

# **Controlling and Regulating Drugs**

**Submission of the  
New Zealand Police Association**

**Submitted to the  
Law Commission**

**12 May 2010**

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## *About the New Zealand Police Association*

The New Zealand Police Association (the Association) is a voluntary service organisation representing some 8,600 constabulary police members across all ranks. The Association also represents nearly 2,300 non-constabulary employee members, who carry out invaluable support roles across the full spectrum of policing. Members are generally very active in engaging in debate and discussion within the Association on matters relevant to policing. The high engagement level of the membership is critical to the Association's ability to speak and act credibly on behalf of members.

In putting together this submission, the Association has consulted with members who have first-hand experience in the matters addressed by this Bill.

## **Introduction and summary**

1. The Police Association welcomes the opportunity to submit on the Law Commission's *Issues Paper on the Review of the Misuse of Drugs Act 1975*. While we are not convinced that there is a compelling case for re-writing that Act, as it appears generally to be working well from a practical law enforcement perspective, the Issues Paper provides a timely focus on the drug policy issues that are reflected both in drug laws, and in government spending priorities.
2. In particular, this is an opportunity to focus attention on the dominance of internationally linked organised crime in the illicit drugs trade. There is a pressing need to address the drugs trade at that level – through attacking the organised crime networks and flow of wealth – to more effectively disrupt supply chains.
3. It is also an opportunity to focus attention on the adequacy or otherwise of current levels of government investment in drug education, addiction treatment and rehabilitation. Increased investment in treatment services would seem to hold some potential for reducing recidivist criminal offending associated with drug addiction.
4. It does not follow that there should be a corresponding reduction in law enforcement activity associated with dealing in illicit drugs. We believe law enforcement activity within the current framework is targeted appropriately and prioritised towards the higher-culpability offending, and at prosecutions which will have a significant disruptive effect on the drug supply chain.
5. It is not our desire to see disproportionate responses to lower-grade offending, or see people imprisoned as a response to their casual drug use. However, we believe that current prioritisation of investigations and the appropriate exercise of discretion at the various stages in the criminal justice process mean that responses are, by and large, proportionate to offending.

6. In considering policy and legislative options, it is important to recognise that we do not start with a 'blank sheet of paper'. Supply of illicit drugs is controlled by crime; current usage rates are to some extent suppressed by prohibition; and New Zealand is just one jurisdiction within the supply chain of many illicit drugs. This last fact places us under not only obligations to relevant conventions, but also under some international political expectation from, if not moral responsibility to, other countries that are also touched by the criminality of those supply chains.
7. The Issues Paper states that essentially the question to be answered in drug policy is whether the benefits of prohibition, measured in harm reduction, outweigh the costs. Setting aside debate about what counts as harm, and the enormous difficulty of predicting illicit market behaviour response to policy changes in relation to any given substance, supply chain or consumer group, we fundamentally disagree with the characterisation of the cost-benefit approach. Because we are not starting with a blank sheet of paper, the onus must fall on advocates for a change in the law enforcement approach to illicit drugs, or any drug in particular, to demonstrate that the benefits of the proposed change would outweigh the costs, as compared to the status quo.
8. There is little doubt that the prohibited status of illicit drugs deters casual use by at least some of those who might otherwise use them. Removing a prohibition, whether formally or de facto, would inevitably lead to increased use of the substance. If abuse and dependency rates are related to usage rates, which seems intuitive, then relaxation of prohibition would be expected to lead to an increase not only in use, but also in the serious harms which affect a proportion of users.
9. We do not believe that it is possible to draw an easy distinction between the harms of a substance, and the harms of prohibition of that substance. The supply chains and distribution of most illicit drugs are dominated by organised crime. Criminality and corruption associated with those groups is complex, international in scope, inextricably intertwined with a myriad of other serious organised criminal offending, and in many cases historically entrenched.
10. Lifting a statutory prohibition seems extremely unlikely to end ongoing organised crime involvement in a globally massively lucrative trade. Similarly, it seems unlikely that the ability legally to buy a drug in itself removes the need for an addict to commit crime to fund an addiction, until and unless the addict seeks help and is accepted into a treatment programme.
11. New Zealand is not a self-contained illicit drugs market, with the possible exception of the cannabis trade (setting aside the likelihood that some cannabis profits are currently laundered and/or channelled into other criminal enterprise offshore). Illicit drugs supply chains are global networks and there are very real law and order, social, economic and political consequences for those countries where illicit substances are grown, manufactured, processed and/or transited. Those consequences include the bribery and corruption of officials and elected representatives, undermining of confidence in the institutions of state, distortion of lawful markets and the loss of investor confidence. In the most serious cases, drug producers can deliberately

undermine democratic regimes and the rule of law, including by funding of insurgencies and terrorism. All of those can seriously affect a country's capacity to deliver effective and efficient state services, and can have extremely adverse impacts on the quality of life of inhabitants of the countries concerned.

