'Mates, Mr Big and the Unwary': Ongoing Supply and its Relationship to Entrapment

Brendon Murphy and John Anderson*

Introduction

Drug crime presents a significant problem for law enforcement. Drug supply involves significant profit; a highly adaptive and responsive target group; the potential for violence; cash transactions; the potential for corruption; mutual consent; a sub-cultural vernacular; political pressure; secrecy; telecommunications; and low levels of reporting by 'consumers'. Drug deals are a simple, rapid transaction, even where substantial quantities are involved, that can take place anywhere at any time – but will typically take place in public space. These difficulties are further complicated by the ambiguous public rejection but private consumption or acceptance of drugs for recreational use by large numbers of people (Wood 1997:219-221; Heydon 1973:268-272; Maher & Dixon 1999). The nature of the illegal drug market requires extraordinary policing methods, including undercover operations.

Undercover operations create a tension between the need to investigate the private world of 'the hermetically sealed drug culture' (*R v Salem* at 431) and protecting the citizen from the clinical gaze of the state. In the context of strong demands to 'get tough' on street level dealing, particularly in western Sydney, the New South Wales Parliament enacted s25A of the *Drug Misuse and Trafficking Act* 1985 (NSW) and the *Law Enforcement (Controlled) Operations Act* 1997 (NSW). This legislation allows for covert operations targeting drug distribution at the 'street level'.

Covert operations have been the subject of academic and judicial censure because there is the temptation for investigators to engage in improper or unlawful conduct to secure an arrest. While the State does have a legitimate and necessary role to play in the eradication of prohibited drugs, it must rigidly police the boundary between authorised controlled operations and conduct that results in persons committing crimes.

The authors conducted an analysis of 'ongoing supply' cases heard by the New South Wales Court of Criminal Appeal between 1999 and 2006 to consider the operation and impact of the comparatively new law. Analyses of the selected cases suggests that the practical operation of s25A is such that it provides a mechanism whereby the state, through its agents, may lawfully engage in entrapment activity, or actions close to it, which, in turn,

* Brendon Murphy is an Associate Lecturer at the School of Law, University of Newcastle, NSW Australia. John Anderson is a Senior Lecturer at the School of Law, University of Newcastle, NSW Australia.

has a disproportionate impact on low-level street dealers/users. The cases reviewed indicate the potential for a blurring of the fine line between 'routine police investigation', and inducing targets into further and/or larger episodes of supply ultimately exposing them to a s25A charge.

A limited defence based on the underlying principle of entrapment, unconscionability, is proposed as a mechanism in balancing individual liberty with the community interest in detection and prosecution of those within the 'hermetically sealed' culture of drug trafficking.

The Offence of Ongoing Supply – 'Getting Tough on Drugs'

Drugs are a highly sensitive topic for government; not only because of community disquiet, but also because of the costs to public health, insurance, law enforcement, and the potential for corruption and crime. Section 25A was introduced in the context of calls for government to 'get tough on drugs', by reducing highly visible street dealing and increasing penalties regarded as manifestly inadequate. Essentially s25A prohibits the business of regular supply of prohibited drugs for profit ('Prohibited Drugs' are specified in Sch 1 of the *Drug Misuse and Trafficking Act* 1985 (NSW)). It is an extensive provision with 10 subsections; the substantive offence is contained in subs(1):

> A person who, on 3 or more separate occasions during any period of 30 consecutive days, supplies a prohibited drug (other than cannabis) for financial or material reward is guilty of an offence.
>
> Maximum penalty: 3,500 penalty units or imprisonment for 20 years, or both.

Parliament introduced the section through the Drug Misuse and Trafficking Amendment (Ongoing Dealing) Bill 1998 (NSW). It was 'based on' a recommendation of the Wood Royal Commission, calling for a strictly indictable offence of 'engaging in commercial supply' (Wood 1997:224). That recommendation had been rejected during the formulation of serious drug offences for inclusion in the Model Criminal Code, due to the expected disproportionate effect the legislation would have on drug users, and the problems of evidence created by a commercial supply provision not reliant on proof of quantity (MCCOC 1998:181-183). Evidence before the Wood Royal Commission indicated that drug suppliers avoided lengthy sentences of imprisonment by ensuring that only small quantities were available at any given time. This practice encouraged police corruption by involving police in 'fit-ups' in an attempt to secure heavier sentences (Wood 1997:224). The Commission recommended criminalising the 'activity' of 'commercial supply', although it is unclear whether the Commissioner's recommendation was aimed at 'commercial' quantities of prohibited drugs, commercial enterprises, or both.

Regardless of the basis of the recommendation, the government introduced legislation based on commercial 'activity', adopting a form of 'small business' model. The amounts involved are 'immaterial' (NSW Parliamentary Debates (Legislative Assembly) 7 May 1998:4689), creating a clear presumption that a person charged under s25A is dealing in a commercial amount of prohibited drugs by way of systematic minor dealings over an extended period of time. That presumption may not be soundly based in fact. The stated intention of the section, apparent from the Second Reading Speech, was to address the 'potential loophole' of dealers avoiding supply charges by limiting the quantities distributed at any one time as identified by the Wood Royal Commission. It was expected the section would be implemented through surveillance and undercover operations, aggressively targeting the full spectrum of drug dealing, particularly regular distribution of small quantities of drugs (7 May 1998:4689-4690).

The parliamentary debates surrounding the Bill highlight the potential scope and predicted practical difficulties associated with a charge of 'ongoing supply'. They make an important contribution to the contextualisation of the provision. It is a common theme in the speeches made by both major political parties that the intended targets of s25A are those who persistently deal in drugs for commercial gain (7 May 1998:4690, 2 June 1998:5563). The minor parties and independents in the Legislative Council, however, argued that the reality of drug use and supply was not straightforward, and there was a very real difference between drug abusers, recreational users, and 'gangsters'. For example, Ian Cohen from the Greens Party was careful to draw a clear distinction between 'major dealers' and other forms of supply, particularly 'recreational suppliers', emphasising that the purpose of the legislation must be to target suppliers of commercial quantities of prohibited drugs but not addicts or recreational users (Parliamentary Debates (Legislative Council) 24 June 1998:6386-6388). Richard Jones, Australian Democrat MLC, succinctly identified the reality of an offence based on supply activity rather than quantity: 'The irony of the situation is that the provisions of this bill are not likely to catch the big dealers, who are the intended recipients of the penalties: it is likely to catch small-time dealers' (24 June 1998:6306).

A literal interpretation of s25A(1) allows a wide net to capture any person dealing in any amount of a prohibited drug at least three times within the 30 day period. The underlying assumption that all suppliers are dealing in 'commercial' quantities is exposed as a fallacy when it is realised that a person who supplied three ecstasy tablets on different days in a month is as liable to prosecution under s25A as a person who supplied three 50 kilogram crates of methylamphetamine in the same period. The appeal cases analysed demonstrate that drug quantity goes to penalty, not liability.

Debate also focused on the prospect of drug addicts supplying as a means to finance their own habits. As drug addiction often compels individuals to regularly access and sell small quantities of drugs (Maher & Dixon 1999), they are at significantly increased risk of prosecution under s25A compared with an individual selling in larger, less frequent deals. This is the logical product of the absence of any express distinction between addicts and organised criminal ventures. Alan Corbett, A Better Future for our Children Party MLC, cogently made this point by highlighting that the Bill 'ignores the fact that a large proportion of the people targeted will be people who are themselves drug dependent, or are supplying friends who are drug dependent' (24 June 1998:6397).

The concerns about a failure to maintain 'the vital distinction between small quantities and commercial quantities' (24 June 1998:6389) were not specifically addressed by the government in reply. An indication of the practical ramifications of such distinctions within the spectrum of seriousness of s25A offences is provided by Fred Nile, Christian Democrat MLC, in his comments about calculation of sentences (29 June 1998:6720-6721). Simply put, it was expected that personal use and motivation for dealing in the amounts detected are not matters of criminal responsibility but matters of culpability for judges to take into account when imposing sentence.

Entrapment was a key feature of the parliamentary debates. The enforcement of s25A requires undercover surveillance and controlled operations. Specific concerns were raised by Clover Moore, Independent MLA (4 June 1998:5801), and Richard Jones, Australian Democrat MLC (24 June 1998:6395), about entrapment and the opportunities that s25A presented for police corruption by allowing supply activity and related crime to take place and continue. The government answered these concerns by restating its commitment to

legal control of covert operations through the *Law Enforcement (Controlled Operations) Act* 1997 (NSW). Notably, the then Attorney General, Jeff Shaw stated:

> The Government dealt with entrapment in the *Law Enforcement (Controlled Operations) Act 1997*. That legislation carefully controls the circumstances in which police engage in what would otherwise be an unlawful course of action. Operations may be undertaken only when the dictates of crime fighting demand that course of action ... the legislation specifically sets out that an operation must not be authorised if it induces or encourages another person to engage in criminal activity or conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged. In short, the legislation does not allow for entrapment. If police choose to operate outside the framework of this legislation they run the usual risks. These include a range of sanctions such as tortious actions and more importantly from a law enforcement perspective the charges being dismissed by a court (29 June 1998:6741).

This concluding statement is compelling. While s25A contemplates undercover operations, such operations were not expected to allow the encouragement of individuals to engage in criminal conduct without 'reasonable suspicion' (*Law Enforcement (Controlled Operations) Act* 1997 (NSW) s7). Where a person has been improperly induced, the person may have a remedy in tort and the evidence could be excluded through the operation of judicial discretion and the applicable rules of evidence (*Evidence Act* 1995 (NSW) ss135-138). The crucial statement of the Attorney General was that the legislation 'does not allow for entrapment'. It is clear upon analysis of the relevant case law that the legislation does allow for enforcement by what might be described as entrapment; the issue is what conduct is regarded as entrapment?

The 'Knotty Problem' of Entrapment[1]

Entrapment is typically described according to two contrasting views. One view is that entrapment has a narrow meaning capable of precise definition. The other view is that entrapment could encompass many things. The foundation for both positions, it seems, is a concern with the nature of covert policing operations. Part of the problem in discussing entrapment is contemplating 'the boundaries of entrapment' (Ashworth 2002:161; Fisse 1988:375). Basically, all claims of entrapment fall within the scope of covert activity, but not all covert activity will sustain a claim to entrapment.

