

# **Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences**

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A U S T R A L I A

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# Abbreviations

ACPO	Association of Chief Police Officers
AIDS	Acquired immunodeficiency syndrome
AOD	alcohol and other drug
CDT	Commission for the Dissuasion of Drug Addiction
CJS	criminal justice system
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EU	European Union
HIV	Human Immunodeficiency Virus
IDDI	Illicit Drug Diversion Initiative
IV	intravenous
LCWS	Lambeth Cannabis Warning Scheme
MDA	Misuse of Drugs Act
NGO	non-government organisation
NPCC	National Police Chiefs Council
OMCG	outlaw motorcycle gang
PWUD	people who use drugs
QCA	qualitative comparative analysis
RRR	rapid realist review
THC	tetrahydrocannabinol
TQ	threshold quantities
UK	United Kingdom
USA	United States of America

# Executive summary

This report reviewed approaches taken in Ireland and nine other jurisdictions to simple possession drug offences with the aim of identifying alternative approach options that would be possible in the Irish context and the advantages and disadvantages of each.

## Approach

A rapid realist review was conducted of the international evidence on alternatives to simple possession following the RAMESES protocol (Realist And Meta-narrative Evidence Syntheses: Evolving Standards) (Wong, Greenhalgh, Westhorp, Buckingham, & Pawson, 2013). Nine nations with alternative approaches were selected based on their mix of reform types and relevance to the Irish situation: Australia, Czech Republic, Denmark, England and Wales, Germany, Jamaica, the Netherlands, Portugal and the United States of America (USA). This gave rise to 15 different approaches: between one and three per country.

A coding schedule was devised that covered the context, mechanisms and outcomes of the approaches (intended and unintended) on the individual, the family and society, the criminal justice system (CJS) and the health system. A total of 6198 records were initially identified and 158 were included for extraction. The number of documents ranged from three in Jamaica (the country with the most recent reform) to 45 in the USA.

Two forms of analysis were conducted. First, literature on the context, mechanisms and outcomes of the reforms was synthesised for each country. Secondly, qualitative comparative analysis was used to produce an empirically based, theoretically informed typology of alternative approaches to deal with simple possession offences, extrapolating across countries. Advantages and disadvantages were then synthesised for each policy option.

## The Irish context

Ireland has a common law, constitutional legal system, without a well-developed system of civil, administrative law. Under current law *Misuse of Drugs Act 1977* possession for personal use of cannabis is punishable by up to one-year imprisonment for a summary conviction or three years imprisonment for conviction on indictment. Possession for personal use of other illicit drugs is punishable by up to one-year and seven-years imprisonment, for a summary or indictable offence respectively.

The existing use of alternatives is more limited than in many other European Union (EU) countries (Kruithof et al., 2016). Only one formal alternative for drug-related offenders is currently used: the Drug Treatment Court in Dublin, which is mainly targeted at serious drug-related offenders. The potential benefits of using alternatives to arrest in Ireland for minor drug offenders have been discussed for several years (e.g. Griffiths et al., 2016), including in the *2017 National Drug Strategy*.

Drug-related harms are significant issues in Ireland, including reported overdoses and infections and concerns about violent and organised crime. Of particular concern:

- Ireland has the second highest rate of 'problematic opiate users' in the EU.
- Rates of HIV infection among people who inject drugs are also relatively high by European standards and has seen a further outbreak of new infections in 2015.
- There was an increase in Ireland from 2005 to 2015 in current and recent use of cannabis and ecstasy, particularly among young people aged 15 to 34.

Recent trends in criminal justice responses also show:

- Between 2015 and 2017 there were an average of 11,626 incidents of recorded possession for personal use in any one year.
- The total number of recorded possession incidents for personal use has increased.

### Alternate approaches for dealing with simple possession drug offences

Qualitative comparative analysis was used to derive six different approaches for dealing with simple possession drug offences. The set of options took into account core differences in:

1. The legal basis: *de jure* = in law or *de facto* = in guidelines.
2. Whether or not the approach employs pathways to education/treatment/social services
3. Whether the approach utilises administrative or civil sanctions

The key features of each are summarised below alongside applicable examples across the nine nations.

### **Alternate approaches for dealing with simple possession drug offences**

<i>Type</i>	<i>Legal basis</i>	<i>Pathways to education / therapy / social services</i>	<i>Administrative / civil sanctions</i>	<i>Examples</i>
Depenalisation	<i>De facto</i>	No	No	Netherlands Gedoogbeleid 'tolerance policy' (cannabis only), US police 'deprioritisation', UK cannabis and khat warnings, Denmark warnings
Police diversion ( <i>de facto</i> )	<i>De facto</i>	Yes	No	Police diversion schemes in most Australian states, Netherlands diversion (hard drugs only), English police diversion schemes in Durham, West Midlands and Avon, US LEAD programme, Baltimore pre-booking scheme
Police diversion ( <i>de jure</i> )	<i>De jure</i>	Yes	No	South Australian Police Drug Diversion Initiative and Queensland Police Drug Diversion Program (police mandated by law to offer diversion to treatment)
Decriminalisation with no sanctions attached	<i>De jure</i>	No	No	Germany (by virtue of Constitutional ruling) and Vermont USA (since 2018)
Decriminalisation with civil or administrative sanctions	<i>De jure</i>	No	Yes	Czech Republic, Jamaica, Cannabis Expiation Notice schemes in three Australian states (ACT, SA, NT), many US states (e.g. Ohio, Mississippi, Massachusetts, Rhode Island)
Decriminalisation with targeted diversion to health / social services	<i>De jure</i>	Yes	Yes	Portugal and several US states (Maryland, Connecticut & Nebraska)

Programme theories for each approach and the advantages and disadvantages differ in significant ways. Two approaches are outlined below. For full details see chapter five.



### Depenalisation: Programme theory and advantages and disadvantages for Ireland

The first approach – depenalisation – has been used in many parts of the world, including Denmark, the Netherlands, England and Wales and the USA. Under depenalisation the goal is to avoid criminalising young people and to save police time to focus on more serious criminal activity. This is based on the belief that traditional policing approaches are ineffective and that police could better allocate resources to more serious crime (be that drug trafficking or other offences). Implicit in this approach is also the belief that people detected for drug possession do not warrant criminal sanctions, nor any other form of social intervention. That is “doing nothing” or “doing little” is the best approach for any people found in possession of drugs.

The programme theory says that if police switch to minimal intervention for people who possess drugs for personal use (e.g. issue warnings instead of arrests), police, prosecutors and courts will have more time to focus on other activities (e.g. serious crime) and there will be fewer people who use drugs who are arrested or convicted for possession alone. In turn this will save the CJS money, lead to more effective resource allocation, and improve the ability of people who use drugs to obtain employment, and to travel without the collateral consequences from criminal justice interventions. Evidence suggests this may also increase some access to drug treatment and harm reduction services, albeit via voluntary means.

An advantage of this approach is that there are few required inputs to implement a model of depenalisation other than new police or prosecutorial guidelines. Particularly in the Irish context it would not necessitate changes in laws or new civil or administrative sanctions for this offence. There is also little risk of over-burdening other systems such as treatment. However, analysis of depenalisation approaches in England and Wales, Denmark and USA suggest that this may not be supported by police and it may lead to net-widening, whereby *more* people receive some form of intervention, and thus increase the burden on the CJS. It may also lead differential implementation on the ground (justice by geography). Evidence suggests voluntary uptake of drug treatment or harm reduction services may in some cases be minimal and hence that it may be difficult using this model to reduce drug-related harms associated with problematic opiate use. This therefore may be an option which the Irish government may consider applying only to some drugs (e.g. cannabis), or only to first or second time offences.

### Decriminalisation with targeted diversion to health/social services: Programme theory and advantages and disadvantages for Ireland

The second approach – decriminalisation with targeted diversion to health / social services – has been employed in Portugal and several US states (Maryland, Connecticut & Nebraska). Under this model the goal is to ensure that people are not criminalised for simple possession alone, while recognising that certain patterns of drug use can be harmful and a symptom of broader health or social problems. As such, governments ought to use the point of detection as a means by which to screen and identify high-risk offenders and address their treatment and other needs. A number of new inputs are required for this approach to work including new laws (civil or administrative) and referral pathways and the ‘purchase’ of additional supports (e.g. for treatment or employment/training). However, the evidence base on model types in Portugal and several US states (Maryland, Connecticut and Nebraska) indicates that such an approach should increase offender access to alcohol and other drug (AOD) treatment and other services (if and when required), albeit *mainly* for high-risk offenders, while low risk offenders receive faster, cheaper, less intensive, non-criminal response (e.g. suspended sanctions, civil penalties etc). This should avoid collateral consequences of convictions for people who possess drugs for personal use (e.g. on employment), reduce costs to the CJS high-frequency use, criminality and infections. It may also increase social reintegration (through direct or indirect means), especially if combined with investment in public health and social support.

Several factors have been found to affect the ability to deliver these goals: a) level and quality of treatment and other services, b) design of referral pathways, c) design of eligibility criteria, and d) overarching legal framework. Best practice models ought to consider what type of support is needed: treatment, social supports (e.g. employment assistance) or a mixture, as well as ensure high efficacy of service provision. Some referral mechanisms are more resource intensive (e.g. Portugal which

established 18 dissuasion committees across the country, as opposed to simple police referrals in Maryland). Some legislative frameworks are also less effective as they limit 'reach' over the potential pool of offenders. Of note, Nebraska only partially removed criminal penalties, which led to many people continuing to receive criminal sanction. If proceeding with this option 'full' removal of criminal penalties is thus recommended as it will maximise impact.

In short there are a variety of options that could be taken: each of which could offer advantages for the Irish context. Given the known shape of the drug problem in Ireland (including relatively high levels of both cannabis and heroin use, with an interrelationship between unemployment and problematic drug use), one final proffered model is a mixed approach (combining two different options, as is done in some parts of the world – see Table 22). The Irish government could, for example, reduce the burden of criminalisation on people who use drugs by applying both depenalisation of the most minor drug possession offences and decriminalisation with targeted diversion for those offenders who are more likely to need it. On the basis of the available evidence, this would not pose a very high risk of increasing drug use (and so may have little effect on serious organised crime or drug driving), would reduce costs in the CJS, and would provide additional pathways into treatment or other social supports for people who need it (while not over-burdening the system with people who do not need it).

Any alternative approach to dealing with simple drug possession comes with risks. The research in this area is complex, incomplete and not capable of providing definitive answers about what the outcome of any given approach will be in the Irish context. The current approach also entails risk, including that costs and burdens are placed on citizens (taxpayers and people who use drugs) that are not justified by the effects in reducing social and health harms.

We hope this report will help to inform discussion in Ireland on how the best balance of risks and burdens can be achieved.

# Chapter one: Introduction

This report reviews approaches taken in Ireland and other jurisdictions to simple possession drug offences with the aim of outlining alternative approach options that would be possible in the Irish context. The review was conducted for the Irish Department of Justice & Equality and the Department of Health (and the working group on this issue) over the period May to September 2018.

More specifically, the review covers:

- A. The current legislative regime that applies to simple possession offences in Ireland and the rationale underpinning this approach, and any evidence of its effectiveness.
- B. The approaches and experiences in nine other jurisdictions to dealing with simple possession offences.
- C. The advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current Irish system for the individual, the family and society, as well as for the CJS and the health system.

The broad aims of the review were:

- 1. To describe the current legislative regime for or policy approach to dealing with simple possession offences and its rationale in the jurisdictions selected.
- 2. To describe the legal or societal remedies for dealing with simple possession offences that applies in these jurisdictions.
- 3. To describe the experiences of these jurisdictions in using legal or societal remedies for dealing with simple possession offences.
- 4. To describe or synthesise the effectiveness (outcomes and impact) of legal or societal remedies for dealing with the offence of simple possession in these jurisdictions on the individual, the family and society, the CJS and the health system
- 5. Using the research and information available in the review, describe policy options to deal with simple possession drug offences available to the Irish government and the advantages and disadvantages of each.

The approach taken to this review was a rapid realist review (RRR). Such an approach differs to a traditional narrative or systematic review, in that policy makers and experts are used to define the research questions and streamline the review, in the aim of informing policy makers of answers to questions that are most directly relevant to the policy problem they are trying to solve. A core focus is placed on unpacking the relationship between context, mechanisms and outcomes to illuminate in whether, why and how specific mechanisms will produce intended policy outcomes (for further details see chapter three).

Chapter two outlines the Irish context. Chapter three outlines the methods for the rapid realist review. Chapters four outlines the approaches and experiences in nine other jurisdictions: including the context of reform, mechanisms and outcomes (intended and unintended). Chapter five extrapolates policy learnings across the reforms and puts forward six difference policy options that could be implemented in Ireland.

# Chapter two: Irish context, existing alternatives and implications for new alternatives

The aim of this chapter is to lay out the background to the current Irish approach for dealing with simple possession offences, discuss related issues and harms, describe existing alternative means of dealing with offences, and to draw implications for the consideration of new alternatives that arise from the specific features of the Irish context. This section is based on a narrative review of available literature, including peer-reviewed journal articles, books, government reports and other 'grey' literature. This includes the 2016 expert review of the Irish national drug strategy (Griffiths, Strang, & Singleton, 2016) and a 2016 report of the working group on alternatives to prosecution. The review of the Irish National Drug Strategy noted a consensus among the consulted experts that a wider range of alternatives for dealing with simple possession offences should be considered. The possibility of Ireland adopting the Portuguese model of decriminalisation has frequently been mentioned, including in a 2016 report of the Joint Committee on Justice, Defence and Equality and in the National Drug Strategy of 2017 (Department of Health, 2017).

## Legal context

It is commonly asserted that countries can be classified as having either common law or penal code approach to defining criminal offences (although this distinction is often blurred in actual cases). Ireland falls into the former group, although moves have been made towards codification, with a draft criminal code published in 2013 (CLCAC, 2013). Some countries, such as Portugal, also have a comprehensive civil code or administrative law. Ireland does not, although there are some legal bases for the use of administrative penalties (e.g. the Central Bank Act 1942(CBI, 2018))

Irish law is founded on the Constitution of Ireland, which came into force in 1939 following a national plebiscite in 1937. Ireland is also a signatory to the European Convention on Human Rights (which was given further effect by the European Convention on Human Rights Act 2003) and to the three UN drug conventions of 1961, 1971 and 1988.

Ireland's criminal law is still based on a mixture of statutory and common law precedents, some of which date back to the period before the Irish Free State, when Ireland was subject to English criminal law (O'Donnell, 2005).

## Current law on simple possession of drugs

Current Irish law on drug offences is based on the *Misuse of Drugs Act 1977* and the *Misuse of Drugs Act 1984*, as amended by the *Criminal Justice Act 1994*, the *Criminal Justice (Drug Trafficking) Act 1996*, the *Licensing (Combating Drug Abuse) Act 1997*, the *Criminal Justice (Illicit Traffic by Sea) Act 2003* and the *Criminal Justice (Psychoactive Substances) Act 2010* (LRC, 2016). According to the report to the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA, 2018) the two most important Irish drug laws are the *Misuse of Drugs Acts 1977 and 1984* (MDA). These criminalise drug possession, cultivation, importation and supply, but not use per se. The laws also distinguish between possession (for personal use) and possession for sale or supply.

The *Misuse of Drugs Regulations 1988* (SI 328 of 1988) are also relevant to the criminalisation of drug possession, as they specify the circumstances under which it is not a criminal offence to possess one of the substances that are controlled under the Misuse of Drugs Acts (e.g. under medical prescription, or for clinical research)

From here on, 'simple possession' offences will be taken to mean offences that involve merely the possession for personal use of substances that are controlled by the Misuse of Drugs Acts in circumstances that are not exempted from prosecution by the Misuse of Drugs Regulations. Simple possession does not include possession with the intention to sell or supply. The offence of possession

is based on Section 3 of the *Misuse of Drugs Act 1977*<sup>1</sup> (S3 MDA). It should be noted that the *Criminal Justice (Psychoactive Substances) Act 2010* does not create an offence of possession of the substances it covers. Possession of new psychoactive substances (NPS) for personal use is a criminal offence where the substance is designated a controlled substance for the purposes of the Misuse of Drugs Acts 1977 to 2016.

The penalties laid out by Irish law for drug possession offences depend on drug type (whether it involves cannabis or another controlled substance) and in which court the case is tried. The 2018 Irish report to the EMCDDA described the applicable penalties as follows:

Possession of cannabis or cannabis resin for personal use is punishable by a fine on first or second conviction; however, third and subsequent offences are punishable by up to one year in prison for a summary conviction and up to three years for conviction on indictment. Possession in any other case is punishable by up to one year in prison and/or a fine on summary conviction and up to seven years' imprisonment for conviction on indictment. However, the Criminal Justice (Community Service) Act 2011 requires courts to consider imposing a community service order instead of a prison sentence in all cases where up to 12 months' imprisonment might have been deemed appropriate. (EMCDDA, 2018)

In contrast, the maximum penalty for offences involving drug supply is life imprisonment, and a minimum 10-year sentence is also available for supply offences involving more than €13,000-worth of drugs.

Ireland does not have a system of sentencing guidelines that advises judges on what the most appropriate sentences is for the severity of an offence, or the level of culpability of the offender (O'Malley, 2013). This may help explain – in addition to the complexities of assessing market values as a basis for sentencing – why Irish experts gave widely differing responses to questions in a European survey on the sentences given for typical drug trafficking offences (EMCDDA, 2017).

An important consequence of being arrested or convicted of simple possession of drugs is that the person receives a criminal record that may have to be disclosed under certain circumstances (e.g. in applying for work, or in applying for visas to travel to other countries). The 2016 expert review of the National Drug Strategy particularly highlighted concerns about the criminalisation of young people in Ireland caught in possession of drugs and the negative impact this may have on their life chances (Griffiths et al., 2016). Criminalisation may also create difficulties in gaining certain licenses (e.g. to drive passenger vehicles). Under the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, convictions that lead to a prison sentence of less than 12 months (or a fine) become 'spent' seven years after the sentence came into force. This means that the person is no longer required to declare the offence when applying for a job in Ireland, but they may still be required to declare an arrest or conviction in other circumstances (e.g. applying for a visa to enter the USA, or for Irish citizenship).

## **Current practice in law enforcement**

Internationally, law enforcement practice cannot be read off directly from the law on the statute book, and may change over time (Belackova, Ritter, Shanahan, & Hughes, 2017). So, we need to look at the actual picture of law enforcement on the ground. In Ireland, the police, public prosecutors and courts have discretion – within the law – to act in the public interest in deciding on arrests, prosecutions and sentencing offenders. Herein we look at trends in *all* illicit drug offences over the last ten years as well as recent trends in drug possession arrests, court outcomes and convictions over the period 2015 to 2017, and how many convictions were for possession alone.

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<sup>1</sup> The 1977 Act may be viewed in full on [www.irishstatutebook.ie](http://www.irishstatutebook.ie)

### Trends in the number of illicit drug offences in Ireland

Table 1 outlines the total number and type of illicit drug offences in Ireland from 2008 to 2017. This data is from the Central Statistics Office, under reservation, and as such is subject to change, but nevertheless provides a useful time series to contextualise recent trends. Table 1 shows that from 2008 to 2017 there have an average of 17,800 recorded controlled drug offences per year in Ireland. Possession of drug offences for personal use account for between 71% and 77% in any one year, or 73% offences over the ten years inclusive. The number of recorded drug offences decreased year on year from 2008 until 2013, albeit that there has been a moderate increase over the last few years.

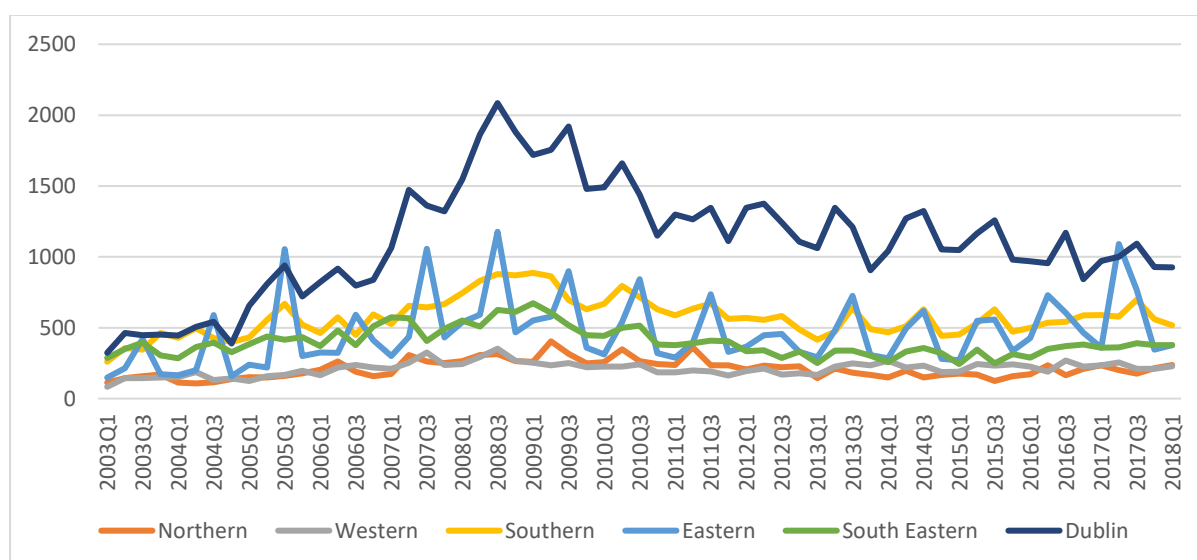
**Table 1: Recorded controlled drug offences in Ireland, 2008 to 2017, by type of offence and year**

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Possession of drugs for personal use	18,076	16,765	14,387	12,606	11,796	11,160	11,247	10,932	11,411	12,201
Possession of drugs for sale or supply	4,266	3,967	4,097	3,817	3,459	3,241	3,563	3,368	3,628	3,888
Cultivation or manufacture of drugs	216	271	532	579	513	390	345	240	263	249
Importation of drugs	67	46	29	40	30	44	29	19	28	21
Other drug offences	731	824	748	530	582	490	679	494	709	491
All controlled drug offences	23,356	21,873	19,793	17,572	16,380	15,325	15,863	15,053	16,039	16,850

Source: Central Statistics Office, 2018. Data is under reservation and hence may be subject to change.

There is large regional variation in possession offences, with both higher detections and unique trends in Dublin compared to other parts of Ireland (see Figure 1).

**Figure 1: Recorded possession for personal use offences in Ireland, by region and quarter, 2003-2018**



Source: Central Statistics Office, 2018. Data is under reservation and hence may be subject to change.

### Section 3 Misuse of Drugs Act (S3 MDA) offences

Herein we look at data provided by An Garda Síochána. The number of recorded incidents detected by the Gardaí involving possession for personal use (a S3 MDA offence) for the three-year period 2015 to 2017 are outlined in Table 2. This shows that consistent with the data above, that the total number of recorded possession incidents has increased, and that there are an average of 11,826 incidents in any one year. (The number of offenders is unknown).

**Table 2: Number of possession incidents under Section 3 Misuse of Drugs Act, 2015 to 2017**

2015	2016	2017
11,149	11,740	12,589

Not all these incidents resulted in the person being charged for a S3 MDA offence and not all proceeded to court or led to a court outcome. Table 3 outlines the number of incidents and number of court outcomes recorded for a S3 MDA offence (irrespective of whether they did or did not lead to a criminal conviction). (Some incidents result in more than one court outcome. For instance, if a person was in possession of two different types of drugs this may result in two separate court outcomes.)

To arrive at the figure of number of incidents that involve simple possession only, Table 3 differentiates firstly all incidents and secondly all simple possession incidents excluding those linked to non-S3 MDA offences. The most common other offence types over the period were no insurance, obstruction, driving without a driver's licence, failure to produce insurance certificate or driver's licence and intoxication. In the three-year period 2015-2017 there were 7,614 court outcomes for unlawful possession of drugs contrary to S3 MDA and 7,360 outcomes for S3 MDA which were *not* linked to any other offence type. This suggests that most S3 MDA court outcomes involve only possession of drugs.

**Table 3: Number of possession incidents that led to a court outcome under Section 3 Misuse of Drugs Act, differentiating those that involved possession alone versus possession and other offences**

Offence description	Total incidents	Total court outcomes
Unlawful Possession Of Drugs Contrary to Section 3 MDA (all)	7,317	7,614
Unlawful Possession Of Drugs Contrary to Section 3 MDA (only where there are <i>no</i> other offences types linked to incident)	7,010	7,360

Looking at the number of outcomes versus the number of individuals sanctioned for this offence (see Table 4) shows that over the 3-year period 2015 to 2017 there were 5,633 individuals who received a court outcome for possession for personal use alone. Moreover, nearly 80% of suspected offenders were linked to just one outcome in the 3-year period 2015 to 2017.

**Table 4: Number of outcomes versus number of individuals sanctioned under Section 3 Misuse of Drugs Act, 2015 to 2017 inclusive**

S3 MDA Outcomes	Total (All S3 MDA offences)	Total (S3 MDA only, no other linked offences)
Total Outcomes	7,614	7,360
Total Individuals	5,781	5,633
≥ 10 Outcomes	4	4
9 Outcomes	6	5
8 Outcomes	4	4
7 Outcomes	6	5
6 Outcomes	14	14
5 Outcomes	20	20
4 Outcomes	63	57
3 Outcomes	239	222
2 Outcomes	856	818
1 Outcome	4,569	4,484

#### Information from the Courts Service

The number of offenders put on probation is an important response, as under the *Probation of Offenders Act 1907*, a judge may decide not to convict. According to information provided by the Department for Justice and Equality if a person received the Probation Act in respect of a S3 MDA offence and for another offence it may be included in the information supplied by the Courts Service. Table 5 outlines the number of people who were dismissed under the Probation Act for a S3 MDA offence.

**Table 5: Number of people receiving a Probation Act for a Section 3 Misuse of Drugs Act offence, 2015 to 2017**

2015	2016	2017
884	835	1,123

Combining this information with the information from Table 4 suggests that of the 5,781 people with a court outcome for a S3 MDA offence in the three-year period 2015-2017 2,939 of them may have received a criminal conviction. This amounts to 980 persons per year. That said, this assumes that all those given probation did not receive a conviction.

