



NSW Ombudsman

Discussion Paper:

*The Police Powers  
(Drug Premises) Act 2001*

June 2003

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## Introduction

The *Police Powers (Drug Premises) Act 2001* (the 'Drug Premises Act') commenced on July 1, 2001. The Act confers new powers on police in relation to drug premises. It also amends the *Summary Offences Act 1988* (the 'Summary Offences Act') by extending police powers to issue 'reasonable directions' to persons suspected of buying or selling prohibited drugs.<sup>1</sup>

Section 21 of the Act requires that the New South Wales Ombudsman review the operation of the legislation for two years from the date of commencement.<sup>2</sup> At the conclusion of the review period, we will prepare a report for Parliament documenting our activities, findings and any recommendations for change. A research project is currently underway to facilitate our monitoring of the operation of the Act. The purpose of this discussion paper is to:

- provide some background to the legislation;
- identify issues which have arisen to date; and
- invite submissions and comment from interested parties on the operation of the Act.

This paper sets out a number of issues and invites comment on particular questions. However, your comments are welcome on any aspect of the legislation and its implementation by police. We intend to use material from your submissions in our report. Please note that we will try not to identify civilians or police involved in incidents either by name or by details that might otherwise identify them. If you do not want all or some aspects of your submission to be attributed to you or your organisation, please advise us accordingly. We are happy to discuss any other concerns about confidentiality that you may have.

**Any submissions or correspondence relating to this review should be sent to:**

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**Due date for submissions: 1st August 2003**

<sup>1</sup> The Drug Premises Act also amends the *Bail Act 1978* by removing the presumption in favour of bail for offences relating to the unauthorised possession or use of a prohibited firearm (*Bail Act* s 9 (1) (e)) and the *Criminal Assets Recovery Act 1990* by extending the application of the criminal assets confiscation provisions to persons convicted of 'allowing premises to be used' as drug premises (see *Criminal Assets Recovery Act 1990*, s (2) (e1) and s 6 (4)).

<sup>2</sup> The review period concludes on June 30, 2003.

## Background

### Cabramatta and the street-level drug trade

The Drug Premises Act had its genesis in the complex and often highly charged debate on drug law enforcement and policing in the Sydney suburb of Cabramatta. Although the law applies state-wide, 'drug house' legislation was primarily introduced to address the law enforcement issues that had emerged in policing the illicit drug market in this suburb. Prior to addressing the substance and intention of this law, it is worthwhile briefly outlining the recent history of drug law enforcement in Cabramatta.

In the 1990s, heroin use generated considerable public concern in New South Wales and Cabramatta, in south-western Sydney, became well-known as a major nexus for the street-level distribution of the drug.<sup>3</sup> This has been, in part, because of the emergence of a visible street-level drug trade, particularly around Cabramatta Railway Station. By the late 1990s, the suburb had been dubbed the 'heroin capital' of Australia. At a local level and beyond, Cabramatta's street-level drug trade became the subject of media attention and public debate. Cabramatta is also one of Sydney's most ethnically diverse suburbs, and has a large South East Asian community. Since the mid 1990s, the involvement of some young Vietnamese in a visible, street-level drug trade has also been a focus of media attention.<sup>4</sup>

As part of the discussion on the drug trade in Cabramatta, questions were raised about how the drug trade was, and could be, effectively policed. As a consequence, aspects of drug law enforcement in Cabramatta came under close public scrutiny. In June 2000, a Legislative Council Committee began an inquiry into policing in Cabramatta.<sup>5</sup> Central to this inquiry was the question of whether adequate resources had been allocated to drug law enforcement.<sup>6</sup>

Since the 1990s, several strategies have been adopted in an attempt to deal with the illicit drug trade in Cabramatta. These have included undercover drug 'buy/busts' and the use of Close Circuit Television (CCTV) cameras, positioned at key vantage points in the suburb's Central Business District (CBD), as a policing tool.<sup>7</sup> But probably the most significant policing strategy to be implemented was the use of intensive, street policing operations. In July 1997, 'Operation Puccini' was launched. This was a major policing initiative targeted at the street-level drug trade and ran for several years.<sup>8</sup>

Central to the strategy police adopted in Puccini was maintaining a constant and overt uniformed police presence in public areas where street-level dealing was believed to be prevalent. Puccini's aim was to eradicate the most visible aspects of the drug trade and to have broader effects such as discouraging drug users from coming to the suburb to 'score'. The operation also aimed to reduce drug-related crime, such as burglary and theft, in Cabramatta.

While Operation Puccini appears to have reduced the incidence of drug dealing in the Cabramatta Central Business District (CBD) since its inception<sup>9</sup>, it may have had countervailing effects on the illicit

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<sup>3</sup> For a discussion of possible reasons for this, see NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3 Report on Inquiry into Cabramatta Policing, 2001, pp 11-13.

<sup>4</sup> David Dixon and Lisa Maher, 'Anh Hai: policing, culture and social exclusion in a street heroin market', *Policing and Society*, 2002, Vol. 12, No. 2, pp. 93-110.

<sup>5</sup> The NSW Legislative Council General Purpose Standing Committee No. 3 conducted the inquiry. Their report, entitled, 'Cabramatta Policing', was published in July, 2001.

<sup>6</sup> The other two terms of reference of the inquiry into policing in Cabramatta were to determine whether the 'Crimes Index' had an impact on policing in the suburb and to assess the ability of the Local Area Command (LAC) to meet the needs of non-English speaking residents.

<sup>7</sup> Police Interview 1, 28/06/02. For further discussion of policing strategies used in Cabramatta, see Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks: Heroin, Health and Harm in South West Sydney*, National Drug and Alcohol Research Centre Monograph No. 38, University of New South Wales, Sydney, 1998.

<sup>8</sup> NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3, Report on Inquiry into Cabramatta Policing, 2001, p. 37. Co-ordinated at a regional level, the operation utilised officers from Cabramatta and other Local Area Commands.

drug market, such as the displacement of the drug market into surrounding areas.<sup>10</sup> Notwithstanding the operation's apparent success in reducing drug dealing in public places, the illicit drug market in Cabramatta has been able to survive. Illicit drug markets have been known for their ability to adapt to the strategies put in place to police them.<sup>11</sup> Some researchers have attributed this to the nature of drug offending itself:

Drug offences, unlike for example, certain types of theft, are 'polymorphous' activities requiring only that the vendor and purchaser know how and where to contact each other. As such, they may be especially susceptible to displacement, which may take a variety of forms.<sup>12</sup>

In response to the tactics employed by police, drug users and dealers developed new 'modus operandi'. Practices such as 'internally concealing' drugs, using mobile phones to organise meetings with dealers and conducting transactions in new locations became more common.<sup>13</sup> In Cabramatta, drug suppliers who had been pressured out of the heavily policed public spaces increasingly moved their activities indoors, into flats and houses in residential areas.

## The emergence of drug houses

'Drug houses' are not a new phenomenon in NSW. Houses, flats, sheds, warehouses and other types of premises have been used for illicit drug supply and manufacture for some time.<sup>14</sup> Drug supply operations housed inside premises are more likely to be shielded from police attention than those operating in public places. In addition, larger quantities of drugs can be stored on premises, where they can also be cut into smaller 'deals' for eventual sale to the consumer. In the late 1970s, for example, the following drug supply operation was being run from a house in an inner-city suburb:

Upon arrival in Sydney, the heroin was delivered to Mr BL's electronic fortress in Sydenham. Using an ordinary household electric mixer to remove lumps, BL adulterated 13 ounces of No. 4 heroin with three ounces of glucodin powder to make up one pound packets which he sealed in plastic sacks.<sup>15</sup>

But while the use of premises for illicit drug manufacture or supply is not new, it appears that in the 1990s, drug premises burgeoned in some areas.

Police reported that 'drug houses' proliferated in Cabramatta in the late 1990s. It is possible that the increasing risk of dealing in public places, generated by intensive street policing, caused the 'displacement' of the drug trade into these premises.<sup>16</sup> 'Drug houses' were often distinguishable by the presence of heavy fortifications, such as steel doors and barriers. These measures aimed to provide protection against rival drug dealers, while also providing an obstacle to police entry. 'Lookouts' were also sometimes positioned nearby, to keep watch and alert occupants of an approach by police.

<sup>9</sup> NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3, Report on Inquiry into Cabramatta Policing, 2001, p. 45, and Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks: Heroin, Health and Harm in South West Sydney*, 1998, p. 124.

<sup>10</sup> Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks: Heroin, Health and Harm in South West Sydney*, 1998, especially pp 102-114.

<sup>11</sup> Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks: Heroin, Health and Harm in South West Sydney*, 1998, p 111-114. Academic Grant Wardlaw has argued that 'Probably the most serious impediment to effective enforcement is the remarkable regenerative quality of most illicit drug markets.' Quoted in P. Green and I. Purnell, *Measuring the success of law enforcement agencies in targeting major drug offenders relative to minor drug offenders*, National Police Research Unit, Adelaide, 1995, p. 6.

<sup>12</sup> D. Dixon and L. Maher, 'Ahn Hai: Policing, Culture and Social Exclusion in a Street Heroin Market', in *Policing and Society*, 2002, Vol 12, No.2, p. 95.

<sup>13</sup> Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks: Heroin, Health and Harm in South West Sydney*, 1998, especially pp. 102-114.

<sup>14</sup> See Alfred McCoy, *Drug Traffic, Narcotics and Organised Crime in Australia*, Harper and Row, Sydney, 1980. This history of the drug trade in Australia includes accounts of illicit drug supply operations run from premises in NSW, such as a flat in the Sydney suburb of Darlinghurst that was used for cocaine supply in the 1920s (pp. 120-122).

<sup>15</sup> Alfred McCoy, *Drug Traffic, Narcotics and Organised Crime in Australia*, Harper and Row, Sydney, 1980, p. 332.