12. New Zealand is in our view therefore bound as much by moral obligation as by its convention commitments to cooperate with international efforts to contain and disrupt the illicit drugs trade. At its most basic, this obligation must include continued domestic law enforcement efforts to disrupt supply chains and suppress demand.
13. The terms 'harm minimisation' and 'war on drugs' tend to be used to characterise viewpoints as either liberal or conservative, respectively. This characterisation can be dismissive or approving depending on the personal viewpoint of the person uttering it. Neither term is particularly helpful, because they obscure the nuances of the issues and particularly the multifaceted nature of the drug problem.
14. Harm minimisation does not stand in contrast to law enforcement activity. Current drug policy, with harm minimisation supported by three pillars, is essentially sound at the policy level. We do not agree that the Act is poorly aligned with the harm minimisation policy; on the contrary, we believe in practice it is extremely well aligned with the supply control pillar, with some additional demand reduction effect. It is unreasonable to expect the Misuse of Drugs Act (or any act) to mandate the entire programme of government activity in support of the policy.
15. We believe increased efforts in support of the other pillars of drug policy are fundamentally issues of priority for investment. While there may well be a case for more drug education and treatment, it is neither necessary, nor in our view desirable, to relax prohibitions or reduce law enforcement activity in order to do so. While the prohibited status of various substances is frequently cited as a hurdle to effective education and treatment, we have yet to see any convincing evidence of that claim which would justify a change in legal status.

### **General comments on policy issues**

16. As the Law Commission notes, the illicit drug scene has changed markedly from the era in which the current Act was written. During the 1970s, most illicit drug use and supply in New Zealand was associated with a 'hippie' counterculture. That is no longer the case. Illicit drug supply is now criminal big business, and characterised by aggressive marketing of products to relatively wealthy, 'mainstream' consumers rather than just those living on society's margins. Suppliers are not always drug users, with profit in almost all cases being the sole motivation at all but the very lowest levels of the supply chain. Market position and debt recovery are enforced through violence and intimidation targeting rival suppliers, lower level dealers and users who leave themselves vulnerable to exploitation.
17. Nevertheless, members working in the field of illicit drug law enforcement believe the Misuse of Drugs Act 1975 is generally working well, in combination

with established judicial sentencing precedents. The Act has generally responded well to the changing drug scene, with the amendments that have been made over the years. Further amendments may continue to refine its operation, but there is not, in our view, a need for fundamental change.

18. A 'ground up' re-write of the Act would only be necessary if New Zealand were to fundamentally change its criminal justice approach to the trade in illicit drugs. Doing so would have serious law and order consequences, through further enriching organised crime and fuelling the diverse serious criminal offending associated with it.
19. Further, any significant revision of the Act involving changes to key offence provisions would likely create new avenues for defence counsel, requiring further consideration by the courts and the creation of a new body of jurisprudence. This would lead to considerable unnecessary cost and uncertainty during the bedding-in period of a new statute, as well as potentially hampering Police operations against serious organised criminal enterprises.

#### *Assessing drug harm*

20. Drug 'reform' advocates often appear to base their arguments on beliefs about the personal harm (however defined) that may or may not be suffered by the substance user, and belief in the primacy of an individual's right to choose to run the risk of that harm. They appear typically to minimise the wider consequences of drug use and the drugs trade, or dismiss those consequences as entirely (or in large part) the result of prohibition. Many of these attitudes seem to reflect a romanticised conceptualisation of the illicit drug scene as it may have been several decades ago, dominated by an underground counterculture social scene, rather than organised criminal big business.
21. The Police Association rejects this narrow approach. It is simply not possible to separate consideration of the legal status of illicit substances from the reality that the major supply chains of such products are, to all intents and purposes, entirely controlled by serious, trans-national organised crime networks. Even the supply of New Zealand's largest domestically produced illicit drug (cannabis) is, at a commercial level, dominated by New Zealand-based, but globally-linked organised crime groups. Those realities mean the drugs trade is inextricably linked to a myriad of other types of criminal offending, in New Zealand and elsewhere. Wealth derived from the supply of drugs is intermingled with wealth from other criminal enterprise, is used to fund a wide variety of other types of serious crime, and is laundered in a way that diverts significant wealth from the local economy and/or distorts the functioning of lawful markets.
22. Decriminalising or legalising a substance in New Zealand would not materially affect those realities, since international supply chains would continue to be controlled by organised crime. Domestic supply would likely continue to be dominated by the organised crime groups that have international criminal connections to suppliers. The most visible change would be that those crime groups could sell their product more openly on the local market.

23. Substitution through development of commercial-scale local production of convention substances, assuming such activity was consistent with an alternative regulatory regime, would likely lead to New Zealand developing an international reputation as a source country for illicit drugs. This would have wide-reaching negative consequences both politically/diplomatically, and economically, most obviously and immediately in our trade and tourism. That point is to some extent acknowledged in the Issues Paper at 8.12.
24. Similar, but lesser consequences could be expected from any change to drug policy which saw New Zealand develop a reputation as permissive towards recreational use of substances that are banned elsewhere. That has been the experience of the Netherlands, with the development of 'drug tourism'. These consequences are also harms that would need to be considered in evaluating the costs and benefits of any proposed change in drug policy.

#### *Evaluation of harm*

25. The general point advanced in the conclusion to Chapter 7, as the basis for setting drug policy, is that "with some limited exceptions ... regulation of drug use is only justified to the extent necessary to prevent harm to others". Loaded in this conclusion is that the harm to others must be fully and properly assessed, and not ignore or minimise relevant harms, for example by dismissing criminality associated with the illicit drugs trade as a 'harm of prohibition' rather than a harm of drug use.
26. In respect of the further qualification in the conclusion to Chapter 7, that "regulation of drug use is only justified ... where the benefits arising from that reduction in harm outweigh the costs arising from regulation itself", we believe practical realities dictate the test should actually be applied in reverse: whether the benefits from any proposed liberalisation outweigh the costs of the proposed measures. That is because we do not have the luxury of starting with a 'blank sheet of paper': we are starting from a position where at least some drug use is currently suppressed by prohibition; where the global and domestic drugs trades are dominated by organised crime; and where the ramifications of any change to our approach in New Zealand would extend beyond this country.
27. Measures of harm need to include not only "measurements of the clinical and social impact of drugs on individuals and populations and the economic and social costs of drug misuse", as expressed in the Issues Paper at 9.77, but also the social impact on individuals and populations, and the economic and social costs of the illicit drugs *trade*, in New Zealand and in other countries touched by supply chains. These cannot simply be conveniently dismissed as costs of prohibition and thus irrelevant to an assessment of a drug's harm.
28. We do not therefore agree that it is erroneous to "conflate the harm arising from drug use with the harm arising from drug prohibition" (Issues Paper 2.8). On the contrary, any approach which artificially excludes the harms associated with criminal drug supply networks from its evaluation is founded on an assumption lacking in credibility: that those harms would disappear if prohibition were ended.

