

Drug Law reform/ Decriminalisation.

What is it?

Decriminalisation is a policy under which drug supply remains illegal but the criminal penalties for drug possession and personal use are removed and/or replaced with civil penalties such as fines or diversion programs (referral to education or treatment programs).

Decriminalisation is not legalisation.

- **Decriminalisation** removes criminal penalties for possession and personal use, but in some cases civil penalties may remain. Drug supply remains illegal.
- **Legalisation** removes civil or criminal penalties for drug possession and/or use. Sale and supply may be regulated through a government controlled market, through not-for-profit community models or through licensed commercial producers and retailers. Criminal offences for the sale or supply of drugs outside a regulated market are still criminal offences.

Defining Decriminalisation

Decriminalisation accords with the view that drug use should be primarily treated as a health and/or social issue, rather than a law and justice issue.

Decriminalisation can be applied in two different ways:

1. **De jure** decriminalisation, which occurs when **the law is changed** so the illegal behaviour attracts a civil penalty such as an infringement notice, a fine, a diversion notice, or an administrative sanction (e.g. suspension of driver's licence), with no further action taken if the individual complies with the order. However, when the offender does not comply, criminal proceedings can follow as the offender is deemed to have rejected the offer of a reduced penalty.

2. **De facto** decriminalisation refers to a **change in the way the law is enforced** so that the penalty for an offence is lessened. It is understood formally as 'prohibition with cautioning or diversion'. Typically, first offenders who plead guilty to minor possession/use offences avoid a conviction if they complete an education or treatment intervention. Prosecution is suspended to enable the offender to complete the intervention, though if the requirement is not completed the original criminal charge can be pursued.¹

Australia has a long history of employing both forms of decriminalisation. South Australia was one of the first places in the world to introduce *de jure* cannabis decriminalisation in 1987 via the Cannabis Expiation Notice Scheme which provided offenders with the option to pay a civil penalty instead of being charged for use and possession of cannabis or home cultivation.² Victoria has a cannabis caution program for possession of cannabis and a police diversion program for possession of other illicit drugs.³ The first leads to an education session and the second to an assessment of treatment need and a brief intervention.

Defining Legalisation

Legalisation removes any civil or criminal penalties for drug possession for personal use. Criminal offences for the sale or supply of drugs outside the regulated market are still criminal offences.

The model for legalisation varies and may be regulated through a government-controlled market (e.g. Uruguay, parts of Canada), through social clubs (a not-for-profit community model, e.g. Spain) or through commercial interests (e.g. Colorado).

Currently, legalisation typically applies only to cannabis and the law may be applied differently depending on its form (smoked vs edibles) or purpose (recreational vs medical).

Why?

Decriminalisation

The rationale for drug law reform is complex and linked to a number of factors including, for example, stigmatisation and marginalisation, ineffective practices and costs to society.

The aim of decriminalisation is to reduce the impact and costs of enforcing the law, while maintaining a view of the illegality of drugs, as well as to reduce harm.

A key argument relates to the effectiveness of the current approach where drug use is treated as a criminal issue as opposed to a health or social issue. This has several components.

The first is that a criminal approach to personal drug use is likely to have only limited effectiveness. The theoretical reasoning of making drugs illegal is it deters people from using them (deterrence theory). Research suggests that undesirable behaviours can be stopped if the punishment is certain, swift and severe.⁴ Where likelihood of detection is low, factors other than the law are likely to be more important determinants of behaviour.⁴

For illegal drug use, the likelihood of detection is low. In the case of cannabis, the likelihood of someone being apprehended for using the drug in any one year is between 1 and 3%.^{4,5} As the likelihood of detection is low, we can assume that the law will not be the primary determinant of behaviour.⁶

The second argument for drug law reform relates to the high burden of cost associated with law enforcement and the justice system. Australian research in 2013 placed expenditure on law enforcement at \$1.1 billion (65% of total expenditure on drugs) compared to \$361 million on treatment (22%); \$157 million (9%) on prevention and \$36 million (2%) on harm reduction.⁷ Proponents of drug law reform argue that by treating drug use as a health issue, we could shift funding from law enforcement to treatment, improving access and reducing the health burden.