#### Information from the Irish Prison Service

The Irish Prison Service annual report for 2017 indicates there were 6,037 committals to prison for 2017. Of these 6% (371) were for a controlled drug offence. And as of 30 November 2017, there were 2,990 prisoners in custody and 11.6% (347) were for a controlled drug offence. The total number of persons committed with sentences solely for possession for personal use from 2015 to 2017 is outlined in Table 6 below, showing 752 persons. There is a clear downward trend from 365 in 2015 to 73 in 2017. Moreover, as of 31 July 2018, the figure for the number of individuals in prison for the unlawful possession of drugs only is 27. We have been advised this downward trend in people imprisoned for possession for personal use may be shaped by broader criminal justice reforms in Ireland, namely the introduction of the Fines (Payment and Recovery) Act 2016, which has reduced prison committal numbers generally and the implementation of the penal policy review (that has at its core custodial sentencing as a last resort).

**Table 6: Number of people imprisoned for unlawful possession of drugs, 2015 to 2017**

2015	2016	2017
365	287	73



In summary, these figures show that over the period 2015 to 2017, there were 35,478 recorded incidents of possession for personal use (or about 11-12,000 in any one year). A total of 5,633 unique offenders received a court outcome for simple possession alone: and an estimated 2,939 offenders or 980 per year received a criminal conviction for simple possession alone. Custodial sentences were rare in Ireland for this offence. This raises implications for the use of alternatives (see below). Nevertheless, it shows that a small but potentially important group of offenders continues to proceed to court and/or receive a conviction for simple possession alone.

According to information provided by the Department of Justice and Equality, the cost of enforcing drug laws in Ireland was estimated to be €47 million in 2017 for Gardaí drug enforcement and €17.36 million for Revenue/Customs drug enforcement. This means that the total cost in 2017 of enforcing drug laws was €64.35 million.

## **Consequences of enforcement of law on simple possession**

The consequences of treating simple possession as a criminal offence may include general deterrence (i.e. deterrence of drug use in the general population), specific deterrence (i.e. deterrence of the individual offender from repeating that offence), costs incurred in the CJS (i.e. arrests, prosecutions, trials, imprisonments), and harms to the arrested individuals.

Our literature search did not find any peer-reviewed studies that have focused on these issues in the Irish context, but there are a number of relevant government and government commissioned reports, including the 2016 expert review of the Irish national drug strategy (Griffiths et al., 2016), the 2016 report of the working group on alternatives to prosecution, the 2017 report on the public consultation undertaken to inform the new National Drugs Strategy and the 2018 public consultation on personal possession of illegal drugs.

Key conclusions of these reports include:

- There is concern about the criminalisation of young people caught in possession of drugs and the negative impact this may have on their life chances.
- There appeared to be a widespread consensus that for minor drug offences, especially those related to cannabis possession, the long term costs for both the individual and society of the offence remaining on file were considerable and unjustified (Griffiths et al., 2016).

The 2017 report on the public consultation undertaken to inform the new National Drugs Strategy noted:

- That criminalisation of drug use impedes effective HIV prevention efforts.
- That criminalisation sometimes stops people who use drugs from contacting emergency services in an overdose situation due to fear of criminal repercussions.
- That criminalisation restricts travel and limits employability, productivity and full integration into society.
- That decriminalisation of some or all drugs would lower expenditure on policing and courts/prison.

Little research has been conducted on the 'secondary effects of imprisonment' in Ireland (Breen, 2010). One article commented on how the barriers to education and employment that are provided by incarceration and a criminal record operate in Ireland (O'Reilly, 2014), but did not specify how many of those affected were convicted of simple possession alone. Another echoed the international literature on the lack of a direct effect of imprisonment rates in reducing indictable crime<sup>2</sup> (O'Sullivan & O'Donnell, 2003). The authors noted, 'it may be that alternative measures, such as drug treatment, employment, community service or probation would have a similar (or greater) effect'.

Neither is there much 'grey' literature published that covers these issues specifically in the Irish context. They are covered by the international literature, as summarised in two editions of the book

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<sup>2</sup> N.B. The majority of drug offences in Ireland are not treated as indictable crimes.

*Drug Policy and the Public Good* (Babor et al., 2010; Babor & et al, 2018). In short, this shows that the international literature:

- Suggests that drug law enforcement has little effect in the general deterrence of drug possession, partly because the proportion of consumers who face arrest is so small (see also Nguyen & Reuter, 2012).
- Does not support a specific deterrent effect of drug law enforcement, with very high rates of recidivism among those arrested and punished for drug possession. An interesting and relevant study from the USA shows, for example, that arrests for drug offences have little effect in reducing future offending, but do have an impact in reducing employment prospects, especially for ethnic minority arrestees (Mitchell, 2016).
- Shows that the costs of drug law enforcement are relatively high, compared to other policy interventions (such as prevention and treatment), with weaker evidence of effect or cost-effectiveness.
- Supports the argument that drug law enforcement has harmful effects on those who are arrested and prosecuted for simple drug possession.

## **Issues related to simple possession offences**

There are a variety of harms related both to the possession and to the control of possession of drugs (Caulkins & Reuter, 2009). These include harms related to drug use itself, as well as to the existence of drug markets. It also includes drug-related crime and the need for and costs of drug treatment. The aim of this sub-section is to highlight some issues that are particularly relevant to how simple possession is dealt with in Ireland.

A more detailed picture on these and other issues is given by Bates (2017) in a report commissioned by the Health Research Board: “The drugs situation in Ireland: an overview of trends from 2005 to 2015.” This showed a general increase in current use (one or more times in the month prior to the survey) and recent drug use (one or more times in the year prior to the survey) between 2011 and 2015, particularly for cannabis and ecstasy and amongst young people aged 15-34, as well as increases in treatment presentations for cannabis, particularly among young people. This led Bates (2017, p.8) to conclude that patterns of drug use and harms had changed over the last decade and that the increased trends amongst young people pose concern given the “increased risk of cannabis related problems that may be associated with increased use of high potency cannabis”.

### *Drug use and related harms*

The use of illicit drugs - as for licit and prescribed drugs - can lead to health problems including mental health issues, physiological damage, infectious diseases (especially among people who inject drugs), overdose and death. The 2014/15 all Ireland survey of drug prevalence suggested that 7.5 per cent of people aged 15 or over had taken any illegal drug in the year prior to the survey year (NACDA, 2016). This was defined as cannabis, ecstasy, cocaine powder, magic mushrooms, amphetamines, poppers, LSD, mephedrone, solvents, crack, heroin and new psychoactive substances<sup>3</sup>. According to the 2016 census, there were 3,755,313 people aged 15 or over in Ireland. This suggests there may be about 280,000 who use drugs in Ireland each year. Cannabis is the most frequently consumed illicit drug in Ireland, with 13.8 per cent of the population aged 15-34 estimated to have taken it in 2015. This is the age group that is most likely to report use of illicit drugs and to be arrested for simple possession. Other commonly consumed illicit drugs include MDMA (4.4 per cent) and cocaine (2.9 per cent). Relatively to other EU nations Ireland, has the second highest prevalence of MDMA consumption and fifth highest prevalence of cocaine amongst those aged 15-34 (EMCDDA, 2018).

Heroin use is much less common. It was, however, estimated that there were between 18,720 and 21,454 ‘problematic opiate users’ in 2014. This gives Ireland the second highest rate (6.2 per 1,000 population) in the European Union.<sup>4</sup> This group is heavily concentrated in Dublin. The highest rate (8.8 per 1,000 population) was estimated for the 25-34 age group, although the rate fell between

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<sup>3</sup> Please note the addition of new psychoactive substances into this category for 2014/15 following the Criminal Justice (Psychoactive Substances) Act 2010.

<sup>4</sup> The highest rate, 8.2 per 1,000 population, is reported in the UK.

2006/7 and 2014 in this age group. The rate rose between 2006/7 and 2014 in the 35-64 age group, which already accounted for two thirds of opiate users (NACDA, 2017).

Rates of HIV infection among people who inject drugs in Ireland are relatively high by European standards, with a concerning outbreak of new infections in 2015. Rates of recorded overdose deaths are also relatively high by comparison with other EU countries: 224 'overdose deaths' were reported in 2015. However, it should be noted that Ireland has a more comprehensive reporting system for overdose deaths compared to other EU countries, which may account for the relatively high recorded death rate. Most of these deaths involved at least one opiate, with the majority involving more than one substance. The rate of drug-related deaths in Ireland is relatively stable.<sup>5</sup>

### *Drug markets and violence*

The demand for psychoactive substances, when combined with the prohibition of supply, creates illicit markets. These markets are very lucrative, with much higher profit margins than observed in licit markets (Kilmer & Reuter, 2009). Due to their illegality and profitability, these markets are sometimes, but not always, characterised by intimidation and violence. This has been a particular concern in Ireland, partly due to high profile killings, such as that of the journalist Veronica Guerin in 1996 (Conway, Daly, & Schweppe, 2010). More recently, there have been several murders that were reported to be related to the drugs trade, including several incidents relating to a reported feud between the Hutch and Kinahan gangs, both of which are linked to the drugs trade.

A review carried out for the Health Research Board also noted the problem of lower level violence and intimidation related to drug use and sale (Murphy, Farragher, Keane, Galvin, & Long, 2017). It noted the common practice of selling drugs on credit, and then using intimidation to ensure the payment of debts. A large proportion (46 per cent) of such incidents reported to 13 local and regional Drug Task Forces involved physical violence, while 32 per cent involved damage to home or property. A specific feature of the Irish drug market is the interaction between organised crime groups of paramilitary organisations, on both sides of the border (Hourigan, Morrison, Windle, & Silke, 2018).

### *Drug-related crime*

Internationally, people who use drugs are more likely than other people to commit other crimes. And people who commit other crimes are also more likely to use drugs (Lurigio & Schwartz, 1999). This has also been observed in Ireland (Connolly, 2006). The highest rates of offending in Ireland are concentrated among those people who have problems with heroin and crack. As this is a compulsive behavioural pattern, these people often offend in order to get money to buy drugs; a phenomenon known as 'economic-compulsive' crime (Goldstein, 1985). Some drugs, and particularly alcohol and stimulants such as cocaine, may also reduce inhibitions and induce aggression; which Goldstein (1985) calls 'psycho-pharmacological' crime. Goldstein also coined a third term – 'systemic' crime – that refers to violence related to the regulation of illicit drug markets (see above).

Illicit drug use also contributes to forms of social harm that can be described as nuisance or anti-social behaviour, rather than crime. This includes the public use of drugs and the discarding of used injecting equipment in public places. In 2017, the Irish government decided to open a pilot safer injecting facility in Dublin. On the basis of evidence from other cities, this facility should reduce some of these harms in its local vicinity (Potier, Laprévote, Dubois-Arber, Cottencin, & Rolland, 2014).

These links between drugs and crime should not be taken out of the social contexts in which they operate. The highest rates of all forms of drug-related crime are observed in communities that suffer from deprivation, unemployment and social exclusion (O'Mahony, 2008; Stevens, 2010). Drug possession – even of heroin – tends not to be associated with other forms of criminality when consumed by people who are wealthy and well-connected (Warburton, Turnbull, & Hough, 2005). This

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<sup>5</sup> It has been much less stable in the UK, where the peak of initiation into heroin started a few years before the 'heroin epidemic' crossed the Irish sea. The British experience shows that long-term users become increasingly likely to die as they age; a phenomenon that has contributed to sharp increases in drug-related deaths in the UK (ACMD, 2016; Carew & Comiskey, 2018). Older opiate users are also at greater risk of dying with methadone (Pierce, Millar, Robertson, & Bird, 2018).

is not the group who typically seek treatment. According to Bates (2017), those receiving treatment for opioid use in Ireland were most likely to be unemployed (75%) and homeless (13%).

It is also important to emphasise that use of cannabis and ecstasy (i.e. the two most commonly used drugs in the Irish context and the drugs associated with most of the recent increase) have much weaker links with other types of crime (Payne & Gaffney, 2012).

The Department of Justice and Equality has provided an initial, indicative estimate of the cost of drug-related crime of approximately £2 billion, or 27 per cent of the total estimated cost of crime in Ireland.

#### *Drug treatment*

Although most people who use drugs do not become dependent, people who develop problematic patterns of drug use often require treatment to help them manage and overcome these problems. Data on demand for drug treatment are collected through the National Drug Treatment Reporting System (NDTRS) and Central Treatment List. The NDTRS data does not include continuous care service users i.e. those on methadone for longer than one year would not typically be included in this data. The Central Treatment List is the most comprehensive list of all people who are accessing methadone treatment in the county, but there is some overlap with the NDTRS data for those who have entered methadone treatment for the first time in 2016 or returned to methadone treatment after a period of absence. Data from the Central Treatment List shows that in 2016, there were 10,087 treatment cases in Ireland for problem opiate use on 31st December 2016 (Health Service Executive, 2017). Of those 69.5% were male, and 50.5% were aged 35-44 and 10% were aged ≤29. The NDTRS data indicate that in 2015 there were 9892 cases involving treatment for problem drug: which included 3742 new cases, 5855 previously known cases and 255 cases unknown (HRB, 2017). Across all cases, 47.8% reported that opiates were their main problem, while 28.2% sought treatment for cannabis use, but amongst new cases cannabis was the main drug: 45.2% compared to 25.9% for opiates. In 2015 across all cases 72.2% were male and the median age was 30, an increase from 28 in 2010. In 2015 across new cases only 75.3% were male and the median age was 25, the same as in 2010 (HRB, 2017). Those entering treatment for cannabis were significantly younger, with a mean age of 22.9 years compared to 32.3 years for heroin (EMCDDA, 2018). As noted above, there are increasing numbers of people entering treatment for cannabis, but declining trends for heroin.

The main mode of treatment provided was outpatient. For people who have problems with opiates, the most commonly used treatment modality is opiate substitution treatment (OST). In Ireland, most of this is delivered in the form of methadone (EMCDDA, 2018), with suboxone also being offered in some cases. According to information provided by the Department of Justice and Equality, average waiting time between assessment for OST and either exit from the waiting list or treatment entry was 26.5 days.

Estimating expenditure on drug treatment in Ireland is not easy given the many different types of treatment and varying costs. The EMCDDA report noted that the annual cost to central government of providing addiction treatment services in Ireland was approximately €120 million in 2016. But this includes money spent by the Department of Justice on drugs. New figures for drug treatment specifically are currently being developed.

#### *Drug Driving*

Driving under the influence of drugs has been illegal in Ireland since the Road Traffic Act 1961 and has more recently been the subject of an 'anti-drug driving' campaign by the Road Safety Authority (RSA, 2017). The RSA has noted high levels of positive tests for drugs among drivers, with a study in Kildare finding that almost a tenth of drivers killed in 1998 and 2009 tested positive for a drug.

There is international concern over the role of drugs in increasing the risks of driving (Watson & Mann, 2016). A 2013 meta-analysis showed detrimental effects on driving performance from all the drugs examined, including opioids, cocaine, amphetamines and cannabis (Elvik, 2013). Opioids do not necessarily impair the driving of people who are tolerant to them (Galski, Williams, & Ehle, 2000), but they do reduce the ability of new consumers (Schisler, Groninger, & Rosielle, 2012). Combining other drugs with alcohol while driving is particularly dangerous (Li, Brady, & Chen, 2013).

## Alternatives already available in Ireland

The range of existing alternatives available for dealing with simple possession offences in Ireland remains limited, in comparison to some other European countries (Kruithof, Davies, Disley, Strang, & Ito, 2016). The expert review of the National Drug Strategy also noted concerns that it was difficult to establish the extent to which existing alternatives were being used, or the evidence base for their use (Griffiths et al., 2016, p. 26).

Formally, section 28 of the *Misuse of Drugs Act 1977* enables courts to divert some drug law offenders to treatment, instead of imposing a different punishment. However, this is rarely used. This is for the following reasons (according to information provided by the Department of Justice and Equality):

- The sentencing resulted in a conviction.
- The sentencing resulted in a 12-month order which may have been considered overly punitive.
- Other options available to the court would be less punitive; e.g. adjourned probation supervision or probation supervision by way of the Probation Act 1907 – thereby preventing conviction.
- Lack of designated residential units.
- Research evidence that it was not good practice to order treatment on an involuntary basis.

### *Drug treatment court*

The only alternative sanction mentioned in RAND Europe's study of such measures is the Dublin Drug Treatment Court (DTC) (Kruithof et al., 2016). This also involves the threat of conviction. Participants who successfully complete the programme do not receive a conviction for the offence for which they were being prosecuted for on that occasion.

The DTC is intended to target offenders who commit a range of non-violent offences related to their problematic drug use such as shoplifting or failing to appear on bail and be used for offenders who would usually receive a custodial sentence. This means that the majority of people who are arrested for simple possession would not be eligible for the DTC (Connolly, 2006).

The DTC has served a relatively small number of people (DJELR, 2010); only 682 people were referred to this court between 2001 and 2014 (Kruithof et al., 2016). According to information provided by the Department for Justice and Equality, the number of people referred to the court has increased since 2014; 112 people were referred in 2017. The most common potential convictions are for theft, bail (failure to appear) and public order offences. Some also have records of drug possession offences, but a person could only be referred to the DTC for this offence if they were facing their third conviction for a S3 MDA charge and a possible custodial sentence (as they are then considered "at risk").

In 2017, 10 people successfully completed the DTC programme (and so had their charges struck out), while 59 left the programme without completing it and 49 were still in the programme at the end of the year. Another 126 people were deemed unsuitable for entry.

### *Adult cautioning scheme*

The Garda Adult Cautioning Scheme was established in 2006 on a non-legislative basis with the agreement of the Director of Prosecutions (An Garda Síochána, 2006). It enables the police to divert adults from prosecution by giving them a caution. It applies to a limited range of offences and offenders, and requires consideration of, not only the weight of evidence, but also public interest factors and views of victim (where relevant).

The offences covered by the Scheme include offences contained in the *Criminal Justice (Public Order) Act 1994*, the *Criminal Justice (Theft and Fraud Offences) Act 2001*, the *Intoxicating Liquor Act 2003*, the *Non-Fatal Offences Against the Person Act 1997* and the *Criminal Damage Act 1991*, such as minor assault, minor theft, possession of stolen property, public drunkenness and disorderly conduct. These offences do not currently include any illicit drug offences.

The scheme is largely reserved for first-time offenders. A person may be given a second caution under the scheme only in the most exceptional circumstances and with the consent of the Office of the Director of Prosecutions. All cautions are required to take place at the Garda station: not on the street. According to Garda figures, between its introduction in 2006 to 5 June, 2013, there were a total of 67,765 adult cautions recorded on PULSE (Working Group on Alternatives to Prosecution, 2016).

The Minister for Justice and Equality has approved a recommendation of the Working Group to extend the Adult Cautioning Scheme to offences involving the simple possession of any illicit drug. This will still only apply to first offences and in contexts where this meets the public interest. It will still require the offender to attend a police station.

The Garda Authorities are currently working with the Health Service Executive to create a drug awareness and advice leaflet (including national and local contact points where people can get further support). This will be handed to everybody who is given a caution for simple possession. Although information can be provided alongside a caution, there is no provision in Irish law to attach conditions or obligations to cautions (such as a condition to attend a drug education programme or undertake an assessment of treatment need). The Working Group has considered the use of conditions alongside cautions for a range of offences, including persistent offending related to problematic drug use. It has described this as a complex issue and has recommended that a cross-sectoral committee consider it.

#### *Diversion programme, for juvenile offenders*

For offenders aged 12 to 18 (or very serious offences by children aged 10 or 11), the *Children's Act 2001* formalised the previously existing Diversion Programme. This aims to avoid bringing children into the CJS. To enter this scheme, the child must admit the offence and give consent to receive a caution and – where judged appropriate by the Garda Juvenile Liaison Officer – supervision for up to 12 months. If they do, they will receive either a formal or informal caution. All juvenile cautions take place in the presence of the offender's parents or guardians and occur at either the Garda station (required for all formal cautions) or offender's home.

In 2016 17,615 referrals were made to the Juvenile Diversion Programme, covering 9,451 children. Of these 7,262 received cautions (5,016 informal and 2,246 formal). Only 794 of the referrals related to simple possession offences (Garda Bureau of Community Engagement, 2017).

While there is strong international evidence to suggest that diverting young people from the CJS reduces the chances of further offending (e.g. McAra & McVie, 2005 from Scotland), concerns have been expressed in Ireland that diversion to caution may compromise the due process rights of suspected offenders (Cambell, 2005) and may also lead to a larger number of people having any action taken against them, rather than being dealt with informally, a phenomenon known as 'net-widening' (Cohen, 1985; Tolan, 2014).

#### *Other alternatives*

Some countries, such as Portugal, use administrative or civil processes to deal with offences that were formerly criminalised (Hughes & Stevens, 2010). Others, such as the UK and USA (Brunet, 2002; Heap, 2014), use civil orders and police-administered fines to deal with some relatively minor offences or anti-social behaviour.

Civil penalties have not been widely used in Ireland, and there may be constitutional impediments to doing so. Article 38.1 of the Irish Constitution states "no person shall be tried on any criminal charge save in due course of law". Article 38.5 further states "no person shall be tried on any criminal charge without a jury". This has been interpreted to mean that substantial criminal penalties cannot be imposed other than by a court (Fitzgerald & McFadden, 2011). However, there are situations under which an administrative penalty can be imposed. Using the *Central Bank Act 1942*, the Central Bank of Ireland can impose cautions, fines and other administrative sanctions on regulated bodies and individuals (CBI, 2018). While the Joint Committee on Justice, Defence and Equality did not consider the constitutional issue to be a blockage to establishing a civil procedure for dealing with simple possession offences they recommended that discretion for the application of this approach would remain with An Garda Síochána/Health Providers in respect of the way in which an individual in possession of a small amounts of drugs for personal use might be treated.

The potential constitutional barrier has not impeded the implementation and expansion of Fixed Charge Penalty Notices (FCPN) in Ireland. Originally introduced to deal with minor motoring offences, these have since been extended to pedal cycle offences and – under the *Criminal Justice Act 2006* – public disorder offences (Working Group on Alternatives to Prosecution, 2016). There have been issues with non-payment of these penalties, but the payment rate increased towards 80% in 2013 and 2014.

FCPNs have been applied to offences that meet three criteria:

- There is no appreciable degree of moral culpability.
- There is no dispute as to whether or by whom the offence has been committed.
- It is not necessary to prove *mens rea*.

On this basis, the Working Group on Alternatives to Prosecution (2016) recommended that FCPNs be extended to more public order offences (under sections 21 and 22 of the *Public Order Act*). It may be argued that simple possession offences could also meet these criteria, but this has not yet been considered in detail.

### **The national drug strategy**

Before 1996, Irish drug policy could be characterised as being led by a law enforcement approach to prohibition (O'Mahony, 2008), with the aim of creating a 'drug-free Ireland' (Comiskey, 2018). In the wake of the HIV epidemic, this shifted towards a policy based more on harm reduction, with a rapid expansion in the provision of methadone maintenance for people who had problems with heroin.

Both the Irish drug situation and its policy have evolved since then. Following a wide-ranging consultation, including the expert review (Griffiths et al., 2016), a new national strategy – entitled *Reducing Harm, Supporting Recovery* – was launched. The vision of the strategy is to create:

'A healthier and safer Ireland, where public health and safety is protected and the harms caused to individuals, families and communities by substance misuse are reduced and every person affected by substance use is empowered to improve their health and wellbeing and quality of life' (Department of Health, 2017, p.8).

The strategy is led by the Department of Health, reflecting the focus on drug use as a public health problem which requires a health-led approach. The focus on health is exemplified by the decision to open the pilot supervised injecting facility in Dublin, as well as the current exploration and consultation on options to provide alternative measures for dealing with simple possession offences. The strategy included 'the establishment of a working group to examine alternative approaches to the possession of controlled drugs for personal use...to promote a harm reducing and rehabilitative approach to drug use'.

### **Implications for consideration of alternatives for simple possession offences**

Ireland shares some important feature with several other countries where illicit drug consumption has grown since the 1960s. These include:

- The vast majority of simple possession offences go undetected and unpunished.
- The majority of those detected for drug offences are for simple possession, not supply.
- There is political and public concern over harms related to drug markets, and the role of violent organised crime.
- The scale and cost of drug-related crime is also a significant concern.
- The policing and criminalisation of illicit drug possession carries many costs, including costs of enforcement, reduced employment opportunities and barriers to accessing harm reduction and drug treatment services.

Specific features of the Irish policy context include:

- Arrest for simple possession can lead to a person receiving a conviction, although the numbers convicted for this offence alone are relatively small.

- The possible extension of the Adult Cautioning Scheme to include simple possession offences could reduce the number of people receiving a conviction for these offences. But this has yet to be implemented and it is unclear how many people this could apply to, or how cost-effective it will be. It could increase the number of people who are formally dealt with for this offence through 'net-widening'. It may also provide an opportunity for people to receive information and advice on drugs and available health services.
- Ireland does not, as some other countries do, have a well-developed system of civil or administrative law to which to divert offenders from criminal conviction. Nor does it have a well-developed system of alternatives to prosecution for adults.
- Other potential alternatives already exist in Ireland, including the use of fixed penalties or administrative sanctions, but it is not clear whether and how these could be applied to simple possession offences.
- The most serious drug-related health harms in Ireland relate to heroin, although there appears to be increasing demand for treatment for problems related to cannabis, particularly among young people.
- There are substantial differences in the drug situation, and responses to it, between Dublin and the rest of the country.
- Ireland has decided, in a process involving consultation and public deliberation, to prioritise the aim of protecting public health and promoting individual recovery in its drug policy.

From these features flow several implications in the consideration of alternatives for dealing with simple possession offences. These include:

1. If Ireland wishes to reduce the harms done to people by being arrested and convicted when they are found in possession of drugs, it will need to:
  - a. Avoid imposing penalties that are heavier than those that are already used.
  - b. Avoid widening the net to include more people in the scope of formal intervention by the CJS.
  - c. Provide pathways for people to enter treatment for drug problems, without having to be subject to a conviction which creates a criminal record.
2. If possible, this should be done in a way that does not predictably increase the size of illicit markets. This is relevant to
  - a. The profits of organised crime groups.
  - b. The scale of drug-related crime and intimidation.
  - c. The level of health problems related to drug use.
  - d. The demand for and cost of drug treatment.
  - e. The risk of drug-related traffic accidents.
3. Any new system of alternatives will need to fit needs of both Dublin and other areas.



