

**Criminal Liability Issues  
Associated with a "Heroin Trial"**

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**Working Paper Number 13**

**Feasibility Research into the  
Controlled Availability of Opioids  
Stage 2**

National Centre for Epidemiology and Population Health  
The Australian National University

Australian Institute of Criminology

MAY 1995

ISBN 0 7315 2159 5  
ISSN 1039-088X

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Published by the National Centre for Epidemiology and Population Health  
The Australian National University  
ACT 0200  
May 1995

Cover designed by Fran Smith, ANU Graphic Design, The Australian National University,  
Canberra, ACT 0200.

Based on an original design for the Feasibility Research Project by Kathie Griffiths.

Publications Officer: Jennifer Braid, NCEPH

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# Executive Summary

## Part I: Drug Law in Australia

1.1 The provision of heroin to participants during the trial would give rise to criminal liability under various drug offences under Commonwealth and ACT legislation. It is recommended that the respective legislatures enact an exemption to permit the lawful possession, supply and administration of heroin for the purposes of the trial. The enactment of these exemptions would not infringe Australia's international obligations under the conventions dealing with narcotics.

1.2 Under the present law, medical practitioners are unable to prescribe and/or administer heroin to any person for the purpose of treatment or research. It is recommended that the *Drugs of Dependence Act 1989* (ACT) be amended to permit the medical prescription of heroin.

1.3 As the heroin provided to participants during the trial has therapeutic use, researchers and clinical staff must comply with licensing and exemption requirements imposed by the *Therapeutic Goods Act 1989* (Cth). The regulatory framework for therapeutic goods is complex, and the compliance requirements are costly and burdensome. It is recommended therefore that the Commonwealth legislature enact a special exemption which states that heroin provided to participants during the trial is not to be regarded as a "therapeutic good" under the *Therapeutic Goods Act 1989* (Cth).

1.4 At present, heroin manufacture is absolutely prohibited in all jurisdictions except Victoria. Importation of heroin from abroad would require compliance with the terms of the Commonwealth legislation (and the obligations imposed by the international conventions on narcotic drugs) before the relevant licences and authorisation to import the drug could be granted.

1.5 Trial staff who arrange interstate transport of heroin may be guilty of aiding and abetting drug offences in those jurisdictions through which the heroin is transported. It is recommended that, in those jurisdictions through which heroin is transported, the rules governing accessory liability be amended in the following terms: trial staff who arrange the transport of heroin shall not, by reason only of that conduct, be taken to have aided and abetted the commission of specific drug offences in that jurisdiction. Furthermore, it is recommended that the *Crimes (Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth) be amended, creating a special exemption for the purpose of the trial, to permit the lawful interstate transportation of heroin by air.

## Part II: Criminal Liability for Causing Harm to Trial Participants

2.1 No amendment of the law governing homicide is considered necessary or desirable. To avoid liability for homicide, researchers and clinical staff must ensure that both foreseen and reasonably foreseeable risks of death or serious harm to participants during the trial are minimised.

2.2 Failure to obtain an effective and valid consent from trial participants would give rise to criminal liability for assault and/or related offences, except where the treatment is provided in an emergency situation.

2.3 Consent in the criminal law requires participants to comprehend only the physical nature of the treatment and procedures. It is recommended that researchers and clinical staff should observe higher standards for consent (i.e., fully informed consent or free agreement). Failure to observe these higher standards for consent may (i) give rise to civil liability for battery or negligence, and/or (ii) constitute a breach of ethical guidelines.

2.4 It is recommended that participants be fully informed, both in writing and orally, about the nature, purpose, significance and context of the treatment and procedures before and during the trial.

In addition, participants should be informed that in situations of emergency it may be necessary to administer treatment without first obtaining their consent.

2.5 The “public interest” places limits on consent where the activity involves the risk of bodily harm. It is unclear, under the present law, whether the treatment or procedures during the trial could be justified under the existing “medical treatment” exception, or some other “public interest” exception.

2.6 The provision of heroin to participants may give rise to liability under poisoning offences. It is unclear whether, and to what extent, the consent of participants would operate as a defence.

2.7 It is recommended that, in light of these uncertainties about consent, the ACT legislature enact a special “consent” defence for assault and related offences (including poisoning offences), which would clarify that staff who administer heroin during the course of the trial can raise the consent of the participants as a defence.

### **Part III: Criminal Liability for the Crimes Committed by Trial Participants**

3.1 In the ACT the common law offence of misprision of felony is no longer available: mere knowledge that a participant has committed an offence, and failing to report that offence to the relevant authorities, is not sufficient to impose criminal liability on researchers or clinical staff. However, where that knowledge is accompanied by positive acts of assistance, which enable the perpetrator to escape punishment or to dispose of the proceeds of the offence, there may be liability as an accessory after the fact.

3.2 Clinical staff may “aid and abet” driving offences (i.e., driving under the influence or culpable driving) subsequently committed by participants, either through (a) the act of supplying the heroin or (b) the failure to take steps to prevent the participants from driving while under the influence of the drug. Clinical staff however would ordinarily lack the requisite intention to be guilty of aiding and abetting, and may in any event avoid liability by taking steps to disassociate themselves from the criminal purpose of the participant. The creation of a special “suppliers’ defence” for clinical staff would not encourage responsible professional conduct. No amendment of the present law governing accessory liability is considered necessary or desirable.

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## Part IV: Miscellaneous Issues

4.1 It is recommended that researchers and clinical staff deter the social congregation of participants in the immediate vicinity of the treatment centre. The conduct of groups of participants may attract police intervention through public order offences and the powers to deal with individuals who are intoxicated in public.

4.2 To avoid liability for public nuisance, which is both a crime and a tort, researchers and clinical staff must ensure that dangers to the general public are kept to a minimum— such steps would include, for example, the establishment of procedures for the safe disposal of used needles and syringes, and effective security for heroin kept on the premises.

4.3 There is some uncertainty over the scope of the powers of law enforcement agencies to search and seize confidential information gained during the trial. It is recommended that the scope of the power to search and seize confidential information gained during the trial be clarified in the *Epidemiological Studies (Confidentiality) Act 1992 (ACT)*: information “concerning the affairs of another person” gained during the trial should not be subject to search and seizure by law enforcement authorities. It is further recommended that through cooperative arrangements with law enforcement agencies, procedures be drawn up to resolve disputes over the privileged nature of the information gained during the trial and whether that information can properly be the subject of a search warrant.

## Foreword

In investigating whether or not it is feasible to undertake a trial of controlled heroin availability, examination of the legal aspects of such a trial is a central issue. In Stage 1 of the feasibility investigations, Jennifer Norberry examined in detail international treaties which Australia has ratified or signed and Commonwealth, State and Territorial legislation relevant to a trial (Norberry, 1991). She also outlined the civil and criminal liability issues which would have to be investigated in more depth if the feasibility investigations moved to a second stage.

The feasibility study has moved to the second stage of examining logistic issues and we have been very fortunate to have two excellent researchers consider the civil and criminal liability aspects. Natasha Cica's examination of civil liability was published as *Working Paper Number 11* in June 1994. This working paper by Simon Bronitt examines criminal liability.

The Stage 2 investigations essentially have two components— assessing the risks which would be associated with a trial of controlled heroin availability and seeing if a workable protocol for the conduct and evaluation of a trial can be designed. Simon Bronitt's paper addresses issues relevant to both of these components.

A trial of controlled heroin availability would carry some risk of criminal liability for researchers, clinical staff and participants. The working paper contains options for legislative reform (where appropriate) and suggests administrative strategies for minimising the risk.

In terms of developing a workable protocol for a trial, some legislative changes would be needed for a trial to proceed. It would not be possible for the ACT to proceed on its own; co-operation from the Commonwealth and other states is particularly important.

If there was a willingness to make appropriate legislative changes, other legal issues would not constitute a barrier to a trial proceeding. In particular, a trial would not be in breach of Australia's obligations under international conventions dealing with narcotics. High professional and ethical standards would be expected from researchers and clinical staff as a matter of course and these would additionally minimise the risk of civil and criminal liability.

**Gabriele Bammer PhD**  
**Feasibility Research Director**

## References

- Cica, N. 1994 Civil liability issues associated with a "heroin trial". *Feasibility Research into the Controlled Availability of Opioids Stage 2 Working Papers Number 11* National Centre for Epidemiology and Population Health, The Australian National University, Canberra.
- Norberry, J. 1991 'Legal issues' In *Feasibility Research into the Controlled Availability of Opioids Volume 2 Background Papers* National Centre for Epidemiology and Population Health, The Australian National University, Canberra, pp 87–115.

## Preface

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This project offered an opportunity to further my interest in medico-legal issues, particularly to explore and critically evaluate the role of the criminal law in regulating the work of health care professionals. The legal questions raised during the feasibility study touched upon areas which I have previously researched, including aiding and abetting crime in the ordinary course of professional or commercial activities (sometimes known as suppliers' or servers' liability); the quality and scope of consent in the criminal law; and the value of using the criminal law to address public health concerns, particularly those raised by the HIV/AIDS pandemic. In the course of the project I also learned much about drug law and policy in Australia. It became apparent to me, early on, that the historical context of drug law is essential to any understanding of present prohibitionist policies. For this insight I am grateful to Desmond Manderson, former colleague from the Law School at The Australian National University, whose extensive historical research has debunked the many myths and preconceptions about drug law and policy in Australia.

In terms of acknowledgements, I must first thank the National Centre of Epidemiology and Population Health (NCEPH) at The Australian National University and the Australian Institute of Criminology for entrusting this work to me, and for providing financial support. Gabriele Bammer (NCEPH) and David McDonald (Australian Institute of Criminology) provided much help in formulating the issues to be addressed, highlighting my egregious errors in an earlier draft and offering much encouragement at every stage of the project. I would also like to thank Jennifer Norberry and Peter Waight for offering useful comments on the paper. This working paper was completed while on sabbatical leave from The Australian National University during the first half of 1995. I am grateful to the Director of the Australian Institute of Criminology, Dr Adam Graycar, who generously provided office space and access to the Institute's excellent research facilities and staff. Susanna Ford deserves special recognition, and my deep gratitude, for her substantial contribution to the research and preparation of this working paper— at all times, she was diligent, perceptive and determined never to be beaten in the search for an answer to the most obscure legal question. As custom dictates, the errors which follow are mine and nobody else's.

Finally, I must acknowledge the different but no less significant contribution of Jane Gath, my significant other' and resident health care professional, who sacrificed and suffered during the completion of this working paper.

The law is stated, on the basis of the materials available to me, as at May 1995.

Simon Bronitt

*Canberra  
May 1995*



## Introduction

The proposed heroin trial is the subject of feasibility research currently being conducted by NCEPH in collaboration with the Australian Institute of Criminology. The trial would involve the provision of heroin in a controlled manner to dependent users, with the aim of assessing changes in health and social behaviours.<sup>1</sup>

The legal issues raised by the proposed trial are wide-ranging. Some of those issues have been addressed in an earlier background paper, and more recently in a working paper addressing civil liability.<sup>2</sup> The purpose of this working paper is to identify, examine and explore the potential sources of liability which may arise under the criminal law for those individuals involved in the trial, specifically the researchers, the clinical staff and the trial participants.

After a brief historical overview of drug law in Australia, Part I of the working paper examines the statutory regimes, both Commonwealth and ACT, which govern the possession, supply, administration and manufacture of heroin, followed by a review of the possible strategies for reform. Part II focuses on the liability of researchers and clinical staff for causing harm to participants. Part III considers the criminal responsibility of researchers and clinical staff for crimes committed by the participants during the trial, focusing on (but not limited to) liability for aiding and abetting driving offences committed by participants. Part IV examines a miscellany of concerns relating to public order, public nuisance and the legal powers of law enforcement agencies to search and seize information gained during the trial.

In each Part, the working paper identifies the potential sources of criminal liability under both statute and common law, including any available defences, and then reviews possible solutions ranging from legislative reform to the adoption of practical strategies in order to minimise the risk of prosecution and/or conviction to researchers, clinical staff and trial participants.

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<sup>1</sup> NCEPH, *Feasibility Research into the Controlled Availability of Opioids Vol 1, Report and Recommendations* (1991), p 7 (recommendations 5 and 6).

<sup>2</sup> Norberry, J. "Legal Issues" in NCEPH, *Feasibility Research into the Controlled Availability of Opioids Vol 2 Background Papers*, (1991), pp 87-115; N Cica, *Civil Liability Issues Associated with a "Heroin Trial: Working Paper No 11* (1994).

## Part I: Drug Law in Australia

### A Brief History of Australian Drug Law

The legal controls over heroin must be understood in their historical context.<sup>3</sup> As this brief historical overview reveals, Australian drug law has been shaped more by international pressures than by domestic concerns about drug use. There are several distinct phases in the history of drug law in Australia. During the first phase, from early settlement to Federation in 1901, drug consumption was largely unregulated and self-prescription of opiates was commonplace.<sup>4</sup> The few legal controls that did exist in the latter half of the nineteenth century aimed to restrict the sale and supply of certain drugs, requiring their labelling as “poisons” and limiting their supply to doctors and pharmacists. It was not until the turn of this century that the first laws were adopted to suppress the recreational use of opium. Commonwealth and State legislatures enacted laws prohibiting opium smoking, largely as a response to public concern about the extent and consequences of opiate use within the Chinese migrant population.<sup>5</sup> The moral panic about opium-smoking and “Chinese vice” generally did not however interfere with the continued, widespread medicinal use of opiates in the form of patent medicines and laudanum.<sup>6</sup> The prohibitions on the importation, supply and possession of opium aimed to eliminate, or at least diminish, opium use. Indeed, these new drug laws were significant in representing the first step toward establishing a prohibitionist model of drug control in Australia.

In the next phase, from Federation to the end of World War II, the original restrictions placed on opium were gradually extended to heroin, morphine, cocaine and other “dangerous drugs”. This expansion of drug law in Australia was not due to public concern about the abuse of these particular drugs, but rather as a result of Australia’s signature to several international treaties. As international law and policy dictated that domestic drug laws be strengthened and multiplied, the policy of prohibition became self-validating. Drug users had become criminals, and with the increasingly severe penalties accompanying narcotic offences, drug use became associated in the public mind as an instance of serious criminality. Moreover the reputation of these drugs for their addictiveness provided another reason for their prohibition and regulation.

After World War II, the international regime of drug control was considerably strengthened by the Paris Protocol of the Geneva Convention, signed in 1948, which placed upon any new narcotic drug the same controls and prohibitions that applied to heroin, morphine and cocaine. Notwithstanding these restrictions, medically prescribed heroin consumption in Australia remained very high. Fearing that its international reputation would be tarnished, the Commonwealth Government acted to prohibit heroin importation in 1953. The Commonwealth put pressure on the States and Territories to prohibit the use, possession and manufacture of heroin— total prohibition was accomplished by 1955. Despite the absence of a significant domestic “drug problem”, the Australian public were led to believe that the total ban of heroin was necessary due to high levels of heroin addiction. These drug laws were rarely invoked until the 1960s when patterns of drug use began to change, and drugs became an issue of public concern.

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<sup>3</sup> For an excellent history of drug law and policy in Australia see, D Manderson, *From Mr Sin to Mr Big— A History of Australian Drug Laws* (1993).

<sup>4</sup> D. Manderson, “History of Australian Law— Conventional Wisdom” in R Fox and I Mathews (eds), *Drug Policy: Fact, Fiction and the Future* (1992), p 81.

<sup>5</sup> See *Opium Act 1895* (SA), *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), *Opium Smoking Prohibition Act 1905* (Vic), *Police Offences (Amendment) Act 1908* (NSW). The importation of opium was prohibited under the terms of the *Customs Act 1901* (Cth) by a proclamation in 1905: see, *Commonwealth of Australia Gazette No. 64*, 30 December, 1905.

<sup>6</sup> D Manderson, “Trends and Influences in the History of Australian Drug Legislation” (1992) 22 *Journal of Drug Issues* 507 at 509.

The final phase can be viewed as the consolidation of the law enforcement or prohibitionist model. During the 1960s and 1970s public fears about the increased recreational use of narcotics and the emergence of links between organised crime and drugs produced even tougher laws and penalties for drug trafficking.<sup>7</sup> In most jurisdictions, the focus of concern shifted away from individual drug users, to those organised crime networks considered responsible for trafficking.<sup>8</sup> At the same time, a more liberal statutory regime was established for dealing with the possession and use of some types of drugs such as cannabis.<sup>9</sup> A distinction was drawn between laws which aimed to control drug use, and laws which aimed to suppress commercial drug-related activities such as trafficking.<sup>10</sup>

## Drug Legislation

In Australia, drug law and the responsibility for its enforcement is split between the Commonwealth, and the States or Territories. The Commonwealth has extensive competence to enact laws in this area based on two heads of power in the Constitution: the “trade and commerce” power and “external affairs” power.<sup>11</sup> The trade and commerce power permits the Commonwealth to restrict the importation and exportation of prohibited drugs. The external affairs power permits the Commonwealth to enact laws implementing the terms of the international treaties and conventions dealing with drugs. It has been suggested that the external affairs power in the Constitution is sufficiently broad to permit the Commonwealth to assume total control over the regulation of drugs.<sup>12</sup> Although transferring the responsibility for drug offences to the Commonwealth would simplify the administration of the law in Australia, it would be politically unacceptable to the States and Territories which are vigilant to protect their competence to legislate in this area.<sup>13</sup>

### A. *Prohibitions on the Supply, Possession and Administration of Heroin*

<sup>7</sup> Separate and higher penalties for the supply or sale of “traffickable quantities” of drugs, were enacted in several jurisdictions: s 21A of the *Poisons Amendment Act* 1970 (NSW) introduced a maximum penalty of up to 10 years’ imprisonment; similar provisions were enacted by s 5, *Dangerous Drugs Amendment Act* (No 2) 1970 (SA); ss 7 and 12, *Health Act Amendment Act* 1971 (Qld); and s 6, *Poisons (Drugs of Addiction) Act* 1976 (Vic). Penalties relating to “commercial quantities” are severe: 25 years’ imprisonment under s 7, *Drugs Poisons and Controlled Substances (Amendment) Act* 1983 (Vic) and s 8, *Drugs Misuse Act* 1986 (Qld); \$500,000 fine or life imprisonment under s 33, *Drugs Misuse and Trafficking Act* 1985 (NSW).

<sup>8</sup> This shift of focus did not however translate into changes in the pattern of enforcement of drug laws. “Although some [drug] squads have had some success in targeting offenders who are selling drugs, the reality is that most arrests still relate to simple possession or use of drugs”: G Wardlaw, “Uses and Abuses of Drug Law Enforcement Statistics” in *Trends and Issues in Crime and Criminal Justice No 1* (1986), Australian Institute of Criminology.

<sup>9</sup> This ranged from lowering the penalties for cannabis offences, to decriminalisation of its possession in small quantities for personal use in South Australia and the ACT: see D MacDonald, R Moore, J Norberry, G Wardlaw and N Ballenden, *Legislative Options for Cannabis in Australia* (1994), National Drug Strategy Monograph No 26, pp 19-21.

