CRIMINOLOGY
RESEARCH GRANT

Sentencing for social supply of illicit drugs in Australia

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Report to the Criminology Research Advisory Council
Grant: CRG 42/16–17

September 2021

This project was supported by a Criminology Research Grant.
The views expressed are the responsibility of the author and are not necessarily those of the Council.

Published by the Australian Institute of Criminology
GPO Box 1936 Canberra ACT 2601
Tel: (02) 6268 7166
Email: front.desk@aic.gov.au
Website: www.aic.gov.au/crg

ISBN: 978 1 922478 29 0 (Online)

This research was supported by a Criminology Research Grant. The views expressed are those of the author and do not necessarily reflect the position of the Criminology Research Advisory Council or the Australian Government.

This report was reviewed through a double-blind peer review process.

Edited and typeset by the Australian Institute of Criminology.

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Acknowledgements

The authors gratefully acknowledge the key roles played by many contributors to this research. This research would not have been possible without the support of court administrative staff in Tasmania and the Northern Territory who provided access to sentencing remarks in those jurisdictions. This ensured a richer and more meaningful analysis of sentencing remarks across all jurisdictions. We would also like to thank court administrative staff in New South Wales, Queensland, South Australia and Victoria who facilitated our access to the judicial officers who were interviewed as part of this project. Moreover, we are grateful for the generosity of those judicial officers who made time to speak with us despite their extremely busy schedules and demanding workloads, sometimes pressing on with an interview at the end of a very demanding day. Their insights and consideration of the issues we explore through this research have without doubt enhanced the analysis we are able to present.

Abstract

In Australia, threshold quantities of illicit drugs act as an indicator of supply offences in distinguishing traffickers from users. This is problematic because it can be difficult for the courts to discriminate between heavy users or 'social suppliers' and 'dealers proper'. Currently, there is no systematic analysis of how the judiciary in Australia navigate the relationship between different types of supply and the consistency and proportionality of the sentence applied. This analysis maps out how current sentencing practices respond to offenders involved in 'social supply' and 'minimally commercial supply' who are charged with drug trafficking. It makes recommendations that could inform future drug law reform, including that review is needed of the system of thresholds, that sentencing objectives of general and specific deterrence be reconsidered in cases of social supply and minimally commercial supply, and that consideration be given to expanding the scope of current diversion programs to accommodate the needs of the types of offenders and offending behaviour addressed in this study.

Introduction

Regulating the supply and use of illicit drugs is a challenge both nationally and internationally. Typically, control strategies are based on a number of key distinctions that address the demand for and supply of these substances: responding to dependent and non-dependent use and differentiating between minor drug-related crimes and serious offending behaviour (Room & Reuter 2012). These distinctions articulate the view that regulatory interventions should differentiate between those who supply drugs and those who are primarily users. Nevertheless, research has consistently demonstrated that many who come to the attention of law enforcement are users themselves, and the challenge is how to distinguish drug traffickers from those who are in fact purchasing illicit drugs for their own personal use.

In Australia, authorities primarily rely on the identification of threshold quantities of various illicit substances as an indicator of supply offences in discriminating between traffickers and users (Hughes 2010). Research by Hughes et al. (2014), however, indicates that this approach is problematic and impacts negatively on socially marginalised heavy users of drugs, as well as on recreational drug users who might make small bulk purchases and distribute drugs to others, including among their networks, but are not motivated by profit or commercially oriented. This is because in practice it can be difficult for the courts to discriminate between heavy users or social suppliers—who supply to friends and acquaintances for little or no profit—and 'drug dealers proper'.

Internationally, the challenge of responding to these groups through the criminal justice system in a proportional way has been recognised. In England and Wales, the *Drug offences: Definitive guideline* (Sentencing Council for England and Wales 2012) influences sentencing practices, and in the United States of America judicial decisions are structured according to sentencing grids or presumptive sentencing guidelines. In Australia, no similar guidelines currently exist. Indeed, historically, Australian jurisdictions have been resistant to change that might challenge judicial discretion (Brown 1998: 384; Bull 2010). The resources that are currently available to assist judges when they make sentencing decisions in these types of cases, leaving aside the un-nuanced type of guidance offered by thresholds, are sentencing statistics gathered from aggregates of large numbers of cases and from like cases (Mizzi, Baghizadeh & Poletti 2014). Both these sources of information are of limited usefulness because offences can be committed in a wide range of circumstances (Bagaric & Edney 2011), and the selection of a sentence involves the exercise of a judicial discretion which is informed by the circumstances in which the offence was committed and the character, antecedents and conditions of the offender.

Bagaric (2015: 80) citing *Hudson v the Queen* [2010] 30 VR 610, 616 (The Court) points out that this method, which is referred to as instinctive synthesis, 'will by definition produce outcomes upon which reasonable minds will differ'.

Erroneous sanctions associated with threshold quantities and inconsistency in sentencing (between and within jurisdictions), as well as sentencing outcomes that are not proportionate to the offence committed, seriously undermine the effectiveness of principles of general and individual deterrence that currently underpin drug law enforcement in Australia (Bagaric & Edney 2011; Bull 2010; Mizzi, Baghizadeh & Poletti 2014). Currently, there is no qualitative systematic analysis of Australian sentencing outcomes that provides a nuanced account of how the judiciary navigate the relationship between different types of supply and the consistency and proportionality of the sentence applied.

This research combines an analysis of sentencing remarks drawn from drug trafficking cases across Australia between 2012 and 2014 and interviews with members of the judiciary, focusing on sentencing decisions on drug trafficking offences. The aim was to identify any differentiation between the types of cases prosecuted for trafficking and to explore how such differentiation is perceived and understood. Ideally, this analysis will provide a clearer understanding of current practice to inform potentially broadened guidance beyond merely threshold quantities. Specifically, this analysis could contribute to the reconfiguration of Australia's Illicit Drug Diversion Initiative in ways that can consistently and proportionately accommodate those involved in heavy use, social supply and minimally commercial supply of illicit drugs.

Background

There is currently significant momentum for proportional sentencing for minor drug-related crimes internationally (Moyle & Coomber 2013; UNODC 2016, 2015) and nationally (Mizzi, Baghizadeh & Poletti 2014; Sentencing Advisory Council 2015), including those related to supply and what has been termed social supply in particular (Moyle, Coomber & Lowther 2013). In Australia, there have been some attempts through the use of thresholds of drug quantities to distinguish between users and traffickers, but this has been only partially successful (Hughes et al. 2014), failing to also accommodate those that are involved in supply acts for reasons other than profit motives, such as heroin user–dealers who arguably should not be understood as traffickers in the conventional sense but primarily as users (Coomber & Moyle 2014; Police Foundation 2000).

Up until the end of the twentieth century, law enforcement approaches to the control of illicit drugs tended to focus on the control of supply (Bull 2008; UNODC 2013). In 1998, however, the UN General Assembly's twentieth special session on countering the world drug problem adopted the Declaration on the Guiding Principles of Drug Demand Reduction, which acknowledged the importance of a 'balanced approach encompassing demand reduction and supply reduction, each reinforcing the other'. In 1997, in Australia, then Prime Minister John Howard launched the National Illicit Drug Strategy: Tough on drugs, which included the 1999 commitment to the development of a drug diversion initiative to support the diversion of illicit drug users from the criminal justice system into education and treatment services delivered by the health and community sector (Bull et al. 2016). These international and national moves signalled a shift in perception and a formal acceptance that approaches seeking to control these substances should differentiate between those who supply drugs and those who are primarily users. Perceptions prevalent at the end of the twentieth century (Model Criminal Code Officers Committee (MCCOC) 1998) that harsh penalties should be reserved for those at the top of the drug supply hierarchy, who seek to profit from the misery and harm arising from the availability of illicit drugs in local communities, were reflected in these changes.

The differentiation of illicit drug regulation into a domain marked out by the regulation of supply or demand is, however, problematic. While research has demonstrated that non-users driven by commercial interests become involved in drug markets, there is evidence that many more who are assumed to be suppliers and come to the attention of law enforcement agencies are users themselves (Coomber 2015, 2010). As Hughes et al. (2014) point out, a principal challenge has been how to effectively identify and sentence participants involved in the drug trade proper, and, in particular, how to distinguish traffickers from those who purchase illicit drugs for personal use.

Australia is among a minority of countries throughout the world that rely on the identification of threshold quantities of various illicit substances as an indicator of supply offences when discriminating between traffickers and users (Hughes et al. 2014). State and territory and Commonwealth drug legislation specifies amounts of drugs over which offenders are either presumed to possess a drug 'for the purposes of supply' and are liable to sanctions as 'drug traffickers' (up to 15 years in most states) or, as is the case in Queensland, liable to sanctions equivalent to those for drug traffickers—up to 25 years (Hughes et al. 2014). The system generally differentiates between a trafficable threshold, to distinguish low-level trafficking from possession or personal use; a commercial threshold; and a large commercial threshold, each imposing increasingly severe penalties (Sentencing Advisory Council 2015). In New South Wales, if an individual is clearly selling illicit drugs, they will be charged with a supply offence no matter the quantity (Belackova et al. 2017).

One of the problems with this system is the inconsistency in threshold quantities across different states and territories. This led to the specification in the Australian Model Criminal Code of Serious Drug Offences (MCCOC 1998) of a single set of threshold quantities for all states and territories. South Australia is the only jurisdiction that has enacted these changes. Enactment in other states would involve lowering threshold quantities, and it is questionable whether they are fit for purpose (Hughes et al. 2014). Indeed, research by Hughes, Cowdery and Ritter (2015), Hughes et al. (2014) and Hughes and Ritter (2011) challenges the belief that thresholds are an effective way to distinguish drug users from traffickers.

Using empirical evidence describing patterns of use and purchase, Hughes et al. (2014) demonstrate that, while there is variation across drug types, current thresholds—particularly in South Australia and New South Wales—in instances of high levels of use and purchasing patterns create the very real risk of unjustified sanctions of users as traffickers. The penalty for trafficking is 15 years, compared with two years for possession. Clearly, for proportional sentencing, getting this right is crucial. Furthermore, the lower threshold values proposed in the model Criminal Code, if adopted, would introduce an even greater risk of users being confused with traffickers. Hughes et al. (2014: 5) conclude that such negative effects are more likely to be realised for some users:

> Drug users who find themselves at the margins of the drug trafficking thresholds are most likely to be the more marginalised users (e.g., more unemployed, and socially disadvantaged; Stafford & Burns 2012), which reduces their capacity to…prevent an unjust sanction.

Although differentiating heavy users from traffickers is clearly important, this is not the only group affected. Recent research on drug markets in the United Kingdom (Coomber 2015; Coomber & Moyle 2014; Coomber & Turnbull 2007) and in Australia (Lenton et al. 2016, 2015; Nicholas 2008) suggests that, aside from more socially marginalised heavy drug users like those identified by Hughes et al. (2014), another group is also vulnerable to the negative consequences of a threshold system such as that employed in Australia—that is, social suppliers.

This work focuses on the concept of social supply, which is used to refer to the activities of suppliers of recreational drugs whose motive for small bulk purchases of drugs is neither profit nor commercially oriented but often altruistic (buying for the group) and involves friends and others already known to them (who may have asked them to buy the drugs) and who do not consider themselves to be dealers proper (Coomber & Moyle 2014; Coomber & Turnbull 2007; Lenton et al. 2016, 2015).

Building on Coomber and Turnbull's (2007) United Kingdom based work involving the supply of cannabis among young people in six rural/urban settings, Lenton et al.'s empirical study of the social supply of marijuana across three Australian jurisdictions also described how it involved 'sharing with friends or buying on their behalf; supplying small quantities; [and] supplying friends or acquaintances' (Lenton et al. 2016: 30). Mirroring work on social supply elsewhere, most of the Australian offenders described how 'cannabis access and supply were an integrated and unremarkable part of their normal interactions, with social capital rather than profit being the dominant benefit' (Lenton et al. 2016: 43). Many offenders did understand that, according to the law, their activities would cross the threshold into cannabis supply or trafficking. Most, however, did not consider themselves dealers and, importantly, many 'did not seem to engage with the fact that they were potentially exposing themselves to a serious criminal charge' (Lenton et al. 2016: 44). They effectively neutralised negative associations they linked to 'dealers proper' by viewing their supplying as 'helping out friends, often in reciprocal relationships, and mostly involving no or minimal profit' (Lenton et al. 2016: 44).

In Coomber (2015) and Coomber and Moyle (2014), the concept of social supply was expanded beyond consideration of the supply of recreational drugs to addicted user–dealers (eg of heroin/crack) and how such suppliers are distinct from commercially oriented, often non-using, dealers proper. In that research, the minimally commercial user–dealers (whose activity may result in some profit, nearly all of which is usually spent subsequently on meeting their own drug needs) were found to have more in common with social suppliers—being less predatory, minimally commercial and more motivated by the need to satisfy their use desires, and being users first, suppliers second. In addition, they were far less associated with other harms commonly linked to drug trafficking, and violence and intimidation in particular (Coomber 2015). In fact, addicted user–dealers of this kind corresponded more closely with the marginalised heavy users that Hughes et al. (2014) expressed concern for than the primarily commercially oriented drug dealer.

Lenton et al. (2015) suggest that this blurring of the edges between consumption and supply has implications for a review of Australia's program of illicit drug diversion in ways that might assist those found to be involved in social supply to avoid the types of erroneous sanctions Hughes et al. (2015) warn against. They speculate (as do Coomber & Moyle 2014 and Potter 2009) that the benefit of their research on social supply, which is focused on the practices and views of those potentially vulnerable to conviction, is that it could be used to brief court and legal officers about different roles in small-scale supply behaviour, which could 'inform opportunities to exercise judicial discretion in these matters' (Lenton et al. 2016: 44).

While there has been some investigation of the sentencing of serious drug trafficking offences in Australia, there has been little exploration of trends at the lower levels or how courts deal with suppliers whose profiles blur definitions and stretch categorisation.

Using data from the Commonwealth Sentencing Database, Mizzi, Baghizadeh and Poletti (2014) presented a national empirical picture of sentencing patterns for serious drug offences in pt 9.1 of the Criminal Code (Cth). Their analysis showed that the most common offences prosecuted under pt 9.1 relate to the importation and possession of marketable and commercial quantities of border controlled drugs—substances where offences relate to drug importation and exportation. It identified differences in the lengths of sentences imposed by the states and the Northern Territory, noting that the lack of a Commonwealth court which deals with Commonwealth matters under a single set of Commonwealth laws was a fundamental barrier to achieving sentencing consistency at a jurisdictional level, meaning sentencing may be influenced by different local sentencing practices. In addition, sentencing is carried out by state and territory courts, where judges may not be as familiar with pt 1B of the *Crimes Act 1914* (Cth), which requires the court to impose a sentence 'of a severity appropriate in all the circumstances of the offence' (Mizzi, Baghizadeh & Poletti 2014: 24), as they are with their home state or territory sentencing laws, which also lack consistency across jurisdictions.

The Victorian Sentencing Advisory Council (2015) examined sentencing practices in that state from 2008–09 to 2012–13 for three major drug offences: cultivating a commercial quantity of narcotic plants, trafficking a drug of dependence in a commercial quantity, and trafficking a drug of dependence in a large commercial quantity. It concluded:

- with respect to major drug offences, high-level statistical analysis of sentencing outcomes (for example, the identification of median terms of imprisonment for an offence) has obscured meaningful sub-groups of cases within an offence; and
- the synthesis of offender and offence factors that defines each sub-group has resulted in different sentencing outcomes between sub-groups during the reference period. (Sentencing Advisory Council 2015: 1)

Although these reports offer some important insights into sentencing trends and mitigating factors, they are focused on drug trafficking at the high end of the spectrum. They identify inconsistency in sentencing across jurisdictions—as well as within jurisdictions—as an issue. They do not address drug supply at the lower end of the spectrum and the sentencing issues that arise in relation to thresholds when the offenders are heavy users or user–dealers who might engage in minimally commercial supply or social supply as described earlier.

Our preliminary investigations suggested that judicial officers in Australia were aware of these types of distinctions. For example, a Queensland magistrate explained to us that 'there's a big drug culture; we're on the Gold Coast. I would see more of what you would call social supply than anything else' (Personal communication May 2015). In *R v Angus Edward Lloyd-Smith* [2015] SADC, heard in the District Court of South Australia, the defendant pleaded guilty to the offence of trafficking in a controlled drug, with a maximum penalty of imprisonment for 10 years or a fine of $55,000 or both. Her Honour suspended the sentence, which was a term of imprisonment reduced from three years to 22 months because of a guilty plea.

She contextualised this outcome, explaining that while it was a very serious matter, and the defendant was guilty of importing 500 g of methylone (a synthetic cathinone similar to MDMA in its effect), he 'was not seeking to profit financially by doing this, but rather there was a small group of people' [friends] to whom the drug would be distributed 'at cost or in exchange for drinks and a meal'. In addition (like the participants in Lenton et al.'s 2016 study), the defendant had 'approached the venture with a degree of naivety in respect of the seriousness of…offending' and had developed some mental health issues as a result of stressors associated with the case. Another example is *R v Robertson* [2014] ACTSC 354, where the judge describes the defendant, who purchased a large quantity of cannabis, as a 'self-sufficient' or 'subsistence' dealer rather than a 'trafficker' proper, and as a consequence handed down a suspended sentence and community supervision in place of a term of imprisonment (Transcript of Proceedings, *R v Robertson,* Supreme Court of the ACT, Burns J, 19 Dec 2014).

These examples indicate that judicial officers in Australia are familiar with roles relating to social supply and/or minimally commercial supply. It is likely that this adds individualised judicial discretion to the factors associated with sentencing inconsistency within and across jurisdictions, further complicating the mix of factors that can undermine the effectiveness of sentencing.

Aims and objectives

Complementing Lenton et al.'s (2016) proposal to expand judicial knowledge by briefing members of the legal profession according to understandings of social supply informed by research on those involved in that practice, this research investigates how judicial officers already understand the concepts of social supply and minimally commercial supply, and the extent to which they might be perceived as applying those concepts in their decision-making. The aims of the project were:

- to produce a detailed empirical account of the ways that Australian courts currently respond to social supply and minimally commercial supply in drug trafficking cases heard within and across jurisdictions.
- to explore judicial officers' understanding of different types of drug supply, including social supply and minimally commercial supply, and the impact that this has on sentencing practices and the expression of proportionality in drug trafficking cases heard in Australian courts.
- to identify opportunities for the development of more consistent and proportionate sentencing practices and criminal justice responses to social supply and minimally commercial supply; and
- to consider if and how social supply and minimally commercial supply (and associated current informal judicial practices) might be included in a reconfiguration of Australia's program for the diversion of illicit drug offenders from the criminal justice system.

Methodology

This research consisted of two phases. Phase 1 involved a quantitative and qualitative analysis of sentencing remarks drawn from drug trafficking cases. It provided an overview of current sentencing practices in relation to supply across eight jurisdictions. Phase 2 was a qualitative exploration of how judicial officers interpreted and responded to our results, and the potential influence of those results on future policing and/or judicial practices responding to the supply of illicit drugs.

The project was approved by Griffith University Human Research Ethics Committee, reference number 2017/051.

Phase 1

The objectives of the analysis of sentencing remarks for cases concerned with drug trafficking in phase 1 were:

- to develop a taxonomy of offenders (and their offences) appearing in courts for drug trafficking offences;
- to map if and how thresholds can distinguish between different types of supply; and
- to describe the ways that judges deal with the different types of supply, paying particular attention to instances of social supply or minimally commercial supply.

As noted, state and territory drug legislation specifies threshold amounts of drugs over which offenders are presumed to possess a drug for the purposes of supply and are liable to sanction as drug traffickers. These are shown in Table 1. Trafficking cases are heard in the superior courts (district, county and supreme courts and courts of appeal), rather than as summary matters in magistrates courts. Sentencing remarks are publicly available for the superior courts but not for magistrates courts. Sentencing remarks for drug trafficking cases were collected from finalised drug supply and trafficking cases for jurisdictions across Australia for the period 1 January 2012 to 31 December 2014.

Transcripts of sentencing remarks from the superior courts are available through LexisNexis for all Australian jurisdictions. The data for this study were from convenience sampling drawn from transcripts available in each jurisdiction. A search of unreported judgements on LexisNexis using the terms 'drug' and 'trafficking' identified the availability of outcomes for almost 350 cases across all jurisdictions over the specified period. Very few cases were available through LexisNexis for the Australian Capital Territory, South Australia, the Northern Territory and Tasmania. Sentencing remarks are publicly available for recent cases in South Australia, Tasmania and the Northern Territory through administrative websites for the courts: (http://www.courts.sa.gov.au/sent_remarks/index.html, https://www.supremecourt.tas.gov.au/decisions/sentences/latest_sentences, and https://supremecourt.nt.gov.au/sentencing-remarks). These sites were not easily searchable, and it was not always possible to retrieve cases that were more than one month old.