<sup>16</sup> NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3 Report on Inquiry into Cabramatta Policing, 2001, p. 45.

Major operations to deal with drug houses in Cabramatta were conducted prior to the formulation of the Drug Premises Act. For instance, in October 2000, police staged Operation Scotsville, which targeted 'drug houses' in the area. Search warrants were executed on a number of houses, and by February 2001, 39 offenders had been charged.<sup>17</sup>

But 'drug houses' continued to confront police with difficulties, particularly in establishing sufficient grounds to lay charges for offences such as drug supply.<sup>18</sup> Police reported that by the time they had gained entry to fortified premises, the drugs had already been destroyed. Once inside, police would often find items associated with drug supply, such as scales and quantities of balloons and foil used for wrapping drugs, but did not find sufficient evidence to lay charges.<sup>19</sup> The Drug Premises Act was introduced to enable police to take action in circumstances in which there would otherwise be insufficient evidence to lay charges for offences such as drug supply.

## Introduction of the legislation

On March, 27, 2001, the Premier delivered a statement announcing the Cabramatta Anti-Drug Strategy, which included the proposal to introduce 'drug house' legislation. The anti-drug strategy was a three-stage plan designed to deal with a range of criminal justice, health and social issues associated with illicit drug use in Cabramatta. Stage one, the 'Criminal Justice Plan', comprised:

- new police powers in respect of so-called 'drug houses';
- an extension of police powers to issue reasonable directions under the Summary Offences Act, empowering police to 'move on' people buying or selling prohibited drugs; and
- new police powers to order that 'internal searches' of persons suspected of having internally concealed an illegal drug for the purposes of supply, be conducted by medical practitioners.<sup>20</sup>

In sum, the 'Criminal Justice Plan' involved the introduction of two new drug laws aimed at countering several different aspects of the drug trade. The remainder of the Cabramatta Anti-Drug Strategy involved drug treatment and prevention initiatives. Stage two involved a compulsory treatment plan, known as the Magistrates Early Referral Into Treatment Scheme (MERIT) and stage three was a plan for 'prevention and early intervention.'

The Drug Premises Act was debated in Parliament in June, 2001, and commenced on July 1, 2001. The application of the law is state-wide. When the law was introduced in Parliament, the Attorney General stated that the government was 'legislating to ensure that drug dealers are caught across the state'.<sup>21</sup>

In 2002, the Drug Premises Act was incorporated into the *Law Enforcement Powers and Responsibilities Act 2002*. This Act consolidates police 'powers and responsibilities' into a single piece of legislation, but, at the time of writing, this Act had not yet commenced.

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<sup>17</sup> NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3 Report on Inquiry into Cabramatta Policing, 2001, p. 37.

<sup>18</sup> The principal drug legislation in NSW is the *Drug Misuse and Trafficking Act 1985*. Supply, possession and a number of other offences relating to prohibited drugs are contained within this Act.

<sup>19</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act, 2001*, p. 1.

<sup>20</sup> The *Police Powers (Internally Concealed Drugs) Act 2001* commenced on July 1, 2002 and will also be monitored by the NSW Ombudsman.

<sup>21</sup> The Hon. R. Debus, Second Reading Speech, NSWPD, May 30, 2001, p. 13997.

# The provisions of the Drug Premises Act

## Drug premises search warrants

The Drug Premises Act gives police new powers in respect of ‘drug houses’, referred to in the legislation as ‘drug premises’. In the Act, drug premises are defined as any premises ‘used for the unlawful supply or manufacture of any prohibited drugs’.<sup>22</sup>

The Act creates a new type of search warrant. Previously, if a search warrant was required in a drug investigation, a warrant could be applied for under the *Search Warrants Act 1985*. This would authorise police to enter and search premises for particular ‘things’, such as a ‘thing connected with a particular narcotics offence’.<sup>23</sup> The new Act creates a ‘drug premises’ search warrant, authorising police to enter and search premises if they have ‘reasonable grounds for believing’ that the premises are being used for the unlawful manufacture or supply of a prohibited drug.<sup>24</sup>

Police adopt what they have described as a ‘two-stage’ approach to the ‘gathering of evidence to prove that premises are drug premises’.<sup>25</sup> Firstly, they must gather evidence that can be used in an application for a search warrant. This evidence must be sufficient to satisfy a magistrate that police have ‘reasonable grounds’ for believing premises are drug premises.<sup>26</sup> If the search warrant is granted, police have the opportunity to gather further evidence that premises are drug premises.

## A drug premises ‘operation’

The following scenario has been developed to illustrate a typical situation in which police might decide to use the legislation, and outlines each stage involved in using the powers contained in the Act:

Several residents suspect that drug dealing is taking place at a nearby house and have reported it to police. On some days, neighbours had noticed a constant stream of people arrive at the house well into the night, and most appeared to stay for a short period of time. Police on patrol in the area had also observed known drug users loitering in the lane behind the house.

Detectives at the Local Area Command nominate the house as a ‘target’ premises and an operation is organised. Undercover police conduct several successful ‘drug buys’ and police now believe that they have sufficient evidence to apply for a search warrant. One of the sergeants<sup>27</sup> in the detective’s office prepares a ‘drug premises’ search warrant application and it is put before the local magistrate. The magistrate is satisfied that there are ‘reasonable grounds’ to issue a search warrant and it is granted.<sup>28</sup>

That afternoon, a team of police executes the search warrant and finds five people on the premises. One person had several ‘foils’ of heroin stashed in his jeans, and several others appear to be drug affected. Police seize scales and a mirror with traces of white powder on it. Large quantities of small water balloons and aluminium foil are also found on the floor in the lounge-room.<sup>29</sup>

<sup>22</sup> *Police Powers (Drug Premises) Act*, s. 5 (1).

<sup>23</sup> *Search Warrants Act*, s. 5 (1) (c).

<sup>24</sup> *Police Powers (Drug Premises) Act*, s. 5 (1).

<sup>25</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act, 2001*, p. 11.

<sup>26</sup> *Police Powers (Drug Premises) Act*, s. 5 (1) and s. 5 (2).

<sup>27</sup> Section 5 (1) of the Act stipulates that the police officer applying for the search warrant must be ‘of or above the rank of sergeant’.

<sup>28</sup> *Police Powers (Drug Premises) Act*, s. 5 (1) and s. 5 (2).

<sup>29</sup> Drugs sold in powder form, such as heroin and cocaine, are often sold in small packages called ‘caps’. The powder drugs are wrapped in aluminium foil, and enclosed in a tiny water balloon.

Four of the occupants are charged with being found on drug premises<sup>30</sup> and the lessee is charged with allowing his premises to be used as drug premises.<sup>31</sup> Charges are also laid under the *Drug Misuse and Trafficking Act 1985*.<sup>32</sup>

At court, the prosecution is able to prove, beyond reasonable doubt, that the premises were drug premises at the time of the offence.<sup>33</sup> The defendants' lawyers are not able to satisfy the court that their clients were on the drug premises for a lawful purpose, or with a lawful excuse.<sup>34</sup>

Each of those charged with being 'found on drug premises' is convicted, and they receive gaol terms ranging in length from six months to a year. The charges laid under the *Drug Misuse and Trafficking Act 1985* are successfully prosecuted. But the prosecution for 'allowing premises to be used' is not successful. The lessee had returned from one month's holiday the day before police executed the search warrant and the prosecution was unable to prove that he knew the premises were being used for drug supply.<sup>35</sup>

## Drug 'move on' powers

In addition to creating new powers in respect of 'drug houses', the Drug Premises Act also gives police new powers to deal with the street level drug trade. By amending section 28F of the Summary Offences Act, the Drug Premises Act extends police powers to issue 'reasonable directions' to people in public places. These provisions are usually referred to as the 'move on' powers.

Under the new drug 'move on' provisions, police may issue a direction to a person if they have 'reasonable grounds to believe' that they are in a public place for the purpose of buying or selling drugs.<sup>36</sup> A police officer may, for example, issue a direction to a person they believe is in a public place with the intention of supplying drugs to leave the area for a prescribed period of time. Police may issue a similar direction to a person who they believe is in a public place for the purpose of buying prohibited drugs. These new drug 'move on' provisions aim to assist police in dealing with drug transactions that occur in public places.<sup>37</sup>

## Offences and penalties created by the Drug Premises Act

The Act creates several key offences relating to 'drug premises'. These offences are:

- being on, entering or leaving drug premises;<sup>38</sup>
- allowing use of premises as drug premises;<sup>39</sup> and
- organising drug premises.<sup>40</sup>

A person cannot be convicted of any of the above offences unless it is first proven in court that premises are drug premises.<sup>41</sup>

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<sup>30</sup> *Police Powers (Drug Premises) Act*, s. 12 (1).

<sup>31</sup> *Police Powers (Drug Premises) Act*, s. 13.

<sup>32</sup> Charges are laid under section 25A (1) of the *Drug Misuse and Trafficking Act 1985* for 'on-going supply' against the person who supplied drugs to the undercover officers on three occasions prior to the execution of the search warrant. Another defendant is charged with possession under section 10 of the *Drug Misuse and Trafficking Act 1985*.

<sup>33</sup> *Police Powers (Drug Premises) Act*, s. 11 (1). Section 11, which sets out the criteria that may be used to determine that premises are drug premises, is quoted in full on page 12.

<sup>34</sup> *Police Powers (Drug Premises) Act*, s 12 (2).

<sup>35</sup> *Police Powers (Drug Premises) Act*, s. 13.

<sup>36</sup> *Summary Offences Act*, s 28 F (1) (d) and (e).

<sup>37</sup> The Hon. R. Debus, NSWPD, May 30, 2001, p. 13999.

<sup>38</sup> *Police Powers (Drug Premises) Act*, s. 12.

