

DRUG DECRIMINALISATION POLICIES IN PRACTICE: A Global Summary

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Introduction

Decriminalisation of drug possession or use can be defined as ‘the removal of sanctions under criminal law, with optional use of administrative sanctions, such as the application of civil fines or court-ordered therapeutic responses.’² Decriminalisation is often mistakenly understood to mean complete removal or abolition of possession offences, or confused with ‘legalisation’ (legal regulation of drug production and availability).³ Under decriminalisation regimes, possession and use of small amounts of drugs are still unlawful but not *criminal* offences.

The first half of this chapter examines the harms associated with criminalising people who use drugs (PWUD) and outlines key considerations for the implementation of decriminalisation of drug possession. The second portion considers models of decriminalisation of drug possession adopted by different countries around the world. It also provides recommendations that should be taken into account when implementing decriminalisation of drug possession and highlights the growing support for adopting such a model.

International drug treaties and decriminalisation of drug possession

The modern international drug control framework was established under the 1961 UN Single Convention on Drugs,⁴ but the criminalisation of personal possession was first explicitly introduced by the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychoactive Substances.⁵ Article 3(2) of the 1988 convention states: ‘...each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption.’

The commentary on the 1988 convention says explicitly that this paragraph ‘amounts in fact also to a penalisation of personal consumption.’ Over 180 States are parties to the three UN drug conventions (1961, 1971 and 1988), and the punitive paradigm they establish has subsequently been translated into domestic policy and law across the world.

However, the 1988 convention does not specify the nature of the sanction and additionally provides a caveat to the presumption that States must criminalise drug possession. Article 3(2) begins with the statement that any measures adopted shall be ‘subject to its constitutional principles and the basic concepts of its legal systems.’ State parties can, therefore, adopt a less punitive criminal justice approach to drug possession and use without breaching their international obligations.^{6, a}

Criminalisation as a risk factor in drug-related harm

The criminalisation of PWUD (directly criminalising use, or indirectly through criminalising possession) has been a central pillar of illicit drug control for over a century.

This punitive approach has come under increasing scrutiny as it has been identified as a key structural risk factor for a range of drug-related harms for people who inject drugs (PWID).⁷ More commonly higher rates of HIV infection among PWID⁸ are seen in environments in which injecting drug use (IDU) and other associated practices such as the provision of sterile needles are criminalised.⁸ The following approaches contribute to exacerbating drug-related harms in a number of ways:

- » encouraging needle sharing and hurried and higher-risk injecting – all of which increase the risk of contracting HIV, viral hepatitis and other blood-borne viruses⁸
- » pushing use into unhygienic marginal environments and thus increasing the risk of infection and overdose death
- » increasing the prison population of people who use and inject drugs – a high-risk environment usually with poor provision of harm reduction and HIV prevention services.⁹

Criminalisation is intended to stigmatise drug use and generate social disapproval. This has resulted in discrimination against PWUD¹⁰ and can further increase risks by:

- » undermining drug education, prevention and harm reduction efforts by alienating and marginalising key populations at higher risk of acquiring HIV, including PWID
- » deterring individuals from approaching services for help or volunteering information about drug use in emergency situations such as overdose¹¹
- » creating informal barriers that effectively deny antiretroviral or hepatitis C treatment to people who use drugs^{12, 13, 14}
- » negatively impacting on wider life opportunities, including access to housing, personal finance and employment, that are all positively linked to improved health and well-being^{15, b}
- » justifying the continuation of counterproductive enforcement approaches, with opportunity costs for public health elements of designated drug policy budgets.

Conversely, claims for a positive deterrent effect from user-level punitive enforcement are not well supported by the limited empirical research and comparative analysis available.^{16, 17} Many of the groups most vulnerable to drug-related harms

a For further discussion, see Bewley-Taylor D & Jelsma M (2012) The UN drug control conventions: The Limits of Latitude, *Series on Legislative Reform of Drug Policies No. 18*. Amsterdam: Transnational Institute.

b McLaren & Mattick (2007) compared the outcomes of individuals given a non-criminal sanction in South Australia and individuals given a criminal sentence in Western Australia (pre-decriminalisation) and found that the individuals given criminal penalties were more likely to suffer negative employment, relationship and accommodation consequences as a result of their cannabis charge and were more likely to come into further contact with the criminal justice system than the (non-criminalised) individuals in South Australia.

