

LEGISLATIVE COMMENT

CHOOSING LIFE: THE DRUG SUMMIT AND BEYOND

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Whilst not condoning drug trafficking or use of illicit drugs, we believe that there are those drug users who must be given every possible chance to help them recover and rehabilitate. After careful consideration of the issue, the Congregation of the Sisters of Charity believes that 'compassion and respect for the dignity of human persons compels us to move beyond deliberation to positive action which redresses this most significant health and social issue for our nation.

Consistent with St Vincent's abiding values of compassion and human dignity the following policy has been developed and affirmed by the SCHS Darlinghurst Board. The policy reflects firstly our regard for the fundamental value of human life; secondly, our compassion for people who are addicted to drugs and; thirdly, our understanding that addiction does not allow for the full and unfettered exercise of free will.' (extract from *St Vincent's Pulse*, July 1999)

In recent years there has been a growing community concern about the harm associated with the use of injecting drugs. Although more people die from legal drugs ... the number of people dying from the use of illegal drugs is increasing. Governments, communities and families are thinking about new and additional ways to reduce the harm associated with illicit drug use and to save lives. The Church is part of this discussion. (extract from *Theological Perspectives on a Medically Supervised Injecting Centre to be operated by the Uniting Church Board for Social Responsibility*, March 2000)

INTRODUCTION

The 1999 Drug Summit provided a unique opportunity to rethink, and subject to scrutiny, drugs policy in New South Wales.¹ As early as the morning of Day One, it

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¹ The forum was ambitious in its ambition. In addition to the Parliamentary delegates, 80 non-parliamentary full delegates and 45 associate delegates were invited to discuss a broad range of matters pertaining to drugs over a 5 day period. Delegates heard from experts in the fields of health, law enforcement and early intervention as well as young people, users and former addicts. Delegates visited a range of frontline services in the middle of the Summit to see the situation for themselves and heard from workers on the ground such as community health,

became clear that there was a compelling need, and considerable support, for new approaches. Much of this debate focused on the shortfalls of prohibition and the benefits of more practical and 'managed' solutions to the problems of drugs in society.²

Two high profile incidents are illustrative of an acceptance of the need for new strategies - first, the willingness of the Sisters of Charity to run a medically supervised injecting facility and, second, the intention of the Uniting Church Board of Social Responsibility (whose church precipitated debate on the issue by opening an unauthorised safe injecting room prior to the Drug Summit) to seek a licence (see the extracts above). The intervention by the highest echelons of the Catholic Church towards the former, and the sporadic forays of the Federal Government and the International Narcotics Control Board towards the latter, reinforced the political and moral complexities of taking a less doctrinaire line on drugs policy.

Over twelve months on from the Drug Summit, it is still too early to tell what it will herald. There remains a strong view that the real legacy of the Summit will be measured not in particular programs but in more abstract terms. The Drug Summit was undeniably a catalyst for new, often more pragmatic, ways of thinking about drugs policy. It fostered an understanding of the issues, introduced the concept of compassion into drugs policy and, in some instances, drastically changed the views of delegates.³ From a law reform perspective, the legacy may well be twofold. First, the Drug Summit signalled a distinct policy move away from an exclusive reliance on a prohibitionist approach. Second, the Summit has arguably institutionalised a commitment to, and dynamic for, reform. As Justice Wood said at the Summit in closing: 'Unless we try the options, none of us can know the answers'.⁴

This paper will pursue two key themes, which the Summit facilitated. The first theme is an examination of the opportunities and capacities for diverting offenders from the criminal justice system into treatment and rehabilitation. Second, the paper discusses the opportunities to identify and to promote law enforcement policies and practices which best work to reduce drug-related crime in the community, promote community safety and minimise harm to individuals.

ambulance and police officers. Throughout the week, delegates also divided into Working Groups to discuss and bring forth recommendations, on themes such as the prevention of drug abuse, issues facing young people, health services, training and education, breaking the drugs-crime cycle, law enforcement and rural and regional drug problems.

² This is not to say that the Drug Summit was essentially about law reform and law enforcement. In its response, the Government has introduced new approaches to prevention and early intervention strategies, the *trialing* of mentoring schemes, greatly expanded treatment services and undertaken a number of community, rural and educational initiatives. These programs are to be judged in their own terms, although some of these will bring enormous crime prevention benefits in the long term.

³ Across the political spectrum, there were the well-publicised changes of mind of the Premier, the Honourable Glachan, and the Honourable John Ryan.

⁴ Justice Wood, *Drug Summit Report of Proceedings*, Plenary Session, Thursday 20 May 1999. References to speakers and delegates can be found on the Drug Summit Website Transcript of Proceedings <<http://203.147.254.2/NSWDS/NSW DrugSummit.nsf/Content/Transcripts/>>.

These themes provide the framework for this discussion. In particular, the paper will do three things. First, it will outline a number of principles that can guide drugs policy in New South Wales from a criminal justice perspective. Second, it will analyse the establishment of Australia's first medically supervised injecting centre trial (an issue that raises law enforcement and harm minimisation issues). Third, it will discuss the raft of programs designed to divert drug-affected offenders into treatment emanating from the Government response to the Drug Summit.

It is to these that we now turn.

PRINCIPLES

The Drug Summit resolved that the development of drug law enforcement policies should target solutions to specific problems, reflect a commitment to evaluation and full cost accounting of all programs, and include an appropriate resource allocation 'mix' across a range of strategies (Recommendation 6.2). These principles were contained in a strategy paper developed by the Attorney General's Department for the Summit.

Targeting solutions to specific problems

The Drug Summit highlighted that there is not a single, amorphous drug problem. This point was re-iterated time and time again throughout the proceedings, to the extent that it almost became a cliché. The point is not merely academic, as the recognition of such complexity increases our understanding of prohibited drugs and allows for a more sophisticated approach to the problems.⁵ During the course of the Summit several key themes emerged.

For example, it was acknowledged that different drugs raise different issues and interventionist responses (a point highlighted by the debates over heroin, cannabis and medically supervised injecting rooms); social groups require programs linked to the nature of their problems; certain communities have discrete problems, and basing law enforcement strategies on the idea of single drug 'market' was a futile exercise.

Breaking down the issues and narrowing the focus of analysis can also help to clarify and elucidate specific problems:

in many respects the problem ... is simplified enormously by focusing on highly specific forms of behaviour. Thus, if the problem is the theft of motor cars, and that

⁵ See, amongst others, the comments on the first day of Professor Wayne Hall (Director, National Drug and Alcohol Research Centre) on the need for combinations of strategies: *Drug Summit Report of Proceedings*, Monday 20 May 1999.

is the only problem, then it perhaps becomes conceivable to adopt a situational approach which makes it more difficult to steal cars through a variety of devices.⁶

The multi-faceted and complex nature of the drug problem has rarely been appreciated by the media, in popular debate and, it must be said, in Parliament. Drugs policy has all too often been clouded by simplistic ideas, formulas and solutions such as 'dealers are evil', 'users deserve our sympathy', 'junkies commit property crime', and 'zero tolerance will solve the problem'.⁷

Such propositions are based on notions of 'commonsense' and often contain more than a germ of truth. Put in an appropriate context, however, such ideas do not survive well. This is where an empirical approach or, to use the current lexicon, 'evidence-based programs', have a role to play.

Empiricism

Rationally based and evaluated programs can help to develop a more sophisticated understanding of drug use and abuse - who users are, what motivates them, what policies work or don't work in specific contexts, what are the drugs-crime cycles. This is a necessary precondition for moving forward and enhancing rational debate on drugs policy in New South Wales. An appreciation of what the problems are allows for the development of programs to 'match' problems.⁸ This is not a technical question. Rather, there is a need to involve communities in any solution to

⁶ K Polk, 'A Community and Youth Development Approach to Youth Crime Prevention' in O'Malley and Sutton (eds), *Crime Prevention in Australia* (1998) 190.

⁷ Two examples from above illustrate the point. It is true that a class of heroin users do commit a disproportionate amount of crime (the Bureau of Crime Statistics and Research tells us one user can commit up to 30 'break and enters' alone per month). However, effective policy-making can only be achieved by also recognising that many other heroin users do *not* commit such crimes: see B L Benson and D W Rasmussen, 'Illicit Drugs and Crime' (1996) *Independent Policy Report: Illicit Drugs and Crime* <www.lindesmith.org/library/indep.html>[2]; I Dobinson and P Ward, *Drugs and Crime: A Survey of New South Wales Prison Property Offenders* (1985); and L Atkinson, *Drugs and Crime: Facts and Fictions* (1992). Likewise, it has been argued that it is out of step with community attitudes to suggest that the same moral opprobrium applies, on the one hand, to those who supply cannabis to their friends and, on the other hand, to organised criminal syndicates who flood the heroin market in Sydney: see S James and A Sutton, 'Developments In Australian Drug Law Enforcement: Taking Stock' (Paper presented to the Australasian Drug Strategy Conference, Adelaide, April 1999).

