

Community consultation: Tasmanian Drug Strategy 2022-2027

Submission to Mental Health, Alcohol and Drug
Directorate Department of Health (Tasmania)

25 July 2022

Contents

Who we are.....	3
Introduction	4
Decriminalisation of illicit substances.....	6
Key features of an effective reform agenda.	8
De jure or de facto: The inadequacy of procedure-only models.....	10
Conclusion.....	12

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.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input the consultation draft for Tasmania's Drug Strategy 2022-2027 (TDS). This submission will focus on the TDS objectives and strategies for addressing use of illicit substances in Tasmania. The TDS states that its primary objective for illicit substance use is to prevent and delay uptake of those drugs. The consultation paper also states that amphetamines, including methylamphetamine and cannabis are the second and third principal drugs of concern after alcohol for those seeking treatment. Finally, it states that these drugs account for the majority of illicit drug related law enforcement activity.
2. The purpose of the TDS is to create "[a] vision that all Tasmanians are supported to make healthy choices when it comes alcohol and other drugs (ATOD) use and can access support where and when they need it." The TDS asserts that it is "*a high level, whole-of-government strategic framework which will help us achieve this vision by guiding collaborative action to prevent and reduce the health, economic and social costs and harmful effects of the use of ATOD use and harm*". In this paper, the ALA submits that without careful consideration of a non-criminal response for possession and use of small quantities of illicit drugs, the burden of responsibility for "other drugs" will remain squarely with law enforcement agencies and the Courts.
3. Finally, this submission will outline the importance of considering alternative responses to criminalisation such as decriminalization, diversion and depenalization schemes. Drug-use, particularly personal drug possession involves a wide array of health and social welfare considerations that the ALA asserts must be considered in any drug-law reform agenda. We submit that the TDS must elaborate on specific non-criminal responses to personal illicit drug-possession and outline the importance of decriminalisation as opposed to depenalization alone.

Decriminalisation of illicit substances

4. Internationally and within Australia, there is increasing recognition that criminalisation of illicit drug consumption has been an abject 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. There is a need to further develop Tasmania's Drug Strategy for illicit drug users.

Action Area 5 states:

- 5.1 Develop an Illicit Drugs Action Plan with a focus on disrupting, dismantling, preventing and reducing supply in Tasmania, overdose prevention (e.g. access to naloxone, and Festival Guidelines), and safer injecting and prevention of blood-borne infections (e.g. Needle and Syringe Programs).
- 5.2 Review the Illicit Drug Diversion Initiative.
- 5.3 Assess current activities, opportunities and gaps for responding to illicit drug use, as well as non-medical pharmaceutical use and alcohol-related crime.

5. The ALA submits that the policy of criminalisation and prohibition of illicit drug use is ineffective. The TDS fails to address the issues that surround and stem from criminalisation of illicit substances or provide alternative, health-focused strategies for those users. Public investment in harm minimisation and health responses to drug consumption as opposed to policing and law enforcement of illicit substance use 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.
6. Without careful consideration of a non-criminal response for possession and use of small quantities of illicit drugs, the burden of responsibility for "other drugs" remains squarely with law enforcement agencies and the Courts. 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. Criminalisation of drug users has proven not to be a deterrent for those who seek to access, use or those overdosing on drugs. Instead, criminalisation of those who rely on drug use has exacerbated the socio-economic gap for those experiencing financial hardship and mental-health issues.

7. That criminalisation in Tasmania, and in Australia generally, of drug possession and use is futile is starkly borne out by recent data from the AIHW² which finds;

The proportion of people who had used an illicit drug in their lifetime has been gradually increasing in Australia since 2001 (Figure HARM2). In 2019, 43% of people aged 14 and over in Australia had illicitly used a drug at some point in their lifetime and 16.4% had done so in the last 12 months.

8. That this is the case is not surprising because no matter how many billions of dollars is spent on law enforcement, when a product is prohibited demand and supply will rise or remain constant.³
9. It is also critical to note that judicial officers and lawyers do not believe that criminalising the use of drugs is an effective general or personal deterrent. A recent study from the Australian Institute of Criminology⁴, which included interviews with judicial officers, found that;

“At best, according to our analysis, they appreciated the potential symbolic significance of the principle of general deterrence—that is, that its expression in sentencing could have a broader denunciatory value. There was some optimism that personal or specific deterrence as a direct punishment could work with some—but generally not drug dependent—offenders at the individual level. A number of participants were ‘sceptical’ about general deterrence in the context of responding to and preventing drug trafficking more broadly, giving the impression that the inclusion of this objective in sentencing remarks was more mechanical than meaningful. Others expressed much more negative views, describing it as a ‘bogus mantra’. In the context of social supply, general deterrence was seen as ineffective because offenders were unaware of the seriousness of their behaviour and its potential legal consequences (Coomber et al. 2018). It was thought that specific deterrence had some meaning for this group but ought to be weighed against the lifelong negative effects of a criminal conviction on an otherwise law-abiding group. Both general and specific deterrence

² Australian Government, ‘Alcohol, tobacco and other drugs in Australia’, *Australian Institute of Health and Welfare* (Web Page, April 2022) <<https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/harm-minimisation/demand-reduction>> Accessed 21 July 2022.

