

Special Commission of Inquiry into the Drug 'Ice'

Legal Aid NSW submission in
response to Issues Paper 2 -
Justice

May 2019

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Legal Aid
NEW SOUTH WALES 

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW's Cooperative Legal Service Delivery Program comprises 12 regional justice partnerships across regional and remote NSW. The aim of the partnerships is to improve access to justice for disadvantaged people in regional and remote areas.

Our civil and family lawyers are also providing outreach to drug and alcohol services. Our Work and Development Order (WDO) Service assists not-for-

profit organisations, government agencies and health practitioners to become WDO sponsors, and provides fines advice and WDO referrals to clients at specialist clinics and outreach events in regional locations.

The Legal Aid NSW Children's Civil Law Service provides a targeted and holistic legal service to young people identified as having complex needs, and assists children in the Youth Koori Court.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and, previously, the Youth Drug and Alcohol Court. Our Prisoner's Legal Service offers a range of legal services to prisoners.

Legal Aid NSW also operates a Client Assessment and Referral Service, which has expertise in substance abuse issues.

Legal Aid NSW welcomes the opportunity to make a submission to the Special Commission of Inquiry into the Drug 'Ice'. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Special Commission of Inquiry into the Drug 'Ice'.

Legal Aid NSW has a broad range of experience in matters associated with drug use, across multiple practice areas. As discussed below, a significant proportion of our clients use or abuse alcohol and/or drugs – including Amphetamine Type Stimulants (ATS) – and we offer a range of services for such clients. Over recent years, we have seen a growing trend of ATS use amongst our clients.

Many of our clients have an urgent need for assistance to overcome their drug problems, but face barriers accessing the services they need. Services are difficult to access in metropolitan areas, and are more difficult to access in non-metropolitan areas (ie regional, rural or remote areas). Particular challenges exist for clients in custody, Aboriginal and Torres Strait Islander¹ clients and young people.

Drug problems among Legal Aid NSW clients

Drug and alcohol use is a significant underlying issue for a large proportion of Legal Aid NSW clients and, in particular, the use of ATS has become increasingly prevalent. In 2013 we examined our 50 most frequent users of legal aid services between July 2005 and June 2010.² Three quarters of these 'high service users' had used drugs and/or alcohol. Twenty per cent had accessed treatment for drug and alcohol addiction. Most of the frequent users had complex needs—nearly half had received a mental health diagnosis. About half had a primary carer who had experienced drug and/or alcohol issues.

A high proportion of frequent users were children/young people with complex needs, many of whom had contact with both the criminal justice system and the care and protection system. In response to their needs, Legal Aid NSW established the Children's Civil Law Service and a criminal law High Services Users position of the Children's Legal Service to work collaboratively in providing holistic services to children.

Many of Legal Aid NSW's criminal law clients have matters associated with drug use. People in prison are highly likely to have used drugs prior to detention. A survey of prisoners in 2015 found that 67 per cent of prison entrants reported illicit drug use during the previous 12 months.³ In 2012, the most commonly reported illicit drug used was cannabis. However in 2015, the most commonly reported illicit drug used was methamphetamine, with 50 per cent reporting having used this drug.⁴

¹ References in this submission to Aboriginal people include both Aboriginal and Torres Strait Islander people.

² Legal Aid NSW, *High service users at Legal Aid NSW*, (2013) 3-4.

³ Australian Institute of Health and Welfare, *The health of Australia's prisoners 2015* (2015) (AIHW) 96.

⁴ AIHW 97.

Prison entrants were two to three times more likely than members of the general community to report recent illicit drug use,⁵ and were 10 times more likely to report using methamphetamines.⁶

The 2015 *NSW Young People in Custody Health Survey* found that 92 per cent of the young people surveyed had tried illicit drugs, with cannabis the most commonly used (90 per cent), followed by crystal methamphetamine at 55 per cent. Illicit drugs were used at least weekly by 81 per cent of young people surveyed, while 65 per cent reported committing crime to obtain alcohol or drugs and 78 per cent were intoxicated (on alcohol, drugs or both) at the time of their offence.⁷

Again, complex needs are evident among young people in custody, with 87 per cent having at least one psychological disorder, and 60 percent having a history of child abuse or trauma.⁸

Legal Aid NSW's civil law and family law clients also face drug and alcohol issues. For example, clients presenting with ATS use may be involved in care and protection proceedings and/or face housing and debt issues. Our civil and family lawyers provide outreach to drug and alcohol services (for example, WHOS – We Help Ourselves – and William Booth House) at a point in time when people are committed to recovery. Our lawyers help to address legal issues which can trigger relapse.

In our experience, often clients who use ATS may also use other forms of drugs and alcohol and present with other complex needs. They have various legal needs which might span civil, family and criminal law. The case study of John, below, illustrates how drug misuse often co-exists with mental and physical health problems and early experience of trauma (including witnessing domestic violence and being homeless), and can impact upon a variety of legal needs.

Case Study: John

John is a young man aged twenty years old. He had his first contact with Legal Aid NSW when he was twelve and is a high user of legal aid services with 96 service contacts over a five-year period.

John's childhood was characterised by physical health problems. He suffered from chronic ear infections, his speech was slow to develop and he had periodic bouts of asthma. He had early corrective surgery for a congenital abnormality.

⁵ AIHW 100.

⁶ AIHW 101.

⁷ NSW Health, NSW Justice, *2015 Young People in Custody Health Survey. Key Findings for All Young People*, 2.

⁸ Devon Indig et al., *'2009 NSW Young People in Custody Health Survey: Full Report'* Justice Health: Sydney, (2011).

John's mother suffered from obsessive-compulsive disorder and other anxiety problems. John's father was violent to his mother. At age two, John's parents separated and he lived with his mother in refuges for a period of time. He has subsequently had periods of living with his mother, his father, his grandparents and in various foster placements.

At age four, John was diagnosed with attention-deficit hyperactivity disorder. Over the subsequent years clinicians have diagnosed him with conduct disorder, oppositional defiant disorder, and various other psychiatric diagnoses. He has had episodes where he has self-harmed and has attempted suicide. On intelligence tests, John returned scores in the range of moderate intellectual disability.

The Department of Family and Community Services became involved with John when he was seven years old. Over subsequent years John had many short and difficult out-of-home-care placements as well as numerous periods where he lived with friends or on the street.

John attended four primary schools and his early learning difficulties were initially addressed by teachers' aides. As John transitioned to high school he was frequently excluded and expelled. Placements in special schools were unsuccessful and he stopped attending school in Year 9.

John started smoking cannabis and drinking alcohol when he was about thirteen years old. By age fifteen he was using amphetamines. John's criminal justice offending profile involved offences such as stalk/intimidate, breach of bail, assault, and theft offences. Often his offences involve family members as victims.

John had periods of residential drug and alcohol treatment and was recommended for the Youth Drug and Alcohol Court but did not proceed with an application. The Youth Drug and Alcohol Court ceased operating in 2012.

On the basis of our extensive work with clients who have used ATS and who are in contact with the legal system, we believe we have insights which will assist the Special Commission in addressing the issues raised in *Issues Paper 2 – Justice*. Where there are related issues which have been raised in *Issues Paper 1, 3 and 4*, we have referred to those Issues Papers in this submission.

Decriminalisation

The Commonwealth Parliament's Joint Committee on Law Enforcement in the Final Report of its *Inquiry into crystal methamphetamine (ice)*⁹ (the Commonwealth inquiry) noted:

What is clear to the committee is that the current approach in Australia is not working. Methamphetamine abuse can have devastating effects on individuals, their families and communities, and has broader social and economic impacts. When former law enforcement officers and law enforcement agencies themselves are saying that Australia cannot arrest its way out of the methamphetamine problem, that view must be taken seriously.

The committee urges Australian governments to implement the recommendations in this and the committee's first report. Improvements can and must be made in addressing methamphetamine use in Australia; in the committee's opinion, this should be done by shifting the focus on methamphetamine from a law enforcement problem to a health issue within an environment where treatment and support are readily available and without stigmatization. Concerted attention must also be paid to improving the services and support available to Aboriginal drug users, drug users in regional and remote areas, prisoners and drug users with young children.