<sup>10</sup> It has been argued that this dichotomy is illogical. The illegality and moral censure of drug trafficking is contingent upon the continued illegality of consumption and possession of drugs. In practical terms also, the distinction proves to be false since many users engage in small-scale commercial drug activity to sustain their addiction: D Manderson, “History of Australian Drug Law— Conventional Wisdom” in R Fox and I Mathews (eds), *Drug Policy: Fact, Fiction and the Future* (1992), pp 90-91.

<sup>11</sup> Sections 51(i) and 51(xxix) of the Commonwealth Constitution, respectively. The High Court, through its purposive interpretation of the external affairs power, has conferred broad powers on the Commonwealth to enact legislation implementing the terms of international treaties or conventions: *Commonwealth v Tasmania* (1983) 158 CLR 1 (High Court of Australia).

<sup>12</sup> R Brown, “Federal Drug-Control Laws: Present and Future” (1977) 8 *Federal Law Review* 435.

<sup>13</sup> It is generally accepted that, as a matter of policy, the present division between Commonwealth and State legislation should continue, and that any recommendation for reform and consolidation should proceed on that assumption: see Review of Commonwealth Criminal Law, *Drug Offences— Discussion Paper No 13* (April 1988), p 8.

Offences against the supply and possession of heroin have been enacted in all jurisdictions in Australia.<sup>14</sup> The policy of criminalisation of supply and possession of heroin poses many legal difficulties for the researchers, clinical staff and trial participants. The supply and possession of heroin is prohibited by both Commonwealth and ACT legislation.

The Commonwealth legislation, the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990 (Cth), contains several offences targetting the activities of those individuals involved in drug trafficking.<sup>15</sup> Possession of prohibited drugs, equipment or materials with knowledge that they are being used in, or for, dealing in drugs is an offence.<sup>16</sup> Dealing in drugs under the Act is broadly defined, and includes “the sale, supply, or possession for the purpose of sale or supply, of a narcotic drug or psychotropic substance”.<sup>17</sup>

In the context of the trial, supplying heroin to trial participants for the purposes of self-administration may constitute a “dealing in drugs” prohibited under the Commonwealth Act. However, the scope of this offence is arguably more restrictive than the ordinary meaning of the term “supply”.<sup>18</sup> Applying the principles of statutory interpretation, the courts may adopt a narrower interpretation of “supply” in the context of dealing in drugs. The courts must adopt a “purposive approach” to the interpretation of Commonwealth enactments, that is, an interpretation which promotes the purpose or object of the legislation.<sup>19</sup> The Explanatory Memorandum states that the purpose of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990 (Cth) is to implement the terms of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>20</sup> The court may consider extrinsic materials, including international treaties or conventions, in order to ascertain the meaning and/or purpose of the legislative provision.<sup>21</sup> The purpose of the Convention is to suppress the various aspects of illicit trafficking in narcotic drugs and psychotropic substances having an international dimension, with the specific mandate for the Parties (those countries signing the Convention) to adopt specific offences. Article 3 of the Convention contemplates a range of criminal measures to suppress specific drug-related activities, specifically “the production, manufacture,

<sup>14</sup> For offences dealing with supply of drugs see s 164, *Drugs of Dependence Act* 1989 (ACT); s 25, *Drugs Misuse and Trafficking Act* 1985 (NSW); s 5, *Misuse of Drugs Act* 1990 (NT); s 6, *Drugs Misuse Act* 1986 (Qld); s 32, *Controlled Substances Act* 1984 (SA); s47, *Poisons Act* 1971 (Tas) and s 6(1)(c), *Misuse of Drugs Act* 1981 (WA). In Victoria, supply of drugs is covered by the “trafficking” offence in s 71, *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) which the courts have interpreted broadly to include supply: *R v Clarke and Johnstone* [1986] VR 643. For offences dealing with possession of drugs see s 171(1), *Drugs of Dependence Act* 1989 (ACT); s 10(1), *Drugs Misuse and Trafficking Act* 1981 (NSW); and s 9, *Misuses of Drugs Act* 1990 (NT); s 9, *Drugs Misuse Act* 1986 (Qld); s 31, *Controlled Substances Act* 1984 (SA); s 48, *Poisons Act* 1971 (Tas); s 73, *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) and s 42, *Poisons Act* 1964 (WA).

<sup>15</sup> The Act received Royal Assent on 29 November 1990, but commencement was deferred until 14 February 1993, the day on which Australia ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, discussed below at text to n 48.

<sup>16</sup> The “dealing in drugs” must constitute an offence against a law of the Commonwealth, of a State or Territory or of a foreign country: s 9(b), *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990 (Cth).

<sup>17</sup> Section 6(1)(e), *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990 (Cth). Section 6 contains an extensive list of activity which can be “dealing in drugs” which includes *inter alia* the cultivation of opium poppy, coca bush or cannabis plant; the manufacture, importation/exportation and distribution of narcotic drugs or psychotropic substances. Indeed, dealing covers possession of a narcotic for any of the above purposes.

<sup>18</sup> In respect of State legislation, the courts have interpreted “supply” as meaning simply the transfer of physical possession of property from one person to another: see discussion below, at text to n 28.

<sup>19</sup> Section 15AA, *Acts Interpretation Act* 1901 (Cth).

<sup>20</sup> The text of this Convention is included in Schedule 1 of the Act. The Convention was signed for Australia, subject to ratification, on 14 February 1989, and ratified on 14 February 1993, the day the Commonwealth Act took effect.

<sup>21</sup> Section 15AB, *Acts Interpretation Act* 1901 (Cth). See further D Pearce and RS Geddes, *Statutory Interpretation in Australia* (1988) at pp 45-49.

extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance”. Significantly, supplying narcotics by itself is not a targeted activity under the Convention.<sup>22</sup> Since the Convention aims to suppress those dealings in drugs of a *commercial nature*, the adoption of a purposive approach to the interpretation of the term “supply” in the Act would exclude activities of a non-commercial nature.<sup>23</sup>

The Commonwealth Act does not limit the operation of any other law of the Commonwealth, or any law of a State or Territory.<sup>24</sup> In the ACT, the sale, supply and possession for the purpose of sale or supply are made offences under the *Drugs of Dependence Act 1989* (ACT). The regulatory framework in the *Drugs of Dependence Act* draws a distinction between “prohibited substances” and “drugs of dependence”. The list of prohibited substances and drugs of dependence is contained in schedules under Drug of Dependence Regulations—heroin is a prohibited substance. The Act itself does not explain the basis for this two-fold classification, although the rationale provided in the Explanatory Statement accompanying the Act is that while drugs of dependence have medical use, prohibited substances have no medical use and are harmful for recreational purposes.

The *Drugs of Dependence Act 1989* (ACT) contains the following prohibitions on sale, supply and possession for the purpose of sale or supply:

**164É(3)** A person shall not—

- (a) sell or supply a prohibited substance to any person;
- (b) participate in the sale or supply of a prohibited substance to any person;  
or
- (c) possess a prohibited substance for the purpose of sale or supply to any person.

The penalties are aggravated where the conduct involves either “commercial” or “traffickable” quantities of the substance,<sup>25</sup> or involves the sale or supply of a prohibited substance to persons under the age of 18 years.<sup>26</sup> “Supply” for the purposes of the ACT legislation is defined as including an “offer to supply but does not include administer”.<sup>27</sup> In interpreting this offence, the courts have applied the ordinary meaning of the term “supply”, which in this context means the transfer of physical control of the property from one person to another.<sup>28</sup> The courts could however adopt a narrower interpretation of supply. Like the Commonwealth Act, one of the aims of the ACT legislation is to implement the

<sup>22</sup> Clause 6 of the Explanatory Memorandum which accompanies the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1990 states that the term “dealing in drugs” was adopted as an umbrella term to describe those activities proscribed under Article 3(1) of the Convention.

<sup>23</sup> Note, however, that in respect of State legislation, the interpretation of the term “trafficking”, which includes sale or supply, is not tied to commercial gain or profit: F Rinaldi and P Gillies, *Narcotic Offences* (1991), pp 82-90.

<sup>24</sup> Section 5(1), *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth).

<sup>25</sup> “Commercial” and “traffickable” describe different quantities of drug or substance prescribed under the Act: see s 160(1), *Drugs of Dependence Act 1989* (ACT).

<sup>26</sup> Section 164(3), *Drugs of Dependence Act 1989* (ACT). Note also the separate provisions dealing with the wholesale sale or supply of drugs of dependence or prohibited substances: s 163, *Drugs of Dependence Act 1989* (ACT).

<sup>27</sup> Section 3(1), *Drugs of Dependence Act 1989* (ACT).

<sup>28</sup> *Excell v Dellaca* (1987) 26 A Crim R 410 at 412, per Kelly J (Supreme Court, ACT). In this case, the defendant had agreed with a friend “to mind” only for one day a quantity of cannabis. The court held that since the defendant intended to return the cannabis to his friend, he was properly convicted of possession of a controlled substance with an intention to supply. Supply therefore does not depend on legal ownership or lawful possession of the property transferred. The meaning of supply in the context of narcotic offences is explored in F Rinaldi and P Gillies, *Narcotic Offences* (1991), pp 90-93.

terms of the UN Convention and thus it could be argued that the liability for supply of a prohibited substance should exclude non-commercial dealings.

The Act also contains separate offences prohibiting possession and administration of a prohibited substance. The possession offence penalises possession for personal use.<sup>29</sup> Administration of heroin is also an offence under the Act: “A person shall not administer, or cause or permit to be administered, to himself or herself a prohibited substance”.<sup>30</sup> Both offences are punishable by \$5000 fine or imprisonment for two years.<sup>31</sup>

These drug offences do not expressly require proof of *mens rea*, that is, a subjective mental state of intention, knowledge or recklessness on the part of the defendant. However, the courts are reluctant to dispense with proof of knowledge for offences which often carry severe penalties. Indeed, the High Court has held that the term “possession” in these offences connotes knowledge, or at least awareness, that the thing possessed is a narcotic drug. In *He Kaw Teh*,<sup>32</sup> a requirement of knowledge was implied into the terms of the offence proscribing possession of a prohibited drug under section 233B(1)(c) of the *Customs Act 1901* (Cth):

“On a count of possession the onus is on the prosecution to prove that an accused, at the time when he had physical custody or control of narcotic goods, knew of the existence and nature, or of the likely existence and likely nature, of the narcotic goods in question”.<sup>33</sup>

Although the case concerned the possession offence under a Commonwealth Act, this statement of principle has been applied to State offences dealing with possession of drugs.<sup>34</sup> It is not necessary to show that the person in possession had detailed knowledge of the chemical composition of the drug, or even that it is a particular type of drug; it is only necessary to prove knowledge that the thing possessed is, or is likely to be, an illicit drug.<sup>35</sup>

The *Drugs of Dependence Act 1989* (ACT) contains “research and education” exemptions for supply and possession. Supply and possession of a drug of dependence or prohibited substance may be authorised under the Act for the purpose of a “program of research or education”.<sup>36</sup> Where the Minister of Health has granted such authorisation, the Act exempts those individuals conducting a program of research or education from liability for those offences relating to possession or supply of a prohibited substance provided that they adhere to the terms and conditions of the authorisation.<sup>37</sup> It should be noted however, that the Act does not provide complete protection: the research or education exemption does not extend to the *administration* of a prohibited substance. Under the present legislation it is an offence to administer heroin either to oneself or to another person.<sup>38</sup> The limited scope of this

<sup>29</sup> Section 171(1), *Drugs of Dependence Act 1989* (ACT). Possession for the purpose of sale or supply is prohibited in s 164(3), extracted above.

<sup>30</sup> Section 171(2), *Drugs of Dependence Act 1989* (ACT).

<sup>31</sup> Section 171(1)(b), *Drugs of Dependence Act 1989* (ACT). Where the offence of possession relates to a quantity of cannabis not exceeding 25 grams a penalty of \$100 applies: s 171(1)(a), *Drugs of Dependence Act 1989* (ACT).

<sup>32</sup> (1985) 157 CLR 523 (High Court of Australia). Subsequent cases have clarified that the requisite intent for possession offence is not limited to actual knowledge, but may rest on awareness that the thing in possession is a narcotic drug: *Bahri Kural* (1987) 162 CLR 502 (High Court of Australia).

<sup>33</sup> *Ibid.*, at 589, per Brennan J.

<sup>34</sup> See discussion in F Rinaldi and P Gillies, *Narcotic Offences* (1991), p 38.

<sup>35</sup> This approach to knowledge, described as the “genus principle”, has been endorsed by the High Court in *Saad* (1987) 29 A Crim R 20; see P Gillies, *Criminal Law* (3rd ed, 1993), at p 745.

<sup>36</sup> Section 32, *Drug of Dependence Act 1989* (ACT).

<sup>37</sup> The conditions of authorisation are outlined in Part IV, Division 1, *Drugs of Dependence Act 1989* (ACT). The exemptions in the Act are found in s 164(5) (exemption for supply) and s 171(4)(a) (exemption for possession). Note that researchers are not exempt from the prohibition on the sale or administration of prohibited substances.

<sup>38</sup> Section 171(2), *Drugs of Dependence Act 1989* (ACT), discussed above.

exemption means that researchers, clinical staff and trial participants are prohibited from administering heroin under the present law.

In sum, the provision of heroin to participants during the trial would give rise to criminal liability under both Commonwealth and ACT legislation. To avoid the prospect of liability, this legislation must be amended to allow the researchers and/or the clinical staff to supply heroin to participants, and that participants may self-administer heroin, without risk of criminal liability.

### **B. Prohibitions on Supplying Syringes for the Administration of Heroin**

In the context of the trial, supplying syringes (i.e. injecting equipment) to participants for the purpose of self-administration of heroin raises the following concerns. The trial envisages that participants will be provided with syringes in order to self-administer the heroin, and that clinical staff would instruct them on safe syringe-handling and injection techniques. Although mere possession of a syringe is not an offence in the ACT,<sup>39</sup> applying ordinary principles of aiding and abetting, any person who supplies equipment or advice which assists or encourages another person to commit an offence may be guilty as an accessory. In the ACT, the provisions dealing with aiding, abetting, attempts, incitement and conspiracy are contained in Part VIII of the *Crimes Act 1900* (ACT).<sup>40</sup> In the context of the trial, supplying syringes or even offering advice about safe injecting techniques could give rise to liability for aiding and abetting the offences prohibiting possession and administration of heroin in the ACT (see above). Moreover, such conduct may also constitute an incitement to commit these offences.<sup>41</sup>

Concerns that the potential criminal liability for supplying syringes to drug users would interfere with public health initiatives designed to combat HIV (such as needle exchange programs) has led to legislative reform in the ACT and Western Australia.<sup>42</sup> The ACT legislative scheme permits, in certain circumstances, the lawful supply of syringes to drug users. Part VII of the *Drugs of Dependence Act 1989* (ACT) establishes a system of syringe distribution through “approved persons”. A medical practitioner, pharmacist, nurse or health worker may apply to the ACT Medical Officer of Health for an approval to supply syringes.<sup>43</sup> This statutory framework for the provision of syringes by approved persons in the ACT is preferable to the position in other jurisdictions, such as NSW, where the supply of syringes is regulated by informal agreements with the police not to prosecute needle exchange workers.

The ACT legislation addresses the risk of accessory liability arising from syringe supply expressly:

**93.(1)** An approved person who supplies a syringe to another person shall not, by reason only of that supply, be taken to commit any offence under or by virtue of a provision in Part VIII of the *Crimes Act 1900* if—

- (a) the supply is in the course of the professional practice or occupational duties of the approved person; and
- (b) the approved person has reasonable grounds for believing that—

<sup>39</sup> For an excellent review of the laws governing intravenous drug use, see J Godwin, J Hamblin, D Patterson and D Buchanan, *Australian HIV/AIDS Legal Guide* (2nd ed., 1993) Chapter 7.

<sup>40</sup> Section 345, *Crimes Act 1900* (ACT) provides: “A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of an offence under a law of the Territory shall be deemed to have committed that offence and shall be punishable, on conviction, accordingly”.

<sup>41</sup> See s 348, *Crimes Act 1900* (ACT). Unlike accessory liability, liability for the offence of incitement is not derivative; that is, there is no legal requirement that crime incited by the defendant is actually committed by the person incited.

<sup>42</sup> Section 36A of the *Poisons Act 1964* (WA), as amended by s 7 of the *Poisons Amendment Act 1994* (WA), provides a defence where individuals aid and abet drug offences by their participation in approved needle and syringe exchange programs for the purpose of preventing the spread of infectious disease.

<sup>43</sup> Section 86, *Drugs of Dependence Act 1989* (ACT). The approval has effect for 12 months, and an approved person must, upon request by a police officer, produce the approval for inspection, and failure to produce the approval without reasonable excuse is an offence: s 91, *Drugs of Dependence Act 1989* (ACT).

- (i) the syringe might be used for the purpose of the administration to the other person of a drug of dependence or substance; and prohibited
- (ii) the supply of the syringe might assist in preventing the spread of disease.

To ensure protection from criminal liability, the clinical staff responsible for distributing syringes and supervising syringe-use must be “approved persons” under the Act, and also must ensure that their actions fall within the precise terms of the exemption created under the Act.

### **C. Strategies for Legalising Supply, Possession and Use of Heroin in the Trial**

There is an extensive body of literature recounting the failures of the present prohibitionist approach to drug control in Australia.<sup>44</sup> However any proposal to repeal or amend existing prohibitions on supply, possession and administration of heroin must consider the position under international law, specifically the implications for Australia’s obligations imposed by the various conventions dealing with narcotic drugs. Legislators will undoubtedly seek assurances that any amendments made to domestic law would not breach the international conventions dealing with narcotic drugs to which Australia is a signatory.

Under the Single Convention on Narcotic Drugs heroin is classified under Schedule IV as a drug having “particularly dangerous properties”.<sup>45</sup> Article 36(1) of the Convention requires the prohibition of the following drug-related activities:

Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences, when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

Under this Article, the prohibition on “possession” does not distinguish between possession for personal or recreational use, and possession for the purposes of trafficking.<sup>46</sup> However, there is some evidence that a narrower conception of “possession” under the Single Convention is emerging. The International Narcotic Control Board, established under the 1972 Protocol to the Single Convention, has accepted that Parties may legitimately view possession under the Convention as being restricted to possession for the purposes of illicit trafficking.<sup>47</sup> However this view that the Convention does not

<sup>44</sup> See generally R Fox and I Mathews (eds), *Drug Policy: Fact, Fiction and the Future* (1992); I Leader-Elliot, “Prohibitions Against Heroin Use: Can They Be Justified?” (1986) 19 *Australian and New Zealand Journal of Criminology* 225; D Weatherburn, “Crime and the Partial Legalisation of Heroin” (1992) 25 *Australian and New Zealand Journal of Criminology* 11.

<sup>45</sup> The Single Convention on Narcotic Drugs was signed on 30 March 1961, ratified on 1 December 1967, and the *Narcotic Drugs Act* 1967 (Cth), which implemented the Convention, entered into force on 31 December 1967.

<sup>46</sup> Over the last decade, policy-makers and enforcement agencies have shifted their attention away from drug users to those organised criminal elements who traffic in drugs: see discussion above at text to n 8. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances required the enactment of offences which carried heavier penalties for those convicted of trafficking commercial quantities of drugs and allowed for the confiscation of the proceeds of dealing in drugs. At the same time, the Convention requires the adoption of measures for treatment, education, aftercare, rehabilitation or social reintegration either as an alternative or in addition to punishment.