# Chapter three: Methods for rapid realist review

This project used a 'rapid realist review' (RRR). More specifically, this RRR followed the RAMESES protocol (Realist And Meta-narrative Evidence Syntheses: Evolving Standards) to ensure high quality and transparency of the review process. As outlined by Wong et al. (2013) this approach differs from a traditional narrative or systematic review, in that:

- It aims specifically to inform policy makers of answers to questions that are directly relevant to the policy problem they are trying to solve.
- It uses systematic processes for searching the literature and extracting data from relevant documents. However, unlike a traditional systematic review or meta-analysis, the aim is not to aggregate effects across a range of studies from different contexts to provide an estimate of the general effect of an intervention.
- Rather, a RRR aims to inform policy makers of the mechanisms which produce both intended and unintended outcomes in specified contexts. This therefore enables better informed decisions on policy transfer and implantation.

The RRR approach is especially suited to research on complex policy interventions that are not amenable to randomised controlled trials. For decriminalisation and other alternatives to simple possession offences, the mode of implementation can vary substantially within the same legal framework, and RRR is suited to examining these complexities. We worked backwards from desired outcomes (and possible unintended adverse consequences) to develop a set of specific research questions on the ways in which different forms of decriminalisation of simple drug possession operate in real world empirical contexts (C) through identifiable mechanisms (M) to produce real outcomes (O). This produced a 'logic model' showing programme theories of ways in which different CMO combinations produce their effects and how each form of decriminalisation could be expected to operate in the Irish context.

## The RRR approach

The RRR proceeded through ten steps. These steps were those recommended by Saul et al (2013) for projects which aim to meet the RAMESES protocol of Wong et al (2013):

1. *Development of the project scope*: This involved work between the researchers and the working group to clarify the aims and limits of the RRR, specifically being clear about what it could and could not achieve given available time and resources. This step also clarified the rationale for the RRR; what policy problems were we trying to solve?
2. *Development of specific research questions and choice of countries*: On the basis of the detailed project scope and the broad aims of the review (see page 5), the researchers then proposed a more specific list of research questions and choice of countries that were in scope (see below). This included decisions on the countries to be included for specific attention in the RRR (both common law and common countries).
3. *Identification of how the findings and recommendations would be used*: The researchers then proposed the ways in which it would be possible to use the results of the review, for agreement by the working group. This included: a. The broader policy questions to which the RRR results would be relevant. b. The intended forms of publication and dissemination of the results.
4. *Development of search terms*: On the basis of the specific research questions and selected country cases, researchers then specified terms to be used in a systematic search of the literature (including legislation and policy documents). Researchers also identified criteria for exclusion of documents (e.g. those that focused on legalisation of drug supply, or on cannabis

for solely medical purposes, or which did not provide original information on the contexts, mechanisms and outcomes of alternatives to simple possession drug offences).

5. *Identification of articles and documents for inclusion in the review:* The search terms were deployed systematically across a range of sources. For details see below.

6. *Quality review:* A quality review was then conducted including:

- a. initial assessment of the identified documents to select only those that were likely to produce information that is relevant to the specific research questions.
- b. outreach to experts in the field to ask for information on other or more recently published documents.

Such an approach ensured focus on forms of approaches and jurisdictions which can most produce useful and robust findings for the Irish context.

7. *Extraction of data from the literature:* Data were extracted from the selected documents and placed in an extraction template (designed based on the research questions). See below for the final template of extraction. The completed template was used to generate programme theories of the ways that mechanisms of alternatives to simple possession drug offences combine with contexts to produce outcomes, enabling informed judgement on which alternatives will or will not 'work' in the Irish context.

8. *Validation of findings with content experts:* The programme theories that were generated from data extraction were reviewed by senior researchers and members of the working group in order to check for quality and relevance of the emerging findings. Researchers attempted to fill any remaining gaps identified at this stage by returning to search even more specifically for relevant documents and reports.

9. *Synthesis of the findings in a final report:* Answers to the specified research questions were written up in ways that are directly useful to policy makers (e.g. by clarifying the context in which these findings were produced, the source and quality of the evidence for the findings). The final report therefore included policy options to deal with simple possession offences available to the Irish government and the advantages and disadvantages of each.

10. *Dissemination of results:* Researchers provided information in forms that can be disseminated, as agreed in step 3.

## **Choice of countries in scope**

Due to the relevance of the legal context, the initial review identified four common law countries for inclusion that have reduced penalties for simple drug possession offences. In effect, this includes:

- All states and territories of Australia.
- Some states of the USA.
- England and Wales (via the cannabis warning) and some English police service areas (via diversion schemes).
- Jamaica.

It is worth noting some common law countries also use civil penalties e.g. Australia.

Other countries were selected based on their salience, relevance and ability to provide useful information for the Irish context. A review of reviews was conducted to inform this. This showed a large variety in decriminalisation approaches across the globe and a lack of consensus about what countries had or did not have decriminalisation. It also showed different mechanisms by which decriminalisation can occur: by law, court judgement or police/prosecutorial agreement or multiple.

Based on the review of reviews, the following five additional countries were included:

- Portugal as it involved a *de jure* reform, high salience in public discussions of alternate legal approaches to drug possession and a high level of evidence.

- Czech Republic, on the basis it has a well-studied and long-standing system for the decriminalisation of possession of all drugs.
- Denmark, as it involved all illicit drugs and involved a reform via police.
- Germany, as it involved all illicit drugs and a reform via court ruling and police.
- The Netherlands, as it involved non-prosecution of simple drug possession.
- USA, due to high salience and diversity of approaches taken.

NB. Austria was identified for potential inclusion but excluded on the basis it was too recent for meaningful information.

The final list of countries included in the detailed country search was thus:

- Australia
- Czech Republic
- Denmark
- England and Wales
- Germany
- Jamaica
- Portugal
- The Netherlands
- USA

## Detailed country search

On the basis of the selected countries, the detailed per country search included:

1. Three bibliographic databases (Web of Science, Scopus, Criminal Justice Abstract).
2. Two grey literature bibliographies: one held by the International Society for the Study of Drug Policy [ISSDP] and the other being the drug law reform bibliography at UNSW's Drug Policy Modelling Program).
3. The bibliographies of existing reviews identified in the initial search above.
4. A forward citation search for relevant documents which cite these reviews.
5. A forward web search of all cited documents (using Google Scholar).
6. A check with country level experts. (These were identified on the basis of our existing international networks each of whom sent the full list of material and asked to identify if there were any missing documents).

The search terms for the detailed *per* country/state search included:

- [country OR state] AND (drug OR cannabis OR marijuana OR heroin OR cocaine ) AND
- (decriminali\* OR depenal\* OR liberal\* OR diversion OR warning OR expiation OR civil OR infringement OR law OR policy) AND ( possess\* OR use ) AND (evaluat\* OR effect\* OR impact\* ) NOT ( pharma\* OR medic\* )

The specific search for relevant literature on Ireland used the following terms:

- Ireland AND [(drug AND possession) or (drug AND policy)] AND NOT [pharma\* OR medic\*]

In search tools that did not allow the use of Boolean operators (AND/OR/AND NOT) or 'wild' word endings denoted by asterisks, different searches were run using these alternative terms and spellings (e.g. decriminalisation/decriminalization). In these searches, results from journals in the pharmacological and purely medical subject areas were excluded from the results. Citations were managed using the bibliographic software Endnote, with duplicates removed manually.

## Document selection

Inclusion criteria for documents found in the detailed *per* country search were:

- Contains original <sup>6</sup> data on the contexts, mechanisms and/or outcomes of some form of decriminalisation or alternative to simple drug possession in the selected countries.
- Is written in English.
- Is available via open access, through the libraries of University of Kent or UNSW Australia, or on request from the lead author.
- Refers to drug policy in the modern era (i.e. since the UN Single Convention on Narcotic Drugs 1961).

We excluded studies of the legalisation or regulation of drug production or supply which did not cover decriminalisation of possession. Documents that discussed opinions, policies or preferences without providing any original data on decriminalisation were excluded from the review.

## Data extraction

A standardised coding form was used, and the key domains were:

- Description of the study
  - o Authors
  - o Date
  - o Type of study (e.g. cost, quasi experimental, observational cross-sectional)
  - o Country (and state/territory/area if relevant)
  - o Type of approach (e.g. formal decriminalisation, formal depenalisation, alternative disposals without legal change)
  - o Year of change in law/practice
  - o Period covered after the change
- Contexts
  - o Common law/penal code legal system
  - o Level of drug use and related problems prior to decriminalisation.
  - o Criminal penalties for possession prior to reform
  - o Simultaneous economic developments
  - o Simultaneous health system developments
  - o Simultaneous criminal justice developments
- Mechanism
  - o General text description of the mechanism
  - o Any changes to statute law, guidance to police and/or guidance to prosecutors
  - o Drugs covered (cannabis only/all/other)
  - o Eligible target group/s
  - o Applies to minors <18 (yes/no)
  - o Threshold amount if specified (e.g. 50g cannabis)
  - o Any sanctions applied to those found in drug possession post reform
  - o Measures for diversion to treatment (if any)
  - o Other diversionary measures
- Outcomes
  - o Arrests
  - o Charges
  - o Convictions
  - o Prison sentences
  - o Prison population
  - o Prevalence of drug use (by drug type if available)
  - o Age of onset of use (cannabis, heroin, other drugs)
  - o Drug availability
  - o Health harms
    - Drug-related deaths

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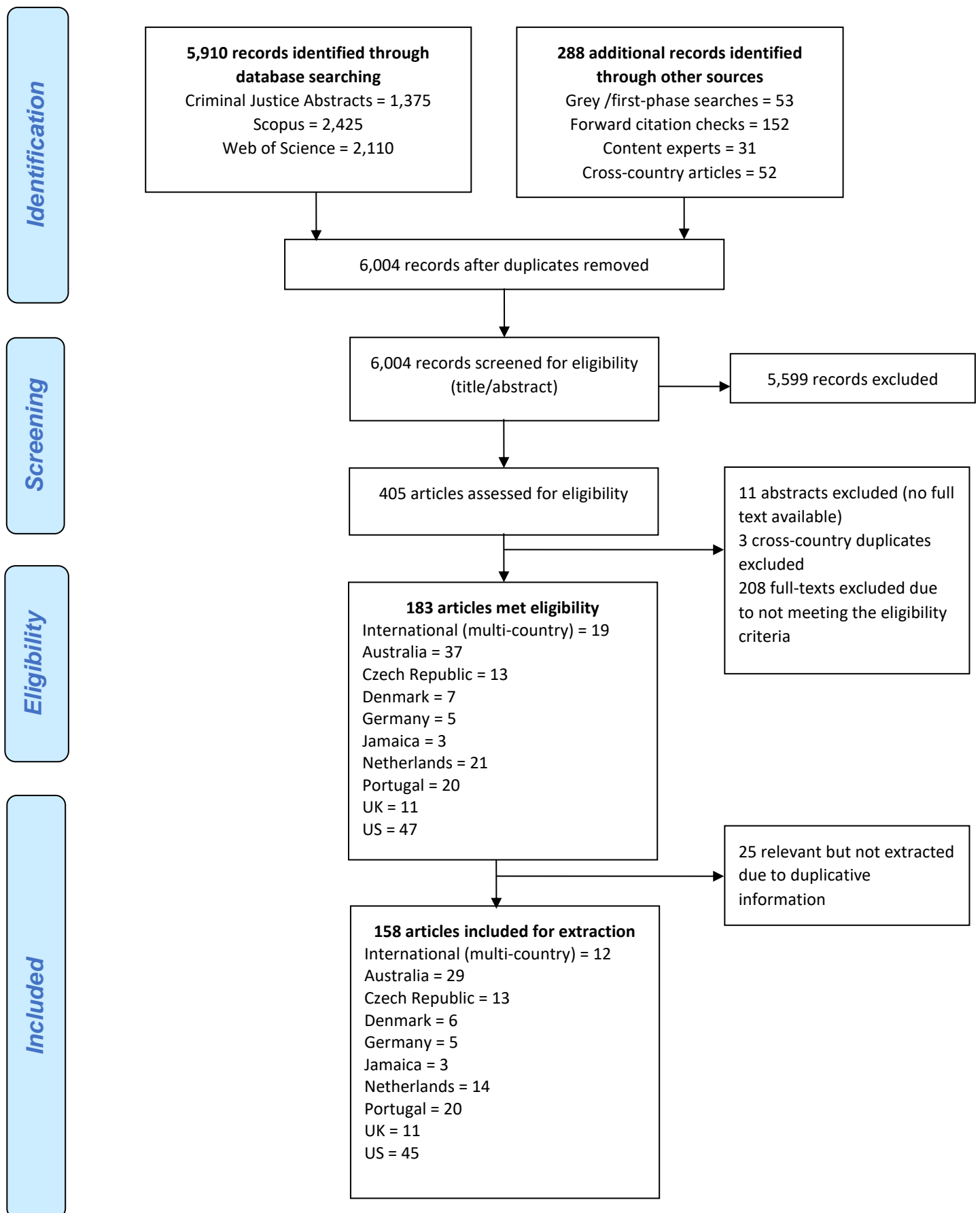
<sup>6</sup> By original, we mean data that is not available in English in previous documents found by the search.

- Overdoses
  - HIV infections
  - Viral hepatitis infections
  - Hospital presentations
  - Monitored drug poisonings
  - Dependence or problematic drug use
  - Injecting drug use
  - Presentations to drug treatment
  - Road traffic accidents
- Costs in health system
- Crime harms
  - Crime in general
  - Acquisitive crime
  - Violent crime
  - Organised crime
  - Street dealing
- Costs in CJS
- Harms of criminalisation
  - Employment
  - Housing
  - Family
  - Travel
- Cost-effectiveness
- Other potential unintended consequences
  - Net-widening
  - Burden on health system
  - Burden on police officers
- Attitudes to drug use
- Attitudes to the policy
- Other outcomes and impacts

## Search results

A total of 5910 records were initially identified via the database searches and 288 from other sources (see Figure 2). 405 articles were accessed for eligibility, with 11 excluded due to full text not being available and a further 210 excluded primarily for lacking original information on the context, mechanisms or outcomes of decriminalisation policies in the countries of interest. A total of 183 articles met the eligibility criteria and 158 were included for extraction. The number of documents included for extraction ranged from three in Jamaica (the country with the most recent reform) to 45 in the USA. There were 12 unique studies extracted that contained content relevant to multiple countries of interest. See Appendix A for the list of included studies.

**Figure 2: PRISMA extraction of studies on alternative approaches taken to simple possession drug offences**



## Data analysis

Data analysis occurred via two methods.

- First, within countries: to describe the context, mechanism and outcomes (CMO) and any areas of conflict between studies. Here we also differentiated evidence on different types of reforms within a nation.
- Second, qualitative comparative analysis (QCA) was used to produce a typology of alternative approaches across the nine countries (for details see chapter five).

A programme logic or programme theory was then developed for each approach. As described by Wong et al. (2013, p. 11) the goal of a realist review is to provide theor(ies) of why a social programme/intervention generates particular outcomes in particular contexts: that is how the programme triggers change. Then we outlined the outcomes from each alternative approach.

By way of example, in chapter four we describe the impacts of depenalisation within several different countries (including the Netherlands, Denmark and the UK). In the final chapter we consolidate all known examples to describe the mechanisms, programme theory and outcomes across the set of nations, as well as any contextual factors that shape the outcomes. This is followed by a list of advantages and disadvantages (and where relevant other factors to consider) for each reform type. Unlike a meta-analysis where the aim is to produce a single statistical analysis (e.g. that drug use increased by 5% given a particular reform), the aim was to explicate patterns of responses across a broad array of data (including quantitative, qualitative or administrative) and multiple contexts, as well as the contingencies that may shape reform outcomes. In so doing the realist review sought to produce a guide of the potential outcomes of alternative approaches to simple drug possession as well as the steps that policy makers may need to take to trigger the desired outcomes.

# Chapter four: Country analysis of approaches to simple possession drug offences

This chapter describes the approach to dealing with simple possession offences in our nine nations. We outline the context (including legal context and drug situation), the rationale for reform, the legislative and judicial regime(s) that has been employed and the main outcomes. We also outline key changes in reform when they have occurred: and lessons for understanding the mechanisms and outcomes of reform. The main alternatives are summarised in Table 1, showing fourteen alternative approaches taken across the set of countries.

**Table 7: Summary of alternative approaches taken to simple possession drug offences across the nine countries**

Country	Legal basis	Reform type	Drug type
Australia	<i>De jure</i>	Decriminalisation with civil penalties	Cannabis
Australia	<i>De facto</i>	Police diversion (cannabis caution) with referral to education session	Cannabis
Australia	<i>De facto</i>	Police diversion to treatment (assessment and brief intervention)	Other illicit drugs
Czech Republic	<i>De jure</i>	Decriminalisation with administrative penalties (fine)	All illicit drugs
England and Wales	<i>De facto</i>	Depenalisation with on the street warnings	Cannabis and khat
England and Wales	<i>De facto</i>	Police diversion to structured interventions involving treatment and social services	All illicit drugs
Denmark	<i>De facto</i>	Depenalisation – guidelines from Attorney General to police to issue warnings for a first offence	All illicit drugs
Germany	<i>De jure</i>	Constitutional court decision for non-prosecution	All illicit drugs
Jamaica	<i>De jure</i>	Decriminalisation with civil penalties	Cannabis
Netherlands	<i>De facto</i>	Depenalisation (“tolerance policy”)	Cannabis
Netherlands	<i>De facto</i>	Police diversion to treatment	Other illicit drugs
Portugal	<i>De jure</i>	Decriminalisation. Offence became an administrative offence, with referrals to dissuasion committee	All illicit drugs
USA	<i>De facto</i>	Depenalisation – police instructed to treat as “lowest priority”	Cannabis
USA	<i>De jure</i>	Decriminalisation with civil penalties	Cannabis
USA	<i>De facto</i>	Police diversion to education / treatment / social services	All illicit drugs

NB. This outlines the main approaches only. Further specificities were included in the final analysis: such as that Australia has some *de jure* diversion programmes and that some US states e.g. Maryland have decriminalisation *with* diversion to treatment.



## England and Wales

### Context

England and Wales use the same, common law legal framework, while Scotland and Northern Ireland have their own legal systems. Policing in England and Wales is carried out by 43 local police services, plus the British Transport Police, under the direction and funding of the Home Office. Police policy and practice is coordinated by the National Police Chiefs Council (NPCC), the successor body to the Association of Chief Police Officers (ACPO).

England and Wales have a similar drug situation to Ireland, having experienced general increases in illicit drug use and, since the 1980s and 1990s, a serious problem with the use of heroin and – later – crack cocaine. These and other substances are controlled by the *Misuse of Drugs Act 1971*, which separates drugs into three classes, depending on their potential for causing social harm. Class A includes those most considered the most harmful, including heroin and cocaine. Class B contains cannabis (although, as described below, it was in class C from 2004 to 2009).

Since drugs were originally controlled in the early 20<sup>th</sup> century, the usual method for dealing with simple possession has been arrest, leading to a caution or conviction. The *Misuse of Drugs Act* allows for a range of penalties on conviction, including fines, community sentences and imprisonment. Imprisonment is used rarely for simple possession offences. In the later 20<sup>th</sup> century, concern grew over two issues. One was the over-policing of people for cannabis possession, and the related drain on police and other criminal justice resources. Another was the high proportion of acquisitive offending that is associated with problematic use of heroin and crack cocaine.

### Alternative mechanisms for dealing with simple possession offences

Over the last 20 years, England and Wales have experienced two types of alternatives: police depenalisation; and diversion. Neither of these have involved a change in the legislation (i.e. *de jure*): instead they have occurred through changes to police practices (i.e. *de facto*).

There have also been other changes in police policy that have affected the policing of drugs offences. During the 2000s, this included the use of targets for ‘offences brought to justice’ or ‘sanction detections’ to manage police performance. Since 2010, these targets have not been used. There has been a substantial fall in the numbers of police in England and Wales due to budget cuts. There have also been reductions in the use of stop-and-search.

#### *Police depenalisation of cannabis*

In Lambeth (a borough of London), a local programme was started in 2001 which came to be known as the Lambeth Cannabis Warning Scheme (LCWS). The goal of the scheme was to save police time to focus resources on ‘high priority’ crimes such as gun crime, street robbery, class A drug enforcement and other serious crime. Police officers were instructed to avoid arresting adults for simple possession of cannabis, and instead to focus their attention on other offences, including class A drug offences, drug supply, robbery, theft and burglary. This scheme ran from 4 July 2001 to 31 July 2002.

Later, in 2004, the UK government reclassified cannabis from class B to class C. At the same time, ACPO issued guidance that advised police officers throughout England and Wales to issue on-street warnings for adults in possession of unspecified small amounts of cannabis, rather than arresting them, unless there were aggravating circumstances. The person must admit to the offence of possession to receive the warning. Police retained discretion over whether to arrest. These cannabis warnings would be counted as sanction detections, but would not lead to an arrest, charge, conviction or criminal record.

In 2009, following media and political controversy (often focusing on the effect of cannabis on mental health), cannabis was again reclassified into class B, but an amended version of the cannabis

#### **England & Wales: cannabis (and khat) warning**

- Rationale: To save police time to focus on more serious offences
- Mechanism: *De facto* – police directed to issue on-street warnings, rather than arrest
- Drugs: Cannabis and khat
- Threshold limits: No

warning continued. Police were advised to continue using an on-street warning for the first possession offence, but to issue a Penalty Notice for Disorder (an on-street fine of £60) for the second offence. A third offence should lead to arrest and a criminal justice disposal (formal caution or conviction). In 2014, this escalating warning system was extended to the possession of khat, when the plant was controlled under the *Misuse of Drugs Act*.

#### *Diversion for other drugs and other offences*

Some police services have developed schemes to divert drug-related offenders from prosecution and conviction. The two best-researched examples are the Operation Turning Point programme in the West Midlands and Operation Checkpoint in Durham. Both are open to a wider group of offenders than just those found in possession of drugs.

In the West Midlands, Operation Turning Point (OTP) was between November 2011 and July 2014. It was targeted at 'low risk' offenders 'for whom the police had decided it was in the public interest to prosecute, but who had no more than one conviction', in the aim of reducing costs and recidivism (via structured interventions and avoiding the potentially counterproductive impacts whereby first-time convictions often increase offending). Another objective was to increase access to Black, Asian and Minority Ethnic (BAME) offenders and as such they removed the requirement for offenders to first admit an offence before being given the diversion (Lammy, 2017). These offenders had their prosecution deferred. They agreed to take part in 'structured interventions'. This included drug or alcohol treatment, mental health assessments, anger management courses, restorative action (such as attending a restorative justice conference) and social interventions such as education, training and employment. Prosecutions were subsequently dropped for offenders who successfully completing the intervention. Prosecutions were resumed for those who did not.

#### **England: diversion (e.g. West Midlands Operation Turning Point programme)**

- Rationale: To reduce cost & recidivism (and increase access to all racial groups)
- Mechanism: *De facto* – police divert minor offenders to structured interventions involving drug treatment, mental health, restorative justice and/or social services
- Drugs: All (and other petty offences)
- Threshold limits: No

Operation Checkpoint in Durham is potentially available to any offender who faces being charged. Offenders do not have to admit guilt to be eligible. Instead of being charged, diverted offenders go through a needs assessment, leading to engagement in interventions. The offender must agree to conditions including: 'no reoffending within a four-month period (mandatory); participation in a restorative approach (mandatory if the victim agrees); attend appointments regarding individual personal issues or undertake one-to-one intervention work; carry out community/voluntary work for 18-36 hours and/or wear a Global Positioning System (GPS) tag; and undertake voluntary drug testing' (Lammy, 2017).

Both have been the subject of evaluations by the University of Cambridge. The results have not yet been fully published, but some are available in 'grey' literature (see below).

Avon police are also trialling a diversionary approach in which drug possession offenders (all controlled drugs) are diverted to a drug awareness session. If they attend, then charges are dropped. No details or results of this approach have been published.

#### Outcomes

##### *Depenalisation*

There is some controversy over the outcomes of the LCWS, partly due to the difficulty in measuring and attributing outcomes. For example, there was a 61 per cent increase in recorded **cannabis possession offences** during the period of the scheme (Adda, McConnell, & Rasul, 2014). It is not known whether this reflects an increase in cannabis use, or an increase in the police recording of possession offences, as the warning scheme made it much easier and cheaper for police officers to do this. However, Adda, McConnell, and Rasul (2014) note that the increase in cannabis possession offences persisted after the LCWS ended. They also note increases in recorded cannabis supply

offences, relative to other London boroughs. They observe a 12 per cent increase in recorded offences of possession of class A drugs; 'the evidence does not suggest the Lambeth police turned a blind-eye towards Class-A drug possession in Lambeth during or after the LCWS policing experiment'.

On other crimes, Adda et al (2014) observe significant increases in **arrest rates** for nearly all crime types, with significant reductions in robbery, burglary, theft and handling, fraud and forgery and criminal damage. This supports the contention that the LCWS achieved the intention of enabling Lambeth police to focus their resources on higher priority crimes.

On the other hand, a time series analysis by Kelly and Rasul (2014) showed 'an immediate and sustained increase in drug-related **hospital admissions** in Lambeth compared to other boroughs'. They argue that this is an effect of increases in cannabis use leading to increases in class A drug use, and therefore to increased hospital admissions. They do not directly observe an increase in cannabis use.

A **public opinion** poll was also carried out to assess local residents' views on the LCWS. These were generally supportive. The report of this poll concluded: 'probably the over-riding message to emerge from the data is how positively the overall population of Lambeth has received the scheme. The survey contained a diverse range of measures of public reaction to the scheme, and across all of these, the survey consistently recorded high levels of public support' (Ipsos MORI, 2002). This is even though Adda et al (2014) found that house prices in Lambeth were reduced in Lambeth, compared to other London boroughs, which they suggest shows a loss of local quality of life.

If there were effects of depenalising cannabis possession on increasing cannabis use, crime and mental health problems in Lambeth, they were not observed when the national cannabis warning was introduced in 2004. Nationally, reported **cannabis use** continued to fall in the adult population and remained stable among young people. There were general reductions between 2005 and 2011 among people aged 10-18 in England, except for some increases among people aged 16-18 (Herbert, Gilbert, Cottrell, & Li, 2017). It could be argued, from the data provided by Herbert et al (2017), that these indicators improved more rapidly in children in Scotland than in England, but it should be noted that Scotland started this period with higher rates of use.

A study of self-reported **drug use and offending** exploited the fact that the cannabis reclassification implied different changes to the threat of punishment for people in different age groups. By comparing changes in behaviours reported by this age group before and after the reclassification, it conclude: 'findings imply no consistent pattern of changes in either cannabis consumption or other risky behaviour', including crime and consumption of other drugs (Braakmann & Jones, 2014). The survey used did not ask these young people whether they were aware of these changes in potential penalties.