### *Involvement of organised crime*

29. It is impossible to separate the drugs trade from organised crime. The same networks that facilitate and control the drugs trade also facilitate other types of serious crime. These include the trafficking in arms and people. The vast cash flows involved are laundered through global financial systems, leading to actual or suspected financial and share market distortions and potentially significant losses to lawful economic enterprise. Cash flows are also applied deliberately to corrupt public officials and institutions along the length of the supply chain, in order to protect and ease the continued flow of the full range of illegal commodities and illegal wealth. At its most overtly destabilising, drugs producers in Afghanistan, Colombia, Peru and elsewhere have deliberately sought to overthrow or undermine democratic regimes, and drugs have been produced and/or trafficked by groups in a range of countries with links to terrorism and various insurgencies with the express objective of funding those activities.
30. If the contention is that removing prohibition would allow 'non-criminal' suppliers to undercut organised crime networks, thus driving them out of business, that does not necessarily follow and indeed seems highly unlikely. We would argue there is an overwhelming likelihood that existing suppliers would simply operate more openly, with more competitive consumer prices offered through elimination of 'risk premiums' charged by middlemen, and through simplification of supply chains and business structures. Suppliers would be likely to broaden distribution bases and openly focus on volume, leveraging market advantage through product quality and existing relationships with reliable producers.
31. The international experience in relation to organised crime is that it tends to develop a presence not just in illicit markets, but wherever there is profit to be made and the criminal organisation is able to gain an advantage over lawful competitors. This includes widespread presence internationally in legal or decriminalised vice industries such as prostitution and gambling, as well as illegal or black market competition in legal industries through, for example, smuggling of tobacco and counterfeit consumer goods. Those are high-volume more than high-margin trades.
32. Given its current market dominance, it is difficult to accept organised crime would give up its position simply because the trade was legalised. Nor, obviously, would the legalisation of the trade necessarily mean the groups were no longer involved in organised crime, given their typically diverse activities.
33. It is also far from certain that violence, intimidation, bribery and corruption of public officials, and similar activity associated with and funded by the drugs trade would vanish if the trade were legalised: given such behaviour characterises organised crime involvement in any number of legal industries worldwide. Organised crime is incentivised in legal markets to attempt to gain a competitive advantage by avoiding some of the costs associated with regulation, for example through bribery of customs officials, licensing inspectors or other regulators. There are also numerous well-established

examples of organised crime creating effective monopolies for its 'lawful' businesses through intimidation of suppliers, competitors and consumers. The likelihood of detection of such crime in an industry which Police are neither mandated nor expected to monitor is extremely low, and this fact alone rationally encourages organised crime to behave in this way.

34. It is also optimistic to expect criminality flowing from drug addiction would disappear, if prohibition were lifted. While it may be true that an addict who seeks and is accepted into a treatment programme may have their motivation to offend alleviated, such addicts are unlikely to be in the majority. Similarly, drug users who find themselves indebted to organised crime through their recreational drug use or social dealing ambitions now increasingly find themselves exposed to 'taxing' (unreported theft/confiscation of their own, and family members' property) and demands to engage in crime on behalf of gangs, to clear debts. Those are not types of criminality that can be directly alleviated by better availability of drug treatment programmes, even if better availability were a logical consequence of removing prohibition.
35. If it is suggested offending committed to pay for drug addictions would reduce because lifting prohibition would cause substance prices to drop, that would appear inconsistent with the regulatory approach to legal recreational drugs. While a narrowing of profit margins might be natural consequence of free market competition, allowing such a price drop would be directly contradictory to the approach taken in respect of the legal drugs alcohol and tobacco: where it is argued that the most effective way to reduce use is to constantly increase the price, through taxes designed to more than negate competitive market forces.
36. Following the logic of alcohol and tobacco control strategies, it would seem to follow that a high street price for illicit drugs must be a good thing from a demand reduction point of view. Conversely, any policy which reduced the price of a substance must be assumed to make that substance more attractive, to the extent that economic considerations influence a potential user's choices. Of course, artificially raising prices of any desirable lawful but regulated product also provides economic incentives to develop a criminal black market to supply the product. The experience in the United Kingdom at present with organised crime involvement in large-scale tobacco smuggling is illustrative.
37. Against these realities, the primacy of an individual's unfettered right to choose to harm themselves must be challenged; even setting aside the fact that in New Zealand, the consequences of self-harm are borne largely by publicly funded health and other social services. There is a social contract implicit in that provision of care that arguably gives society the moral right to proscribe certain risky behaviours, such as riding a motorbike without a helmet, or driving without a seatbelt.

*Alignment with policy platform of harm minimisation*

38. The Association agrees that the current Act is a criminal justice statute; but strongly disagrees with the assertion at 4.50 of the Issues Paper that this

means the current Act is poorly aligned with an overall policy objective of harm minimisation.

