Discussion paper

Advocacy, and Research and Social Policy

25 November 2020

POSSESSION AND USE OF DRUGS.

Options for changing the law

FAIR TREATMENT

uniting church in Australia, Synod of NSW & ACT

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This discussion paper flows from a workshop of Fair Treatment partner organisations held in 2019 to discuss decriminalisation models and has been prepared collaboratively by:

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A MESSAGE FROM TRACEY BURTON AND THE REV. SIMON HANSFORD

The Uniting Church of NSW and the ACT, and its social justice, community services and chaplaincy arm, Uniting NSW.ACT, have never shied away from controversial issues.

Uniting's missional principles are drawn from the Church's foundational beliefs. They are to inspire people, enliven communities and confront injustice. The Fair Treatment campaign for drug law reform is well aligned with those principles. The campaign calls for society to question whether our drug laws reflect the essential worth and rights of every person. The campaign is proudly a partnership approach in recognition of the mutuality and interdependence between all people. The campaign also seeks to promote the active participation of those affected by the injustice of our drug laws, by giving voice to those with lived experience.

It's called 'Fair' Treatment for a reason: because our current approach to drug policy is neither fair nor sensible. And Uniting believes in a fair go for everyone, but especially for those that are vulnerable.

We believe that people and communities do best when they are supported, celebrated, and accepted. The stigma that has too long attached to people who live with drug dependency has discouraged many from having the open and honest conversation about their drug use that might have pointed them towards treatment. We need to change our approach.

We also note that most Australians support a health response when someone is found with small quantities of substances – and have done for many years. Yet the word 'decriminalisation' remains a misunderstood term, often conflated with the concept of legalisation, and often used by some of our media to drive an agenda based on fear, not facts.

This paper is deliberately written to increase our understanding of a complex topic and encourage conversation.

Many issues we face today involve complex ethical dilemmas without simple answers. We are guided by our Christian faith and the way Jesus astonished people with his grace, acceptance, and forgiveness, before he ever offered a word of judgement. We observe that sometimes we must have the courage to take risks and break conventions, as Jesus did.

This paper will take you through some of the principles we believe are important in making decisions about law.

We ask questions like: What should happen when someone is found with small quantities of psychoactive substances? Should the same thing happen to everyone? What about the person supplying these substances? Should the response be different for different substances?

These are not easy questions, and nor do we propose any definitive solutions. However, we do highlight the ideals and the policy principles which we believe in, and suggest one approach.

We encourage all to get involved. You can find out more about the campaign and sign up as a supporter at fairtreatment.org.

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INTRODUCTION

In 2016, the Synod of the Uniting Church of NSW and the ACT passed two resolutions: one to support the decriminalisation of personal possession of small amounts of prohibited drugs; and the other to increase investment in drug and alcohol treatment services. In 2018, when the Fair Treatment campaign was created to advance these aims, the preferred decriminalisation model was not specified. And indeed, it is not an easy question to answer. However, it is one Uniting NSW.ACT (Uniting) is determined to explore and, in doing so, hopes to foster a deeper understanding in our community.

In 2019, Uniting brought together a number of our Fair Treatment partners to discuss various decriminalisation models. A working group was subsequently formed, resulting in this paper. This paper starts from the position that the criminal law should not apply to individual possession and use of small amounts of drugs. There is support for this position among the Australian community.

The 2019 National Drug Strategy Household Survey[1] showed that there continues to be strong public support among Australians for measures amounting to the removal of criminal sanctions for possession for personal use of all prohibited drugs. Indeed 53-78% of the representative Australian sample in the survey supported personal use to attract a caution/warning, or referral to treatment or an education program (with methamphetamine and cannabis at each end of the range). This rises to 68-92% if a fine is included as a response to personal drug use. Support for decriminalisation and legalisation grew between 2010 and 2019, particularly for cannabis. However, we acknowledge that the strength of this support depends on how questions are worded, and support is less strong when the issue is presented in more simplistic or black-and-white terms.[2]

The most common action supported for people in possession of selected drugs was for 'referral to treatment or an education program' except for cannabis, where a 'caution/warning' was the most common action supported.

This paper explores options for changing the law in NSW and the ACT in relation to the possession of all substances for personal use. These substances include cannabis, heroin, methamphetamine, cocaine and MDMA.

In considering the various decriminalisation options in this paper, we are attracted to a comprehensive decriminalisation model, namely one that applies to all drugs, does not apply civil sanctions, removes eligibility criteria, utilises a combination of alternatives to sanctions (including taking no action, confiscation and referral) and abolishes threshold quantities (via a staged approach).

