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Bulletin No. 26: Models for the decriminalisation of the personal use and possesion of drugs

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Background and aims

There have been, and continue to be, many calls to reform the drug laws in Australia. Some of the reform proposals concern the legalisation of currently illicit drugs, and the establishment of a regulated market. Other calls are for the removal of criminal penalties for personal use and possession of drugs (without creating a legal regulated market). In the latter, supply of illicit drugs remains a criminal offence, but illicit drug use itself or possession of quantities of illicit drugs for personal use is no longer a criminal offence. These latter reform options are referred to as "decriminalisation".

There are a number of different models of decriminalisation, and indeed, when there are calls for 'decriminalisation' there might not be a shared understanding of what that means, and which model is under consideration.

The aim of this document is to provide a relatively simple summary of the various models for the decriminalisation of personal use/possession of illicit drugs. We take current Australian laws as our starting point, and describe four possible models with reference to Australia. Nonetheless this work is also relevant for other countries.

Our hope is that this paper provides a basis for generating a shared understanding of the key features of different decriminalisation models; enables robust debate; and operates as a decision-support tool for those considering decriminalisation.

Features of decriminalisation under consideration

The law and the various aspects of decriminalisation are complicated. In this document, the features of those laws which we consider include:

- The role of threshold quantities (TQ) of illicit drugs
- The actions taken (e.g. fines, education, therapeutic response and so on)

DPMP Drug Policy Modelling Program
SPRC Social Policy Research Centre
NDARC National Drug & Alcohol Research Centre

- Eligibility criteria
- Non-compliance measures

Threshold quantities (that is the weight/purity of drugs possessed) are used in Australia to define the difference between a use/possession offence and a supply offence. Many countries do not have TQ (including Uruguay, Denmark, Spain). This means that in those countries without TQ, the personal use offence exists only where evidence of supply (such as scales, packed quantities and cash) is not found.

The four models outlined below do not cover every feature of the laws. The models do not yet consider "social supply", i.e. without money changing hands, nor how drug using equipment is treated. They also do not cover personal cultivation (e.g. growing plants). Not only is the law itself important, but also the operational procedures (for example, the systems for recording people and offences; the ways in which fines can be paid; and where the actions take place). These are not covered in the models below, despite our recognition that these can have potential impacts on the scheme. It is hoped that these elements can be addressed with further refinement of the models.

The models described here apply to any/all illicit drugs – cannabis, heroin, cocaine, methamphetamine, ecstasy and so on.

Four models

The diagram below provides four models for decriminalisation of the personal use/possession of an illicit drug.

Model 1: Removal of use/possess from criminal law irrespective of amount possessed ("no TQ model")

Under this model, the offence of use/possess is removed from the criminal law (offences that remain include trafficking and other supply offences) and no threshold quantity applies as supply offences are not defined by quantity (rather they are defined by evidence of supply).

Actions: Model 1 would most likely have no actions associated with it. Drugs for personal use are not in criminal law and police do not have authority to search. However it is also possible that Model 1 contains civil sanctions (consistent with it being classed as a civil offence). If it is classed as a civil offence in Model 1 there are options for a fine; a therapeutic response; and/or a community service order. Furthermore, if the civil offence option is chosen, then there is also the need to consider whether there are measures for non-compliance associated with these actions, and if so, the nature of those non-compliance measures (noting that under Model 1 illicit drug use/possession is no longer a criminal offence, therefore non-compliance measures cannot refer to the original offence). It is assumed that drugs would not be confiscated as it is not a criminal offence in Model 1, although this remains possible under Model 1 (akin to civil asset forfeiture).

Example: This model currently exists in Uruguay for heroin.

Law reform challenges: This model would be very difficult to implement in Australia, as Australia has relied on TQs to define use/possess offences to date, and so would require extensive law reform concerned with the removal of TQs.

Model 2: Removal of use/possess from the criminal law up to a certain threshold amount ("TQ only model")

Model 2 removes use/possess from criminal law up to a certain amount (TQ), with no other eligibility criteria. i.e. anyone possessing drugs in a small quantity (as defined by the TQ) is automatically not charged with a criminal offence (and if the amount exceeds the TQ, the charge is supply/deemed supply). The threshold quantity (i.e. amount of each drug) for which a decriminalisation option applies needs to be defined.