Each of these three jurisdictions was approached to explore the possibility of securing direct access to these data, which had previously been publicly available. South Australia was prepared to supply the data at a cost per page that we were unable to meet. Tasmania and the Northern Territory both assisted by providing a USB with the data we were seeking. As a result, our dataset consisted of sentencing remarks for 551 cases across all jurisdictions. A proportionately greater number of cases were available through LexisNexis for the larger jurisdictions of New South Wales and Victoria. Sentencing remarks for these states were mainly from appeal cases heard in the Supreme Court. The court administrative authorities in the Northern Territory and in Tasmania—jurisdictions with smaller populations and unique demographic and/or geographical characteristics—provided access to similarly large numbers of sentencing remarks. These cases were heard in the Supreme Court and generally were not matters returning to the court on appeal. See Figure 1 and Table 2 for the distribution of cases across states and territories and the distribution of cases across courts, respectively.

While sentencing remarks are now available online in a number of Australian jurisdictions, these are often listed as recent judgements—for example, in South Australia, for the last month. Alternatively, they can be searched by case name or judge to find a specific case. At the time this research was conducted, it was not possible to specify broad search parameters like time frames and specific offence types to isolate a sample selection of cases. We were only able to do this using LexisNexis. For this reason, we have not drawn on jurisdictional databases like the Queensland Sentencing Information Service (sclqld.org.au), which undoubtedly includes more comprehensive listings of cases for that jurisdiction.

This project focuses only on state and territory jurisdictions and state and territory laws because there is no Commonwealth court (see *Background*). State and territory judicial officers hear Commonwealth cases and, as Mizzi, Baghizadeh and Poletti (2014) note above, decisions in these cases are made by the same judicial officers who hear state and territory matters and are influenced by the state or territory context of the hearing.

A database was developed using Microsoft Excel to categorise these cases by:

- jurisdiction—state and court;
- characteristics of the offender—age, gender, criminal record, relationship to drugs and relationship to those supplied;
- substance(s) involved—quantity, and purity where available;
- signs of supply;
- other offences—apart from drug supply or trafficking;
- financial gain;
- court classification of the offence as supply, trafficking, commercial or large commercial trafficking;
- identification of cases involving social or minimally commercial supply, drawing on the criteria listed below;
- plea and sentence for drug offence; and
- total sentence.

To anonymise the data, case names were replaced with a unique alphanumeric identifier that indicated state and court jurisdiction. In Queensland, for example, *John Smith* [2014] SCA 311 would be recoded as QLD001SCA, with SCA designating Supreme Court (Appeal).

This database was used to develop summary data describing the distribution of cases, types of drugs, nature of offenders and the length of sentences. From this we developed a taxonomy of offenders and of offences coming before the courts in drug trafficking matters; mapped if and how thresholds were able to distinguish different types of supply—that is, distinguish between users and dealers; and looked at sentencing outcomes for cases involving social supply and minimally commercial supply compared with cases of commercial and large commercial supply. Following the development of this descriptive overview of the cases that made up our sample, we used NVivo software to conduct a qualitative inductive thematic analysis of the sentencing remarks to produce a more nuanced understanding of if and how, as part of the sentencing process, judicial officers differentiate between types of offenders and offences in cases involving drug trafficking; and whether, in doing so, they speak about and respond to cases of minimally commercial or social supply in distinctive ways.

Phase 2

Interviews were conducted with a sample of judicial officers drawn from New South Wales, Victoria, Queensland and South Australia. The first three of these jurisdictions were selected because judicial officers in these states hear the bulk of state and—according to Mizzi, Baghizadeh and Poletti (2014)—Commonwealth cases concerned with drug trafficking in Australia. When making this decision, we also considered trafficable threshold quantities in each jurisdiction (see Table 1). South Australia was included because it is the only state that has implemented the model Criminal Code thresholds. Victoria and New South Wales have similar thresholds that are slightly higher than those in South Australia, except in the case of MDMA in New South Wales, for which the threshold is much lower. Queensland offers a contrast because thresholds are based on the purity rather than the overall quantity of the drug, and, in the case of cannabis, the threshold of 500 grams is significantly higher than in the other jurisdictions in this research. There is some variation between states in terms of how substances are measured and how purity is taken into account. This can be complex.

Table 1: Trafficable threshold quantities (grams) in Australian states and territories by drug type, system (purity or mixed based), and jurisdiction

Jurisdiction	Heroin	Meth/ amphetamine	Cocaine	MDMA/ ecstasy	Cannabis
Purity based system					
Qld	2	2	2	2	500
ACT	5	6	6	10	300
Mixed based system					
NSW	3	3	3	0.75	300
Vic	3	3	3	3	250
WA	28	28	28	28	3,000
SA	2	2	2	2	250
Tas	25	25	25	10	1,000
NT	2	2	2	0.5	50

Source: Adapted from Hughes et al. 2014

Semi-structured interviews were conducted with judicial officers who sat in both district and supreme courts. Questions were designed to explore their experience of sentencing in drug trafficking matters, as well as their views on the results of our research from phase 1; and, finally, how this related to or might better inform future criminal justice processing of those involved in the supply and trafficking of illicit drugs.

More specifically, participants were asked to outline their relevant experience in processing and sentencing drug trafficking matters, any changes or trends noticed in the course of their career, their views on the operation of thresholds for social supply and minimally commercial supply matters, the factors that influenced sentencing decisions, the nature and perceived efficacy of sentencing frameworks in their jurisdiction and relevant considerations in the potential expansion of diversion programs in appropriate cases. Interviews were recorded and transcribed and then subjected to inductive thematic analysis (Braun & Clarke 2006) framed by the aims of this project. Participants were assigned anonymous identifiers and are referred to as J1 through to J12.

Twelve judges and justices who sat in district and supreme courts across the four identified jurisdictions were interviewed. They included a mix of women and men. Between them, participants had well in excess of 150 years accumulated experience sitting as judges, including in magistrates courts. Most had long legal careers spanning more than 30 years in which they had acted in a variety of roles, including as public and private solicitors, barristers, senior counsel, legal advisers (general counsel), public defenders, commissioners, Crown advocates, Crown solicitors and Crown prosecutors. Some had a mix of criminal and civil or commercial experience, while others had done mainly criminal work. Several discussed their experience of appellant work, both as legal counsel and judges. They outlined extensive histories of involvement in the prosecution, defence and adjudication of drug trafficking and supply cases. The quotations below are illustrative of how participants assessed their own experience in relation to drug matters:

> As a judge I've had a good deal of work sentencing offenders and doing drug trials. Not any of the big major commercial ones. I've done a few like that, not a lot, but also sentencing offenders for drug supply or drug cultivation. (J6)
>
> …in this court you're either doing murder or manslaughter trials or serious drug trials. Sometimes I've gone for a couple of years and I haven't done murder or manslaughter, but I've done loads of drug sentences and drug trials. (J8)
>
> Oh well I've both appeared in many drug traffic trials and I've sentenced in many drug trafficking cases. I've either sat—I've presided over trials or sentences or pleas, or if they've been found guilty. So yes lots of it. I would say it's been a steady proportion of my work always. I mean if you do crime it's drugs. (J9)

In reporting the results of phases 1 and phases 2 (see *Results* section), we begin by detailing the taxonomy of offences and offenders that became evident from the analysis of sentencing remarks. This descriptive quantitative analysis also compares the length of sentences for different types of offending behaviour. This is followed by a qualitative thematic analysis of sentencing remarks in relation to social supply and minimally commercial supply cases identified through the taxonomic analysis. Such cases were identified using the following criteria, which were derived from the results of recent research that describes these phenomena (Coomber 2015; Coomber & Moyle 2014; Coomber & Turnbull 2007; Lenton et al. 2016).

In this study, social supply was defined by:

- the supply of recreational drugs—for example, MDMA, cannabis, cocaine, hallucinogens, methamphetamine, ketamine et cetera, and possibly heroin;
- bulk purchase that is not-for-profit or commercially oriented but often altruistic (buying for the group or acting as a middleman);
- exchanges involving friends and/or acquaintances;
- drugs being shared or exchanged—for example, for dinners or as a favour. However, a small amount of profit might be made; and
- offenders who are often employed or undertaking education, and have apparently supportive social networks—families, employers, non-criminal friends et cetera—and who are usually able to function according to daily social routines and tend not to be drug dependent.

Minimally commercial supply cases were characterised by:

- drugs commonly including heroin, methamphetamine, cannabis, cocaine, and diverted pharmaceuticals like opioids (morphine, oxycodone, codeine, hydrocodone, methadone), benzodiazepines, and Ritalin;
- offenders who tended to be heavy users (user–dealers) and were likely to be dependent, and sold drugs for a small amount of profit or gain to offset the costs of their own drug use;
- offenders who were likely to be socially marginalised—for example, homeless, living in temporary accommodation such as motels, and not well connected to the community through employment et cetera;
- offenders who would have access to few or limited legal options to fund their drug use;
- offenders whose lives are often (a bit) chaotic, able to engage in opportunistic criminal activity but with the focus on keeping themselves supplied with drugs; and
- activity that may result in some profit, nearly all of which is usually spent subsequently on meeting the offender's own drug needs and their activities are 'minimally commercial'.

These characterisations, to some degree, represent ideal types within these classifications. In everyday criminal justice contexts, as will become clear, these distinctions may not be entirely straightforward or may shift between categories. When this is the case, officers of the court are required to navigate and negotiate the blurring or dynamic nature of boundaries as part of the sentencing process.

Results

The results of our analysis are presented in three parts. The first part provides a descriptive overview of our analysis of sets of sentencing remarks gathered from 551 cases in all eight jurisdictions in Australia. It outlines the distribution of cases across jurisdictions; the nature of offenders described in terms of age, gender and relationship to drugs; and the types of drugs and trafficking offences that were involved. The focus here is the outcome of phase 1 of this study.

The second part reports on our inductive thematic analysis of the sentencing remarks conducted as part of phase 1 but integrates this with insights gained through interviews with judicial officers across four jurisdictions (New South Wales, Victoria, Queensland and South Australia) that were conducted as phase 2 of this study. This part highlights how judicial officers currently think about and respond to cases of social supply and minimally commercial supply.

The final part of this *Results* section draws wholly on phase 2 of the study. It sets out how judicial officers understand and navigate sentencing frameworks that are used to address drug trafficking in Australia and considers what scope there might be for reform or change in the future.

The distribution and nature of drug trafficking cases

Overview of data by jurisdiction

Following the process described in the methodology, we were able to collate the sentencing remarks for the 551 drug trafficking cases that were distributed across the eight jurisdictions. Table 2 shows the distribution of the cases included in our analysis across states and territories and the types of drugs involved in the matters heard.

In categorising the types of drugs involved in these matters, variations on amphetamine or methamphetamine-type substances (including precursors) have been listed as amphetamine-type stimulants (ATS). The following have been included under ‘other’: lysergic acid diethylamide (LSD); new psychoactive substances designed to mimic more familiar illicit drugs and commonly referred to as bath salts, legal highs, research chemicals et cetera; performance- and image-enhancing drugs; and legal pharmaceutical substances that have been diverted to the illicit market.

The substances falling under amphetamine-type stimulants, for example, included but were not limited to (pseudo)ephedrine, 4-methylaminorex, dimethyltryptamine, P2P and benzaldehyde, along with more familiar formulations of amphetamine and methylamphetamine. Under the 'other' category, diverted legal pharmaceuticals included morphine, fentanyl, oxycodone, Kapanol, Ritalin and the benzodiazepine called alprazolam. Performance- and image-enhancing drugs that were listed included steroids, nandrolone, trenbolone, testosterone and propionate. Various formulations of new psychoactive substances commonly referred to as bath salts, MDMA alternatives, GBH, ketamine, JWH-018, 4-MEC and BZP-TFMPP were also identified.

Table 2: Total number of cases by drug and jurisdiction (*n*)

Jurisdiction	Total	ATS	Cannabis	Heroin	Cocaine	MDMA	Other
NSW	138	79	20	23	22	25	12
Vic	78	55	11	10	3	20	9
Qld	53	32	26	3	9	20	4
WA	41	32	7	4	2	8	2
SA	18	9	5	1	0	1	3
Tas	105	39	57	0	1	3	30
ACT	16	7	3	2	5	2	0
NT	101	27	82	0	0	6	3
Total	551	280	211	42	42	86	68

Note: ATS=amphetamine-type stimulants. 'Other' includes lysergic acid diethylamide (LSD), new psychoactive substances, performance- and image-enhancing drugs, and legal pharmaceutical substances diverted to the illicit market

In some cases, the relative newness of the formulation of the drug (such as BZP-TFMPP) meant that judges were unfamiliar with the substance and its effects, and this had a negative impact on their ability to sentence offenders effectively. For example, in VIC003SCA, the appellant had been charged with importing an amount of BZP and TFMPP to Australia from China. The appeal was to the effect that the sentencing judge had erred in characterising the trafficking charge as a 'very serious example of this type of offence'. The appeal court concluded that the case should not be so characterised because the trafficked drugs had a combined total weight of 3.5 grams and were not being trafficked for financial gain. The original sentence was determined to be excessive and the appeal was allowed. The sentencing remarks in the appeal hearing described the initial challenge faced by the sentencing judge and explained how, in relation to this (then) 'relatively new drug', the judge had sought information but had been given none:

> She simply had no idea what BZP was. Sensibly, she asked defence counsel one question, 'what is BZP meant to be used for?' She was told that there was no evidence regarding that matter. Her Honour then asked whether there was any evidence that BZP was harmful, and was again told that there was nothing in counsel's brief regarding the matter.
>
> There was nothing to suggest that, by asking these questions, her Honour was attempting to assess the relative harmfulness of BZP in comparison with other drugs. Having asked for assistance from defence counsel, and having been provided with none, the prosecutor did not seek to rectify the situation. The judge was left to sentence the applicant without having even the basic information that could assist her in assessing the gravity of the offending.

In terms of the distribution of cases, the Northern Territory and Tasmania are notable for a comparatively high proportion of cannabis cases—82 percent and 54 percent, respectively—of the total number of cases for each of these jurisdictions, followed by Queensland on 49 percent. Attention should also be paid to the proportion of 'other' drugs (28.5%) in supply or trafficking offences coming before the courts in Tasmania. This may be a product of the predominantly non-appeal cases that made up our sample for these jurisdictions. It may also reflect particular geographies of supply. In Tasmania, for example, a number of cases arose from drugs detected in transit on the ferry from mainland Australia. In the Northern Territory, a pattern arose in relation to offences attracting higher penalties for supplying drugs, predominantly cannabis, in prescribed areas associated with Indigenous communities as a consequence of legislation enacted following the 2007 Northern Territory 'emergency response' intervention. More detail in relation to these factors is depicted in the analysis below.

Figure 1: Distribution of cases by court (*n*=551)

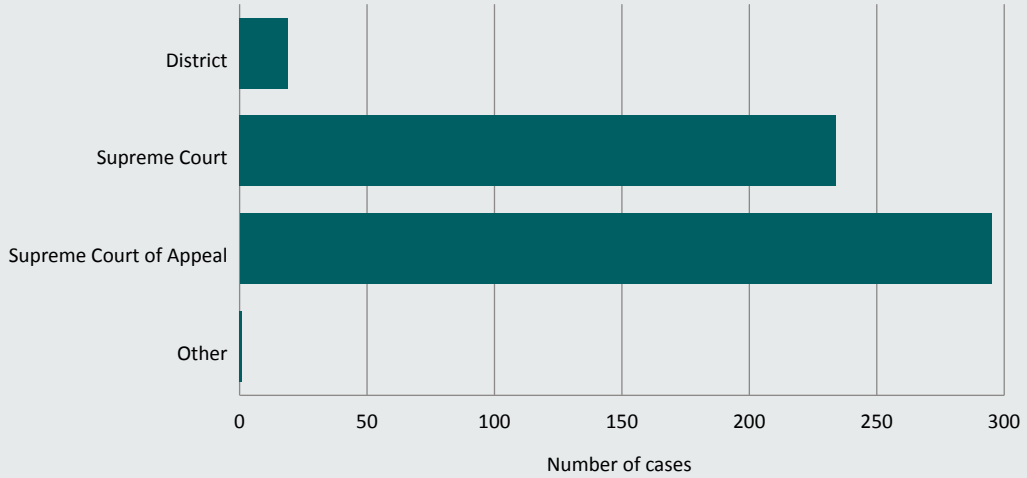


Figure 1 shows the distribution of the 551 drug trafficking cases among the various courts represented in the sample of cases we were able to extract from LexisNexis and cases supplied to us by Northern Territory and Tasmanian authorities. It provides a snapshot of the types of courts our sample of cases were heard in.

Table 3 shows the distribution of these cases among the states. For New South Wales, Victoria, Queensland, Western Australia and South Australia, the majority of sentencing remarks were from matters heard in the supreme courts of appeal. The total number of cases heard as appeals was 286 (52%) of the overall sample. Approximately one-third of appeal cases heard across all jurisdictions (*n*=98) were successful in at least some aspect of their challenge to the outcome of the original hearing. Our consideration of these sentencing remarks revealed not only where errors in the decision-making process had been made, or the limits of knowledge, but also differences of opinion and differences in relation to how officers of the court approached the matter of drugs and their supply (see *Responding to social supply and minimally commercial supply*).

Table 3: Type of court by jurisdiction (*n*)

Jurisdiction	Supreme court of appeal	Supreme court (criminal)	District court	Other
NSW	114	8	15	1[a]
Vic	60	18	–	–
Qld	47	3	3	–
WA	40	–	1	–
SA	17	1	–	–
Tas	3	102	–	–
ACT	3	13	–	–
NT	2	99	–	–
Total	296	234	19	1

a: This case was heard in the New South Wales Civil and Administrative Tribunal

We acknowledge that this study might be criticised because our data have been gathered from different types of courts. But this reflects differences between states and, as mentioned, is also a product of the availability of sentencing remarks. Nevertheless, the quantity of cases collected provides some mitigation of such criticism. Moreover, in most instances, appeal cases summarised the relevant facts of the case as well as the sentencing remarks and judgement from the initial hearing. These provided insight into the nature of deliberations and points of difference that are evident in these different sentencing contexts, adding to, rather than detracting from, our qualitative analysis of this large body of data.

Taxonomy of offences and offenders appearing in courts on drug trafficking charges

Offences

Table 4 summarises the findings of the court on matters heard in each jurisdiction. It also provides details about the average sentence, presented as months in custody (the head sentence). These figures are simply descriptive, and caution is certainly required in their interpretation. There is clearly some consistency between the jurisdictions with larger populations (New South Wales, Victoria, Queensland and perhaps Western Australia), which hear the majority of these types of cases. It is difficult to gain a sense of the possible average length of a sentence from the relatively small amount of data from the Australian Capital Territory and South Australia. The average sentence lengths for Tasmania and the Northern Territory are much lower, and many of these sentences were wholly or partially suspended.

Table 4: Sentence classification by jurisdiction

Jurisdiction	Total cases (*n*)	Supply	Trafficking	Indictable	Commercial	Large commercial	Other	Average sentence (months)
NSW	138	22	11	4	43	53	5	89.8
Vic	79	–	24	–	31	23	1	77.1
Qld	53	2	50	–	–	–	1	77.6
WA	41	2	39	–	–	–	–	80.2
SA	18	1	17	–	–	–	1	49.3
Tas	105	–	105	–	–	–	–	8.6
ACT	16	–	13	–	–	–	3	28.4
NT	101	14	15	–	70	–	2	23.0
Overall	551	41	274	4	144	76	13	54.2

On appeal, one South Australian case was finalised as possession, and as such is not included in sentencing calculations. In some cases, sentence length was not included in the remarks, so these cases were not included in the calculation of averages. Sentencing categories reflected legislation in each state.

In the Northern Territory, sentences were wholly suspended, or partially suspended after a short period of imprisonment, in 31 percent (*n*=31) and 39 percent (*n*=39) of cases, respectively. In Tasmania, sentences were wholly suspended, or partially suspended after a short period of imprisonment, in 69 percent (*n*=72) and 11 percent (*n*=11) of cases, respectively. In both instances, this perhaps reflects the courts in which these matters were heard and/or the substantially higher thresholds in drug legislation in Tasmania. It was clear from the transcripts that unique demographic and geographic characteristics of these jurisdictions played a role in the types of matters heard. As noted above, supply in remote Northern Territory Indigenous communities or trafficking drugs from mainland Australia to Tasmania as an island state featured in a number of cases heard in these jurisdictions. Consequently, patterns of supply and sentencing in these jurisdictions deserve further analysis and consideration in relation to the policy and models for legislation that are frequently developed in mainland urban contexts.