The key objections raised by an accused are twofold. First, the accused was induced to offend. Secondly, the use of deceit by the state, which constitutes a breach of individual privacy. Those objections are, however, at best, moral objections that have little credibility when the evidence shows that the individual was actively engaged in criminal activity. Intrusion into privacy, and acceptance of selective inducement to offend, is the first accepted casualty in covert operations. Indeed, the nature of 'invisible' and 'hidden' crime makes covert operations a necessary evil. However, the activities of inducing an offence import strong moral and libertarian objections that demand careful attention to the extent of permissible entrapment conduct (Dworkin 1985; Braithwaite et al 1987).

The recognition that entrapment was not something amenable to narrow interpretation was stated by Gaudron J in *R v Ridgeway* (at 70):

> 'Entrapment' is not a term of art; nor is it a term with any precise meaning. It has been used to cover a variety of situations in which law enforcement agents resort to undercover activity ... It is commonly used when law enforcement agents or persons who are

1 Description proffered by Lord Nicholls in *Attorney General's Reference No 3; R v Looseley* at [5].

> 'authorised' by them in that regard incite the commission of an offence or participate in some more positive way in the criminal enterprise giving rise to the offence with which the accused is charged.

This view of entrapment is shared by some academic writers (Bronnitt & McSherry 2005:842-843; Bronnitt 2004) and formed the basis of a rejection of a proposed statutory defence in English law (Law Commission UK 1977:32).

By contrast, some writers narrowly confine and define entrapment, involving a form of state 'provocation' as the essential ingredient. This is the function of the 'agent provocateur'.[2] An often cited judicial definition is that of Gleeson CJ in *R v Sloane* (at 272-273):

> [E]ntrapment involves as a necessary element the idea that an accused person has been induced to commit a crime which he or she otherwise would not have committed or would have been unlikely to commit ... In the context of an ongoing course of criminal activity, such as dealing in drugs, the reference to committing a crime which would otherwise not have been committed is a reference to a form of conduct rather than to a particular transaction.

Under the narrow formulation, entrapment is confined to circumstances where the conduct of the agent provocateur is a, if not the, primary cause of the offence. In effect the mens rea of the offence is absent in the accused or has been 'adopted' or 'transplanted' as a result of the overbearing conduct of the agent of the state. This concept has a direct bearing on criminal culpability, and partly explains why in some cases analysed, such as *R v Jolevski* and *R v Maessen*, there were lesser sentences.

An analysis by Professor Eric Colvin directs attention to the facts of the matter. Professor Colvin (2002:231-232) argues that entrapment is associated with behaviours in three categories of cases:

(1) where the police operative makes an improper contribution to the offence being prosecuted;

(2) where the police improperly target an individual without 'reasonable suspicion'; and

(3) where an offence is procured in order to generate sufficient evidence to convict.

This model is useful for considering a claim of entrapment where the accused did, in fact, intend to supply a drug, but the amount, type or frequency of supply was variable and the product of varying degrees of influence. On this construction, an accused could argue that they were entrapped into committing a s25A offence.

Identifying the mens rea of an 'ongoing supply' offence can be difficult because there are three separate instances of supply. In a simple case, the offender intended to supply on each of the three occasions. Where an undercover police operative is involved in coercion, threats or harassment there is the potential that mens rea in any or all of the episodes of supply is not sourced in the accused. The difficulty is whether the accused subsequently formed the relevant intention or acquiesced under pressure.

In this context, there is debate on the scope of entrapment conduct and the role of the accused and the state in the commission of the offence. This has made the formulation of a

---

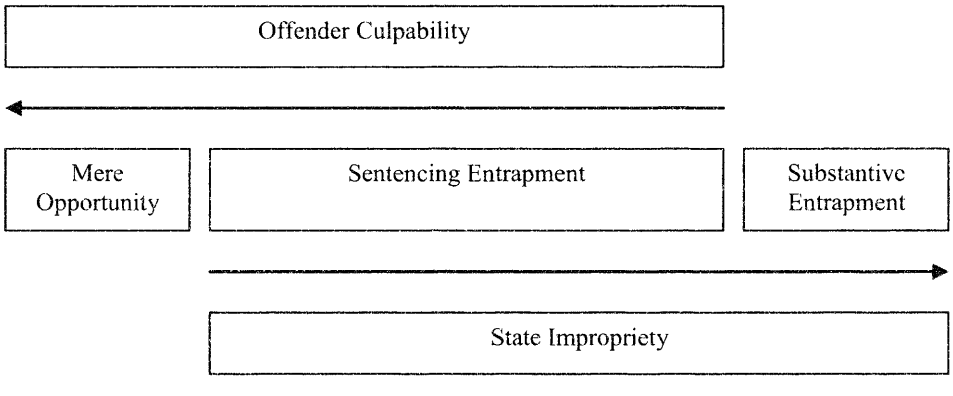
2 A precise definition of 'agent provocateur' is found in the *Report of the Royal Commission on Police Powers* 1928 (UK): 'a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds or informs against him in respect of such an offence' cited in *R v Mealey and Sheridan* at 61 (see also Choo 1995).

reliable and definitive test virtually impossible. Too broad a definition is misleading and blurs the line between legitimate investigations and 'improper conduct' (Bishop 1998:50-51; Braithwaite et al 1987:35). Too narrow a definition has the effect of legitimising the activities of the 'agent provocateur' in state-sponsored crime. The court jurisprudence ultimately shows that indicia of entrapment are generally assessed on the basis of two sets of factors. These are subjective factors, with a focus on the specific circumstances of the case and individual conduct, and objective factors, which attend to wider philosophical and policy considerations. They form the basis of an appraisal of what, exactly, lies between the narrow and expansive conceptions of entrapment.

Arguably the clearest examples of entrapment involve the conduct of a law enforcement officer that has produced a crime that otherwise would not have taken place at all. The conduct of the state through its agent(s) is active and aggressive, and may involve creating a 'set-up' or the application of pressure or incentives that substantially overwhelm the will of the person targeted. In effect, the state, through its agents, has manufactured a crime. It becomes more difficult, however, where the facts are not so clear, such as where the agent has simply made a suggestion and offered a reward for the person to commit a crime, or to 'aggravate' a crime by being asked or enticed into the supply of a greater quantity or more potent form of drug. This is referred to as 'sentencing entrapment' and although a feature of academic writing in the United States (Abelson 2003), is largely absent from Australian discourse. Nevertheless, it is a crucial concept when dealing with s25A offences because, as will be discussed below, the frequency of the conduct attracts prima facie liability, while the quantity and type of drug affects the sentence.

To assist in understanding entrapment, a three part model based on opportunity, sentencing entrapment and substantive entrapment is offered:

Figure 1



The model is based on the conduct of the accused and the conduct of the agents of the state. The focus of much judicial and academic writing is on either one or the other. Both the accused and the agents of the state may be involved in conduct that is 'improper'. What constitutes 'state impropriety' is very much open, but includes conduct that is illegal, unfair or 'inconsistent with the minimum standards' of acceptable investigation (*R v Ridgeway* at 36). At a certain point the extent of impropriety becomes unacceptable to the court and the cognitive 'line' between permissible and impermissible entrapment is drawn and the courts will invoke a remedy.[3] That decision is made where the improper conduct of the agents of the state exceeds the culpability of the offender. Offender culpability is greatest where the conduct of the agents of the state provides mere opportunity to offend; and lowest where

the offence is substantially the result of state impropriety. However, there exists between 'mere opportunity'[4] and 'substantive entrapment' a space where there is considerable scope for argument. It is in this space that the potential for injustice arises and the scope of entrapment is a matter of policy and debate. Like the Gordian Knot, entrapment presents legislators and the judiciary with a complex problem of policy, law and jurisprudence.

The Judicial Response to Entrapment

The common law has (generally) adopted four approaches to entrapment: (1) as a defence; (2) by refusing to hear the matter (a 'stay' in proceedings); (3) by subjecting the evidence to exclusionary rules; and (4) by reducing the sentence of the offender. These methods have developed in different ways in different jurisdictions.

In the United States a common law defence of entrapment will entitle the accused to an acquittal where the accused can produce sufficient evidence that the behaviour charged would create a 'substantial risk' that a person other than the defendant would commit the offence. That risk includes not only the prospect of material reward, but also harassment, blackmail, emotional pressure and recovering addiction. An evidential burden is placed on the accused to indicate the inducement concerned, which may be negatived by the prosecution based on the 'predisposition' of the accused to offend in the manner charged (*Sorrells v US*; *Sherman v US*; *US v Russell*; *Hampton v US*; *Jacobson v US*; *US v Jiminez Recio*).

In contrast, there is no defence of entrapment in English common law. The focus of English law has been the effect entrapment has on the evidence available to the court, and the judicial process. Until comparatively recent times the leading authority for that principle was *R v Sang*, where Lords Diplock, Salmon and Fraser held that a defence of entrapment was unknown at common law. Evidence obtained through entrapment was admissible, even if improperly obtained, where it was obtained prior to the offence taking place or where it otherwise satisfied the rules of evidence. Entrapment was only a relevant issue in mitigation of sentence, which could include discharge of the offender. Stricter controls over entrapment developed through changes in evidence law in the decades post-*Sang*. Legislative change through the *Police and Criminal Evidence Act* 1984 (UK) s78 gave courts discretionary power to exclude evidence that would have 'an adverse effect on the fairness of the proceedings'. Entrapment was subsequently held to be relevant to the exercise of the s78 discretion in *Williams v DPP* and *R v Smurthwaite and Gill*.[5]

With the entry of the United Kingdom into the European Union and the passage of the *Human Rights Act* 1998 (UK), the House of Lords ultimately reformed the manner in which evidence of entrapment was to be assessed. In *Attorney General's Reference (No 3 of 2000)*,

---

3 It was noted by Professor Andrew Ashworth (1998b:111) that 'the line between encouraging the commission of an offence and "stringing along" a person in order to obtain evidence may be gossamer thin, but it is highly significant'.

