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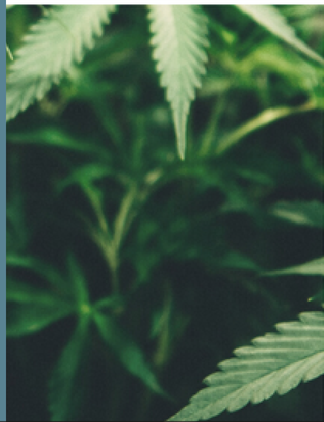

DOING MORE HARM THAN GOOD

MARCH 2021

THE NEED FOR A HEALTH-FOCUSED LEGAL RESPONSE TO DRUG USE

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

Acknowledgments

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[1] <www.lawyersalliance.com.au>.

Introduction

Drug policies across Australia are ineffective.

These policies, grounded in prohibition and criminalisation, are in reality causing harm – to the extent that this harm has been described as 'an intrinsic part of our current regulatory framework'. [2]

Current policies target and stigmatise drug users. This sends drug users, fearful of law enforcement, underground. Users then become reliant on drug suppliers not just for the drugs themselves, but also for any information about what they are taking and how they should take it. This reliance fuels a dangerously unregulated drug market, and people – of all ages and backgrounds – are dying as a result.

With this context in mind, it is little wonder that drug users looking to address their addictions are also less likely to know where, or even if, they can seek help. This effectively denies chronically ill Australian residents the medical treatment they need.

The ALA considers that a policy focused on prohibition is counterproductive and causes significant harm additional to that resulting from drug use.[3] The ALA also considers that the criminalisation of some drugs that are harmful to one's health, but not others, is inconsistent and illogical.

The ALA agrees with the many medical and public health experts who advocate for a shift in the focus of drug policy from criminal law enforcement to the broader health and social issues associated with the harmful use of drugs.[4] This would involve the diversion of government funding and financial resources from law enforcement, prosecution and incarceration into health and social services.

As such, the ALA advocates for the following shift to take place in drug policies across Australia: from an emphasis on law enforcement, to a focus on the broader health and social issues associated with the harmful use of drugs.

This policy paper will address:

- The problems associated with criminalisation of drug possession and use;
- Alternative approaches to criminalisation;
- Access to medicinal cannabis;
- International perspectives on harm minimisation;
- Human rights implications for criminalisation of illicit substance possession and use;

[2] State Coroner's Court of New South Wales, *Inquest into the death of six patrons of NSW music festivals* (Findings, 8 November 2019) 127.

[3] Ben Mostyn, Helen Gibbon and Nicholas Cowdrey, 'Contemporary comments – the criminalisation of drugs and the search for alternative approaches' [2012] 24(2) *Current Issues in Criminal* Justice, 261, 265.

[4] Special Commission of Inquiry into the Drug "Ice", *Decriminalisation Roundtable: Brief to Participants*, (2019) 9.

- International models of harm minimisation;
- Benefits of a harm minimisation approach; and
- Current harm minimisation approaches in Australian states and territories.

Criminalisation – increasing the burden on society

The approach to illicit drug consumption in Australia is largely one of criminalisation. This has failed to address rates of recidivism among drug users, and has failed to reduce the number of people overdosing on drugs.

In addition, this approach has been unsuccessful in addressing the various social problems associated with drug consumption, including financial hardship, mental illness, unemployment and homelessness. The ALA considers that criminalisation exacerbates these problems, which are often both a cause *and* a symptom of substance abuse.[5]

The criminalisation of drug use has a disproportionately adverse effect on those who are socially and economically disadvantaged. According to the former Director of Public Prosecutions for NSW, Nicholas Cowdery AO QC, problematic drug use is more likely to arise with people who are disadvantaged and have issues with education, employment, health, housing, social pressures, poverty, impulsiveness, addiction and/or mental illness.[6] Health and social problems for drug users often remain unaddressed and the result can be death or disease from unregulated drug use.[7] Prosecuting such people in criminal proceedings, and in many cases imprisoning them, is likely to exacerbate these issues.[8]

The criminalisation of substance use also increases the level of stigma associated with drugs and further marginalises and excludes people who use illegal drugs.[9] The law has an immense influence on social beliefs. It therefore should promote a fair and unbiased legal system, so that drug users do not become marginalised. Prohibiting certain drugs is inherently stigmatising because it conveys a message that certain drugs are bad and, therefore, so too are the people who use them. In addition, specific drug-related law enforcement practices may disproportionately target certain groups.[10] Stigma due to the criminalisation of drug use has been identified as a barrier to the person who is engaging in problematic drug use – or their family – seeking help, as someone is less likely to seek assistance if what they are doing is illegal.[11]

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[5] Mostyn et al (n 3) 261.

[6] Ibid.

[7] Ibid.

[8] Ibid 264–265.

[9] James D Livingston, Teresa Milne, Mei Lan Fang and Erica Amari, 'The effectiveness of interventions for reducing stigma related to substance use disorders: A systematic review' (2011) 107 *Addiction* 39, 40, discussed in Special Commission of Inquiry into the Drug "Ice", *Decriminalisation Roundtable: Brief to Participants* (n 4).

[10] Special Commission of Inquiry into the Drug "Ice", *Decriminalisation Roundtable: Brief to Participants* (n 4) 598.

[11] SBS News, 'Australian teen swallowed pills 'to avoid detection', inquest hears', *SBS News* (online, 8 July 2019), <https://www.sbs.com.au/news/australian-teen-swallowed-pills-to-avoid-detection-inquest-hears#:~:text=Australian%20teen%20swallowed%20pills%20'to%20avoid%20detection'%2C%20inquest%20hears,-0%3A00&text=A%2019%2Dyear%2Dgirl%20from,a%20Sydney%20inquest%20has%20heard.>.

The emphasis on a punitive criminalised approach to drugs in Australia has inhibited advances in research into the therapeutic and health benefits of cannabis use. The ALA considers that a change in attitude could have huge health advantages and assist the many people who would benefit immediately from access to legal, less expensive and more readily available cannabis and other illicit drugs, subject to quality control.

Australia's current approach, with its emphasis on criminalisation, has shown little success in reducing illicit drug use. Australia's reported rates of illicit drug use per capita are among the highest in the world,[12] indicating the social ambivalence regarding their criminal status.[13] The prohibition of the use of cannabis is ignored by many Australians, with research showing that in 2016, 35 per cent (or approximately 6.9 million people) had used cannabis in their lifetime and 10.4 per cent (or 2.1 million people) had used cannabis in the previous 12 months.[14]

The ALA strongly submits that the possession and use of illicit substances should be decriminalised at the very least, and preferably legalised. It is evident that decriminalising or legalising drugs does not increase use but instead allows harm minimisation policies to be put in place that produce better outcomes for users.

The criminal justice system carries the major burden of drug policy in Australia. Funding for health and social services is diverted into law enforcement, prosecution and incarceration. As a result, significantly more public resources are expended on criminal law enforcement as opposed to health or treatment.[15]

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[12] United Nations Office on Drugs and Crime, *World Drug Report*, United Nations publication, Sales No. E.12.XI.1 (June 2012), discussed in Mostyn et al (n 3) 262.

[13] Mostyn et al (n 3) 262.

[14] Australian Institute of Health and Welfare, 'Alcohol, tobacco and other drugs in Australia' (Web report, Cat. no. PHE 221, 15 December 2020), <https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia>.

[15] Mostyn et al (n 3) 265.

Alternative approaches to criminalisation

Depenalisation

Depenalisation retains as criminal offences the use or possession of prohibited substances and introduces a range of civil and administrative measures to deal with the offence as an alternative to criminal prosecution.[16] These measures may include civil penalties (fines); cautions; educational responses, such as the requirement to attend an education session; and health responses, such as referrals to counselling or treatment.[17]

Depenalisation models can be *de jure* (involving a rightful entitlement or claim) or *de facto* (relevant to the specific facts of the case, but with no legal rights attached). Examples of depenalisation currently employed in NSW are the Cannabis Cautioning Scheme and the Criminal Infringement Notices provisions. The Cannabis Cautioning Scheme is a *de facto* model, as it has no legislative basis but is governed by the Cannabis Cautioning Scheme Guidelines issued by NSW Police. The Criminal Infringement Notices provisions is a *de jure* model and is regulated by the *Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019* (NSW).

Depenalisation models may also rely on eligibility criteria to determine who, or in what circumstances, a person will be charged with a criminal offence, or receive a civil or administrative response.[18]

Decriminalisation

Decriminalisation removes the use or possession of a prohibited substance from criminal offences and implements a range of civil and administrative measures to deal with the conduct.[19] The use or possession of a prohibited substance is instead a civil or administrative offence, or a regulatory offence. As a result, a person cannot be charged, convicted or sentenced for the conduct.

Rather, there is a state response designed to deter the conduct from occurring again – for example, similar to a traffic violation, where a fine may be issued to deter the conduct. Engagement in the conduct will not be recorded on a person's criminal history. Neither a civil or administrative offence or a regulatory offence has the necessary components to deem it 'a crime'.

Unlike the flexibility of depenalisation models, all decriminalisation models are *de jure* as they require the removal of the criminal offence from legislation. There may be eligibility criteria in a decriminalisation model that exempts only certain people from criminal liability – for example, a statute may exempt from criminal liability a person possessing and administering a small quantity of a prescribed substance in a licensed supervised injection centre.

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[16] Special Commission of Inquiry into the Drug "Ice", *Decriminalisation Roundtable: Brief to Participants* (n 4) 6.

[17] Ibid 7.

[18] Ibid 18.

[19] Ibid 7.

The ALA supports decriminalisation as an important measure to change the focus from law enforcement to the broader health and social issues associated with the harmful use of drugs.

Legalisation

Legalisation removes the criminal offence for the use or possession of substances and does not replace it.

Under such a model the use or possession of substances is not prohibited and executive bodies are not allowed to convict or prosecute individuals who engage in this conduct.[20]

Regulation

Regulation of the use and possession of substances involves a regulatory model of prescription, pharmacy or licensed sales. A regulatory model may co-exist with other models, such as legislation, or with prohibition, decriminalisation or depenalisation, in which exemptions for use and possession apply for persons who are lawfully prescribed the substance.[21]

A model for a regulated market in cannabis and ecstasy in Victoria was proposed by Emeritus Professor David Penington AC when he chaired the Victorian Premier's Drug Advisory Council in 1999. Under the Penington proposal, cannabis and ecstasy would be distributed through a government-approved supplier, such as a pharmacy, with the quality and quantity of the drugs strictly regulated and subject to conditions. Such a regulated approach would operate in conjunction with other public health initiatives. Products would contain health warnings and pharmacists would discuss the health consequences of drug use with the consumer.[22]

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[20] Ibid.

[21] Ibid.

[22] Mostyn et al (n 3) 268.

Access to medicinal cannabis

Over the past few years, medicinal cannabis has finally been made accessible to patients in Australia through a highly regulated scheme. While this is a step in the right direction, the number of people who have been able to access medicinal cannabis is low compared to many other countries. The current regulatory model makes it difficult for many people to access the system, and a new and fit-for-purpose framework is needed.

As a result of the challenges in the scheme, patients often must resort to self-medication by using illicitly obtained cannabis. Families are desperate to provide the best possible medical treatment and pain relief for their loved ones. The cost, the regulatory burdens and the outdated approaches of some medical practitioners means that these families are often forced to source illegal, black market cannabis, which puts them at risk of serious criminal charges.

Black market cannabis is considerably cheaper than lawfully manufactured medicinal cannabis, which continues to deter patients from accessing medicinal cannabis lawfully. This will continue if the issue of cost is not addressed.

In 2020, the Senate Community Affairs References Committee reported that it had received evidence of inequitable access to medicinal cannabis across jurisdictions, with patients in rural and remote communities finding it difficult to access medicinal cannabis if their local health professional is unwilling to consider prescribing it, or does not have sufficient knowledge of it. In situations described as 'postcode lottery', the Committee received reports of patients unable to meet the costs of travelling into cities to access health services, or having to relocate to other regions in order to access medicinal cannabis.[23]

To help address this issue the ALA recommends that medicinal cannabis prescribing rights be extended to nurse practitioners, particularly in rural and remote communities.

The Committee also received reports from patients who chose not to access medicinal cannabis legally due to the significant cost and complexity of the legal access system. These patients preferred to self-medicate with illicit cannabis. The Committee heard that the estimated number of people in Australia self-medicating with cannabis is around 100,000.[24] This was in spite of the fact that the people who are choosing to access illicit cannabis for self-medication could be subject to criminal charges for possession or cultivation of a controlled substance.

The current barriers to patient access to medicinal cannabis in Australia have had a detrimental impact on the mental and physical wellbeing of patients and their families.

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[23] Senate Community Affairs References Committee, Parliament of Australia, *Current barriers to patient access to medicinal cannabis in Australia* (Report, March 2020) 44–45.

[24] Ibid 84.

The international perspective

In 2012, the United Nations estimated that there were 250 million illicit drug users worldwide.[25] Globally, there is increasing recognition of the need to keep non-violent drug users out of the criminal justice system.[26]

The Global Commission on Drug Policy published a report in 2011 calling for an end to the criminalisation of the drug trade.[27] The report stated:

> 'The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and 40 years after President Nixon launched the US government's war on drugs, fundamental reforms in national and global drug control policies are urgently needed … Vast expenditures on criminalisation and repressive measures directed at producers, traffickers and consumers of illegal drugs have clearly failed to effectively curtail supply or consumption.'[28]

The report called for the end of 'criminalisation, marginalisation and stigmatisation of people who use drugs but who do no harm to others'.[29] It called on governments to experiment with models of legal regulation of drugs to undermine the power of organised crime and safeguard the health and security of their citizens.[30]

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[25] Beckley Foundation, *Public Letter in The Times and Guardian calling for a new approach to Drug Policy* (19 November 2011), discussed in Mostyn et al (n 3) 261.

[26] Mostyn et al (n 3) 267.

[27] Global Commission on Drug Policy, *War on Drugs: Report of the Global Commission on Drug Policy* (Report, 2011) 2, discussed in Mostyn et al (n 3) 266.

[28] Ibid.

[29] Ibid 261.

[30] Ibid 262.

Human rights implications

As a signatory to the *Universal Declaration of Human Rights*, Australia has an obligation to ensure that 'everyone has the right to life' and 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including … housing and medical care and necessary social services'.[31] In addition, as a signatory Australia agreed that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family' is the critical foundation for a free, just, and peaceful world.[32]

The United Nations Development Programme's *International Guidelines on Human Rights and Drug Policy* acknowledges that all aspects of the policy response to managing the use of drugs have human rights implications.[33]

The employment of a harm-minimisation policy will prioritise the provision of life-saving programs and services for drug users, thereby adhering to Australia's human rights obligations to protect and fulfil the right to life and the right to adequate health care. It will also ensure that the inherent dignity of people who use drugs will be respected and promoted by removing the criminalised stigma associated with drug addiction.

In 2010, the Special Rapporteur on the Right to Health released a report to the UN Human Rights Council calling for a move away from drug criminalisation because of the health and human rights consequences:[34]

> 'A human rights-based approach to drug control must be adopted as a matter of priority to prevent the continuing violations of rights stemming from the current approaches to curtailing supply and demand, and to move towards the creation of a human system that meets its own health-related objectives.'[35]

In particular, any discussion of medicinal cannabis should be underpinned by the *International Covenant on Economic, Social and Cultural Rights*,[36] which states that everyone has the right to the highest attainable standard of physical and mental health; and to the Australian Charter of Healthcare Rights,[37] which provides that all people receiving health care in Australia have the right to receive safe

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[31] *Universal Declaration of Human Rights* articles 3 and 25.

[32] *Universal Declaration of Human Rights* Preamble.

[33] United Nations Development Programme et al, *International Guidelines on Human Rights and Drug Policy*, United Nations Development Programme publication (March 2019).

[34] Quoted in Mostyn et al (n 3) 266.

[35] A Grover, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN GA, 65th sess, Agenda Item 69(b), UN Doc A/65/255 (6 August 2010), discussed in Mostyn et al (n 3).

[36] The United Nations *International Covenant on Economic, Social and Cultural Rights* opened for signature on 16 December 1966 and entered into force on 3 January 1976.

[37] 'Australian Charter of Healthcare Rights', *Australian Commission on Safety and Quality in Health Care*, (Poster, 2nd ed, May 2020) <https://www.safetyandquality.gov.au/australian-charter-healthcare-rights>.

and high quality care in an effective continuum. When people are suffering, governments have an obligation under the International Guidelines to amend 'laws, policies, and practices that inhibit access to controlled substances for medical purposes'.[38]

[38] United Nations Development Programme et al (n 33) 7 [II.1.iv].