<sup>39</sup> *Police Powers (Drug Premises) Act*, s. 13.

<sup>40</sup> *Police Powers (Drug Premises) Act*, s. 14.

<sup>41</sup> *Police Powers (Drug Premises) Act*, s. 5 (1).

Several other offences in the Act relate to the obstruction of police during the execution of the search warrant. A person may be convicted of these offences even if premises are *not* proven to be drug premises.

It is also an offence to disobey a drug-related reasonable direction (also known as a drug 'move on'), provided that it has been issued in accordance with the Act.<sup>42</sup> There is no custodial penalty for this offence.

The offences and penalties contained in the Drug Premises Act are set out below.

| <b><i>The Police Powers (Drug Premises) Act 2001</i></b><br><b>Offences and Penalties</b>   |   |
|---|---|
| <b>Offences</b>   | <b>Penalties</b>  |
| <p><b>Drug premises offences of:</b></p> <ul style="list-style-type: none"> <li>• being on, entering or leaving drug premises;<sup>43</sup></li> <li>• allowing use of premises as drug premises;<sup>44</sup> and</li> <li>• organising drug premises<sup>45</sup></li> </ul>  | <p><b>first offence:</b></p> <ul style="list-style-type: none"> <li>• 12 months imprisonment, or a fine of \$5,500, or both</li> </ul> <p><b>second offence:</b></p> <ul style="list-style-type: none"> <li>• 5 years imprisonment, or a fine of \$55,000, or both</li> </ul> |
| <p><b>Offences that relate to obstructing a police officer executing a search warrant:</b></p> <ul style="list-style-type: none"> <li>• wilfully prevent a police officer from entering or re-entering premises;<sup>46</sup></li> <li>• wilfully obstruct or delay a police officer from entering or re-entering premises;<sup>47</sup></li> <li>• give alarm for the purpose of either notifying another person of the presence of police, or delaying police entry<sup>48</sup></li> </ul> | <p>12 months imprisonment or a fine \$5,500, or both</p>  |
| <ul style="list-style-type: none"> <li>• fail to provide, without a reasonable excuse, full name and address to police<sup>49</sup></li> </ul>  | <p>Maximum penalty is a fine of \$5,500<sup>50</sup></p>  |
| <p><b>'Drug-related reasonable directions:</b></p> <ul style="list-style-type: none"> <li>• fail or refuse to comply with a direction, without a reasonable excuse, issued in accordance with the Act<sup>51</sup></li> </ul>   | <p>Maximum penalty is a fine of \$220<sup>52</sup></p>  |

<sup>42</sup> *Summary Offences Act*, s. 28 F (6). Disobeying a reasonable direction is only an offence if the police officer has complied with certain procedural requirements when they issue the direction, and if after giving a first direction, 'the person initially refuses to comply, the police officer may again give the direction and, in that case, warn the person that failure to comply with the direction may be an offence.' *Summary Offences Act*, s. 28 F (5).

<sup>43</sup> *Police Powers (Drug Premises) Act*, s. 12.

<sup>44</sup> *Police Powers (Drug Premises) Act*, s. 13.

<sup>45</sup> *Police Powers (Drug Premises) Act*, s. 14.

<sup>46</sup> *Police Powers (Drug Premises) Act*, s. 9 (1) (a).

<sup>47</sup> *Police Powers (Drug Premises) Act*, s. 9 (1) (b).

<sup>48</sup> *Police Powers (Drug Premises) Act*, s. 9 (1) (c).

<sup>49</sup> *Police Powers (Drug Premises) Act*, s. 9 (1).

<sup>50</sup> *Police Powers (Drug Premises) Act*, s. 9 (2).

<sup>51</sup> *Summary Offences Act*, s. (5).

<sup>52</sup> *Summary Offences Act*, s. 28 F (6).

## Issues for Discussion

This part of the discussion paper is divided into two sections:

- **Section 1** discusses issues arising from the 'drug premises' provisions.
- **Section 2** discusses issues that relate to the drug 'move on' powers.

Specific questions are provided in relation to each issue, but we welcome your comments on any aspect of an issue, or the implementation of this Act. We have also noted some review activities currently underway that relate to particular issues that have emerged.

The ambit of our review, and the length of time we have to conduct it, limit our ability to examine some of the broader or longer-term effects of the Drug Premises Act on illicit drug markets. We therefore encourage interested parties who have knowledge of the impact of the Act at a local level to contribute to our review.

## Section 1: ‘Drug Premises’ – Issues for Discussion

### 1. Targeting drug supply

The primary objective of the Drug Premises Act is to target illicit drug supply by giving police increased powers to close down ‘drug premises’.<sup>53</sup> In Parliament, the reduction of drug supply by this means was linked to the reduction of harm associated with illicit drug use. As one speaker put it, ‘Drug houses mean drug dealers, and drug dealers destroy lives’.<sup>54</sup>

Despite concerns raised in Parliament about some aspects of the legislation, there was strong bipartisan support for the objective of reducing drug supply. For instance, one speaker who considered that aspects of the legislation constituted a ‘departure from fundamental principles of criminal justice’, concluded that the law may nonetheless ‘be justified by the need for effective powers to combat the drug trade’.<sup>55</sup>

Drug premises, as they are described in the Second Reading Speech, are premises that have been specifically modified to facilitate the unlawful supply of drugs. In recent years, police had noticed the emergence of these premises in Sydney suburbs such as Marrickville and, most notably, Cabramatta. According to the Attorney General:

These premises are often heavily fortified and utilise look-outs to keep the occupiers protected from interference by police. Drugs are dealt and used on these premises, but such is the professional criminality of the occupiers that they are able to rid themselves of the actual prohibited drugs before police can enter. Sometimes there are piles of syringes, or other evidence that demonstrates that the premises are being used for purposes of manufacture or supply of prohibited drugs.<sup>56</sup>

The Drug Premises Act is aimed at ‘major and organised’ criminals who are involved in the operation of drug premises.<sup>57</sup> In Parliamentary debate, the understanding that the Act would be particularly useful in dealing with this type of offender was reflected in references made to ‘drug barons’<sup>58</sup>, ‘major and organised criminals’<sup>59</sup>, the ‘big end of town’<sup>60</sup> and to ‘professional criminality’.<sup>61</sup>

Not all aspects of the illicit drug trade are targeted by the Act. Cannabis leaf, resin and oil, for example, have been excluded from the application of the legislation. In the Second Reading Speech, the Attorney General explained that these substances were excluded because they ‘are not usually a feature of the drug premises that the bill is aimed at’.<sup>62</sup> Some police have, however, been critical of the exclusion of cannabis from the Act. In the experience of senior officers at one LAC, people who supply cannabis often move on to supplying drugs such as heroin and cocaine. These officers expressed the view that an opportunity to catch people earlier in their drug offending was lost by the exclusion of cannabis from the legislation.<sup>63</sup>

<sup>53</sup> Supply reduction strategies are a key component of drug policy in Australia. This policy is outlined in the *National Drug Strategic Framework, 1998-1999 to 2002-03*, and has been endorsed by the NSW Government. The policy is underpinned by the principle of harm minimisation which encompasses supply reduction, demand reduction and harm reduction. Supply reduction strategies are aimed at both reducing the amount of illicit drugs entering the country, and disrupting production and distribution within Australia. The Drug Premises Act is aimed at the latter.

<sup>54</sup> Mr B. Collier, NSWPD, June 6, 2001, p. 14562.

<sup>55</sup> Ms M. Moore, NSWPD, June 6, 2001, p 14507. Ms Moore also recommended various changes to the Bill that aimed to provide additional safeguards to the powers contained in the legislation.

<sup>56</sup> The Hon. R. Debus, Second Reading Speech, NSWPD, May 30, 2001, p. 13997.

<sup>57</sup> The Hon. R. Debus, Second Reading Speech, NSWPD, May, 30, 2001, p. 13998.

<sup>58</sup> Mr P. Gibson, NSWPD, June 6, 2001, p. 14560.

<sup>59</sup> Miss C. Burton, NSWPD, June 6, 2001, p. 14506 and the Hon. James Samios, NSWPD, June 7, 2001, p. 14620.

<sup>60</sup> Mr G. Torbay, NSWPD, June 6, 2001, p. 14560.

<sup>61</sup> The Hon R. Debus, Second Reading Speech, NSWPD, May 30, 2001, p. 13997.

<sup>62</sup> The Hon R. Debus, Second Reading Speech, NSWPD, May 30, 2001, p. 13998.

<sup>63</sup> NSW Police Interview 3, 30 August, 2002.

Concerns have also been expressed that the Drug Premises Act may not target high-level drug supply. In Parliament, some speakers were of the view that the law would mainly result in the conviction of ‘minor players’, and fail to target the ‘Mr Bigs’ of the drug trade. This view was echoed by members of a drug user advocacy group we consulted for our review. In their opinion, ‘no high level drug supplier [was] going to sit around’ in drug premises.<sup>64</sup>

Concerns were also expressed that the legislation may impact heavily on vulnerable groups in the community that do not fit the description of the ‘sophisticated criminals’<sup>65</sup> that the legislation was intended to target. In its submission to Parliament, the National Council of Social Services expressed concern that some people may become ‘inadvertently involved in illicit drug activity for a variety of reasons’ and be ‘potentially exposed to police arrest in drug houses’.<sup>66</sup> In Parliament, a similar concern was also raised about young people who are employed to ‘sit in apartments’ operating as drug premises.<sup>67</sup> Research on drug law enforcement has also shown that drug law enforcement does not always fulfil the aim of targeting more serious offenders.<sup>68</sup> It has been argued that, while it is ‘widely accepted’ that police should focus on ‘large-scale importers, suppliers, and traffickers, rather than user dealers’, there is a:

significant disjuncture between law enforcement agencies’ commitment to targeting major drug offenders and the more prosaic reality in which law enforcement impacts most on users and street-level dealers.<sup>69</sup>

A central part of our review will therefore be to assess the extent to which this Act is meeting its objective of targeting drug supply. While it is not possible to gauge the impact this law is having on drug supply overall,<sup>70</sup> it is possible to measure the level of drug supply the law appears to be targeting.<sup>71</sup>

### **Questions for consideration**

1. Is the Drug Premises Act successful in targeting high-level drug supply? What evidence is there showing the success, or otherwise, of the legislation?
2. Is the law impacting on vulnerable groups in the community? If so, in what ways?

