



Australian Government

Attorney-General's Department

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Inquiry into Australia's illicit drug problem: Challenges and opportunities for law enforcement

Introduction

The Attorney-General's Department (AGD) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Law Enforcement (Committee) inquiry into Australia's illicit drug problem: Challenges and opportunities for law enforcement in addressing Australia's illicit drug problem.

This submission outlines AGD's responsibilities in advancing illicit drug policies and supporting portfolio law enforcement agencies, including the Australian Federal Police (AFP), Australian Criminal Intelligence Commission (ACIC) and the Commonwealth Director of Public Prosecutions (CDPP), in addressing the illicit drug problem.

The AFP and ACIC will provide separate submissions. AGD recommends that this submission be read alongside the AFP submission, which provides an operational context, and the ACIC submission, which provides an intelligence picture.

Australia's approach to illicit drugs

Australia's policy response to illicit drugs is primarily guided by the National Drug Strategy 2017-2026 (the National Drug Strategy), which is administered by the Department of Health and Aged Care.

The National Drug Strategy provides a framework that balances criminal justice responses with healthcare and harm minimisation responses to prevent uptake and reduce the harmful effects of alcohol, tobacco, licit and illicit drugs in Australia. It identifies national priorities and guides governments in partnership with service providers to deliver a coordinated response.

Under the framework, responsibility for the control of illicit drugs and precursor chemicals is shared between Commonwealth and state and territory law enforcement, justice and health portfolios.

States and territories have primary responsibility for the laws governing the possession and use of illicit drugs within their jurisdictions, including laws relating to decriminalisation or legalisation, and supply, demand and harm reduction initiatives.

Commonwealth responsibility for the oversight, development, implementation and monitoring of Australia's national illicit drugs policy framework is shared between the Department of Health and Aged Care, the Australian Border Force (ABF) and AGD.

AGD has responsibility for the administration of criminal justice and law enforcement policy which, in the illicit drugs space, includes developing overarching illicit drugs policy that responds to current and emerging illicit drug trends across Australia through:

- Administering Commonwealth illicit drug offences under Part 9.1 and Part 9.2 of the Commonwealth *Criminal Code Act 1995* (the Criminal Code) and *Criminal Code Regulations 2019* (the Criminal Code Regulations).
- Administering Commonwealth law enforcement powers under the *Crimes Act 1914* (Crimes Act), *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Surveillance Devices Act 2004* (SD Act), and legislation governing Commonwealth law enforcement and intelligence

agencies including the *Australian Federal Police Act 1979*, *Australian Crime Commission Act 2002* (the ACC Act) and *Law Enforcement Integrity Commissioner Act 2006*.

- Administering legislation that facilitates the ability of law enforcement agencies to detect, seize and otherwise impede the illicit financial flows underpinning the illicit drug trade, including the *Proceeds of Crime Act 2002* (POCA), the money laundering offences at Part 10 of the Criminal Code and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).
- Facilitating international crime co-operation in criminal matters, including through extradition and mutual assistance.
- Administering the laws governing the sentencing and management of federal offenders, including the Commonwealth spent convictions regime.
- Working with the Commonwealth Health portfolio to achieve national consistency of controls on precursor chemicals and equipment used to manufacture illicit drugs.
- Assisting the Department of Health and Aged Care and the Department of Foreign Affairs and Trade in engaging with international counterparts through relevant forums, including the United Nations Commission on Narcotic Drugs on international policy and to strengthen engagement between international agencies.

AGD also has responsibility for administering Commonwealth courts and tribunals. In practice, however, illicit drug prosecutions are heard in state and territory courts, including those relating to Commonwealth illicit drug offences which are prosecuted by the CDPP.

Australia is a signatory to three major United Nations international drug conventions, which provide the framework for the international control of relevant substances. These are the:

- *Single Convention on Narcotic Drugs 1961*, as amended by the 1972 Protocol,
- *Convention on Psychotropic Substances of 1971*, and
- *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*.