Offenders

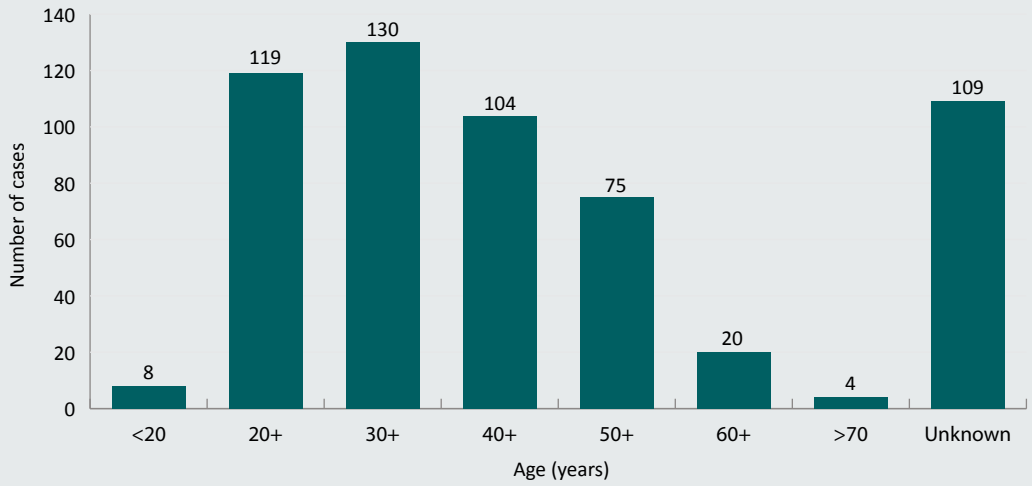
While not all cases provided the age of offenders, this information was available in just over 80 percent (*n*=441) of the sentencing remarks we considered. The average age distribution of the offenders in our sample is slightly higher than the distribution in Australian Bureau of Statistics (ABS) data for all types of (imprisoned) offenders. Between 2012 and 2014, the average age of all adult prisoners was just over 34 (ABS 2012, 2013, 2014). The mean age (where this data was available) in our study's group of offenders was 37.

ABS data on prisoners' ages and most serious offences demonstrated a significant shift over the period of our study. In 2012 and 2013 the majority whose most serious offence or charge was illicit drugs fell in the 25–34 and 35–44 age categories (ABS 2012, 2013). In 2014 this profile shifted, with most offenders being in the 45–54 and 55-and-over age ranges, with more in the latter category (ABS 2014).

In our sample, the oldest person was an 87-year-old man in the Northern Territory who was sentenced to 18 months imprisonment, suspended after three months, for his involvement as a courier in the supply of cannabis. Three offenders in their 70s appeared before courts in other jurisdictions: in Tasmania, a 70-year-old man received a six-month wholly suspended sentence for selling cannabis to friends; in New South Wales, a 79-year-old woman received a four-month wholly suspended sentence for selling cannabis that had belonged to her deceased daughter; and, in Victoria, a 70-year-old man was sentenced to four years imprisonment for his principal involvement (with his daughter) in the cultivation of 1,542 cannabis plants.

In our sample, there were also nine offenders who were younger than 20 years old. The youngest of these were 18 years old. In Tasmania, three of these young offenders were convicted for the supply of cannabis, and of cannabis and methylamphetamine. They received sentences of three, four and six months, respectively, that were wholly suspended. In Queensland, an 18-year-old male received a three-year sentence (with a provision for parole after four months) for his role in the supply of MDMA and 'ice'. In Tasmania, a 19-year-old offender was fined for the supply of the new psychoactive substance 4-methylmethcathinone. In the Northern Territory, two offenders the same age each received a sentence of two years and three months, with one's sentence (for the supply of cannabis) suspended after five months, and the other's sentence (for the supply of MDMA and cannabis) suspended after 18 months. The longest sentence received by someone younger than 20 was seven years and four months, when the Western Australian Court of Appeal disallowed an application made by a 19-year-old methylamphetamine courier who had received $5,000 as remuneration for his involvement. Figure 2 describes the age distribution of offenders, who were mainly aged between 20 and 50.

Figure 2: Age distribution of offenders (in years) by number of cases (*n*=441)

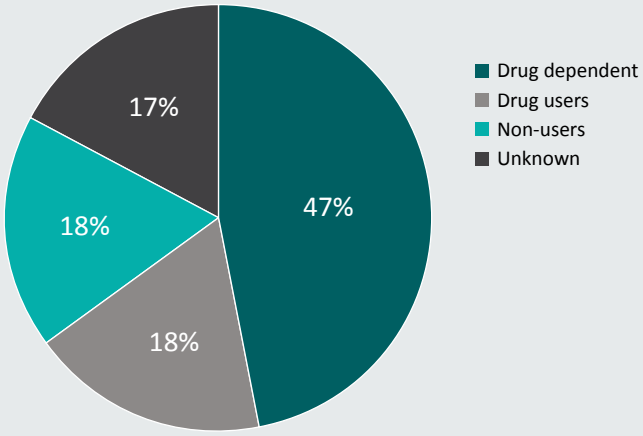


The gender distribution of our sample was similar to Australian data on prisoner populations for all crimes throughout the period of our study. Of all those held in custody between 2012 and 2014, approximately eight percent were female and 92 percent were male (ABS 2012, 2013, 2014). In our study, just over 11 percent (*n*=63) were female, and a little over 88 percent (*n*=486) were male. The slightly higher proportion of women in our study might be accounted for by ABS data that showed that, in 2012 and 2013, illicit drug offences were the most common offences and/or charges for which female prisoners were held. In 2014, they were the second most common offence (17%) behind acts intended to cause injury (20%).

Figure 3 describes the relationship between offenders and drug use. In 17 percent (*n*=95) of cases, judges made no reference to drug use by the offender ('unknown'). Similarly, 17.5 percent of those appearing before the court were definitively identified as non-users. The remainder and majority, 65 percent (*n*=359), were said to be drug users, and 73 percent (*n*=262) of these individuals were identified as drug dependent. When sentencing a drug dependent offender, judges frequently referred to their troubled life and long history of offending behaviour linked to problematic drug use. It was not uncommon for sentencing remarks to mention a difficult upbringing, including poor or no relationship with parents, not living with immediate family, an itinerant lifestyle, exposure to domestic violence, and victimisation through physical and/or sexual abuse. In WA015SCA, the sentencing remarks list each of these factors before making this comment about the respondent's antecedents:

> [His] life has been marred by substance abuse. Illicit substance abuse has been entrenched and normalised for him from a young age. The respondent reported that at the age of 4 his mother and her then partner would give him cannabis so that he could get 'stoned…for a joke'.

Figure 3: Offenders' drug use (*n*=551)



Different types of supply: Social supply and minimally commercial supply

Social supply

Our analysis identified a small but noteworthy number of cases where the offence could be unambiguously categorised as social supply. Table 5 describes the distribution of these cases in each of the jurisdictions in Australia, and the types of drugs that were involved in these convictions. These 31 cases constituted 5.6 percent of our sample and were distributed across all jurisdictions except Victoria. A higher number of cases were identified in Tasmania, the Northern Territory and New South Wales. This could be related to the higher overall number of cases considered in each of these jurisdictions—105, 101 and 138, respectively (62.5% of the sample). It could also be related to the types of courts in which the sentencing remarks were made. For example, the majority of cases in the Northern Territory and Tasmania were not matters heard on appeal.

Table 5: Distribution of social supply (SS) cases by drug and Australian jurisdiction (*n*)							
Jurisdiction	No. SS	ATS	Cannabis	Heroin	Cocaine	MDMA	Other
NSW	4	1	2	0	1	3	0
Vic	0	0	0	0	0	0	0
Qld	2	1	0	0	0	1	0
WA	1	0	1	0	0	0	0
SA	2	1	1	0	0	0	0
Tas	15	0	12	0	0	0	4
ACT	1	0	1	0	0	0	0
NT	5	0	5	0	0	1	0
Totals	30	3	22	0	1	5	4

Note: ATS=amphetamine-type stimulants

Cases that exemplified social supply were NT017SC, where the offending behaviour was the supply of 15 ecstasy tablets, just over two grams of cannabis and what the judge described as 'a very small quantity' of methamphetamine (0.05 grams). In the main, the drugs had been purchased to supply to friends between 31 December and 3 January (ie the New Year's Eve holiday period). The offender was employed, engaged in tertiary study and had no prior record, apart from a driving offence that was explicitly described as 'technical' rather than 'egregious' nine years earlier. The judge found that the offending was in the very low range. Notwithstanding that, the offender had spent three months on remand until granted bail, even though he had pleaded guilty. During this time, he had come under 'significant' threat and was placed in protective custody. Ultimately, he was released on a two-year good behaviour bond.

Case NSW007CCA tells a similar story. The offender, who was attending a music festival, was found in possession of 20 ecstasy tablets and a small amount of cannabis. He admitted that he intended to take two tablets himself and give the balance to friends over the weekend; the cannabis was primarily for his own use. The offender was described as not a regular drug user, and he was tertiary educated, in a professional job on a relatively large salary ($300,000 per annum), a committed supporter of various charities and an active community volunteer. The Crown had lodged an appeal claiming that the original sentence (a two-year good behaviour bond) was manifestly inadequate. The appeal was dismissed.

What is notable in each of these cases is the inconsistency within different arms of the criminal justice system that arguably resulted in the unnecessary expenditure of resources (keeping someone in remand or pursuing an appeal) and potential harm to the offender in terms of their employment, connection to the community and mental health. These are all factors that research has repeatedly identified as protective, preventing the development of problematic drug use.

An unusual case was that of NT015SC, who was arrested after his vehicle was stopped for a random breath test. The police searched the car because of the strong smell of cannabis coming from the vehicle. They found 161.8 grams of plant material and about $2,000. The defendant was not charged with the supply of drugs to an Indigenous community, even though he was selling drugs in an Indigenous community. He was a first-time offender, and his Land Cruiser was forfeit as proceeds of crime. He had a strong history of employment and of responsible and positive contributions to the Indigenous communities he had lived in. The circumstances of his offending described in the sentencing remarks are as follows. The defendant was aware that cannabis was being supplied in the community and was widespread. He thought that there were bad drugs that were making people sick and was asked if he could get some 'good stuff', which he did. Once he started to supply a little, he was asked for more and more. The drugs were supplied on a cost recovery basis, although he did charge more to those he knew to be dealers, but this money was given away to help others. The judge accepted that the offender did not appreciate the harmful effects of cannabis and thought he was helping other people and felt good about that. He concluded that in this case there was no disregard for welfare, and the defendant was not motivated by money. Taking these facts into account, the judge showed some leniency, and the outcome was a 12-month wholly suspended sentence.

Minimally commercial supply

A much larger proportion of cases in our sample, just over 35 percent, were categorised as minimally commercial supply according to our criteria. This is perhaps not surprising, given that, in the sentencing remarks for nearly half the cases (48%), the offender was identified as drug dependent. These types of cases featured in all jurisdictions. A larger proportion of minimally commercial supply cases were evident in the Northern Territory and Tasmania (47% and 57% of the total number of cases in each of these jurisdictions, respectively). Again, this could be a consequence of the type of court in which the sentencing remarks were made.

Table 6 shows the distribution of our cases across jurisdictions and the types of substances that were involved in these matters. ATS and cannabis were the most common drugs in this type of supply. This distribution further contributes to the impression of a distinctive geographical aspect of supply and how it is policed. For example, cannabis-related minimally commercial supply cases (79%) were recorded predominantly in the Northern Territory and Tasmania. Also notable was the number of 'other' drugs associated with minimally commercial supply matters: 70 percent (*n*=21) of the 30 cases overall involving drugs in the 'other' category (see Table 2) were minimally commercial supply cases, and 76 percent of these occurred in Tasmania. The substances in these matters were listed as LSD, BDPEA, JWH-018, 4-MEC, 3,4-methylenedioxymethcathinone, PV8, MDPV, morphine, Kapanol, oxycodone, alprazolam, Ritalin and testosterone.

Table 6: Distribution of minimally commercial supply cases by drug across Australian jurisdictions (*n*=195)

Jurisdiction	Total minimally commercial supply cases	ATS	Cannabis	Heroin	Cocaine	MDMA	Other
NSW	34	20	6	4	3	5	0
Vic	21	17	1	1	1	4	2
Qld	12	4	7	1	1	0	1
WA	8	5	2	3	0	0	0
SA	7	5	0	1	0	0	1
Tas	60	24	32	0	0	0	16
ACT	6	4	2	0	0	0	0
NT	47	13	37	0	0	2	1
Total	195	92	87	10	5	14	21

Note: ATS=amphetamine-type stimulants

Such variation potentially suggests Tasmanian and Northern Territory drug markets, policing and sentencing practices warrant further consideration and investigation. In the Northern Territory, there were a number of instances where the supply of cannabis occurred in relation to an Indigenous community, sometimes within a prescribed area under the *Northern Territory Emergency Response Act 2007* (Cth), and, as a consequence, the offence carried a higher penalty (see, for example, NT001SC and NT003SC).

Another Northern Territory case demonstrates the impact of the implementation of sentencing thresholds consistent with the Australian Model Criminal Code of Serious Drug Offences (MCCOC 1998)—in particular, the limits that Hughes et al. (2014: 47) highlight for distinguishing users from traffickers of methamphetamine. In NT010SC, the offender was driving from Adelaide to Darwin with 2.73 grams of methamphetamine for her own use. Two weeks earlier, with the rescheduling of methamphetamine as a dangerous drug (from schedule 2 to schedule 1) in the *Misuse of Drugs Act 1990* (NT), two grams had become a trafficable amount. The judge accepted that the offender had a drug addiction and noted that the only reason she was charged with supply rather than possession was that her behaviour now came 'within the broad definition of supply, namely, transporting drugs'.

In her sentencing remarks, her Honour commented that in the circumstances of the case she 'wouldn't have considered it appropriate…to order [the offender] to serve any more than the statutory minimum of 28 days', particularly as the offender indicated that she would plead guilty at an early stage and asked for the matter to be expedited. Nevertheless, the matter proceeded to committal. Her Honour went on to say, 'I do not understand why time and resources were wasted on such an exercise which has also resulted in you spending double the amount of time in custody that you would have spent'—in particular, 'more time on remand in conditions less favourable than sentenced prisoners than otherwise would have been the case'.

The appalling conditions on remand included dorms designed for four people holding seven in each; three people in those dorms sleeping on the floor; locker facilities for only four in these rooms; extreme heat, no air-conditioning and small louvred windows, some of which did not open; smell coming from outside from the septic facilities and the smell inside because of women forced to swelter in stifling hot conditions; bedding not changed once a week; overflow areas full of beds and people; people sitting on the floor to eat; not enough chairs; no working refrigerator; and very few facilities for exercise and playing sport—as her Honour said, 'All leading to a condition where a large group of women are grumpy, bored and tired.'

Thresholds and cases of social supply and minimally commercial supply

As described in the *Background* section, Australia is among the minority of countries throughout the world that rely on the identification of threshold quantities of various illicit substances as an indicator of supply offences when distinguishing traffickers from users. In most parts of Australia, state and territory as well as Commonwealth drug legislation specifies threshold amounts of drugs 'over which offenders are presumed to possess a drug "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)' (Hughes et al. 2014). The threshold system generally consists of a trafficable threshold (to distinguish low-level trafficking from possession or personal use), a commercial threshold and a large commercial threshold, each triggering increasingly severe penalty ranges (Sentencing Advisory Council 2015).

Our close analysis of sentencing remarks revealed further complexity across jurisdictions in relation to these broader categories. In New South Wales, for example, there are five different quantity ranges under the *Drug Misuse and Trafficking Act 1985*. They are:

- not more than the small quantity;
- more than the small quantity but less than the indictable quantity;
- more than the indictable quantity but less than the commercial quantity;
- more than the commercial quantity but less than the large commercial quantity; and
- not less than the large commercial quantity.

The actual quantities are set out in the Act and vary according to drug types. Not all states and territories have this level of variation. In our analysis of sentencing, New South Wales was the only state where reference was made to the indictable threshold (see *Thresholds and sentencing* section for judicial explanation).

In their sentencing remarks, judicial officers made determinations of 'supply' and 'trafficking' when referring to lower quantities. Understanding this distinction is not simply a matter of referring to quantities specified in legislation. For example, Hemming (2015) explains that, in the context of the Queensland and Western Australian jurisdictions, 'supply' is given a broad definition, encompassing to 'give, distribute, sell, administer, transport or supply' in section 4 of the *Drugs Misuse Act 1986* (Qld), as well as doing or offering to do any preparatory act that furthers these purposes. In Western Australia, under section 3 of the *Misuse of Drugs Act 1981*, to supply 'includes to deliver, dispense, distribute, forward, furnish, make available, provide, return or send, and it does not matter that something is supplied on behalf of another or on whose behalf it is suppled'.

Hemming (2015, ch 8: 6) explains that 'Trafficking', however, is not defined in either jurisdiction but is distinguished from supplying by its commercial nature. Section 5 of the *Drugs Misuse Act 1986* (Qld), for example, refers to carrying on a business:

> 5 Trafficking in dangerous drugs
>
> (1) a person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime.

Table 7 shows court findings across jurisdictions for those cases that we identified as constituting social supply; and Table 8, minimally commercial supply. When it came to social supply, in most cases the conviction was for supply or trafficking. However, in New South Wales, two cases—one involving cannabis and MDMA, the other MDMA alone—were determined to be indictable, and another case, involving cannabis, MDMA and methylamphetamine, was determined to be commercial. The indictable threshold is greater than the trafficking threshold but less than the commercial supply threshold. In New South Wales, for cannabis, the trafficking threshold is 300 grams, the indictable threshold is one kilogram and the commercial threshold is 25 kilograms; and, for both MDMA and methylamphetamine, the respective thresholds are three grams, five grams and 250 grams.

Table 7: Court decisions in social supply cases by jurisdiction (*n*=30)

Jurisdiction	Total social supply cases	Court decision				
		Supply	Trafficking	Indictable	Commercial	Large commercial
NSW	4	–	1	2	1	–
Vic	0	–	–	–	–	–
Qld	2	1	1	–	–	–
WA	1	1	–	–	–	–
SA	2	1	1	–	–	–
Tas	15	–	15	–	–	–
ACT	1	–	1	–	–	–
NT	5	3	2	–	–	–
Total	30	6	21	2	1	–

In the context of minimally commercial supply, about three-quarters of offenders appearing in these cases were convicted of supply or trafficking, with the remaining 43 cases determined as trafficking in commercial quantities, and two trafficking in large commercial quantities. Seven of the commercial and two of the large commercial findings were decided in NSW courts and involved a variety of drugs (MDMA, cocaine, cannabis and methylamphetamine). Victorian commercial cases involved the supply of methylamphetamine, heroin, MDMA and BZP-TFMPP. In the Northern Territory, 29, or almost two-thirds, of the minimally commercial supply cases were deemed matters involving trafficking in commercial quantities. Twenty-four of these cases involved cannabis, and in 21 of these cases it was the only drug.

Table 8: Court decisions in minimally commercial supply cases by jurisdiction (*n*=195)

Jurisdiction	Total minimally commercial supply cases	Court decision				
		Supply	Trafficking	Indictable	Commercial	Large commercial
NSW[a]	34	16	5	–	7	2 (4 unknown)
Vic	21	–	13	–	8	–
Qld[b]	12	–	11	–	–	(1 unknown)
WA	8	8	–	–	–	–
SA[c]	7	–	7	–	–	–
Tas	60	–	60	–	–	–
ACT	6	–	6	–	–	–
NT	47	9	9	–	29	–
Total	195	33	111	–	43	2

a: In four minimally commercial supply cases in New South Wales, there was no clear court determination, and one sentence was two years, two were of 12 months, and the other of four months suspended

b: In one minimally commercial supply case in Queensland, there was no clear determination in the sentencing remarks

c: The ultimate conviction in one case of social supply in South Australia was for possession of cannabis

In most cases, court decisions that fell into our categories of social supply and minimally commercial supply generally found the offenders guilty of supply or trafficking, with a few—and, in the Northern Territory, a significant number—convicted of commercial trafficking. While the findings of the court in relation to the charges are pertinent to our understanding of current criminal justice responses to these types of offences, a fuller appreciation can be gained if we compare the mean sentence in months, along with the maximum and minimum sentencing ranges, and take into account remarks made by judges when handing down a sentence.

Comparing sentences across categories of supply

Table 9 compares the mean, minimum and maximum sentences for cases included in our sample that involved the trafficking, commercial supply and large commercial supply of drugs that were not consistent with our categorisation of social and minimally commercial supply, and those that we identified as such. This comparison makes it clear that, on average, judges do respond to these cases in quantitatively different ways: the average sentence for large commercial supply, commercial supply and trafficking cases (125.4, 68.2 and 55.5 months, respectively) were substantially greater than the sentences we recorded for minimally commercial supply (20.1 months) and social supply (8.1 months). The small number of social supply cases meant that it was not possible to provide a mean sentence duration for each jurisdiction.

Other figures of interest in this table are the scope between the minimum sentence and maximum sentence for social supply and minimally commercial supply categories in each jurisdiction. In the social supply category, this ranged from a fine or a good behaviour bond to six- and 12-month wholly suspended sentences to potentially quite lengthy periods of imprisonment—for example, 60 months, or five years, as a head sentence.

