



Families and Friends for Drug Law Reform (ACT) Inc.
committed to preventing tragedy that arises from illicit drug use

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**SUBMISSION OF
FAMILIES AND FRIENDS FOR DRUG LAW REFORM
TO THE
INQUIRY INTO
THE CRIMES LEGISLATION AMENDMENT (PROCEEDS OF
CRIME AND OTHER MEASURES) BILL 2015
BY THE
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
LEGISLATION COMMITTEE**

CRIMES LEGISLATION AMENDMENT (PROCEEDS OF CRIME AND OTHER
MEASURES) BILL

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INQUIRY INTO the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 by the Senate Legal and Constitutional Affairs Legislation Committee Submission of Families and Friends for Drug Law Reform

Introduction

1. Families and Friends for Drug Law Reform is most grateful for the invitation to make a submission to the inquiry of the Senate Legal and Constitutional affairs Legislation Committee into the Crimes Legislation Amendment (Procedures of Crime and Other Measures) Bill 2015. The Bill will do further violence to underlying principles and safeguards of our legal system that have underpinned our liberties. It will do so in the name of effectively combating the reach of serious and organised crime in this country of which the illicit drug trade is perhaps the most lucrative element. The interest of Families and Friends for Drug Law Reform is particularly on the extent that the Bill would impact on drug law enforcement. We also have an interest as citizens in the extent that the Bill would impact on Civil Liberties.

2. In this submission we examine the Civil Liberty implications of the proposed changes. We then discuss the economic impacts that might accrue from the proposed amendments. Finally we present an analysis demonstrating that changes to drugs laws, rather than the proposed amendments, would be a much more effective measure in counteracting organised crime in relation to drugs.

About Families and Friends for Drug Law Reform

3. Families and Friends for Drug Law Reform was formed 20 years ago as a result of the public meeting in April 1995 of a group of people in the Australian Capital Territory who had a child, relative or friend who had died from a drug overdose. Its membership now extends across Australia. The grief that all shared turned to frustration and anger that those lives should have been lost:: all would be alive today if drug use and addiction had been treated as a social and medical

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problem and not a law and order one. The criminal law and how it was enforced contributed to the death of these young Australians.

4. Families and Friends for Drug Law Reform does not promote the view that all drugs should be freely available. Indeed it believes that they are too available now in spite of their illegality. As this submission will explore, experience points to reliance on the criminal law to control their availability being ineffective and, in fact, counterproductive.

5. Since its establishment the group has been intent on reducing the tragedy from illicit drugs, reducing marginalisation and shame, raising awareness of the issues surrounding illicit drugs and encouraging the search for and adoption of better drug policies. Accordingly, the criterion that we apply in assessing the worth of the Bill is whether it will promote the following objectives:

- (a) make currently illicit drugs less available; and
- (b) ensure that the those who happen to consume drugs that are available do not experience the suffering and harm that the family of so many of our members have.

Approach adopted in this submission

6. In this submission Families and Friends will first consider the extent that the Bill would rip up the fabric of the protections of the liberties of the citizen that have until recently been unquestioned pillars of the Australian legal system inherited from English law and tracing back to foundational documents like Magna Carta and reflecting the evolution of common law over the centuries by courts facing down executive tyranny. It can be objected that the Bill no more than consolidates a change that Parliament endorsed in 2001 with the passage of the Proceeds of Crime Bill which introduced the heretical concepts that property may be seized by the State without the need of proof of crime – the so-called non-conviction based confiscation regime. The submission will argue that the Bill will entrench in a radical and fundamental way this unhappy breach of our rights. The sad development should be reversed rather than intensified.

7. An alleged necessity to combat serious and organised crime is the pretext for the proposals. Families and Friends argue that it is fanciful to expect that the proceeds of crime mechanism will reduce the illicit drug trade to any meaningful extent. And that the harm done to civil liberties in the course of a vain attempt to undermine the problem will simply add to the multiplicity of serious harms of Australia's failed drug policy.

Civil liberty concerns

8. Families and friends urge the committee not to except unquestioningly the assumption of the Bill that a non-conviction based forfeiture scheme is an appropriate measure simply because the concept already finds expression in the

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Proceeds of Crime Act 2002 (POCA). Grave concerns were harboured then about the appropriateness of the measure and these have not abated since. The Attorney General in December 1997 referred the then proposed non-conviction based scheme to the Australian Law Reform Commission. He made it clear that fundamental questioning of the civil libertarian implications of the proposal were beyond the remit of the commission. Even so the commission observed that:

“ . . . there exists within the Australian community a body of concerned opinion about the civil liberties aspects of proceeds legislation and whether proceeds legislation represents an effective policy response to the problems that it is intended to address. While some may be disappointed that these fundamental issues are not readdressed in this report, the Commission remains firmly of the view that such issues remain outside the scope of its inquiry (ALR 1998, para. 1.23).

