforcement.

In relation to the social and economic factors, there appears to be considerable scope for redirecting resources towards diversionary options, treatment, rehabilitation and harm minimisation strategies. The evidence on the efficacy of such approaches, including from the Portuguese experience, is compelling.

It is submitted that the Commission ought to consider the efficacy of all such approaches. In particular, consideration should be given to whether, particularly for offences of simple possession, the interests of the public – including community health and safety and the public purse – would be better served by a significant focus on harm minimisation, treatment and rehabilitation and by focusing law enforcement and justice resources on serious trafficking offences and community safety offences such as drug-driving.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R J W O', followed by a horizontal line extending to the right.

Richard Wilson
Acting Senior Public Defender
Public Defenders Chambers