Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Australia's illicit drug problem: Challenges and opportunities for law enforcement

Submission to Joint Committee on Law Enforcement

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Protecting and promoting justice, freedom and the rights of the individual.

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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.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Joint Committee on Law Enforcement inquiry into Australia's illicit drug problem. The ALA has long advocated for drug policy reform in the direction of harm minimisation and the view that drug policies in Australia are counter-intuitive and ineffective. Policies that are grounded on prohibition and criminalisation are causing harm which is often described as 'an intrinsic part of our current regulatory framework'. [2]

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.

3. 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.

4. 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.

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[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.

5. This submission will focus on terms of reference four and five.

   The involvement of law enforcement in harm reduction strategies and the effectiveness of their involvement will be explored in this submission through analysis of current harm minimisation approaches in Australian states and territories.

   In addressing the weaknesses of decriminalisation and its impact on illicit drug markets and the experiences of other jurisdictions, this submission will explore;

   a. Problems associated with criminalisation of drug possession and use
   b. Benefits of harm minimisation
   c. Restricted access to medicinal cannabis
   d. Conclusion: Alternative approaches to criminalisation

Current harm minimisation approaches in Australian states and territories

Australian Capital Territory

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

6. 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,[5] and to help individuals gain access to treatment.[6] 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.[7]

[5] 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>.

[6] https://www.canberrahealthservices.act.gov.au/services-and-clinics/services/police-and-court-drug-diversion-service

[7] 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>.

7. Eligibility for CADAS includes that an individual has been 'apprehended or charged with an alcohol and/or drug related offence',[8] and that they are willing to undertake treatment.[9] CADAS clinicians report both compliance and non-compliance to the courts, which is considered by the magistrate in future decisions pertaining to that individual.[10] 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.[11]

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

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

9. 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.[12] 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.[13]

10. After an assessment by the Alcohol and Drug Program Diversion Service (ADPDS), the individual is referred to an approved ACT agency for treatment.[14] This may include education, residential rehabilitation, and counselling.[15] Compliance with the treatment offered is

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

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

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

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

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

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

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

[15] Ibid.

monitored by the ADPDS, with non-compliance reported back to the AFP for further action.[16] That action could include a criminal penalty.[17]

11. 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.[18] 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.[19]

12. A key benefit of the ACT diversion system is that it allows for a streamlined process between police and the health system. This benefit is critical for allowing different stakeholders to work together. For example, tools such as 'SupportLink' were praised by police and health services alike for enabling easier referrals, and an efficient system for appointment management. This referral system and the interconnectedness between programs that it allows is cited as a reason for its success and the high number of assessments and completions for these two programs.[20]

New South Wales

Cannabis Cautioning Scheme (April 2000 – present)

13. 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.[21]

[16] Ibid.

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

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

[19] Ibid.

[20] Ibid 78.

[21] 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_initiative>

14. 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.[22]

15. 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.[23] There is no further action taken if the individual does not comply by attending this session, beyond recording non-compliance.[24] A magistrate may, however, take non-compliance with this scheme into account when determining sentences for other offences.[25]

16. 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.[26] 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'.[27]

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[22] 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>.

[23] NSW Police Force (n 182).

[24] 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>.

[25] Ibid.

[26] 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>.

[27] 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>.

17. In 2013, there were 5,327 cannabis cautions issued in NSW, with similar numbers recorded in 2011 and 2012.[28] 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.[29] Without an incentive to attend (for example, prosecution for non-attendance) like in other schemes across the country, there was very low compliance.[30] This undermines the ability of the scheme to effectively educate individuals about cannabis use and impact their future behaviour.

18. 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.[31] 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.[32]

19. 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.[33] 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

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

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

[30] Ibid 30.

[31] 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>.

[32] Ibid.

[33] 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>.

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).[34] 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.[35]

Criminal Infringement Notice Scheme (January 2019 – present)

20. 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 of illicit drug involved.[36] As above with CCS, police discretion underlies the implementation of this scheme.

