

Decriminalisation of illegal drugs: what it means, why are we talking about it and how does it work?

This report has been developed by the Alcohol and Drug Foundation to provide information on decriminalisation.

Key points:

- Decriminalisation is the removal of criminal penalties for the possession of a small amount of a drug and personal use.
- Under decriminalisation civil or administrative penalties may be introduced instead.
- Under decriminalisation drug possession and use remain illegal.
- Decriminalisation does not appear to increase rates of drug use.
- A policy of decriminalisation needs to be considered alongside investment in treatment services to be successful.

Many Australians have heard the term decriminalisation without it being clearly defined. Whether it's a chat over coffee with friends, a disagreement at the family dinner table during holidays, or a heated policy debate, it's critical that everyone understands what decriminalisation means to have an informed discussion about it.

This paper outlines what decriminalisation is, its rationale, how it differs from legalisation and some key considerations about decriminalisation models.

Overview: Decriminalisation vs legalisation

Decriminalisation

When drug use and possession are decriminalised, criminal charges are not applied.

Criminal charges are those brought against a person by police and legal practitioners on behalf of the government. They are managed through the court system.* If a person is found guilty and convicted, punishment may include jail time. The person will also have a criminal record.

A criminal conviction can result in the breakdown of personal relationships and close off future employment, housing and travel options. For example, future employers may reject a job application because of a criminal record. A person with a criminal record may not be granted a visa to visit other countries. The stigma of a criminal record may cause mental anguish. Having a criminal record can severely impact on someone's life.

Decriminalisation may replace criminal penalties with civil penalties. These could include referral to an education or treatment program, or a fine. Civil cases do not have to go through the

*In Victoria, records of court appearances are kept regardless of the outcome. However, Victoria Police does not typically share criminal records with employers if the person was found not guilty, or they went into a diversion program and abided by the conditions. Victoria Legal Aid: <https://www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records>

court system and may be dealt with by tribunals.¹ While records may be kept by a tribunal, these are not criminal records and will not affect employment, housing, or travel opportunities. The key difference to a criminal model is that in a decriminalised model, while penalties still apply for use and possession of drugs, they are no longer criminal charges.

Decriminalisation is not legalisation.

If drug possession and personal use are decriminalised, it is still illegal to possess and use drugs. Selling and manufacturing drugs still carry criminal penalties.

Put simply, if a drug or drug use is decriminalised, people are not criminalised for personal use.

The rationale behind decriminalisation is to treat drug use and dependence as a health and social issue, not a criminal justice or moral issue. The aim of this model is to improve health and social outcomes.

Treating drug use as a health and social issue can reduce stigma and increase the likelihood that a person will seek help when they need it.² A person may also avoid negative social outcomes – such as loss of employment or housing – that can result from a criminal record or engagement with the criminal justice system.

Decriminalisation may also reduce strain on the criminal justice system by reducing the burden on the court system; time spent by police and legal practitioners on court matters; and costs of imprisonment.³⁻⁵

Decriminalisation, however, is not a single solution. Advocates of decriminalisation emphasise that success depends on investments in drug treatment and support services. This means increasing the number of spaces available in treatment services like detoxification units, therapeutic communities and pharmacotherapy treatment (e.g. methadone), as well as reducing wait times for those services.⁴



Additionally, there are several drug-related health risks that are not addressed by decriminalisation. More details about decriminalisation are provided below.

Legalisation

Drug legalisation removes all penalties for possession and personal use of a drug. Regulations are typically established to manage where and how the legal drug can be produced, sold, and consumed. Criminal or civil penalties may apply if production, sale or consumption occur outside of regulations. An example of a legalised drug is alcohol.

Alcohol is a legal drug in Australia.

Alcohol production, distribution and consumption are subject to regulations in Australia. For example, there are

quality controls placed on its production, businesses must be licenced to sell it, hours of sale are restricted and there are minimum age laws and secondary supply laws to restrict sale and supply of alcohol to young people.

Despite these restrictions, alcohol causes significant harm to Australians. Every day, 15 Australians die due to alcohol-attributable disease or injuries and 430 Australians are hospitalised because of alcohol use.⁶ Alcohol is the most common drug that Australians seek treatment for,⁷ and alcohol-related harms cost Australian society an estimated \$15.3 billion a year.⁸

It's important to recognise that legalisation does not solve all the problems associated with a drug's use and people's experience of potential adverse impacts of that drug.