Legal Aid NSW supports the call of the Joint Committee for a new focus on dealing with ATS use as a health issue. Decriminalisation is part of a suite of measures to support this focus. Legal Aid NSW supports decriminalisation of offences involving use and possession of ATS. In particular, we support the existing examples of decriminalisation in NSW (listed below) and would welcome consideration of further measures:

- Penalty notice for the use and possession of a small quantity of prohibited drug in lieu of criminal proceedings;¹⁰
- Diversion under the Young Offenders Act;
- Cannabis cautioning scheme; and
- Exempting a person possessing and using a small quantity of a prohibited drug at the Medically Supervised Injecting Centre from criminal liability.

⁹ Parliament of Australia, Joint Committee on Law Enforcement, *Inquiry into crystal methamphetamine (ice) - Final Report*, (2018), Chapter 6.

¹⁰ *Criminal Procedure Act 1986 (NSW)* ss 333-338; *Criminal Procedure Regulation 2017 (NSW)* Sch 4, amended by the *Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019 (NSW)*.

Decriminalisation removes the barriers to treatment that criminal justice intervention imposes and is a far more effective course for encouraging treatment. There is evidence that decriminalisation results in measurable savings in health costs, social costs and costs to the justice system.¹¹ Savings for the justice system can include freeing up police time, allowing them to focus on more serious crimes, savings on court and legal resources, and reductions in prison overcrowding.¹²

An important qualifier concerning decriminalisation is that its success is reliant upon additional investment in health and social services.¹³

International conventions

In relation to concerns about whether decriminalisation in NSW would be inconsistent with Commonwealth law and international laws to which Australia is a signatory, we note that these issues were considered extensively in the Victorian Parliamentary Law Reform, Road and Community Safety Committee's *Inquiry into drug law reform* in 2018 (the Victorian Inquiry). They were also extensively considered in the report of New Zealand's Law Commission, *Controlling and Regulating Drugs*.¹⁴

The Victorian Inquiry noted that there is an ongoing debate about what the conventions require of member states in the context of personal use and possession of illicit substances. According to various scholars, none of the United Nations conventions actually criminalise the use of illicit substances per se.

Furthermore, the Victorian Inquiry noted the International Narcotics Control Board's (INCB) support for Portugal's liberal drug policy framework that is based on decriminalisation. In particular, at the April 2016 United Nations General Assembly Special Session (UNGASS) on drugs, the former INCB President, Werner Sipp, identified the model as one of best practice and that it is 'fully committed to the principles of the Drug Control Conventions'.¹⁵

We note that the above mentioned decriminalisation in NSW is a form of de facto decriminalisation (depenalisation) which does not legalise drug use/possession and is fully consistent with Commonwealth law and international conventions. If NSW were to consider other forms of decriminalisation or legalisation, guidance may be gained from other Australian jurisdictions, New Zealand, or Portugal. We note that the Commonwealth Inquiry examined variations of decriminalisation (both de jure and de facto) across all the

¹¹ Ritter, *Decriminalisation or legalisation: injecting evidence in the drug law reform debate*, National Drug and Alcohol Research Centre (NDARC), 22 April 2016.

¹² Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalisation*, (2016), 21.

¹³ Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalisation*, (2016), 20.

¹⁴ New Zealand Law Commission, *Controlling and Regulating Drugs*, Issues Paper 16, Feb 2010, Chapter 6.

¹⁵ Sipp, W, *The Portuguese Approach and the International Drug Control Conventions*, Paper presented at the UNGASS 2016, International Narcotics Control Board, New York, (2016).

Australian jurisdictions¹⁶. Inconsistency with international obligations was not raised as a concern in that Inquiry's report.

Penalty notices

The ability to issue on the spot fines for use and possession of drugs has only recently been introduced in NSW in January 2019. Hence, at this stage there is little publicly available data regarding the number of penalty notices issued and the impact of these penalty notices. It is probably too early to assess their effectiveness.

Nevertheless, Legal Aid NSW suggests that it is likely that the introduction of penalty notices for use or possession of ATS (in lieu of charges) will generally reduce the harms associated with criminal prohibition of use and possession. Criminalisation for the use and possession of illicit drugs for personal use can result in a range of negative outcomes for individuals. These include the time and stress involved in participating in the court process, obtaining a criminal penalty and having a criminal record which can impact future employment opportunities, and lead to experiences of discrimination.¹⁷ Besides from costs to the individual offender, there are also costs to the criminal justice system in dealing with such matters.

While the use of on the spot fines may wield potential benefits by enabling offenders to avoid being convicted and sentenced by a court, their use should be regarded with some degree of caution. A penalty is not avoided altogether. The Issues Paper notes that the majority of those convicted of possession of amphetamines under s 20 of the *Drug Misuse and Trafficking Act 1985* (NSW) (the **DMT Act**) between July 2016 and June 2018 were sentenced by court to pay a fine, followed by a section 9 bond and section 10 bond.¹⁸ However, most offenders convicted of possession of MDMA between July 2016 and June 2018 had no prior convictions and the most common penalty was a section 10 bond, followed by a fine only, followed by a section 10(1)(a) dismissal.

For many offenders the receipt of an on the spot fine will be preferable to attendance at court proceedings and the uncertainty of a court penalty and conviction. For some offenders, the on the spot fine will be a lesser penalty than what they would have otherwise received in court. However, in some cases, particularly those offenders with no prior record, the fine may be a harsher response than proceeding to court, where they may have had their matters dismissed by a section 10. As such, for these offenders, the on the spot fine may have a net widening effect.¹⁹

¹⁶ Parliament of Australia, Joint Committee on Law Enforcement, *Inquiry into crystal methamphetamine (ice) - Final Report*, (2018), 152.

¹⁷ Victorian Parliamentary Law Reform, Road and Community Safety Committee, *Inquiry into drug law reform*, (2018), Chp 3.

¹⁸ Under the *Crimes (Sentencing Procedure) Act 1999* (NSW).

¹⁹ NSW Law Reform Commission, *Penalty Notices: Report 132*, 2012, p 19, 289, 293-296.

The amount of the fine issued may also have a net widening effect. The Expert Panel Report *Keeping People Safe at Music Festivals*²⁰ considered that the NSW Government should have regard to existing Criminal Infringement Notice penalties when setting the amount of the proposed on the spot fine. Currently, those penalties range from \$200 to \$1,100. The fine amount set by *Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019* was \$400. A \$400 on the spot fine would be higher than the fine amount imposed by the Local Court in 45.5 per cent of cases²¹.

Given that the on the spot fine may in fact be a greater penalty for some offenders, Legal Aid NSW is concerned that police continue to retain and use their discretion to issue warnings/cautions.

NSW Police should have guidelines for exercising the discretion to issue on the spot fines for the use and possession of prohibited drugs. Such guidelines should ensure consistent application of the scheme and should take into account whether the offender has a prior conviction and favour the issuing of a warning/caution, rather than a fine. NSW Police should be trained about the guidelines and the guidelines should be publicly available.

The police should not take a 'blanket' approach such that on the spot fines are issued for those who would otherwise have received a warning. We note that the fines are not available for children and we are concerned that children are not disadvantaged by this restriction: they should be issued with a warning rather than sent to court.

Generally, Legal Aid NSW notes with concern that there has been a rapid growth in penalty notices issued,²² especially to children and young people: there was a six fold increase between 1998 and 2013. Monetary penalties have a disproportionate impact on children and young people.²³ Therefore, whilst Legal Aid NSW is supportive of the ability to issue on the spot fines rather than court proceedings, such fines should not be used at the expense of other diversionary measures such as warnings/cautions, especially for children, young people and those with no prior records.

²⁰ Fuller M, Chant K, and Crawford P, *Keeping People Safe at Music Festivals: Expert Panel Report*, (October 2018), 13.

²¹ Gotsis, T, *Drug Use at Music Festivals*, NSW Parliamentary Research Service, e brief Issue 3/2018, (December 2018), 5.

²² Brown, D., Cunneen, C. and Russel, S., *'It's all about the Benjamins': Infringement notices and young people in NSW* (2017) 42(4) *Alternative Law Journal* 253 at 5. Quilter and Hogg note that there are 23 penalty notices issued for every penalty imposed by a court in NSW: Quilter, J. and Hogg, R., *'The Hidden Punitiveness of Fines'*, Paper presented to the 4th Annual Criminal Law Workshop, Faculty of Law, UNSW, (15 February 2017), 3.