(including young people, PWID, those from lower socio-economic backgrounds, those with existing criminal records, and those with mental health vulnerabilities) are also likely to be among the least deterred by criminalisation.¹⁸

Definitions of 'decriminalisation'

'Decriminalisation' is not a strictly defined legal term, but its common usage in drug policy (and the definition used here) refers to the removal of criminal sanctions for possession of small quantities of currently illegal drugs for personal use, with optional use of civil or administrative sanctions.² Under this definition of 'decriminalisation', possession of drugs remains unlawful and a punishable offence (albeit not one that results in a criminal record).

A distinction is also made between *de jure* decriminalisation, involving specific reforms to the legal framework, and *de facto* decriminalisation, with a similar outcome but achieved through non-enforcement of criminal laws that technically remain in force. With the exception of some of the more tolerant policies for cannabis possession (for example, in Spain, the Netherlands and Belgium), people caught in possession under a decriminalisation model will usually have the drugs confiscated.

Policy variables

There is considerable variation in how decriminalisation models function in different jurisdictions, making international comparisons and generalisations about impacts on key indicators problematic. Each of these variables can have a significant impact on the measurable outcomes. These include:¹

Threshold quantities

Many but not all decriminalisation policies use maximum-quantity thresholds to distinguish between trafficking or supply offences and personal possession or use offences.¹⁹ Mexico, for example, allows possession of up to 0.5g of cocaine without prosecution, while Spain allows up to 7.5g, a fifteen-fold difference.²⁰ Since cocaine is usually sold in 1g units, Mexico's permissible possession level of 0.5g means it is likely that virtually everyone will exceed that threshold and be liable for criminal prosecution.

Types of administrative penalties

Non-criminal sanctions in different jurisdictions include: fines, community service orders, warnings, mandatory treatment or education sessions, driver's or professional licence suspensions, travel bans, property confiscation, associational bans, mandatory reporting, mandatory drug testing, termination of public benefits, administrative arrest, or no penalty at all.

Roles of the judiciary and police

Some jurisdictions, such as the Czech Republic and the Australian states with civil penalty schemes, allow the police to issue fines in the field for minor drug offences, similar to issuing a traffic violation. Other jurisdictions, such as Brazil and Uruguay, require individuals arrested for drug offences to appear before a judge in court to determine the charge and receive an appropriate sentence, if any.

Policy implementation

Role of medical professionals and harm reduction programmes

The effectiveness of decriminalisation of drug possession is also dependent on a number of other key considerations including investment in a wide range of harm reduction and treatment options. The relationship between a country's public health and law enforcement systems can significantly change an individual's experience following an arrest for a drug offence. For example, the significant investment in Portugal's harm reduction interventions and treatment in 2001 (see Page 5), coupled with the new decriminalisation model, saw an increase in the numbers accessing services. Many commentators have highlighted that the reduced stigma associated with drug use, due largely in part to the decision not to impose criminal sanctions, contributed to this increase.²¹ As the current report shows, jurisdictions also vary greatly in the resources allocated to and availability of harm reduction and treatment programmes.

Data availability and quality

Data availability and quality are important to assess the impact for a country that has adopted decriminalisation. Incomplete, inaccurate or inconsistent data on key indicators assessing the impact of decriminalisation pose important challenges to evaluation. For example, long reporting periods between national surveys on prevalence or the manner in which drug-related deaths are recorded can make it difficult to ascertain the actual impact of the policy.