4 Consistently regarded as legitimate and falling outside the scope of 'entrapment'.

5 In the latter case, Lord Taylor CJ (at 901-902) held: 'In exercising his discretion whether to admit the evidence of an undercover officer, some, but not an exhaustive list of the factors ... are as follows: [1] Was the officer acting as an *agent provocateur* in the sense that he was enticing the defendant to commit an offence he would not otherwise have committed? [2] What was the nature of any entrapment? [3] Does the evidence consist of admissions ...or...the actual commission of an offence? [4] How active or passive was the officer's role...? [5] Is there an unassailable record of what occurred? ... [6] whether he [police officer] has abused his role to ask questions which ought properly to have been asked as a police officer and in accordance with the Codes'.

R v Looseley, it was held that 'entrapment' was a matter of evidence that could be raised at any time, normally prior to the hearing. If the judge was satisfied that the conduct of the police was such that the offence was 'manufactured', then the court had an inherent power to order a stay of proceedings on the basis that 'a prosecution founded on entrapment would be an abuse of the court's process' (at [16]). The discretionary remedy of a stay hinged on two factors; (1) the nature of the offence and the difficulty of detection without covert investigation, and (2) the 'extent' of police participation. Important to that analysis is the issue of whether the conduct of the police was simply providing the accused with an 'ordinary/unexceptional opportunity to offend' (at [23]). Further, there needs to be 'reasonable suspicion' prior to commencing operations. In an important departure from the position in the United States, the House of Lords also held that the 'predisposition' of the accused was irrelevant to the grant of a stay; it would invariably result in unfairness to those with criminal records or drug addiction. Fundamentally, the nature of entrapment and the discretionary nature of the remedy meant that each case necessarily turns on its own facts (at [48]).

There is no defence of entrapment in Australian statute or common law, but entrapment is a relevant matter in challenges to admissibility of evidence and in mitigation of sentence. The focus of Australian entrapment law is the subject of broad judicial discretion centred on the nature of the evidence coming before the court. Developments of the law in this area can be traced through a number of cases from the various State jurisdictions (see e.g., *Coward*; *Hsing*; *Venn-Brown*; *Papoulias*; *Vuckov, Romeo*; *Steffan*; *Thomson*; *Hunt v Wark*; *D'Arrigo*; *Sloane*; *Stead*; *Dugan*), but overall, entrapment must be understood in the context of the legacy of the High Court in the seminal case of *R v Ridgeway*. In this case, involving a Federal Police undercover operation with Thai authorities investigating a suspected heroin trafficker, the majority (Mason CJ, Brennan, Dawson, Deane & Toohey JJ) applied the broad public policy discretion derived from *Bunning v Cross* but, in doing so, created a specific class of discretion. The 'Ridgeway discretion' has two limbs. The first limb will exclude evidence where the evidence arises from the 'improper' conduct of the police. The second limb will exclude evidence where police conduct is *itself* an element of the offence charged (at 37-39 per Mason CJ, Deane & Dawson JJ; at 48-49 per Brennan J; and at 56 per Toohey J). These are questions determined by 'balancing competing public interests'. The investigation, conviction and punishment of crime and criminals, particularly drug offences, will ordinarily outweigh considerations as to the impropriety of the conduct of investigating officers. The courts will, however, exclude evidence on the basis of public policy in certain cases where the conduct of law enforcement officers is substantially improper. In such cases the exclusion may cause a fatal defect in the available evidence that may warrant a stay in proceedings.

Ridgeway recognised that entrapment does take place, but did not define what behaviours constitute entrapment. In adopting a pragmatic view, the High Court directed attention to the effect caused by improperly and illegally obtained evidence. The scope of entrapment was left open. Mason CJ, Deane and Dawson JJ saw entrapment as satisfying a 'but for' test, where 'an otherwise law-abiding person ... would not have offended were it not for the "inordinate inducements" involved in the illegal conduct [of law enforcement officers]' (at 39). The phrase 'inordinate inducements' was not discussed but this is seemingly a reference to Frankfurter J in *Sherman v United States*, who included 'appeals to sympathy, friendship [and] the possibility of exorbitant gain' as 'intolerable inducements' (at 383). Brennan J held that entrapment could involve conduct that trapped the 'unwary innocent' in addition to conduct that also trapped the 'unwary criminal' (at 49-50). This is consistent with the principle that the public policy discretion would also

encompass conduct where the target of the operation was, in fact, a willing participant. Toohey J went further and endorsed the analysis of entrapment in the Canadian case of *R v Mack*; the essential elements being that (1) the offence must be instigated by the police, (2) the offender was ensnared by the conduct of police, and (3) the intention of the operation was to gain evidence to prosecute the accused (at 58). His Honour also made use of the conception of the distinction between entrapment and situations where the police have 'merely provided the opportunity for an offence to be committed' (at 57), as did Gaudron J (at 77).

In keeping with the development of the common law in the United Kingdom, the judges in *Ridgeway* declared that entrapment was not a defence, but its existence was recognised and some of the elements that identify the scope of entrapment were articulated. *Ridgeway* is a critical part of the jurisprudence of entrapment, which has continued to develop in subsequent case law (e.g., *Albu, Gheorghita*; *Bijkerk*; *Dau v Emanuele*; *Davidson*; *Gyurka*; *R v N*; *Richards*; *Sahin*; *Swift*; *Tricouris*; *Ellis*; *Gudgeon*; *Karam*; *Martelli*; *Medina v The Queen*).

In cases where allegations of entrapment are raised, the most likely 'remedy' is mitigation of sentence. In New South Wales it has long been recognised that there is a distinction between legitimate undercover operations and conduct that had the effect of inducing a crime (see *Coster*; *Mandica*; *Anderson*; *Rahme*; *Taouk*; *R v N*). In *R v Anderson*, Kirby J (at 155) held that mitigation of sentence was appropriate where it was clear that a more 'serious' crime had been induced, there is 'a fine line between passive yet properly inquisitive conduct of an undercover police agent ... and a positive inducement by that agent to commit such an offence or an encouragement which lifts the offence from a minor category to a major one'. The result is that the calculated escalation in the seriousness of the crime by an *agent provocateur* constitutes grounds to reduce the length of the sentence imposed.

The definitive statement was made by Badgery-Parker J in *R v Taouk*, recently approved by Spigelman CJ in *R v N* (at 504):

> [T]he question is whether there is a real possibility that but for the assistance, encouragement or incitement offered by police officers, [the accused] would not have [offended] and whether, in all the circumstances of the case, the involvement of the police and the commission of the crime was such as to diminish his culpability.

In effect, the common law in Australia provides two methods of addressing allegations of entrapment; through a challenge to the admissibility of evidence, and through mitigation in sentence. The difficulty with these methods is that the accused still must face prosecution for a strictly indictable offence in circumstances where, arguably, the subjective criminality of the accused has been escalated through covert operations.

Legislative Responses to Entrapment

The discretionary powers in Pt3.11 of the *Evidence Act* 1995 (NSW) allow courts to exclude or limit the use of evidence. Section 138 deals with evidence that has been improperly or illegally obtained and essentially reflects the common law discretion from *Ridgeway* and earlier cases (Selway 2002:8). The existence of this statutory discretion is comparable with *Police and Criminal Evidence Act* 1984 (UK) s78, however *Evidence Act* 1995 (NSW) s138 is more detailed in terms of the factors for consideration in exercising the discretion (see *Salem*).

Another example of legislative intervention in this area is 'controlled operations' legislation. One outcome of *Ridgeway* was a finding that law enforcement agencies could be liable for breach of the law if they conducted illegal operations. The Commonwealth and some State legislatures introduced 'controlled operations' legislation to provide statutory protection and regulation for undercover operations, including *Crimes Amendment (Controlled Operations) Act* 1996 (Cth), *Law Enforcement (Controlled Operations) Act* 1997 (NSW), *Criminal Law (Undercover Operations) Act* 1995 (SA), and *Police Powers and Responsibilities Act* 2000 (Qld). The constitutional validity of the Commonwealth legislation was upheld with a 5:2 majority decision by the High Court in *Nicholas v The Queen*. In New South Wales, the *Law Enforcement (Controlled Operations) Act* 1997 allows undercover operations targeted at specific citizens and venues, and provides for a substantial degree of police presence in the ordinary affairs of citizens. That power is, in principle, subject to the specific requirement that any operation is not authorised where the target 'could not reasonably be expected to engage' in the prohibited activity (s7(1)(a)). This is, in fact, a low threshold test. There is no guidance within the Act as to what a 'reasonable' expectation means. In the context where the target has a criminal record, or a known drug addiction, it is highly unlikely that an application for a controlled operation under the Act would be refused. The type of crime being investigated, the prior record of the target, and the characteristics of the target are all likely matters in assessing the predisposition of the target to commit the offence (Doherty 1999).

Overall, entrapment has clearly been a vexed issue for the law. The courts have been the primary vehicle for ensuring the proper conduct of law enforcement officers involved in varying undercover activities. All remedies available to the Australian courts to manage entrapment evidence and covert operations are discretionary in nature and allow a flexible judicial approach to a poorly defined and idiosyncratic area of the law. Academic commentators, Simon Bronitt and Declan Roche (2000:88-89), state that research suggests that applications by defence counsel to exclude evidence of entrapment are usually unsuccessful as courts demonstrate a 'permissive' attitude to evidence. Confirmation of this is found in the research of Bram Presser (2001:776-779), especially for drug-related charges.

Ultimately, in the context of considering 'ongoing dealing' offences under s25A in practice, it must be kept in mind that the law governing entrapment in Australia has developed in an ad hoc manner favouring a flexible, discretionary process that has not attempted to define or limit the scope of what is involved in entrapment conduct nor what the proper remedy is in such cases. The 'spectre' of entrapment hangs over the practical operation of s25A and the following analysis of cases determined by the NSW Court of Criminal Appeal illustrates that undercover operations are the usual method of founding charges under s25A. Within that context then there is significant potential for a person to be induced to supply a prohibited drug, or to supply an amount of a prohibited drug that they otherwise would not.