A particularly interesting finding, given the concern expressed over **mental health** while cannabis was in class C, is that hospital admissions for cannabis psychosis reduced rather than increased between 2004 and 2009. They started to rise again once cannabis was put back in class B (Hamilton, Lloyd, Hewitt, & Godfrey, 2014), although – given that the cannabis warning remained – there is no clear mechanism by which to link classification to mental health outcomes.

In terms of policing, there was clear evidence of '**net-widening**' associated with the introduction of the cannabis warning. Despite the apparent absence of an increase in cannabis use, there was a substantial increase in the numbers of people who were given some sort of recorded intervention – mostly in the form of a cannabis warning – by the police. This increase reversed after the government stopped using targets for sanction detections to manage police performance. Initially, the number of cautions and convictions fell as cannabis warnings rose, but these started to climb back from 2006 (Shiner, 2015).

### *Diversion*

There has been one main evaluation of diversion to date in England: of the Operation Turning Point programme in West Midlands. This compared two randomised groups: those given the deferred prosecution versus those receiving prosecution as normal. It found **victims** were in general satisfied with the scheme, that the scheme yielded 68 per cent **fewer court cases** than those prosecuted in the usual way. There was little difference in **re-offending** for OTP participants compared to treatment as usual, except that OTP participants showed lower recidivism for violent offences than the treatment as usual comparison group. Finally, “despite the costs associated with the structured interventions paid for through the OTP scheme” the Turning Point programme led to “a **saving** of around £1,000 per case” (Lammy, 2017, p. 28). More generally they concluded:

Rarely does an intervention improve outcomes for victims, offenders and wider society all at the same time. OTP does this – and without the usual trap of sifting out defendants through the plea process, which is likely to disproportionately affect those from BAME [Black, Asian and Minority Ethnic] backgrounds. Critically, it also holds the potential to prevent large numbers of children and young adults from picking up a criminal record, which can be hugely damaging for their future employment prospects (Lammy, 2017, p. 29).

An internal presentation by the Cambridge University evaluators (provided by the West Midlands police) further noted that compared to the comparator group the Turning Point programme had led to an overall reduction of 36 per cent in the relative ‘crime harm’ of **reoffending** as measured using the Cambridge Crime Harm Index. There had been a 45 per cent reduction when comparing ‘all costs of processing (All Courts, CPS, Police)’: Cost of prosecution as usual = £1762.03 per person. Cost of Turning Point = £977.34. This suggests that the programme may achieve several objectives, particularly **reducing costs**. That said, we do not yet know whether impacts and cost-effectiveness may differ for possession offenders specifically. No other outcomes of depenalisation or diversion have been evaluated in published documents.

## Czech Republic

### Context

The context of drug policy reform in the Czech Republic is unique for several reasons. First, the Czech Republic employs a “continental” legal system: with both Civil and Criminal Codes. It also has administrative procedures to protect individual rights in relation to public law. Second, over the last thirty years the Czech Republic has experienced significant political and economic change. Of note, Czechoslovakia was under communist rule from 1948 until 1989. Czechoslovakia then split into two countries—the Czech Republic and Slovakia on 1 January 1993. In 2004, the Czech Republic joined the European Union. Third, the Czech Republic has traditionally had much lower rates of drug use than other European nations, due in large part to Soviet rule and restrictions on the free movement of goods (Zábranský, 2004). For example as noted by Radimecký (2007, p. 15) “under the control of the communist regime, nonconformists such as drug users were treated as public enemies of the so-called ‘ideal classless society’ and were persecuted.” Patterns of drug use also differed to other European nations as heroin use was rare and the main drugs consumed were cannabis, MDMA and pervatin (a home-made variant of methamphetamine). The penal code of the Czechoslovak Socialist Republic had established criminal sanctions, for drug possession, of up to three years imprisonment for possession and a fine, albeit also mandated compulsory “treatment” for people deemed problematic drug users (Zeman, 2007). This was rarely used due to the low levels of drug use. Nevertheless, the penal code was changed in 1990.

Rather than being in response to rising drug use (or drug-related harms), reform occurred simultaneously with political and CJS upheaval following the 1989 transition to democracy that included the abolition of the death penalty and a shift towards a legal system that emphasised the use of criminal sanction as the last resort (*ultima ratio*). The resultant reform - decriminalisation of possession – was thus part of this broader change, albeit here using criminal sanctions for drug use as a last resort. For example as noted by Zábranský (2004): “These changes constituted one component of a larger systemic reform that was designed to revise the deviant system of communist ‘class-conditioned justice’ where those who supported the regime were treated differently than those who did not.”

### Alternative mechanisms for dealing with simple possession offences

In 1990 the Czech Republic decriminalised possession for personal use of all illicit drugs making drug possession of any amount an administrative offence: *de jure* decriminalisation. In line with the objective of use of criminal sanctions for drug use as a last resort the reform removed criminality of the offence. Detected offenders were instead liable to pay a fine (amounts have varied over time).

As outlined in Table 8, since 1990 there have been changes to the amount of drug that could be possessed under the reform. Specifically, in 1999, following fears that decriminalisation of all possession could send the wrong message, the law was amended to decriminalise use *up to a specified amount* (Zábranský, 2004) and to allow criminal sanctions for possession over that amount. Specific threshold quantities (TQs) were not legislated at that time. Following a national evaluation (see below) the law was then modified in 2010 and 2014 to introduce threshold quantities on the amount of drug that could be possessed. Importantly, as outlined by Belackova and Stefunkova (2018), while there have been changes in TQs, the intent and operation of the law has remained largely constant over the time.

#### **Czech Republic**

Rationale: To use criminal sanctions as a last resort

Mechanism: *De jure* –administrative offence

Drugs: All

Threshold limits: Yes, currently 1.5 grams of heroin and 10 grams of cannabis

**Table 8: Czech Republic decriminalisation periods of reform**

1990-1998	<i>De jure</i> decriminalisation of possession for personal use of all illicit drugs by law (for possession of any amount)
1999-2009	<i>De jure</i> decriminalisation only for possession in 'small amount'. But TQs were not legislated and internal guidelines differed across CJS institutions. (TQs from the General Instructions of Supreme Public Prosecutor were: 0.3 grams of pure THC, 0.15 grams of pure heroin, 1 grams of pure MDMA, 0.25 grams of pure cocaine. TQs for police were: 0.3 grams pure THC, 0.5 grams pure heroin, 1 grams of pure MDMA, 0.3 grams of pure cocaine.)
2010 -2013	<i>De jure</i> decriminalisation of possession in 'small amount' using legislated TQs. (15 grams dried cannabis, 2 grams methamphetamine, 1.5 grams of heroin, 1 gram of cocaine, 0.4 grams of MDMA). Personal cultivation in 'small amount' also decriminalised.
2014-present	<i>De jure</i> decriminalisation of for possession in 'small amount' with revised legislated TQs for personal use (10 grams of cannabis, 1.5 grams of methamphetamine or heroin, 1 gram of cocaine, 0.4 grams of MDMA)

### Outcomes

Analysis of the outcomes of reform, shows most data has been collected since 1999, following the introduction of threshold quantities. Comparison of trends over time is also complicated given that there was negligible drug use prior to reform: and that the opening of the Czech Republic borders led to an inevitable rise in drug use and supply. For example, as noted by Zeman (2007, p. 50): “the period immediately after the fall of communism proved very favorable to the creation and stabilization of a ‘classic’ drug scene and drug markets similar to those found in Western countries.” It also led to more open recognition of behaviours that had previously been covert (Radimecký, 2007). Nevertheless, some clear observations can be made.

First, there was some evidence of an increase in **drug consumption** following the 1990 reform and specifically, an increase in heroin use. In more recent times trends in drug use have been stable and/or increased in line with European Union trends. As summarised by Radimecký (2007, p. 16), “contrary to various media portrayals... the situation with regard to rates of drug use has not changed significantly since the change in political regimes at the end of 1989. The number of problem drug users in the Czech Republic has remained relatively stable over the long term”. Thus, there is little evidence that decriminalisation directly increased drug use in the Czech Republic.

Second in relation to **drug markets**, post the 1990 reform drug markets both increased and became more visible. For example as noted by Zábranský (2004) “in major Czech cities, relatively small-scale open drug scenes have appeared in public places where users meet dealers – especially pervitin purveyors – but increasingly also those who deal in heroin.” There was also a subsequent increase in organised crime involvement in the pervitin (methamphetamine) trade involving the Russian outlaw motorcycle gangs (OMCGs), but this coincided with and has largely been attributed to the opening of the borders: not the reform *per se*.

Third, **demands on the CJS** for possession-related offences have remained very low, particularly compared with other nations. For example, an analysis by Belackova et al (2017) of trends from 2002 to 2012 showed that 72.4 per cent of use/possess offenders received administrative sanctions and there were only 0.02 court proceedings for use/possession per 1000 population and 0.001 people sentenced to prison for use/possession per 1000 population. The number of court proceedings involving use/possess offenders was also much lower than in other national contexts that did not have *de jure* decriminalisation. Specifically, there were 0.02 court proceedings for use/possession per 1000 population in the Czech Republic, compared to 1.21 court proceedings per 1000 population in Florida (where drug possession remained a criminal offence). A comparison of drug policy in the Czech Republic and Slovakia is also instructive here. Following the dissolution of Czechoslovakia in 2003, Slovakia penalised drug possession for personal use. Moreover, while it subsequently removed criminal penalties for possession of drugs in the amount of up to 10 doses in 2004 (on accession to the EU), analysis showed that this post-soviet country remained more punitive on paper and in practice. For example, analysis in 2010 showed that while some cases in Slovakia were disposed of

through fines rather than prison sentences, little use was made of diversion to treatment. In addition, many instances of inhumane treatment of people in custody for drug offences, and other violations of detainees' rights were uncovered (Csete, 2012).

Fourth, decriminalisation and the removal of stigma around drug use, facilitated the provision of harm reduction services and reduction in **drug-related harms**. As noted by Zábranský (2004):

“It seems very likely that that the relatively early inception of Czech NGOs [non-government organisations] providing drug services and introducing new treatments and harm reduction services helps to explain the success of the Czechs in sustaining an extremely low prevalence rate for both HIV/AIDS. For example, the Czech rate was less than 0.1 per cent in 2003, compared to the level of 30 per cent of HIV-positive IDUs in neighboring Poland... and 1 to 34 per cent in the European Union ... Regarding viral hepatitis C, the Czech rate in 2003 was 30 per cent among intravenous drug users and in the general population as well ... compared to .... 40-90 per cent in individual EU member states.”

More generally as noted by Radimecký (2007, p. 16) even after the “tightening of drug legislation in 1999 (introducing potential punishments for drug possession), fewer drug users are being processed through the CJS than are being handled through the **system of social and health services**. Specifically, all drug offences prosecuted numbered 2,357 in 2003, 232 of which were for drug possession alone. In contrast, 18,000 persons were treated in 2003, and these treatment participants accounted for about 60 per cent of all problem drug users.”

To date the most comprehensive evaluation of decriminalisation in the Czech Republic was a government sponsored evaluation of the introduction of the 1999 reform (the most punitive of the four decriminalisation reforms). This was conducted by Zábranský, Mravčík, Gajdošíková, and Milovský (2001) and sought to test whether the introduction of the penalty for possession of illegal drugs of above a particular threshold would (1) reduce the availability of illegal drugs; and (2) reduce the prevalence of drug use; without increasing the negative health consequences related to illegal drugs and increasing the social costs. The evaluation concluded that the new law met none of the objectives. Instead, they found youth consumption increased. Demands on the CJS increased significantly. For example, the number of people arrested for use/possession increased from 0 in 1998 to 235 in 2001, (with 85 people convicted and 28 imprisoned for use/possession) and the costs of CJS response increased by 37 million Czech crowns (or about U.S. \$1 million). The reform was also found to reduce treatment seeking due to increased stigma of people who used drugs and increase arbitrary police enforcement and on the street police corruption (e.g. requests for information in exchange for turning a blind eye to possession). They thus concluded that the reform led to no additional benefits and that it had increased social costs and wasted resources that could otherwise have been used for better purposes.

Outcome analyses in more recent times have showed that demands on the CJS have reduced, that there are **no apparent indicators of arbitrary enforcement** and drug use trends have largely remained stable, albeit with increased injecting of methamphetamine / pervatin. Importantly, the prevalence of drug-related harm – particularly overdose and drug-related HIV – have remained low and are still some of the lowest in the European Union. Overall this reform has thus been found to reduce CJS costs and sanctions for many (young) people who use drugs and to reduce barriers to the provision of harm reduction and treatment services (albeit not via direct referral as in some reforms, such as the Portuguese decriminalisation). The reform has also shown the importance of careful design of threshold limits for decriminalisation reforms to avoid discretionary enforcement and fear amongst people who use drugs.

## Denmark

### Context

As with all Scandinavian countries, Denmark has a civil law system, albeit with many common law traits. Denmark is also characterised by its comparatively strong welfare-oriented profile and egalitarian ethos.

In 1955 the *Danish Act on Euphoriant Substances* made illicit drug possession a criminal offence punishable by up to two years imprisonment. But in the mid-1960s the patterns of drug use shifted beyond being a behaviour of a small socially deviant sub-group who resided in Copenhagen. Instead, there was a growth of a 'new type of drug user' who were young people, school children and students, artists, musicians and bohemians (Houborg, 2010). By the late 1960s, national surveys, academic studies and a public committee showed that exposure to drug use was increasingly routine and part of the everyday life amongst young people, albeit that those who developed drug problems were those who were more socially disadvantaged. Drug use thus came to be seen as a normal activity and drug 'abuse' as a symptom of fundamental social problems (Houborg, 2017).

### Alternative mechanisms for dealing with simple possession offences

From 1969 to 2004 Denmark depenalised possession of illicit drugs for personal use. The rationale for depenalisation was to avoid criminalising young people. More specifically there was recognition that drug use was a widespread but largely non-problematic phenomenon amongst young people and that treating it as a social issue was preferable to criminalisation and treating young people as deviants. As noted by Houborg (2010, p. 790) the Danish Government "did not wish to criminalise a large number of otherwise normal young people and risk alienating them from society." As such the Attorney General issued guidelines to police, prosecutors and the courts to exempt possession of illicit drugs for personal use from penalties for a first offence and to instead issue warnings. Fines could be used for repeat offenders.

Threshold limits were set: up to 10 grams of cannabis or 0.2 grams of heroin or cocaine. The target group were youth and first-time offenders and it was immaterial if it involved public or private use. Supplementing the depenalisation policy were broader welfare policies targeting drug demand and problematic drug use (via improving living conditions) and tougher penalties and enforcement of supply.

#### **Denmark (1969-2004)**

Rationale: To avoid criminalising young people

Mechanism: *De facto* – Attorney General advised police to issue warnings for personal possession

Drugs: All drugs

Threshold limits: Yes (e.g. 10 grams cannabis and 0.2 grams of heroin or cocaine)

### Outcomes

Analysis of the outcomes of the Danish depenalisation is limited; there is more published on the reversal of the reform in 2004 (discussed further below). From the mid-90s and until early 2000, there was a clear **increase in experimental drug use** in the general population, young adults and adolescents (15 and 16-year-olds) (EMCDDA, 2004b). By the early 2000s, the prevalence of cannabis use was amongst the highest in Europe. As outlined by Houborg (2017) "various studies and reports provided evidence of extensive drug use amongst young Danes and indicated that a new culture of intoxication was developing." The extent to which this was attributable to the reform, versus broader European trends, is not clear. For example, much of the increase in stimulant use occurred in the context of the night-time economy and echoed that seen in other European countries including the UK, the Netherlands, France and Spain (EMCDDA, 2004a, 2004b). Police however argued that the increase was due in part to the reform and that the depenalisation had made legal control difficult and also **undermined social controls about the acceptability of illicit drug use** (Houborg, 2017).

More generally the EMCDDA (2004b) report on Danish drug trends at the conclusion of the depenalisation indicated there had been a **reduction or stabilisation in drug-related harms**. Specifically:



- The number of cases of drug-related cases of **hepatitis A, B and C** reduced: such as from 49 cases of drug-related Hepatitis C in 1993 to 2 in 2003.
- The number of cases of drug-related HIV was stable.
- The number of drug charges made by the CJS were stable or decreasing: from 18,604 in 1993 to 14,316 in 2003.

The main indicator of concern was drug-related deaths which had been stable in the 1980s (at around 150 per year) but increased significantly in the 1990s (to around 250 per year from 1994 to 2003). Moreover, while most deaths in the 1980s occurred in Copenhagen they were more spread across the country.

In 2004 the depenalisation was ended: under arguments that it sent the wrong message, the exception being for dependent drug users who continued to have options of warning due to the recognition they should not be punished for being dependent and that they would have few economic means to pay a fine (the typical sanction for possession). Houborg (2010, p.795) noted that the 2004 reforms took place in a broader context of a new conservative Government and adoption of tough on crime penal policies, and “in light of these changes in the political culture in Denmark, it is hardly surprising that possession of illegal drugs for personal consumption would be re-penalized.”

Analysis of the re-criminalisation by Møller (2010) showed there was a significant negative correlation between the number of seizures of cannabis and amount seized – indicating the increased focus on retail distribution may have displaced control of trafficking/wholesale offences. Møller argued that this is an indication of policy displacement with scarce police resources redirected to targeting use and possession rather than higher-level trafficking and wholesale distribution. It is important, however, to interpret this in the context of highly fluctuating seizure amounts on an annual basis. Note there were no significant findings for other drugs, including heroin, amphetamine and cocaine.

Equally importantly, Møller (2010) found evidence of a clear increase in punishment that had occurred post re-penalisation. The number of fines for drug law misdemeanours was approximately three times higher in 2006 and 2007 than in 2000 and 2002: up from 2,950 in 2000 to 4,789 in 2004 to 7,950 in 2008 (Møller, 2010). Finally, he looked at ethnic bias in policing and found that the proportion of non-Westerners who were given a fine for use / possession cannabis increased between 2000 and 2008 from 2.6 to 6.8 per 1,000 citizens. In contrast, the proportion of Danish citizens and people of Western origin who were fined only increased from 1.6 to 2.4 per 1,000 citizens. This led him to conclude that **re-penalisation increased ethnic bias in policing** of people who use drugs in Denmark, due in large part to differential access to public space.

## Netherlands

### Context

The Netherlands has a civil law system. In 1953 possession of illicit drugs became a criminal offence, punishable with up to two years imprisonment, but drug use was rare until the late 1950s. Concern in relation to illicit drugs increased in the 1960s, as young people started experimenting with cannabis, LSD and amphetamines and the use of psychoactive substances in the Netherlands increased rapidly. Dutch law enforcement authorities initially responded forcefully leading to a spike in arrests (from 74 in 1966 to 544 in 1969), however, enforcement was found to be difficult, time consuming and ineffective and the “repressive approach” was widely criticised (Grund & Breeksema, 2017). In 1969 the Public Prosecutor’s office shifted the focus of policing away from cannabis consumption towards trafficking of cannabis and ‘hard drugs’. Such an approach – known as the “Gedoogbeleid tolerance policy” – is consistent with a number of Dutch traditions. First, it is customary for Dutch police to act on the basis of the expediency principle, whereby laws and rules are only enforced when there are reasons to intervene (Uitermark, 2004). Second, there is a longstanding Dutch preference for “gedogen” or a pragmatic and minimalistic approach to difficult social problems. However, a further rise in heroin consumption sparked more explicit attention to optimal policy responses.

It was in this context that two Government advisory committees were established, the Hulsman Commission and the Baan Commission, and became highly influential in shaping the future of the Dutch drug policy. Both emphasised the normalisation of use: that drugs are ‘a normal social problem’, hence the optimal approach for society is to depolarise and integrate people who use rather than exclude and punish. They also proposed separating drug markets based on their risk profiles, to reduce the exposure of young cannabis consumers to other illicit drugs.

### Alternative mechanisms for dealing with simple possession offences

In 1976 the Netherlands introduced a formal written policy of depenalisation of adult possession of cannabis and a system of regulated cannabis supply, which eventually led to the establishment of ‘coffee shops’ where sale of cannabis is tolerated. Here we focus on the response to possession, rather than the coffee shops. Under the new reform, charges for the possession of up to 30 grams of cannabis would be dismissed (in accordance with a Gedoogbeleid ‘tolerance policy’) or be charged as a petty offence or misdemeanour (comparable with a traffic tickets) that would not result in a criminal record.

A second (and lesser known) mechanism of response was provided to adults found in possession of other illicit drugs: namely diversion to treatment. Potential offenders are visited in police custody by social workers and referred to treatment. Here threshold limits are lower at 0.5 grams.

The central aim of Dutch drug policy was the prevention or alleviation of social and individual risks caused by drug use. This was premised on the belief that individual policy measures should reflect a rational response to those risks and the inadequacy of the criminal law to resolve aspects of the drug problem other than the trafficking of drugs. As such repressive measures are prioritised for drug trafficking (other than cannabis) rather than drug use. The Dutch policy has shifted over time. Of note, in 1995, the threshold limit of the amount of cannabis of which possession would be tolerated was reduced to 5 grams.

#### **Netherlands (cannabis)**

Rationale: To use criminal sanctions as a last resort

Mechanism: *De facto* – depenalisation (Gedoogbeleid ‘tolerance policy’)

Drugs: Cannabis

Threshold limits: Yes, 30 grams cannabis (from 1976-1995), 5 grams (since 1995)

#### **Netherlands (hard drugs)**

Rationale:

- Early intervention
- Reduce drug-related harms

Mechanism: *De facto* – diversion to treatment

Drugs: Other illicit drugs

Threshold limits: Yes, 0.5 grams of heroin or cocaine

## Outcomes

There is a large evidence-base on the Dutch drug policy, which shows that the **rates of drug use** in the Netherlands are similar or lower than other nations. For example, Chatwin (2016) found that the prevalence of cannabis use increased post the 1976 reform, however this increase was in line with broader European trends. For example, 25.7 per cent of the general population reported lifetime cannabis use, slightly above the European average of 21.7 per cent. Moreover, the Netherlands has the lowest **rate of problematic drug use** in the EU (Grund & Breeksema, 2017). The use of “hard drugs”, with the exception of ecstasy, is relatively low in the Netherlands, and cannabis users in the Netherlands report less use of other illicit drugs like cocaine, amphetamine, heroin and crack than those in other countries (van Ooyen-Houben, 2017). Moreover, in 2013, the number of opiate users was 14,000; a 21 per cent reduction since 2009 and a much lower rate than in other European countries.

Cross-national comparisons are particularly instructive here. Comparing Amsterdam to San Francisco in the United States, Reinerman, Cohen, and Kaal (2004) found the overall pattern of use was similar across both cities: with age of onset, age at first regular use, age at the start of their periods of maximum use nearly identical. But, contrary to expectations, the general population prevalence surveys (age 18 and above) showed significantly lower lifetime prevalence of cannabis use in Amsterdam (34.5 per cent), where it has been depenalised, than in San Francisco (62.2 per cent) where criminal sanctions for possession were still used.

Another important cross-national comparison was undertaken by MacCoun and Reuter (2001). This study compared the prevalence of cannabis use over time in the Netherlands, USA and several European nations (including Denmark and the UK), taking into account two phases of Dutch cannabis policy: first, involving only depenalisation and second, involving depenalisation and the growth of commercialised coffee shops. During the first phase from 1970 to 1983, they found that Dutch lifetime prevalence of cannabis use was 3.6 per cent lower than that of the USA, but somewhat higher than that of some, but not all, of its neighbours (on average 5 percentage points higher). In relation to trends they showed that cannabis use was declining among Dutch adolescents in the years prior to the 1976 reform, which had little effect on levels of use during the first seven years of the new regime (i.e. no evidence of further reductions, but also no evidence of increase). During the second phase, from 1984 to 1996, lifetime prevalence of cannabis use increased consistently and sharply in the Netherlands. The US, Norway and Canada all experienced similar sharp increases in use from 1992 to 1996, but only the Netherlands showed an increase from 1984 to 1992. This led the authors to conclude this rise was the consequence of the gradual progression from a passive depenalisation regime to the broader *de facto* legalisation involving commercialised coffee shops, which allowed for greater access and promotion (MacCoun & Reuter, 2001). This suggests that the depenalisation of possession of cannabis did not increase cannabis use, though commercialisation may have.

Irrespective of the trends in use there is now a large amount of evidence showing that the Dutch policy is associated with fewer **drug-related harms**.

- There have been declines in injecting drug use, and only 7 per cent of opiate users inject – the lowest in Europe. The Dutch model has resulted in a very low rate of AIDS infection contrasted with that found in the US (about 12 per cent of all dependent people and 25 per cent high-risk intravenous (IV) users in Amsterdam tested positive for HIV compared to at least 50 per cent HIV positive among IV users in the US) (Bullington, 1994).
- There is also increased evidence of contact with health services. Specifically, because there is no overt threat presented by the authorities, health care workers in the Netherlands have been able to maintain close contact with about 70 per cent of local dependent people, as contrasted with a figure of 15 per cent in New York. Moreover, the low rates of drug injecting and risks of overdose and HIV have contributed to high rates of survival amongst people who use heroin in the Netherlands: with 81 per cent of clients in treatment for opiates aged 39 or over (Grund & Breeksema, 2017).
- Finally, the rates of arrest and conviction are low in comparison with other European nations. For example, in 2005 there were 3 arrests per 1000 users compared to 44 per 1000 users in Austria and 34 per 1000 users in Germany (Grund & Breeksema, 2017).

## Germany

### Context

Germany is a federated country comprised of 16 states or Landers that enjoy a high level of autonomy in many areas of public policy (drug policy included). That said, as opposed to its Australian and US counterparts, the German federal government is exclusively responsible for enacting criminal laws, states mainly have responsibility for decisions around enforcement of laws (Pacula et al., 2005) (Pacula et al., 2005) (Pacula et al., 2005) (Pacula et al., 2005). Germany has a civil legal system as well as a Constitution that guarantees rights to personal freedom, inviolability of the home, freedom of expression and equality before the law (Holzer, 2017).

