



INQUIRY INTO THE CHALLENGES AND OPPORTUNITIES FOR LAW ENFORCEMENT IN ADDRESSING AUSTRALIA'S ILLICIT DRUG PROBLEM

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About

Turning Point is a national addiction treatment centre, dedicated to providing high quality, evidence-based treatment to people adversely affected by alcohol, drugs, and gambling, integrated with world-leading research and education. Turning Point is auspiced by Eastern Health and is formally affiliated with Monash University. Turning Point reduces the harms caused by alcohol, drugs and gambling and promotes recovery through integrated activity that: increases access to support and evidence-based practice using innovative technologies; delivers high quality evidence-based practice and supports health care professionals nationally and internationally to do the same; educates and trains the workforce to deliver programs to a broad range of populations; and underpins policy and practice relevant research and the provision of key national population level data that informs expert comment and policy advice to state, territory and federal governments.

The **Monash Addiction Research Centre (MARC)** brings together world-leading expertise from across Monash University and the sector to provide solutions to the challenges of addiction. MARC draws on the multidisciplinary strengths and capabilities of researchers across the University to develop and test novel, scalable prevention and treatment approaches. MARC's mission is to provide national solutions to addiction, leveraging expertise in basic and social science, clinical, and epidemiological research to develop new knowledge to shape government policy and evidence-based approaches.

1. Summary of recommendations

Turning Point and MARC welcome the opportunity to contribute to the Joint Committee on Law Enforcement's inquiry into the challenges and opportunities for law enforcement in addressing Australia's illicit drug problem. This submission recommends the Commonwealth Government works with states and territories to:

1. Decriminalise the personal possession and use of small quantities of all illicit drugs by either removing criminal penalties from the law or replacing them with civil penalties or administrative sanctions.
2. Harmonise and expand access to drug diversion programs so they are accessible and consistent across all Australian jurisdictions, including by ensuring:
 - a. police diversion is legislated and available for cannabis and other illicit drugs Australia-wide;
 - b. police cautioning discretion and any limits on the number of cautions people receive are removed;
 - c. no admission of guilt/offence is required to access diversion;
 - d. threshold quantities that distinguish between possession and supply-type offences, and quantities of drugs that determine eligibility for diversion are consistent, evidence-based, and considerate of use and purchasing patterns; and
 - e. treatment is an optional aspect of diversion.
3. Increase investment in treatment and support services to ensure they are accessible and support people to successfully participate in diversion programs.
4. Invest in drug checking services to improve data collection, better identify emerging trends and risks in illicit drug markets, and inform more effective public health responses.

2. Background

2.1. Criminalisation is a failed policy harming Australians

The global 'war on drugs' is one of the single greatest public policy failures in history. Not only has it failed to achieve its objective of preventing drug use and related harms, but it has also resulted in expanded drug markets and a more dangerous drug supply controlled by organised crime.¹

Criminalisation of the personal possession and use of drugs doesn't minimise harm, it maximises it. The harms of criminalisation are increasingly falling on children, including through parental incarceration or death,² becoming involved in the illicit drug trade,³ and having easy access to illicit drugs.⁴ Recognising the failure of criminalisation, at the United Nations General Assembly Special

¹ Alex Wodak, 'The Abject Failure of Drug Prohibition' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 190.

² For example, more than 50,000 Mexican children lost at least one parent to drug market-related violence between 2006 and 2010. Steve Rolles, *Legalizing Drugs: The Key to Ending the War* (New Internationalist, 2017) 46.

³ Damon Barrett, *The Impacts of Drug Policies on Children and Young People* (Report, May 2015) 8

<<https://www.opensocietyfoundations.org/publications/impact-drug-policies-children-and-young-people>>.

⁴ For example, a recent investigation found that in only two clicks, children using Instagram can easily find drug dealers on the platform, compared with legal drugs such as alcohol and tobacco, where purchase requires formal identification and licenced retailers caught selling to minors incur large penalties. 'Xanax, Ecstasy, and Opioids: Instagram Offers Drug Pipeline to Kids', *Tech Transparency Project* (Investigative Report, 7 December 2021) <<https://www.techtransparencyproject.org/articles/xanax-ecstasy-and-opioids-instagram-offers-drug-pipeline-kids>>.

Session in 2016, Canada promoted their plan to legalise and regulate cannabis as one that “ensures we keep marijuana out of the hands of children and profits out of the hands of criminals.”⁵

Criminalisation is not an effective deterrent. Drug-related deaths increased 60% worldwide between 2000 and 2015.⁶ Alcohol and illicit drug use now accounts for 1.5% of the global disease burden, and Australia has one of the highest rates of drug dependence-related health burdens in the world (3.46% in 2019).⁷ And despite rates of drug use in Australia remaining stable, more people who possess and use even small quantities of drugs risk criminal conviction and imprisonment due to increasing detection rates.⁸ Drug seizures also have little effect on drug-related crime and harm overall,⁹ with former Australian Criminal Intelligence Commission CEO Mike Phelan stating that “even when law enforcement make large seizures... we see it [drug use] go back up again.”¹⁰

2.2. Our priorities are out of order

The Case Categorisation and Prioritisation Model of the Australian Federal Police deems the possession of small quantities of drugs as having a low impact on Australian society,¹¹ yet an enormous amount of police time and funding are spent responding to minor drug offences. Scarce human and financial resources would be better spent responding to other law enforcement priorities deemed as very high impact, such as terrorism, cybercrime, and human trafficking.¹²

In 2021, drug-related harm cost the Australian economy an estimated \$12.9 billion, with justice and law enforcement the main driver of costs, accounting for \$5.8 billion (or 45%) of the total.¹³ Indeed, law enforcement consumes 61–69% of the total drug budget.¹⁴ The current focus of resourcing has resulted in the number of consumer drug arrests having more than doubled last decade, with 68,776 consumer arrests representing 80.7% of all drug arrests in 2009–10,¹⁵ increasing to 146,476 consumer arrests representing 88.1% of all drug arrests in 2019–20.¹⁶ Provider drug arrests are rare by comparison. In 2019–20, there were only 17,501 provider arrests representing 10.5% of all drug arrests,¹⁷ down from 15,624 provider arrests representing 18.3% of all drug arrests in 2009–10.¹⁸

Programs that target drug use upstream rather than downstream will help reduce demand for illicit drugs. Public health and community harm reduction programs are examples of upstream initiatives that help reduce drug-related harms and demand by targeting the causes rather than the symptoms

⁵ Rolles (n 2) 32, 46.

⁶ United Nations, *Statement by UN High Commissioner for Human Rights Michelle Bachelet to the Harm Reduction International Conference* (Web Page) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24529&LangID=E>>.

⁷ Hannah Ritchie and Max Roser, ‘Drug Use’, *Our World in Data* (Research Report, December 2019) <<https://ourworldindata.org/drug-use#disease-burden-from-substance-use-disorders>>.

⁸ Australian Criminal Intelligence Commission, *Illicit Drug Data Report 2019–20* (Report, 20 October 2021) 2 <<https://www.acic.gov.au/publications/illicit-drug-data-report/illicit-drug-data-report-2019-20>>.

⁹ Wai-Yin Wan et al, ‘Do Drug Seizures Predict Drug-Related Emergency Department Presentations or Arrests for Drug Use and Possession?’ (2016) 27 (January) *International Journal of Drug Policy* 74, 81; Elizabeth Eggins et al, *The Impact of Arrest and Seizure on Drug Crime and Harms: A Systematic Review* (Report, No 602, September 2020) 12 <https://www.aic.gov.au/sites/default/files/2020-09/ti602_impact_of_arrest_and_seizure_on_drug_crime_and_harms.pdf>.

¹⁰ Natalie O’Brien, ‘\$420 a Gram: Cocaine to Hit Record Price in Australia’, *Herald Sun* (online, 4 December 2022).

¹¹ Australian Federal Police, *The Case Categorisation and Prioritisation Model: Guidance for AFP Clients* (Guide, 12 December 2020) 6 <<https://www.afp.gov.au/about-us/operational-priorities/case-categorisation-and-prioritisation-model>>.

¹² Ibid 5.

¹³ Rethink Addiction and KPMG, *Understanding the Cost of Addiction in Australia* (Report, 2022) 9 <<https://www.rethinkaddiction.org.au/the-cost-of-addiction>>.

¹⁴ Alison Ritter, Ross McLeod and Marian Shanahan, *Government Drug Policy Expenditure in Australia – 2009/10* (Monograph, No 24, June 2013) 1 <<https://ndarc.med.unsw.edu.au/resource/24-government-drug-policy-expenditure-australia-200910>>.

¹⁵ Australian Criminal Intelligence Commission, *Illicit Drug Data Report 2009–10* (Report, June 2011) 128 <<https://apo.org.au/node/25422>>.

¹⁶ *Illicit Drug Data Report 2019–20* (n 8) 14, 168.

¹⁷ Ibid 168.

¹⁸ *Illicit Drug Data Report 2009–10* (n 15).

of Australia's illicit drug problem, but law enforcement also has a role to play. Section 4 provides examples of law enforcement making a positive contribution to harm reduction efforts.

Investment in anti-recidivism programs is also vital. In the United Kingdom, Durham Constabulary established a voluntary adult offender deferred prosecution scheme: *Checkpoint* takes a public health approach to policing and focuses on low level offenders arrested for behaviour such as drug possession, public intoxication, and theft.¹⁹ As an alternative to criminal prosecution, eligible offenders are given the opportunity to take part in a 4-month program where they work with a 'navigator' to address the reasons for their offending, such as alcohol and drug dependence, financial stress, and poor mental health, with the aim of reducing reoffending.²⁰ Trained in a broad range of psychological approaches such as motivational interviewing and person-centred care,²¹ navigators arrange for participants to attend treatment services and education programs and connect them with other services such as housing support.²² *Checkpoint* reduced participants' risk of reoffending by 30% compared to those who did not take part in the program.²³ It costs Durham Constabulary £480,000 a year to run *Checkpoint*, but it is estimated that for every 1,000 offenders who go through the program, at least £2,000,000 a year is saved because of reduced offending.²⁴

There is also a pressing need to invest more in treatment and support for addiction.²⁵ Treatment receives only 20–23% of the total drug budget,²⁶ yet we know that every dollar invested in treatment saves up to seven dollars,²⁷ and that every year roughly half a million Australians go without the treatment they need and deserve.²⁸ This large and unmet demand for treatment significantly contributes to police workload, because people won't limit or stop their drug use if they aren't receiving treatment, care, and support for their health struggles or addiction.

2.3. Our current approach is costly and ineffective

If the goal is to get people to stop using drugs, prison is one of the worst places they can be. The prison system is awash with illicit substances: 56% of people incarcerated in New South Wales said it was 'quite' or 'very' easy to obtain drugs in prison, and while in prison 22% reported using cannabis and 15.6% reported using methamphetamine.²⁹ Moreover, 12% of Queensland prisoners inject drugs while incarcerated,³⁰ with many likely sharing needles in the absence of needle and syringe programs that provide clean injecting equipment, increasing their risk of acquiring blood borne viruses.³¹

¹⁹ Kevin Weir, Gillian Routledge and Stephanie Kilili, 'Checkpoint: An Innovative Programme to Navigate People Away from the Cycle of Reoffending: Implementation Phase Evaluation' (2021) 15(1) *Policing: A Journal of Policy and Practice* 508, 515.