To avoid confusion, Uniting's support for decriminalisation of personal drug use/possession does not equate to support for legalisation of personal drug use/possession or the decriminalisation of drug supply and associated activities like cultivation, manufacture and importation.

The paper begins by laying out some general principles for good policy on this issue and then considers a range of options. Each option is considered in light of the good policy principles and their consequences. Where there is evidence of what the community thinks about possible changes, this is also presented.

As this paper starts from a position that our belief in the equal worth of all human beings means we support decriminalisation of personal drug use/possession, the paper does not advance arguments for or against this approach. Readers interested in this should refer to other documents released by Uniting's Fair Treatment campaign.[3]

TO SUMMARISE BRIEFLY:

- Only a small proportion of people who use drugs experience drug dependency (i.e. use that causes social, financial, psychological or physical problems). For those who do not develop drug dependency, the current reliance on criminal sanctions puts at risk careers and opportunities. For those who do develop drug dependency, the current approach creates barriers to help and support.
- Existing drug laws create unnecessary barriers, stopping people getting into treatment, increasing social stigma and heightening the isolation among those who need support. By responding with law and order rather than treatment and support, society is punishing people rather than trying to help.
- Drug dependency is often linked to a variety of complex social circumstances, disadvantage and trauma. Responses to harmful drug use and addiction must address these underlying causes of use and stop blaming the victim.
- Treatment works. By refocusing the system on helping people, lives can be saved, money can be saved, and law enforcement resources can be redirected.

WHAT GOOD DRUG LAWS LOOK LIKE

We believe that, among other things, good laws generally display the following characteristics: transparency, equity, focus and proportionality. Uniting proposes these principles should be applied to the legislation governing the possession and personal use of illegal drugs in NSW and the ACT. In fact, to not do so would, in our view, be an abrogation of good public policy making.

EQUITABLE

The law should apply fairly and consistently in practice. It should not apply in idiosyncratic fashion (for example, unpredictably to particular people or groups, or under certain circumstances). Differential responses for specific groups should be as few and as limited in scope as possible, and should be consistent with the other principles cited here.

TRANSPARENT

The law should be unambiguous and easy to understand. Discretionary powers, like those held by police at the point of identifying a possible offence, should be few in number and limited in scope. This is because they may lead to ambiguity or inconsistency in practice.

PROPORTIONATE

Laws should only rely on the coercive power of the state to the extent necessary to achieve their purpose, and only if there is no less onerous way of achieving the same purpose. Laws should also employ means that are actually likely to achieve their intended purpose and be reasonable considering the competing interests at stake.

FOCUSED

Laws should have a clear purpose, and not apply to a broader range of people or behaviours than is necessary to achieve that purpose.

We believe these principles are consistent with a set of broader beliefs about what makes good social policy in general, which flow from our experience as the main social services and advocacy arm of the NSW and ACT Synod of the Uniting Church in Australia.

DIGNITY OF THE HUMAN PERSON

Law and policy should recognise the essential dignity and worth of every person and treat all with respect. It should affirm the rights and needs of all people, especially those whose rights are violated or threatened, or who are excluded from full participation in communal life.

CONCERN FOR THE MOST DISADVANTAGED

The poor, the marginalised, and victims of injustice should be the particular focus of our concern and our greatest priority. Inequality has a corrosive impact on individuals and the whole community. The disadvantaged should have access not just to necessities, but also to opportunities to live a flourishing life.

THE NEEDS OF THE WHOLE PERSON

All dimensions of human existence – physical, social, psychological, spiritual and economic – must be considered. Differences in culture, language, gender, sexual orientation, race and religion must be recognised and respected.

COST-EFFECTIVENESS

Resources must be wisely invested to maximise long-term social impact. On this basis, prevention and early intervention, and interventions which address the root cause of problems, are particularly supported.

THE COMMON GOOD

Law and policy should enhance the good of all, and contribute to communal wellbeing. A morally adequate response to inequality means going beyond acts of compassion and relieving individual need, to challenging systems that limit opportunity and perpetuate inequality.

SOLIDARITY

Decision making and active participation should be promoted among those affected by injustice, especially the vulnerable. Those who are on the edges of society, marginalised, subject to violence and abuse, and experiencing injustice, must be heard.

This paper seeks to apply these principles to the issue of drug law reform. A summary of the current legal approach in NSW and the ACT can be found in Attachment 1.

