

Drug law reform: Moving beyond strict criminal penalties for drugs

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Introduction

The term ‘decriminalisation’ can confuse the discussion about drug policy reform as it means so many different things to different people. Indeed many confuse ‘decriminalisation’ with ‘legalisation’, that is, making some aspect of the drug possession/use no longer an offence. More correctly, the term is used to refer to what is termed *prohibition with civil penalties*, that is, much like speeding in a motor vehicle – illegal, not condoned, but only attracting civil penalties like a fine, with no further criminal actions taken if the fine is paid by the due date. It is likely that others use it as a generic term meaning reducing penalties in comparison to *total prohibition* with strict criminal penalties. The confusion about what decriminalisation means is problematic for a number of reasons. Firstly, sensible discussion of drug policy options is impossible when the meanings of terms aren’t shared. Secondly, we tend to be scared of what we don’t understand. Consequently, it is unsurprising that the latest Nielsen poll has found that public support for ‘decriminalisation’ is low, at only 27% (1). Previously it has been found that when the term was explained, support for applying *prohibition with civil penalties* to cannabis use increased from 64% to 72% (2). According to the National Drug Strategy Survey Australian public support for criminal penalties for possession of cannabis has remained low, ranging from 34% to 39%, in the four surveys conducted between 2001 and 2010. Interestingly, support for legalisation of cannabis use has been even lower declining from 31% in 2001 to 25% in 2010. On the other hand, support for allowing use of cannabis for medical reasons has been supported by approximately 69% of the general public since the question was first posed in the 2004 survey(3, 4).

Drug policy reform has much more to do with politics that it does with research evidence. In translating research evidence into policy proposals for cannabis which contributed to cannabis law reform in Western Australia in 2004 it was decided that a concrete proposal would be most likely to be enacted if it was: (i) supported by a clear majority of the general public; (ii) Seen as electorally survivable by politicians; (iii) Supported by law enforcement stakeholders, notably the police; (iv) Supported by cannabis users as better than the prevailing criminal regime; (v) Supported by the research evidence; (vi) Sustainable under the international drug treaties and conventions which put limitations on signatory countries capacity to implement non-prohibitionist drug law regimes; and (vii) Subject to evaluation and review to increase the likelihood that it met the goals that it was designed to achieve. (5)

This paper aims to: (i) clarify drug law reform terms, summarise the evidence and rationale behind drug law reform beyond strict criminal penalties; (ii) describe Australian experience of drug law

reform and some international examples; (iii) briefly describe the impact of the international drug treaties on countries capacity to reform their drug laws (iv) and offer some politically viable and useful ways forward.

Terminology on types of reform

Firstly what needs to be understood is that drug law reform can be undertaken by changing drug laws themselves (*dejure* change), or through leaving the drug laws unchanged 'on the books' but changing the way the laws are enforced by the police and others (*defacto* change). There are examples of both *dejure* and *defacto* reforms in the reform typologies described below.

Under *total prohibition* all behaviour in relation to drugs including even minor possession and use of small amounts, but also manufacture/cultivation and supply are against the law (illegal) and attract strict criminal penalties including a criminal record and possibly a custodial sentence. Under *prohibition with cautioning or diversion*, sometimes called 'depenalisation' drug offences remain illegal, but under some circumstances penalties are reduced. For example, first offenders who plead guilty to minor possession/use offences may avoid a conviction being recorded if they attend and successfully complete an education or treatment intervention. Such schemes operate in the UK and in all Australian and some US states. Under *prohibition with civil penalties*, sometimes called 'decriminalisation' all drug related actions remain illegal but certain offences (usually specified small possession offences, but not supply offences) are eligible for civil penalties (infringement notices, fines administrative sanctions) rather than strict criminal penalties. Such schemes apply for specified minor cannabis offences in SA, the ACT and the NT. Under *Partial prohibition* some drug related behaviours remain illegal, while others are permitted. This can be done either by *defacto* or *dejure* means. Under *defacto legalisation* also termed *prohibition with an expediency principle* all drug related activities are illegal according to the law, however, cases involving defined small quantities are not investigated or prosecuted by police. Examples of this system operate for cannabis in Belgium and in parts of the Netherlands and Germany. Under *dejure legalisation* some drug use and possession is permitted under the statutes. Examples include the 'medical marijuana' schemes of regulated availability which apply in parts of the USA and Canada, and in Alaska where cannabis possession in one's home is not an offence.