The *Federal Narcotics Law* enabled punishment of up to 4 years imprisonment for drug possession. During the 1960s illicit drug use and drug offences in Germany were rare. However, 1968 saw an exponential rise in consumption, drug offences and thereafter, drug-related deaths (Holzer, 2017). Then, despite the allocation of significant resources (particularly by law enforcement), the 1980s saw further increases in the availability of heroin, as well as drug-dependent people, drug-related harms and property crime. For example, from the early to late 1980s, the number of deaths in Germany caused by illicit drug use tripled to more than 2,000 mortality cases per year. Moreover, amongst those who were arrested, recidivism rates continued to climb. In combination, these factors increased levels of police activity and youthful resistance, producing a “revolving door effect” and drove increased attention to seeking alternative mechanisms for dealing with simple possession offences (Holzer, 2017).

### Alternative mechanisms for dealing with simple possession offences

In 1992 the German Parliament introduced Section 31a BtMG, which partially depenalised consumption-related drug offences by giving public prosecutors the authority to decide when to prosecute defendants charged with consumption-related drug offences. Then, in 1994 the Federal Constitutional Court delivered a landmark ruling, that there was no ‘right to intoxication’ but made it obligatory for the prosecution to drop the case (*nolle prosequi*: no further action) when it involved possession of small amounts for personal use if there was no danger to third parties. One key rationale for the ruling was the belief that such offences would amount to excessive state intervention and thus seriously infringe upon the constitutional principle of proportionality. The ruling also allowed for the removal of a punishment that had already been pronounced in a court verdict if an offender underwent drug treatment in an inpatient treatment institution.

#### **Germany**

Rationale: That it is unconstitutional to criminalise people who use drugs for simple possession alone

Mechanism: *De jure* – Constitutional court decision

Drugs: All

Threshold limits: Yes, e.g. 6-30g of cannabis and 10-30 ecstasy pills

However, the Federal Court left it up to the states to decide what constituted ‘small amounts’. This has resulted in large variation. The first variation is whether this applies to cannabis or all illicit drugs, as while the ruling stated cannabis, many states extended this to other illicit drugs. The second variation is in threshold limits, which vary across states between 0.1–2 grams of heroin or cocaine; 6–30 grams of cannabis; and 10–30 ecstasy pills. The southernmost state insisted on very low limits (e.g. 6 grams of cannabis, 0.5 grams of heroin, 0.3 grams of cocaine, 0.2 grams of amphetamine and its derivatives), while other states (e.g. Berlin and Hamburg) adopted limits of between 10 and 30 grams of cannabis. A third variation is whether states allow dismissals for repeat offences – this is common in liberal states, but largely ruled out in conservative states unless in exceptional circumstances.

The German approach to dealing with simple possession offences was based on harm reduction principles: concentrating repression by directing law enforcement efforts towards drug traffickers and smugglers rather than on users, and of offering “Help instead of Punishment,” Sect. 31a BtMG. These reforms occurred alongside a significant expansion in harm reduction in Germany: including the introduction of methadone maintenance, heroin assisted treatment and supervised injecting facilities.

## Outcomes

In Germany, impacts on the **CJS** appear mixed. For some, the procedural decriminalisation has led police to increasingly abstain from proactive enforcement and even from reactively responding to such incidents, particularly cannabis and ecstasy. But, drug offences have risen in Germany: from 122,240 in 1993 to 253,525 in 2013, two-thirds of which are for consumption alone (mainly cannabis) (Holzer, 2017). More generally the differences in interpretation have fuelled large variations in enforcement and justice by geography. For example, the proportion of unconditionally discontinued prosecutions ranged between 49 per cent (e.g. Bavaria) and over 90 per cent (e.g. Berlin), with further variance evident in the numbers that go to court (5 per cent of cases in Berlin compared with 30 per cent of cases in Bavaria) (Schäfer & Paoli, 2006). Data indicate that there is no correlation between the prosecution policy adopted and self-reported rates of cannabis consumption. Bollinger (2004) further notes that the Bavarian government sometimes instructed the Bavarian police to *intensify* cannabis enforcement.

Germany has seen increased use of the inpatient **treatment system**. As Bollinger (2004, p. 501) noted “practically all perpetrators now accept or undergo treatment. The proportion of in to outpatient treatment was originally about 9 to 1, but that has now been reversed.” This has led to much greater and faster access to drug treatment.

There is evidence of declines in **drug-related harms** particularly in relation to studies conducted post the first reform. For example, the number of newly registered heroin users in Frankfurt declined significantly from 903 in 1992 to 557 in 1993 after a consistent increase in the previous years (Fischer, 1995). Drug overdoses further decreased in Hamburg from 184 in 1991 to 135 in 1993. While the number of deaths caused by heroin use in Frankfurt in the 1980s rose by a rate of 50 per cent per year to a peak of 147 deaths in 1991, this trend was reversed: deaths related to heroin use decreased by almost 60 per cent to 68 in 1993. Drug-related crime in Frankfurt also declined significantly over the same period. The percentage of street robberies in Frankfurt that were committed by heroin users, as identified by the authorities, decreased from 35 per cent in 1991 to 8 per cent in 1993. That said, the expansion of harm reduction services has clearly played a role in such trends. As such, the extent to which reductions in drug-related harm could be attributed to the law versus the expansion of harm reduction or other interventions remains unclear.

Amongst German youth annual trends in **lifetime cannabis consumption** was stable pre-reform (16.3 per cent in 1989 and 1993), but almost doubled by 2004: to 31.3 per cent and has now stabilised at 25 per cent in 2015. Trends in last 12 month use also point to an increase from 1990 to 2003 then a stabilisation. That said, Germany has lower rates of drug use, including problematic drug use, than many other European countries (Eastwood, Fox, & Rosmarin, 2016), as well as lower rates of HIV and drug-related overdose.

The net result of the German reform is thus mixed, with clear reductions in the number of people prosecuted and reductions in drug-related harm in some regions, but also increased prosecution in others. While this in part reflects the federated context of the reform it also reinforces the potential divergence that can arise if reforms are interpreted in different ways or if there is opposition or a lack of support for reform.

## Portugal

### Context

Portugal's legal and judicial system was based on Roman civil law, albeit contemporary Portugal has criminal, civil and administrative laws. It also has a constitution that guarantees human rights and freedom, including the right to safeguarding of health and guaranteed access to health care. The most relevant article of the Portuguese Constitution is article 64 on health care which states the Government has a duty, "to guarantee access by every citizen, regardless of his economic situation, to preventive, curative and rehabilitative medical care." Portugal consists of 18 administrative regions, including Lisboa, which hosts the capital city Lisbon. Portugal also includes two autonomous regions, the Archipelagos of Azores and Madeira Islands, both located in the Atlantic Ocean.

The main drug law preceding reform was *Decree-Law 15/93*. This law distinguished between consumption, trafficking-consumption and trafficking. Under this law, the maximum penalty for occasional or habitual consumers in possession of small quantities of drugs was three months imprisonment (*Decreto-Lei n.º 15/93, de 22 de janeiro 1993*). The penalty for possession of a larger quantity was up to one-year imprisonment. In practice, however fines were commonly used.

Portugal has traditionally had a low prevalence of illicit drug use, albeit Portugal's location on the south-western border of Europe means it is a gateway for drug trafficking. However, the context changed rapidly in the 1980s with the emergence of a public health and humanitarian crisis, surrounding injecting use of heroin, infectious diseases and open-air drug markets. For example, the number of drug-related AIDS cases increased from 47 in 1990 to 635 in 1999. In 1999, Portugal had the highest rate of drug-related AIDS cases in the EU and the second highest prevalence of HIV among injecting drug users (Hughes, 2017). Moreover, there were up to 5,000 people attending open air drug markets such as Casal Ventoso in central Lisbon on a daily basis, amongst whom 60 per cent were HIV positive, 74 per cent were HCV positive and many were homeless and socially marginalised.

An expert committee was established by the Government to develop a new strategy and way forward. One of the key recommendations was to decriminalise drugs. This was based on a number of core principles, the most important of which were pragmatism and humanism: Pragmatism reflected the notion that the dogmatic policies of the past had not worked and humanism recognised the need to treat all people with respect and humanity and to take measures to integrate or re-integrate them into society, including by removing the barrier of the criminal law and by expanding prevention, harm reduction, treatment and social reintegration resources.

### Alternative mechanisms for dealing with simple possession offences

On 1 July 2001, Portugal decriminalised the use, possession and acquisition of all illicit drugs, when deemed for personal use. The decriminalisation is a *de jure* reform, enacted through *Law no. 30/2000*.

The definition of "one's own consumption" is a quantity "not exceeding the quantity required for an average individual consumption during a period of 10 days" (Article 2(2)). The quantities delineated are 1 gram of heroin, 1 gram of ecstasy, 1 gram of amphetamines, 2 grams of cocaine, or 25 grams of cannabis. The 2000 law is notable in its breadth—it includes all previously controlled psychoactive drugs and does not distinguish between public and private use.

Since that time drug use became an administrative offence, with all detected people referred by police to a Commission for the Dissuasion of Drug Addiction (CDT).

The CDTs are regional panels made up of three people, including lawyers, social workers and medical professionals. They are connected with a broader network of agencies, including drug

#### **Portugal**

- Rationale: Social integration of problematic drug users
- Mechanism: *De jure* – Possession became an administrative offence, with diversion to dissuasion committees and targeted referrals to treatment
- Drugs: All
- Threshold limits: Yes (10 days' supply e.g. 1g heroin, 25g cannabis)

treatment; primary care; mental health; schools; employment; social services; and child protection. There is one CDT for each of the 18 regions of continental Portugal and 3 in the autonomous archipelago of the Azores.

The CDTs conduct an interview with referred offenders to assess their treatment needs and explore the cause and circumstances of drug use and - where relevant - their mental health history. The CDTs also assess whether there are any social issues such as in school, employment or housing (and refer affected people to relevant support agencies). The CDTs then decide on an appropriate ruling or sanction. They have a range of possible sanctions, including: warnings; community service; suspended sentence; bans on obtaining a firearms license; requiring regular attendance at a specified site (e.g. an employment service); and fines (these cannot be used for dependent users). However, their primary aim is to dissuade drug use and to encourage dependent users into treatment. In practice, most offenders are deemed non-dependent and receive a suspended sentence. For example, in 2013 the CDTs completed 7,528 rulings and 70 per cent involved suspended sentences for non-dependent users (EMCDDA, 2015). A further 12 per cent of rulings involved suspended sentences with a referral to treatment for dependent users and 11 per cent were 'punitive', of which 8 per cent required periodic attendance at a site (EMCDDA, 2015).

Decriminalisation is supported by a national drug strategy and action plan, which has as its central goals (i) to reduce use and (ii) to reduce the health and social consequences of use. The first iteration of these documents was adopted in May 1999 (*National Strategy in the Fight Against Drugs (NDFAD)*) and led to an expansion in policies across multiple domains, including a range of harm reduction and social measures (such as needle syringe programmes, outreach teams, free hepatitis B vaccinations, shelters, guaranteed minimum wage and subsidies for employers to hire drug-dependent individuals). The new policy also coincided with improvements in social housing and the introduction of a guaranteed minimum income.

### Outcomes

The major perceived success of the Portuguese reform has been its contribution to changes in public health problems, with significant referrals—particularly in the early years—by the CDTs of heroin users to treatment. For example, the overall numbers of drug users in **treatment expanded** in Portugal from 23,654 to 38,532 between 1998 and 2008 (Hughes & Stevens, 2010). Evaluation of the CDTs found that about a quarter of the participants were referred to specialised services in addictive behaviours, mainly Treatment Structures, and that for half of them this was their first contact with the structures (Carapinha, Guerreiro, & Dias, 2017). The largest increase in treatment was in outpatient opioid substitution therapy.

Pombo and da costa (2016) further evaluated **drug treatment involvement** in the periods of pre-and post-drug policy reform and showed that treatment engagement increased by 94 per cent. Drug injection had decreased with heroin users smoking heroin rather than injecting it and HIV infection also decreased (28.0 per cent to 19.6 per cent) (Pombo & da costa, 2016). Moreover, the population of people who use drugs had aged and become better educated. This led them to conclude that the drug-use profile of heroin-addicted patients changed after the new policy on drugs was implemented with stable or reducing harms.

**Drug-related HIV** infections decreased significantly between 2000 and 2009 from 1,400 to fewer than 200 cases per year. Significant reductions in mortality for HIV, HCV and tuberculosis (TB) also occurred (Moreira, Trigueiros, & Antunes, 2007). The number of new diagnoses of HIV and AIDS has also declined. For example, between 2000 and 2008, the number of new cases of HIV reduced amongst people who use drugs from 907 to 267 and the number of new cases of AIDS reduced from 506 to 108 (Hughes & Stevens, 2010). This was attributed primarily to expansion of harm reduction services, which may have been facilitated by the reduction in stigma around harm reduction services after the removal of criminal penalties. As of 2016, Portuguese trends in the total number of annual notifications of drug-related HIV infection cases had continued to decrease to 30 cases (EMCDDA, 2017).

Between 2000 and 2005, the number of problematic drug users and the prevalence of injecting drug use also declined. For example, the rate of injecting drug users decreased from a mean of 3.5 people who inject drugs per 1,000 population aged 15–64 to 2.0.

The number of **drug-induced deaths** in Portugal (defined according to ICD protocols) also decreased from the time of reform (Hughes & Stevens, 2015a). Following a large drop in drug-related deaths from 2001 to 2005, there has been a subsequent increase, although levels remain much lower than at the time of reform. Trends in relation to drug-induced deaths have showed consecutive increases in the last two years: but much lower than at the time of reform. In 2015 the rate of drug-induced mortality among adults (aged 15 to 64 years) was 5.8 deaths per million: much lower than the 2015 European average of 20.3 deaths per million (EMCDDA, 2017). Given that heroin problems were the major driver of the reform, this reduction in overdose and opiate-related death was deemed a considerable achievement of both the decriminalisation and the broader drug strategy.

There was also a significant reduction in the **burden on the CJS**. The number of people arrested for criminal offences related to drug offences reduced from over 14,000 offenders in 2000 to an average of 5,000-5,500 offenders per year in 2008 (with 6,000 sent to CDTs). Stakeholders thus argued that decriminalisation did as conjectured reduce the burden on the Portuguese CJS and enable police to refocus their attention on more serious offences, namely drug trafficking-related offences. It also led to a reduction in prison overcrowding (Hughes & Stevens, 2010).

Trends in relation to **drug use** are complex as there were no general population data prior to the reforms. Between 2001 and 2007 the reported prevalence of lifetime drug use increased in Portugal for almost all illicit substances and amongst most age groups. But analysis of rates of discontinuation of drug use (the proportion of the population that reported ever having used a drug but opting not to in recent years) also increased, which suggests that the growth in lifetime reported use reflected predominantly short-term experimental use (Hughes & Stevens, 2015a). Trends moreover in recent use were stable (only a 0.3 per cent increase), and trends actually reduced amongst those aged 15-24 – those most at risk of initiation. The most recent data on drug use among students, from the 2015 European School Survey Project on Alcohol and Other Drug, showed lifetime use of cannabis and other illicit drugs among Portuguese students was slightly lower than the European average (based on data from 35 countries): with trends either stable or decreasing over time. This all indicates that the feared increase in drug use has not occurred and that net-harms may have reduced.

Again cross-national analyses are particularly informative here. Hughes and Stevens (2012) combined stakeholder interviews with analysis of trends in Portugal, Spain and Italy in relation to drug use, drug-related harms, CJS and drug markets. This study concluded that post reform there were:

- small increases in reported illicit drug use amongst adults albeit on par with Spanish and Italian trends;
- reductions in illicit drug use among problematic drug users (in direct contrast to those trends observed in Spain and Italy);
- reductions the burden of drug offenders on the CJS (in direct contrast to those trends observed in Spain and Italy);
- reductions in illicit drug use among adolescents, at least since 2003;
- increases in the uptake of drug treatment;
- reductions in opiate-related deaths and infectious diseases;
- increases in the amounts of drugs seized by the authorities; and
- reductions the retail prices of drugs.

This led to the conclusion that combining the removal of criminal penalties with the use of alternative therapeutic responses to dependent drug users may offers several advantages: reducing the burden of drug law enforcement on the CJS, while also reducing problematic drug use.

Gonçalves, Lourenço, and da Silva (2015) evaluated the **social costs of the reform** including the strategy. They found a significant average reduction (12 per cent) in the social cost of drugs in the 5 years following the NSFADs approval (2000 - 2004). In a longer timeframe (2000 - 2010), the social cost (average) reduction was more significant (18 per cent).



## Jamaica

### Context

The cultivation and consumption of cannabis have long had major economic and cultural importance in Jamaica (Emanuel, Haughton, & K'nife, 2018). For example, while cannabis use and cultivation in the Caribbean was made illegal in 1913, it remained popular amongst members of the Rastafari faith for religious and medical purposes. Moreover, in the 1940s, Jamaica was home to the first Ganja Enterprise and used to cultivate and transport cannabis to England during the Second World War. More recently, in 2014 the International Narcotics Control Board reported that Jamaica remains the largest illicit producer and exporter of cannabis in Central America and the Caribbean. Nevertheless, general population rates of cannabis/ganja use have tended to be lower than in North America (Younger-Coleman et al., 2017).

Use has traditionally been concentrated amongst sub-populations, particularly members of the Rastafari faith, and there have been ongoing concerns about the policing and enforcement of the cannabis laws and disproportionate impacts on such groups. For example, there have been many accounts of police brutality and shootings of people who use cannabis/ganja and the Jamaican police have been branded as operating a death squad trained to pursue extrajudicial strategies to fight the War on Drugs, especially in relation to religious minorities (Niaah, 2016). In 1999 the Government of Jamaica established a National Commission on ganja which discussed possible policy options of legalisation or decriminalisation (Emanuel et al., 2018). Twelve years later, the subject of amending the law in Jamaica re-emerged as a hot topic when a construction worker died in police custody three days after being arrested for the possession of a ganja spliff (Niaah, 2016).

### **Jamaica**

- Rationale: To reduce harm to people who use drugs from a criminal conviction
- Mechanism: *De jure* – Replacement of criminal penalties with a civil fine ('fixed penalty notice') of J\$500 (€3.14)
- Drugs: Cannabis only
- Threshold limits: Yes, 2 ounces

### Alternative mechanisms for dealing with simple possession offences

On 15 April 2015, the Government introduced *de jure* decriminalisation by replacement of criminal penalties with a civil fine for possession of small quantities of cannabis. The purpose of the reform was multiple including: efficiency (to reduce the backlog on the courts); human rights (to reduce conflict with rights to privacy); and to reduce the harm to young people from provision of a criminal conviction. Under the new law possession of 2 ounces or less of ganja is no longer an offence for which one can be arrested, charged and sent to court, and it will not result in a criminal record. However, the police may issue a ticket to a person in possession of 2 ounces or less of ganja, similar to a traffic ticket, and the person has 30 days to pay the sum of J\$500 at any Tax Office. A person who is found in possession of 2 ounces or less and who is under the age of 18 years, or who is 18 years or older and appears to the police to be dependent on ganja, will also be referred to the National Council on Drug Abuse for counselling, in addition to paying the ticket. The reform was part of a broader suite of changes. These included allowing members of the Rastafari faith to use and cultivate, once granted authorisation, cannabis for religious purposes, and the establishment of a court supervised drug treatment programme for persons dependent on cannabis and other substances who commit crimes such as theft as an alternative to imprisonment. Laws enabling past convictions for cannabis possession or use to be expunged were also passed.

### Outcomes

Given the recency of the change, there are very few studies. But, a general population survey was conducted in 2016 (all data was collected between April and July) which examined **knowledge and attitudes to the new law** and drug use trends (Younger-Coleman et al., 2017). The survey found 34.6 per cent of the population reported that they did not know of any of the changes recently made to the *Dangerous Drugs Act*. Knowledge appeared lower amongst the younger population with 52 per cent of those aged 12-17 and 40.4 per cent of those aged 18-24 aware of none of the changes, compared to 25.4 per cent amongst those aged 35-44. Nevertheless there was strong support for the change in regards to possession; 70 per cent of Jamaicans aged 12-65 years old agreed with being allowed to have limited amounts of cannabis for personal use (Younger-Coleman et al., 2017). This

led these authors to conclude that the provisions appear to have public support but that more work needs to be done to educate the populace about the changes.

The general population survey showed that in 2016, 18.0 per cent of the general population aged 12 to 65 reported recent (last 12 month) **cannabis use**. Comparison of the findings from the 2001 and 2016 survey showed a 6 per cent increase in last year cannabis use in the general population of 12-55/65 year-olds (Younger-Coleman et al., 2017), but any increase appeared concentrated amongst older populations. Amongst those aged 10-17, last year cannabis use increased by less than 1 per cent. Across both surveys the prevalence of use of other illicit drugs such as cocaine was stable and very low (<1 per cent reported lifetime or past year use).

## Australia

### Context

Australia is a federated nation comprised of the Commonwealth of Australia and eight states and territories. Australia has a common law system, but this has evolved over time to include criminal, civil and administrative laws. The main legislative responsibility of the Commonwealth, in relation to drugs, is for border control (*Customs Act 1901*), and drug trafficking and manufacturing (*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*). Responses to simple drug possess offences are largely the remit of states and territories.

Most states prohibit the trafficking, cultivation, possession and consumption of substances including heroin, cocaine, cannabis and amphetamines, with maximum penalties for use or possession of 1 to 2 years imprisonment. For example, the maximum penalty in Victoria for use or possession of an illicit drug is A\$500 fine for cannabis or A\$3,000 fine and/ or 1-year imprisonment for any other drug (McDonald & Hughes, 2017).

Drug use in Australia is relatively high. For example, in 1993 the Australian national household survey showed that 37.1% of people aged 14 years and over had tried illicit drugs, mainly cannabis (24%) and 13.7% reported they had used an illicit drug in the last 12 months. Moreover, 7% of women and 15% of men were weekly cannabis users.

The first National Drug Strategy (the *National Campaign Against Drug Abuse*) was adopted in 1985, with the objective of harm minimisation; i.e. reducing harms without necessarily reducing use. This led to a practice (or at least rhetoric) of focusing criminal justice intervention on drug traffickers, rather than drug users. There has also been a commitment to a partnership approach to responding to illicit drugs, exemplified by the involvement of both health and law enforcement stakeholders in the peak body overseeing the National Drug Strategy.

The diversion of offenders away from the CJS has long been part of Australian police practice, especially relating to youth offenders, but early programmes were *ad hoc* or relied on informal police discretion. Throughout the 1980s and 1990s programmes that targeted illicit drug offenders started to be introduced. The most well-known of these was the South Australian Cannabis Expiation Notice Scheme, introduced in 1987 (see below). Diversion became much more systematic and embedded into all states and territories after adoption of the Council of Australian Government Illicit Drug Diversion Initiative (IDDI); a national commitment, signed in 1999, to divert minor drug offenders away from the CJS into assessment, education and/or treatment programmes via both police and courts. The IDDI was accompanied by a national framework, principles of best practice for diversion and federal funding amounting to over A\$310 million to enable an expansion of treatment places (Hughes & Hughes, 2007).

The introduction and expansion of alternate mechanisms was driven by multiple factors. This included inquiries into cannabis such as the National Cannabis Taskforce in 1992 which highlighted the adverse consequences associated with the application of criminal penalties for cannabis possession for personal use, and a rise in the late 1990s of heroin and drug-related crime, an increasingly overburdened CJS, and increased research and an international therapeutic jurisprudence movement showing diversion could be a useful policy option (Hughes & Hughes, 2007).

### Alternative mechanisms for dealing with simple possession offences

Australia has evolved a broad array of alternatives for drug-related offenders, including *de jure* and *de facto* reforms, as well as therapeutic and non-therapeutic options. For example, Hughes and Ritter (2008) conducted a review of all Australian drug diversion options, and showed that in 2007 there were 51 programmes provided across Australia: and that most states employed 5 or 6 different programmes. Two main types of alternative mechanisms for simple possession offences now operate.

### *Decriminalisation with civil penalties*

The first approach is decriminalisation with civil penalties. This is a *de jure* system that removes criminal penalties for possession for personal use of 50-100 grams (and cultivation of up to two plants) and provides offenders with the opportunity to avoid a criminal record through the payment of an expiation fee (\$100-300). South Australia was the first state to introduce *de jure* decriminalisation of cannabis by a civil penalty scheme – in 1986 (enacted 1987), via the Cannabis Expiation Notice (CEN) scheme in the *Controlled Substances Amendment Act 1986*. At the time, it was one of the first places in the world to introduce such a reform. The Australian Capital Territory and Northern Territory followed suit in 1992 and 1996 respectively. Western Australia also introduced a civil penalty scheme in 2004, but this was repealed in 2008 following the election of a centre-right Government. A common feature of the Australian programmes (that differs from the US examples) is that they do not target first-time offenders alone. Instead, they provide unlimited opportunities for offenders to be expiated. Failure to pay the expiation fee may however result in criminal proceedings.

### *Police diversion*

The second type of alternative used in Australia is police diversion. In most cases, this is a *de facto* system that offers police the option to refer detected offenders to education or treatment instead of laying criminal charges. Two main types of police diversion programmes operate. The first, a cannabis caution programme, is aimed at offenders detected using or possessing 10-50 grams cannabis. This leads to an “on the street” formal caution by police and referral to an education session or telephone service. The second, other drug diversion programmes, are aimed at offenders detected using or possessing small quantities of amphetamines, cocaine, ecstasy or heroin (1-10g) and lead to a police referral for an alcohol and other drug (AOD) assessment and brief intervention. The nature and intensity of the programmes vary. For example, in the New South Wales Cannabis Caution Program offenders are provided with a caution notice outlining the legal and health consequences of cannabis use and a phone number for a 24-hour Alcohol and Drug Information Service, albeit any contact to the information line is optional unless it is an offender’s second caution. In contrast, cannabis caution programmes in other states - including Queensland - require offenders to undertake a face-to-face assessment of their cannabis use and then receive education on the health effects of cannabis. The diversion programs for other illicit drugs typically involve a more intensive response: counselling, albeit this can vary between one to three sessions. All police diversion programmes have the option to impose sanctions for non-compliance, albeit this is rare in practice.