OPTIONS FOR REFORM

1

Should decriminalisation apply to everyone?

Australia has already begun to move towards decriminalisation, even partial legalisation. Various cannabis offences were decriminalised de jure decades ago in the ACT, SA, WA and the NT. The WA provisions have subsequently been repealed. And there is now partial legalisation of personal-level cannabis offences in the ACT.

Various States and Territories have also adopted de facto decriminalisation schemes like police diversion programs.[4] These approaches have generally removed sanctions in a piecemeal fashion, by relying on so-called 'eligibility criteria'. They are designed to ensure that sanctions are only applied for specific combinations of criteria. Existing schemes in Australia typically rely on a combination of several criteria to define eligibility.

Common criteria found in existing schemes include age (i.e. whether the person is a youth or an adult), whether the person admits to the offence, whether the person has previously been found in possession more than a certain number of times (typically once or twice), and the quantity of the substance.[5] Criteria and thresholds vary depending on the drug and the jurisdiction.

Eligibility criteria are inconsistent with the principle of transparency. While they may be superficially appealing because they appear to mitigate the undesirable effects of the criminal law in some cases, they make the law more complex to draft and enforce, and can have unintended consequences in practice.

Eligibility criteria are also inconsistent with the principle of equity. Their complexity, coupled with the fact that some eligibility criteria may not be knowable with certainty at the point when a person is found in possession, means it may not be clear whether the person has committed a crime or not. They therefore make the job of front-line police more difficult, and open the possibility of idiosyncratic application of the law to some people but not others. This is not merely a theoretical concern. There is some evidence that eligibility requirements can exclude those most marginalised, and those most in need of diversion, from access to treatment and rehabilitation.[6]

Finally, eligibility criteria are also inconsistent under many circumstances with the principle of *proportionality*. As noted earlier, many schemes only withhold criminal sanctions for the first few occasions a person is found in possession. This is presumably on the grounds that if a person is repeatedly found in possession, after having been provided with an alternative and a more lenient response, then it is appropriate for the full force of the criminal law to operate. The underlying assumption, in other words, is that the most appropriate way of dealing with drug use is still a criminal response, and that eligibility criteria are a grudging compromise for certain circumstances. A more consistent application of the principle of proportionality would mean treating repeated incidents of being found in possession as evidence of a more serious underlying health or social problem. However, this also assumes there are no structural biases towards certain cohorts being more likely to be targeted for search, bringing in the principle of equity. In any event, it is certainly not proportionate or equitable to assume a criminal response is more warranted for frequent instances of possession.

The idea that eligibility criteria should not be part of the criminal law does not mean we should take no account of these factors. The principles of proportionality and focus are perfectly compatible with responses being tailored to the specific circumstances of people who exhibit drug dependency, or who may be at particular risk of drug dependency. Many of the factors which currently appear as eligibility criteria in decriminalisation schemes around Australia would be relevant in this context.

Age provides one very clear example. Police in NSW currently have the power to seize tobacco[7] and alcohol[8] found in the possession of people under the age of 18 in a public place. It may be appropriate for police to have similar powers to confiscate other drugs from all people or certain categories of people, such as children and young people, given the evidence that the effect of prohibited substances on developing minds is substantial and harmful. It may also be appropriate to consider the age of the person in determining the most appropriate therapeutic response, and for the sale or supply of drugs to a minor to be a more serious offence than sale or supply to an adult. This is explored more in the section ahead.

Should decriminalisation apply to all prohibited drugs?

2

It is possible to remove criminal sanctions for possession/use of some prohibited drugs but not others. This is already happening to an extent in Australia: as noted earlier, NSW has a de facto scheme to decriminalise cannabis, and the ACT introduced de jure decriminalisation in 1992, with its Simple Cannabis Offence Notice system (a fine-instead-of-conviction). This was widened in late 2019, when the ACT legislated for the partial legalisation of personal-level cannabis possession, consumption and cultivation. Both jurisdictions retain criminal sanctions for 'harder' drugs like heroin.[9]

The principle of equity supports the decriminalisation of the personal use of all prohibited drugs. Decriminalisation for some drugs but not others is a compromise with a weak rationale and is inconsistent with the principle of *proportionality.*

The recent Special Commission of Inquiry into the Drug 'Ice' Report **(the Ice Inquiry)** recommended that the NSW Government implement a model for the decriminalisation of the use and possession for personal use of prohibited drugs.[10] However, we note that this position is inconsistent with public opinion, which is consistently more favourable towards decriminalisation of cannabis than other substances.[11]

One possible rationale for decriminalisation of some drugs but not others appears to be the assumption that substances such as cannabis are less harmful or problematic and can therefore be decriminalised with less risk. While superficially appealing, this does not survive serious scrutiny. The more serious social and health problems associated with the use of opioids and methamphetamine mean a health-and-wellbeing-oriented response is more appropriate than a criminal response for these substances than it is for cannabis. By retaining criminal sanctions for 'harder' drugs, legislative barriers preventing those who need help the most are retained.