Other arguments for decriminalisation include reducing pressure and overcrowding in the legal system and judicial systems and potentially improving relationships between police and communities (which may in turn lead to improved crime control in the future).

Illicit drug use offences are one of the three most common offences for prisoners in Australia, accounting for 16% (or 6779) of prisoners in 2018. This number refers to offences of supply and use with the vast majority being for supply. The number of prisoners with an offence for illicit drug use more than doubled between 2010 and 2018, increasing by 110%.⁸

Decriminalisation prevents a criminal conviction by people who are found guilty of personal possession and use of an illicit drug.

An illicit drug conviction can ruin, disrupt and disable a person's life in serious ways, including incarceration, rupturing close familial and personal relationships, and closing career, employment and travel options due to the stigma of a criminal record. Decriminalisation also helps an individual who is unlikely otherwise to come to judicial attention to avoid entrenchment in the criminal justice system.

Decriminalisation is also identified as a way to reduce stigma and further marginalisation of those who use illicit drugs. Stigma and marginalisation are considered to contribute to poorer health outcomes as they can delay help seeking behaviour and impact on mental health.⁹ Laws can protect people from stigma, but labelling and categorisation by laws can also create stigma with laws playing an important role in establishing societal values and norms.¹⁰

Arguments around drug laws and their role in establishing stigma often form the crux of the public debate on drug law reform. For some, stigma is a phenomenon that leads to discrimination, marginalisation and self-loathing, therefore increasing the harm from illicit drug use. For others, it is a way of sending a message about what is considered acceptable behaviour – what society will tolerate.¹¹

Legalisation

Further arguments specific to legalisation are that this will:

1. increase government revenue through taxes that can be diverted to treatment and support for those who need it, and
2. reduce the harms associated with black market distribution of drugs, as drugs sold legally are done so within a regulated market with testing that meets standards for purity and quality. A reduction in harms associated with accessing drugs (e.g. crime, violence) are also hypothesised to reduce when drugs are available through a regulated market.¹²

Evidence to support legalisation as a cost effective approach is mostly hypothetical and dependent upon the model and if there is a regulated market and what prices are set at.¹² There is currently not a strong body of evidence to support legalisation of illicit drugs from a health or social perspective.



Pros and cons of drug law reform

Pros

- Total prohibition has not succeeded in eliminating illicit drugs and there is minimal prospect that it will.
- Criminalisation promotes secrecy around drug use and inhibits people from seeking help when drug problems occur.^{13, 14}
- It puts users at risk of a drug conviction that has long term consequences and interferes with education, employment, housing, travel and relationships.^{15, 16}
- The impact of law enforcement falls upon the individual user as most drug-related arrests are for consumer offences of personal use and possession.
- Removing criminality from personal possession and use of forbidden substances is a way of reducing harm without risking increased drug use.
- Reduces the burden on the police and justice systems.
- Decriminalisation reduces incarceration rates for drug use and reduces the prison population with ancillary savings of reducing the personal and social costs of incarceration, and the financial cost of maintaining a large prison complex.
- Decriminalisation might also reduce the stigma of illicit drug use and encourage users to approach treatment and other health services.
- There are high levels of public support for decriminalisation, but this support varies by drug type with more support for what are perceived as 'softer' drugs, and less support for the perceived 'harder' drugs.

Cons

- Fears of increased use, particularly amongst youth.
- One argument against decriminalisation is based on the principle that the law should not be compromised by accommodating illegal behaviour. A more pragmatic version of this argument is a concern that decriminalisation might achieve the worst of both worlds by facilitating increased use of drugs, which would enlarge the illicit market and further enrich criminals in charge of the trade.¹⁷ The problem might be exacerbated because drug prices might remain high, which is the main aim of prohibition policy.¹⁷
- Criminal penalties put downward pressure on demand and that removing them 'sends the wrong message' and could suggest that society approves drug use.
- There is differential support for decriminalisation depending on which drug people are considering. This could make it more difficult to implement with drugs other than cannabis.
- De facto decriminalisation could result in greater risks of inequity in relation to who avoids criminal charges. This may impact most on the most vulnerable (e.g. Indigenous Australians, lower socioeconomic groups) and vary between regions depending on police discretion.

