



Decriminalisation of drug use and possession in Australia – A briefing note

Key messages

LRRCS - INQUIRY INTO DRUG LAW REFORM
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1. **Decriminalisation does not mean legalisation:** decriminalisation removes criminal penalties for use/possession either by law (*de jure*) or by practice (*de facto*).
2. There is **strong public support** in Australia for decriminalisation approaches.
3. The **research evidence** indicates that decriminalisation of drug use:
 - Reduces the costs to society, especially the criminal justice system costs
 - Reduces social costs to individuals, including improving employment prospects
 - Does not increase drug use
 - Does not increase other crime
 - May, in some forms, increase the numbers of people who have contact with the criminal justice system (net widening)
4. **Many countries around the world** have decriminalised drug use and possession in various ways.
5. Australia currently has a **mixture of *de jure* and *de facto* decriminalisation** schemes for use and possession of illicit drugs: but decriminalisation is not universal. Accordingly, many people continue to be sent to court for possession of only minor quantities of drugs.
6. There is an **opportunity to expand decriminalisation for drug use in Australia**, particularly through *de jure* decriminalisation schemes targeting all illicit drugs. This may further reduce costs to the criminal justice system and to individuals.



Background

Currently there is debate about how Australia could better respond to illegal drugs and the associated harm. One frequently raised option is “decriminalisation of drug use and possession”.

This briefing paper explains:

- What decriminalisation is, and how it differs from prohibition and legalisation
- Public opinion on decriminalisation in Australia
- What the research evidence tells us about decriminalisation
- Which countries have adopted decriminalisation policies
- What currently occurs in Australia

What is decriminalisation?

Decriminalisation is the removal of criminal penalties for specific offences. When we talk about decriminalisation, we are talking about the offence of drug use or drug possession for personal use, not supply offences (such as manufacture, wholesale supply or trafficking)¹. That is, we are talking about removal of criminal penalties for drug use/possession.

Decriminalisation removes criminal penalties for use or possession of drugs for personal use. It does not mean legalisation.

Decriminalisation of drug use/possession is not the same as legalisation. Under decriminalisation, there is no legal means to obtain drugs for personal use (if a person carrying drugs for their own use is apprehended by police, the drugs will be confiscated). The key feature of decriminalisation is that drug use does not carry a criminal record at least in the first instance (much like many road traffic offences such as speeding) and this can have significant benefits for society and people who use drugs. Along a spectrum, decriminalisation sits between full prohibition (criminal penalties for all drug use that are applied in practice) and legalisation (drug use is legal).

There can be a variety of ways for decriminalisation to occur.² The biggest distinction is whether the reform is *de jure* or *de facto*. In a *de jure* reform criminal penalties for use/possession are removed in the law (with optional use of non-criminal sanctions). In a *de facto* reform criminal penalties remain in the law, but can be lessened in practice (eg via police guidelines to not enforce the law).

De jure decriminalisation can occur through:

- Removing criminal penalties;
- Replacing criminal penalties with civil penalties (such as a fine). (Criminal penalties may apply for people who fail to comply with the civil penalty);
- Replacing criminal penalties with administrative penalties (such as a ban on attending a designated site).

De facto decriminalisation can occur through:

- Non-enforcement of the law (through police discretion or police or prosecutorial guidelines);
- Referral of offenders to education/treatment instead of court. (Eligibility tends to be subject to criteria: such as that this be a first/second offence and criminal penalties may be enforced for non-compliance).

What do the Australian public think?

Australians support a range of non-criminal actions (that is, actions which equate with the decriminalisation of use/possession of illicit drugs). When asked: “What single action best describes what you think should happen to anyone found in possession of small quantities of cannabis/ecstasy/heroin/methamphetamine?” those surveyed in the 2013 National Drug Strategy Household Survey (N= 23,855) could select from a range of responses. The table below shows the results for each drug. As can be seen there is significant support for decriminalisation responses across all four drugs.

Table 1: Support for actions taken against people found in possession of selected illicit drugs for personal use

	Cannabis	Ecstasy	Heroin	Meth/ amphetamines
Action to be taken:				
A caution/warning or no action	42.1	12.5	3.1	4.3
Referral to treatment or education program	28.2	37.4	44.3	43.1
Fine	17.8	24.5	16.8	18.6
Sub-total decriminalisation support	88.1%	74.4%	64.2%	66.0%
Community service or weekend detention	5.8	10.3	10.0	11.4
Prison sentence	5.0	13.7	23.7	20.3
Some other arrangement	1.1	1.5	2.2	2.3

Source: NDSHS 2013; Respondents: aged 14 or older

What does the research evidence tell us about the effects of decriminalisation?

