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Australian threshold quantities for 'drug trafficking': Are they placing drug users at risk of unjustified sanction?

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Foreword | *Legal threshold quantities for drug trafficking, over which possession of an illicit drug is deemed 'trafficking' as opposed to 'personal use' are used in most Australian states and territories. Yet, in spite of known risks from adopting such thresholds, most notably of unjustified conviction of users as traffickers, the capacity of Australian legal thresholds to deliver proportional sanctioning has been subject to limited research.*

In this study, the authors use data on patterns of drug user consumption and purchasing to evaluate Australian legal threshold quantities to see whether Australian drug users are at risk of exceeding the thresholds for personal use alone. The results indicate that some, but not all users are at risk, with those most likely to exceed current thresholds being consumers of MDMA and residents of New South Wales and South Australia. The implication is that even if the current legal threshold system helps to convict and sanction drug traffickers, it may be placing Australian drug users at risk of unjustified charge or sanction. The authors highlight a number of reforms that ought mitigate the risks and increase capacity to capture Australian drug traffickers.

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Drug trafficking in Australia is deemed a very serious offence, one for which legislators and courts have ruled general deterrence is paramount and 'little mercy' should be shown (Clune [1989] VR 567, O'Bryan and Marks JJ, 576). A principal challenge has been how to effectively differentiate and sanction participants in the drug trade—particularly how to differentiate 'traffickers' from those who consume or purchase illicit drugs for personal use alone (people whom legislators and courts have determined ought be sanctioned more leniently; MCCOC 1998b). To assist in this endeavour, all Australian states and territories have adopted legal thresholds that specify quantities of drugs over which offenders are either presumed to have possessed the drugs 'for the purposes of supply' and liable to sanction as 'drug traffickers' (up to 15 years imprisonment in most states), or in the case of Queensland, liable to sanctions equivalent to drug traffickers (up to 25 years imprisonment). Yet, in spite of known risks from adopting such thresholds, particularly of an unjustified conviction of a user as a trafficker, the capacity of Australian legal thresholds to deliver proportional sanctioning has been subject to limited research to date. This paper summarises key findings from a Criminology Research Grant funded project. The broader project examined this issue in two different ways—whether the thresholds are designed to filter traffickers from users and whether they enable appropriate sanctioning of traffickers of different controlled drugs. Herein, the focus is on the former—to what extent Australian legal thresholds unwittingly place users at risk of unjustified and disproportionate charge or sanction as traffickers.

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Legal thresholds for drug offences

Legal thresholds are significant yet controversial tools in the sentencing of drug offenders (Hughes 2010a, 2003). Many countries explicitly avoid their use (eg France). A minority of countries specify actual quantities (eg Germany; Hughes 2010a, 2003). Australia falls into this latter, minority category. Moreover, among countries that choose to employ legal thresholds, there is variation in how they are employed, whether for example they are used to distinguish traffickers from users or to distinguish between different levels of drug trafficking or to trigger the type of sanction warranted for users (Hughes 2010a, 2003). That said, legal thresholds are used primarily to facilitate responses to high-level offenders; that is, drug traffickers.

Table 1 Trafficable threshold quantities in Australian states and territories by jurisdiction and drug type (mixed grams)

Jurisdiction	Heroin	Meth/ amphetamine	Cocaine	MDMA/ecstasy	Cannabis
NT	2	2	2	0.5	50
WA	2	2	2	2	100
SA	2	2	2	2	250
Vic	3	3	3	3	250
NSW	3	3	3	0.75	300
ACT[a]	8.1 (2)	20 (2)	3.3 (2)	3.3 (0.5)	300
Qld[a]	10.8 (2)	14.6 (2)	10.5 (2)	9.6 (2)	500
Tas	25	25	25	10	1,000

a: Threshold quantities in these jurisdictions are listed per pure gram (shown in brackets). They have been converted for the current analysis into 'mixed grams' based on the median 2010–11 retail purity in each state for seizures ≤2 grams (ACC 2012)