International models of harm minimisation

It is estimated that around 25 to 30 countries have implemented some form of decriminalisation in the last decade or so.[39] While the form of decriminalisation varies widely between countries, each instance represents recognition by governments that criminalisation is causing significant problems and that alternative approaches are preferable.[40]

Norway

In December 2019, a proposal for a new drug policy was tabled by the Drug Reform Committee (DRC). The report, *From Punishment to Help,* proposed a human rights approach towards the use and possession of illicit substances in the state. The report strongly advocated for harm minimisation.[41] The Committee noted that that 'punishment is counterproductive' and that 'from a perspective of the law it is problematic to agitate for prosecution when the premises on which it is based have been refuted'.[42]

The DRC recommended that Norway decriminalise the use and possession of drugs, as criminalisation is an obstacle to providing good health care to vulnerable groups in the community. It emphasised that the intention of the drugs policy should be 'to promote health and welfare':

> 'These international recommendations indicate that changing the orientation of national drug policy from punishment to health, through decriminalisation of use and possession and the introduction of health-orientated measures in response to drug use, will make Norway better respect the citizens' right to health.'[43]

The DRC adopted a strong human rights framework in its report, stating that:

> 'The human rights perspective is key to most recommendations. One of the main objectives is to prevent human rights violations arising from drug control policy, such as arbitrary imprisonment and disproportionate penalties for drug crimes.'[44]

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[39] See Ari Rosmarin and Niamh Eastwood, *A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe* (Report, 2012), discussed in Mostyn et al (n 3). See also Claudia Stoicescu, *The Global State of Harm Reduction: Towards an Integrated Response* (Report, 2012), discussed in Mostyn et al (n 3).

[40] Mostyn et al (n 3) 267.

[41] Drug Reform Committee, *Rusreform – fra straff til hjelp* (*Drug law reform – from punishment to help*) (Report, 19 December 2019) 26.

[42] Ibid.

[43] Ibid 180.

[44] Ibid 18.

The report also noted that decriminalisation is a measure that fulfils Norway's international obligations under the *Convention on the Rights of the Child* (CROC).[45]

Portugal

In 2001, Portugal became the first country in the world to decriminalise low-level drug use. Possession and drug use continue to be prohibited, but violations of those prohibitions are deemed to be exclusively administrative violations. The Portuguese model of decriminalisation was one part of Portugal's National Strategy for the Fight Against Drugs. Portugal also extended its health care services network and needle and syringe exchange program; increased scientific drug research and specialist training; and significantly increased the budget allocated to drug-related harms.[46]

The Global Commission has noted the positive health outcomes that have taken place in Portugal since decriminalisation. These include a decline in illicit substance use in Portugal over the last decade, a decreasing trend in the total number of notifications of HIV infection and AIDS cases since the early 2000s, and that the drug-induced mortality rate among adults (ages 15–64) is lower than the most recent European average.[47] Since 2001, in addition to trends consistent with regional trends, there has been a reduction in problematic drug users and a reduction in the burden of drug offenders on Portugal's criminal justice system.[48]

In 2015, the president of the International Narcotics Control Board described Portugal's policy as 'a model of best practices in light of these achievements'.[49]

United States

The landscape in the US with respect to decriminalisation of marijuana for medical and recreational use has been truly unique, with many states moving to decriminalise the drug despite federal condemnation.

In the 1970s, the so-called 'War on Drugs' emerged as a government-led initiative aiming to stop illegal drug use by drastically increasing prison sentences for the users, sellers and producers of illegal drugs. The message thoroughly drilled into the public mind at the time was that drug addicts were serious

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[45] Ibid 181.

[46] Glenn, Greenwald, 'Drug Decriminalization in Portugal: Lessons for creating fair and successful drug policies' (White Paper, Cato Institute, 2 April 2009) 1. See also Ricardo Gonçalves, Ana Lourenço and Sofia Nogueira da Silva, 'A social cost perspective in the wake of the Portuguese strategy for a fight against drugs' (2015) 26(2) *International Journal of Drug Policy* 199, 201.

[47] Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalization* (Report, 2016) 19. See also European Monitoring Centre for Drugs and Drug Addiction, *Portugal Country Drug Report 2017*, (Report, June 2017) 5–9.

[48] Ibid 20.

[49] Ibid.

criminals and posed a threat to the nation's peace and security.[50] However, over the past few decades, states have responded to the growing social and political response against the continued criminalisation of marijuana by contravening federal prohibition and legalising marijuana for medical use.

The movement began in 1996 when California passed 'Proposition 215' and became the first state in the US to legally allow medical practitioners access to marijuana for pain treatment.[51] By the beginning of 2021, more than half of the US (34 states, Washington DC and four US territories) had decriminalised marijuana for both medical and health-related purposes.[52] The explosion of marijuana law reform has witnessed a domino effect of states authorising, regulating and taxing marijuana, although the federal government continues to firmly prohibit it for any purpose.

In addition to determining the outcome of the presidential race at the November 2020 US election, voters in a number of states across the country were also casting their ballots on various drug reforms. Every proposed drug reform passed, namely:

- 'Measure 109' in Oregon, which – in a first for the US – legalises the use of psilocybin by adults for therapeutic purposes in a medically-supervised environment;
- 'Measure 110' in Oregon, which now means that the state has decriminalised possession of all illicit drugs for personal use. Individuals found in personal possession of drugs will instead have the choice to either pay a USD$100 fine or undertake a treatment program – programs which will now be expanded using tax revenue from marijuana sales;[53]
- 'Proposition 207' in Arizona, legalising marijuana for adults aged 21 and older, with purchase and possession limits set at one ounce or less;
- 'MT Initiative 190' and 'MT Constitutional Initiative 118' in Montana, which together legalise marijuana for adults aged 21 and older;
- 'Public Question No.1' in New Jersey, legalising the possession and recreational use of marijuana in that state;

[50] Doris Marie Provine, 'Race and inequality in the war on drugs' (2011) 7 *Annual Review Law and Social Sciences* 41, 43.

[51] Zachary Ford, 'Reefer madness: The constitutional consequence of the Federal Government's inconsistent marijuana policy' (2019) 6(3) *Texas A&M Law Review* 671, 677.

[52] Rachel Harrison, 'How the 2020 Election Reshaped US Drug Policy', *New York University*, (*NYU News* News Story, 3 December 2020) <https://www.nyu.edu/about/news-publications/news/2020/december/2020-election-drug-policy.html>.

[53] Poppy Noor, 'US drug laws set for sweeping overhaul as voters choose decriminalization', *The Guardian* (online, 5 November 2020) <https://www.theguardian.com/us-news/2020/nov/04/us-drug-laws-decriminalization-voters-us-elections>.

- Mississippi's proposed medical marijuana program, which will allow patients with debilitating conditions (including cancer and post-traumatic stress disorder) to legally obtain marijuana in consultation with a doctor;
- 'Amendment A' in South Dakota, which legalises the recreational possession and use of up to one ounce of marijuana by adults aged 21 and older, and 'Amendment B', which establishes a medical cannabis initiative for patients suffering from debilitating conditions; and
- 'Initiative 81' in Washington DC, decriminalising the possession and use of a range of psychedelic plants and fungi.

Once these recent legislative changes come into effect, 15 US states will have fully legalised marijuana. The involvement of more traditionally conservative states in drug reform, such as Arkansas, Mississippi, Texas, Nevada, South Dakota and Alabama, is particularly noteworthy.

The divide between federal and state law places the legal status of marijuana in the US into a contested existence.[54] Essentially, federal law allows states to draft their own marijuana regulations even when they contravene federal prohibition. While explicitly prohibiting marijuana at every angle, the *Controlled Substances Act 2001* (US) also disclaims any federal intention to openly intervene with or block inconsistent state law.[55] Although the federal government is unable to require states to re-criminalise marijuana or enforce federal law when it is not written into state legislation, the federal position will be prioritised by the courts in the instance of conflict.[56] Despite this clear position, the statute does not prevent states from liberalising their marijuana regulations. Therefore, the federal government is unable to order states to re-criminalise marijuana, yet states are unable to escape the boundaries of federal prohibition.[57]

State government involvement in the marijuana industry has largely been shaped by the 2013 US Department of Justice Cole memorandum, which establishes that the only conditions in which the federal government would intervene on states' marijuana laws is if they failed to prevent criminal activity in the market, sales to young persons and the diversion of the drug to other states.[58] This has encouraged states to maintain strong political involvement in their marijuana industries in order to avoid federal regulations and to establish a minimum purchasing age.

In addition, state regulators have also invested in marijuana education programs focused on reducing the risk for youths and educating adults on responsible use and state marijuana laws.[59]

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[54] Syuzanna Martirosyan, 'The decriminalization of recreational cannabis in California: Commercial cultivation could cost growers an arm, a leg and their freedom' [2017] 27(1) *San Joaquin Agricultural Law Review* 187, 202.

[55] Sam Kamin, 'Legal cannabis in the U.S: Not whether but how?' (2016) 50 *U.C Davis Law Review* 617, 627.

[56] Ibid 624.

[57] Ibid 628.

[58] Ibid.

[59] Ibid.

There is limited systematic evaluation of the impacts of decriminalising marijuana across US states.[60] While finite conclusions cannot yet be made, early evidence has suggested that the legalisation of marijuana has had either positive or neutral impacts.[61] A Drug Policy Alliance report in 2018 confirmed that marijuana arrests for possession, cultivation and distribution were down in all states that had legalised as well as Washington D.C. The report cited the total number of court filings in Washington had fallen by a phenomenal 98 per cent between 2011 and 2015.[62] Since Colorado legalised marijuana in 2012, the number of marijuana-related court fillings declined by 81 per cent between 2012 and 2015.[63] The number of marijuana arrests in Oregon dropped by 96 per cent from 2013 to 2016 after the state decriminalised marijuana in 2014, similar to Alaska, which experienced a 93 per cent drop in arrests from 2013 to 2015.[64]

In Washington and Colorado, where marijuana has been decriminalised, crime clearance rates increased for both violent crimes and property crimes, confirming that as a result of decriminalisation police and law enforcement have more time and resources to solve other crimes.

Other European countries

Several European countries have adopted harm minimisation drug strategies. Switzerland (which explicitly supports harm reduction and has introduced medically supervised injecting centres), Armenia, Estonia, Kyrgyzstan, Poland, Croatia and the Czech Republic have all implemented decriminalisation policies.[65]

Central and South America

Across Central and South America there has been increased consideration of alternative strategies to address drug-related violence, with the governments of Colombia, Mexico and Belize demanding a broader debate on the issue of relaxing punitive drug laws.[66] In 2013, the Uruguayan Government legalised the possession and use of marijuana.[67]

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[60] Drug Policy Alliance, *From Prohibition to Progress: A Status Report on Marijuana Legalisation* (Report, January 2018) 4, <https://drugpolicy.org/legalization-status-report>.

[61] Ibid.

[62] *Safe Streets Alliance v Hickenlooper*, 859 F 3d 865, 5 (2017).

[63] Drug Policy Alliance (n 60) 5.

[64] Ibid.

[65] Mostyn et al (n 3) 267.

[66] Damien Cave, 'South America sees drug path to legalisation', *The New York Times* (online, 29 July 2012) <https://www.nytimes.com/2012/07/30/world/americas/uruguay-considers-legalizing-marijuana-to-stop-traffickers.html?pagewanted=all>, discussed in Mostyn et al (n 3).

[67] Mostyn et al (n 3) 267.

New Zealand

As part of New Zealand's general election on 17 October 2020, voters also decided on two referenda: one regarding legalising the recreational use of cannabis, and the other regarding legalising euthanasia for adults with a terminal illness.

Proposed legislation on the former – which would be put to Parliament were the referendum to pass – focused on the legalisation of recreational cannabis, since medicinal marijuana is already permitted in New Zealand when prescribed by a doctor, and hemp is legal when it is produced and sold in line with government regulations.[68] The main features of the proposed scheme included a minimum age of 20 years old for an individual to legally purchase and possess up to 14 grams of cannabis per day; limiting the use of cannabis to private homes and licenced premises; as well as licensing and regulating the whole supply chain of cannabis, for example requiring retailers to communicate health information and warnings about using cannabis at the point-of-sale.[69]

Former New Zealand Prime Minister and member of the Global Commission on Drug Policy, Helen Clark, threw her support behind the 'yes' vote, pointing to the 'disproportionate burden of the prosecutions, convictions and custodial sentences' on New Zealand's Indigenous Māori population based on current prohibitionist drug laws, and contending that legalisation would 'enable those health issues associated with cannabis to be dealt with upfront':[70]

> 'Clearly, the prospect of invoking criminal sanctions has had little impact on people's behaviour. Evidence from longitudinal studies carried out in New Zealand indicates that by the age of 25, 80% of New Zealanders will have tried cannabis at least once. Put simply, prohibition-based policy approaches have not eradicated and will not eradicate cannabis consumption and supply in New Zealand or anywhere else where its use is established.'[71]

While declining to make her position public during the election campaign, Prime Minister Jacinda Ardern revealed after the election that she had voted for legalising the recreational use of cannabis.[72]

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[68] New Zealand Government, 'Referendum on the Cannabis Legislation and Control Bill', *National Library of New Zealand* (Online Archive, 2019) <https://ndhadeliver.natlib.govt.nz/webarchive/wayback/20191205054948/https://www.referendum.govt.nz/cannabis/index.html>.

[69] Hon Andrew Little, 'Cannabis Legalisation and Control Bill: Draft for Consultation', *National Library of New Zealand* (Online Archive, 2019) <https://ndhadeliver.natlib.govt.nz/webarchive/wayback/20191205055155/https://www.referendum.govt.nz/materials/Cannabis-Legalisation-and-Control-Bill.html#d7982149e2758>.

[70] Helen Clark, 'Cannabis prohibition doesn't work anywhere. It's New Zealand's turn to legalise it', *The Guardian* (online, 4 September 2019) <https://www.theguardian.com/commentisfree/2019/sep/04/cannabis-prohibition-doesnt-work-anywhere-its-new-zealands-turn-to-legalise-it>.

[71] Ibid.

[72] James Massola, 'New Zealanders vote 'yes' to euthanasia, 'no' to legalising cannabis', *The Sydney Morning Herald* (online, 30 October 2020) <https://www.smh.com.au/world/oceania/nz-votes-yes-to-euthanasia-no-to-legalising-cannabis-20201030-p56a3m.html>.

Proponents of the 'no' vote, including the Say Nope to Dope campaign and Family First New Zealand, raised concerns about the health impacts on individuals using cannabis, and contended that rates of use would increase should the referendum and its associated legislation pass.[73]

Ultimately, the referendum on legalising euthanasia passed convincingly. However, by a slim majority, voters determined not to legalise recreational cannabis (53.1 per cent voted 'no' while 46.1 per cent had voted 'yes').[74]

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[73] Ibid.

[74] Ibid.

Benefits of a harm minimisation approach

Cost reduction

In 2019 the Queensland Productivity Commission (QPC) concluded that the policy of prohibition is expensive to the taxpayer, with large expenditures on police, courts, community corrections and prisons. It estimated that the annual cost to the criminal justice system in Queensland for enforcing drug laws is $500 million.[75] The Commission noted that this doesn't include other costs, including:

- Personal impacts of drug-related imprisonment include time costs, loss of social capital, lost productive capacity and increased risks to health and mental wellbeing, disqualification from some types of employment, and limitations on travel;
- Secondary costs to family, friends and the broader community;
- Drug convictions indirectly leading to imprisonment, given that convictions contribute to a person's criminal record, creating a higher likelihood of imprisonment for subsequent convictions which may be minor and/or non-drug related; and
- Associated costs for drug users including legal fees, fines, community service, the stigmatisation of a criminal record, and time costs.[76]

The QPC also estimated that the cost of drug-related property and violent crime per year was $420 million for methamphetamines and $170 million for cannabis.[77]

The NSW Special Commission of Inquiry into the Drug "Ice" received numerous submissions on issues relating to the cost of prohibition. The Drug Policy Modelling Program (DPMP) submitted that drug diversion is a cost-effective response to use and possession, as reducing the number of people arrested and sent to court for this offence will substantially reduce the costs borne by the state.[78] Legal Aid NSW referred to evidence that decriminalisation results in measurable savings in health costs, social costs and costs to the justice system.[79]

Decriminalisation may further reduce costs to the criminal justice system. These savings include freeing up police time which allows them to focus on more serious crimes, savings on court and legal resources, and reductions in prison overcrowding.[80]

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[75] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, August 2019) 225 <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>.