²³ Brown, D., Cunneen, C. and Russel, S., *op. cit.*

Expansion of the cannabis cautioning scheme

We note the cannabis cautioning scheme has been generally effective. In 2011, the NSW Auditor General conducted a '10 year review' of the scheme²⁴. It found that over the previous ten years, NSW Police had issued over 39,000 cautions to minor cannabis offenders, saving at least \$20 million in court costs. The review also found that people cautioned for minor cannabis offences were less likely to reoffend than those dealt with by the courts. It was assessed as one of the most successful schemes in Australia for reducing reoffending rates.

There was some concern about net widening insofar as there were more people dealt with officially for cannabis possession after the introduction of the scheme. However, we note that the impact of a caution on an offender is less significant than a fine.

In 2013, the NSW Law Reform Commission recommended that the cannabis cautioning scheme be extended to cover possession of minor quantities of other prohibited drugs.²⁵ This would bring NSW in line with other Australian jurisdictions. Legal Aid NSW would support such an extension. We suggest that the cautioning scheme could cover possession of a range of prohibited drugs, including ATS, and the scheme could be used either in lieu of, or in addition to, on the spot fines.

Wider application

Legal Aid NSW also suggests that there should be wider application of police discretion to use warnings/cautions and fines in lieu of court proceedings. We note that the introduction of the on the spot fines resulted from ATS related deaths at music festivals. However, the Expert Panel Report *Keeping People Safe at Music Festivals* noted that most of the 1,808 drug-induced deaths in Australia in 2016 were not related to music festivals.²⁶ The discretion to issue penalty notices that was introduced by the *Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019* is not confined to offences which arise from music festivals. However, anecdotally, Legal Aid NSW has not seen a rise in penalty notices being issued for drug use/possession 'on the street' (ie outside of a music festival context). Indeed, some police had advised Legal Aid NSW lawyers that they were not even aware of the provisions and some understood that the powers could or would only be exercised at music festivals.

If the use of this method of decriminalisation is confined only to occasional events (eg music festivals) then it is limiting its potential for harm reduction. It is unlikely to have any benefit for people whose drug use is regular and problematic in their lives.

²⁴ NSW Auditor-Generals Report, *Performance Audit: The Effectiveness of Cautioning for Minor Cannabis Offences*, The Audit Office NSW, (2011). This confirmed findings of an evaluation in 2004: Baker, J, and Goh, D, *The Cannabis Cautioning Scheme Three years on: An implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004).

²⁵ NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) .

²⁶ Fuller, M, Chant, K, Crawford, P, Expert Panel Report - *Keeping People Safe at Music Festivals*, (2018), page 4 citing Australia Bureau of Statistics – 3303 Causes of Death, Australia 2016. <http://www.abs.gov.au/>

Furthermore, we note that penalty notices may only be issued for offences of possession of prohibited drugs: an offence under s 10 of the DMT Act. There is no similar power to issue penalty notices for possession of equipment to administer prohibited drugs (s 11 of the DMT Act), such as glass pipes used for inhaling ATS. We note that *Issues Paper 3* (at 3.5.9) questions whether the possession of such equipment should be decriminalised. Legal Aid NSW supports the decriminalisation of possession of this equipment.

Mandatory counselling or education

Legal Aid NSW does not support a requirement for an offender who is issued an on the spot fine to undergo counselling or education. Whilst referrals to counselling/education should be encouraged, we query the effectiveness of mandatory counselling/education. Counselling/education is more effective if undertaken voluntarily.²⁷

As noted above, many court outcomes would not involve mandatory counselling/education. For many, participation in such counselling/education might be more onerous than the payment of the fine. We also note that the suggested requirement to undergo counselling/education appears to be in addition to the payment of the fine rather than in lieu of the fine. On the other hand, we refer to the effectiveness of the Work and Development Order scheme (discussed below) where clients can choose to participate in counselling/education to pay off fines.

We also note that where fines are used for low-level or infrequent users, a requirement to undergo counselling/education would not target people who actually require such intervention. Problematic use more often comes to light in conjunction with secondary offending such as theft or dishonesty offences, for which penalty notices are unavailable.

The current legal framework and options for change

The criminal prohibition of ATS use frustrates the National Drug Strategy in relation to harm reduction for those who are ATS users. The intervention of the criminal law is a significant barrier to access to treatment for many people. Defendants seeking treatment are frequently placed on unrealistic bail conditions to completely abstain from drug use, and being detected in possession or under the influence of drugs leads to frequent arrests and incarceration, which interrupts treatment. Decriminalisation has the potential to remove this barrier and assist people to access treatment.

Legal Aid NSW practitioners report a prevalent and often erroneous belief held by local communities and the police that arrests and charging for drug use can be a catalyst for change; that is, the prospect of imprisonment can make drug users accept treatment as a direct alternative. In our experience, we are aware of police officers recommending to

²⁷ We note that the cannabis caution scheme makes education mandatory for anyone receiving a second caution. However, only 43% of those issued with a second caution completed the mandatory education session: Baker, J, and Goh, D, *The Cannabis Cautioning Scheme Three years on: An implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004), 30.

concerned family members that they not agree to allow a defendant to be bailed to their home, in hopes that this will force the defendant instead to be bailed to a residential rehabilitation facility. However, this approach is ineffective because:

- there are not enough residential rehabilitation facilities available for treatment; and
- there are significant issues with defendants accessing assessments for rehabilitation facilities from custody and there is no efficient mechanism for defendants to be bailed to such services.

These issues are discussed in further detail below. What they illustrate is a need for a cultural shift, greater community awareness and systemic decriminalisation so that drug usage can be addressed as a health issue rather than with the blunt instrument of the criminal justice system.

Categorisation of drugs

Legal Aid NSW queries whether the categorizing of prohibited drugs and penalties according to quantities in Schedule 1 of the DMT Act is an effective measure of harm. In particular, with the admixture provisions, the gross quantity may have no correlation to the actual amount of the drug.

We recommend a review of the threshold quantities in Schedule 1 of the DMT Act.

We note that there may be merit in having a system of categorisation according to levels of harm (such as in New Zealand) where categorisation is rigorously considered and regularly reviewed by an expert panel, taking into account set criteria.²⁸ We encourage the Special Commission of Inquiry to further consider the benefits and disadvantages of such systems in other jurisdictions.

Drug driving

Since the introduction of the 'Drive with illicit drug present' offence, there have been a large number of these matters in the Local Court. Legal Aid NSW is concerned that this offence is based on the mere presence of drugs in a person's body. This offence does not require the accused to be affected by the drug, or their ability to drive a motor vehicle to be impaired to any extent. Offenders may be found to have a residual presence of drugs in their system, but not be impaired in any way. This is particularly concerning given the very lengthy periods for which particular drugs can be detected in a person's system after use. For example, Methamphetamines can be detected in a person for three to five days after use.

²⁸ Section 4B of the *Misuse of Drugs Act 1975* (New Zealand). See New Zealand Law Commission, *Controlling and Regulating Drugs*, Issues Paper 16, February 2010, Chp 9.

In our view, the imposition of automatic disqualification and significant monetary penalties may result in harsh outcomes in 'Drive with illicit drug present' cases where there is no evidence of risk to public safety.

Moreover, we are opposed to the increase in maximum penalties for 'Driving under the influence offences' to reflect the maximum fines, prison terms and disqualification periods available and applied to high range PCA drink driving offences.²⁹ A high range PCA involves a known high degree of intoxication and risk to the public whereas the degree of affectation of a driver in a Driving under the influence offence may involve only slight affection.

We are concerned that there is no reliable scale on which to assess the degree of risk in a given case of 'Driving under the influence'. Courts often rely on police observations of the demeanour of a driver and generic opinions about whether the driver was, for example, 'moderately affected' or 'slightly affected'. There should be consideration of the development of a scale which identifies certain threshold limits for particular drugs (such as ATS). Where a sample is obtained and a drug identified, this would allow for the categorisation of offences dependent upon the level of the particular drug identified, similar to PCA.

There are benefits to having a uniform and reliable scale which would provide:

- a more grounded basis on which to assess the seriousness of the offence and provide better transparency in the sentencing process;
- more consistency in sentencing; and
- enhanced statistical reporting of drug driving history and trends.

Impacts of ATS on the criminal justice system

In Legal Aid NSW's experience, drug possession and drug driving matters are a large share of the Local Court workload. Cannabis and ATS are the most common drug types for these charges.