The threats to civil liberties posed by a non-conviction based forfeiture

9. The aspects of proceeds of crime legislation that trash long-standing protections of our common law legal system inherited from England include the following:

(i). People are to have their property confiscated as proceeds of crime even though no court has established that a crime has been committed. Indeed the amendments will further entrench the anomalous non-conviction based forfeiture scheme of the principal act. As well, people's assets are instantly seized, and families – particularly innocent wives and children – frequently suffer severely because they may not be able to access funds for basic needs, such as education.

(ii). Courts have no discretion but to order forfeiture of property to the Commonwealth once property is found, on the basis of a balance of probabilities, to be “proceeds of unlawful activity” or “an instrument of unlawful activity”. This is so even though “the source of the funds” may be legitimate, and regardless of any hardship that may be expected to be caused to any person by the operation of the forfeiture order” (Odgers);

(iii). If someone wishes to contest an unexplained wealth order, he or she has the burden of proving that the wealth is not derived from one of the specified offences (s. 179E(3)). This provision flies directly in the face of what the current Attorney-General, Senator George Brandis, has said is vital to justice, that the burden of proof is not reversed on to the citizen.

(iv). Authorities need to satisfy no more than the civil burden of proof of balance of probabilities rather than the criminal one of proving a proposition beyond reasonable doubt (s. 317(2)).

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- (v). At the option of the authority the owner of property must not be given notice of an application by an authority for an unexplained wealth order over his or her property (s. 179B(3));
- (vi). Those suspected of having committed a specified offence may be forced to prejudice their defence to a criminal charge if he or she wishes to defend an application for confiscation of their property. Defence of a forfeiture application could well undermine their right to remain silent and right not to incriminate themselves. The explanatory memorandum makes much of the discretion of the court to hear forfeiture proceedings in a closed court. This can effectively restrict the rights of the media and the public to know of the proceeding. Only flimsy privacy protection (see s. 266A of the POC Act) restrains law enforcement and prosecutorial authorities.
10. Neither the Minister for Justice nor this Bill's explanatory memorandum referred to these discarded common law protections but instead rests content with a justification of the proposals in the light of the safeguards found in the International Covenant on Civil and Political Rights, 1966 (Explanatory Memo, paras 91ff). The International Covenant is a multilateral treaty designed to apply to states with a wide variety of legal systems. Such treaties reflect the lowest common denominator of protections and is not the additional protections that are found in for example common-law rather than the civil law systems of law. Judging from the explanatory memorandum it is enough that the forfeiture procedures are in procedural terms civil rather than criminal: civil so that only the civil burden of proof need apply rather than the criminal standard. This line of argument ignores the substance of what is involved: that people may have their property confiscated for a crime that is not proven. The characterisation of the procedure involved as civil rather than criminal is no more than a fig leaf. Families and Friends for Drug Law Reform begs to differ from the Assessment of the Minister that the legislation as proposed to be amended represents "a balanced approach to maintaining the resilience of the Commonwealth's proceeds of crime laws while ensuring respondents' rights are appropriately protected" (Keenan 2015).
11. The verdict of one of Australia's leading criminal barristers and chair of the New South Wales Bar Association, Stephen Odgers SC, is that the legislation as it stands "is truly Draconian legislation. Whatever the political complexion of the Federal Government, this Act should be amended as a matter of urgency in order to reintroduce judicial discretion."
- "... the establishment of a complementary civil regime under which confiscation would follow from a civil finding of unlawful conduct on the balance of probabilities could be seen to give rise to civil liberties concerns. Specifically, the question might be raised whether what was

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seen as in essence a remedy ancillary to a finding of proven criminality beyond a reasonable doubt could now be brought to bear on a defendant without such a finding, i.e. By the discharge of the lower civil burden of proof” (ALR 1998 para. 2.64).

Further threats to civil liberty proposed in the amending Bill

12. Families and friends urges the Committee pay close attention to the judgements of two of the highest courts in the land whose judgements have spurred the government to propose amendments to the Proceeds of Crime Act. The cases are *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 (*Zhao and Jin*) and *In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390 (*Zhang*) (explanatory memorandum, para. 7)

Undermining the right to a fair trial

13. In the Zhao case the High Court upheld the right of a lower court to stay proceeds of crime hearing until after a criminal trial. The High Court made the point that if the respondents or witnesses to a forfeiture hearing were to be compelled to give evidence in that hearing they would broadcast to the prosecution their defence to a subsequent criminal prosecution:

“ . . . if the proceedings were not stayed, the prosecution would be informed, in advance of the second respondent's trial, of his defence because he could not realistically defend the forfeiture proceedings without telegraphing his likely defence. The result would be that the prosecution would be advantaged in a manner which fundamentally alters its position vis-a-vis the second respondent and renders the trial unfair” (*Zhao* case)