[76] Ibid.

[77] Ibid Appendix G, 497.

[78] See Mostyn et al (n 3) 14.

[79] Ibid 14–15.

[80] Ibid 15.

The approach taken by the QPC and others is, in part, built upon the law and economics approach to drug control. The law and economics approach to policy issues such as control of drugs 'tries to explain and predict the behaviour of participants in and persons regulated by the law':[81]

> 'It also tries to improve law by pointing out respects in which existing or proposed laws have unintended or undesirable consequences, whether on economic efficiency, or the distribution of income and wealth, or other values.'[82]

In the context of drugs, the work of leading law and economics theorists such as the Nobel Prize winning University of Chicago economist Gary Becker, and Richard A Posner, formerly of the United States Court of Appeals for the Seventh Circuit from 1981 until 2017, is highly critical of the prohibitionist approach.

Becker, in a seminal article written with his colleague Kevin Murphy in the *Wall Street Journal* in 2013,[83] pointed to the great failure of the 'war on drugs' from a law and economics perspective:

> 'The paradox of the war on drugs is that the harder governments push the fight, the higher drug prices become to compensate for the greater risks. That leads to larger profits for traffickers who avoid being punished. This is why larger drug gangs often benefit from a tougher war on drugs, especially if the war mainly targets small-fry dealers and not the major drug gangs. Moreover, to the extent that a more aggressive war on drugs leads dealers to respond with higher levels of violence and corruption, an increase in enforcement can exacerbate the costs imposed on society.'[84]

Posner has pointed to the flawed argument that the policy of prohibition is necessary because drug consumption and distribution is closely associated with violence. Posner argues that while '[d]rug crimes are often thought to be inherently violent because of their association with guns, gangs, turf wars, and fatal overdoses', these 'characteristics are, however, merely artifacts of the fact that the sale of the drugs in question has been criminalized, so that the suppliers cannot use the usual, peaceable means of enforcing property rights and contracts and are not regulated in the interest of consumer safety, as legal drugs are'.[85]

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[81] Richard A. Posner, 'Values and Consequences: An Introduction to Economic Analysis of Law'*, Coase-Sandor Institute for Law & Economics* (Working Paper No. 53, 1998) 2.

[82] Ibid.

[83] Gary S. Becker and Kevin M. Murphy, 'Have we lost the war on drugs?', *Wall Street Journal* (online, 4 January 2013) <https://www.wsj.com/articles/SB10001424127887324374004578217682305605070>.

[84] Ibid.

[85] Richard A. Posner, 'The War on Drugs-Posner's Comment'*, The Becker-Posner Blog* (Blog Post, 20 March 2005) <https://www.becker-posner-blog.com/2005/03/the-war-on-drugs--posners-comment.html>.

Reduced numbers in the criminal justice system

Courts and prisons are clogged with significant numbers of people prosecuted for drug-related crimes.[86] This includes people who have breached their parole or community-based orders by being charged with low level drug or drug-related charges, despite their original offence being one of a more serious nature. The effect of this is people ending up back in prison for a minor offence having been previously released after serving a sentence for a more serious matter.

These prosecutions for drug-related crimes cause an enormous drain on courts' time and resources, resulting in significant delays in case resolution, including for other serious offences.

In addition, there is evidence from the US that criminalisation and prohibition have been major causes of the significant increases in the US prison population.[87]

An approach that emphasises health and harm minimisation will result in resource efficiencies for the criminal justice system and decrease the prison population.

Improves health and wellbeing of drug users

Significant social problems often arise from the consumption of illicit drugs. These include financial hardship, physical impairment, and psychological problems including mental illnesses such as depression.

Rather than addressing these issues, the current Australian approach is to penalise and punish people who need specialised assistance to address their addiction. Criminal prosecution only serves to exacerbate these problems, which often remain unaddressed.[88] A system of decriminalisation and regulation with various other harm minimisation strategies enables individuals to address the related health and social problems that often arise from illicit substance use.[89]

Reducing the stigma involved with drug usage

Drug-related stigma may be caused or compounded by prevailing legal frameworks governing drugs and drug use.[90] The criminalisation of substance use increases the level of stigma associated with drugs

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[86] Mostyn et al (n 3) 261

[87] Ernest Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America* (The New Press, 2011), discussed in Mostyn et al (n 3) 265.

[88] Mostyn et al (n 3) 261.

[89] Ibid 268.

[90] Livingston et al (n 9). See also Seear, Lancaster and Ritter, 'A new framework for evaluating the potential for drug law to produce stigma: Insights from an Australian study' (2017) 45(4) *Journal of Law, Medicine and Ethics,* 596-7, discussed in Special Commission of Inquiry into the Drug "Ice" (n 4).

and further marginalises and excludes from society those people who use illegal drugs.[91] A system of prohibition of particular drugs is inherently stigmatising as it conveys a negative message that these drugs, and the people who use them, are bad. In addition, specific drug-related law enforcement practices may disproportionately target certain groups.[92]

Stigma, due to the criminalisation of drug usage, has been identified as a barrier to individuals or their families seeking help or accessing services, as someone is less likely to comply with authorities if what they are doing is illegal. An example of this was where a 19-year-old girl swallowed three MDMA pills in close proximity to police officers because she feared that she would be caught and arrested.[93]

By feeling safer and more comfortable in these environments, people will also be more inclined to engage with authorities to seek assistance for the various health, financial and other social problems they may encounter as a result of their addiction. This can best be delivered in a reliable and regulated system that allows the purchase drugs which are currently considered illicit.

[91] Livingston et al (n 9) 4.

[92] Seear, Lancaster and Ritter (n 90) 598.

[93] SBS News (n 11).

Approaches in Australian states and territories

The following table summarises the programs and initiatives in place in state and territory jurisdictions across Australia. Each initiative is detailed further in the next section, and in Appendix 1.

<table>
<tr><th rowspan="2">Jurisdiction</th><th rowspan="2">Legalisation</th><th colspan="2">Depenalisation, diversion and/or cautioning schemes, enforced by the police</th><th rowspan="2">Drug courts</th><th rowspan="2">Harm minimisation initiatives / other programs</th></tr>
<tr><th>De facto</th><th>De jure</th></tr>
<tr><td>Australian Capital Territory</td><td>Cannabis for personal use
Limited, primarily possession of up to 50g, and growing up to two plants.</td><td>Police Early Diversion Program
Diversion to treatment (incl. education, rehab, counselling) for those caught possessing small amounts of any illicit drug.</td><td>Proposed decriminalisation of illicit drugs
Private member's bill to be brought to ACT Legislative Assembly in 2021 to decriminalise personal possession of certain quantities of illicit drugs.</td><td>--</td><td>Pill testing
- Two trials at music festivals;
- Tested illicit pills on-the-spot;
- Education about the pills offered to festival goers;
- Amnesty bins available;
- Govt considering opening permanent pill testing site.

Court Alcohol and Drug Assessment Service
- Referral from magistrates;
- Post-sentencing treatment program;
- Up to 12 months long.</td></tr>
<tr><td>New South Wales</td><td>--</td><td>Cannabis Cautioning Scheme
- Caution for possession;
- Voluntary education session after first caution;
- Mandatory education session after second caution.</td><td>Criminal Infringement Notices scheme
On-the-spot fine for illicit drug possession.</td><td>Drug Court of NSW
- 12-month program;
- Tailored treatment plan for participants.

Youth Drug and Alcohol Court
[closed 2012]
For youth aged 14 to 18 years.</td><td>Magistrates Early Referral Into Treatment
- Three-month local court program;
- Tailored treatment plan, sometimes a condition of bail.

Medically Supervised Injecting Centre
- One location;
- Supervised injecting space;
- Medical team on hand to manage overdoses;
- Clients are given information about rehabilitation options.</td></tr>
</table>

Victoria	--	**Cannabis Cautioning Program** - Caution for simple use or possession; - Optional education component. **(Illicit) Drug Diversion Program** - Caution for simple use or possession of illicit drugs other than cannabis; - Mandatory clinical assessment and treatment session.	--	**Drug Court of Victoria** - Two-year post-sentencing program; - Supervised treatment in the community.	**Medically Supervised Injecting Room** - One location; - Another site is in the works; - Supervised injecting space; - Medical team on hand to manage overdoses; - Clients are given information about rehabilitation options.
South Australia	--	--	**Cannabis Expiation Notice Scheme** Expiation notice, including an expiation fee. **Police Drug Diversion Initiative*** Referral of individual in possession of any illicit drug to a tailored treatment plan.	**South Australian Drug Court** - 12-month program; - Drug testing and supervised treatment.	--
Northern Territory	--	**Illicit Drug Pre-Court Diversion Program** - For first-time drug offenders; - Education, counselling and treatment.	**Cannabis Expiation Notice scheme** - Expiation notice, including a fee; - No education component.	--	--

Western Australia	--	**Cannabis Intervention Requirement scheme** - Caution for personal possession, and a fee; - Mandatory education component.	--	**Perth Drug Court** Three streams of programs available, all including treatment.	--
Queensland	--	--	**Police Diversion Program*** - For minor drug offences; - Includes assessment, education, counselling and optional treatment.	**Queensland Drug and Alcohol Court** Program includes counselling, education, and treatment.	**Illicit Drugs Court Diversion program** - Referral from a magistrate; - One session of assessment, education and counselling.
Tasmania	--	**Illicit Drug Diversion Initiative** Three-tiered program aimed at low-level and/or first-time users of any illicit drug. - Level One: caution; - Level Two: assessment and possible treatment; - Level Three: assessment, counselling, detoxification and rehabilitation.	--	--	**Court Mandated Diversion Program** - Referral from a magistrate; - Includes regular drug testing, counselling, and education.

* Mandatory referral by police; all other programs presented are at the discretion of police.

Recent proposals for change around Australia, and government responses

New South Wales

Pill testing

Six young people died at music festivals in NSW between December 2017 and January 2019, and in each case the cause of death was a toxic level of the drug MDMA in their blood (in one case, MDMA and cocaine).[94] In response, Coroner Grahame conducted an inquest (the Inquest into the death of six patrons of NSW music festivals).

One of the key recommendations made by Coroner Grahame was that the NSW Government should support and facilitate pill testing, based on successful international models.[95] Underpinning this recommendation were findings by the Coroner that it appears likely that each of the six young people who died 'had limited knowledge about the potential dangers of MDMA or how to recognise the signs of distress'.[96]

Coroner Grahame proposed that pill testing should be implemented not just at music festivals, but also in permanent structures throughout the state, starting with a trial of supervised pill testing at music festivals in NSW during the summer of 2019–2020.[97] The Coroner found that pill testing 'would seem to fall squarely within the government's harm reduction policy framework and requires close consideration'.[98]

In response to the Coroner's findings, NSW Premier Gladys Berejiklian has rejected the push for pill testing in NSW. Premier Berejiklian has consistently said that pill testing 'sends a wrong message':

> 'It actually gives people a false sense of security because how one person reacts to a drug is very different to another person reacting and unfortunately we have seen people lose their lives by taking what is a pure substance, a pure drug.
>
> What pill testing does is pick up on irregularities, however pill testing doesn't protect people from the actual substance itself and that's what concerns us as a Government.'[99]

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[94] State Coroner's Court of New South Wales, *Inquest into the death of six patrons of NSW music festivals* (n 2) 1.

[95] Ibid 135.

[96] Ibid 13.

[97] Ibid 135–136.

[98] Ibid 105.

[99] Sarah Hawke and Sarah Thomas, 'NSW Premier reiterates Government's opposition to pill testing despite coroner's impending recommendation', *ABC News* (online, 16 October 2019) <https://www.abc.net.au/news/2019-10-16/gladys-berejiklian-repeats-government-opposition-to-pill-testing/11605550>.

Premier Berejiklian has only committed to introducing drug amnesty bins at music festivals.[100]

Pill testing has since also been recommended in a report from the Special Commission of Inquiry into the Drug "Ice" (detailed below). The NSW Government also rejected that recommendation outright, as the Government 'does not consider there is sufficient evidence to introduce substance checking (colloquially known as "pill testing") services'.[101]

Special Commission of Inquiry into the Drug "Ice" (January 2020)

The report arising out of the Special Commission of Inquiry into the Drug "Ice", released last year, stated categorically that policies based on the prohibition of substances like opium have led to 'drug smuggling, a large increase in the price of illegal opium, the corruption of customs officers and adulteration of the product'.[102]

The report also noted, however, that since 1985 jurisdictions across Australia have generally displayed a commitment to harm minimisation, including in NSW after the State Government heavily invested in drug and alcohol support services as well as other initiatives in the aftermath of the 1999 NSW Drug Summit.[103] Progress since then, the report noted, has 'gone backwards'.[104]

As such, Commissioner of the inquiry Professor Dan Howard SC made 109 recommendations, including that:

- harm minimisation must remain the overarching objective to any alcohol and other drugs policy in NSW;[105]
- the NSW Government should implement a model 'for the decriminalisation of the use and possession for personal use of prohibited drugs', which would mean removing the criminal offences for use and possession for personal use, and referral instead to treatment and intervention services, with no limits to the number of referrals an individual may receive;[106]

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[100] The Premier's Office, 'Drug amnesty bins for music festivals' (Media Release, NSW Government, 11 December 2019) <https://www.nsw.gov.au/media-releases/drug-amnesty-bins-for-music-festivals>.

[101] Premier and Cabinet, 'Interim NSW Government response to the Special Commission of Inquiry into the Drug "Ice"' (Online Publication, NSW Government, February 2020) 2 <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/01-Interim-NSW-Government-response-to-the-Special-Commission-of-Inquiry-into-the-Drug-Ice.pdf>.

[102] Dan Howard, *Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* (Report, Volume 1b, January 2020) 43.

[103] Ibid 49–50.

[104] Ibid 51.

[105] Dan Howard, *Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* (Report, Volume 1a, January 2020) lvii [Recommendation 5].

[106] Ibid lix [Recommendation 11].

- the NSW Government should introduce ‘a legislated police diversion scheme for use and possession for personal use of prohibited drugs’, which would include *mandatory* referral by police to education and treatment services;[107]

- the Drug Court of NSW should be ‘adequately resourced’ and also expanded;[108]

- given the need for a state-wide program for youth after the closure of YDAC, the MERIT program should be adapted for defendants younger than 18 years old across NSW;[109]

- the NSW Government should establish ‘a state-wide clinically supervised substance testing, education and information service’ (i.e. pill testing), with a trial at a music festival;[110] and

- the NSW Police Force should cease certain practices that uncover drug possession, such as employing drug detection dogs at music festivals and using strip searches.[111]

The Berejiklian Government rejected many of the above recommendations. While the Government reaffirmed its commitment to reducing alcohol and other drug-related harm,[112] from the outset NSW Health Minister Brad Hazzard rejected a handful of the Commissioner’s recommendations, including introducing pill testing and ceasing the use of drug detection dogs.[113]

After committing to respond to the Special Commission report before 2021, a draft response to the report was taken to NSW Cabinet in early December 2020 by Attorney-General Mark Speakman. The proposal centred on a legislated ‘three chance’ or ‘three strikes’ police diversion program. Under this program police could give individuals caught with drugs for personal use penalty infringement notices three times before criminal proceedings in court would be activated.[114] This program would also require the individual involved to participate in an ‘appropriate health intervention’.[115]

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[107] Ibid [Recommendation 12].

[108] Ibid lx [Recommendations 14 and 15].

[109] Ibid [Recommendation 16].

[110] Ibid lxvi [Recommendation 53].

[111] Ibid lxx [Recommendations 80–82].

[112] Premier and Cabinet (n 101) 2.

[113] NSW Government, ‘Special Commission of Inquiry into 'Ice' report released’, *NSW Government News* (Web Page, 4 March 2020) <https://www.nsw.gov.au/news/special-commission-of-inquiry-into-ice-report-released>.

[114] Tom Rabe and Lucy Cormack, ‘NSW government delays response to ice inquiry amid internal dispute’, *Sydney Morning Heald* (online, 14 December 2020) <https://www.smh.com.au/national/nsw/nsw-government-delays-response-to-ice-inquiry-amid-internal-dispute-20201214-p56ne5.html>.

[115] Ashleigh Raper, ‘NSW Government defers finalising drug reforms until new year after ice inquiry recommendations’, *ABC News* (online, 14 December 2020) <https://www.abc.net.au/news/2020-12-14/nsw-government-defers-finalising-drug-reforms-until-new-year/12982302>.