A second rationale appears to be that removing criminal sanctions itself has risks. This may be either because criminal sanctions are presumed to be an effective and appropriate deterrent, or because the act of removing currently-existing sanctions could send a signal that drug use is now permissible. The experience of countries that have decriminalised use/possession is that this does not occur (see, for example, the discussion of Portugal in section 3 ahead).

The principles of *focus* and *proportionality* would tend to support having a range of non-criminal responses available for drug use, each tailored to the specific circumstances of the person using drugs. These tailored responses should be based on evidence of the particular physiological and health impacts of each substance, and of the most effective treatment or combination of treatments. It may be valuable, for example, for diagnosis, referral and treatment programs to be structured and operate in a way that recognises the different kinds of social stigma attached to the use of different drugs. Public sentiment is often much less sympathetic towards the use of 'hard' drugs like heroin and methamphetamine. Consequently, those exhibiting drug dependency are often less likely to seek treatment, even though they are often more isolated and vulnerable, and require support more urgently than others. Appropriate and effective responses for people in these circumstances is not just a matter of proportionality and focus; it is also consistent with valuing the dignity of the human person, and a concern for the most disadvantaged.

Under decriminalisation, what would happen to someone caught with personal quantities of illicit drugs?

3

At present, the main response to the possession and use of prohibited drugs in Australian jurisdictions is negative sanctions of various kinds – mostly criminal penalties, but other options include fines, community service orders, and other coercive measures.

The principles we laid out favour a health-and-welfare-oriented response to drug dependency, rather than one which relies on the criminal justice system. The most common alternatives to criminal sanctions are:

- Taking no action, either in all circumstances or in identified circumstances only
- Confiscation
- Referral to education
- Referral to treatment and/or
- Some kind of civil sanction (for example, a fine or community service order).

The Ice Inquiry made a recommendation on these issues, which we discuss under each of the sub-headings ahead. Recommendation 11 was 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
- No civil sanctions for non-compliance.[12]

TAKING NO ACTION

Taking no action has majority support (54%) for cannabis use in the 2019 National Drug Strategy Household Survey, but much lower support for other drugs.[13] Taking no action is reflected in the NSW Cannabis Cautioning Scheme. Although counterintuitively, the NSW Bureau of Crime Statistics and Research 2004 evaluation of the scheme showed it resulted in net-widening, "inasmuch as the total number of people dealt with formally for cannabis offences is now higher than it was prior to the introduction of the scheme".[14]

Given the fact that 43.2% of people over the age of 14 have used drugs in their lifetime (with 16.4% in the past year)[15], taking no action is a credible option, at least for the vast majority of people who use drugs and are not dependent.

CONFISCATION

It should not be automatically assumed that under a decriminalisation model, the confiscation of illicit substances would occur. As we note earlier, the majority of Australians (54%) support either taking no action or a caution/warning for cannabis possession. However, these responses are very different for other drugs.[16] Yet drug dependency problems only arise for a small proportion of people who use drugs, and being stopped and searched – a likely prerequisite for confiscation to occur – is an interaction with the criminal justice system, and one that can be applied groundlessly and inconsistently. NSW Police found nothing in 88% of the 211,000 personal searches conducted in 2018. About 78.5 per cent of all personal searches in the Central North police district of NSW were conducted on people identified as Aboriginal or Torres Strait Islander, with 93% finding nothing.[17] Further, as noted above, the cannabis caution scheme in NSW resulted in more 'formal' interactions about cannabis use than occurred previously.

Therefore, removing the right for police to stop and search where possession/use has been decriminalised, should be considered alongside non-confiscation. Alternatively, stop and search and confiscation could be applied narrowly, perhaps where there is an unacceptable risk of harm to the person or third parties. This might include, for example, possession by young people or consumption in a public place. However, we note that confiscation of all substances in all circumstances was recommended by the Ice Inquiry and it is what currently occurs in Portugal.