⁸ R MacCoun and P Reuter, 'Drug Control' in M Tonry (ed) *The Handbook of Crime and Punishment* (1998) 215. See also T Makkai, 'Linking Drugs and Criminal Activity: Developing an Integrated Monitoring System' (1999) *Trends and Issues in Crime and Criminal Justice* 1.

their drugs problem.⁹ The advantages of community participation - and the attendant dangers of 'parachuting' in top-down solutions - are well documented.¹⁰

A commitment to an empirical approach has a second key role: that is, in actively considering and, where appropriate, acting upon recommendations already made or initiatives tried in other jurisdictions.¹¹ This is not a strong point of drugs policy in Australia, which has tended to be quite conservative.¹² As the Williams Report (Report of the Australian Royal Commission Inquiry into Drugs) noted somewhat apologetically in 1979, its recommendations were not notably different from those put forward in the Senate Select Committee Report of 1971:

If the Commission is proposing a policy that is not novel the question that inevitably must be answered is why it has not worked before. The answer is that it has not been tried.¹³

The Drug Summit certainly provided a circuit breaker in the development of alternative approaches in New South Wales. The establishment of a medically supervised injecting centre trial and a number of diversionary initiatives (discussed below) stand as testament to this.

A third aspect of the commitment to empiricism is evaluation. Evaluation is a necessary corollary to targeted programs.¹⁴ Such evaluations need to use scientific

⁹ See the comments of Mr Nguyen, Cabramatta Youth Team, Cabramatta Community Centre, *Drug Summit Report of Proceedings*, Plenary Session, Thursday 20 May 1999. The point was also emphasised by the Honourable John Della Bosca when moving the Resolutions of Working Group 8 - Drugs and Community Action: *Drug Summit Report of Proceedings*, Thursday 20 May 1999.

¹⁰ See, for example, 'Bringing Britain Together: A National Strategy for Neighbourhood Renewal' *Report of the Social Exclusion Unit of the British Cabinet Office* <<http://www.cabinet-office.gov.uk/seu/1998/bbt/nrhome.htm>>. For the advantages of participation more generally see the seminal article S R Arnstein, 'A Ladder of Citizen Participation' (1969) *Journal of the American Institute of Planners* 216-223 and D Robinson, 'Public Participation in Decision-Making' (1993) 10 *EPLJ* 320.

¹¹ To take one example, supervised injecting facilities have operated for some years in European countries such as Germany, Switzerland and the Netherlands, although not all these countries are signatories to the 1961 *Single Convention on Narcotic Drugs* and the 1988 *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. The experiences in these jurisdictions have provided valuable information and insights into the establishment of medically supervised injecting rooms in New South Wales.

¹² This is not in itself a bad thing; the area is complex and reforms need to be carefully considered (and then tested). However, it is quite another thing for nothing to be done because of political inertia.

¹³ Report of the Australian Reform Commission into Drugs: Volumes A-F (1980) Canberra, AGPS in N Hartland, D McDonald, P Dance and G Bammer, 'Australian reports into drug use and the possibility of Heroin Maintenance' (1992) 2 *Drug and Alcohol Review* 175-182 <www.lindesmith.org/library/prehart.html>[3].

¹⁴ As the Australian Institute of Criminology has argued: 'Many might argue that Australia does not need empirical data on this issue. What is required is action in the form of intervention: be it more treatment, Drug Courts or more police on our streets and our borders. However, for interventions to be successful they need to be targeted in the appropriate manner and then evaluated to determine their level of success': see T Makkai, 'Linking Drugs and Criminal

principles or methodologies - such as pilot studies or reviews, where appropriate - as a basis for learning.¹⁵

They also need to be properly funded. The pilot Drug Court in Western Sydney is an early example of a reform that made a strong and enduring commitment to evaluation. From a broader perspective, the development of performance indicators regarding, for example, drug law enforcement is also a fundamental part of an empirical approach to policy-making.¹⁶

The Drug Summit emphatically embraced the concept of an evidence-based approach.¹⁷ The Government response, in turn, reflects a commitment to the concept. The set of drug-crime diversionary programs emanating from the Summit are premised on trials and subsequent evaluations: a cautious approach that reflects the controversial and complex nature of the problems at hand.

Thus, it can be said that there are three elements to a commitment to an empirical or evidence-based approach to drugs policy. First, there is a need to develop a more sophisticated understanding of drug use and abuse. Second, there must be a preparedness to base strategies on recommendations repeatedly made or approaches already tried elsewhere. Third, there needs to be a commitment to the trialling and rigorous evaluation of new programs.

Activity: Developing an Integrated Monitoring System' (1999) *Trends and Issues in Crime and Criminal Justice* 1.

¹⁵ See L W Sherman, 'Evidence-Based Policing: Social Organization of Information for Social Control' in E Waring and D Weisburg (eds), *Crime and Social Organisation: Essays in Honour of Albert J. Reiss Jr* (1998).

¹⁶ See NSW Drug Summit Recommendation 9.11, which called for the development of an explicit set of performance indicators for drug law enforcement, and annual reports on performance against these factors. Despite the obvious necessity for such benchmarks, this is an enormously complex undertaking which involves, amongst other things, the following components: clarifying the objectives of the Service's demand, supply and harm reduction drug law enforcement strategies; identifying a core set of drug law enforcement activities for measurement which are consistent with Service, State and Federal drug policies; determining what are appropriate measures of these activities (for example, processes, inputs and outputs); developing best practice performance indicators which reflect the above activities and are practical, meaningful and measurable; and determining how the drug law enforcement performance indicator data is to be collected, collated and reported against annually. See also D Weatherburn, 'Performance Indicators in Drug Law Enforcement' (2000) *Contemporary Issues in Crime and Justice* 48.

¹⁷ See, for example, Professor Hamilton and Professor Penington, *Drug Summit Report of Proceedings*, Monday 17 May 1999; Dr Van Beek, Professor Penny and the Law Society, *Drug Summit Report of Proceedings*, Tuesday 18 May 1999; Dr Bammer, Reverend Crews, *Drug Summit Report of Proceedings*, Wednesday 19 May 1999; Justice Wood, *Drug Summit Report of Proceedings*, Plenary Session, Thursday 20 May 1999 and the Honourable Jeff Shaw in moving the Resolutions of Working Group 6 - Breaking the Drugs Crime Cycle: *Drug Summit Report of Proceedings*, Thursday 20 May 1999.

Full cost accounting

'Full cost accounting' is a term which is little understood in the criminal justice arena, but which occupies a central place in environmental law and policy. The idea can be distinguished from cost-benefit analysis, which makes a more limited critique of the pros and cons of a proposal. Full cost accounting seeks to examine the full dimensions of a problem: if action A occurs, what are the effects on B, C and D.

Let us take an example. Suppose there was a proposal to impose mandatory minimum terms on 'dealers'. What consequences might flow from this? First, as most of these offenders are user-dealers, many users would be gaoled. This would offend the jurisprudential basis of drug law, which is predicated on a distinction between users and dealers. Second, it may lead user-dealers to commit other crimes against the general community - property crimes such as bag snatches or 'break, enter and steals' being the obvious examples - as these may attract lesser sentences. Third, it may lead to user-dealers increasing their mobility (to avoid detection), thus making regulation of such markets more difficult. Furthermore, the new found seriousness of the offence may debar such offenders from important crime prevention programs such as the Drug Court. Such a law may also lead to unsafe and unhealthy dealing practices whereby dealers deposit drugs in their mouths or noses.¹⁸ Finally, the new offence would increase the prison population and lengthen sentences served.¹⁹

In this example, issues of jurisprudence, theories of dispersion, law enforcement and crime prevention strategies, public health matters and cost-benefit analyses are touched on in order to assess the validity or otherwise of such a proposal. Full cost accounting thus provides a powerful analytical tool for examining the dimensions of an issue from a whole range of perspectives.

Resource allocation

Since 1971 there have been at least 10 major reports into drugs, drug use and ways of ameliorating the effects of drug use in Australia.²⁰ These reports (and many other

¹⁸ D Dixon and L Maher, 'Law Enforcement, Harm Minimization, and Risk Management in a Street-level Drug Market' (Paper presented to the Australasian Conference on Drugs Strategy Adelaide, 27-29 April 1999).