Australia's 25yr experience of drug policy reform

Note that whilst many people think that *total prohibition* laws that apply to drugs in Australia, it is clear from the above that this is not the case. *Prohibition with civil penalties* schemes were introduced for minor cannabis offences in South Australia in 1987, the Australian Capital Territory in 1992, the Northern Territory in 1996 and in Western Australia from 2004 to 2011. Furthermore *prohibition with cautioning and diversion* schemes were introduced for cannabis in the non-civil penalty jurisdictions and for all other illegal drugs (heroin, amphetamines cocaine, LSD, ecstasy, etc.) for all Australian states and territories under the Illicit Drug Diversion Initiative (IDDI) introduced under the Howard Government in 1999 (6). That is, for drug possession offenders, depending on the jurisdiction, for first, second or third offences drug offenders without prior violent offences are given the option of having their prosecution suspended whilst they complete an intervention, usually drug treatment, specified by the caution. Should this be successful, they are not prosecuted for their drug offence.

So, Australia has a 25 year history of drug law reforms beyond *total prohibition*. This has happened under both national and state and territory governments of the left and the right political persuasion. Granted, these reforms have been limited in scope, have rarely addressed the supply side of the drug issue, may only apply to first offenders, and still result in many drug users who come into contact with the law getting criminal charges. However, to describe the Australian experience as simply a 'War on Drugs' approach is a caricature which ignores and diminishes the attempts which have been made to mitigate, if not remove, the adverse impacts of the criminal law on drug users. Are there more sensible and practical things which can be done to reform drug laws in this country? – without doubt. But in many ways Australia began moving beyond a 'war on drugs' at least 2 decades ago, and we will see below that the evidence is that, despite these reforms, 'the sky hasn't fallen in'.

The evidence

Much of the evidence regarding the impact of policy options for drugs has been based on the most prevalent illicit drug – cannabis. There is no evidence that maintaining the illegality of cannabis (prohibition) but applying civil rather than criminal penalties to minor cannabis offences results in higher rates of cannabis use among the general population, school children, nor apprehended cannabis users. Support for this position comes from research evidence from a variety of converging sources (see 7) including: (i) criminological research on deterrence; (ii) studies of the impact of reducing drug penalties on rates of use; and (iii) studies demonstrating the impacts of being apprehended for a minor cannabis offence.

Deterrence theory and drug policy research

The theoretical underpinning of much of our criminal law, and general and our drug law in particular, is *classical deterrence theory* which asserts that “undesirable behaviour can be curtailed if punishment is sufficiently certain, swift, and severe” (8). Much of the early criminological research showed that individuals' perceptions of punishment *likelihood*, rather than punishment severity, deterred further offending. Furthermore, in situations where likelihood of detection is low, or hard to estimate, factors other than the law are likely to be more important determinants of behaviour (7).

In mostly private behaviours such as illegal drug use, the likelihood of detection is extremely low. For cannabis, the likelihood of someone being apprehended for using the drug in any one year is between 1 and 3 % (9). Given the number of episodes of use of the typical cannabis user in one year, the risk per episode of use is probably less than 0.01% (7). It is thus unsurprising that research shows there is little relationship between rates of cannabis and whether *strict criminal penalties* or *civil penalties* apply. Those who believe that more law enforcement is the way to deter cannabis use, need to ask themselves what level of policing, and the associated public expenditure required, could get the detection rate per episode above the current 1% to a level where detection was 'certain'.

Studies of the impacts of reducing penalties on rates of drug use

Policy impact research on 'natural experiments' where penalties have been reduced for minor cannabis offences does not show that such measures result in higher rates of cannabis use in the general community. Eleven US States which 'decriminalised' cannabis during the 1970's. Research

showed that those states which removed criminal penalties did not experience greater increases in cannabis use among adults or adolescents, nor more favourable attitudes towards the drug, than those states which maintained strict prohibition against cannabis possession and use (e.g. 10). Research on the impact of the South Australian Cannabis Expiation Notice system concluded that rates of recent (weekly) use, and use among young adults and school students had not increased at a greater rate in South Australia compared to other states which had not liberalised their laws (11). The experience of the introduction of a prohibition with civil penalty scheme in WA in 2004, which was overturned in 2011 after a change of government, suggested that the scheme did not result in increased cannabis use in that state among the general public, regular cannabis users, nor school students, nor did it result in a 'softening' of attitudes to cannabis. Indeed the prevalence of cannabis in WA had been declining since the late 1990s as it has done elsewhere in Australia and there was a growing recognition of the health harms associated with the drug, particularly harms associated with heavy and early use (12). Beyond impacts on use and attitudes, a variety of studies have shown that applying civil penalties for cannabis use results in savings to the criminal justice system, with the size of the savings depending on the size of the jurisdiction and the way the scheme is implemented (13-15).