<p><b>Australia Cannabis Expiation Schemes (three states: ACT, NT, SA)</b></p> <p>Rationale: To use criminal sanctions as a last resort</p> <p>Mechanism: <i>De jure</i> – replacement of criminal penalties with civil penalties (\$100-300)</p> <p>Drugs: Cannabis</p> <p>Threshold limits: Yes 50-100g (varies by state)</p>	<p><b>Australian Cannabis Caution programmes (four states: NSW, Qld, Vic, WA)</b></p> <p>Rationale: To educate people who use drugs about the legal and health consequences of cannabis use</p> <p>Mechanism: <i>De facto</i> – police “on the street” formal caution and referral to education session or telephone service</p> <p>Drugs: Cannabis</p> <p>Threshold limits: Yes 10-50g (varies by state)</p>	<p><b>Australia other drug diversion programmes (six states: ACT, NT, SA, Tas, Vic, WA)</b></p> <p>Rationale:</p> <ul style="list-style-type: none"> <li>• Early intervention</li> <li>• Reduce recidivism</li> <li>• Reduce harmful drug use</li> </ul> <p>Mechanism: <i>De facto</i> – referral for AOD assessment &amp; brief intervention (typically 1-3 counselling sessions)</p> <p>Drugs: All illicit drugs / All except cannabis</p> <p>Threshold limits: Yes typically 1 or 2g heroin or cocaine, but up to 5g heroin &amp; 10g ecstasy</p>
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All Australian diversion programmes have eligibility restrictions including on priors and concurrent offences and some also require offenders to admit an offence or admit guilt. Notably while most of the cannabis caution and drug diversion schemes are *de facto* – operating via police guidelines – there are three *de jure* diversion schemes that are based in law: the South Australian Police Drug Diversion Initiative (for all illicit drugs) and Queensland Police Diversion Program for Minor Drug Offences (for cannabis) and the Western Australian Cannabis Intervention Requirement (for cannabis).

## Outcomes

### *Expiation*

The best studied cannabis expiation notice scheme in the South Australian Cannabis Expiation Notice Scheme. In the early years, two **perverse effects** were observed. First, net-widening as evidenced by a 2.5-fold increase in expiable cannabis offences: from 6,231 in 1987 to over 17,170 in 1996 (Christie & Ali, 2000). Second, low rates of compliance in paying the expiation notices. at 45%. The net widening was attributed to the greater ease with which CEN can be issued under the scheme, compared to the procedures for an arrest and charge that would be required for a prosecution. The low compliance rates was attributed to lack of knowledge of the law and financial difficulty experienced by a substantial proportion of those detected for minor cannabis offences. This led to more cannabis users incarcerated for non-payment of fines. In 1996, the South Australian Government responded by introducing new payment options, including payment by instalments and substitution of community service for fees and increased education about the reform. Such measures led to a reduction in net-widening and increased payment (Eastwood et al., 2016).

In spite of the early perverse effects, the scheme was found **more cost-effective** for dealing with minor cannabis offences. For example, in the 1995/96 the total cost was estimated to be A\$1.24m and revenue from CEN fees, fines and costs was A\$1.68m. In contrast, the total cost of the prohibition approach was estimated to be A\$2.01 million, while revenue from fines and levies was estimated to be A\$1.0 million (Ali et al., 1999).

Comparisons of cannabis users who had received an expiation versus a conviction in South Australia and Western Australia respectively showed that decriminalisation with civil penalties was associated with significant **social benefits**, including fewer negative employment problems such as a loss of a job and less relationship disruption. The WA convicted group were also more likely to identify negative episodes of involvement with the CJS which they thought were related to their cannabis offence, such as further police enquiries or questioning.

There is some contestation about the impacts on **drug use**. For example, Damrongplasit et al. (2010) used the 2001 National Drug Strategy Household Survey to assess the impact of cannabis decriminalisation policy on cannabis smoking prevalence in Australia. They concluded that on average, living in a decriminalised state significantly increases the probability of smoking cannabis, by 16.2%. However, Donnelly et al (1995) used four household drug-use surveys and showed that while there was a national increase in self-reported lifetime cannabis use between 1985 (26%) and 1995 (36%), with a greater degree of increase in South Australia than in the average of other Australian states and territories, the SA increase is unlikely due to the CEN system, because (1) similar increases occurred in Tasmania and Victoria, where there was no change in the legal status of cannabis use; (2) there was no differential change in weekly cannabis use in South Australia as compared with the rest of Australia, and (3) there was no greater increase in cannabis use among young South Australian adults aged 14 to 29 years (the group most likely to take up use). Finally, Cameron and Williams (2001) found that holding all else equal, the probability that an individual used cannabis was 2.0 percentage points higher if the individual lived in South Australia, but that the increase was temporary and dissipated over time:

“Cannabis participation was not higher in South Australia in 1988 than in the other states. However, it was significantly higher in 1991 and 1993 (by 4.5 and 3.3 percentage points respectively). The probability of participating then dropped in 1995 to the same level in the other states. The effect of introducing a more legal regime has only a transient effect on cannabis use. In particular, 7 years after decriminalisation of cannabis in South Australia, the probability of an individual from South Australia using cannabis is no different than an individual from one or the other Australian states, all else being equal” (Cameron & Williams, 2001, p. 31)

Importantly, they also found that the increase reflected delayed exit of older consumers (aged 30 and over): not an increase amongst young people.

Moreover, analysis of prevalence of use in other states has shown stable trends or reductions. Of note the Northern Territory has historically reported high rates of cannabis use well exceeding all other states in Australia. However, rates of cannabis consumption in the state have fallen significantly since 1998 – two years after the introduction of decriminalisation – with reported use in that year of 36.5 per cent of the population, meaning that prevalence has more than halved in the last 17 years (to 17.1 per cent in the past year), supporting the evidence that the ending of criminal sanctions does not lead to an increase in use (Eastwood et al., 2016).

#### *Police diversion*

Cannabis cautioning programmes have been found to reduce **number of people convicted** for cannabis use or possession. For example, Baker and Goh (2004) found that the NSW Cannabis Cautioning Program led to 2,658 fewer persons convicted with a principal offence of cannabis by the local courts in the three years since the introduction of the Scheme, compared with the three years prior to the Scheme.

The **burden on the CJS** also reduced, as evidenced by 5,241 fewer sole cannabis charges dealt with by the local courts in the three years since the introduction of the scheme compared with the three years prior to the scheme. As such it was estimated that over the first three years of the scheme the police saved over 18,000 hours, or over \$400k and the local courts have saved at least \$800k and probably more than \$1m (Baker & Goh, 2004). Analysis of the Queensland Police Drug Diversion Program also showed that over the first two years this led to a 28% reduction in the number of minor illicit drug possession charges being prosecuted through the courts (Hales, Mayne, Swan, Alberti, & Ritter, 2004).

A more recent analysis by Belackova et al (2017) showed further evidence of reductions in the burden on the CJS. Over the period 2002 to 2012, 31.53% of all cannabis use/possess offences in NSW received a caution, and few proceeded to court or were imprisoned for this offence alone. For example, there were 1.10 court proceedings for use/possession per 1000 population (Belackova et al., 2017). This was lower than in a nation with a prohibitionist context (Florida): 1.21 per 1000 population, but higher than in a nation with *de jure* decriminalisation (Czech Republic): 0.02 per 1000 population. One apparent reason is the reach of the programme: as the Czech Republic diverts more than double the proportion of use/possess offenders away from criminal sanction: 72.44% versus 31.53% in NSW (Belackova et al., 2017).

The Australian drug diversion programmes have led to a large **increase in treatment referrals** in Australia. For example, in the 10 years to 2012-13, the number of treatment episodes provided to clients referred from diversion programmes more than doubled, whereas numbers of treatment episodes of other clients were about constant (Australian Institute of Health and Welfare, 2014). Moreover, clients referred from police or court diversion programmes received 27,405 treatment episodes in 2012-13, accounting for 18% of all treatment episodes provided by all Australian alcohol and other drug treatment agencies. Diversion clients have also been shown to be a distinct group who otherwise do not access the system. For example, they are younger (25% aged 10–19 compared with 11% amongst clients not-diverted). The increase in treatment uptake is particularly significant as Shanahan et al (2017) found that respondents detected for cannabis use or possession in Australia had high levels of dependence and other health problems. For example, 50% of those detected by police were daily cannabis users compared to only 12.8% in the general population of cannabis users (measured using the 2013 National Drug Strategy Household Survey).

That said, it is also clear that not all reforms are equally likely to lead to treatment uptake. For example, over the first three years of the scheme the NSW Cannabis Caution Program led to only 63 persons calling the Alcohol Drug Information Service helpline after receiving a caution – or 0.7% of the 9235 cautions that were issued. This was attributed to the voluntary nature of the reform. In contrast, a total of 10,623 offenders were referred by police to the Diversion Coordination Service of the Queensland Police Drug Diversion Program for education and assessment, of whom 81% complied (Hales et al., 2004).

Some studies (especially those with high treatment exposure) have shown that diversion programs are associated with reductions in harmful **drug use**. For example, the Queensland Police Drug Diversion Program found that use of cannabis regularly reduced from 95% at baseline to 74% at the 3 month follow-up: a rate that was sustained at 6 month follow-up (Hales et al., 2004). However, a national cost-effectiveness and outcomes study by Shanahan et al (2017) that compared pre-post impacts of three forms of diversion (caution, cannabis expiation and warning) versus a traditional criminal justice response for minor cannabis offenders found that all programmes led to a small overall reduction in the number of days cannabis was used and in the number of other illicit drugs used the previous month, but there was no added benefit (or cost) from diversion versus a traditional criminal justice sanction.

Like Australian cannabis expiation schemes, cannabis diversion programmes have been associated with **social benefits**. Shanahan et al (2017) showed that those receiving a diversion for cannabis possession versus charge reported **fewer employment problems**, with those in the charge group significantly more likely to report a change in employment status e.g. a termination and to directly attribute this to their police encounter. They also reported less disruptive relationships with family and friends. Moreover, those diverted to had more **positive perceptions of police legitimacy** (23.9% compared to 14.9% for those charged). This suggests that diversion may have flow on effects for police beyond reducing CJS costs.

**Cost-effectiveness analysis** of both cannabis expiation and cannabis caution programmes showed both were significantly cheaper than a traditional criminal justice response (charge). Cannabis diversion cost six to 15 times less than a criminal charge (Shanahan et al., 2017). The charge group's mean cost was the highest (A\$1,918), reflecting additional police and court activities, with the next most expensive being the caution group, following by expiation.

Payne et al (2008) conducted a national evaluation of **rates of reoffending** post the IDDI programmes. This showed that rates varied across the states and territories reflecting differing eligibility criteria and programme design, but that there were significant reductions in the rates of reoffending across all diversion programmes. Reductions were particularly noted in relation to individuals who had a prior offending history, amongst whom between 53 per cent and 66 per cent recorded fewer offences in the 18 months after diversion. The majority of first-time or non-recent offenders diverted under the national IDDI also did not reoffend (between 70 per cent and 86 per cent).

The Australian studies have, however, also highlighted the importance of careful design of eligibility criteria. For example, in 2014 Hughes et al (2014) evaluated police and court diversion programme in the ACT, showing that at the time, police diversion for drugs other than cannabis were restricted due to low threshold limits (2 'ecstasy' pills or 0.5 pure grams of heroin, amphetamine or cocaine). As a consequence, police were diverting 70.9% of cannabis offenders but only 0-7.9% of other illicit drug use/possess offenders, which meant that many offenders were missing out on diversion opportunities. Threshold limits have since been lifted and diversion rates increased. For other design considerations see Hughes et al. (in press).

## USA

### Context

The USA has a common law system. As a federated system with large devolved powers to the 50 states, and large differences in demography, inequalities, health and judicial systems, the USA presents a very diverse set of experiences in responding to illicit drugs.

Drug use was relatively rare in the 1940s and 1950s in the USA, but following dramatic changes in the 1960s, 1970s and 1980s with the spread of cannabis, the heroin epidemic, the explosion in cocaine initiation and the spread of crack and street markets, it now has amongst the highest rates of use and drug-related harms in the world. In 1970 then President Richard Nixon declared a 'war on drugs' and signed the *Controlled Substances Act* that confirmed the prohibited the use, possession, manufacturing and importation of illicit drugs and classified cannabis as a Schedule I drug alongside heroin and cocaine. Almost immediately, alternative mechanisms - particularly for cannabis - started to be discussed. For example, the National Commission on Marihuana and Drug Abuse recommended in 1972 that criminal penalties for the private possession and use of cannabis be eliminated and that states decriminalise public possession (but not use) (Logan, 2014).

In spite of a number of reforms in the 1970s (see below), the USA is renowned for having the highest rates of arrests and imprisonment of drug offenders in the world. This has contributed to significant collateral consequences, including the erosion of civil liberties, over-policing, high rates of conviction and imprisonment of largely black and minority populations and an estimated cost to the criminal justice and legal systems of over one trillion dollars in the past four decades (Caulkins, Reuter, Iguchi, & Chiesa, 2005). This has continued to spark many considerations of alternative policy options.

### Alternative mechanisms for dealing with simple possession offences

The USA has developed three broad types of mechanisms of response. The first is **depenalisation**. For example, in Los Angeles county a low-priority initiative mandates that minor cannabis possession offences be the lowest enforcement priority for local law enforcement agencies, with the goal of saving police time to focus on other more serious crime. While there are some differences in the specific laws implemented in each jurisdiction, there are a few common components, namely that it: operates through a *de facto* approach (not in law), targets minor cannabis possession offences only (and excludes felony drug crimes), is only for adults and for offences committed in private (DeAngelo, Gittings, & Ross, 2018).

The second approach is **police diversion**. This is again a *de facto* system that involves diversion to treatment or diversion to other types of non-criminal sanctions. For example, one scheme was the 1994 Baltimore "pre-booking diversion" where an arrest was initially made but no formal charges were filed. This was targeted at possession of all illicit drugs. Under the leadership of Commissioner of Public Health, Peter Beilenson (1992-2005), a "Treatment on Request" policy was adopted, defined as the provision of detoxification and drug treatment services to people who use drugs within 24 hours. Publicly funded treatment slots, including those for residential-based and outpatient facilities, detoxification centers and methadone maintenance, were doubled from about 4,100 to almost 8,000 by the end of the 1990s. They were made available through a quasi-independent agency: Baltimore Substance Abuse Systems (Goetz & Mitchell, 2006). Such an approach developed in the context of high rates of heroin and cocaine use, linked to high level of violence in Baltimore's drug markets, which drew attention to how to break drug/crime connection. Another pre-booking scheme operated in San Francisco from 1998 (Goetz & Mitchell, 2006).

Amore recent programme, launched in 2011, is the Seattle Police Department programme – law enforcement assisted diversion (LEAD). This provides for the voluntary diversion of low-level drug (and prostitution) offenders from criminal prosecution (Collins, Lonczak, & Clifasefi, 2015b). LEAD was developed in response to the calls of Washington State legislators to identify evidence-based programmes for drug offenders. The primary goal was to reduce recidivism, but it also sought to reduce use of the CJS and improve psychosocial, housing and quality-of-life outcomes for drug offenders. It provides case management, access to drug treatment, legal services and other social supports (including referrals to job training and housing assistance).



A final diversion programme of note is prosecutor-led diversion programme that provide individualised alcohol and other drug (AOD) education, treatment and social services, as well as requiring community service. Such programmes focus on reducing costs of the CJS, as well as rehabilitation and increasing community engagement. Some have a pre-filing model (diverting cases before and *in lieu* of initiating a criminal court case), eight adopt a post-filing model (after the court process is underway), and four programmes enrol different participants either pre- or post-filing (i.e. a mixed model).

The third approach is **decriminalisation**. This is a *de jure* system that removes criminal penalties for possession for personal use, often with use of civil penalties instead. As noted by Logan (2014, pp. 326-327), the “laws have been motivated by a variety of factors. In addition to the cost associated with incarcerating individuals convicted of possessing cannabis, and a desire to loosen government control over victimless crimes more generally, decriminalisation advocates point to major racial disparities in arrest and conviction rates, and the long-term negative consequences of continued criminalization for individuals (including collateral consequences such as lost access to student loans and housing).” All states with decriminalisation have been for cannabis only, and most involve possession of up to an ounce of cannabis (28 grams).

In the 1970s there were 11 “decriminalisation states”. The first such reform was introduced in Oregon in 1973. It was then followed by Colorado, Alaska and Ohio in 1975; California, Maine and Minnesota in 1976; Mississippi, New York and North Carolina in 1977; and Nebraska in 1978. Alaska then followed suite in 1996. One challenge is that as outlined by Pacula et al. (2003) it is “impossible to uniquely identify the so-called decriminalisation states using the statutes.” For example, they noted that California and North Carolina retained cannabis possession as a criminal offence at that point in time. (California then expanded to proper decriminalisation on 1 October 2010). Some also limited the removal of criminal penalties to one offence only. This has led Pacula et al. (2003) to conclude that some were more examples of depenalisation than decriminalisation. As of 2017, there are 20 US states with a proper decriminalisation in practice, defined as the removal of criminal penalties for possession of up to an ounce (personal communication with Rosalie Pacula on 6 September 2018). <sup>7</sup>

<p><b>USA Depenalisation (e.g. LA County)</b></p> <p>Rationale: To save police time to focus on more serious offences</p> <p>Mechanism: <i>De facto</i> – guidance to police officers to treat possession as ‘lowest priority’</p> <p>Drugs: Cannabis</p> <p>Threshold limits: No</p>	<p><b>USA Decriminalisation (e.g. Ohio, Mississippi and Rhode Island)</b></p> <p>Rationale: To reduce the burden on the CJS and to reduce collateral consequences to people who use drugs</p> <p>Mechanism: <i>De jure</i> – with civil penalties</p> <p>Drugs: Cannabis</p> <p>Threshold limits: Varies by state but one ounce is the norm</p>	<p><b>USA Diversion (e.g. LEAD)</b></p> <p>Rationale: To support/treat/rehabilitate instead of punish (?)</p> <p>Mechanism: <i>De facto</i> – referral to education/treatment/social services instead of charge</p> <p>Drugs: All illicit drugs</p> <p>Threshold limits: No</p>
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<sup>7</sup> The 20 decriminalisation states as of 2017 (defined as removal of criminal penalties for possession of up to one ounce of cannabis) are: AK, CO, CA, ME, MS, NE, NY, OH, OR, NV, MA, CT, RI, WA, VT, MD, DE, IL, NK, MO. Two others are often called decriminalisation states but are not (MN & NC), as they retain the criminal misdemeanour offence for possession of cannabis albeit without the threat of jail time.

## Outcomes

Most of the research to date has focused on the decriminalisation schemes, rather than depenalisation or diversion. Moreover, as has been well documented by Pacula et al (2005; 2014) a key finding has been that many of the apparent decriminalisation schemes were not applied in practice. There can be gaps between the policy and the practice.

### *Depenalisation*

While depenalisation programmes sought to save police time to focus on more serious crime, research has shown that impacts have been mixed. For example, Ross and Walker (2017) and more recently DeAngelo et al. (2018) both showed that as intended the adoption of a low-priority initiative caused a reduction in the number of arrests for misdemeanour cannabis offences. This effect was not statistically significant at conventional levels, but was statistically significant when the sample was restricted to the largest cities with populations above 100,000. However, there was no evidence of benefit for other crimes: “We do not find that adoption of a low-priority initiative caused a statistically significant reduction in any type of violent or property crime. In fact, the only statistically significant effect we obtain is that adoption of the low-priority initiative increases some crime rates, specifically robbery and burglary in large cities. We do not find a statistically significant effect of the law on the clearance rate for violent and property crimes” (DeAngelo et al., 2018). Moreover, analysis showed evidence of displacement: namely that there was a sharp increase in cannabis arrests in the non-adopting jurisdictions after the implementation of the low priority initiative.

### *Diversion*

Local evaluations of diversion suggested benefits were realised in getting more people into **treatment** and reducing HIV infections (Goetz & Mitchell, 2006). However, numbers of imprisoned drug offenders in Maryland continued to rise and the scheme was ended by the mayor in 1999. Impacts of the San Francisco pre-booking scheme were more limited as Goetz and Mitchell (2006) noted the programme was hampered by arguments between police and health over funding, leading to only four people entering the scheme during the first year.

The most efficacious diversion programme in the USA appears to be the law enforcement assisted diversion programme. Research conducted by the University of Washington in Seattle has shown a 58 per cent **reduction in recidivism** among LEAD participants when compared against a comparative group that went through the traditional CJS, and that the LEAD group had 87 per cent lower odds of at least one prison incarceration subsequent to evaluation entry (Collins et al., 2015b). Participants were also significantly more likely to obtain housing, employment and legitimate income in any given month subsequent to their LEAD referral (i.e., during the 18-month follow-up) compared to the month prior to their referral (i.e., baseline). Moreover, there were observed statistically significant reductions for the LEAD group compared to the control group on average yearly **criminal justice and legal system utilisation** and associated costs. For example, while from pre- to post-evaluation entry, LEAD participants showed substantial cost reductions (-US\$2,100), control participants showed cost increases (+US\$5,961). That said, evaluators also found some implementation challenges, as some police were disinclined to use the diversion system (on the grounds it could be harmful and enabling to people who use drugs). This led to fewer diverted than expected (Collins, Lonczak, & Clifasefi, 2015a). Moreover, during the first 6 months of LEAD, diverted individuals were disproportionately white and female and it was only in the second 6 months that more black men (the target group) were diverted. This again shows the importance of implementation and getting police support for such programmes, particularly if they are discretionary to use.

### *Decriminalisation*

Studies in relation to the **CJS impacts** of US decriminalisation with civil penalties have diverse findings. For example, Males and Buchen (2014) compared decriminalisation in California (2011), Connecticut (2011) and Massachusetts (2009) for all age groups against impacts of legalisation of cannabis in Washington State and Colorado for people aged 21 and over. They found that all states that introduced decriminalisation saw large **declines in cannabis arrests**: an average decrease of 72 per cent in rates of arrest for cannabis compared to a 7 per cent decrease for states that undertook no reform. But they found that the extent of decline varied, as evidenced by declines in cannabis arrests of 90, 86 and 67 per cent in Massachusetts, California and Connecticut respectively. Grucza et al

(2018) conducted a longitudinal difference-in-difference analysis of data on arrests and youth cannabis use (from the Youth Risk Behaviour Survey) of five states that passed decriminalisation measures between the years 2008 and 2014: Massachusetts (decriminalised in 2008), Connecticut (2011), Rhode Island (2013), Vermont (2013), and Maryland (2014). They showed that decriminalisation was associated with an immediate and strong reduction in the rate of drug-related arrests for youth and adults; the risk of arrest more than halved for both groups.

In contrast, Pacula et al. (2005) found that states that have eliminated the criminal status of possession offences involving amounts of one ounce or less of cannabis did not have systematically lower arrests per capita than those states retaining the criminal status. Several of the states, including New York and Louisiana, had larger per capita arrest rates in most years than the national average across states. They thus concluded that the enforcement of cannabis laws was not highly correlated with the criminal status of cannabis possession offences. Logan (2014) also outlined specific examples where the decriminalisation states have significant increases in arrest, noting that arrests for cannabis possession have skyrocketed in number in recent years and that several states adopting decriminalisation have some of the nation's highest per capita arrest rates for possession: particularly in New York and Chicago. For example, there had been a 2,461 per cent increase in cannabis possession arrests in New York since the late 1990s and that despite strenuous public criticism, and concern voiced by Governor Cuomo, possession arrests continued unabated. Logan (2014, p. 330) attributed this to implementation programmes, including lack of “police buy-in”. For example, “In Flint, Michigan... city police and state troopers publicly proclaimed their intent to make possession arrests despite voters’ strong endorsement of a ballot decriminalisation initiative” (Logan, 2014, p.331). Added to that was continuation of police performance monitoring systems that incentivise police officers to make arrests.

Findings further vary in relation to **drug use**. For example, Grucza et al (2018) difference-in-difference analysis (of recent decriminalisation states) found that decriminalisation was not associated with any increase in the past-30 day prevalence of cannabis use. Significant declines in prevalence were observed for Rhode Island and Vermont. Decriminalisation had no impact on measures of availability, perceived risk, or disapproval/stigmatisation of cannabis use. In contrast, Pacula et al’s (2003) cross-sectional analysis found youths living in decriminalised states are 2 per cent more likely to use cannabis both in the past year and in the past month, although the finding with respect to annual use was not statistically significant at conventional levels and Yulia (2011) found that in decriminalised states, users consume cannabis on average 11 days per year more than their counterparts living in non-decriminalisation states. Finally, Miech et al. (2015) analysis of the California decriminalisation found youth cannabis use increased at a significantly greater rate in California as compared to the other U.S. states following decriminalisation. For example, amongst 12th graders in both 2012 and 2013 the prevalence of any cannabis use in the past 30 days was proportionately about 25 per cent higher in California as compared to the other states.

Pacula et al. (2003) suggest some reasons for the differences in studies. These include: studies may be comparing apples and oranges (due to the large variance in what “decriminalisation states” actually mean); failures of authors to control for other reforms that have occurred in “non-decriminalisation states”; and the fact that public knowledge of decriminalisation is imperfect. A latter study demonstrated this latter issue by finding from population surveys in various states that “the percentages who believe they could be jailed for marijuana possession are quite similar in both states that have removed ... penalties and those that have not” (MacCoun, Pacula, Reuter, Chiqui, & Harris, 2009).

Pacula et al (2003) looked at how decriminalisation policies have been operationalised, and what additional implementation elements might influence outcomes. This study found that that prevalence of lifetime and recent cannabis use among young people is very sensitive to the statutory penalties imposed. That is, higher minimum jail times were statistically associated with lower prevalence rates. Specifically, a one-day increase in statutorily imposed minimum jail time is associated with a 7 to 9 percentage point reduction in annual cannabis prevalence and a 4 percentage point reduction in thirty-day prevalence (Pacula et al., 2003). This suggests that states that ruled out all forms of imprisonment were associated with higher prevalence of use. They offer two explanations for these

findings: “First, formal decriminalization statutes may be an indicator of a larger social acceptance of marijuana use within the state. Second, they might be an indicator of greater public knowledge (or advertisement) of the reduced penalties associated with possession of marijuana.” They acknowledge “our data are insufficient to explore these two alternative hypotheses” (Pacula et al, 2003, p.26). The later finding by MacCoun et al (2009), lends support to the first hypothesis (that decriminalisation follows social acceptance of cannabis use) than the second (that awareness of punishments deters use).