39. It is not necessary for the Act to provide a statutory basis for an entire government programme of activity. For example, an Act is not the only, nor necessarily the best means of promoting drug education and treatment. The Issues Paper acknowledges this point at 4.51.
40. A criminal justice statute is, however, necessary for mandating the law enforcement activity and legal sanctions needed to disrupt supply by addressing the importation, manufacture, sale and supply of drugs; and suppress demand through restricting supply and deterring casual use.
41. Those are critical aspects of any programme to minimise the harm from illicit drugs, particularly when harm is properly evaluated to include the wider economic and social harms (in New Zealand and in other countries) that are inherent to illicit drug supply chains.
42. We would argue the Act is consistent with the 'three pillars' of harm minimisation, and generally works well in addressing supply control, with some crossover effect into demand reduction. Problem limitation, and demand reduction through education and treatment, are not matters necessarily requiring legislation.
43. The risk, expressed at 4.52 of the Issues Paper, "that the criminal law and its enforcement, because these are contained in legislation, can become the main focus of drug policy" is not borne out by an examination of that policy. The Government's current drug policy is based on the 'three pillars' of harm minimisation, only one of which is supply control. The resourcing of activities to give effect to the drug policy is a question of political priority. Even if the Misuse of Drugs Act were able to be held responsible for the current balance of those activities, which we do not believe it can be, the Act would be a poor vehicle to use in any attempt to change those priorities. We would suggest that political priority determines legislation, and not vice versa.

#### *Freeing up resources for education and treatment*

44. It does not follow that if Police did 'less enforcement', that this would free resources for drug education and treatment. Leaving aside the obvious point that the government of the day will seldom prioritise its expenditure on the basis of a simplistic binary choice, the reality is that the serious criminal enterprises which supply the illicit drugs market must be policed. It is not an option for Police to ignore these networks and the criminality, including serious violence and homicides, which go along with them.
45. Police, to some extent, made the mistake of de-prioritising policing of the drugs trade in the late 1990s with the disbanding of Drug Squads and Organised Crime Squads in many districts. Those decisions contributed to the massive growth of the methamphetamine trade over the same period, with disastrous social consequences, and the enriching of serious organised crime to the tune of literally hundreds of millions of dollars. We would also observe that disbanding those squads did not free up resources for any noticeable

boost to drug education or treatment efforts: instead, the growth of P simply created a whole new group of people desperately in need of such treatment.

46. Even in the case where some or all illicit drugs were legalised, and even if the criminality associated with drug supply disappeared, it would still be extremely optimistic to expect Police resources to be freed up as a result. The amount of Police resource currently occupied by the consequences of alcohol vastly outstrips the amount of resource used to police prohibition of illicit drugs. Even allowing that other drugs would not achieve the same widespread usage rates as alcohol, it is more than likely increased drug use would increase the need for police response to crime and disorder, crashes, victimisation of intoxicated persons, and similar workload associated with intoxication.
47. While some of this workload might displace workload associated with alcohol, it seems to us more likely (since, as noted at 2.5 in the Issues Paper, many drug users seem to prefer to combine their drug use with alcohol; often with the effect of amplifying or rendering unpredictable the intoxicating effects – as noted at 8.68 in the Issues Paper) there would be a net increase in the total number of incidents requiring Police attention.

#### *Legal versus illicit drugs*

48. It may be the case that overall government priorities over many years have not matched law enforcement and supply interdiction efforts with commensurate investment in illicit drug education and treatment efforts. As discussed above, that is not a failing of the statute. Nor is it, in our view, due to a dominant law enforcement focus in determining drug policy.
49. On the contrary, the Association believes the relatively low priority attached to illicit drug education and treatment has arguably been due in large part to the determination to approach drug issues from a health perspective, with little differentiation between legal and illegal drugs when determining priorities. The view appears to prevail that because the majority of harm (relatively narrowly assessed, and defined largely as aggregated adverse health impacts) flows from alcohol and tobacco use, all (or nearly all) available drug demand reduction resource should be directed at education and treatment for use of those two substances.
50. Our observation is this focus results in the vast majority of demand reduction and treatment resource, if not tagged to a politically driven Budget initiative, being preferentially committed to efforts to combat legal drugs, to the exclusion of a focus on other substances. Consequently, efforts focused at reducing demand for illicit substances have long been the 'poor cousin' to campaigns against smoking and drinking. This situation seems unlikely to change while harm is still narrowly evaluated from a health perspective, and begs the question as to whether it is even sound to apply the same parameters to evaluate the harm of both legal and illicit drugs. Clearly, simply making all drugs legal would have no bearing on the prioritisation of alcohol and tobacco-related harms, unless the uptake of a newly legalised drug was such that the aggregated negative health impacts rivalled or outstripped the comparative harms of alcohol or tobacco.

*Prohibition not a barrier to education and treatment*

51. The Association rejects assertions that the current legal status of substances is a significant barrier to drug education and addiction treatment. There is no statutory barrier to increased investment by government in drug education, treatment and rehabilitation services. Nor do we believe that a change in health services investment priorities would necessarily or automatically follow a change in a drug's legal status.
52. The alleged barrier to education is summarised at 2.45 of the Issues Paper as being, essentially, that educators are perceived by drug users to lack moral authority to discourage them from using their 'drug of choice', since alcohol and tobacco are legally available. Audience scepticism or outright rejection of the moral authority of educators may be a factor, especially amongst particular audiences such as teenagers who have already been exposed personally or through peer groups to drug use without suffering immediate catastrophic harm. However, we find this an extremely weak basis for concluding that prohibition is the main problem, or that removing prohibition would remove this barrier. Similar dynamics may be at work, for example, in educating the same audience about the dangers of smoking or unprotected sex, both of which are legal but highly inadvisable. We are unconvinced that the hypothetical 'difficult teenage audience' would be significantly more receptive to abstinence messages in a social context where drug use was decriminalised or legal. The opposite may even be true.
53. Any complications to education and treatment that might flow from prohibition (as referred to at 4.53 and 4.54 of the Issues Paper) are clearly not insurmountable hurdles, as evidenced by the fact such activities do now take place despite prohibition (albeit at levels that are arguably less than desirable). The question then is whether demonstrable benefits would accrue to education efforts which would outweigh the costs of lifting or weakening prohibition, those costs being for example the result of increased problematic drug use and increased wealth diverted into criminal enterprise. We would strongly argue those benefits cannot be demonstrated.