14. The High Court here was considering s. 266A of the POCA and an inherent power of the court to stay proceedings to prevent an injustice. The Bill would undermine that capacity by inserting a revised section (s. 319) dealing with stay of proceedings. On its face the amendment would to allow a court to stay proceedings under the POCA “if the court considers that it is in the interests of justice to do so” (CI 319(a)) but then in the subsequent paragraph lists a set of circumstances, including those considered by the High Court in Zhao, when it would be disentitled to do so. The Bill would in short consolidate the injustice perpetrated by the legislation as it stands. The explanatory memorandum makes much of the discretion of the court to hear forfeiture proceedings in a closed court. This can effectively restrict the rights of the media and the public to know of the proceeding. Only flimsy privacy protection (see s. 266A of the POCA) restrains law enforcement and prosecutorial authorities. In another High Court case (*Lee v The Queen* [2014] HCA 20 (21 May 2014)) the court observed that forcing someone to signal in advance (through POCA proceedings) their likely

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defence to a possible criminal proceedings. This pressure to disclose one's defence goes to:

“ . . . :the very nature of a criminal trial and its requirements in our system of criminal justice. The appellants' trial was altered in a fundamental respect by the prosecution having the appellants' evidence before the Commission in its possession.”

15. The assumed justification for these inroads into civil liberties is that they are necessary in order to combat the serious menace of organised crime. At least in the case of illicit drugs it is clear that this legislation will have little impact. This submission will show that money received by the Financial Management Authority has been just 1.4% of the estimated \$21.3 billion of proceeds of serious and organised crime. It is hard to imagine that the refinements to be introduced by the Bill under consideration will materially increase that. The president of the NSW Bar Association has described the Proceeds of Crime Act 2002 as "truly Draconian legislation" that should be amended (Odgers).

Are the measures proposed likely to have a significant impact?

16. The proceeds of crime legislation to be amended by the proposed amendments falls within a long list of instances where traditional safeguards of the individual in the criminal law have been swept away or overturned in the hope of securing more effective and efficient drug law enforcement. Indeed the Minister for Justice appeals to such considerations in his second reading speech in support of the Bill. He admits that the legislation will constitute "tough steps" but believes it necessary "to ensure our nation is safe and secure" from the "significant risk to Australian communities" of "serious and organised crime." He asserts that the proceeds of crime legislation as amended will "strike at the heart of organised crime." Families and Friends for Drug Law Reform does not believe that it will do anything of the sort.

The size of the target problem

17. When embarking on a chase it is prudent to learn as much as one can about the beast that one intends to hunt, in this case, crime in Australia. An accurate estimate of its size was provided by the Australian Crime Commission in a report released just before Christmas. In short, the direct costs of serious and organised crime amounted in 2013-14 to \$21.29 billion. This vast sum is supplemented by response and prevention costs amounting to \$15 billion. All told, it is reckoned that in 2013-14 serious and organized crime cost Australia \$36 billion (ACC 2015c)

18. The CEO of the ACC pointed out that this "estimate is more than double our previous conservative figure" but went on to warn that even so "this updated

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estimate still only reflects a proportion of the total cost of serious and organised crime. There are many elements we could not measure or only partially measure”.

19. As part of a project to improve measures of what is known as the non-observed economy, the Australian Bureau of Statistics has commissioned an attempt to estimate the size of the illegal drug economy in accordance with methods recommended by the OECD. The Bureau researchers came up with an estimate of the total value of domestic and imported drug supply in 2010 of \$7.574 billion (Gajewski and Cullen 2012b).

20. In the accounting framework of the analysis, domestic supply amounted to \$6,684bn and imports to \$890m.

21. As far as Families and Friends are aware there is no evidence before the committee that the amending legislation will have a significant impact on crime in the Australian community. There is an expectation but no evidence that amendments will lead to the confiscation of more assets but, at the Commonwealth level, this would need to increase by a factor of at least 25 in order to amount to just a fifth of the proceeds of serious and organised crime as estimated by the ACC. In 2014 the Financial Management Authority received \$83.6 million in its confiscated assets account, which is just 1.4% of the estimated \$21.3 billion of proceeds of serious and organised crime. This calls into question the Minister’s claim that “The Commonwealth proceeds of crime scheme is an effective weapon in the fight against serious and organised crime” (*Hansard*, second reading speech, 3 December 2015). In short, any expectation that the proposed amendments will significantly reduce the profitability of serious and organised crime in Australia and reduce the amount of that crime seems based on a groundless hope rather than a realistic appreciation and strategic analysis.

Why law enforcement and confiscation of assets stimulates rather than reduces the illicit drug trade

22. Families and Friends cannot claim to comment generally about the efficacy of the law enforcement to reduce serious and organised crime but we have given much consideration over the 20 years of our existence to one significant aspect of it, the efficacy of drug law enforcement. Rather than acting as a brake on the illicit drug trade, law enforcement stimulates that trade. The reasons it does so are:

- Firstly, law enforcement encourages the direct peer-to-peer marketing system at the heart of the retail trade generally involving networks of friends and acquaintances, which is extraordinarily effective;