Actions: There are two possible actions if illicit drugs (under the TQ amount) are detected: no action at all; or a civil sanction. Under civil sanctions there are options for a fine; a therapeutic response; and/or a community service order. If the civil offence option is chosen, then there is also the need to consider whether there are measures for non-compliance, and if so, the nature of those non-compliance measures (non-compliance measures can pertain only to non-compliance with the penalty, as there is no criminal offence). Two further considerations for Model 2 are whether the drug is confiscated or not; and whether a civil/administrative offence is recorded or not (these are not shown in the diagram).

Example: Portugal and Italy.

Law reform challenges: Establishing the most appropriate TQs are a challenge for this model.[1]

Model 3: Removal of criminal penalties for eligible people/offences up to a certain threshold amount ("eligibility model")

Model 3 removes use/possess from criminal law only for those people, and/or offences where eligibility criteria are met, including threshold quantity PLUS other criteria. This means the offence is still retained in criminal law for some people and/or offences which do not meet eligibility criteria. The threshold quantity (i.e. amount of each drug) for which a decriminalisation option applies needs to be specified but more particularly for Model 3, the eligibility criteria must be determined. These may include: prior offending (for example, if more than 3 prior drug offences, then decriminalisation is not an option); concurrent offending (i.e. drug use/possess offence concurrent with another offence, e.g. driving unlicensed); and/or requirements to admit the offence.

Actions: There is a choice of the action to be taken for those who meet the eligibility criteria (and are therefore not charged with a criminal offence). There are four possible options for action: no action; civil/admin offence; caution; caution plus education/ information/ assessment/ treatment. And once the option is chosen, there is then the further decisions regarding measures for non-compliance. Unlike Models 1 and 2, non-compliance could result in a return to the original use/possess offence (as it still exists in law for those who do not meet eligibility criteria). Two further considerations for Model 3 are whether the drug is confiscated or not; and whether an offence is recorded or not (especially if option of 'no action' is taken).

Example: South Australia's CEN scheme (as this is open only to people aged 18 and over who possess under a specified amount (≤100g) and excludes use/possession in a public setting).

1 In Portugal, the TQ is defined as possession of up to ten days' worth of drugs = decriminalised (possession of more than ten days = criminalised). In Australia, existing TQ's that define quantities above personal use/possess could be used, although these should be reviewed for their alignment with current illicit drug usage patterns and their appropriateness within a decriminalisation approach. See Hughes, C., Ritter, A., Cowdery, N. and Phillips, B. (2014). Australian threshold quantities for 'drug trafficking': Are they placing drug users at risk of unjustified sanction? *Trends and Issues in Crime and Criminal Justice no 467*, Canberra: Australian Institute of Criminology; Hughes, C., Ritter, A., Cowdery, N. and Phillips, B. (2014). *Evaluating Australian drug trafficking thresholds: Proportionate, equitable and just?* Canberra: Criminology Research Grants.

Law reform challenges: Choosing the eligibility criteria.

