



Submission to the Parliamentary Joint Committee on Law
Enforcement's Inquiry into Addressing Australia's Illicit Drug
Problem

January 2023

SUBMISSION | NEW SOUTH WALES
BAR ASSOCIATION

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A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Parliamentary Joint Committee on Law Enforcement (**Joint Committee**) for the opportunity to make a submission to its Inquiry into the challenges and opportunities for law enforcement in addressing Australia's illicit drug problem.
2. The following submission addresses Term (5) of the Joint Committee's Terms of Reference: *the strengths and weaknesses of decriminalisation, including its impact on illicit drug markets and the experiences of other jurisdictions*.
3. For decades, the Association has advocated for personal drug use and possession of small quantities to be treated as a health issue requiring a properly resourced health intervention and treatment strategy, instead of putting drug users – as opposed to drug dealers – into the criminal justice system. The Association maintains that position and supports the decriminalisation of use and possession for personal use of all prohibited drugs.
4. After taking evidence from multiple experts and receiving more than 250 submissions, the *Report of the Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine-type Stimulants (the NSW Ice Inquiry)* was released in January 2020.¹
5. In a damning indictment, the NSW Ice Inquiry found that “[t]he current stance of our criminal law towards use and possession of drugs has failed to have any significant impact on the prevalence of illicit drug use in NSW.”²
6. The NSW Ice Inquiry made 109 recommendations, all of which are endorsed by the Association.
7. The NSW Ice Inquiry recommended that NSW decriminalise the use and possession for personal use of prohibited drugs, or alternatively introduce a legislated police diversion scheme for use and possession for personal use of prohibited drugs. Either option, the Inquiry recommended, must be implemented in conjunction with increased resourcing for specialist drug assessment and treatment services.³
8. Opportunities that could arise from the decriminalisation of use and possession for personal use of illicit drugs include the freeing up of the significant time and resources presently dedicated to the policing and prosecution of these offences. These resources could be diverted to more pressing policing issues which are resource-constrained including, for example: the importation or manufacture of large

¹ *Report of the Special Commission of Inquiry into Crystal Methamphetamine and other Amphetamine-type Stimulants (the NSW Ice Inquiry Report)*, January 2020. Available at <<https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/the-special-commission-of-inquiry-into-the-drug-ice/>>.

² Ibid, p. ix.

³ Ibid, Recommendations 11 and 12.

amounts of illicit drugs that fund organised crime; serious domestic violence offences including coercive control; and, an increased focus on improving community outcomes in policing with First Nations communities. It also removes the risk of inequitable application of discretionary policing, the dangers of which are further addressed in paragraphs [17]-[19] and [29] of this submission.

9. The Association acknowledges the existence of certain challenges to decriminalising use and possession for personal use of prohibited drugs, including: the limited potential for detrimental health outcomes; a mistaken public perception that law enforcement is “soft on drugs”; and arguments surrounding the alleged “normalisation” of illicit drug use in the community. On balance, however, the Association considers that the benefits to law enforcement of decriminalisation significantly outweigh the risks, and would allow law enforcement agencies to focus on, and be better resourced to address real and significant policing challenges confronting the community.

Terminology: “Decriminalisation”, “depenalisation” and “legalisation”

10. A distinction is drawn between “decriminalisation”, “depenalisation” and “legalisation” of drugs.

“Decriminalisation”

11. Decriminalisation of the use and possession for personal use of prohibited drugs would result in those activities no longer constituting criminal offences. A person found, for instance, in possession of illicit drugs for personal use would, following decriminalisation, no longer be liable to prosecution or any form of criminal sanction.
12. Decriminalisation can be coupled with administrative responses (confiscation and destruction of the drug) or civil sanctions (for instance, civil penalties). The model of decriminalisation preferred by the Special Commission, and outlined in Recommendation 11 of the NSW Ice Inquiry, would limit responses to the use of drugs and simple possession to:
 - a. the administrative confiscation and destruction of the substance; and
 - b. the making of a referral to a voluntary health, social or educational scheme.
13. Under the Recommendation 11 decriminalisation model, there would be no civil sanctions for non-compliance with, for instance, a voluntary health scheme.

“Depenalisation”

14. A depenalisation approach would involve the retention of criminal offences of using drugs and possessing drugs for personal use and would rely on police to exercise their discretion either to take a

minimal response (such as the issuing of cautions, warnings or on-the-spot fines) or to take no response to offending in defined circumstances.

15. The particular depenalisation policy implemented would set out the circumstances in which a person found to be in possession of drugs for personal use may be eligible to either have no action taken or to be issued a caution, warning or fine. Relevant factors could include: the drug type; the quantity of drugs; the status of the person in possession (for instance that person's juvenility or previous convictions); and, the location where the drugs are found. The police would ultimately, however, be able to charge and to prosecute individuals for using drugs and for simple possession offences.
16. Examples of depenalisation programs operating at present in New South Wales are:
 - a. the Cannabis Cautioning Scheme (**CCS**), under which police may, on a discretionary basis, caution offenders detected with small amounts of cannabis rather than charge them; and
 - b. Criminal Infringement Notices (**CINs**), which are on-the-spot fines issued on a discretionary basis by police for simple possession offences at music festivals.⁴
17. The decriminalisation of possession offences is not supported by the NSW Police Force, which prefers depenalisation of low-level possession offences.⁵ The NSW Ice Inquiry, however, concluded that, if a health response to drug misuse is to be considered more appropriate than a criminal response, depenalisation would represent a "*less effective option*" than decriminalisation.⁶ That view was informed by concerns that:
 - a. depenalisation could be accompanied by fines (as is currently the case with CINs), which, for marginalised groups including First Nations people, may result in secondary offending to pay financial penalties;⁷ and
 - b. depenalisation policies, like the CCS and the CIN programs, which are solely reliant on police discretion, can lead "*to discrimination*" and "*variance in application*" of diversionary programs between local area commands.⁸
18. The Special Commission's concerns regarding the discriminatory application of depenalisation policies appear to have been confirmed by data analysed in June 2020 which indicates that, between 2013 and 2017, the NSW Police Force:

⁴ Ibid, [11.254].