Implementation challenges

Despite the existence of a statutory, judicial or regulatory decriminalisation policy, a jurisdiction's inability or unwillingness to implement that policy in practice can make it difficult to assess a policy's merits. In Peru, for example, researchers report that police regularly arrest and detain individuals for long periods without charge for decriminalised drug offences. In practice, for those in detention, such a system does not resemble decriminalisation, despite Peruvian law instructing no penalty for certain minor possession offences. Furthermore, in some jurisdictions the impact of decriminalisation has had a 'net-widening' effect, so that while the intention of the policy is to decriminalise certain behaviour, in practice more people get caught up in the system.²²

Social, cultural, economic and religious characteristics

A community's – or individual's – relationship to drug use is impacted by much more than a country's drug laws. Public health capacity, religiosity, cultural history, employment, inequality²³ and various other measures of social and personal well-being significantly impact drug-using behaviours in a given society. It is important to recognise that impacts and implementation of drug decriminalisation policies cannot be evaluated in a vacuum.

Growing support for decriminalisation

High-level support for decriminalisation has grown in recent years in parallel with the growing trend towards its adoption by states and jurisdictions. Alongside the development of the wider mainstream drug policy reform movement (focused primarily on recreational cannabis use), support for decriminalisation of drug possession and use in the context of HIV and other blood-borne viruses among PWID has also grown significantly among key voices in the public health community. This includes journals such as the *British Medical Journal*²⁴ and *Lancet*,²⁵ non-governmental organisations (NGOs) including the Red Cross/Red Crescent²⁶ and International AIDS Society (IAS),²⁷ and high-profile individuals including Anand Grover (UN Special Rapporteur on the Right To Health),²⁸ Michel Sidibé (UNAIDS Executive Director),²⁹ Ban Ki-Moon³⁰ (UN Secretary-General) and Michel Kazatchkine³¹ (former Executive Director, the Global Fund to Fight HIV, Tuberculosis and Malaria). Among the UN family of agencies, UNAIDS³² and UNDP have shown cautiously worded support in principle (but remaining reluctant to overtly use the language of 'decriminalisation'). The executive summary of the 2012 UNDP Global Commission on HIV and the Law report, for example, highlights the need to:

Reform approaches towards drug use. Rather than punishing people who use drugs but do no harm to others, governments must offer them access to effective HIV and health services, including harm reduction programmes and voluntary, evidence-based treatment for drug dependence.³³

Even the historically conservative UN Office on Drugs and Crime (UNODC) has increasingly adopted the narrative that 'drug use is a health problem, not a crime,'³⁴ and in a 2012 discussion position paper the UNODC make clear that:

Responses to drug law offences must be proportionate. Serious offences, such as trafficking in illicit drugs must be dealt with more severely and extensively than offences such as possession of drugs for personal use. For offences involving the possession, purchase or cultivation of illicit drugs for personal use,

community-based treatment, education, aftercare, rehabilitation and social integration represent a more effective and proportionate alternative to conviction and punishment, including detention.³⁵

One of the highest-profile public expressions of support, in terms of signatories and media coverage, has been the Vienna Declaration,³⁶ which states 'The criminalisation of illicit drug users is fuelling the HIV epidemic and has resulted in overwhelmingly negative health and social consequences. A full policy reorientation is needed' and includes a call on 'governments and international organisations, including the United Nations,' to 'decriminalise drug users.'

In June 2012 the Global Commission on Drug Policy launched its second report, *The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Pandemic*.³⁷ It highlighted that fear of criminalisation led to increased HIV risk behaviour in certain countries and that mass incarceration fuelled HIV transmission rates within prisons. The Commission, which is made up of several former presidents and other high-profile individuals, has repeatedly called for the decriminalisation of drug possession.

Decriminalisation systems around the world^c

It is estimated that around 25–30 countries have now implemented some form of decriminalisation. Decriminalisation approaches are found mostly in Europe, Latin America and, to a lesser extent, Eurasia, as well as some parts of the USA (cannabis only) and Australia. The precise number of countries implementing such an approach depends on which definition is used, with additional problems in quantifying more localised or informal *de facto* decriminalisation policies, as well as challenges of incomplete country data. Some Southeast Asian states, such as Vietnam, nominally espouse decriminalisation of use but are not included here because, instead of criminal sanctions, they often forcibly detain drug users in 'drug detention centres' largely indistinguishable from prisons and associated with serious human rights violations.^{38, 39}

The following survey is adapted from the Release report, *A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe*.¹

c. This information is largely taken from the report by Release: Rosmarin A & Eastwood N (2012) *A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe*. London: Release.