As mentioned in the Special Commission of Inquiry's *Issues Paper 1 – Use, Prevalence and Policy Framework*, it is difficult to estimate with precision the prevalence of ATS use or patterns of use in NSW, due to incomplete data capture, inconsistency between data sources and problems with self reporting. However, evidence suggests an increase in meth/amphetamine usage in NSW in recent years. In particular, *Issues Paper 1* notes that more people are using methamphetamine and MDMA in regional NSW than in Sydney³⁰ and people in remote and very remote areas are 2.5 times more likely to use

²⁹ *Road Transport Legislation Amendment (Road Safety) Act 2018 (NSW)*.

³⁰ Australian Criminal Intelligence Commission, *National Wastewater Drug Monitoring Program* (Report No 6, December 2018) 42.

meth/amphetamines than those in major cities.³¹ Aboriginal Australians are 2.2 times more likely to use meth/amphetamines than non Aboriginal people³² and are five times more likely to be hospitalised for conditions related to methamphetamine use.³³

These statistics are consistent with the observations of Legal Aid NSW practitioners. In our experience, the prevalence of ATS use amongst Aboriginal populations and in regional, rural and remote areas is reflected in increases in drug related crime and law enforcement.

The NSW Bureau of Crime Statistics and Research (**BOCSAR**) has noted an increase in police recorded incidents of possession/use amphetamine in NSW in each quarter since June 2010.³⁴ There is a disproportionate rate of possession and use in regional and remote NSW.³⁵ These are locations where there are few drug rehabilitation services. After the Sydney local government area, the top 15 locations with the highest rates of the crimes of possession and/or use of amphetamines in 2016/17 are in regional and remote NSW. There are few drug detoxification and rehabilitation facilities in these locations.

Table 1: rates of possession and use of amphetamines in regional and remote NSW

LGA	Possession and/or use of amphetamines	
	Number	2016/17 rate per 100,000 population
Narrandera	24	405.4
Moree Plains	41	291.8
Deniliquin	21	282.7
Wellington	25	275.5
Gilgandra	12	274.7
Wagga Wagga	157	247.5
Cessnock	132	236.3

³¹ Australian Institute of Health and Welfare, Commonwealth, *National Drug Strategy Household Survey 2016: detailed findings* (Report, 2017) 129.

³² Australian Institute of Health and Welfare, Commonwealth, *National Drug Strategy Household Survey 2016: detailed findings* (Report, 2017) 108.

³³ Centre for Population Health, New South Wales Government, *Methamphetamine Use and Related Harms in NSW – Surveillance Report to December 2017*(Report, 4 April 2018).

³⁴ That is, crimes reported to crime reported to, or detected by, the NSW Police Force: BOCSAR 'Mapping the increase in amphetamine and cocaine use in NSW'

http://www.bocsar.nsw.gov.au/Pages/bocsar_news/Map-cocaine-and-amphetamines.aspx Accessed 1 December 2017.

³⁵ BOCSAR 'Amphetamines and cocaine statistics for NSW'

http://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Amphetamines.aspx Accessed 31 November 2017.

Coonamble	10	234.6
Lismore	102	228
Shoalhaven	228	227.7
Muswellbrook	37	215
Murray	16	210.6
Wollongong	437	209.2
Mid-Western Regional	49	202.6
Newcastle	322	199.7

We note that these figures only paint part of the picture. We note that ATS use has played a large part in many non drug offences (eg assaults, property offences, sexual offences).

The increase in ATS related offences puts pressure on courts, especially circuit courts which may already be stretched in covering remote locations. The lack of drug rehabilitation services in these areas adds even more pressure on practitioners attempting to service the needs of their clients.

We acknowledge that there is currently no adequate method by which to record the full impact of drugs on the criminal justice system. Improvements in data collection could be made by more consistent and systematic recording by practitioners, the police and the courts of when drug use is acknowledged to be related to an offence. We acknowledge that there may still be challenges in developing such systems and that clients may not provide instructions to reveal the role of drug usage in their offending, especially where they may be restricted from accessing rehabilitation anyway and their drug use may not mitigate their sentence or assist in obtaining bail. Nevertheless, any improvements in data collection will assist in the development of evidence based policies and proper and targeted allocation of resources.

Law Enforcement Strategies

Legal Aid NSW is supportive of harm reduction strategies. We support substance testing as a powerful harm prevention strategy. We would also support the expansion of Medically Supervised Injecting Centres. Such initiatives reduce public risk.

By contrast, the bulk of charges that Legal Aid NSW see before the courts criminalise users of ATS for behaviour which does not put the public at risk (i.e. drug possession and drive with the presence of drug in system). We suggest that the criminal prosecution of these matters does little to deter use or reduce demand. We recommend a review of drug law enforcement strategies.

It is unclear whether NSW Police are using or recording their use of diversionary schemes such as on the spot fines. As discussed above, there appear to be some police who are not familiar with such schemes.

Legal Aid NSW is critical of some of the tools employed by NSW Police in drug detection and we oppose any expansion of their use. The accuracy of drug detection dogs is questionable. Mobile Roadside Drug Testing facilitates a system of penalising people for behaviour that has no proven detriment to the community.

Drug Searches

Legal Aid NSW is also concerned about the use of police searches for drugs, especially routine searches, systematic searches and strip searches in public.

We are concerned about routine searches at locations which police may designate as connected with drugs (eg a train station or plaza) where the basis for the search is not a reasonable suspicion that attaches to the person but merely because the person is in the location. We are concerned about systematic searches of individuals which the police may have targeted, such as those on a Suspect Targeted Management Plan (STMP). We are particularly concerned about the use of strip searches which are most frequently justified as searches for drugs. Such searches are especially intrusive and frequently unnecessary.

Notably, there have been a number of recent instances of large scale police operations involving drug detection dogs and strip searches at music festivals and train stations.³⁶ The Redfern Legal Centre expressed concerns about the 50 per cent increase in strip searches in the last four years and noted 'a high number of strip searches find nothing illegal, which places serious doubt on whether many of these searches are necessary and justified'.³⁷ We note the Law Enforcement Conduct Commission (LECC) is currently conducting an investigation into the use by police officers of powers to conduct strip searches under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

Controlled operations

There currently appears to be a discrepancy between law enforcement expenditure and health expenditure in addressing ATS usage, with significantly more resources being devoted to law enforcement.³⁸ Vast amounts of police resources are used in controlled operations targeting ATS. Typically, during an authorised controlled operation, police will install and monitor surveillance devices at multiple premises. Phone conversations are also intercepted, recorded and monitored. These may require translation and transcription.

³⁶ Redfern Legal Centre, *Redfern Legal Centre concerned about police search operation at a public train station*, Media Release, 14 March 2019.

³⁷ Redfern Legal Centre, *Redfern Legal Centre concerned about police search operation at a public train station*, Media Release, 14 March 2019.

³⁸ See *Issues Paper 4*, pages 9-10.

Operation Eurong was conducted in Dubbo and Wellington between September 2015 and July 2016. The Operation involved 150 Under Cover Operatives (UCO) and Street Level Operatives (SLO) over 10 months. Many more police were involved in the preparation, planning and arrests. Ultimately, 10 people who were drug addicts were arrested. The most serious offender was no more than a 'mid level' offender.

The briefs of evidence were voluminous, containing many hours of surveillance and telephone intercepts. Processing these cases was hugely demanding on Legal Aid NSW, the Office of the Director of Public Prosecutions and the courts.

There have been numerous similar examples of Ice related controlled operations.³⁹ It is questionable whether these operations are an efficient use of resources to deal with Ice usage and supply.

The below case study relates to an Ice user arrested in a controlled operation.

Case Study: Sarah

Sarah was charged with two counts of knowingly taking part in the supply of a prohibited drug. She committed the offences by driving her friend from regional NSW to Sydney so that he could purchase Ice. She drove the car because he was a disqualified driver. On the first trip, he purchased approximately 28 grams of methyl amphetamine. On the second trip he paid for what he thought was one and a half ounces of Ice but the substance turned out to be rock salt. At the time of her arrest, Sarah was using Ice heavily but, apart from the above offences, she was not otherwise involved with the supply of Ice.

Going in and out of custody, she effectively spent five months on remand by the time she was sentenced. She was a young mother to several children, had mental health issues and had a very minor criminal record. When sentenced, the Judge imposed a bond under the Section 9 of the *Crimes (Sentencing Procedure) Act 1999*, accepting that the offence, in combination with her subjective circumstances, did not warrant a sentence of imprisonment.