⁵ Ibid, [11.293].

⁶ Ibid, [11.321].

⁷ Ibid, [11.289]-[11.290].

⁸ Ibid, [11.241].

- a. chose to prosecute 82.55 per cent of Indigenous people found to be in possession of non-indictable quantities of cannabis, compared with 52.59 per cent of the non-Indigenous population; and
 - b. 11.41 per cent of Indigenous people found to be in possession of small amounts of cannabis were cautioned under the CCS, compared with 40.03 per cent of the non-Indigenous population.⁹
19. The Association has consistently expressed concerns about the over-policing of Indigenous people and their differential treatment by police.¹⁰ Based on the CCS's operation, depenalisation of the possession of small amounts of illicit drugs (regardless of type) might simply give rise to another point within the criminal justice system where disproportionate police responses to Indigenous offenders will be seen when compared with their non-Indigenous peers.

“Legalisation”

20. “Legalisation” of currently illicit drugs would require the repeal of offences relating to drug misuse and supply to permit the manufacture and supply of drugs to take place in a statutorily regulated market. This and other models were discussed in a 2014 Discussion Paper, *Drug Law Reform*, issued by members of the NSW Bar Association's Criminal Law Committee.¹¹
21. Under a legalisation model, it would be lawful to produce and trade drugs, subject to regulatory controls, as is currently the case with pharmaceutical drugs, alcohol and tobacco.¹² In contrast to legalisation, decriminalisation of simple possession does not involve the decriminalisation of other drug offences such as supply or manufacture.¹³
22. This submission primarily addresses decriminalisation but includes references to legalisation. The Association does not endorse a legalisation model.

⁹ McGowan, M and Knaus, C, “NSW police pursue 80% of Indigenous people caught with cannabis through courts”, *The Guardian*, 10 June 2020. Available at <<https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>>.

¹⁰ See, for instance, the Association's submission of 17 September 2017 to the Australian Law Reform Commission's *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples – Discussion Paper 84*. Available at <https://www.alrc.gov.au/wp-content/uploads/2019/08/88._nsw_bar_association.pdf>.

¹¹ NSW Bar Association, Criminal Law Committee, *Drug Law Reform: Discussion Paper*, November 2014. Available at <https://nswbar.asn.au/docs/webdocs/Drugs_DP_final1.pdf>.

¹² Breaching market and licencing regulations would likely become offences under a legalisation model of drug law reform.

¹³ See Division 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985* (NSW).

B. Decriminalisation and Depenalisation Generally

23. As noted above, the NSW Ice Inquiry recommended that the NSW Government implement a model for the decriminalisation of use and possession for personal use of prohibited drugs. Decriminalisation models involve the removal of criminal sanctions for some or all offences, with the option of imposing administrative sanctions. A number of countries have decriminalised the personal use of some drugs but the most notable is Portugal, which has enacted legislation explicitly decriminalising the purchase, possession and consumption of all drugs for personal use. A system of administrative sanctions has been adopted instead.
24. The Portuguese experience appears to have been largely successful, at least in terms of reducing levels of problematic use, reducing crime committed while intoxicated, and reducing acquisitive crime. The court system has become more efficient, the number of users seeking treatment has increased, and levels of drug-related harm and mortality have decreased – all without any significant increase in the overall levels of drug use. Because drugs have not been legalised, and administrative sanctions are applied to drug users, there is no significant risk of “normalising” drug use or inadvertently encouraging a significant uptake in drug use.
25. Thus, whilst decriminalisation of use and possession for personal use of prohibited drugs would not represent a comprehensive ‘solution’ to Australia’s illicit drug problem, benefits of decriminalisation are likely to include:
- Removal of the user from the criminal justice process which demonises and penalises with great cost in financial and psychological terms;
 - Reduction of disruption to users’ personal lives and relationships;
 - Avoidance of the stigma of criminal conviction and of the adverse consequences that conviction may have on employment, education, travel and engagement in voluntary activities; and
 - Provision of treatment and drug education.

C. The NSW Ice Inquiry

26. The Association’s submission to the NSW Ice Inquiry is included at **Attachment A**. The Association adheres to the views expressed therein:

It is the position of the Association that consideration should be given to decriminalisation of personal acquisition, possession and use of illicit drugs, with increased focus on treatment and harm reduction measures. There should also be encouragement of diversionary measures for minor matters that remain criminalised. Such an approach would involve:

- *the continued application of criminal sanctions for drug producers, traffickers and suppliers;*
- *decriminalisation of personal acquisition, possession and use of all currently illicit drugs (including ice and illicit ATS);*
- *the use of civil orders to deal with personal acquisition, possession and use of all currently illicit drugs (including ice and illicit ATS), through a comprehensive framework of community-based tribunals;*
- *the expansion of harm reduction measures and drug treatment services.*

27. The Association notes particularly its concluding comments:

The current policy has not proved effective at minimising the harms associated with drug use. As the predominant tool, it may cause harm to personal drug users and to the community more generally. Decriminalisation of personal acquisition, possession and use of illicit drugs would allow the implementation of a comprehensive public health approach. This would be complemented by the use of civil orders, the expansion of harm reduction measures and drug treatment services with the continuing application of criminal sanctions for drug suppliers, producers and traffickers.

28. The NSW Ice Inquiry received detailed and compelling evidence from across the state about the nature and extent of harm caused by the criminalisation of simple possession, including the disproportionate impact of criminalisation on Aboriginal people.¹⁴

29. The Inquiry also highlighted evidence that Aboriginal people experience inequality in accessing diversionary schemes in NSW, noting that an evaluation of the CCS found that Aboriginal people were much less likely than non-Aboriginal people to receive a caution under that Scheme.¹⁵ Young Aboriginal offenders have also been found to be significantly less likely to be diverted under the *Young Offenders Act 1997* (NSW).¹⁶ The Inquiry's findings in this regard have been echoed in recent research by Professor Don Weatherburn and Brendan Thomas (to be published in the Australian and New Zealand Journal of Criminology) that has found that NSW police are more likely to prosecute rather than caution Indigenous children and teenagers for minor offences than non-Indigenous young people, taking all other relevant factors into account.¹⁷

¹⁴ The NSW Ice Inquiry Report, [11.41].