Australia's illicit drug environment

Australia's demand for illicit drugs, and the harms caused by both their use and trade, have continued to rise over the past decade.

Transnational, serious and organised crime (TSOC) groups see Australia as an attractive market for illicit drugs. This is due to the potential high return on investment, the relative safety of coordinating illicit drug trafficking from overseas safe havens, and the ability to partner with domestic groups capable of smuggling illicit drugs through border controls and laundering profits.

Australia is one of the largest per capita consumers of illicit stimulants (particularly methamphetamine) worldwide. The ACIC's National Wastewater Drug Monitoring Program (NWDMP) provides insight into national drug use by providing data on drug consumption throughout Australia. Data from Report 15 of the NWDMP, published on 15 March 2022, showed that an estimated 15,764 kilograms of four of the major illicit

drugs (methamphetamine, cocaine, methylenedioxymethamphetamine (MDMA) and heroin) were consumed in 2020-21, with an estimated street value of almost \$10.3 billion.

The Australian Institute of Health and Welfare (AIHW) 2019 National Drug Strategy Household Survey reports that the proportion of Australians aged 14 or over reporting illicit use of drugs in their lifetime has also increased from 37.7% in 2001 to 43.2% in 2019.

Internationally, the United Nations Office on Drugs and Crime reports that Australia's demand for illicit drugs is well above global averages. In Australia in 2019, a user self-report survey of the general population indicated that according to the survey respondents, cannabis continued to be the most commonly used illicit drug, with more than one in three (36.5%) having used it in their lifetime and 11.6% using it in the previous 12 months. Ecstasy and cocaine were the second and third most common illicit drugs used in a lifetime (12.5% and 11.2%, respectively) and in the last 12 months (3.0% and 4.2%, respectively).

Report 16 of the NWDMP, published on 30 June 2022 and covering the period December 2021 to February 2022 saw Australia rank highly in the consumption of four main illicit drugs. Australia ranked first of 25 countries for methylamphetamine consumption, fifth of 27 countries for MDMA consumption, sixth of 16 countries for cannabis consumption and fifteenth of 26 countries for cocaine consumption.

Australia's high consumption of illicit drugs drives a number of health, social and economic harms, including harm to those who use drugs and their friends and families, associated criminal activity, and a significant burden on Australia's health system.

Rising drug consumption and related harms also reflect difficulties in targeting illicit drug supply chains, as offshore criminal groups continue to operate from safe-haven jurisdictions. The critical supply chains in Australia, however, are largely domestic, and the decrease in drug consumption in 2020-21 may show that increased enforcement action against domestic supply chains impacts domestic consumption. Although the decrease may also have been impacted by international supply chain issues due to the COVID-19 pandemic.

Emerging trends and risks

TSOC groups are opportunistic, adaptive and resilient to changes in their operating environment. They exploit vulnerabilities, emerging technologies and perceived gaps in law enforcement powers.

The production of synthetic illicit drugs requires ready access to precursor chemicals, many of which have legitimate industrial purposes. Criminal actors gain access to these precursors through the diversion of chemicals used by legitimate industry, or through illegal importation.

Existing border controls regulate the importation of many precursor chemicals commonly used in the production of illicit drugs. However, criminals are employing new production methodologies, which use precursor or pre-precursor chemicals that are currently unregulated at the border. This enables criminals to legally import a number of high-risk chemicals, while avoiding detection, monitoring and prosecution by law enforcement.

State and territory laws regulate the possession of many precursor chemicals not captured by Commonwealth border controls. However, their uncontrolled importation creates a significant risk of diversion. Inconsistencies between Commonwealth and state and territory regulations also places

unnecessary costs on legitimate industry, particularly for businesses that import high-risk precursor chemicals for legitimate purposes.