¹⁹ As Professor Findlay noted at the Drug Summit, judges are loathe to consider 'resourcing' questions as part of the sentencing process: see *Report of Proceedings*, Tuesday 18 May 1999.

²⁰ See, for example, N Blewett, *National Campaign Against Drug Abuse: Assumptions, Arguments and Aspirations* (1987); Senate Select Committee, *Report of the Senate Select Committee on Drug Trafficking and Drug Abuse* (1971); Royal Commission into the Non-Medical Use of Drugs, *Some Responses* (1978); Committee of Inquiry into the Legal Provision of Heroin, *Report of the NSW Committee of Inquiry into the Legal Provision of Heroin and Other Possible Methods of Diminishing Crime Associated with the Supply and Use of Heroin* (1981); Australian Royal Commission of Inquiry into Drugs, *Report of the Australian Royal Commission of Inquiry into Drugs: Volumes A-F* (1980); Royal Commission into the Non-Medical Use of Drugs, *Report of the South Australian Royal Commission into the Non-*

academic papers) have emphasised education, treatment, and law enforcement. While there is no resiling from the importance of a multi-faceted approach, it is suggested that these reports are implicitly or explicitly based on the following equation or formula:

law enforcement + education + treatment = the solution to the drugs problem

It is time to depart from this 'drugs formula'.²¹ There is a need to develop a more complex formula that attempts to ascertain what mix of education, treatment and law enforcement works best. Moreover, we need to address issues in terms of specific drugs *problems*, rather than in the abstract and across the whole spectrum of drugs policy.

Let us give a concrete example. RAND studies of the cocaine epidemic in the USA highlight the need for a multi-dimensional approach to law enforcement in New South Wales, based on the degree of saturation of particular drugs within the market. The studies suggest that cocaine can best be dealt with by devoting more resources to law enforcement, as compared with heroin where the emphasis should be on 'managing' the problem by focusing on treatment modalities. This is because the cocaine problem is only now emerging whereas the heroin problem is entrenched.²² In other words, the time of the crisis is a key factor in determining the appropriate mix of effort and expenditure which is respectively devoted to law enforcement, education and treatment.

It is not the purpose of this paper to fully develop a new drugs formula that captures the complexities of the debate in this area. However, two brief observations can be made. First, it is noted that law enforcement is a narrow and self-limiting term. Too often, the role for law enforcement is marked out as what is done to stop crime and what happens when all else has failed. This essentially negative view of law

Medical Use of Drugs (1979); Senate Standing Committee, *Report of Senate Standing Committee on Social Welfare: Drug Problems in Australia - An Intoxicated Society?* (1977); Parliamentary Joint Committee on the NCA, *Drugs, Crime and Society* (1989); D Collins and H Lapsley, *Estimating the Economic Costs of Drug Abuse in Australia* (1991); Commonwealth Department of Community Services and Health, *AIDS: A Time to Care, A Time to Act: Towards a Strategy for Australians* (1988); and the Williams Report, *Report of the Australian Royal Commission Inquiry into Drugs* (1989).

²¹ In a similar vein, the approach to harm minimisation provides a more discrete example of the 'drugs formula' conundrum. Once again, there is an implicit assumption that harm minimisation is simply the sum of supply reduction and demand reduction strategies. As the National Heroin Supply Reduction Strategy (Ministerial Council on Drug Strategy) recognises, there is a need for a balanced law enforcement, health, and education approach that also addresses harm minimisation principles and demand reduction strategies. In light of the ever-present limits to public funding, it is arguable that the real concern is with getting the balance right and allocating appropriate funds to each of these elements of the strategy.

²² C P Rydell and S S Everingham, *Modelling the Demand for Cocaine* (The RAND Corporation); B L Benson and D W Rasmussen, 'Illicit Drugs and Crime' (1996) *Independent Policy Report: Illicit Drugs and Crime* <www.lindesmith.org/library/indep.html>; P Rydell, *Dynamics of Cocaine Control: Policy Analysis Based on Exploratory Modelling* (Seminar presented at the RAND, Santa Monica, June 1997).

enforcement does not recognise the positive role that the criminal justice system can have in deterring and discouraging certain behaviour. For example, Coumarelos and Weatherburn have argued that the criminal justice system, with its formal rituals of disapproval can play an important role in regulating social behaviour.²³

Second, treatment and rehabilitation should not be hived off as a responsibility of other agencies alone. The Drug Court provides an obvious example. The Drug Court program represents an ethically defensible form of legally coerced treatment for drug dependent offenders. It uses the threat of imprisonment as an incentive for treatment entry, and the fear of return to prison as a reason for complying with drug treatment whilst on parole or probation. Indeed, some studies have shown that the prospects for successful rehabilitation of offenders, if an offender is 'coerced' into treatment and made to face their responsibilities as compared with entering programs voluntarily, may actually increase.²⁴

Law enforcement and harm minimisation

It should always be the case that law enforcement is compatible with harm minimisation and the protection of the community. In essence, this is what policing is all about.²⁵ The problem becomes one of ensuring that this is so in an operational sense and, in turn, of ascertaining how such compatibility can be measured.

Three elements for measuring suggest themselves. The *first* element is whether, and to what extent, law enforcement is *counter-productive* to principles of harm minimisation and community protection and vice versa. The circumstances in which there is a clash between these approaches has not been given a great deal of attention. As Professor Tim Stockwell said at the Drug Summit:

programs need to be co-ordinated with law enforcement actions to make sure that the two do not trip each other up and create problems for the other's sphere.²⁶

The policing of 'injection episodes' provides an example. In a recent Bureau of Crime Statistics and Research study, heroin users who were interrupted by police in the middle of an injection episode were asked an open-ended question about what the police did. Weatherburn, Lind and Forsythe comment:

The disturbing feature ... is not the fact that a high proportion of heroin users were charged with a drug offence, or trespass or subjected to a warrant check. It is the fact

²³ C Coumarelos and D Weatherburn, 'Targeting Intervention Strategies to Reduce Juvenile Recidivism' (1995) 28 *Australian and New Zealand Journal of Criminology* 55-72.

²⁴ For a review of the arguments see W Hall, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30(2) *Australian and New Zealand Journal of Criminology* 103-120.

²⁵ See, as an example of this mission, the definition of 'police services' under the *Police Service Act 1990*.

²⁶ Director, National Centre for Research into the Prevention of Drug Abuse Drug Summit Presentation: *Report of Proceedings*, Tuesday 18 May 1999.

that 42 per cent reported that their injection equipment was destroyed or confiscated. Whatever the reason for this practice it does little or nothing to minimise the criminal harm inflicted by heroin users on the community but a significant amount to increase the health threat they present to themselves and to the community.²⁷

The remaining elements revolve around notions of cost-effectiveness. The *second* element is whether money spent on law enforcement may be better spent on other areas such as education, treatment and rehabilitation. Every dollar spent on law enforcement may be a dollar lost on education, treatment and rehabilitation. A RAND study has indicated that money spent on treatment is up to seven times more effective in combating substance abuse than money spent on law enforcement.²⁸ A United Kingdom study has also found that for every pound spent on drug misuse treatment, more than 3 pounds were saved in terms of victim costs and reduced demands on the criminal justice system.²⁹

The *third* element is whether money spent on law enforcement may be better spent on targeting other non-drug crimes. In an era where money is assigned on a ministerial or departmental basis, money saved on drug law enforcement is not necessarily spent on services outside the criminal justice system. Indeed, such a re-allocation would be abnormal and would need to be strenuously argued. As Benson and Rasmussen have noted:

Because law enforcement resources are limited, decisions made within the criminal justice system regarding the control of illicit drug markets are part of a general resource allocation problem. This means that when a decision is made to wage a 'war on drugs', other things that criminal justice resources might do have to be sacrificed. One of the consequences of using a large portion of the criminal justice system's resources to control drugs is that violent and property criminals are not caught until they have committed a relatively large number of crimes, if they are caught at all, and even after they are caught for some crimes, they can be forced out of prison relatively early due to the admission of increasing numbers of drug criminals, freeing them to commit new crimes. Thus, active participation in a drug war often means higher rates of property and violent crime. The fundamental fact of limited criminal justice resources means that getting tough on drugs inevitably translates into getting soft on non-drug crime.³⁰

MEDICALLY SUPERVISED INJECTING CENTRES

The issue of medically supervised injecting centres (also colloquially known as 'safe injecting rooms' or 'shooting galleries') was considered and supported at the

²⁷ D Weatherburn, B Lind and L Forsythe, 'Drug Law Enforcement, Heroin and Harm Minimisation' (Paper presented to the Australasian Drug Strategy Conference, Adelaide, April, 1999) 8.