³ See, for example, Gary S Becker and Kevin M Murphy, Michael Grossman, *The Market for Illegal Goods: The Case of Drugs*, *Journal of Political Economy*, 114(1) (2006) 38-60.

⁴ Bull M *et al.* 2021. Sentencing for social supply of illicit drugs in Australia. *Trends & issues in crime and criminal justice* no.638. Canberra: Australian Institute of Criminology, p.12.

were considered ineffectual when it came to minimally commercial supply that involved dependent drug users. This is a point often reflected in academic research.”

10. The ALA submits that government funding would substantially alleviate the issues surrounding drug use by redirecting investment into health, housing and social services such that underlying causes of substance abuse and the associated social problems are effectively addressed. Simply put, punishment as deterrence does not work in the area of personal drug-use because the drivers that bring users to use or abuse substances involve a number of complex factors including health needs, financial hardship, and housing issues.
11. 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.

Key features of an effective reform agenda

12. The ALA asserts that it is imperative to ensure careful consideration of “reform architecture” and that agencies are appropriately resourced to deliver on the policy objectives set out in the Consultation Draft. In this regard, we refer to a recent review of decriminalisation policies titled *‘How to Decriminalize Drugs: the Design Features of a Non-Criminal Response to the Personal Possession of Drugs’* where the authors emphasise the importance of clear reform objectives, consideration of the legislative framework and the approach taken. The paper proposes that the key features of a reform agenda should include:⁵

⁵ Greer, A., Bonn, M., Ritter, A., Shane, C., Stevens, A., & Tousevard, N., ‘How to decriminalize drugs: the design features of a non-criminal response to the personal possession of drugs’ (2021) *International Journal of Drug Policy*, 5.

- a. Identifying clear objectives to promote evaluation, accountability and implementation e.g. to limit contact with the criminal justice system, to connect people with healthcare, treatment, social services and/ or education;⁶
 - b. Identifying which drug offences will remain criminal e.g. Will civil penalties be used in lieu of criminal ones?⁷
 - c. Will the model be in law or procedure only?⁸
 - d. Consideration of eligibility criteria, including age, population, previous and concurrent offending, place and drug (including the type and quantity.)⁹
 - e. What actions are to be taken upon detection of drugs for personal use? For example, will the decriminalisation of certain offences be replaced with administrative or civil sanctions/ penalties? What sanctions can be imposed? Will individuals be re-directed or diverted into other systems? How much discretion will apply to policing practices? What responses will apply to non-compliance?¹⁰
13. The ALA submits that legislative reform alongside policy reform is appropriate to limit the discretion and inequitable application of, for example, a 'policing policy' only approach. As a first step, the decriminalisation of possession and personal use of a small quantity of cannabis will significantly reduce the burden on law enforcement and the criminal justice system, with the flow on effect of freeing up resources to provide a greater focus on the objectives of the TDS being to address the impacts of ATOD use and harm.
14. Furthermore, while a primary objective of the TDS is to reduce supply of, and the risks and harms associated with illicit drug use, the impact of criminalising those drugs is consequential. As the TDS discussion paper points out, tobacco and alcohol are the main source of concern when it comes to those seeking treatment and yet the penalty for illicit drug use of cannabis for example is much more onerous. The ALA submits that it is crucial to consider the interplay between criminalisation of certain drugs, the penalties associated

⁶ Ibid 4.

⁷ Ibid.

⁸ Ibid 5.

⁹ Ibid 5.

¹⁰ Ibid 9.

therewith and the goal of the TDS to reduce the stigma and discrimination behind certain drug use.

De jure or de facto: The inadequacy of procedure-only models

Illicit Drug Diversion Initiative

15. Tasmania's Illicit Drug Diversion Initiative (IDDI) is a police diversion program, and its implementation is at the discretion of police officers. It is aimed at low-level and/or first-time users of illicit drugs, including but not limited to cannabis.
16. Eligible individuals are adults 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.¹¹
17. 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.¹²
 - Level Three is available for individuals facing charges for third-time cannabis offences or other illicit drug-related offences.