A cross-national comparison between the Netherlands, other European states and the USA, showed that despite the introduction of *de facto* legalisation of cannabis through the cannabis *coffeeshops*, the Dutch did not have higher rates of cannabis use than these other countries (16). Separate to the legal changes, an increase in commercial access to cannabis, associated with the growth in numbers of cannabis *coffeeshops* from 1992 to 1996, may have resulted in growth in the cannabis using population, including young people (16-19) but this growth has put the rates of cannabis use no higher than that in the USA (16) and declined when restrictions on the number of *coffeeshops* and the age of patrons were introduced (20). In 2004 the UK government reduced penalties for cannabis use downgrading it from a Class B to a Class C drug. Cannabis use among adults and children continued to decline after the change (21).

In The Czech Republic, cannabis and other drugs were criminalised in 1998. A two year evaluation found that, while the implementation of the laws was far from universal, there was no evidence that it resulted in any reduction of drug use, but there were clear and substantial economic costs to the state (22). Liberalisation of drug laws in Portugal occurred in 2001. Under these reforms drug acquisition and possession became an administrative offence, but drug supply remained a criminal offence. The laws apply to use/possession of up to 10 days worth of all illicit drugs. Sanctions for the new offences are applied by specially constituted Commissions for the Dissuasion of Drug Addiction (CDTs). Their goal is to dissuade drug use and refer drug dependent people into treatment, whilst those assessed as being non-dependent or functioning users may have their proceedings suspended, be required to attend a police station, be referred for psychological or educational intervention, or receive a fine (23). In some ways this is the converse to the Australian *prohibition with cautioning or diversion* schemes which limit cautions and interventions to first, second or third offenders. In the Portuguese system it is the entrenched drug offenders who are referred for treatment and the less entrenched receive civil penalties. However, Whilst there has been conflicting claims that the Portuguese reforms have been a 'resounding success' or a 'disastrous failure', it is most likely neither are fair representations(24). Limitations with available data, means it has not been possible to definitively gauge the impacts of these changes (25), however, the Portuguese reforms do not appear to have led to a substantial increase in drug use or related harms (23).

Another interesting alternative model are the *cannabis social clubs* which originated in Spain where, due to a quirk of law, cannabis possession and use by adults in private is not illegal, but supply for profit is criminalised. Under this arrangement a collective of cannabis users band together to grow cannabis for their own consumption (and in some cases for gifting to medical users), but not for sale outside the closed system of the club. The clubs monitor member's health, and address the supply issue whilst aiming to mitigate against commercialism. However the Spanish clubs are not subject to government regulation and have grown in number to around 300 (26). Furthermore, there are reports of organised commercial distributors setting up new 'clubs' as a front for cannabis supply, which may undermine political and public support and the integrity of the original clubs (27). However, in Spain and elsewhere, proposals are being drafted to develop regulations to support the integrity of the cannabis clubs as originally developed. It will be interesting to see how this approach develops.

Impacts of being apprehended for a minor drug offence

In a comparison of the social impacts of a conviction under strict cannabis prohibition in place at the time in Western Australia, with that of an infringement notice under the CEN system in South Australia the experiences of 68 matched first-time apprehended cannabis users from each of these states were examined (28, 29). Importantly, neither the infringement notice nor the cannabis conviction appeared to have much impact on subsequent cannabis use. Rates of post-apprehension cannabis use were highly correlated with rates of use prior to apprehension, consistent with earlier Canadian research (e.g. 30, 31). However, those in the WA convicted group were significantly more likely than the South Australian infringement notice group to report: adverse employment consequences; further contact with the criminal justice system; relationship problems, and accommodation difficulties that could be attributed to their apprehension for the cannabis offence. Cannabis users arrested and convicted for the first time in Western Australia were more likely to report negative attitudes to police and the justice system and be less trusting of police than their South Australian counterparts who received an infringement notice.(see 7).

Impact of the international drug treaties

Australia, like almost all countries, is signatory to the 1961 Single Convention on Drugs and the 1988 Vienna Convention, which together require what are defined as 'narcotic' drugs (effectively all illicit drugs including cannabis) to be treated as punishable offences under signature countries domestic law, except for medical and scientific purposes. While interpretations of the drug conventions differ, most commentators agree that the conventions require trafficking offences to be criminal, but that cultivation and possession for personal use must be punishable, but not necessarily criminal (32, 33). Beyond this, whilst it is clear that the treaties act upon national laws of signatory countries, the extent to which they are binding at the sub-national or state level is unclear.

Consistent the above, there is experience showing that *prohibition with civil penalty systems* like those in place for cannabis in eleven US states and SA, the ACT and NT are not in breach of the treaties. Also consistent with the treaties are the *prohibition with cautioning schemes* that operate in the other Australian jurisdictions and the *de facto* legalisation or *prohibition with an expediency principle* schemes that operate for cannabis in Belgium, Germany and the Netherlands. The latter are consistent because the drug offences remain illegal on the statutes, even though cases involving

defined small quantities are not investigated or prosecuted by police. The North American *medical marijuana* initiatives whilst *de jure* are permitted under the treaties as they invoke the 'except for medical treatment' clause.