<sup>47</sup> *Report of the International Narcotics Control Board for 1992* (1992), p 6. The trend towards viewing “possession for personal or recreational use” as standing outside prohibitionist framework imposed by the Single Convention is reviewed in D MacDonald, R Moore, J Norberry, G Wardlaw and N Ballenden, *Legislative Options for Cannabis in Australia* (1994), National Drug Strategy Monograph No 26, pp 29-30.

require offences against possession for personal use is in direct conflict with the mandate in Article 3(2) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, *the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption* contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention (emphasis added).

Notwithstanding the uncertainty over the meaning and scope of possession of narcotics under international law, the possession and cultivation of small quantities of cannabis have been decriminalised in South Australia and the ACT.<sup>48</sup> Arguably, the introduction of expiation/infringement notice systems, which impose “civil penalties” as an alternative to prosecution, are not inconsistent with the obligations contained in the above Conventions.<sup>49</sup>

In the context of the trial, the supply, possession and use of heroin would not infringe the terms of the Single Convention due to the “medical and scientific research” exemption contained in Art 2(5):

(a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and

(b) A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug *except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision of the Party* (emphasis added).

Thus the terms of the ACT legislation which permit the supply and possession of a prohibited substance for purposes of an authorised program of research are not in breach of Australia’s international obligations. Arguably, the scope of exemption in the ACT could be legitimately extended to include the *administration* of a prohibited substance to a human subject for the purposes of medical and scientific research. At present, administering heroin (to oneself or to another person) is unlawful even in the context of an authorised program of research.<sup>50</sup>

The question has also arisen whether the heroin supplied to trial participants *must* be prescribed by a medical practitioner. Under section 57 of the *Drugs of Dependence Act* 1989 (ACT) only a medical practitioner (or a veterinary surgeon) can prescribe a “drug of dependence”. As heroin is a “prohibited substance” under the Act, there exist no equivalent provisions mandating its prescription by medical practitioners. The international conventions dealing with drugs do not expressly require that prohibited drugs used in medical and scientific research involving human subjects can be prescribed only by a medical practitioner. However, Article 2(5)(a) of the Single Convention recognises that with respect to the list of drugs in Schedule IV (which includes heroin) the Parties “shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a

<sup>48</sup> Sections 31(2)(a) and 32(6) of the *Controlled Substances Act* 1984 (SA) limit the penalties for the possession, consumption and cultivation of prescribed quantities of cannabis to a maximum of \$500. Where these offences involve quantities of cannabis below a specified amount they must be dealt with under the Cannabis Expiation Notice System—payment of a prescribed penalty by the offender expiates the offence and no conviction is recorded. A similar, though non-mandatory, infringement notice scheme has been established in the ACT. By virtue of section 171A, *Drugs of Dependence Act* 1989 (ACT), police officers may issue an offence notice in cases where they reasonably believe that the offender has committed a “simple cannabis offence”, that is, an offence involving less than a specified quantity of cannabis. Payment of a prescribed penalty under the offence notice discharges liability in respect of the alleged offence, and no conviction is recorded.

<sup>49</sup> See D MacDonald, R Moore, J Norberry, G Wardlaw and N Ballenden, *Legislative Options for Cannabis in Australia* (1994), National Drug Strategy Monograph No 26, p 31.

<sup>50</sup> See discussion above at text to n 30.

drug so included”. This Article does not mandate a *specific* type of control, and the Parties have a margin of discretion in how they formulate such controls. Indeed, imposing a requirement that heroin is to be prescribed by a medical practitioner is not the only available means of control. Under section 34 of the *Drugs of Dependence Act 1989* (ACT) conditions could be specified in the authorisation (granted to possess and use heroin for research purposes) as “are necessary and reasonable for ensuring— (a) the proper use and safe-keeping of the relevant drug or substance; and (b) that proper records concerning the receipt, use and disposal of the drug or substance are kept”. Researchers however are strongly of the opinion that heroin should be available only under prescription and medical supervision. An amendment to the *Drugs of Dependence Act 1989* (ACT) is required to permit medical practitioners to prescribe and administer heroin for the purpose of the trial.

Any proposal for reform of these laws must consider the implications for other areas of policy, particularly public health. Any recommendation to the Commonwealth and ACT governments to amend their respective laws governing supply, possession and administration of heroin, in addition to identifying the research aims and possible outcomes, should identify the public health implications of the existing prohibitionist policy. It is clear that criminalising the possession and use of drugs hampers initiatives to combat the HIV/AIDS pandemic by deterring intravenous drug users (the group most at risk of HIV infection) from seeking medical treatment. Indeed, as a result of these public health concerns, the Legal Working Party of the Intergovernmental Committee on AIDS recommended the decriminalisation of possession and self-administration of drugs.<sup>51</sup>

#### **D. Statutory Controls over the Supply and Manufacture of Heroin**

##### **(i) Compliance under the Therapeutic Goods Act 1989 (Cth)**

The heroin supplied to trial participants must also be considered in the context of the legal framework governing therapeutic goods. The object of the *Therapeutic Goods Act 1989* (Cth) is to establish and maintain a national system of controls relating to the “quality, safety, efficacy and timely availability of therapeutic goods”.<sup>52</sup> Therapeutic goods are defined under the Act as goods that are represented to be for therapeutic use, that is for use in, or in connection with the prevention, diagnosis, cure or alleviation of a disease, defect or injury in persons, or in the influence, inhibition, or modification of a physiological process in persons, or in testing the susceptibility of persons to a disease or ailment.<sup>53</sup> Therefore, heroin used in the trial would be a therapeutic good under the Act.

The Act is administered by the Therapeutic Goods Administration (TGA) within the Department of Human Services and Health (DHS). Therapeutic drugs must be registered or listed on the Australian Register of Therapeutic Goods established under the Act. The Register declares those goods which are, for the purposes of the Act, therapeutic goods. The Act also establishes relevant standards for therapeutic goods, and in order for a therapeutic good to be included in the register, it must comply with the standards set out in Part 2 of the Act. Under the Act, the Secretary of the DHS may grant exemptions permitting importation, exportation or supply of the goods where the specified goods are (a) for use in the treatment of another person; or (b) for use solely for experimental purposes in humans.<sup>54</sup> It is important to determine into which category of use the heroin in the trial would fall. Where the proposed use is experimental, in addition to supplying the Secretary with information relating to the goods, the exemption application must be made in writing and accompanied by a prescribed evaluation fee, currently \$10,000. As the use of heroin in the proposed trial is not *solely* experimental, it is possible to argue that these other conditions do not apply. Under section 19(5), authority may be given to a specified medical practitioner to supply a specified class of such goods to a specified class of recipients.

<sup>51</sup> Legal Working Party of the Intergovernmental Committee on AIDS, *Final Report* (1992), Chapter 8.

<sup>52</sup> Section 4, *Therapeutic Goods Act 1989* (Cth).

<sup>53</sup> Section 3(1), *Therapeutic Goods Act 1989* (Cth).

<sup>54</sup> Section 19(1)(a) and (b), *Therapeutic Goods Act 1989* (Cth).

Compliance with the *Therapeutic Goods Act 1989* (Cth) would require the TGA to grant the relevant exemptions and/or approvals under the Act, and clinical staff who supply the heroin to adhere to the conditions of the exemptions and/or approvals granted under the Act. Failure to adhere to these conditions of the exemption or approval is an offence and carries heavy financial penalties.<sup>55</sup> In light of the costs and burdens of compliance under the *Therapeutic Goods Act 1989* (Cth), an alternative strategy is to obtain, by legislative amendment, a special exemption for the heroin used in the trial that would remove it from the regulatory framework otherwise applicable.

## **(ii) Licensing the Manufacture of Heroin**

The manufacture of heroin is subject to restrictions under both Commonwealth and State or Territory legislation. The Commonwealth, in implementing its obligations under the Single Convention, has enacted legislation prohibiting the production of narcotic drugs, including heroin, without a licence issued by the Commonwealth.<sup>56</sup> The Commonwealth Act does not affect the power of the States or Territories to enact laws restricting the manufacture of heroin; with respect to heroin, the licensing provisions have only limited practical relevance since the manufacture of heroin is prohibited in absolute terms in all Australian jurisdictions except Victoria.

In Victoria, a licensing scheme has been established which permits the lawful manufacture, sale and supply of heroin.<sup>57</sup> The reforms were introduced to allow the medical profession to use heroin in the treatment of terminal illnesses.<sup>58</sup> However the plan never went ahead and licences to produce heroin have never been issued.<sup>59</sup> The political difficulties in obtaining such licences, combined with the lack of commercial viability in producing the relatively small amounts of heroin needed for the trial, militate against the domestic manufacture of heroin.

## **Transporting Heroin for the Trial**

The problem of transporting heroin from one jurisdiction to another for use in the trial has been foreshadowed in earlier research.<sup>60</sup> In each jurisdiction, the transportation of heroin would involve the commission of an offence, usually possession of a prohibited drug or some related offence.<sup>61</sup> Transporting heroin within the territorial limits of the ACT would not give rise to liability under the possession offences, provided that the person transporting it had obtained the relevant authorisation under the *Drugs of Dependence Act 1989* (ACT) and had complied with the terms of the research exemption granted under the Act.<sup>62</sup>

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<sup>55</sup> The import, export, manufacture and supply of therapeutic goods are prohibited unless the goods are registered or exempted under the Act: s 20, *Therapeutic Goods Act 1989* (Cth). It is an offence under s 22(7A) of the Act to supply goods except in accordance with the authority given under s 19(5) or any regulations made for the purpose under s 19(7). Similarly, it is also an offence under s 22(8) to knowingly or recklessly use therapeutic goods that are neither exempt goods, nor goods included in the register, except in accordance with an approval or authority under s 19.

<sup>56</sup> Section 15, *Narcotic Drugs Act 1967* (Cth).

<sup>57</sup> Section 56(1), *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

<sup>58</sup> D Manderson, *From Mr Sin to Mr Big— A History of Australian Drug Laws* (1993), p203.

<sup>59</sup> The licensing conditions restrict the supply of heroin to medical practitioners or pharmacists for medicinal purposes and to “fit and proper” persons at universities or other specified institutions for “educational, experimental or research purposes”: s 56(9) and (10), *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

<sup>60</sup> J Norberry, “Legal Issues” in NCEPH, *Feasibility Research into the Controlled Availability of Opioids Vol 2 Background Papers*, (1991), p 110; D Manderson, *From Mr Sin to Mr Big— A History of Australian Drug Laws* (1993), p 203.

<sup>61</sup> See discussion above at text to n 29. See further F Rinaldi and P Gillies, *Narcotics Offences* (1991), pp 95-96. Transporting heroin may also amount to trafficking in drugs, see for example, s 5, *Drugs Misuse Act 1986* (Qld); s 47, *Poisons Act 1971* (Tas); s 71, *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

<sup>62</sup> See discussion above at text to n 36.

More problematic is the potential liability of researchers or clinical staff who arrange for the transport of heroin to the ACT through another jurisdiction which does not exempt the supply or possession of heroin for the purpose of a program of research.<sup>63</sup> In such cases, the researcher may be guilty of aiding and abetting the commission of the possession or supply offences in those jurisdictions through which the heroin is transported.

Consider the following hypothetical situation: researchers based in the Canberra, contact (by phone, fax or letter) a courier company in NSW to arrange for road transport of a consignment of heroin from the Victorian border to the ACT. The question arises whether the researchers who arrange transportation without leaving the ACT are committing an act of aiding and abetting the supply or possession of heroin in NSW.<sup>64</sup>

To obtain a conviction the court would have to establish that the aiding and abetting (in this case, procuring the couriers to transport the heroin) occurred within the territorial boundaries of the particular jurisdiction. There is no authority dealing directly with the jurisdictional problems of aiding and abetting across borders in Australia, but there exists a general presumption against the extra-territorial operation of the criminal law. The High Court has held, in respect of homicide, that jurisdiction depended not on where the conduct causing death occurred, but on where that conduct took effect on the victim.<sup>65</sup> By analogy, where the researcher arranges transportation through NSW, it can be argued that the act of aiding and abetting in this case *took effect* in NSW where the courier received their instructions, and so jurisdiction vests in the criminal courts of that State alone. Liability will turn on *mens rea* of the accessory; in this case whether the researchers acted with the relevant knowledge and intention with respect to the possession offences committed in NSW.<sup>66</sup> The only way for researchers to avoid liability in this case, is to request an amendment to the NSW legislation, to extend the research exemption to cover the aiding and abetting provisions as well.

One further matter concerning accessory liability requires consideration. As a matter of general principle, to be liable for aiding and abetting, the prosecution must prove that the perpetrator committed, or at least attempted to commit, an offence. In the hypothetical situation above, the courier who transports the heroin will not be guilty of an offence in NSW provided that the relevant authorisation under the Act has been granted. As a matter of logic, since the would-be perpetrator (the courier) is excused liability, it follows that the researcher who assists or encourages the courier cannot be guilty of aiding and abetting the supply or possession offences in NSW. However, the law in this area is unclear, and there is authority confirming a person may be liable as an accessory notwithstanding the fact that the perpetrator is excused liability because of the existence of a valid defence.<sup>67</sup> The only certain way for researchers to avoid liability in the hypothetical situation outlined above is to seek amendment of the aiding and abetting provisions in NSW, inserting a section that clarifies that a

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<sup>63</sup> Indeed, medical or scientific research exemptions do not exist in all jurisdictions: for example, the *Drugs Misuse Act 1986* (Qld) contains no exemptions for possession or supply of drugs for research or scientific purposes; note also the absence of such exemptions for the “dealing in drugs” offence under the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth).

<sup>64</sup> The aiding and abetting provisions are found in s 345, *Crimes Act 1900* (NSW). The possession of heroin in NSW by the courier would not give rise to liability in that jurisdiction where the courier has obtained authorisation under the terms of the *Drugs Misuse and Trafficking Act 1985* (NSW). The Secretary of Department of Health must be satisfied that the possession of the prohibited drug is for the purpose of scientific research, instruction, analysis or study: s 10(2)(d), *Drugs Misuse and Trafficking Act 1985* (NSW).

<sup>65</sup> *Ward v R* (1980) 142 CLR 308 (High Court). The facts of this case are unusual. The defendant, who while standing on the bank of the Murray River in Victoria, shot and killed a man who was fishing just inside the NSW border. The High Court overturned his conviction for murder in Victoria on the ground that the killing had occurred in NSW and it alone had jurisdiction to hear the matter.

<sup>66</sup> The question of intention where the assistance or encouragement occurs in the ordinary course of professional or commercial activity is considered below at text to n 177.

<sup>67</sup> *Bourne* (1952) 36 Cr App R 125; *Cogan and Leak* [1976] 1 QB 217 (Court of Appeal, England).

researcher who arranges transport of heroin shall not, by reason only of that conduct, be taken to have aided and abetted the commission of the supply or possession offences in NSW. As was pointed out in an earlier background paper, “[a] lawful trial in the ACT will not make lawful, related activities which occur in other jurisdictions”.<sup>68</sup>

There are further legal restrictions on transporting heroin by air within Australia. Section 10 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth) creates an offence of dealing in drugs on board an Australian aircraft. This section applies only to conduct which occurs during an interstate flight within Australia; section 10(2) of the Act preserves the operation of State or Territory law with respect to conduct occurring on flights between two places in the same State or Territory. A person is guilty of an offence under section 10 if he or she engages in conduct which constitutes a “dealing in drugs” as defined under the Act (see discussion above), and that conduct also would amount an offence against a law in force in a State or Territory if it had occurred in that State or Territory. The Act therefore proscribes the interstate transport by aircraft of narcotic drugs (which include heroin) and the equipment or materials used for the manufacture, extraction or preparation of narcotic drugs. As there are no exemptions for medical or scientific research under this Act, a specific amendment is required to permit the lawful transportation of heroin by air within Australia.

## Importing Heroin for the Trial

The power to enact laws governing the importation and exportation of heroin is vested exclusively in the Commonwealth. Under the *Customs Act 1901* (Cth), enacted under the “trade and commerce” power in the Constitution, the Governor General may prohibit, by way of regulation, the importation of goods into Australia.<sup>69</sup> There are special provisions dealing with narcotic goods. Section 223B(1)(b) provides that a person who “imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies is guilty of an offence”. The prohibited imports and exports to which this section applies are narcotic goods,<sup>70</sup> which are defined in the Act, as “goods that consist of a narcotic substance” which are described in Schedule VI of the Act and includes heroin, methadone and morphine.<sup>71</sup> The prohibition on the import and export of narcotic goods may be either absolute, or qualified in the sense that importation or exportation is prohibited unless certain conditions are complied with.<sup>72</sup>

It is an offence under section 223B(1)(c) for a person, without reasonable excuse, to possess or attempt to possess any prohibited import to which this section applies which has been imported into Australia in contravention of this Act. A reasonable excuse is provided by the *Customs (Prohibited Imports) Regulations*, which allows importation only where a person has obtained both a licence to import a drug and permission to import a drug, granted by the Secretary of the Department of Human Services and Health.<sup>73</sup> Failure to obtain a licence to import heroin would expose those individuals who assist with its importation to liability under the aiding and abetting provision in the Act.<sup>74</sup> Moreover, individuals

<sup>68</sup> J Norberry, “Legal Issues” in NCEPH, *Feasibility Research into the Controlled Availability of Opioids Vol 2 Background Papers*, (1991), p 110.

<sup>69</sup> Section 50(1), *Customs Act 1901* (Cth). It is an offence to import a prohibited import under Section 51(1), *Customs Act 1901* (Cth).

<sup>70</sup> Section 233B(2), *Customs Act 1901* (Cth).

<sup>71</sup> Section 4(1), *Customs Act 1901* (Cth).

<sup>72</sup> Section 50(2), *Customs Act 1901* (Cth).

<sup>73</sup> Regulation 5(1)(a), *Customs (Prohibited Imports) Regulations*. The conditions governing the issuing of licenses are contained in Regulation 5(7). The specific conditions governing the use of the drug for medical or scientific purposes are contained in Regulation 5(10)(b).

<sup>74</sup> Section 236, *Customs Act 1901* (Cth).

abroad who manufacture or supply the heroin for the trial may be engaged in a “dealing in drugs” under the extra-territorial provisions in the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth).<sup>75</sup>

Where researchers are seeking to import heroin from abroad it is essential that the formalities in the above Act are strictly followed. Appropriate authorisations and licences must be obtained before arrangements are made to import the heroin otherwise there may be liability for attempting to import or possess a prohibited import. Before permission to import heroin could be granted there are further formalities under the Single Convention which must be satisfied.<sup>76</sup>

## Findings and Recommendations for Part I

1.1 The provision of heroin to participants during the trial would give rise to criminal liability under various drug offences under Commonwealth and ACT legislation. It is recommended that the respective legislatures enact an exemption to permit the lawful possession, supply and administration of heroin for the purposes of the trial. The enactment of these exemptions would not infringe Australia’s international obligations under the conventions dealing with narcotics.