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- Secondly, much of the drug trade exists under the radar because there is no typical self-perceived victim in a crime of drug dealing: purchaser and the seller have a strong interest in keeping the transaction confidential. By contrast to victims of other categories of organised and serious crime – like cyber crime and identity theft have a strong incentive to report the offence – those engaged in drug dealing or related offences like corruption do not;
- Thirdly: the drug trade is resistant to any significant level of penetration by law enforcement;
- Fourthly: There is an endless supply of middle level dealers prepared to run the risk of apprehension in return for the high profits. The addicted user who deals to feed a habit is the disposable bottom layer of the distribution pyramid, the cannon fodder of the drug war. At most, local policing merely displaces the market.
- Fifthly: For a deterrence to be effective, it should be swift and certain. Drug law enforcement is neither. Based on the most recent usage and arrest rates, there is less than a 2% chance of ever being caught;
- Sixthly: The impact that police seek to have on the drug market works to the benefit of drug dealers: Drug Law Enforcement works to raise the price of drugs and thus, it is hoped place drugs beyond the reach of users; but higher prices raise the profit margin for drug suppliers who are better able to invest in measures to hide their tracks, so the money laundering, violence and corruption that support and conceal “serious and organised criminal activity” is supported and concealed” (IDDR 2013-14 p. 5).
- Seventhly: raising the price of drugs, far from moderating demand and thus supply, serves as an incentive to supply. The ACC is well aware that profit attracts further supply: “. . . the price paid for methylamphetamine in Australia is among the highest in the world, making the importation of the drug and its precursor chemicals an attractive target for transnational crime groups” (ACC 2015a);
- Eighthly: The demand for addictive substances by those dependent upon them is relatively insensitive to price;
- Ninthly: The forbidden fruit aspects of illicit drugs is a marketing attraction as well as a deterrence. Surveys of why young people (who form the bulk of the market) try illicit drugs reveal that a high proportion do so because it is a challenge;
- Tenthly: Others try drugs, to avoid pain or, particularly in the case of stimulants, seek to compensate for perceived inadequacies – in other words as a form of self medication combating social awkwardness;

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Market indicators

23. The foregoing are the reasons why one would expect drug law enforcement to be ineffective . . . but has it actually been ineffective? A clear “no” can be provided to this question on the basis of market indicators like the seizure rate, level of use, availability, price and purity. As summarized in a report of the Parliamentary Joint Committee on the ACC, Families and Friends for Drug Law Reform urges that performance criteria of drug law enforcement agencies should not be activity-focused, “. . . but should instead assess effectiveness by measuring the ‘extent to which law enforcement effort reduces the quantity of drugs needed to satisfy the demand of the Australian market.’ Pointing to a wider range of indicators of supply and demand factors such as price, purity and availability, they argue that much more accurate measures of the effectiveness of law enforcement activities directed against the drug trade are possible” (PJCACC 2005 para. 7.57, p. 110)

It is vital that public policy be framed having regard what is known to work. It is in this context that's for many years now, Families and Friends for Drug Law Reform has urged the adoption of meaningful set of market indicators of the effectiveness of the drug policy. It elaborated such measures in its submission in September and November 2005 (FFDLR 2005) to the Parliamentary Joint committee on the ACC for its inquiry reviewing the Australian Crime Commission Act 2002 (PJCACC 2005) and in its submission of March 2006 (FFDLR 2006) to the same joint committee's inquiry into amphetamines and other synthetic drugs (PJCACC 2007).

24. In the words of the PJC report of November 2005, the measures that Families and Friends for Drug Law Reform proposed are of “great relevance to policy formulation” (PJCACC 2005 para. 7.60 p. 110). The PJC urged that: “A full assessment of all the variables raised by the FFDLR is certainly appropriate and necessary to permit a sensible understanding of the illicit drug problem in Australia and should underpin the assessment and ongoing refinement of Australia's anti-drugs policies (*ibid.* para. 7.59). The committee added that: “the analysis proposed by the FFDLR should be done and published, and, as the FFDLR suggest, the ACC may be an ideal agency to perform this task in the context of its intelligence assessments and the Illicit Drug Data Report” (para. 7.61).

25. The PJC in its report on its later inquiry into amphetamines and other synthetics was even more specific in its endorsement of the performance measures proposed by Families and Friends for Drug Law Reform:

"The Committee recommends that the Australian Crime Commission collaborate with the Australian Federal Police, the Australian Customs Service

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and the relevant state and territory law enforcement agencies to improve performance measurements for drug law enforcement under the National Drug Strategy" (PJCACC 2007, recommendation 13, para. 6.64, P. 98).

Low seizure rate

26. For the amount of drugs seized to constrain the illicit trade, the quantity must amount to a significant proportion of the total drug market. Given the astronomically high profit margin of the drug trade, drug dealers can afford a high level of losses and still turn a profit. It is not enough that a record level of seizures is made in any one year, because a new record is simply evidence of the ready availability of the drugs.

27. It is never likely that law enforcement effort will succeed in seizing illicit drugs at a sufficiently high rate to disrupt the drug trade. The illicit drug market is nothing if not malleable and adaptable. What law enforcement agencies have singularly failed to do is to identify what it would take to fatally wound the illicit drug market. The only serious effort that we are aware was reported in a confidential briefing paper prepared at the instance of the Home Office in 2003 for the British Cabinet. The paper was leaked to *The Guardian* in 2005. To put a drug dealer out of business requires seizures at a sustained high level that have never been achieved. As the Home Office paper put it:

"A sustained seizure rate of over 60% is required to put a successful traffic out of business. Anecdotal evidence suggests that seizure rates as high as 80% may be needed in some cases. Sustained successful interventions on this scale have never been achieved."