Her incarceration for five months was unnecessary; it interfered with her rehabilitation, was damaging to her mental health and caused unnecessary dislocation to her children.

³⁹ For example, Strike Force Todces, conducted in Gunnedah, from May 2015 to September 2016, resulted in 5 Arrests. Strike Force Badim, conducted in the Northern Rivers /Lismore in 2014, resulted in 6 Arrests. Strike Force Duncera, conducted in Glen Innes, from July 2015 to July 2016, resulted in 1 Arrest.

Diversions programs for adults

Drug Court

Drug courts have proved to be effective in reducing reoffending in both Australian and international research.⁴⁰ The Parramatta Drug Court has been in operation for eighteen years, the Hunter Drug Court for seven years and the Sydney Drug Court for four years. They take referrals from certain metropolitan Local and District Courts of non-violent offenders who satisfy the eligibility criteria. Participants are assisted not only with specific drug rehabilitation services but also with their other needs such as accommodation and education.

The NSW Drug Court has undergone several evaluations. In 2008, NSW BOCSAR found that participants in the Drug Court were less likely to be reconvicted than offenders given conventional sanctions (mostly imprisonment). Compared with those in the comparison group, Drug Court participants were 17 per cent less likely to be reconvicted for any offence, 30 per cent less likely to be reconvicted for a violent offence and 38 per cent less likely to be reconvicted for a drug offence at any point during the follow-up period.⁴¹ Weatherburn et al noted: 'The apparent success of the Drug Court suggests that consideration should be given to expanding its reach' and discussed how the model might be adapted to a regional setting.⁴²

An earlier evaluation found that the Drug Court costs less than conventional sanctions and is likely to be a cost-effective approach to reducing re-offending.⁴³ Another 2008 study also found the Drug Court to be a cost effective use of resources.⁴⁴ The Centre for Health Economics Research and Evaluation estimated that the Drug Court program provided a net saving of \$1.758 million per year when compared with conventional sanctions.

More recent research in 2011 by BOCSAR confirmed the 2008 findings about the effectiveness of the Drug Court. The research showed that more intensive judicial supervision of offenders by the Parramatta Drug Court reduces the risk of relapse among drug dependent offenders.⁴⁵

⁴⁰ Jones, C., *Intensive judicial supervision and drug court outcomes: interim findings from a randomised controlled trial*, NSW Bureau of Crime Statistics and Research, (2011), 2.

⁴¹ Weatherburn, D., Jones, C., Snowball, L and Hua, J., *The NSW Drug Court: a re-evaluation of its effectiveness*, NSW Bureau of Crime Statistics and Research, (2008), 1.

⁴² Weatherburn et al *The NSW Drug Court: a re-evaluation of its effectiveness*, NSW Bureau of Crime Statistics and Research, (2008), 13.

⁴³ Goodall, S., Norman, R., and Haas, M, *The costs of NSW Drug Court*, NSW Bureau of Crime Statistics and Research, (2008).

⁴⁴ Goodall, S., Norman, R., and Ha, M., *Crime and Justice Bulletin: The costs of NSW Drug Court* Centre for Health Economics Research and Evaluation (CHERE), (2008).

⁴⁵ Jones, C., *Intensive judicial supervision and drug court outcomes: interim findings from a randomised controlled trial* , NSW Bureau of Crime Statistics and Research, (2011), 2.

Commenting on the findings, the Director of BOCSAR, Dr Don Weatherburn, said that ‘The NSW Drug Court is the benchmark against which all other offender rehabilitation programs in NSW should be assessed’.⁴⁶

These results are comparable with drugs courts in other jurisdictions.⁴⁷

Legal Aid NSW considers that drug courts, with associated drug rehabilitation and other services, should be available in regional areas. We note the recommendation of the NSW Legislative Council’s inquiry into *Provision of Drug Rehabilitation Services in regional, rural and remote New South Wales*⁴⁸ that the NSW Government pilot a Drug Court in Dubbo in parallel with an increase in rehabilitation services for the area.

Furthermore, access to the Drug Court can be improved by reviewing its cultural appropriateness and eligibility criteria. The Drug Court should be expanded to allow eligibility for violent offenders. Whilst a 2006 BOCSAR study could not conclude a link between methamphetamine use and violent assaults, it did note instances of methamphetamine induced psychosis can produce violent behaviour.⁴⁹ Anecdotally, Legal Aid NSW practitioners have seen many clients who use ATS become involved in violent offences, especially if their ATS use is compounded by mental health issues and/or the use of other drugs. Such clients should be eligible to access the benefits of the Drug Court.

Compulsory Drug Treatment Program

Certain metropolitan Local and District courts, including the Drug Courts, can refer male offenders with long-term drug dependence to the Compulsory Drug Treatment Program (CDTP) at the Parklea Correctional Centre in north-west Sydney.

This sentencing option is not available to residents of non-metropolitan NSW. Legal Aid NSW considers that both the Drug Court and the Compulsory Drug Treatment Program should be made available outside Sydney.

An evaluation of the CDTP found that it was effective in improving participants’ health and wellbeing over their time on the program.⁵⁰ Although the program was coercive, the vast majority of participants felt that their participation in the CDTP was voluntary. Participants made positive comments about the program and consistently expressed their desire to be in the program regardless of what stage they were in. This indicated that offenders in the program genuinely wanted to change their behaviour.

⁴⁶ NSW BOCSAR Media Release, *New Drug Court Research Findings*, 14 December 2011.

⁴⁷ Magistrate’s Court of Victoria, *Evaluation of the Drug Court of Victoria, Final Report* (2014). See also,

⁴⁸ NSW Legislative Council, Portfolio No 2 – Health and Community Services Committee, *Provision of drug rehabilitation services in regional, rural and remote New South Wales*, (2018), 65.

⁴⁹ McKetin, R., McLaren, J., Riddell, S., and Robins, L., National Drug and Alcohol Research Centre, UNSW, *The Relationship between methamphetamine use and violent behaviour*, Crime and Justice Bulletin No 97, August 2006.

⁵⁰ Dekker, J., O’Brien, K., and Smith, N., *An Evaluation of the Compulsory Drug Treatment Program*, NSW Bureau of Crime Statistics and Research, (2010), page ix.

MERIT

Magistrates Early Referral Into Treatment (**MERIT**) is available at some Local Courts in NSW, and enables eligible defendants to have their matter adjourned to allow them to focus on treating their drug or alcohol problem. Treatment may include detoxification, methadone, residential rehabilitation, individual and group counselling, case management and welfare support. It is usually planned as a 12 week intensive program. Successful engagement in the program can be taken into account in sentence proceedings.⁵¹

An evaluation found that completion of the program reduces the risk of reconviction of any type of offence in the next two years by 12 per cent.⁵²

There are several reasons why Legal Aid NSW considers MERIT to be highly effective. It is much easier for a person of limited means to get a place at a residential rehabilitation through MERIT than by themselves. MERIT also has a vetting process which means people are more likely to access higher quality treatment via this program. Further, MERIT officers can provide support as a contact person for drug users to reach out to if they struggle in the program. MERIT do not have a policy of treating ongoing drug use as a breach of their program that warrants immediate exclusion, and this is a further factor contributing to the success of its participants. Generally, there is very good support for MERIT from magistrates, but there are some exceptions.

Legal Aid NSW recommends the expansion of MERIT to:

- selected locations in regional and remote NSW;
- include individuals suffering from alcohol abuse problems in all MERIT locations; and
- include people in custody and those charged with strictly indictable and/or violent offences.

MERIT is not currently available in many regional, rural and remote areas in NSW which are typically areas of high need.

As with the Drug Court, any expansion of the MERIT program would require a commitment to both outpatient and residential drug and alcohol detoxification and rehabilitation facilities that are accessible and culturally appropriate.

⁵¹ Local Court Practice Note Crim 1: Case management of criminal proceedings in the Local Court [12.1].

⁵² Lulham, R., *The Magistrates Early Referral Into Treatment Program – Impact of program participation on re-offending by defendants with a drug use problem*, NSW Bureau of Crime Statistics and Research, (2009). Lulham also noted that the literature strongly suggests that small changes in the rate of convictions are associated with much larger changes in actual offending: at 9.