1.2 Under the present law, medical practitioners are unable to prescribe and/or administer heroin to any person for the purpose of treatment or research. It is recommended that the *Drugs of Dependence Act 1989* (ACT) be amended to permit the medical prescription of heroin.

1.3 As the heroin provided to participants during the trial has therapeutic use, researchers and clinical staff must comply with licensing and exemption requirements imposed by the *Therapeutic Goods Act 1989* (Cth). The regulatory framework for therapeutic goods is complex, and the compliance requirements are costly and burdensome. It is recommended therefore that the Commonwealth legislature enact a special exemption which states that heroin provided to participants during the trial is not to be regarded as a “therapeutic good” under the *Therapeutic Goods Act 1989* (Cth).

1.4 At present, heroin manufacture is absolutely prohibited in all jurisdictions except Victoria. Importation of heroin from abroad would require compliance with the terms of the Commonwealth legislation (and the obligations imposed by the international conventions on narcotic drugs) before the relevant licences and authorisation to import the drug could be granted.

1.5 Trial staff who arrange interstate transport of heroin may be guilty of aiding and abetting drug offences in those jurisdictions through which the heroin is transported. It is recommended that, in those jurisdictions through which heroin is transported, the rules governing accessory liability be amended in the following terms: trial staff who arrange the transport of heroin shall not, by reason only of that conduct, be taken to have aided and abetted the commission of specific drug offences in that jurisdiction. Furthermore, it is recommended that the *Crimes (Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth) be amended, creating a special exemption for the purpose of the trial, to permit the lawful interstate transportation of heroin by air.

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<sup>75</sup> Under this Act, there are no exemptions or licences which can authorise the supply of a drug for the purpose of research; see discussion above at text to n36. It is an offence for a person to engage, outside Australia, in “dealing in drugs” with a view to carrying out in Australia another dealing in drugs where that conduct constitutes an offence against the law of the Commonwealth or of a State or Territory: s 13, *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth).

<sup>76</sup> To grant permission to import a narcotic the importation must not exceed the estimates that have been determined by the International Narcotic Control Board. In order to avoid unnecessary stockpiles of narcotics, each year Australia notifies the Board of the estimated quantity of narcotics to be imported over the next year. At present, heroin is not imported and no estimates are provided in relation to heroin. These issues are discussed in J Norberry, “Legal Issues” in NCEPH, *Feasibility Research into the Controlled Availability of Opioids Vol 2 Background Papers*, (1991), pp 92-93.

## Part II: Criminal Liability for Causing Harm to Trial Participants

The physical safety and well-being of participants will be a paramount concern to both the researchers and the clinical staff. Nevertheless, in the course of the trial, there is a risk that participants may suffer serious physical harm, either by an overdose caused by consuming too much heroin or by an adverse interaction between trial and non-trial drugs such as alcohol or benzodiazepines. These dangers raise the following question: in what circumstances will the researchers and/or the clinical staff be criminally liable for the death or serious injury of a participant during the course of the trial?

The researchers and clinical staff owe a common law duty of care to trial participants to avoid reasonably foreseeable harm, and causing harm by breaching that duty exposes them to the risk of civil liability in negligence.<sup>77</sup> The standard of care imposed by the law of negligence on researchers and clinical staff is that of the ordinary skilled person exercising and professing to have that special skill.<sup>78</sup> Criminal liability for causing harm to participants is however much more difficult to establish than civil liability for harm caused by negligence. In addition to the procedural safeguards for the defendant in criminal trials (the higher standard of proof “beyond reasonable doubt” and the presumption of innocence), the criminal law is much more reluctant to impose liability for negligent behaviour. As a general rule, to be liable under the criminal law, individuals must possess *mens rea*, that is, intention, recklessness or knowledge. The general rule is now subject to a growing number of exceptions in the form of statutory offences which no longer require the prosecution to prove a mental state on the part of the defendant.<sup>79</sup> Exceptionally, negligence alone will suffice for criminal liability, although the courts apply a higher standard than that employed in the civil law of negligence— simple lack of care is not sufficient for so-called “criminal negligence”.

### Liability for Causing Death: Murder and Manslaughter

In cases where a participant dies during the trial, the law governing homicide (that is, murder and manslaughter) may be relevant. Both forms of homicide require the defendant to have caused the death of another person. The difference between murder and manslaughter lies in the mental state which accompanies the defendant’s conduct. Murder in the ACT requires an intention to cause death or recklessness indifference as to the probability of death.<sup>80</sup> Manslaughter applies to all other forms of culpable homicide.<sup>81</sup> There are two broad categories of manslaughter: “involuntary manslaughter” where the defendant causes death as a result of an unlawful dangerous act or criminal negligence, and “voluntary manslaughter” where the defendant’s plea of provocation reduces an otherwise intentional killing to manslaughter.<sup>82</sup>

It is important to appreciate that liability for murder or manslaughter can arise from either an act or an omission. Philosophers have argued that there is a distinction, morally and ethically, between

<sup>77</sup> The question of negligence is explored in an earlier working paper: see N Cica, *Civil Liability Issues Associated with a “Heroin Trial”*: Working Paper No 11 (1994), pp 9-22.

<sup>78</sup> *Rogers v Whitaker* (1992) 109 ALR 625 at 628, per Mason J (High Court of Australia).

<sup>79</sup> The reluctance of the courts to punish a person without proof of a subjective mental state is reflected in the presumption that *mens rea* is an essential ingredient in every offence: *Sherras v De Rutzen* [1895] 1 QB 918. In the context of statutory offences, this presumption is rebuttable in cases where dispensing with proof of a mental state would promote the object of the legislation. Statutory crimes dispensing with *mens rea* take one of two forms: (a) strict liability, where mistake of fact can be raised as a defence or (b) absolute liability, where mistake of fact cannot be raised as a defence: see *He Kaw Teh* (1985) 157 CLR 523 (High Court of Australia).

<sup>80</sup> Section 12, *Crimes Act* 1900 (ACT).

<sup>81</sup> Section 15(1) of the *Crimes Act* 1900 (ACT) provides: “Except where a law expressly provides otherwise, an unlawful homicide that is not, by virtue of section 12, murder shall be taken to be manslaughter”.

<sup>82</sup> Section 13, *Crimes Act* 1900 (ACT).

causing harm and merely allowing harm to happen.<sup>83</sup> The common law, reflecting these concerns, exhibits a reluctance to punish omissions. There is no criminal liability for an omission except where the defendant is under a legal duty to act (not merely a moral or ethical duty). A legal duty to act can arise because of the nature of the relationship (including professional relationship),<sup>84</sup> or because that duty has been voluntarily assumed.<sup>85</sup> In context of the trial, the researchers and clinical staff would owe a legal duty to participants which is based both on the nature of that relationship and on their voluntarily assumed responsibility to treat and care for participants.<sup>86</sup> This legal duty would require them to use reasonable care and skill in the treatment or procedures, and to take proper precautions to avoid dangers to participants. Failure by the researchers or clinical staff to provide the proper level of care or take proper precautions may give rise to liability for an omission.

The prosecution must prove, in respect of both murder and manslaughter, that the defendant's conduct (act or omission) caused the death of the victim. The question of causation in law is a difficult one, and several tests have emerged from the available authorities. In those cases where causation is in issue, the jury should be directed that the causal connection between the defendant's conduct and the death must be "sufficiently substantial" to enable responsibility for the crime to be attributed to the defendant.<sup>87</sup> The defendant's conduct need not be the *sole* cause of the death, and the presence of other factors contributing to death will not preclude a causal connection being established.<sup>88</sup> The test for causation has been alternatively expressed as requiring the death to be a "reasonably foreseeable consequence"<sup>89</sup> or a "natural consequence"<sup>90</sup> of the defendant's conduct. In some circumstances, the unreasonable conduct of the victim may break the causal connection.<sup>91</sup> In the context of the trial, the presence of other factors contributing to death, such as the trial participant's prior administration of a non-trial drug, is not likely to prevent the administration of heroin by the clinical staff from being regarded as a cause of death.<sup>92</sup> Only where the adverse reaction to the heroin is totally abnormal or

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<sup>83</sup> See "Ethical Issues" in NCEPH, *Feasibility Research into the Controlled Availability of Opioids*, Vol 2, *Background Papers*, (1991), p 180.

<sup>84</sup> This duty may arise by virtue of the legal status of the parties, for example, parents owe a duty to care for their children: *Russell* [1933] VLR 59 (Supreme Court, Victoria). It has been suggested that a similar legal duty is also owed by surgeons to their patients: see J Stephen, *History of the Criminal Law of England* (1883) Vol II at pp 10-11.

<sup>85</sup> *Taktak* (1988) 34 A Crim R 334 (Court of Criminal Appeal, NSW); *Stone and Dobinson* [1977] 1 QB 354 (Court of Appeal, England).

<sup>86</sup> Control over a dangerous thing may also give rise to a legal duty to take reasonable steps to prevent others from that danger: *Callaghan* (1952) 87 CLR 115 (High Court of Australia). There is even a legal duty to take steps to remedy a dangerous situation which is caused by accident: *Miller* [1982] 1 QB 532 (Court of Appeal, England).

<sup>87</sup> *Royall* (1991) 172 CLR 378, per Deane and Dawson JJ; Toohey and Gaudron JJ and Brennan J (High Court of Australia). The majority, recognising that the test for causation is based on common-sense, approved to the following passage from *Campbell v The Queen* [1981] WAR 286 (Supreme Court, Western Australia): "It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter": at 290, per Burt CJ.

<sup>88</sup> *Evans and Gardiner (No 2)* [1976] VR 523 (Supreme Court, Victoria); *Royall* (1991) 172 CLR 378 at 411, per Deane and Dawson JJ.

<sup>89</sup> *Ibid.*, at 448-449, per McHugh.

<sup>90</sup> *Ibid.*, at 389-390, per Mason CJ. Mason CJ took the view that "foreseeability" should not be used to direct the jury since it was more likely to confuse than to clarify the issue of cause: *id.*

<sup>91</sup> The facts of *Royall* required the High Court to consider the so-called "fright and flight" cases, where the victim's fatal injury is inflicted in the course of escaping from the violence or threats of the defendant. The question whether the conduct is "reasonable" must be placed in the context of the perceived threat.

<sup>92</sup> The policy of the criminal law has been expressed as defendants must "take their victims as they find them": see *Blaue* [1972] 1 WLR 1411 at 1415, per Lawton LJ (Court of Appeal, England), where the refusal of a victim to receive a blood transfusion on religious grounds was held not to break the chain of causation.

extraordinary (in the sense of not being a reasonably foreseeable or natural consequence) would the act of administration of the heroin be disregarded as the cause of the death.

Liability for homicide however rarely turns on causation. More commonly, liability turns on whether the person who caused the death had the relevant mental state. In the ACT, the crime of murder is a statutory offence under the *Crimes Act 1900* (ACT). The relevant section provides that:

**12. (1)** A person commits murder if he or she causes the death of another person:

- (a) intending to cause death of any person; or
- (b) with reckless indifference to the probability of causing the death of any person.<sup>93</sup>

**12. (2)** A person who commits murder is guilty of an offence punishable on conviction, by imprisonment for life.

“Reckless indifference” is a term of art, and the legal definition must be distinguished from the commonly understood meaning of that term. In the context of murder, the term “reckless indifference” in the Act connotes a subjective foresight that death is a probable or likely consequence of the defendant’s conduct.<sup>94</sup> Foresight of the mere possibility of death or grievous bodily harm is not enough. Liability for murder would require researchers or clinical staff to intend death (in the sense that this was their purpose or design), or to foresee death as a probable or likely consequence of their actions.<sup>95</sup> To avoid criminal liability in this situation, researchers and clinical staff must assess the risk of death and serious injury to each individual trial participant, and take steps to ensure that the risks involved are minimised, accepting that, in practical terms, it is impossible to eliminate completely the risk of physical danger to participants.

A death of a participant during the trial, if attributable to the supply of heroin, would be unlikely to be the result of intentional or reckless conduct on the part of the clinical staff. It is possible however that the failure of the clinical staff to maintain the proper level of care for the participant may contribute to the death. As stated above, the principal difference between murder and manslaughter lies in the relevant mental state. For manslaughter, the culpability of the defendant’s conduct is judged objectively, and is not based on what the defendant subjectively intended, knew or foresaw. The law governing manslaughter was radically altered by the High Court in *Wilson*.<sup>96</sup> The majority held that there existed only two categories of involuntary manslaughter under the common law: “unlawful dangerous act” and “criminal negligence”.

### **A. Unlawful Dangerous Act Manslaughter**

This category of manslaughter requires the prosecution to prove defendant’s conduct which caused death was both unlawful and dangerous. The High Court in *Wilson* divided over the meaning of dangerous act. The minority preferred the simple formulation of dangerousness as “an act likely to

<sup>93</sup> Under the common law, the mental state for murder is alternatively satisfied by an intention to cause grievous bodily harm: *Crabbe* (1985) 156 CLR 464 (High Court of Australia).

<sup>94</sup> *Royall* (1991) 172 CLR 378, where the High Court considered the meaning of reckless indifference in s 18, *Crimes Act 1900* (NSW).

<sup>95</sup> The High Court has rejected attempts by judges to further clarify the foresight of probability in percentage terms: *Boughey* (1986) 161 CLR 10 (High Court of Australia).

<sup>96</sup> (1992) 107 ALR 257 (High Court of Australia). The deceased was a wandering drunk who stumbled into the defendant. The defendant claimed that he saw the victim clench his fist and so hit him, not very hard and only once. The victim died from resulting brain damage consistent with his head striking the concrete. The defendant was charged with murder. The judge directed the jury as to both murder and manslaughter and the defendant was convicted of manslaughter.

injure”.<sup>97</sup> The majority however adopted a more stringent test for dangerousness: a reasonable person in the position of the defendant, doing what the defendant did, would have realised that he or she was exposing another person to an appreciable risk of serious injury.<sup>98</sup>

The conduct which causes death must also be an unlawful act, in the sense that it involves the commission of a separate criminal offence.<sup>99</sup> Although many manslaughter cases involve defendants who kill in the course of other violent crimes (such as assault), there is no legal requirement that the unlawful act must be a crime of violence. Any breach of the criminal law, however trivial, will satisfy the requirement of unlawfulness. As modern legislation often attaches criminal liability to a breach of a statutory duty, the potential scope of this type of liability is extremely broad.<sup>100</sup> Indeed, many of the statutory duties imposed by legislation dealing with drugs are supplemented by offence and penalty provisions which punish breach of those duties.<sup>101</sup> It has been argued that the Australian cases, while not addressing this point directly, suggest a more restrictive conception of unlawful act:

“What the courts appear to have in mind is not an act which is dangerous and incidentally also unlawful, but an act which is unlawful *because* it is dangerous” (emphasis in original).<sup>102</sup>

He concludes that, for the purpose of manslaughter, unlawful acts are limited to acts which are unlawful only *because* they are dangerous.<sup>103</sup> Although there is little direct authority supporting this proposition, the Victorian Law Reform Commission noted that the requirement of unlawfulness has nothing relevant to add and recommended the adoption of a test based on dangerousness only: “Dangerousness is the key element here, and it is assessed by an objective test”.<sup>104</sup>

## **B. Manslaughter By Criminal Negligence**

The above category of manslaughter, unlawful dangerous act, only comes into play when there is no question of criminal negligence.<sup>105</sup> The conception of negligence which has emerged in the criminal law differs from the civil standard of negligence. The authorities stress that a higher degree of

<sup>97</sup> The minority (Brennan, Deane and Dawson JJ) followed the approach as adopted in NSW, and applied the formulation of dangerous act laid down in the English decisions of *Larkin* [1943] 1 All ER 217 and *Church* [1966] 1 QB 59.

<sup>98</sup> The majority (Mason CJ, Toohey, Gaudron, and McHugh JJ) applied the formulation adopted in the Victorian Supreme Court decision of *Holzer* [1968] VR 481: “Authorities differ as to the degree of danger which must be apparent in the act. The better view, however, is I think that the circumstances must be such that a reasonable man in the accused’s position, performing the very act which the accused performed, would have realised that he was exposing another or others to an *appreciable risk of really serious injury*” at 482, per Smith J (emphasis added). While the majority of the High Court endorsed *Holzer*, they doubted the utility of the qualifier “really” with respect to serious injury.

<sup>99</sup> The importance of the “unlawful act” element of manslaughter is apparent in *Pemble* [1971] ALR 762 (High Court of Australia). The defendant’s girlfriend was sitting on the bonnet of a car in a hotel car park. The defendant approached her from behind with a shotgun, only intending to frighten her. The gun discharged and killed her. The High Court quashed his conviction on the ground that the jury had been misdirected that the unlawful act in this case had been an assault. The High Court pointed out that there had been no assault in this case since the victim had her back to the defendant; thus an essential element of the assault, causing the victim to apprehend immediate violence, was not established by the prosecution. The ingredients of common assault are discussed below at text to n 116.

<sup>100</sup> Motor traffic regulations often provide that a breach of statutory duty constitutes an offence, for example, the failure to comply with vehicle registration requirements or driving licence conditions are summary offences in most jurisdictions.

<sup>101</sup> The offence provisions in the ACT and Commonwealth legislation dealing with drugs are outlined in Part I above.

<sup>102</sup> B Fisse, *Howard’s Criminal Law* (5th ed., 1990), at p 127.

<sup>103</sup> *Ibid.*, at p 128. Brent Fisse cites the following authority for this proposition: *Martin* (1983) 32 SASR 419 at 452 per White J. Note however that the High Court in *Wilson* did not consider this issue.

<sup>104</sup> Victorian Law Reform Commission *Homicide— Report No 40* (1992), at p 113, para 262.

<sup>105</sup> B Fisse, *Howard’s Criminal Law* (5th ed., 1990), p. 126

negligence than will support a civil action is required for criminal negligence— simple lack of care is not enough to impose criminal liability.<sup>106</sup>

The authoritative definition of criminal negligence in Australia is found in the Victorian decision *Nydam*,<sup>107</sup> where the Supreme Court of Victoria held that manslaughter by criminal negligence required the prosecution to prove that the defendant caused the death in circumstances involving,

“Ésuch a great falling short of the standard of care which a reasonable man (sic) would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment”.<sup>108</sup>

The standard is objective— it is not based on the defendant’s subjective awareness of the dangers involved in the conduct, but rather on what a reasonable person in the position of the defendant would have done and appreciated in those circumstances.<sup>109</sup>

In the context of the trial, the question of criminal negligence may arise in those situations where a member of the clinical staff, acting on information provided by the participants, mistakenly administers too much heroin with lethal consequences. It is important to appreciate that in deciding whether that mistake amounts to criminal negligence, the reasonable person (or in this case, the reasonable health care professional) is placed in the position of the defendant.<sup>110</sup> The jury is entitled to consider whether the reasonable person, placed in the defendant’s position, might have entertained that mistaken belief held by the defendant.