The Commonwealth, states and territories have sought to address these issues by working together to ensure national consistency of controls on precursor chemicals, wherever possible. This includes through the Precursor Working Group, an AGD-chaired Group consisting of members from industry and law enforcement agencies from the Commonwealth, states and territories, which explores issues specifically related to precursor chemicals.

AGD is working with the Department of Health and Aged Care and the ABF to develop options for government on enhancing controls on illicit drug precursors.

AGD's response – law enforcement capability

The impact of illicit drugs on the Australian community cannot be addressed by law enforcement alone. It requires a multifaceted approach that encompasses supply and demand reduction, and harm minimisation efforts. Close collaboration between jurisdictions at all levels of government and across health, education and law enforcement policy portfolios is key.

As the Commonwealth policy lead for TSOC issues, including illicit drugs, AGD works closely with portfolio agencies, including the AFP, ACIC and the Australian Transaction Reports and Analysis Centre (AUSTRAC) to provide legislative and policy support to ensure they have appropriate powers and legal frameworks to perform their functions effectively.

AGD also engages closely with the ABF and the Department of Health and Aged Care, as well as international partners and intergovernmental agencies.

AGD administers key legislation and systems underpinning law enforcement's response to illicit drugs and precursors.

Commonwealth illicit drug offences

The Commonwealth's serious drug offences are contained in Part 9.1 and 9.2 of the Criminal Code.

Part 9.1 of the Criminal Code contains serious drug offences and gives effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. These offences can be divided into four main categories:

- trafficking, selling and cultivation,
- manufacture,
- importing and exporting, and
- possession.

The penalty associated with serious drug offences depends on the quantity of the illicit substance involved. There are three tiers of quantities used in the Criminal Code:

- commercial quantity (the largest, usually measured in kilograms),
- marketable quantity (in grams), and

- trafficable quantity (in grams, but less than a marketable amount).

The specific marketable, trafficable and commercial quantities of serious drugs are listed at Schedule 1 (controlled drugs) and Schedule 2 (border-controlled drugs) of the Criminal Code Regulations.

The penalties range from two years' imprisonment for possession offences, through to life imprisonment for trafficking or importing/exporting commercial quantities of a border-controlled drug.

Part 9.2 of the Criminal Code contains offences for importing new psychoactive substances (NPS). NPS are new versions of illicit synthetic drugs, whose chemical structures have been altered to avoid existing controls. These substances are often ordered over the internet and brought in through the international mail system.

The offences in Part 9.2 prohibit the importation of NPS based on their effect rather than their chemical structure. These ensure that criminals cannot import untested and potentially dangerous substances, as an alternative to more established illicit drugs. The ban does not affect the importation of substances with a legitimate use, such as foods, therapeutic goods and industrial chemicals.

Additional offences relating to the importation of non-narcotic drugs, specified chemical compounds and specified performance enhancing substances also exist under the *Customs Act 1901*, which is administered by the Department of Home Affairs, though the penalties are significantly less than those under the Criminal Code.

Commonwealth law enforcement powers

AGD administers a range of legislation that provides Commonwealth law enforcement agencies with powers to undertake investigation of Commonwealth offences, including those relating to illicit drug activity. These investigative powers provide law enforcement with the key tools required to gather evidence on illicit drug crimes, with these powers being designed to adapt to the range of evolving methodologies and technologies through which illicit drug crime is committed.

Crimes Act 1914

The Crimes Act contains the most commonly used investigative powers used by Commonwealth law enforcement in illicit drug cases, including powers to obtain and execute search warrants (Part IAA, Divisions 2 and 3), arrest a suspect (Part IAA, Division 4), conduct controlled operations (Part IAB) and detain a person prior to charging them with an offence (Part IC).

Search warrants

Search warrants are one of the most common tools used by law enforcement to obtain evidence in illicit drug cases. Part IAA, Division 2 of the Crimes Act outlines the requirements for obtaining and executing a search warrant.