It is also worth noting that the argument in support of decriminalisation - that it frees up police resources to spend on other matters, like trafficking and domestic violence for example - is undermined if the decriminalisation system still generates administrative actions and paperwork, such as would occur with stop/search/confiscation and civil sanctions (discussed below).

REFERRAL TO EDUCATION/TREATMENT

As the Ice Inquiry rightly identifies, any consideration of referring to education and/or treatment as an alternative to criminal sanctions for possession/use would need to be accompanied by increased investment to ensure there were appropriate education and treatment options to meet demand. It should also be noted that education/treatment would likely reflect a wide spectrum of options from online education to residential rehabilitation services. Uniting supports education/treatment being voluntary and appropriately tailored, which is also the position of the Ice Inquiry. Most people who use drugs do not want, or need, referral to treatment.

CIVIL SANCTIONS

The frequently given rationale for civil sanctions such as fines and/or community service orders is that they send a signal that society discourages drug use, and such sanctions are likely to operate as a general deterrent. However, fines and community service orders are problematic as primary responses to possession/use. They are not consistent with a belief that policy should reflect concern for the most disadvantaged, nor the principle of equity, because they have a greater adverse impact on those who are most vulnerable (i.e. those with limited means). Drug dependency generally is a symptom of underlying vulnerability and disadvantage, and therefore sanctions like fines and community service are likely to exacerbate that disadvantage.

However, many will argue that civil sanctions need to be considered as responses to a failure to comply with a referral to treatment or an attempt to confiscate drugs, as one part of a suite of measures. This is because a health-and-welfare-oriented approach to drug dependency depends on people actually engaging with treatment and support services to which they are referred. Uniting's experience as a provider of a very wide range of social services has taught us that this cannot be taken for granted. Engagement is particularly difficult in the case of 'semi-voluntary' services, namely services which are not technically compulsory, where the client may be reluctant to engage, and there is significant public benefit in ensuring they do so.

One possible approach to ensuring engagement would be to allow voluntary referrals where treatment was deemed necessary, backed up with sanctions should the person not take up the referral or engage with the service. Options for these sanctions include fines and community service orders.[18] This approach is favoured by the Ice Inquiry, which supports voluntary treatment/education and civil sanctions for non-compliance, although many would argue this is, in effect, mandatory treatment.

If coercive measures such as fines and orders were to be available, they should not be the sole, or even the primary, way of ensuring engagement with treatment. The assumption behind fines is that engagement with services is primarily a matter of free individual choice, and that punishing those who choose not to participate, will encourage everyone to choose to participate. This assumption may not be accurate at all, and is unlikely to be accurate in relation to the circumstances of people with drug dependency.

- There may be structural or systemic barriers to engagement. Even if supply of assessment and treatment options is increased to meet demand, it still may not be accessible due to the person's circumstances, or culturally appropriate. It is unjust, and will almost certainly prove ineffective, to use coercive measures where participation in treatment is not practically possible.
- Complexity of need will also likely be a factor. The more serious a person's drug dependency, the more likely it will be that their use does not exist in isolation, but is a symptom of deeper social and psychological issues or part of a reinforcing complex of structural vulnerabilities. Therefore, people with drug dependency may have difficulty making good decisions about their own long-term best interests and compounding this by adding fines or orders for non-compliance helps no one.

The above responses are not mutually exclusive options, and there may be merit in having all the alternatives available. To do so would certainly meet the principles of *proportionate* and *focused*, as well as prioritising the concern for the disadvantaged, dignity of the human person, and the common good. Although, it should be recognised to do so is also arguably inconsistent with the *equitable* and *transparent* principles.

The experience of Portugal shows the benefits of a range of alternatives to criminal sanctions. In 2001, Portugal eliminated criminal penalties for possession and use of all illicit drugs. Those found in possession are instead referred to local 'dissuasion commissions' made up of officials with legal, health and social services expertise, to determine whether the person's drug use is problematic, and appropriate responses (including voluntary treatment and fines). Around 80% of matters before these commissions are deemed non-problematic and are dismissed without action. There has been no major increase in drug use in Portugal in the nearly two decades since criminal penalties were removed, while rates of problematic use and use by adolescents has fallen, as have rates of drug-related deaths. Outcomes have also improved, with fewer people appearing before the courts, increased rates of people receiving drug treatment, and reduced social costs of drug misuse.[19]

There is some evidence that these kinds of options are increasingly supported by public opinion here in Australia. The National Drug Strategy Household Survey shows that in 2019, Australians wanted 65.2% of drug budget resources allocated to drug education and treatment, and the proportion was increasing (current spending is around one-third).[20 21]

Under decriminalisation, should possession/use of prohibited drugs also be removed as an aggravating factor in relation to other crimes?