Ongoing Drug Dealing in Practice - Quantity and Magnitude

Eighty-two cases involving offences under s25A heard by the NSW Court of Criminal Appeal between January 1999 and June 2006 were identified and analysed. Key features of the cases have been tabulated below in Appendix 1. Cases where full particulars could not be ascertained were not included in the table.

At the outset, it is acknowledged that there is an important limitation for the overall analysis and findings to be extrapolated from these cases. The assessment of the operation

of s25A is based only on the 'ongoing supply' cases determined by the NSW Court of Criminal Appeal. Analysis of cases at the appellate level has the clear limitation of omitting judicial decisions at the trial stage in the District Court, where matters relating to admissibility of evidence of covert police investigations are initially considered. This limitation warrants some caution as to the conclusions drawn.

The cases analysed illustrate there is a clear nexus between personal use/dependence and dealing on an ongoing basis; drug dealers are often drug abusers. When charged, these offenders are often prosecuted for offences other than s25A, including separate occasions of supply (see *Butcher*; *Camplin*; *CBK*; *Chang*; *Connell*; *D'Alencon*; *Fogg*; *Gordon*; *Grbin*; *Hennock*; *Hofer*; *Jordan*; *Koklas*; *Kostecoglou*; *Maessen*; *Nuth*; *O'Dowd*; *Patek*; *Radford*; *Sakkar*; *Shaw*; *Siljanovski*; *SJD*; *Smith*; *Way*; *Wilkie*; *Zakaria*), assault (see *Bacon*), possession of drug paraphernalia and precursors to manufacture (see *Jordan*; *Sakkar*), and various firearms offences (see *Gordon*; *Kostecoglou*; *O'Dowd*; *SJD*). These are typically dealt with by being taken into account on a Form 1 (pursuant to *Crimes (Sentencing Procedure) Act* 1999 (NSW) s32). Individuals are routinely prosecuted in conjunction with co-offenders, doubtless because of the social nature of drug supply (see *Fogg*; *Hoon and Pouoa*; *Jackson*; *SJD*; *Siljanovski and Kostdinovic*). There are examples of individuals charged with multiple counts under s25A that may or may not involve groups (see *Kostecoglou*; *Preston*). The consequence of the social nature of drug offending is two-fold. First, parity as to sentence becomes a common feature of appeals. Secondly, the evidence used to prosecute individuals frequently involves 'social' discourse that can involve confession, self-incriminating statements, use of public information, and the use of listening devices. These points demand close scrutiny of the facts and the admissibility of certain evidence when defending or prosecuting s25A offences.

The cases analysed also demonstrate the pervasive nature of undercover operations. Of the 82 cases analysed, 68 involved undercover operations, including telephone intercepts (see *Bruppacher*; *Hennock*; *Kamminga*; *Smith*; *Siljanovski*), use of arrested addicts/users as informants (see *Bruppacher*; *Ladocki*), controlled drug purchase (see *Bacon*; *Bentley*; *Camplin*; *Connell*; *D'Alencon*; *SJD*), and nightclub 'stings' (see *Jolevski*). The prevalence of undercover operations is not fully known, but these methods are on the increase. The number of authorised controlled operations rose from 164 in 2000 to 456 in 2005. More than 80 per cent of those operations concerned drug investigation (NSW Ombudsman 2005:4-5).

Investigation of these offences is facilitated by the *Listening Devices Act* 1984 (NSW), *Telecommunications (Interception) Act* 1987 (NSW), and the *Law Enforcement (Controlled Operations) Act* 1997 (NSW). These Acts require strict protocols in relation to application for, and execution of, authorised investigation. A full consideration of the effects of breach of legislation regulating controlled operations is largely absent from the cases examined. There was an allegation that the procedures under the *Law Enforcement (Controlled Operations) Act* 1997 were breached during the investigation into the activities of Peter Ladocki (*R v Ladocki* [2002]; *R v Ladocki* [2004]), but ultimately the evidence was admitted on the basis of the exercise of discretion and the balancing test under *Evidence Act* 1995 (NSW) s138. However, there are instances where evidence in breach of the procedures under the *Law Enforcement (Controlled Operations) Act* 1997 has been excluded in the District Court (*Lawrence Raymond Kelly*; *Glenda Jane Rangi*; *John Ibrahim v The Queen*). It has been observed that there is a clear preference in the judiciary to exercise the *Evidence Act* 1995 (NSW) s138 and common law discretion in favour of the prosecution in drug cases (Presser 2001).

The cases analysed reveal that there are very few instances of 'ongoing supply' charges involving the archetypal 'Mr Big' dealer. There are only three examples where individuals were prosecuted for actual supply of commercial quantities of prohibited drugs (see *Butcher*; *Huang, Lin*; *Soo*). By contrast, the analysis of s25A cases decided by the Court of Criminal Appeal reveals that a significant majority of cases involved small scale localised street dealers who are often addicts themselves.

Recreational users are evident as offenders in the cases analysed. In *R v Jolevski*, a young man in his early 20s met an undercover officer at a Sydney nightclub. The officer asked if he could supply her with ecstasy. At that time, Jolevski was under the effects of ecstasy himself and agreed to source some for her. Jolevski acted as an 'agent'. The officer then asked Jolevski for his telephone number, and proceeded to call him numerous times over the following week. These calls led to another three episodes of 'agency' based supply, resulting in a charge under s25A. Jolevski maintained that he would not have supplied if 'Jenny' had not made the request, and that he had not supplied to anyone else in the past. This was accepted by Kinchington DCJ, who sentenced Jolevski to an 18-month good behaviour bond and a $3000 fine. A Crown appeal against the inadequacy of this sentence was ultimately dismissed.

Similarly in *R v Maessen* the offender was charged when a friend, at the behest of investigating police, asked to purchase drugs through the offender. It was noted by Adams J that the offender would not have supplied any drug unless requested to do so by a friend, as there was no evidence to suggest that he was involved in the 'market' of amphetamine supply (at [15]).

Taking into account the inherent limitations in the data, the cases analysed do still support a number of the arguments raised during parliamentary debate about the logical effect of the enforcement of s25A as primarily a vehicle that would, by default, capture the 'consumers' of the drug market more than erode large-scale narcotic supply. The cases strongly emphasise the 'sociology' of drug supply: the key distributors of narcotics are frequently themselves drug users with high public exposure. The apparently hidden point of large-scale supply does not involve numerous transactions to an 'unknown consumer'. If that conclusion is correct, the practical effect of s25A is unlikely to be convictions of individuals for actual commercial supply of prohibited drugs, but will rather have a significant impact on the 'consumers' of narcotics.

Consistent with the Minister's anticipated 'broad' interpretation of s25, appeals have addressed a number of matters, including the requirement of financial reward, the requirement of three episodes of supply including intention to supply (see *Bentley*; *Smith*), the quality and purity of drug (see *Bacon*; *Huang, Lin*) including placebos (see *SJD*), parity (see *Chang*; *Fogg*; *Giang*; *Hoon, Pouoa*; *Kostecoglou*; *Mucenski*; *Siljanovski and Kostdinovic*; *SJD*; *Wilkie*), the offender's role in distribution (see *Hoon, Pouoa*), entrapment, and evidence including admissions of dealing (see *Chang*) and informer statements (see *Bruppacher*). Detailed analysis of all of these aspects of judicial consideration of the legislative provision is beyond the scope of this article. Analysis will be confined to sentencing factors and entrapment as significant matters highlighting the practical enforcement and operation of s25A.

Smiroldo

The importance of the decision in *R v Smiroldo* is highlighted in a number of subsequent 'ongoing supply' cases. *Smiroldo* is the 'typical' s25A case, involving an undercover police officer approaching an individual suspected of 'ongoing supply'. Drugs were solicited. The

officer paid $50 for 0.37g of methylamphetamine. During the transaction, the offender invited the officer back, and he then returned on two subsequent occasions. On the final visit the officer asked for a larger quantity. Smiroldo advised he could supply up to 10 ounces. The officer subsequently purchased one ounce. Smiroldo was then arrested and was ultimately convicted of an 'ongoing supply' offence. He was sentenced to 4 years 6 months imprisonment and a subsequent severity appeal was dismissed. In considering the case, Hulme J drew upon the Minister's Second Reading Speech and existing common law (in particular the cases of *Ibbs v The Queen*; *Veen v The Queen (No 2)*; *De Simoni*; *Olbrich*; *Kalache*). *Smiroldo* is often cited for establishing two important principles (see *Bruppacher* at [15]; *Fogg* at [24]; *Gill* at [10]; *Hofer* at [19]; *Jordan* at [7]; *Khaled* at [16]; *McArthur* at [14]; *Smith* at [12]). First, quantity *is* relevant on sentence despite the views expressed in the Minister's Second Reading Speech:

> [I]t cannot be that all offenders who on three or more occasions within 30 days supply drugs ... were intended by Parliament to suffer the same penalty. In accordance with normal sentencing principles the maximum penalty stipulated 'is intended for cases falling within the worst category of cases' (Hulme J at 50).

Hulme J reasoned (following *R v Kalache*) that quantity is relevant because s25A must be read as a part of the *Drug Misuse and Trafficking Act* 1985 (NSW), which attaches greater culpability to the quantity of drug supplied. However, quantity is not a singular measure of criminality for the purposes of sentencing. In the case of *R v O'Dowd*, the offender was sentenced to 12 years imprisonment for his role in distributing 20 grams of amphetamine, compared with *R v Soo*, where the offender was sentenced to 11 years imprisonment for distributing 1 kilogram. The point of departure was that O'Dowd was concurrently involved in a violent robbery.

In addition to quantity, the magnitude of the operation must be considered. This is particularly important even where the quantity of drug on indictment is relatively low, as this quantity is not necessarily a definitive measure of the offender's involvement in drug trafficking. In this regard, Hulme J (at 50-51) stated in the case of *Smiroldo*:

> The persons at whom s25A is directed are those who appear to be indulging in a practice or business of supplying prohibited drugs. It must, it seems to me, be relevant to consider the magnitude of such an operation. As great a quantity of a prohibited drug may be supplied by a series of small transactions as by a few large ones and one may anticipate that most offenders charged under s.25A will have been involved in the supply of far more than the particular quantities the subject of the occasions which have inspired the charge.