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<sup>64</sup> Focus Group 2, November 14, 2002.

<sup>65</sup> The Hon. R. Debus, NSWPD, June 6, 2001, p. 14565.

<sup>66</sup> Submission by the National Council of Social Services (NCOSS), quoted by the Hon I. Cohen, NSWPD, June 7, 2001, p. 14636. The groups which NCOSS identified as being at risk of arrest under the Act included the homeless, the unemployed, women who are victims of domestic violence, carers, children, people with dual diagnosis such as mental illness or disability, and people who are subject to ‘cultural and language barriers’. NSWPD, June 7, 2001, p. 14636.

<sup>67</sup> The Hon. R. Jones, NSWPD, June 7, 2001, p. 14630. The Hon. I. Cohen also expressed concern that the law may target young people, NSWPD, June 7, 2001, p. 14634.

<sup>68</sup> P. Green and I. Purnell, *Measuring the success of law enforcement agencies in targeting major drug offenders relative to minor drug offenders*, National Police Research Unit, Adelaide, 1995.

<sup>69</sup> Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks: Heroin, Health and Harm in South West Sydney*, 1998, p. 98, referencing the work of Sutton and James, *Evaluation of Australian Drug Anti-Trafficking Law Enforcement*, National Police Research Unit, Payneham, 1995.

<sup>70</sup> It is acknowledged that assessing the overall impact of a single law enforcement strategy on drug supply, such as ‘closing down drug houses,’ is not possible. One of the main reasons for this, as researchers in the area have pointed out, is that the recorded rate of drug offences is more a measure of police activity than an indicator of the actual rate of offending. Because drug offences are not generally reported to police, unlike other forms of criminal activity such as burglary or car theft, the recorded number of offences does not reflect the frequency of offending. For further discussion on assessing the effectiveness of drug law enforcement, see Don Weatherburn, ‘Performance Indicators for Drug Law Enforcement’, New South Wales Bureau of Crime Statistics and Research, Sydney, *Crime and Justice Bulletin*, No. 48, 2000.

<sup>71</sup> In the early 1990s, research was conducted on Australian drug law enforcement which found that police agencies did not have clear, consistent definitions of what constitutes low, medium and high -level drug supply (see P. Green and I. Purnell, *Measuring the success of law enforcement agencies in targeting major drug offenders relative to minor drug offenders*, National Police Research Unit, Payneham, 1995). In the course of our review, this will be investigated as it relates to the implementation of the Drug Premises Act.

## 2. Definition of ‘drug premises’

According to the Act, drug premises are ‘any premises [that] are being used for the unlawful supply or manufacture of any prohibited drug’.<sup>72</sup> The definition of ‘premises’ provided in the legislation includes any structure, building or aircraft, vessel or place, or any part of any such structure or place.<sup>73</sup> Therefore, under the Act, it is possible for a flat, a house, a car or a parking lot<sup>74</sup> to be considered drug premises. Another significant feature of the legislation is that premises may still be considered to be ‘drug houses’ whether drugs are found on the premises or not.<sup>75</sup>

Section 11 of the Act provides eight criteria to which ‘regard may be had’ in determining if premises are being used for the unlawful supply or manufacture of drugs. The Act does not provide guidance on the weight each criterion is to be accorded, just that regard may be had to ‘any or all’ of these matters in determining if premises are drug premises. Section 11 reads:

Without limiting matters to which regard may be had in determining whether premises involved in the offence were being used for the unlawful supply or manufacture of any prohibited drug, regard may be had to any or all of the following:

- a. evidence that a police officer authorised by law to enter the premises was wilfully prevented from, or obstructed or delayed in, entering or re-entering those premises or any part of those premises,
- b. evidence of the external or internal construction of the premises, including any external or internal door of, or means of access to, those premises that is found likely to have been fitted with a bolt, bar, chain, or any means or device for the purpose of preventing, delaying or obstructing the entry or re-entry into those premises of such a police officer or any other person, or for giving an alarm in case of such entry or re-entry,
- c. evidence of a person acting as a lookout to warn persons on the premises of the approach of police officers or other persons,
- d. evidence that there was found on the premises, or in the possession of a person on those premises, any syringe or other means or device used in the supply, manufacture or use of a prohibited drug,
- e. evidence that there was found on the premises, or in the possession of a person on the premises, a firearm or prohibited weapon the possession of which is unlawful,
- f. evidence that there was found on those premises any documents or other records, including computer records, that appear to have been kept or used in connection with the unlawful supply or manufacture of a prohibited drug,
- g. evidence that there was found on the premises any large amount of money that is not accounted for by the owner or occupier of the premises,
- h. evidence that there were found on those premises persons who appeared to be affected by a prohibited drug.

In addition, it is important to note that police are not limited to these criteria in determining if premises are drug premises.<sup>76</sup> Regard may also be had to other evidence, such as a series of undercover drug buys conducted by police from the premises or information from a police informant that drug dealing

<sup>72</sup> *Police Powers (Drug Premises) Act*, s. 5 (1).

<sup>73</sup> *Police Powers (Drug Premises) Act*, s. 3 (1).

<sup>74</sup> It is most likely that the Act was intended for use on ‘enclosed’ premises. However, because the definition of premises in section 3 of the Act also includes a ‘place (whether built upon or not)’, the Act could also apply to a ‘place’ such as a parking lot.

<sup>75</sup> *Police Powers (Drug Premises) Act*, s. 10.

<sup>76</sup> *Police Powers (Drug Premises) Act*, s. 11(2).

is taking place at a particular location. So, while certain features, such as 'fortifications', are commonly noted in descriptions of drug premises, the Act does *not* stipulate that drug premises must show evidence of fortifications or of any other particular characteristic. Concerns have been raised about specific criteria by which drug premises are defined in the Act and these are outlined below.

## 2.1 'Fortification' of premises

'External or internal constructions', often referred to by police as 'fortifications', are one criterion to which regard may be had in determining if premises are 'drug premises'.<sup>77</sup> Also included are bolts, bars and chains which are 'likely to have been fitted' to premises for the purpose of giving alarm, or of preventing, obstructing or delaying entry to a premises.<sup>78</sup>

For police, 'fortifications' constitute an overt sign of the organised nature of the drug supply operations housed within premises, and are regarded as a measure of the extent to which those involved have sought to avoid apprehension by police.<sup>79</sup> In the course of parliamentary debate on this aspect of the legislation, the Attorney General distinguished between security on 'normal' residences and on drug premises:

It should be clear that this legislation actually describes the sorts of premises that we are talking about. We are not talking about normal domestic residences with a flyscreen door, we are talking about fortified premises... [the legislation] is designed to catch sophisticated criminals who have been taking advantage of the inability of the police to effectively deal with a matter at the forensic evidence level.<sup>80</sup>

Concerns have been raised that measures such as steel grills on windows and doors are commonplace security devices, and should not be one of the criteria used to determine if premises are drug premises.<sup>81</sup> In Parliament, one member of the Legislative Council also urged that it was 'crucial to consider the conditions of a particular area to determine whether the security used is excessive'.<sup>82</sup>

Further, it has been argued that for some types of premises, additional security measures may be required. This issue arose when police executed a 'drug premises' search warrant on a safe house brothel<sup>83</sup> in Sydney, in early 2002. Safe house brothels may need to have certain security measures in order to meet occupational health and safety requirements.<sup>84</sup> A sex worker advocacy group expressed concern to us that the security measures required of the safe house brothel by law may have been used to determine that premises were drug premises.<sup>85</sup>

## 2.2 Presence of syringes

Syringes found in the possession of a person on the premises, or on the premises itself, are one of the indicia to which 'regard may be had' in determining if premises are drug premises.<sup>86</sup> In the Second Reading Speech, the Attorney General noted that 'piles of syringes' are characteristic of some drug

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<sup>77</sup> *Police Powers (Drug Premises) Act*, s. 11(2) (b).

<sup>78</sup> *Police Powers (Drug Premises) Act*, s. 11(2) (b).

<sup>79</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act 2001*, pp. 6 and 9.

<sup>80</sup> The Hon. R. Debus, NSWPD, June 6, 2001, p. 14565.

<sup>81</sup> Focus Group 1, April 12, 2002.

<sup>82</sup> The Hon. R Jones, NSWPD, June 7, 2001, p. 14631.

<sup>83</sup> At safe house brothels, the clients of sex workers rent rooms and services and prices are negotiated with the sex worker. These brothels are primarily used by street sex workers and are regulated, like other types of brothels, by local councils. See the *Disorderly Houses Amendment Act 1995*.

<sup>84</sup> Workcover NSW, *Health and Safety Guidelines for Brothels*, WorkCover NSW Health and Safety Guide, 2001, p. 8.

<sup>85</sup> Focus Group 1, April 12, 2002.

