

31 July 2003

Our ref Jane Sanders

Doc no Sydney\004530354

Attention: Katie Hall

NSW Ombudsman
Level 24
580 George Street
SYDNEY NSW 2000

Submission on the Police Powers (Drug Premises) Act 2001

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged people aged 25 and under. Our solicitors provide court representation and legal advice on a range of legal issues, with our main area of expertise being criminal law.

The Shopfront is located in Darlinghurst and our primary client base is in the Kings Cross and inner city area. However, we also act for young people in other parts of metropolitan Sydney. In 2000 we initiated an outreach service in Cabramatta, which has resulted in a considerable amount of case work.

We welcome the opportunity to provide a submission to the Ombudsman's review of the *Police Powers (Drug Premises) Act 2001*. We attach a copy of our preliminary submission to this review, dated 28 June 2002. Our concerns expressed in that submission remain valid.

In relation to the questions raised in your recent Discussion Paper, we do not propose to comment on questions 1-5, as our experience in relation to drug premises offences is very limited. However, we wish to register our concern about the creation of new offences which criminalise people for merely being on (or in control of) premises, without any evidence that they are involved in illicit drug supply or manufacture. We are particularly concerned about the reverse onus of proof which applies to two of the offences.

We have worked with numerous clients who have been affected by the expansion of the police "move-on" power. The case study of "Tran" below provides a typical example. Following the case study are our comments in relation to questions 6-13.

Case study: Tran

Tran, 19, lives in a rented flat in a suburb near Cabramatta. He grew up in Cabramatta and still has close family members there. He also uses a range of services in Cabramatta including Centrelink, his job network provider, his general practitioner, and a drug and alcohol counselling service. He also does most of his shopping in Cabramatta as it is the best and cheapest source of Vietnamese food.

Unfortunately Tran is also a heroin user and, by his own admission, sometimes purchases drugs in Cabramatta. He also uses the needle exchange van to obtain safe injecting equipment. Tran has been attempting to stop using heroin by going on a methadone program. In order to pick up his daily methadone, he catches a bus from his home to Cabramatta, and then a train to his clinic at Liverpool.

Tran has been given numerous police “move-on” directions while in Cabramatta. Because he is a known drug user, police tell him they believe he is Cabramatta “to buy or to use” and tell him he must not come back within a 2km radius for seven days.

On at least one occasion, Tran disobeyed the police direction by returning to Cabramatta twice within seven days. The fact that he had legitimate reasons to be there, and was not there to purchase drugs, was of no interest to the police. The police arrested him and charged him with disobeying a police direction under *Summary Offences Act* section 28F. He was bailed on the condition that he not go within a 2km radius of Cabramatta railway station.

Despite the bail conditions, Tran continued going to Cabramatta. He knew of no way to get to his methadone clinic without passing through Cabramatta. He also had to attend employment-related interviews and faced being breached by Centrelink if he did not attend.

One day Tran was arrested for breach of bail and held overnight in the police cells before being taken to court. The magistrate told him that if he pleaded guilty to the original charge he would be released straight away with a fine (as there is no penalty of imprisonment provided for this offence). However, Tran had received legal advice and believed he was not guilty, so he entered a plea of not guilty and the matter was adjourned for hearing. The magistrate released him again on bail but refused to vary the conditions.

While Tran was waiting for his matter to come up for hearing, he was arrested again for breach of bail and taken to court. Again, he refused to plead guilty and the magistrate refused to vary his bail conditions. His solicitor then helped him to apply to the Supreme Court for a bail variation. The Supreme Court varied his bail conditions so that he was allowed to be in Cabramatta as long as it was not for an unlawful drug-related purpose.

Before Tran’s charge of disobey police direction came up for hearing, his solicitor wrote to the police requesting that they withdraw the charge because there was no reasonable prospect of Tran being found guilty. She argued that the police direction was invalid because it was not reasonable in the circumstances. Alternatively, she submitted that there was no evidence that Tran had continued to engage in “relevant conduct” after the direction was made, and that Tran had a lawful excuse for disobeying the direction. On the hearing date, the prosecutors withdrew the charge.

Question 6: How are police interpreting the ‘relevant conduct’ provisions in the Act?