The accused's involvement in the operation can be inferred from their conduct: particularly where the accused demonstrates a willingness to supply *further quantities* or *increasing* amounts of a drug.

Quantity and magnitude are not the only considerations. The cases analysed clearly demonstrate the important role that covert operations play in detecting ongoing supply. In this context, defendants periodically allege they were either trapped into supplying to the covert operative, or actively encouraged to 'aggravate' the offence by supplying larger quantities. Of the 82 cases reviewed, 13 raised entrapment conduct as an issue. Analysis of these cases indicates not only a fine line between investigating and creating an 'ongoing supply' offence, but also activity that increases the objective seriousness of the offence through the supply of large quantities of a prohibited drug.

In *R v D'Alencon*, the offender told an undercover officer that he was able to supply 'from one cap to one kilo' (at [11]). The officer obtained three deals during the 30 day period – one of 1 gram, one of 1.5 gram, and finally one of 37 grams. At the final meeting

the officer asked the offender if he could supply a larger amount. An agreement was then made to supply 400 grams. The offender was later charged with offences under both s25A *and* s25(2), supply of a commercial quantity of a prohibited drug.

The circumstances in *R v Fogg* are very similar. In this case an undercover officer made three 'controlled purchases' of small amounts of a prohibited drug. On the third occasion the officer asked the offender 'about the possibility of obtaining larger quantities' (at [8]). The offender subsequently supplied amounts of 13.8 grams, 8.5 grams and agreed to supply an ounce (28 grams) at a later date; he was soon after arrested and charged with a s25A 'ongoing supply' offence.

In *R v Gordon*, the offender was charged with a s25A offence, two 'deemed supply' charges as well as firearms offences. This case arose in the context of an undercover operation. One of the key findings of fact at trial by Coleman DCJ was that 'the actions of the police operative induced the prisoner to deal at a level which was higher than that at which he had already been dealing, and I have taken that into account in mitigation' (at [13]).

The case of *R v Hennock* involved a young man selling ecstasy. He sold 10 tablets to a schoolgirl, who unwittingly on-sold them to an undercover officer. The officer asked the girl to supply a larger quantity. The girl then purchased 200 tablets from the offender, and on-sold them to the officer. The officer then arranged to meet 'her supplier' and procured 40 tablets from the offender. Hennock claimed that the only reason he sold the 200 tablets was because of the police officer's request. This version was rejected at trial.

The facts in *R v Hide* follow a similar pattern to the first three cases. In this matter the offender made four supplies of increasing quantities of cocaine and amphetamine. On the final deal the officer asked about further supplies. The offender indicated she could supply an ounce (28 grams) of amphetamine. The offender later backed out of the agreement. Although not charged for that offence, the conduct of the officer was factored into an assessment of criminality. Barr J cited *Taouk v The Queen* as authority for the principle that the onus of proof to claim a reduced sentence because of the inducement of the police officer lies with the defendant and quoted from the judgment of Badgery-Parker J (at 404):

> The question is not whether an accused can show that but for the involvement, encouragement or incitement by police he or she would not have committed the crime, rather whether in all the circumstances of the case the involvement of the police was such as to diminish the culpability of the accused.

This was a test which Hide subsequently failed.

R v Huang; R v Lin is another case example of a 'scaled' increase in the supply of drugs. The offenders supplied 1 ounce, 3 ounces and then 12.5 ounces of heroin. The facts in the case do not make it clear precisely how the increase came about, but the pattern appears to be that requests were made to supply larger quantities of heroin by undercover officers. This was also the modus operandi in *R v SJD* and *R v Smiroldo*.

The case of *R v Jolevski* demonstrates the use of deception in the context of the nightclub scene. It is interesting in that there was evidence at the trial that the police officer made repeated phone calls to the offender, placing some degree of pressure on him to supply her with ecstasy. A key feature of this case was a concluding comment of Sperling J (at [21]):

> [T]he respondent was not engaged at all in the business of supplying an illicit drug and, by inference, would never have been involved in criminal activity at all had it not been for the blandishments of an undercover officer. This is not to suggest that police conduct in this

> case was improper, but it is an aspect of the case which limits the respondent's criminal responsibility to a very low level.

In a similar case, *R v Maessen*, the offender was originally charged with a s25A offence, which was later replaced by two s25(1) supply charges.[6] This case involved the supply of amphetamine between two friends. Once again there was a finding that it was 'very likely' that no supply would have taken place without a request from one friend to another, and without 'the instigation of the police'(at [15]).

More recently, in *R v Sama*, the offender gave evidence that he would not have supplied heroin if undercover officers had not solicited a purchase from him. That argument was rejected by the court, as there was evidence that the offender demonstrated he was willing and able to supply heroin and methadone.

An analysis of these cases supports the conclusion that in some circumstances police conduct does involve enticement or encouragement to supply prohibited drugs. The extent of that encouragement varies; from simply providing an offender with an opportunity to provide a drug (in the usual course of 'doing business'), through to the use of persistent phone calls and 'abuse of relationship' in order to procure further instances of supply. It is apparent that where the offender has dealt in larger amounts in circumstances where they would not have done so but for the inducement of police, this is a relevant factor that can mitigate the sentence imposed. Similarly, mitigation arises in cases where it is clear that the person charged would not have acted at all without the inducement of the police. The person charged carries the onus of proof in such cases. The key appears to be an objective assessment of the facts to determine the nature of the undercover operation; particularly evidence of the offender's willingness and capacity to supply, knowledge of the risks, and knowledge of the drug market. On the other hand, soliciting a larger quantity of drug depends on the defendant having access to larger quantities, whether through direct possession or through having the contacts to source the drug concerned. There is a fine balancing act between targeting suspects who are part of the distribution network of significant quantities of narcotics, and targeting suspects who have knowledge of sources but whose subjective criminality falls short of an effective charge of deemed commercial distribution.

A Defence to Ongoing Supply

The above analysis of s25A 'ongoing supply' cases, coupled with consideration of relevant academic commentary, highlights two issues of primary concern. First, investigation and targeting potential offenders carries with it the prospect that an individual may be enticed into distinct episodes of supply that may not otherwise have occurred at all. Secondly, the quantity of drug supplied may similarly be increased, thereby exposing the accused to greater penalty. At one level, individuals may be charged with a s25A offence when presented with 'mere opportunities' to supply. Conversely, they may also be charged following conduct of law enforcement officers that amounts to active encouragement, pressure, or presentation of opportunities that were simply beyond the scope of that individual ('substantive entrapment').

The cases examined do not indicate that the *Ridgeway* discretion to exclude evidence provides a successful means of controlling entrapment practices in covert operations. There are few, if any, incidents of successful challenge to a charge under s25A because of

---

6 It was noted that these were charges that should have been dealt with summarily in the Local Court and *not* on indictment (at [4]).

improperly obtained evidence. This may be a reflection of the success of controlled operations legislation and the attention given to evidence by the Director of Public Prosecutions when preparing a case for prosecution. On the other hand, it may be indicative of a level of judicial acceptance of certain entrapment practices in the interests of suppressing the trafficking in prohibited drugs.

The case analyses raise the ongoing dilemma concerning the protection of the community from the distribution of narcotics, balanced against the interests of individuals from being exposed to a strictly indictable offence based on covert operations. In an age where covert investigation has become routine, the safeguards for individuals need to be increased not only to ensure that individual liberties are protected, but also to ensure that the energies of law enforcement officers are appropriately directed. An additional control over s25A may be required in the form of amendment to the Act to introduce a statutory defence, or to provide a mechanism for summary disposal.

There has been staunch judicial opposition to endorsement of a defence of entrapment although there have been calls for more than two decades by academic commentators for its introduction in Australia and the United Kingdom (Allen 1984; Fisse 1998:375). The Australian position remains aligned with those arguments favouring control of judicial process and exclusion of 'tainted' evidence (Heydon 1973:285-286; Roser 1993:741-743; Harris 1994:215-220), without adopting a defence of general application. It is proposed that a limited defence of specific application may be required to control the principled use of s25A.

The argument for reform is based on two propositions; first, the practical enforcement of s25A is broader than the intention of Parliament. Secondly, the investigation of offences under s25A has the potential to bring police investigations unreasonably close to a variety of impermissible entrapment practices. Section 25A has been used effectively in targeting 'low-level' street dealers, primarily because those individuals are more likely to be engaged in visible, regular supply activity. Those individuals are often also drug abusers, and most likely to be involved in other forms of localised crime. The evidence suggests s25A has not been used with any effect in large scale supply operations. That conclusion is necessarily cautious, as it has long been recognised that 'low-level' dealing can be directly responsible for the distribution of large quantities of prohibited drugs over time. Indeed, it may be that 'low-level' dealing is a far more common type of drug supply than 'grand scale' economies. The effect of s25A is, however, to target the immediate sellers, who are often users. The question arises as to whether this effect is further penalising the victims of the drug trade, a concern raised during parliamentary debate.

In addition, s25A also captures recreational drug users. The desirability of this is a matter of policy. However, when this is considered in light of the potential for entrapment into the supply of larger quantities of drugs (sentencing entrapment), and entrapment into a s25A offence, there arises real concern about the role of the state in covert operations and 'random virtue-testing' (Dworkin 1985). The use of covert operations to investigate ongoing drug supply creates a climate where a person can be entrapped into a strictly indictable 'ongoing supply' offence, even though their criminal culpability may be at the level of a minor supply charge. There is a strong element of unfairness to an accused if s25A is applied too broadly; it potentially subjects an individual to a charge and penalty that may never have arisen, or is beyond their subjective criminality. In addition, s25A invites the courts to admit evidence that may be improperly obtained. These are significant issues touching upon fairness to the accused and the proper administration of justice in a constitutional democracy.