¹⁵ Baker, J and Goh, D 'The cannabis cautioning scheme three years on: an implementation and outcome evaluation', NSW Bureau of Crime Statistics and Research, 2004, p. 33.

¹⁶ The NSW Ice Inquiry Report, [11.70].

¹⁷ Fitzsimmons, C "Like a snare": Indigenous young offenders more likely to be prosecuted for same crimes', *Sydney Morning Herald*, 20 November 2022. Available at <<https://www.smh.com.au/national/nsw/like-a-snare-indigenous-young-offenders-more-likely-to-be-prosecuted-for-same-crimes-20221129-p5c20v.html>>.

30. The NSW Ice Inquiry ultimately agreed that the current approach to drug policy is profoundly flawed, and that a different and more nuanced response than criminal prosecution is called for in relation to the offences of use and possession for personal use of illicit drugs:¹⁸

A determined whole-of-government approach to effective public health messaging, improved harm reduction measures, education, research and properly resourced treatment pathways will achieve far better outcomes for people who use and possess these drugs, and for society as a whole. The current stance of our criminal law towards use and possession of drugs has failed to have any significant impact on the prevalence of illicit drug use in NSW. Criminalising use and possession encourages us to stigmatise people who use drugs as the authors of their own misfortune. It gives us tacit permission to turn a blind eye to the factors driving most problematic drug use: trauma, childhood abuse, domestic violence, unemployment, homelessness, dispossession, entrenched social disadvantage, mental illness, loneliness, despair and many other marginalising circumstances that attend the human condition.

31. The NSW Ice Inquiry recommended that, in conjunction with increased resourcing for specialist drug assessment and treatment services, the NSW Government implement a model for the decriminalisation of the use and possession for personal use of prohibited drugs, which includes the following elements:

- removal of the criminal offences of use and possession for personal use of prohibited drugs;
- at the point of detection, prohibited drugs to be confiscated and a referral made to an appropriately tailored voluntary health/social and/or education intervention;
- no limit on the number of referrals a person may receive; and
- no civil sanctions for non-compliance. (**Recommendation 11**)

32. In the alternative to Recommendation 11, the NSW Ice Inquiry recommended a legislated police diversion scheme for use and possession for personal use of prohibited drugs with the following elements:

- mandatory referral by police of people detected in possession of a prohibited drug to an appropriately tailored health/social and/or education intervention;
- a maximum of three times that a person may be diverted;
- threshold quantities that do not unduly limit access to diversion; and
- no requirement to admit guilt. (**Recommendation 12**)

33. The rationale behind Recommendation 11 of the NSW Ice Inquiry is set out below:¹⁹

¹⁸ The NSW Ice Inquiry Report, p. ix.

¹⁹ The NSW Ice Inquiry Report, [11.320]-[11.321].

Once it is accepted that drug use may be harmful to the health of the person who uses drugs and that drug dependence is a medical condition – propositions that the Inquiry regards as uncontroversial – a health response is more appropriate than a criminal response.

Having examined and considered closely all the evidence before the Inquiry relevant to the issue, the Inquiry is satisfied that decriminalisation of the use and possession for personal use of prohibited drugs is a fundamental and necessary reform. In the Inquiry's view, true decriminalisation by removing criminal sanctions would be the most effective option. An alternative, less effective option – decriminalisation by depenalisation – would be the very minimum reform required.

34. The NSW Ice Inquiry's recommendation that use and possession for personal use of prohibited drugs should be decriminalised was informed by a recommendation made pursuant to section 82 of the *Coroners Act 2009* (NSW) by Deputy State Coroner, Magistrate Harriet Grahame, in November 2019, that the NSW Department of Premier and Cabinet "*should give full and genuine consideration to...[d]ecriminalizing personal use of drugs, as a mechanism to reduce the harm caused by drug use*".²⁰
35. Recommendation 11 also came after a clear-sighted analysis by the NSW Ice Inquiry of the merits of decriminalisation, depenalisation and legalisation models.²¹
36. In September 2022, the NSW Government rejected the Inquiry's recommendation that the use and possession for personal use of prohibited drugs should be decriminalised, but supported – with significant qualifications – the alternative recommendation for a legislated police diversion scheme for use and possession for personal use of prohibited drugs.²²
37. As stated above, the Association supports all of the 109 recommendations of the NSW Ice Inquiry, including Recommendations 11 and 12.
38. The Association supports, in the absence of decriminalisation, the use of pre-court diversionary schemes for possession of small quantities of prohibited drugs for personal use as swift, proportionate and efficient responses to minor criminal acts committed by those who pose little risk to the community as long as safeguards are in place and diversion is administered by police in a non-discriminatory manner.
39. Diverting drug users towards health intervention, education and rehabilitation is not being "soft on crime", nor does it mean this behaviour does not have consequences. It is about being smart on crime

²⁰ State Coroner's Court of NSW, *Inquest into the death of six patrons of NSW music festivals, Hoang Nathan Tran & Ors*, 8 November 2019, pp. 135-136, [8].

²¹ The NSW Ice Inquiry Report, pp. 302-333.

²² The Final NSW Government Response to the Special Commission of Inquiry into the Drug 'Ice', September 2022. Available at <<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/Final-Government-Response-to-the-Special-Commission-of-Inquiry-into-the-Drug-Ice-September-2022.pdf>>.

with the focus on harm reduction for drug users – not drug dealers. It is about saying “yes” to making communities safer.