Proponents of the use of threshold quantities argue that they are the optimal means to guarantee that drug offenders receive the sanction that they deserve (MCCOC 1998b; Sentencing Council 2011). Concern is that without legal thresholds, there would be more opportunity for prosecutorial and sentencing abuse, leading to more adverse sentencing outcomes (such as sanctioning traffickers for simple possession or 'Mr Bigs' with overly lenient terms). This, is turn, could foster higher levels of community dissatisfaction and lower deterrence for current and would-be traffickers. Conversely, opponents of threshold quantities argue that specification of a quantity of drug as the 'cut off' between offences can unwittingly lead to inappropriate or unjust sentencing of drug offenders. A key risk is that users who possess large quantities will be presumed to be trafficking and erroneously imprisoned as traffickers (Harris 2011b; Walsh 2008). This view is supported by a US study by Sevigny and Caulkins (2006) which showed that in 1997, 11.9 percent of US federal and 15.6 percent of state inmates convicted of drug trafficking self-reported no trafficking involvement. Instead, at both the time of conviction and the year leading to the conviction, they were users/possessors only. Opponents of legal thresholds also argue that they may unwittingly provide perverse incentives for high-level traffickers to modify their behaviour to reduce their risk of severe sanction (through, for example ensuring mules hold their drugs rather than themselves). In so doing, it is feared that thresholds reduce the capacity to sanction drug traffickers on the basis of their intended or actual harm.

For both proponents and opponents concern is twofold. First, there has yet to be any systematic assessment of the risks (and benefits) of thresholds. Second, the methods by which existing quantitative thresholds have been devised have been largely ad hoc and non-transparent. As summarised at an international meeting on threshold quantities,

> how these figures were set...is not a calculation for which the workings are generally in the public domain, nor did some jurisdictions retain their workings out even in the private domain (Harris 2011b: 9).

This increases the likelihood that existing thresholds will have unintended and undesirable policy outcomes.

Legal thresholds for drug trafficking in Australia

As noted above, Australia is in the minority of countries that specify quantities for distinguishing between drug offences with different penalty scales. Most Australian states and territories employ three different thresholds—a trafficable threshold (that distinguishes crimes of 'low-level trafficking' versus 'possession for personal use'), a commercial threshold and a large commercial threshold (Hughes 2010b). Each triggers increasingly severe penalty ranges that can be applied, such as up to 15 years imprisonment for a trafficable quantity and life imprisonment for a large commercial quantity in New South Wales (*Drug Misuse and Trafficking Act*, 1986 (NSW)). Queensland employs prescribed quantities in a different way—triggering penalties equal to drug trafficking, rather than an actual charge or sanction as a drug trafficker (*Drug Misuse Act* 1986 (Qld)). Nevertheless, in all Australian states and territories, possession of the base-level threshold quantities triggers elevated maximum penalty ranges. This is particularly when compared with the sanction for simple use or possession—a maximum of two years imprisonment or a more probably, a simple caution or diversion (and no criminal record; Hughes & Ritter 2008).

The specific threshold quantities employed vary by drug type, by jurisdiction and whether they are measured in terms of the pure chemical compound of a drug (pure grams) or, more commonly, in terms of pure chemical and any inert substances and fillers that are added before sale on the street (mixed grams or admixtures). Table 1 outlines the trafficable threshold quantities for heroin, methamphetamine, cocaine, MDMA and cannabis. It shows that in all jurisdictions, the quantities for cannabis are larger than for any other drug. Indeed,

they are 25–200 times larger. Moreover, there is wide variation across states. Most notably, Tasmania employs considerably greater threshold quantities for all illicit drugs. Reasons for such differences remain unknown.