<sup>86</sup> *Police Powers (Drug Premises) Act*, s. 11 (2) (d). Section 11 (2) (d) also includes any 'means or device' for the purpose of using a prohibited drug, so items such as tourniquets to assist the injection process or spoons used for 'mixing' drugs may also be encompassed by this provision.

premises. One of the reasons for this, according to police, is that some premises have a 'no takeaways' policy, requiring that when drugs are purchased, they must be injected prior to leaving the premises. Police believe that this practice is designed to foil the attempts of undercover officers to conduct controlled 'drug buys'.<sup>87</sup>

When the legislation was debated in Parliament, concerns were raised about the inclusion of syringes as a matter to which 'regard may be had' in determining premises are drug premises. One member of the Legislative Council feared that the inclusion of syringes in the legislation may 'work against the policy of trying to encourage as many drug users as possible to use clean syringes' and, in turn, have a negative impact on needle and syringe exchange programs.<sup>88</sup>

In the incident referred to above, in which the Drug Premises Act was used on a safe house brothel, the inclusion of syringes in the Act also emerged as an issue. When the 'drug premises' search warrant was executed on these premises, officers seized, in accordance with the Act, numerous quantities of used and unused syringes, and other drug paraphernalia.<sup>89</sup> We were advised that for several weeks after the incident, the safe house brothel refused to accept deliveries of clean syringes from the local needle and syringe exchange service. Local health authorities expressed their concern to us about the potential impact of this incident on public health.<sup>90</sup>

## 2.3 Presence of persons who 'appear to be' drug affected

Section 11 (2) sets out that evidence of persons on premises who 'appeared to be affected by a prohibited drug' is one matter to which regard may be had in determining if premises are drug premises.

Concerns were raised in parliament that the term 'appeared' was 'subjective'.<sup>91</sup> This issue was also raised by a drug user advocacy group which questioned what kind of evidence would be required to prove that a person 'appeared' to be drug-affected.<sup>92</sup>

### Review activities

We will be monitoring how all indicia in section 11 of the Act are used to determine if premises are drug premises, including those discussed above. We will also be documenting any other 'matters' that are taken into account by police in making such a determination.

#### Question for consideration

3. How have the indicia that define 'drug premises' been used? If you are aware of examples of the use of particular indicia, please provide details.

<sup>87</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act 2001*, p. 6.

<sup>88</sup> The Hon. I. Cohen, NSWPD, 21 June, 2001, p. 14999.

<sup>89</sup> Section 7 (1) of the Drug Premises Act allows police to seize any thing that relates to an activity prohibited under the *Drug Misuse and Trafficking Act 1985*, including a syringe.

<sup>90</sup> Focus Group 1, April, 2002.

<sup>91</sup> The Hon. R. Jones, NSWPD, 7 June, 2001, p. 14631.

<sup>92</sup> Focus Group 2, November 14, 2002.

### 3. Reversal of the onus of proof

Probably the most controversial aspect of the Drug Premises Act has been the Act's creation of two new offences that reverse the onus of proof. These are:

- the offence of being found on, entering, or leaving drug premises;<sup>93</sup> and
- the offence of organising drug premises.<sup>94</sup>

The onus of proof relates to *who* is required to prove an offence. In most instances in the criminal law, the onus of proof is on the prosecution, and guilt must be proved 'beyond reasonable doubt'. That the defence is not required to prove innocence reflects what is usually regarded as a fundamental principle of the criminal law - that a person is innocent until proven guilty. If the onus of proof is reversed, the defence is required to prove the innocence of the accused. The standard to which this must be proved, however, is on the 'balance of probabilities', rather than the higher threshold of 'beyond reasonable doubt'.

The legal significance of reversing the onus of proof was widely acknowledged in Parliamentary debate on the Drug Premises Act. In the Second Reading Speech, the Attorney General noted that the legal requirement this places on persons charged by police under the Act is 'not taken lightly', but because drug premises are not used for 'lawful or domestic purposes', it is 'reasonable to expect persons to show why' they are on premises that have been proven to be drug premises.<sup>95</sup>

Concerns have been raised about the reversal of the onus of proof in two of the new offences created by the Drug Premises Act.<sup>96</sup> Criticism of this aspect of the legislation was also made in submissions that were quoted during parliamentary debate on the Bill from legal practitioners, academics, and bodies such as the NSW Council for Civil Liberties.<sup>97</sup>

In the Second Reading Speech, it was noted that the courts provide 'protection' in respect of the new powers contained in the Act. This is because premises must first be proven, beyond reasonable doubt, to be drug premises before a person can be found guilty of several key offences in the Act.<sup>98</sup> Section 11 (1) of the Act states:

A court must not find a person guilty of an offence against this Part unless the prosecution satisfies the court beyond a reasonable doubt that at the time the offence is alleged to have been committed any premises involved in the offence were being used for the unlawful supply or manufacture of any prohibited drug.

One member of parliament described the role of the courts as providing 'an inbuilt check on the police assessment' that premises are drug premises.<sup>99</sup>

### Review activities

In our review, we will examine a selection of court proceedings in which matters were heard under the Drug Premises Act and investigate how the reversal of the onus of proof is operating in respect of the two offences discussed below. For example, we will record any instances in which the court was satisfied that there was a lawful excuse for being found on, entering or leaving drug premises.

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<sup>93</sup> *Police Powers (Drug Premises) Act*, s. 12.

<sup>94</sup> *Police Powers (Drug Premises) Act*, s. 14.

<sup>95</sup> The Hon. R. Debus, NSWPD, Second Reading Speech, May 30, 2001, p. 13997.

<sup>96</sup> The Hon. R. Jones, NSWPD, June 7, 2001, p. 18.

<sup>97</sup> A range of these submissions was quoted by the Hon. R. Jones, NSWPD, June 7, 2001, p.14629.

<sup>98</sup> As we have noted elsewhere in this paper, a person may still be convicted of offences that relate to the obstruction of police executing the search warrant (see *Police Powers (Drug Premises) Act* s. 9) even though it was not proved that premises were drug premises.

<sup>99</sup> The Hon. M. Iemma, NSWPD, June 6, 2001, p. 14564.

### 3.1 Offence of being found on, entering or leaving drug premises

Most debate in relation to the reversal of the onus of proof has focused on the offence of being found on, entering or leaving a drug premises. Section 12, which contains this offence, reads:

1. A person who is found on, or who is found entering or leaving, drug premises is guilty of an offence.  
...
2. A person is not guilty of an offence under this section if the person satisfies the court that he or she was on, or was entering or leaving, the drug premises for a lawful purpose or with a lawful excuse.<sup>100</sup>

A reverse onus in respect of this offence means that it is incumbent upon the accused to satisfy the court that they were on premises for a lawful purpose, or with a lawful excuse. The common law recognises, as was noted above, that the standard to which this must be proved is 'on the balance of probabilities'. If the onus of proof were not reversed, the prosecution would be required to prove beyond reasonable doubt that the accused was on the premises for an unlawful purpose.

One magistrate, in a case in which charges under this section of the Act were heard, expressed his understanding of the intention behind this provision in the following way:

This piece of legislation was set up to extend a wider degree of criminal liability for those who are found to be on premises that are drug premises, whether they are transacting criminal misconduct themselves or not.<sup>101</sup>

Most of the concern in relation to the reversal of the onus of proof has centred on the use of the legislation on premises with a dual purpose, particularly domestic residences. A key question is whether people who are not involved in unlawful activity may have difficulty proving their innocence. Some of the scenarios raised in Parliamentary debate on the Act included households in which illicit drug activity may be taking place without the knowledge and/or consent of all occupants. One member of parliament expressed the following concerns:

What if a girlfriend or the child of a drug dealer is found on the premises but his or her name does not appear on the lease? How will such a person substantiate a lawful reason for being on the premises? We have the quite likely scenario of an individual who has never sold or used prohibited drugs and is only remotely connected to someone who has been arrested, charged and convicted for being on the premises of a drug house.<sup>102</sup>

In the NSW Police training manual on the Act, it is advised that if a person has an obvious lawful purpose for being on the premises, and there is no additional evidence to suggest otherwise, 'it is unlikely that there will be sufficient evidence to warrant proceeding' as there is 'no reasonable prospect of conviction'.<sup>103</sup> The manual provides examples of a lawful excuse for being on premises, which include if a person lives or works on the premises, or if they are attending an organised function.<sup>104</sup>

<sup>100</sup> *Police Powers (Drug Premises) Act* s. 12 (2).

<sup>101</sup> *Police v Truc Ly Thi Nguyen, Thuy Thanh Pham and Cuong Vo*, Local Court, March 4, 2002.

<sup>102</sup> Ms L. Rhiannon, NSWPD, June 7, 2001, p. 14626.

<sup>103</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act, 2001*, p. 19.

<sup>104</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act, 2001*, p. 19.

## 3.2 Offence of organising drug premises

Under section 14 of the Act:

- (1) A person must not organise or conduct, or assist in organising or conducting, any drug premises.<sup>105</sup>

The types of activities that may constitute an offence under this provision are also outlined in section 14:

- (2) For the purposes of this section, a person assists in organising or conducting drug premises if, for example, the person acts as a lookout, door attendant or guard in respect of any premises that are organised or conducted as drug premises.<sup>106</sup>

In this offence, the onus of proof is also reversed. If charged with this offence, a person must satisfy the court that they 'did not know, and could not reasonably be expected to have known'<sup>107</sup> that the premises were being used as drug premises. Again the standard to which the defence must prove this is on the balance of probabilities.

In a submission prepared by the Law Society, concern was expressed that the court's assessment of the accused's 'knowledge or intent' would be based 'solely on an assessment of the person's credibility'. The Law Society argued that:

the reversal of the onus will (more often than not) require the court to assess an accused's knowledge or intent based solely on its assessment of the person's credibility. The ability of one person to assess another's credibility is hardly a precise science. For example, nervous witnesses can easily create an impression that they have something to hide.<sup>108</sup>

### Question for consideration

4. How has the reverse onus of proof operated in relation to 'drug premises' offences?

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<sup>105</sup> *Police Powers (Drug Premises) Act*, s. 14 (1).

<sup>106</sup> *Police Powers (Drug Premises) Act*, s. 14 (2).