D. Other Views

40. The Association also draws the Joint Committee’s attention to the following relevant submissions and evidence supporting decriminalisation:

- a. Submission on drug decriminalisation to the NSW Ice Inquiry dated 19 August 2019, prepared by Nicholas Cowdery AO KC FAAL, former Director of Public Prosecutions for NSW and a member of the Ice Inquiry’s Expert Advisory Panel (**Attachment B**);
- b. Dr Alex Wodak AM’s November 2022 article ‘The ACT legislated to decriminalise possession of personal quantities of illicit drugs’.²³ Dr Wodak, a longstanding advocate for drug law reform and the former head of the Alcohol and Drug Service at St Vincent’s Hospital, Sydney, observes as follows:²⁴

Portugal began decriminalisation of personal quantities of all illicit drugs in 2001 combined with greatly expanded and improved drug treatment. The result was impressive reductions in crime, drug overdose deaths, HIV infection, and problematic drug use in prison. Since 2019, drug decriminalisation has been the agreed common position of all 31 United Nations organisations responsible for drug policy. In September 2022 speaking to the General Assembly of the United Nations, President Gustavo Petro of Colombia called for the legalisation of cocaine. President Pedro Castillo of Peru has also announced an intention for his country to legalise cocaine use. Already, almost 30 countries around the world have implemented drug decriminalisation in some form or other. In November 2020, 58% of voters in the US state of Oregon supported a Ballot Initiative making the personal non-commercial possession of a controlled substance liable to a fine of no more than \$100 and establishing a drug addiction treatment and recovery program funded in part by the state’s cannabis tax revenue and state prison savings. This is now operating.

Seven countries have already started regulating recreational cannabis, including Canada, a G7 country, and 20 of the 50 states of the United States. Germany has recently also started working towards the imminent regulation of recreational cannabis. In his many years in the US Senate, President Biden is said to have written more War on Drugs legislation than any other member of Congress. Yet he recently announced the expungement of all US Federal cannabis possession convictions. This will have limited impact but is

²³ Wodak, A, ‘The ACT legislated to decriminalise possession of personal quantities of illicit drug use’, *Pearls and Irritations*, 10 November 2022. Available at <<https://johnmenadue.com/the-act-legislated-to-decriminalise-possession-of-personal-quantities-of-illicit-drugs>>.

²⁴ Ibid.

symbolically important. Biden's recent call for rescheduling cannabis is likely to have quite a significant impact on future US drug policy. US Senate Majority Leader Chuck Schumer said recently that he is close to closing a deal with some Republicans on legislative cannabis reforms including banking.

So by 2022, the international drug law reform train has well and truly left the station. The growing consensus is that drug prohibition has been an expensive way of achieving consistently terrible outcomes. Political support for drug law reform is no longer a liability and has started becoming a political asset.

- c. The Penington Institute Report, *Cannabis in Australia 2022*,²⁵ which is the most recent comprehensive study into law enforcement and cannabis in Australia and includes data from a wide range of government and non-government sources. The Report argues that decriminalisation is an important step towards public health by reducing the harms of justice system involvement.

E. Decriminalisation and Depenalisation in Australia

41. Perhaps in growing recognition of the reality of the failure of current approaches to drug possession, several Australian jurisdictions have moved towards decriminalisation and/or depenalisation.
42. There is no uniform approach to regulation (or deregulation) of illicit drugs across the Australian states and territories. Some have moved more formally to decriminalise the possession of small quantities of drugs by the passing of legislation, others have developed a *de facto* approach to decriminalisation through depenalisation (pre-court diversionary programs). States and territories also differ in the treatment of particular drugs, with cannabis being subject to decriminalisation in each state and territory in one form or another:
 - a. **The Australian Capital Territory** decriminalised the possession, use and cultivation of small amounts of cannabis in 2019. The decriminalisation of the possession of small quantities of another nine illicit drugs will come into effect in October 2023.²⁶
 - b. **South Australia** has depenalised cannabis possession, providing for expiation on payment of fines for less than 100 grams of cannabis. Other illicit drugs are subject to depenalisation through a police drug diversion scheme.
 - c. **The Northern Territory** has also depenalised cannabis possession, instead providing for expiation on payment of fines for possessing less than 50 grams. Other illicit drugs are subject to depenalisation through a discretionary pre-court diversion program.

²⁵ Penington Institute, *Cannabis in Australia 2022: Technical Report*, 2022.

²⁶ *Drugs of Dependence (Personal Use) Amendment Act 2022* (ACT).

- d. **New South Wales, Victoria and Queensland** all have a depenalisation approach to cannabis through caution and police diversion programs. All three states appear to have no plans to move towards decriminalisation (for example, as noted above, the current NSW Government has to date refused to decriminalise low level possession of other illicit drugs, contrary to Recommendation 11 of the NSW Ice Inquiry).²⁷
- e. **Western Australia** has depenalisation schemes for cannabis and other illicit drugs. For cannabis, therapeutic intervention is required for less than 10 grams and criminal penalties may apply for further detection. For other illicit drugs, a process of assessment and compulsory treatment is required with criminal penalties applying for further detection.
- f. **Tasmania** has a depenalisation approach through a police diversion scheme that applies to all illicit drugs. People found in possession of drugs must attend counselling and treatment and must not be involved in drug possession more than three times in 10 years. Criminal penalties apply outside this scheme.

F. Decriminalisation in Other Jurisdictions

43. Evidence before the NSW Ice Inquiry confirmed that those at the highest levels of global drug policy unanimously support the removal of criminal sanctions for simple drug possession:²⁸

The World Health Organization, the United Nations System Chief Executives Board for Coordination and the Global Commission on Drug Policy all support decriminalization of low-level personal drug use offences. At least 26 countries, including Switzerland, Denmark, Brazil, France, Germany, Portugal and 11 states in the United States have decriminalized simple possession of drugs in some form.

44. Cannabis has been legalised in a number of jurisdictions including Canada, 19 of the American States and Washington DC, Uruguay, Switzerland, the Netherlands and Malta, with Germany under way.
45. Cannabis has been decriminalised in Spain, South Africa, Georgia, Jamaica and Thailand.
46. As noted above, all drugs (under quantity limits) have been decriminalised in Portugal since 2001. The Transform Drug Policy Foundation published an updated report on the Portuguese scheme in 2021.²⁹ There have been many other reports by a range of international bodies and the overwhelming assessment has been that the program has been a major success by all measurable criteria.³⁰

²⁷ The Final NSW Government Response to the Special Commission of Inquiry into the Drug 'Ice', September 2022. Available at <<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/Final-Goverment-Response-to-the-Special-Commission-of-Inquiry-into-the-Drug-Ice-September-2022.pdf>>.