21. 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.[37]

22. Three hundred CINS were issued during the scheme's first six months, with the vast majority of CINS (256) being issued for ecstasy possession.[38] This was evaluated by the National Drug and Alcohol Research Centre (NDARC) to be saving the NSW Government more than $300,000

[34] Ibid.

[35] Ibid.

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

[37] 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>.

[38] 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>.

by keeping the individuals who were fined largely out of court.[39] 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.'[40]

Drug Court of NSW (February 1999 – present)

23. 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,[41] 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 they will be sentenced to full-time imprisonment, if convicted; live in certain catchment areas; and be willing to participate in the program.[42]

24. 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.[43] 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).[44]

25. 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

[39] Ibid.

[40] Ibid.

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

[42] '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>.

[43] '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>.

[44] '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>.

non-custodial sentence is usually granted to the individual.[45] 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'.[46] 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'.[47]

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.[48]

26. 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 accepted into the program with 329 individuals deemed eligible for the program but not accepted into the program.

27. 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';[49]

[45] '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>.

[46] 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>.

[47] Ibid 1.

[48] Ibid 13.

[49] 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>.

- 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;[50]
- those who participated in the Drug Court of NSW program were found to take 22 per cent longer to commit a 'person offence';[51] 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.[52]

28. 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'.[53]

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

29. 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.

30. Individuals engaged in this program were under supervision throughout the program, as they worked through a tailored plan for treatment in non-custodial settings.[54] The program was designed such that those who graduated would avoid conviction, and instead receive a

[50] Ibid 1.

[51] Ibid.

[52] Ibid 13.

[53] Ibid 13–14.

[54] 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>.

community-based order.[55] 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.[56]

31. 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.[57] 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'.[58]

Magistrates Early Referral Into Treatment (July 2000 – present)

32. 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'.[59]

33. 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.[60] Importantly, a defendant must have a

[55] Ibid 287.

[56] 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>.

[57] Ibid 14-15.

[58] '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>.

[59] '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>.

[60] Ibid.

treatable drug or alcohol problem, reside within a defined catchment area, and voluntarily consent to being part of the program.[61]

34. 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.[62] Non-compliance will be reported to the magistrate, and the individual may be removed from the program.[63] 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.[64]

35. 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.[65]

Medically Supervised Injecting Centre (May 2001 – present)

36. 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.

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[61] '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>.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] 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 >.

37. 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.[66] 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.[67]

38. Since 2001, the Kings Cross MSIC has supported 16,500 clients and has managed 8,500 overdoses.[68] There have been no fatalities.[69] 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).'[70]

39. 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.[71] 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.[72] 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'.[73]

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

[67] Ibid.

[68] Ibid.

[69] Ibid.

[70] 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>.

[71] Ibid 20.

[72] Ibid.

[73] Ibid 9.

Victoria

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

40. 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.[74] 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.[75]

41. 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.[76] 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.

42. In addition, an individual receiving a caution may attend a voluntary cannabis education program called 'Cautious with Cannabis'.[77] 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.[78] 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

[74] 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.

[75] Ibid.

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

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

[78] '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>.

were cautioned reoffended.[79] 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).[80]

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

43. After deeming the Cannabis Cautioning Program a success early in its state-wide enforcement, the Victorian Police proposed developing a cautioning program for those using or in possession of illicit drugs other than cannabis.[81] 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.[82]

44. 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.[83] 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.[84]

45. 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-

[79] 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>.

[80] Ibid.

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

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

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

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

compliant than those without that recent history.[85] 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.[86]

The Drug Court of Victoria (May 2002 – present)

46. 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.[87] 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'.[88]

47. 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'.[89] Additional eligibility criteria include that the individual must be facing a term of 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.[90]

48. 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

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

[86] 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>.

[87] 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>.

[88] 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>.

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

[90] Ibid.

(*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).[91]

49. 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.[92] If an individual absconds or if their DTO is cancelled during the program, the original prison sentence is usually reimposed.[93]

50. 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').[94] 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.[95]
51. 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'.[96]

52. 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 program has reduced the demands on correctional facilities

[91] Ibid.

[92] 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.

[93] Ibid.

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

[95] Ibid.