In all jurisdictions except Queensland, Australian drug trafficking thresholds are attached to deemed supply laws, which reverse the traditional burden of proof from prosecutors onto defendants. Such laws mean that possession of the trafficable threshold amount will constitute a presumption of trafficking placing the onus on the alleged offender to prove that the possessed amount was not for the purposes of trafficking ('deemed supply'). While such provisions have been justified in terms of assisting in the successful prosecution of drug traffickers, they are unique relative to most other drug trafficking threshold systems across the world, where deemed supply laws are explicitly avoided (Harris 2011a; Hughes 2003; Walsh 2008). They also conflict with standard criminal justice principles, such as the presumption of innocence and the burden of proof being placed on the prosecutor, rather than the defendant (Judicial College of Victoria 2012).

Policy context

In Australia, the issue of drug trafficking thresholds has risen to the fore, mainly in the context of concern about the lack of consistency across drug quantities in different state systems. Recognition of the lack of uniformity led to specification of the Australian Model Criminal Code of serious drug offences (MCCOC 1998b) and a single set of threshold quantities for all states and territories in Australia to adopt (set for a trafficable threshold quantity at 2 mixed grams of heroin, methamphetamine, cocaine or MDMA and 250 grams of cannabis). To date, only one state, South Australia, has enacted such changes. Enactment by other jurisdictions would lower most threshold quantities, particularly in Tasmania, but also in the Australian Capital Territory, Queensland, New South Wales and Victoria. There has been an increasing push for all states and territories to adopt the proposed threshold quantities (AGD 2011; NDS 2007). Yet, a rational basis for whether current or proposed thresholds are fit for purpose, that is, whether they enable proportionate sanction, has been largely ignored.

The exception to this has been the Australian Capital Territory. In 2011, Hughes and Ritter (in press) were commissioned by the Australian Capital Territory (Justice and Community Safety Directorate) to evaluate the current and proposed Model Criminal Code quantities. In conducting this work, five new metrics were developed and applied to evaluate drug trafficking threshold design, using Australian and international research evidence on drug user behaviour and drug markets. Application to the ACT setting showed that the current thresholds created risks of unjustified sanction of users as traffickers and that by virtue of their lower values, the proposed Model Criminal Code thresholds, if adopted, would pose greater risks (particularly for users of methamphetamine; Hughes & Ritter in press).

This study

In this study, the ACT work was extended to evaluate the most pertinent drug trafficking threshold—the trafficable threshold—in six Australian states (New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia) against drug user behaviour and knowledge of Australian drug markets. The Australian Capital Territory and the Northern Territory were excluded from this analysis for two reasons—the prior analysis of the Australian Capital Territory (Hughes & Ritter in press) and lack of adequate data on illicit drug use and purchasing for the Northern Territory. Specific goals of relevance for this paper were to:

- evaluate whether the trafficable thresholds allow the prosecution and the judiciary to properly distinguish drug users from traffickers;
- compare and contrast threshold design across Australia, taking into account interstate differences in current legal thresholds and drug markets;
- determine whether the problems identified with the ACT drug trafficking thresholds are common across state systems.

Methods

The method replicated the approach of Hughes and Ritter (in press). Analysis was confined to examining the thresholds for heroin, methamphetamine, cocaine, MDMA (also known as ecstasy) and cannabis (leaf not whole plant form). Threshold quantities for Queensland were converted into mixed grams (admixtures) based on the 2010–11 retail purity (ACC 2012) as listed in Table 1. This was necessary given all available data on which thresholds can be evaluated (patterns of use and purchasing) concerning admixtures.

For each state, the ability of the legal threshold to successfully filter out drug users from drug traffickers (ie the reasonableness of the assumption that all who exceed the trafficable threshold warrant severe charge/sanction for trafficking) was examined using two metrics of the quantity of drug a user is likely to possess for personal use alone:

Metric 1: User patterns of use; that is, quantity of drugs that a user is likely to possess for a single session of personal use.

Metric 2: User patterns of purchasing; that is, quantity of drugs that a user is likely to purchase for personal use.