However, clearly the international drug conventions have impeded countries from going beyond *prohibition* options to trial and evaluate more comprehensive legislative reforms. This is a significant barrier to accruing evidence to inform future drug policy reform (34).

Where more evidence is needed

There is no doubt that all drug law reform options have their strengths and weaknesses (See 33, 35). Whilst the evidence for the minimal impact on rates of use moving from *total prohibition with strict criminal penalties* to *prohibition with civil penalties* is relatively strong, the evidence for the impacts of *prohibition with cautioning schemes* on populations or individuals drug use is relatively scant (e.g. 36). Although politically popular and often supported by the drug treatment sector for who such schemes provide often needed financial support from government, evidence of their effectiveness is yet to accrue. Such cautioning schemes are far cheaper than incarceration, give offenders a chance to address their problems and avoid criminalisation, but there are concerns that tying up treatment places with minor drug offenders may not be the best use of this valuable resource. Questions also remain whether most of those diverted engage effectively with treatment or may be more willing to do so in future. Also, given that only about 3% of cannabis users have contact with the criminal justice system in any one year, it is questionable whether a system built around cannabis users is ideal, even if we assumed that the majority of those apprehended had significant cannabis use problems.

Whilst cogent arguments can be mounted in favour of legalisation of drugs under a strictly regulated model (e.g. 37) many public health experts have serious concerns about putting currently illegal drugs like cannabis in the hands of commercial interests and replicating the problems of promotion and high rates of use and harm that we have seen with alcohol and tobacco (e.g. 38). A major issue here is that evidence on which to base decisions about likely impacts of regulatory or commercial schemes is lacking (35) and whilst attempts to estimate the impacts of such changes suggest rates of use will probably increase (39), the magnitude of such an increase and the impact on drug related harm are contested (40-42).

A practical way forward

Building on the successful Australian approach

As argued above, evidence is only part of the drug policy process. Yet sensible drug policy is not harmed by accruing new evidence. The Australian approach of cautious and evaluated reforms has, to date, contributed to accruing valuable evidence on which to base further reforms. As Australia is a federation and drug law is state law this has enabled diversity on drug laws to co-exist which has made this country an ideal laboratory for investigating and comparing different approaches to drug policy.

Expanding the evidence base

This is an approach which we should advocate for at the international level. In many countries the problems with the application of *prohibition with strict criminal penalties* to minor drug possession and use offences is apparent. Yet although application of *civil penalties* and *cautioning schemes* have mitigated some of these, and reduced the criminal justice costs, drug supply is left in the hands of the illicit market and significant number of citizens still get a criminal record as a result of using these drugs. Similarly the *de facto legalisation* schemes in countries like the Netherlands and the *medical cannabis* schemes in place in North America are compromised by 'workarounds' which have been made to ensure their survival under the constraints of the international drug treaties.

International treaties

However, Australia and other countries capacity to conduct carefully conducted and evaluated policy experiments beyond *prohibition* is limited by the current provisions of the international drug conventions. Elsewhere it has been suggested how the international treaties could be modified to allow carefully evaluated drug policy reform trials while allowing states to operate under the current treaties, if that is what they prefer (33). Australia, with its history of more than two decades of cautious and evaluated drug policy reforms, is ideally situated to advocate for this approach at the international level.

Helpful public debate

Public debate on drug policy is often polarised and this is fuelled by entrenched positions of some of the protagonists, a polarisation which is frequently exacerbated by the media's framing of the issues. In this context public discourse about drug policy reform can be beneficial if it leads to an engaged and informed consideration of a range of policy options by the public and policy makers alike. However, if the debate is going to be characterised by more light and less heat, then terminology needs to be clear. Using unclear terms like 'decriminalisation' will confuse the public debate, will be taken by many to mean 'legalisation' in a commercial model, and will lead politicians, who must be engaged in consideration of reform options, to run from the public debate.

Engaging with policy makers

Having a framework for the policy change process can assist in engaging political and policy stakeholders in the policy process. Kingdon's Multiple Streams model (43) has been useful in informing and describing drug policy reforms in Australia (44). In a nutshell Kingdon argues that windows of opportunity for policy change open when three streams come together: an understanding that there is a *problem* which needs to be addressed by a policy response, events in the *political* stream which allow political engagement with an issue, and emergence of economically feasible and politically viable *policy* responses. Whilst all of these factors can be canvassed in the public debate, engagement with active political and policy stakeholders often needs to be done out of the public spotlight within a trusting relationship where there is space to consider the evidence and craft viable political and policy positions. Without this kind of engagement it is likely that public discourse about drug policy will remain a talk fest and won't result in real further drug policy reform.

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