The proposal was met with strong opposition from some within the NSW Government, and public debate on the issue ensued once it was leaked to the media that the NSW Government may be considering decriminalisation measures.[116] Premier Berejiklian rejected these reports, stating that the NSW Government 'will not be going down that path'.[117]

While a compromise to apply the new system only to young individuals found possessing drugs for personal use has reportedly been offered,[118] ultimately Attorney-General Speakman announced in mid-December that any decision on drug reform would be deferred until 2021.[119]

Another medically supervised injecting centre in NSW

Currently, NSW has one medically supervised injecting centre (MSIC) in Kings Cross, Sydney (detailed in Appendix 1). There have been calls for the NSW Government to open at least one more MSIC.

Deputy State Coroner Harriet Grahame publicly called for a second MSIC when she handed down her findings in 2019 on the death by heroin overdose of 25-year-old Amaru Bestrin in a Liverpool Hospital bathroom in December 2016.[120]

This was also a recommendation arising from the Special Commission of Inquiry into the Drug "Ice" last year. Commissioner of the inquiry Professor Dan Howard SC recommended that the NSW Government should provide more drug consumption services – for example, medically supervised injecting centres – based on local need.[121] Professor Howard also recommended that these services be made available to those aged 16 to 18, as well as to pregnant women.[122]

Despite these calls, the NSW Government has indicated that it will not open a second MSIC.[123]

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[116] Tom Rabe and Lucy Cormack, ''No strategy': Drug possession compromise on the table to end bitter cabinet division', *Sydney Morning Herald* (online, 4 December 2020) <https://www.smh.com.au/national/nsw/no-strategy-drug-possession-compromise-on-the-table-to-end-bitter-cabinet-division-20201203-p56k8z.html>.

[117] Ibid.

[118] Ibid.

[119] Raper (n 115).

[120] Angus Thompson and Jacqueline Maley, ''A chance to live': Coroner calls for second Sydney injecting room', *Sydney Morning Herald* (online, 17 December 2019) <https://www.smh.com.au/politics/nsw/coroner-calls-for-a-new-supervised-injecting-room-in-south-west-sydney-20191217-p53kn0.html>.

[121] Howard, Volume 1a (n 105) lxvi [Recommendation 51].

[122] Ibid.

[123] NSW Government (n 113).

Victoria

Victoria's diversionary programs

A March 2018 inquiry by the Parliament of Victoria's Law Reform, Road and Community Safety Committee determined that Victoria's police diversionary programs had 'produced a number of associated positive benefits',[124] and that there was broadly a positive and supportive feeling toward the state's two diversionary programs – the Cannabis Cautioning Program and the (Illicit) Drug Diversion Program (detailed in Appendix 1) – among those who made submissions to the inquiry.[125]

However, two major issues were identified and noted by the Committee in their final report.

First, the Committee noted concerns that the limit on the number of diversions an individual can accumulate 'fails to recognise substance dependence as a relapsing condition'.[126] As such, an individual with a substance dependence problem could easily accumulate two cautions, and from that point is automatically excluded from diversionary programs. That individual would then be processed through the criminal justice system and would face the problems associated with that process, including reduced access to treatment and harm minimisation options.[127]

Secondly, the discretionary nature of Victoria's police diversionary programs has been identified as a point of concern. As the programs are *de facto* schemes with no legislative backing, implementation of the programs is at the full discretion of police officers. Victoria's Law Reform, Road and Community Safety Committee noted submissions which revealed that willingness by police officers to offer individuals these programs varies across Victoria and even between local police stations.[128] Whether an individual is offered a diversionary program depends on a 'postcode lottery', including whether the local police commander has fostered a culture at that police station which is favourable to the diversionary programs instead of charging individuals.[129]

Given these issues, the Committee ultimately recommended that alternative models that actually treat drug use should be explored, and that all police discretion should be removed by codifying the diversionary programs.[130]

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[124] Law Reform, Road and Community Safety Committee, *Inquiry into drug law reform* (Report, March 2018) 168.

[125] Ibid 166.

[126] Ibid.

[127] Ibid.

[128] Ibid 167.

[129] Ibid 167–168.

[130] Ibid xxiv.

The Victorian Government's response to these specific recommendations was to invest further in diversionary programs across Victoria, including the police diversionary programs;[131] but, ultimately, to leave any further changes to the programs to Victoria Police.[132]

In December 2020 Victoria Police released *The Victoria Police Drug Strategy 2020–2025*, which identified 'treatment and support' and 'harm reduction' as two key elements of its four-pronged strategy.[133]

Victoria Police reinforced its commitment to Victoria's police drug diversion program, stating that '[t]reatment is cost effective and prevents far more expensive justice and acute health demand and costs'.[134] It has committed to continue working with the Victorian Department of Health and Human Services on expanding the Victoria police drug diversion program, and using 'police discretion for diversion as the regulatory mechanism to ensure that personal drug use is treated as a health issue'.[135]

In relation to harm reduction, Victoria Police acknowledged that 'drug problems are first and foremost health issues'.[136] As such, it is not just committed to implementing harm minimisation programs like supervised injecting rooms, but has also recognised that 'compassion and empathy towards drug users and their families' from the police themselves are important in guiding those individuals through health-centred programs.[137]

Assessing Victoria's medically supervised injection room

Victoria has had a medically supervised injection room (MSIR) since June 2018, a service trialled in North Richmond, Melbourne. An independent review was undertaken into this MSIR to assess the service's first 18 months.

In its report released in June 2020, the Medically Supervised Injecting Room Review Panel stated unequivocally that the 'MSIR has prevented overdoses and further harm and has saved lives'.[138]

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[131] Victorian Government, *Response to the Parliamentary Inquiry into Drug Law Reform* (Report, August 2018) 17.

[132] Ibid 19.

[133] Victoria Police, 'Victoria Police Drug Strategy 2020-2025' (Online Publication, December 2020) 11 <https://www.police.vic.gov.au/drug-strategy>.

[134] Ibid 16.

[135] Ibid 17.

[136] Ibid 18.

[137] Ibid 19.

[138] Medically Supervised Injecting Room Panel, Victorian Government, *Review of the Medically Supervised Injecting Room* (Report, June 2020) x <https://www.parliament.vic.gov.au/file_uploads/Review_of_the_Medically_Supervised_Injecting_Room_June_2020_WsP785dN.pdf>.

Specifically, the review's authors contend that between 21 and 27 deaths were avoided because of individuals using the MSIR.[139]

As such, the Panel drew this conclusion about the North Richmond MSIR:

> 'Given that North Richmond has long been a major site of heroin use and related harms in Victoria, and that the trial has successfully reduced harms for service users, the Panel call on the government to continue the trial of the Medically Supervised Injecting Room at North Richmond Community Health for a further three years.'[140]

Further, the Panel recommended that 'the government expands the current trial to include another supervised injecting service' located in the City of Melbourne, reasoning that '[o]ne site cannot effectively address all the needs for such a service in a city the size of Melbourne'.[141]

On 6 June 2020, the Victorian Government announced that it would accept the Panel's recommendations and thus will extend the North Richmond MSIR trial for three more years, and also open a new site in the City of Melbourne.[142]

Australian Capital Territory

Legalisation of cannabis in ACT (January 2020 – present)

After months of debate in its Parliament on the proposed legislation, the ACT last year became the first jurisdiction in Australia to legalise the possession, use and cultivation of small amounts of cannabis.

Under the *Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019*, which came into effect on 31 January 2020, an adult will be able to grow a maximum of two cannabis plants, possess up to 50 grams of cannabis per person, and use cannabis in their own home for personal use only.[143]

However, the sale or supply of cannabis is still a criminal offence, and the 2019 amendment also introduced the offence of smoking cannabis within 20 metres of a child.[144] It is also illegal to consume cannabis in public.[145]

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[139] Ibid.

[140] Ibid xii.

[141] Ibid xiii.

[142] Victorian Government, 'Review Panel finds Medically Supervised Injecting Room is saving lives', *Victorian Government News* (Web Page, 6 June 2020) <https://www.dhhs.vic.gov.au/news/review-panel-finds-medically-supervised-injecting-room-saving-lives>.

[143] ACT Government, *Cannabis* (Web Page) <https://www.act.gov.au/cannabis/home>.

[144] Ibid.

[145] ACT Health, ACT Government, *The Festivals Phill Testing Policy* (Policy Guide, September 2020) 2 <https://www.health.act.gov.au/sites/default/files/2020-09/The%20Festivals%20Pill%20Testing%20Policy_September%202020.pdf>.

Despite the grim predictions from those opposed to the legalisation of cannabis in the ACT, those concerns have not been realised a year on from the changes coming into effect. For instance, cannabis usage rates in the ACT have remained mostly steady, and there has not been an increase in cannabinoid-related presentations to hospitals as a proportion of all drug-related hospital presentations.[146]

Further, according to data from ACT Police:

- 90 per cent fewer Simple Cannabis Offence Notices were issued in 2020;
- There was no increase in drug driving offences; and
- There have been no standalone small amount cannabis possession offences recorded since 31 January 2020.[147]

Alcohol, Tobacco and Other Drug Association ACT Chief Executive Devin Bowles summarised the first twelve months of cannabis legalisation in the ACT as: 'The sky hasn't fallen and people who need to access treatment are better able to do so while the taxpayer is saving money. It's a win-win.'[148]

Proposed decriminalisation of illicit drugs (December 2020 – present)

Further steps have been taken in the ACT towards the decriminalisation of personal possession of specific quantities of illicit drugs.

Labor backbencher Michael Pettersson announced in December 2020 that he will be introducing a private member's bill to the ACT Legislative Assembly in 2021 to decriminalise illicit drugs, including heroin and MDMA. Mr Pettersson's proposed scheme would see individuals who are found in personal possession of certain quantities of the drugs listed in Mr Pettersson's draft bill being issued with a fine, rather than being charged with a criminal offence.[149]

ACT Chief Minister Andrew Barr labelled this proposed bill 'an important public policy debate', although decriminalising illicit drugs is not official ACT Labor policy.[150] Chief Minister Barr also noted that a

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[146] Michael Inman, 'What has changed in the year since cannabis possession was legalised in the ACT?', *ABC News* (online, 31 January 2021) <https://www.abc.net.au/news/2021-01-31/what-has-changed-since-cannabis-was-legalised-in-the-act/13105636>.

[147] Ibid.

[148] Ibid.

[149] Parliamentary Counsel's Office, ACT Government, *Drugs of Dependence (Personal Use) Amendment Bill 2021* (Consultation Draft, December 2020) <https://michaelpettersson.com.au/media/187211/j2020-1655-drugs-of-dependence-personal-use-amendment-bill-2021-d04-final.pdf>.

[150] 'Bill to decriminalise small amounts of MDMA, heroin, ice and other drugs to be introduced in ACT', *ABC News* (online, 14 December 2020) <https://www.abc.net.au/news/2020-12-14/canberra-bill-to-decriminalise-drugs-heroin-meth-mdma/12980358>.

Legislative Assembly committee will examine the proposed legislation before it comes before the Legislative Assembly ‘towards the end of 2021’.[151]

Pill testing (April 2018 – present)

The ACT was home to the nation’s first government-sanctioned trial of pill testing, which took place at the music festival Groovin the Moo in Canberra in April 2018. A second government-sanctioned trial in the ACT was completed by Pill Testing Australia in April 2019, also at Groovin the Moo in Canberra.

Functioning as a harm minimisation strategy, pill testing involves members of the public submitting pills – for example, ecstasy or MDMA – so that trained officials can analyse the composition of those pills. If lethal or unknown substances, or any adulterants, are found in the pills then the individual who submitted them for testing is informed about the risks of taking those pills, and is offered a safe method of disposal free from criminal prosecution. Educators are on hand to discuss the risks of consuming the substances, how to minimise these risks, and to reiterate that ‘no level of drug use is “safe”’.[152]

At the second trial, 234 patrons used the pill testing service, and a total of 170 substances were submitted for testing during the festival.[153] This trial was deemed to have been successfully implemented in an independent evaluation by a team from the Australian National University (ANU).[154] The key findings of the ANU evaluation included that:

- the service was received positively by festival goers;
- there was general support for ongoing pill testing in the ACT;
- valuable suggestions for service improvements were garnered; and
- the success of this second trial of pill testing supports developing the strategy nationwide.

While the ACT Government’s position remains that it ‘does not endorse the use of illicit drugs and reiterates that no level of drug use is considered safe’, underscoring its framework on pill testing (*The Festivals Pill Testing Policy*) is a commitment to harm minimisation and reducing the dangers of illicit drug use.[155]

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[151] Ibid.

[152] Anna Olsen, Gabriel Wong and David McDonald, *ACT Pill Testing Trial 2019: Program Evaluation* (Final Report, December 2019) 12–13 <https://www.health.act.gov.au/sites/default/files/2019-12/ACT%20Pill%20Testing%20Evaluation%20report%20FINAL.pdf>.

[153] Ibid 15.

[154] Ibid 44.

[155] ACT Health (n 145) 2.

In August 2020, the ACT Government agreed to explore the idea of having a dedicated pill testing site in Canberra's city centre for the 2019/2020 summer.[156] However, the ACT Government announced in January 2021 that the project would not be operational by the end of February 2021 due to 'the range of legal and practical issues involved in establishing a static pill testing trial'.[157] The project will still be considered by Cabinet, but there is no definitive timeline for Canberra's dedicated pill testing site.[158]

Queensland

Queensland Productivity Commission's review and recommendations

A Queensland Productivity Commission report from 2019 found that, despite the existence of the Police Diversion Program and the Illicit Drugs Court Diversion program (both detailed in Appendix 1), Queensland authorities make 'limited use of diversion'.[159]

The report identifies that certain factors have contributed to this, including 'limited expertise amongst police and courts about when and how to limit unproductive contact with the criminal justice system, triage and connect offenders to treatment'; strict eligibility criteria which greatly limits to whom police can give cautions; and a lack of incentives for police to use diversion – for example, meeting their workplace KPIs may necessitate police officers favouring proceedings over harm minimisation processes.[160]

The Commission recommended that it should be made easier for police to offer cautions; that police officers should be able to offer cautions for minor drug offences involving drugs other than cannabis; that measures for deferred prosecution should be introduced in Queensland; and that police should have incentives to use diversion programs.[161]

In response, the Queensland Government reiterated its support for diversionary options, including police offering cautions to greater numbers of eligible individuals, but stated that there are 'no legislative amendments planned'.[162]

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[156] Daniella White, 'Canberra pill testing site moves closer as ACT govt agrees to investigation', *The Canberra Times* (online, 21 August 2020) <https://www.canberratimes.com.au/story/6888821/pill-testing-site-could-be-coming-to-the-city-this-summer>.

[157] Daniella White, 'Civic pill testing site won't go ahead this summer', *The Canberra Times* (online, 21 January 2021) <https://www.canberratimes.com.au/story/7093951/civic-pill-testing-site-wont-go-ahead-this-summer>.

[158] Ibid.

[159] Queensland Productivity Commission (n 75) 159.

[160] Ibid 160.

[161] Ibid 164–172.

[162] Queensland Government, *Queensland Productivity Commission inquiry into imprisonment and recidivism: Queensland Government response* (Online Publication, January 2020) 11 <https://qpc.blob.core.windows.net/wordpress/2020/01/Government_response_to_QPC_inquiry_into_imprisonment_and_recidivism.pdf>.

National

Medicinal cannabis oil approved for sale

After the Therapeutic Goods Administration (TGA) announced its approval in December 2020, low-dose medicinal cannabis oil can be purchased over-the-counter at pharmacies around Australia as of 1 February 2021. Cannabis oil is made up of cannabidiol, which is an active ingredient in cannabis but is non-psychotropic and does not make the user high.[163] Clinical research has found that cannabis oil can help with a range of medical conditions, including pain management, symptoms of anxiety, and even post-traumatic stress disorder.[164]

The TGA approved preparations of up to 150mg per person per day of cannabis oil, which pharmacists can now dispense without the customer needing a prescription, referral or special approval.[165] As per the terms of the TGA's approval, only adults will be able to purchase cannabis oil, and it should not be used by pregnant women.[166] Producers of cannabis oil will need to meet strict regulatory requirements of safety and efficacy in order for their product to be added to the Australian Register of Therapeutic Goods, and then sold through pharmacies.[167]

[163] Julie Power, ''We know it works': Cannabis oil firms chase approvals as over-the-counter sales are legalised', *The Sydney Morning Herald* (online, 30 January 2021) <https://www.smh.com.au/national/we-know-it-works-cannabis-oil-can-be-legally-sold-over-the-counter-from-monday-20210129-p56xyd.html>.

[164] Fraser Barton, 'Cannabis oil over the counter, no high', *The Canberra Times* (online, 1 February 2021) <https://www.canberratimes.com.au/story/7108832/cannabis-oil-over-the-counter-no-high/?cs=14231>.