A search warrant can only be issued if it is suspected that there is, or will be within the next 72 hours, evidential material at the premises to which, or on the person to whom, the search warrant relates (s 3E). Evidential material is broadly defined to cover a wide range of potential evidence in illicit drug cases, meaning a thing relevant to an indictable or summary offence, including a thing in electronic form (s 3C).

A search warrant in relation to accessing premises authorises the executing officer and constables assisting to engage in a wide range of conduct under s 3F including (but not limited) to:

- entering premises,
- taking samples for forensic purposes,
- seizing evidential material in relation to the offence to which the warrant relates or another indictable offence, or other material to prevent its concealment, loss or destruction or use in committing an offence, and
- obtaining access to computers, electronic equipment and data storage devices.

Powers of arrest

Part IAA, Division 4 of the Crimes Act provides constables with powers of arrest that may be exercised with and without a warrant.

Constables may arrest a person for an offence under a warrant (see s 3ZB). A constable may also use powers of arrest against a person without a warrant in a range of circumstances outlined at s 3W, including (but not limited) to where arrest is to:

- stop or prevent the commission of an offence,
- ensure the appearance of a person before a court in respect of the offence, and
- prevent the fabrication, concealment, loss or destruction of evidence.

Constables have a range of powers to facilitate the execution of an arrest, including the power to enter premises under s 3ZB and to use necessary and reasonable force under s 3ZC.

Once the arrest is carried out, constables may gather evidence through a range of methods, including frisk searches, ordinary searches and strip searches of an arrested person, as well as a search of an arrested person's premises (ss 3ZE-3ZI). Significant restrictions apply to ensure that powers only apply in appropriate situations.

Controlled operations

Controlled operations permit law enforcement agencies to use covert and coercive powers to uncover and interdict criminal activity and dismantle illicit drug networks, and have proven highly successful in combatting illicit drug crimes, particularly those that were resistant to more traditional law enforcement methods.

When investigating Commonwealth illicit drug offences, such as trafficking and importation activity, Commonwealth law enforcement agencies may conduct a controlled operation in order to gather evidence which may lead to the prosecution of a person for a serious Commonwealth offence.

In controlled operations, law enforcement officers may be engaged in conduct that would otherwise constitute a Commonwealth, state or territory offence (e.g. assisting with the delivery of illicit drugs or infiltration of an organised criminal group). Law enforcement agencies and persons participating in a controlled operation must comply with strict legislative requirements outlined in Part IAB, Division 2 of the Crimes Act. The AFP, ACIC and the Australian Commission for Law Enforcement Integrity (ACLEI) have access to controlled operations powers.

Under s 15GI of the Crimes Act, an application for a controlled operation may be approved on the grounds that, among others:

- a serious Commonwealth offence or a serious state or territory offence with a federal aspect has been, is being, or is likely to be committed,
- the nature and extent of the suspected criminal activity justify the conduct of a controlled operation, and
- any illicit goods will be under the control of a law enforcement officer at the end of the controlled operation.

Under a formal application, the period of effect for a controlled operation must not exceed three months or, in the case of an urgent application, seven days (s 15GH(4c)).

Pre-charge detention powers

Part IC of the Crimes Act sets out the Commonwealth pre-charge detention regime, which enables law enforcement officers to detain a person for a limited period of time prior to charging them with an offence.

This enables law enforcement officers to undertake questioning or investigation for the purpose of gathering evidence of a Commonwealth offence. For non-terrorism offences, including illicit drug offences, the regime allows law enforcement officers to hold a person without charge for an initial period of four hours, with the ability to seek extension to a maximum period of eight hours, subject to magistrate approval (s 23DA). The legislation provides additional protections and requirements for persons under 18 years of age and Aboriginal or Torres Strait Islander peoples (s 23C(4)).