¹¹ Hughes et al, *Criminal justice responses relating to personal use and possession of illicit drugs* (n 183) 25.

¹² Marian Shanahan, Caitlin Hughes and Tim McSweeney, *Australian police diversion for cannabis offences: Assessing program outcomes and cost effectiveness* (Monograph Series No. 66) 61
<<https://www.aic.gov.au/sites/default/files/2020-05/monograph-66.pdf>>.

18. 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.¹³ If the individual does not comply, they will be charged with the offence/s.
19. 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.¹⁴ The authors determined that a significant factor in non-compliance was a recent history of drug offending.¹⁵ Within 18 months of diversion, 42 per cent of individuals had reoffended.¹⁶
20. The discretionary nature of the IDDI ensures it is of limited utility in achieving the Tasmanian Government's vision that *"all Tasmanians are supported to make healthy choices when it comes [sic] alcohol and other drugs (ATOD) use and can access support where and when they need it."* Rather, it is an approach that leaves *"considerable interpretation and discretion to [police], creating vulnerability to inequitable application and uncertain outcomes for people who use drugs."*¹⁷

Court Mandated Diversion Program (July 2007 – present)

21. 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).

¹³ Michael Hill and Liz Moore, 'Reflections from the 'double figures' milestone: A decade of Therapeutic Jurisprudence in Tasmania' (Research Report, December 2008) 19.

¹⁴ 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>>

¹⁵ *Ibid* xv.

¹⁶ *Ibid*.

¹⁷ Greer, A. et al, 'How to decriminalize drugs: the design features of a non-criminal response to the personal possession of drugs' (2021) *International Journal of Drug Policy*, 5.

22. 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.¹⁸ 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.¹⁹ Those on parole or facing charges involving a sexual offence or significant violence are ineligible for the program.²⁰
23. 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).²¹
24. 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.²²
25. 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'.²³ Authors of a 2018 review of the program by the Tasmanian Institute of Law Enforcement Studies noted that there is 'much evidence of the lives of program participants

¹⁸ *Sentencing Act 1997* (Tas) s 27C.

¹⁹ 'Doing a drug treatment order', *Magistrates Court of Tasmania* (Web Page) <https://www.magistratescourt.tas.gov.au/about_us/criminal_division/drug_treatment_orders>.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *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-ofTherapeutic-Jurisprudence-in-Tasmania.pdf>.

being turned around from chaotic and pro-criminal to structured and pro-social during the course of serving their DTO sentences'.²⁴

26. 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.²⁵ 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.

27. Please refer to annexure for a proposed bill by the ALA for Tasmania: Misuse of Drugs (Cannabis Decriminalisation) Bill 2021.

Conclusion

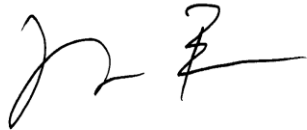
1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Tasmanian Government's Community Consultation on the Tasmanian Drug Strategy 2022-2027.
2. It is our submission that the continued criminalisation of possession and personal use of illicit substances operates as a disincentive for individuals and their families who may otherwise access other services to address problematic drug use early, reducing harm and the likelihood of associated offending behaviour. Thus, decriminalisation would have the dual effect of achieving the broader goals of the TDS while reducing the burden on the Magistrates Court CMD program.
3. While a primary objective of the TDS is to reduce supply of, and the risks and harms associated with illicit drug use, there is a clear need to address the impact of criminalising these drugs. As the Consultation Paper points out, tobacco and alcohol are the main source of concern when it comes to those seeking treatment and yet the penalty for illicit drug use of cannabis for example is much more onerous. The ALA submits that it is important to note

²⁴ Michael Hill and Liz Moore, 'Reflections from the 'double figures' milestone: A decade of Therapeutic Jurisprudence in Tasmania' (Research Report, December 2008) 19.

²⁵ Matt Maloney, 'Tasmania's Alcohol, Tobacco and Other Drugs Council pitch to expand court-mandated drug diversion program to alcohol', *The Examiner* (online, 19 September 2019) <<https://www.examiner.com.au/story/6395672/pitch-to-expand-drug-diversion-program>>

the interplay between criminalisation of certain drugs, the penalties associated therewith and the goal of the TDS to reduce the stigma and discrimination behind certain drug use.

4. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

A handwritten signature in black ink, appearing to read 'Greg Barns', with a stylized flourish extending to the right.

Greg Barns QC

Spokesperson on Criminal Justice

Australian Lawyers Alliance