

SPECIAL COMMISSION OF INQUIRY INTO THE DRUG 'ICE'

SUBMISSION ON DRUG DECRIMINALISATION

Nicholas Cowdery AO QC

19 August 2019

INTRODUCTION

I am a member of the Expert Advisory Panel to the Inquiry. A roundtable discussion is to be held by the Commission on decriminalisation in September 2019. I was invited to the roundtable, but I shall be overseas at the time. I have been permitted to make a short submission in writing instead; but I emphasise that these are just the thoughts of one person that I might have had the opportunity to air at the roundtable. I offer them from a person who has been involved in criminal justice in various capacities for 50 years, for 16+ of them as Director of Public Prosecutions for NSW.

While the focus of the discussion will undoubtedly be upon the decriminalisation of Ice and amphetamine-type substances, I believe that the same issues arise and arguments apply in principle to all presently illicit drugs and my submission is directed in that way.

DRUGS

So-called "recreational" drugs (to distinguish between medicinal and non-medicinal use) are both licit or legal and sometimes subject to conditions (caffeine, nicotine, alcohol) and illicit or prohibited (the full range of drugs scheduled to the Drug Misuse and Trafficking Act 1985, for example), for which criminal sanctions are imposed for growth, manufacture, sale and distribution (trafficking), possession and use.

People use illicit drugs for a very wide range of reasons. Some do so without creating problems for themselves or others. Problematic use can arise with people who are overborne, who are disadvantaged or who have issues with, *inter alia*, education, employment, health, housing, social pressures, poverty, impulsiveness, addiction and mental illness. Until these underlying conditions can be satisfactorily addressed in individual cases and generally – an extremely long term prospect, if possible at all – then other courses must be taken to reduce the harm of drug use for both problematic and controlled users.

I think a number of propositions can be made about the use of illicit drugs in our society.

1 There have always been, are and forever will be drugs – substances that alter the mood and the mind when ingested (and have physical effects, as well). Some are naturally occurring, some are synthetic or manufactured.

2 There have always been, are and forever will be persons wanting to consume drugs. The reasons for that are multifarious. Some of the underlying contributors to problematic use have been mentioned above, but they only create or compound use by people drawn to drugs in the first place. Some people take drugs to relax, some to heighten their excitement; some take them to escape, some to engage with their peers; some take them to aid in contented reflection, some to rave. Some deliberately choose to consume, some are sucked or drift into it. Some become addicted or otherwise problematic users, many do not.

3 With supply and demand, there is a market.

4 The market for some drugs (and their handling and consumption) is unlawful.

5 Persons involved in that market therefore run a risk of official detection, prosecution and punishment.

6 They choose to run that risk because, in the case of suppliers, they are able to reap high profits from their market; they compensate for the risk by charging high mark-ups. Illicit profits are redirected into other unlawful activities. Consumers run the risk of involvement in the market because their desire for what drugs bring cannot be satisfied by other means.

7 Consumers, especially problematic users, are sometimes unable to meet the high prices charged from their own resources, so they steal. Secondary crime is created.

8 Consumers are also at risk of official sanction, so they consume in secret. Those conditions encourage the use of unhygienic methods in unhygienic circumstances, especially for injecting users. Disease and death can eventuate.

9 Consumers in this unregulated market are also not the beneficiaries of market and product controls – they literally do not know what they are consuming. That adds further risk of harm from uncertain dosage levels and the presence of contaminants.

10 In the meantime, successful suppliers can sometimes pay law enforcers to turn a blind eye to their activities. Corruption breeds from high profits.

11 Other illegality is funded by high profits – and competition in the drug market and in other illegal conduct resulting from it can lead to violence.

These propositions seem to me to be unarguable. They underpin an illegal market that creates harm additional to the harm already possible in drug consumption – additional harms of disease, death, secondary crime and official corruption, not to mention the psychological and practical harms to consumers as a result of the intervention of the criminal law (see below).