Australian Crime Commission Act 2002

The ACC Act establishes the ACIC's coercive powers, which are used in special ACIC operations and special ACIC investigations and allow ACIC examiners to compel people to give evidence for the purposes of a special ACIC operation or special ACIC investigation. The ACIC Board may authorise, by determination, a special ACIC operation or special ACIC investigation to occur where it considers that it is in the public interest.

In addition to their powers to compel witnesses, ACIC examiners may also issue notices requiring people to produce documents or other things relevant to a special ACIC operation or special ACIC investigation. Examinations are held in private, and witnesses may claim protection so the answers, documents or things they provide are not admissible in evidence against them in a criminal proceeding.

As well as its coercive powers, the ACIC utilises a full range of traditional investigative methods, including telephone interception, surveillance devices and controlled operations, to carry out special ACIC operations and special ACIC investigations.

Mutual assistance and extradition

Australia's mutual legal assistance and extradition frameworks facilitate effective international crime cooperation efforts to combat transnational crime. These frameworks are critical in disrupting and dissuading transnational and serious organised crime threats to Australia, including criminal activity relating to illicit drug offences. AGD is Australia's central authority for extradition and mutual assistance matters. As such, AGD

provides extensive assistance and support to the AFP and law enforcement agencies seeking to make extradition and mutual assistance requests.

Mutual assistance is the process by which countries provide formal government-to-government assistance in the investigation and prosecution of criminal offences and related proceedings. Mutual assistance can also be used to identify and recover proceeds of crime. The *Mutual Assistance in Criminal Matters Act 1987* (the MACMA) governs mutual assistance arrangements in Australia in addition to, where applicable, bilateral mutual assistance treaties and multilateral conventions that include mutual assistance obligations. This relevantly includes the United Nations Convention Against Transnational Organised Crime, which obliges State Parties to criminalise, and provide mutual assistance in matters involving, participations in organised criminal groups (which includes organised criminal groups involved in illicit drug smuggling).

Australia can receive requests and provide mutual assistance on the basis of reciprocity. Forms of assistance that Australia can request and provide under the MACMA include production of documents, search and seizure, and taking evidence from witnesses amongst many other forms of assistance.

Extradition is the process by which one country apprehends and sends a person to another country for the purposes of criminal prosecution or to serve a prison sentence. The *Extradition Act 1988* (Extradition Act) provides the legislative basis for extradition in Australia. Under the Extradition Act, Australia can make an extradition request to any country, but can only receive an extradition request from a country declared in regulations to be an 'extradition country'. As with mutual assistance, Australia's extradition framework also includes obligations under bilateral extradition treaties and multilateral conventions.

Australia's mutual assistance and extradition frameworks have proven effective in efforts to combat criminal activity relating to illicit drug offences. In the 2021-22 reporting period, four people were surrendered to Australia for drug offences (which was listed in the Attorney-General's Department Annual Report 2021-22 as the highest major offence category for which people were surrendered to Australia). Drug offences also comprise a significant number of Australia's incoming and outgoing mutual assistance requests.

Combatting illicit financial flows

The illicit drug trade is inherently profit-driven, with illicit financing at the centre of maximising profits and reinvestment in criminal enterprise. The response to illicit financial flows is a multifaceted and collaborative effort between law enforcement, regulatory, intelligence and policy agencies, as well as industry, international partners and the broader community. AGD has policy responsibility for Australia's anti-money laundering and counter terrorism financing (AML/CTF) regime, money laundering offences under the Criminal Code, and Australia's proceeds of crime framework. These legislative schemes are designed to combat illicit financial flows and take the profit out of crime, including illicit drug trade.

The AML/CTF regime is provided by the AML/CTF Act and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (AML/CTF Rules). The regime is designed to deter, detect and disrupt money laundering by imposing a range of obligations on businesses that provide high risk services. These services have been highlighted as some of the most common avenues of laundering money obtained through illegal means, including through the illicit drug trade. These criminals exploit a range of aspects of our financial system to launder proceeds of crime, as well as fund further illicit drug activity.