<sup>107</sup> *Police Powers (Drug Premises) Act*, s 14 (3).

<sup>108</sup> Law Society Submission, quoted by the Hon. I. Cohen, NSWPD, June 7, 2001, p. 14636.

## 4. Offence by owner or occupier of allowing use of premises as drug premises

Under Section 13 of the Drug Premises Act, owners or occupiers who 'knowingly allow' their premises to be used as drug premises may be charged with an offence. This provision would appear to be aimed at those who are involved in organising, and profiting from, drug premises. Criminal asset confiscation provisions also apply to those people convicted of a second or subsequent offence of 'allowing use of premises as drug premises'.<sup>109</sup>

For an owner or occupier to be found guilty of allowing premises to be used as drug premises, the prosecution must prove that they 'knowingly allowed' their premises to be used for this purpose. Therefore, unlike the two offences discussed above, the onus of proof is not reversed. In order to successfully prosecute a person for this offence, there must be some 'act or conduct' that proves that the defendant had this 'knowledge'. As one magistrate explained in a 2002 hearing involving an offence under this provision:

The prosecution must prove that the defendant knowingly allowed the premises to be used as drug premises. There's a vast area of the law over the years for knowingly allow, knowingly permit, knowingly - that sort of combination of words but in summary, in my submission, there must be some act or conduct proved against the defendant in order to get up on the positive phrase of knowingly allow.<sup>110</sup>

Police anticipated from the outset that there may be difficulties in proving this offence. This is evident in training material prepared on the Act.<sup>111</sup>

### Review activities

In our review, we will be monitoring a selection of cases in which offences under this provision of the Drug Premises Act are heard.

#### Question for consideration

5. Are there any unnecessary difficulties in proving that a person 'knowingly allowed' their premises to be used as drug premises? If so, what are they?

<sup>109</sup> *Criminal Assets Recovery Act*, s (2) (e1) and s 6 (4). This provides for the initiation of civil proceedings that may result in the seizure of the assets or 'interests' of a person who has been convicted of this offence on more than one occasion.

<sup>110</sup> *Police v Lan Chau Nguyen*, Local Court, 29 April, 2002.

<sup>111</sup> NSW Police, Training Video, *Police Powers (Drug Premises) Act*, undated (circa, July, 2001).

## Section 2: Drug ‘move on’ powers

### Reasonable directions

Statutory powers to issue ‘reasonable directions’ were first conferred on NSW police by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (Police and Public Safety Act) which commenced on July 1, 1998.<sup>112</sup> The Police and Public Safety Act amended the Summary Offences Act by inserting a new section 28F.<sup>113</sup> The section 28F provisions are often referred to as the ‘move on’ powers. The Police and Public Safety Act was said to be a clear statement by the New South Wales Government in regard to:

... the sort of community we want this state to be- a community where ordinary people, young and old, can go out without fear of harassment or intimidation, without fear for their safety from knife wielding thugs.<sup>114</sup>

According to the original ‘move on’ powers, police could issue a direction in instances where a person’s behaviour or presence in a public place constituted obstruction, harassment or intimidation, or caused fear.<sup>115</sup> These criteria are referred to in the legislation as ‘relevant conduct’.

### Extension of police powers to issue reasonable directions

The Drug Premises Act has extended police powers to issue directions by amending section 28F of the Summary Offences Act. Unlike the original directions powers contained in section 28F, the new provisions are clearly aimed at the street-level drug trade. The objective of these amendments was to give police additional powers to reduce the incidence of drug transactions in public places. In the Second Reading Speech, the Attorney General explained the intention of the new drug ‘move on’ powers:

This is a feature designed specifically to assist police in places such as Cabramatta, where it is known that persons congregate to supply and possess prohibited drugs, to clear an area. Cabramatta railway station is one such example currently, but the drug trade will remain mobile to try and subvert the law and this amendment allows police to keep pace with it and destroy it wherever it emerges.<sup>116</sup>

Police also anticipated that the new drug move on powers would enable them to address a ‘long standing law enforcement and community problem’ generated by people who ‘descend upon a location’ for the purpose of buying or selling drugs.<sup>117</sup> In the past, in areas such as Cabramatta and Kings Cross, some community members and local businesses have requested an increase in police activity to deal with public amenity and other issues arising from the presence of a street level drug trade.<sup>118</sup> Police have described the new drug move on powers as an ‘effective legislative framework’ that will enable them to address these issues.<sup>119</sup>

In Parliamentary debate, a range of views was put forward on the extension of the reasonable direction powers. Some argued that an extension of these powers was necessary ‘if police ... [were] to control the

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<sup>112</sup> The Ombudsman was also required to monitor the implementation of this Act and the findings were published in the *Policing Public Safety* report in 1999.

<sup>113</sup> Section 28F contains the reasonable directions powers.

<sup>114</sup> The Hon. P. Whelan, Second Reading Speech, NSWPD, April 28, 1998, p. 3972.

<sup>115</sup> *Summary Offences Act* s 28F (a), (b) and (c).

<sup>116</sup> The Hon. R. Debus, NSWPD, May 30, 2001, p. 13998.

<sup>117</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act, 2001*, p. 1.

<sup>118</sup> See, for example, NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3 Report on Inquiry into Cabramatta Policing, 2001, pp. 29-34.

<sup>119</sup> NSW Police, Mandatory Continuing Police Education Scheme Package, *Police Powers (Drug Premises) Act, 2001*, p. 1.

activities of drug dealers.<sup>120</sup> Others appeared to be sceptical about the legislation's potential to impact on the drug trade:

... this provision will not deter organisers or principal drug dealers as they are hardly likely to be dealing drugs in public places. That is left to the drug users and small fish.<sup>121</sup>

## A brief description of the powers

The Drug Premises Act extends the definition of 'relevant conduct' for which police may issue a direction to include drug related activity:

28F. (1) A police officer may give a direction to a person in a public place if the police officer has reasonable grounds to believe that the person's behaviour or presence in the place (referred to in this section as "relevant conduct"):

...

(d) is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or

(e) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.<sup>122</sup>

When issuing a direction under section 28F, police must also comply with certain procedural requirements. These requirements stipulate that prior to issuing a direction, a police officer must provide evidence that they are a police officer and give their name and place of duty. The officer must also give the reason for the direction and warn that failure to comply may be an offence.<sup>123</sup>

To illustrate the kind of situation in which police might use the new move on powers, we have extracted two fairly typical police records:

1. Police noticed [person's name] loitering opposite the Railway Station, [street name, suburb].

[person's name] was in possession of syringes and had track marks on his arms. He was given a seven day move on direction not to attend [suburb] Railway Station or surrounding shops.<sup>124</sup>

2. [person's name] had track marks on his arms. He stated he was just waiting for a friend. Prior to police approaching him, police noticed another male nod and [person's name] do the same. Police believe [person's name] may have been at the location for the purpose of selling drugs.

[person's name] was given a seven day move on direction not to loiter along [street name], especially near the [hotel name, suburb].<sup>125</sup>

<sup>120</sup> Mr C. Hartcher, NSWPD, June 6, 2001, p. 14505.

<sup>121</sup> The Hon. I. Cohen, NSWPD, June 21, 2001, p. 15007.

<sup>122</sup> *Summary Offences Act*, s 28F (1) (d) and (e).

<sup>123</sup> *Summary Offences Act*, s 28F (4).

<sup>124</sup> Extract from one Computerised Operational Policing System (COPS) record examined in the Ombudsman's review of the drug move on powers in the Drug Premises Act.

<sup>125</sup> Extract from one COPS record examined in the Ombudsman's review of the drug move on powers in the Drug Premises Act.

## Drug ‘move on’ powers – Issues

### 5. Reasons for issuing of ‘drug-related’ directions

Police are only permitted to use the new directions powers when they have a reasonable belief that a person’s behaviour or presence in a public place is for the purpose of engaging in the following types of ‘relevant conduct’:

- unlawfully supplying a prohibited drug,<sup>126</sup> or
- intending to unlawfully supply a prohibited drug,<sup>127</sup> or
- soliciting another person or persons to unlawfully supply a prohibited drug,<sup>128</sup> or
- obtaining, procuring or purchasing a prohibited drug.<sup>129</sup>

The intention behind these provisions, as outlined in the Attorney General’s Second Reading Speech, was to enable police to ‘clear’ public places where people congregate to buy or sell prohibited drugs. Their purpose appears to be to empower police to thwart the conduct of drug transactions in public places.

We have been informed that in some instances, drug users who do not appear to be engaged in the ‘relevant conduct’ prescribed by the legislation, are being issued with directions to ‘move on’.<sup>130</sup> One legal centre advised us that drug users who attract police attention because of characteristics such as visible track marks or appearing to be drug affected, but who were not engaged in the ‘relevant conduct’, have been given directions by police. The direction commonly issued is not to return within a certain radius of the place where the direction is given, for a period of seven days.<sup>131</sup>

Concerns about the basis upon which police issue directions raise the question of what police may properly take into account in determining whether a person is engaging in the ‘relevant’ conduct. For example, is it reasonable for a police officer to believe that a person is in a public place to purchase a prohibited drug solely on the basis that the person is in an area known for drug supply and has visible track marks? Or is it reasonable to issue a direction not to return within a two-kilometre radius of the local Railway Station for seven days, if the person issued with the direction lives in the area?

### Review activities

As part of our review, we are auditing police records of the use of these directions powers. We will be analysing these records to determine the basis upon which a direction has been issued and whether it appears that the ‘relevant conduct’ was taking place when the direction was given.<sup>132</sup>

#### Questions for consideration

6. How are police interpreting the ‘relevant conduct’ provisions in the Act?
7. Is it difficult to assess if ‘the purpose’ of a person’s presence in a public place is to purchase or supply drugs? If so, what are these difficulties?

<sup>126</sup> *Summary Offences Act*, s. 28F (1) (d).