²⁸ The NSW Ice Inquiry Report, [43].

²⁹ Transform Drug Policy Foundation, 'Drug Decriminalisation in Portugal: Setting the Record Straight', 13 May 2021. Available at <<https://transformdrugs.org/blog/drug-decriminalisation-in-portugal-setting-the-record-straight>>.

³⁰ As discussed in the NSW Ice Inquiry Report at [11.280].

G. Recommendations

47. The Association endorses the NSW Ice Inquiry's recommendation that NSW decriminalise the use and possession for personal use of prohibited drugs.
48. In the absence of decriminalisation, the Association recommends that the Joint Committee endorse the model recommended by the NSW Ice Inquiry for the introduction of a legislated police diversion scheme for use and possession for personal use of prohibited drugs. Either option must be implemented in conjunction with increased resourcing for specialist drug assessment and treatment services.
49. The NSW Ice Inquiry's findings build on various states' and territories' moves toward decriminalisation and changes in community perceptions.
50. The resources currently being expended on criminalisation could be redirected to other criminal activity and, in some cases, its connection to serious organised crime, or into appropriate health treatments.
51. The Association would be pleased to assist the Joint Committee with any questions it may have, through oral or further written submissions.



NEW SOUTH WALES
BAR ASSOCIATION

19/208

7 May 2019

The Commissioner
Special Commission of Inquiry into the Drug "Ice"
GPO Box 5341
Sydney NSW 2001
Dear Commissioner

Submission to the Special Commission of Inquiry into the Drug "Ice"

Pursuant to the invitation to make a submission, I am writing on behalf of the NSW Bar Association. This submission is made in respect of Issues Paper 2 *Justice*.

Introduction

I note that one of the matters that you are requested by the Letters Patent to inquire into and report on is:

Options to strengthen NSW's response to ice and illicit ATS, including law enforcement, education, treatment and rehabilitation responses.

"ATS" refers to "amphetamine-type stimulants", which includes methamphetamine in crystalline form (also known as "ice"), amphetamine and 3,4 Methylenedioxymethamphetamine (MDMA), also known as "ecstasy". In the light of the reference to "education, treatment and rehabilitation responses" as well as "law enforcement", I interpret the word "strengthen" to mean "improve", rather than conveying any (necessarily) punitive element.

Given that, the Association submits that it is important for the Inquiry to consider these illicit drugs in the broader context of drug policy. Assessment of the harm resulting from these particular drugs should include consideration of those harms resulting from heavy reliance on law enforcement. The focus should be on developing effective strategies for reducing drug-related harm, increasing the number of drug dependent users seeking treatment (thereby reducing the number of drug dependent users) and implementing effective demand reduction strategies. That would be the best way to improve "NSW's response to ice and illicit ATS".

It is the position of the Association that consideration should be given to decriminalisation of personal acquisition, possession and use of illicit drugs, with increased focus on treatment and harm reduction measures. There should also be encouragement of diversionary measures for minor matters that remain criminalised. Such an approach would involve:

- the continued application of criminal sanctions for drug producers, traffickers and suppliers

- decriminalisation of personal acquisition, possession and use of all currently illicit drugs (including ice and illicit ATS).
- the use of civil orders to deal with personal acquisition, possession and use of all currently illicit drugs (including ice and illicit ATS), through a comprehensive framework of community-based tribunals
- the expansion of harm reduction measures and drug treatment services.

Continued application of criminal sanctions with respect to drug producers and traffickers, with increased focus on diversion for minor offences

The Association does not suggest that production, trafficking and supply of illicit drugs should be decriminalised.

However, for relatively minor offences involving production, trafficking or supply of illicit drugs where the offender was drug-dependent, there should be an increase in the availability of diversionary measures and an increased focus on rehabilitation in sentencing. In relation to sentenced offenders, such measures should be available within the custodial setting, on community based sentencing orders and parole orders.

Of course, if personal acquisition, possession and use of all currently illicit drugs continues to be subject to criminal penalties, there should also be an increase in the availability of diversionary measures for such offences.

An increased availability of diversionary measures has particular significance for Indigenous offenders. ATS abuse is a particular consideration for Indigenous communities, both urban and rural. There is evidence that Indigenous communities are more at risk of developing problematic ATS use because of the complex issues already facing those communities, such as racism and discrimination, higher rates of social breakdown, poorer physical and mental health, higher unemployment and highly disproportionate rates of incarceration.¹ There are insufficient diversionary programs for adults, particularly programs that deal specifically with the needs of women and, more particularly, the needs of Aboriginal women. This is an area that needs reform. In the case of Indigenous offenders, diversionary programs which work well involve a cultural component that allows the participant to reconnect with country, culture and history. An example of a successful diversionary program is the residential rehabilitation program at the Glen.

Anecdotally the program achieves a significant rate of success. Its success appears to be related to the emphasis placed on culture. The Glen currently only takes Indigenous men however, on the basis of its accepted successes to date, it has just been approved funding to establish a service for women. The Association understands that this will be the first such service for Indigenous women in the State.

The Association also understands that a number of District Court judges have been confronted with cases where an offender would benefit from a diversionary program but beds are unavailable

¹ Commonwealth Parliamentary Joint Committee on Law Enforcement, Inquiry into crystal methamphetamine (ice): First Report, September 2017, at [255]

or will not be available for some time. In practice, this can frustrate the Court's capacity to grant bail, order a section 11 remand or impose a community-based sentencing option. The barriers to accessing diversionary programs largely relate to the availability of well-resourced programs in the community that provide appropriate treatment, supervision and monitoring. The barriers for female offenders are largely a product of the unavailability of programs that specifically deal with the issues facing women. The barriers to accessing diversionary programs are particularly notable in regional NSW. Consideration should be given to designing programs that deal with subpopulations, for example:

- Culturally appropriate programs for Aboriginal and Torres Strait Islander participants that are culturally relevant and appropriate and that are run by community-based organisations. These programs will better deal with the intergenerational trauma that is prevalent amongst Aboriginal and Torres Strait Islander offenders.
- Programs designed specifically for female offenders. Many female offenders who use ATS have been the victims of domestic violence and sexual abuse. These women require specifically designed programs to treat this underlying trauma which often lead to the addiction in the first place.