*Costs of lifting or relaxing prohibition*

54. The Association believes that an inevitable consequence of any material liberalisation of the legal status of a substance (i.e., decriminalisation or legalisation) would be increased use of that substance. The Issues Paper acknowledges this point at 7.103 and 7.112. Some of those additional users will be or become problematic users, suffering personal harms and inflicting direct harms on those around them. Increasing demand for illicit substances would fuel the trade in those substances, and thus further enrich organised crime by diverting more wealth from the lawful economy into criminal enterprise. That wealth enables and encourages a diverse range of other serious criminal offending which is socially and economically destabilising, including money laundering, corruption and violence. The net consequence of these outcomes would be a marked increase in the total harm to New Zealand society caused by the substance. Other countries touched by supply chains would also be affected.

55. We believe the prohibited status of illicit substances has a significant deterrent effect against personal use: both through restricting availability; and by deterring drug use (or frequent use) by members of society who are not willing to run the risk (e.g. to career and/or reputation) of criminal legal consequences. Even illicit drugs which are relatively widely available, such as cannabis and methamphetamine, do not match the ubiquitous availability, social acceptability or low price of licit drugs such as alcohol, or BZP (when that substance was permitted).
56. We believe the experience with BZP is illustrative of the demand reduction effects that flow from a legally prohibited status. When legal, BZP's arrival in popular awareness led to the explosive proliferation of corner shops dedicated to its supply, and the rapid normalisation of its usage. As soon as it was made illegal, there was a rapid contraction in availability, a reduction in use, and a massive rise in its street price. The Law Commission's paper makes similar observations at 1.20.

*Increased investment in demand reduction*

57. The Association would welcome any measures which effectively reduced demand for illicit drugs. However, we do not believe these measures require a change in legal status of prohibited substances, and nor should or need they be traded off against law enforcement activity.
58. The Issues Paper quotes (at 15.8 and elsewhere) survey figures that in 2006, 1.2% of the adult population (16 years old and over) experienced drug abuse (excluding alcohol), and 0.7% drug dependence. On our calculation the first figure equates to approximately 41,000 individuals, more than half of whom experienced dependence. This is contrasted with the reported statistics that 22,500 people per year in total (*including* alcohol) receive some assistance with drug and alcohol issues, of which information elsewhere in the Issues Paper suggests 4,500 people are those currently receiving methadone treatment.
59. It is difficult to envisage any health programme overcoming capacity and funding constraints to deliver effective treatment programmes to something between 20,000 and 40,000 more people per year for serious drug (non-alcohol) issues. Based on current expenditure, quoted in the Issues Paper at 15.18, doing so would cost in the region of \$100-200 million per year. It is also difficult to envisage facilities being established for even a fraction of that number to be compulsorily detained for treatment. It seems more likely, based on current investment in (for example) youth justice and other State-funded residential facilities, that perhaps a few dozen or low hundreds more people might be able to be treated each year.
60. Such efforts would no doubt be very worthwhile, but it would be optimistic to expect them to make any material difference to overall rates of drug dependence (let alone drug use).
61. While increased investment in treatment is needed, any suggestion that this would reduce the need for law enforcement, or even allow for a relaxation of prohibition, would be extremely misguided. A further \$100-200 million of

treatment certainly could not be funded through a reduction in prosecutions for possession of cannabis for personal use. As the figures above indicate, it is unrealistic to expect treatment to materially reduce the numbers of New Zealanders with serious drug problems (and hence the harm they inflict on themselves and others). On the other hand, overt or tacit relaxation of prohibition would inevitably lead to greater casual substance use; with a proportion of the new user population going on to develop serious abuse and dependency problems. We believe it is likely the net effect of such a combination of policies would be an increase in the numbers of drug dependent New Zealanders, and the total harms arising from those dependencies.

62. The following necessarily uses some rough calculations and assumptions, since methodologies and population segments don't map with total accuracy across the data sources, but we believe it nevertheless broadly illustrates our point.
63. Self-reported drug use statistics for the 16-64 population age segment quoted in the Issues Paper (1.10) show various illicit substances are used by between about 15% (cannabis) and around 2% or less (amphetamines, opiates and other 'hard' drugs) of that group each year. That population segment accounts for roughly 84% of the total New Zealand adult population (with around 16% of the adult population being aged 65 or older).
64. Assuming drug dependency almost always affects this same segment of the adult population, we can translate the earlier quoted total adult population figures of 1.2% non-alcohol drug abuse and 0.7% dependence to approximately 1.4% and 0.8%, respectively, excluding the 65+ age bracket. Comparing these rates to the earlier-quoted self-reported usage rates, these figures suggest somewhere between 6% and 75% of drug users will develop a dependency. The Issues Paper quotes dependency rates amongst cannabis users in the range of 9-18%, and methamphetamine users at up to 63%, which are broadly consistent with our rough calculation and widespread assumptions that 'hard' drugs tend to be more addictive. These apparent ratios of dependency to use are clearly very much higher than for alcohol, which can be calculated to be about 1.8% based on the same data sources.
65. While the dependency to use ratio figures are slightly lower across the board if we assume drug dependence rates are constant across the adult population rather than concentrated amongst the 16-64 age bracket, the difference is immaterial to the conclusion.
66. So, even as little as a 1% rise in drug usage rates arising from less enforcement or a lifting of prohibition would seem likely to result in hundreds (or thousands) of additional cases of dependency and associated harm. Based on the BZP experience, we suggest a change in the prohibited status of any currently illegal drug would result in far greater increases in usage rates. A policy of liberalisation would need to be able to deal effectively with significantly more than the number of 'new' addicts to be able to demonstrate a net benefit through improved harm reduction.