²⁰ Ibid.

²¹ Ibid 516.

²² Josh Halliday, 'Durham's Pioneering Police Scheme Slashes Reoffending Rates' *The Guardian* (online, 15 February 2020) <<https://www.theguardian.com/uk-news/2020/feb/14/durham-pioneering-police-scheme-slashes-reoffending-rates-rehabilitation-programme>>.

²³ Kevin Weir et al, 'Checkpoint: An Innovative Programme to Navigate People Away From the Cycle of Reoffending – A Randomised Control Trial Evaluation' (2021) 95(3) *The Police Journal: Theory, Practice and Principles* 1, 16.

²⁴ Halliday (n 22).

²⁵ London School of Economics Expert Group on the Economics of Drug Policy, *Ending the Drug Wars* (Report, May 2014) 8 <<https://www.lse.ac.uk/ideas/publications/reports/ending-drugs>>

²⁶ Ritter, McLeod and Shanahan (n 14).

²⁷ National Institute on Drug Abuse, *Principles of Drug Addiction Treatment* (Research-Based Guide, January 2014) 11 <<https://nida.nih.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/preface>>.

²⁸ Alison Ritter, Jenny Chalmers and Maria Gomez, 'Measuring Unmet Demand For Alcohol and Other Drug Treatment: The Application of an Australian Population-Based Planning Model' (2019) *Journal of Studies on Alcohol and Drugs, Supplement* 42, 47.

²⁹ Justice Health & Forensic Mental Health Network, *2015 Network Patient Health Survey* (Report, 2017) 64-65 <<https://www.justicehealth.nsw.gov.au/publications/research-publications>>.

³⁰ Stuart Kinner et al, 'High-Risk Drug-Use Practices Among a Large Sample of Australian Prisoners' (2012) 126(1-2) *Drug and Alcohol Dependence* 156, 157.

³¹ Angus Paterson, 'Needle and Syringe Programs in Prisons: Victoria's "Problematic" Policy Position' (2022) 29(1) *Journal of Law and Medicine* 67, 67.

Mass imprisonment tears at our social fabric and is an egregious misuse of public money³² that is projected to cost \$7 billion a year by 2030, if spending continues at its current rate.³³ In 2019–20, prisons alone cost state and territory governments \$5.2 billion.³⁴ More than half that cost results from recidivism (measured by people in prison who have been previously sentenced, or people who return to prison within 2 years of release).³⁵ Indeed, almost half of all people released from prison return to prison only, or both prison and community corrections, within two years.³⁶ The wider cost of the criminal justice system, including police, courts and corrective services was roughly \$20 billion in 2019–20.³⁷

Alternatives to prison, such as community corrections, are less costly and often have better outcomes. Indeed, if 1% of the Australian prison population was shifted to community corrections, \$45 million would be saved every year.³⁸ Treatment also reduces recidivism: only 22% of people who complete treatment for drug use reoffend, compared to 52% who do not receive treatment and 43% who commence treatment but do not complete the program.³⁹

2.4. Diverse and marginalised communities are disproportionately impacted

In Australia, First Nations people make up 3.8% of the population⁴⁰ yet represented 31.9% of the prison population in September 2022.⁴¹ In Western Australia, the First Nations imprisonment rate is the highest in the country, at 3,623 per 100,000, followed by the Northern Territory at 3,174 per 100,000.⁴² Many First Nations people entering prison have a history of alcohol and other drug use, contributing to an incarceration rate 16 times higher than that of non-First Nations people.⁴³

Likewise, people of diverse sexual orientations and gender identities are disproportionately impacted by the harms associated with the criminalisation of drug use, including stigma, discrimination, and reduced use of health services.⁴⁴ These communities also experience the after-effects of historical criminalisation and oppression, which can manifest in a reluctance to report crime due to assumptions of police hostility.⁴⁵ People from culturally and linguistically diverse backgrounds may also bypass treatment services and other support, only coming into contact with alcohol and other drug services due to their involvement in the criminal justice system.⁴⁶

³² Queensland Productivity Commission, *Imprisonment and Recidivism* (Summary Report, August 2019) 6 <https://apo.org.au/sites/default/files/resource-files/2020-01/apo-nid273991_1.pdf>.

³³ Committee for Economic Development of Australia, *Double Jeopardy: The Economic and Social Costs of Keeping Women Behind Bars* (Report, 4 November 2022) 18 <<https://www.ceda.com.au/ResearchAndPolicies/Research/Institutions/Double-jeopardy-The-economic-and-social-costs-of-k>>.

³⁴ Australian Government Productivity Commission, *Australia's Prison Dilemma* (Research Report, October 2021) 47 <<https://www.pc.gov.au/research/completed/prison-dilemma>>.

³⁵ Ibid 42, 47.

³⁶ 'Report on Government Services 2022', *Australian Government Productivity Commission* (Web Page, 28 January 2022) <<https://www.pc.gov.au/ongoing/report-on-government-services/2022/justice>>.

³⁷ *Australia's Prison Dilemma* (n 34) 55.

³⁸ Ibid 47.

³⁹ John Hepburn, 'Recidivism Among Drug Offenders Following Exposure to Treatment' (2005) 16(2) *Criminal Justice Policy Review* 237, 245.

⁴⁰ 'Estimates of Aboriginal and Torres Strait Islander Australians', *Australian Bureau of Statistics* (Web Page, 21 September 2022) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/jun-2021>>.

⁴¹ 'Corrective Services, Australia', *Australian Bureau of Statistics* (Web Page, 24 November 2022) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>>.

⁴² Ibid.

⁴³ Michael Doyle et al, 'Alcohol and Other Drug Use Among Aboriginal and Torres Strait Islander and Non-Aboriginal and Torres Strait Islander Men Entering Prison in New South Wales' (2015) 3(15) *Health & Justice* 1, 1.

⁴⁴ Ele Morrison, 'Drug Policy and Criminalisation: More Harm Than Good' (2015) 13(1) *HIV Australia* 35, 35.

⁴⁵ Angela Dwyer, 'Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature' (2011) 22(3) *Current Issues in Criminal Justice* 415, 415.

⁴⁶ Victorian Alcohol and Drug Association, *CALD AOD Project* (Final Report, March 2016) 46 <<https://www.vaada.org.au/wp-content/uploads/2018/03/CALD-AOD-Project-final-report.pdf>>.

3. Emerging trends, risks, and opportunities

3.1. Trends: Global

3.1.1. Cannabis use remains common

Cannabis is the most in-demand drug worldwide, with around 209 million people (4% of the global population) using cannabis in 2020.⁴⁷ Consistent with the finding that young people generally use drugs more than adults, cannabis use among those aged 15 to 16 years is also more prevalent, with 5.8% reportedly having used cannabis in 2020.⁴⁸

3.1.2. Opioid use has increased

Opioids account for two thirds of all drug-related deaths globally, with approximately 61 million people having used opioids in 2020, roughly double that of the decade prior, and of these an estimated 31 million used opiates, mainly heroin.⁴⁹

3.1.3. Novel psychoactive substances have increased

Since 2013, 137 jurisdictions around the world have reported the discovery of more than 1150 novel psychoactive substances (NPS).⁵⁰ The growing prevalence of NPS in the global drug market is reflected by the number of NPS detections having steadily increased from around 200 in 2011 to more than 500 in 2021. Synthetic opioids (a category of NPS) have been detected more frequently in recent years.⁵¹

3.1.4. Drug checking services have expanded

The first drug checking service was established in the Netherlands in 1992 with at least 30 now operating worldwide,⁵² including a pilot drug checking service established in the Australian Capital Territory in 2022.⁵³

3.2. Trends: Australia

The results of the National Drug Strategy Household Survey 2022 will not be available until mid to late 2023, but we know the following from the 2019 survey and other studies:

3.2.1. Cannabis use varies

Cannabis is the most used drug in Australia, and compared to the global rate of 4%, cannabis use is high, with 11.6% of Australians reporting use in the last 12 months.⁵⁴ Since 2001, recent cannabis use has declined among people aged 14 to 39 and increased among those aged 40 and over. Despite declining cannabis use in those aged 20 to 29, its use remains most common in this age group (23.8%), followed by those aged 30 to 39 (13.7%).⁵⁵

⁴⁷ United Nations Office on Drugs and Crime, *World Drug Report 2022, Executive Summary: Policy Implications* (Report, 2022) 28 <<https://www.unodc.org/unodc/en/data-and-analysis/world-drug-report-2022.html>>.

⁴⁸ Ibid 38.

⁴⁹ Ibid 28.

⁵⁰ United Nations Office on Drugs and Crime, *Current NPS Threats: Volume V* (Report, November 2021) 1 <<https://www.unodc.org/unodc/en/scientists/current-nps-threats.html>>.

⁵¹ Ibid 2.

⁵² Monica Barratt et al, *Global Review of Drug Checking Services Operating in 2017* (Bulletin, No 24, 2018) 11 <<https://ndarc.med.unsw.edu.au/resource/bulletin-no-24-global-review-drug-checking-services-operating-2017>>.

⁵³ 'CanTEST: Health and Drug Checking Service', *Directions Health* (Web Page, 2022) <<https://directionshealth.com/cantest/>>.

⁵⁴ 'Alcohol, Tobacco & Other Drugs in Australia: Cannabis', *Australian Institute of Health and Welfare* (Web Report, 14 December 2022) <<https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/drug-types/cannabis>>.

⁵⁵ Ibid.

3.2.2. Cocaine-related harm has increased

Recent cocaine use among Australians aged 14 and over has increased significantly, from 2.5% in 2016 to 4.2% in 2019. Among males aged 20 to 29, rates of recent use increased from 7.3% to 14.4% in the same time frame.⁵⁶ After a period of relative stability between 2001 and 2011, deaths related to cocaine use have accelerated significantly since 2012.⁵⁷ This is consistent with a reported increase in cocaine-related hospitalisations between 2011–12 and 2017–18.⁵⁸

3.2.3. Growing support for drug checking services

The Australian Capital Territory is currently trialling a fixed site drug checking service in Canberra (see section 3.5) after two successful mobile drug checking service trials offered at *Groovin the Moo* music festival.⁵⁹ In 2019, an inquest into the deaths of six people who died at music festivals by the Coroner's Court of New South Wales recommended that drug checking services be offered at music festivals, as well as the establishment of a permanent fixed site service and an early warning system.⁶⁰ After investigating the drug-related deaths of five men, the Victorian Coroner also recommended drug checking services and an early warning system in 2021.⁶¹

3.3. Risk: Opioids including fentanyl

North America is currently experiencing an overdose epidemic. In the United States, 56,516 people died of an overdose involving opioids in 2020, an increase of 55% from the previous year.⁶² In Canada, opioid-related deaths have increased by 91% in the last two years, with 90% of these deaths concentrated in Alberta, British Columbia, and Ontario.⁶³ Since 2013, this overdose epidemic has largely been driven by the introduction of synthetic opioids (primarily fentanyl) to the illicit drug market.⁶⁴

The scale of the problem in Australia remains comparatively minor.⁶⁵ Between 2001 and 2021, 37 deaths occurred in Australia due to illicitly manufactured fentanyl, compared to 774 attributable to the licit or illicit use of pharmaceutical fentanyl.⁶⁶ However, the threat of illicitly manufactured fentanyl remains and appears to be growing.