[96] Ibid 7.

by the equivalent of 13,948 prison days a year, which is a saving of $3.77 million.[97] This includes annualised recidivism savings, since the DCV graduates were generally offending less often with less severity.[98]

Medically Supervised Injecting Room (June 2019 – present)

53. 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 2019.[99] 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.[100] There were no fatalities.[101]

South Australia

Cannabis Expiation Notice scheme (April 1987 – present)

54. 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.

[97] 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>.

[98] Ibid.

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

[100] Ibid x.

[101] Ibid.

55. 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
    - 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.[102]

56. 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.[103] 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.

57. 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.[104]

[102] 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.

[103] 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>.

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

Police Drug Diversion Initiative (June 2001 – present)

58. 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'.[105]

59. 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.[106] Individuals are not required to admit guilt for the offence, but they cannot deny the allegations.[107] The scheme does not apply to non-drug offences, even where drug use is a significant factor behind the individual offending.

60. 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.[108] 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.[109]

61. 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

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

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

[107] Ibid.

[108] SA Health (n 266).

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

receiving two or more diversions, as evidence of the success of PDDI in the treatment it offers a broad group of individuals.[110]

62. On the other hand, political opponents of the scheme have suggested that individuals referred to the program more than once are 'manipulating the system',[111] 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.[112]

South Australian Drug Court (June 2000 – present)

63. 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.[113] The aims of this program are to 'minimise/stop the use of illicit drugs' and to 'prevent/decrease any further offending'.[114]
64. 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

[110] Ibid 54–55.

[111] 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>.

[112] 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>.

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

[114] Ibid.

- pleads guilty to both the most serious offence and the majority of offences for which they have been charged.[115]

65. 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.[116] The program is described officially as combining 'intensive judicial supervision, strict bail conditions, rewards and sanctions, drug testing, intensive treatment and practical support'.[117] Once accepted into the program, participants are able to access housing, and a case management plan is designed for each individual.[118]

66. 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.[119] That last qualifier is an important one, though, since that same study found that less than one-quarter of participants actually completed the program.[120] However, of those who did, almost 80 per cent displayed lower levels of offending post-program, as compared with their pre-program records.[121]

Northern Territory

Cannabis Expiation Notice Scheme (1996 – present)

67. 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'.[122] The quantities involved must be less than a trafficable amount, which is deemed to be up to 50 grams for cannabis plant

[115] Ibid.

[116] Ibid.

[117] Ibid.

[118] Ibid.

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

[120] Ibid 9.

[121] Ibid 28.

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

material, up to one gram for cannabis oil, and ten grams for both cannabis resin and cannabis seed.[123]

68. This *de jure* reform applies to the possession and/or cultivation of cannabis. Self-administration remains a criminal offence.[124] 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.[125] Once the individual has paid the fee, no record of the incident is kept.[126] 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.[127]

69. 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;[128]
    - their driver's licence may be suspended;[129]
    - the individual's personal property may be seized;[130]
    - the amount may be deducted from the individual's wages or salary;[131]
    - a statutory charge may be registered on land owned by the individual;[132] and
    - they could be taken into custody until the fine is paid.[133]

[123] Ibid sch 3.

[124] Ibid s 13.

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

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

[127] Ibid.

[128] 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>.

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

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

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

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

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

This latter practice especially has been labelled as 'costly and inefficient'.[134]

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

70. 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 (i.e. not just cannabis).[135] 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.[136] Failure to comply by completing the program results in the individual being prosecuted through the court system.[137]

71. 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'.[138]

Western Australia

Cannabis Intervention Requirement Scheme (August 2011 – present)

[134] Rickard (n 289).

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

[136] 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>.

[137] 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.

[138] 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>.

72. 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 state-wide from October 1998 by administrative direction from the Commissioner for Police.[139] 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.

73. 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.[140]

74. The current Cannabis Intervention Requirement (CIR) scheme came in the context of the Barnett Liberal Government's 'war on drugs' in 2011.[141] 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.[142] 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.[143]

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

[140] Ibid 13–16.

[141] 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>.

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

[143] Swensen (n 300) 12.