Division 400, Part 10.2 of the Criminal Code provides for Commonwealth money laundering offences, for dealing with proceeds or instruments of crime and for dealing with property reasonably suspected of being proceeds of crime. These offences enable the prosecution of money laundering to deter and penalise such criminal conduct, which may involve predicate offences such as drug-related offences

Asset confiscation powers are a central pillar of law enforcement agencies' ability to take the profit out of crime, including the illicit drug trade. The POCA enables law enforcement agencies to:

- identify property that may be proceeds of crime, including through production orders, search warrants, notices to financial institutions, monitoring orders, and freezing orders
- restrain property to prevent it from being dealt with while an investigation is conducted into its origins, and
- following restraint, an application for an order can be made to a Court to realise the value of restrained property, for example, for a forfeiture order.

Once confiscated assets are realised, they may be used to benefit the community through crime prevention measures, law enforcement measures, measures relating to the treatment of drug addiction and diversionary measures relating to illegal use of drugs.

AUSTRAC

AUSTRAC's unique financial intelligence capabilities provide law enforcement and national security agencies with invaluable insights into illicit funds flows, for a variety of crime types and illegal activities including illicit drugs. This contributes significantly to the national intelligence picture and investigations by partners to prevent crime, while protecting Australia's financial system from exploitation.

AUSTRAC is active in multi-agency, multi-jurisdictional task forces, and supports joint operations and state and territory law enforcement agencies in line with Serious and Organised Crime Coordination Committee national priorities.

AUSTRAC has developed proactive financial profiles to detect entities of interest, or patterns of transactions that may indicate money laundering, terrorism financing or other serious criminal activity, such as illicit drug indicators. Profiles are aligned to partner agency and national intelligence priorities, including the serious and organised crime strategy. Designated partner agencies also have a gateway to AUSTRAC's online database, enabling direct access to transaction reports, including suspicious matter reports and international funds transfer instruction reports.

AUSTRAC's public-private partnership, Fintel Alliance, engages industry and government partners in operations across many crime types. Fintel Alliance shares intelligence and delivers innovative solutions to detect, disrupt and prevent serious crime. Partners include major banks, remittance service providers and gambling operators, as well as law enforcement and security agencies from Australia and overseas.

AUSTRAC leverages Fintel Alliance to better understand and disrupt emerging and complex crimes impacting the Australian community. This has been achieved through matching disparate data sets to generate insights into how organised crime operates and moves the proceeds of crime. Insights from Fintel Alliance are shared with the financial services sector, to enhance reporting of suspicious transactions in support of law enforcement efforts.

Addressing the impact of anonymising technology

The rapid advancement of communication technologies has had a significant impact on law enforcement's ability to detect, investigate, prosecute and disrupt serious crime, including drug offences.

The online trade in illicit drugs has continued to expand significantly in Australia, due in large part to the emergence of the crypto market and the use of the dark web, encryption and other anonymising technology, which are used by criminal actors to evade law enforcement detection. The scale of the problem in Australia is considerable, with Australia hosting more online drug dealers per capita than any other country except the Netherlands.¹

In recent years, the Australian government has introduced a range of new powers to combat this threat.

Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (TOLA Act)

Commencing on 9 December 2018, the TOLA Act addressed law enforcement and intelligence agencies' challenges with the evolution of the communications environment, including the growth of encrypted communications. The TOLA Act amongst other things:

- introduced a framework to allow agencies to request or compel assistance from businesses that provide communications services
- established computer access warrants for law enforcement agencies, to enable the collection of evidence from computers at a point where the information is not encrypted, and
- strengthened existing search and seizure powers, particularly with respect to computers.

Surveillance Legislation Amendment (Identify and Disrupt) Act 2021 (SLAID Act)

The SLAID Act introduced new powers to enhance the ability of the AFP and the ACIC to combat online serious crime, including the online trafficking of illicit drugs.