In 2015, 9 deaths were attributed to fentanyl-laced heroin in Melbourne, with 7 of these deaths occurring within a three-kilometre radius of one another in East Melbourne, and 4 of those 7 deaths

⁵⁶ 'Alcohol, Tobacco & Other Drugs in Australia: Meth/Amphetamine and Other Stimulants', *Australian Institute of Health and Welfare* (Web Report, 14 December 2022) <<https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/drug-types/meth/amphetamine-and-other-stimulants#consumption>>.

⁵⁷ Shane Darke et al, 'Rates, Characteristics and Toxicology of Cocaine-Related Deaths in Australia, 2000–2021' (2022) *Addiction* (forthcoming).

⁵⁸ Nicola Man et al, 'Trends in Cocaine Use, Markets and Harms in Australia, 2003–2019' (2021) 40(6) *Drug and Alcohol Review* 946, 952.

⁵⁹ Toni Makkai et al, *The ACT GTM Pill Testing Pilot: A Harm Reduction Service* (Report, June 2018) <<https://apo.org.au/node/179286>>; Anna Olsen, Gabriel Wong and David McDonald, *ACT Pill Testing Trial 2019: Program Evaluation* (Report, December 2019) <<https://apo.org.au/node/272326>>.

⁶⁰ State Coroner's Court of New South Wales, *Inquest Into the Death of Six Patrons of NSW Music Festivals* (Coronial Inquest, 8 November 2019) 135 <[https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2019/Music Festival Redacted findings in the joint inquest into deaths arising at music festivals.pdf](https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2019/Music%20Festival%20Redacted%20findings%20in%20the%20joint%20inquest%20into%20deaths%20arising%20at%20music%20festivals.pdf)>.

⁶¹ 'Coroner Calls for Urgent Drug Testing Services in Victoria', *Coroners Court of Victoria* (Media Release, 7 April 2021) <<https://www.coronerscourt.vic.gov.au/coroner-calls-urgent-drug-testing-services-victoria>>.

⁶² 'Drug Overdoses', *National Safety Council Injury Facts* (Data Table, 2022) <<https://injuryfacts.nsc.org/home-and-community/safety-topics/drugoverdoses/data-details/>>.

⁶³ 'Opioid- and Stimulant-Related Harms in Canada', *Government of Canada* (Web Page, 28 September 2022) <<https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants/>>.

⁶⁴ Daniel Ciccarone, 'The Triple Wave Epidemic: Supply and Demand Drivers of the US Opioid Overdose Crisis' (2019) 71 (September) *International Journal of Drug Policy* 183, 185.

⁶⁵ Tina Lam et al, 'Infrequent Detection of Unintentional Fentanyl Use Via Urinalysis Among People Who Regularly Inject Opioids in Sydney and Melbourne, Australia' (2022) 117(8) *Addiction* 2331.

⁶⁶ Amanda Roxburgh and Suzanne Nielsen, 'Twenty-Year Trends in Pharmaceutical Fentanyl and Illicit Fentanyl Deaths, Australia 2001–2021' (2022) 109 (November) *International Journal of Drug Policy* 1, 4.

occurred over a three-day period. The proximity in both time and location suggests that a batch of street heroin in this part of Melbourne was contaminated with fentanyl.⁶⁷ The New South Wales Government also issued a warning in January 2021, after fentanyl and acetyl fentanyl were detected in heroin in central Sydney.⁶⁸

The introduction of fentanyl to drug markets in North America can be explained by the *Iron law of Prohibition*, whereby barriers and costs imposed on illicit drug supply create pressure to minimise volume while maximising profit.⁶⁹ Bulky items become more expensive, which creates an incentive to seek out higher potency (and therefore cheaper) products.⁷⁰ This was observed during alcohol prohibition in the U.S., during which time the potency of alcohol products rose by more than 150% relative to pre-prohibition and declined by a similar amount post-prohibition.⁷¹ Fentanyl is 50 times more potent than heroin and 100 times more potent than morphine, so significantly more doses can be obtained from the same quantity of physical product.⁷² Coupled with the fact that smaller packages reduce the risk of interception, it is no surprise that drug traffickers have prioritised fentanyl over heroin or other opioids.⁷³

While current rates of fentanyl use and supply are comparatively low in Australia, this could change quickly given the financial incentive for organised criminals to increase profits by ‘cutting’ heroin with fentanyl. The interception of 11 kilograms of pure powdered fentanyl late last year, equating to 5 million doses, is further evidence that attempts to do so may already be underway.⁷⁴ However, no amount of resourcing will ever keep all illicit drugs from entering Australia, and with 5 million doses in a mere 11 kilograms of powdered fentanyl, the potential for harm is enormous and underscores the need for greater investment in overdose prevention and treatment such as opioid replacement therapy.

3.4. Risk: Novel psychoactive substances

Novel psychoactive substances (NPS) are synthetic compounds designed to mimic the effects of drugs currently deemed illicit while skirting laws that prohibit them.⁷⁵ In this way, prohibitionist laws create a perverse incentive to develop new drugs, which are frequently being detected in Australia and internationally and pose a significant health risk because their effects are not well known.⁷⁶ In Australia, 82 deaths between 2007 and 2017 have involved NPS.⁷⁷ Indeed, five young men died between July 2016 and January 2017 after unknowingly taking a combination of NPS instead of what

⁶⁷ Luke Rodda et al, ‘A Cluster of Fentanyl-Laced Heroin Deaths in 2015 in Melbourne, Australia’ (2017) 41(4) *Journal of Analytical Toxicology* 318, 321.

⁶⁸ ‘Heroin may contain fentanyl and acetylfentanyl, which are dangerous opioids’, NSW Health (Web Page, 28 January 2021) <<https://www.health.nsw.gov.au/aod/public-drug-alerts/Pages/heroin-may-contain-fentanyl-sydney-update.aspx>>.

⁶⁹ Richard Cowen, ‘How the Narcs Created Crack’ (1986) 38(23) *National Review* 26, 26; Leo Beletsky and Corey Davis, ‘Today’s Fentanyl Crisis: Prohibition’s Iron Law, Revisited’ (2017) 46 (August) *International Journal of Drug Policy* 156, 157.

⁷⁰ Beletsky and Davis (n 69).

⁷¹ Ibid; Mark Thornton, ‘Alcohol Prohibition Was a Failure’, *Cato Institute* (Policy Analysis, 17 July 1991) <<https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure>>.

⁷² ‘Fentanyl Facts’, Centre for Disease Control and Prevention (Web Page, 23 February 2022) <<https://www.cdc.gov/stopoverdose/fentanyl/index.html#>>.

⁷³ Michael Krausz et al, ‘Shifting North American Drug Markets and Challenges for the System of Care’ (2021) 15(86) *International Journal of Mental Health Systems* 1, 3.

⁷⁴ Nino Bucci, ‘Fentanyl Seizure: Experts Warn Potent Drug Could Rapidly Emerge as a Problem in Australia’, *The Guardian* (online, 22 August 2022) <<https://www.theguardian.com/australia-news/2022/aug/22/fentanyl-seizure-experts-warn-potent-drug-could-rapidly-emerge-as-a-problem-in-australia>>.

⁷⁵ ‘What are NPS?’, *UNODC Early Warning Advisory on New Psychoactive Substances* (Web Page) <<https://www.unodc.org/LSS/Page/NPS>>.

⁷⁶ *Current NPS Threats* (n 50).

⁷⁷ Shane Darke et al, ‘Characteristics and Circumstances of Death Related to New Psychoactive Stimulants and Hallucinogens in Australia’ (2019) 204 (November) *Drug and Alcohol Dependence* 1, 2.

they thought was MDMA. The coroner subsequently recommended the immediate establishment of drug checking services to mitigate the risks associated with NPS.⁷⁸

3.5. Opportunity: Enhance our understanding of the illicit drug market through drug checking services

Drug checking services provide an opportunity for people to anonymously submit substances for analysis to receive results regarding their chemical composition, purity, and the presence of any toxic or dangerous additives, while also receiving harm reduction information and counselling services. Drug checking can be conducted by mail or at mobile and fixed sites. These data can then be used to monitor trends in the drug market and alert the public to substances of concern through collaboration with police and health services. For example, *The Loop UK* operates drug checking services and shares their data with police, with one senior member of police noting that this data sharing has been “very informative” and “welcome[d] its continued use” because it gives them an understanding of new and emerging drug trends in the area that they were previously unaware of.⁷⁹

In the Netherlands, the government-funded *Drug Information and Monitoring System* (DIMS) has been testing people’s substances (mostly ecstasy, amphetamines, and hallucinogens) and monitoring the drug market through rigorous data collection since 1992.⁸⁰ According to a protocol developed in collaboration with the Dutch Ministry of Public Health and DIMS’ partners, when DIMS detects dangerous additives in a certain variety of pill or tablet, the public is warned via widespread ‘red alert’ media campaigns.⁸¹ Drugs included in these campaigns quickly leave the Dutch market and no further samples containing the additive are submitted for testing.⁸² For example, after a 2014 red alert campaign about a variety of ecstasy containing para-methoxy methamphetamine, the pill stopped circulating in the Netherlands, but not in the UK (which lacks a comprehensive drug monitoring system), where it caused numerous deaths.⁸³

CanTEST is Australia’s first fixed-site health and drug checking service, operating as a six-month pilot in Canberra.⁸⁴ Demand for the service is high, especially in the lead up to music festivals and events.⁸⁵ CanTEST has already proven that drug checking services can garner new insights into the drug market, after scientists working there discovered a new drug that has never been seen in Australia nor described anywhere else in the world.⁸⁶ Discoveries like this one, made possible through drug checking services analysing a regular throughput of substances in local markets, provide a clearer picture of illicit substances currently available on the market.

As the Australian Criminal Intelligence Commission has noted, “No single dataset provides a comprehensive picture of illicit drugs, or the Australian illicit drug market. Each has benefits and

⁷⁸ ‘Coroner calls for Urgent Drug Testing Services in Victoria’, *Coroners Court of Victoria* (Media Release, 7 April 2021)

<<https://www.coronerscourt.vic.gov.au/coroner-calls-urgent-drug-testing-services-victoria#>>.

⁷⁹ ‘About Drug Checking’, *The Loop* (Web Page) <<https://wearetheloop.org/about-drug-checking>>; ‘Testimonials’, *The Loop* (Web Page) <<https://wearetheloop.org/testimonials>>.

⁸⁰ Tibor Brunt and Raymond Niesink, ‘The Drug Information and Monitoring System (DIMS) in the Netherlands: Implementation, Results, and International Comparison’ (2011) 3(9) *Drug Testing and Analysis* 621, 622.

⁸¹ ‘About DIMS’, *Trimbos Institute* (Web Page) <<https://www.drugs-test.nl/en/about-dims/>>.

⁸² ‘Pragmatic Dutch: “We Have Been Testing Illegal Drugs for 25 Years”’, *SBS Dutch* (SBS Radio, 13 February 2019) 00:02:34 <<https://www.sbs.com.au/language/english/audio/pragmatic-dutch-we-have-been-testing-illegal-drugs-for-25-years>>; Inge Spruit, ‘Monitoring Synthetic Drug Markets, Trends, and Public Health’ (2001) 36(1-2) *Substance Use & Misuse* 23, 38.