Rarely is even about 10% of the drug supply in the country ever interdicted. Thus, the 27 tonnes seized in 2013 – 2014 represents a mere 10.8% of the 240.9 tonnes of total consumption of illicit drugs in Australia as estimated by researchers of the ABS for 2010 (Gajewski & Cullen 2012, table 5).

And it would indeed need to be higher than 80% in the case of cocaine where, as the ACC commented, "Organised criminals can achieve profit mark-ups of more than 6100 per cent compared with the wholesale cocaine price in Mexico" (ACC 2011).

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Figure 1: Seizure rates required to put a major trafficker out of business

CONFIDENTIAL: POLICY

The high seizure rates required to put a major trafficker out of business pose a substantial challenge to law enforcement

Profit margins for a major trafficker at different seizure rates



Source: HMG data, team analysis

73

SOURCE: United Kingdom (2003), p. 73.

To those who have lost children to drugs, two recurring aspects of government policy are particularly riling:

- firstly, the tendency of law enforcement management to trumpet law enforcement "successes" as evidence of policy effectiveness in the regular plea for government resources and,
- secondly, the preparedness of their political masters to swallow this argument uncritically.

By doing so, governments reward failure rather than policy success.

The ACC engages in this gaming for funds. In its latest illicit drug report its director boasted that: "In 2013–14, law enforcement agencies recorded more than 93 000 illicit drug seizures, with a combined weight of 27 tonnes and more than 110 000 arrests. These figures are all the highest on record" (IDDR 2013-14 p. 2).

In the commercial world of organised crime, losses flowing from law enforcement are regarded as simply a cost of doing business. Drug use surveys show a lack

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of responsiveness to law enforcement “successes”, demonstrating that the market demand is fully supplied. The principal concern of suppliers is to ensure that the retail price remains sufficiently high. Here lies the most bitter irony. The interests of both law enforcement and organised crime coincide in seeking to maintain a high cost of illicit drugs.

28. It is naïve to assume that the success of an anti-drug policy can be measured by the amount of drugs seized, and the extent to which the drug trade is disrupted by indicators like the arrest of dealers, the number of clandestine laboratories that are closed down and the level of proceeds of crime that is seized. From this point of view the Australian community could well take comfort from the record success announced in May by the ACC and the Minister for Justice that: “In the 2013-14 financial year, Australian law enforcement agencies seized a record 27 tonnes of illicit drugs and made more than 110 000 arrests.”(ACC 2015).

29. Nothing could be further from the truth that the harvest of law enforcement effort is a measure of success. Just as a record fish catch indicates a well stocked fish population or that a record number of rabbits trapped, the continuing existence of a rabbit plague, so does a record quantity of drugs seized indicate a thriving illicit drug trade. Law enforcement “success” is a demonstration of the health of the drug market. If law enforcement were succeeding in suppressing the trade, law enforcement seizures would be declining. Acceptance of this proposition is vital if the government and the committee is to come up with effective strategy to undermine the Australian drug market. The illicit trade and consumption of drugs is a market and must be understood and analysed as a market whereby suppliers provide a commodity to satisfy the demand from consumers. In other words, methamphetamine and its precursors are like any other commodity that is traded, apart from the fact that this commodity is illegal.

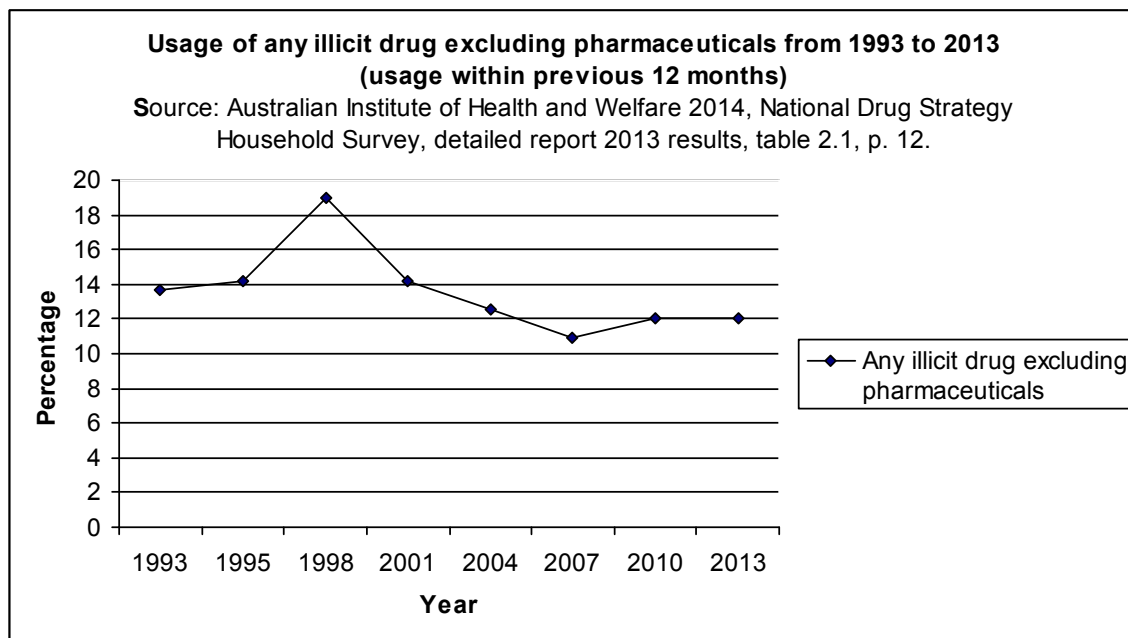
30. To its credit the ACC recognises this. It affirms that its annual illicit drugs charter report seeks to give “a robust picture of the Australian illicit drug market” and it has observed that: “Organised crime groups are profit driven, constantly looking for new opportunities, operating across domestic and international borders” (ACC 2015b).