In summary

Decriminalisation	Legalisation
<ul style="list-style-type: none"> • No criminal penalties • May be civil or administrative penalties • Drug possession and use are illegal • Does not change production, distribution or supply of drugs – still through black market 	<ul style="list-style-type: none"> • No penalties if regulations are complied with • May be criminal penalties if regulations aren't followed • Drug possession and use are legal • Regulations control production, distribution and supply

Decriminalisation in detail

It's not a single solution

Decriminalisation is not recommended as a stand-alone policy. The Federal Parliamentary Joint Committee on Law Enforcement noted that implementing decriminalisation as policy would need to happen alongside investment in treatment services. These investments need to ensure that people who use drugs have a place in treatment available for them immediately upon needing it.⁹

Decriminalisation removes the criminal penalties from drug use and possession so that a person who uses drugs is not, by definition, a criminal. This can help define drug use as a health and social issue, and reduce the damaging stigma attached to people who use drugs. Reducing stigma, while expanding access to treatment services, could significantly improve health outcomes for people who use drugs. However, the inherent risks of drug use will not be lessened.

Risks of drug use

There is no safe level of drug use. Use of any drug always carries some risk.

It's important to remember that decriminalisation does not change the supply of drugs – all illegal drugs must still be sourced through the black market. This means drugs will remain of unknown strength and purity, and potentially be cut with various fillers. Also, it may not be the drug that it was sold as (e.g. a new psychoactive substance being sold as MDMA or LSD).

Additional health risks of drug use may include the risk of dependence, potential for negative mental health impacts, risk of experiencing a bad reaction, risk of

overdose – including fatal overdose – as well as the risk of blood borne viruses for people who inject drugs.

Initiatives to prevent drug use, minimise the harms associated with drug use, and provide support for people who experience dependence, are also necessary to expand or implement alongside decriminalisation.

A further issue is the concern that decriminalisation may lead to increased drug use. However, this concern has not been supported by evidence from Australia and overseas.⁹⁻¹¹ Portugal, which decriminalised all drugs in 2001, does not have higher rates of drug use than neighbouring countries.¹² One study in 2017 suggested that rates of drug use had fallen lower than the European average.¹³

Decriminalisation in Australia

Decriminalisation of drug use and possession is not new in Australia. South Australia (SA) was a world leader when it decriminalised cannabis in 1987, introducing an option to pay a fine instead of receiving a criminal charge.¹¹ An analysis of cannabis use in SA between 1985 and 1993 found that the decriminalisation of cannabis did not appear to significantly increase rates of cannabis use relative to other states.¹¹

Currently, all Australian states and territories practice some form of decriminalisation.¹⁴ Significant differences exist between the various state models – for example, the quantity of a drug considered to be for personal use versus what would be considered as a trafficable amount.¹⁵

Research centres such as the National Drug and Alcohol Research Centre (NDARC), organisations such as the Australian Institute of Criminology (AIC), as well as various governmental committees, commissions, and inquiries have explored the viability of decriminalisation as a policy in Australia. The key themes of these considerations are highlighted below.

Different models

There are two primary types of decriminalisation.¹⁴

In law (de jure)

By law, criminal penalties for possession and personal use are removed and may be replaced with civil or administrative penalties, such as a fine, or a referral to an education or treatment program. Criminal penalties may still apply if the person does not comply with the civil or administrative penalties.

As of 2019, three Australian states (Northern Territory, Australian Capital Territory and South Australia) have in law decriminalisation for cannabis.

In practice (de facto)

In practice, possession and personal use remain a criminal offence. However, police may use their discretion (e.g. be provided with police guidelines) on enforcement. The courts may also be able to offer alternative punishments to prison if certain eligibility criteria are met by the offender. For example, a first-time offender may be referred to an education program rather than receiving a criminal conviction. Criminal penalties may still apply if the person does not attend.

The key difference is the legal change.

De facto decriminalisation means that the law remains the same, but some cases can receive special treatment if the police exercise their discretion and/or the eligibility criteria are met.

As of 2019, all Australian states have some type of in practice (de facto) decriminalisation.