⁸³ ‘Pragmatic Dutch’ (n 82) 00:03:00; ‘Three Dead in Suffolk After ‘Taking Ecstasy From Dangerous Batch’’, *BBC News* (online, 1 January 2015) <<https://www.bbc.com/news/uk-england-suffolk-30648419>>.

⁸⁴ ‘Pill Testing’, *ACT Government* (Web Page, 19 July 2022) <<https://www.health.act.gov.au/about-our-health-system/population-health/pill-testing>>.

⁸⁵ Georgia Roberts, ‘Demand So High for Canberra’s Pill-Testing Service That 27 People Were Turned Away Ahead of Spilt Milk Music Festival’, *ABC News* (online, 1 December 2022) <<https://www.abc.net.au/news/2022-12-01/almost-30-turned-away-cantest-drug-testing-ahead-of-spilt-milk/101710630>>.

⁸⁶ ‘ANU Scientists Make Australian-First Detection of New Drug’, *Australian National University* (Blog Post, 19 October 2022) <<https://www.anu.edu.au/news/all-news/anu-scientists-make-australian-first-detection-of-new-drug>>.

limitations, and it is only through the layering of multiple data that we are able to enhance our understanding of the extent of the supply and demand trends in Australia's illicit drug markets."⁸⁷ The implementation of additional drug checking services across Australia would support the creation of a powerful dataset to supplement the following existing data sets:

- The National Drug Strategy Household Survey, which collects self-reported information on alcohol, tobacco, and illicit drug use among the general population. Conducted approximately every three years, the survey also captures people's attitudes and perceptions in relation to these drugs;⁸⁸
- The National Wastewater Drug Monitoring Program, which collects bimonthly wastewater samples in capital city sites and every four months in regional sites to acquire population level data on the use of 13 illicit and licit drugs;⁸⁹
- The Illicit Drug Reporting System, which collects self-reported information on drug use and related harms annually from individuals in Australian capital cities who regularly inject drugs;⁹⁰
- The Ecstasy and Related Drugs Reporting System, which collects self-reported information on drug use and related harms annually from individuals in Australian capital cities who regularly use ecstasy and other stimulants;⁹¹ and
- The Drug Use Monitoring in Australia program, which collects quarterly criminal justice and drug use information from police detainees through interviewer-assisted self-report surveys and voluntarily provided urine samples that are tested for licit and illicit substances.⁹²

Drug checking services should be expanded across the country, not only as a harm reduction measure, but to support public health responses and provide more detailed insights into the state of the illicit drug market. Importantly, the success of drug checking services depends on service users' willingness to use them; a willingness that is based on the service users being anonymous and not targeted by police.

A poll conducted in 2019 found a clear majority of respondents supported drug checking services at music festivals, including 73% of Labor voters, 74% of Greens voters, and 57% of Liberal/National voters.⁹³ In the Australian Capital Territory, where drug checking trials have taken place at music festivals and fixed site locations, support for drug checking services is the highest, suggesting that exposure to these services increases acceptability.⁹⁴ The Parliamentary Budget Office recently estimated that the operation of 18 drug testing sites, as well as an Australian drug testing agency and national drug warning system, would cost only \$16 million per annum.⁹⁵

⁸⁷ *Illicit Drug Data Report 2019–20* (n 8) 60.

⁸⁸ 'National Drug Strategy Household Survey', *Australian Institute of Health and Welfare* (Web Page, 20 July 2022) <<https://www.aihw.gov.au/about-our-data/our-data-collections/national-drug-strategy-household-survey>>.

⁸⁹ 'National Wastewater Drug Monitoring Program Reports', *Australian Criminal Intelligence Commission* (Web Page, 26 October 2022) <<https://www.acic.gov.au/publications/national-wastewater-drug-monitoring-program-reports>>.

⁹⁰ 'The Illicit Drug Reporting System (IDRS)', *National Drug & Alcohol Research Centre* (Web Page, 2022) <<https://ndarc.med.unsw.edu.au/project/illicit-drug-reporting-system-idrs>>.

⁹¹ 'The Ecstasy and Related Drugs Reporting System (EDRS)', *National Drug & Alcohol Research Centre* (Web Page, 2022) <<https://ndarc.med.unsw.edu.au/project/ecstasy-and-related-drugs-reporting-system-edrs>>.

⁹² 'Drug Use', *Australian Institute of Criminology* (Web Page, 2022) <<https://www.aic.gov.au/statistics/drug-use>>.

⁹³ Gareth Hutchens, 'Overwhelming Majority of Voters Support Pill Testing – Guardian Essential Poll', *The Guardian* (Online, 15 January 2019) <<https://www.theguardian.com/australia-news/2019/jan/15/overwhelming-majority-of-voters-support-pill-testing-guardian-essential-poll>>.

⁹⁴ Ian Mcallister and Toni Makkai, 'The Effect of Public Opinion and Politics on Attitudes Towards Pill Testing: Results From the 2019 Australian Election Study' (2021) 40(4) *Drug and Alcohol Review* 521, 526.

⁹⁵ Gareth Hutchens, 'Pill-Testing: Budget Office Finds it Would Cost \$16m to Put Services in Major Cities', *The Guardian* (Online, 9 November 2018) <<https://www.theguardian.com/society/2018/nov/09/pill-testing-budget-office-finds-it-would-cost-16m-to-put-services-in-major-cities>>.

3.6. Opportunity: Ambulance data to support efficient use of law enforcement resources and enhanced understanding of drug-related violence

Turning Point established and maintains the National Ambulance Surveillance System (NASS), a public health surveillance dataset, in partnership with jurisdictional ambulance services, that captures detailed information on alcohol and other drug, suicide, self-harm, and mental health-related presentations.⁹⁶ Data available in NASS includes the location of ambulance attendances, the time and duration of the attendance, whether police co-attended, and outcomes (such as transportation to hospital). NASS also has the capacity to capture the following violence-related information: type of violence, the role of the patient (e.g., perpetrator or victim-survivor), and whether any third party was involved. A feasibility study describing the utility of examining violence in NASS data has been published by the Australian Institute of Criminology,⁹⁷ and other studies have also used these data to examine the relationship between alcohol-related family violence in both victims and perpetrators.⁹⁸

NASS is a powerful and internationally unique dataset that has been utilised by state governments to monitor trends, identify where harm is occurring, and inform public policy decision-making. NASS has the potential to support intelligence and surveillance operations, including identification of high-risk locations where harm is greatest, as well as the impact of targeted police operations related to alcohol, drugs, and violence.

4. Law enforcement and harm reduction

4.1. Victoria Police e-Referral system

The Victoria Police e-Referral system (VPeR) is a statewide electronic referral system that enables police members, in the course of their day-to-day duties, to refer people to treatment and support services for alcohol and other drug concerns. VPeR is used when no offence has been committed, or to support counselling and referral for people affected by someone else's offending.

In 2021–22, Victoria Police made 2,699 referrals through VPeR, responding to concerns related to alcohol and drug use, as well as drink or drug driving. Through Victoria Police's referral via VPeR, Victoria's alcohol and drug helpline, DirectLine, was able to contact people experiencing alcohol or drug-related harm and provide them with harm reduction information, advice, a brief intervention and where appropriate, referral to treatment services or other support they may need. If the person is unable to be reached by phone, they are sent a text message with DirectLine contact details.

The VPeR program provides the opportunity for people who have come into contact with police but who have not committed an offence to be referred to treatment or receive a formal, brief intervention, which can help address any alcohol or other drug-related harm and limit further contact with police or the criminal justice system.

⁹⁶ Dan Lubman et al, 'The National Ambulance Surveillance System: A Novel Method for Monitoring Acute Alcohol, Illicit and Pharmaceutical Drug Related-Harms Using Coded Australian Ambulance Clinical Records' (2020) 15(1) *PLoS ONE* 1; Dan Lubman et al, 'National Ambulance Surveillance System: A Novel Method Using Coded Australian Ambulance Clinical Records to Monitor Self-Harm and Mental Health-Related Morbidity' (2020) 15(7) *PLoS ONE* 1.

⁹⁷ Debbie Scott et al, *The Feasibility and Utility of Using Coded Ambulance Records for a Violence Surveillance System: A Novel Pilot Study* (Research Report, No 595, April 2020) <<https://www.aic.gov.au/publications/tandi/tandi595>>.

⁹⁸ Debbie Scott et al, 'Alcohol Accessibility and Family Violence-Related Ambulance Attendances' (2022) 37(13-14) *Journal of Interpersonal Violence* NP10661.

4.2. Drug driving referrals

After a successful trial, Turning Point is finalising a partnership with VicRoads to provide brief interventions and where appropriate, referral to treatment, for people detected drink or drug driving. Referrals to the program will be made by Victoria Police at the point of detection. In conjunction with police, Turning Point staff will also trial being present at drug detection buses where they can offer people brief advice or make an e-referral to telephone support sessions.

During these telephone support sessions, highly trained counsellors provide people detected drink or drug driving with information and pragmatic advice about the process of getting their licence back. They also provide support on how to prepare and cope with being unlicensed, discuss any alcohol or drug issues, and identify the person's next steps including any other mental health support they may need.

The trial phase of the telephone-based intervention was well-received by participants, all of whom agreed they felt better informed about the process that occurs after being detected drink or drug driving, the steps to getting their licence re-issued, and the potential legal consequences if they continue to drink or drug drive. This program is highly valuable because it provides a chance to intervene during an opportune 'teaching moment' when people may be particularly open to making changes, after recognising the link between the driving offence and their alcohol or other drug use.

5. Decriminalisation

5.1. Widespread support for decriminalisation

The decriminalisation of the personal possession and use of drugs is supported by former police commissioners, peak medical bodies, public health and drug policy experts, and international agencies, including the following:

- the Royal Australian College of General Practitioners,⁹⁹ the Royal Australasian College of Physicians,¹⁰⁰ the Royal Australian and New Zealand College of Psychiatrists,¹⁰¹ and the Australian Medical Association;¹⁰²
- a group of Australian former police commissioners (including Mick Palmer AO APM, former Commissioner of the Australian Federal Police), retired judges, prosecutors, prison and parole administrators, and drug law experts, who in their 2017 report not only recommended that national drug policy move toward decriminalisation of drug use, but that all drugs currently deemed illicit eventually be regulated.¹⁰³ Former premiers Jeff Kennett and Bob Carr launched the report, with Kennett saying, "what we are doing [criminalising

⁹⁹ 'RACGP: Alcohol and Other Drug Problems Are Health Issues', *Royal Australian College of General Practitioners* (Media Release, 23 February 2022) <<https://www.racgp.org.au/gp-news/media-releases/2022-media-releases-1/february-2022/racgp-alcohol-and-other-drug-problems-are-health-i->>.

¹⁰⁰ Royal Australasian College of Physicians, Submission No 224 to Law Reform, Road and Community Safety Committee, Parliament of Victoria, *Inquiry into Drug Law Reform* (30 March 2017) 3 <https://www.parliament.vic.gov.au/images/stories/committees/lrrcsc/Drugs/_Submissions/224_2017.03.30_-_Royal_Australasian_College_of_Physicians_-_submission.pdf>.