Data were derived from three different national surveys—two of regular drug users (the Illicit Drug Reporting System: IDRS and the Ecstasy and related Drug Reporting System: EDRS) and one from the general population (the National Drug Strategy Household Survey: NDSHS). The IDRS and EDRS are national monitoring systems that survey regular (at least monthly) drug users on an annual basis. They have been designed to target different populations—regular injecting users, predominantly heroin (IDRS) and regular ecstasy users (EDRS). In 2011, a total of 868 users participated in IDRS (Stafford & Burns 2012) and 693 in the EDRS (Sindicich & Burns 2012). These surveys provide data on patterns of drug use (under both typical and heavy use sessions), purchasing behaviour, typical

street prices and a number of other user and market characteristics. There are limitations to the IDRS and EDRS. Of relevance here, users of cocaine are underrepresented in the sample (Degenhardt & Dietze 2005). The surveys also omit users who consume substances less frequently. Accordingly, data on quantity of drug consumed was also sourced from the 2010 NDSHS (AIHW 2011). The NDSHS is a representative sample of the general Australian population that is conducted every three years. In 2010, more than 26,000 people from all Australian jurisdictions aged 12 years and over were sampled (AIHW 2011).

To calculate Metric 1, raw data on all three samples (IDRS, EDRS and NDSHS) were used. For each survey, data on 'quantity consumed' in a typical and heavy session was extracted by state, then dosage conversions applied (to convert all dosage units into grams) and the mean, median and range calculated by state and by drug type. The upper quantities were checked with a number of key experts (n=6) to verify if they were within the maximum range that could be consumed in a single continuous session of use without sleep. Those quantities deemed implausible were removed; for example, reported consumption of 20 grams of heroin which would be toxic. The final quantities were then compared against the actual trafficable thresholds to identify for each drug and state two things—first, whether most users consume less than the threshold quantity in a single continuous session of use (using median and mean estimates) and second, whether there is risk to any users of an unjustified charge/conviction; that is, whether the maximum possessed is equal to or greater than the trafficable threshold.

This process was repeated for Metric 2 using data from the IDRS and EDRS only (data on purchasing was unavailable from the NDSHS). Data on 'last purchase amount' was extracted by state and drug type, dosage conversions applied, data cross-checked with experts and then estimates compared against the actual threshold quantities. To provide added surety that estimates were derived from users not user-dealers, purchase amounts from offenders who reported 'any dealing for cash profit in the last month' were excluded. This led to removal of 27 percent (n=237) of the national IDRS sample (n=868) and 28 percent (n=160) of the national EDRS sample (n=574).

Results

The results are complex, as there are a large number of datasets crossing different populations, patterns of drug user behaviour and jurisdictions. Nevertheless, most median and mean quantities that Australian drug users reported consuming or purchasing were lower than the trafficable thresholds. That said, the maximum quantity consumed or purchased for personal use alone exceeded the trafficable quantity for most drug types. This is exemplified by considering patterns of consumption and purchasing from two of the five drugs examined—heroin and MDMA.

Under typical conditions, heroin users reported consuming a median quantity of 0.2 to 0.3 grams of heroin; well under the trafficable threshold of two to 25 grams. However as shown in Table 2, examining the maximum quantity that a heroin user might be reasonably expected to possess for their personal use alone, users can equal or exceed the thresholds in one state for a typical session of use, in three states for a heavy session and in two states for purchasing. Indeed, heroin users in New South Wales can consume up to double the threshold quantity for their personal use alone.

For MDMA, under typical conditions, most users again reported consuming less than the thresholds. For example, most irregular users reported consuming a median quantity of 0.25 to 0.41 grams of MDMA (approximately 1 pill) and most regular users reported consuming 0.58 to 0.73 grams (approximately 2 pills). This is under the trafficable threshold of 0.75 to 10 grams. However, as shown in Table 3, examining the maximum quantity that an MDMA user might be reasonably expected to possess for their personal use alone, users can exceed the thresholds in two states for a typical session of use, in four states for a heavy session and in all six states for purchasing.