For a direction to be given under *Summary Offences Act* section 28F, a police officer must believe on reasonable grounds that the defendant's behaviour or presence in a public place (defined as “relevant conduct”) is of a type covered by paragraphs (a) to (e) of subsection 28F(1).

One of these situations is where a police officer believes that person's behaviour or presence in the public place is “*for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess*”.

It is common practice for police in Cabramatta to issue directions to people who are thought to be in the area for the purpose of selling, buying *or using* drugs. Many people are given directions merely because they have syringes in their possession, have track marks on their arm, admit to being drug users or appear to be under the influence of drugs.

In our view, evidence that a person is a *user* of prohibited drugs is not sufficient grounds to issue a direction. Even if the police believe that the person is visiting Cabramatta to purchase and/or use drugs, we suggest this is not sufficient. We suggest that the power to issue a direction only arises if police believe on reasonable grounds the defendant is *currently in that particular public place for the purpose of obtaining or supplying* drugs. If police believe the person has *already* purchased and used their drugs, or may be on their way to *private premises* (such as a drug house) to obtain drugs, this is not sufficient.

As mentioned in our preliminary submission, the second reading speech to the *Police Powers (Drug Premises) Bill* indicates that it was aimed at dispersing people who congregate around the railway station and other public areas of Cabramatta to buy and sell drugs or act as “runners”. There was no suggestion that it was aimed at sweeping the streets of people who may be purchasing or using drugs in private places nearby.

We do not have direct knowledge of how the police are interpreting the “relevant conduct” provisions in areas other than Cabramatta.

Question 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?

In many cases it will be relatively easy to assess whether a person is in a public place to obtain or supply drugs. Loitering in an area known for drug dealing, approaching passers-by, being observed to engage in suspicious-looking conversations or transactions, would be indicia that a person is present for such a purpose.

In some cases it may be difficult to assess whether the purpose of a person's presence in a public place is to purchase or supply drugs. However, this does not justify the police jumping to conclusions about the person's purpose for being in the area. A suspicion that a person is in a public place to buy or sell drugs must be based on reasonable grounds, not on idle speculation.

It is often asserted on police fact sheets that “the defendant could give no good reason for being in Cabramatta”. The absence of an explanation for the person’s presence should not give rise to an inference that the person was there for an unlawful purpose. Citizens are entitled to use public space without giving any reason for their presence.

Question 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?

We believe that police (at least in Cabramatta) are targeting the most vulnerable and marginalised people in our community.

Our experience suggests that the main targets of move-on directions are users rather than dealers. This is at odds with the recommendations of the 1999 NSW Parliamentary Drug Summit, which agreed that illicit drug users should be assisted, rather than criminalised, for their drug dependency.

Racism is also a concern. Our clients have also reported that police appear to be targeting people of Asian background whilst turning a blind eye to “Anglo” dealers.

Finally, in all areas (not just Cabramatta) we have observed that young people are prime targets for the exercise of police move-on powers. We have already commented on this at length in our submission to the Ombudsman’s review of the *Crimes Amendment (Police and Public Safety) Act 1998*. We remain concerned about the overuse of police directions against young people, including in situations where people are thought to be engaging in drug-related conduct.

Question 9: Is the issuing of ‘seven day’ directions appropriate? If so, in what circumstances?

We adhere to the view, expressed in our preliminary submission, that “seven day” directions are inappropriate.

While it may be reasonable to direct a person to leave an area for a short period of time, it is not reasonable to direct a person to stay away from a public area for an entire week.

Banning a person for long periods of time is not what was contemplated by the legislation (in its original or amended form). In the second reading speech to the *Crimes Amendment (Police and Public Safety) Act 1998*, the then Attorney-General, Mr Shaw, said “*The key purpose of this provision is to enable police to disperse persons acting in a disruptive manner before a situation gets out of hand.*” (Legislative Council Hansard, p4277, 5 May 1998).

The 2001 amendments (allowing police to issue directions to persons thought to be in public places for the purpose of obtaining or supplying drugs) do not alter this position. Nothing in the second reading speech to the *Police Powers (Drug Premises) Bill 2001* suggests that the parliament intended to change the fundamental nature of the direction-giving power. We submit that it was not intended to exclude people from public places for long periods. It was certainly not intended to ban drug users from Cabramatta or to discourage them from using drug treatment and needle exchange services in the area.