¹⁰¹ Royal Australian and New Zealand College of Psychiatrists, Submission No 4110 to National Ice Taskforce, *National Ice Taskforce Consultation* (29 May 2015) 8 <<https://www.ranzcp.org/files/resources/submissions/4110-ranzcp-sub-president-to-k-lay-re-national-ice.aspx>>.

¹⁰² Australian Medical Association, *Harmful Substance Use, Dependence and Behavioural Addiction (Addiction)* (Position Statement, 2 August 2017) 1 <<https://www.ama.com.au/position-statement/harmful-substance-use-dependence-and-behavioural-addiction-addiction-2017>>.

¹⁰³ Mick Palmer et al (eds), *Can Australia Respond to Drugs More Effectively and Safely?* (Roundtable Report, September 2015) 7-8 <<https://apo.org.au/node/74641>>.

drug possession and use] is simply not good enough,”¹⁰⁴ and appealing to “legislators today with the courage to try something different”;¹⁰⁵

- an international commission of medical experts, which in 2016 called for global decriminalisation of drug use, possession, and petty sale.¹⁰⁶ The Fair Treatment partnership for drug law and policy reform has over 60 organisational partners from Australia and overseas representing researchers, health, policy, legal and law enforcement professionals, social workers, drug users and diverse communities;¹⁰⁷ and
- the United Nations Chief Executives Board for Coordination, representing 31 UN agencies, which in 2018 issued a statement highlighting the need to “promote prevention and treatment, including harm reduction; and enhance action by justice and law enforcement systems to stop organised crime and protect – rather than target – people who use drugs.”¹⁰⁸

5.2. Types of decriminalisation

Decriminalisation is not the same as legalisation. In law (or *de jure*) decriminalisation would see drug use remain illegal, but criminal penalties for personal possession and use of drugs would either be removed from the law or replaced with civil penalties such as fines, or administrative penalties such as restrictions on attending designated areas. By comparison, in practice (*de facto*) decriminalisation retains criminal penalties in law but seeks to prevent them from being applied.¹⁰⁹

5.3. We already have *de facto* decriminalisation

Drug diversion programs are a form of *de facto* decriminalisation for personal drug possession and use, which aim to keep people out of the criminal justice system by redirecting them to education and treatment.¹¹⁰

Diversion can be a result of police diversion (such that people are not charged with an offence), court diversion (such that people are not convicted of an offence they have been charged with), or custodial diversion (such that people convicted of drug offences avoid custodial sentences).¹¹¹ In all cases, people must comply with conditions (such as paying a fine, accessing assessment or treatment within a certain timeframe / as a condition of parole, or admitting the offence) to avoid being charged, convicted or sentenced.

In addition to police diversion, police also act as gatekeepers for court diversion. For example, to be eligible for court diversion in Victoria, the police officer responsible for the matter must recommend diversion and have this approved by their station Sergeant, with another barrier being that the person must plead guilty to the offence. The focus hereafter will be on police diversion programs.

¹⁰⁴ Karen Percy, ‘Jeff Kennett Backs Drug Decriminalisation in Australia, Says Current Approach ‘Not Good Enough’, *ABC News* (online, 20 March 2017) <<https://www.abc.net.au/news/2017-03-20/jeff-kennett-backs-drug-decriminalisation-in-australia/8369970>>.

¹⁰⁵ Elle Hunt, ‘Former Premiers and Australian Police Chiefs Call for Drug Decriminalisation’, *The Guardian* (online, 20 March 2017) <<https://www.theguardian.com/australia-news/2017/mar/20/former-premiers-and-australian-police-chiefs-call-for-drug-decriminalisation>>.

¹⁰⁶ Joanne Csete et al, ‘Public Health and International Drug Policy’ (2016) 387(10026) *The Lancet Commissions* 1, 6.

¹⁰⁷ ‘Fair Treatment Campaign’, *Uniting Church* (Web Page) <<https://nswact.uca.org.au/social-justice/the-social-justice-forum/fair-treatment-campaign/>>.

¹⁰⁸ United Nations Chief Executive Board for Coordination, *Second Regular Session of 2018* (Document for Sessions, 18 January 2019) <<https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>>.

¹⁰⁹ Caitlin Hughes et al, *Decriminalisation of Drug Use and Possession in Australia* (Briefing Note, 2016) 2

<<https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/Decriminalisation%20briefing%20note%20Feb%202016%20FINAL.pdf>>.

¹¹⁰ *Ibid* 5-6.

¹¹¹ Australian Institute of Health and Welfare, *Alcohol and Other Drug Treatment and Diversion From the Australian Criminal Justice System* (Bulletin, No 125, October 2014) 4 <<https://www.aihw.gov.au/reports/alcohol-other-drug-treatment-services/diversion-from-australian-criminal-justice-system/contents/table-of-contents>>.

Police diversion is currently available in all Australian jurisdictions, but there are many inconsistencies, examples of which are detailed in the following case studies.

5.3.1. Case study: police diversion in the ACT

While it is an offence for any person to possess ≤50g dried cannabis or ≤150g harvested cannabis in the ACT,¹¹² an exception for adults was introduced in 2020, enabling them to possess these small quantities of cannabis and cultivate up to two cannabis plants without the threat of criminal liability.¹¹³ It remains an offence for people under the age of 18 to possess or use cannabis in any amount.¹¹⁴ *Simple cannabis offences* are those relating to the possession of small quantities of cannabis or the cultivation of 1 or 2 cannabis plants.¹¹⁵ People under the age of 18 who commit simple cannabis offences are issued with an expiation/infringement notice and have 60 days to pay a \$100 fine to avoid possible criminal penalties.¹¹⁶

The Illicit Drug Diversion Program in the ACT is a partnership between ACT Policing and the ACT Health Directorate and aims to keep people found in possession of small amounts of any drug out of the justice system by diverting them to assessment, education, counselling and/or other treatment. If they comply with the requirements of their diversion, no conviction is recorded on their criminal record.¹¹⁷

These existing arrangements will be simplified from October 2023 with the introduction of *simple drug offence notices* for cannabis, drugs of dependence, and prohibited substances.¹¹⁸ Anyone found to possess *small quantities* of cannabis, drugs of dependence such as cocaine, or prohibited substances such as heroin,¹¹⁹ will be issued with a simple drug offence notice. People who receive these notices will have to either pay a fine or satisfy attendance requirements at an *approved drug diversion program* (i.e., assessment or treatment program) within 60 days to avoid criminal penalties,¹²⁰ including a maximum 6-month prison sentence (reduced from 2 years for cannabis, drugs of dependence, and prohibited substances).¹²¹

5.3.2. Case study: police diversion in SA

The Cannabis Expiation Notice Scheme creates *simple cannabis offences* for the cultivation of one cannabis plant, possession of up to 100g of cannabis / 20g of cannabis resin, and smoking or consuming (i.e. using) cannabis in private.¹²² Any person found committing these offences must receive an expiation notice either on-the-spot or by post, the fee of which must be paid within 28 days.¹²³ Once the fee is paid, the person is no longer liable for prosecution and payment of the fee is not considered an admission of guilt.¹²⁴ Fees vary depending on the type of offence, ranging from \$250 for use of cannabis or possession of <25g of cannabis / <5g cannabis resin, to \$400 for

¹¹² *Drugs of Dependence Act 1989* (ACT) ss 171AA(1).

¹¹³ *Ibid* ss 162, 171AA(3).

¹¹⁴ *Ibid* ss 171AA(1)-(3).

¹¹⁵ *Ibid* s 171A(7).

¹¹⁶ *Ibid* ss 171A(3)(c), 171A(8).

¹¹⁷ 'Youth Alcohol and Drug Diversion Programs', *ACT Policing* (Web Page) <<https://www.police.act.gov.au/about-us/programs-and-partners/youth-alcohol-and-drug-diversion-programs>>.

¹¹⁸ *Drugs of Dependence (Personal Use) Amendment Act 2022* (ACT) s 9.

¹¹⁹ For example, a small quantity of heroin will be 1.0g and cocaine will be 1.5g. Small quantities are defined in the *Drugs of Dependence Regulation 2009* (ACT); *Drugs of Dependence (Personal Use) Act 2022* (ACT) s 14.

¹²⁰ *Drugs of Dependence (Personal Use) Amendment Act 2022* (ACT) s 9 Section 171A(3)(c)(i-ii).

¹²¹ *Ibid* ss 5-6.

¹²² *Controlled Substances Act 1984* (SA) s 45A(8)(a)-(c).

¹²³ *Expiation of Offences Act 1996* (SA) s 6(c),(j).

¹²⁴ *Ibid* ss 15(1), 15(4)(a).

possession of >25g – ≤100g of cannabis / >5g – ≤20g cannabis resin, and cultivation of one cannabis plant.¹²⁵

The Police Drug Diversion Initiative requires by law that any person found committing a simple possession offence (possession or use of any controlled substance excluding cannabis)¹²⁶ must be referred to an assessment service.¹²⁷ The referral acts as a stay of proceedings, effectively halting a prosecution.¹²⁸ If the person referred to assessment does not attend the service, the referral can be terminated and the case proceeds in court.¹²⁹ After assessment, the diverted person enters into an ‘undertaking’ for up to 6 months, during which time they must take part in treatment or other educational, preventive, or rehabilitative programs.¹³⁰ If they complete the undertaking, no criminal charges are laid.¹³¹ A person is not eligible for this scheme if they have already been diverted twice in the last four years.¹³²

Both the Cannabis Expiation Notice Scheme and the Police Drug Diversion Initiative are legislated and leave no room for police discretion. The effect of this is evident, as 98% of all drug offenders in South Australia were served a diversion between 2010–11 and 2014–15, compared with the national average rate of diversion being just 55%.¹³³

5.3.3. Case study: police diversion in Vic

In Victoria, it is illegal to use and/or possess any ‘drug of dependence’, which includes substances like cannabis, cocaine, ecstasy, amphetamines, and heroin.¹³⁴ Use of cannabis and possession of up to 50g is punishable with a fine of up to \$924.60.¹³⁵ People found in possession of a small amount of cannabis can be cautioned by police and referred to the voluntary Cannabis Caution Program, provided they admit to the offence. This means they will not be charged or receive a criminal record.¹³⁶ Possessing an amount of cannabis greater than 50g but less than 250g is punishable by a fine of up to \$5,547.60 or up to a year in jail.¹³⁷

For illicit drugs other than cannabis, possession or use of a small amount carries a maximum penalty of one year in jail and/or a fine of up to \$5,547.60.¹³⁸ Victoria Police can also divert people found in possession of “small amounts”¹³⁹ of illicit drugs for personal use. People who have been diverted by police must admit to the offence and engage in compulsory assessment and treatment through contact with the Drug Diversion and Appointment Line. People can only receive a maximum of two diversions before they are no longer eligible.¹⁴⁰

¹²⁵ *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* (SA) sch 5.

¹²⁶ *Controlled Substances Act 1984* (SA) s 33L(1).

¹²⁷ *Ibid* s 36(1).

¹²⁸ *Ibid* s 36(3).

¹²⁹ *Ibid* s 37(3).

¹³⁰ *Ibid* s 38.

¹³¹ *Ibid* s 38(3)(b).