The SLAID Act introduced the following warrants:

- Data disruption warrants: These warrants enable the AFP and ACIC to disrupt data through the modification, adding, copying or deletion of data, in order to frustrate the commission of serious offences online.
- Network activity warrants: Network activity warrants allow the AFP and ACIC to collect intelligence on serious criminal activity being conducted by criminal networks.
- Account takeover warrants: Account takeover warrants provide the AFP and ACIC with the ability to take control of a person's online account for the purposes of gathering evidence to further a criminal investigation.

Notwithstanding these reforms, TSOC groups continue to seek out new ways to exploit technology for their own gain.

¹ Australian Institute of Criminology, 2020, Darknet drug traders: A qualitative exploration of the career trajectories and perceptions of risk and reward of online drug vendors, at <https://www.aic.gov.au/sites/default/files/2020-10/CRG5016%2017%20FinalReport.pdf.pdf>

AGD is leading major reform of Australia's electronic surveillance framework. Consistent with recommendations of the Comprehensive Review of the legal framework governing the National Intelligence Community, this reform will repeal the TIA Act, SD Act, and parts of the *Australian Security Intelligence Organisation Act 1979* and replace them with a new Act. Holistic reform of this framework is aimed at ensuring law enforcement agencies have the powers they need to respond to a range of serious crimes, protecting privacy, and keeping pace with technological changes that can be exploited by criminals and nefarious actors.

Sentencing and management of Commonwealth offenders

AGD administers the key frameworks underpinning the sentencing and management of offenders for Commonwealth drug crimes.

Commonwealth drug crimes in Part 9.1 and 9.2 of the Criminal Code may be punished by a maximum sentence of anywhere between two years' imprisonment and life imprisonment, depending upon the seriousness of the offender's conduct and the quantity of the drug, precursor or prohibited plant they dealt with. There is no minimum sentence that applies to these offences.

Given the range of penalties available to the judiciary, the law regarding sentencing and parole has been designed to give the judiciary considerable flexibility in dealing with drug crime, including options for judicial officers to divert offenders from the criminal justice system, or impose significant criminal penalties, where appropriate.

General sentencing principles

Part 1B of the Crimes Act deals with the general principles that apply when sentencing federal offenders, including drug offenders.

When sentencing a person for a federal offence, the court must impose a sentence that is of the severity appropriate in all the circumstances of the offence (see s 16A). Sections 16A, 16B, 16C and 16D set out matters that a court sentencing a federal offender must consider when passing sentence, including (but not limited to) the nature and circumstances of the offence, the personal circumstances of the victim, the relevant characteristics of the offender (age, criminal record etc) and their prospects of rehabilitation.

When sentencing an offender, a court has a range of sentencing options under Part 1B, from the imposition of the maximum sentence of imprisonment applying to the offence, to the discharge of offenders without proceeding to conviction under s 19B.

Spent convictions

The Commonwealth's spent convictions scheme under the Crimes Act assists individuals who have committed less serious offences by ensuring that previous convictions are not disclosed once particular criteria have been met. In the context of illicit drug offences, this assists in reducing recidivism by removing the stigma of a criminal conviction on an individual in particular circumstances, removing barriers to employment and reintegration into society.

Generally, a Commonwealth conviction is spent under the Commonwealth's spent convictions scheme where a person was not sentenced to imprisonment or was not sentenced to imprisonment for more than

30 months, and the relevant waiting period has expired during which time no further offences have been committed (s 85ZM). The waiting period is ten years from the date of conviction, or five years for juvenile offenders. There are no exceptions to the waiting period and an individual convicted of a further offence committed during the waiting period will generally lose the option to have the earlier conviction treated as spent (s 85ZL).

Subject to particular exclusions, where a Commonwealth conviction is 'spent', the person is not required to disclose the fact that they have been convicted of the offence (s 85ZV). It is also against the law for an individual or agency to disclose or take into account information about a spent conviction, unless an exclusion applies (s 85ZW).