Table 9: Comparison of mean, minimum and maximum sentences (in months) in large commercial, commercial, trafficking, minimally commercial supply and social supply

	Large commercial				Commercial				Trafficking				Minimally commercial supply				Social supply			
	n	Mean	Min	Max	*n*	Mean	Min	Max	*n*	Mean	Min	Max	*n*	Mean	Min	Max	*n*	Mean	Min	Max
NSW	50	143.0	36	264	31	84.8	23	144	16	64.1	18	156	34	33.8	ICO/ 4[a]	60	4	N/A	GBB/ ICO	60
Vic	25	122.0	48	372	21	62.1	36	138	11	51.5	24	102	21	33.0	6[b]	68	–	–	–	–
Qld	8	118.0	54	156	15	92.8	48	168	15	68.8	36	96	12	48.4	24[a]	72	2	N/A	9[a]	18
WA	8	124.3	30	204	7	107.1	72	180	15	65.1	12	102	8	25.5	6	48	1	–	–	–
SA	–	–	–	–	6	67.5	38	90	1	N/A	120	120	7	27.8	15	48	2	N/A	Fine	20[a]
Tas	–	–	–	–	7	30.6	14	54	23	9.0	Fine	24	60	6.7	Fine	12[a]	15	5.5[a]	Fine[b]	12[a]
ACT	–	–	–	–	–	–	–	–	4	38.8	16	69	6	13.2	GBB	36	1	N/A	6[a]	6[a]
NT	1	N/A	120	120	28	32.5	3	72	17	21.4	6	52	47	18.8	0.9[a]	45[a]	5	4.8[a]	GBB[b]	12[a]
Overall	92	125.4	30	372	115	68.2	3	180	102	55.0	Fine	102	195	20.1	Fine	72	30	8.1	Fine	60

a: These sentences were wholly or partially suspended

b: A reminder that there are some caveats—for example, the relationship between shorter sentences and a longer sentence that might be fully suspended, and the very large number of (wholly) suspended sentences used in Northern Territory and Tasmania. In both the Northern Territory and Tasmania, fewer suspended sentences were awarded to cases where there was a finding of trafficking, commercial or large commercial supply than for minimally commercial or social supply. The use of suspended sentences varies across jurisdictions. Victoria abolished suspended sentences in 2012 and 2013. Parole rules vary between jurisdictions, so imposed terms may not be the same as time actually served. Here, the total sentence in months was used as the most useful comparator, bearing this variation in mind. The 12-month maximum sentence for social supply was suspended after 28 days. The sentence was not provided in the remarks for the Western Australia social supply case. The number of cases in this table is less than the total number of cases that made up the initial sample for this study because the length of the sentence was missing in a small number of transcripts. (Figures were rounded up or down to nearest tenth.)

Note: GBB=good behaviour bond (an order that requires 'good behaviour' for a specified period of time); ICO=intensive correction order (a court sentence of up to two years served under strict community supervision)

Sentences for social supply

Some examples of non-custodial sentences, such as a two-year good behaviour bond (GBB), received for what we have defined as social supply have already been looked at. There were, however, cases where offenders received a custodial sentence.

At the lower end of the scale, the applicant in QLD005SCA received a sentence of nine months, suspended after eight days (the time in custody at the time of the appeal hearing). The offender was sentenced on seven counts of supplying ecstasy. At the time of offending, she was aged 49 and running her own legitimate business. Supply occurred over a nine-month period and consisted of providing one tablet or two tablets to two friends. No money changed hands. The appeal court judge concluded that there had been a failure to exercise sentencing discretion when the facts were compared with the sentence: 'This lady ought not have been sentenced to a term of actual imprisonment.' The original sentence was 12 months imprisonment, to be suspended after serving four months.

Two NSW cases involved much longer sentences. In NSW004CCA, the applicant was sentenced for three counts of supplying ecstasy, two counts of supplying cannabis and one of possessing cannabis. He received an 18-month prison sentence. The applicant denied supplying 100 tablets to 15 of his friends while they 'partied' in Byron Bay. The judges in this case (in both the initial case and the appeal hearing) took a different view. The sentencing judge explained:

> …what he told me stretched my powers of belief beyond breaking point. In order to dispose of the number of tablets which he had…when he was up at Byron Bay with 15 of his mates, he said that he didn't give his mates any, which would be understandably a natural thing to do if they were up there in Byron Bay but rather he ate the lot himself. Meaning that he had to consume at least 8 tablets a day…this is an improbable number for him to ingest, particularly in circumstances where his mother testified that she saw no untoward effects in him at all. I think it is highly probable that he did distribute the drugs to his mates in Byron Bay where they were all partying and why he was foolish enough to tell me a series of lies to conceal that I have no idea. But I am convinced that he did.

In this case the apparent unwillingness of the applicant to admit to what amounts to social supply (on the judge's own account) worked against him. When setting the sentence, the sentencing judge explained that his lie 'redounds against him'. Two of the judges hearing the appeal commented that the offender was a young man with a very minor criminal history and a good work record. They concluded that 'it would have been open to his Honour to impose a non-custodial sentence on the applicant given that he was relatively young at the time he offended and the other aspects of his subjective case'. But they go on to note 'just because his Honour did not do so does not mean that the sentence imposed was manifestly excessive', and the original sentence remained.

The longest sentence that appeared to be consistent with the social supply category was five years, or 60 months. NSW008CCA involved the supply of cannabis, MDMA and methylamphetamine. The remarks from the appeal court were that his Honour had come to the view that it was 'to the advantage of the applicant that the applicant was using the supply to his nine or ten mates as a means of covering the outlay for his own use', which the court remarked 'explains but does not excuse his offending behaviour'. The sentencing judge came to the conclusion that, while the acts of supply to his friends must have been intended to be on a very regular basis, it was 'not in the higher echelons of the drug trafficking hierarchy' and accepted that the applicant 'was trafficking drugs to a relatively small group of individuals who he knew were users for the purposes of funding his own habit'.

Sentences for minimally commercial supply

A striking feature of the cases that fell within the minimally commercial category was their complexity and diversity in both the types of offending behaviour and the ways that judges navigated this in the context of sentencing. Cases in this category involved both very small and sometimes quite large quantities of drugs.

For example, in the Northern Territory, offenders who were convicted of trafficking cannabis sold relatively small quantities (about one gram) to undercover police (in NT019SC and NT014SC). In both cases, the judge accepted that the offenders sold small amounts of cannabis to subsidise personal use, which in one case involved self-medication for pain. In neither case was there evidence of any large-scale drug operation. In NT019SC, upon search of the premises the police found only one gram of cannabis, which the offender had for his own use. He was nevertheless held on remand for four months and then released on a six-month good behaviour bond on the day of his hearing. In the case of NT014SC, following two searches four months apart, police found just under nine and 16 grams on each occasion. Because of this criminal justice attention, the offender, who was an amputee on a disability support pension, was evicted from his housing commission flat and was living with friends; he had stopped using cannabis. He received the minimum sentence of 28 days, which was wholly suspended.

In other cases, much larger quantities of drugs were involved. In Tasmania, for example, cases were brought against individuals prosecuted for acting as couriers. In TAS016SC, the offender was the middleman in an MDPV (cathinone class stimulant) trafficking enterprise, making three to five deliveries each week of between three to four grams of the drug, and about 60 deliveries in total. There were three regular customers. The offender received about one gram of the drug per delivery for his own use. There was a space of one year between arrest and sentencing, and in that time he had sought treatment and had not used. The offender in TAS016SC received a four-month wholly suspended sentence and a fine of $2,000. As a further illustration, TAS007SC resulted in a suspended sentence of the same duration (but no fine). The offender was convicted of one count of trafficking of 39.3 grams of morphine. The offender did not use morphine but received 19.8 grams of cannabis (which he did use) for his part in the trafficking.

In contrast, in Victoria, VIC079SCA involved a 57-year-old Vietnamese woman found guilty of importing 345.5 grams of heroin (33.8% pure—116.8 grams). She was sentenced to five years and eight months (68 months) imprisonment, with a non-parole period of three years and eight months. The case that was put to the court was that she came to Australia as a refugee in the 1970s. She had had a difficult life and from 1998 struggled with heroin dependence. Recently she had needed to travel to Vietnam to care for ailing parents. Unable to pay a drug debt of $15,000, she was offered the alternative of bringing drugs into the country.

In other cases involving larger quantities, the length and nature of an offender's criminal history could influence the sentencing decision in unexpected ways. In NT016SC, the offender, aged 50, pleaded guilty to one charge of possessing a trafficable quantity of cannabis (255.1 grams). He had a 30-year criminal history that involved drugs. The judge accepted that in the past the offender had developed a methylamphetamine addiction but had managed to overcome it, and now his drug use was confined to smoking cannabis from time to time. Her Honour recognised that his criminal behaviour associated with problematic use of methamphetamine had ceased some time ago and that the offender's recent drug activity only involved supplying cannabis to people he knew (and who knew he knew where to get the drug) and he did not run a large-scale operation. He was sentenced to 12 months imprisonment but, when passing the sentence, the judge—acknowledging positive change in offending behaviour—'determined somewhat reluctantly that the sentence should be suspended'.

Other factors that some judges were prepared to take into account when sentencing were the successes and relapses of offenders seeking to overcome dependence. QLD014SCA involved the regular supply, over five weeks, of relatively small quantities of heroin to known drug addicts. The respondent was drug dependent and trafficked to meet his own needs. He was 42 years old, with a serious criminal history. The sentencing judge noted many mitigating factors, including his dysfunctional background and a past addiction to heroin which was the major reason for a 12-year prison sentence as an 18-year-old. On release from this long sentence, he rehabilitated himself, gaining employment and starting a new life with his now long-term partner. Some years later, with two children, they moved to Brisbane to be closer to his mother. He allowed a homeless, drug dependent acquaintance from his past to stay in the family home and he relapsed. He spent four months on remand. Released on bail, he successfully completed a residential rehabilitation program, gained employment and interacted in a positive way with his supportive family. He was sentenced to 5½ years imprisonment with parole eligibility set at nine months. The sentencing judge was 'concerned to ensure that in returning the respondent to custody he did not impose such a heavy sentence that his hope and commitment to rehabilitation was destroyed'. The Queensland Attorney-General appealed against the sentence, contending that it was manifestly inadequate in that the parole eligibility date was too early. The appeal judge agreed, concluding the mitigating factors were not so extraordinary as to warrant such extreme leniency. The sentence remained 5½ years, but parole eligibility was set at 14 rather than nine months.

This part of our report has explored social supply and minimally commercial supply cases that have come before courts across Australia. While there is consistency in the characteristics of cases falling into the social supply category, it could be that this is linked to their small number. Although the minimally commercial supply cases demonstrate greater diversity, what they do have in common is that offenders appearing before the courts had largely become involved in the supply process to support their own use of illicit drugs and their involvement tended to involve little in the way of profit or commercial expansion. The threshold system, as Hughes et al. (2014) cautioned, is ineffective in distinguishing between users and dealers in these types of supply. Judges appear to take these limitations into account when formulating sentences; nevertheless, issues of consistency and proportionality do arise.

Responding to social supply and minimally commercial supply

The second part of the analytical section of this report looks at the results of our inductive qualitative thematic analysis of the sentencing remarks, and our interviews with judicial officers. It begins by providing an overview of how social supply and minimally commercial supply were acknowledged in the context of drug trafficking cases coming before the courts and then discusses the various themes that emerged from our analysis.

The aim of this analysis was to gain a more nuanced understanding of if and how judicial officers differentiate offenders and offences in lower end supply cases from others involving drug trafficking, and whether, in doing so, they speak about and respond to cases of minimally commercial or social supply in distinctive ways. This analysis has provided evidence that markers of social supply and minimally commercial supply affect how judges formulate sentences. It is not surprising that a range of aggravating and mitigating factors influence judges' accommodation of these types of supply; however, it is clear from our analysis that, while there is considerable consistency, not all officers of the court interpret factors associated with different types of supply cases in the same way.

Court acknowledgement of social supply characteristics

Courts showed some evidence of accommodating social supply activities in sentencing decisions, focusing most often on characteristics such as lack of financial profit and supply to non-strangers. Sentencing remarks for cases located in the Northern Territory, New South Wales and Queensland noted occasions where the defendant 'did not benefit financially from the transaction' (NT025SC), 'had not intended to profit from what he did' (NSW007CCA) and 'where no money changed hands in consideration for the supply' (QLD005SCA). In such cases, these supply practices were compared with commercially orientated trafficking and consequently deemed to be located at the 'very lowest end of the [supply] scale'.

The relationship between the supplier and the receiver of the drug was also discussed as a mitigating circumstance that separated social supply offences from drug dealing proper. In QLD001SCA, the defence submitted that the persons to whom the applicant sold cannabis were not 'customers' but friends, and therefore harm to the community was restricted. Elsewhere, sentences that failed to acknowledge that the defendant supplied 'only to a handful of people' (QLD012SCA), or that drugs were possessed for personal use and 'the use of friends' (SA001SCA), provided the basis for counsel to argue that the original sentences were manifestly excessive or inadequate.

In Tasmania, court officials also discussed these types of offence characteristics. In TAS050SC, the judge accepted that friends who were involved in the purchase of an ounce of cocaine 'were already users of the drug' and that the defendant was 'buying for himself and friends'. And, in a cannabis cultivation case, the presiding judge acknowledged that the defendant 'only sells to people he knew' and that he had 'not set out to sell' the crop but 'ultimately ended up selling some of it' (TAS052SC). In both cases, while it was reasoned that trafficking was a serious offence, what were effectively social supply characteristics were said to enable the imposition of a less serious punishment, with both defendants receiving suspended sentences.

In the interviews that made up phase 2 of this project, judicial officers consistently acknowledged the existence of and their exposure to cases of what we have termed social supply, although in some jurisdictions—namely, Victoria and South Australia—they explained that they do not see a large number of cases involving *trafficking simpliciter* (discussed below) or not-for-profit sharing among friends or acquaintances. Participants from these jurisdictions (J3, J5, J7, J9 and J10) explained that such cases were dealt with in lower courts, but they did hear them on appeal in instances where magistrates had been overly harsh. J7 said:

> We see them on appeal. That's where we mainly see them. We get them on appeal, and look, I see on appeal a punitive approach adopted by a cluster of magistrates, because you have a lot of discretion as a magistrate. You don't provide written reasons.

The most common types of social supply cases referred to in all jurisdictions generally involved a young person (male) with a 'pocket full of' or '20 or 25' MDMA tablets purchased in the 'carpark of a night club' or before a dance party or music festival to share with friends. Indicative comments included the following:

> A lot of those people are at street level. They're going to the night clubs and they might be buying 25 pills and keep five to themselves and sell 20 and finance their habit. These are the sort of kids that are coming before the court. Obviously, we get higher levels than that, and they're much more serious cases, but we see a lot of those cases. (J2)
>
> But party drugs, so MDMA and those types of things, we see a lot of young people who have literally no idea how serious it is. They start off using the pills themselves. They buy them at nightclubs just as part of a good night out. Then they realise that it's actually cheaper if they buy in bulk. Then they're standing there with about 20 odd pills and one of their mates says, could you let me have a pill? …sometimes they will hand it over, sometimes supply. Sometimes they'll say, well, they cost me 20 bucks. How about 20 or $25 for the pill, thus trafficking. (J4)

These young people were described as having functional lives and as in some ways 'drifting' (J3) into the practice of social supply. It was said that they frequently had 'no idea of how serious' or criminal their behaviour was (J6). Typical examples cited in each of the jurisdictions were of students or young professionals with potentially promising careers that would be 'crushed':

> [They are] people who have functional lives, they've got all their lives ahead of them. Often we see students. You know, I think of one young lad who was doing extremely well at university and he had a career that would take him overseas in normal circumstances, probably to the US. He's just not going to be able to do that now, not with a drug trafficking charge. (J4)

Participants across jurisdictions commented on the influence of changing perceptions about drug use. They described drug taking as increasingly 'normalised' (J4), saying in this regard:

> I don't think it's caused by trafficking. I think it's caused by demand and the culture that kids have now. Not even kids. That young adults have now about what they will use recreationally, what they will do recreationally. So I don't know it might sound weird. But I don't actually see the proliferation of drug use as being something that you lay at drug traffickers doors… It's culturally normalised now. (J9)

Participants across three jurisdictions, however, commented that those who end up before the courts are often naive or in some way vulnerable, explaining:

> So MDMA is a good example of that. They are not actually addicted but they'll do it on Friday and Saturday nights, or whenever they are going out. To have a good time—one of them, you know, the most pliable one will be nominated to go and buy the drugs from someone and that usually happens in a car park outside a night club and the police arrest that person. Next thing you know they're on supply charges at least. (J2)

Judicial officers who were interviewed as part of this project described how they approached sentencing in these types of cases, particularly when offenders were young, with few or no prior convictions and with good prospects of rehabilitation. Most discussed the value of having a range of non-custodial options, including suspended sentences, home detention, intensive correction orders or a fine, and commented that respective courts of appeal tended not to revise such decisions—for example:

> I try and give them suspended sentences…the reasoning behind that is very often they just need the wakeup call of being prosecuted. Sometimes you see repeat offenders but very often you don't… [Often they are] kids selling party drugs—in their teens or early 20s and they've got no priors. So you don't want to put them in prison. SCA doesn't interfere with our suspended sentences by and large for that sort of stuff. (J3)
>
> So where it's just one or two transactions with a mate because they both use drugs, they'll both get them anyway, that is absolutely emphasised to us, and in that circumstance usually the person will get a non-custodial sentence. They'll get either a suspended sentence or they might get home detention or they might get a large fine of some sort. (J5)

Court acknowledgement of minimally commercial supply characteristics

In the qualitative analysis of sentencing remarks, the connection between drug use and criminality was noted by judicial officers in all states and territories. A defendant's drug use was most likely to be cited and acknowledged by the court when it was found to be 'chronic' or 'chaotic', and where it was perceived that it was related to 'or had a direct impact' on their criminality. Across all jurisdictions the concept of addiction presented a 'circumstance of the offender' that carried weight in the sentencing process. In Victoria, one judicial officer commented that the 'causal' relationship between drug addiction and the nature and level of trafficking is 'relevant circumstances in the sentencing process' (VIC017SCA). This illustrates the way that addiction is considered a mitigating factor. The importance of considering addiction as a mitigating factor was also observed in a number of cases beyond the state of Victoria, where the failure to acknowledge the relationship between drug dependency and low-level drug supply resulted in the court granting leave for appeal and the substitution of a sentence.

Analysis of these cases indicated that judges frequently made distinctions between those who were motivated by a perceived need, desire or compulsion to support a personal drug habit or addiction, and traffickers motivated by 'greed' (ACT007SCA). It was commonly accepted by sentencers that supply was used to 'finance a drug habit' (NT011SC) and to support addiction (NSW017CCA) and that, in many cases, this practice did not lead to any material benefit for the defendant. Justifications for reducing sentences were in part based on the offender's role and their attendant levels of culpability, particularly when comparing an addicted drug user's 'unsophisticated' (NSW021CCA) opportunistic street-level supply with a commercially motivated operation.

The hierarchy of drug supply and the level at which an offender is operating thus become important areas of discussion in sentencing and differentiating street-level addicted drug offenders from commercial traffickers. In several NSW cases, it was suggested that, although the circumstances of addiction do not detract from the fact that a serious offence has been committed, it does mean that characterising this kind of offence as 'for financial gain and thus to characterise it as an offence falling within the mid-range' was erroneous (NSW003CCA). Similar themes were noted in the ACT, when it was submitted that a judge failed to give sufficient weight to the fact that as a user–dealer, rather than a trafficker for greed, the applicant was (as it was put) 'at the lower level of criminality' (ACT008SC).

In addition to exploring the motivation of the offender and their overall place in the drug supply hierarchy, in some cases judges also considered the wider social circumstances of those found to be dependent on drugs. In one case, a presiding judge talked about the wider social disadvantage, 'emotional, financial, or social deprivation, poor educational achievement, unemployment, and the despair and loss of self-worth' that can result from addicted drug use (NSW017CCA). The ways in which these factors can work to shape a defendant's criminality were explored in the Northern Territory, when a judge acknowledged the limited options available to unemployed addicted drug users and the prevalence of drug supply being used to repay drug debts and fund basic living expenses (NT033SC).

Much like the way a drug dependent offender's role is compared to that of a commercial supplier, the relative harms associated with minimally commercial drug supply were contrasted with the harms of profit motivated drug trafficking. Courts acknowledged the limited scope of these types of offences, which tended to be characterised by relatively closed supply networks where the individual 'had only supplied those already addicted' (NSW022CCA) rather than supplied 'into the community at large'. In such cases, the fact that the defendant had supplied the drug to 'a limited class of people'—namely, friends and acquaintances who were already habitual users of the substance (WA014SCA)—provided a meaningful point of mitigation for counsel at the point of appeal.

Our quantitative analysis identified this category as a more substantial component of our sample than that of social supply. Indeed, one judicial officer interviewed suggested that these types of cases are probably far more common but not evident in courts because so few legal representatives call their clients to the witness box. J11 said:

> It follows actually because so few people call their clients into the witness box, but I don't believe judges really appreciate that most of the people we deal with are within that description; of essentially use, bad users who you know you've found with drugs in their possession and probably a fair bit of it was intended for their own use and, or either sharing rather than simply supplying to the world at large.