Table 2 Maximum quantity of heroin used or purchased by state, compared with the current trafficable threshold quantity

State	Current trafficable threshold quantity	Maximum quantity heroin used (typical session)	Maximum quantity heroin used (heavy session)	Maximum quantity heroin purchased
NSW	3.0	3.0	6.0	3.5
Vic	3.0	2.0	4.0	3.5
Qld	10.8	1.2	6.0	3.5
SA	2.0	1.5	1.5	1.0
WA	2.0	1.0	2.0	1.0
Tas	25.0	1.5	5.0	1.0

Table 3 Maximum quantity of MDMA used or purchased by state, compared with the current trafficable threshold quantity

State	Current trafficable threshold quantity	Maximum quantity MDMA used (typical session)	Maximum quantity MDMA used (heavy session)	Maximum quantity MDMA purchased
NSW	0.75	3.5	6.7	14.5
Vic	3.0	1.6	5.8	58.0
Qld	9.6	2.0	8.7	29.0
SA	2.0	2.9	7.3	29.0
WA	2.0	1.5	3.5	29.0
Tas	10.0	2.2	7.3	29.0

This indicates that Australian drug users are unlikely to exceed the trafficable threshold under normal circumstances, but that when using or purchasing their 'highest doses', many do exceed the thresholds. While it must be emphasised that circumstances of high use and purchase are not going to occur all the time, this clearly shows the erroneousness of the assumption that the thresholds effectively filter out all users from traffickers. The question arises, which users are at risk and how often will this occur?

Which users are most at risk?

It is clear that the risks of exceeding the thresholds vary considerably across drug types. For example, as shown in Table 3, in every state regular ecstasy users reported consuming and/or purchasing quantities for personal use that exceeded the trafficable threshold. By contrast, cannabis users have the least evidence of exceeding the thresholds, with no instance where a cannabis user consumes more than the trafficable quantity and only one instance where the maximum purchased exceeded the trafficable threshold quantity. Indeed, with one exception, the maximum quantities reported by cannabis users were 3.5–35 times under the threshold.

Instances of exceeding the thresholds are also greater when examining practices of regular users, rather than irregular users, and for considering patterns of 'heavy' use, rather than patterns of 'typical' use.

That said, they biggest determinant of risk is the state. Some states have almost no evidence that users exceed current thresholds for personal use alone (eg Tasmania and Queensland, reflecting in large part the much higher trafficable thresholds). By contrast, other states show that users are at risk of exceeding the thresholds across multiple drug types. Of particular note here are New South Wales and South Australia where users risk exceeding the thresholds for consumption or purchase of three different drugs—MDMA, methamphetamine and/or cocaine.

It is difficult to definitively estimate what proportion and how often users are placed at risk of unjustified charge or sanction. This is due to gaps in knowledge about the frequency of high use and purchase behaviour. The current data suggests a small but not insignificant proportion of heroin users are affected. For example, in a heavy session of use, 4.2 percent, 4.6 percent and 11.3 percent of regular heroin users in Western Australian, New South Wales and Victoria respectively consumed equal to or more than the current thresholds (the frequency of heavy sessions is unknown). More concerning is the proportion of affected MDMA users. For example 19 percent, 31 percent and 57 percent of regular MDMA users in Western Australia, South Australia and New South Wales respectively purchased more than the current trafficable threshold quantity on their last MDMA purchase (risks in other states were much smaller—3 to 6.5%). Moreover, in a heavy session, 80 percent of regular users in New South Wales reported consuming more than the trafficable threshold quantity (18% in Western Australia and 30% in South Australia). Such behaviour is of concern, not only because of the number of regular MDMA users exceeding the thresholds, but also because binging (ie high quantity use; Sindicich & Burns 2102) and stockpiling (ie high-quantity purchases) are both common behaviours among regular MDMA users (Fowler, Kinner & Krenske 2007).