Level of use

31. The level of consumption in the community of illicit and legal substances, including tobacco and alcohol, is surveyed every three years by Institute of Health and Welfare which publishes them as the national drug strategy household surveys..

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Figure 2: Household survey of usage within previous 12 month any illicit drugs except pharmaceutical by people aged 14 years or older, 1993-2013



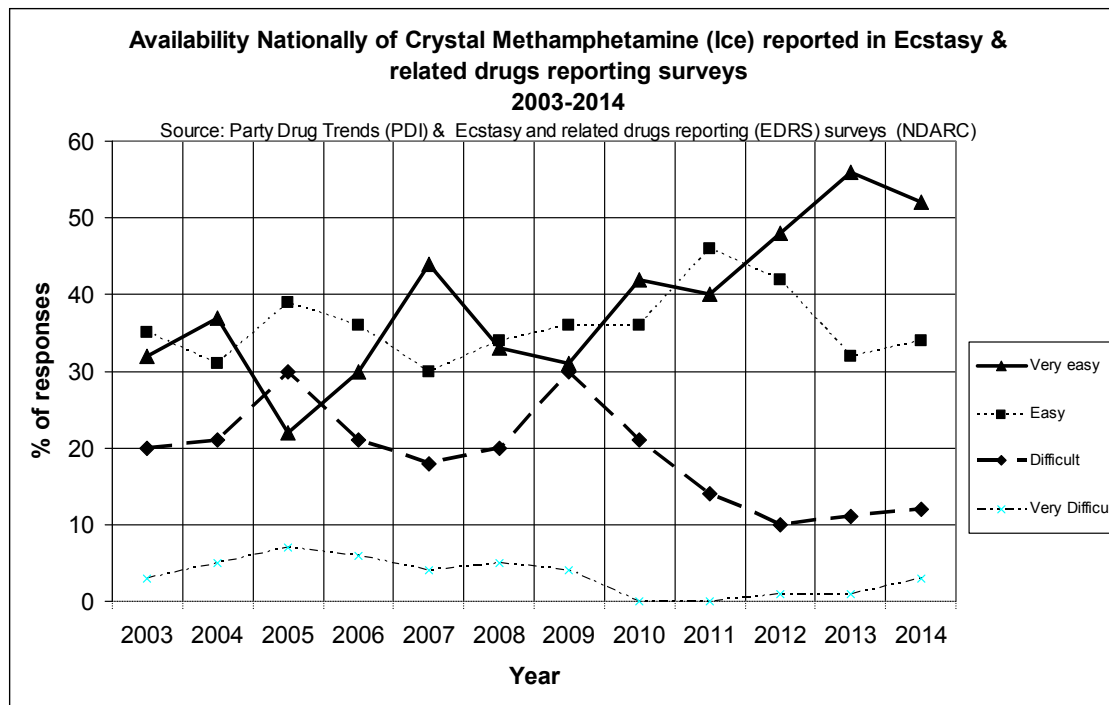
Since 1996 consumption has been remarkably stable, irrespective of the varying extent of law enforcement “successes”.

Availability

32. In spite of intense law enforcement effort, annual surveys carried out by the National Drug and Alcohol Research Centre of ecstasy and related drugs, show that, since 2003, ice is consistently reported by more than 60% to be easy or very easy to obtain. Indeed in the past five years this drug, that commands most public and political attention, became increasingly more available. By 2014 86% of those surveyed responded that ice was "very easy" or "easy" to obtain.