Impact of legalisation only

- Reduces the impacts of black market access.
- Increases government revenue. Model type will determine this as some models may return no revenue (i.e. home grown only) and others limited (i.e. government monopoly).
- In a regulated market where cannabis can be bought, impacts on the black market would vary by price and controls as to who can enter the market.

Models for delivery

Decriminalisation has been implemented in a number of countries (e.g. 11 states in the USA), the Netherlands, Switzerland, France, Germany, Austria, Spain, Portugal, Belgium, Italy, Czech Republic, Denmark, Estonia, Ecuador, Armenia, India, Brazil, Peru, Columbia, Argentina, Mexico, Paraguay, Uruguay, Costa Rica, Norway and Jamaica. Ireland aims to decriminalise in 2019.)

Two countries (Canada and Uruguay) and several US states (e.g. Colorado, California, Nevada, Washington), have also legalised recreational cannabis. NZ is planning a referendum in 2020.

The international models vary in terms of sanctions, diversion and the amount of drugs people are able to carry (threshold amounts) without criminal sanctions.

Portugal

Largely a response to heroin use, Portugal reformed drug policy in 2001 with elements drawn from prohibition with civil penalties and prohibition with diversions. Drug offences remain illegal and drug supply remains a criminal offence, while personal acquisition, possession and use of drugs is treated as an administrative offence. Individuals who hold no more than a 10-day supply of a drug are liable for an administrative sanction.

Offenders appear before a regional Commission for the Dissuasion of Drug Addiction (CDT) whose role is to assess drug users: drug dependent people are referred into treatment, while people assessed as not drug dependent, or not impaired by drug use, are offered other sanctions. These include having their proceedings suspended, being required to attend a police station, being referred for psychological or educational intervention, or paying a fine.¹⁸ The intent of the CDT is to avoid stigmatising the person using drugs and to emphasise the health aspects of drug use and treatment.

This is the reverse of the Australian 'prohibition with cautioning or diversion' schemes which limit cautions and interventions to first, second or third offenders. In Portugal's system, entrenched drug offenders are referred for treatment and the less entrenched receive civil penalties.

United Kingdom

In 2004, the UK transferred the classification of cannabis to a Class C drug, effectively removing the threat of arrest for possession. In 2009, the UK government reclassified cannabis as a Class B due to mental health concerns. This was contrary to the advice of the Advisory Council on the Misuse of Drugs.

Italy

In Italy, where cannabis is depenalised and regarded as an administrative offence, first offenders are given a warning on the assumption that they do not intend to commit the offence again; for a second offence they receive an administrative penalty such as suspension of a motor car driver's licence.¹

Czech Republic

Currently, possession of a small amount of drugs is a non-criminal offence liable for an administrative sanction such as warnings and fines; however, possession of a larger amount is punishable by incarceration for between one to eight years.

Drug Diversion Programs

Diversion measures or schemes are formal procedures that direct offenders away from the processes of conventional criminal justice to minimise their contact with the formal system.¹⁹

They can occur through a Drug Court, or prior (through police diversion programs). Police diversion programs are distinct from the work of Drug Courts that deal with offenders who are charged with the more serious drug related offences. Drug Courts can offer diversion at various stages: pre-trial, pre-sentencing, and at sentencing.¹

Every jurisdiction in Australia has at least one police drug diversion program (pre-court) which is broadly similar in operation but can differ according to which drugs are included, age of eligibility, whether admission of guilt is required and whether it is mandatory.²⁰

Evidence

International schemes

Definitive evidence of the impact of decriminalisation at international levels is not available for several reasons.

- A lack of substantial data impacts assessment of many decriminalisation schemes. Portugal is a good example as there is no baseline data of drug use prior to decriminalisation.²¹
- Few schemes have been subject to evaluation and the evaluations that have been applied lack methodological rigour.¹
- Decriminalisation/depenalisation is not a single entity; the schemes tried across the world vary considerably, so comparisons between them are fraught. For cultural reasons extrapolation from one location to other locations is similarly hazardous.¹
- In general, there is no evidence that the alternative policy regimes have led to substantial increased drug use.¹
- Data can be used selectively to build a case either for, or against, drug law reform, muddying the evidence field.²¹

Impact on the prison system

Criminal drug offences in Portugal declined from around 14,000 in 2000 to between 5000–5500 per year after decriminalisation. The proportion of people in prisons for low level drug offences fell from 44% of prisoners in 1999 to 24% in 2013.²²

Diversions Programs

Evaluations of Australian programs have supported diversion.