Nevertheless, all of the judicial officers we interviewed were familiar with what we have termed minimally commercial supply and were of a similar view that '[t]hey are very, very common. Very common' (J4).

In making the point about the large number of people in this category, one participant explained the scope of offending that came before the court in this way:

> I think it's better to say how often do you see the just purely commercial. There's a lot of people between the social supply and the purely commercial. A vast number of people are in the middle. Most people who supply drug are users. (J1)

In each of the jurisdictions, interviewees recounted anecdotes about two types of cases that fell into this category. One was of the person from a disadvantaged background who was introduced to drugs at a young age or had grown up in a family where there was drug use, had been abused as a young person or child, whose life was sad and tinged with hopelessness. The other was a 'tradie' or a person with a business who had promise but, as a result of certain events (sometimes trauma or loss of a family member), had developed a pattern of problematic drug use. For example, J10 described this case:

> A young man who had not been part of any drug using cohort or peer group particularly until certain things happened. He was only about 24 I think when he began using drugs. Quickly became dependent and quickly needed more money than he had to get hold of them. So he fell into the clutches of a group who used him then to store huge amounts of it. Huge amounts. That's what his role was, just storage. He only needed a little bit of that. …he did run up a considerable debt and then the only way out of his debt was to do this, was to get involved in this so he went to prison for a very, very long time. So there's that type. You know, came from a very good family, he had his own business. He was seemingly a well-adjusted young man. But bang, down he went. The other group you more commonly see are the ones with the disadvantaged background who begin using drugs very, very early in their childhood even and just keep going. But that's—they're always small time those people. They never get involved at the higher end of things because probably they're not trustworthy enough in the first place. They just go from disaster to disaster.

When analysing the different ways that participants spoke and thought about those who appear before them, it became evident that there was slippage between the categories of social supply and minimally commercial supply and greater commercial supply. Judicial officers described how those who engage in supply, regardless of the level at which they are operating, are part of a network. J1 commented, for example:

> The extent of their supply will depend on whether they get sucked into a syndicate because they're purchasing drugs from other people, whether they start supplying not to street users but to the next layer up, and whether they get drug debts they have to repay.

J5, who was from a different jurisdiction, described how the problem of users is that they are part of the drug network, and went on to explain:

> …but you know it's still, in a sense the same type of offending. Because it's users who are part of a drug network. You're never going to get anyone who is just on their own in this because they always have to get drugs from someone else and they supply drugs to someone else. Where in the chain they go, can change and rapidly change over time.

Taking this into account, that participant (along with some others) was precautionary. While acknowledging that minimally commercial supply might be considered less serious than trafficking, where a large amount of profit is involved, they drew attention to the potential harm caused by drugs regardless of their source. J5 said:

> [Minimally commercial supply] …that is slightly less serious than if they were making a profit but what can't be lost sight of is the damage that those drugs are doing. They're doing exactly the same damage as if they were sold at full price and the person was making a lot of money… The accused's personal circumstance has got to be taken into account as well as whether it was commercial or not, it's worse if it's commercial, it's a bit less worse if it's not just for profit. But the other side of the coin is the damage and that is all the same.

Despite some reservations about the type and extent of harm that arises from this type of drug distribution, one thing that all participants agreed upon was the need to respond to those offenders involved in minimally commercial supply in a therapeutic way. J6 said:

> I think the solution in those cases is not necessarily to send them to jail where, well gee they'll probably have a healthier lifestyle. They'll be fed better. They'll sleep better. They may or may not get drugs. But they're going to mix with a whole lot of much heavier criminals than they are. It's not going to be really good. If they offer to me a realistic, workable, therapeutic alternative, I will be attracted to it. But it's got to be workable. The crime can't be too serious. Sometimes they're just too serious…

In this context, participants underlined the importance of sentencing practices that increased opportunities for the supervision of offenders, including either supervision in the community through an increased amount of time on parole or, alternatively, judicial monitoring. J1 explained:

> The most important thing is to stop them using… If they have to spend time in jail because of the seriousness of it, try and increase the time on parole so they'll be supervised. That's very important…if they have jail and then they're released without supervision, then they're just asking for them to go back to the same old problem. You're not solving anything.

Aggravating factors: Harm

From our analysis of sentencing remarks, it became evident that several factors affected the courts' willingness to grant appeals and/or implement more lenient sentences for social suppliers and minimally commercial suppliers. High purity levels of drugs such as methamphetamine, cocaine and heroin were in many cases accepted as potentially indicating that the substance was able to be diluted, either by the respondent or someone else, to increase the volume of the drug available for further sales. In validating the importance of purity in gauging seriousness, it was put that 'well-established case law' proposes that the purity of the substance is considered a significant sentencing consideration, whereas personal circumstances, while not irrelevant, 'will almost always be subsidiary considerations' (WA014SCA).

The context in which the act of supply was executed can also increase the seriousness of the offence in sentencing decisions. When undertaken at 'street level', even relatively small-scale supply at the lowest end of the scale was considered an aggravating circumstance indicative of a more serious level of offending. In QLD006SCA, it was suggested by the judge that, despite the appellant 'not making a particular profit', there was a commercial aspect to this because 'the drugs were being on sold to members of the community'.

In most cases, the issue of community harm is not explored in detail but assumed (eg TAS055SC, ACT009SC and NT005SC). But, in NSW022CCA, the judge provides further detailed remarks on the consequences of drug offences in the community, referring to case law that draws on a study by the New South Wales Bureau of Crime Statistics and Research:

> The survey of imprisoned burglars reported in 'The Stolen Goods Market in New South Wales' conducted by the New South Wales Bureau of Crime Statistics and Research indicated a median expenditure by heroin users of $1,500 per week and the need to steal goods worth a number of times this amount to feed their habit. On average, each such offender is thus costing the community through property losses and the like $200,000 per year. (Originally cited in *R v Markarian* [2003] NSWCCA 8)

Though the effects on the wider (law-abiding) community are perhaps most commonly cited in sentencing decisions, one judge in the Northern Territory departed from this narrative, noting that the harm caused by supply offences 'is generally brought to those members of the community who are more vulnerable to the influence of these sort of drugs'. Justifying the importance of general deterrence, the judge notes that 'sadly, you are one of those vulnerable individuals who are prone to serious addiction and for whom these laws are intended to protect'—suggesting that the reason for deterrent sentences is to protect vulnerable drug users as well as the wider community (NT011SC). In other contexts, sentencing remarks make some reference to the harm to users (TAS076SC), and there are also cases in which the 'victims' of minimally commercial supply offences are identified as 'the people who ended up buying the drugs, whether those people bought it for their own use or to sell onto somebody else' (NT021SC).

In the Northern Territory, the broader vulnerability of Indigenous communities was also identified as a context in which supply offences can cause great harm, and general deterrence is especially important. This point was made in the case of a young man in Darwin who was sentenced for supplying cannabis within an Aboriginal community. Explaining the need for general deterrent sentences in such communities, in two separate cases the same judge highlighted 'the effect on young people in particular and also economic harm that is done when limited funds are used to buy expensive drugs' (NT058SC), 'pulling money out of the community that ought to be spent on food and clothing for children' (NT003SC).

Our interviews with judges reflected similar themes—although there was less discussion of deterrence—in their consideration of harm. Judicial officers expressed a diversity of views when asked about the harms associated with drug trafficking generally, and social supply and minimally commercial supply specifically. A familiar theme in their responses was a distinction between social harm and individual harm (Bull et al. 2016).

Social harm generally referred to the types of 'havoc' and associated crime referred to in the interviews, or the role of organised crime or gangs and associated threats and 'thuggery'. Participants commented:

> One of the harms is caused by it being illegal and that there's a lot of thuggery involved. You know, you don't—if someone doesn't pay you for a drug debt, you don't take them to court and sue them. You just threaten to harm them or those close to them. So the organised crime and thuggery is one of the harms. (J1)

> The other issue is with the criminal networks that arise because of it. …there's a certain amount of crime associated with people getting money to pay for their drugs, but there's also sort of organised criminal gangs who—they're all about exploiting people taking drugs, and some pretty nasty things go on in and around all of that. They prey on users and encourage them. So those are the sorts of social harms that we see… (J4)

> But I'm very concerned about the criminal running of drug trafficking. That's really nasty. …the other thing that's always nasty with drug trafficking…there is a lot of: you owe me money. A lot of enforcement. Drug run throughs. House run throughs. Users know that there's drugs in a household they'll run through, they'll do it really violently. But that's usually got to do with the socioeconomic group. But it's the violence I don't like. That's often around money and getting drugs. (J9)

One judge worked through a scale of the various harms that arise from large commercial supply, minimally commercial supply and social supply of drugs. For this participant, the harms associated with large commercial importation and/or supply were substantial because such offending affected 'hundreds of people', and these people made a lot of money exposing so many potentially vulnerable people to harm. In the judge's view, 'Whoever does that needs to go to jail for a long, long time.' Working down the scale, this judge saw the harms that arise from minimally commercial supply and social supply as potentially similar, saying 'they're exposing people who are already drug users to drugs. Now I'm not saying that's okay but it's not extending the harm' (J6). Others (J5 and J8) made similar points. For J6, harm arises particularly for those exposed to the drugs for the first time, because of the potential for new users to develop related social and mental health problems. They cautioned, however, that, in the case of minimally commercial supply, suppliers may not demonstrate any consideration of the harm that might arise from their actions. After working through their scale, J6 outlined how they understood harm in the context of social supply:

> The harm to answer your question in the lowest level of social supply is exposure of people who are vulnerable because of their young age to something that could change their lives. …What I am saying is that there are people who are vulnerable. You might be vulnerable because of your age, psychological make up, all sorts of things, your background, what's going on at home, what's going on at the school. The harm is that a person who may not have gone completely off the rails in a health way, their own health is compromised, usually their mental health, often their physical health, but also their career and, also they are exposed to the legal system. That's the harm—vulnerable people. (J6)

The concern of these participants was about the harm that could occur from introducing drugs to new users, and the risk that they might go on to become dependent and develop all the associated problems.

When participants spoke more specifically about harm to the individuals appearing in their court, they described it in this way:

> The personal ones for the person involved will be if they're a drug addict themselves. By trafficking or whatever it is, they are sealing their fate in a sense. They have no way out. They're really trapped often by the debt they've got and they've got nowhere to go. They fear for their safety and their family's safety. (J10)

Individual harm associated with trafficking was linked to vulnerability, both the vulnerability of the offender and of those that they supplied to:

> [It] harms the vulnerable: drug use ties them to drug dealers but also makes them less stable, less strong, less psychologically capable of leading a normal life in the community. (J1)

Other themes raised in the context of individuals appearing in courts were the health harms posed by drugs. This included the harm caused by the effect of methylamphetamine on the brain (J1) and the harm caused by the following:

> …the fact that people very often don't know exactly what they're taking. Whether or not they're taking the drug they think they're taking or what the quality of the drugs is. (J1)

It was also about the impact that drug use and a criminal prosecution can have on the user and the user's family, which included 'disappointment' and 'terrible waste of a life' (J5). In the words of J2, the harm is 'wasted lives… It's not just the user, it's the user's family and everyone who is devastated by that'.

There was a tendency for participants to distinguish between the types of harm associated with different drugs. Overwhelmingly, they associated methylamphetamine with violence. This included violence stemming from enforcement and the trade in the drug, drug psychosis, breaches of intervention orders, stalking, and other family and domestic violence matters where 'the male spirals out of control' (J7). J11 brought up family violence too.

When considering harm more generally in relation to drugs, a number of participants explained that it depends on the drug, and, while they were reluctant to quantify specific harms, they drew some clear distinctions:

> It varies with drugs. Under our legislation all illicit drugs except for cannabis are deemed very harmful and there'd be a lot of debate about that. There are people who say MDMA is less harmful, various types of pills are less harmful, methamphetamine is the worst. Or ice is the worst, crack cocaine is also pretty bad but we don't see much of that. Because it's much easier for somebody to cook up some pseudoephedrine in a tin shed than…[get] cocaine, manufacture it into crack. (J5)

More specifically, participants drew a distinction between methylamphetamine and cannabis. J5 and J1 both explained 'one would usually consider that selling methylamphetamine is more serious than selling cannabis. Not that cannabis is harm free' (J5). Others also noted this distinction (J7, J10 and J4), saying, for example:

> I don't see such harms in terms of users of cannabis. I don't see such harm in users of (in terms of its criminal consequences) in terms of prescription medication, heroin, opioids and cannabis. I don't see that. It's overwhelmingly the stimulants. …But it's ice, and harm—that's where we see the harm. …Most parents would feel understandably upset about kids who were using cannabis constantly, and in one sense wasting their lives, but that's a different issue from the criminal courts. Most people who use [cannabis] don't appear in court and don't get charged with offences. (J7)

> Methylamphetamine I would universally say is just appalling in terms of outcomes. It's shocking for the health of the user and it causes a lot of—you know, if someone smokes a joint they're more likely to fall asleep or eat a pizza, whereas somebody who's taking methylamphetamine—we see a high proportion of crimes of violence that involve people who have been using methylamphetamine. (J4)

Aggravating factors: Culpability

In addition to offence characteristics that, it was suggested, increase the harm of social and minimally commercial supply offences, sentencing remarks also provide insight into factors that signal greater culpability. The length of time over which the offending took place indicated a greater commitment to the drug trade and provided evidence to suggest that supply was organised rather than a one-off, opportunistic event. In NSW023CCA, for example, although the amount of methylamphetamine supplied by the appellant was found to be 'comparatively small', his Honour observed that the objective seriousness of this type of offence was determined by 'concepts of repetition, system and organisation'. Similar themes were noted in Tasmania when drugs were found to be sold through many small transactions 'over a period' (TAS061SC). Here, as well as in the ACT, supply over time was regarded as significant in the sense that it had 'the potential to create a serious problem' for 'those to whom they were sold' (ACT002SC).

Along with the duration of supply offences, signs of supply also provided an important means of assessing an individual's culpability. In all states, cash and dealing paraphernalia such as scales and tick sheets were commonly taken to indicate a professional operation, but the retrieval of one or two mobile telephones and evidence of communication with customers were argued to be signs of an organised operation. In a NSW case, for example, analysis of sentencing remarks suggested 'recorded conversations and the charges as a whole showed that the applicant conducted an organised street level supply business with both enthusiasm and resourcefulness' (NSW027CCA). Another judge in the same jurisdiction made similar comments at sentencing stage, assessing supply to be at a slightly higher level than a street-level deal, as the 'offender took phone calls on a telephone and attended personally for the arranging of supply', positioning the sentence 'a long way from a bottom range offence' (NSW029CCA).

Evidence of financial profit generally provided the courts in all jurisdictions with enough justification to treat an individual as a commercially motivated trafficker with heightened culpability. In a very few cases, the contradictory position was taken, and 'limited financial gain' could also be conceived as an aggravating factor, even where it was accepted that offenders' involvement in supply was to maintain a drug habit (NSW034DC).

The theme of profit had a high profile in our analysis of how our interviewees discussed culpability. They all agreed that selling drugs to make money, when it was completely commercial and driven by profit, was a key aggravating factor in relation to culpability. For example, J10 said, 'If it's for greed and not personal need, that's a higher degree of culpability', and J6 explained their view:

> …you don't have to be Mr Big but if…you're really making money out of supplying drugs and you're not addicted yourself but you've got a business of supplying it then that's another category altogether.

J7, similarly, said 'not having a drug dependence oneself and selling it for profit, so being entirely mercenary about it' increased culpability, and J9 made it clear that 'someone who is not a user, who is doing it specifically to make money—I've got a real problem, that makes it worse'.

Evidence that those appearing before them in court were driven by profit included opportunistically selling beyond a known user group to others who might not have come into contact with drugs or used drugs if it were not for this exposure. Reflecting this, J3 and J4 drew a distinction between those selling drugs to peers already known to them and those selling to the public at large. According to J4, it made a difference whether offenders were 'dealing to their fellow drug users who might be dealing back to them when they've got money and some drugs, or are they actively going out and expanding the number of people that they know?' They went on:

> That's where I see the line, where they sort of go from what you've described as the social supply to something more commercial. That's the case even if they're not making lots of money, because typically they don't. Typically there are no signs of huge wealth. They're spending it all on drugs. (J4)

The threat or the use of violence, along with the involvement of weapons, was also commonly cited as an aggravating factor that increased culpability (J1, J3, J8 and J9). The presence of violence was linked to the idea that the distribution had more of a 'criminal element'. In such circumstances the supply was described in these terms:

> …highly organised and there's enforcement going on. That there's layers of authority extending up beyond a certain way…if it's more sophisticated. Because that usually brings in the violence and the enforcement and that. So that's more business like…Mafia like way of running it. (J9)

Some participants made a distinction between this type of activity and supply that 'does not involve' being drawn into a criminal lifestyle. 'Apart from the fact that you're selling drugs and it's against the law. But you aren't getting involved in heavier criminal enterprises' like armed robberies, aggravated burglaries and more organised crime (J9).

In our interviews, as reflected in the transcripts of sentencing remarks, culpability was also seen as linked to the position of the offender in the supply chain. The higher up a defendant is, the more culpable they are. One judge explained that, in terms of role, 'a crop sitter is at about the lowest level' (J9). For another, the purity of the drugs was important as an indicator of how far up or down the offender was in the system (J5). Finally, in relation to culpability and involvement in criminal activity, most interviewees referred to the duration of trafficking and the amount. Regarding the latter, J10 explained that there was increased culpability 'where we're talking about kilograms being moved and not grams'. J8 agreed. There was also agreement that increased 'moral culpability' included 'doing it with' or 'in front of [your] children', or selling to children (J1 and J6).

Addiction

The role of addiction has already featured in our analysis. When considering the sentencing remarks, we found that there was some variation in how addiction might influence the outcome of the sentencing process, and how its presence or absence acted as a mitigating or aggravating factor. Our analysis of sentencing remarks across jurisdictions provided insight into the types of discrepancies that can arise in the sentencing of social supply and minimally commercial supply cases. In ACT008SC, the judge highlighted inconsistencies in the punishment of addicted suppliers, noting the 'question of what might be called need versus greed', and adding that 'addiction should amount to a matter of mitigation', although 'the courts have not always agreed' (ACT008SC). In New South Wales, the presiding appeal court justice made explicit reference to the District Court judge's failure to 'give appropriate weight to the origin of the applicant's drug addiction and his achievement in defeating it'. It was further suggested that 'his Honour did fall into error', which then enlivened the 'court's discretion to intervene and re-sentence the applicant' (NSW017CCA). Inconsistencies in sentencing approaches were also explored in the Victorian context, where it was noted that the impairment of an addicted amphetamine user 'should at least have led to the conclusion that one motivation for the appellant's trafficking was to obtain funds to satisfy his addiction' (VIC017CCA).

More often than not, appeal judges criticised manifestly excessive sentences in cases where addiction featured. There were, however, departures from this approach. In Western Australia and Tasmania, two judges accepted that appellants were 'addicted to drugs and that this explained their criminality; nevertheless, they claimed that this 'did not excuse' the appellant's criminality (WA013SCA; TAS039SC). In Victoria, the judge in the case of VIC009SCA once again departed from this approach and argued that, although addiction should be a 'consideration', it had been 'said on countless occasions that addiction to heroin is not to be considered as effective reduction of what would otherwise be an appropriate sentence'. In qualifying this statement, they referred to the case of *Henry*, where Spigelman CJ said: 'self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice' (*R v Henry* (1999) 46 NSWLR 346). Here, understandings of addiction as tied up with structural disadvantage and social marginality, and as self-medication, are substituted with a rational choice framework which prioritises personal responsibility and designates addiction as a choice.

Reflecting these variations in sentencing remarks, differing views were expressed by interviewees when they were asked about the significance of addiction in relation to sentencing in drug trafficking cases. Some were clear on the matter, saying:

> …obviously it's a mitigating factor because the person who is a heavy user, or an addict, is vulnerable. So it's different from someone who is of purely commercial motives. That one is clear'. (J1)

> …that's a recognised mitigating feature. But if someone is trafficking purely for monetary reward then they don't have that mitigating feature. In fact, they've got aggravating features. (J2)

J8 and J9 made similar points. Other participants entered into longer discussions of how drug dependency impacted on their decision-making.

J10 worked through three examples to demonstrate when addiction would be a mitigating factor and when it would not. They described two different scenarios that have been referred to in other aspects of this study. The first involves someone whose drug use begins at an early age (pre-teens or early teens). The judge described how parents may be drug users, or the offender falls in with a drug using peer group because of failure at school, or there are some other reasons 'to do with disadvantages', and so 'their drug addiction or dependence has to be a big mitigating factor'. The second scenario is someone who does not have a disadvantaged background but falls into drug use in their 20s and quickly becomes addicted. The judge explained that you must look at their individual circumstances, saying:

> They were doing okay, something went wrong, they've become addicted. So the addiction is the thing that you have to look at. They wouldn't be criminals if it wasn't for their addiction. So again, it's mitigating. (J10)

The third, less favourable, example was this:

> The opposite situation…someone who commits a crime and then says it's because I was drug addicted, one way of looking at that from a sentencing point of view is to say well, they knew they were an addict. They knew if they went out and tried to get money from doing an armed robbery on a milk bar owner that that was a crime. They've done it before and they've been punished for it before and they shouldn't have done it again because they knew. So that has got some teeth. (J10)

In our interviews, judges were often circumspect in talking about the role of addiction as a mitigating factor. They referred to guidance provided by the Supreme Court (Appeal) (SCA) and then commented on how judges respond to that. For example, J3 opined:

> SCA says addiction is not a mitigating factor—but most judges would see it as such. It is difficult. They [SCA] are right to be ambiguous about the mitigating status of addiction. It depends on the case.