In relation to the link between alternatives and **non-drug crime**, Huber, Newman, and LaFave (2016) used state panel data on recorded crime rates from 1970 to 2012 to examine the relationship between cannabis control policies and non-cannabis crime. They found a link between medical marijuana laws and reduced violent crime, but no or unfavourable changes for states that had removed criminal penalties for cannabis without providing a legal avenue to supply. In these states, they found an increase in crimes they regard as related to the cannabis market (e.g. robbery and burglary). They speculate that this is due to the continuation or increase of the illicit market when criminal sanctions are removed without enabling legal supply. Their study is vulnerable to the criticism that it uses police-recorded crime (a notoriously unreliable measure of underlying crime rates). Its authors do not consider the possibility that recording of other crimes increased as police shifted their attention from cannabis possession to other offences. They support their speculation with the funding that there was no increase in recorded crimes that they consider not to be related to the cannabis market (e.g. murder and theft of motor vehicles).

A number of studies have found that decriminalisation is associated with increased risks of **drug driving**. These studies, however, are subject to similar problems in comparing states and attributing differences to decriminalisation to those identified by Pacula et al (2003). For example, Lee et al. (2018) found that there is a general association between the change in cannabis laws, except for medical legalisation, and an increase in fatal crashes involving cannabis. For example, cannabis-related crashes significantly increased in Massachusetts – a decriminalisation state - compared with their comparison states. Moreover, Huber et al. (2016) found that the odds of a driver being THC positive is 17 per cent higher in jurisdictions that have decriminalised cannabis. Finally, Pollini et al (2015) found a significant post-decriminalisation increase in cannabis-positive driving among fatally injured drivers but no significant changes in THC-positive driving among night-time weekend drivers. In contrast, Males and Buchen (2014) found that cannabis decriminalisation in California has not resulted in harmful consequences for teenagers, such as increased crime, drug overdose, driving under the influence, or school dropout. In fact, California teenagers showed improvements in all risk areas after reform. For example, post reform there was a 20 per cent reduction in overdose in California compared with a 4 per cent increase in the rest of the USA, moreover there was a 25 per cent reduction in California compared with a 14 per cent reduction in the rest of the US for property crime. It should be noted that this finding is confounded by the different nature of the heroin market, with a higher prevalence of Mexican ‘black tar’ heroin in California, which is more rarely contaminated with fentanyl.

Evidence in relation to **substitution between alcohol and drugs** is also conflicting. For example, Yulia (2011) found decriminalisation has a positive significant impact on the alcohol consumption. People living in states which have decriminalised cannabis are 4.2 per cent more likely to consume alcohol last month than people living in non-decriminalised ones. In contrast, Thies and Register (1993) examined whether the decriminalisation of cannabis in eleven states has affected self-reported usage of alcohol, cannabis or cocaine. In their analysis, decriminalisation did not significantly impact either the choice or frequency of use of drugs, either legal (alcohol) or illegal (cannabis and cocaine). They concluded that the demand for drugs is highly inelastic with respect to incremental changes in the legal sanctions for possession of small amounts of cannabis. On the other hand, Chaloupka and Laixuthai (1997) found that amongst high school seniors, where cannabis was decriminalised, consume alcohol less frequently and are less likely to engage in heavy drinking than those in states where cannabis possession was still criminalised. Moreover, they conducted simulations to shows that moving from a policy where cannabis is criminalised to one where cannabis is decriminalised everywhere (nationwide) would increase the number of alcohol abstainers in the past year by nearly 12 per cent, while reducing the number frequent drinkers in the past year by almost 11 per cent.

Two PhD theses analysed impacts on **racial bias in law enforcement**. Crouch (2015) found that decriminalisation in Massachusetts decreased the black-white gap in juvenile arrests by 192.0 per 100,000 for cannabis possession and by 14.57 per 100,000 for cannabis sales. There was also evidence that decriminalisation also reduces the black-white arrest-rate gap for other crimes including the sale of cannabis and non-cannabis drugs for adults and juveniles and theft-related crimes for adults. Overall, the results are consistent with a shift in police resources away from poor black neighborhoods after decriminalisation of cannabis in Massachusetts. Munslow (2017) also found decriminalisation has a significant effect for all ethnic groups and that black arrest rates decrease more than 4 times as much as whites due to decriminalisation.

Finally, Pacula et al. (2010) examined **price changes** in relation to a number of variables, including decriminalisation policies. They found that both decriminalisation and conditional discharge is positively associated with price. As economists, they note that this price increase could be explained by decriminalisation increasing demand for cannabis, or by it increasing risk for sellers (as police shift their attention from buyers).

# Chapter five: Policy learnings across the reforms

In this chapter we look at lessons across the nine countries, about the a) types of reforms that can be undertaken to simple possession, b) the programme logic or theory of how each operates and c) the lessons about positive and potential negative impacts of each. To do this we firstly use Qualitative Comparative Analysis (QCA), which is a theoretically driven method for testing sets of relationships between cases (Rihoux, 2006; Schneider & Wagemann, 2010).

## QCA of alternatives for dealing with simple possession offences

### *Aim*

The aim was to use QCA to produce an empirically-based, theoretically informed typology of alternatives for dealing with simple possession offences, based on the mechanisms and targets that currently operate.

### *Mechanisms*

This analysis is based on a matrix of the different mechanisms of alternatives reviewed in the nine countries chosen for the review. Three dimensions of comparison were chosen as they offer the most theoretically interesting and policy-relevant modes of comparison between alternatives. These dimensions are:

1. Whether the alternative is *de jure* (rather than *de facto*).
2. Whether the alternative provides pathways to an intervention (e.g. education, treatment assessment or social services).
3. Whether the alternative provides for the imposition of a civil or administrative penalty (e.g. fine, suspension of licence).

The combination of dimensions 2 and 3 enables this comparison to identify a fourth, logically implicated dimension of whether the alternative provides any sanction at all (if the answer to both 2 and 3 is no, then there is no sanction provided for).

The matrix of 26 different alternatives found in these nine countries was created by scoring each alternative as either 0 (no) or 1 (yes) on each of these three dimensions. This matrix was then used to create a 'truth table', showing which combinations of the dimensions actually exist in these alternatives. Out of eight possible combinations of these dimensions, six were found to exist in practice. This is partly because there are two 'missing' combinations that are probably logically, legally impossible. These are the combinations of *de facto* change with the imposition of civil sanctions, either with or without diversionary measures. There would need to be a legal basis for such civil sanctions.

Table 9 shows the six combinations and the examples that exemplify these types.

**Table 9: Typology of alternate approaches to dealing with simple possession drug offences**

<i>Type</i>	<i>Legal basis</i>	<i>Pathways to education / therapy / social services</i>	<i>Administrative/ civil sanction</i>	<i>Examples</i>
Depenalisation	<i>De facto</i>	No	No	Netherlands Gedoogbeleid 'tolerance policy' (cannabis only), US police 'deprioritisation', UK cannabis and khat warnings, Denmark warnings
Police diversion ( <i>de facto</i> )	<i>De facto</i>	Yes	No	Police diversion schemes in seven Australian states, Netherlands diversion (hard drugs only), English police diversion schemes in Durham, West Midlands and Avon, US LEAD programme, Baltimore pre-booking scheme
Police diversion ( <i>de jure</i> )	<i>De jure</i>	Yes	No	South Australian Police Drug Diversion Initiative and Queensland Police Drug Diversion Program (police mandated by law to offer diversion to treatment)
Decriminalisation with no sanctions attached	<i>De jure</i>	No	No	Germany (by virtue of Constitutional ruling) and Vermont USA (since 2018)
Decriminalisation with civil or administrative sanctions	<i>De jure</i>	No	Yes	Czech Republic, Jamaica, Cannabis Expiation Notice schemes in three Australian states (ACT, SA, NT), many US states (e.g. Ohio, Mississippi, Massachusetts, Rhode Island)
Decriminalisation with targeted diversion to health / social services	<i>De jure</i>	Yes	Yes	Portugal and several US states (Maryland, Connecticut & Nebraska)

### *Targets*

We subsequently tried creating a truth table based on three dimensions of the targets of these alternatives. These dimensions were:

1. Whether the alternative targets cannabis only or includes other drugs.
2. Whether the alternative is available for adults only (rather than including minors)
3. Whether the alternative includes a threshold amount for the weight of drugs.

No clear pattern emerged from this truth table, in terms of groups of alternatives or jurisdictions. Instead it appears each of these factors (what could be classed as eligibility characteristics) can be utilised with each model. Herein, we therefore look at our six ideal types of responses to drug possession and then take into account the factors that may affect the reach or intensity of response in our assessment of outcomes. For example, a programme that applies to all illicit drugs may have more reach than one for only cannabis. Alternatively, one that has variable implementation will have less intensity than one with consistent implementation.

## Programme logics and advantages and disadvantages of each approach

Herein, we outline the programme logics and known outcomes for each approach. A programme logic (also known as outcome model, or logic model,) sets out *what* a project will do, *how* it will do it and what needs to be delivered to achieve the desired outcomes (McLaughlin & Jordan, 1999; 2004). It makes explicit the relationships between inputs, activities, outputs and outcomes. Establishing the programme logic is important for programme development and evaluation design as it helps to determine “for whom” and “in what circumstances” a programme works (Pawson, 2006). It also helps to build a common understanding about expectations and identify any assumptions or flaws in thinking before programmes are introduced (Funnell & Rogers, 2011). Programme logic has been found particularly useful in criminal justice settings where many programmes have been introduced and achieved less than desired impacts or even counterproductive impacts (Welsh & Harris, 2016).

### Model 1: Depenalisation

The first approach – depenalisation – has been used in many parts of the world, including Denmark, the Netherlands, England and Wales and the USA. Under depenalisation, the goal is to avoid criminalising young people and to save police time to focus on more serious criminal activity. This is based on the belief that traditional policing approaches are ineffective and that police could better allocate their resources to more serious crime (be that drug trafficking or other offences). Implicit in this approach is also the belief that people detected for drug possession do not warrant criminal sanctions, nor do they warrant any other form of sanction. (One variant is that they only warrant sanction if they continue to offend).<sup>8</sup> This reflects the theories of Stanley Cohen and the concerns that however well-intentioned, social control risks funnelling offenders into “different nets” or “deeper nets” (Cohen, 1979). As such, “doing nothing” or “doing little” may be the best approach for people who possess drugs. It also reflects the idea that the imposition of a sanction for drug possession is disproportionate as it may cause more harm than the actual use of that drug.

<b>Denmark (1969-2004)</b>	<b>Netherlands (soft drugs)</b>	<b>England &amp; Wales: Cannabis (and khat) warning</b>	<b>USA LA County</b>
Rationale: To avoid criminalising young people	Rationale: To use criminal sanctions as a last resort	Rationale: To save police time to focus on more serious offences	Rationale: To save police time to focus on more serious offences
Mechanism: <i>De facto</i> – Attorney General advised police to issue warnings for personal possession	Mechanism: <i>De facto</i> – depenalisation (Gedooogbeleid 'tolerance policy')	Mechanism: <i>De facto</i> – police directed to issue on-street warnings, rather than arrest	Mechanism: <i>De facto</i> – police directed to make enforcement of cannabis possession their ‘lowest priority’
Drugs: All drugs	Drugs: Cannabis	Drugs: Cannabis and khat	Drugs: Cannabis
Threshold limits: Yes (e.g. 10 grams cannabis and 0.2 grams heroin)	Threshold limits: Yes, 30 grams cannabis (from 1976-1995), 5 grams (since 1995)	Threshold limits: No	Threshold limits: No

The programme theory for this approach is outlined in Table 10. The theory contends that if police switch to doing little or nothing to people who possess drugs for personal use (e.g. issuing warnings instead of arrests), police, prosecutors and the courts will have more time to focus on other activities (e.g. serious crime) and there will be fewer people who use drugs who are arrested or convicted for possession alone. In turn, this will save the CJS money, lead to more effective resource allocation, and improve the livelihoods of people who use drugs, including their ability to gain employment without the collateral consequences of a drug conviction.

<sup>8</sup> Here we note the cannabis warning system in England and Wales which offers a partial model of depenalisation. Here depenalisation is provided only for the first one or two detections of cannabis possession. Subsequent detections lead to arrest.



**Table 10: Programme logic – depenalisation**

Programme aim: To ensure that people are not criminalised for simple possession alone and to allow police more time to focus on more serious criminal activity, while minimising any form of sanction or intervention by police.				
Problem statement	Inputs	Process	Outputs	Outcomes
Criminalising people for drug possession alone is disproportionate and costly. But, any alternative system of responses is also potentially disproportionate and costly.	New procedure (police or prosecutorial)	Police do little or nothing (e.g. they may issue warnings instead of arresting offenders for simple possession)	Offenders contact with the CJS is reduced	Reduce/avoid collateral consequences of convictions (e.g. on employment)
	Police training		Fewer people are convicted	Reduce burden on the CJS and cost
				Increase policing of serious crime
				Increase voluntary treatment uptake

*Advantages and disadvantages*

As outlined in Table 11 a key advantage of depenalisation is that it is simple to implement, as it requires no changes in laws. Particularly in the Irish context it would not necessitate the adoption of civil or administrative sanctions. There is also little risk of over-burdening other systems such as treatment. There is evidence from Netherlands and Denmark that this approach can reduce demands on police, courts and prison. There is some evidence that this may also increase access to drug treatment and harm reduction services (via voluntary means).

There are some disadvantages of this approach. Firstly, impacts on drug use appear to be variable. For example, evidence from the depenalisation model adopted in the Netherlands suggested that there was no or limited impact on use. In Denmark police argued depenalisation directly increased use of stimulants, as it sent the wrong message and undermined social controls about the acceptability of illicit drug use (Houborg, 2017). That said, no increase in cannabis use has been attributed to the partial depenalisation in England and Wales. Risks of justice by geography have also been observed in some US contexts, where programmes reduced cannabis arrests in specific areas but led to increased targeting in other areas (DeAngelo et al., 2018). Finally, the Lambeth experiment, showed that depenalisation can lead to net-widening. In Lambeth, there was a 61% increase in recorded cannabis possessions, in spite of no other evidence of change in cannabis prevalence (Adda et al., 2014). Such studies suggest that depenalisation can be shaped by level of police support for the reform and by performance targets. The latter was particularly shown in the UK as net-widening reversed after the government stopped using targets for sanction detections to manage police performance (Shiner, 2015). This suggests that if adopted, top down leadership is required as well as guidance about the purpose and benefits of the reform.

**Table 11: Advantages and disadvantages from depenalisation**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>Simple to achieve and few implementation costs</li> <li>Reduces convictions of PWUD</li> <li>Reduces demands on and costs to the CJS (unless net-widening)</li> <li>May reduce other more serious crimes</li> <li>Avoids over-burdening other services</li> </ul>	<ul style="list-style-type: none"> <li>Risk of net-widening</li> <li>Risk of a sense of impunity</li> <li>Risk of increasing drug use</li> <li>Risk of differential application / justice by geography</li> </ul>

## Model 2: Police diversion (*de facto*)

The second approach – *de facto* police diversion – has been used in Australia, England, the Netherlands and the USA. There are two main approaches. The first is therapeutic diversion: where offenders are directed to education/assessment/treatment programmes (e.g. Australian models and Dutch Early Intervention Approach for hard drugs). The second has a broader diversionary approach: diversion to social and/or reintegration options as well as in some instance health programs (e.g. US LEAD programme and West Midlands Turning Point Programme).

As outlined in Table 12 the programme logic of this approach contends that drug use is often more of a health or social issue than a criminal justice issue and as such police should not be arresting people for simple possession alone. It is also argued that police are one of the main gatekeepers who come into contact with people who possess drugs, and as such that they should play a role in fostering early intervention by referring offenders to services that they may not otherwise access. As such the key goal is to redirect people who use drugs away from the traditional criminal justice response and into other services that may be more beneficial. This can include alcohol and other drug education/treatment system or social systems (e.g. employment, training). Implicit in this approach is the notion that referring people who possess drugs to the health or social services will increase their knowledge and skills (e.g. awareness of the harms from drug use or resilience), address needs (e.g. treatment or employment) and/or reduce their likelihood of reoffending. This draws on three proven approaches to AOD dependence and offender management: first, the efficacy of drug treatment; second, the importance of seeing the law as an agent of change that can be therapeutic or anti-therapeutic – and the proven benefits of employing a more therapeutic non-adversarial approach (Wexler, 2011); and third, the efficacy of offender rehabilitation that targets risk, need and responsivity (Andrews et al., 1990). Diversion programmes can also retain the deterrent threat of prosecution. As per Lammy (2017) the “hypothesis is that police can prevent crime by a combined treatment, holding a prosecution over the offender.”

<b>Australia (five states)</b>	<b>Netherlands (hard drugs)</b>	<b>England (e.g. West Midlands Turning Point Programme)</b>	<b>USA Diversion (e.g. LEAD)</b>
Rationale: Early intervention, reduce recidivism and reduce harmful drug use	Rationale: Early intervention with drug dependent offenders and to reduce harmful drug use	Rationale: To reduce cost and recidivism (and increase access to all racial groups)	Rationale: To support/treat/ rehabilitate instead of punish
Mechanism: <i>De facto</i> – referral for assessment & brief intervention	Mechanism: <i>De facto</i> – visit by social worker in police custody and referral to treatment	Mechanism: <i>De facto</i> – police divert minor offenders to structured interventions eg treatment, mental health, and/or social services	Mechanism: <i>De facto</i> – referral to education/ treatment/ social services instead of charge
Drugs: All illicit drugs or all except cannabis	Drugs: Other illicit drugs	Drugs: All (and other petty offences)	Drugs: All illicit drugs
Threshold limits: Yes (typically 1 or 2g heroin or cocaine)	Threshold limits: Yes 0.5g heroin or cocaine	Threshold limits: No	Threshold limits: No

**Table 12: Programme logic – police diversion (*de facto*)**

Programme aim: To redirect people who use drugs away from the traditional criminal justice response and into health or social services, and thereby provide opportunities to intervene early, to build knowledge/skills and to reduce recidivism and drug-related harm				
Problem statement	Inputs	Process	Outputs	Outcomes
Drug use is more of a health or social issue than a criminal justice issue. Criminalising people for drug possession alone is disproportionate and costly, but turning a blind eye is also not the right approach. Police should thus divert offenders to health or social services	New procedure (police or prosecutorial), including rules around eligibility e.g. drug types and TQs	Police switch to referring people instead of arresting for possession alone	Quicker police interactions for simple possession	Reduce/avoid collateral consequences of convictions (e.g. on employment)
	Police training		Fewer people are convicted	Reduce burden on CJS and cost
	AOD education/treatment or other social supports		More referrals to health or social services	Increase knowledge/skills amongst people who use drugs  Reduce drug-related harms

#### *Advantages and disadvantages*

The evidence reviewed suggests there are many advantages from *de facto* police diversion (see Table 13). For example, most programmes led to more offenders accessing treatment and/or other services (e.g. AIHW, 2014; Goetz and Mitchell, 2016), albeit the types of services accessed varied according to the specific mechanism. For example, the LEAD programme tended to lead to access to employment/training services (Collins et al., 2015b), whereas the Australian programmes to treatment or education services. Moreover, many showed evidence of increased knowledge acquisition and skills as well as reduction in drug-related harms, including reductions in intravenous use and high-frequency use.

There were also clear reductions in recidivism from many programmes. For example, research conducted by the University of Washington in Seattle has shown a 58% reduction in recidivism among LEAD participants when compared against a similar group that went through the traditional CJS entry (Collins et al., 2015b). Payne et al (2008) showed similar reductions in recidivism from police drug diversion in the Australian context: 53% to 63% reductions. Reductions in demand on the CJS have also been observed from most programmes. For example the English Turning Point programme yielded 68% fewer court cases than those cases that were prosecuted in the usual way for all crimes (Lammy, 2017).

Police diversion, even when *de facto*, requires establishing a new system of responding, including new police procedures that define any eligibility criteria for access, such as if there are limits on the number of opportunities someone can be referred and if non-compliance will be followed up. Referral pathways also need to be established: will it be done by police or by offenders, and online or via telephone, as well as any new service provision (e.g. drug treatment). Importantly, the theory of this approach is that the setup costs of the programmes and ongoing costs for service provision will be cost-effective, as they will reduce drug-related harms and recidivism. Studies from Australia, England and the USA largely show that they are (Shanahan et al., 2017). For example as noted in the English context, “despite the costs associated with the structured interventions” the Turning Point programme led to “a saving of around £1,000 per case” (Lammy, 2017, p. 28).

Finally, while in general police diversion has been associated with large increases in access to treatment (or social services) there are two noted exceptions in our review. The first was the NSW Cannabis Caution programme, which led to only 0.7% uptake of drug education (Baker and Goh,

2004). The second was the Dutch Early Intervention Approach that showed that only 1,590 persons out of the target group of 4,582 offenders in police custody or pre-trial detention were visited by a social worker from the Early Intervention team, and only 30% of those visited chose a treatment option, and even fewer actually entered treatment (Stevens et al. 2005). This suggests that therapeutic benefits of *de facto* police diversion may be less if it is “voluntary” for people who use drugs to attend and/or if the services provided are not attractive to the target group.

The main disadvantages are firstly, the potential for this to be more resource intensive at least initially, for both the police/justice system and for treatment or social systems. Arguably more importantly is that given this is a discretionary model it may lead to inequitable application. This can lead to specific sub-groups of offenders (particularly ethnic minorities) less likely to be diverted, or to geographic variation in coverage, as was exemplified by the NSW Cannabis Caution programme (NSW Auditor General, 2011).

There are several issues to consider for best practice implementation of *de facto* police diversion. The first is resourcing - if services are not properly funded or there are delays it will affect referral numbers, compliance and outcomes. Second, is the challenge in building mutual understanding and expectations between police and new service providers about the purpose of any diversion. Experience from the Australian context suggests this can take time, but that conflict is minimised if a harm reduction rather than abstinence goal is employed (Hughes et al., 2014). Third, given the discretionary nature of *de facto* programs, feedback mechanisms to police about the “worth” of diversion, such as from program evaluations can be vital. This is particularly important in the early years to build support and reduce any cultural resistance (Hughes et al, in press). Finally, careful design of any adopted eligibility criteria, such as threshold limits on amount of drug that can be possessed, rules around prior offences, limits on programme entry, or rules around requirements to admit an offence, is important to ensure any criteria do not adversely limit access to specific categories of groups (such as ethnic minorities) or exclude whole groups (Hughes et al, 2014; in press).

**Table 13: Advantages and disadvantages from police diversion (*de facto*)**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Reduces convictions of PWUD</li> <li>• Increases access of offenders to treatment/mental health/social services</li> <li>• Assessment and early intervention</li> <li>• Addresses offender needs e.g. access to AOD treatment, employment or legal (dependent on model)</li> <li>• Reduces costs of criminal justice</li> <li>• Reduces drug-related harms e.g. high frequency use</li> <li>• Reduces recidivism</li> </ul>	<ul style="list-style-type: none"> <li>• May be resource intensive (in short term) for police/justice system</li> <li>• Increases costs for other services</li> <li>• Given this is discretionary there may be specific groups of offenders who ‘miss out’ e.g. people of minority backgrounds</li> <li>• Access may vary by region e.g. regional versus metropolitan areas</li> </ul>

### Model 3: Police diversion (*de jure*)

A *de jure* model of police diversion has a similar programme logic to Model 2, namely that drug use is often more of a health or social issue than a criminal justice issue and that police can play a critical early intervention role (increasing knowledge about drugs or fostering behavioural change) by referring people who possess drugs onto health or social services (see Table 14). The key difference to Model 2 is that *de jure* diversion adopts a legislated approach to ensure that police are required to offer police referral to all in the target groups. This seeks to overcome some of the known challenges with Model 2 in which police retain discretion. Implicit in this approach is thus the belief that *all* people who possess drugs should be given the same opportunity of a health/social response. Examples of note are the South Australian Police Drug Diversion Initiative, the Queensland Police Diversion Program and the Western Australian Cannabis Intervention Requirement.

**Table 14: Programme logic – police diversion (*de jure*)**

Programme aim: To redirect people who use drugs away from the traditional criminal justice response and into drug health or social services, while ensuring that all offenders are given the same opportunity to build knowledge, reduce recidivism and reduce drug-related harm				
Problem statement	Inputs	Process	Outputs	Outcomes
Drug use is more of a health or social issue than a criminal justice issue. Hence people who use drugs should be directed to such services. But, <i>de facto</i> diversion will lead to bias and inconsistent application.	New procedure (police or prosecutorial), including rules around eligibility e.g. drug types and TQs	Police switch to referring people instead of arresting for possession alone	Quicker police interactions for simple possession	Reduce/avoid collateral consequences of convictions for all detected offenders who meet criteria (e.g. on employment)
			Fewer people are convicted	
			More referrals of offenders to health or social services	Reduce burden on CJS and cost (more so than Model 2)
	Police training			Increase offender's knowledge/skills
	AOD education/treatment			Reduce drug-related harms.
				Equitable response to all PWUD

#### *Advantages and disadvantages*

One challenge in assessing the impacts of this policy option is that there are few examples. Two of the *de jure* schemes implemented in Australia – the Queensland Police Drug Diversion Program and the South Australian Police Drug Diversion Program – show very high treatment referrals and compliance and evidence of reduction in drug-related harms. For example, analysis of 10 years of provision of the South Australian Police Drug Diversion Initiative showed that 13,627 people had been diverted over that period, with 80% fulfilling the requirements and individuals who complied with their diversions were significantly less likely to reoffend. The Queensland Police Drug Diversion Program also led to 10,623 referrals for education and assessment: the highest rate of referral for a programme of its type in Australia, of whom 81% complied (Hales et al., 2004). Arguably the major advantage is that by removing discretion there are less likely to be specific groups of offenders who miss out (such as people of minority backgrounds). This can thus significantly increase access (Hughes et al, in press).

**Table 15: Advantages and disadvantages from police diversion (*de jure*)**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Reduces convictions of PWUD</li> <li>• Removes discretion that may limit access in <i>de facto</i> approaches</li> <li>• Increases access to all offenders to treatment/mental health/social services</li> <li>• Address offender needs e.g. access to AOD treatment</li> <li>• Reduces costs of criminal justice</li> <li>• Reduces drug-related harms</li> <li>• Reduces recidivism</li> </ul>	<ul style="list-style-type: none"> <li>• May be resource intensive for police/justice system</li> <li>• Increases costs for treatment services</li> <li>• May lead to “frequent fliers” entering the programme on repeated occasions</li> </ul>

Disadvantages are that this requires legislation and it is more resource intensive, both for treatment sectors as well as police/justice to manage referrals and compliance. The South Australian programme has also observed that while the majority of people receive only a single diversion (72.8 per cent) there are some “frequent flyers”: 4 per cent had four or more diversions and one offender had 32 diversions, which can lead to allegations of the scheme being “soft”. It is also increasingly clear that even a *de jure* scheme will limit diversion access if the eligibility criteria are narrow. Of note, while the Queensland Police Drug Diversion Program has enabled very high levels of diversion of cannabis use/possess offenders, the programme is only open to people who use cannabis. This, coupled with the absence of any other illicit drug diversion programme, means that this state continues to have increasing rates of detections and people sent to court for minor possession alone (Hughes et al, in press).