4

Aggravating factors are those factors particular to the offence, the victim, or the defendant, which may warrant a more serious charge or a higher penalty. Under the current laws, drug possession/use may be taken into account such that the person is exposed to a more serious charge or more severe sanction.[22] The question is, in a decriminalised system where there are no criminal sanctions for possession/use on its own, should possession/use remain an aggravating factor when other crimes are charged? For the same reasons that we oppose criminalisation of possession/use, we would oppose possession/use being an aggravating factor in other crimes. It has the potential to perpetuate criminalisation, albeit in a piecemeal fashion, which would be inconsistent with our overall goal, as well as our principle of *transparency*.

This would not prevent, possession/use being taken into account in relevant administrative decisions, such as child protection risk assessments (it might contribute to a decision that a child is at risk of sufficiently significant harm to require the intervention of child protection authorities). However, we would hope and expect that decriminalisation would mean better access to help for parents whose drug dependency is impacting their parenting.

Under decriminalisation, what happens to 'deemed supply'?

5

In NSW, the weight of drugs is currently used to determine the difference between the offence of use/possession and the offence of supply. For example, if a person is found in NSW with less than three grams of heroin,[23] they will be liable to a charge of possession under s10 of the *Drug Misuse and Trafficking Act 1985* (NSW). However, if the amount is equal to or greater than three grams, they will be deemed to have it for the purposes of supply under s29 of the Act, and will be liable to prosecution under s25. In this situation, the onus of proof falls on the person to prove they did not have the heroin for the purpose of supply. Similar provisions exist in the ACT.

Deemed supply provisions such as these were introduced across Australia to overcome perceived difficulties in the prosecution and sanction of drug traffickers.[24] However, many countries do not use threshold quantities to make this distinction, including Uruguay, Denmark and Spain. This means that in those countries, police and prosecutors must prove a charge of supply by using other evidence.

We support the prosecution of those who seek to profit from the large-scale trafficking of illicit drugs. In fact, decriminalisation would free up policing resources for this task. However, it would be worth considering in the long term, whether threshold quantities should be removed as a mechanism for distinguishing between possession/use and supply. Instead, establishing the offence of supply would require evidence other than the quantity of the substances (such as possessing paraphernalia such as scales or packed quantities of the substances, or evidence of transactions such as large amounts of cash). This approach would be consistent with the *equity* and *focus* principles.

This position appeals for several reasons. First, the concept of the threshold quantity helps to perpetuate a technical focus on the substances themselves, and to distract attention from the personal and social circumstances in which they are supplied and consumed. Implementing a threshold quantity requires setting a threshold, and this is always, to some extent, arbitrary. Moreover, thresholds reverse the burden of proof for those over the threshold. Where the threshold quantity is very low, it tends to expose users to more serious strict liability offences from which they cannot easily defend themselves. This is inequitable and inconsistent with fairness and proportionality, insofar as it tends to increase the risks to people who use most heavily, and who are most in need of medical and other supports.

However, threshold quantities are a fundamental feature of drug law in Australia, and their removal would have significant impacts on legislation, and on police and judicial practice. A staged approach would probably be required, starting with the removal of criminal sanctions for possession/use under the threshold quantity, and the gradual replacement of threshold quantities with other criteria for determining supply/trafficking in due course. This would also allow the issue of social supply and personal production to be addressed.

CONCLUSION

Uniting NSW.ACT and the Uniting Church of NSW and the ACT have a vision of people and communities to be accepted, supported, and valued. People who use drugs are some of the most stigmatised in our society, and we believe that a change in our approach is desperately needed. We support decriminalisation of possession of small amounts of prohibited drugs and are advocating to change the law through the Fair Treatment campaign. This is because we believe in the inherent worth of every human being and therefore exercise our work in the hope of justice, healing and restoration.

We recognise there are a variety of ways in which decriminalisation could be achieved. This paper discusses various decriminalisation models. We are attracted to a decriminalisation model that applies principles that we believe make good laws, as well as our beliefs about what makes good social policy.

Applying these principles, we can see the attraction of a comprehensive decriminalisation model, namely one that applies to all drugs, does not apply civil sanctions, removes eligibility criteria, utilises a combination of alternatives to sanctions (including taking no action, confiscation and referral) and abolishes threshold quantities (via a staged approach). Not insignificantly, such a model is most consistent with our beliefs.