Moreover, the practice of issuing the same standard seven-day direction to everyone is unreasonable because it is arbitrary. This was the view expressed by a magistrate, Mr Brydon, in the case of *Police v Saysouthinh*, decided at Liverpool Local Court on 24 May 2002. He held that a direction of this type is not reasonable unless the police can demonstrate reasonable grounds for issuing the *particular* direction to the *particular* person in the *particular* circumstances.

We concede that it may be reasonable to exclude a person from an area for as long as seven days in very rare circumstances, such as when a person has repeatedly engaged in serious and persistent problem behaviour such as blatant street dealing or violence. However, we do not believe that section 28F of the *Summary Offences Act* is the appropriate vehicle for this.

If police have evidence that the person has been involved in persistent unlawful conduct, it is open to them to charge the person with a relevant criminal offence such as supply or assault. If appropriate, bail conditions may be imposed restricting them from access to the area. Whilst we do not generally advocate the use of such bail conditions, at least they have the advantage of being reviewable by a court, whereas directions given under section 28F are not judicially reviewable.

If police do not have sufficient evidence to charge a person with a substantive offence, but wish a person to be banned from an area for longer than (say) 24 hours, we suggest that they should have to apply for a court order. Excluding a person from a public place (even if they do not “need” to be there) is a significant restriction on their liberty, and should not be imposed without giving the person a right to be heard.

Question 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?

No doubt the Cabramatta police would say that the practice of issuing “seven day” directions has been effective, least in terms of disrupting street-level supply.

There is no doubt that the use of seven day directions (combined with the practice of arresting, charging and conditionally bailing people alleged to have disobeyed directions) has been effective in removing many drug users from the Cabramatta CBD.

However, any benefit that may have been derived from this “street-sweeping” exercise is largely cosmetic. Anecdotal evidence suggests that drug suppliers have simply moved into other areas and ply their trade with the assistance of cars and mobile phones. Our experience is that most of the drug users who have been hounded out of Cabramatta are still purchasing and using illicit drugs.

Even if seven-day directions *are* effective in stopping drug purchase/supply, the human cost is far too high. The negative implications for civil liberties and public health greatly outweigh the benefits of such measures.

Question 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?

We believe that the use of “seven day” directions has had a dramatic negative impact on the provision of services and on public health. In this regard we rely on the matters raised in our preliminary submission.

In the last 12 months the situation has worsened. Local drug and alcohol workers (including those who staff the needle and syringe exchange van) have reported that harassment of drug users has escalated to the point where police routinely confiscate “fit boxes” containing clean needles. This is extremely disturbing and seriously compromises the harm minimisation goal that underpins the delivery of alcohol and other drug services in New South Wales.

Even more disturbing is the fact that the Drug Intervention Service Cabramatta (DISC) has recently closed. It appears to us that aggressive policing strategies are a major factor behind this closure.

Question 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.

Anecdotal evidence suggests that there has been a displacement effect. As mentioned above, drug dealers have adapted to the new environment by using other methods to conduct their trade.

As far as drug users are concerned, it appears that many of those who have been driven out of Cabramatta are now frequenting Liverpool and other nearby areas. The problem has not been solved but has been moved on.

Question 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?

Arresting and charging a person for an offence which does not carry a custodial penalty is rarely (if ever) appropriate. As a blanket policy (as has been adopted in Cabramatta) it is grossly inappropriate.

This practice is even more inappropriate given that most defendants are not guilty of the offence. A “seven day” direction has been held by the Local Court to be arbitrary and unreasonable; a defendant who breaches such a direction is not guilty. Every “disobey police direction” charge which we have defended on behalf of our clients has been withdrawn or dismissed.

For more detailed discussion on this issue, we draw your attention to our preliminary submission.

We are happy to discuss or expand upon any matters raised in this submission. We can be contacted by email at shopfront@freehills.com or by telephone on 9360 1847.

Yours faithfully

Jane Sanders
Principal Solicitor