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Figure 3: Availability of Crystal Methamphetamine 2003-2014

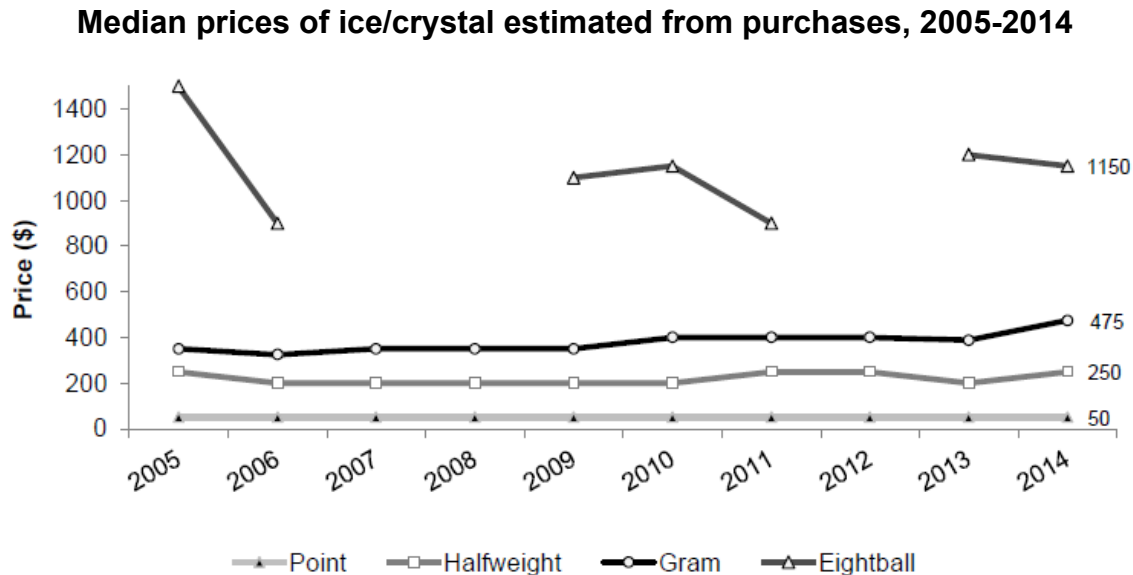


Price

33. If drug law enforcement were reducing the supply of drugs to the retail market, the price in that market would rise. Such a rise might be explained on other grounds such as a general shortage in supply but a steady or falling retail price while drug law enforcement effort remains intense, is about as clear a demonstration as one can get of the ineffectuality of drug law enforcement to reduce supply. In Australia this is most dramatically illustrated by the price of crystal methamphetamine in New South Wales, the most populous state of the Commonwealth. As the figure below shows, the retail price for a point of ice, the most common retail measure, has remained unchanged at \$50 for a full 10 years!

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Figure 4: Median price of crystal methamphetamine in New South Wales, 2005-2014



SOURCE: D.McKell and L.Burns, NSW drug trends 2014, Findings from the Illicit Drug Reporting System (IDRS). Australian Drug Trends Series No. 128
https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/NSW_IDRS_2014.pdf
 visited 9/01/2016

Purity

34. The surge in recent years in use of the purest form of methamphetamine, crystalline methamphetamine or ice, is strong evidence of the failure of supply reduction strategies.

Relevance of drug law enforcement performance measures to Proceeds of Crime legislation

35. Families and Friends recommends that the proposed Bill should extend to illicit drug crimes only if there exists compelling evidence that the amendments are likely to make serious inroads into the Australian drug trade.

36. The only qualification by the PJC to its endorsement in November 2005 to adoption of the performance criteria proposed by Families and Friends was that it may be inappropriate for the ACC to carry it out because the commission's "tasks are set by government policy, and the agency has little scope to vary that policy" (para. 7.60). In short even though "a full assessment of all the variables . . . should underpin the assessment an ongoing refinement of what Australian anti-

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drugs policy is", the assessment was too politically sensitive to expect the ACC to carry out.

37. In principle Families and Friends is appalled that government agencies should be dissuaded from undertaking rigorous, frank and fearless analysis of the impact of government policies. But, whatever the case with agencies, such a consideration should not apply to a parliamentary committee in its consideration of a material "refinement of Australia's anti-drugs policies" as it is embodied in the proceeds of crime Bill currently before the present committee.

38. The committee needs to be convinced that:

(a) the legislation will materially reduce the availability of illicit drugs in the Australian community; and

(b) that this positive impact will counterbalance the harm that the legislation will cause to traditional safeguards and values of the criminal law that form a bulwark against the country becoming a police state and which thus underpin the liberty of the citizen.

The undermining of civil liberties flowing from POCA are discussed above.

What alternative courses are open?

39. The POCA is inappropriate because the policing and political analysis is fundamentally flawed. The measure seeks to thwart the drug trade by confiscating funds at the end of the marketing chain.

40. The approach is like preventing the potential damage from hoverboards by waiting until the wholesaler and retailer had made a sale, then confiscating the profits as a way of preventing injury and death from a known potential hazard. Any measure to counter the impact of drugs at the profit end is like waiting until a house fire is out and the house has burned down, then chasing the bank account of someone probably three to five sales removed from the processes of profit.

41. The government funds spent on this and other "proceeds" approaches would be much better spent on research and analysis to provide a potential new drug 'regime' in Australia that would eliminate the profit motivation for criminals entirely. It should also formulate complementary measures for presentation at the United Nations General Assembly Special Session on Drugs in April this year. Without the ability to profit from drug crime, there would be no need for this or any 'proceeds of drug crime' laws.