As a provider of services to many families and individuals impacted by drug dependency, we recognise that any change that moves NSW and the ACT closer to this decriminalisation model, together with our other Fair Treatment campaign goals of increasing treatment and reducing stigma, would significantly benefit all of our community, as well as improving the lives of the vulnerable and disadvantaged.

ATTACHMENT 1:

New South Wales drug laws

Possession and use are defined in the Drug Misuse and Trafficking Act 1985 and related case law. The Act defines both prohibited drugs and prohibited plants, in separate sections.

- Prohibited drugs are defined under subsection 3(1) as those substances listed in Schedule 1 of the Act.[25] The Schedule also specifies various threshold quantities for each substance, relating to different types of offences (for example, "small amount", "indictable quantity", and "trafficable quantity"). As of early 2020, Schedule 1 lists 361 substances.
- Prohibited plants are defined under section 3. This lists cannabis, the Erythroxylon genus (the main source of cocaine), and several species of Papaver (opium-producing poppies). Subsection 3(2) gives the Minister power to prohibit any plant which is capable of being used for the purposes of producing prohibited drugs.

The Act establishes offences for the possession of both prohibited drugs and prohibited plants, and for the use of prohibited drugs.

- Possession of prohibited drugs is an offence under subsection 10(1). Subsection 10(2) provides lawful excuses for possession of a prohibited drug, all related to being authorised (e.g. prescription by a medical practitioner).
- Possession of prohibited plants is an offence under subsection 23(1)(c).
- Using a prohibited drug is an offence under section 12 (which covers "self-administration") and section 13 (administering to others).
- The penalty is two years in prison, and/or 20 Penalty Units (currently $2200).

'Possession' does not just mean having a prohibited drug in one's immediate physical custody. It can also mean having a prohibited substance under one's 'control'.[26]

NSW adopted de facto decriminalisation of cannabis in 2000, through a cautioning scheme. This allows police to issue a caution to adults on up to two occasions, provided they have no prior convictions for drug offences or offences of violence or sexual assault. The first caution provides contact telephone numbers for the Alcohol and Drug Information Service (ADIS). The second caution requires the person to contact ADIS for education about cannabis use. Cautions are recorded, and the court is notified if the person reoffends.[27]

In addition, the *Young Offenders Act 1997,* which is designed to divert young offenders from court for minor offences, applies to those who commit minor drug offences (such as possession of small quantities). Alternatives include warnings, cautions and conferences instead of being charged.[28]

Australian Capital Territory drug laws

Possession, and associated offences and penalties, are defined in the *Drugs of Dependence Act 1989*, with certain key provisions in the Criminal Code 2002 (ACT). Collectively, these define:

- Drugs of dependence (under section 169). Listed in Schedule 1, Part 1.1 of the Regulation are 75 'controlled medicines'. It is similar in structure to Schedule 1 of the NSW Drug Misuse and Trafficking Act 1985, and includes columns specifying 'trafficable quantity', 'commercial quantity' and 'large commercial quantity'.
- Prohibited substances (under section 171). 185 substances are listed in Schedule 1, Part 1.2 of the Regulation, which has a similar structure to Part 1.1.
- Small amounts of cannabis (under section 177AA). This applies to possession of cannabis plants, whether living or dead, or parts of cannabis plants, weighing less than 50g (dried) or 150g (not dried or a mixture of dried and not dried). It does not apply to greater amounts, or to cannabis resin or cannabis fibre.
- The partial decriminalisation of personal-level cannabis offences, which commenced in 1992, through which police have the power to issue offenders with a Simple Cannabis Offence Notice, rather than charge them with an offence (Drugs of Dependence Act 1989, s.171A)
- Prohibited plants. It is not an offence to possess prohibited plants per se, but it is an offence to cultivate them under Part 6.5 of the Criminal Code 2002. These are listed in Schedule 2 of the Regulation.

The penalty for possession of almost all prohibited drugs and substances is up to two years imprisonment and 50 penalty units (currently $8000 for individuals). The exceptions are:

- possession of cannabis under s177AA of the Drugs of Dependence Act 1989, which carries a maximum penalty of 1 penalty unit for those under 18 years of age (currently $160 for individuals);
- possession authorised under the Medicines, Poisons and Therapeutic Goods Act 2008 is exempt (see sections 169 and 171);
- possession of small amounts of cannabis are exempt if the person is 18 years or older and possesses the cannabis in the Australian Capital Territory *(see subsection 171AA (3) of the Drugs of Dependence Act 1989).*