[165] Power (n 163).

[166] Barton (n 164).

[167] Power (n 163).

Conclusion

There is increasing recognition both within Australia and internationally that criminalisation of illicit drug consumption has been a monumental policy failure, both in terms of reducing crime and addressing the significant health and social problems associated with drug consumption. With this recognition, a momentum has developed to shift the focus of the policies from criminal law enforcement to initiatives that focus on health and harm minimisation, and to address the social problems associated with drug consumption. These include financial hardship, mental illness, unemployment and homelessness.

Put simply, criminalisation of drug use has not worked. It has not stopped people from continuing to use drugs. It has not stopped people from overdosing.

It has often exacerbated people's disadvantage, resulting in further financial distress, mental illness, and difficulties finding and keeping housing.

From a financial and economic perspective, the policy of criminalisation and prohibition is not sustainable. The significant public expenditure on law enforcement, the courts, community corrections and prisons, as well as the continuing ongoing costs associated with drug consumption, including health issues and mental illness, is not providing sufficient return to warrant its continuation.

The ALA submits that this money would be better spent on health, housing and social services that will serve to address the underlying causes of substance abuse and the associated social problems that go with it. Public investment in harm minimisation and health responses to drug consumption will result in significant savings for the criminal justice system and improved health and wellbeing for people who suffer from addiction.

As more and more countries recognise the failure of criminalisation as a policy response to substance abuse, the evidence for the effectiveness of health-focused harm minimisation strategies is becoming apparent. Australian states and territories have been cautious in their approach by comparison. However, there has been increasing awareness of the need to give greater recognition of the need to divert people with drug abuse problems away from the criminal justice system and towards services that can address the underlying health problems associated with addiction.

The time has come to go further.

The ALA strongly encourages all state and territory governments to abandon their policies of prohibition and criminalisation of substance abuse and embrace decriminalisation, with a focus on harm minimisation, and invest in public health and social services to address drug abuse and the associated social and health effects.

Appendix 1

Approaches in Australian states and territories

Australian Capital Territory

Court Alcohol and Drug Assessment Service (October 2000 – present)

Under the Court Alcohol and Drug Assessment Service (CADAS), magistrates refer individuals to a diversion program focused on treatment, with the aim of reducing rates of recidivism.[168] CADAS operates through the ACT Magistrates Court, ACT Children's Court, and the ACT Supreme Court.

While the program was designed as an eight-week diversion treatment program when the individual first came before the court, CADAS has expanded to also become a post-sentencing program lasting up to 12 months.[169]

Eligibility for CADAS includes that an individual has been 'apprehended or charged with an alcohol and/or drug related offence',[170] and that they are willing to undertake treatment.[171] CADAS clinicians report both compliance and non-compliance to the courts, which is taken into account by the magistrate in future decisions pertaining to that individual.[172]

An evaluation of CADAS in 2010/11 found that individuals who are going through treatment via CADAS have a very high likelihood of treatment completion, with 83.9 per cent completing the treatment.[173]

Police Early Intervention and Diversion program (December 2001 – present)

Where magistrates refer individuals to a treatment program under the Court Alcohol and Drug Assessment Service (see below), under the Police Early Intervention and Diversion (PED) program the Australian Federal Police (AFP) – the ACT's community police service – refers individuals to a diversion program.

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[168] ACT Health, ACT Government, *Diversion services* (Web Page, 13 November 2018) <https://health.act.gov.au/services-and-programs/alcohol-and-drug-services/diversion-services>.

[169] Caitlin Hughes et al, *Evaluation of the Australian Capital Territory Drug Diversion Programs* (Report, February 2013) 32 <https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/Evaluation%20of%20the%20Australian%20Capital%20Territory%20Drug%20Diversion%20Programs.pdf>.

[170] ACT Health, *Diversion services* (n 168).

[171] Hughes et al, *Evaluation of the Australian Capital Territory Drug Diversion Programs* (n 169) 33.

[172] ACT Health, *Diversion services* (n 168).

[173] Hughes et al, *Evaluation of the Australian Capital Territory Drug Diversion Programs* (n 169) 45.

The aim of this program is to divert an individual (youth or adult) who has been apprehended for personal possession of a small amount of illicit drugs to a treatment program within the health sector, rather than charging that individual with a drug offence/s.[174] Further eligibility criteria include the individual admitting to the offence, and also consenting to going to a diversion program. An individual is automatically not eligible for the program if they have been to more than two diversion programs previously, and/or if violence was involved in the offence for which they have come to police attention.[175]

After an assessment by the Alcohol and Drug Program Diversion Service (ADPDS), the individual is referred to an approved ACT agency for treatment.[176] This may include education, residential rehabilitation, and counselling.[177] Compliance with the treatment offered is monitored by the ADPDS, with non-compliance reported back to the AFP for further action.[178] That action could include a criminal penalty.[179]

During the first nine years of PED, the program struggled with low referral numbers due to police resistance to the scheme coupled with low awareness of eligibility for the scheme at the point of arresting an individual.[180] Since January 2010, the system for processing PED referrals was upgraded to be faster and easier, and training for AFP officers about the program was also expanded.[181]

New South Wales

Cannabis Cautioning Scheme (April 2000 – present)

The Cannabis Cautioning Scheme (CCS) is a *de facto* model, meaning it has no legislative basis but is governed by the Cannabis Cautioning Scheme Guidelines issued by NSW Police. CCS was initiated as a response to the 1999 NSW Drug Summit, which questioned the efficacy of arresting people for minor drug offences.[182]

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[174] ACT Health, *Diversion services* (n 168).

[175] Hughes et al, *Evaluation of the Australian Capital Territory Drug Diversion Programs* (n 169) 31.

[176] ACT Health, *Diversion services* (n 168).

[177] Ibid.

[178] Ibid.

[179] Queensland Productivity Commission (n 75) 229.

[180] Hughes et al, *Evaluation of the Australian Capital Territory Drug Diversion Programs* (n 169) 30.

[181] Ibid.

[182] NSW Police Force, NSW Government, *Drug Programs and initiatives* (Web Page) <https://www.police.nsw.gov.au/crime/drugs_and_alcohol/drugs/drug_pages/drug_programs_and_initiatives>.

In this scheme, a police officer has discretion to issue an eligible adult a caution for personal possession of 15 grams of cannabis or less, rather than charge and prosecute the individual involved. Individuals must admit to the offence in order to receive the caution.

An individual is excluded from the scheme if they have already received two cautions; and/or if they are facing charges for concurrent offences, or have prior convictions for violence or sexual offences.[183]

The formal, written caution itself warns of the health and legal consequences of cannabis use, and provides contact information for the Alcohol and Drug Information Service (ADIS). Contacting ADIS is optional upon receipt of a first caution, but is mandatory for individuals receiving a second (and final) caution, as they must attend an education session about cannabis use.[184] There is no further action taken if the individual does not comply by attending this session, beyond recording non-compliance.[185] A magistrate may, however, take non-compliance with this scheme into account when determining sentences for other offences.[186]

In the first three years of CCS, a total of 9,235 cautions were issued, coupled with a fall of 6,679 in the number of cannabis-related charges when compared to the three years before CCS began.[187] Authors of a 2004 study of the scheme found that this data especially indicates 'that the Scheme appears to have been successful in diverting cannabis users from the court'.[188]

In 2013, there were 5,327 cannabis cautions issued in NSW, with similar numbers recorded in 2011 and 2012.[189]

One point of concern about the scheme is that only 0.7 per cent of those issued with a caution have actually contacted ADIS, even though it is mandatory for those receiving a second caution.[190] Without an incentive to attend (for example, prosecution for non-attendance) like in other schemes across the

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[183] 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, 2019) 23 <http://doi.org/10.26190/5cca661ce09ce>.

[184] NSW Police Force (n 182).

[185] Marian Shanahan, Caitlin Hughes and Tim McSweeney, *Australian police diversion for cannabis offences: Assessing program outcomes and cost effectiveness* (Monograph Series No. 66) 59 <https://www.aic.gov.au/sites/default/files/2020-05/monograph-66.pdf>.

[186] Ibid.

[187] NSW Bureau of Crime Statistics and Research, 'Cannabis Cautioning Scheme Evaluation' (Media Release, 23 September 2004) <https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2004/bocsar_mr_r54.aspx>.

[188] Joanne Baker and Derek Goh, *The Cannabis Cautioning Scheme Three Years On: An Implementation and Outcome Evaluation* (Report, 2004) 25 <https://www.bocsar.nsw.gov.au/Publications/General-Series/r54.pdf>.

[189] Derek Goh and Jessie Holmes, 'New South Wales Recorded Crime Statistics 2013' (NSW Bureau of Crime Statistics and Research, 10 April 2014) 35.

[190] Baker and Goh (n 188) 16.

country, there was very low compliance.[191] This undermines the ability of the scheme to effectively educate individuals about cannabis use and impact their future behaviour.

The discretionary nature of CCS has come under scrutiny recently, first in relation to how NSW Police has treated Aboriginal and Torres Strait Islander individuals in relation to cannabis-related offences. From 2013 to 2017, despite the availability of CCS, police used their discretion to issue a caution in only 11.41 per cent of cases involving someone of Aboriginal and Torres Strait Islander descent, as opposed to issuing cautions in 40.03 per cent of cases where the individual was not of Aboriginal and Torres Strait Islander descent.[192] Those individuals not issued with a caution were then pursued through the court system, where evidence suggests that those of Aboriginal and Torres Strait Islander descent receive harsher sentences.[193]

Further, allegations of 'postcode justice' in the discretionary enforcement of the CCS by police have been raised after the release of NSW Bureau of Crime Statistics and Research data in December 2020.[194] That data revealed that police are using their discretion to issue cautions for cannabis possession – rather than charging individuals, who must then go to court – far more for individuals in areas of Sydney such as North Sydney (75 per cent cautioned), Byron Bay (66 per cent cautioned) and the Northern Beaches (64 per cent cautioned), as compared with the experience of individuals in Penrith (36 per cent cautioned), Newcastle (34 per cent cautioned), Cessnock (28 per cent cautioned) and Singleton (11 per cent cautioned).[195] Individuals in those latter locations, among others, are more likely to end up facing court for possessing cannabis than individuals in 'affluent' and 'trendy' locales, where cautions are more readily given out by police.[196]

Criminal Infringement Notice Scheme (January 2019 – present)

The Criminal Infringement Notice Scheme (CINS) is a *de jure* model and is regulated by the *Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019* (NSW).

Under this scheme, police can issue on-the-spot fines of $400 for illicit drug possession. The amount of a drug that warrants receipt of a fine is outlined in the legislation and varies between the type and form

[191] Ibid 30.

[192] Michael McGowan and Christopher Knaus, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts', *The Guardian* (online, 10 June 2020) <https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>.

[193] Ibid.

[194] Damon Cronshaw, 'NSW crime data shows Cannabis Cautioning Scheme has gone to pot and become a 'class war'', *Newcastle Herald* (online, 20 December 2020) <https://www.newcastleherald.com.au/story/7055185/cannabis-use-class-war-between-the-hunter-and-wealthy-sydney-areas>.

[195] Ibid.

[196] Ibid.

of illicit drug involved.[197] As above with CCS, police discretion underlies the implementation of this scheme.

While fines for other offences (for example, some traffic offences) have been longstanding features of police powers, on-the-spot fines for illicit drug possession were only introduced in NSW in 2019 after the deaths of two young people at a music festival in September 2018. The initiative was recommended by an expert panel, convened by Premier Gladys Berejiklian, after the music festival deaths.[198]

Three hundred CINS were issued during the scheme's first six months, with the vast majority of CINS (256) being issued for ecstasy possession.[199] This was evaluated by the National Drug and Alcohol Research Centre (NDARC) to be saving the NSW Government more than $300,000 by keeping the individuals who were fined largely out of court.[200]

However, the same report also raised concerns about the 'unintended consequences' of a fines-based system:

> 'Fines can have a disproportionate impact on the lives of disadvantaged people, particularly those who are homeless, mentally ill, young, or recently released from prison. These populations may be more susceptible to fines due to higher visibility in public places and less able to absorb unexpected financial costs.'[201]

Drug Court of NSW (February 1999 – present)

The Drug Court of NSW was the first to be established in any Australian jurisdiction, and today it sits in three locations around NSW: Parramatta, Toronto and Sydney CBD.

Operating according to its governing legislation,[202] the Drug Court of NSW aims to address drug dependencies which underscore criminal offending. Individuals are referred to the program by local and district courts.

To be eligible for this 12-month program, the individual must be aged 18 years and above; be dependent on the use of prohibited drugs; have indicated they will plead guilty to an offence for which

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[197] *Criminal Procedure Regulation 2017* (NSW) sch 4; and *Drug Misuse and Trafficking Act 1985* (NSW) sch 1.

[198] The Premier's Office, 'Safety at music festivals to be improved' (Media Release, NSW Government, 23 October 2018) <https://www.nsw.gov.au/media-releases/safety-at-music-festivals-to-be-improved>.

[199] National Drug & Alcohol Research Centre, 'Change in drug law saves criminal justice system $300,000 in six months but could have been more', *News* (Web Page, 14 September 2020) <https://ndarc.med.unsw.edu.au/news/change-drug-law-saves-criminal-justice-system-300000-six-months-could-have-been-more>.

[200] Ibid.

[201] Ibid.

[202] *Drug Court Act 1998* (NSW) and *Drug Court Regulation 2015* (NSW).

they will be sentenced to full-time imprisonment, if convicted; live in certain catchment areas; and be willing to participate in the program.[203]

Once in the program, each individual is assessed and receives a tailored treatment plan, which may require the individual to live in a residential rehabilitation centre or undertake the program while living in the community.[204] Individuals are monitored throughout the program, and are given rewards for compliance (for example, being able to work), and sanctions for non-compliance (for example, an increase in the frequency of drug testing).[205]

Upon completing the program, the Court considers the individual's initial sentence. The initial sentence cannot be increased, and if the individual has complied with the program, then a non-custodial sentence is usually granted to the individual.[206]

An evaluation of the Drug Court of NSW's efficacy by the NSW Bureau of Crime Statistics and Research in 2008 found that the program is 'more effective than conventional sanctions in reducing the risk of recidivism among offenders whose crime is drug-related'.[207] The report found that individuals in the program were:

> '17 per cent less likely to be reconvicted for any offence, 30 per cent less likely to be reconvicted for a violent offence and 38 per cent less likely to be reconvicted for a drug offence at any point during the follow-up period'.[208]

The evaluation's authors noted that the Court only has the resources to deal with a fraction of the individuals in the justice system whose crime is drug-related, and suggested that the program should be adapted to reach rural areas.[209]

Findings from a long-term study of individuals who complete the Drug Court of NSW's program were released last year. The study – a joint project of the National Drug and Alcohol Research Centre at the University of NSW and the NSW Bureau of Crime Statistics and Research, led by Professor Don Weatherburn, who was also involved in the 2008 evaluation – compared outcomes for 645 individuals

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[203] 'Who is eligible for the Drug Court program?', *Drug Court of New South Wales* (Web Page, 5 July 2020) <https://www.drugcourt.nsw.gov.au/drug-court/our-program/who-is-eligible.html>.

[204] 'Assessment and detoxification, *Drug Court of New South Wales* (Web Page, 6 July 2020) <https://www.drugcourt.nsw.gov.au/drug-court/our-program/assessment-and-detoxification.html>.

[205] 'Monitoring compliance with the program', *Drug Court of New South Wales* (Web Page, 30 June 2020) <https://www.drugcourt.nsw.gov.au/drug-court/our-program/monitoring-compliance.html>.

[206] 'When we terminate a program', *Drug Court of New South Wales* (Web Page, 14 June 2020) <https://www.drugcourt.nsw.gov.au/drug-court/our-program/when-we-terminate-a-program.html>.

[207] Don Weatherburn et al, 'The NSW Drug Court: A re-evaluation of its effectiveness', *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin* (Online Publication, Number 121, September 2008) 12 <https://www.drugcourt.nsw.gov.au/documents/cjb121.pdf>.

[208] Ibid 1.