The physical dangers to which participants are exposed during the trial must be considered from the perspective of the trained professional concerned. In the context of criminal negligence, professional conduct (and conversely misconduct) must be judged in light of the standard of care which can be expected from a person professing to have those particular skills. As Fisse points out, individuals are entitled to the benefit of their professional competence:

“[The doctor] may justifiably make a decision in relation to a patient which turns out to be wrong, or administer treatment involving a high degree of danger to the patient which he mistakenly supposes to be necessary, under circumstances which would amount to criminal negligence in an unqualified person”.<sup>111</sup>

Administering heroin of an unknown purity to an addict *in any quantity* would ordinarily involve a high risk of death or serious injury. However, in the context of the trial, administering pharmaceutical grade heroin with appropriate procedures for dealing with overdoses and adverse reactions, the risk of death

<sup>106</sup> *Andrews* [1937] AC 576 (House of Lords). The definition of criminal negligence in this decision is circular, hindering rather than assisting the jury. The House of Lords suggested the following adjectives to describe the negligence involved in criminal cases: *culpable, criminal, gross, wicked, clear and complete*.

<sup>107</sup> [1977] VR 430 (Full Court of the Supreme Court of Victoria).

<sup>108</sup> *Ibid.*, at 445, per Young CJ, McInerney and Crockett JJ. This definition of criminal negligence was endorsed by the majority of the High Court in *Wilson*, see above n. 96.

<sup>109</sup> The English cases dealing with criminal negligence conflate objective and subjective standards, often using “recklessness” as a synonym for criminal negligence: *Lamb* [1967] 2 QB 981 and *Stone and Dobinson* [1977] 1 QB 354. In *Stone*, the Court of Appeal defined criminal negligence as “reckless disregard of danger to the health and welfare of the victim”.

<sup>110</sup> In one Victorian case, a mother, acting on medical advice given over the phone, mistakenly administered a lethal dose of a sedative to her hyperactive 6 year old child. The normal dose had been 5ml but her doctor had told the defendant that it was safe to use a ‘higher dosage’ or ‘a little bit more than 5 ml’. She gave a dose in excess of 40 ml. The Victorian Court of Criminal Appeal confirmed that the issue of criminal negligence is determined objectively, without reference to the particular belief of the defendant. The proper direction was whether a reasonable hypothetical person placed in the position of the defendant (having regard to the advice given by the doctor) would have regarded the defendant’s conduct as being dangerous: *Taylor* (1983) 9 A Crim R 358 at 360, per Lush J.

<sup>111</sup> B Fisse, *Howard’s Criminal Law* (5th ed, 1990), p 120.

and serious injury is much lower, and in most cases would be insufficient to impose liability for criminal negligence.

## **Liability for Causing Injury: Assault and Related Offences**

Researchers and clinical staff associated with the trial must be aware that carrying out research or medical treatment on trial participants without their valid consent may give rise to criminal liability for assault and/or related offences. It is important to appreciate that the degree of force involved in an assault can be minimal; technically speaking, merely touching another person without consent constitutes an assault in the form of a battery.<sup>112</sup> The values protected by the law governing assault are as much concerned with respect for individual autonomy, as with protection from physical harm.

The essence of an assault in either the civil or criminal context is physical interference without consent. For criminal assault, the burden rests with the prosecution to prove the absence of a valid consent by the other person. Thus, obtaining the informed consent of trial participants is not merely an ethical requirement,<sup>113</sup> it is also necessary in order to avoid legal liability (under both the civil and criminal law) for assault. In practice, however, the risk of prosecution under the criminal law for assault in these circumstances, though possible, is remote:

“In reality, consent or lack of it is only an issue in the civil law of torts. Although theoretically, a doctor who ordinarily acts without obtaining a patient’s consent may not only be exposed to liability in tort, but also runs the risk of facing a criminal prosecution for the crime of battery, there is little or no chance that this will actually happen in the context of the ordinary practice of medicine in good faith”.<sup>114</sup>

Moreover, a mistaken belief that the participant has consented to the procedures or treatment is inconsistent with the *mens rea* requirement of intention or recklessness required for assault.<sup>115</sup>

### **A. Common Assault and Assault Occasioning Actual Bodily Harm**

In the ACT common assault is a statutory offence,<sup>116</sup> although its ingredients are defined by the common law. Common assault involves intentionally or recklessly causing another person to apprehend the imminent infliction of unlawful physical force.<sup>117</sup> The offence also embraces battery, which is the intentional or reckless infliction of unlawful physical force on another person.<sup>118</sup>

<sup>112</sup> In practice, however, a person who merely touches another person without consent would be rarely prosecuted for battery. The legality of most physical contact in our ordinary daily activities cannot be explained by consent, other than by employing some version of “implied consent”. In Tasmania, the Code excludes from an assault “any act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion”: s 182(3), *Criminal Code Act 1924* (Tas).

<sup>113</sup> The ethical guidelines regarding human experimentation are issued by the National Health and Medical Research Council and the Commonwealth Department of Health, Housing and Community Services: *National Health and Medical Research Council Statement on Human Experimentation and Supplementary Notes* (revised 1992).

<sup>114</sup> I Kennedy and A Grubb, *Medical Law* (2nd ed., 1994), p 89-90.

<sup>115</sup> See *DPP v Morgan* [1976] AC 182 (House of Lords, England). Under the common law, an honest belief (albeit unreasonable) that the woman consented to intercourse negates the mental state for rape. The principle has general application for all crimes requiring proof of *mens rea*, and the principle has been affirmed in *He Kaw Teh* (1985) 157 CLR 532 at 592, per Dawson J (High Court of Australia).

<sup>116</sup> Section 26, *Crimes Act 1900* (ACT) simply provides: “A person who assaults another person is guilty of an offence punishable, on conviction, by imprisonment for 2 years”.

<sup>117</sup> *Venna* [1975] 3 All ER 788 (Court of Appeal, England); *Knight* (1988) 35 A Crim R 314 (Court of Criminal Appeal, NSW).

<sup>118</sup> Battery also constitutes a tort, and the civil liability issues are reviewed in N Cica, *Civil Liability Issues Associated with a “Heroin Trial”*: *Working Paper No 11* (1994), pp 2-8.

Any treatment of a trial participant without consent may constitute a common assault. In the civil context, in addition to liability for any non-consensual physical touching, it has been suggested that the provision of heroin to trial participants for self-administration (though not involving direct physical contact) may constitute a battery by the clinical staff.<sup>119</sup> By contrast, the criminal law defines the offence of assault narrowly, recognising that there exist other related offences which do not require harm to be caused as a result of direct physical contact between the defendant and the victim.<sup>120</sup> There is however some authority which could arguably support criminal liability for battery in this situation. The courts could apply an expanded notion of cause, directing the jury that the administration of the heroin, although directly the result of the participant's own act, is caused by the conduct of the clinical staff.<sup>121</sup> The question of causation is governed by the same general principles applied in homicide cases—the jury must be satisfied that there is a sufficiently substantial causal connection between the actions of the clinical staff and the participant's self-administration of heroin.<sup>122</sup> Alternatively, the courts could apply the “doctrine of innocent agency”, which provides that a person may be regarded as a perpetrator of a crime notwithstanding that the physical elements of that crime (the *actus reus*) are brought about by another person—an “innocent agent” who lacks the requisite mental state or has a valid defence.<sup>123</sup> Whichever approach is taken, liability for battery in this situation will depend on the effectiveness of the participants' consent, which is discussed below.

Where treatment occurs without consent *and* causes bodily harm, the researchers and/or clinical staff may be liable under an “aggravated assault” such as assault occasioning actual bodily harm.<sup>124</sup> Where the injury inflicted is more serious, liability may arise under the offences dealing with inflicting or causing grievous bodily harm.<sup>125</sup>

## **B. Poisoning Offences**

Providing heroin to participants for the purpose of self-administration may also give rise to criminal liability under the offences dealing with poisoning. Under the *Crimes Act 1900* (ACT), administering a stupefying or overpowering drug, poison or other injurious substance is dealt with under two sections dealing with “acts endangering life etc.” and “acts endangering health etc.”.<sup>126</sup> The difference between the two offences is the relative seriousness of the harm involved. It is an offence under section 27(3)(b) to administer to another person “any stupefying or overpowering drug or poison or any other injurious substance likely to endanger human life or cause a person grievous bodily harm”. Under section 28(2)(a) it is an offence to administer to another person “any poison or other injurious

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<sup>119</sup> *Ibid.*, at p 2.

<sup>120</sup> The offence of *causing* grievous bodily harm does not require an “assault” or an “infliction” as a precondition for liability: s 25, *Crimes Act 1900* (ACT). The terms “assault” and “infliction” have been construed narrowly and do not include infecting another person with a disease: *Clarence* (1888) 22 QBD 23 at 41-42, per Stephen J (Court for Crown Cases Reserved, England).

<sup>121</sup> In one English case, the defendant armed with a gun held a girl hostage in front of him as a shield. In the course of his escape, the defendant fired on armed police, who acting in self-defence returned fire and killed the girl. Although the defendant's use of the girl as a shield did not directly contribute to her death, the court held that his actions could be regarded as the cause of death: *Page* (1983) 76 Cr App R 279 (Court of Appeal, England).

<sup>122</sup> The principles governing causation are discussed above at text to n 87.

<sup>123</sup> See *Michael* (1840) 9 Car & P 356 where the doctrine was applied in the context of a murder trial. The defendant was convicted of murder of her child on the basis that she had procured another person to administer poison to her child in the innocent belief that it was medicine.

<sup>124</sup> Section 24, *Crimes Act 1900* (ACT). Inflicting actual bodily harm (which does not require the commission of an assault) is a separate offence under s 23, *Crimes Act 1900* (ACT).

<sup>125</sup> Sections 19 and 20, *Crimes Act 1900* (ACT), dealing with intentional and reckless infliction of grievous bodily harm respectively. Section 25, *Crimes Act 1900* (ACT) deals with unlawful or negligent acts or omissions causing grievous bodily harm.

<sup>126</sup> Sections 27 and 28, *Crimes Act 1900* (ACT).

substance with intent to injure or cause pain or discomfort to that person". Under both sections "administering" includes causing another person to take any drug or poison. "Poison" in the context of these offences is given a broad interpretation.<sup>127</sup> It is likely that the heroin provided to trial participants for self-administration would be regarded by the courts as a "stupefying drug" or alternatively as an "injurious substance".<sup>128</sup>

Liability under these poisoning offences may turn on the availability of defences. Both sections above state that the person administering the drug, poison or injurious substance must act "intentionally and unlawfully". Intentionally in this context requires the person administering the heroin to have acted with the purpose of causing serious injury to the participant for the serious offence, or with the purpose of causing pain or discomfort for the lesser offence. Unlawfully in this context probably means "without lawful excuse", and it could be argued that administering heroin in the course of an authorised program of research would provide such an excuse. More likely, however, is that the conduct must be unlawful in the sense that the defendant cannot rely upon a recognised defence such as self defence or necessity. In the context of assault and related offences, consent is also a defence. The question of consent as a defence to the poisoning offences has never been raised, but it must be doubted whether, as a matter of public policy, the courts would permit a person to raise consent as defence where the administration of a drug is likely to endanger human life or cause grievous bodily harm. The courts may however accept consent as a defence where the activity involved merely causes pain or discomfort.<sup>129</sup>

### C. *Consent as a Defence*

For common assault, lack of consent is an element of the offence to be proved by the prosecution beyond reasonable doubt. For other assaults, such as assault occasioning actual bodily harm, the other person's consent may be raised as a defence, which means that the defendant must adduce prima facie evidence of that consent.<sup>130</sup> There is an exceptional situation where the law dispenses with the requirement of consent to avoid criminal liability; in cases of a medical emergency, the treatment of a person who is incapacitated and therefore unable to consent, although prima facie a common assault, will be justified under the doctrine of necessity.<sup>131</sup> Medical treatment provided to resuscitate an unconscious participant who has overdosed on heroin would not constitute a common assault. Since emergency treatment is a possibility, it is advisable (as matter of practice, if not a strict legal requirement) that the consent form should explain that in situations of emergency it may be necessary to administer treatment without first obtaining the consent of the participants.

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<sup>127</sup> In 1990, the poisoning offence in New South Wales formed the basis of a charge against a prisoner who allegedly infected a prison guard with HIV by stabbing him with an infected syringe. The doctrinal distortions created by regarding HIV as a "poison" are reviewed in S Bronitt, "Spreading Disease and the Criminal Law" [1994] *Criminal Law Review* 21 at pp 24-25. Indeed in *Clarence*, Stephen J. noted that the transmission of disease was not in the nature of an assault precisely because "[i]nfection is a kind of poisoning" and administering poison amounts to another offence under the 1861 Act: see above n 134 at 41-42.

<sup>128</sup> In England, it has been held that injecting heroin into a person with a high tolerance to that drug could amount to "administering a noxious thing" under the equivalent poisoning offence in the United Kingdom: *Cato* [1976] 1 WLR 110 (House of Lords, England).

<sup>129</sup> The limits on the defence of consent imposed by consideration of public policy are reviewed below at text to n 148.

<sup>130</sup> This obligation on the defence to adduce some evidence of consent is called the "evidential burden". Once the judge is satisfied that there is an issue of consent in the case, the legal burden rests with the prosecution to prove the other person's lack of consent beyond reasonable doubt.

<sup>131</sup> The scope of the defence of necessity under the common law is hazy. An essential element of the defence is that the criminal act must have been done "only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect": *Loughnan* [1981] VR 443 at 448 (Supreme Court, Victoria). The risk of death to an unconscious participant is clearly an "irreparable evil" which would justify the emergency treatment.

A preliminary issue, particularly relevant in the context of the trial, is whether a participant has competence to consent to the treatment. The criminal law governing consent lacks the detailed rules governing capacity which have developed in the civil law. There is no statutory “age of consent” in relation to assault,<sup>132</sup> although in some jurisdictions rules do exist in relation to the medical treatment of minors.<sup>133</sup> The criminal law however is concerned with the *quality* and *limits* of consent, which are matters of particular importance in the context of the trial. The general position is that a participant’s consent (or apparent consent) will not be effective (i) where the participant has mistaken the “nature and character” of the treatment or procedure; or (ii) where the treatment or procedure, which causes or is likely to cause bodily harm, is not in the “public interest”.

### (i) Mistakes Vitiating Consent

As trial participants are heroin dependent, their ability to understand the nature of the treatment or procedures may, at times, be significantly impaired. The participants’ ability to understand the nature of the treatment or procedures may be affected by non-trial drugs, or by the emotional and physical effects of withdrawal. Alternatively, participants may understand the nature of the treatment or procedures, but feel unable to refuse the heroin, a drug which they find highly desirable and will attempt to obtain on any terms. In other cases, participants may again understand the nature of the treatment or procedures, but feel “coerced” onto the trial by the terms of a court order or suspended sentence requiring their participation in the trial. [As the trial is presently conceived, recruitment of participants through the courts would be unlikely.] As will be explained below, under the present law only where the participant lacks an understanding of the nature of the treatment or procedures will consent be ineffective. Vulnerability to heroin and the lifestyle of many addicts will undoubtedly place constraints on the “free choice” of many participants; however this context will not destroy consent unless the ability to understand the nature of the treatment or procedures has been affected.

The rules governing consent are found in the common law. The authorities have established that a person’s consent is vitiated where it is obtained under a misunderstanding as to the nature and character of the act. In many of the early cases, this misunderstanding was induced by fraud or deceit on the part of the defendant. In *Clarence*,<sup>134</sup> the defendant infected his wife with gonorrhoea through consensual sexual intercourse. He knew, but failed to inform her that he was infected with gonorrhoea, which in the nineteenth century was a fatal and incurable disease. The defendant was charged with assault occasioning actual bodily harm and inflicting grievous bodily harm. The court considered whether the concealment of the fact of infection would vitiate the wife’s consent to sexual intercourse. The majority held that not all fraudulent conduct vitiates consent— consent is only vitiated where the defendant has perpetrated a fraud “as to the nature of the act itself, or as to the identity of the person who does the act”.<sup>135</sup> In this case, the defendant’s failure to disclose the risk of contracting the disease to his wife did not constitute a fraud which would vitiate consent and leave him guilty of assault.<sup>136</sup> According to Stephen J, the wife’s consent to intercourse was as “full and conscious as consent could

<sup>132</sup> Cf, the age of consent provisions for sexual offences: sexual intercourse or an act of indecency with a minor are offences irrespective of consent: ss 92E and 92K, *Crimes Act 1900* (ACT), respectively.

<sup>133</sup> The rules governing the treatment of minors and incompetent adults are reviewed in an earlier working paper: see N Cica, *Civil Liability Issues Associated with a “Heroin Trial”*: Working Paper No 11 (1994), pp 3-5.

<sup>134</sup> (1888) 22 QBD 23 (Court for Crown Cases Reserved, England).

<sup>135</sup> *Ibid.*, at 44, per Stephen J.

<sup>136</sup> There is some degree of flexibility in how the courts characterise “nature of the act”. It is possible to argue that sexual intercourse with a diseased person is very different in nature from intercourse with a healthy person. Indeed, Field J, dissenting in *Clarence*, argued that the defendant’s fraud *had* related to “the very act of connection, its physical nature and conditions”: *ibid.*, at 61.

be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent".<sup>137</sup> These rules governing vitiation of consent have been applied in the context of rape.<sup>138</sup>

Applied to medical context, consent will only be vitiated where the patient has been misled, or has misunderstood,<sup>139</sup> the nature of the treatment or procedures.<sup>140</sup> What constitutes a mistake as to the "nature of the act" in medical treatment was considered in the Victorian decision of *Mobilio*.<sup>141</sup> In this case, a radiographer conducted a series of internal vaginal examinations upon several female patients using ultrasound transducers. These internal scans had no medical value, and were done for the radiographer's own sexual gratification. He was charged with rape under the extended definition of sexual intercourse in Victoria and convicted.<sup>142</sup> The Court of Criminal Appeal considered whether the patients had consented to intercourse and whether their consent had been vitiated. Applying the above rules, the court held that in order to vitiate consent, the patient's mistake must relate to the nature and character of the act or the identity of the person doing the act; a mere mistake as to the purpose of the act (which induces that consent) would not be sufficient. Applied to the facts, as each patient had understood the nature of the physical act (the insertion of the ultrasound transducer into her vagina) consent had not been vitiated.<sup>143</sup>

In the present law only where the patient's mistake relates to what is physically being done will consent be vitiated. In *Mobilio*, the patients were not mistaken about what was physically happening to them. The physical act (the insertion of the ultrasound transducer) would be the same whether the act was done for a medical purpose or for sexual gratification. But clearly the patients were not consenting to interference for the radiographer's sexual pleasure. Consent in the criminal law is restricted to an understanding of the physical character of the act, and thus consent to treatment need not require comprehension of its purpose, context or significance. The restrictive approach to vitiation of consent, which stems from the judicial reluctance to broaden the interpretation of "nature of the act", has been

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<sup>137</sup> Thus, in the context of HIV transmission, the deliberate non-disclosure of infection to a sexual partner does not destroy consent. Arguably, there is no assault or rape in such cases because the fraud (non-disclosure of infection) did not relate to the nature and character of the physical act: S Bronitt, "Spreading Disease and the Criminal Law" [1994] *Criminal Law Review* 21 at pp 25-26.