### *Differentiated approach*

67. There are risks in attempting to generalise approaches to the various drugs, for example by arguing from a position that the moral choices involved are no different, as a matter of principle, regardless of the substance.
68. There are, as a matter of fact, differential levels of harm associated with different substances, both in terms of personal health impacts and in terms of the criminality associated with supply chains for different products. The Issues Paper acknowledges this point at 8.9, although the approach subsequently proposed to personal possession and use offences does not seem consistent with that.
69. We would argue that the current Act, through its ABC classification system, and Police's exercise of discretion in enforcing the law, already contains adequate and appropriate differentiation on the basis of overall harm.
70. If it is the case, as advanced in 7.40(d) of the Issues Paper, that law enforcement activity displaces drug users from one substance to another relatively less stringently enforced substance, then the logic of harm minimisation would again dictate a differentiated approach with the harshest penalties focussed on the most harmful drugs. While it is suggested at 8.19 that is the model New Zealand should adopt, we would argue that it is essentially the model we already have in New Zealand today (the actual range of consequences being, of course, a separate matter).
71. Note that the example of displacement as an "unintended consequence of prohibition" given in paragraph 7.40(d), of an increasing market for synthetic stimulants against a declining market in cannabis, cocaine and opiates, is a poor example of displacement caused by law enforcement activity, not least because the vast majority of the stimulants concerned are also prohibited. In almost all jurisdictions, cannabis also tends in practice to be the most leniently policed illicit drug, and stimulants such as methamphetamine one of the most stringently policed. Any shift in drug consumption trends is therefore, in our view, far more likely to be a function of fashion and lifestyle trends, marketing and market availability, and price.

### **Specific comments on proposed changes**

#### **Proposed approach to convention drugs**

##### *Classification system*

72. For the reasons outlined above, the Association is in favour of retaining the current ABC classification system. Any proposal to re-classify a particular substance should be assessed on its merits. In line with the comments made earlier about evaluation of the harm associated with a substance, it is important the classification decision also takes account of any significant harms associated with a particular substance's production and supply, as well as scientific evidence about personal health effects. For example, if drug intelligence indicates sale of a certain substance in New Zealand is generating funds for a designated terrorist entity, or its production has serious

environmental or health consequences for populations in the developing world, those seem to us to be aggravating factors which ought to justify the highest tier of penalties applying to those involved in its trade, so long as the basis for the decision is clear.

### *Dealing*

73. The Association does not have a strong view about the retention of a distinction between 'sale' and 'supply' of controlled drugs, since the distinction is only relevant to non-commercial supply of cannabis to an adult. We are not persuaded there is a pressing need for change; however, we would have no particular objection to facts about scale and the commercial motivation or otherwise of a transaction being dealt with as sentencing issues.

### *Social supply*

74. However, we do not believe there is a need for a separate approach to 'social supply', such as through the Issues Paper's proposed presumption against imprisonment for such an offence. Attempting to differentiate relatively low culpability supply offending by reference to a set of prescriptive criteria is potentially fraught, especially if the criteria attempt to capture social sharing of all illicit drugs regardless of their relative harms. For example, it may be very difficult to differentiate on the basis of fixed criteria between sharing of drugs between close friends, casual friends, and a dealer and his or her potential new customers.

75. A related offence of 'possession for social supply', as proposed in the Issues Paper at 10.99, would to all practical intents and purposes be impossible to differentiate, given the criteria proposed relate to intended future use/disposition of the quantity of drugs, which is impossible to prove either way.

76. It would also be difficult to justify on a harm minimisation basis a more lenient approach to, for example, the social sharing of intravenously administered heroin between 10 users, than to the commercial supply of a bullet of cannabis to one user. In our view it is preferable to allow for the evaluation of all the facts, and application of appropriate discretion, if warranted, at the various junctures throughout the criminal justice process, from charging to sentencing.

77. If the current distinction in respect of supply (but not sale) of a Class C drug to an adult were to be repealed, of course the general statutory presumption against imprisonment for that offence would also presumably be lost. However, given established sentencing precedent and the general sentencing guidance contained in the Sentencing Act 2002, we would not expect a major change in judicial behaviour to follow.

### *Statutory presumption of imprisonment*

78. We believe it is important to maintain the statutory presumption in favour of imprisonment for dealing in Class A drugs. That is because the trade in such drugs is almost entirely dominated by organised crime. No penalty other than

imprisonment has any impact whatsoever on organised crime networks (with the exception of asset forfeiture). For example, fines imposed on drug dealers would simply be paid by the criminal organisation as a business cost. Rehabilitation is entirely unsuitable as the dealer is almost always motivated by money, not addiction, and may not even be a user of the substance in question. Even though those who are able to be charged with dealing offences are often lower- to mid-level players in organised crime networks, imprisonment at least imposes meaningful consequences for calculated criminal offending, temporarily disrupts drug networks, and offers some deterrent against the rapid recruitment of replacement dealers.