²⁸ Rydell and Everingham, above n 22, 20.

²⁹ UK National Treatment Outcome Study cited in J Jones, 'Drug Treatment Beats prison for Cutting Crime and Addiction Rates' (1999) 319 *BMJ* 470.

³⁰ B L Benson and D W Rasmussen, 'Illicit Drugs and Crime' (1996) *Independent Policy Report: Illicit Drugs and Crime* 1 <www.lindsmith.org/library/indep.html>.

Drug Summit. Government support was, in many respects, a result of the recommendation made at the Royal Commission into the NSW Police Service. Commissioner James Wood favoured the establishment of safe, sanitary injecting rooms:

At present, publicly funded programs operate to provide syringes and needles to injecting drug users with a clear understanding they will be used to administer prohibited drugs. In these circumstances, to shrink from the provision of safe, sanitary premises where users can safely inject is somewhat shortsighted. The health and public safety benefits outweigh the policy considerations against condoning otherwise unlawful behaviour.

For these reasons the Commission favours the establishment of premises approved for this purpose and invites consideration of an amendment of the Drug Misuse and Trafficking Act to provide for the same.³¹

The Government, after much deliberation, ultimately decided to adopt this recommendation.³² As the Premier said at the time of the announcement, medically supervised injecting rooms were not the answer to the drug problem, but part of a package of measures, a way of 'managing the problem'.³³ In the words of Father Sinn:

A supervised injecting room is no starry-eyed response to a complex issue. It is a humane, non-judgmental response to that group of addicts who are not ready to stop and are at the risk of using.³⁴

The trial of a medically supervised injecting centre in Kings Cross forms the centrepiece of the *Drug Summit Legislative Response Act 1999*.³⁵ Following the withdrawal of the Sisters of Charity, the centre will now be run by the Uniting Church Board of Social Responsibility.³⁶ The establishment of a medically supervised injecting facility is premised on a number of related objectives, including:

³¹ *Final Report, Vol II: Reform* (1997) 226. Support for a trial in NSW in recent years has also come from the Australian Medical Association, public health officials, the NSW Law Society, the NSW Bar Association, and many community organisations, parents and local councils.

³² This turned back a decision of a Joint Select Committee into Safe Injecting Rooms which was established in mid-1997 to advise the government on the costs and benefits of safe injecting rooms, and any legislative amendments which would be needed. The Committee then decided - by a bare majority (6-4) - to recommend against their introduction into NSW.

³³ 'Nuns to Run Heroin Room: Carr Agrees to Injecting Haven to "Save Lives"' *The Sydney Morning Herald*, 28 July 1999, 1.

³⁴ *The Australian*, 4 August 1999, 12.

³⁵ The *Drug Misuse and Trafficking Act 1985*. Under this Act, the DMTA was amended to restrict to one the number of medically supervised injecting rooms allowed during the course of the trial: see section 36A.

³⁶ The proposed premises for the trial are at 66 Darlinghurst Road, Kings Cross. For a strong defence of the actions of the Sisters of Charity - since disallowed by the Catholic Church - see 'How Sisters Staged a Quiet Revolution' *Sydney Morning Herald*, 28 July 1999, 1.

- a reduction in fatal overdoses and transmission of blood borne diseases;
- a reduction of public health risks such as needle-stick injuries;
- improvements in public order and amenity;
- improvements in occupational health and safety issues for police and ambulance officers;
- increased cost-effectiveness of policing; and
- better management of social problems associated with large public drug scenes.

It is not our purpose to discuss the public health and operational issues in any depth. The focus here will be on three issues which have generated much debate in the aftermath (and, indeed, prior to) the decision to trial a medically supervised injecting centre in New South Wales. These are:

- The legality of medically supervised injecting centres in light of Australia's international obligations;
- What will be the legislative framework under which such centres operate? and
- What is the position regarding unlicensed medically supervised injecting centres?

International Conventions

Australia is a signatory to a number of international conventions relating to illicit drugs. The precise effect on, and relationship to, domestic law is yet to be fully tested in New South Wales. It is far from clear that Australia's international obligations would prevent fundamental drug reforms in New South Wales. Complex legal arguments would arise if the powers of the New South Wales legislature were sought to be read down by such instruments. It is noted that the establishment of medically supervised facilities in certain European countries has proceeded without any apparent breach of international treaty obligations by these countries. In any case, a brief analysis of these international obligations highlights that there is more scope for reform than is commonly believed. For present purposes, the relevant treaties are the 1961 *Single Convention on Narcotic Drugs* and the 1988 *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. These Conventions essentially commit Australia to prohibiting the possession, use, supply and cultivation of illicit drugs (scheduled drugs as defined by the Conventions). In relation to medically supervised injecting centres, however, there are two avenues by which such facilities can be established without breaching compliance with international obligations.

Firstly, the 1961 *Single Convention* allows the possession and use of illicit drugs for medical and scientific research purposes, including controlled clinical trials.³⁷ The establishment of such facilities in New South Wales could therefore be commenced in the context of a clinical, scientific trial. There is no doubt - as the Summit emphasised - that the establishment of a medically supervised injecting centre

³⁷ Article 2(5)(b).

should be accompanied by rigorous, systematic monitoring and evaluation on this basis. As the Honourable John Della Bosca said in his Second Reading Speech:

The model that will be trialed for 18 months aims to save lives and reduce the spread of disease, but especially focuses on providing a gateway for referral to treatment and counselling. Its effectiveness will be clinically assessed on all those grounds.³⁸

Secondly, the 1961 *Single Convention* also allows for departures from a total prohibition stance where the prevailing conditions in the country do not 'render it the most appropriate means of protecting the public health and welfare'.³⁹ In other words, medically supervised injecting centres would be allowable in circumstances where evaluation and monitoring had demonstrated that such facilities were beneficial to public health and welfare in New South Wales.

In terms of implementation, therefore, the establishment of safe injecting centres needs to be staged. First, a scientific trial would be justifiable under the 'medical and scientific purposes' clause of the 1961 *Single Convention*. Second, and conditional upon the success of any such trials, medically supervised injecting centres could be implemented on an on-going basis by virtue of their demonstrated public health and welfare benefits.

Finally, it is also necessary to refute the view that the establishment of medically supervised injecting centres facilitates and encourages illicit trafficking in drugs, thereby breaching Australia's international obligations.⁴⁰ These claims are unfounded. It involves a leap in logic to suggest that medically supervised injecting centres encourage trafficking. Indeed, it is nonsense to even suggest that such facilities encourage use, let alone trafficking. Long-standing prohibitions against use and possession remain outside of such facilities and the manufacture, cultivation and supply of prohibited drugs are prohibited within such facilities. As many delegates at the Drug Summit, including the Premier, have noted, medically supervised injecting facilities - a clear harm reduction initiative - are a logical extension of long-established needle and syringe programs in New South Wales.⁴¹

Legislative framework

There are a number of legislative models that could allow for the establishment of medically supervised injecting centres. The Government could require a new piece of legislation every time a new centre was proposed, pass framework legislation

³⁸ The Honourable John Della Bosca in Hansard: (NSW) *Drug Summit Legislative Response Bill 1999*, Second Reading Speech, 21 November 1999, 51. See also comments on evaluation (52) and Australia's international obligations (54).

³⁹ Article 2(5)(b).

⁴⁰ See the letter by Father John M George, *The Daily Telegraph*, 24 August 1999, 12.

⁴¹ See 'Carr backs injecting room trial' *The Weekend Australian*, 22 May 1999 and also the comments of the Honourable John Ryan, *Drug Summit Report of Proceedings*, Thursday 20 May 1999.

which sets down guidelines,⁴² exempt certain acts under regulation (as is the case with needle and syringe programs)⁴³ or insert a new part in the *Drug Misuse and Trafficking Act 1985*. The last approach was the clearly preferred course of action, allowing for both flexibility and regulatory oversight.⁴⁴

The legal issues in relation to the establishment of medically supervised injecting centres are essentially straightforward, despite the controversy surrounding the proposal. The main impediment to the legal operation of such injecting centres is the criminal liabilities that attach to the use of prohibited drugs and possession of drug taking equipment.⁴⁵ These prohibitions affect the legality of using prohibited drugs on such premises and raise issues of aiding and abetting for staff, managers and operators.⁴⁶ The reforms exempt users and those engaged in the conduct of medically supervised injecting centres from criminal liability for certain acts. Users are exempt from liability for possessing a small quantity of a prohibited drug, equipment to administer and the self-administration of the drug.⁴⁷ There are no exemptions if a person possesses even the minutest quantity for the purposes of dealing.⁴⁸

Two Drug Summit Recommendations supported in the Communique were the repeal of the offences of self-administration and possession of drug taking equipment.⁴⁹ The Government did not adopt this recommendation. However, in the context of medically supervised injecting centres, these acts are not illegal on licensed premises. Persons are exempt from liability for engaging, participating or being involved in the conduct of medically supervised injecting centres, if that centre is licensed.⁵⁰ For the purposes of the trial, this means the medically supervised injecting centre operated by the Uniting Church Board of Social Responsibility. The Commissioner of Police and the Director-General of Health are the responsible authorities for the issue of such a licence.⁵¹

⁴² The *Children (Protection and Parental Responsibility) Act 1997* provides an example of this approach where the broad statements of principle, rationale, objects and planning processes are set down under legislation.