¹³² *Ibid* s 34(1)(c).

¹³³ Caitlin Hughes et al, *Criminal Justice Responses Relating to Personal Use and Possession of Illicit Drugs: The Reach of Australian Drug Diversion Programs and Barriers and Facilitators to Expansion* (Monograph, No 27, May 2019) 5 <https://unsw-primo.hosted.exlibrisgroup.com/primo-explore/fulldisplay?vid=UNSWORKS&docid=unsworks_modsunsworks_55882&context=L>.

¹³⁴ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 73, 75.

¹³⁵ *Ibid* ss 73(1)(a)(i), 75(a).

¹³⁶ ‘Drug Possession’, *Victoria Legal Aid* (Web Page, 22 August 2022) <<https://www.legalaid.vic.gov.au/drug-possession>>.

¹³⁷ *Ibid*.

¹³⁸ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 73(1)(b), 75(b).

¹³⁹ *Ibid* sch 11 pt 2-3.

¹⁴⁰ Custom Training Network, *Diversion Options for Drug Offenders - An Overview for Teachers* (Guide, September 2019) <<https://is.vic.edu.au/wp-content/uploads/2019/09/diversion-options-for-drug-offenders.pdf>>.

5.4. Strengths of existing police diversion programs

5.4.1. Reduced recidivism

In general, youth diversion programs reduce reoffending compared with conventional judicial interventions,¹⁴¹ and low-risk youth who engage with police-initiated, pre-court diversions are less likely to exhibit future antisocial behaviour when compared with traditional court processing.¹⁴² A review of all police-level drug diversion initiatives across every Australian jurisdiction found that rates of drug-related reoffending were low in the 18 months after diversion, ranging from only 1.8% in New South Wales to 13.8% in Western Australia, with all other states and territories falling somewhere in between.¹⁴³

5.4.2. Reduced costs

The cost to charge someone for cannabis possession and use is 6 times more expensive than diverting them through treatment, almost 12 times more expensive than diversion through expiation schemes, and over 15 times more expensive than issuing an informal warning, for little or no improvement in outcomes.¹⁴⁴ Criminal records make it difficult for people to find employment,¹⁴⁵ and parole conditions are often time consuming, which means that full-time employment is not always possible.¹⁴⁶ And while 33% of people are homeless upon entry to prison, 54% of people leaving prison expect to be homeless upon release.¹⁴⁷ By preventing criminal convictions, diversion programs significantly limit these social costs.

5.4.3. Case study: Drug Diversion and Appointment Line

Whenever assessment and treatment are required as part of a police diversion program, prompt connection to an alcohol and other drug service is essential. In Victoria, this occurs through the 24/7 Drug Diversion and Appointment Line (DDAL) operated by Turning Point, whose staff responded to 1546 DDAL calls in 2020–21. When a caution is issued by police for drug possession or use, police contact DDAL to arrange an appointment for the cautioned person at an alcohol and other drug service. The DDAL team also accompany Victoria Police to music festivals, concerts, and other events to arrange appointment bookings. For people who have been cautioned by police, DDAL is the first point of contact that initiates their engagement with alcohol and other drug services and helps them to avoid a criminal conviction. DDAL plays an essential role in the process of police cautioning in Victoria. For example, drug diversion rates in Western Australia are low when compared with other Australian jurisdictions partly because there is no 24/7 diversion line available there, so it is often easier for police to charge offenders than divert them.¹⁴⁸

¹⁴¹ Holly Wilson and Robert Hoge, 'The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review' (2013) 40(5) *Criminal Justice and Behavior* 497, 504.

¹⁴² David Wilson, Iain Brennan and Ajima Olaghere, 'Police-Initiated Diversion For Youth to Prevent Future Delinquent Behavior: A Systematic Review' (2018) 14(1) *Campbell Systematic Reviews* 1, 8.

¹⁴³ Jason Payne, Max Kwiatkowski and Joy Wundersitz, *Police Drug Diversion: A Study of Criminal Offending Outcomes* (Report, No 97, 2008) 41 <<https://www.aic.gov.au/publications/rpp/rpp97>>.

¹⁴⁴ Marian Shanahan, Caitlin Hughes and Tim McSweeney, *Police Diversion for Cannabis Offences: Assessing Outcomes and Cost-Effectiveness* (Report, No 532, June 2017) 9 <<https://www.aic.gov.au/publications/tandi/tandi532>>.

¹⁴⁵ Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record* (Discussion Paper, December 2004) 6-7 <<https://humanrights.gov.au/our-work/human-rights-discrimination-employment-basis-criminal-record>>.

¹⁴⁶ John Halushka, 'The Runaround: Punishment, Welfare, and Poverty Survival after Prison' (2020) 67(2) *Social Problems* 233, 240; Jewel Topsfield, 'How Do You Get a Job After Prison? Ask Former Inmate, Luke, Who Has Beaten the Odds', *The Age* (online, 18 June 2022) <<https://www.theage.com.au/national/victoria/how-do-you-get-a-job-after-prison-ask-former-inmate-luke-who-has-beaten-the-odds-20220617-p5aug5.html>>.

¹⁴⁷ 'The Health of Australia's Prisoners 2018', *Australian Institute of Health and Welfare* (Web Page, 30 May 2019) <<https://www.aihw.gov.au/reports/prisoners/health-australia-prisoners-2018/summary>>.

¹⁴⁸ Hughes et al (n 133) 6.

5.5. Weaknesses of existing police diversion programs

Differences between drug diversion programs across Australian jurisdictions are resulting in inconsistent and unfair outcomes for Australians. Despite the intention of diversion being to reduce criminal charges and convictions, many people are still falling through the cracks and facing criminal penalties. This happens for a range of reasons.

5.5.1. Gaps in diversion options

New South Wales¹⁴⁹ and Queensland¹⁵⁰ don't have formal police diversion programs for illicit substances other than cannabis, and many existing diversion programs are not legislated (i.e., the Cannabis Cautioning Scheme in New South Wales, the Illicit Drug Pre-Court Diversion Program in the Northern Territory, the Illicit Drug Diversion Initiative in Tasmania, the Cannabis Caution Program and Illicit Drug Diversion Program in Victoria, and the Other Drug Intervention Requirement in Western Australia).

5.5.2. Differences in 'threshold quantities'

Globally, different jurisdictions have adopted varied strategies to distinguish between possession of drugs for personal use or for supply. Ensuring that these methods of distinguishing between the two offences are accurate is critical, because penalties for supply type offences are generally more severe than for personal possession offences.¹⁵¹

Australian jurisdictions use legislated threshold quantities to distinguish between these offence types, however, differences in threshold quantities between jurisdictions result in inconsistent and unfair outcomes. For example, 25g of cocaine is considered a trafficable quantity in Tasmania¹⁵² (maximum 21 years imprisonment),¹⁵³ compared to only 2g in Queensland¹⁵⁴ (maximum 25 years imprisonment).¹⁵⁵

5.5.3. Differences in 'diversion quantities'

Eligibility for diversion depends on one possessing less than a specified quantity of the drug possessed. These quantities differ between Australian jurisdictions, which contributes to inconsistent and unfair outcomes. For example, people found in possession of up to 100g of cannabis in South Australia are eligible for diversion through its Cannabis Expiation Scheme.¹⁵⁶ In other jurisdictions such as Queensland and the Northern Territory, eligibility for diversion is limited to those possessing an amount of cannabis that does not exceed 50g.¹⁵⁷ And in New South Wales, the diversion amount limit is even lower, at up to and including 15g of cannabis.¹⁵⁸

¹⁴⁹ NSW has no formal illicit drug diversion program for adults, but children aged between 10 and 18 can receive a warning or caution for minor non-violent offences, including drug possession. For more serious offences, young people may be referred to a Youth Justice Conference. Decisions to divert young people are left to police/court discretion. *Young Offenders Act 1997* (NSW) pt 3-5.

¹⁵⁰ "Police Drug Diversion Program", *Queensland Police* (Web Page, 14 October 2021) <<https://www.police.qld.gov.au/drugs-and-alcohol/police-drug-diversion-program#>>.

¹⁵¹ Caitlin Hughes et al, *Australian Threshold Quantities for 'Drug Trafficking': Are They Placing Drug Users at Risk of Unjustified Sanction?* (Report, No 467, March 2014) 2 <<https://www.aic.gov.au/sites/default/files/2020-05/tandi467.pdf>>.

¹⁵² *Misuse of Drugs Act 2001* (Tas) sch 1 pt 2.

¹⁵³ *ibid* s 12.

¹⁵⁴ *Drugs Misuse Regulation* (Qld) sch 3 pt 1.

¹⁵⁵ *Drugs Misuse Act 1986* (Qld) s 5.

¹⁵⁶ *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* (SA) s 15(2)(a).

¹⁵⁷ "Police Drug Diversion Program", *Queensland Police* (Web Page, 14 October 2021) <<https://www.police.qld.gov.au/drugs-and-alcohol/police-drug-diversion-program#>>; *Misuse of Drugs Act 1990* (NT) s 20(b)(ii).

¹⁵⁸ Australian Institute of Health and Welfare, *The Effectiveness of the Illicit Drug Diversion Initiative in Rural and Remote Australia* (Report, No 19, April 2008) 150 <<https://www.aihw.gov.au/reports/alcohol-other-drug-treatment-services/effectiveness-illicit-drug-diversion-initiative/summary>>.

5.5.4. Threshold and diversion quantities should reflect use and purchasing patterns

People who use drugs often purchase amounts that will sustain multiple sessions or days of use,¹⁵⁹ and this is especially true of people experiencing drug dependence / addiction (see section 5.7.4). If threshold quantities are set too low (i.e., below the amount that is typically purchased for personal use), then people may be charged with trafficking offences despite having no intention to supply drugs to others. Similarly, if diversion quantities are set too low, people are less likely to be eligible for diversion and therefore more likely to miss out on health interventions offered through diversion programs. This is especially relevant for people experiencing addiction, who consume and are likely to possess greater quantities than those who use casually and are often most in need of support.

Low threshold and diversion quantities may also encourage people to repeatedly and frequently purchase single-dose or small amounts rather than a larger amount for use over an extended period.¹⁶⁰ This increases the risk of experiencing harm because purchasing drugs is one of the most dangerous aspects of drug use, as it exposes people to potential harm such as violence and theft.¹⁶¹

5.5.5. Police discretion

Use of diversion options is highly dependent on police discretion and is influenced by their personal beliefs about individual offenders (for example, that they would not be receptive to help, they are unwilling to change their behaviour or are taking advantage of diversion schemes to avoid more serious consequences)¹⁶² and cultural resistance to diversion.¹⁶³ We also know from comparing recorded drug offences in Victoria with call volumes to the Drug Diversion Appointment Line that only a small fraction of people arrested for drug possession and use are currently being cautioned.¹⁶⁴

5.5.6. Admission of guilt/offence

Some diversion programs require an admission of guilt to be eligible for the diversion. This requirement can result in people admitting guilt even if they have been wrongly accused, and children who are required to admit guilt may feel uncomfortable doing so when there is a parent present, resulting in a missed opportunity for diversion.¹⁶⁵ This is especially relevant when considering children as young as 10 years old can be subject to diversion.