[209] Ibid 13.

accepted into the program with 329 individuals deemed eligible for the program but not accepted into the program. Researchers followed up with each individual for an average of 13.5 years. Some of the key findings were:

- about 40 per cent of the individuals in the Drug Court of NSW's program 'completed it to the satisfaction of the Drug Court';[210]
- participants in the program recorded a 17 per cent lower rate of reoffending than those who did not participate in the Drug Court of NSW's program;[211]
- those who participated in the Drug Court of NSW program were found to take 22 per cent longer to commit a 'person offence';[212] and
- there seems to be no effect of participating in the program on the time it took individuals to commit other offences, such as property or drug offences.[213]

A possible explanation for the latter two findings in particular, proffered by the study's authors, was that many of the offenders who entered the program in the early 2000s would have been dependent on heroin. As that is a 'chronic relapsing condition', then:

> 'it would not be surprising if Drug Court participants, whose crime is driven by a need to purchase heroin, gradually returned to property or drug crime after the support, structure and surveillance provided by the Drug Court program was no longer a feature of their lives'.[214]

Youth Drug and Alcohol Court (July 2000 – July 2012)

Another product of the 1999 NSW Drug Summit was the establishment of the Youth Drug and Alcohol Court (YDAC) in July 2000.

The program aimed to reduce offending and alcohol/drug use among youth aged 14 to 18 years at the time of carrying out the offence. Individuals were referred to the program by the magistrate of the NSW Children's Court, and to be eligible the individual had to plead guilty to the offence.

[210] Don Weatherburn et al, 'The long-term effect of the NSW Drug Court on recidivism', *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin* (Online Publication, Number 232, September 2020) 6 <https://www.bocsar.nsw.gov.au/Publications/CJB/2020-The-Long-term-effect-of-the-NSW-Drug-Court-on-recidivism-CJB232.pdf>.

[211] Ibid 1.

[212] Ibid.

[213] Ibid 13.

[214] Ibid 13–14.

Individuals engaged in this program were under supervision throughout the program, as they worked through a tailored plan for treatment in non-custodial settings.[215] The program was designed such that those who graduated would avoid conviction, and instead receive a community-based order.[216]

A review of the program in 2004 found that around 35 per cent of participants were not recorded as having offended again after the YDAC program, and that number increased to 40 per cent for those who completed the program.[217]

However, some issues were identified in that review, including YDAC's mixed reputation in the community, delays in the referral process, and the requirement to plead guilty in order to be part of the program.[218]

YDAC was quietly shut down by the NSW Government on 1 July 2012, with the Government citing the outcomes of reviews into the program as underscoring the decision: 'Unfortunately none of these evaluations have been positive enough to justify it continuing'.[219]

Magistrates Early Referral Into Treatment (July 2000 – present)

The Magistrates Early Referral Into Treatment (MERIT) is a three-month, court-based intervention program that operates out of local courts in NSW. MERIT allows 'adult defendants with substance abuse problems to work, on a voluntary basis, towards rehabilitation as part of the bail process'.[220]

After being assessed by a NSW Health official or non-government organisation as suitable for the MERIT program, a MERIT treatment plan is developed for each individual, and the court may deem involvement in MERIT a condition of bail.[221]

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[215] Shelley Turner, 'The New South Wales Youth Drug & Alcohol Court Program: A Decade of Development' (2011) 37(1) *Monash University Law Review*, 281, 286 <https://www.austlii.edu.au/au/journals/MonashULawRw/2011/15.pdf>.

[216] Ibid 287.

[217] Tony Eardley et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program* (Report No. 8/2004, January 2004) 122 <https://www.researchgate.net/publication/277293106_Evaluation_of_the_New_South_Wales_Youth_Drug_Court_Pilot_Program>.

[218] Ibid 14-15.

[219] 'Quiet death of the youth drug court', *Sydney Morning Herald* (online, 9 July 2012) <https://www.smh.com.au/politics/federal/quiet-death-of-the-youth-drug-court-20120708-21p7h.html>.

[220] 'Welcome to the Magistrates Early Referral Into Treatment (MERIT)', *NSW Government Communities & Justice* (Web Page, 17 October 2019) <http://www.merit.justice.nsw.gov.au>.

[221] Ibid.

Importantly, a defendant must have a treatable drug or alcohol problem, reside within a defined catchment area, and voluntarily consent to being part of the program.[222]

Upon completion of the program, the individual's hearing or sentencing will take place, and the magistrate hearing the case will receive a report from the MERIT team about the individual's participation in the program and treatment.[223]

Non-compliance will be reported to the magistrate, and the individual may be removed from the program.[224] If that happens, the individual proceeds straight to plea or hearing. Crucially, the individual is not punished punitively for failing to complete drug or alcohol treatment.[225]

As at 30 June 2011, since its inception 25,714 defendants had been referred to MERIT. Of those accepted into the program (62 per cent of those who were referred), 63 per cent successfully completed MERIT. Cannabis was the principal drug of concern for almost half of accepted defendants.

Generally, the MERIT program has been associated with improved health outcomes for participants, and a reduction in reoffending.[226]

Medically Supervised Injecting Centre (May 2001 – present)

NSW's Medically Supervised Injecting Centre (MSIC) was Australia's first supervised injection room.

The MSIC in Kings Cross came about after both the 1997 Royal Commission into the NSW Police Service and the 1999 NSW Drug Summit recommended that a medically supervised injection centre should be trialled in the state. NSW Parliament subsequently passed the *Drug Misuse and Trafficking Amendment (Medically Supervised Injecting Centre) Act 2010* (NSW) which established an 18-month trial.

Kings Cross, with the nation's highest concentration of people dying from drug overdose, was chosen for the trial, and the Uniting Church received the licence to run this MSIC.

As a harm minimisation initiative, the aims of the MSIC in Kings Cross include: preventing people dying from drug overdose; providing those dependent on drugs with access to health and social services (including addiction treatment); and promoting awareness in the community about drug use.[227]

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[222] 'The MERIT program', *NSW Government Communities & Justice* (Web Page, 11 November 2014) <http://www.merit.justice.nsw.gov.au/magistrates-early-referral-into-treatment/the-merit-program>.

[223] Ibid.

[224] Ibid.

[225] Ibid.

[226] R. Lulham, 'The Magistrates Early Referral Into Treatment Program: Impact of program participation on re-offending by defendants with a drug use problem', *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin* (Online Publication, Number 131, 2009), <http://www.merit.justice.nsw.gov.au/Documents/issue_9_bulletin_may_2012.pdf >.

[227] 'Community Impact: Uniting Medically Supervised Injecting Centre', *Uniting* (Web Page) <https://www.uniting.org/community-impact/uniting-medically-supervised-injecting-centre--msic>.

Registered nurses and health education officers supervise clients as they inject in a safe and clean space, and provide help immediately in the event of any health issue, including overdoses.[228]

Since 2001, the Kings Cross MSIC has supported 16,500 clients and has managed 8,500 overdoses.[229] There have been no fatalities.[230] In an evaluation by professional services firm KPMG on the Kings Cross MSIC, the firm stated:

> 'It is reasonable to assume that a proportion of these overdoses at MSIC would have led to overdose injury or overdose death had the client not injected at the MSIC (in a medically supervised setting, allowing earlier medical intervention).'[231]

MSIC officers have also referred 14,500 clients to drug treatment services. All of those clients have accepted the referral, as it is only at the point of client acceptance that the referral is recorded.[232]

In its aforementioned evaluation, KPMG found that the more often a client visited the MSIC, the more likely they were to accept the referral for treatment.[233] KPMG found that 40 per cent of these clients had never accessed any drug treatment, and so concluded that the MSIC was successfully reaching 'a socially marginalised and vulnerable population group of long-term injecting drug users – who frequently had not previously had interaction with any drug treatment'.[234]

Victoria

Cannabis Cautioning Program (trialled in 1997; official roll-out September 1998 – present)

Victoria's Cannabis Cautioning Program is a diversion program available for adults (aged 18 years and above) who are subject to simple use or possession cannabis offences.[235] The individual involved can only be in possession of a small, non-trafficable amount of cannabis (50 grams or less); must admit to the offence; and must consent to receiving the caution.[236]

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[228] Ibid.

[229] Ibid.

[230] Ibid.

[231] KPMG, *Further evaluation of the Medically Supervised Injecting Centre during its extended Trial period (2007-2011)* (Final Report, 14 September 2010) 11 <https://www.health.nsw.gov.au/aod/resources/Documents/msic-kpmg.pdf>.

[232] Ibid 20.

[233] Ibid.

[234] Ibid 9.

[235] It is worth noting that for individuals aged between 10 and 17 years, a child caution is available. The threshold is still 50 grams or less of cannabis; however, there must be no other offence involved, and the child cannot have previously received than one cannabis caution or drug diversion: discussed in Shanahan et al (n 185) 62.

[236] Ibid.

An individual is excluded from this program if they have previously received any two of the drug cautions available in Victoria, and/or if they are also facing other charges for which they cannot receive a caution or infringement notice.[237]

This *de facto* scheme is outlined in the *Victoria Police Manual* (rather than in legislation), and under this scheme cautions are provided at the discretion of police. Treatment is not part of the diversion program; instead, the focus is on drug education. The caution itself comes with written material to educate the individual about cannabis.

In addition, an individual receiving a caution may attend a voluntary cannabis education program called 'Cautious with Cannabis'.[238] The individual's family and friends are also able to attend this program, which is offered in 15 locations in both metropolitan and rural Victoria.[239]

Since there is no mandatory further action for an individual to take once given the caution, compliance rates for Victoria's Cannabis Cautioning Program are at 100 per cent. In terms of recidivism among those receiving cautions, a 2008 study found that 26 per cent of those who were cautioned reoffended.[240] Of those who did reoffend, 54 per cent were apprehended for only one incident in the 18 months after being cautioned, with a larger proportion being rearrested for another drug offence (as compared to property or violence offences, for example).[241]

Drug Diversion Program (trialled September 1998 – May 1999; official roll-out August 2000 – present)

After deeming the Cannabis Cautioning Program a success early in its statewide enforcement, the Victorian Police proposed developing a cautioning program for those using or in possession of illicit drugs other than cannabis.[242]

Victoria's Drug Diversion Program (called the 'Illicit Drug Diversion Program' in some literature) enables police officers to give a caution to youth (aged ten years and above) and adults who have been arrested for the use and/or possession of a small, non-trafficable amount of illicit drugs, provided they admit to the offence and do not have more than one previous cautioning notice.[243]

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[237] Hughes et al, *Criminal justice responses relating to personal use and possession of illicit drugs* (n 183) 26.

[238] M. Berry et al, *Towards a New Framework for Forensic Alcohol and Other Drug Treatment in Victoria* (Report, 2011) 42.

[239] 'Forensic Services', *Victoria State Government* (Web Page) <https://www2.health.vic.gov.au/alcohol-and-drugs/aod-treatment-services/forensic-aod-services#lp-h-4>.

[240] Jason Payne, Max Kwiatkowski and Joy Wundersitz, 'Police drug diversion: a study of criminal offending outcomes' (Report, Research and Public Policy Series 97, 2008) xiii <https://www.aic.gov.au/sites/default/files/2020-05/rpp097.pdf>.

[241] Ibid.

[242] John McLeod and Gaye Stewart, '*Evaluation of the Drug Diversion Pilot Program*' (Report, September 1999) 5.

[243] 'Forensic Services' (n 239).

As with the Cannabis Cautioning Program, an individual is not eligible for this program if they are concurrently facing charges which cannot be dealt with by a caution or infringement notice.[244]

Unlike its cannabis equivalent, however, this diversionary program requires that the individual involved attends a clinical drug assessment *and* at least one session of drug treatment. Once the individual has attended both, the caution no longer applies and no further legal action is taken.[245]

The compliance rate for the Drug Diversion Program was found to be 75 per cent in 2008, with those who had a recent history of property offending four times more likely to be non-compliant than those without that recent history.[246]

Rates of recidivism for participants in the Drug Diversion Program in that same year were identified as higher than for participants in the Cannabis Cautioning Program, with 33 per cent reoffending within 18 months. In 2014, however, Victoria Police contended that 80 per cent of individuals in the Drug Diversion Program did not have further contact with the police after the program.[247]

The Drug Court of Victoria (May 2002 – present)

After some reluctance among decision-makers to establish a drug court in Victoria, a trial drug court was established in May 2002 as part of a three-year trial.[248] Since 2005, the Drug Court of Victoria (DCV) has received ongoing funding. The DCV's two stated objectives are 'to improve the health and well-being of participants' and 'to reduce the severity and frequency of reoffending'.[249]

Functioning as a division of the Magistrates' Court of Victoria, the DCV is a two-year 'post-sentence program focusing on the rehabilitation and treatment of offenders with a drug and/or alcohol dependency'.[250] Additional eligibility criteria include that the individual must be facing a term of

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[244] Hughes et al, *Criminal justice responses relating to personal use and possession of illicit drugs* (n 183) 26–27.

[245] 'Forensic Services' (n 239).

[246] Payne, Kwiatkowski and Wundersitz (n 240) xiii.

[247] Law Reform, Road and Community Safety Committee, 'Inquiry into drug law reform' (Report, Parliament of Victoria, March 2018) 165 <https://www.parliament.vic.gov.au/images/stories/committees/lrrcsc/Drugs_/Report/LRRCSC_58-03_Full_Report_Text.pdf>.

[248] David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) 15(2) *Current Issues in Criminal Justice*, 136, 143 <http://www5.austlii.edu.au/au/journals/CICrimJust/2003/21.pdf>.

[249] KPMG, *Evaluation of the Drug Court of Victoria* (Final Report, 18 December 2014) 3 <https://www.mcv.vic.gov.au/sites/default/files/2018-10/Evaluation%20of%20the%20Drug%20Court%20of%20Victoria.pdf>.

[250] 'Drug Court', *Magistrates' Court of Victoria* (Web Page, 12 August 2019) <https://www.mcv.vic.gov.au/about_us/drug-court>.

imprisonment of two years or less; must plead guilty to the offence(s); must live in the DCV's catchment area; and cannot be facing charges involving sexual offences or serious violence.[251]

The purpose of this drug court is to impose and administer a sentence order – the Drug Treatment Order (DTO) – which was created by the same legislation that created the DCV (*Sentencing Amendment Act 2002* (Vic)).

A DTO has two main elements: a custodial element (where the individual serves their prison sentence of two years or less in the community so that they can receive treatment), as well as a treatment and supervision element (involving a targeted focus on addressing the individual's dependency on drugs or alcohol).[252]

If an individual fails to comply with the DTO, the magistrate may order a short term of imprisonment for that individual. The minimum period of imprisonment for non-compliance is seven days.[253] If an individual absconds or if their DTO is cancelled during the program, the original prison sentence is usually reimposed.[254]

An evaluation by KPMG of the DCV program between 1 July 2010 and 30 June 2013 compared those who had completed the whole DCV program (the 'DCV Cohort') with individuals who had completed two years in prison for similar principle primary offences (the 'Control Cohort').[255] Key findings included:

- a 31 per cent lower rate of reoffending by the DCV Cohort within the first 12 months;
- a 34 per cent lower rate of reoffending by the DCV Cohort within 24 months;
- a general reduction in the average seriousness of offences being committed by both cohorts; and
- significant increases in theft offences among both groups.[256]

Overall, KPMG concluded that the DCV 'continues to deliver positive outcomes for the community and participants, as evidenced by improvements in health and wellbeing for the participants, and a reduction in recidivism by those who complete the program'.[257]

The DTO program has also yielded financial benefits for Victoria. In an addendum to their earlier evaluation, KPMG released figures in July 2016 based on the involvement of 128 participants in the DTO program during the period 1 July 2011 to 30 June 2014. The findings reveal that the DCV's signature

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[251] Ibid.

[252] Ibid.

[253] Drug Court of Victoria, Submission to The National Ice Taskforce, *Improving the efforts of the federal, state and territory governments to combat the growing use of ice in our community* (20 June 2015) 13.

[254] Ibid.

[255] KPMG, *Evaluation of the Drug Court of Victoria* (n 249) 4.

[256] Ibid.

[257] Ibid 7.

program has reduced the demands on correctional facilities by the equivalent of 13,948 prison days a year, which is a saving of $3.77 million.[258] This includes annualised recidivism savings, since the DCV graduates were generally offending less often with less severity.[259]

Medically Supervised Injecting Room (June 2018 – present)

Following concerns about the high numbers of people dying as a result of heroin overdoses, a two-year trial of a medically supervised injection room (MSIR) was initiated by the Victorian Government in North Richmond, Melbourne from 30 June 2018.[260]

At North Richmond's MSIR, individuals aged 18 years and over are able to use the available services for free, including the supervised injecting room, as well as mental health support, drug treatment, and blood testing.

An independent review of the first 18 months of the MSIR trial found that the trial has supervised 116,802 injections and managed 2,657 overdoses.[261] There were no fatalities.[262]

South Australia

Cannabis Expiation Notice scheme (April 1987 – present)

The Cannabis Expiation Notice (CEN) scheme introduced in South Australia was the first *de jure* model of depenalisation related to cannabis offences introduced in Australia.