Western Europe

- » Belgium decriminalised small-scale cannabis possession in 2003.⁴⁰
- » German federal law has contained decriminalisation elements since the early 1990s.⁴¹ There is variation between different *Länder* (German states) in application.^{42, d}
- » Italy first decriminalised drug possession in 1975. Since then, laws and policies around drug possession have fluctuated between harsh and lenient penalties.⁴³
- » Spain formally decriminalised possession and private use of small amounts of drugs in 1982, following a 1974 Supreme Court ruling.^{44, 45}
- » The Netherlands has had a *de facto* decriminalisation policy since 1976. While remaining technically criminal, possession offences of up to 5g of cannabis (30g prior to 1996)⁴⁶ or 'one dose' of 'hard' (non-cannabis) drugs for personal use are not prosecuted.⁴⁷

Case Study: The Portuguese decriminalisation experience

Portugal provides a useful case study, with over a decade of detailed evaluation to draw on and a policy developed and implemented in response to a perceived national drug problem with public health priorities at the fore from the outset. Notably, Portugal coupled its decriminalisation with a public health reorientation that directed additional resources towards treatment and harm reduction.⁴⁸ Those caught in possession are referred to a 'dissuasion board' that decides whether to take no further action (the most common outcome), direct the individual to treatment services if a need is identified, or impose an administrative fine.

The useful volume of data collected during and since the reform offers considerable scope for filtering through different political and ideological lenses;⁴⁹ contrast the evaluation of Portugal's prohibitionist 'anti-drug' organisations who see it as an unmitigated disaster⁵⁰ with that of the high-profile but overwhelmingly positive Greenwald report⁵¹ from the libertarian-leaning Cato Institute. A more rigorous and objective academic study of the Portuguese experience from 2008² summarises the changes observed since decriminalisation as:

- » small increases in reported illicit drug use among adults
- » reduced illicit drug use among problematic drug users and adolescents, at least since 2003
- » reduced burden of drug offenders on the criminal justice system
- » increased uptake of drug treatment
- » reduction in opiate-related deaths and infectious diseases

- » increases in the amounts of drugs seized by the authorities
- » reductions in the retail prices of drugs.

In conclusion the authors note:

[Portugal's experience] disconfirms the hypothesis that decriminalisation necessarily leads to increases in the most harmful forms of drug use. While small increases in drug use were reported by Portuguese adults, the regional context of this trend suggests that they were not produced solely by the 2001 decriminalisation. We would argue that they are less important than the major reductions seen in opiate-related deaths and infections, as well as reductions in young people's drug use. The Portuguese evidence suggests that combining the removal of criminal penalties with the use of alternative therapeutic responses to dependent drug users offers several advantages. It can reduce the burden of drug law enforcement on the criminal justice system, while also reducing problematic drug use.

Supporting these conclusions has been a more recent Drug Policy Profile of Portugal⁴⁸ from the European Monitoring Centre on Drugs and Drug Addiction, which observed that:

While some want to see the Portuguese model as a first step towards the legalisation of drug use and others consider it as the new flagship of harm reduction, the model might in fact be best described as being a public health policy founded on values such as humanism, pragmatism and participation.

d For the different thresholds, see: <http://www.drug-infopool.de/gesetz/nordrhein-westfalen.html>.