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42. Several other countries have pointed the way, including United States (regarding cannabis and a relaxed approach to the drug conventions), Portugal, Spain, Switzerland, Germany, Uruguay, The Netherlands and Canada. They have realised that perpetuating a “war on drugs” model only empowers criminals to engage in a high profit, low risk (to them) business which is aided and facilitated by increasing amounts of funds poured into the current muddle-headed political, police and crime commission approach to “law enforcement”. The more current laws are enforced, the more criminals profit: that is obvious. Families and Friends urges the Senate Legislative and Constitutional Affairs Committee to recommend that the government changes the law to eliminate the profit motive for criminals in relation to drugs by treating drug taking as a health issue, and providing the appropriate facilities, resources, education and – different – law enforcement to bring to an end the death, disease and suffering inflicted by our present prodigally costly but ineffective drug policy.

12/01/2016

CRIMES LEGISLATION AMENDMENT (PROCEEDS OF CRIME AND OTHER
MEASURES) BILL

REFERENCES

- PJCACC 2005: Australia, Parliament, Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002* (Canberra, November 2005) at http://www.aph.gov.au/Senate/committee/acc_ctte/acc_act02/report/report.pdf visited 23/11/05
- PJCACC 2007: Australia, Parliament, Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into the manufacture, importation and use of amphetamines and other synthetic drugs (AOSD) in Australia (Canberra, February 2007) http://www.aph.gov.au/Senate/committee/acc_ctte/aosd/report/index.htm visited 01/03/2007
- ACC 2011: Australian Crime Commission, *Victoria seizes over 233kg of cocaine in 2009–10*, Media release, 28 June 2011 at <https://www.crimecommission.gov.au/media-centre/release/australian-crime-commission-media-release/victoria-seizes-over-233kg-cocaine> visited 21/06/2015
- ACC 2015a: Australian Crime Commission, *Highest risk criminals driving the ICE age*, Media release, 25 March 2015 at <https://www.crimecommission.gov.au/media-centre/release/australian-crime-commission-media-release/highest-risk-criminals-driving-ice> visited 21/06/2015;
- ACC 2015b: Australian Crime Commission, *Illicit drug seizures and arrests at record highs*, Media release, 14 May 2015 at <https://www.crimecommission.gov.au/media-centre/release/australian-crime-commission-media-release/illicit-drug-seizures-and-arrests> visited 21/06/2015
- ACC 2015c: Australian Crime Commission, *The costs of serious and organised crime in Australia 2013–14* (Australian Crime Commission, Canberra, 2015)
- ALR 1998: Australian Law Reform Commission, *Confiscation that counts*, 1998
- FFDLR 2005: Families and Friends for Drug Law Reform, *Submission of Families and Friends for Drug Law Reform to the Review by the Parliamentary Joint Committee on the Australian Crime Commission of the Australian Crime Commission Act 2002* (September 2005) submission 15 at www.ffdlr.org.au and http://www.aph.gov.au/Senate/committee/acc_ctte/acc_act02/submissions

FAMILIES AND FRIENDS FOR DRUG LAW REFORM

[/sub15att1.pdf](#)

FFDLR 2006: Families and Friends for Drug Law Reform, *Submission of Families and Friends for Drug Law Reform to the inquiry by the Parliamentary Joint Committee on the Australian Crime Commission into amphetamines and other synthetic drugs* (March 2006) at www.ffdlr.org.au

Gajewski and Cullen 2012a: Adam Gajewski and Derick Cullen, “*Measuring the Illegal Drug Economy of Australia*” in a *National Accounts Framework*,” (Australian Bureau of Statistics) paper delivered at DPMP Symposium, Sydney, 16 March 2012;

Gajewski and Cullen 2012b: Adam Gajewski and Derick Cullen, Australian Bureau of Statistics – Macro Economic Research Drug Policy Modelling Program Symposium 16 March 2012 at <https://dpmp.unsw.edu.au/sites/default/files/dpmp/resources/ABS%20report.pdf>

IDDR 2013-14: Australian Crime Commission, *Illicit drug data report 2013–14*, (Australian Crime Commission, Canberra City, May 2015)

Michael Keenan, MP, House Of Representatives, Bills, *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015*, Second Reading, Speech, Thursday, 3 December 2015

D.McKell and L.Burns, *NSW drug trends 2014, Findings from the Illicit Drug Reporting System (IDRS)*. Australian Drug Trends Series No. 128 https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/NSW_IDRS_2014.pdf visited 9/01/2016

Stephen Odgers, *Proceeds of Crime: Instrument of Injustice?*, editorial at <http://archive.nswbar.asn.au/docs/resources/lectures/odgers.pdf>

United Kingdom, Strategy Unit, *SU Drugs Project: Phase 1 Report: Understanding the Issues* (13 June 2003) at <http://image.guardian.co.uk/sys-files/Guardian/documents/2005/07/05/Report.pdf> visited 05/07/05