⁴³ See Part 2 of the *Drug Misuse and Trafficking Regulation 1994*.

⁴⁴ This approach was also the recommendation of the dissenting members of the Joint Select Committee into Safe Injecting Rooms. Under the *Drug Summit Legislative Response Act 1999*, a new Part 2A was inserted into the *Drug Misuse and Trafficking Act 1985*.

⁴⁵ Sections 11 and 12 of the *Drug Misuse and Trafficking Act 1985*. The establishment of such facilities also raises a number of civil liability and occupational health and safety issues that are beyond the scope of this paper: see, for example, section 36P of the *Drug Misuse and Trafficking Act 1985*.

⁴⁶ *Drug Misuse and Trafficking Act 1985*, s 19.

⁴⁷ *Drug Misuse and Trafficking Act 1985*, s 36N.

⁴⁸ *Drug Misuse and Trafficking Act 1985*, s 36N(2)(a)(i) and s 36N(2)(b)(i).

⁴⁹ Recommendations 6.12 and 6.13.

⁵⁰ *Drug Misuse and Trafficking Act 1985*, s 36O.

⁵¹ *Drug Misuse and Trafficking Act 1985*, ss 36D and 36E. Before a licence may be issued, the authorities must be of the opinion that certain conditions are met, including a requisite level of acceptance amongst the community, satisfactory management protocols and public health, safety and amenity issues: see s 36F.

The example of the Wayside Chapel establishing such facilities immediately prior to the Drug Summit highlights that the proper operation of medically supervised injecting centres also require the establishment of clear administrative protocols to govern and guide policing in relation to such facilities.⁵² These protocols need to be flexible and allow police to respond without unnecessary constraints. There is no suggestion of establishing ‘no go’ areas in the vicinity of these authorised premises. Indeed, drug trafficking and other criminal activities may increase in the immediate area as a consequence of the establishment of an injecting centre (the so-called ‘honey-pot’ effect).

On the other hand, protocols need to deal sensibly with those offenders who would be frequenting such facilities to use injectable drugs. If so minded, police could effectively close down supervised injecting centres - displacing drug use onto the streets and into other unsupervised premises - by engaging in intensive street policing of possession offences in the immediate vicinity of safe injecting centres. This would defeat any investment – political and economic - in such facilities. The rigorous, independent evaluation of injecting room facilities is an essential step.⁵³ It is consistent with the aforementioned international law obligations and also with key themes and Resolutions developed at the Drug Summit (see above). Although the scope of the evaluation is yet to be determined, it is envisaged that key questions and issues to be addressed include:

- an assessment of the operational feasibility and service delivery of the centre
- measurement of the public health impact of the centre (including impacts relating to drug overdoses and the transmission of blood borne viruses)
- measurement of the health and well-being of clients of the centre (specifically, their use of treatment services)
- measurement of the impact of the centre on criminal activity in the surrounding area
- measurement of the impact of the centre in terms of public amenity (such as the effect on unsafe disposal and littering of used injection equipment in the surrounding area and the incidence of drug injecting behaviour in public places)
- measurement of community attitudes to the centre and drug users
- cost analysis.⁵⁴

⁵² In this case, the Opposition and others tried to raise the issue of the inappropriateness of *not* enforcing breaches of the law. It is true, of course, that the police use their discretion all the time. Discretion, despite its shortfalls in certain circumstances, is a fundamental aspect of modern democratic policing and central to ideas about community policing, problem-oriented policing and ‘smart policing’. A ‘zero tolerance’ law enforcement approach is often inflammatory, counterproductive and contrary to broader principles such as community safety or harm minimisation. In the Wayside example, arresting key and legitimate medical and religious figures has no deterrent value and risks making ‘martyrs’ of them.

⁵³ *Drug Misuse and Trafficking Act 1985*, s 36B.

⁵⁴ Other issues might include the effect on other health problems resulting from hazardous drug use and injection practices; violence or harassment directed towards staff or other clients; negative publicity and controversy; and effects on nearby businesses, residents, or public amenities.

It should be noted that there are significant difficulties and limitations in terms of what any evaluation will be able to demonstrate. These arise from a number of ethical and methodological constraints - for example, that it is not feasible to have a randomised control group. These limitations need to be taken into account so that unrealistic expectations are not formed.⁵⁵

Unauthorised injecting rooms

Immediately prior to the Drug Summit, the Wayside Chapel opened a safe injecting room at their premises in Kings Cross.⁵⁶ The Wayside Chapel safe injecting room was not the first such facility in New South Wales (according to police, places such as 'Porky's' have, from time to time, operated on a 'commercial' basis). However, the Wayside Chapel opened for altruistic (and, no doubt, political) purposes. This action generated much publicity and gave rise to a great deal of debate about the legality, morality and policing of such premises.

As discussed above, given their stated purpose and given that no regulatory exemptions were made, providers and workers at such rooms were committing the offence of aiding and abetting the offence of self-administration of a drug. This offence carries a maximum penalty of two years gaol and \$2200. Such aiding and abetting can be the basis for a manslaughter charge. In a recent case, a young man who supplied a clean needle to a friend - who subsequently overdosed - was convicted of manslaughter.⁵⁷ The original charge was on the basis of *both* negligence (omission or failure to act) and unlawful and dangerous act. The unlawful act was sought to be established on two bases: firstly, as an accessory before the fact to the unlawful self-administration, and secondly, as having committed the statutory offence of aiding and abetting the self-administration.⁵⁸ The dangerousness involved was in the administration of heroin.

An argument may also be made that safe injecting rooms save lives. The law allows a defence in the strictly limited circumstance of saving lives, known as the defence of necessity. Although attempts have been made to limit the defence to sudden and extraordinary emergency⁵⁹ it remains arguable in NSW as the defence is available in common law states.⁶⁰ It is likely that application of common law principles will see the defence restricted by a requirement that the circumstances be so extreme that the

⁵⁵ See Dr Van Beek Drug Summit Presentation, Treatment and Rehabilitation, *Report of Proceedings*, Tuesday 18 May 1999.

⁵⁶ The premises were opened on 3 May 1999.

⁵⁷ This case formed the basis for the formation of the Working Party chaired by the Criminal Law Review Division within the Attorney General's Department which recommended the repeal of self-administration or use offences under the *Drug Misuse and Trafficking Act 1985*.

⁵⁸ *Drug Misuse and Trafficking Act 1985*, s 19.

⁵⁹ See Model Criminal Code, *General Principles of Criminal Responsibility Volume 2* (1992) 66-67 and the Queensland *Criminal Code Act 1899*, s 25.

⁶⁰ *Loughnan v R* [1981] VR 443; *Rogers* (1996) 86 *A Crim R* 542.

defence will rarely be available. As Lord Denning said in the leading case of *Southwark London Borough Council v Williams*:

The doctrine ... must, however, be carefully circumscribed. Else necessity would open the door to many an excuse.⁶¹

Beyond this, the legal issues arising with regard to 'unauthorised' medically supervised injecting rooms will depend a great deal on the context, as the Wayside Chapel example highlights.⁶²

The Government has moved to prohibit other medically supervised injecting rooms operating in New South Wales by the creation of an offence of advertising or holding out that premises are available for the administration of prohibited drugs.⁶³ This new offence will cover both the 'Wayside Chapel' and 'Porky's' scenarios (as the action is unlawful regardless of whether undertaken for financial or material reward).

DRUG-CRIME DIVERSION

Many of the delegates at the Summit, including the Police Commissioner, drew attention to the limits of a purely prohibitionist or 'zero tolerance' approach to the policing of drugs. This point has been well made and often, with the adverse effects

⁶¹ [1971] 1 Ch 734, 743.