75. The scheme applies to anyone aged 14 years and over.[144] 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.[145] 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.[146] Completion of a CIS is not viewed as an admission of guilt;[147] however, failure to attend the session will lead to prosecution.[148]

76. 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.[149] 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.[150]

77. 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.[151] 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.[152]

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[144] 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>.

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

[146] Ibid s 8J.

[147] Ibid s 8K.

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

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

[150] 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.

[151] Swensen (n 300) 21.

[152] Ibid.

This has given the public the idea that the Government had put in place a system of *de jure* decriminalisation,[153] or even that legalisation had occurred.[154]

Perth Drug Court (2000 – present)

78. 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'.[155] 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.

[153] Ibid.

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

[155] 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>.

79. 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.[156]

80. 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.[157] The reviewers declared this to be 'relatively low' rate by international standards,[158] and broadly concluded in their review that the Drug Court 'had a positive effect on reducing re-offending over a two year follow up period'.[159] 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.

81. 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.[160] 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'.[161] For this age group, the DCR

[156] Ibid 19.

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

[158] Ibid 20.

[159] Ibid 25.

[160] 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>.

[161] 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>.

program can last up to 12 months, and individuals undertake treatment under the Drug Court magistrate's judicial case management.[162]

Queensland

Police Diversion Program (June 2001 – present)

82. 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,[163] which is viewed as an alternative to prosecution.[164]

83. 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.[165] The individual cannot be facing charges for another indictable offence related to the minor drugs offence; cannot have been previously sentenced to a term 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.[166]

84. 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.[167]

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[162] Ibid.

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

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

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

[166] Ibid.

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

85. 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.[168] 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.[169] Failure to comply with the program is an offence under the legislation underpinning the PDP, and the individual may then need to attend court.[170]

Illicit Drug Court Diversion program (2002 – present)

86. 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.[171]

87. 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.[172]

88. 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.[173] An individual is not eligible for the program if they have pending charges for offences involving violence against another person, for offences of a sexual nature, or for certain drug offences (for example, drug trafficking).[174]

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

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

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

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

[172] '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>.

[173] Ibid.

[174] Ibid.

89. 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.[175] 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.[176]

90. 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.[177]

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

91. 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.[178] 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.

92. Compliance with the program included frequent drug testing, attendance at treatment, court supervision, reporting, and the individual abstaining from both drugs and criminal activity.[179] Graduation from or non-compliance with Queensland Drug Court's program were then considered by the court in final sentencing.[180]

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[175] Ibid.

[176] Ibid.

[177] '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>.

[178] 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/rbr20061 7.pdf>.

[179] Ibid 6.

[180] Ibid.

93. 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 than those who did not complete the program.[181] While issues were highlighted, including low referrals in North Queensland (especially for Aboriginal and Torres Strait Islander people),[182] the program was seen to be broadly fulfilling the intentions behind its creation.[183]

94. 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'.[184]

95. During the 2015 Queensland election campaign, Queensland Labor leader Anastasia Palaszczuk committed to reinstate court and diversionary programs defunded by the LNP Government.[185] Labor won that election, committed $8.7 million in funding for the four years commencing 2015/16, and initiated the Drug Specialist Courts Review.[186] The Review ultimately found that the Queensland Drug Court should be re-established by legislation,[187] and recommended improvements for this new iteration. An improvement which was

[181] Ibid 20.

[182] Ibid 21.

[183] Ibid 18–19.

[184] 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>.

[185] 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>.

[186] Ibid.

[187] Ibid 39–40.

accepted in the new model was that the Court's purview be expanded to include individuals with alcohol dependency.[188]

96. 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'.[189]

97. 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.[190] 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)

98. 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

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

[189] Ibid.

[190] Ibid.

been diverted three times in ten years; and whose concurrent offences do not preclude participating in a diversion program.[191]

99. 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.[192]
- 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.[193] If the individual does not comply, they will be charged with the offence/s.

100. 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.[194] The authors determined that a significant factor in non-compliance was a recent history of drug offending.[195] Within 18 months of diversion, 42 per cent of individuals had reoffended.[196]

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

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

[193] Rickard (n 289) Appendix 1.