Latin America

- » Argentina's Supreme Court declared criminalisation of drug possession for personal consumption unconstitutional in 2009.^{52,53} A process of formally incorporating this decision into law is underway.⁵⁴
- » Chile decriminalised possession in 2007;⁵⁵ sentencing judges can administer fines, mandatory treatment, community service requirements and/or suspension of driver's licence.⁵⁶ Although the majority of cases end in the suspension of sentences or administrative sanctions, many people caught with small quantities do go to prison. Chile is assessing possible further changes to its laws, including full decriminalisation.⁵⁶
- » Colombia decriminalised possession following a Constitutional Court ruling in 1994.⁵⁷ This decision has been subject to more recent ongoing legal and constitutional argument between the government and Supreme Court.^{58,59,e} While these tensions leave the situation in flux, *de facto* decriminalisation continues, with a formal new government decriminalisation proposal reported.⁶⁰
- » Mexico decriminalised possession of small amounts of drugs in 2009, replacing criminal sanctions with treatment recommendations, and mandatory treatment for repeat offenders.⁶¹ The quantity thresholds have, however, been criticised as being too low and ambiguous, leaving implementation vulnerable to police corruption.⁶²
- » Paraguay decriminalised small-scale possession in 1988.⁵⁶
- » Peru decriminalised drug possession in 2003,⁶³ but research reveals a disconnect between policy and the reality of police practices in the country.⁶⁴
- » Uruguay has never criminalised possession of drugs for personal use.⁵⁶ The principle formally entered Uruguayan law in 1974. Concerns have been raised about high levels of pre-trial detention without charge for more serious drug offences.⁶⁵
- » Decriminalisation laws are also pending in Brazil and Ecuador.^f

Eurasia

- » In Armenia possession of small quantities of drugs has been decriminalised since 2008⁶⁶ and is subject to administrative fines. However, the high level of fines (100 to 200 times the minimum wage for first-time offenders) can still result in incarceration of those unable to pay.

- » In Estonia possession of small quantities of drugs for personal use has been decriminalised since 2002,^{47,67} subject to court-ordered administrative fines or 30 days administrative detention (in a local police jail).
- » In Kyrgyzstan small-scale possession offences have been decriminalised and subject only to administrative responses since 1998.⁶⁸
- » In Poland since May 2011 prosecutors have had discretion not to prosecute small-scale possession offences⁶⁹ or if the individual is judged to be drug-dependent.
- » The Czech Republic formally decriminalised possession of all drugs for individual use in 2010.⁷⁰
- » Russia nominally decriminalised possession in 2005. Article 228 of Russia's criminal code provides that possession of less than a 'large amount' of illegal drugs face only administrative sanctions. However, since then the threshold amount that determines a 'large' quantity of drugs has oscillated from very low thresholds to slightly higher thresholds and back again, making decriminalisation in Russia an inconsistent and effectively unrealised policy.⁷¹

Other countries

- » Between 1987 and 2004 four Australian states decriminalised possession and use of cannabis. Two of these, Northern Territory⁷² and South Australia,⁷³ have additional treatment diversion schemes for those found in possession of other drugs for personal use (completion of the designated programme avoids a prosecution).
- » Since 1973, 14 US states and a number of other local jurisdictions have decriminalised cannabis possession.

Recommendations for implementation of decriminalisation of drug possession

When adopting a decriminalisation policy, a number of factors have to be considered to ensure the framework is meaningful in its goal of not criminalising those caught in possession of drugs for their own personal use. The following section details points for consideration in terms of the actual policy/legislation and implementation of the policy:

- » **Thresholds** – where threshold amounts are adopted to determine whether someone is in possession for personal use the level needs to reflect market realities and be flexible enough to ensure that the principle of decriminalisation of personal possession is properly achieved.

e The dose is not the only factor the Court can look at when considering if drugs are for personal use.

f For updates, see: <http://www.druglawreform.info/en/country-information/item/261-regional-overview-of-drug-law-reform-in-latin-america>.

- » **Response** – the State can either decide to take no action against someone caught in possession of drugs (for example, the Netherlands or Belgium) or can respond using civil sanctions.