Section 177AA of the Drugs of Dependence Act 1989, and related sections, came into force at the end of January 2020, and partially legalised the possession and cultivation of small amounts of cannabis for personal use by adults, and the consumption of cannabis by adults in the ACT. It remains an offence in the ACT to smoke cannabis in a public place, to sell, share or give cannabis to another person, for anyone aged under 18 to grow, have, or use cannabis, and to drive under the influence of cannabis or with any detectable level of cannabis in the body.[29]

The self-administration of a declared substance (other than cannabis in the circumstances described above), and administering them to others, is an offence under s. 37 of the *Medicines, Poisons and Therapeutic Goods Act 2008.* In both cases, the maximum penalty is a $16,000 fine, imprisonment for one year, or both.

[1]*2019 National Drug Strategy Household Survey*, https://www.aihw.gov.au/reports/illicit-use-of-drugs/national-drug-strategy-household-survey-2019

[2]Hughes and Ritter (2018) *What does the research evidence tell us about what Australians think about the legal status of drugs?* A 2018 update, Sydney, National Drug and Alcohol Research Centre and Social Policy Research Centre.

[3]See, for example, the Fair Treatment campaign's website at https://www.fairtreatment.org/

[4]Hughes, et al. (2016) op. cit.

[5]Hughes, et al. (2019) *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,* Sydney, National Drug and Alcohol Research Centre, UNSW.

[6]Hughes, et al. (2014) *Evaluation of Australian Capital Territory Drug Diversion Programsibid.*

[7]Public Health (Tobacco) Act 2008 (NSW), s26.

[8]Summary Offences Act 1988 (NSW), s11.

[9]Hughes, et al. (2016) op. cit.

[10]https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/the-special-commission-of-inquiry-into-the-drug-ice/

[11]Hughes and Ritter (2018) op. cit.

[12]https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/the-special-commission-of-inquiry-into-the-drug-ice/

[13]2019 National Drug Strategy Household Survey, https://www.aihw.gov.au/reports/illicit-use-of-drugs/national-drug-strategy-household-survey-2019

[14]https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2004/bocsar_mr_r54.aspx

[15]Ibid.

[16]2019 National Drug Strategy Household Survey, https://www.aihw.gov.au/reports/illicit-use-of-drugs/national-drug-strategy-household-survey-2019

[17]https://www.smh.com.au/national/systemic-unlawfulness-88-per-cent-of-nsw-police-searches-found-nothing-20200214-p540t4.html

[18]Ritter, et al. (2018) *Models for the decriminalisation of the personal use and possession of drugs,* Sydney, National Drug and Alcohol Research Centre, UNSW.

[19]https://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Portugal_Decriminalization_Feb2015.pdf. Ibid at

[20]Hughes and Ritter (2018) op. cit. at p. 3.

[21]https://www.aihw.gov.au/reports/illicit-use-of-drugs/national-drug-strategy-household-survey-2019/data

[22]For example, under s52A of the Crimes Act 1900 (NSW), driving under the influence of intoxicating liquor or a drug is one of three circumstances which open a person to a charge of dangerous driving occasioning death/grievous bodily harm (the other two are speeding and driving in a dangerous manner). In addition, having more than the prescribed concentration of in one's blood or breath, or driving while "very substantially impaired" by drugs, are "circumstances of aggravation" for these offences.

[23]*Drug Misuse and Trafficking Act 1985* (NSW), Schedule 1.

[24]Hughes, et al. (2015) *Deemed supply in Australian drug trafficking laws: A justifiable legal provision?,* Current Issues in Criminal Justice, 27(1), pp. 1-20.

[25] http://www.austlii.edu.au/au/legis/nsw/consol_act/dmata1985256/sch1.html

[26]Director of Public Prosecutions v Brooks [1974] 2 WLR 899 at 902; R v Hinton (1976) Petty SR 1749; He Kaw Teh v R (1985) 157 CLR 523. R v Rawcliffe [1977] 1 NSWLR 219 at 231

[27]Hughes, et al. (2016) *Decriminalisation of drug use and possession in Australia – A briefing note*, Sydney, Drug Policy Modelling Program, NDARC, UNSW Australia. See also https://www.police.nsw.gov.au/crime/drugs_and_alcohol/drugs/drug_pages/drug_programs_and_initiatives

[28]https://www.police.nsw.gov.au/crime/drugs_and_alcohol/drugs/drug_pages/drug_programs_and_initiatives

[29]https://police.act.gov.au/safety-and-security/alcohol-and-drugs/drugs-and-law

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