A 2008 study found high compliance, little recidivism, and most reoffenders offended only once more.¹⁹

A recent study of police diversion of cannabis offenders found the outcomes included lower rates of use, reduced recidivism, better health and wellbeing, lower participation in the criminal justice system, better employment prospects and a profound financial benefit. A police diversion costs 6–15 times less than charging an offender.²³

Current situation in Australia

There is growing acceptance among law enforcers that drug prohibition cannot eliminate drug use and new approaches are needed.

The head of the National Ice Taskforce and former Police Commissioner, Ken Lay, has stated: '[drug] use is not a problem we can solve over-night and we cannot simply arrest our way out of it'.²⁴

Consumer opinion also appears to be shifting. A 2018 National Drug and Alcohol Research Centre (NDARC) report found support for decriminalisation grew between 2010–2016.²⁵ As of 2016, 77.5% of Australians supported decriminalisation for cannabis; 57% for ecstasy; 50% for meth/amphetamine; and, 52% for heroin.²⁵

The following diversion approaches are currently in place in Australia:

- All jurisdictions allow diversion by police for use and possession of cannabis by either civil penalty schemes or by cannabis caution schemes.
- All but NSW and Qld allow police diversion for other illicit substances.
- All allow youth specific diversion programs by police and courts.
- All allow court diversion for minor drug or drug related offences.
- Most diversion programs limit the number of times a person can utilise the program.
- All jurisdictions – but SA – allow police discretion in offering diversion. One effect of discretion is the risk that some populations may be subjected to discrimination in the way drug laws are interpreted and enforced.²⁰

Data on current diversions in Australia

Most people diverted are male (79.4%), aged 18–29, particularly between 20–24 years, and are detected on one occasion only. Most detections take place in Qld, NSW and SA which account for nearly 75% of all detections in Australia.²⁶

Over half (55.5%) of offenders detected for use/possession nationally were diverted by police away from court action: if Qld is excluded, the rate of diversion rises to 63.8%.²⁶

Of people detected for a principle offence of use/possession, just under half (45.3%) proceeded to court.

ADF position

- Supply of drugs remains a criminal offence.
- The ADF supports *de jure* decriminalisation* of personal drug use – which has occurred to varying degrees across Australia – as it accords with the longstanding successful harm minimisation approach of Australian governments that treat personal use of illicit drugs as a health issue, not a law and order issue.
- Decriminalisation should be developed with reference to the Portuguese model and be accompanied by investment in, and pathways to, early intervention support and access to evidence-based treatment for all people who need it.
- Decriminalisation of personal use should not discriminate by drug type and should not impose onerous financial penalties on low income earners. Ideally, decriminalisation would be nationally consistent.
- The ADF draws a clear distinction between decriminalisation and legalisation (the lawful sale of drugs) and acknowledges the role of law enforcement in disrupting supply of illicit drugs by domestic and overseas criminal syndicates.
- The ADF does not currently support legalisation of recreational cannabis given the early stage of international models and a lack of data to inform the evidence base. The ADF will continue to monitor outcomes in countries where recreational cannabis is legalised.

* It's important to note that the Alcohol and Drug Foundation views *de jure* decriminalisation as part of a range of measures to prevent and minimise drug harms.

Common misinterpretation of the evidence

The term 'decriminalisation' is used confusingly, and sensible discussion of drug policy options is not possible when the meanings of terms are not shared. In public discourse decriminalisation is sometimes confused with legalisation.

Whilst there is strong evidence to demonstrate that decriminalisation or expanded diversion is a cost effective approach, decriminalisation is not a cheap option.²⁷ For Australia to adopt drug decriminalisation along the lines of the Portugal model, a large financial investment in the various legal, health and education services would be needed for the new system.

A comprehensive overview of the different models of decriminalisation can be found [here](#).

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