If a system of fines is to be adopted, they must be set at a reasonable level and not result in the imprisonment of large numbers of people for non-payment. Other forms of civil penalties, such as seizure of passport or driving licence, should be avoided, as these can have a disproportionately negative impact on a person's life. In terms of those who are dependent on drugs, Portugal's approach, in which the police work with treatment agencies to offer an individualised referral route (with a range of treatment options available, including harm reduction), appears to be a pragmatic option. Also, failure to meet the conditions of treatment should be addressed by involving the person in their treatment programme and should certainly not result in criminal sanctions. In particular, 'drug-free' conditionality is also potentially setting up a person to fail, given the relapsing nature of drug dependence.

- » **Disproportionate sentencing for cases involving possession above the threshold or supply offences** – it is critical that governments recognise the principle of proportionality in sentencing for drug offences. Too often those convicted of non-violent drug supply offences receive custodial periods which are much harsher than other violent offences, such as rape and even murder.
- » **Public health interventions and treatment** – countries that wish to reduce the potential harms of problematic drug use and limit long-term health costs by introducing programmes that tackle HIV transmission and other blood-borne viruses should consider coupling the decriminalisation model with such a public health investment.
- » **Net-widening** – policymakers must work to ensure that decriminalisation does not result in more people coming into contact with the criminal justice system. Whether this comes as a result of expanded police powers or low thresholds, decriminalisation policies must be targeted at reducing the number of individuals who suffer from the consequences of a criminal conviction, not merely the enactment of decriminalisation in name only.

Discussion

Given the wide variation in models around the world, there are relatively few general conclusions that can be made about the impacts of decriminalisation beyond the observation that it does not lead to the explosion in use that many fear. Critics of decriminalisation will often cite drug tourism as a risk associated with the introduction of such a policy. However,

there is no evidence to suggest that this occurs. More often than not, countries or states that have adopted this approach will see similar rates of prevalence as their neighbours.^{22, 74-77, 9}

Research from Europe,⁷⁸ Australia,⁷² the USA²² and globally¹⁷ suggests changes in intensity of punitive user-level enforcement appear to have only a marginal influence on determining prevalence of use, although, as noted earlier, there are significant impacts on risk behaviours.

Increasingly, more countries are joining the drug policy reform debate. Latin and Central American countries such as Colombia⁷⁹ and Guatemala⁸⁰ are some of the leading proponents calling for a reform of drug laws. Australia⁸¹ has set up a new enquiry to consider the implementation of decriminalisation of possession of all drugs. It is not surprising that this growing momentum for change is occurring; the harms caused by criminalising those who use drugs are well documented, but added to this is a global economic crisis which is seeing cuts in police budgets all over the world. In California the decriminalisation of cannabis saw the total cost of enforcement decline from \$17 million in the first half of 1975 to \$4.4 million in the first half of 1976.²²

Some research has shown that beyond ending the criminalisation of PWUD there can be other positive benefits. In Portugal, the increased numbers in treatment have been linked to the reduced stigmatisation created by a non-criminal approach to drug use.⁸² Research from Australia compared individuals who had been criminalised for cannabis possession against those who had received a non-criminal response. It found that individuals given criminal penalties were more likely to suffer negative employment, relationship and accommodation consequences as a result of their cannabis charge and were more likely to come into further contact with the criminal justice system.¹⁵

Decriminalisation is clearly no 'silver bullet'; it can only aspire to reduce harms created, and costs incurred, by criminalisation in the first place and does not reduce harms associated with the criminal trade on which it has little direct impact. If inadequately devised or implemented, decriminalisation will have little impact, even potentially creating new problems such as net-widening.^{1, 83} A more critical factor appears to be the degree to which decriminalisation is part of a wider policy reorientation and resource reallocation away from harmful punitive enforcement and towards public-health-oriented and human-rights-based approaches targeted at PWUD, particularly young people and PWID. Decriminalisation can be seen as a part of a broader harm reduction approach, as well as a key to creating an enabling environment for other public health interventions.

g. These studies showed that there were no statistically significant differences in prevalence of cannabis use in states throughout Australia, even though three states had decriminalised cannabis possession and cultivation.

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