5.5.7. Limited number of diversions

Many diversion programs in Australia have a maximum number of diversions beyond which the person is no longer eligible for diversion and must be charged.¹⁶⁶ For example, there are a maximum of two diversions for cannabis or other illicit substances in Victoria,¹⁶⁷ whereas the Northern

¹⁵⁹ Keelin O'Reilly et al, 'Distinguishing Personal Use of Drugs from Drug Supply: Approaches and Challenges' (2022) 103 (May) *International Journal of Drug Policy* 1, 4.

¹⁶⁰ Alison Ritter et al, Submission No 22 to Select Committee on the Drugs of Dependence (Personal Use) Amendment Bill 2021, Legislative Assembly for the Australian Capital Territory, *Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill 2021* (16 June 2021) 6 <https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/1779306/Submission-22-The-Drug-Policy-Modelling-Program-DPMP-UNSW-Sydney.pdf>.

¹⁶¹ Scott Jacques et al, 'Effects of Prohibition and Decriminalization on Drug Market Conflict: Comparing Street Dealers, Coffeeshops, and Cafes in Amsterdam' (2016) 15(3) *Criminology and Public Policy* 843, 863.

¹⁶² Rachael Green et al, 'Police Decision-Making with Young Offenders: Examining Barriers to the Use of Diversion Options' (2019) 53(1) *Journal of Criminology* 137, 145.

¹⁶³ Hughes et al (n 133) 7.

¹⁶⁴ DDAL received 1553 referrals from Victoria Police in FY 2021-22, while the Crime Statistics Agency recorded 30,012 drug offences in Victoria in FY 2021-22. 'Recorded Offences', *Crime Statistics Agency* (Data Charts, September 2022) <<https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2>>.

¹⁶⁵ Karen Cushing, 'Diversion from Prosecution for Young People in England and Wales - Reconsidering the Mandatory Admission Criteria' (2014) 14(2) *Youth Justice* 140, 149-150.

¹⁶⁶ 360Edge, *What is Drug Diversion?*, (Web Page, 17 December 2020) <<https://360edge.com.au/drug-diversion-should-be-evidence-based/>>.

¹⁶⁷ Marian Shanahan, Caitlin Hughes and Tim McSweeney, *Australian Police Diversion For Cannabis Offences: Assessing Program Outcomes and Cost-Effectiveness* (Monograph, No 66, 2016) 62 <<https://www.aic.gov.au/sites/default/files/2020-05/monograph-66.pdf>>.

Territory has unlimited diversions for cannabis and a maximum of one diversion for other illicit substances.¹⁶⁸

Limits on diversion opportunities assume all drug use is a choice and fail to recognise that for people experiencing addiction, ceasing drug use is difficult and requires support from health professionals, and relapse is a common and expected part of treatment. Even in the absence of addiction, limits on diversion opportunities are arguably unreasonable, because drug use on its own is a victimless crime.

5.5.8. Prescribed treatment

Many drug diversion programs in Australia prescribe treatment. Yet we know many people who use drugs do not need treatment, and that even when they do better outcomes can be achieved when participants are motivated and ready for treatment.¹⁶⁹ Mandatory treatment means that people who do not want or are not ready for treatment use appointment places that could benefit other patients who are ready, placing additional pressure on an already overstretched treatment system. Mandatory treatment also contravenes patient autonomy, which is paramount from an ethical perspective regardless of any perceived or actual treatment benefit.¹⁷⁰

5.6. Improve police diversion programs

Diversion should be the expectation for all non-violent offenders, not the exception. A consistent approach to police diversion between jurisdictions is needed to ensure fair outcomes for Australians. All Australian jurisdictions should work toward harmonising their police drug diversion programs so that:

- police diversion is legislated and available for cannabis and other illicit drugs Australia-wide;
- police cautioning discretion and any limits on the number of cautions people receive are removed;
- no admission of guilt/offence is required to access diversion;
- quantities of drugs that determine eligibility for diversion are consistent across jurisdictions, evidence-based, and considerate of use and purchasing patterns, including by people living with addiction; and
- treatment is an optional aspect of diversion.

These improvements to police diversion should be understood in the broader context within which they operate. While court diversion is useful, the court system is not resourced to adequately divert the large number of people currently charged with drug offences. Current pressure on court systems could be significantly alleviated through improved police-level diversion that reduces the number of people charged with drug offences.

Alcohol and other drug treatment services are likewise not resourced to respond to current levels of demand. While improved police diversion would take pressure off the courts, when coupled with mandatory assessment and treatment it would place an additional burden on already stretched alcohol and other drug services, by driving many people who don't need treatment into the treatment system, where they would compete with the roughly 500,000 Australians who do need treatment and can't access it.¹⁷¹

¹⁶⁸ Hughes et al (n 133) 23.

¹⁶⁹ Matthew Hiller et al, 'Motivation as a Predictor of Therapeutic Engagement in Mandated Residential Substance Abuse Treatment' (2002) 29(1) *Criminal Justice and Behavior* 56, 69.

¹⁷⁰ Arthur Caplan, 'Ethical Issues Surrounding Forced, Mandated, or Coerced Treatment' (2006) 31(2) *Journal of Substance Abuse Treatment* 117, 117.

¹⁷¹ Ritter, Chalmers and Gomez (n 28).

Importantly, if assessment or treatment is a mandatory aspect of police diversion, already stretched alcohol and other drug treatment services must be adequately resourced to respond to the increased demand, and a stepped approach as per Tasmania's Illicit Drug Diversion Initiative is at least better than requiring treatment from the outset. Time limits for compliance with treatment obligations should also be realistic and considerate of often lengthy appointment wait times.

5.7. International experience

Many jurisdictions around the world have implemented some form of decriminalisation, with varying degrees of success. By examining their strengths and weaknesses, we can learn from them to ensure Australia adopts a best practice approach to decriminalisation.

5.7.1. Portugal

Portugal decriminalised the personal use and possession of drugs in 2001.¹⁷² While drug trafficking remains an offence, individuals caught with small quantities are subject to administrative sanctions rather than criminal penalties.¹⁷³ The Commissions for the Dissuasion of Drug Addiction (CDTs) decide on the exact penalties, however they suspend most cases and penalties are not applied.¹⁷⁴ CDTs comprise a legal expert, health professional, and social worker who are supported by a multidisciplinary team, and offer "targeted advice and interventions, in conjunction with a network of wide-ranging local support" that can assist with employment, housing, and medical and psychological aid.¹⁷⁵

People living with addiction can also access substitution therapies from government-approved providers.¹⁷⁶ This allows them to safely manage and ultimately stop their drug use. While people experiencing drug-related harm are encouraged to seek treatment, those who do not are rarely sanctioned because the aim is to encourage voluntary treatment uptake.¹⁷⁷

Following decriminalisation in Portugal, overall rates of drug use have not increased, drug-related harms have decreased, and more people have sought and accessed treatment.¹⁷⁸ HIV diagnoses linked to injecting drug use have significantly declined (from 50% to 1.7%).¹⁷⁹ Rates of crime committed to ultimately aid in acquiring drugs have also decreased.¹⁸⁰ Following the success of decriminalisation in Portugal, several jurisdictions around the world have done the same.¹⁸¹

5.7.2. Italy

Italy's drug policy has oscillated between compassionate and punitive approaches to drug use since the mid 1970s. In 1975, with the introduction of Law 685/1975, purchasing, possession, and use of small amounts (the quantity was left to the judge's discretion) of non-therapeutic drugs for personal

¹⁷² Glen Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies* (White Paper, September 2009) 1 <https://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf>.

¹⁷³ Ibid.

¹⁷⁴ Ana Sofia Santos et al, *National Report (2011 Data) to the EMCDDA: "Portugal" New Developments, Trends and In-Depth Information on Selected Issues* (Report, 2012) 102 <http://www.emcdda.europa.eu/attachements.cfm/att_214060_EN_Portugal_NR2012.pdf>.

¹⁷⁵ Arianna Silvestri, *Gateways From Crime To Health: The Portuguese Drug Commissions* (Report, 2014) 11-12 <<https://www.wcmt.org.uk/fellows/reports/drug-use-health-issue-learning-portuguese-policies>>.

¹⁷⁶ Santos et al (n 174) 69.

¹⁷⁷ Ibid 102.

¹⁷⁸ Harvey Slade, *Drug Decriminalisation in Portugal: Setting the Record Straight* (Report, 13 May 2021) <<https://transformdrugs.org/blog/drug-decriminalisation-in-portugal-setting-the-record-straight>>.

¹⁷⁹ Ibid.

¹⁸⁰ Caitlin Hughes and Alex Stevens, 'What Can We Learn From the Portuguese Decriminalisation of Illicit Drugs?' (2010) 50(6) *British Journal of Criminology* 999, 1010.

¹⁸¹ Niamh Eastwood, Edward Fox and Ari Rosmarin, *A Quiet Revolution: Drug Decriminalisation Across the Globe* (Report, March 2016) 6 <<https://www.release.org.uk/publications/drug-decriminalisation-2016>>.

use were considered minor offences for which no punishment would be enforced.¹⁸² This law also specified forms of intervention for people experiencing problems with drugs, such as (sometimes mandatory) treatment and preventive measures.¹⁸³

In 1990, Law 162/1990 reversed the changes made in 1975 by explicitly prohibiting drug consumption and establishing a “daily average dose guide” to determine what constituted a small amount.¹⁸⁴ For those found to be consuming drugs, fines and custodial sentences were introduced alongside other administrative sanctions such as suspension of driver's licence, curfew, ban on being in certain public places, and community service.¹⁸⁵ The daily average dose concept, administrative sanctions, and custodial sentences were reversed in 1993 after a 1991 Constitutional Court decision and a public referendum.

In 2006, the law changed yet again as the *Fini-Giovanardi* legislation established threshold limits on quantity possessed and imposed harsher punishments for personal possession and use of drugs, including compulsory reporting to police and the removal of the option to undergo treatment rather than receive administrative sanctions.¹⁸⁶ This 2006 law was deemed unconstitutional and struck down in 2014, meaning that the 1990 law (with the 1993 changes) was reinstated. A distinction between ‘soft’ and ‘hard’ drugs was also added and administrative sanctions were reintroduced.¹⁸⁷

Notably, whenever Italy's sanctions were more severe, they did not deter people from using drugs but *did* limit treatment-seeking. Two years after the introduction of the *Fini-Giovanardi* drug law, the number of people imprisoned and experiencing drug dependence increased from 24,493 in 2006 to 30,528 in 2008, and the number of sanctions applied for personal use more than doubled from 7,229 in 2006 to 16,154 in 2010.¹⁸⁸ Italy also saw a dramatic drop in the number of people seeking treatment for drug use as an alternative to imprisonment, from 3,852 in 2006 to 1,597 in 2010.¹⁸⁹ Conversely, after the striking down of *Fini-Giovanardi* which marked a return to more compassionate drug policy, arrests for minor drug offences decreased dramatically.¹⁹⁰

5.7.3. Netherlands

The Netherlands takes a de facto approach to decriminalisation. While the use of any drug by people aged 18 and over is not an offence in the Netherlands, its municipal authorities can prohibit drug use in certain areas through municipal by-laws.¹⁹¹

The law makes a distinction between “soft drugs” (e.g. cannabis) and “hard drugs” (e.g. cocaine, heroin, and amphetamines).¹⁹² It is an offence to illicitly *possess, sell or produce* any soft or hard drugs however, under the Netherlands' tolerance policy, adults found in possession of up to 5g of cannabis (reduced from 30g in 1996)¹⁹³ or up to 5 cannabis plants have their cannabis confiscated

¹⁸² Natale Mario di Luca et al, ‘Evolution of Italian Laws Banning Trafficking, Use and Abuse of Psychotropic Drugs’ (2020) 56(1) *Annali dell'Istituto Superiore di Sanità* 76, 77.