Criminals continue to profit hugely from this illicit market and to diversify into other criminal conduct without restraint. We have created the conditions for criminals to flourish by the laws that we have made – and then we spend vast amounts of public resources attempting to stop them. Would it not be better to prevent most of this from happening in the first place? The aim should be to remove the criminal profits from the drug trade at the same time as reducing the harm caused by the use of prohibited drugs.

CRIMINAL LAW

The criminal law's primary purpose should be the attempted prevention of harm to individuals and society caused by the actions proscribed by the law. It has no justifiable role as an enforcer of any code of morals that is not community-wide or as a paternalistic enforcer of selected idealistic standards of conduct. But in prohibiting only some drugs, it does both and adds harm to those affected.

If drug use (without the intervention of the criminal law) causes harm, it does so to the user and perhaps to persons in the immediate orbit of the user. In many cases no additional harm is caused. But if the activity is a crime, there is harm added for the person involved and others by the psychological pressures that attend the doing of a criminal act, the fear of detection and punishment, deterrence from seeking support if wanted, the consequences of conviction and punishment (for example, effects on education, employment, engagement in charitable work, travel, reputation) and involvement in the criminal justice process and punishment itself.

The criminal justice process is ill-suited to constructively addressing personal issues of health and social engagement that lie at the foundation of illicit (or any) drug use.

DECRIMINALISATION

There are "soft" and "hard" meanings given to the word decriminalisation.

The "soft" interpretation is to maintain drug prohibition, but to remove the criminal sanctions from (usually) low level trafficking, possession and use. In Australia some jurisdictions have done this with cannabis, under cannabis cautioning schemes and the like. The effect is to replace criminal sanctions with administrative penalties (cautions, penalty notices, etc). If these are coupled with conditions, such as to accept drug counselling or other therapeutic courses, then there is a reduction of harm to the user. Such a course may well be helpful in dealing with Ice and amphetamine-type substances (provided sufficient resources are applied to make such schemes work effectively). But it has not been suggested to date that it should so apply or be extended to other "hard" drugs (heroin, cocaine, LSD, etc) and it is difficult to see a benefit in doing so.

The Portuguese model (since 2001) may be said to approach such a solution – but it is much more comprehensive in the use of Commissions for the Dissuasion of Drug Addiction (CDTs), which can impose penalties but are better known for their high level of intervention in drug users' lives. Ordinary criminal sanctions remain for larger scale growers, manufacturers, traffickers and possessors. A broadly similar approach was adopted in Norway in December 2017. It has proven to be a very effective model, but it is not (in my view) a complete answer.

LEGALISATION

The only rational way we can remove criminal profits and reduce harm to those involved with drugs is to take over the market at government level: to legislate, regulate, control and tax the whole process of growth, manufacture, distribution and use – and guide it in directions that will

substantially reduce the overall harm presently being caused. This is the “hard” interpretation of decriminalisation. Drug use cannot be eliminated. Individual regimes would need to be developed for drugs or classes of drugs. Some of the taxation proceeds from such a regime could be applied beneficially (eg in drug education and treatment programs). Controls can be put in place to prevent under-age involvement, advertising and over-use.

This course has been taken in relation to cannabis in (so far): The Netherlands, Spain, some other European countries to various extents, in Uruguay, Canada and nine of the United States of America and Washington DC. But it has not been extended to other drugs – yet.

I do not see a rational basis for limiting such an approach to cannabis. It is said that cannabis is the “low hanging fruit” that can be picked and thrown to those agitating for more rational policies in this area. That recognises that cannabis is actually less harmful than nicotine or alcohol. But so, too, could be other drugs if appropriate different regimes of growth, manufacture, distribution and use were designed for them. Including Ice and amphetamine-type substances.

Free medically prescribed heroin is available to addicts in the UK and elsewhere. Harm reduction programs of that kind, along with medically supervised injecting premises, expose users to medical care, advice and support services of various kinds that, in addition to reducing physical, financial and social harm, expose users to alternatives to drug use. But they cannot operate unless sanctioned by the law.

Devising and controlling a lawful regime for Ice and amphetamine-type substances may be a challenge, but the outcomes are certain to be better than attempted prohibition.