In addition, diversionary programs should take a holistic approach to treatment providing wraparound services to assist participants in the process of recovery and to reduce the likelihood of relapse. Many ATS users have underlying psychiatric and psychological issues that must also be treated. They often have medical and economic problems that also require attention. The most effective diversionary programs are those that address not only the addiction but other related issues such as employment, housing and parenting skills.

In the case of Indigenous offenders who come before the court having committed ATS related offences, the most effective way of providing diversionary programs is to establish an Indigenous sentencing court. Such a Court is best placed to direct offenders to suitable diversionary programs, monitor their progress and provide the wraparound services necessary to promote rehabilitation and reduce the likelihood of relapse and recidivism. The Walama Court Proposal which has been submitted to the NSW Attorney-General for the establishment of the Walama District Court, a specialist Indigenous sentencing court, seeks to achieve these goals. The proposal emphasises the use of culturally appropriate diversionary programs for drug-user offenders, following the success of similar Indigenous courts in Victoria and Canada. It is strongly recommended that this proposed court be established in Sydney and, if successful, extended.

The use of civil orders for personal drug acquisition, possession and use

The introduction of civil orders to deal with personal drug acquisition, possession and use would alleviate the harms caused by the criminalisation of drug use, while facilitating a public health approach to the use of drugs. This approach is closely modelled on that adopted in Portugal in 2001, which successfully decriminalised personal acquisition, possession and use of all illicit drugs.

At that time UN Secretary-General Guterres, who was Prime Minister of Portugal at the time of its drug reforms, said that *“the government assumed its responsibilities for prevention and treatment – rooted in the conviction that drug addicts are victims who need treatment rather than punishment”*. The Portuguese model has been successful, particularly in reducing levels of problematic use and psychopharmacological and economic-compulsive crime. The court system has become more efficient, the number of users seeking treatment has increased and levels of drug-related harm and mortality have decreased – all without any significant increase in the overall levels of drug use.

A fundamental element of any such reform would be the creation of local tribunals which would deal with instances of personal drug use as they arise. The composition, powers and function of those tribunals could be based on the Portuguese model which has one tribunal for each region, comprised of three individuals. One of those individuals is a lawyer and the other two may be social workers or psychologists. Whether such a model would be appropriate in an Australian context, or whether a slightly different model should be adopted, would be determined by the Government in consultation with the relevant stakeholders. However, the overriding purpose of the tribunals should be to examine the circumstances of the individual user, and determine whether the individual's drug use is problematic in nature. If so, the tribunals would be in a position to make a range of civil orders (subject to non-criminal sanctions if breached), including requirements to engage with available treatment and rehabilitation services. It is expected that the cost of establishing and maintaining such tribunals would be offset by savings from other sectors such as police, courts and corrections, resulting from decriminalising personal use offences.

The success of the approach in Portugal does not necessarily ensure the successful application of such approach in this country. However, the Portuguese model appears to represent best practice in the implementation of civil orders in addressing illicit drug use and in the alleviation of drug related harm.

Harm reduction and treatment programs

The success of the proposed reforms is contingent on substantially increased funding for harm reduction and treatment programmes. Harm reduction measures would include steps designed to reduce the adverse consequences of illicit drugs supplied in an unregulated black market. The proposed framework assumes that there will be adequate services to which drug users can be referred. Drug treatment services are currently unable to meet demand. A recent assessment of alcohol and other drug treatment provision found that approximately 200,000 people a year receive treatment. Unmet demand per annum has been conservatively estimated to be between 200,000 and 500,000 people. This is the case notwithstanding that alcohol and other drug treatment is exceptionally cost effective, returning \$7 for every \$1 invested.²

² Ettner, S. Huang, D., Evans, E., Ash, D., Hardy, M., Jourabchi, M., et al. (2006). Benefit-cost in the California treatment outcome project: does substance abuse treatment “pay for itself”? *Health Services Research*, 41(1), 192-213.

Rationale: Assessment of harm

While acknowledging that the consumption of drugs is harmful to the individual, the criminalisation of personal drug use may result in greater harm to the individual, and to society more broadly.

Harms suffered by the community from general drug use include loss of public amenity, the burden on the public health system, diminished productivity and crime. A more exhaustive list would include harms to the community from corruption, decreased national productivity and the seemingly uninhibited proliferation of an international and intra-national black market for drugs. As stated in Issues Paper 1 at page 10, “[o]rganised crime syndicates are linked with supply and distribution chains at all levels”. Some of these harms result from the criminalisation of drug use, rather than drug use in and of itself. There is no doubt that organised crime networks rely on prohibition for their business model and profit margins.

Amphetamine use undoubtedly has the potential to be harmful, but the actual number of deaths resulting from such use does not compare with alcohol and tobacco. Further, generally speaking, the greatest harms are more likely to be suffered by dependent users of drugs. Even though all drugs can be addictive, only a minority of individuals who use illicit drugs become dependent on them. Many people who use drugs are rational consumers insofar as they make a deliberate choice to take a drug or drugs to achieve a desired effect.

Importantly, there are considerable harms associated with the criminalisation of personal drug use. The legacy of involvement in the criminal justice system can be far-reaching and long-lasting. It can affect a person’s ability to obtain and maintain employment, housing and education. Those who are incarcerated are exposed to more serious offenders. Incarceration substantially increases the risk of mortality. The criminalisation of personal drug use affects personal wellbeing and relationships. Social stigma and the activities of law enforcement can also undermine the implementation of harm reduction measures.