In Victoria, the possession and use of cannabis and other illicit drugs is in practice (de facto) decriminalised under the Cannabis Cautioning Scheme and the Drug Diversion Program.¹⁶ These discretionary programs are laid out in the Victorian Police Manual instead of legislation. A person can only be cautioned or diverted twice under these schemes after which they are no longer eligible.**

Under the Cannabis Cautioning Scheme, a person found with less than 50 grams receives a caution and information on a free educational session they can choose to attend.¹⁶ Under the Drug Diversion Program, people with small amounts of non-cannabis illegal drugs are required to attend an assessment and a minimum of one treatment session.¹⁶

Other considerations

In exploring models for drug decriminalisation, leading researchers have pointed to four key issues for consideration. These are detailed below.¹⁷

DETERMINING PERSONAL USE

In Australia, police rely on set quantities of drugs (a threshold quantity) to decide if the charge is for 'personal use' or considered 'trafficking'. These quantities can be different depending on the state or territory, and the type of drug.¹⁵

**More information about diversion programs in Australia can be found in the Law Reform, Road and Community Safety Committee's 'Inquiry into drug law reform', and the Drug Policy Modelling Program's 'Decriminalisation of drug use and possession in Australia – A briefing note' publications.

The purpose of setting threshold quantities is to differentiate people trafficking drugs from people who use drugs, so that harsher trafficking penalties can be applied. However, leading researchers in this field have challenged their accuracy compared to how much a person who uses drugs would actually use or purchase at a given time.¹⁸

For example, in New South Wales the trafficable threshold quantity for MDMA is 0.75 grams. Regular users report using around 0.58 grams - 0.73 grams of MDMA (approximately 2 pills) in a regular session.¹⁵ Therefore, when purchasing drugs, or before a heavy session of drug use, people may exceed the threshold of 0.75 grams with just the drugs for their personal use.

Additionally, in all states except Queensland, trafficking thresholds are tied to 'deemed supply' laws – that is, a person is assumed (deemed) to be supplying drugs based solely on the quantity of a drug in their possession, even in the absence of other evidence (e.g. scales, small plastic bags for packing drugs, phone and text records).¹⁵ ¹⁸This is misaligned with legislation in many countries internationally, where the amount of a drug can only indicate potential trafficking.¹⁸ Surrounding circumstances – such as the presence of scales or pre-packaged drugs – must also be evident to support trafficking charges.¹⁸

These laws also reverse the burden of proof onto the defendant, so they are required to prove that they are not guilty of supplying drugs.^{15, 18} The UK rejected deemed supply laws in part because they “would always be arbitrary and unjust to some drug users”.¹⁸

The concern is that a person who uses drugs may be wrongly convicted of trafficking and face the significantly higher penalties associated with that charge.

An AIC report examines if threshold quantities work to separate people who use drugs from people who traffic drugs.¹⁵ The report looks at how much of a drug a person might use in a session, and the amount they might purchase for personal use at a given time.¹⁵ While findings were complex and varied between states, they established that under some circumstances, specifically when people were using or buying at their 'highest doses', many people did exceed the threshold quantities for trafficking.¹⁵

The paper further suggests that some people are at increased risk for exceeding thresholds depending on:

- the state they live in (if the threshold quantities are low)
- the type of drug they use (thresholds for cannabis are typically higher than other drugs, so people are less likely to exceed them)
- if they're a person who regularly uses drugs
- if they're a person who is a heavy consumer of drugs.¹⁵

These findings highlight how critical it is to establish an evidence-based approach to separating people who use drugs from people who traffic drugs. This can help ensure that a decriminalisation model doesn't risk causing significant unintentional harm to some people who use drugs.

DETERMINING ACTIONS TAKEN

If a person is found possessing or using a drug, there are options for what type of response is triggered. Different responses may be appropriate depending on the circumstances, such as if it's the first event for that individual.

Options include (but are not limited to):

- caution or warning
- fine
- community service order
- referral to:
 - education program
 - brief intervention
 - treatment program.

When determining actions taken, it's important to recognise the different impacts that options can have on an individual depending on their socio-economic or other situation.

For example, a fine of a few hundred dollars can be an annoyance to an affluent person, but a significant financial blow to a person living pay cheque to pay cheque.

ELIGIBILITY CRITERIA

Current drug diversion programs in Australia typically have eligibility criteria attached to them which determine who can be considered for the programs. For instance, whether the offence in question is the first or second offence.¹⁴ It's important to consider that people with multiple offenses may be in greatest need of support. They may be young people who have had prior engagement with the criminal justice system, or have a range of other issues.^{14, 19}

For example, an AIC report identified that people who reoffended after being diverted for cannabis offenses are more likely to “have significantly more complex needs (i.e. they are more likely to be dependent, unemployed, less educated and have more health problems)”²⁰ than people who didn't reoffend.

As with determining actions taken, eligibility criteria should be considered alongside socio-economic differences. For example, a person experiencing homelessness may be more likely to be found using or possessing drugs because that use is by necessity public. That person may then have multiple offences and become ineligible for a diversion program.