Despite the potential for impropriety, covert operations in this context have evolved out of the specific difficulties raised in investigating and prosecuting drug crime. The unique, hidden, context of drug supply is arguably a strong justification for conducting covert operations.[7] However, unquestioned acceptance denies the principle that a person being investigated for a drug offence is not a criminal; they are a suspect. Covert investigations by the state carry with them an imperative of integrity in order to ensure that power is not abused and the administration of justice is not tainted (Ashworth 1998a:118-122). It is strongly arguable that these are not mere idle aspirations, but essential components of the justice system.

The present control over s25A is focused on the *process* of investigation and the evidence flowing from it. It is essentially an *objective* focus. What is missing from s25A is the *subjective* focus, which is a characteristic of the common law view on entrapment in Canada (e.g., there is a detailed, and influential, review in *R v Mack*, which was considered in *Ridgeway*), and the defence available in the United States. The inclusion of a subjective element into s25A is advocated because of its heavy reliance on deception and potential entrapment.

One option for reform is to repeal the section entirely. Prior to the introduction of s25A, the common law allowed the prosecution for 'ongoing supply' on the basis of small, regular transactions over a period of time; including commercial quantities. In *R v Hamzy*, it was held (at 348) that:

> [T]he Crown is entitled to plead in the one count a charge of supply where it intends to prove a number of individual acts of supply by the accused to different people and at different times, provided that those acts can fairly and properly be identified as part of the criminal enterprise.

The common law was quite able to deal with the type of conduct that s25A is directed to without the 'pressure' of a time requirement. *Hamzy* complemented the *Drug Misuse and Trafficking Act* 1985 (NSW) in that there was discretion to charge a person on indictment or summarily, and quantity remained an essential factor. There is no such flexibility in s25A. Wholesale repeal of the section is, however, unlikely to be politically acceptable in New South Wales wherein a climate of 'tough' law and order policies endures.

One practical option is altering s30 of the *Drug Misuse and Trafficking Act* 1985 to include s25A as an indictable offence that may be dealt with summarily unless the prosecution elects otherwise. This is a simple way of ensuring that the relatively 'minor' cases of dealing may be dealt with summarily in the Local Court. The problem with that, despite its utility, is that it fails to address the important question about the use of entrapment evidence in a s25A offence.

The basic proposition is that inducing a citizen to commit a crime is unconscionable and not to be tolerated, except in very limited circumstances. Reforms aimed at a statutory defence make a clear statement of that principle although numerous arguments have been made against a statutory defence (*R v Ridgeway* at 28; Harris 1994:215-220; Law Commission UK 1977:46-48; Heydon 1973:284-285). These arguments include the legal/

---

7 Arguments in favour of covert investigation include the perception that (i) criminals do not respect the rights of others, and as such have fewer rights than law-abiding citizens; (ii) criminals routinely lie and deceive. Honesty from the State is not something that should be expected when serious crime is being investigated; and (iii) the utilitarian value to the community in neutralising drug distribution exceeds the harm done in deceiving a select group of individuals (Ashworth 1998a:115-118; note that Ashworth was highly critical of these views).

judicial construction of an offence where the coincidence of *actus reus* and *mens rea* means that, as a matter of law, the person is guilty of the offence because they have acted in the proscribed manner with the requisite intention (subject to the defences based on 'excuse', such as self-defence). Also, the creation of a statutory defence would place the focus of judicial attention on the individual accused rather than the conduct of the Executive; and the ambit of entrapment is so broad that the prospect of drafting a defence of general application is rendered almost impossible. Further, certain forms of covert investigation are permissible and necessary for law enforcement so that a defence could raise the prospect of disrupting legitimate forms of police investigation. Finally, the issue of entrapment can be properly dealt with by procedural remedies, including a stay of proceedings, exclusion of evidence, and the mitigation of sentence.

Careful consideration of these arguments does not, however, erode the utility of a limited defence. The law recognises a number of factual scenarios where the culpability of the accused may be negatived or modified as a matter of law despite evidence otherwise establishing the guilt of the accused (e.g., the defences of provocation and duress: see Birch 1994:82). The coincidence of *actus reus* and *mens rea* does not justify denial of an excuse to an accused. The existence of a defence does not intrude on the inherent jurisdiction of the courts to control the administration of justice. A defence is primarily for the benefit of the accused not for judicial review of executive action (Fisse 1988:374). To rely on a failure of drafting as the basis of avoiding a defence is hollow in the face of existing examples (Allen 1984:72-75; Fisse 1988:380-383). While courts do endorse certain deceptive conduct as necessary in certain circumstances (*R v Ridgeway* at 43-44), the existence of the defence in the United States for more than 70 years does not reveal evidence of an unwarranted interference in the activities of law enforcement. To dismiss the utility of a defence on this basis is to overlook the substantial injustice that can be done in trapping an otherwise 'unwary innocent', or even 'aggravating' the sentence of an 'unwary criminal'. Clinging to the absence of common law authority is to err on the side of a conservative ideology that adopts a highly restrictive view of the nature of judicial reasoning. It is the essence of the common law to adapt.

As to the existence of other remedies, there is substantial utility in the availability of procedural remedies in the form of control over evidence and proceedings generally. The focus on the *judicial process* is sufficiently flexible to be amenable to the myriad of situations in which entrapment manifests upon the facts of a particular case. The essential concerns are that s25A is a strictly indictable offence carrying a significant maximum penalty which relies for proof largely on covert investigation where the only remedies available to deal with improperly obtained evidence are discretionary and where those remedies are routinely exercised in favour of the prosecution (Bronitt & Roche 2000:88-89).

The case for a limited defence is based on five observations. First, the state engages in conduct that has the potential to involve individuals in drug supply that they may not have engaged in at all or on a scale beyond the ambit of the original intention thereby exposing that individual to a significant penalty. Second, there is substantial risk of injustice by exposure to entrapment into a s25A offence. Third, s25A represents state sanctioned intrusion into the affairs of the body politic infringing the right of individuals in a democratic state to live free from the intervention of the state. Fourth, risk of police misconduct in the execution of covert operations is high were the activities of officers are 'invisible' to official observation. And fifth, the existence of a statutory defence to a s25A charge would supplement the general discretionary powers of the judiciary. This would assist in the preservation of the administration of justice, and provide a clear statement that proceedings under s25A must be conducted with scrupulous integrity (Harris 1994:198-199).

The arguments for and against entrapment contain an essential ingredient: unconscionability. At the heart of covert investigation is a complex moral and public policy jurisprudence. On one hand there is a clear requirement to vigorously police drug crime. The 'hermetic seal' of user networks, and the social evils that lie in its shadow, require extraordinary methods. This also provides a significant justification for breaching liberties. Indeed it is a powerful argument that, ordinarily, law-abiding citizens do not engage in the distribution of narcotics and thereby do not become the targets of s25A investigations. Despite that, many defendants in s25A cases raise a 'moral objection' to having been investigated in this way. The moral objections to entrapment have been considered by philosopher Gerald Dworkin (1985). Dworkin argued that 'pro-active law enforcement' is state manufactured crime (1985:24; a more recent discussion is found in Ashworth 1998a:115-118). A key objection is that covert operations engage in 'virtue-testing' citizens rather than detecting crimes, with the control based on 'reasonable degree of suspicion' (1985:33). Dworkin argues that 'it is not proper to solicit, encourage, or suggest crime even if this is done by no stronger means than verbal suggestion' (31). Dworkin offers an essentially moral answer to a very practical problem. At a minimum, the state should not be involved in the active encouragement of criminal activity, and may well have no business undertaking covert operations at all. That is not the position advocated here. The judiciary has long considered the competing arguments and has essentially settled on a pragmatic approach that there is a role for covert operations, but there must be a limit (e.g., see *Brennan v Peek* at 72 per Lord Goddard; *Sorrells v US*; *Ridgeway*; *Anderson* at 157 per Kirby J). Those cases of high authority, such as *Ridgeway*, *Mack*, *Looseley* and *Sorrells* all contain judicial statements concerning matters (ultimately) of political philosophy and public policy; the underlying theme of judicial distaste captured in the concept of unconscionable conduct.

Various defences have been proposed to cover entrapment in the past, but these will not be discussed here. It is sufficient to say that these are defences of general application rather than an amendment to a specific section of the *Drug Misuse and Trafficking Act* (Fisse 1988:382-383; Allen 1984). A range of principles drawn from a number of leading cases have been considered and synthesised, in particular the decisions of McHugh J in *Ridgeway*, Lamar J in *R v Mack*, and the House of Lords in *R v Looseley*.

A defence to an 'ongoing supply' charge under s25A based on unconscionable conduct might be constructed as a new s25B:

(1) If, on the trial of a person for an offence under section 25A, the jury is satisfied that the offence is proven but that the accused was improperly induced into committing the offence through the unconscionable conduct of law enforcement authorities, the jury may find the person not guilty of the offence charged.

(2) Without limiting the matters that the Court may have regard to for the purpose of determining whether law enforcement authorities have improperly induced a person into committing an offence under section 25A, the Court is to have regard to whether:

(a) in proffering the inducement, law enforcement authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one similar to it;

(b) law enforcement authorities were acting as part of an authorised controlled operation;

(c) the conduct of law enforcement authorities involved harassment, threats, deceit, inducements or offers of reward not ordinarily associated with the commission of the offence;

(d) the accused had the intention to commit the offence without undue influence;

(e) law enforcement authorities were disproportionately involved in the offence when compared with the conduct of the accused;

(f) the conduct of law enforcement authorities exceeded accepted standards of law enforcement investigation, having regard to the requirements of investigating offences under section 25A.

Conclusion

Section 25A of the *Drug Misuse and Trafficking Act* 1985 (NSW) is a provision that relies for its enforcement on covert investigations and carries with it a real risk that a person will be entrapped into the commission of an offence or an aggravation of that offence by supply of quantities outside the scope of subjective criminality. It is an offence that overwhelmingly targets low-level street dealers and recreational drug users. While it is accepted that the state has a necessary duty to investigate crime relating to prohibited drugs, the ambit of s25A is so wide that it has potential to arbitrarily capture individuals in its net. Coupled with the risk of entrapment, the covert investigation methods used necessitate careful application of the charge to appropriately targeted individuals and clear protection of those who may be unconscionably induced into the commission of such an offence.