⁶² For example, the Chapel claimed the so-called privilege of sanctuary, as the injecting rooms were inside a church (and thus consecrated premises). However, no such privilege is recognised under Australian law (whatever may occur in Europe or ecclesiastical jurisdictions). If any such law existed it was literally put to the sword when Henry VIII sacked the Catholic Church in the 15th Century. Under English law, sanctuary became 'a privileged place by the prince for the safe guard of mens lives which are offenders, being founded on the law of mercie, and upon the great reverence, honour, and devotion which the prince beareth to the place where unto hee granteth such a privilege' (Termes de la Lay). In 1822 the English Parliament declared that 'no sanctuary shall hereafter be admitted or allowed' (21 Jac. 1, c 28, s 7) Although this Act was repealed in 1863 the privilege was not revived. NSW adopted English Common and Statute Law subject to statutory change by our legislature (*Imperial Acts Application Act 1876*). It is also technically arguable that the *Disorderly Houses Act 1943* could be used to close down such premises. Under this Act, a house or premises where drunken or indecent behaviour occurs, or where liquor or drugs is unlawfully sold, or where criminals consort, can be declared a disorderly house by the Supreme Court. There is no suggestion that drugs were being sold at the Wayside Chapel. However, the legal threshold for seeking such a declaration from the Supreme Court is not difficult to achieve. A high ranking police officer need only have a reasonable suspicion that 'disorderly or indecent conduct' is taking place on the premises (or has taken place and is likely to take place again) or that 'reputed criminals' or their associates are on the premises (or have been and are likely to be again). After the declaration had been made, a person who enters the premises is guilty of an offence under the Act. So is the occupier if he or she allows the disorderly conduct to continue, and the owner if he or she does not take steps to evict the occupier. A police officer can also enter the premises without a warrant at any time and seize any liquor, drugs or related items found on the premises.

⁶³ A new section 18A is to be inserted in the *Drug Misuse and Trafficking Act 1985*. The offence will be a wholly summary offence which carries a maximum penalty of 2 years gaol and \$2200 fine.

of prohibition being documented. The Parliamentary Joint Committee on the National Crime Authority concluded in their 1989 Report *Drugs, Crime and Society* that:

All the evidence shows, however, not only that our law enforcement agencies are not succeeding in preventing the supply of illicit drugs to Australian markets, but that it is unreasonable to expect them to do so. The present policy of prohibition is not working and it is time to give serious consideration to the alternatives, however radical they may be.⁶⁴

What was novel, however, was the acceptance of what flowed from this. Rather than simply react, the Drug Summit recognised the need to capture the middle ground of the debate on drug reform:⁶⁵ what might be called a ‘third way’ or an ‘abandonment of extremes’.⁶⁶

This move was a welcome development and may well be one of the important legacies of the Drug Summit. In the recent past, morally absolute and intractable positions have hindered debate in this area:

... the discussion of drug policy remains unproductively polarized between the ‘drug warriors’ who advocate stricter controls and harsher punishments and the ‘legalizers’ who favour more relaxed controls. As a result, a wide variety of sensible policy modifications that fail to fit the ideological predilections of either extreme simply do not get discussed ...⁶⁷

This policy ‘gaze’ over the middle ground has much to offer. It has the potential to address the debate over drugs policy in a way which the existing camps have singularly failed to do. It is essentially a pragmatic approach that seeks to take the best elements from various approaches; if it were a musical movement, it would be called eclecticism.

It is perhaps useful to reflect for a moment on the benefits of prohibition. Prohibition can play a central role in discouraging the use of prohibited drugs. There are many reasons for this, based on a number of rational, psychological and moral considerations. They include:

- fear of legal sanctions
- availability of the drug
- price of the drug

⁶⁴ Parliamentary Joint Committee on the NCA, *Drugs, Crime and Society* (1989) xiv.

⁶⁵ A need recognised by some in academic circles: see D Dixon, ‘We Need Desirable Measures of Harm Reduction’ *The Sydney Morning Herald*, 17 May 1999, 15.

⁶⁶ To use a phrase of the Honourable Member for Wallsend, Mr Mills: *Drug Summit Report of Proceedings*, Plenary Session, Tuesday 18 May 1999.

⁶⁷ M Kleiman, ‘Drugs and Drug Policy: The Case for a Slow Fix’ (1998) *Issues in Science and Technology* 1-10 in D Weatherburn, B Lind and L Forsythe, ‘Drug Law Enforcement, Heroin and Harm Minimisation’ (Paper presented to the Australasian Drug Strategy Conference, Adelaide, April 1999).

- mere fact of illegality
- stigmatisation
- influence on informal social controls⁶⁸

Weatherburn *et al* have also identified the considerable monetary and non-monetary costs associated with heroin (with the argument capable of cautious extension to other prohibited drugs) under a prohibitionist approach.⁶⁹ These costs may serve as so-called ‘entrance barriers’ to the heroin market. Likewise, it has been shown that by ‘cranking up’ the tools of prohibition - for instance, the probability of arrest - drug crime can be reduced.⁷⁰

As the Drug Summit revealed, these arguments are often overlaid because the law without more (education, moral authority and so on) is clearly a blunt instrument.⁷¹ The failure of prohibition in the USA in relation to alcohol in the 1920s and the present rate of use of cannabis in many Western societies highlights the complexities.⁷² Furthermore, the effects of particular law enforcement strategies have also been shown to fail in terms of their effects on price, purity and availability.⁷³ More generally, there may be countervailing tendencies that encourage use (such as the forbidden fruit effect).⁷⁴

⁶⁸ R MacCoun and P Reuter, ‘Drug Control’ in M Tonry (ed), *The Handbook of Crime and Punishment* (1998) 213-214.

⁶⁹ D Weatherburn, B Lind and L Forsythe ‘Drug Law Enforcement, Heroin and Harm Minimisation’ (Paper presented to the Australasian Drug Strategy Conference, Adelaide, April 1999).

⁷⁰ B L Benson, D W Rasmussen and Zvehlke, ‘An Economic Analysis of Recidivism Among Drug Offenders’ (1996) 60 *Southern Economic Journal* 169-183; B L Benson and D W Rasmussen ‘Illicit Drugs and Crime’ (1996) *Independent Policy Report: Illicit drugs and Crime 2* <www.lindsmith.org/library/indep.html>.

⁷¹ See, for example, the Parliamentary Joint Committee on the NCA (1989) *Drugs, Crime and Society* (the Cleeland Report).

⁷² See Professor Penington, Drug Summit Presentation, *Report of Proceedings*, Monday 17 May 1999. See also R E Marks, ‘Cannabis laws: an Analysis of Costs’ (1994) 13 *Drug and Alcohol Review* 341-346; S Lenton, ‘Cannabis Policy and the Burden of Proof: Is it Now Beyond Reasonable Doubt that Cannabis Prohibition is Not Working’ (1999) 18 *Drug and Alcohol Review*; and a recent study by the National Centre for Research into the Prevention of Drug Abuse (the Western Australian study). But see R MacCoun, ‘Drugs and the Law: a Psychological Analysis of Drug Prohibition’ (1993) 113 *Psychological Bulletin* 497-512.

⁷³ D Weatherburn, B Lind and L Forsythe, ‘Drug Law Enforcement, Heroin and Harm Minimisation’ (Paper presented to the Australasian Drug Strategy Conference, Adelaide, April 1999) 6. See also Professor Reuter, Director, Social Policy Specialisation, University of Maryland, Drug Summit Presentation, *Report of Proceedings*, Tuesday 18 May 1999; Commissioner Ryan Drug Summit Presentation, *Report of Proceedings*, Monday 17 May 1999. The Federal Minister for Justice and Customs, Senator Amanda Vanstone, reaffirmed her support for strict law enforcement in the face of this evidence after a statement by Commissioner Ryan questioning the validity of this approach: see ‘Police Fail to Arrest Dealers: Vanstone’ *The Sydney Morning Herald*, 20 May 1999, 7; ‘Vanstone Slams Police Chief’s Record’ *The Australian*, 20 May 1999, 5; ‘Vanstone Attacks Poor Police Record’ *The Daily Telegraph*, 20 May 1999, 3; and ‘Vanstone v NSW: Heroin Insults Fly’ *The Sydney Morning Herald*, 27 May 1999, 1.

⁷⁴ R MacCoun and P Reuter, ‘Drug Control’ in M Tonry (ed), *The Handbook of Crime and Punishment* (1998) 213-214.