A number of international and Australian studies have considered the effects of decriminalisation (for a full list of studies, see the DPMP annotated bibliography: <https://ndarc.med.unsw.edu.au/resource/drug-law-reform-annotated-bibliography-2016>). Most studies have focussed on cannabis decriminalisation, but they cover different types of models e.g. *de jure* vs *de facto* reforms.

Is there any research showing negative effects of decriminalisation? Yes, one negative consequence of decriminalisation that has been reported in research is ‘net widening’.³ Net-widening occurs when more people are sanctioned after than before reform, due to the greater ease with which police can process minor drug offences. The extent of this depends on the specific choice of policy design and how the reform is implemented (eg whether the consequences for non-compliance are more severe than the original offence; the extent of police discretion). This means that the way in which decriminalisation is implemented is very important. Research has shown that decriminalisation does not lead to increases in crime (through perceptions of weaker laws). Indeed, people who do not receive a criminal record are much less likely to engage in future crime or have subsequent contact with the criminal justice system, even when you take into account their previous offending history. There is also no evidence that decriminalisation will lead to other types of crime, such as supply or drug-related crime.⁴

Is there research showing positive effects of decriminalisation? Yes, there are a number of positive outcomes associated with decriminalisation:



- *Decriminalisation reduces the demands on the criminal justice system:* Research shows that decriminalisation policies can lead to less use of police, court and prison. For example, total law enforcement costs in California dropped from \$17 million in the first half of 1975 (before decriminalisation) to \$4.4 million in the first half of 1976 (after decriminalisation).⁵
- *Decriminalisation improves employment prospects and relationships with significant others for those detected with drugs:* Evidence from a number of countries, including Australia, shows that decriminalisation can lead to improved social outcomes. For example, individuals who avoid a criminal record are less likely to drop out of school early, be sacked or to be denied a job.⁶ They are also less likely to have fights with their partners, family or friends or to be evicted from their accommodation as a result of their police encounter.

Does decriminalisation lead to increased drug use? No.

- *Decriminalisation has no or very small effects on rates of drug use:* Drug use rates don't change or dramatically increase when the laws are changed to introduce decriminalisation. Research from across the globe has consistently found that decriminalisation is not associated with significant increases in drug use⁷. And in instances where just cannabis has been decriminalised it has not led to increases in use of other drugs such as ecstasy or heroin.

As noted above much of the research has focussed solely on cannabis decriminalisation. Even so, the same effects have been achieved across all drugs (eg heroin, cocaine) in Portugal which decriminalised the use and possession of all illicit drugs in 2001 alongside a more comprehensive approach that expanded investment in drug treatment, harm reduction and social reintegration. Portugal demonstrated reductions in the burden on the criminal justice system, reductions in problematic drug use, reductions in drug-related HIV and AIDS, reductions in drug-related deaths, and lower social costs of responding to drugs.⁸

Does the model matter? Yes, *de facto* reforms tend to rely on the application of police/judicial discretion. This creates higher risk of inequity in terms of who avoids criminal sanctions: such as exclusion of disadvantaged and minority groups or geographic differences in policing. There is much less risk of inequity in *de jure* reforms, although any reform (whether *de jure* or *de facto*) that uses criteria to target particular groups of people or drug types risks inequitable outcomes.

Which countries have decriminalised drug use/possession?

Given the positive research evidence, it is not surprising that many countries have decriminalised drug use in various ways.⁹ For example, the following countries have decriminalised drug use/possession:

USA (11 states)	Italy	Colombia
Netherlands	Czech Republic	Argentina
Switzerland	Denmark	Mexico
France	Estonia	Paraguay
Germany	Ecuador	Uruguay
Austria	Armenia	Costa Rica
Spain	India	Jamaica
Portugal	Brazil	
Belgium	Peru	

Others are imminent (for example, in November 2015 the Irish Drugs Minister announced their intention to decriminalise possession of all illicit drugs).

What currently occurs in Australia?

Laws concerning use and possession of illicit drugs are largely the remit of states and territories, not the Commonwealth. As of 2016 in most state/territories drug use and possession is a criminal offence that can be sanctioned with up to two years prison.¹⁰ Does that mean that everyone detected by police is charged, convicted and sent to prison? No.

One key reason is that Australia has a number of forms of decriminalisation for drug use and possession in place. The system is complex: and the devil really is in the detail. But, we summarise here the response for adults specifically.