They went on to explain that, in their jurisdiction, the mitigating fact of addiction depends on the personal circumstances of the offender in the case, the prospect of rehabilitation, when there is a guilty plea or if they help police. Another judicial officer from the same jurisdiction added to this:

> [We are told]…that it can't mitigate offending in every case because…basically what we're told to do is to carefully assess those claims, because if you use it as mitigation, it's almost inevitable that it's a major factor for everyone. So yes it is a mitigating factor. But how far it goes really depends against the background of the seriousness of the offending. (J4)

This was the view in a different jurisdiction:

> The court here, Court of Appeal, said that it's not a mitigating factor other than in exceptional cases… I think notwithstanding that distinction, or that limitation, about the circumstances in which addiction mitigates, most judges in practice regard a person with a drug dependency in a somewhat different category than a person who is simply selling for profit, absent other criminal charges, which elevate the objective gravity of the offending. If there's dependence and it's associated with gross violence, well, that's a different category and that person is simply trafficking. (J7)

In our interviews, it became evident that the presence of addiction can influence sentencing in other ways too. When discussing factors taken into consideration in the sentencing process, judicial officers frequently referred, as mentioned above, to the significance of the offender's prospects for rehabilitation along with any evidence of willingness to engage, or actual engagement, in rehabilitation. One judicial officer in Queensland explained, for example:

> Because we are usually sentencing them a fair way, it could be 18 months or two years since they've been charged. I would expect to see real steps towards their rehabilitation… A New South Wales court of Criminal Appeals Decision that says, if someone undergoes residential rehabilitation whilst they're waiting to be sentenced, you can give them the equivalent to that time they spent in rehabilitation off the sentence. So, I always make sure that I give them full benefit of the residential rehabilitation, not only in taking into account their personal circumstances, but the fact that they accepted that constraint on their liberty while they were waiting for the sentence, you get something off the top that's also reflected off the bottom. (J8)

Judges in other states (J6 and J7) similarly mentioned the importance of or being sympathetic to a well thought out or realistic plan for drug rehabilitation and evidence of meaningful engagement in it.

Other Queensland participants explained:

> Because someone who's progressed in their rehabilitation under treatment, who is showing encouraging signs, again that's a mitigating feature and also the courts are loath to interrupt a good course of rehabilitation. So they're less likely to put someone in jail which would have that effect. (J2)

> …what you really are aiming at in sentencing is making sure they go on the right path and you don't make things worse. That you make it more likely that they'll continue with their rehabilitation rather than go down the path of reoffending. (J1)

While rehabilitation was cited in each jurisdiction as an important mitigating factor, participants repeatedly lamented its lack of availability, saying:

> But sentencing is not an easy task and it's about structuring the sentence that on the one hand will act as the deterrent to others, but that on the other hand provides the most hope for the offender. But the lack of treatment facilities and the lack of rehabilitation, I think that operates unfairly on drug addicts. (J2)

We discuss further the challenge presented by the lack of available rehabilitation programs below.

Deterrence

Deterrence is a key principle that guides sentencing decision-making in Australia and elsewhere in the world, and it is specifically identified as an objective in both crime control policy and legislation. Deterrence features particularly strongly in drug trafficking legislation (Bull 2010). It is the idea that fear of harsh punishment will cause potential wrongdoers to act within the parameters of the law. Despite its prominence as a sentencing objective, inconsistency was evident in both our analysis of the sentencing remarks and our interviews with judicial officers in how the sentencing objective of deterrence was applied and understood. The rationale for increasing sentence severity for drug offences relates to the significance of general and individual deterrence as a sentencing principle. This rationale was often repeated in sentencing remarks.

For example, in NT021SC, it was suggested that 'the community expects that this kind of conduct must be discouraged' and general deterrence is required to 'be strong enough to show other people that they should not be involved in the drug trade either'. Elsewhere the point was made that defendants are therefore instructed to expect severe punishment because of the need to protect families and communities from 'havoc' and 'suffering' (ACT008SC) and deter others who might be tempted to distribute drugs (WA001SCA). These themes were even more salient when considering street-level distribution of drugs such as methylamphetamine and heroin, which it is argued have the potential to 'lead to antisocial criminal behaviour' (TAS048SC), inflicting degradation and violence 'on the tens of thousands of people it comes to dominate' (NSW022CCA) and 'wreaking the sort of havoc with which the courts are all too familiar' (NSW044CCA).

In our analysis of sentencing remarks, some tension was evident between the acknowledgement of offender circumstances, such as addiction, and the application of the wider sentencing principles of general and specific deterrence. Many judges see low-level supply for funding addiction as justifying sentencing discounts, but for others the tendency for minimally commercial suppliers to supply the addictive substances that they use at street level to the public at large (not to users known to them) increases the seriousness of the offence. In this context, the need for the application of general and personal deterrence was based on the understanding of drug addiction as a 'social evil', with the 'lives of addicts being damaged, often irreparably, sometimes even ending in death from overdoses'. There was also a focus on the effects of addiction on 'other members of society, such as the wider community and families of drug users'. Deterrent sentences were thus intended to dissuade 'those who may be tempted to engage in an ongoing trade in heroin' and, in particular, 'to deter those who are minded to stand in their shoes once they are apprehended and sentenced to imprisonment'. In sentencing remarks, it was claimed that the use of these principles is necessary due to the 'almost endless supply of street sellers willing to move in once others of their ilk are taken off the streets' (*R v Khalad* [2001] NSWCCA 169). These sentencing remarks speak to the symbolic, or denunciatory, significance of the principles of deterrence, the intention of deterrent sentences being to dissuade offenders from future offending.

The following quotations taken from our interviews with judicial officers provide examples that demonstrate a similar appreciation of the symbolic significance of deterrence in drug law and sentencing. The following comment represents the view expressed by several interviewees (including J6 and J8) on the symbolic significance of deterrence:

> They are matters that the law says we have to take into account, and we do, but whether you believe it's going have any real effect is another thing. I think when a judge has to express the mantra about general deterrence, its one positive effect is that the community reading the sentence or hearing about the sentence will know that at least the judge has considered the risk to the community and the prevalence of whatever it is. …So it's got that retributive element to it, sort of ring about it. (J10)

Expressing the view that these principles are symbolically important, however, is not the same as claiming they are effective. While some of our participants seemed somewhat agnostic about how effective such principles were in the context of preventing drug trafficking, others indicated clearly their assessment that any claim of deterrence was a 'bogus mantra' (J7). Those who were more critical said:

> I don't believe that general deterrence works for drug, violence, sex or DV, but the SCA says it is an important consideration so I wouldn't go against it but I never mention general deterrence. I'm sceptical about general deterrence. (J3)
>
> It's a favourite mantra of the law…It's a mantra without much substances. What's the objective proof of something like this? The stats show growing drug use, not declining drug use, a greater variety of drugs and people prepared to take the risk notwithstanding the consequence… (J7)
>
> I mean look to be brutally honest I wonder how much effect general deterrence [has]…I mean the community likes to think oh yes they've been put away. Sometimes it's certainly good that certain people are put away. But in terms of deterring others, I don't think it deters people at all. (J9)
>
> Well, the cloak of anonymity in this interview means that I can say that I hold very little regard for general deterrence. I don't think it works generally. I think it works in some limited cases, like drink driving. …Speeding, anything to do with your car. (J10)

Some participants, reasonably, linked the limitations of general deterrence to the perception among offenders of the limited likelihood of detection of drug crimes and dishonesty crimes, or the irrelevance of deterrence in the context of crimes of passion. Others cited the public's lack of understanding of the nature of sentences for drug trafficking (J4, J6 and J1). They laid the blame for this with the popular press. J4, for example, said:

> General deterrence, you know I have to believe that it works at some level but I just don't think it does. I think there's a perception out there that people get bags of lollies for drug offending. That's perpetuated a bit by the press who tend to print the cases where people do get apparently light sentences. They don't publicise the run-of-the-mill, day-in/day-out locking-people-up sentences that we impose, so people are shocked when they get here. (J4)

> …one of the depressing things that doesn't change is for low level drug use and supply, penalties seem to make no impact whatsoever. It's different with [commercial] trafficking… They do know. It hasn't stopped them but at least they know. Whereas very often people involved in supply or use of drugs, they have no idea and it has no impact. It is never reported in the press so any idea of general deterrence is just fictional. Because they don't know about it. It has no deterrent effect. (J1)

J5, who was strongly supportive of the principles of specific and general deterrence, offered a different assessment of the press. In J5's view, the general public is aware of laws on drug trafficking and the nature of penalties, saying:

> By and large they do [know] because of the newspapers and the television, and the community is much better educated now because of that, and also because of the raft of crime and punishment documentaries and television shows. I mean juries now are totally different. I get forensic questions from juries. Can we please have the forensic report, was DNA taken, did the accused refuse to answer questions, can we please have a copy of the police file? So the public are now much better educated than they were, and I think everybody pretty much knows that drug trafficking is wrong now.

Contrasting with the views expressed by J5 above, one reason posited for the lack of a deterrent effect was the normalisation of drugs. Participants described how young people just don't realise that what they are doing is a crime:

> Young ones involved with party drugs don't realise the seriousness of their behaviour—drift into it. It [party drug use] is normalised all their friends are doing it… (J3)

> What worries me is that the general deterrence isn't happening. Because the message about…how serious that sort of activity is just doesn't get through. So we see a fair number of young people who start off just…buying the odd pill and end up trafficking because of the general progression…General deterrence isn't working very well…at all because I just don't think a lot of young people realise what they're doing is actually drug trafficking. (J4)

> You think they think about it? What's the sentencing level? In their lucid moments, maybe they do. Commercial drug traffickers it's a business risk. Deterrence is undoubtedly important. Very important. …Sentences have to be structured in such a way that they have an appropriate deterrent effect. But as that flows through to have an impact on the decision made by an 18 year old at some night club to sell a few pills, I wouldn't think so. (J2)

More optimism was expressed about the usefulness of specific, or personal, deterrence, particularly in relation to social supply when offenders were not drug dependent. J4 said (and J6 made a similar point):

> Specific deterrence works well where there's no addiction…where kids just don't see it as a serious thing because it's socially normalised. I think it works well because they're just horrified at that fact that they've suddenly got caught…and they are now a criminal for behaviour they didn't realise was so bad. They thought, you know, maybe a little bit risky but not to the extent that it is.

It was also seen as important by J3 (J1 and J8 expressed similar views) for dependent users at a particular point:

> …it is a matter of timing getting them when they're on remand, working on becoming drug free, making progress. It's a wake-up call. Offenders sometimes say: I'm glad I got caught—it made me wake up.

There were some reservations about the value of specific deterrence for those who are drug dependent. J6 explained that it is not so clear for those who are addicted:

> …that's tricky because it really depends where they're at with their addiction…if people are in the grip of an addiction, that's not going to work for them. You know, they're addicted and they're going to take the drugs if they're there to be taken.

Sentencing frameworks and the future

To recap, the results we have presented above encompass a systematic qualitative analysis of sentencing remarks from 551 cases gathered from across eight Australian jurisdictions and integrated with interviews with 12 judicial officers with considerable experience in sentencing of drug trafficking matters, from four Australian jurisdictions (New South Wales, Queensland, South Australia and Victoria). The focus of our analysis was on sentencing decisions in cases of illicit drug supply characterised as social supply or minimally commercial supply. The reason this is significant is that, to date, most research has focused on more serious drug trafficking offences in Australia—importation and possession of marketable and commercial quantities of border controlled drugs—not on the exploration of sentencing trends at the lower levels, and how courts deal with offenders whose profiles blur the edges between categories of offences (Mizzi, Baghizadeh & Poletti 2014; Sentencing Advisory Council 2015).

This study therefore focused on providing a detailed account of how the judiciary currently assesses different types of supply, and the consistency in and proportionality of the sentences applied. The analysis of sentencing remarks demonstrated offenders involved in social supply and minimally commercial supply regularly came before district and supreme courts on drug trafficking matters. While the number of social supply matters in our sample was small, it is likely that this was an under-representation of those types of cases heard in higher courts. It is possible that it was an artefact of our sampling method, which, as stated, was restricted by the availability of transcripts through Lexis Nexis. These were therefore supplemented by electronic records sourced directly form jurisdictions where sentencing remarks were not available on the database. A greater proportion of social supply cases were represented in the samples provided to us directly through the Tasmanian and Northern Territory jurisdictions. In contrast with the small number of social supply cases, minimally commercial supply cases made up most cases that came before the courts.

Our empirical analysis demonstrates, across Australian jurisdictions, sentencing in drug trafficking cases does differentiate social supply and minimally commercial supply from other types of supply. It also shows that, while this is the case, there is some variation in sentencing practices for all types of supply across and within jurisdictions. For example, sentences for social supply matters ranged from a fine or intensive correction order to five years imprisonment and, for minimally commercial supply, from a fine to six years imprisonment. This perhaps is not surprising given the diversity and complexity of cases that come before judges, and the range of mitigating and aggravating factors that are taken into account in formulating sentencing decisions. This variation warrants more detailed analysis and should be the subject of future research.

Nevertheless, considering the overall results of our study, we can agree with Hughes et al. (2014) that thresholds are in an ineffective means of differentiating between users and dealers. As these authors cautioned, the threshold system impacts in negative ways on marginalised heavy drug users, but, as we have shown, this also extends to those who engage in social supply.

This last part of the *Results* section focuses on how judicial officers view specific elements of the sentencing frameworks that shape decision-making. It also explores their views on potential legislative and sentencing reform.

Thresholds and sentencing

When asked about the usefulness of threshold quantities of illicit drugs as a means of distinguishing between users and dealers, and as a guide in appropriate sentencing, judges across the group interviewed as part of this project described them as being, at worst, ‘out of touch’, ‘stupid’, ‘arbitrary’, ‘misleading’ or ‘meaningless’, saying ‘they don’t keep pace with the times’.

Various accounts were given of the limitations of thresholds, including the comment that the amount held at the time of arrest may not be an 'accurate' or 'reliable' guide to the level of dealing involved. One judicial officer, J3, explained, 'You might have just got your stuff in, so the quantity may not reflect your real participation,' and, further, how they try to bear this in mind. 'But the legislation tells us that—what the maximum is for each threshold, so we have no choice about that'.

This view was repeated by another participant, J4, who said:

> They are a bit problematic in the sense that it depends where in the cycle the police arrest somebody. Because some people you see have got jobs and they have a bit of money and they realise that the more you buy the cheaper it is and also the less risky it is, because if you buy in bulk, you're only doing one transaction as opposed to having to do half a dozen if you buy in small quantities. So if you can afford to buy in bulk it makes sense. If the police happen to arrest you at the time you've just made your purchase as opposed to when you've pretty much used it all up there you are; massive quantity of drugs which may well all be for personal use… The same with cannabis. If somebody just happens to be very good at growing it, then bingo…
>
> If they're a heavy user, then they can have a reasonably substantial amount. It doesn't necessarily tell you that they're trafficking.

A judicial officer from a different jurisdiction was of the view that thresholds were 'out of touch'. Citing the circumstance of aggravation for possession of methamphetamine as having two grams, they went on to explain:

> With the much greater use of meth some addicts use quite a bit. It's not unheard of for them to be in possession of a much greater amount than two grams. You can still be satisfied that they have it for personal use, but you have to sentence them on the basis that they've pleaded guilty to an offence with a circumstance of aggravation…so thresholds don't keep pace with the times. (J8)

The problem with thresholds arises, according to J7, because they are unable to distinguish between different categories of offenders:

> You want more room to move where people are caught by a threshold but are essentially selling drugs to a circle of friends and acquaintances, who themselves are users, to feed their own habit, perhaps minimally for a bit of profit.

J7 went on, saying:

> There's no rhyme or reason why a person with a similar quantity but one who's doing it overwhelmingly for profit and another who's only doing it in a very secondary way for profit should be treated in a similar manner, notwithstanding distinctions in terms of their personal circumstances.

Those who were a little more circumspect did suggest that it was hard to imagine how else the problem of distinguishing between users and dealers and ensuring proportionality in drug sentencing could be addressed (J3). But, even in providing this caveat, they said that, in principle, there wasn't a problem as long as 'you're conscious of the imprecision', and said, 'You've got really to look at the behaviour rather than the raw fact of the real quantity' (J3). In short, it was the circumstances of offending and of the offender that were important.

In discussing the role of thresholds, it became clear that the judicial officers we interviewed saw them in a limited way. Mainly, they saw them as policy settings that determined which court a matter would be heard in—for example, in J2's opinion:

> So that's just a jurisdictional thing. …it's just shifting people around as to which court—where your entry point is. So I don't know that that ultimately impacts in terms of the sentencing discretion… Just that the penalties are higher. So that certainly impacts and there might be a case for a higher threshold. …there is a strong case for a sensible review.

In New South Wales, a more complex situation exists because there are different thresholds that are taken into account (see *Thresholds and cases of social supply and minimally commercial supply*). J11 described how the trafficable threshold is evidentiary, and the indictable threshold is jurisdictional (ie they determine the court where the case will be heard), explaining that officers of the court tend to 'proceed on the basis that they are indicators of objective seriousness when they shouldn't be' (J11).

In other jurisdictions, there were specific provisions that affected the way that thresholds were applied. In Victoria and South Australia, these included the provision for a separate charge of supply. This goes some way, perhaps, towards explaining the absence and near absence of social supply cases in our Lexis Nexis sample of sentencing remarks from Victoria and South Australia. Victorian participants said that they rarely heard matters relating to social supply because they were dealt with as *trafficking simpliciter* in the Magistrates' Court, which is the least serious form of drug trafficking and the accused can be sentenced to a maximum of two years imprisonment for a single offence and five years for multiple offences. As noted in the section *Court acknowledgement of social supply characteristics*, such cases come to the county and higher courts on appeal. In South Australia, judicial officers similarly referred to a separate charge of supply for cases where drugs are 'given over without payment'. They explained that 'it's well recognised that that is much less serious' (J5). When asked if that view was affected by quantity, the judge responded: 'No, no. As long as the court is satisfied that it's for supply there's no deeming provision there…' (J5).

In Queensland, while there are threshold amounts that determine the jurisdiction of a matter, there is an absence of deeming provisions within the legislation—that is, unlike other states, there is no provision that, if the quantity is above the relevant threshold amount, it is deemed to be supply. One of the participants from this jurisdiction explained the benefits of this approach:

> It's not decided just by the amount of the drug. You've got to take into account all the circumstances. So it's much better when the legislator does not deem things to be of a certain type. Because you could have a small amount of drug and still be a commercial supplier. It could be evidence of trafficking commercially in drugs. Or you might have a much larger amount and it's really for personal use and circumstances have meant that you have had that drug in your possession because you bought it more cheaply or had the opportunity, or you came into some money which you could use it for. So…it's much better to actually sentence for the particular crime and the particular person. (J1)

For that judicial officer, the benefit of this approach is that sentencing is considered to respond to the 'particular facts of the crime and the particular person who committed it'. They acknowledged that this did mean that there were disputes as to whether or not possession in a particular matter was commercial, and said 'but then it's up to the judge to sort that out. That's what we do' (J1).

Reflecting on the usefulness of thresholds, another participant in Queensland explained the particular problems that arise in that jurisdiction:

> …it gets all blurred. Trafficking used to be commercial trafficking…so the definition of trafficking drugs hasn't changed since it was enacted. …that's 1986 and so when it started trafficking was commercial trafficking. Carrying on a business…in the supply of illicit drugs. But somewhere along the line it was argued successfully that trafficking could include not really a monetary transaction…it could include transactions where you're getting a benefit and that is, you're trafficking for someone else, for example, say you're selling X number of drugs and you're going to keep some for your own habit, and that's regarded as trafficking. I must say, I've always had a lot of trouble with that. I would like to see in the law a clearer demarcation between people who are selling for monetary profit and those who are doing it to support their addiction, or those who are doing it a social sort of setting. (J2)

Approach to sentencing

As we stated, one of the aims of this project was to investigate how the judiciary currently manage the relationship between different types of illicit drug supply and the consistency in and proportionality of the sentence applied to trafficking described as social supply or minimally commercial supply. This required gaining some understanding of how judicial officers approach sentencing and how they formulate decisions that address the specifics of each case within some of the legislative and policy constraints (such as quantity thresholds) that exist in this context. There was considerable consistency in the responses from judicial officers across jurisdictions about how they approached drug trafficking cases, but each one tended to focus on particular elements of the decision-making process when asked to outline how they engaged in sentencing these types of cases.