A key unknown is whether this type of reform would be cost-effective if applied to all illicit drugs. For example, the South Australian Police Drug Diversion Initiative operates alongside the South Australian Cannabis Expiation Notice scheme which offers a cheaper and faster response to the lionshare of people detected for simple possession offences.

#### Model 4: Decriminalisation with no sanctions attached

The fourth model is decriminalisation with no sanctions attached. The main such example is Germany, although Vermont, USA, adopted a similar approach in their 2018 legalisation of possession of cannabis for personal use. As outlined in Table 16 the programme logic of this approach is that drug possession should not be a crime, and that rather than setting up any alternate system or merely depenalising the offence, the best response is complete removal of the offence from the law. This has clear similarities with Model 1 (depenalisation), but this approach is legislated, in the aim of humanising the person, reducing stigma, sending a clear signal to society and overcoming any issues that may arise from a discretionary model. Reduction in stigma is conjectured to increase voluntary service uptake: more so than under Model 1 due to the legislative nature of the reform, which would tend to make it more widely known.

##### Germany

Rationale: That it is unconstitutional to criminalise personal users

Mechanism: *De jure* – Constitutional court decision

Drugs: All

Threshold limits: Yes, 6-30 grams cannabis and 10-30 ecstasy pills

**Table 16: Programme logic – decriminalisation with no sanctions attached**

Programme aim: To send a signal that drug possession is not a crime and to ensure that people are not criminalised or sanctioned for simple possession alone. Also seeks to save police time to focus on more serious criminal activity.				
Problem statement	Inputs	Process	Outputs	Outcomes
Criminalising people for drug possession alone is disproportionate and costly. Any alternative system of responses including mere depenalisation is also potentially inequitable and disproportionate, so the best response is to remove the offence from the law.	Legislative change (removal of criminal penalties for possession)	Police cease arresting people for simple possession alone	Offenders contact with the CJS is ceased	Eliminate collateral consequences of convictions (e.g. on employment)
			No new people are convicted	Reduce burden on CJS and cost
	Public education		Police attend to other crimes	Increase policing of serious crime
				Reduce stigma
				Increase voluntary treatment uptake



### *Advantages and disadvantages*

There is limited evidence-base on this approach and one reform (in Vermont) has only just commenced. Analysis of the German reform suggests this approach may lead to some benefits, including reductions in reliance on the CJS for simple possession offences, and reductions in drug-related harms such as overdose and problematic drug use. For example, the number of newly registered heroin users in Frankfurt declined significantly from 903 in 1992 to 557 in 1993 after a consistent increase in the previous years (Fischer, 1995). More generally, Germany has lower rates of drug use, including problematic drug use, than many other European countries (Eastwood et al., 2016), as well as lower rates of HIV and drug-related overdose. These rates have causes other than drug laws, including economic wellbeing, systems of healthcare and social support. The constitutional decision has been inconsistently applied at the local level, and there is little published in English on its implementation or effects on drug use and related harms.

Overall, as outlined in Table 17, this suggests there may be positive benefits: of both reducing demands on the CJS and reducing drug-related harms via reducing barriers to treatment seeking and humanising people who use drugs. Decriminalisation with no sanctions attached is arguably simpler to implement than other legislative reforms (Models 5 and 6). This is particularly in the Irish context, as it does not require new civil or administrative systems to be set up. It also avoids the need for any new systems of referral or ongoing monitoring of offender compliance to be established.

A key disadvantage, as evident in some German regions, is that this may be seen as giving a “free go” and hence may have less support of the police and/or differential application (justice by geography). That said, it remains unclear whether such effects were a by-product of the German experience, as opposed to an inevitable consequence of this model. Access to services is not directly facilitated via this model, which may affect the potential gains and the application/reach of the model. Best practice implementation may thus necessitate top down police leadership and investment in public education.

**Table 17: Advantages and disadvantages from decriminalisation with no sanctions attached**

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Eliminates convictions for possession alone</li><li>• Reduces stigma of people who use drugs</li><li>• Reduces costs of criminal justice</li><li>• Reduces barriers to harm reduction and treatment seeking</li><li>• Reduces drug-related harms e.g. high frequency use</li><li>• Simple to achieve and few set up costs (albeit more complex than Model 1)</li></ul>	<ul style="list-style-type: none"><li>• Little evidence of effect on prevalence and frequency of drug use.</li><li>• Reduces legal possibility to intervene in problematic drug use.</li></ul>

### **Model 5: Decriminalisation with civil or administrative sanctions**

Decriminalisation with civil or administrative sanctions operates in a number of countries, including the Czech Republic, Australia, USA and Jamaica. The programme logic for this approach is that drug possession should not be a crime, but it also should not just be ignored (see Table 18). Treating it as a lesser offence, similar to a driving / motor vehicle violation, thus provides the opportunity for the state to still sanction the behaviour, but without the risk of providing criminal convictions that may have adverse impacts on the future of people who use drugs. This model makes use of low level sanctions rather than therapeutic interventions. For example, it could be argued that it is better in some circumstances to charge a fine or to restrict a license than to send a person to treatment: particularly for relatively low risk activities like cannabis use.

<b>Czech Republic</b>  Rationale: To use criminal sanctions as a last resort  Mechanism: <i>De jure</i> – administrative offence  Drugs: All  Threshold limits: Yes (currently 1.5 gram of heroin and 10 grams of cannabis)	<b>Australia civil penalty schemes (three states: ACT, NT, SA)</b>  Rationale: To use criminal sanctions as a last resort  Mechanism: <i>De jure</i> – with civil penalties  Drugs: Cannabis  Threshold limits: Yes 50-100 grams (varies by state)	<b>USA Decriminalisation (e.g. Ohio, Mississippi and Rhode Island)</b>  Rationale: To reduce the burden on the criminal justice system & to reduce collateral consequences to people who use drugs  Mechanism: <i>De jure</i> – with civil penalties  Drugs: Cannabis  Threshold limits: Yes, one ounce is the norm	<b>Jamaica</b>  Rationale: Reduce harm to users (including from a criminal conviction)  Mechanism: <i>De jure</i> – Replacement of criminal penalties with a civil fine ('fixed penalty notice') of J\$500 (€3.14)  Drugs: Cannabis only  Threshold limits: Yes (2 ounces)
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**Table 18: Programme logic – decriminalisation with civil/administrative sanctions**

Programme aim: To ensure that people are not criminalised for simple possession alone, while also recognising that complete removal of sanctions may send the wrong signal and thus to institute a new and alternate system. This also seeks to save police time to focus on more serious criminal activity.				
Problem statement	Inputs	Process	Outputs	Outcomes
Drug possession should not be a crime, but it shouldn't just be ignored as this may send the wrong message people for drug possession and lead to new harms.	Legislative change (new civil/administrative law)	Police switch to issuing civil/admin sanctions instead of arresting offenders	Quicker police interactions for simple possession	Reduce collateral consequences of convictions (e.g. on employment)
	New system to response e.g. pay a fine online		No new people or fewer people are convicted (dependent upon model)	Reduce burden on CJS and cost
	Public education		Offenders pay civil penalties	Increase policing of serious crime
				Reduce stigma but also send a message that it is a sanctionable offence
				Increase revenue

#### *Advantages and disadvantages*

When well implemented decriminalisation with civil/administrative sanctions has been found to be faster for police and to lead to a reduced burden on the CJS. For example, demands on the Czech Republic CJS for possession have remained very low: particularly compared against other nations, including those with police diversion alone (Belackova et al., 2017). Decriminalisation with civil/administrative sanctions is also associated with social benefits for offenders from the removal of convictions, including employment prospects and housing stability (Ali et al, 1998; Shanahan et al, 2017). More generally, there is evidence that decriminalisation with civil/administrative sanctions can facilitate the provision of harm reduction and treatment services and reduce drug-related harms



(although the benefit is realised by the removal of stigma around service access as opposed to via direct referral as in some reforms, such as Models 2, 3 or 6). The benefits of reducing stigma for service access were particularly apparent in the natural experiments in Czech Republic where both harm reduction services and people who use drugs noted that the tightening of the reform reduced service access (Zábranský et al. 2001). Most schemes have found drug use trends have remained stable or reduced. Of note, Gruzia et al. (2018) found decriminalisation was not associated with any increase in the past-30 day prevalence of cannabis use among adolescents and instead significant declines in prevalence were observed for Rhode Island.

However, outcomes have been less positive in some contexts. For example, Pacula et al (2003) found youths living in US decriminalised states were 2% more likely to use cannabis both in the past year and in the past month, and that states that ruled out all forms of imprisonment were associated with a higher prevalence of use. Moreover, some recent US studies have noted increases in drug driving in states with decriminalisation with civil penalties. Examples of net widening have also been observed, particularly in the early years of the South Australian Cannabis Expiation Notice that resulted in a 2.5-fold increase in detections. (Similar experiences occurred in New York and Chicago). Two aspects of these findings should be noted, following the work of Pacula et al (2003), MacCoun et al (2009) and Logan (2014). One is that many people are not aware what sanctions apply to cannabis possession in their state. The other is that many states that have formally decriminalised actually have higher rates of arrest for low level drug offences than state that have not decriminalised. This means that findings on the effects of decriminalisation on cannabis use in US states are ‘fairly weak’ as well as being ‘inconsistent’ (MacCoun et al 2009).

Importantly, the more recent reforms in the US have been associated with more positive outcomes. For example, Gruzia et al (2018) analysis of five states in the USA that passed decriminalisation measures between the years 2008 and 2014 found the reforms were associated with an immediate and strong reduction in the rate of drug-related arrests for youth and adults, including reductions in most cases by 50% or more. But this nevertheless shows that there may be some unintended consequence of this approach particularly if the approach is not well implemented.

The research suggests that it is important to consider the impacts of an expiation system on groups who have financial difficulty. For example, in the South Australian Cannabis Expiation Notice scheme people who were unemployed could not comply with the new expiation scheme. This suggests that two requisite elements for effective implementation include allowing for different avenues to pay (e.g. via community service) and ensuring easy systems of payment (e.g. online). Moreover, reforms that continue to retain the option of prison penalties (for repeat offenders) will inherently reduce the number of people who will avoid a conviction. Full implementation as per the examples from the Czech Republic and Australia would thus appear to offer much greater potential benefit.

**Table 19: Advantages and disadvantages from decriminalisation with civil/administrative sanctions**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Reduce convictions for PWUD</li> <li>• Faster for police</li> <li>• Very cheap to run (particularly with new revenue)</li> <li>• Social benefits for offenders from reducing conviction e.g. increased employment prospects</li> </ul>	<ul style="list-style-type: none"> <li>• Need a civil/administrative system</li> <li>• Need a system for payment</li> <li>• Alternate system may not be fair for all i.e. advantages wealthy people</li> <li>• Risk of net-widening as “easy” for police</li> <li>• Risk of increased drug use and driving</li> </ul>

## Model 6: Decriminalisation with targeted diversion to health / social services

A sixth model and alternative is decriminalisation with targeted diversion to health/social services. The clearest example of this is the Portuguese decriminalisation, where all drug possession offenders are referred to dissuasion committees and then problematic drug users are referred to drug treatment and other social services. A handful of states in the USA have also adopted targeted diversionary elements as part of their approach to decriminalisation of cannabis. The key mechanism that differentiates this approach from Model 2 and 3 is that intensive responses are aimed at high-risk offenders.

<p><b>Portuguese decriminalisation</b></p> <p>Rationale: Social integration of problematic drug users</p> <p>Mechanism: <i>De jure</i> – Possession became an administrative offence, with diversion to dissuasion committees and targeted referral of drug dependent offenders to treatment</p> <p>Drugs: All</p> <p>Threshold limits: Yes (10 days supply e.g. 1 gram of heroin, 25 grams of cannabis)</p>	<p><b>Maryland decriminalisation (2014)</b></p> <p>Rationale:</p> <ul style="list-style-type: none"> <li>• Reduce collateral consequences of a cannabis conviction</li> <li>• Early intervention for high-risk pops</li> </ul> <p>Mechanism: <i>De jure</i> – Possession became a civil offence (\$100-500), but with diversion to education, assessment &amp;/or treatment for youth and repeat offenders</p> <p>Drugs: Cannabis</p> <p>Threshold limits: Yes (10 grams)</p>
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The extent of application in the US examples differs but each are instructive. The first example is Maryland, which in 2014 made possession of up to 10 grams of cannabis a civil offence only (sanctionable with a \$100-500 fine). Maryland retained the option to divert offenders to education/assessment and/or treatment for youth aged less than 21 and repeat adult offenders (defined as third time offenders). The goal was to identify those with or at risk of a substance abuse disorder and to encourage treatment uptake. The second example is Connecticut, which in 2011 made possession of less than half an ounce (14 grams of cannabis) a civil offence (sanctionable with a \$150-500 fine). Here for a second offence, the court must make an evaluation and if the court decides the person is drug dependent, prosecution may be suspended, and the person ordered to complete a drug abuse treatment programme. The final example is Nebraska, which in 1978 made a first offence involving possession of up to an ounce of marijuana a civil infraction punishable by a \$300 fine — and a possible drug education course — instead of jail time. Under this reform any subsequent possession offences could lead to imprisonment.

As outlined in Table 20 the programme logic for this approach is that society can and should deal with drug possession outside the criminal law. However, there should be options for the employment of health/social services instead of criminal sanction for those who need it. This model is about recognising that most people will use drugs in non-problematic ways, but for a minority there may be broader drivers and hence more complex needs. Hence, removing criminal penalties whilst also providing targeted options for diversion to health/social services is a more effective hybrid system that offers the potential to firstly, reduce the harms from giving people a criminal conviction for simple possession alone, secondly reduce the burden on the CJS, and thirdly, assess and potentially treat or provide social supports to 'high-risk offenders'. A final but important part of this programme logic that differentiates it from some of the other therapeutic diversionary models (Model 2 and 3) is the notion that only high-risk offenders should be referred to treatment: either based on age, or number of times they have been seen, or assessment of offender's needs by independent panels (Portugal). This thus offers the potential to avoid any potential increase in drug use that may occur after removing criminal penalties albeit in a more targeted way.

**Table 20: Programme logic - decriminalisation with targeted diversion to health/social services**

Programme aim: To ensure that people are not criminalised for simple possession alone, while also recognising that drug use can be a potentially harmful behaviour and/or symptom of broader health or social problems, and thus that governments ought to use the point of detection as a means by which to screen and address high-risk offender needs (be it treatment or other needs)				
Problem statement	Inputs	Process	Outputs	Outcomes
Criminalising people for drug possession alone is disproportionate and costly. It also exacerbates harms amongst the minority of people who are problematic drug users. But referring all offenders to the drug treatment system is also not required. We need therefore a targeted response.	New law (civil or administrative)	Low risk offenders receive non-criminal response (civil penalties or suspended sanctions etc.)	Low risk offenders avoid convictions	Holistic response
	Screening and assessment procedures for high risk offenders	High-risk offenders are referred to AOD assessment and treatment	High risk offenders avoid convictions and have AOD needs met	Offenders have increased access to AOD/other services (if and when required)
	Alcohol and other drug (AOD) treatment		Agencies (e.g. AOD treatment agencies) are not burdened	Avoid collateral consequences of convictions (e.g. on employment)
	Other services as relevant through brokerage (e.g. employment services)			Improve social integration
				Reduce in AOD dependence
				Reduce in drug-related harms
				Reduce burden on CJS and cost

#### *Advantages and disadvantages*

As outlined in Table 21 studies have found that decriminalisation with targeted diversion to health/social services are associated with lower rates of regular or problematic drug use. For example, Grucza et al. (2018) showed that post reform both Maryland and Connecticut had lower rates of regular use, defined as 10 or more times in the past 30 days: 8.1% and 8.9% respectively, compared to 10.3% to 11.1% for decriminalisation states employing civil penalties alone. Moreover, the prevalence of any cannabis use in the last 30 days in Maryland were similar to non-decriminalised states: 20.5% compared to 19.5% for non-decriminalised states and 23-25.8% for the decriminalised states employing civil penalties only. Moreover, the Portuguese decriminalisation was followed by reduced illicit drug use among problematic drug users and adolescents, as well as significant reductions in drug-related harms including opiate-related deaths and infectious diseases (Hughes & Stevens, 2010; Hughes & Stevens, 2015b). The evaluation of the Portuguese model by Pombo and da Costa (2016) showed that drug treatment engagement increased by 94% from pre to post reform and that drug injection had decreased with heroin users smoking heroin rather than injecting it. HIV infection decreased, too from 28.0% to 19.6%. It is important, however, to consider the contribution of more general changes to welfare and healthcare systems in contributing to these improvements (Hughes & Stevens, 2010).

Studies have also shown that such reforms tend to lead to a reduction in the burden on the CJS. For example, Grucza et al (2018) showed that post reform the arrest rate in Maryland fell 42% for youth (aged 18 and under) and 35% for adults. The trend was less than in non-therapeutic decriminalisation states, where there was an average reduction of 75% in decriminalisation states for youth and 78% for adults. This was attributed to Maryland having the lowest threshold amount for the lowest level of possession offence (10 grams, compared to 28 grams). Nevertheless, the significant declines were

very much in line with the intended programme logic. Connecticut also observed declines in arrest rates for cannabis possession, specifically a 51% reduction for youth and 70% for adults (Grucza et al., 2018). Moreover, Portugal saw significant reductions in burden of drug offenders on the CJS, with falls in arrests, imprisonment and prison overcrowding (Hughes & Stevens, 2010).

More generally, analysis of the Portuguese reform has shown increased access to specialised services for high-risk offenders, although most offenders are dealt with through more minor methods (suspended proceedings). For example, evaluation of the CDTs found that about a quarter of the participants were referred to specialised services in addictive behaviours, mainly treatment structures, and for half of them this was the first contact with these structures (Carapinha et al., 2017). Importantly, taking into account the new services the approach also reduced social costs. For example, Gonçalves et al. (2015) found social cost of drugs reduced by 12% in the first 5 years and by 18% in the longer term (10 years).

However, in relation to the Nebraska reform, Sugg (1981) concluded that there was a small but insignificant increase in the number of adults arrested each month and a small but insignificant decrease in the number of minors arrested each month. For adults the mean number of charges filed increased after the new law went into effect (from 26.7 to 36.2) but not significantly. Sugg (1981, p. 64) concluded:

On the whole, it appears that the decriminalisation law *per se* has not significantly lessened enforcement efforts of the legal actors involved with the law. The actual frequency of arrests and citations by police officers has not decreased, nor has the frequency of judge's ruling defendants not guilty increased. And while there is some evidence from the police survey that a minority of officers feel that they have reduced their enforcement efforts in this area, this possible reduction is offset by a very large increase in the enforcement efforts on the part of the prosecuting attorney. That is to say, more of the cases brought to the county attorney's office are actually prosecuted. In this sense it can be said that decriminalisation has had an overall effect of enhancing the enforcement of the law against marijuana possession.

More recently Nebraska has one of the highest marijuana arrest rates in the USA. This suggests that decriminalisation with targeted diversion will have limited capacity to reduce the burden on the CJS or increase offender access or reduce drug-related harm if it remains within a framework of coercive control. Requisite elements for good implementation include: an administrative or civil legal basis; streamlined / non-resource intensive referral pathway; efficacious treatment options; police training about new procedures; public education about the new law; and well designed eligibility criteria e.g. threshold quantities that are established high enough to fit typical patterns of possession in Ireland.

**Table 21: Advantages and disadvantages from decriminalisation with diversion to health/social services**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Holistic response system based on need: "low" versus "high-risk"</li> <li>• Increases access of high-risk offenders to treatment/mental health/social services</li> <li>• Reduces problematic drug use</li> <li>• Reduces drug-related harms e.g. overdose, HIV and Hepatitis C</li> <li>• Reduces burden on the CJS</li> <li>• Reduces costs</li> <li>• Increases social reintegration</li> </ul>	<ul style="list-style-type: none"> <li>• Requires new infrastructure including new administrative legal basis and new referral pathways</li> <li>• Some increased costs for other services (but much lower than in Model 3)</li> </ul>

## Blended models

A final consideration is that a jurisdiction may adopt multiple different models. These could then be applied in different areas or by different police agencies, to different drugs, or to different target groups (e.g. children/adults, occasional/frequent users). For example, in the USA there is depenalisation in LA County, diversion in Seattle and Baltimore and decriminalisation with civil penalties in Ohio, Mississippi and Rhode Island. In the UK, Scotland has a different approach to depenalisation (e.g. cannabis warnings) to that in England and Wales, where different police force areas place different priorities on the enforcement of laws against drug possession. And some areas in England (e.g. Durham, Bristol, and the West Midlands) have introduced diversion schemes, while others have not.

Different models can also be applied within the same area as shown in the Netherlands and many states of Australia as well as in some parts of England and Wales. Examples are summarised in Table 22. For example, across the Netherlands there are dual models of depenalisation of cannabis and *de facto* police diversion for other illicit drugs. Moreover, in Australia, five states/territories employ two models. The types differ. For example, Victoria has two *de facto* police diversion programmes targeting different drug types, with a less intense programme for cannabis than for other illicit drugs. Moreover, three states/territories have decriminalisation with civil penalties for cannabis, but *de facto* or *de jure* police diversion for other illicit drugs (or cannabis and other illicit drugs), which allows different mechanisms of response for different drug types. A further Australian example is that of Tasmania, which provides multiple models within the one programme: first time cannabis use/possession leads to a warning, whereas a third-time cannabis use/possession offence or first time other illicit drug use/possession leads to a therapeutic intervention and treatment. Finally, England and Wales offer yet another example of dual models, as while depenalisation of cannabis is offered across all regions, some regions such as Durham and Avon in Bristol also have *de facto* police diversion for other drugs.

**Table 22: Countries/regions operating two models within the same geographic area**

Location	Model 1	Model 2
<b>Netherlands</b>	Depenalisation (cannabis)	Police diversion ( <i>de facto</i> ) (other illicit drugs)
<b>England &amp; Wales</b>	Depenalisation (cannabis)	Police diversion ( <i>de facto</i> ) (other drugs [in a few areas e.g. Durham and Avon])
<b>Portugal</b>	Decriminalisation with targeted diversion to health/social services	[includes diversion to health/social services within the model]
<b>Australian Capital Territory</b>	Decriminalisation with civil penalties (cannabis)	Police diversion ( <i>de facto</i> ) (cannabis and other illicit drugs)
<b>Northern Territory</b>	Decriminalisation with civil penalties (cannabis)	Police diversion ( <i>de facto</i> ) (cannabis and other illicit drugs)
<b>South Australia</b>	Decriminalisation with civil penalties (cannabis)	Police diversion ( <i>de jure</i> ) (other illicit drugs)
<b>Victoria</b>	Police diversion ( <i>de facto</i> ) (cannabis)	Police diversion ( <i>de facto</i> ) (other illicit drugs)
<b>Western Australia</b>	Police diversion ( <i>de jure</i> ) (cannabis)	Police diversion ( <i>de facto</i> ) (other illicit drugs)

Importantly, the Dutch and Australian approaches have now operated for many years. This shows that adopting a dual model can enable different objectives to be achieved at the same time, such as targeting different groups, or reserving scarce resources for those who most need it (high-needs offenders). As such it can offer a more comprehensive system but also a more cost-effective system. For example, in the ACT Hughes et al, (2014) showed that police use of a civil fine (*de jure* decriminalisation with civil penalties) was cheaper than referral for an alcohol and other drug assessment and brief intervention. Combining two models of *de jure* decriminalisation with civil penalties for cannabis possession with a therapeutic programme of police diversion for possession of cannabis or other illicit drugs improves the cost-effectiveness of the system, over and above sending

everyone to treatment. It also affords people who use cannabis the choice in this case over what system they prefer: alcohol and other drug assessment or payment of a civil penalty.

As outlined above the Portuguese model of decriminalisation with diversion includes processes for combining different approaches within the same approach. The *de jure* decriminalisation applies to all types of illicit drugs. Everyone who is found to be in possession of small quantities is referred to a local CDT (commission for the dissuasion of addiction). The CDTs act as a mechanism of triage; assessing the needs of each person and deciding on appropriate intervention. For occasional users of cannabis, there is usually no sanction or intervention (suspension of proceedings). For repeat offences by people who are considered not to be dependent on drugs, the CDT can impose a fine. For people who are considered to have a drug problem, the CDT can refer to local treatment agencies.

Lessons on 'best practice' approaches when multiple models are applied include the following. First, if different programmes are offered it is important to have a clear understanding about the goals of each. Second, rather than having very different rules for different programmes, clear and harmonised eligibility criteria and systems can make it easier for police. One example of a non-streamlined system is Western Australia, where police are required to carry two different books to use the different programmes and where eligibility criteria have differed between the two programmes. An advantage of the Portuguese approach or indeed the Tasmanian diversionary response is that it incorporates streamlining and harmonisation across types of drugs and people who use drugs within the one system.

## **Concluding remarks**

In summary, this report has outlined an array of policy options that could be taken in Ireland, each of which offers potential benefits: including for people who possess drugs, for the CJS, for taxpayers and for other service providers. Given what is known about the drug problem in Ireland, including relatively high levels of both cannabis and heroin use, with an interrelationship between unemployment and problematic drug use, a mixed approach (combining a few of the models outlined) may be the preferred approach. The Irish government could, for example, reduce the burden of criminalisation on people who use drugs by applying both depenalisation of the most minor drug possession offences and decriminalisation with targeted diversion for those offenders who are more likely to need it. On the basis of the available evidence, this would pose a minimal risk of increasing drug use (and so may have little effect on serious organised crime or drug driving), would reduce costs in the CJS, and would provide additional pathways into treatment for people who need it (while not overburdening the treatment system with people who do not need it).

Any alternative approach to dealing with simple drug possession comes with risks. The research in this area is complex, incomplete and not capable of providing definitive answers about what the outcome of any given approach will be in the Irish context. The current approach also entails risk, including that costs and burdens are placed on citizens (taxpayers and people who use drugs) that are not justified by effects in reducing social and health harms. We hope this report will help to inform discussion in Ireland on how the best balance of risks and burdens can be achieved.

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