Parliament recognised that to authorise clandestine investigation has significant social policy implications and sought to control entrapment methods by restricting opportunities for it to take place. A limited defence aims to balance the legitimate need of law enforcement authorities to police drug crime with the rights of individual citizens by providing a clear statutory limitation on the conduct of investigating authorities. Since the serious indictable s25A offence operates at the theoretical junction between the citizen and the state, there is an imperative to rigidly protect the individual from the extensive and intrusive resources of the apparatus of state power.

Appendix 1 KEY:- ***E*** = Entrapment alleged; y = year; m = month; Np = non-parole period; ↓ = downward variation

Case Name	Covert Operations	Offender Type	Amount and Type of Drug	Add Supply/ Possession Charge/s	Sentence	Nature of Appeal	Appeal Outcome
Bacon [2000] NSWCCA 549	Yes	Dealer	68.53g Amphetamine	Yes	3 y [2y Np] + 6m Assault	Sentence + Interpretation	Allowed –Sentence ↓ 3 y [18m Np]
Bentley [2003] NSWCCA 360	Yes	User / Dealer	0.9g Heroin	No	3y [27m Np]	Conviction + Sentence	Dismissed
Bruppacher [2002] NSWCCA 182	No	User / Dealer	2.22g Heroin	No	5y 6m [3y 3m Np]	Sentence	Dismissed
Butcher [2001] NSWCCA 188	Yes	User / Dealer	4.73g Amphetamine	Yes	7y [4y Np]	Sentence	Allowed -Sentence ↓ 5y [3y Np]
Camplin [2004] NSWCCA 29	Yes	Dealer	2.5g Amphetamine	Yes	3y 6m [2y 10m Np]	Sentence	Allowed – Sentence ↓ 3y 6m [2y 7.5m Np]
CBK [2002] NSWCCA 457	Yes	User / Dealer	12.41g Amphetamine	Yes	7y [3y Np]	Sentence + Interpretation	Allowed –Sentence ↓ 7y [2y Np]
Chang [2003] NSWCCA 327	Yes	User / Dealer	19.8g Heroin	Yes	6y 3m [4y 6m Np]	Sentence	Dismissed
Connell [2003] NSWCCA 90	Yes	User / Dealer	65.5g Amphetamine	Yes	4 y [2y 6m Np]	Sentence	Dismissed
D'Alencon [2003] NSWCCA 269	Yes ***E***	Dealer	59.5g Amphetamine (– offer to supply 400g)	Yes	7y 6m [5y Np]	Sentence	Allowed – Sentence ↓ 6y 6m [4y Np]
Esquilant [2005] NSWCCA 421	Yes	User / Dealer	3g Cocaine	No	15m [12m Np]	Sentence	Dismissed
Farah [2005] NSWCCA 67	Yes	Dealer	? Heroin	Yes	5y 6m [2y 6m]	Sentence	Allowed – adjustment in Np period

Case Name	Covert Operations	Offender Type	Amount and Type of Drug	Add Supply/ Possession Charge/s	Sentence	Nature of Appeal	Appeal Outcome
Fogg [2002] NSWCCA 395	Yes ***E***	User / Dealer	25.56g Amphetamine (low purity)	Yes	4y 4m [3y 2m Np]	Sentence	Allowed – Sentence ↓ 3y 6m [3y Np]
Giang [2005] NSWCCA 387	Yes	User / Dealer	0.54g Heroin	Yes	3y 3m [1y 9m Np]	Sentence -Parity	Dismissed
Gill [2002] NSWCCA 93	Yes	User / Dealer	0.36g Heroin	No	3y 6m [2y 8m Np]	Sentence	Allowed – Sentence ↓ 3y 6m [2y 6mNp]
Gordon [2002] NSWCCA 476	Yes ***E***	Dealer	54.48g Heroin	Yes	2y	Sentence	Dismissed
Grbin [2004] NSWCCA 220	Yes	Dealer	4g Amphetamine	Yes	2y 8m [2y Np]	Sentence	Allowed – Sentence ↓ 2y 8m [1y Np]
Hennock [2002] NSWCCA 229	Yes ***E***	User / Dealer	250 tablets MDMA	Yes	4y [2y Np]	Sentence	Dismissed
Hide [2003] NSWCCA 371	Yes ***E***	Dealer	1.69g Cocaine + 6.54g Amphetamine	No	4y [2y Np]	Sentence	Dismissed
Hofer [2001] NSWCCA 544	Yes	Dealer	2.9g Amphetamine	Yes	5y [3y Np]	Sentence	Allowed – Sentence ↓ 4y [2y 4m Np]
Hoon; Pouoa [2000] NSWCCA 137	Yes	User / Dealer	0.75g Heroin	No	14m	Crown App Sentence	Dismissed
Huang [2005] NSWCCA 244	Yes	User / Dealer	0.9g Heroin	No	5y [3y 6m Np]	Sentence	Dismissed
Huang; Lin [2001] NSWCCA 76	Yes ***E***	Dealer	458.3g Heroin	No	8y [6y Np]	Sentence	Dismissed
Jackson [2004] NSWCCA 110	Yes	User / Dealer	4 g Amphetamine	No	4y [2y Np]	Conviction + Sentence	Allowed – New Trial Ordered

Case Name	Covert Operations	Offender Type	Amount and Type of Drug	Add Supply/ Possession Charge/s	Sentence	Nature of Appeal	Appeal Outcome
Jolevski [2002] NSWCCA 472	Yes *E*	Social	29 tablets (8.37g) Amphetamine	No	18m Gd Bh Bond + $3000 Fine	Crown App Sentence	Dismissed
Jordan [2002] NSWCCA 228	Yes	User / Dealer	7g Cocaine	Yes	6y 6m [4y Np]	Sentence.	Allowed – Sentence ↓5y 6m [3y Np]
Kamminga [2003] NSWCCA 337	Yes	User / Dealer	22.1g Amphetamine	No	6y [3y Np]	Sentence	Allowed – Sentence ↓ 3y [2y Np]
Kdouh [2006] NSWCCA 140	Yes	User/ Dealer	0.9g Heroin	No	3y [2y Np]	Sentence	Dismissed
Khaled [2001] NSWCCA 169	Yes	Dealer	0.19g Heroin	No	4y [2y Np]	Sentence	Dismissed
Koklas [2003] NSWCCA 302	Yes	User/ Dealer	0.33g Heroin + 0.39g Cocaine	Yes	4y [2y Np]	Sentence	Dismissed
Kostecoglou [2002] NSWCCA 514	Yes	User / Dealer	? Heroin + Cocaine	s25A x4	3y 2m [12m Np]	Crown App Sentence	Dismissed
Ladocki [2004] NSWCCA 336	Yes *Ei*	User/ Dealer	15.9g Heroin	No	7y 6m [5y Np]	Sentence + Conviction	Dismissed
McArthur [2002] NSWCCA 390	Yes	Dealer	3g (approx) Amphetamine	No	14m [7m Np]	Sentence	Allowed – Sentence ↓ 10m [5m 20d]
Maessen [2004] NSWCCA 160	Yes *E*	Social	2.33g Amphetamine	3 x s.25(1) Supply	2y 9m [1y 9m Np]	Sentence	Allowed – Sentence ↓18m [1y 1m 4d Np]
Mucenski [2004] NSWCCA 299	Yes	Dealer	0.8g Cocaine	Yes	6y [4y 6m Np]	Sentence / Parity	Allowed – Sentence ↓ 4y 4m [2y 6m Np]
Nasr [2004] NSWCCA 441	Yes	User/ Dealer	? Amphetamine	Yes	3y [1y 8m Np] Periodic Detent.	Crown App Sentence	Allowed – Sentenced to Imprisonment.

Case Name	Covert Operations	Offender Type	Amount and Type of Drug	Add Supply/ Possession Charge/s	Sentence	Nature of Appeal	Appeal Outcome
Nuth [2001] NSWCCA 318	No	Dealer	Heroin	Yes	4y [2y Np]	Sentence	Allowed – Sentence ↓ 3y [18m Np]
O'Dowd [2002] NSWCCA 502	Yes	Dealer	20g Amphetamine	Yes	12y [9y Np]	Sentence	Allowed – Sentence ↓ 12y [7y Np]
Patek [2001] NSWCCA 315	Yes	User / Dealer	1.54g Heroin	Yes	27m [20m Np]	Crown App Sentence	Dismissed
Preston [2005] NSWCCA 177	Yes	User/ Dealer	60g Heroin	No	5y 6m [2y Np]	Sentence	Allowed – Sentence ↓ 3y 6m [1y 6m Np] concurrent
Radford [2002] NSWCCA 122	Yes	User / Dealer	0.78g + Heroin	Yes	6y [4y Np]	Sentence	Dismissed
Sakkar [2003] NSWCCA 26	Yes	User / Dealer	19.14g Cocaine	Yes	4y [18m Np]	Sentence	Dismissed
Sama [2005] NSWCCA 191	Yes ***E***	User / Dealer	Methadone + 0.079gHeroin	No	2y 6m [1y 3m Np]	Sentence	Dismissed
Schodde [2003] NSWCCA 164	Yes	User / Dealer	2.05g Amphetamine	No	3y [18m Np]	Sentence	Allowed – Sentence ↓ 3y [18m Np] Adjusted start date
Shaw [2001] NSWCCA 498	Yes	Dealer	? Amphetamine	Yes	30m	Conviction + Sentence	Allowed – Sentence 24m [12m Np]
Siljanovski; Kostdinovic [2003] NSWCCA 38	Yes	User / Dealer	47.6g Heroin	Yes	7y 6m [4y Np] (S); 2y 6m [1y 10m Np] (K)	Sentence / Parity	Allowed – Sent ↓(S) 6y [3y Np]Dismissed (K)
SJD [2004] NSWCCA 182	Yes ***E***	User / Dealer	707 tablets "MDMA"	Yes	25A = 1y + 25(2) = 2y 6m [18m Np]	Sentence	Allowed – Sent ↓(25(2)) = 2y 6m [1y Np]