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

[195] Ibid.

[196] Ibid.

Court Mandated Diversion Program (July 2007 – present)

101. 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.[197]

102. 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.[198] Those on parole or facing charges involving a sexual offence or significant violence are ineligible for the program.[199] 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).[200]

103. 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.[201]

104. 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'.[202] Authors of a 2018

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

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

[199] Ibid.

[200] Ibid.

[201] Ibid.

[202] *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,

review of the program by the Tasmanian 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'.[203]

105. 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.[204] 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.[205]

Criminalisation; increasing the burden on society

Problems associated with criminalisation of drug possession and use

106. 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.[206]

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>.

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

[204] 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>.

[205] 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>.

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

107. 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.[207] Health and social problems for drug users often remain unaddressed and the result can be death or disease from unregulated drug use.[208] Prosecuting such people in criminal proceedings, and in many cases imprisoning them, is likely to exacerbate these issues.[209]

108. The criminalisation of substance use also increases the level of stigma associated with drugs and further marginalises and excludes people who use illegal drugs.[210] 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.[211] 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.[212]

109. 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

[207] Ibid.

[208] Ibid.

[209] Ibid 264–265.

[210] 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).

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

[212] 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.>.

people who would benefit immediately from access to legal, less expensive and more readily available cannabis and other illicit drugs, subject to quality control.

110. 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,[213] indicating the social ambivalence regarding their criminal status.[214] 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.[215]

111. 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.

112. 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.[216]

Benefits of decriminalisation

Cost reduction

113. 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

[213] 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.

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

[215] 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>.

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

corrections and prisons. It estimated that the annual cost to the criminal justice system in Queensland for enforcing drug laws is $500 million.[217] 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.[218]

114. 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.[219] 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.[220] Legal Aid NSW referred to evidence that decriminalisation results in measurable savings in health costs, social costs and costs to the justice system.[221]

115. 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

[217] 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>.

[218] Ibid.

[219] Ibid Appendix G, 497.

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

[221] Ibid 14–15.

court and legal resources, and reductions in prison overcrowding.[222] 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':[223]

> '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.'[224]

116. 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,[225] 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.'[226]

117. 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 artefacts 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

[222] Ibid 15.

[223] 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.

[224] Ibid.

[225] 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>.

[226] Ibid.

property rights and contracts and are not regulated in the interest of consumer safety, as legal drugs are'.[227]

Reduced numbers in the criminal justice system

118. Courts and prisons are clogged with significant numbers of people prosecuted for drug-related crimes.[228] 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.

119. 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.[229] An approach that emphasises health and harm minimisation will result in resource efficiencies for the criminal justice system and decrease the prison population.

Improved health and wellbeing of drug users

120. 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.

[227] 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>.

[228] Mostyn et al (n 3) 261

[229] 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.

121. Criminal prosecution only serves to exacerbate these problems, which often remain unaddressed.[230] 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.[231]

Reducing the stigma involved with drug usage

122. Drug-related stigma may be caused or compounded by prevailing legal frameworks governing drugs and drug use.[232] The criminalisation of substance use increases the level of stigma associated with drugs and further marginalises and excludes from society those people who use illegal drugs.[233] 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.[234]

123. 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.[235]

124. 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.

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

[231] Ibid 268.

[232] 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).

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

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

[235] SBS News (n 11).

Access to medicinal cannabis

125. 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.

126. As a result of the challenges in the scheme, patients often must resort to self-medication by using illegally 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.

127. 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.[236] To help address this issue the ALA recommends that medicinal cannabis prescribing rights be extended to nurse practitioners, particularly in rural and remote communities.

128. 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

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

estimated number of people in Australia self-medicating with cannabis is around 100,000.[237] 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.

Conclusion

129. The Australian Lawyers Alliance (ALA) has welcomed the opportunity to have input into the Joint Committee on Law Enforcement's inquiry into the challenges and opportunities for law enforcement in addressing Australia's illicit drug problem.

130. 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 consumpion. 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.

131. 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.

132. 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.

133. 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

[237] Ibid 84.

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.

134. 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.

135. 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.

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

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