Most emphasised the individualised nature of sentencing and the importance of responding to the variations in the spectrum of cases, from low-level supply to commercial trafficking, including the circumstances of the crime (noting that 'they are extremely varied')—as well those of the individual (J1, J3, J4 and J9). As one participant explained:

> So every variation is a variable in a sentence to be imposed. So there's no standard. It really depends. I mean people do tend to fall into certain categories from time to time. But really, you are sentencing individuals for crimes that are always different. Every case is different from every other case. (J1)

Others from different jurisdictions expressed similar views, adding:

> We're obliged to take into account the circumstances of the offender and the offending. So, in other words, we try to work out where in the hierarchy of seriousness the particular offending is… Sentencing principles require us to be as individual as we possibly can. The full court says that at the commercial level, the really commercial level, you're not to be interested in the person. If they're dealing in large quantities of drugs for profit, with signs of wealth and so on, that it doesn't really matter what school they went to or it doesn't matter much. You're done. There's this range of penalties you'll get. But everyone else, it's really got to be given individual attention. (J3)

Referring to the context of sentencing, yet another (from a different jurisdiction again) similarly described the individualised approach, saying:

> So you assess the objective gravity. You look at obviously the normal considerations, maximum penalties, prior criminal history, personal circumstances of the offender. I try wherever possible to give someone who's worth a risk a chance to come good. Sometimes, it's not possible…because of the nature of the offending, because of their criminal record, because of their own inability to confront their demons. I try and do that where I can, so judicial discretion and the room to move or manoeuvre is very important. We have a more flexible sentencing regime than in some cases, in which as I read it, judges are very frequently reading pro forma sentences and ticking boxes. We don't approach it in that manner. …Having said that, there are factors which we have to have regard to in the *Sentencing Act*, and we must do so, and do so. (J7)

Alternative responses to this question also described beginning by assessing the gravity of offending. Interviewees outlined methodical processes for understanding the circumstances of the offender and of the offence, which required a focus on the facts of the case. Participants went to some length to underline the importance of establishing those facts. They also discussed some of the challenges in that process. One interviewee, in explaining that sentencing 'proceeds on agreed facts', outlined the start of the sentencing exercise:

> …the first thing you do is you assess the offender's culpability, or the objective seriousness of the offences. Because that will determine a starting point for the sentence, before you take into account factors, personal to the offender, mitigating factors and assessing culpability of the offender, on that scale, we're talking about. …you've got [a] commercial trafficker, who isn't addicted and is just doing it for money at one end of the scale. At the other end of the scale, you've got persons who are drug dependant who are doing different things to fund their habit. Now, that may even extend to supplying drugs to someone else for on-sale. Or it may just extend to buying in bulk, in a group of friends. But the culpability of those offenders compared to the commercial drug traffickers, there's a gulf between them…
>
> Now the starting point for those offenders, that is the offenders who are doing it to support their habit, particularly those that have no previous convictions and have other things in their favour, the starting point is pretty low. Even before we get to mitigating features. Whereas the commercial drug trafficker, that's where you're 25 years, 30-year maximum penalties. (J2)

While starting with the facts of the case might seem straightforward, another participant explained that a challenging aspect of the task was being 'able to find facts' (J11). They said that this was hampered because defendants rarely give evidence in a sentencing proceeding and lamented this, saying it was unfortunate, because 'without evidence all you're really left with is history given in a psychological or psychiatric report and the superior courts tell us that you must exercise caution before you rely upon a history that's given in the report which remains untested' (J11). This participant went on to explain why this was significant:

> …[to] find exceptional circumstances (required in the past for a non-custodial sentence), or even here now under the present regime, to find that the person's long-term prospects of rehabilitation are better served in the community rather than in jail—that depends on the finding of fact. So unless you're given that by counsel as a concession by the Crown, that is also very very difficult, because it's got to be based on a finding of fact at least on the balance of probability. (J11)

These comments about agreed facts and the difficulty of fact-finding point to the important role played by reports and submissions in the decision-making process, and the ways that judicial officers rely on the prosecutors and defence counsel not only to provide relevant information but also in the testing of that information. Judicial officers described how they got quite a lot of information as part of the sentencing process. Submissions are made by the Director of Public Prosecutions (DPP) and defence counsel. They can order pre-sentence reports, particularly if someone has been on a form of supervised bail or if there is an issue that they have been 'alerted to by counsel' (J4). One judicial officer specified:

> Well I focus on each case. I just read what I'm told to read. I listen to the evidence. I rely a lot, deliberately, on counsel—both sides. I expect to be helped. I listen carefully and then decide what I should do in that case rather than be guided by some overall sense of policy. (J6)

They also said:

> It depends on good counsel, prosecution and defence. I really emphasise the prosecution as well, because defence usually do a good job. But it's really good to have a contradictor, to have somebody at the other end of the bar table saying, yes but, yes but. …it is really helpful when it does happen—when you have a contradictor. …As a judge I like a contradictor. I like to hear both sides so that I've got a sense. Okay I've got—yep good, good. That's what I'm going to do. (J6)

Another participant also pointed to the important role played by good counsel in the sentencing process:

> It's just a matter of synthesizing all of the information. I have regard to the comparables and I go into Court. Then when we have a discussion, I like to throw out to the prosecutor and the defence what I'm thinking and get their reaction. It's ultimately by the time we get to end of the sentencing hearing I'm fairly clear what my sentence will be. (J8)

The value of good counsel was evident in the transcripts—for example, in the case of VIC003SCA, where insufficient guidance was provided by either the defence or the prosecutor on the nature of a new drug (BZP) and, according to the remarks made in the appeal, 'the judge was left to sentence the applicant without having even the basic information that could assist her in assessing the gravity of the offending'.

Perceptions of sentencing frameworks

When asked about the sentencing frameworks and guidelines that shape their decision-making, judicial officers referred to the variability of the legislation and guiding cases from the court of appeal in each jurisdiction. One participant from Queensland was of this view:

> Well the sentencing frameworks, the *Penalties and Sentences Act*. As construed by the courts, and sentencing levels which are determined by the Court of Appeal, yes, I do think it works well. But I think that the courts strive to hand down sentences that are appropriate to having regard to the considerations we're required to have regard to under the *Penalties and Sentences Act*, and I think working well with a very difficult problem. Working as well as it can be expected to work. (J2)

An alternative view from that jurisdiction, though, was that the guidance provided by the court of appeal was much more responsive to a specific situation than legislation:

> I mean, in terms of the sentencing levels for particular types of conduct, the Court of Appeal regularly sit on appeals and particularly applications for leave to appeal against sentences. The applications by the Attorney General (AG) complaining about an inadequate sentence. But the Court of Appeal sets the sentencing levels and the great thing about that is that, it provides, I think, robust guidance to trial judges about—sentencing judges about the appropriate levels constantly. (J1)

In other jurisdictions, there had been recent changes to legislation that were said to both help and hinder sentencing processes. In South Australia, changes to the *Sentencing Act 2017* were seen as expansive and restrictive. They were expansive because they provided 'a few more options' (J4). They included the introduction of intensive correction orders and more clearly defined home detention, allowing more scope for offenders to be supervised in the community. But, at the same time, J4 said:

> There are some things which reduce [a judge's] discretion in terms of dealing with people; for example…people can quite easily become serious repeat offenders, which absolutely limits what we can do in terms of sentence…[It's] an issue because you can actually commit those offences in circumstances that your average person would think, well, that's not a serious and organised criminal, that's a person who's just, through circumstances, committed that offence as opposed to a lesser offence.

Judicial officers who took part in this study valued their discretion in sentencing and were strongly of the view that any move to introduce a less flexible system or grid sentencing or presumptive sentencing should be resisted. One participant reflected:

> South Australia has always resisted. The court here has always resisted grid sentencing. Now one day, our government will force it on us, but the court here has resisted it in all sorts of offending. They were asked years ago to do it for 'caused death' and they refused. I'm very glad they did. (J3)

In another jurisdiction, the following strong opinion was expressed when discussing sentencing frameworks:

> I don't think you can come up with a grid for sentencing. The High Court has said that it's a process of instinctive synthesis and it is. It is. It's an art, it's not a science. I don't think it lends itself to a grid saying this person has no previous convictions, it's the particular drug, it's that number of grams, it should be X. …it just can't possibly work because there are—and you're very familiar with the *Penalties and Sentences Act*, but if you have a look at the list of considerations, there's a place in there for compassion, and there is a place in there for hope. They are important things. (J2)

In responding to our question about sentencing frameworks, another judicial officer took a different approach, cautioning that we should not underestimate how well the criminal justice system in Australia works. They explained that, when compared with many other countries in the world, judges in this country are independent and fair, and will listen:

> They'll generally apply the law. They'll apply the evidence. They are trained in the sense that they've had a lot of experience themselves. They take their jobs seriously. They're responsible. You will feel—you should feel in most cases, not all—listened to and your case will be disposed of appropriately. If the judge makes a mistake there is a Rolls Royce system for you to go to court of criminal appeal where you will get heard again. (J6)

J3, J4 and J5 also referred to the value of the court of appeal where there was an error.

At the same time, however, this flexibility can be precarious. For example, a recent decision by the Court of Criminal Appeal in New South Wales (*Parente v R* [2017] NSWCCA 284) was cited as enhancing the discretion of judicial officers in sentencing drug trafficking matters. In the view of one participant, following this decision, things had moved quite quickly from a situation that required 'exceptional circumstances' for a non-custodial sentence in drug trafficking matters to one where intensive correction orders 'are now given' more readily. In their view, they said:

> …we're still at a very elementary stage. I mean ultimately we don't know whether the Court of Criminal Appeal might then look at this again and say no, no, no, it's been pulled too far back and we go back to some hybrid between exceptional circumstances and the long-term behaviour of change. (J11)

The vulnerability of the system was linked to not only this type of potential turnabout but also the pressure felt by courts as a result of the influence that views expressed in the popular press can have on parliament. In short, there was a potential follow-on effect to sentencing practices:

> Even if Parliament doesn't change maximums, courts have frequently said in the last number of years, we've got to have greater regard for maximum sentences. We've got to up the sentence in respect of drug matters. So does that affect an individualised approach? Yes, it does to some degree. It doesn't eliminate it, but it does mean that harsher sentences are imposed, even perhaps in cases where in the past a non-custodial therapeutic sentence might have been considered. We had the case of *Boulton* in Victoria…which provided for the use of community correction orders where previously suspended sentences had been imposed, even for serious offences. As time has gone by, that's been whittled away, and there are very few—although barristers always cite *Boulton*, in reality, the practical application of that has been whittled away very much to a significant degree. So despite all the medical knowledge, all the experience of police on the job, retired AFP commissioners and the public debate, the shrillness in certain sections of media have had an effect on sentencing practices as expressed by the Court of Appeal. I think that's undeniable. (J7)

Finally, in relation to how judicial officers viewed sentencing frameworks for drug trafficking in their jurisdiction, several were critical of how these worked at the lower end of illicit drug supply. One participant suggested it did not work because 'It doesn't distinguish between—it doesn't even recognise the difference between criminal and non-criminal drug trafficking. So I think it's poor like that. It's not even recognised' (J9). Another pointed to its limitation in relation to couriers and crop sitters. Those filling these roles were described as often vulnerable and at the very bottom of the chain in the network of commercial supply. J10 said:

There's one area I have a personal problem and that is with couriers. I think starting at the bottom with crop sitters, it's—we have a lot of flexibility in that area. Just by reason of the cases for example. You can isolate, for example, someone who didn't know what they were doing basically. Where they went to a house and watered a crop or did something. Their level of knowledge and criminality can be very low and so you've got a big sentencing range there. But with couriers, they're often…people from poor countries who get identified as someone who would be useful for this role. They're desperately poor… So I don't think it deals well with that, with the lower level ones necessarily. The higher level ones, yeah, I haven't got a problem with. Yeah. [Those at the lower end] they're the people who are more vulnerable to this type of exploitation.

Social supply, minimally commercial supply and diversionary programs

As previously stated, another major objective of this research was to provide a clearer understanding of current practices by which judicial officers discriminate between users, social suppliers and traffickers when formulating sentences in drug trafficking cases. We were also keen to consider the implications of our research for legislative reform. Specifically, we wanted to know if there was scope for the reconfiguration of Australia's Illicit Drug Diversion Initiative in ways that can consistently and proportionately accommodate those involved in social supply and minimally commercial supply. When asked about the possibility of expanding diversionary programs to include those appearing in matters relating to social supply and minimally commercial supply, participants first drew a distinction between the needs of different offenders, saying:

> Yeah. So maybe something for the ones who are dealing to their friends… Then perhaps something else for those who are drug dependent. …you know, they deal to their drug-dependent mates who deal back to them… (J4)

> See, part of the problem is, for some young people once they're charged it doesn't matter whether it's a non-serious offence or whatever, that might be enough. But, for others it might be the prospect that they're actually facing a real prospect of going into custody. Then that is the wake-up call. I don't think there's one answer for all young people. Better education about the downsides of being involved in the criminal activity that's associated with use of illicit substances, I think is really important and the effect on their health. (J8)

> That's a matter for the policy makers. It's hard, because a young person for a concentrated period of time just gets carried away and does a lot of selling; and it truly is trafficking. It possibly should still be treated as trafficking, but taking into account their personal circumstances. But someone who is just supplying to a few friends because they're using themselves, maybe they should be charged with supply where they could perhaps be the subject of drug diversion. But that's a matter for the police and the DPP. (J8)

> Social suppliers—probably not because look they've just done stupid things. Often by your definition they're not addicted and don't need therapeutic jurisprudence. In the middle category of minimally commercial dealing yes. The scope is not so much in the legal system as in—well it is in the sense that—drug courts are an excellent, excellent idea. I think so anyway. (J6)

According to these participants, there isn't a single answer for responding effectively to the different types of supply, whether social or minimally commercial. They do, however, draw a distinction between them and suggest that a range of options, including education and treatment, are needed. Most agreed that, for drug dependent minimally commercial suppliers, diversion should be a key consideration—for example, according to one clearly enthusiastic supporter of the provision of diversionary programs at this level:

> Absolutely. It should be first port of call. That's what we should be doing. [There is] virtue in having it court supervised, because…there's some virtue in having, a disincentive to return to drug use as well as a positive incentive. (J1)

But they underlined that targeting and preventing the problem behaviour was not an issue for the criminal justice system alone, saying, 'But just seeing it as a criminal justice problem is not going to provide a solution at all' (J1).

Another was more qualified in their support:

> Yes if you get the programs. There aren't the programs. Diversion programs are a great thing governments like to talk about. Drug diversion, because it sounds great, but there just aren't the programs available to respond to the needs of offenders. (J2)

Throughout the interviews, participants unanimously and repeatedly referred to the need for more rehabilitation options and treatment services for people with problem drug use in particular. Views were divided on whether this was a matter that could be addressed by the criminal justice system or whether it was a health issue. Some were clear that it was predominantly a health or social problem:

> I think for people who are addicted, it's a medical issue. It should be a medical issue. Well predominantly. (J2)
>
> It's a health problem. It's a social disadvantage problem. It's people who live in economically and socially deprived areas turning to drugs because they haven't got anything else to fulfil their lives. So they numb themselves with alcohol and drugs. So those are the kind of social programs we should be looking at rather than just policing programs. …You do obviously have to police the high level drug traffickers and the people underneath them that they use. But we need a much more rehabilitation and health directed approach rather than as a criminal justice and punishment approach. (J1)

J7 and J3 made similar points. J11 said:

> Yes. Yeah. Look, I mean much of this really has its foundation either in a medical or psychological problem, and once that's identified they're the better people to deal with it; not here. We don't have the skills to help people… We don't know anything about counselling. We don't know what the appropriate approach is for that particular person and we don't want to sort of believe that we can['t] do things generally, but sentencing is bespoke; so is counselling. So is counselling, so you know it's all a farce really. They shouldn't be here. They shouldn't be here really. You know, but that's the way we work.

Others agreed that, although it was primarily a health or social issue, a possible solution would be to provide judges with 'a vast array of rehabilitative tools that [they] could throw at a lot of these people and supervise them' (J9). The view that there were not enough options available was repeated often. Two judicial officers in Queensland and one in Victoria indicated that, in the course of their long careers on the bench, available treatment options had shrunk in number or become less accessible (J2 and J9, and J10). As other participants suggested, a key issue for judges is the availability of options and resources:

> In the sense of resources often what you need as a judge is somebody to come before saying look yes, they've done the wrong thing. They know that. They've spent 12 months already or nine months in custody. We've got this lined up. We've got that lined up. They're booked in for Tuesday week. It's a six month residential program. If they breach it they come back before you. The judge says, thank you. Good. I'll send you there. You breach it, back before me. You breached it and you'll go to jail. It is a matter for you, if you tell me you want to turn your life around. So to answer your question it's resources that we can send people to… But if [government would] put more resources into it, it would be really good…so that judges have the capacity to make orders that will be therapeutic and effective… (J6)

> What would make things a lot better for sentencing would be if we had more availability of rehabilitation and more ability to send people off and monitor their rehabilitation. I mean, we put them on a suspended sentence bond, for example, here and we leave it to Corrections to deal with them. We only get to see them if they breach. There's a bit of discretion in there. …So you've got people at a time in their lives when they might be amenable to getting that help, and what we've got is a pretty blunt instrument in terms of, well, here's your sentence. If you don't do these things, if they're available, then you'll be serving that sentence. It's just a big stick over their head but there's not much in the way of assistance to get people there. So that's what worries me the most about the sentencing, is the fact that we don't have the ability to—or the resources to get people the help they probably need. (J4)

Most participants argued that multidisciplinary and multifaceted approaches are needed:

> There's no point in just looking at one factor in the absence of others. So you can have a drug and alcohol counsellor, which is fine and dandy, but if you don't provide a series of other services, the drug and alcohol counsellor is probably whistling Dixie. So it's a matter of having an approach which is multifaceted but is justifiably so, because you can't just look at the cost of the prison system. You have to look at all the other services that people need, whether it's public housing, whether it's social security, whatever it be or mental health. The cost of having and sustaining a drug-dependent person is very great over a number of years. (J7)

They discussed how, at various times and in various contexts, innovative judicial officers had created forms of diversion through a structured response of judicial monitoring. For example, J1 described an informal diversion program that they introduced in the Supreme Court in the late 1990s to early 2000s that, according to their follow-up, had a positive effect in reducing offending. J6 provided accounts of how various judicial colleagues had managed a list that involved bringing offenders back before the court:

> It's a bit like the drug court. They bring you back. How are you going? What happened when you fell off the perch six weeks ago? Can you explain it? I won't breach you this time but boy—so they keep them. Now arguably that's more a drug court job than a judicial officer's job—well it is a judicial officer's job but more—we do a whole lot of extra things apart from that. But that's one way of dealing with it.

Both J9 and J10 described how they structured the sentencing process to provide de facto judicial monitoring in particular cases. Some of these examples bore similarity to drug court models, including urine testing and supervision through community corrections, and participants framed such approaches within a context of therapeutic jurisprudence. In one jurisdiction, there was some discussion about the introduction of a version of the drug court at a higher level:

> So you have to look at other approaches if you're to deal with their individualised needs. Drug courts are one such approach, and all the literature shows that they have a much higher rate of success than standard community-based orders, but they're not the only approach. The medical profession is for the most part fairly enlightened… They're well informed, the literature's there. There's plenty of evidence that shows that other approaches should be adopted. Courts are only one part of that, and ultimately, government has to commit to it. It's not cheap, but it's not as expensive as the way we're doing things now. (J7)

Participant J7 also described how in their jurisdiction a submission to government for the provision of a drug court at the higher level (higher than a magistrates court) was being developed and there was 'a lot of bureaucratic support'. This optimism was evident in a response from another judicial officer working in the same jurisdiction:

> We're about to get a Drug Court here I'm hoping and that's going to be wonderful. Something like a Drug Court just is a much better response. It's just far more practical and it works, and it's cheaper. It's productive and it's hopeful. (J9)

In a similar vein, an interviewee in a different jurisdiction expressed the view that consideration of such an option at this level was desirable. J4 made the following two comments:

> Yes. I think there is and I think there ought to be consideration of that. The Drug Courts in the Magistrates Court as I understand it have had some great success. We don't have access to that in this jurisdiction because we're dealing with more serious offences. But I still think that harm reduction and the safety of the community ultimately would benefit from other options.
>
> …I think we ought to have a similar mechanism available in the higher courts so that we can deal with the people who are not the Mr Bigs of the drug trafficking world but are in that range that we've been talking about.