<sup>127</sup> *Summary Offences Act*, s. 28F (1) (d).

<sup>128</sup> *Summary Offences Act*, s. 28F (1) (d).

<sup>129</sup> *Summary Offences Act*, s. 28F (1) (e).

<sup>130</sup> Shopfront Legal Centre, Submission, 28/06/02.

<sup>131</sup> Issues relating to seven day direction are discussed below.

<sup>132</sup> This aspect of the audit involves a qualitative analysis of the ‘event narrative’ on the NSW Police database, COPS (Computerised Operational Policing System). The ‘narrative’ is an unstructured account of what happened. It usually outlines why a person came to the attention of police, what transpired, and why the direction was issued.

## 6. Impact of directions powers on young people and the homeless

In recent years, the practice of recruiting young people to act as 'go-betweens' and to perform other roles in the street-level drug trade in some areas, such as Cabramatta, has received public attention.<sup>133</sup> In some areas, many of these young people are from particular ethnic groups. In studies of policing in Cabramatta, it has also been claimed that young Indo-Chinese 'user-dealers' are targeted by police in street-level drug operations.<sup>134</sup>

A senior law enforcement official has noted that, in the past, it is common for many of those arrested in large, street-level operations or 'street sweeps' to be young people and that many of those arrested were first offenders.<sup>135</sup> According to the officer, this suggested that there was a large pool of young people able to be recruited into the street-level drug trade, and that once a person had been apprehended by police, they were generally 'a bit wiser the next time'.<sup>136</sup>

Others claim, however, that police appear to be broadly targeting young people in their use of the powers. One community centre has advised us of instances in which young people arriving at Cabramatta Railway Station have been approached by police patrolling the area and told to 'get back on the train'.<sup>137</sup> In response to this practice, the centre began issuing identification cards to young people attending their programs so that they are able to prove to police that they had a legitimate reason for being in the suburb.

Local media in south-west Sydney have also reported allegations that young people are being singled out by police using the new directions powers. One article noted a range of complaints by young people alleging police harassment. One interviewee claimed that, 'Even other youths who are doing something to help youth in the area are being told to move on'.<sup>138</sup>

There are also some indications that the new powers, in combination with the drug premises provisions, may be impacting on other vulnerable groups, such as the homeless. A recent report on the nexus between homelessness and drug use in Cabramatta found:

Homeless people are "moved on" from public places irrespective of whether they are engaging in criminal activities even though they have nowhere else to go. Squats have been defined as "drug houses" and homeless people seeking shelter are charged with serious criminal offences.<sup>139</sup>

Research conducted by the NSW Ombudsman on the original reasonable directions powers, documented in the report, *Policing Public Safety*, found that young people and Aboriginal people were the subject of a large proportion of 'move on' directions.<sup>140</sup> We will examine whether any patterns of this nature emerge in the way police use the new drug 'move on' provisions.

<sup>133</sup> While there has been some controversy and debate in respect of this issue, particularly in regard to the involvement of school children in gangs, the Legislative Council inquiry into policing in Cabramatta found that there was 'general agreement' that teenagers in Cabramatta are involved in the drug trade. NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3 Report on Inquiry into Cabramatta Policing, 2001, pp. 24-29.

<sup>134</sup> D Dixon and L Maher, 'Ahn Hai: Policing, Culture and Social Exclusion in a Street Heroin Market', *Policing and Society*, 2002, Vol 12, No.2, p. 93.

<sup>135</sup> Evidence given by Commissioner Phillip Bradley, NSW Crime Commission, to the NSW Legislative Council inquiry into Cabramatta policing. The 'street sweeps' referred to were operations in which undercover officers would 'essentially round up as many dealers on the street as they can in a short period of time.' NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3 Report on Inquiry into Cabramatta Policing, 2001, p. 12.

<sup>136</sup> NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3 Report on Inquiry into Cabramatta Policing, 2001, p. 12.

<sup>137</sup> Telephone interview, September 19, 2002.

<sup>138</sup> *Fairfield City Champion*, 22/01/02.

<sup>139</sup> Heidi Coupland, Lisa Maher and Myly Thach, *Every Day's the Same, Youth Homelessness in Cabramatta*, 2001, p. iv.

<sup>140</sup> NSW Ombudsman, *Policing Public Safety*, 1999, pp. 227-232.

## Review activities

In our audit of the use of these powers, we will examine available demographic data, including the age and ethnicity of those issued with a direction. We will also analyse the circumstances in which directions are issued, to assess whether these powers are being used fairly and appropriately.

### Question for consideration

8. Are police targeting particular groups in their use of the new 'move on' provisions? If so, what evidence is there of inappropriate or appropriate targeting? What are the consequences of targeting particular groups?

## Types of directions – Overview

Section 28F of the Act does not provide specific guidance on what type of direction police can give, just that the direction must be 'reasonable in the circumstances' for the purposes set out in Act.<sup>141</sup> Types of directions may include, for instance, that a person leave a particular location for a prescribed period of time, or that they stop the conduct that is the subject of the direction. Notwithstanding the discretion afforded to police in respect of the type of direction they may issue, most police directions take the form of requiring a person to 'move on'.<sup>142</sup> Commonly, the officer will also specify the length of time and the spatial boundaries of the direction. According to the Act, a drug-related direction must be reasonable for the purposes of:

(b) stopping the supply, or soliciting to supply, of the prohibited drug,<sup>143</sup> or

(c) stopping the obtaining, procuring or purchasing of the prohibited drug.<sup>144</sup>

## 7. 'Seven Day' directions

One commonly issued direction is known as a 'seven day' direction. This is a direction not to return to a particular suburb, or not to go within a certain radius of where the direction is given, for a period of seven days. Concerns have been raised by one legal centre about the 'reasonableness' of the length of time involved in this direction, and that its application is 'arbitrary'.<sup>145</sup> According to this legal centre, while it may be reasonable to direct a person to leave an area for a short period of time, a seven day direction was excessive. Particular attention was also drawn to the impact of this direction when issued to people who live in the area where the direction applies.

We are aware of instances in which police appear to have limited the radius of a direction because the person lives in the suburb where the direction applies. There have also been instances in which police have tailored a direction to reduce its impact on an individual's daily routines, such as excluding food outlets where a person regularly eats.

Several other issues in relation to seven day directions were also raised by the legal centre. It was argued that the seven day direction may interrupt drug users' access to services such as needle and syringe exchange programs and counselling. In the legal centre's submission, it is also noted that the use of the local mobile needle and syringe exchange service has been 'down significantly' since police began using the new provisions.<sup>146</sup>

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<sup>141</sup> *Summary Offences Act*, s. 28F (3).

<sup>142</sup> An audit conducted of directions issued in one LAC as part of the review indicates that this is the case.

<sup>143</sup> *Summary Offences Act*, s. (3) (b).

<sup>144</sup> *Summary Offences Act*, s. 3 (c).

<sup>145</sup> Shopfront Legal Centre, Submission, June, 28, 2002, p. 4.

<sup>146</sup> One of the functions of this mobile service is to distribute clean syringes.

When the legislation was debated in Parliament, some speakers indicated concern that the Drug Premises Act not compromise harm minimisation initiatives.<sup>147</sup> While it is clear that aspects of the 'move on' powers are directed at drug users,<sup>148</sup> for some parliamentarians, the value they saw in the legislation appeared to be predicated on the understanding that the law would focus on drug suppliers, rather than users. One member stated that the law is 'important because it tackles the drugs issue by targeting those who supply drugs rather than those who use them'.<sup>149</sup> Another speaker expressed a similar view:

There is a difference between a drug dealer and a drug user. In many cases users are victims. I do not deny that they perpetuate crimes as a result of their addiction. In many cases, they are victims and have an illness. This legislation attacks the dealers, who are the real villains in our communities.<sup>150</sup>

It is clear that the above comments are also underpinned by an assumption that drug dealers and users are two distinct groups. However, researchers on the drug trade have questioned this belief on the basis of findings that indicate some users substantially fund their drug use by dealing.<sup>151</sup>

Another issue raised in the legal centre's submission was the potential of seven day directions to disrupt family and cultural ties. This was seen as a particular concern for members of ethnic groups whose support networks are more likely to be primarily concentrated in a particular suburb.

## Review activities

As part of our audit of these powers, we are recording the type, length of time and location of the directions issued, and if the person lives in the suburb where the direction was issued. We also welcome comments from local health authorities and user groups on any impact the new powers may be having on drug users and the provision of health services.

### Questions for consideration

9. Is the issuing of seven day directions appropriate? If so, in what circumstances?
10. Is a seven day direction effective in stopping the purchase/supply of prohibited drugs? How might a direction of this type be effective or ineffective?
11. Do seven day directions issued to clients of drug and alcohol services impact on the provision of those services and/or on public health generally? If so, in what ways?

<sup>147</sup> Several members of parliament expressed support for approaches to illicit drug use that incorporate treatment for drug users. One member expressed concern that the Drug Premises Act did not constitute a 'comprehensive, transparent, equitable and whole-of-community response' to the problems created by illicit drug use. Ms C. Moore, NSWPD, June 6, 2001, p. 14507. Also see Mr A. Chesterfield-Evans, NSWPD, June 7, 2001, p. 14638.

<sup>148</sup> *Summary Offences Act*, sections 28F (1) (e) and (3) (c).

<sup>149</sup> Mr G. McBride, NSWPD, June 6, 2001, p. 14509.

<sup>150</sup> Mr D. Campbell, NSWPD, June 6, 2001, p. 14561.

<sup>151</sup> Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks, Heroin, Health and Harm in South West Sydney*, p.51.

## 8. 'Reasonable directions' and operations-based policing

As well as providing officers with additional powers in the routine policing of public space, the drug 'move on' powers are used by police in the context of large-scale police operations. In some areas, these operations have been an important strategy in drug law enforcement. Since 1996, for instance, they have been a major component of the approach to policing the street-level drug trade Cabramatta.