Work and development orders

Work and development orders (**WDOs**) allow people experiencing disadvantage to clear fines through unpaid work, courses or treatment. They are available to people who have a serious addiction to drugs, alcohol or volatile substances,⁵³ and drug and alcohol treatment can be undertaken as part of a WDO. Large fine debt and fine enforcement measures have a crippling effect on vulnerable people. Aboriginal people are more likely to accumulate large fine debt, and be subject to fine enforcement measures, such as driver licence sanctions and garnishee orders. Incarceration can then result from driving while subject to licence sanctions for fine default.⁵⁴

In 2016-17, 29 per cent of WDO participants were eligible because of serious addiction,⁵⁵ and the most common activity undertaken for all WDOs was drug or alcohol treatment.⁵⁶ Legal Aid NSW has a specialist WDO Service which assists not-for-profit organisations, government agencies and health practitioners to become WDO sponsors, and provides fines advice and WDO referrals to clients at specialist clinics and outreach events in regional locations. The WDO scheme relies heavily on support from the non-government sector, and depends on sponsors being available. Capacity to accept new WDO clients can be an issue, particularly in regional and remote areas. An improvement in the availability of drug rehabilitation services in rural, regional and remote areas would be of significant benefit to vulnerable people with both unpaid fines and drug and alcohol addictions.

There is evidence that WDOs have utility in aiding harm reduction for drug addicted individuals. An evaluation of the WDO scheme found 95 per cent of sponsors said the scheme had helped reduce the level of stress and anxiety their clients felt about their fines debt, and 87 per cent of sponsors said the scheme had enabled clients to address the factors that made it hard for them to pay or manage their debts in the first place, including their drug use.

⁵³ *Fines Act 1996* (NSW), section 99B.

⁵⁴ As noted by the Australian Law Reform Commission in its recent Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, in 2016, Aboriginal people made up 31% of all people imprisoned for driving while suspended or disqualified: see NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2016* (2017) tables 5, 14, cited in the Discussion Paper at p126.

⁵⁵ Revenue NSW / Department of Justice / Legal Aid NSW *Work and Development Order (WDO) Program Annual Report 16/17*, 24.

⁵⁶ Revenue NSW / Department of Justice / Legal Aid NSW *Work and Development Order (WDO) Program Annual Report 16/17*, 26.

Diversionsary programs and therapeutic approaches to youth justice

Drug rehabilitation services for young offenders

In the context of youth diversionary programs to avoid long-term involvement in the criminal justice system, we submit that there should be more attention paid to the drug rehabilitation needs of young offenders. The NSW Legislative Assembly's report for its *Inquiry into the Adequacy of Youth Diversionary Programs in NSW* (the Youth Diversion Inquiry)⁵⁷ found that a significant proportion of young offenders have substance abuse issues and that there is a lack of youth drug and alcohol rehabilitation services in NSW, especially in regional areas and Western Sydney. Even where services do exist, many do not appear to take a culturally appropriate or trauma-informed approach to service delivery.

We have observed that young Aboriginal clients referred to residential drug and alcohol services in Sydney and Canberra rarely graduate from the programs, and often do not remain at the service for more than 24–48 hours. Staff members are rarely Aboriginal, although their clients are often Aboriginal. Children who have experienced multiple traumas and have had chaotic family histories are required to conform to strict rules and are asked to leave for infractions such as swearing, smoking or possessing a can of deodorant. One of our clients left a residential rehabilitation placement because he was not allowed to use a PlayStation—he had been diagnosed with Attention Deficit Disorder and it was difficult for him to have nothing to do.

Youth Drug and Alcohol Court

The Young Drug and Alcohol Court (YDAC) was discontinued in 2012 after it was found to be not cost effective. One factor that contributed to this finding was the low numbers of YDAC participants. Clients were not provided with an indicative sentence before commencing the YDAC and hence some participants received longer sentences when they failed to complete the YDAC properly. By contrast, the NSW Drug Court operates as an alternative to imprisonment and the participant will not be penalised with an increased sentence if their participation in the program is inadequate. Further, many changes were made to the NSW Drug Court as it developed, increasing its cost effectiveness.

The report of the Youth Diversion Inquiry referred to a number of stakeholders calling for the reinstatement of the YDAC. Noting the effectiveness of the NSW Drug Court, Legal Aid NSW suggests consideration of reinstatement of a more efficient YDAC in conjunction with increased drug and alcohol services. Reinstatement of the YDAC should be with modifications to the previous model and supported by legislation which ensures that a participant is not given a greater sentence if they fail to complete the program.

⁵⁷ NSW Legislative Assembly Law and Safety Committee, *The Adequacy of Youth Diversionary Programs in New South Wales*, (2018).

MERIT type diversion in the Children's Court

Noting the effectiveness of MERIT in the adult courts, consideration should be given to a similar system of MERIT type diversion in the Children's Court.

Young Offenders Act

The *Young Offenders Act 1997 (NSW) (YOA)* applies to some offences under the DMT Act, but there are exclusions for more serious drug offences.⁵⁸ Legal Aid NSW would prefer a stronger focus on diversion and rehabilitation for young people charged with drug offences, including by removing or winding back the exclusions for drug offences under the YOA.

Youth on Track

Youth on Track is an early intervention scheme for 10-17 year olds that identifies and responds to young people at risk of long-term involvement with the criminal justice system. Police and local schools can refer a young person known to be at medium or high risk of offending to Youth on Track. The young person's engagement with the scheme is voluntary.

The program is not available across the State. The Department of Justice funds NGOs to deliver the scheme in six locations across NSW: Blacktown, the Hunter, the Mid North Coast, the Central West, Coffs and New England.

The program is currently being evaluated by NSW BOCSAR which is due to report in 2020. The Youth Diversionary Inquiry recommended that the NSW Government should expand Youth On Track so that it is available across NSW, should the results of the evaluation be positive. Meanwhile, Legal Aid NSW supports the expansion of Youth on Track as we have seen it achieve amazing results for very at-risk young people, for example in Coffs Harbour and Grafton which are areas which have high rates of arrests of young people.

Youth Koori Court

The Youth Koori Court is an alternative process in the NSW Children's Court for dealing with Aboriginal young people who have pled guilty to, or have been found guilty of, a criminal offence.⁵⁹ The Youth Koori Court has the normal powers of the Children's Court, but:

- provides for Aboriginal community involvement in the court process, including the young person's family and Elders;

⁵⁸ See YOA, ss 8(2)(e1)-(g).

⁵⁹ Children's Court of NSW, *Practice Note No 11: Youth Koori Court*, section 4.

-
- provides low volume case management mechanisms to facilitate greater understanding of and participation in the court process by the young person;
 - identifies relevant risk factors that may impact on the young person's continued involvement with the criminal justice system; and
 - monitors appropriate therapeutic interventions to address these risk factors.⁶⁰

It currently operates at Parramatta Children's Court and Surry Hills Children's Court.

Legal Aid NSW's Children's Civil Law Service (CCLS) partners with the Aboriginal Legal Service NSW/ACT to provide civil law advice and assistance to participants in the Youth Koori Court. Since the Youth Koori Court pilot commenced in 2015, the CCLS has worked with over 70 participants, who are all young Aboriginal people with complex needs and, often, a multitude of civil law issues. The following recent case study demonstrates the importance of a collaborative and therapeutic approach to these issues.

Case Study: Conrad

Conrad is a young Aboriginal man who was removed from his family due to concerns around substance abuse, transience and neglect. Conrad and his siblings were placed with his grandparents, but the placement broke down, resulting in the children spending time in foster care, crisis accommodation and residential out-of-home-care. Most of Conrad's placements have broken down because his carers were unable to provide the therapeutic care that his complex needs require.

Conrad has often had to couch-surf with friends or sleep on the streets, where he has been exposed to further violence and alcohol and drug use. He has also spent time in juvenile detention, which he has indicated was often preferable to sleeping on the street. He also has had interactions with the child protection system as a young parent, with his own child removed from his care.

Conrad struggles with drug and alcohol issues, as well as mental health issues which has included incidents of self-harm. His homelessness has impacted on his education, employment, contact with his child and ability to maintain professional appointments to address his drug use and mental health. His experiences have also engendered a mistrust of welfare agencies.