<sup>138</sup> *Papadimitropoulos* (1957) 98 CLR 249 (High Court of Australia). In this case, the defendant accompanied a young Greek woman recently arrived in Australia to the Melbourne Registry Office. He told the woman, who did not understand English, that she had gone through a marriage ceremony with him. This was not true. Although his fraudulent representation induced her consent to intercourse, the High Court held that her mistake did not relate to the "nature of the act", and therefore could not destroy her consent and leave him guilty of rape. For a critical discussion of "nature of the act" in the context of rape, see S Bronitt, "Rape and Lack of Consent" (1992) 16 *Criminal Law Journal* 289, at pp 296-298.

<sup>139</sup> In *Papadimitropoulos* (1957) 98 CLR 249, the High Court emphasised that it was the victim's mistake which vitiated consent rather than the defendant's fraud, "...in considering whether an apparent consent is unreal it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself" at 260.

<sup>140</sup> In the so-called "medical cases", it was held that consent would be vitiated where the woman had submitted to sexual interference under the mistaken belief that it formed part of a *bona fide* medical or surgical procedure: *Flattery* (1877) 2 QBD 410 and *Williams* [1923] 1 KB 340.

<sup>141</sup> [1991] 1 VR 339 (Supreme Court, Victoria). *Mobilio* is subjected to a detailed discussion and analysis in J Morgan, "Rape in Medical Treatment: the Patient as Victim" (1991) 18 *Melbourne University Law Review* 403.

<sup>142</sup> Sexual penetration in the context of the statutory offence of rape is defined broadly, and includes *inter alia* "É(b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person": s 35, *Crimes Act* 1958 (Vic), as amended by the *Crimes (Sexual Offences) Act* 1991 (Vic).

<sup>143</sup> The effect of *Mobilio* has since been reversed by statute in Victoria. Statutory provisions clarifying consent were introduced by the *Crimes (Rape) Act* 1991 (Vic). Section 36 of the *Crimes Act* 1958 (Vic) provides that a person does not freely agree to an act in circumstances where that person *inter alia* "mistakenly believes that the act is for medical or hygienic purposes".

subject to academic criticism.<sup>144</sup> Indeed, in the context of rape and sexual assault, the more objectionable consequences of these rules have been abrogated by statute.<sup>145</sup>

In practical terms, the effect of these rules is that consent is not vitiated simply because the trial participant has not been provided with sufficient information to appreciate the purpose, context or significance of the procedures. Although the only requirement under the criminal law is that the participants comprehend the physical nature of what is being done to them, researchers and clinical staff should be aware that failure to provide such information may give rise to liability in negligence and/or constitute a breach of ethical guidelines.<sup>146</sup>

## (ii) Consent and the Public Interest

Treatment which causes physical injury to a participant may give rise to liability for assault occasioning actual bodily harm, or causing grievous bodily harm in the case of serious injury. Researchers must be aware that different, more stringent, rules apply when the treatment or procedures involve the risk of injury to the participants. In cases where there is the risk of physical injury, the “public interest” intrudes, and different rules of consent apply. The basic rule under the common law is that a person cannot ordinarily consent to actual bodily harm (or the risk of actual bodily harm) except where that activity falls within a well-established exception.<sup>147</sup> This rule was recently affirmed in the English decision *Brown*.<sup>148</sup> In the absence of any substantive judicial consideration of the rules governing consent in Australia, the decision in *Brown* (though not strictly binding) merits careful consideration.

*Brown* provided the House of Lords with an opportunity to articulate the principles governing the defence of consent. The majority (Lords Templeman, Jauncey and Lowry; Lords Mustill and Slynn dissenting) held that where conduct causes or is likely to cause actual bodily harm, the consent of the other person cannot be raised as a defence *unless* the activity falls within one of the well-established exceptions which include, *inter alia*, properly conducted games or sports, reasonable chastisement, reasonable surgical interference, dangerous exhibitions.<sup>149</sup> The public interest determines whether consent can or cannot be a defence to activity which causes, or is likely to cause, actual bodily harm. Lord Lowry summed up the present law in the following terms:

“Thus we are left with the proposition that it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason and that it is an assault if actual bodily harm is caused (except for good reason).”<sup>150</sup>

<sup>144</sup> For a critical review of the equivalent rules governing consent in rape, see J Scutt, “Fraud and Consent in Rape” (1976) 18 *Criminal Law Quarterly* 312; G Roberts, “Dr Bolduc’s Speculum and the Victorian Rape Provisions” (1984) 8 *Criminal Law Journal* 296; J Morgan, “Rape in Medical Treatment: the Patient as Victim” (1991) 18 *Melbourne University Law Review* 403 and S Bronitt, “Rape and Lack of Consent” (1992) 16 *Criminal Law Journal* 289.

<sup>145</sup> The common law rule in *Papadimitropoulos*, discussed above at n 138, that a mistake as to marital status will not vitiate consent, has been reversed by statute in NSW: s 61R(2)(a)(ii), *Crimes Act* 1900 (NSW).

<sup>146</sup> N Cica, *Civil Liability Issues Associated with a “Heroin Trial”*, Working Paper No 11 (1994), pp 9-22.

<sup>147</sup> Different rules apply in the Code States of the Northern Territory and Queensland, which fix the degree of harm to which a person can lawfully consent at a higher level than the common law: a person can consent to bodily injury which is not intended to kill or cause grievous bodily harm: see D Kell, “Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal?” [1994] 68 *Australian Law Journal* 363.

<sup>148</sup> [1993] 2 WLR 556 (House of Lords, England). The defendants, a group of homosexual men, engaged in consensual sado-masochistic activity which included violent caning, branding, body piercing and blood-letting. The participants were then charged with various offences including wounding and assault occasioning actual bodily harm under sections 20 and 47 of the *Offences against the Person Act* 1861 (UK). At trial the defendants were convicted, and subsequently appealed on the ground that the trial judge had wrongly excluded consent as a defence.

<sup>149</sup> See also *Attorney-General’s Reference (No 6 of 1980)* [1981] 3 WLR 125 (Court of Appeal, England).

<sup>150</sup> See above n 148 at 581-582.

Whether there is “good reason” for a particular activity is determined by judicial perceptions as to the social acceptability of that activity. The majority concluded that consent therefore is never available as a defence to sado-masochistic activity which causes, or is likely to cause actual bodily harm.<sup>151</sup>

*Brown* is open to several criticisms. In doctrinal terms, the decision can be criticised as representing a disguised departure from earlier authorities. Previously consent had been seen as a defence in all but the few cases where the judiciary specifically ruled that it could not apply. Following *Brown*, consent operates as a defence *only* where the judiciary permits it, in effect amounting to a complete inversion of the consent defence.<sup>152</sup> More fundamentally, the decision has been criticised for undermining the important liberal values of individual autonomy and the right to be free from unwarranted state intrusion into one’s private life.<sup>153</sup>

Under the present framework, where the treatment or procedures in the trial cause, or are likely to cause, physical injury, in order to raise consent as a defence the researchers or clinical staff would have to establish that there were “good reasons” for the trial; in other words, that the trial served the public interest. The treatment or procedures may fall under the exception relating to medical treatment. This exception, although expressed as “reasonable surgical interference”, is not restricted to invasive medical procedures. The scope of this exception has been rarely tested by the courts, and there is little authority directly on the limits of consent in the context of medical treatment. To escape criminal liability, it must be established that the medical treatment which causes, or is likely to cause, actual bodily harm is “reasonable” in the circumstances. In practice, the question whether particular treatment constitutes “reasonable surgical interference” is determined largely by its acceptability to the medical profession.<sup>154</sup> It is not yet certain that treatment involving the provision of heroin to trial participants would have the unqualified support of the medical profession,<sup>155</sup> and it may prove difficult to satisfy a court that treatment involving heroin is within the medical treatment exception.

If the treatment does not fall within the medical treatment exception, the experimental value of the trial may justify the risk of bodily harm to participants. The categories of exception outlined in *Brown* may not be closed, and it is arguable that consent should be available as a defence to any activity which causes, or is likely to cause, actual bodily harm provided there is “good reason” for that activity. In the context of the trial, it could be argued that supplying heroin to participants has scientific value, by advancing knowledge about drug dependency and the pharmacology of heroin, and also benefiting the broader community by furthering the National Drug Strategy policy of “harm minimisation”. It has been argued that medical procedures performed for the advancement of medical knowledge would not ordinarily give rise to criminal liability for assault:

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<sup>151</sup> Lord Lowry expressed the view, at 583, that sado-masochism is not “conducive to the enhancement or enjoyment of family life or conducive to the welfare of society”; also he noted the danger that sado-masochistic activity “will get out of hand”, exposing participants to the risk of physical danger including infection from HIV/AIDS. Lord Templeman, at 566, concluded: “Society is entitled and bound to protect itself from a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised”.

<sup>152</sup> For a review of the impact of *Brown* on consent as a defence to activity involving the risk of HIV transmission see S Bronitt, “Spreading Disease and the Criminal Law” [1994] *Criminal Law Review* 21 at 31-32.

<sup>153</sup> These issues are further explored in I Freckleton, “Sado-masochism, Repeated Self-mutilation and Consent” (1994) 2 *Journal of Law and Medicine* 48.

<sup>154</sup> This raises the question whether potentially harmful “cosmetic” surgery, like silicone breast implantation, constitutes reasonable surgical interference. In England, it has been suggested that sterilisation operations may not fall within this exception: see *Bravery* [1954] 1 WLR 1169 (Court of Appeal, England), where Denning J expressed the view that notwithstanding consent, male sterilisation for the purpose of contraception is a criminal assault. His remarks were made in a civil case, and therefore are not binding. It is probably the case that consent is not available as a defence to doctors who perform female circumcision for religious or cultural reasons: see R Mackay “Is Female Circumcision Unlawful?” [1983] *Criminal Law Review* 717.

<sup>155</sup> While the Federal Council of the Australian Medical Association supports the feasibility study ‘in principle’, it may or may not support a trial if that is recommended by the feasibility study.

“Provided the procedure is not unreasonably dangerous, and the risks involved are not disproportionate to the knowledge or experience which must be gained, the possibility of long-term benefit to the health of members of the community will almost certainly provide a just cause or excuse”.<sup>156</sup>

As the above analysis suggests, there is considerable doctrinal uncertainty over the nature, scope and limits of consent under the present law. To resolve this uncertainty, the ACT legislature could enact a special “consent” defence for assault and related offences (including poisoning offences) which would clarify that staff who administer heroin during the course of the trial can raise the consent of the participants as a defence.

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<sup>156</sup> P Skegg, “Medical Procedures and the Crime of Battery” [1974] *Criminal Law Review* 693 at 696 (footnotes omitted).

### (iii) Consent: Some Ethical and Practical Considerations

As a matter of ethical clinical research practice, the researchers and clinical staff must obtain the informed consent of each trial participant before any research or treatment is undertaken.<sup>157</sup> To obtain the free and fully informed consent, each participant must be informed in both oral and written form, wherever possible, of the purpose of the research and also risks and possible side-effects of treatment with heroin.<sup>158</sup> Although there is no legal requirement to obtain the participant's consent in writing, the ethical guidelines state that the consent obtained should be evidenced in writing as a record of the participant's apparent comprehension and consent, and the participant should receive a copy of that consent form. Provided that these ethical guidelines are complied with, the participant's consent will be effective and there will be no issue of criminal liability for common assault. As outlined above, where the treatment causes or is likely to cause injury, an informed consent is a necessary *but not a sufficient* condition for the defence of consent—the treatment must in addition satisfy the public interest requirements.<sup>159</sup>

Obtaining an informed consent is also necessary to avoid the risk of civil liability in battery and negligence.<sup>160</sup> The duty to disclose information to participants under the civil law is particularly stringent where the research involved is new or experimental, and offers only limited benefits to participants. In *Halushka v University of Saskatchewan*,<sup>161</sup> it was established that the failure of the researcher to inform a trial participant of the possible adverse consequences of taking a new drug gave rise to civil liability for assault: "The subject of medical experimentation is entitled to a full and frank disclosure of the facts, probabilities and opinions which a reasonable man (sic) might be expected to consider before giving his consent".<sup>162</sup> The position is less certain where the experimental treatment may offer therapeutic benefits for the participants, as is anticipated in this trial. These therapeutic benefits to the participants however do not change the essential characterisation of the treatment as experimental.<sup>163</sup>

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<sup>157</sup> National Health and Medical Research Council, *Statement on Human Experimentation and Supplementary Notes* (1992); see also Commonwealth Department of Health, Housing and Community Services, *Guidelines for Good Clinical Research Practice* (1991).

<sup>158</sup> Commonwealth Department of Health, Housing and Community Services, *Guidelines for Good Clinical Research Practice* (1991).

<sup>159</sup> See discussion above.

<sup>160</sup> N Cica, *Civil Liability Issues Associated with a "Heroin Trial"*, Working Paper No 11 (1994), at p 6 and p 16.

<sup>161</sup> (1985) 53 DLR (2d) 436 (Court of Appeal, Saskatchewan).

<sup>162</sup> *Ibid.*, at 444.

<sup>163</sup> In the context of experimental drug testing to combat HIV/AIDS it has been observed that "unless there is genuine uncertainty as to whether an experimental treatment is more effective than established or than no treatment at all, the conduct of a controlled trial is likely to be unethical and may, in some circumstances, be unlawful": J Godwin, J Hamblin, D Patterson and D Buchanan, *Australian HIV/AIDS Legal Guide* (2nd ed., 1993) at p 185.

## Findings and Recommendations for Part II

2.1 No amendment of the law governing homicide is considered necessary or desirable. To avoid liability for homicide, researchers and clinical staff must ensure that both foreseen and reasonably foreseeable risks of death or serious harm to participants during the trial are minimised.

2.2 Failure to obtain an effective and valid consent from trial participants would give rise to criminal liability for assault and/or related offences, except where the treatment is provided in an emergency situation.

2.3 Consent in the criminal law requires participants to comprehend only the physical nature of the treatment and procedures. It is recommended that researchers and clinical staff should observe higher standards for consent (i.e., fully informed consent or free agreement). Failure to observe these higher standards for consent may (i) give rise to civil liability for battery or negligence, and/or (ii) constitute a breach of ethical guidelines.

2.4 It is recommended that participants be fully informed, both in writing and orally, about the nature, purpose, significance and context of the treatment and procedures before and during the trial. In addition, participants should be informed that in situations of emergency it may be necessary to administer treatment without first obtaining their consent.

2.5 The “public interest” places limits on consent where the activity involves the risk of bodily harm. It is unclear, under the present law, whether the treatment or procedures during the trial could be justified under the existing “medical treatment” exception, or some other “public interest” exception.

2.6 The provision of heroin to participants may give rise to liability under poisoning offences. It is unclear whether, and to what extent, the consent of participants would operate as a defence.

2.7 It is recommended that, in light of these uncertainties about consent, the ACT legislature enact a special “consent” defence for assault and related offences (including poisoning offences), which would clarify that staff who administer heroin during the course of the trial can raise the consent of the participants as a defence.

### Part III: Criminal Liability for the Crimes Committed by Trial Participants

There is concern that by supplying heroin to trial participants, researchers or clinical staff may be assisting or encouraging them to commit other crimes. Liability as an accessory will arise only where the researchers or clinical staff have, in some way, assisted or encouraged the commission of those crimes. As a causal matter, it is unlikely that merely supplying heroin to participants would actually assist in the commission of many crimes. [The exceptional problem of aiding and abetting driving offences committed by participants is considered below.] Indeed, it is possible that supplying heroin to participants will remove, or at least reduce, the economic incentive to commit some forms of crime, such as theft or social security fraud.

In the course of the trial, both researchers and clinical staff may gain knowledge of crimes which have been committed by the participants, or of crimes which may be committed in the future. The question arises whether possessing knowledge that a participant has committed a crime, and failing to report that knowledge to the police, would give rise to criminal liability. Under the common law, a person who, knowing that a felony has been committed, conceals or fails to report that felony to the police, is guilty of the offence of misprision of felony.<sup>164</sup> However, with the abolition of the felony and misdemeanour distinction in the ACT, the common law offence of misprision of felony has disappeared.<sup>165</sup> The offence only applies in those jurisdictions which retain this distinction, namely NSW and South Australia. Mere knowledge of the commission of an offence by a participant is not enough to give rise to criminal liability. However, where that knowledge is accompanied by a positive act of assistance, there may be liability as an accessory after the fact. There is no liability as an accessory after the fact unless the person, with actual knowledge of the precise crime committed by the perpetrator,<sup>166</sup> provides assistance in order to enable the perpetrator to escape punishment or to dispose of the proceeds of the offence.<sup>167</sup>

### Culpable Driving and Driving Under the Influence

Both researchers, clinical staff and trial participants must be aware of the motor traffic offences and culpable driving offences which may apply to those participants who drive a motor vehicle while under the influence of heroin. Section 24 of the *Motor Traffic (Alcohol and Drugs) Act 1977* (ACT) provides:

**24.(1)** A person who drives a motor vehicle on a public street or in a public place while under the influence of intoxicating liquor or of a drug to such an extent as to be incapable of having proper control of the motor vehicle is guilty of an offence<sup>E</sup>

In addition to a fine, the driver's licence may be suspended or cancelled.<sup>168</sup> The court has the discretion, in appropriate cases, to sentence the driver to a term of imprisonment not exceeding 12 months.<sup>169</sup> Separate provisions in the *Crimes Act 1900* (ACT) deal with causing death or grievous bodily

<sup>164</sup> *Sykes* [1962] AC 528 (House of Lords, England). The offence is committed where a person fails to disclose within a reasonable time, and having a reasonable opportunity for doing so, the commission of a felony to the police. The obligation to disclose only applies to felonies (serious offences), and it is not an offence to conceal a misdemeanour.

<sup>165</sup> In the ACT, the distinction between felony and misdemeanour was abolished in 1983: see s 9, *Crimes Act 1900* (ACT). The High Court has held that removal of this distinction in Victoria by s 322B(1) of the *Crimes Act 1958* (Vic) has eliminated the offence of misprision of felony: *A v Hayden (No 2)* (1984) 156 CLR 532 (High Court of Australia).

<sup>166</sup> *Stone* [1981] VR 737 (Supreme Court, Victoria).

<sup>167</sup> Section 346, *Crimes Act 1900* (ACT).

<sup>168</sup> Sections 31 and 32, *Motor Traffic (Alcohol and Drugs) Act 1977* (ACT).