Commonwealth Parole Office

The Commonwealth Parole Office (CPO) has policy responsibility for the imprisonment and release of federal offenders under Part IB of the Crimes Act. The CPO manages the release of federal offenders on parole or licence and considers applications from offenders and parolees for interstate transfer or permission to travel overseas. The CPO is also responsible for considering applications for an exercise of the Royal Prerogative of Mercy and applications for referrals to state and territory courts of appeal, as well as confiscation of superannuation under the *Crimes (Superannuation Benefits) Act 1989* (Cth).

The possible impact of decriminalisation

Decriminalisation of illicit drugs generally refers to a system in which possession of 'personal use quantities' of an illicit drug (up to a particular weight) is not punishable by a criminal penalty. Legalisation of illicit drugs authorises the regulated manufacture, sale and possession of illicit drugs (as the Commonwealth does for medicinal cannabis and other substances under the *Narcotic Drugs Act 1967* and *Narcotic Drugs Regulation 2016*).

In general, Australia takes a prohibition stance on illicit drugs, in which supply and possession (even in very small quantities) carries criminal penalties. However, all states and territories have diversionary schemes for small amounts of drug possession. While a criminal penalty for possession is maintained, law enforcement or courts may respond to drug possession without pursuing criminal penalties. Some jurisdictions have also decriminalised possession and use of small quantities of certain illicit drugs.

The impact of decriminalisation of illicit drugs on societal harms and drug consumption is complex. Every jurisdiction has its own circumstances that may impact on the outcome of any proposed reforms.

Academic research indicates that decriminalisation may assist in reducing an ongoing cycle of recidivism for some drug users, ensuring that these users do not incur a criminal record that would otherwise reduce their chances of rehabilitation and employment prospects.² The Health of Australia's Prisoners 2018 reports that 65% of prison entrants reported using illicit drugs in the 12 months before incarceration.³ In states and

² Stevens, A., Hughes, C. E., Hulme, S. & Cassidy, R., 2022. Depenalization, diversion and decriminalization: A realist review and programme theory of alternatives to criminalisation for simple drug possession. *European Journal of Criminology*, 19(1), pp. 29-54.

³ Australian Institute of Health and Welfare (AIHW) 2021, Alcohol, tobacco & other drugs in Australia, viewed 15 February 2022, <https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia>

territories where drug possession is a crime, this creates a significant impost on law enforcement, with the AIHW finding 88% of illicit drug arrests from 2019-20 were for consumer-related offences.⁴ The Australian Institute of Criminology has also found that reactive arrests of drug users can actually increase crime without reducing drug consumption or other harms.⁵

Experiences from the international community, however, indicate that decriminalisation poses considerable difficulties unless there is a coordinated approach and significant investment in treatment, education and other demand and harm reduction measures.

Portugal's decision to legally decriminalise illicit drug possession in 2001 was coupled with ambitious initiatives to improve healthcare responses, leading to an immediate significant reduction in drug-related mortality. While legal decriminalisation decreased barriers to treatment and rehabilitation, its impact on illicit drug demand remains under debate. Portugal still relies on traditional law enforcement practices to prevent the importation and distribution of drugs.

The International Narcotics Control Board has confirmed that decriminalisation of possession of illicit drugs can occur within the framework of the international drug conventions, noting that these conventions permit member States to apply alternative measures to conviction, punishment and incarceration.

Conclusion

Australia's illicit drug market is highly lucrative to transnational, serious and organised crime groups and illicit drug use is a high risk activity that contributes to social, economic and personal harms. The Attorney-General's Department will continue to work closely with law enforcement agencies, the Department of Health, and states and territories on this issue.

⁴ <https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/priority-populations/people-in-contact-with-the-criminal-justice-system>

⁵ Australian Institute of Criminology, 2020, The impact of arrest and seizure on drug crime and harms: A systematic review