Under the 1987 scheme, an adult alleged to have committed a 'simple cannabis offence' (including possession or consumption within a prescribed amount not in a public or a restricted place, under the *Controlled Substances Act 1984* (SA)), would be issued an expiation notice before prosecution was commenced. If the prescribed expiation fee was paid, the alleged offender was not liable to prosecution for that offence.

According to a report prepared for the Irish Department of Justice and Equality and the Department of Health, the South Australian CEN scheme had two perverse effects in its early years:

- Net-widening, as evidenced by a 2.5-fold increase in expiable cannabis offences: from 6,231 in 1987 to over 17,170 in 1996. This was attributed to the ease with which a CEN could be issued (in contrast with arrest and charge procedures); and

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[258] KPMG, *Addendum to Evaluation of Drug Court Victoria* (Addendum to Final Report, October 2016) 4 <https://www.mcv.vic.gov.au/sites/default/files/2018-10/Addendum%20to%20Drug%20Court%20Evaluation.pdf>.

[259] Ibid.

[260] Medically Supervised Injecting Room Panel (n 138) vii.

[261] Ibid x.

[262] Ibid.

- Low rates of compliance in paying expiation notices (ie. 45 per cent). This was attributed to a lack of knowledge of the law and the financial difficulties experienced by a substantial proportion of those detected for minor cannabis offences, which led to more cannabis users being incarcerated for non-payment of fines.[263]

In 1996, new payment options were introduced (including payment by instalments and substitution of community services for fines) and there was an effort to educate the public about the reforms. This latter reform was especially important, as three-quarters of non-expiators did not know, for instance, that they would get a criminal record if they did not pay the expiation fee.[264] These measures led to a reduction in net-widening and increased payment. This scheme was regarded as more cost-effective than prosecuting simple cannabis offences and was associated with significant social benefits, including reduced loss of employment and less relationship disruption.

The Irish Review Report notes that there is some disagreement about the impacts of the CEN scheme on drug use, but ultimately reports that an analysis of prevalence of use in other states has shown stable trends or reductions, supporting the evidence that removal of criminal sanctions does not lead to an increase in use.[265]

Police Drug Diversion Initiative (June 2001 – present)

It is mandatory for South Australian Police to divert individuals who have committed a minor drug possession offence to health intervention services under the Police Drug Diversion Initiative (PDDI).

This legislated scheme aims to 'provide individuals with the opportunity to address their drug use through health services and reduce the number of people appearing before the courts for use or possession of illicit drugs offences'.[266]

Those eligible for PDDI are youth (aged ten to 17 years) in possession of 50 grams or less of cannabis, or any quantity of other illicit drugs, and adults in possession of any quantity of illicit drugs below the trafficable threshold.[267] Individuals are not required to admit guilt for the offence, but they cannot deny the allegations.[268] The scheme does not apply to non-drug offences, even where drug use is a significant factor behind the individual offending.

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[263] Caitlin Hughes at al, 'Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences' (Report, National Drug and Alcohol Research Centre, UNSW Australia and the University of Kent, September 2018), 47.

[264] National Drug Research Institute, 'Effects of the WA CIN Scheme on regular cannabis users' (Report, May 2005) 13 <https://ndri.curtin.edu.au/ndri/media/documents/publications/T139.pdf>.

[265] Hughes et al, 'Review of approaches taken in Ireland' (n 263) 47.

[266] SA Health, Government of South Australia, *Police Drug Diversion Initiative (PDDI)* (Web Page, 2 November 2020) <www.sahealth.sa.gov.au>.

[267] Hughes et al, *Criminal justice responses relating to personal use and possession of illicit drugs* (n 183) 24–25.

[268] Ibid.

An eligible individual partakes in PDDI once police phone a 24-hour Drug Diversion Line to make an appointment for that individual. After that, all tailored treatment plans (and compliance thereof) are managed by SA Health, specifically Drug and Alcohol Services South Australia.[269]

This program has been highly praised due to the fact that PDDI is legislated, and because police are required to divert individuals to the program, which removes issues identified with other programs that rely on discretion on the part of the referrer.[270]

A point of contention, however, among those analysing the program has been the fact that there is no limit on the number of times an individual can be referred to PDDI.

On the one hand, academics analysing the program point to the high rate of individuals who are referred to the program receiving only one diversion (76 per cent), and low rates of individuals receiving two or more diversions, as evidence of the success of PDDI in the treatment it offers a broad group of individuals.[271]

On the other hand, political opponents of the scheme have suggested that individuals referred to the program more than once are 'manipulating the system',[272] and that a fall in compliance rates from 72.7 per cent to 54.5 per cent in 2015–16 is an indication of deficiencies in the program.[273]

South Australian Drug Court (June 2000 – present)

The South Australian Drug Court operates in the Adelaide Magistrates Court, and is a 12-month program. The program brings together government and non-government agencies to offer legal representation, home detention monitoring, and housing and treatment services.[274]

The aims of this program are to 'minimise/stop the use of illicit drugs' and to 'prevent/decrease any further offending'.[275]

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[269] SA Health (n 266).

[270] Hughes et al, *Criminal justice responses relating to personal use and possession of illicit drugs* (n 183) 54.

[271] Ibid 54–55.

[272] Doug Robertson, 'South Australian MP wants to force repeat drug users to face court', *The Advertiser* (online, 19 July 2014) <https://www.adelaidenow.com.au/news/south-australia/south-australian-mp-wants-to-force-repeat-drug-users-to-face-court/news-story/07d53b16f3491428f7af88138f8b76d2>.

[273] Lauren Novak, 'More offenders being referred to drug diversion programs to avoid jail, but only half complete the course', *The Advertiser* (online, 10 August 2017) <https://www.adelaidenow.com.au/truecrimeaustralia/police-courts/more-offenders-being-referred-to-drug-diversion-programs-to-avoid-jail-but-only-half-complete-the-course/news-story/fc10d7b3ce3c9c82524b94d72bef29e8>.

[274] Courts Administration Authority of South Australia, *Drug Court* (Web Page) <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx>.

[275] Ibid.

To be eligible for South Australia's Drug Court program, an individual must fulfil **all** of the following conditions:

- is an adult (18 years and above) at the time of committing the offence/s;
- lives in the Adelaide metropolitan area;
- has been charged with an offence related to their drug use and is likely to be imprisoned;
- is either currently dependent on drugs, or has had a previous dependency but is likely to relapse;
- is willing to participate in the Drug Court program; and
- pleads guilty to both the most serious offence and the majority of offences for which they have been charged.[276]

An individual who has been charged with a major indictable offence and/or who lives outside of the Adelaide metropolitan area is automatically not eligible for this program.[277]

The program is described officially as combining 'intensive judicial supervision, strict bail conditions, rewards and sanctions, drug testing, intensive treatment and practical support'.[278] Once accepted into the program, participants are able to access housing, and a case management plan is designed for each individual.[279]

A study by South Australia's Office of Crime Statistics and Research in the Court's early days suggested that the program may be effective in fulfilling one of its goals of reducing rates of recidivism among offenders who complete the program.[280] That last qualifier is an important one, though, since that same study found that less than one-quarter of participants actually completed the program.[281] However, of those who did, almost 80 per cent displayed lower levels of offending post-program, as compared with their pre-program records.[282]

[276] Ibid.

[277] Ibid.

[278] Ibid.

[279] Ibid.

[280] Elissa Corlett, Grace Skrzypiec and Nichole Hunter, 'Offending profiles of SA Drug Court Pilot Program 'completers' (Report, February 2005) 29.

[281] Ibid 9.

[282] Ibid 28.

Northern Territory

Cannabis Expiation Notice Scheme (1996 – present)

Under the Northern Territory's Cannabis Expiation Notice (CEN) scheme, police may issue an infringement notice to an individual aged 17 years and above requiring payment of a prescribed expiation fee for an 'infringement notice offence'.[283] The quantities involved must be less than a trafficable amount, which is deemed to be up to 50 grams for cannabis plant material, up to one gram for cannabis oil, and ten grams for both cannabis resin and cannabis seed.[284]

This *de jure* reform applies to the possession and/or cultivation of cannabis. Self-administration remains a criminal offence.[285]

Under this scheme, there is no requirement for the individual to attend an educational seminar. A person may avoid any further action in relation to the offence by paying the prescribed expiation fee within 28 days after the notice is given.[286] Once the individual has paid the fee, no record of the incident is kept.[287] It has been noted that a result of this is that it is impossible to garner how expiated offenders fare after going through this process.[288]

However, if the fine is not paid within the specified time:

- the individual could be prosecuted through the court system, or a warrant of recovery will be issued to seize the amount;[289]
- their driver's licence may be suspended;[290]
- the individual's personal property may be seized;[291]
- the amount may be deducted from the individual's wages or salary;[292]

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[283] *Misuse of Drugs Act 2017* (NT) s 20.

[284] Ibid sch 3.

[285] Ibid s 13.

[286] Ibid s 20B(2)(a).

[287] Payne, Kwiatkowski and Wundersitz (n 240) 11.

[288] Ibid.

[289] Maurice Rickard, 'Reforming the Old and Refining the New: A Critical Overview of Australian Approaches to Cannabis' (Research Paper No 6/2001-2002, Social Policy Group, 10 October 2001) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0102/02RP06#appendix1>.

[290] *Misuse of Drugs Act 2017* (NT) s 20B(2)(c)(i).

[291] Ibid s 20B(2)(c)(ii).

[292] Ibid s 20B(2)(c)(iii).

- a statutory charge may be registered on land owned by the individual;[293] and
- they could be taken into custody until the fine is paid.[294]

This latter practice especially has been labelled as 'costly and inefficient'.[295]

Northern Territory Illicit Drug Pre-Court Diversion Program (December 2002 – present)

Northern Territory police are also able to refer individuals aged 17 years and above to the Illicit Drug Pre-Court Diversion Program (NTIDPCD). This program targets first time drug offenders in possession of less than a trafficable quantity of any illicit drug (ie. not just cannabis).[296]

This program requires that the individual involved admits to the offence, and they are then assessed before undertaking an education session, counselling and compulsory treatment.[297] Failure to comply by completing the program results in the individual being prosecuted through the court system.[298]

A study of 484 participants admitted into this program between July 2003 and December 2008 found that Aboriginal and Torres Strait Islander participants had a lower program completion rate than non-Aboriginal and Torres Strait Islander participants, as did participants who were 'younger, male, had an educational level of Year 10 or less, were unemployed, had a previous custodial order and used drugs other than cannabis'.[299]

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[293] Ibid 20B(2)(c)(iv).

[294] Ibid s 20B(2)(c)(v). See also Rickard (n 289).

[295] Rickard (n 289).

[296] 'State and Territory Legislative Amendments and Initiatives', *Illicit Drug Data Report 2012–2013* (Report) 9.

[297] Caitlin Hughes and Alison Ritter, *A summary of diversion programs for drug and drug-related offenders in Australia* (Monograph No. 16, February 2008) 52.
<https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/16%20A%20summary%20of%20diversion%20programs.pdf>.

[298] Department of Health and Ageing, Supplementary Submission to the Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into Amphetamines and Other Synthetic Drugs* (2006) 43.

[299] Paul Rysavy, Teresa Cunningham and Rosemary O'Reilly-Martinez, 'Preliminary analysis of the Northern Territory's illicit drug court diversion program highlights the need to examine lower program completion rates for indigenous clients' (2011) 30(6) *Drug and Alcohol Review* 671.
<https://researchers.cdu.edu.au/en/publications/preliminary-analysis-of-the-northern-territorys-illicit-drug-cour>.

Western Australia

Cannabis Intervention Requirement Scheme (August 2011 – present)

Since 1998, three schemes have been operative in Western Australia in relation to minor cannabis offences.

The Cannabis Cautioning Mandatory Education Scheme (CCMES) was established statewide from October 1998 by administrative direction from the Commissioner for Police.[300] Once issued with a CCMES, a person was required to attend a cannabis education session (CES). Failure to attend and complete that session resulted in the person being charged for the original offence. The scheme ended in March 2004.

The second scheme – the Cannabis Infringement Notice Scheme (March 2004 to July 2011) – was ushered in by legislation, specifically the *Cannabis Control Act 2003* (WA). Under that scheme, a cannabis infringement notice (CIN) was issued for four expiable offences and a scaled monetary penalty was implemented based on the amount of cannabis involved.

For example, use or possession of not more than 15 grams of cannabis incurred a penalty of $100, while use or possession of more than 15 grams but not more than 30 grams of cannabis incurred a penalty of $150. If an individual issued with a CIN either paid the monetary penalty, or attended a CES, this expiated their guilt and no record of the criminal conviction was made.[301]

The current Cannabis Intervention Requirement (CIR) scheme came in the context of the Barnett Liberal Government's 'war on drugs' in 2011.[302] Under the CIR scheme, police officers can give a CIR to a person found to be in possession of ten grams or less of cannabis (or cannabis seeds; but not a cannabis plant, cannabis resin, or any other derivative) for personal use.[303]

The CIR scheme also expanded the offences concerning the use and sale of drug paraphernalia, with a much broader definition of what is meant by drug paraphernalia that included cannabis smoking paraphernalia.[304]

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[300] George Swensen, 'Fifteen years of cannabis law reform in WA: lessons for future reform' (Research Paper, Critical Criminology Conference, Flinders University, July 2013) 7.

[301] Ibid 13–16.

[302] Joe Spagnolo, 'Dopes to feel the heat under new pot laws', *Perth Now* (online, 16 July 2011) <https://www.perthnow.com.au/news/wa/dopes-to-feel-the-heat-under-new-pot-laws-ng-9917e972464747bec7dd7dba42135595>.

[303] *Misuse of Drugs Act 1981* (WA) s 8B.

[304] Swensen (n 300) 12.

The scheme applies to anyone aged 14 years and over.[305] A CIR cannot be issued to an adult who has previously been convicted of a minor cannabis-related offence, or to an adult who has previously been given a CIR.[306]

Anyone issued with a CIR must attend a cannabis intervention session (CIS), which is a seminar designed to educate attendees about the health, social and legal effects of cannabis use.[307] Completion of a CIS is not viewed as an admission of guilt;[308] however, failure to attend the session will lead to prosecution.[309]

The monetary penalties under this scheme were increased significantly. For example, possession of cannabis under the CIN scheme yielded an individual in possession of ten grams of cannabis a $100 penalty; but under the new scheme that same individual faces a fine of $2,000 and the possibility of two years' imprisonment.[310]

Much like South Australia's CEN program, a criticism of the overall impact of these three Western Australian schemes has been 'net widening', as the schemes require law enforcement to formally process and charge someone with a minor cannabis offence that the police might have otherwise cautioned informally.[311]

Western Australia's schemes have also suffered from the communication and public perception problems faced by the South Australian CEN scheme. Complex and legalistic language surrounding the reforms has caused public confusion about what the laws actually do.[312] The scheme was initially framed as 'prohibition with civil penalties for the personal use of cannabis', but in Parliament and in the media 'decriminalisation' became the buzz word.[313] This has given the public the idea that the Government had put in place a system of *de jure* decriminalisation,[314] or even that legalisation had occurred.[315]

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[305] Western Australian Police Force, 'Illicit Drugs and the law', *Your Safety* (Web Page, 25 August 2017) <https://www.police.wa.gov.au/Your-Safety/Alcohol-and-drugs/Illicit-drugs-and-the-law>.

[306] *Misuse of Drugs Act 1981* (WA) s 8E.

[307] Ibid s 8J.

[308] Ibid s 8K.

[309] Western Australian Police Force (n 305).

[310] *Misuse of Drugs Act 1981* (WA) s 34(1)(e).

[311] Drug and Alcohol Office, *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report* (Report, 2007) 64-65; cited in Swensen (n 300) 17.

[312] Swensen (n 300) 21.

[313] Ibid.

[314] Ibid.

[315] Wayne Hall and Rosalie Liccardo Pacula, *Cannabis use and dependence* (Cambridge University Press, 2003) 191.

Perth Drug Court (2000 – present)

Western Australia's Drug Court operates in both the Perth Magistrates Court (the 'Perth Drug Court') and the Perth Children's Court.

The Perth Drug Court incorporates treatment for drug dependence as part of the court process for offenders who are accepted into the program. It offers three different programs, the suitability of which is dependent on the level of substance use by the offender, and on the particular offence the individual has committed:

1. Supervised Treatment Intervention Regime (STIR): this program is managed by the Mental Health Commission. STIR is for those participants who have committed a less serious offence, and who most likely do not have a criminal record. It offers community-based treatment while the participant is on bail, usually for six months.