There are thus benefits and disadvantages flowing from a policy of prohibition. This is where diversion has a key role to play. The notion of diversion is defined by its rationale:

Diversion systems are designed to improve outcomes both for the community at large and for offenders who commit drug-related crimes. Diversion involves a graduated series of interventions that are appropriate and proportionate to the seriousness and circumstances of the offence, and the personal circumstances of the offender. Interventions aim to prevent first offenders from entering the criminal justice system and to divert offenders with drug problems into appropriate treatment.⁷⁵

The theoretical justifications for diversionary programs and strategies are well established but have only begun to be accepted in practice. As Professor Webster said in his final day address which brought together the themes of the Summit:

Diversion is now a major focus. Everyone at the Summit has accepted that as a key way to go forward. It is better that people not enter the criminal justice system or be held in it if they can overcome the drug problem that causes their antisocial behaviour in the first place. Two years ago it was almost unenvisaged that we would be discussing diversion now in Australia. It was at most discussed by a select few people.⁷⁶

A recent National Drug and Alcohol Research Centre Monograph has identified the following inter-related rationales for an upsurge of interest in diversion world-wide:

- evidence of the links between drug use (licit and illicit) and crime, particularly property crime and crimes of violence;
- the significant economic and social costs for the community of crime;
- the prohibitive costs (and limited or adverse effects) of dealing with drug-related crimes by traditional criminal justice system means (law enforcement, courts and incarceration); and
- reductions in drug use (and subsequent criminality) associated with treatment programs which suggest the cost-effectiveness of such approaches.⁷⁷

These findings underpin the initiatives put forward at the Drug Summit. In addition to existing schemes in New South Wales, a suite of diversionary programs to break the cycle of drug misuse and crime will be trialed. These schemes will involve a number of key interventions at various points along the criminal justice spectrum:

⁷⁵ C Spooner, R Mattick and W Hall, 'A Strategic Overview of the Diversion of Drug-Related Offenders in New South Wales' (National Drug and Alcohol Research Centre Monograph, 1999) 10. This Monograph provides an excellent overview of current programs around Australia and New South Wales and the issues pertaining to diversion.

⁷⁶ Professor Webster, Introductory Speaker, *Drug Summit Report of Proceedings*, Friday 21 May 1999.

⁷⁷ C Spooner, R Mattick and W Hall, 'A Strategic Overview of the Diversion of Drug-Related Offenders in New South Wales' (National Drug and Alcohol Research Centre Monograph, 1999) 13-21.

pre-arrest, pre-trial, pre-sentence, post-sentence and pre-release.⁷⁸ This range of responses is in recognition of the broad categories of offenders who may be appropriately diverted. Put another way, diversionary programs are not only applicable for first-time offenders (although it can be expected that an emphasis will lie at this point). As the Drug Court highlights, diverting long-term offenders who have fallen into a spiral of drug use and offending has a compelling logic in itself, in terms of crime prevention, public health outcomes, community safety and basic economics.

The main schemes to be trialed include:

- a Cannabis Cautioning Scheme
- a Drug Offenders Compulsory Treatment Pilot
- an expansion of the *Young Offenders Act 1997*
- an Early Court Intervention Pilot
- a Youth Drug Court⁷⁹

These schemes will be discussed briefly.

Cannabis Cautioning

A trial Cannabis Cautioning Scheme is currently running statewide for twelve months. The trial commenced on 3 April 2000.⁸⁰ The scheme applies to adults caught by police in possession of small amounts of dried cannabis leaf (up to 15g) and equipment for administration of cannabis. Police may issue offenders with a cannabis cautioning notice, provided they meet a number of other criteria. The scheme is designed to target offenders whose only criminality is drug use or offenders in the early stages of criminality. The criteria include that the drugs must be for personal use, the offender must admit the offence, have no prior convictions for drug offences or specific offences involving violence or sexual assault and that an offender can only be given two cautions. Police retain the discretion to charge if the circumstances suggest that court proceedings are more appropriate.

The cannabis cautioning notice sets out the health and legal consequences of cannabis use. The caution takes place in the field, unless the police cannot establish the identity of the offender. The scheme is based on the approach taken in Victoria,

⁷⁸ Ibid 3.

⁷⁹ This is not to say that these are the only programs. For example the Government will also bring forward a proposal to establish an adult offenders conferencing program on a pilot basis, to promote restorative justice for victims and the community in respect of offenders who commit drug-related and non-violent offences. This project is still being developed and will, to a large extent, depend on the evaluation of the young offenders regime. However, the programs mentioned are the most developed and are 'Priority A' projects.

⁸⁰ As at 30 April 2000, 121 cannabis cautioning notices had been issued.

although for much smaller amounts of cannabis (the Victorian scheme applies to 50g of cannabis).⁸¹

The benefits of this approach are that court time and state resources are saved, that the offender does not get a criminal record for what might be considered less serious offences, that the 'hard' and 'soft' drug markets are separated and that offenders are made to confront the nature and possible consequences of their drug use.

Drug Offenders Compulsory Treatment Pilot

A Drug Offenders Compulsory Treatment Pilot will similarly target first and second time offenders caught by police in possession of small amounts of a prohibited drug (half the statutory small quantity) and related minor offences. As with the cannabis-cautioning scheme, offenders will be required to meet a number of other criteria to be eligible for the scheme.⁸² The scheme will be trialed in the Illawarra and Far North Coast areas. Offenders will be formally cautioned at the station. Cautions for these offences will be conditional upon the offender signing an agreement to undergo assessment and treatment (in Victoria, an offender must attend a drug counselling session within 5 days). Police will again retain the discretion to proceed to charge.

Victoria also trialed a 6-month cautioning program for minor use or possession offences for all *other* prohibited drugs. The trial was limited to the Broadmeadows area but this was subsequently expanded during the course of the trial. The pilot commenced on 1 September 1998 and is ongoing (although for evaluation purposes, it officially came to an end on 1 May 1999). During this time, only 60 people were cautioned (presumably due to the fact most people detected were not first offenders). Of these, about 15% of people breached the conditions of the program by not attending treatment programs, as compared with 30% for other drug programs. A third of those in the program also voluntarily sought further treatment. An evaluation of the program indicated that it was detecting heroin use in its early stages and diverting users into treatment. On the basis of the results, the Victorian Government is presently intending to expand the program state-wide, subject to funding.⁸³

Young Offenders Act 1997

As part of the Government's response to the recommendations of the Drug Summit, the Government has decided to expand the *Young Offenders Act 1997* to include wholly summary drug offences. This legislation provides for a formal system of

⁸¹ During the pilot period 97 cautions were issued. According to Victorian Police, this compares with 100 people arrested in the twelve months prior to the trial. From the point of view of net-widening - an ever-present issue in diversionary schemes - this is an encouraging sign.

⁸² The criterion is essentially the same as for the cannabis-cautioning scheme.

⁸³ *The Age*, 23 June 1999, 3.

warnings, cautions and conferences for juveniles. The extension of the scheme aims at early intervention for young people with drug problems, providing a greater chance of their long-term rehabilitation. The regime provides a series of alternative interventions into juvenile offending (such as cautions and youth justice conferences) which enable factors which contribute to the offending behaviour of young people (such as drug use) to be addressed.

The reform was included in the *Drug Summit Legislative Response Bill*. The change removes an existing anomaly whereby simple drug offences were excluded from the regime but the criminal consequences of such drug taking (usually property crime such as break and enters and malicious damage) could be dealt with.

Lismore Early Court Intervention Pilot

An Early Court Intervention Pilot will target less serious offenders who are motivated to seek treatment. This involves the trialing of a court-based assessment and referral system to drug treatment services. The trial will be conducted at the Lismore Local Court from July 2000. Amendments have been made to the *Bail Act* to facilitate bail treatment orders.⁸⁴ Such orders are available state-wide but the trial scheme, which will seek to co-ordinate law enforcement and treatment responses, will be limited to the Lismore area. This proposal is modelled on the recent pilot program CREDIT (Court Referral & Evaluation for Drug Intervention Treatment) in Victoria.

The Lismore Scheme will work by using stringent conditions of bail to direct offenders with drug problems into appropriate treatment and rehabilitation programs. The range of treatment services will include both government and non-government services and involve community based options such as counselling and methadone as well as residential treatments such as detoxification programs and therapeutic communities. Participants will be intensively case managed throughout the programs. These programs will be matched to the needs of the individual offender to maximise their impact.

The scheme has been described as a regional Drug Court. This is not the case. It is true that the scheme will adopt, to an extent, the Drug Court philosophy of combining sanctions and incentives or 'carrots and sticks', with suspects being closely supervised by the Court and agreeing to participate in a range of short-term, intensive treatment programs. It will also have similar objectives - namely, reductions in drug use and crime, improvements in community safety and improved health and social functioning for drug users.