¹⁸³ Emilio Torrini, *Drug Control and Prevention: Italy's Legal Framework* (Report, 31 December 2012) 2 <<https://www.talkingdrugs.org/sites/default/files/italian-drug-legislation.pdf>>.

¹⁸⁴ Eastwood, Fox and Rosmarin (n 181) 23.

¹⁸⁵ Torrini (n 183).

¹⁸⁶ Eastwood, Fox and Rosmarin (n 181) 23.

¹⁸⁷ *Ibid.*

¹⁸⁸ Grazia Zuffa, *How to Determine Personal Use in Drug Legislation: The “Threshold Controversy” in the Light of the Italian Experience* (Report, No 15, August 2011) 7 <<https://www.tni.org/en/briefing/how-determine-personal-use-drug-legislation>>.

¹⁸⁹ *Ibid.*

¹⁹⁰ Eastwood, Fox and Rosmarin (n 181) 23.

¹⁹¹ ‘Am I Committing a Criminal Offence if I Possess, Produce or Deal in Drugs?’, *Government of the Netherlands* (Web Page) <<https://www.government.nl/topics/drugs/am-i-committing-a-criminal-offence-if-i-possess-produce-or-deal-in-drugs>>.

¹⁹² *Opiumwet* [Opium Act] (Netherlands) list I-II [tr author].

¹⁹³ Eastwood, Fox and Rosmarin (n 181) 25.

and are not prosecuted.¹⁹⁴ Similarly, anyone found in possession of up to 0.5g of any hard drug is usually dismissed by police, has their drugs confiscated and receives no civil or criminal penalties.¹⁹⁵

Cannabis is also available for purchase and consumption in Dutch ‘coffee shops’, so long as they comply with certain conditions such as having a valid permit, limiting sales to 5g per person, ensuring stock on hand does not exceed 500g, only selling to people aged over 18, not serving alcohol, and not advertising the sale of cannabis or the coffee shop more generally.¹⁹⁶ Currently, coffee shop owners can only purchase cannabis from illegal suppliers, but under the new ‘controlled cannabis supply chain experiment’, a selection of coffee shops will be able to purchase cannabis from government regulated growers to trial whether the supply of cannabis to coffee shops can be decriminalised and regulated.¹⁹⁷

Despite cannabis being easily accessible at coffee shops in the Netherlands, Dutch rates of past-year cannabis use in people aged 15 to 64 are lower than Croatia, France, Italy, and Spain, where no such coffee shops exist.¹⁹⁸ Similarly, when comparing past-year and last-month use of cannabis in 10th grade adolescents in the U.S., Canada, and the Netherlands, no significant differences were found between countries except that girls from the Netherlands were less likely to use cannabis than boys and girls from the other countries.¹⁹⁹ Indeed, a study examining cannabis use in European young people over time found no notable impact of cannabis legislation changes, whether stringent or lenient, on rates of cannabis use, indicating that harsher laws do not meaningfully deter use, nor do lenient laws encourage use.²⁰⁰

5.7.4. Uruguay

Uruguay has never criminalised the possession of any drugs for personal use, and in 1974 the decriminalisation principle was codified under *Law Decree No. 14.294*, which stated that people in possession of a “reasonable quantity” of drugs²⁰¹ for personal use will be “exempt from punishment.”²⁰² In 1998, the law was amended to clarify that a judge is left to determine whether the substance was intended for personal consumption (rather than sale or production), and that they must provide reasoning for their decision in their sentencing.²⁰³

Despite personal drug possession in Uruguay not being criminalised, many people who use drugs still have contact with the criminal justice system. Between 35% and 55% of drug seizures are for amounts less than 10g, so there is an inconsistency between policing practices and the spirit of the law that states there be no punishment for drug possession for personal use.²⁰⁴ Between 2009 and 2013, the percentage of people incarcerated for drug-related offences increased by 39%, while the

¹⁹⁴ ‘Am I Committing a Criminal Offence’ (n 191).

¹⁹⁵ Eastwood, Fox and Rosmarin (n 181) 25.

¹⁹⁶ ‘Policy: Coffeeshops’, *City of Amsterdam* (Web Page) <<https://www.amsterdam.nl/en/policy/policy-safety/policy-coffeeshops/>>.

¹⁹⁷ ‘Controlled Cannabis Supply Chain Experiment’, *Government of the Netherlands* (Web Page)

<<https://www.government.nl/topics/drugs/controlled-cannabis-supply-chain-experiment>>.

¹⁹⁸ Jakob Manthey et al, ‘Public Health Monitoring of Cannabis Use in Europe: Prevalence of Use, Cannabis Potency, and Treatment Rates’ (2021) 10(100227) *The Lancet Regional Health* 1, Supplementary Table 1.

¹⁹⁹ Bruce Simons-Morton et al, ‘Cross-National Comparison of Adolescent Drinking and Cannabis Use in the United States, Canada, and the Netherlands’ (2010) 21(1) *International Journal of Drug Policy* 64, 68.

²⁰⁰ Alexander Gabri et al, ‘Changes in Cannabis Policy and Prevalence of Recreational Cannabis Use Among Adolescents and Young Adults in Europe - An Interrupted Time-Series Analysis’ (2022) 17(1) *PLoS One* 1, 7.

²⁰¹ Specifically, substances contained in schedules I and II of the New York Single Convention of 1961 and substances contained in schedule I of the Convention on Psychotropic Substances drawn up in Vienna, Austria, in February 1971.

²⁰² *Decreto Ley No. 14294* [Decree-Law No. 14294] (Uruguay) art 31 [tr United Nations Office on Drugs and Crime].

²⁰³ Martin Jelsma, *Drug Law Reform Trend in Latin America* (Research Analysis, 2009) 1 <https://www.tni.org/files/article-downloads/country_overview_drug_laws_final.pdf>.

²⁰⁴ Giorgina Garibotto, ‘Prisons and Drugs in Uruguay’ in Pien Metaal and Coletta Youngers (eds), *Systems Overload: Drug Laws and Prisons in Latin America* (PrimaveraQuint, 2011) 81, 85 <https://www.tni.org/files/tni-systems_overload-def.pdf>.

total prison population in Uruguay grew by 15% during the same time.²⁰⁵ This may be due to judicial discretion in determining whether a person found in possession of a substance was intending only to use the substance, or to sell or traffic it.

Uruguayan legal specialists have noted that judges often use differing and misinformed criteria to make their determinations – a major flaw in the country’s approach to decriminalisation.²⁰⁶ This can happen, for example, if a person experiencing a drug dependence is in possession of a relatively larger amount of a substance because they consume more than a non-dependent person, which can lead a judge to charge them for trafficking without considering the context of their drug use.²⁰⁷ Peru gets around this problem by exempting all drug dependent persons, as evidenced by a medical certificate.²⁰⁸

Pre-trial detention is also commonly used in Uruguay for people accused of a drug offence, and this is especially so for women in pre-trial detention, 23% of whom are detained for drug offences (compared with 7% of male pre-trial detainees).²⁰⁹ Remarkably, 69.7% of Uruguay’s total prison population was made up of pre-trial detainees in 2017.²¹⁰ Not only are large numbers of people being detained for crimes they have not yet been found guilty of, the use of pre-trial detention for drug related offences is only adding more pressure to Uruguay’s overcrowded prison system, which is operating at 130% capacity.²¹¹ Moreover, harm reduction and treatment programs are underfunded in Uruguay, so people experiencing drug-related harm don’t always have access to the support they need and many commit crime to fund their drug use.²¹²

Uruguay’s approach is a cautionary example of how decriminalisation can be ineffective when judicial discretion extends to determining what quantities of drugs constitute possession for personal use or trafficking, and when decriminalisation is not supported by investment in harm reduction and treatment services.

6. Conclusion

When it comes to illicit drugs, we keep doing the same thing and expecting a different result. No amount of resourcing for law enforcement will ever be enough to eliminate drug use. For every drug shipment seized, many more make it to market.²¹³ For every criminal drug syndicate that is dismantled by police another steps in to fill the power vacuum created in the black market for illicit drugs – a market that is as lucrative as it is dangerous precisely because the failed policy of criminalisation has put the regulation of hard drugs in the hands of organised crime. And with 88% of drug arrests being of consumers, it’s clear that police resources would be better spent addressing law enforcement priorities deemed as very high impact, such as terrorism, cybercrime, and human trafficking.²¹⁴

²⁰⁵ Alejandro Corda, *Drug Policy Reform in Latin America: Discourse and Reality* (Report, 2015) 7 <[http://files.idpc.net/library/CEDD_drug_policy_reform_latin_america%20\(1\).pdf](http://files.idpc.net/library/CEDD_drug_policy_reform_latin_america%20(1).pdf)>.

²⁰⁶ John Walsh and Geoff Ramsey, *Uruguay’s Drug Policy: Major Innovations, Major Challenges* (Report, 2016) 3 <<https://www.brookings.edu/wp-content/uploads/2016/07/Walsh-Uruguay-final.pdf>>.

²⁰⁷ Garibotto (n 204) 86.

²⁰⁸ *Decreto Ley No. 22095* [Decree-Law No. 22095] (Peru) art 56 [tr author].

²⁰⁹ Washington Office on Latin America, *Pretrial Detention for Drug Offenses in Latin America* (Policy Submission, April 2020) 3 <<https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Call/CSOs/WOLA.pdf>>.

²¹⁰ *Ibid* 2.

²¹¹ ‘Uruguay’, *World Prison Brief* (Data Summary, 30 April 2022) <<https://www.prisonstudies.org/country/uruguay>>.

²¹² Garibotto (n 204) 82.

²¹³ *Illicit Drug Data Report 2019–20* (n 8) 13.

²¹⁴ *The Case Categorisation and Prioritisation Model* (n 11) 5.

Effective and comprehensive decriminalisation of the personal possession and use of small quantities of all illicit drugs, coupled with a national network of drug checking services would significantly reduce the harms created by criminalisation and improve law enforcement responses. Drugs will still be made by criminals and therefore be more dangerous than they otherwise would be, but the feedback loop created by drug checking services will put pressure on illicit manufacturers to produce safer products, while also gathering useful insights into the nature of the illicit drug market.

To ensure more consistent and fair outcomes for Australians, we should harmonise threshold quantities that differentiate between possession and supply-type offences as well as quantities of drugs that determine eligibility for diversion across all Australian jurisdictions. We should also ensure threshold and diversion quantities are evidence based and accurately reflect use and purchasing patterns of people who use drugs, including people living with addiction who are more likely to possess greater amounts of drugs to which they are dependent. And while improving access to diversion programs we must also increase investment in treatment services to meet demand. Harmonising and improving police diversion programs across the country will reduce costs and benefit everyone – not just people who use drugs, but also police and other frontline workers in the health and justice systems.