<sup>169</sup> Section 28, *Motor Traffic (Alcohol and Drugs) Act 1977* (ACT).

harm by “culpable driving” which includes, *inter alia*, “driving while under the influence of alcohol or a drug, to such an extent as to be incapable of having proper control of the vehicle”.<sup>170</sup>

The question of secondary liability for administering heroin to participants who drive while under the influence has been raised in earlier research.<sup>171</sup> Clinical staff who provide heroin to participants who drive while under its influence may be guilty of aiding and abetting any driving offences subsequently committed by the participant. Clinical staff may assist or encourage the commission of these driving offences through either the act of supplying the heroin, or through the failure to take steps to prevent the participants from driving while under the influence of a drug. In the latter case, liability for an omission is imposed exceptionally on the basis of the “power to control” the actions of the participants.<sup>172</sup> Under the present law, a person who has the power to control the acts of another person and refrains from doing so, may be regarded as participating as an accessory in any offence committed by the other person. Thus, a publican who stands by watching customers drinking after hours in breach of licensing laws is guilty of aiding and abetting them to do so.<sup>173</sup> Similarly, the owner of vehicle who permits another person to drive that vehicle in a dangerous manner or while intoxicated would be guilty of aiding and abetting the offence of dangerous driving or driving while intoxicated.<sup>174</sup> Furthermore, the authorities have established that the power to control is not dependent upon ownership rights. It has been held that a driving instructor may assist or encourage the offences committed by his student on the basis of the power of an instructor to control a learner driver.<sup>175</sup> It is possible that the courts would accept that clinical staff exercise such a power of control over trial participants, as they have the right to control the conditions under which individuals participate in the trial. The clinical staff may even have a legal duty to intervene based on their knowledge that failing to act would endanger participants and other motorists.<sup>176</sup>

Under the present law, a person can be an accessory notwithstanding that the assistance or encouragement occurs in the ordinary course of business or professional activity.<sup>177</sup> Liability in these cases will turn on the *mens rea* requirement, that is, the accessory’s intention and state of knowledge. The High Court in *Giorgianni*<sup>178</sup> established that aiding and abetting must be accompanied by an intention to assist or encourage based on knowledge of the essential elements of the offence.<sup>179</sup> Recklessness or wilful blindness is not sufficient for liability.<sup>180</sup> In this case, the defendant was alleged

<sup>170</sup> Section 29, *Crimes Act 1900* (ACT).

<sup>171</sup> D Friedman, “Drug Legalisation: A Bad Idea” in J Hando and J Carless (eds), *Controlled Availability: Wisdom or Disaster?* (1990); J Norberry, “Legal Issues” in NCEPH, *Feasibility Research into the Controlled Availability of Opioids*, Vol 2, *Background Papers*, (1991), p 101.

<sup>172</sup> J Finn, “Culpable Non-Intervention: Reconsidering the Basis for Party Liability by Omission” (1994) 18 *Criminal Law Journal* 90.

<sup>173</sup> *Tuck v Robson* [1970] 1 All E R 1171.

<sup>174</sup> *Du Cros v Lambourne* [1907] 1 KB 40; *Cooper v Ministry of Transport* [1991] 2 NZLR 693.

<sup>175</sup> *Harris* [1964] *Criminal Law Review* 54. Some academics have argued that there are convincing policy reasons for retaining a modified control principle where the right to control property derives from ownership: D Lanham, “Drivers, Control and Accomplices” [1982] *Criminal Law Review* 419; cf Law Commission, *General Principles, Parties, Complicity and Liability for the Acts of Another* (1972) Working Paper No 43, at p 35.

<sup>176</sup> See the discussion of omission liability in the context of homicide, above at text to n 87. In the civil law, doctors are under duty to intervene in cases where they are aware or should be aware that the patient is a danger to third parties and breach of that duty gives rise to liability in negligence: *Tarasoff* (1976) 551 P 2d 334 (Supreme Court, California), discussed in N Cica, *Civil Liability Issues Associated with a “Heroin Trial”*: Working Paper No 11 (1994), pp 10-11.

<sup>177</sup> See S Bronitt, “Defending *Giorgianni*— Part Two: New Solutions for Old Problems in Complicity” (1993) 17 *Criminal Law Journal* 305 at pp 306-310.

<sup>178</sup> (1985) 156 CLR 473 (High Court of Australia).

<sup>179</sup> *Ibid.*, at 504-505, per Wilson, Deane and Dawson JJ.

<sup>180</sup> *Ibid.*, at 506-508.

to have procured the offences of culpable driving causing death and grievous bodily harm by sending an employee on the road in a defective vehicle. The employee lost control of the vehicle, killing five people and seriously injuring another. The High Court confirmed that the prosecution must prove *mens rea* on the part of the accessory even where the crime assisted or encouraged is one of strict or absolute liability (that is, an offence which does not require proof of *mens rea* on the part of the perpetrator).<sup>181</sup> In respect of the offences of culpable driving causing death and grievous bodily harm, the majority held that the intention of the accessory need only relate to the act of culpable driving and need not extend to “the occurrence of the death or grievous bodily harm which ensues” upon the unlawful act the commission of which was aided, abetted, counselled or procured”.<sup>182</sup>

Accessory liability for the driving offences committed by the participants only arises where the clinical staff providing the heroin have the relevant intention based on knowledge of the essential matters. The prosecution must prove that the clinical staff had knowledge that the participant was under influence of heroin to such an extent that it would affect the ability to drive, and that the participant intended to drive in that state.

The prosecution must establish that clinical staff intended to assist or encourage the driving offences. Intention is a matter which is inferred from the circumstances. The question of intention where the assistance or encouragement of a crime occurs in the course of medical treatment was considered in an English decision, *Gillick v West Norfolk and Wisbech Area Health Authority*.<sup>183</sup> The case considered, by way of judicial review, the legality of a Department of Health circular advising doctors of the exceptional circumstances in which contraception might be prescribed to a patient under the age of sixteen without parental consent. The House of Lords considered *inter alia* whether a doctor prescribing contraception to a patient in these exceptional circumstances would be guilty of aiding and abetting unlawful sexual intercourse. The majority held that criminal liability would depend on the doctor’s intention, and prescribing contraception in the bona fide exercise of clinical judgment must be a “complete negation of a guilty mind” which is an essential ingredient of aiding and abetting.<sup>184</sup>

There are two possible explanations why the doctor would escape liability. First, the doctor in this case lacks an intention to assist or encourage unlawful sexual intercourse.<sup>185</sup> Duff demonstrates the lack of intention in *Gillick* by applying the “test of failure”:

“She [the doctor] prescribes contraceptives because she wants to protect her patient’s health and believes this to be the best way of achieving that end: her intention, that is, is to protect the girl’s health; and her action will have been a failure if it does not achieve that end. She also knows that her action will facilitate the commission of unlawful sexual intercourse: but if no such intercourse in fact occurred, she would not take her action to have failed; which shows that she does not intend to assist, or act with the intention of assisting, unlawful sexual intercourse”.<sup>186</sup>

It would follow that clinical staff who provide heroin to participants similarly lack intention to assist the offences of culpable driving or driving under the influence: they would not regard their actions as having failed if these offences did not occur. It is not universally accepted that aiding and abetting

<sup>181</sup> In *Giorgianni*, Wilson, Deane and Dawson JJ held that “there is no basis upon which it can be said that where a statutory offence requires no proof of intent, it is unnecessary in order to establish secondary participation in the commission of that offence to prove actual knowledge of all the essential facts of the offence”: *ibid.*, at 504.

<sup>182</sup> *Ibid.*, at 503.

<sup>183</sup> [1986] AC 112 (House of Lords, England).

<sup>184</sup> *Ibid.*, at 190, per Lord Scarman.

<sup>185</sup> Ian Dennis argues that in *Gillick* “the ‘Innocent’ doctor does not prescribe contraceptives in order that intercourse shall take place, but in order that health shall be preserved and unwanted outcomes avoided”: I Dennis, “The Mental Element for Accessories” in P Smith (ed), *Criminal Law Essays in Honour of JC Smith* (1987) at p 54.

<sup>186</sup> RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) at p 62 (emphasis added).

requires intention in this narrow sense of purpose.<sup>187</sup> Indeed, the lack of guilty mind in *Gillick* is alternatively explained in terms of the necessity or social desirability of the doctor's conduct.<sup>188</sup>

The uncertainty over the legality of supplying goods or advice in the course of ordinary professional activity has led to a proposal for the creation of a suppliers' or servers' defence.<sup>189</sup> It must be doubted whether such a defence is necessary or desirable in Australia, in light of the strict requirement of criminal purpose for aiding and abetting under the present law.<sup>190</sup> Moreover, the creation of a special "suppliers' defence" for clinical staff would not encourage responsible professional conduct.

The legitimate uncertainty over the scope of intention, and therefore liability, in the "supply cases" may be tackled in another way. To minimise the risk of accessory liability, clinical staff could take steps to disassociate themselves from the participant's criminal purpose to drive while under the influence. In practical terms, this could be achieved in a number of ways. For example, it could be made a condition of involvement in the trial that participants undertake not to drive while under the influence of heroin, and that the car keys are surrendered to staff until the participant is judged to be competent to drive. On each visit to the treatment centre, participants could be asked about their transport arrangements, and informed that if they are driving, their car keys must be surrendered before they can receive heroin. At any time during the trial, the participants may request for the return of their car keys, and clinical staff are under a legal duty to comply with this request. Refusing to return the car keys would give rise to civil liability for trespass to goods (specifically, an action in detinue). Staff who return the car keys do not, by that action alone, aid and abet the driving offences subsequently committed by trial participants. It is well established that handing over property to its legal owner in the knowledge it will be used in the commission of an offence does not give rise to liability as an accessory.<sup>191</sup> Alternatively, the clinical staff may disassociate themselves from the participant's criminal purpose by taking steps to frustrate the driving offences. Such steps are not only evidence of the lack of their intention to assist or encourage the participant's offences, it also establishes the defence of withdrawal. To be effective, the act of withdrawal by the clinical staff must "serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw".<sup>192</sup> Such direct communication between the parties is essential—merely contacting the police would not be sufficient for an effective act of withdrawal.<sup>193</sup> To be confident that there is no accessory liability, the clinical staff should advise participants that driving

<sup>187</sup> Intention in the criminal law can be satisfied by "oblique intention", which is foresight of probable consequences. This form of intention, which is more properly described as recklessness, does not suffice for accessory liability: *Giorgianni* (1986) 156 CLR 473 at 506.

<sup>188</sup> *Gillick* has been explained on the ground of a concealed defence of necessity: see JC Smith's comment on *Gillick* [1986] *Criminal Law Review* 113 at 117, and J Spencer, "Trying to Help Another Person Commit a Crime" in P Smith (ed), *Criminal Law Essays in Honour of JC Smith* (1987) at p 164.

<sup>189</sup> G Williams, "Complicity, Purpose and the Draft Code-1" [1990] *Criminal Law Review* 4 at pp 20-21

<sup>190</sup> S Bronitt, "Defending *Giorgianni*— Part Two: New Solutions For Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305 at pp 308-309.

<sup>191</sup> *Lomas* (1913) 9 Cr App R 220; *NCB v Gamble* [1959] 1 QB 11. See S Bronitt, "Defending *Giorgianni*— Part Two: New Solutions for Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305 at pp 311-314.

<sup>192</sup> *Whitehouse* [1941] 1 DLR 683 at 685, per Sloan J (Court of Appeal of British Columbia), approved in *Becerra* (1975) 62 Cr App R 212 at 218.

<sup>193</sup> In *White v Ridley* (1978) 140 CLR 342, members of the High Court took different approaches as to what amounted to an effective act of withdrawal. Gibbs CJ said that the act of withdrawal must demonstrate that the accessory no longer intended to bring about the commission of the offence and that it must be reasonably capable of counteracting the earlier assistance or encouragement. Stephen and Aitken JJ went further, requiring the act of withdrawal to nullify the effect of the earlier conduct. Murphy J. simply required that the accessory did what he reasonably could do to prevent the commission of the offence. See generally, D Lanham, "Accomplices and Withdrawal" [1981] 97 *Law Quarterly Review* 575.

while impaired is not only dangerous but is also an offence, and that if they intend to do so, the staff are obliged by law to contact the relevant authorities and can provide no further assistance to the participant.

### **Findings and Recommendations for Part III**

3.1 In the ACT the common law offence of misprision of felony is no longer available: mere knowledge that a participant has committed an offence, and failing to report that offence to the relevant authorities, is not sufficient to impose criminal liability on researchers or clinical staff. However, where that knowledge is accompanied by positive acts of assistance, which enable the perpetrator to escape punishment or to dispose of the proceeds of the offence, there may be liability as an accessory after the fact.

3.2 Clinical staff may “aid and abet” driving offences (i.e., driving under the influence or culpable driving) subsequently committed by participants, either through (a) the act of supplying the heroin or (b) the failure to take steps to prevent the participants from driving while under the influence of the drug. Clinical staff however would ordinarily lack the requisite intention to be guilty of aiding and abetting, and may in any event avoid liability by taking steps to disassociate themselves from the criminal purpose of the participant. The creation of a special “suppliers’ defence” for clinical staff would not encourage responsible professional conduct. No amendment of the present law governing accessory liability is considered necessary or desirable.

## Part IV: Miscellaneous Issues

### “Urban Aesthetics”: Problems with Social Congregation and Public Intoxication

Leader-Elliot raised the issue of “urban aesthetics” in an article advocating the introduction of a comprehensive scheme of opioid maintenance.<sup>194</sup> Although the following passage addresses the possible consequences of the legalisation of “recreational opiate use”, the concerns raised apply equally to this trial where there is the realistic prospect of social congregation of trial participants outside the treatment centre.

“More permissive regimes of control may also intensify problems of urban aesthetics. When users are not punished, and attempts to drive them underground are abandoned, the undesirable effects of recreational opiate use may be even more visible than they are now. For many, the spectacle is offensive. One would add, however, that Australians are not unused to viewing the degrading spectacle of public intoxication and appallingly primitive and disorganized methods of purveying liquor”.<sup>195</sup>

Supplying heroin up to three times daily may encourage loitering outside the treatment centre. Not only may this social congregation of heroin users attract and foster undesirable links with the illicit drug scene, it may also contribute to other anti-social behaviour such as violence (for example, when the participant is refused heroin) or public intoxication.

The visibility of heroin users during the course of the trial may well attract police attention. Although public intoxication itself is not an offence in the ACT, being intoxicated in public may give rise to liability under the broadly worded summary offence proscribing offensive behaviour.<sup>196</sup> There is the potential for discrimination in the application of this law, as illustrated in the history and empirical research relating to enforcement of offensive conduct laws against members of minority groups in NSW.<sup>197</sup> In the ACT, police officers also have the power to detain in custody for up to eight hours any person who is found drunk in a public place and who is “(a) behaving in a disorderly manner, (b) behaving in a manner likely to cause injury to herself or himself or another person or damage to property or others; or (c) incapacitated due to her or his being drunk and in need of physical protection”.<sup>198</sup> This power to detain applies only in respect of individuals who are drunk (i.e., intoxicated by alcohol), and therefore does not apply to individuals who are intoxicated by drugs—however in practice it may be difficult for the police to distinguish between these different types of intoxication.

Congregation of participants in large groups outside the treatment centre may give rise to concerns about public order. The police regard the preservation of public order as a paramount duty, and police officers have a range of powers to prevent a breach of the peace. At common law, every person has the power to arrest without warrant anyone who is committing or is threatening to commit

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<sup>194</sup> I Leader-Elliot, “Prohibitions Against Heroin Use: Can They Be Justified” (1986) 19 *Australian and New Zealand Journal of Criminology* 225.

<sup>195</sup> Ibid., at pp 244-245.

<sup>196</sup> Section 546A, *Crimes Act 1900* (ACT) provides that “A person shall not in, near, or within the view or hearing of a person in, a public place behave in a riotous, indecent, offensive or insulting manner”. This is a summary offence punishable by a fine not exceeding \$1000.

<sup>197</sup> See G Travis, “Police Discretion in Law Enforcement: A Study of Section 5 of the NSW Offences in Public Places Act 1979” in M Findlay, S Egger and J Sutton (eds), *Issues in Criminal Justice Administration* (1983), pp 200-219; S Egger and M Findlay, “The Politics of Police Discretion” in M Findlay and R Hogg (eds), *Understanding Crime and Criminal Justice* (1988), pp 209-223.

<sup>198</sup> Section 351, *Crimes Act 1900* (ACT).

a breach of the peace.<sup>199</sup> The person who is arrested may be brought before a court to enter into a recognisance, with or without sureties, to “keep the peace and be of good behaviour”.<sup>200</sup> Moreover, short of arrest, every person in whose presence a breach of the peace occurs or is reasonably apprehended has the right to take “reasonable steps” to prevent an actual breach of the peace or threatened breach of the peace. These “reasonable steps” include *inter alia* committing an assault, dispersing a meeting, committing a trespass, temporarily detaining a person against his or her will and temporarily seizing and detaining a person’s chattels.<sup>201</sup> To deter social congregation outside the treatment centre the police may also use these public order powers to disperse participants. There are also offences relating to obstruction of the highway (which includes pedestrian areas such as footpaths).

## Endangering the Community: Public Nuisance

Public nuisance, which is both a crime and a tort, deals with conduct which endangers the public. In Australia, the common law offence of public nuisance exists in Victoria, New South Wales, South Australia and the ACT.<sup>202</sup> Public nuisance encompasses conduct which has the *potential* to endanger the life, safety and health of the public.<sup>203</sup> Public nuisance differs from the specific offences dealing with acts endangering life or health considered above; for public nuisance the defendant’s harmful conduct need not be aimed at any specific person or group of persons.<sup>204</sup> Consequently the dangers to which *the participants* in the trial are exposed could not form the basis of a public nuisance charge since these dangers involved are directed to a specific group, rather than to the general public.

The offence, which is satisfied by knowledge or criminal negligence,<sup>205</sup> has a very broad scope. In the medical context, it has been used against individuals who donate HIV infected blood and blood supply companies which fail to ensure safe, effective blood screening.<sup>206</sup> To avoid liability for public nuisance, which is both civil and criminal, the researchers and clinical staff must take steps to ensure that dangers to the public are kept to a minimum—such steps would include, for example, the establishment of procedures for the safe disposal of used syringes and effective security for heroin kept on the premises.

<sup>199</sup> Breach of the peace is *not* a crime, rather it is the criterion which justifies the exercise of broad powers to prevent crime and preserve the peace: “There is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance”: *Howell* [1981] 3 WLR 501 at 509, per Watkins LJ.

<sup>200</sup> Under the common law a person can be bound over to keep the peace without having committed an offence: see *Forbutt v Blake* [1981] 51 FLR 465 at 476, (Supreme Court, ACT).

<sup>201</sup> *Humphries v Connor* (1864) 17 ICLR 1; *O Kelly v Harvey* (1883) 15 Cox CC 435; *Thomas v Sawkin* [1935] 2 KB 249; *Albert v Lavin* [1981] 3 WLR 955; *Minot v McKay (Police)* [1987] BCL 722. For a review of these common law preventive powers see R Handley, “Preventive Powers and National Union of Mineworker Pickets” (1986) 10 *Criminal Law Journal* 93.

<sup>202</sup> The Code states have enacted a statutory crime of common nuisance: see s 230, *Criminal Code* 1899 (Qld); s 230, *Criminal Code* 1913 (WA) and s 140, *Criminal Code* 1924 (Tas).

<sup>203</sup> *Madden* [1975] 1 WLR 1379 (Court of Appeal, England).

<sup>204</sup> In *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 Romer LJ held that the Crown must prove that the nuisance affected “a class of Her Majesty’s subjects—distinct from individual persons”: at 184.

<sup>205</sup> *Shorrock* [1993] 3 WLR 698 (Court of Appeal, England). The court held that the mental element for the crime of public nuisance is the same as that for the tort of private and public nuisance. To be guilty of the offence of public nuisance the accused must have known, or *ought to have known* (in the sense that the means of knowledge were available to him or her) that there was a real risk that his or her conduct would endanger the public. On the meaning of criminal negligence, see discussion above at text to n 107.