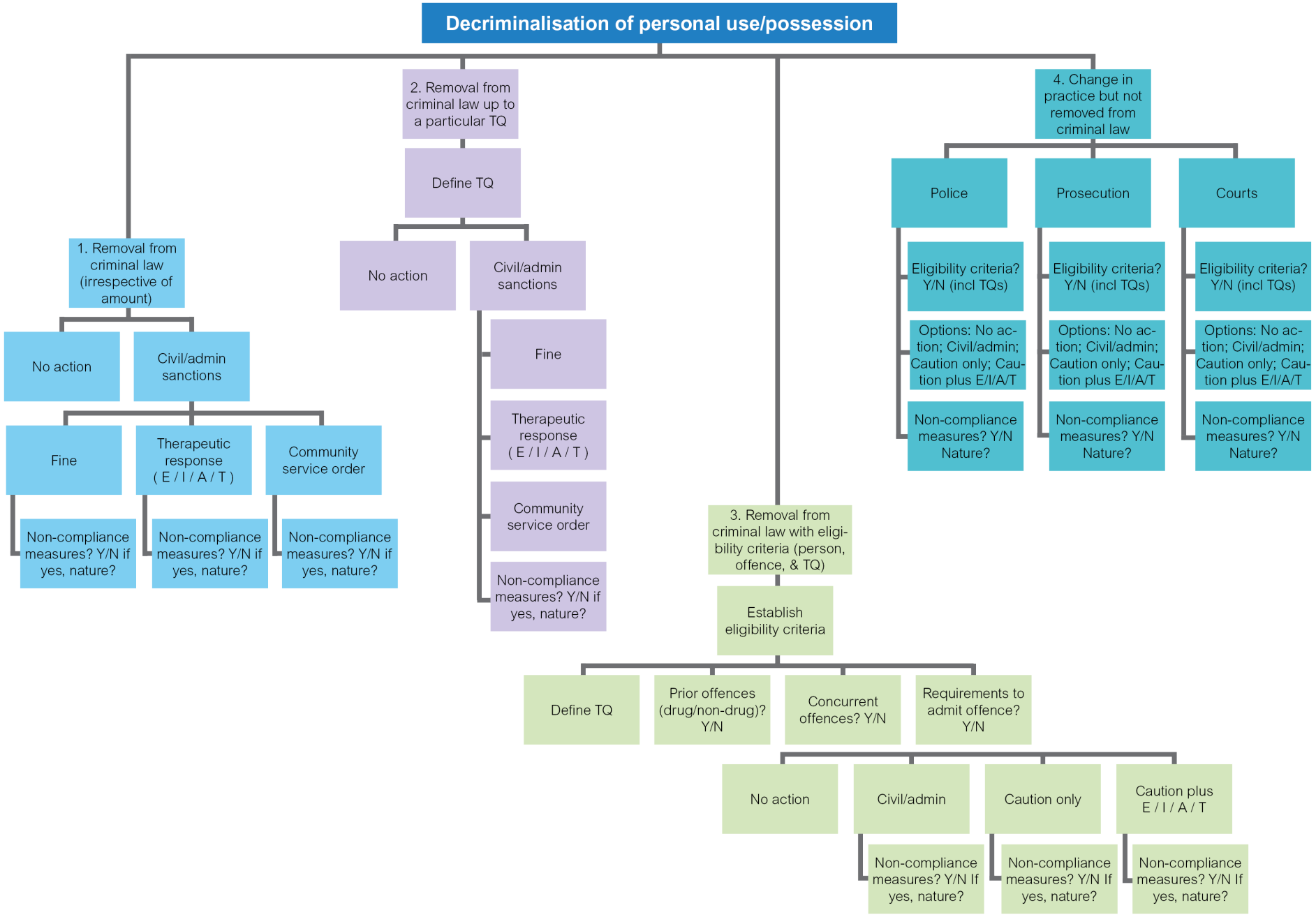
Model 4: Change in practice but not removed from criminal law ("de facto" model)

Model 4 is the prevailing version of decriminalisation in Australia, and varies substantially by state/territory. It represents a change in practice – by police, prosecutors and/or courts, without a change to the criminal law status of drug use/possession. The threshold quantities and eligibility criteria need to be established.

Actions: Model 4 can have options of no action; civil offence; caution; or caution plus education/info/assessment/treatment. A further consideration for Model 4 is whether the change in practice is effected within policies, procedures or guidelines (that is, what is the level of discretion available, and for which bodies – police, prosecutors, courts).

Example: NSW Cannabis Caution Scheme.

Law reform challenges: Model 4 does not represent law reform, rather is limited to administrative or procedural reform.


Decriminalisation of personal use/possession
1. Removal from criminal law (irrespective of amount)
No action
Civil/admin sanctions
Fine
Therapeutic response (E / I / A / T)
Community service order
Non-compliance measures? Y/N if yes, nature?
Non-compliance measures? Y/N if yes, nature?
Non-compliance measures? Y/N if yes, nature?
2. Removal from criminal law up to a particular TQ
Define TQ
No action
Civil/admin sanctions
Fine
Therapeutic response (E / I / A / T)
Community service order
Non-compliance measures? Y/N if yes, nature?
3. Removal from criminal law with eligibility criteria (person, offence, & TQ)
Establish eligibility criteria
Define TQ
Prior offences (drug/non-drug)? Y/N
Concurrent offences? Y/N
Requirements to admit offence? Y/N
No action
Civil/admin
Caution only
Caution plus E / I / A / T
Non-compliance measures? Y/N If yes, nature?
Non-compliance measures? Y/N If yes, nature?
Non-compliance measures? Y/N If yes, nature?
4. Change in practice but not removed from criminal law
Police
Prosecution
Courts
Eligibility criteria? Y/N (incl TQs)
Eligibility criteria? Y/N (incl TQs)
Eligibility criteria? Y/N (incl TQs)
Options: No action; Civil/admin; Caution only; Caution plus E/I/A/T
Options: No action; Civil/admin; Caution only; Caution plus E/I/A/T
Options: No action; Civil/admin; Caution only; Caution plus E/I/A/T
Non-compliance measures? Y/N Nature?
Non-compliance measures? Y/N Nature?
Non-compliance measures? Y/N Nature?