Rationale: Ineffectiveness of criminal prohibition

The 2018 Commonwealth Joint Parliamentary Committee on Law Enforcement’s *Inquiry into crystal methamphetamine* concluded that “the current approach in Australia is not working” and noted that when former law enforcement officials and agencies themselves are saying “Australia cannot arrest its way out of the methamphetamine problem” such a view must be taken seriously”.³ Law enforcement efforts are predominantly focused on supply reduction. In theory, the reduction in supply should, in turn, reduce the levels of use and therefore reduce levels of drug related harm. However, it has not been established that this objective is being met. Research suggests that increased efforts by law enforcement to reduce supply do not affect levels of drug-related crime, or the number of arrests for drug possession and use.

³ Commonwealth Parliamentary Joint Committee on Law Enforcement, *Inquiry into crystal methamphetamine (ice)* (Final Report, 2018) 158.

As noted in Issues Paper 1 at page 5, it is difficult to determine the prevalence of ATS use in NSW, partly because it is illicit. However, it is apparent that, across Australia, use of both methamphetamines and MDMA is increasing. One measure of effectiveness is drug availability. As stated in Issues Paper 1 at page 10, available evidence indicates that crystal methamphetamine and MDMA are both “easy” or “very easy” to obtain by users. Another measure is price. As stated in Issues Paper 1 at page 11, prices for these drugs have remained stable or, in some cases, have dropped, in recent years.

It has been argued that law enforcement efforts increase the risks associated with drug dealing, which increase price and decrease levels of use. However, the question of whether use of a drug is ‘price-elastic’ is a complex one, and some argue that increasing the price of drugs merely increases the incentive to trade in illicit drugs, and increases the likelihood that those drugs will be ‘cut’ with dangerous additives. The only apparent benefit of supply reduction efforts are increased risks of incarceration for the drug producers, suppliers and traffickers. This arguably increases the cost to the drug consumer and, according to standard economic theory, will lead to lower levels of drug consumption. However, neither the relationship between efforts to reduce supply and prices, or the application of standard economic theory to drug use, is universally accepted. There is little evidence to support the argument that supply reduction measures have been effective at reducing the supply of drugs, levels of drug use or drug related harm.

The criminalisation of conduct occurring frequently in society, such as personal drug use and possession for the same, is something that requires careful consideration. Justification for criminal sanctions is often based on an argument that criminal sanctions will:

- secure incapacitation of the offender (that is, physically prevent the offender from re-offending);
- exact retribution upon the offender for the harm that they have inflicted upon another and/or society;
- deter the offender (specific deterrence) and others (general deterrence) from engaging in criminal behaviour; and
- assist the offender to be rehabilitated.

Each of these arguments requires closer consideration so far as they concern personal possession and drug use. As regards incapacitation, a study found that 46% of participants reported using illicit drugs during their time in prison. As regards retribution, drug dependence is a medical condition, so in the absence of a concomitant crime such as property crime to obtain funds to purchase drugs (which may be punished in its own right), it is hard to justify criminal sanction on that ground. Punishment and retribution imposed under the criminal law in order to try to achieve some deterrent effect can be a blunt, and sometimes brutal, mechanism of community education and control. In any event, a link between heavier penalties and increased deterrent effect has not been established. The compulsion involved in drug dependence makes it unlikely that specific deterrence will be effective. It may have a greater deterrent effect on non-dependent users but research suggests that a drug’s illicit status is not a significant factor in the decision to take an illicit drug.

The objectives set out in the Australian Drug Strategy, to reduce the supply of illicit drugs, demand for drugs and harms associated with drug use, are not being achieved through the current approach. Law enforcement has been an extremely costly and largely ineffective as the main strategy for reducing levels of drug availability and use. A focus on reducing demand and harm reduction through the adoption of a public health approach may result in a better model that creates an environment supportive of treatment and allows drug users to be included in the society of which they form a part.

International Conventions

It is the understanding of the Association that decriminalisation of personal acquisition, possession and use of illicit drugs on the Portuguese model is consistent with the United Nations Conventions dealing with illicit drugs.

The way forward

The current policy has not proved effective at minimising the harms associated with drug use. As the predominant tool, it may cause harm to personal drug users and to the community more generally. Decriminalisation of personal acquisition, possession and use of illicit drugs would allow the implementation of a comprehensive public health approach. This would be complemented by the use of civil orders, the expansion of harm reduction measures and drug treatment services with the continuing application of criminal sanctions for drug suppliers, producers and traffickers.

Yours sincerely

Tim Game SC
President

SPECIAL COMMISSION OF INQUIRY INTO THE DRUG 'ICE'

SUBMISSION ON DRUG DECRIMINALISATION

Nicholas Cowdery AO QC

19 August 2019

INTRODUCTION

I am a member of the Expert Advisory Panel to the Inquiry. A roundtable discussion is to be held by the Commission on decriminalisation in September 2019. I was invited to the roundtable, but I shall be overseas at the time. I have been permitted to make a short submission in writing instead; but I emphasise that these are just the thoughts of one person that I might have had the opportunity to air at the roundtable. I offer them from a person who has been involved in criminal justice in various capacities for 50 years, for 16+ of them as Director of Public Prosecutions for NSW.

While the focus of the discussion will undoubtedly be upon the decriminalisation of Ice and amphetamine-type substances, I believe that the same issues arise and arguments apply in principle to all presently illicit drugs and my submission is directed in that way.

DRUGS

So-called "recreational" drugs (to distinguish between medicinal and non-medicinal use) are both licit or legal and sometimes subject to conditions (caffeine, nicotine, alcohol) and illicit or prohibited (the full range of drugs scheduled to the Drug Misuse and Trafficking Act 1985, for example), for which criminal sanctions are imposed for growth, manufacture, sale and distribution (trafficking), possession and use.

People use illicit drugs for a very wide range of reasons. Some do so without creating problems for themselves or others. Problematic use can arise with people who are overborne, who are disadvantaged or who have issues with, *inter alia*, education, employment, health, housing, social pressures, poverty, impulsiveness, addiction and mental illness. Until these underlying conditions can be satisfactorily addressed in individual cases and generally – an extremely long term prospect, if possible at all – then other courses must be taken to reduce the harm of drug use for both problematic and controlled users.

I think a number of propositions can be made about the use of illicit drugs in our society.

1 There have always been, are and forever will be drugs – substances that alter the mood and the mind when ingested (and have physical effects, as well). Some are naturally occurring, some are synthetic or manufactured.