<sup>206</sup> See *Thornton* [1993] 2 SCR 445 (Supreme Court of Canada); S Bronitt, “Donating HIV-infected Blood: A Public Nuisance?” (1994) 1 *Journal of Law and Medicine* 245.

## Access to Confidential Information Concerning Trial Participants

The civil liability of researchers and clinical staff participating in the trial for disclosing confidential information has been examined in an earlier working paper.<sup>207</sup> Researchers and clinical staff are under a duty, both legal and ethical, to maintain confidentiality with respect to information which is gathered in the course of the trial. The legal duty to maintain the confidentiality of this information arises by virtue of the *Epidemiological Studies Confidentiality Act 1992 (ACT)*.<sup>208</sup> This obligation of secrecy imposed on researchers and clinical staff is strict, though not absolute. Disclosure is permitted in specified circumstances including, *inter alia*, where access to the information has been expressly authorised by the Minister for the purpose of assisting other researchers engaged in another prescribed study.<sup>209</sup> Similarly, information may be disclosed to the person (or nominee) who supplied the information or to whose affairs the information relates; or to other persons (or nominees) to whose affairs that information relates where all persons concerned have given consent to the disclosure.<sup>210</sup> The Act however does not permit the disclosure of information obtained during a prescribed study simply because the information is reasonably necessary for the enforcement of the criminal law.<sup>211</sup>

The question arises whether information gained during the trial may be used in legal proceedings. Ordinarily, there is legal obligation to disclose otherwise confidential information where that information has been subpoenaed for use in civil or criminal proceedings. Refusal to comply with the terms of a subpoena may constitute contempt of court, resulting in fines or imprisonment. The only ground for non-compliance with the terms of the subpoena is where the information is subject to legal professional privilege (arising from the lawyers/client relationship),<sup>212</sup> or some other analogous privilege created by statute.<sup>213</sup>

Researchers and clinical staff who are subpoenaed to provide information gained in the course of the trial may assert privilege by virtue of the *Epidemiological Studies Confidentiality Act 1992 (ACT)*.

### Protection of information from court

**8. (1)** A person who has assisted, or is assisting in the conduct of a prescribed study shall not be required:

(a) to produce in a court, or permit a court to have access to, a document prepared or obtained in the course of that study, being a document concerning the affairs of another person; or

<sup>207</sup> N Cica, *Civil Liability Issues Associated with a Heroin Trial: Working Paper No 11* (1994), pp22-26.

<sup>208</sup> Section 4, *Epidemiological Studies (Confidentiality) Act 1992 (ACT)*. Unlawful disclosure is punishable by a penalty of \$5000, or imprisonment for 12 months, or both. This ACT legislation is modelled on the *Epidemiological Studies (Confidentiality) Act 1981 (Cth)* which applies to prescribed studies “conducted by, or on behalf of, the Commonwealth”: s 3(1). Since the heroin trial is not a Commonwealth study, the Act has no application.

<sup>209</sup> Sections 4, 5 and 6, *Epidemiological Studies (Confidentiality) Act 1992 (ACT)*.

<sup>210</sup> Section 7, *Epidemiological Studies (Confidentiality) Act 1992 (ACT)*.

<sup>211</sup> This may be contrasted with the position under the *Privacy Act 1988 (Cth)*, see s 14, Information Privacy Principle 11. The common law likewise permits the disclosure of otherwise confidential information where non-disclosure would not serve the “public interest”. Confidentiality may be breached where non-disclosure would endanger public safety (*W v Egdel* [1990] 2 WLR 471, Court of Appeal, England) or would interfere with the apprehension and prosecution of serious criminal activity (*Brown v Brooks*, NSW Supreme Court, unreported, 18 August 1988). Failure to disclose such information to the authorities may result in injury to third parties, and could give rise to liability in negligence: *Tarasoff v University of California* (1976) 551 P 2d 334, discussed in N Cica, *Civil Liability Issues Associated with a “Heroin Trial”: Working Paper No 11* (1994), pp 10-11.

<sup>212</sup> *Baker v Campbell* (1983) 153 CLR 52 (High Court of Australia).

<sup>213</sup> Under the common law communications between physician and patient are not privileged, though in some jurisdictions such a privilege has been created by statute: s 28(2), *Evidence Act 1958 (Vic)*; s 96(2), *Evidence Act 1910 (Tas)*; s 12(2), *Evidence Act 1939 (NT)*. The statutory privilege however does not apply to criminal proceedings.

(b) to divulge or communicate to a court any information concerning the affairs of another person acquired by the first-mentioned person by reason of that person having assisted, or assisting, in the conduct of that study.

The phrase “information concerning the affairs of another person” is broadly defined and includes information relating to the existence or non-existence of a document concerning the affairs of a person, and information relating to the whereabouts of a document concerning the affairs of a person.<sup>214</sup> Thus, researchers or clinical staff cannot disclose *in any legal proceedings* information gained in the course of the trial concerning participants, including information relating to their drug use (both legal and illegal), and past, present or future criminal activity.<sup>215</sup>

A further question arises whether researchers and clinical staff, by asserting statutory privilege, can object to a search warrant and thereby prevent law enforcement agencies from searching for and seizing documents containing incriminating information about participants (or other persons) gained during the trial. There are specific powers of entry, search and seizure under Commonwealth and ACT legislation for gathering evidence pertaining to drug offences.<sup>216</sup> With respect to other offences, a search warrant of particular premises may be issued under the *Crimes Act 1900* (ACT) when an issuing officer is satisfied that there are reasonable grounds for suspecting that there is evidential material on the premises.<sup>217</sup> Evidential material is defined as a “thing relating to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form”.<sup>218</sup> The warrant must particularise the offence to which it relates and the kinds of evidential material which are to be searched for under the warrant.<sup>219</sup> In the course of the search, the officers executing the warrant are authorised to seize other things that they *believe* on reasonable grounds to be evidential material in relation to an offence to which the warrant relates, or evidential material in relation to *any* indictable offence, if it is believed to be necessary to prevent their concealment, loss, or destruction.<sup>220</sup>

The High Court has held that a search warrant could not properly apply to lawyer-client communications which are protected by legal professional privilege.<sup>221</sup> Notwithstanding that researchers and clinical staff may assert an equivalent claim of privilege under statute, the police may nevertheless obtain and execute a search warrant believing that the evidential material specified under the warrant is not protected by the privilege conferred by the *Epidemiological Studies (Confidentiality) Act 1992* (ACT).<sup>222</sup> Researchers and clinical staff who obstruct the execution of the warrant in order to

<sup>214</sup> Section 3(3)(a) and (b), *Epidemiological Studies (Confidentiality) Act 1992* (ACT).

<sup>215</sup> It is suggested that the Act protects information, gathered in the course of the study, concerning the affairs of individuals who are not participating in the trial: see N Cica, *Civil Liability Issues Associated with a Heroin Trial? Working Paper No 11* (1994), p 24. Section 11 of the Act also prevents the publication of the results of the study in a manner that enables the identification of an individual person, including a deceased person. By virtue of section 11(2), publication includes disclosing those results to a court.

<sup>216</sup> See s 10, *Crimes Act 1914* (Cth); s 199, *Customs Act 1901* (Cth); ss184-190, *Drugs of Dependence Act 1989* (ACT). On the conditions governing search warrants with respect to narcotic offences see F Rinaldi and P Gillies, *Narcotic Offences* (1991), pp 141-174.

<sup>217</sup> Sections 349E and 349F, *Crimes Act 1900* (ACT), as amended by the *Crimes (Amendment) Act (No 2) 1994* (ACT). This recent amendment substituted “reasonable grounds for believing” with “reasonable grounds for suspecting”. Belief requires more knowledge than suspicion. In reviewing the term “reasonable grounds for suspecting” under equivalent provisions in Queensland, the High Court unanimously held that “suspicion and belief are different states of mind—the facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.”: *George v Rockett* (1990) 170 CLR 104, at 115.

<sup>218</sup> Section 349AA, *Crimes Act 1900* (ACT).

<sup>219</sup> Section 349E(5), *Crimes Act 1900* (ACT).

<sup>220</sup> Section 349F(d), *Crimes Act 1900* (ACT).

<sup>221</sup> *Baker v Campbell* (1983) 153 CLR 52 (High Court).

<sup>222</sup> The High Court has held that “the case [*Baker v Campbell*] does not suggest that the only things for which a search warrant might be issued are things which are or will become admissible in evidence. The power to issue a search

preserve the confidentiality of the information would be threatened with arrest for hindering the execution of a search warrant.<sup>223</sup>

It is recommended that the scope of the power to search and seize confidential information gained during the trial be clarified by legislative amendment, and/or by cooperative arrangements between researchers, clinical staff and the relevant law enforcement agencies. There is a strong case for amending the *Epidemiological Studies (Confidentiality) Act 1992 (ACT)* to state, in express terms, that information “concerning the affairs of another person” gained during the trial cannot be subject to search and seizure by law enforcement authorities. Under the present terms of the Act, researchers and clinical staff cannot be compelled to produce information gained during the trial to the court. It may be argued, *a fortiori*, that researchers and clinical staff should not be required to provide law enforcement agencies access to such information. The relevant law enforcement agencies should be advised that confidential information gained during the trial is privileged, and under the terms of the *Epidemiological Studies (Confidentiality) Act 1992 (ACT)* cannot be used in any criminal proceedings. Furthermore, through cooperative arrangements with law enforcement agencies, procedures could be drawn up to resolve disputes concerning information gained during the trial. Such procedures are necessary because law enforcement agencies may claim that the evidential material sought is not protected by privilege and therefore can properly be the subject of a search warrant.<sup>224</sup> Where a search warrant is executed against premises on which privileged information is held, the evidential material should be sealed prior to seizure by the law enforcement agencies, and produced to a court to determine whether that information is privileged under the terms of the Act.<sup>225</sup> The Act does not prevent law enforcement agencies from producing privileged information to the court for inspection.<sup>226</sup>

## Findings and Recommendations for Part IV

4.1 It is recommended that researchers and clinical staff deter the social congregation of participants in the immediate vicinity of the treatment centre. The conduct of groups of participants may attract police intervention through public order offences and the powers to deal with individuals who are intoxicated in public.

4.2 To avoid liability for public nuisance, which is both a crime and a tort, researchers and clinical staff must ensure that dangers to the general public are kept to a minimum— such steps would include, for example, the establishment of procedures for the safe disposal of used syringes and effective security for heroin kept on the premises.

4.3 There is some uncertainty over the scope of the powers of law enforcement agencies to search and seize confidential information gained during the trial. It is recommended that the scope of the

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warrant is in aid of criminal investigation as well as in aid of proof at the trial, though it is necessary that the investigation should have reached the stage where reasonable grounds for the statutory suspicion and belief can be sworn to”: *George v Rockett* (1990) 170 CLR 104 at 119.

<sup>223</sup> Section 358D, *Crimes Act 1900 (ACT)* provides that a person who, without lawful excuse, hinders a police officer in the execution of a search warrant is guilty of an offence. Lawful excuse is not defined in the Act; however it is submitted that researchers and clinical staff who take action in order to preserve the confidentiality of information protected under the *Epidemiological Studies (Confidentiality) Act 1992 (ACT)* have a lawful excuse and therefore are not guilty of this offence.

<sup>224</sup> A warrant will not be invalid because it authorises seizure of documents which may (upon review) attract the privilege— clearly the applicant for and person issuing a search warrant cannot know in advance, in the ordinary case, the status of the things which may be found”: F Rinaldi and P Gillies, *Narcotic Offences* (1991), p 169; on search warrants generally see pp 141-174.

<sup>225</sup> Law enforcement agencies and the ACT Law Society have agreed to similar procedures governing the execution of search warrants on the offices of lawyers in order to ensure that the confidentiality of information protected by legal professional privilege is not unnecessarily breached.

<sup>226</sup> See sections 8 and 11(2), *Epidemiological Studies (Confidentiality) Act 1992 (ACT)*.

power to search and seize confidential information gained during the trial be clarified in the *Epidemiological Studies (Confidentiality) Act 1992 (ACT)*: information “concerning the affairs of another person” gained during the trial should not be subject to search and seizure by law enforcement authorities. It is further recommended that through cooperative arrangements with law enforcement agencies, procedures be drawn up to resolve disputes over the privileged nature of the information gained during the trial and whether that information can properly be the subject of a search warrant.

## Conclusion

The Working Paper has outlined the relevant heads of liability under the criminal law. Under the present law, heroin cannot be administered to trial participants without substantial amendment to the Commonwealth and ACT legislation dealing with drugs (see Part I). The Working Paper does not recommend that the proper solution is the wholesale exemption of researchers, clinical staff and participants from all forms of criminal liability. The criminal law has a normative value and a potential educative function. Under the present law, the risk of criminal liability for causing death or harm to participants cannot be eliminated entirely; however researchers and clinical staff, through an awareness of their legal duties and compliance with professional and ethical standards of care, can greatly minimise that risk of criminal liability (see Part II). Similarly, the risk of researchers and clinical staff being held liable as accessories to driving offences committed by participants, has implications for both trial design and the development of strategies for dealing with such situations when they arise (see Part III). Other preventive strategies must be adopted to meet the concerns about public order, public nuisance and the power of law enforcement agencies to search and seize confidential information gathered during the trial (see Part IV).

This Working Paper does not provide “hard and fast” rules which researchers and clinical staff must always follow in order to avoid criminal liability: professional and ethical behaviour requires the exercise of *judgment*, and inevitably, with the benefit of hindsight, some action taken (or not taken) in a particular situation may prove to be wrong or even unlawful. The harsh maxim that “ignorance of the law is no excuse” means that individuals who commit an offence through inadvertence or mistake are guilty notwithstanding that they obtained and relied upon competent legal advice. There can be no guarantees that activities during the trial will not attract criminal liability, however the Working Paper, through its findings and recommendations, provides strategies, both legislative and administrative, for minimising the risk of prosecution and conviction of researchers, clinical staff and trial participants.

## Feasibility Research into the Controlled Availability of Opioids

The Feasibility Research into the Controlled Availability of Opioids arose from a request to the National Centre for Epidemiology and Population Health (NCEPH) from the Select Committee on HIV, Illegal Drugs and Prostitution established by the Australian Capital Territory (ACT) Legislative Assembly.

A first stage of research, conducted in collaboration with the Australian Institute of Criminology (AIC), found that a trial to provide opioids, including heroin, to dependent users was feasible in principle. It was recommended that a second stage of feasibility investigations to examine logistic issues be conducted.

The first stage investigations examined illegal drug use in the ACT, the arguments for and against the controlled availability of opioids as reviewed in the literature, the current Australian political context for a trial, the role of interest groups in social controversies, legal issues, possible options for a trial, ethical issues, attitudes to a trial in the general community and among key interest groups (police, service providers, and illegal drug users and ex-users), and evaluation by a randomised controlled trial.

In addition, a proposal for a trial was developed as the starting point for the Stage 2 investigations.

The research which needs to be conducted to determine Stage 2 logistic feasibility can be divided into five areas:

- core information (for example, estimating numbers of users, determining relevant characteristics of ACT-based users, documenting the known information about the psychopharmacological and toxicological effects of opioids);
- information relevant to trial design and evaluation;
- information relevant to service provision;
- information about relevant legal, law enforcement and criminological matters;
- community and key stakeholder acceptability of a specific trial proposal.

The Stage 2 research is also governed by the following principles:

- the research should have intrinsic value so that, regardless of whether or not a trial goes ahead, the research should be of value to treatment services or to drug policy generally;
- research should be conducted in all relevant disciplines and the disciplinary findings should be integrated to address the central problem;
- the process should involve to the greatest extent possible the key interest groups— illicit drug users, ex-users, service providers, police, policy makers and the community.

Stage 2 of the feasibility research into the controlled availability of opioids has many components. As significant advances are made in each particular substudy, we publish the results as a working paper, so that the information is available for discussion in the public arena.

## Publications

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- \* Bammer, G. and Gerrard, G. (eds) (1992), *Heroin Treatment – New Alternatives*, Proceedings of a one-day seminar, Becker House, Canberra, November 1991.

### Working papers

- \* Larson, A. (1992), *Estimating the numbers of heroin users in the ACT*, Feasibility Research into the Controlled Availability of Opioids Stage 2, Working Paper Number 1.
- \* Bammer, G. (ed) (1993), *Australian drug markets research: What are we doing? Where are we going? What are the gaps? Proceedings of a one-day workshop held at the Scarth Room, University House, The Australian National University, Monday 22 February 1993*, Feasibility Research into the Controlled Availability of Opioids Stage 2, Working Paper Number 2.
- \* Sibthorpe, B., Sengoz, A. and G. Bammer in collaboration with The Youth Affairs Network of the ACT (1993), *Drug use and HIV risk among homeless and potentially homeless youth in the Australian Capital Territory*, Feasibility Research into the Controlled Availability of Opioids Stage 2, Working Paper Number 3.
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- \* Humes, G; Moloney, M; Baas Becking, F. and G. Bammer, in collaboration with Winnunga Nimmityjah (1993), *It will kill us faster than the white invasion? Views on alcohol and other drug problems and HIV/AIDS risk in the Canberra/Queanbeyan Aboriginal community and on the suitability of a heroin trial for Aboriginal heroin users*, Feasibility Research into the Controlled Availability of Opioids Stage 2, Working Paper Number 6.
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- \* Cica, N. (1994), *Civil liability issues associated with a heroin trial* Feasibility Research into the Controlled Availability of Opioids Stage 2, Working Paper Number 11.
- \* Attewell, R.G. and S.R. Wilson (1994) *Statistical issues in planning a randomised controlled heroin trial* ?

Feasibility Research into the Controlled Availability of Opioids Stage 2, Working Paper Number 12.

- \* Bronitt, S. (1995) *Criminal liability issues associated with a heroin trial*. Feasibility Research into the Controlled Availability of Opioids Stage 2, Working Paper Number 13.

## Published papers

- # Hartland, N; McDonald, D; Dance, P. and G. Bammer (1992), Australian reports into drug use and the possibility of heroin maintenance', *Drug and Alcohol Review*, 11, pp.175–182.
- # Bammer, G. (1992) A trial of controlled availability of heroin for the ACT? ; in White, J. (ed) *Drug problems in our society: dimensions and perspectives* (Selected papers from the Window of Opportunity, First National Congress. An Intersectoral Approach to Drug Related Problems in Our Society, December 2–5, Adelaide), pp.57–62.
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- # Bammer, G; Douglas, B; Moore, M. and D. Chappell (1993) A heroin trial for the Australian Capital Territory? An overview of feasibility research', in Heather, N; Wodak, A; Nadelman, E.A. and O Hare, P. (eds) *Psychoactive drugs and harm reduction: from faith to science* (Selected papers from the Third International Conference on the Reduction of Drug-related Harm), Whurr, London, pp.137–150.
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- # Bammer, G; Sengoz, A. (1994) Non-fatal heroin overdoses', *The Medical Journal of Australia*, Letters to the Editor, 161, pp.572–573.
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## Newsletters

- # Newsletters reporting project results are also published from time to time.

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# These publications are available free from:  
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