According to police, these large operations are conducted with aims such as improving public amenity for those who live and work in the area, and the reduction of drug related crimes, such as shoplifting and burglary.<sup>152</sup> Residents and local businesses in areas such as Cabramatta and Kings Cross have raised a range of concerns arising from the presence of a visible, street-level drug trade. Complaints have been made, for example, about regular, unsolicited approaches by people attempting to sell drugs and of feeling threatened by the presence of drug dealers. Other concerns relate to public health, such as the potential for 'needle stick' injuries arising from used syringes being left in parks and other public spaces.<sup>153</sup>

High levels of the use of the new direction powers have been reported in some areas, particularly Cabramatta, since July, 2001. Eight months after the powers were introduced, it was reported that 'move on' powers had been used on 2,487 occasions in this Local Area Command.<sup>154</sup> The NSW Bureau of Crimes Statistics also found that there had been a 'significant increase' in the frequency of directions issued by Cabramatta Police since July, 2001.<sup>155</sup>

Some research has indicated that intensive street-level drug law enforcement may have a range of 'unintended consequences'.<sup>156</sup> For instance, as has been noted elsewhere in this paper, the drug trade may be displaced into other areas or dealers may develop new modus operandi. Concern that the Drug Premises Act may have this effect was raised during Parliamentary debate on the Act.<sup>157</sup> Intensive drug law enforcement can also 'harden the target' and cause the drug trade to become more complex and organised to 'protect participants' from apprehension by police.<sup>158</sup> Other unintended consequences relate to public health. Studies of the impact of intensive street-level drug law enforcement have suggested that the increased threat of being apprehended by police may increase the incidence of unsafe injecting practices, such as sharing needles, and may also encourage the unsafe disposal of syringes.<sup>159</sup>

### Review activities

As we have noted elsewhere in this paper, the ambit of this review, and the length of time we have to conduct it, limit our ability to assess the broader, or longer-term impact of this law on illicit drug markets. Accordingly, we encourage comment from interested parties on the issues raised above and any insight this may provide on the impact of this law at a local level.

#### Question for consideration

12. Are you aware of any 'unintended consequences', such as the displacement of the drug trade to other areas, that may have been a result of the use of the new drug 'move on' powers? If so, please describe these consequences.

<sup>152</sup> NSW Police, 'NSW Illicit Drug Law Enforcement Performance Indicators', 2002, p. 16.

<sup>153</sup> In the Legislative Council's report on *Cabramatta Policing*, these, and a range of other concerns are well-documented. NSW Legislative Council, *Cabramatta Policing*, General Purpose Standing Committee No. 3, Report on Inquiry into Cabramatta Policing, 2001, pp. 29-34.

<sup>154</sup> NSW Government, *Cabramatta, A Report On Progress*, April, 2002, p. 16.

<sup>155</sup> NSW Bureau of Crime Statistics and Research, *Recent trends in recorded crime and police activity in Cabramatta*, 2002, p. 7.

<sup>156</sup> See, for example, Steve James and Adam Sutton, 'Policing Drugs in the Third Millennium: The Dilemmas of Community-based Philosophies' *Current Issues in Criminal Justice*, Vol 9, No. 3, pp 217-227 and Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks, Heroin, Health and Harm in South West Sydney*, pp. 96-118.

## 9. Arresting and charging offenders for a refusal to move on

Under Section 28F (6), a refusal or failure to obey a reasonable direction is an offence. An offence has been committed if a police officer issues two directions to move on, and the person continues to disobey the direction without a 'reasonable excuse'.<sup>160</sup> It is important to note, however, that a person is only guilty of an offence if they continue to engage in the 'relevant conduct' after the direction was issued.<sup>161</sup> No custodial penalty applies to this offence, and the maximum penalty is a fine of \$220.<sup>162</sup>

Police have several options when a person disobeys a direction issued under section 28F. They may issue an infringement notice<sup>163</sup> or a Field Court Attendance Notice (FCAN).<sup>164</sup> Alternatively, the offender may be arrested, taken to a police station and charged, and be required to enter into a bail agreement prior to their release.<sup>165</sup>

We have been advised by one legal centre that in some Local Area Commands, police routinely arrest and charge offenders if they disobey directions issued under section 28F. The legal centre has argued that this practice is an 'inappropriate' way of dealing with a minor summary offence, particularly one for which no custodial penalty applies:

In our view, arrest and charge are only appropriate where the defendant's conduct is extremely disruptive or violent (in which case they would probably be charged with a more serious offence in any event) or where the police are ... [unable] to establish the defendant's identity.<sup>166</sup>

In addition, the legal centre is also of the view that the bail conditions imposed by police are often too onerous, and out of proportion to the nature of the charge.<sup>167</sup> The centre pointed out that if the person breaches these bail conditions, they may be arrested again, and spend further time in police custody.

While police have the discretion as to whether an offender is arrested and charged, the NSW Police Handbook advises that:

... arrest is an extreme action. Keep in mind other means of getting someone to court (eg: summons, CAN).<sup>168</sup>

The legal centre claims that when they have raised concerns with police about this practice, police have expressed the view that disobeying a direction is a 'continuing offence' and that the arrest, charging, and subsequent imposition of bail conditions on an offender is necessary to stop the commission of the offence.<sup>169</sup>

<sup>157</sup> Ms C. Moore, NSWPD, June 6, 2001, p. 14507, the Hon. R. Jones, NSWPD, June 7, 2001, p. 14629 and the Hon. I. Cohen, NSWPD, June 7, 2001, p. 14633.

<sup>158</sup> Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks, Heroin, Health and Harm in South West Sydney*, p. 100.

<sup>159</sup> See Lisa Maher, David Dixon, Michael Lynskey and Wayne Hall, *Running the Risks, Heroin, Health and Harm in South West Sydney*, pp. 97-119.

<sup>160</sup> *Summary Offences Act*, s. 28F (6).

<sup>161</sup> *Summary Offences Act*, s. 28F (7).

<sup>162</sup> *Summary Offences Act*, s. 28F (6).

<sup>163</sup> If a person is issued with an infringement notice by police, they can also elect to have the matter heard in court.

<sup>164</sup> An FCAN is a notice issued 'in the field' that requires the person to attend court where the matter will be heard.

<sup>165</sup> *Bail Act 1978*.

<sup>166</sup> Submission, Shopfront Legal Centre, June 28, 2002, p. 6.

<sup>167</sup> Section 37 (2) of the *Bail Act* stipulates that bail conditions 'shall not be imposed that are any more onerous for the accused person than appear to the authorised officer or court to be required: (a) by the nature of the offence, or (b) for the protection and welfare of any specially affected person, or (c) by the circumstances of the accused person'.

<sup>168</sup> NSW Police, 'Arrests', *Police Service Handbook*, 2003.

<sup>169</sup> Submission, Shopfront Legal Centre, June 28, 2002, p. 6.

## Review activities

Our audit of 'move on' directions will include recording what action police take if a person disobeys the direction, such as whether police arrest and charge the offender. We will also examine the bail conditions imposed by police when offenders are charged under this provision.

### Question for consideration

13. Is it appropriate for police to arrest and charge a person who, for example, police believe is in an area to supply prohibited drugs and refuses to obey a direction to leave? If so, in what circumstances would an arrest and charge be appropriate or inappropriate?

## Conclusion

We welcome your comments on any of the issues raised in this discussion paper, or on any other issue or aspect of the Drug Premises Act.

If you wish to respond to a particular question, please cite the question number in your response.

If your comments are in response to an issue that has been raised in this paper, or any other issue that relates to the implementation of the Drug Premises Act, please indicate to which issue your comments refer.

If you are aware of a particular court case that may be of interest to our review, please send us the details and we will obtain the relevant transcript of the hearing.

Inquires in relation to the Drug Premises review can be directed to Ms Katie Hall, on 02 9286 1076 or [khall@ombo.nsw.gov.au](mailto:khall@ombo.nsw.gov.au).

**The closing date for submissions is 1st August 2003**

## Questions for Consideration

### Drug Premises Provisions

1. Is the Drug Premises Act successful in targeting high-level drug supply? What evidence is there showing the success, or otherwise, of the legislation?
2. Is the law impacting on vulnerable groups in the community? If so, in what ways?
3. How have the indicia used to define Drug Premises Act been used? If you are aware of examples of the use of particular indicia, please provide details of these.
4. How has the reverse onus of proof operated in relation to 'drug premises' offences?
5. Are there any unnecessary difficulties in proving that a person 'knowingly allowed' their premises to be used as drug premises. If so, what are they?

### Drug 'Move on' Provisions

6. How are police interpreting the 'relevant conduct' provisions in the Act?
7. Is it difficult to assess if 'the purpose' of a person's presence in a public place is to purchase or supply drugs? If so, what are the difficulties?
8. Are police targeting particular groups in their use of the new 'move on' provisions? If so, what evidence is there of inappropriate targeting? What are the consequences of targeting particular groups?
9. Is the issuing of 'seven day' directions appropriate? If so, in what circumstances?
10. Is a 'seven day' direction effective in stopping the purchase/supply of prohibited drugs? How might a direction of this type be effective or ineffective?
11. Do 'seven day' directions issued to clients of drug and alcohol services impact on the provision of those services and/or on public health generally? If so, in what ways?
12. Are you aware of any 'unintended consequences', such as the displacement of the drug trade to other areas, that may have been a result of the use of the new drug 'move on' powers? If so, please describe these consequences.
13. Is it appropriate for police to arrest and charge a person who, for example, police believe is in an area to supply prohibited drugs and refuses to obey a direction to leave? If so, in what circumstances would an arrest and charge be appropriate or inappropriate?