2 There have always been, are and forever will be persons wanting to consume drugs. The reasons for that are multifarious. Some of the underlying contributors to problematic use have been mentioned above, but they only create or compound use by people drawn to drugs in the first place. Some people take drugs to relax, some to heighten their excitement; some take them to escape, some to engage with their peers; some take them to aid in contented reflection, some to rave. Some deliberately choose to consume, some are sucked or drift into it. Some become addicted or otherwise problematic users, many do not.

3 With supply and demand, there is a market.

4 The market for some drugs (and their handling and consumption) is unlawful.

5 Persons involved in that market therefore run a risk of official detection, prosecution and punishment.

6 They choose to run that risk because, in the case of suppliers, they are able to reap high profits from their market; they compensate for the risk by charging high mark-ups. Illicit profits are redirected into other unlawful activities. Consumers run the risk of involvement in the market because their desire for what drugs bring cannot be satisfied by other means.

7 Consumers, especially problematic users, are sometimes unable to meet the high prices charged from their own resources, so they steal. Secondary crime is created.

8 Consumers are also at risk of official sanction, so they consume in secret. Those conditions encourage the use of unhygienic methods in unhygienic circumstances, especially for injecting users. Disease and death can eventuate.

9 Consumers in this unregulated market are also not the beneficiaries of market and product controls – they literally do not know what they are consuming. That adds further risk of harm from uncertain dosage levels and the presence of contaminants.

10 In the meantime, successful suppliers can sometimes pay law enforcers to turn a blind eye to their activities. Corruption breeds from high profits.

11 Other illegality is funded by high profits – and competition in the drug market and in other illegal conduct resulting from it can lead to violence.

These propositions seem to me to be unarguable. They underpin an illegal market that creates harm additional to the harm already possible in drug consumption – additional harms of disease, death, secondary crime and official corruption, not to mention the psychological and practical harms to consumers as a result of the intervention of the criminal law (see below).

Criminals continue to profit hugely from this illicit market and to diversify into other criminal conduct without restraint. We have created the conditions for criminals to flourish by the laws that we have made – and then we spend vast amounts of public resources attempting to stop them. Would it not be better to prevent most of this from happening in the first place? The aim should be to remove the criminal profits from the drug trade at the same time as reducing the harm caused by the use of prohibited drugs.

CRIMINAL LAW

The criminal law's primary purpose should be the attempted prevention of harm to individuals and society caused by the actions proscribed by the law. It has no justifiable role as an enforcer of any code of morals that is not community-wide or as a paternalistic enforcer of selected idealistic standards of conduct. But in prohibiting only some drugs, it does both and adds harm to those affected.

If drug use (without the intervention of the criminal law) causes harm, it does so to the user and perhaps to persons in the immediate orbit of the user. In many cases no additional harm is caused. But if the activity is a crime, there is harm added for the person involved and others by the psychological pressures that attend the doing of a criminal act, the fear of detection and punishment, deterrence from seeking support if wanted, the consequences of conviction and punishment (for example, effects on education, employment, engagement in charitable work, travel, reputation) and involvement in the criminal justice process and punishment itself.

The criminal justice process is ill-suited to constructively addressing personal issues of health and social engagement that lie at the foundation of illicit (or any) drug use.

DECRIMINALISATION

There are "soft" and "hard" meanings given to the word decriminalisation.

The "soft" interpretation is to maintain drug prohibition, but to remove the criminal sanctions from (usually) low level trafficking, possession and use. In Australia some jurisdictions have done this with cannabis, under cannabis cautioning schemes and the like. The effect is to replace criminal sanctions with administrative penalties (cautions, penalty notices, etc). If these are coupled with conditions, such as to accept drug counselling or other therapeutic courses, then there is a reduction of harm to the user. Such a course may well be helpful in dealing with Ice and amphetamine-type substances (provided sufficient resources are applied to make such schemes work effectively). But it has not been suggested to date that it should so apply or be extended to other "hard" drugs (heroin, cocaine, LSD, etc) and it is difficult to see a benefit in doing so.

The Portuguese model (since 2001) may be said to approach such a solution – but it is much more comprehensive in the use of Commissions for the Dissuasion of Drug Addiction (CDTs), which can impose penalties but are better known for their high level of intervention in drug users' lives. Ordinary criminal sanctions remain for larger scale growers, manufacturers, traffickers and possessors. A broadly similar approach was adopted in Norway in December 2017. It has proven to be a very effective model, but it is not (in my view) a complete answer.

LEGALISATION

The only rational way we can remove criminal profits and reduce harm to those involved with drugs is to take over the market at government level: to legislate, regulate, control and tax the whole process of growth, manufacture, distribution and use – and guide it in directions that will

substantially reduce the overall harm presently being caused. This is the “hard” interpretation of decriminalisation. Drug use cannot be eliminated. Individual regimes would need to be developed for drugs or classes of drugs. Some of the taxation proceeds from such a regime could be applied beneficially (eg in drug education and treatment programs). Controls can be put in place to prevent under-age involvement, advertising and over-use.

This course has been taken in relation to cannabis in (so far): The Netherlands, Spain, some other European countries to various extents, in Uruguay, Canada and nine of the United States of America and Washington DC. But it has not been extended to other drugs – yet.

I do not see a rational basis for limiting such an approach to cannabis. It is said that cannabis is the “low hanging fruit” that can be picked and thrown to those agitating for more rational policies in this area. That recognises that cannabis is actually less harmful than nicotine or alcohol. But so, too, could be other drugs if appropriate different regimes of growth, manufacture, distribution and use were designed for them. Including Ice and amphetamine-type substances.

Free medically prescribed heroin is available to addicts in the UK and elsewhere. Harm reduction programs of that kind, along with medically supervised injecting premises, expose users to medical care, advice and support services of various kinds that, in addition to reducing physical, financial and social harm, expose users to alternatives to drug use. But they cannot operate unless sanctioned by the law.

Devising and controlling a lawful regime for Ice and amphetamine-type substances may be a challenge, but the outcomes are certain to be better than attempted prohibition.