Case Name	Covert Operations	Offender Type	Amount and Type of Drug	Add Supply/ Possession Charge/s	Sentence	Nature of Appeal	Appeal Outcome
Smiroldo [2000] NSWCCA 120	Yes *E*	User / Dealer	27.56g Amphetamine	No	4y 6m [2y 6m Np]	Sentence	Dismissed
Soo [2005] NSWCCA 161	Yes	Dealer	1kg+ Amphetamine	Yes	11y 6m [7y 6m Np]	Sentence	Allowed – Sentence start dates adjusted
Smith [2002] NSWCCA 378	No	Dealer	42.5g Amphetamine	Yes	4y [3y Np]	Sentence	Dismissed
Vo [2003] NSWCCA 124	Yes	User / Dealer	0.09g Heroin	No	3y 6m [2y 2m]	Sentence	Dismissed
Vu [2005] NSWCCA 266	Yes	Dealer	0.048g Cocaine	No	6y [4y 6m Np]	Sentence + Conviction	Conv. Dismissed – Sent. Allowed ↓ 4y [2y 6m Np]
Way [2004] NSWCCA 131	Yes	Dealer	9.7g Amphetamine	Yes	13y 4m [10y Np]	Sentence	Allowed – Sent. ↓ 9y 4m [7y Np]
Wilkie [2003] NSWCCA 69	Yes	User / Dealer	0.24g Heroin	Yes	3y [1y 10m Np]	Sentence / Parity	Allowed – Sent. ↓ 2y 6m [1y 6m Np]
Zakaria [2002] NSWCCA 450	Yes	User / Dealer	0.41g Cocaine	Yes	3y [18m Np]	Sentence	Dismissed
Zarei [2002] NSWCCA 350	Yes	User / Dealer	0.15g Cocaine	No	3y [18m Np]	Sentence	Dismissed

Cases

Attorney General's Reference (No 3 of 2000), R v Looseley [2001] UKHL 53.
Brennan v Peek [1948] 1 KB 68.
Bunning v Cross (1978) 141 CLR 54.
Dau v Emanuele (1995) 84 A Crim R 197.
Hampton v United States 425 US 484 (1976).
Hunt v Wark (1985) 40 SASR 489.
Ibbs v The Queen (1987) 163 CLR 447.
Jacobson v United States 503 US 540 (1992).
John Ibrahim v The Queen (Unreported, NSW District Court, Finnane DCJ, 05/11/0361).
Medina v The Queen (1995) 126 FLR 368.
Nicholas v The Queen (1998) 193 CLR 173.
R v Albu, R v Gheorghita (1995) 84 A Crim R 11.
R v Anderson (1987) 32 A Crim R 146.
R v Bijkerk (2000) 111 A Crim R 443.
R v Coster (1978) 1 NSWLR 515.
R v Coward (1985) 16 A Crim R 257.
R v D'Alencon [2003] NSWCCA 269.
R v D'Arrigo [1994] 1 Qd R 603.
R v Davidson (1996) 92 A Crim R 1.
R v De Simoni (1981) 147 CLR 383.
R v Dugan [1984] 2 NSWLR 554.
R v Ellis (2001) 125 A Crim R 419.
R v Fogg [2002] NSWCCA 395.
R v Glenda Jane Rangi (Unreported, NSW District Court, Coolahan DCJ, 01/11/0151).
R v Gordon [2002] NSWCCA 476.
R v Gudgeon (1995) 128 FLR 221.
R v Gyurka (2001) 120 A Crim R 407.
R v Hamzy (1994) 74 A Crim R 341.
R v Hennock [2002] NSWCCA 229.
R v Hide [2003] NSWCCA 371.
R v Hsing (1991) 25 NSWLR 685.
R v Huang; R v Lin [2001] NSWCCA 76.
R v Jolevski [2002] NSWCCA 273.
R v Kalache (2000) 111 A Crim R 152.
R v Karam (1995) 83 A Crim R 416.
R v Ladocki [2002] NSWCCA 442.
R v Lodocki [2004] NSWCCA 336.

R v Lawrence Raymond Kelly (Unreported, NSW District Court, Woods DCJ, 02/11/0148).
R v Mack [1988] 2 SCR 903.
R v Maessen [2004] NSWCCA 160.
R v Mandica (1980) 24 SASR 394.
R v Martelli (1995) 83 A Crim R 550.
R v Mealey and Sheridan (1974) 60 Cr App R 59.
R v N (1999) 106 A Crim R 493.
R v O'Dowd [2002] NSWCCA 502.
R v Olbrich (1999) 199 CLR 270.
R v Papoulias [1988] VR 858.
R v Rahme (1991) 53 A Crim R 8.
R v Richards (2001) 123 A Crim R 14.
R v Ridgeway (1994) 184 CLR 19.
R v Sahin (2000) 115 A Crim R 413.
R v Salem (1997) 96 A Crim R 421.
R v Sama [2005] NSWCCA 191.
R v Sang [1980] AC 402.
R v SJD [2004] NSWCCA 182.
R v Sloane (1990) 49 A Crim R 270.
R v Smiroldo (2000) 112 A Crim R 47.
R v Smurthwaite and Gill [1994] 1 All ER 898.
R v Soo [2005] NSWCCA 161.
R v Stead [1994] 1 Qd R.
R v Steffan [1993] 30 NSWLR 633.
R v Swift (1999) 105 A Crim R 279.
R v Thomson (1992) 58 A Crim R 451.
R v Tricouris (2000) 110 A Crim R 86.
R v Venn-Brown [1991] 1 Qd R 458.
R v Vuckov, R v Romeo (1986) 40 SASR 498.
Sherman v United States 356 US 369 (1958).
Sorrells v United States 237 US 435 (1932).
Taouk v The Queen (1992) 65 A Crim R 387.
United States v Jiminez Recio 123 SCt 819 (2003).
United States v Russell 411 US 423 (1973).
Veen v The Queen (No 2) (1988) 164 CLR 465.
Williams v DPP [1993] 2 All ER 365.

References

Abelson, D (2003) 'Sentencing Entrapment', *Marquette Law Review*, vol 86, no 4, pp 773-795.

Allen, M (1984) 'Entrapment: Time for Reconsideration', *Anglo-American Law Review*, vol 13, no 4, pp 57-84.

Ashworth, A (1998a) 'Should the Police be Allowed to Use Deceptive Practices?', *Law Quarterly Review*, vol 114, pp 108-140.

Ashworth, A (1998b) *The Criminal Process*, 2nd edn, Oxford University Press, Oxford.

Ashworth, A (2002) 'Redrawing the boundaries of entrapment', *Criminal Law Review*, pp 161-179.

Birch, D (1994) 'Excluding Evidence from Entrapment: What is a "Fair Cop"?', *Current Legal Problems*, vol 42, pp 73-99.

Bishop, J (1998) *Criminal Procedure,* 2nd ed, Butterworths, Sydney.

Braithwaite, J, Fisse, B & Geis, G (1987) 'Covert Facilitation and Crime: Restoring Balance to the Entrapment Debate', *Journal of Social Issues*, vol 43, no 3, pp 5-42.

Bronitt, S (2004) 'The Law of Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe', *Common Law World Review*, vol 33, no 1, pp 35-80.

Bronitt, S & McSherry, B (2005) *Principles of Criminal Law*, 2nd ed, Thomson LawBook Co, Sydney.

Bronitt, S & Roche, D (2000) 'Between Rhetoric and Reality: Sociolegal and Republican Perspectives on Entrapment', *International Journal of Evidence and Proof*, vol 4, no 2, pp 77-89.

Choo, A (1995) 'Undercover Police Operations and What the Suspect Said (or Didn't Say)' *Web JCLI.*

Colvin, E (2002) 'Controlled Operations, Controlled Activities and Entrapment', *Bond Law Review*, vol 14, pp 227-250.

Doherty, M (1999) 'Judicial discretion: victimizing the villains?', *International Journal of Evidence and Proof*, vol 3, no 44.

Dworkin, G (1985) 'The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime', *Law and Philosophy*, vol 4, pp 17-39.

Fisse, B (1988) 'Entrapment as a Defence', *Criminal Law Journal*, vol 12, pp 367-386.

Harris, W (1994) 'Entrapment', *Criminal Law Journal*, vol 18, pp 197-222.

Heydon, JD (1973) 'The Problems of Entrapment', *Cambridge Law Journal*, vol 32, no 2, pp 268-286.

Law Commission UK (1977) *Criminal Law Report on Defences of General Application* No 83.

Maher, L & Dixon, D (1999) 'Policing and Public Health', *British Journal of Criminology*, vol 39, no 4, pp 488-512.

Model Criminal Code Officers Committee (MCCOC) of the Standing Committee of Attorneys-General (1998) *Model Criminal Code Chapter 6 Serious Drug Offences Final Report.*

NSW Ombudsman (2005) *Law Enforcement (Controlled Operations) Act Annual Report 2004-2005.*

New South Wales, *Parliamentary Debates* (Legislative Assembly), Second Reading Speech, *Drug Misuse and Trafficking Amendment (Ongoing Dealing) Bill 1998*, 7 May 1998.

New South Wales, *Parliamentary Debates* (Legislative Assembly), *Drug Misuse and Trafficking Amendment (Ongoing Dealing) Bill 1998*, 2 June, 4 June 1998.

New South Wales, *Parliamentary Debates* (Legislative Council), *Drug Misuse and Trafficking Amendment (Ongoing Dealing) Bill 1998*, 24 June 1998.

New South Wales, *Parliamentary Debates* (Legislative Council), *Drug Misuse and Trafficking Amendment (Ongoing Dealing) Bill 1998*. 29 June 1998.

Presser, B (2001) 'Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence', *Melbourne University Law Review*, vol 25, no 3, pp 757-779.

Selway, B (2002) 'Principle, Public Policy and Unfairness – Exclusion of Evidence on Discretionary Grounds', *Adelaide Law Review*, vol 23, pp 1-28.

Roser, W (1993) 'Entrapment: have the Courts found a Solution to this Fundamental Dilemma to the Criminal Justice System', *Australian Law Journal*, vol 67, pp 722-743.

Wood, J (1997) Final Report, Royal Commission into the New South Wales Police Service, vol 2.