- *De jure* decriminalisation is provided in three state/territories: in the form of civil penalty schemes. It is only available for cannabis.
- *De facto* decriminalisation is provided in most states: in the form of ‘police referral to education/assessment/treatment’. These are often referred to as ‘drug diversion’ programs. Programs target cannabis and other illicit drugs e.g. cocaine and heroin.
- Both schemes may result in criminal penalties in cases of non-compliance (see Table A1).
- The specific options afforded in each state/territory are outlined in Table 2.

Table 2: Type of decriminalisation provided in Australia by police for people aged 18 and over, by type (*de jure* vs *de facto*), drug, and state/territory (as of 2016)

STATE	De jure reform		De facto reform	
	Cannabis	Other illicits	Cannabis	Other illicits
NSW			✓	
Qld			✓	
Vic			✓	✓
SA	✓			✓
WA			✓	✓
Tas			✓	✓
ACT	✓		✓	✓
NT	✓			✓

Key things to note:

1. All states provide some type of decriminalisation for cannabis (mainly *de facto*).
2. Six states provide decriminalisation for other illicit drugs (all *de facto*). This is not an option in NSW or Qld.
3. No state/territory has removed criminal penalties by law for possession of all illicit drugs.
4. Accordingly, many people continue to be sent to court for possession of only small quantities of drugs.

There are two final points to note about the Australian approach. First, access to all *de facto* decriminalisation schemes in Australia is controlled by “eligibility requirements.” For example, to be eligible people often have to admit the offence, not have been detected by police more than once or twice, and carry only a particular quantity of drug (e.g. 2 grams or less). Anyone who does not meet the strict requirements is processed through the usual



court mechanism. Such eligibility requirements can exclude those most marginalised and/or those most in need of diversion into treatment and rehabilitation.¹¹ *De jure* schemes have fewer eligibility restrictions (see Table A1) which increases program access and equity.

Second, despite population drug use rates remaining stable in Australia, the rates of drug use/possession detections are continuing to rise.¹² This means more people who use drugs risk getting charged, convicted and imprisoned for minor quantities of drugs.

Possible improvements for Australia?

There are a number of ways in which Australia could improve its policies:

1. Adoption of *de jure* decriminalisation for cannabis in all jurisdictions;
2. Adoption of *de jure* decriminalisation for drugs other than cannabis;
3. Amendment of *de jure* decriminalisation to remove criminal sanctions for non-compliance;
4. Amendment of *de facto* decriminalisation by removing strict eligibility requirements;
5. Amendment of *de facto* decriminalisation to remove criminal sanctions for non-compliance.

Resources

The DPMP have developed a bibliography of the main research reports and analyses of drug law reform options, available at: <https://ndarc.med.unsw.edu.au/resource/drug-law-reform-annotated-bibliography-2016>

ATTACHMENT

Table A1: De facto and de jure decriminalisation options provided in Australia by police and key requirements

Reform type and jurisdiction	Drugs	Scheme	Response	Allowable # of referrals	Response to non-compliance
DE JURE REFORMS					
ACT	Cannabis	Simple cannabis offence notice (SCON)	Fine	No limits	May result in criminal penalty
NT	Cannabis	Cannabis expiation scheme	Fine	No limits	Debt to state; may result in criminal prosecution
SA	Cannabis	Cannabis Expiation Notice (CEN)	Fine (Option to pay via community service)	No limits	Reminder notice, additional fee; automatic criminal conviction
DE FACTO REFORMS					
ACT	All illicit drugs (inc cannabis)	Police Early Diversion (PED) Program	Caution plus brief intervention	2 previous	May result in criminal penalty
NSW	Cannabis	Cannabis cautioning scheme	Caution plus information	1 previous	Recorded and court advised if subsequently re-offends
NT	Other illicit	Northern Territory Illicit Drug Pre-Court Diversion Program	Assessment + compulsory treatment	No limits	May result in criminal penalty
QLD	Cannabis	Police diversion program for minor offences	Assessment	1 previous	May result in criminal penalty
SA	Other illicit	SA Police Drug Diversion Initiative (PDDI)	Assessment + referral	No limits	May result in criminal penalty
TAS	All illicit drugs (inc cannabis)	Police diversion	Caution + brief intervention (for 3 rd assessment + compulsory treatment)	3 previous (in last 10 years)	May result in criminal penalty
VIC	Cannabis	Cannabis cautioning program	Caution plus education and optional referral	1 previous	Nil
VIC	Other illicit	Drug diversion program	Assessment + referral	1 previous	May result in criminal penalty
WA	Cannabis	Cannabis Intervention Requirement	Assessment + compulsory education	1 previous	May result in criminal penalty
WA	Other illicit	All drug diversion	Assessment + compulsory treatment	1 only	May result in criminal penalty

Source: Updated from Hughes, C. & Ritter, A. (2008). Monograph No. 16: A summary of diversion programs for drug and drug-related offenders in Australia. *DPMP Monograph Series*. Sydney, National Drug and Alcohol Research Centre. NB. Programs for youth are not included in the above. For details on other requirements including threshold limits see Hughes and Ritter (2008).