Conrad was referred to the Youth Koori Court and also received assistance from the Legal Aid NSW CCLS. A CCLS lawyer and youth worker worked with Conrad to provide a wrap-around service and help address his civil law and other non-legal needs. This included assistance with debt, accommodation, Centrelink and family law issues. Conrad was also referred to Alcohol and Other Drug (AOD) counselling, as well as mental health services to ensure that he received sufficient support around his mental health and risk of suicide. CCLS helped Conrad to set up a Work and Development

⁶⁰ Children's Court of NSW, *Practice Note No 11: Youth Koori Court*, section 1.3

Order (WDO), and by regularly engaging with AOD counsellor he is satisfying his outstanding fine debt.

The Youth Koori Court should be adequately funded to maintain this important role and to enable expansion to regional areas. This should be accompanied by a commitment to therapeutic services for young people, including outpatient and residential drug and alcohol detoxification and rehabilitation facilities that are accessible and culturally appropriate.

Their Futures Matter

Their Futures Matter (TFM) is a reform of the NSW Government to deliver coordinated multiagency interventions to vulnerable children. TFM delivers services under the pilot program 'A Place to Go' (APTG) which is targeted at 10–17 year olds entering and exiting the juvenile justice system, with a focus on young people in remand. Services provided include supported bail accommodation and education and FACS liaison officers at court. There is also an emphasis on providing health support via mental health and general health practitioners both at court and in the community. Specifically, APTG has included resourcing an alcohol and drug worker. These initiatives assist in providing diversion and holistic support to young people at the police station, in the community and at court.

Barriers to accessing diversionary programs

Aside from the difficulties in accessing particular diversionary programs discussed above, there are also several barriers to accessing drug rehabilitation services across the State. These include:

Lack of quality services

There is a significant lack of drug rehabilitation services across the State but especially in regional, rural and remote areas. Even in locations where some services may be available, these may not be suitable for everyone. There needs to be a mix of service provision across the State, for example in patient and out patient services.

We note that there are varying types of drug rehabilitation services within NSW and some clients have reported services of varying quality. There needs to be not only an increase in drug rehabilitation services but also a means to ensure quality service provision. Currently, NSW Health-funded drug and alcohol rehabilitation services are required to

maintain accreditation or be actively working to attain accreditation against standards.⁶¹ However, privately-run services are not required to be similarly accredited.⁶²

Cost to patients

Our clients have reported having to pay for a criminal record check before entering rehabilitation. The cost of travel is also of concern for our clients: clients are sometimes required to travel from Dubbo (where there are no rehabilitation services) to Kempsey for treatment—more than 600 kilometres away.

Waiting lists and waiting times for gaining entry

Legal Aid NSW solicitors report serious concerns about waiting lists for drug rehabilitation programs. People who are remanded in prison are highly motivated to address their drug problems so that they can present evidence of their rehabilitation to the courts if they are convicted. Judicial officers are also willing to grant bail to accused persons so that they can attend rehabilitation. However, we understand that they are frustrated by the absence of local services, particularly in western NSW.⁶³

The NSW Government has indicated that the commencement of sentencing reforms will see more offenders subject to supervision and programs to address their offending behaviour.⁶⁴ However, while funding has been provided to increase staffing levels in Corrective Services, this does not appear to be accompanied by increased funding of community based rehabilitation programs.

Pre entry conditions

Many residential rehabilitation facilities require a person on the waiting list to call the facility three times per week to remain on the waiting list. This can be onerous for those with limited telephone access and is particularly onerous on those in custody.

The requirement to produce a birth certificate is also a barrier for some of our clients. Many births are not registered, and to apply for one as an adult, requires several forms of identification. Disadvantaged people with literacy problems or cognitive disability find the process prohibitive.

⁶¹ For example, the National Safety and Quality Health Service (NSQHS) Standards.

⁶² NSW Government submission to the Inquiry into the provision of drug rehabilitation services in regional, rural and remote New South Wales, 17 January 2018, p 19. We note that the Ministerial Drug and Alcohol Forum approved in principle in November 2017 the development of a National Quality Framework for Drug and Alcohol Treatment Services

⁶³ 'Former judge backs rehabilitation push in Dubbo' *Daily Liberal* 4 October 2017

⁶⁴ NSW Department of Justice, *Sentencing Reform*, <http://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx> accessed 21 November 2017

Mandatory detoxification

The requirement to detoxify before entering a rehabilitation facility is sometimes a barrier. Detoxification is a precondition for rehabilitation and it is essential that both of these services are available. Legal Aid NSW understands that public hospitals do not provide detoxification facilities.

Lack of culturally appropriate services

As mentioned above, there is a lack of culturally appropriate services for Aboriginal people. Legal Aid NSW recommends that all rehabilitation services should undertake localised Aboriginal cultural awareness training to build their capacity to deliver services to Aboriginal people. There should also be more Aboriginal community controlled and culturally appropriate rehabilitation centres, particularly in regional, rural and remote communities.

Lack of services in regional, rural and remote areas

The increase in amphetamine use is particularly pronounced in regional, rural and remote areas. Whilst police records of possession of amphetamines has increased generally over the past decade, there have been marked increases in some regional areas. For example, in the Central Coast and Hunter Valley a 400 per cent increase; in the Southern Highlands a 500 per cent increase; and in the Far West there has been a 700 per cent increase. Most notably, in Coffs Harbour and Grafton there has been a 1000 per cent increase.⁶⁵

Legal Aid NSW practitioners report that ATS is readily available in some areas and that there is an increased use of Ice in conjunction with other drugs, like Heroin.

Despite this increase in amphetamine use, Legal Aid NSW solicitors in our regional offices report serious concerns about the adequacy of treatment options available. Our clients in regional and remote areas have very poor access to detoxification and drug rehabilitation services. Drug and alcohol related crime rates are high, and the drug and alcohol related drivers of crime are not addressed. Judicial officers are willing to refer to detoxification and rehabilitation services but they are often not available.

Legal Aid NSW's Cooperative Legal Service Delivery (CLSD) Program comprises 12 regional justice partnerships across regional and remote NSW. In recent years, the single most persistent issue arising from the CLSD Program partnerships is the lack of detoxification and rehabilitation services.

Frequently, the only way our clients can access treatment is to travel hundreds of kilometres. Many are reluctant to do this because of family responsibilities, cultural obligations, or difficulty obtaining housing or employment in another town. For Amelia, in

⁶⁵ Han, E., *Ice use is growing, but in one region it has shot up by 1000 per cent*, Sydney Morning Herald, 7 May 2019.

the case study below, the lack of rehabilitation facilities led to separation from her young children.

Case Study: Amelia

Legal Aid NSW assisted Amelia in her family law proceedings. She was in her thirties, lived in a town in western NSW and had two children aged under 10 years. After she separated from their father, Tony, Amelia maintained primary care of the children and continued to engage in employment as she had done during her adult life. However, Amelia experimented with the drug 'ice' and her dependence on the drug increased. Amelia began a new relationship that was characterised by domestic violence. Amelia and Tony began to share the care of the children, and Tony brought an application in the Federal Circuit Court for an order that the children live with him.

From the commencement of court proceedings until their conclusion two years later, Amelia continued her struggle with addiction, homelessness, unemployment and unhealthy relationships. Rehabilitation and detoxification facilities were not available in Amelia's town. Finally, the Court ordered that the children live with their father and spend only supervised time with Amelia at a family member's home.

If rehabilitation and detoxification facilities had been available, it is likely that Amelia would have availed herself of those treatments as she could have stayed within close proximity to her children. If her treatment was successful, she would have been in a very different position before the court or been able to resolve her matter at an earlier stage on less onerous terms.

Barriers to access for people in custody

People detained in the John Moroney and Dyllwynia Correctional Centres in western Sydney are able to access the Intensive Drug and Alcohol Treatment Program, a residential program for people whose drug or alcohol problem is linked to their offending behaviour. No such program is available to offenders in non-metropolitan areas of NSW, despite the significant needs in these areas.

Legal Aid NSW is also concerned about the barriers for people on remand to access community-based drug rehabilitation services. Gaining admission to a rehabilitation service requires that service to assess a client for suitability. This is often done by a lengthy telephone assessment.

In 2016, Corrective Services NSW changed its policy so that assessment reports for residential rehabilitation programs can now only be undertaken following a guilty plea to assist in identifying sentencing options, or where the inmate has been remanded for the purpose of a Supreme Court bail determination.