#### *Differentiation between dealing behaviours*

79. Section 6 of the Misuse of Drugs Act currently addresses all the various dealing behaviours, being import, export, production, manufacture, and supply. Judicial precedent has established a reasonably consistent approach to the relative culpabilities of dealing offences, on the basis of the scale, degree of commerciality and so on. We see no particular grounds to change the current offence structure.
80. As a general comment, we would tend to see importation of marketable quantities as generally relatively more culpable than other dealing, since such offending almost always requires considerable and determined planning and organisation. It is invariably motivated by an intent to supply or develop a local market for a pure profit motive. Local manufacture of prohibited drugs often requires similarly calculated and organised criminal activity, but might also in some cases be somewhat more opportunistic and spontaneous with more mixed motivations. Supply offending may cover the full range of degrees of culpability.
81. As a further comment, we would note that manufacture of methamphetamine is not the only extremely hazardous manufacturing process. We are informed anecdotally by our overseas counterparts that a large proportion of deaths and injuries associated with drug manufacture overseas are a result of fires and explosions during the manufacture of cannabis oil.

#### *Presumption of possession for supply*

82. We are not convinced there is a need to overreact to the Supreme Court's opinion as to the justifiability of the supply presumption as a limitation on the right to be presumed innocent, as expressed in *Hansen*.
83. The Attorney General advised Parliament in respect of the 2005 Amendment Act that the reversed onus was a justified limitation in terms of section 5 of the New Zealand Bill of Rights Act (BORA). The amendment was passed; so even though the Supreme Court judges differ in their opinion, Parliament has nevertheless legislated to confirm the presumption in the post-BORA environment.
84. Further, as the Court pointed out in rejecting the appeal, section 4 of the BORA means the decision of Parliament to enact the legislation, notwithstanding any inconsistency with the BORA rights, in effect overrides

those rights. If the Court believes despite Parliament's legislative action that the limitation was unjustified, and that Parliament was poorly advised by the Attorney General, it can indirectly invite Parliament to reconsider the issue, as it has done through its judgment. In the words of McGrath J in *Hansen* [259], "it is the constitutional responsibility of the court to indicate in its judgment that it has relied on s 4 of the Bill of Rights Act to uphold an inconsistent provision in another statute [but] other branches of government are under no obligation to change the law to remedy the inconsistency". Rather, as Anderson J says at [267], "the court's opinion will have a social value in bringing to notice an enactment which is inconsistent with Section 25(a) fundamental rights and freedoms." The issue essentially becomes one between society and the representatives it has democratically elected. If the public, informed by the Court's judgment, feels the current Parliament is unjustifiably eroding fundamental rights, it has recourse to elect new representatives who will reverse the offending law.

85. The Police Association is more inclined to agree with the opinion of the Attorney General than the Supreme Court as to the justifiability of the limitation on rights represented by the presumption. In a case where the presumption is triggered, the fact that the accused was in possession of a substantial quantity of illegal drugs is not in question. The presumptive levels are, in our opinion, set at levels whereby it is not credible to presume the drugs were for personal use, and represent quantities sufficient to cause significant social harm, beyond harm to the accused, if distributed. It is our view that these facts justify the reversed onus.
86. At a practical level, the current presumption has clear secondary benefits to investigators, in that an accused may be motivated by exposure to the higher penalties to make a statement or give information that they would otherwise not be inclined to give. This can be extremely helpful in investigating the other individuals and groups involved in supply chains of illicit drugs.
87. As stated above, we are not convinced there is a need to revisit the presumption of possession for supply. If some action were deemed necessary in response to *Hansen*, our preference would be for Parliament to reaffirm the law in light of the decision and perhaps some further comment from the Attorney General.
88. If Parliament instead decided change was necessary, the best of the options canvassed in the Issues Paper would be the Law Commission's preferred option (b), of creating two offences along the lines 'possesses a controlled drug' (equating to the current possession for personal use), and 'possesses a trafficable quantity of a controlled drug' or similar (equating to the current possession for supply offence). The more serious offence would be proved by possession of the prescribed quantity alone, with no reference to the purpose of the possession: the statute would likely have to state explicitly that the offence does not require an intent to supply to be proved. An accused who wished to mitigate the more serious penalties would be free to argue that they possessed the drugs for personal use only, and if they did so persuasively that could be taken into account at sentencing.

89. If the lesser offence were allowed to overlap (i.e., did not contain a reference to the quantity of drugs possessed), the scope for discretion in laying a charge would provide a 'safety valve' for genuine cases of possession of unusually large quantities for personal use, and might still allow for some secondary benefit to be garnered in respect of investigations into drug supply networks.

#### *Personal use offences*

90. The statistics, quoted at 11.20 in the Issues Paper, relating to the number of possession offences being prosecuted need to be interpreted with considerable caution. While it may be true that in 36% of cases the possession offence was the most serious offence prosecuted, it is not safe to infer from that statistic that the prosecution was the result of police activity deliberately targeting possession of drugs for personal use. Such an inference is inherent in many of the claims made as to the financial savings that would accrue from decriminalisation.

91. Our members report anecdotally that possession offences are almost always detected as a result of police contact with an offender for other reasons, such as in relation to disorder or violence, driving offences such as failing to stop, questioning in relation to property offending, attendance at a family violence incident, or as a result of exercising a search warrant looking for (for example) stolen property. Even where possession is the most serious charge arising from that contact, that is no evidence of an unreasonably or unnecessarily punitive approach. On the contrary, the anecdotal reports from our members as to the circumstances of detection, and the prior criminal histories of most of those prosecuted (as described at 11.22 in the Issues Paper) tend to suggest that simple possession offences are not vigorously pursued in a way that is disproportionate to the offending.