This briefing note was prepared in February 2016 and was accurate to the best of our knowledge at that time.

Endnotes

¹ In theory you can apply decriminalisation to low level supply offences, such as 'social supply' but here we focus only on use/possess offences.

² International Drug Policy Consortium (2015). Decriminalisation Comparison Tool: An e-tool. Accessible via: <http://decrim.idpc.net/>

³ Shiner, M. (2015). "Drug policy reform and the reclassification of cannabis in England and Wales: A cautionary tale." *International Journal of Drug Policy* 26(7): 696-704; Single, E., et al. (2000). "The impact of cannabis decriminalisation in Australia and the United States." *Journal of Public Health Policy*: 157-186.

⁴ Lenton, S., et al. (1999). Infringement versus Conviction: the Social Impact of a Minor Cannabis Offence Under a Civil Penalties System and Strict Prohibition in Two Australian States. Canberra, Department of Health and Aged Care; Shanahan, M., Hughes, C., McSweeney, T. (forthcoming). Australian police diversion for cannabis offences: Assessing program outcomes and cost-effectiveness. Canberra, National Drug Law Enforcement Research Fund; Males, M. & Buchen, L. (2014). "Reforming Marijuana Laws: Which Approach Best Reduces the Harms of Criminalization? A Five-State Analysis," San Francisco: Center on Juvenile and Criminal Justice.

⁵ Single, E., et al. (1999). The Impact of Cannabis Decriminalisation in Australia and the United States. South Australia, Drug and Alcohol Services Council. See also Baker and Goh (2004) <http://www.bocsar.nsw.gov.au/Documents/r54.pdf>

⁶ Lenton, S., et al. (1999). Infringement versus Conviction: the Social Impact of a Minor Cannabis Offence Under a Civil Penalties System and Strict Prohibition in Two Australian States. Canberra, Department of Health and Aged Care; Shanahan, M., Hughes, C., McSweeney, T. (forthcoming). Australian police diversion for cannabis offences: Assessing program outcomes and cost-effectiveness. Canberra, National Drug Law Enforcement Research Fund; Males, M. & Buchen, L. (2014). "Reforming Marijuana Laws: Which Approach Best Reduces the Harms of Criminalization? A Five-State Analysis," San Francisco: Center on Juvenile and Criminal Justice.

⁷ Babor, T. F., Caulkins, J. P., Edwards, G., Fischer, B., Foxcroft, D. R., Humphreys, K., . . . Strang, J. (2010). *Drug policy and the public good*. Oxford: Oxford University Press; Room, R., Fischer, B., Hall, W., Lenton, S., & Reuter, P. (2008). The Global Cannabis Commission Report: Cannabis Policy: Moving Beyond Stalemate Oxford: The Beckley Foundation; Home Office (2014). *Drugs: International Comparators*. London, Home Office.

⁸ Hughes, C. E. & A. Stevens (2010). "What can we learn from the Portuguese decriminalization of illicit drugs?" *British Journal of Criminology* 50(1): 999-1022. Gonçalves, R. et al.(2015) "A social cost perspective in the wake of the Portuguese strategy for the fight against drugs". *International Journal of Drug Policy* 26(2), 199 – 209

⁹ Rosmarin, A., & Eastwood, N. (2013). *A quiet revolution: Drug decriminalisation policies in practice across the globe*. London: Release.

¹⁰ Hughes, C. (2014). *Drugs and the law: what you need to know*. Sydney, National Drug and Alcohol Research Centre

¹¹ Hughes, C., Shanahan, M., Ritter, A., McDonald, D., & Gray-Weale, F. (2014). Monograph No. 25: Evaluation of the ACT drug diversion programs. DPMP Monograph Series Sydney, NDARC.

¹² IDDR 2013/2014 Annual Report: # of drug consumer arrests in 2011/12 was 76,165; in 2012/13 it rose to 83,042 and in 2013/14 (latest data available) it was 92,874.