However, there are important differences. The length of treatment interventions envisaged under the Lismore scheme will be much less than the Parramatta Drug

⁸⁴ A new section 36A has been inserted into the *Bail Act 1978*, which prescribes additional conditions under which bail may be granted. The provision commenced on 10 March 2000.

Court (around 8-12 weeks). Moreover, the level of supervision will be discretionary, rather than mandated. Also, the target populations are not the same, with the Lismore scheme seeking to draw on less serious offenders than at Parramatta. There is no requirement of a guilty plea under the Lismore scheme nor that an offender be facing gaol.

In sum, the scheme is best conceptualised as an important complement to the trial of a Drug Court at Parramatta, which targets more serious repeat offenders facing a full-time gaol term. It is hoped that lessons will be learnt from the Lismore scheme that are capable of application to the Parramatta Drug Court and vice versa.

Youth Drug Court

A key component of the Government Plan of Action is Recommendation 6.11, which proposed the establishment of a Youth Drug Court. To an extent, the scheme will be based on the Adult Drug Court pilot currently operating in Parramatta. The Youth Drug Court will combine intensive judicial supervision and case management of young offenders who are charged with criminal offences that result from the misuse of drugs. Unlike the adult Drug Court, it will target alcohol abuse as well as illicit drugs. These young people will be referred to programs aimed at eliminating or reducing their drug/alcohol misuse and related criminal behaviour and increasing their ability to function as law abiding members of the community.

The Youth Drug Court will operate in Western Sydney on a two year pilot basis from July 2000.⁸⁵ The program will be conducted within the existing framework of the Children's Court with Drug Court type powers. Eligibility criteria for the program have been developed which limits the program to young people who:

- are charged with an offence able to be dealt with by a Children's Court, with the exception of young people who are charged with a sex offence;
- have a demonstrable drug/alcohol problem;
- meet certain residential requirements;⁸⁶
- are not appropriate for a caution or conference;
- plead guilty (or indicate an intention to plead guilty if admitted into the program);
- consent to participate in the program; and
- are aged between 14-18 (although there will be a discretion for a magistrate to admit younger people otherwise assessed as suitable for the program).

A Youth Drug Court magistrate will hear argument and determine each young person's eligibility to participate in the program. Each young person determined to

⁸⁵ The Youth Drug Court is to sit at Campbelltown Children's Court and either Cobham Children's Court or Westmead Coroner's Court.

⁸⁶ That is, offences for which the young person is aged between 10-18 at the time of commission of the offence, excluding serious indictable offences or traffic offences that are dealt with by other courts.

be eligible and acceptable into the program will have their matter adjourned while they undergo an in-depth assessment of their total needs. The assessment will result in the development of an individually tailored program plan for each young person. The magistrate will have final determination as to whether a young person is or is not accepted into the program.

Young people accepted into the program will be placed on an order similar to a 'Griffiths Remand',⁸⁷ mandating that they comply with their program plan⁸⁸ and other general program requirements and that their final sentence be deferred for a minimum of 6 months. Each young person will be supervised, monitored and assisted through the program by a program manager and support person. All participants in the program will have regular meetings with the magistrate, the Court Team⁸⁹ and, where appropriate, their program manager and support person throughout the course of their participation in the Program.

Problems with compliance will be addressed by the Court Team adjusting the program plan to best meet the young person's needs. In addition, although the initial sentence deferral and program length is for 6 months, sentence deferral and requirement for continued program participation might be continued for an additional 6 months. Continuous or serious breaches of the program plan and other program requirements may lead to a young person being discharged from the program. Other than adjustment of the program plan, extension of time needed to complete the program and ultimately discharge, there will be no judicial sanction for program breaches. This is an important distinction from the adult Drug Court, which is heavily based on a sanctions/rewards philosophy. It is expected that young people who successfully complete the program will be sentenced to suspended sentences or other unsupervised orders. If a young person is discharged due to continuous or serious breaches, the young person will then be sentenced for the original offence.⁹⁰

It is widely acknowledged that the establishment of a Youth Drug Court is one of the most important and difficult initiatives arising from the Drug Summit. Although the Government has already established Australia's first adult Drug Court - which

⁸⁷ Pursuant to *Crimes (Sentencing Procedure) Act 1999*, s 11 which will be duplicated in an amendment to the *Children (Criminal Proceedings) Act 1987*. This section allows deferral of sentencing for up to 12 months for the purpose of the offender attending rehabilitation and other services.

⁸⁸ Participants in the program will be referred to and required to participate in services as set out in their Program Plan, including appropriate drug/alcohol treatment as well as other programs aimed at addressing health, housing, educational and other social needs and at assisting the young person to take responsibility for his/her life.

⁸⁹ The Court Team will consist of the YDC Program Magistrate, the police prosecutor, the legal representative and a representative from a joint assessment and review team comprised of representatives from NSW Health, Department of Community Services, Department of Education and Training and Department of Juvenile Justice.

⁹⁰ The sentence must take into account the time the young person spent participating in the program and must be no more severe than the sentence that the court would have given if the young person had not attempted to participate in the program.

can provide important lessons - it would be wholly inappropriate to simply transplant this model for children and young people. The adult Drug Court is primarily aimed at the 'hard' end of the market - long-term heroin addicts. The Youth Drug Court has no such discrete target population (a facet which is reflected in the development of individual program plans). Just as juvenile justice is vastly different from adult justice and operates according to different rationales, so too must the Youth Drug Court develop a model independent of the adult Drug Court.

The Youth Drug Court will also provide an important complement to the *Young Offenders Act 1997*, which already provides alternative interventions into juvenile offending (such as cautions and youth justice conferences). The delineation of matters between these two regimes is one of degree with the Drug Court intervening in more serious matters of more serious offenders.

CONCLUSION

The Drug Summit provided the impetus for a fresh, and refreshing, look at drug policy in New South Wales. The value of holding the Summit seemed to surprise even its detractors; the forum was an evident success. The hard part for the Government has been in assessing the resolutions. It is fair to say it has moved cautiously in the light of the recommendations. This has been deliberate. As John Della Bosca said in the Second Reading Speech 'caution has been the watchword'. What will the aftermath of the Summit bring? First, there is clearly much work to be done (however cliched that might sound). The task of implementing the Summit will require extraordinary efforts of co-ordination, determination and resolve in the years to come.

Second, there is a need to keep gathering evidence and watching developments in other jurisdictions. A recommendation to remove gaol penalties for minor cannabis offences⁹¹ has not been adopted by the Government, as it wants to gather together medical evidence on potency and also assess diversionary programs in other jurisdictions. This material needs to be gathered together and evaluated in order to assess whether this recommendation will ultimately be adopted.

Third, there are a range of programs which are being trialed. These will, in turn, need to be evaluated. Not all of them may survive. The acid test should be what works, not whether a program suits a particular ideology. As was said at the Summit:

We have to learn from our mistakes and move forward. We have to take the new ideas generated by this Summit and have the courage to test them out in practice in the real world. We have a responsibility to try to do that. There are some who will criticise any new initiative and, of course, there may be setbacks, but if New South Wales is to move forward and is to use the determination, courage and goodwill demonstrated by those who have supported the Summit, we must act. We should

⁹¹ Recommendation 6.9.

carefully evaluate all the aspects of our drug policy and objectively identify what works and what does not.⁹²

This last point brings us back full circle and to our conclusion. As we noted at the beginning of the paper, tangible outcomes from the Summit - to be measured by the trialing of particular programs - cannot yet be determined. Indeed, regardless of these outcomes, some reformers have been disappointed by the Government's openly cautious response. From a long-term perspective, however, it is obviously of the most crucial importance to properly bed down a coherent and sustained policy framework.

The need for new approaches to old problems was one such idea. In this respect, the Drug Summit has served as a circuit breaker for a new 'politics of pragmatism'. This is a welcome move away from unproductive debates on drugs based on ideologically entrenched party positions. Perhaps most importantly, a pragmatic approach may well provide opportunities in other areas of social policy. The most obvious example is alcohol, to which much of the logic of drugs policy - such as diversionary programs to break the crime cycle - can be extended.⁹³ A dynamic for reform in drugs policy and other related policy areas - together with the anticipated success of modest law reform programs - would truly be a lasting and significant legacy from the Summit.

⁹² As argued by the Honourable Jeff Shaw in moving the Resolutions of Working Group 6 - Breaking the Drugs Crime Cycle, *Drug Summit Report of Proceedings*, Thursday 20 May 1999.

⁹³ The Youth Drug Court, with its emphasis on alcohol as well as prohibited rugs, is clearly a move in this direction.