Policy implications

The approach taken in this work is subject to the limits of currently available data. A number of desirable indices such as 'purchases under heavy conditions' were unavailable. Moreover, sample sizes for a number of estimates were small, which likely reduces their reliability. Further data on the frequency of high consumption and high purchasing behaviours is also needed. Nevertheless, this is the best available data to date and provides considerable insight into the Australian drug trafficking threshold system.

The findings suggest that users are at minimal risk of exceeding the trafficable thresholds when they follow typical use and purchase patterns, but that when using or purchasing high doses many can exceed the thresholds for their personal use alone. This is particularly true for MDMA and for users in the states of New South Wales and South Australia. This provides clear evidence that thresholds in such instances are too low relative to patterns of drug use. Equally importantly, while the results support the findings from the Australian Capital Territory of thresholds posing clear risks to users, they also show how risks can be mitigated with better design—namely with thresholds that better reflect using patterns in the particular state of concern and how the wholesale adoption of the Model Criminal Code quantities across Australia would serve to increase the likelihood of a drug user being unjustly charged and/or sanctioned for trafficking (MCCOC 1998b).

More generally, the findings suggest that instances of users exceeding the threshold quantity identified would be much less problematic if the threshold quantity were not also linked to the 'deemed supply' laws. The question arises—to what extent is it reasonable to expect a drug user in such circumstances to prove the absence of trafficking or intent to traffic?

Such a question has particular importance for three reasons. First, the deeming provision that reverses the onus of proof onto alleged drug offenders found in possession of the threshold quantity or greater is highly exceptional, compared with other countries' drug trafficking thresholds and the standard Australian law and criminal justice responses to serious crimes. For example, even for offences of murder and manslaughter, the onus remains on the prosecution to prove guilt (MCCOC 1998a). The supremacy of the principle of prosecutorial burden of proof has been for good reason. Second, the drug users who find themselves at the margins of the drug trafficking thresholds are most likely to be the more marginalised users (eg more unemployed and socially disadvantaged; Stafford & Burns 2012), which reduces their capacity to successfully prevent an unjust sanction. Third, it is known that an 'unjustified conviction for dealing will often impose social and individual harms which far exceed the harm associated with the drug in question' (MCCOC 1998b: 87). This is particularly true in this case as, across all states, it is users of MDMA who are most at

risk of unjustified sanction—a drug that when compared across both licit and illicit drugs has been shown to be least likely to cause crime or health and societal harm (Nutt, King & Phillips 2010).

Two additional solutions are suggested. The first solution is to abolish the deemed supply provisions—to place the onus back on the prosecutor to prove trafficking intent (or intent for preparation for trafficking) based on evidence such as scales, multiple bags, telephone records, etc. The fact that this is how police and prosecutors operate in Queensland, France and most other criminal justice systems (Hughes 2010a) shows this is not only possible but a more common practice. Under such a situation, circumstances where users exceed the thresholds would be much less troubling, as in the absence of any additional evidence of trafficking intent, the user would be appropriately charged with a simple possession offence (and liable to a much smaller maximum penalty eg 2 years imprisonment). The second solution, if deemed supply laws are retained, is that threshold quantities be elevated to exceed the maximum quantities identified for personal use. Given this would necessitate much larger quantities in some cases (eg 29 grams of MDMA), this may well be a less potentially feasible option.

In conclusion, legal thresholds for drug trafficking have long been central to the Australian response to drug offenders, justified under goals of delivering proportionality and effective responses to those who inflict widespread suffering—drug traffickers (MCCOC 1998b). What is clear from this analysis is that, even if the system helps to convict and sanction drug traffickers, the current legal threshold system is placing Australian drug users at risk of unjustified charge or sanction. This is due to both the particular quantities adopted and the idiosyncratic Australian criminal justice response to drug traffickers which removes the normal criminal justice safeguard of the burden of proof resting with the prosecution. However, it is also clear that the level of risk can be mitigated by better design. It is thus hoped that the data herein will help build threshold systems that adopt and deliver more proportional, just and equitable responses to Australian drug offenders.

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