2. Pre-sentence Order (PSO): this program offers a delay in sentencing for up to two years so that the participant can 'address factors which have contributed to criminal behaviour'.[316] A PSO is usually 12 months long, and the strict conditions placed on participants during their treatment includes regular court appearances, urine testing, curfew, and counselling.

3. Conditional Drug Court Regime (DCR): for those not eligible for a PSO, this intensive program is available for offenders who are facing serious charges, already have a criminal record, and have a history of drug-related problems. Sentencing is delayed for up to six months after the participant has pleaded guilty, and involves the strict conditions from the PSO program as well as closer supervision by officials, attendance at support programs, and personal goal-setting.

Completion of these programs may result in a reduced sentence for the participant.

To even be considered for the Perth Drug Court, the applicant must admit that they have a problem with drug use, plead guilty to all charges, be willing to undergo the appropriate treatment, and consent to being supervised by Drug Court officials throughout the process.

Those ineligible for a program through the Perth Drug Court include declared drug traffickers, outlaw motorcycle gang members, and those facing mandatory imprisonment.[317]

A comprehensive review of the Perth Drug Court found that for participants during the two-year period from December 2003 to December 2005, the rate of recidivism was 53.6 per cent.[318] The reviewers declared this to be 'relatively low' rate by international standards,[319] and broadly concluded in their

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[316] Department of Justice, Government of Western Australia, 'Perth Drug Court Guidelines' (Publication, 2020) 33 <https://www.magistratescourt.wa.gov.au/_files/Perth_Drug_Court_Guidelines.pdf>.

[317] Ibid 19.

[318] Department of the Attorney General, Government of Western Australia, *A review of the Perth Drug Court* (Report, November 2006) 20–21.

[319] Ibid 20.

review that the Drug Court 'had a positive effect on reducing re-offending over a two year follow up period'.[320]

It is worth noting that two of the above programs are available for youth (aged ten to 17 years inclusive) through the Perth Children's Court. An officer from Youth Justice Court Assessment and Treatment Services assesses the child's suitability to take part in the Youth Supervised Treatment Intervention Regime (YSTIR) and in the aforementioned DCR program.

While a referral for a young person to be assessed for YSTIR can be requested by a magistrate, lawyer, or the individual involved, referral is ultimately at the discretion of a magistrate.[321] YSTIR – much like STIR, its adult counterpart – is viewed as a program for young people with 'relatively less serious offences and drug related problem than those young persons who would otherwise be considered for inclusion in the DCR'.[322]

For this age group, the DCR program can last up to 12 months, and individuals undertake treatment under the Drug Court magistrate's judicial case management.[323]

Queensland

Police Diversion Program (June 2001 – present)

Queensland's Police Diversion Program (PDP) is a legislated diversion program whereby police officers must offer eligible individuals the opportunity to participate in a drug diversion assessment program,[324] which is viewed as an alternative to prosecution.[325]

Individuals eligible for this program are adults or youth (ten years and above) arrested for a minor drugs offence (for example, possession of 50 grams or less of cannabis), who have not previously been offered a drug diversion assessment program.[326] The individual cannot be facing charges for another indictable offence related to the minor drugs offence; cannot have been previously sentenced to a term

[320] Ibid 25.

[321] Mental Health Commission, Government of Western Australia, 'Youth Supervised Treatment Intervention Regime', *Diversion options for juveniles* (Web Page) <https://www.mhc.wa.gov.au/getting-help/diversion-support-programs/diversion-options-for-juveniles>.

[322] Department of Justice, Government of Western Australia, 'Youth Supervised Treatment Intervention Regime (YSTIR)', *Courts Drug Diversion Program* (Web Page, 11 September 2019) <https://courts.justice.wa.gov.au/C/courts_drug_diversion_program_print.aspx>.

[323] Ibid.

[324] *Police Powers and Responsibilities Act 2000* (Qld) s 379.

[325] 'Police drug diversion program', *Queensland Police* (Web Page, 10 September 2019) <https://www.police.qld.gov.au/drugs-and-alcohol/police-drug-diversion-program>.

[326] *Police Powers and Responsibilities Act 2000* (Qld) s 379.

of imprisonment for an offence under Queensland's *Drugs Misuse Act 1986*; and cannot have been previously convicted of an offence involving violence against another person.[327]

Once an individual meets the above criteria and agrees to participate, the police officer makes an appointment for them with the closest Drug Diversion Assessment Program (DDAP) provider. The assessment lasts two hours and includes education and counselling, with the option of continuing on a treatment program. Treatment is not a condition of completing the PDP.[328]

While the DDAP provider does not pass on information shared by the individual in the session, the provider must inform the police of compliance – ie. attendance and completion of DDAP.[329] Those who complete DDAP will ultimately not be charged for that minor drugs offence, will not need to attend court for that offence, and will not have a criminal record for that offence.[330] Failure to comply with the program is an offence under the legislation underpinning the PDP, and the individual may then need to attend court.[331]

Illicit Drug Court Diversion program (2002 – present)

The Illicit Drugs Court Diversion (IDCD) program is an assessment and education-based initiative which was implemented to ensure that users of illicit drugs other than cannabis had access to the resources already offered to cannabis users under the PDP.[332]

This program aims to address drug use among individuals charged with drug-related offences, and reduce drug-related offending in the future. If eligible, individuals are directed to the IDCD program by the magistrates in the Magistrates Court or the Children's Court by being sentenced to a recognisance order.[333]

Individuals are eligible for IDCD if they are charged with certain offences under the *Drugs Misuse Act 1986* (Qld), for example: possessing dangerous drugs under Section 9; if they plead guilty to all offences; and if they have not been afforded two diversion alternatives previously, including the PDP.[334] An individual is not eligible for the program if they have pending charges for offences involving violence

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[327] Ibid.

[328] 'Police drug diversion program' (n 325).

[329] Shanahan et al (n 185) 60.

[330] 'Police drug diversion program' (n 325).

[331] Shanahan et al (n 185) 60.

[332] Explanatory Notes, Drug Diversion Amendment Bill 2002 (Qld) 2.

[333] 'Illicit Drug Court Diversion Program', *Queensland Courts* (Web Page, 30 August 2019) <https://www.courts.qld.gov.au/services/court-programs/illicit-drug-court-diversion-program>.

[334] Ibid.

against another person, for offences of a sexual nature, or for certain drug offences (for example, drug trafficking).[335]

As part of the program, individuals must attend one session involving assessment, education and counselling. Non-compliance includes not attending the session at all, attending but not participating satisfactorily, or attending under the influence of drugs and/or alcohol.[336] In that case, the individual may then be deemed in breach of court and a magistrate may resentence that individual with their original offences after forfeiting the individual's recognisance order.[337]

It is worth noting that IDCD is different to the Drug and Alcohol Assessment Referral course, which is a counselling and education course imposed as a condition of bail for individuals who identify a relationship between their substance use and offending behaviour.[338]

Queensland Drug and Alcohol Court (2000 – 2012; January 2018 – present)

The Queensland Drug Court (as it was called at its inception) was created in June 2000 under the *Drug Court Act 2000* (Qld) to promote the rehabilitation of eligible individuals who had engaged in criminal behaviour, and to reduce the rates of recidivism among those individuals.[339]

For eligible individuals, the Queensland Drug Court magistrate would make an Intensive Drug Rehabilitation Order (IDRO), which suspends an individual's sentence and requires that individual to participate in various treatments to address their drug dependence. The program included counselling, education, and even employment training.

Compliance with the program included frequent drug testing, attendance at treatment, court supervision, reporting, and the individual abstaining from both drugs and criminal activity.[340] Graduation from or non-compliance with Queensland Drug Court's program were then considered by the court in final sentencing.[341]

Reports conducted on the efficacy of this Court across Queensland in the first three to five years after the Court's inception found that the program was generally satisfying its objectives. For example, graduates of the program were less likely to reoffend, or took longer to commit further criminal activity

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[335] Ibid.

[336] Ibid.

[337] Ibid.

[338] 'Drug and Alcohol Assessment Referral course', *Queensland Courts* (Web Page, 30 August 2019) <https://www.courts.qld.gov.au/services/court-programs/drug-and-alcohol-assessment-referral-course>.

[339] Nicolee Dixon, 'Drug Courts – An Update' (Research Brief No 2006/17, Parliamentary Library, Queensland, April 2006) 5 <https://www.parliament.qld.gov.au/documents/explore/researchpublications/researchbriefs/2006/rbr200617.pdf>.

[340] Ibid 6.

[341] Ibid.

than those who did not complete the program.[342] While issues were highlighted, including low referrals in North Queensland (especially for Aboriginal and Torres Strait Islander people),[343] the program was seen to be broadly fulfilling the intentions behind its creation.[344]

However, the Queensland Liberal National Party (LNP) Government announced in 2012 that they would no longer fund the Queensland Drug Court. Jarrod Bleijie, who was Queensland Attorney-General and Justice Minister at the time, cited the need for the Government to save money as the impetus for the decision. Bleijie claimed that each graduate of the Queensland Drug Court's program cost $400,000, and that the 'outcomes achieved by the court did not justify the resources or the funding it required to operate'.[345]

During the 2015 Queensland election campaign, Queensland Labor leader Anastasia Palaszczuk committed to reinstate court and diversionary programs defunded by the LNP Government.[346] Labor won that election, committed $8.7 million in funding for the four years commencing 2015/16, and initiated the Drug Specialist Courts Review.[347] The Review ultimately found that the Queensland Drug Court should be re-established by legislation,[348] and recommended improvements for this new iteration. An improvement which was accepted in the new model was that the Court's purview be expanded to include individuals with alcohol dependency.[349]

The Queensland Drug and Alcohol Court (QDAC) was then established through the Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017 (Qld). Magistrates can now offer a Drug and Alcohol Court Treatment Order (DACTO) to adults who plead guilty to all charges, live in the Brisbane Magistrates Court catchment area, and have a 'severe substance use disorder that contributed to their offending behaviour'.[350] Those not eligible for a DACTO are individuals already serving a term of imprisonment, those who are already subject to a parole order, and those charged with a sexual assault offence.[351]

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[342] Ibid 20.

[343] Ibid 21.

[344] Ibid 18–19.

[345] Tony Moore, 'Diversionary courts fall victim to funding cuts', *Brisbane Times* (online, 13 September 2012) <https://www.brisbanetimes.com.au/national/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html>.

[346] Arie Freiberg et al, 'Queensland Drug and Specialist Courts Review' (Final Report, November 2016) 24 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/514714/dc-rpt-dscr-final-full-report.pdf>.

[347] Ibid.

[348] Ibid 39–40.

[349] 'Queensland Drug and Alcohol Court', *Queensland Courts* (Web Page, 10 July 2020) <https://www.courts.qld.gov.au/courts/drug-court>.

[350] Ibid.

[351] Ibid.

Under a DACTO, an individual's prison sentence is suspended while they complete a two-year treatment program. Supervision, reporting, rewards for graduation and consequences for non-compliance are similar to the original Queensland Drug Court process.

Tasmania

Illicit Drug Diversion Initiative (March 2000 – present)

Tasmania's Illicit Drug Diversion Initiative (IDDI) is a three-tiered, *de facto* diversion program aimed at low-level and/or first-time users of illicit drugs, including but not limited to cannabis. The IDDI is a police diversion program, and its implementation is at the discretion of police officers.

Eligible individuals are adults (youth have been processed through a different program since April 2011) in possession of 50 grams or less of cannabis, two cannabis plants, less than one gram of methamphetamine, or no more than three tablets of another drug, who admit to their offence/s and agree to be part of a diversion program; who have not already been diverted three times in ten years; and whose concurrent offences do not preclude participating in a diversion program.[352]

Those in possession of cannabis are eligible for all three tiers of the program, while those in possession of other illicit drugs are automatically processed through Level Three of the IDDI. The program is structured as follows:

- Level One involves a caution for first-time cannabis-related offences and an education pamphlet.
- Level Two diverts individuals who have committed a second cannabis offence for a one-hour assessment and possible treatment through the Alcohol and Drug Service (ADS) in the Tasmanian Department of Health and Human Services. The onus is on the individual to schedule an appointment with the ADS within three days of the offence date, and to attend that session within 21 days. If the individual does not comply, they will be charged with the offence/s.[353]
- Level Three is available for individuals facing charges for third-time cannabis offences or other illicit drug-related offences. The onus is again on the individual to schedule an appointment with the ADS within three days of the offence date, but this time they must attend that session within seven days. The focus of this level is a more comprehensive assessment with a view to counselling, detoxification and rehabilitation.[354] If the individual does not comply, they will be charged with the offence/s.

Given that no further action is required by individuals in Level One of IDDI, the compliance rate stands at 100 per cent. A 2008 study found that compliance rates for Level Two and Level Three were 53 and 52 per cent respectively.[355] The authors determined that a significant factor in non-compliance was a

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[352] Hughes et al, *Criminal justice responses relating to personal use and possession of illicit drugs* (n 183) 25.

[353] Shanahan et al (n 185) 61.

[354] Rickard (n 289) Appendix 1.

[355] Payne, Kwiatkowski and Wundersitz (n 240) xv.

recent history of drug offending.[356] Within 18 months of diversion, 42 per cent of individuals had reoffended.[357]

Court Mandated Diversion Program (July 2007 – present)

The Magistrates Court of Tasmania offers treatment for drug use to eligible individuals through the Court Mandated Diversion Program (CMD). This program is legislated under the *Sentencing Act 1997* (Tas).

A magistrate is able to initiate a drug treatment order (DTO), which aims to be an alternative to imprisonment; facilitate an individual's rehabilitation; and reduce future offending.[358]

Eligible individuals are adults (18 years and over) who have pleaded guilty or have been found to be guilty of charges against them; who consent to being part of the program; and who have a history of drug use and offending linked thereto.[359] Those on parole or facing charges involving a sexual offence or significant violence are ineligible for the program.[360]

The DTO can last up to two years, and involves regular drug testing (the individual must abstain from all illicit drug use throughout the program), counselling, court reviews, and education (for example, literacy lessons).[361]

Court diversion officers monitor each individual throughout their participation in the program, and provide regular reports to the magistrate on the individual's participation. Successful graduates of the program may see a reduction or cancellation of their prison sentence; while those who do not comply with or complete the program could be returned to prison.[362]

This program has been broadly heralded as fulfilling its goals. The Magistrates Court of Tasmania has described the impact of the CMD program as having been 'successful in diverting a large group of offenders away from prison into community-based treatment and has had some positive impacts on delaying relapse or a return to crime'.[363] Authors of a 2018 review of the program by the Tasmanian

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[356] Ibid.

[357] Ibid.

[358] *Sentencing Act 1997* (Tas) s 27C.

[359] 'Doing a drug treatment order', *Magistrates Court of Tasmania* (Web Page) <https://www.magistratescourt.tas.gov.au/about_us/criminal_division/drug_treatment_orders>.

[360] Ibid.

[361] Ibid.

[362] Ibid.

[363] *Magistrates' Court of Tasmania Annual Report 2015-16*, cited in Michael Hill and Liz Moore, 'Reflections from the 'double figures' milestone: A decade of Therapeutic Jurisprudence in Tasmania' (Research Report, December 2008) 19 <https://www.utas.edu.au/__data/assets/pdf_file/0004/1224256/Hill-and-Moore-2018-A-decade-of-Therapeutic-Jurisprudence-in-Tasmania.pdf>.

Institute of Law Enforcement Studies noted that there is ‘much evidence of the lives of program participants being turned around from chaotic and pro-criminal to structured and pro-social during the course of serving their DTO sentences’.[364]

However, some concerns have been expressed about the CMD program. Namely, that the cap of 120 places in the program (increased from 80 in 2017/18) is too limited and reflects resource restrictions, rather than the real need for the program.[365] There has also been outright opposition to the program expressed by those who believe some serious offenders are using the program merely as a way avoid prison.[366]

[364] Michael Hill and Liz Moore, ‘Reflections from the ‘double figures’ milestone: A decade of Therapeutic Jurisprudence in Tasmania’ (Research Report, December 2008) 19.

[365] Matt Maloney, ‘Tasmania's Alcohol, Tobacco and Other Drugs Council pitch to expand court-mandated drug diversion program to alcohol’, *The Examiner* (online, 19 Septmeber 2019) <https://www.examiner.com.au/story/6395672/pitch-to-expand-drug-diversion-program>.

[366] Caroline Tang, ‘Court drug diversion program ‘a joke’’, *The Examiner* (online, 11 March 2015) <https://www.examiner.com.au/story/2939519/court-drug-diversion-program-a-joke>.