Local and District Courts no longer order drug and alcohol assessments and, from 3 June 2019, the Supreme Court will also no longer order such assessments. This means that

the only official means of entering a rehabilitation facility will be if clients plead guilty and are eligible for the Drug Court or are given a sentence that falls within the guidelines for the CDTF. If the client defends their charges, neither of those options are open to them.

Practical issues arise where an accused tries on their own to be assessed for a program. In the experience of Legal Aid NSW solicitors, an accused who has an initial phone assessment and is then required to provide further information to the rehabilitation facility such as a criminal history report may not be helped by Services and Program Officers (SAPOs). This results in the accused automatically being found unsuitable. They may also be required to phone the facility each week to maintain their place on the waiting list. This is a significant barrier for a person in gaol, as the case study of Graeme, outlined below, illustrates. Legal Aid NSW solicitors observe that the experience of Graeme is not unusual.

Case Study: Graeme

Legal Aid NSW acted for Graeme, an Aboriginal man with long-term drug and alcohol dependence who lives in regional NSW. He was charged with a number of offences related to domestic violence in August 2016. He was bail refused and pleaded guilty to the charges at his first appearance in the Local Court. A court-ordered drug and alcohol assessment identified Graeme as suitable for a long term residential rehabilitation program. He was accepted into a facility, but with an expected wait time of approximately six weeks. Graeme was told he must call the facility three times a week between 10am and 4pm to maintain his position on the waiting list.

By November 2016, Graeme had run out of gaol money and was unable to keep calling the facility three times a week. During that time, his brother committed suicide, and Graeme was refused leave by Corrective Services NSW to go to the funeral. He only called the facility once a week, and so lost his place on the program. At his solicitor's request he was placed back on the waiting list, but at the bottom of the list and with an expected wait time of more than three months. A further bail application was refused.

By December 2016 Graeme had progressed to the top half of the list. By the end of January 2017 however, he gave up trying to get into the program and proceeded to be sentenced. While the sentence he received was backdated, he had spent five months on remand with no access to a much needed rehabilitation program.

Within weeks of his matter being finalised, Graeme reoffended and was returned to prison.

SAPOs previously assisted inmates with the facilitation of telephone assessments but this service has now been withdrawn. Corrective Services now expects legal practitioners to arrange phone assessments for their clients through Just Connect (AVL link). Legal Aid NSW views this as an unsatisfactory and unsustainable use of limited AVL resource. Moreover, neither Legal Aid NSW nor Aboriginal Legal Services (**ALS**) are properly

resourced or skilled to undertake this role. Private practitioners on legal aid grants are also not funded to perform this role.

Rehabilitation facilities are also struggling with this change, fielding calls and AVLs with several legal practitioners rather than working with SAPOs who are more familiar with the rehabilitation facilities, the assessment processes and the inmates.

Compounding the situation, recent changes to the Supreme Court Bail Practice Note means that a Supreme Court bail application will no longer be listed until all of the conditions for bail are in place. Therefore, a client has to be approved for a bed in a residential facility and the bed must be available before the bail application can even be listed. This will make it significantly more difficult for people on remand to enter a drug rehabilitation facility.

Legal Aid NSW submits that the above mentioned barriers could be addressed through:

- revising the current Corrective Services NSW's policy with respect to alcohol and drug rehabilitation assessments reports;
- the re-introduction of dedicated alcohol and drug workers in prisons;
- measures to facilitate access by Legal Aid NSW staff and rehabilitation service providers to prisoners on remand to assist with assessment processes;
- the establishment of a free call service to rehabilitation providers; and
- the appointment of a 'diversion officer' funded by Corrective Services for each correctional centre to undertake rehabilitation and diversion work.

Justice Reinvestment

Legal Aid NSW supports adopting a justice reinvestment approach in addressing the prevalence and impact of ATS use in NSW. This would involve evaluating the costs to the criminal justice and child protection systems associated with ATS use, comparing this with the resources being allocated to detoxification and rehabilitation, and considering whether there may be any savings in devoting further resources to preventative measures.

There currently appears to be a discrepancy between law enforcement expenditure and health expenditure in addressing ATS usage. As noted in *Issues Paper 4* at pages 9-10:

An analysis of 2009/10 funding for illicit drug policy activities across all Australian governments found that approximately 64.9% of funding was directed towards law enforcement compared to 9.5% towards prevention, 22% towards treatment, 2.2% towards harm reduction and 1.4% towards other domains.

According to Justice Reinvest NSW,⁶⁶ evidence shows that strategic community-driven investment in localised early intervention, prevention and diversionary solutions can reduce crime, build local capacity and strengthen local communities. For example, a justice reinvestment approach would channel resources into education, rehabilitation services and diversionary options in areas in regional NSW with a high usage of ATS, with a view to diverting ATS users from the criminal justice and child protection systems.

A Justice Reinvestment approach would also focus on consulting on what is needed most within a local community and it is particularly significant for Aboriginal communities. It is consistent with a 'strengths-based, community led approach' endorsed by the Closing the Gap Report 2019.⁶⁷

ATS use and custody

Legal Aid NSW has significant concerns about the health care (including treatment for ATS use) given to the inmates. Feedback from inmates to the *Full House* report of the Inspector of Custodial Services was that a lack of physical and mental health care was 'the single biggest issue at all centres'.⁶⁸ Our Legal Aid NSW practice experience reflects the feedback provided to the *Full House*. In particular, many inmates face difficulties in accessing drug rehabilitation services in custody.

Post custodial support and community based sentences

Legal Aid NSW is concerned about the absence of transition support and throughcare in New South Wales. Our solicitors report that clients have been released without accommodation, arrangements for transport, at night in a country town when there is no train until morning, without medications or prescriptions, and without any treatment for their substance addiction. It is not uncommon for inmates to be released from the Sydney Central Law Courts or the Downing Centre Court complex in their prison greens and with no accommodation arrangements, having received no treatment in custody for their substance abuse and/or mental health issues and at potential risk of reoffending within a short time.

As noted above, Legal Aid NSW submits that Aboriginal communities and agencies in particular should be empowered to participate in every stage of the criminal justice process, including in providing throughcare support. The North Australian Aboriginal Justice Agency's Throughcare Project provides a useful model for New South Wales,⁶⁹ as did the *Prisoner Throughcare* program offered by the ALS in New South Wales and the Australian Capital Territory until funding of the program ceased in 2014.

⁶⁶ <http://www.justreinvest.org.au/what-is-justice-reinvestment>

⁶⁷ Department of the Prime Minister and Cabinet, *Closing the Gap Report 2019*, p 12.

⁶⁸ Inspector of Custodial Services *Full House: The growth of the inmate population in NSW* (2015) 12.

⁶⁹ NAAJA has prison-based support workers helping offenders with parole, and community based case managers who help offenders get ready to leave prison and support them in the community.

Currently, High Intensity Program Units (HIPUs)⁷⁰ are established in seven correctional centres across the State with two of them (at Wellington and Mid North Coast Correctional Centres) dedicated to the specific needs of Aboriginal inmates. Inmates complete their HIPU programs within four months before release and prepare a plan for reintegration into the community. However, Legal Aid NSW practitioners report that, despite the work that inmates may do in a HIPU, the lack of drug rehabilitation services in the community means that there are often difficulties in continuing their rehabilitation when they transition into the community. In addition, where inmates are unable to adequately access prescription medication upon release or unable to access mental health services to deal with anxiety/depression, these untreated needs may lead to relapse and/or drug usage.

Legal Aid NSW's Civil Law Service for Aboriginal Communities conducts the Aboriginal Women Leaving Custody (AWLC) Service which focuses on addressing the pressing legal needs of women facing a transition out of custody. The AWLC Service visits Silverwater Women's Correctional Centre on a fortnightly basis to provide legal advice and community legal education. Because a high proportion of women leaving custody face the prospect of insecure housing or homelessness on their release, some of the main areas of work conducted by the AWLC Service centre on removing barriers to housing. Similar services are needed in other correctional centres, especially in regional, rural and remote areas.

The Youth Diversion Inquiry also explored transitional and post-release support for young people, noting the need for holistic support including drug and alcohol services. Current initiatives by Juvenile Justice in this area include the introduction of new caseworkers to help young people transition out of custody. Such initiatives should be expanded wherever possible.

⁷⁰ https://www.justice.nsw.gov.au/Documents/Reforms/HIPU_Fact_Sheet_27.03.18_2.pdf