Eligibility criteria can have a disproportionate impact on people with complex needs. This should be taken into account when considering potential models for decriminalisation.



DETERMINING NON-COMPLIANCE MEASURES

If a person does not comply with the action required of them (e.g. paying a fine, attending an education session) this may trigger a further response. Currently, non-compliance in Australia might result in criminal charges.¹⁴

It's important that the appropriateness of criminal charges is considered alongside what the person is required to do (e.g. undertake an education course). There may be barriers to compliance that aren't immediately visible, such as socio-economic or cultural barriers.

For example, a person may be facing criminal charges because they didn't pay their fine on time. They may have been unable to pay the fine because of their economic circumstances and will be criminally charged where an affluent person could have paid off the fine and avoided the charges.

Or a person may not have attended an educational session because they would feel culturally unsafe in that environment, and no culturally appropriate option was available.

Careful consideration of these potential barriers can avoid a disproportionate negative impact on people who may be in the most need of support.

International models

Differences in culture, the availability of treatment and support services for drug-related issues, problems with accurate and consistent data collection, and variation between models of decriminalisation make evaluative comparisons between countries challenging.²¹ Similarly, attempting to 'transplant' any model wholesale to another country should involve rigorous consideration of the differences between the nations, and how the policy may need to be adapted for a new location.

Internationally, many countries including Denmark, France, Germany, and Norway have adopted some form of decriminalisation.⁹ The most commonly discussed example is that of Portugal, which has received considerable international attention – Australia's Joint Committee on Law Enforcement visited Portugal in 2017 to investigate its model.⁹

A brief outline of the approach Portugal has adopted is provided here to illustrate one frequently cited model.

PORTUGAL

All drugs were decriminalised in 2001 on the advice of a multi-disciplinary expert committee. They recommended that the nation also focus efforts on prevention, education, harm reduction programs and expanding access to treatment as well as other support networks (e.g. connections to family).⁹

Trafficking remains a criminal offence. Personal use is distinguished from trafficking by a threshold quantity of a drug, set at approximately 10 days' worth of personal supply.

In the Portuguese model, a person found possessing or using drugs is assessed by the Commission for the Dissuasion of Drug Addiction (CDT).

People considered to be experiencing a dependence are referred to treatment. People who are not experiencing a dependence have other penalty options, such as referral to an educational intervention or paying a fine. The emphasis within this model is on drug use as a health and social issue and referring a person to interventions appropriate to their circumstances (e.g. if they're experiencing a dependence).

Conflicting claims have been made about the outcomes of the Portuguese model. These depend on what datasets were used and which indicators considered. For example, if researchers chose to consider indicators of either the 'lifetime use' of drugs or the 'problematic use' of drugs.¹²

A study analysing these conflicting claims determines that "while general population trends in Portugal suggest slight increases in lifetime and recent illicit drug use,

studies of young and problematic drug users suggest that use has declined".¹²

The Federal Parliamentary Joint Committee on Law Enforcement noted in its final report that decriminalisation cannot account for all positive improvements in health outcomes because of the simultaneous investment in treatment services. However, they further noted that decriminalisation may enable people who use drugs to seek treatment without fearing potential criminal penalties.⁹ Reports indicate that people in pharmacotherapy (substitution) treatments increased by 147% between 1999 and 2003 – from 6,040 people to 14,877 people.²²

Pressure on the criminal justice system appears reduced as fewer people are charged with drug offences and enter prison. By 2013 only 24% of prisoners were charged with drug offences compared to 44% in 1999.¹⁶

It is critical that the example of Portugal be examined in the full context of investment in treatment and recovery support. Perhaps the most important message from Portugal is that:

"Decriminalization is not a silver bullet. If you decriminalize and do nothing else, things will get worse. The most important part was making treatment available to everybody who needed it for free. This was our first goal." - João Castel-Branco Goulão, Portugal's National Coordinator on Drugs, Drug Addiction and the Harmful Use of Alcohol General-Director of SICAD.

If you, a family member or friend have concerns around drug or alcohol use, please call the free DrugInfo line on **1300 85 85 84**

Further reading on decriminalisation:

Joint Committee on Law Enforcement. Inquiry into crystal methamphetamine (ice). Final Report: Chapter 6.

Drug Policy Modelling Program, Social Policy Research Centre, UNSW Sydney. Bulletin No. 26: Models for the decriminalisation of the personal use and possession of drugs.

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