92. In the absence of evidence that there is currently an unreasonable or disproportionate use of law enforcement resources in targeting 'low level' possession and use offences, there is no reason to believe that adopting a less punitive approach would free up law enforcement resources to be re-targeted on more harmful offending like commercial dealing, or provide a more proportionate response to the harm caused by such offending, address/mitigate the costs that inevitably result from drug prohibition in any significant way, or provide better opportunities to divert drug users into education, assessment and treatment.

93. In terms of the Law Commission's proposed approaches to personal use offences, the Police Association essentially favours a menu of responses. We would argue that is what we currently have: there is already considerable discretion able to be applied, and in fact applied, by Police in dealing with low-level personal use or possession offences. Police officers are already able to caution someone who is found in possession or using drugs. Such cautions are often verbal, and are not issued within a formal framework, but will sometimes be noted as having been given. Establishing a formal cautioning scheme for drug use/possession offences alone, in contrast to the general approach taken to cautions in the criminal justice system, does not seem justified. There may be scope for continuing to work to ensure more consistent use of some of the discretionary mechanisms, such as the Police

Adult Diversion Scheme and Alternative Case Resolution; however, we are not persuaded there is a need for statutory change in this area.

94. Any proposal for the addition of a new menu option in relation to an illicit substance needs to be debated on the merits of the particular circumstances relating to that substance; instead of attempting to extend a proposed approach to all prohibited drugs, irrespective of their relative harms.
95. Given the statutory presumption against imprisonment for Class C possession for personal use and use offences, and thus the fact such offending generally results in a court-imposed fine on conviction, it is arguable there would be little lost from allowing such offences to be dealt with by way of infringement notice where the circumstances supported that approach. In the case of adult offenders, the change in sanction would be immaterial, and because the approach is not internationally novel it would be unlikely to damage New Zealand's reputation or promote significant drug tourism.
96. Such a regime could not apply to young people, because the evidence suggests young people are at heightened risk of suffering long term harms from cannabis use. That dictates more focussed intervention and education efforts should be undertaken, preferably involving familial oversight and guidance.
97. So long as the discretion were retained to proceed with a prosecution where the circumstances warranted it, the Police Association would not be strongly opposed to the addition of an infringement notice option to the range of options already available to police dealing with simple Class C possession/use offences. Preserving discretion would mean Police could still respond appropriately to dealers who operate just below the supply-presumption threshold. There would be a need to ensure that addition of the option did not affect the availability of search powers in relation to such offences.
98. We would note, however, that in practice the result might actually be that infringement notices would be issued in circumstances where currently no penalty is ultimately imposed. Collection of fines imposed by infringement notice would also be subject to the same problems and limitations, and hence challenges to their credibility and effectiveness, as exist in relation to that form of sanction generally. Issuing of infringement notices would also arguably remove the apprehension crisis-point lever for intervention in drug use habits, as described in the issues paper at 11.23.

#### *Usable quantity*

99. We are not convinced there is a need for change to the established approach to the question of whether a drug was possessed in a usable quantity. The objective of the provisions is clear, and where there is room for argument as to whether detected drugs are a residue or not, the current provisions allow for that argument to be heard. Attempting to specify the threshold in more detail is likely to be fraught, especially if actual quantities are specified.

### *Separate offence of use*

100. We do not see any advantage in repealing the offence of using a controlled drug. As 'use' is ultimately the behaviour which the statute attempts to discourage, its prohibition should be retained.

### *Possession of utensils*

101. The offence of possession of utensils should remain, as such possession (with or without the presence of drugs) is very strongly connected with actual drug use, given the offence also requires that the purpose of possession be established. A clear analogy can be drawn with the possession of burglary tools or conversion instruments. At a practical level, this is a useful charge for investigators, which we do not believe is used in a way disproportionate to the overall circumstances.

### *Internal concealment*

102. The Police Association is not aware that the current maximum detention period causes any significant problem, in practice. Members report that detentions rarely go beyond four or five days. There is the risk that having any finite maximum period of detention potentially sets a 'target' which might encourage a courier to place their health at risk in an effort to avoid penalties for their offending. While there is no pressing need for change, availability of alternative options such as the use of a wider range of medical scans would be welcome.

### *Controls to prevent drug-seeking*

103. We agree that the current provisions need to be better targeted at drug-seeking behaviour, and not on drug dependence (or otherwise) of the person who is doing the drug-seeking. This will ensure that 'trustworthy looking' people who front this activity for others, for a fee, are able to be picked up by the health sector systems designed to detect and report it.

### *Medicinal cannabis*

104. The Association has no particular view on the potential medicinal uses of cannabis-based extracts, so long as these are properly assessed and regulated in the same way as any other medicine. In that respect, cannabis-based medicines are no different in principle to opiate-based medicines or other medicines which contain or are derived from psychoactive compounds.
105. We would, however, be strongly opposed to a situation that allowed the prescribing of cannabis in forms such as leaf or oil, or personal cultivation for medical use, since such a situation would inevitably be open to widespread abuse in a way that is not seen with other medicines such as morphine or codeine.

## **Non-convention drugs**

106. The Police Association is broadly supportive of the proposed approach to new substances, so long as Police and other law enforcement experts (particularly those with knowledge of the international drugs trade) are consulted and able to provide advice in relation to any application for approval to import or manufacture a new substance.

Greg O'Connor  
**PRESIDENT**