Discussion

This report started with a critique of thresholds of drug quantities as a framework for sentencing in illicit drug supply offences, noting problems due to the inconsistency in designated thresholds between different states and territories, as well as their ability to effectively differentiate drug users from traffickers (Hughes et al. 2014). Efforts have been made to develop a national system of threshold quantities for all states and territories; however, if adopted, this system would introduce a greater risk of users being confused with traffickers. Such negative outcomes are likely to disproportionately affect more socially marginalised and disadvantaged users—in particular, heavy users of methamphetamine—thus reducing the capacity to prevent unjust sanctions (Hughes, Cowdery & Ritter 2015). We flagged that this group of heavy users would not be the only group affected, pointing to the potential for those involved in what research across a range of jurisdictions, nationally and internationally, has defined as social supply to be drawn into the system as well. While there are some significant differences between these two groups of drug users, there are also some important similarities—namely, both groups are likely to buy illicit drugs in sufficient bulk to reduce the costs and the risks associated with their acquisition, and both are then frequently involved in distributing or sharing these drugs within their networks of peers and with friends, for little or no profit.

Lenton et al. (2015) suggest that this blurring of consumption and supply has implications for a review of Australia's program of illicit drug diversion in ways that might assist those found to be involved in social supply or, as we argue, minimally commercial supply so that they might avoid the sorts of erroneous sanctions Hughes, Cowdery and Ritter (2015) warned against above. They speculate (as do Coomber & Moyle 2014 and Potter 2009) that the benefit of their research on social supply—which is focused on the practices and views of those potentially vulnerable to conviction—was that it could be used to brief court and legal officers about different roles in small-scale supply behaviour, which could 'inform opportunities to exercise judicial discretion in these matters' (Lenton et al. 2016: 44).

Complementing Lenton et al.'s (2016) proposal to expand judicial knowledge by briefing members of the legal profession according to the understanding of social supply informed by research on those involved, this study investigated how judicial officers already understand the concepts of social supply and minimally commercial supply and the extent to which they apply them consistently. Our results indicate that judicial officers in this country are familiar with the different roles in social and/or minimally commercial supply. In addition, it is clear that this familiarity often contributes to, or is at the very least considered, in the exercise of judicial discretion in sentencing.

Social supply and minimally commercial supply in Australian courts

Our analysis of sentencing remarks demonstrates that offenders involved in social supply and minimally commercial supply can and do end up in the superior courts (district, supreme and appeal) on drug trafficking charges. In Victoria and South Australia, there are provisions that could potentially militate against such an outcome. In Victoria, any person who traffics or attempts to traffic a trafficable amount of a drug of dependence is liable to a maximum sentence of 15 years. In cases of *trafficking simipliciter*, however, this offence can be heard summarily in the Victorian Magistrates' Court. The Magistrates' Court can sentence an accused to a maximum of two years imprisonment for a single offence and five years for multiple offences. In South Australia, J5 explained that such matters are treated as supply rather than trafficking.

Through our analysis it became clear that sentences differed across large commercial supply, commercial supply, trafficking, and the ones we designate as minimally commercial and social supply cases, with average sentences across these types of offences being 125.4, 68.2, 55.5, 20.1 and 8.1 months respectively. While there could be considerable variation for those involved in social supply and minimally commercial supply—with sentences for each ranging from a good behaviour bond or a fine through to 60 or 72 months imprisonment, respectively—ultimately, the mean sentence for each type of offence was within the range of sentences for possession (two years), rather than supply (10–15 or 25 years, depending on the jurisdiction). Admittedly, for minimally commercial supply, the mean sentence was closer to the two-year maximum sentence for possession. This, together with the sentences at the high end of the range, suggests that this type of behaviour can be punished harshly (see Table 9).

The judicial officers we interviewed recognised that, in the context of social supply, the exchange of drugs often involved sharing for very little to no profit among friendship networks. This is consistent with the findings of Lenton et al.'s empirical study of social supply of marijuana across three Australian jurisdictions, which described 'sharing with friends, or buying on their behalf; supplying small quantities; [and] supplying friends or acquaintances' (Lenton et al. 2016: 30). Moreover, like the social suppliers interviewed by Lenton et al. (2016: 44), who neutralised negative associations they linked to dealers proper by viewing their own supply as 'helping out friends', defendants in this study regarded their behaviour in similar ways.

In the social supply case of NT015SC, for example, the judicial officer explained that the offender 'thought he was helping other people and felt good about that' (see *Social supply* section for further details). Similar explanations of sharing and 'helping others out' appeared in the summary of the facts of minimally commercial supply case NSW021CCA. Indeed, one of the factors that appeared to reduce the considered seriousness of an offence was that supply was to people already known to the offender. For example, minimally commercial supply was seen to be less serious (or harmful) where it involved distribution to already drug dependent peer networks rather than to the 'public at large' (see *Aggravating factors: Culpability* section). This characteristic has been noted as a mitigating factor in the sentencing of social supply in jurisdictions that have developed guidelines to assist with sentencing these types of drug supply cases (Sentencing Council 2012).

Other consistencies were evident between work done to investigate social supply from the perspective of suppliers–users and how the judicial officers in our study viewed this type of behaviour. In research on social supply in Australia (and elsewhere), participants described how 'cannabis access and supply was an integrated and unremarkable part of their normal interactions, with social capital rather than profit being the dominant benefit' (Lenton et al. 2016: 43). Furthermore, while they might understand that, according to the law, their activities would cross the drug quantity threshold into cannabis supply (or trafficking), many participants 'did not seem to engage with the fact that they were potentially exposing themselves to a serious criminal charge' (Lenton et al. 2016: 44).

Judicial officers in our study frequently commented that social supply occurred in the context of the wider 'normalisation of drug use' and pointed to the failure of offenders to realise the gravity of what they had done. As J3 explained, 'Young ones involved with party drugs don't realise the seriousness of their behaviour—they drift into it. It is normalised…all their friends are doing it.' In fact, among the judicial officers themselves, there was an impression that this type of behaviour was less serious, notwithstanding the concerns expressed by some participants about the potential harm that might arise from those vulnerable to mental health issues being exposed to such drugs. This is consistent with Coomber et al.'s (2018) description of the normalisation of drug use as a recognition that, while not everyone is a drug user and drug use is generally not condoned, recreational drug use has shifted from being a behaviour of people in some way on the margins of society, to now being comparatively mainstream. Users are as likely to come from a range of 'normal' backgrounds across the social spectrum as socially excluded populations (South 2004, 1999). This is accompanied by a related shift in the mainstream acceptability of what was termed sensible recreational drug use (Parker, Aldridge & Measham 1998).

The demographics of offenders and taxonomy of offences revealed through our analysis of sentencing remarks demonstrates that the overwhelming majority of offenders in our sample of cases appearing in the higher courts on trafficking charges could be described as being involved in minimally commercial supply. One judicial officer expressed the view that these types of cases are probably far more common but are not evident in courts because so few legal representatives call their clients into the witness box (J11). Those involved in minimally commercial supply were drug dependent user–dealers, who are distinct from commercially orientated (often non-using) dealers proper. The activity of these minimally commercial user–dealers may result in some profit, nearly all of which is usually spent subsequently on meeting their own drug needs.

According to Coomber (2015), this group generally has more in common with social suppliers, being less predatory, minimally commercial and motivated by the need to satisfy their use needs and being users first and suppliers second. They are also far less associated with other harms commonly associated with drug trafficking—violence and intimidation in particular. This distinction was backed up by J10, who described this group as 'small time, those people. They never get involved at the higher end of things because probably they are not trustworthy enough in the first place. They just go from disaster to disaster'. Drug dependent user–dealers of this kind share more characteristics with the marginalised heavy users Hughes et al. (2014) expressed concern for in relation to the unintended consequences of thresholds, than they do with the primarily commercial drug dealer.

The relevance of thresholds

Our research demonstrated that thresholds are an imprecise tool for distinguishing between users and traffickers, and heavy users along with those involved in social supply and minimally commercial supply do end up before the superior courts charged with drug trafficking. These cases generally involved quantities that surpassed thresholds for trafficking, rather than commercial or large commercial supply, although in the context of minimally commercial supply commercial thresholds were more commonly breached, particularly in relation to cannabis in the Northern Territory (Tables 6 and 7).

Judicial officers are acutely aware of these limitations. Most of those interviewed did not view distinguishing between users and dealers as the primary purpose of thresholds. They viewed thresholds simply as 'policy settings used by government' (J2) to determine which court a matter would be heard in. They acknowledged, nevertheless, that this was likely to affect the severity of the sentence ultimately imposed. Judicial officers questioned whether the groups that were the focus of our research should be appearing in the courts they sat in. J2, for example, when talking about young people caught buying ecstasy in the carpark of a night club, said, 'I mean I don't think they should be in the Supreme Court, but they are because [they are] trafficking in a schedule one drug.'

When asked about the usefulness of thresholds to distinguish between users and traffickers and as a guide in proportionate sentencing, participants were aware that these designations are not mutually exclusive categories, and agreed with the negative assessments expressed in Hughes et al.'s research (2014; Hughes & Ritter 2011, and Hughes et al. 2015). The harshest appraisals were that thresholds were 'out of touch', 'stupid', 'arbitrary', 'misleading' or 'meaningless'. Some participants were more prudent, saying that it was hard to imagine how else the problem of distinguishing between users and dealers could be addressed in drug sentencing while ensuring proportionality. J3, who was of this view, cautioned that it was important to be 'conscious of the imprecision' and really 'look at the behaviour rather than the raw fact of the real quantity'. In short, it was the circumstances of offending and of the offender that were more important than the quantity when it came to minimally commercial supply and social supply.

In Queensland, which is the only state that does not have deeming provisions attached to the scheduled thresholds (Hughes, Cowdery & Ritter 2015), one participant underlined the virtue of such an approach, saying: 'It's not decided just by the amount of the drug. You have got to take into account all the circumstances. So it's much better when the legislator does not deem things to be of a certain type' (J1). In that jurisdiction, trafficking is distinguished from supplying by its commercial nature. Section 5 of the *Drugs Misuse Act 1986* (Qld), for example, refers to carrying on a business. Another participant suggested that the problem with the Queensland approach was that 'it gets all blurred…[because] somewhere along the line it was argued successfully that trafficking could include not really a monetary transaction' (J2). That participant was troubled by this ambiguity and expressed the view that they would like to see in the law 'a clearer demarcation between people who are selling for monetary profit and those who are doing it to support their addiction, or those who are doing it in a social sort of setting' (J2).

In some jurisdictions there were provisions that enabled the consideration of the efficacy of thresholds—in relation to our populations of interest—to be sidestepped. As noted previously, Victorian participants said that they rarely heard matters relating to social supply because they were dealt with as *trafficking simpliciter* in the Magistrates' Court. Such cases come to the county courts (and higher courts) on appeal, when magistrates had made harsh sentencing decisions. In South Australia, judicial officers similarly referred to a separate charge of supply for cases where drugs are 'given over without payment'. J5 explained that in such cases quantities were generally not important and 'it's well recognised that that is much less serious'. When specifically asked if that view was impacted by quantity, the judge responded:

> No no. As long as the court is satisfied that it's for supply there's no deeming provision there. …Then if they get charged with trafficking there is a deeming provision that cuts in at different quantities of whatever the respective drug is… (J5)

Clearly, in these jurisdictions, frameworks for making determinations in sentencing matters involving minimally commercial and social supply have already begun to develop. Moreover, these frameworks appear to have circumvented elements (thresholds and deeming provisions) that have for some time in Australia been taken for granted as fundamental in the criminal regulation of illicit drugs.

The utility of deterrence

Thresholds were not the only 'holy grail' of drug control that our participants were critical of. As we noted previously, principles of general deterrence (of the general public) and specific deterrence (of individuals) were frequently referred to in the formulation of sentences outlined in our analysis of sentencing remarks. When questioned about their perception of the role of deterrence in sentencing, judicial officers expressed a range of views. At best, they appreciated the potential symbolic significance of the principle of general deterrence—that is, that its expression in sentencing could have a broader denunciatory value. There was some optimism that personal or specific deterrence could work with some (but generally not drug dependent) offenders at the individual level. Expressing the view that these principles are symbolically important, however, is not the same as claiming they are effective. A number of participants were 'sceptical' (J3) about general deterrence in the context of responding to and preventing drug trafficking, giving the impression that the inclusion of this objective in sentencing remarks was more mechanical than meaningful. J6 said:

> I'm told to take it into account by the legislation and the academics say well look probably it's pretty doubtful value. Some judges acknowledge that but look I'm told to take it into account. So I do. I have to. If I don't, I'm not doing my job.

Others expressed a much more negative view, describing it as a 'bogus mantra', and backing this assessment with the following critique:

> It's a favourite mantra of the law… It's a mantra without much substance. What's the objective proof of something like this? The stats show growing drug use, not declining drug use, a greater variety of drugs and people prepared to take the risk notwithstanding the consequence. (J7)

Deterrence is a useful principle in punishment that has as its primary objective the prevention of future offending. Its characteristics are well covered in criminology textbooks, which explain the requirements of effective general deterrence, including public knowledge of the law and penalties for specific offences, and punishment for offending behaviour being sure, swift and proportionate (Bull 2010). Taking this into account, it is perhaps unsurprising that some participants, with reason, linked the limits of general deterrence to the lack of appreciation among offenders of the seriousness of their behaviour due to the normalisation of drug use, as well as a lack of appreciation by the public of the nature of sentences for drug trafficking (J4, J6 and J1). They laid the blame for this on media reporting practices; as J4 explained, there was a public perception that drug offenders received light sentences:

> …perpetuated a bit by the press who tend to print the cases where people do get apparently light sentences. They don't publicise the run-of-the-mill, day-in/day-out locking-people-up sentences that we impose, so people are shocked when they get here.

On the second requirement for deterrence—that punishment should be sure, swift and proportionate—it is easy to establish that this is unlikely in the context of drug offending. Charges for and prosecution of drug offences, including trafficking, are uncertain because detection rates are very low. When an arrest and then conviction eventuates, it is not processed swiftly. For example, J8 commented that a considerable amount of time might have passed before sentencing: 'It could be 18 months or two years since they've been charged.' And, in terms of proportionate sentences, Hughes et al. (2014) established in their research that certain groups of offenders—notably those who are likely to be represented among minimally commercial supply cases—were vulnerable to unjust (ie disproportionately severe) sanctions.

Sentencing frameworks and guidelines

Bearing in mind that these two factors—drug thresholds and principles of general and specific deterrence—have long been accepted foundations for the sentencing of drug trafficking offenders in Australia, these results raise important questions about the factors that shape the sentencing practices of judicial officers in drug trafficking cases involving minimally commercial supply and social supply. One logical response is the guidance provided by legislation and case law. All of the participants in this study acknowledged the importance and efficacy of such frameworks, describing how those frameworks consisted of the various sentencing and penalties Acts and drug legislation, which are interpreted by the courts, with sentencing levels determined by the court of appeal. In J1's view, 'The great thing about that is that, it provides, I think, robust guidance to trial judges about—sentencing judges about the appropriate levels constantly.'

Courts of appeal were also valued as the backstop to the system 'if the judge makes a mistake' (J6). The case will get heard again and the sentence reviewed and changed if necessary. Of course, this could not be guaranteed. Such flexibility could be precarious. For example, a recent decision by the Court of Criminal Appeal in New South Wales (*Parente v R* [2017] NSWCCA 284) was cited as enhancing the discretion of judicial officers in sentencing drug trafficking matters. As one participant explained, following this decision, the situation had moved quite quickly from one that required 'exceptional circumstances' for a non-custodial sentence in drug trafficking matters, to one where intensive correction orders 'are now given'. In their view:

> …we're still at a very elementary stage. I mean, ultimately, we don't know whether the Court of Criminal Appeal might then look at this again and say no, no, no, it's been pulled too far back and we go back to some hybrid between exceptional circumstances and the long-term behaviour of change. (J11)

This type of turnabout was linked not only to potential vulnerability of the system but also to the pressure felt by courts as a result of the influence that views expressed in the popular press can have on parliament.

Any criticism of the system was reserved for its limitations at the lower end of the trafficking scale and a failure to recognise the difference between 'criminal and non-criminal drug trafficking' (J9) or to properly consider low-level roles in commercial supply networks (J10). These two reservations refer to the limits of the current frameworks for those coming before the courts for social supply and those dependent users who are vulnerable and drawn into the very bottom of the commercial supply chain. J10's comment was made about couriers or drug mules, who, they explained, were 'often…people from poor countries who get identified as someone who would be useful for this role. They're desperately poor'. That participant recounted the challenge of sentencing (in different cases) vulnerable women from Vietnamese and African backgrounds who were single parents with significant family responsibilities.

Supporting this assessment, UK researchers Fleetwood, Radcliffe and Stevens (2015) argue that the disproportionate sentences for drug mules are not only ineffective (Reuter & Stevens 2007); they have dire consequences for women in this category who are often the sole carer for children and family (Giacomello 2013). These researchers questioned to what extent drug mules ought to be held responsible for factors outside their knowledge or control, since few know what they are carrying, compared with self-employed couriers who often carry smaller quantities, often for personal supply.

In 2012 the *Drug offences: Definitive guideline* was introduced by the Sentencing Council for England and Wales as part of a large-scale project to codify sentencing practice and promote consistency in sentencing for all offences. Drug mules were identified in the guideline as a group of offenders for whom sentencing has been disproportionate to both level of culpability and harm (Fleetwood, Radcliffe & Stevens 2015). Consideration of the differential role of the offender was proposed as a means of achieving more proportionate sentencing for drug mules in particular. This is framed as a matter of both fairness and consistency, and it is made clear that punishment ought to be proportionate to the culpability and harm caused. While the guideline included quantities as a proxy for harm, they were not threshold quantities but merely indicative.

In this framework, sentencers must also decide whether the offender played one of three roles in importing the drug: leading, significant or lesser. The role of a drug mule is lesser. As a non-exhaustive guide, they perform a limited function under direction; they are engaged by pressure, coercion or intimidation or they are involved through naivety or exploitation; they have no influence on those above in the chain; and they have very little if any awareness or understanding of the scale of the operation. Quantity (weight and purity) and role together form the primary basis for determining a provisional sentence. After this, sentencers consider mitigating and aggravating factors. According to Fleetwood, Radcliffe and Stevens (2015), with some caveats, differentiating sentences according to role appears to play a major part in achieving proportionality. They argue that this change should be seen as an internationally significant example of drug policy reform.

Internationally, the challenge of dealing in a proportional way with diverse types of drug supply offenders has been recognised throughout criminal justice systems. Different international jurisdictions accommodate distinctions in sentencing for drug supply in various ways, ranging from systems in which culpability is assessed with regard to an offender's role (England and Wales) to systems in which supply offences do not exist (Finland) or the courts hold wide discretionary power (the Netherlands, some jurisdictions in the United States and Australia) (Coomber et al. 2018). Unsurprisingly, the degree to which proportionality and supply differentiation are acknowledged shapes the extent to which social supply and minimally commercial supply are recognised within sentencing practices.

In Coomber et al.'s (2018) research, which surveyed sentencing responses to social supply internationally, they explained that the extent to which sentencing guidelines and practices make room for this category is tied up with how wider drug supply sentencing apparatus recognises supply differences or applies proportionality. Proportionate sentencing frameworks for drug offences are characterised by a distinction between the type of drug and the scale of the illicit activity as well as the role and motivation of the offender (Lai 2012). Coomber et al. (2018) argue that sentencing guidelines, like those for England and Wales, which distinguish between the gravity of different supply offences and supply characteristics have the potential to deliver more proportionate outcomes for less nuanced or clear-cut social (and minimally commercial) supply cases.

In Australia, no similar guidelines currently exist. As we have outlined, the judiciary do recognise the characteristics of social supply and minimally commercial supply and, on an aggregate scale, punishment is reduced as a consequence. While some offenders may benefit from the recognition of such supply attributes, or instruction from 'guideline cases', in discretionary systems there are obvious challenges relating to inconsistency in sentencing. As Coomber et al. (2018) caution, where there is no differentiated sentencing apparatus in place, discretion can facilitate mitigation of mandatory sentences. However, dependence on 'arbitrary judicial discretion' to uphold proportionate sentences leads to variation across geographical space (Sigler 2003), and many individuals may have to wait to appeal their sentence before the mitigating factors in their case are sufficiently recognised. J7 commented on this in the context of our study, noting that, even though *trafficking simpliciter* provisions in Victoria generally meant social supply cases were heard in the lower courts, the higher court heard them on appeal:

> We get them on appeal, and look, I see on appeal a punitive approach adopted by a cluster of magistrates, because you have a lot of discretion as a magistrate. You don't provide written reasons.

Bagaric, Wolf and Bagaric (2019) point out the problem with the current Australian approach to proportionality, explaining that, while the High Court has held the principle of proportionality to be the main consideration in formulating a just sentence—and the principle of proportionality is the view that the harshness of the punishment should match the seriousness of the crime—'at present no criteria have been developed' describing how these two aspects should be calibrated. They go on to say that 'given that the principle is abstract, vague and devoid of substantive content', it cannot assist in defining the concept of a just sentence. They point out other problematic aspects of sentencing, too, saying:

> …in any area of law, there is a degree of ambiguity regarding the application and scope of legal standards. This is due to the inherent vagueness of some language and the scope of norms, and the desire to ensure that the law is sufficiently flexible to apply to different facts. Thus, it is to be expected that in sentencing law there might be some uncertainty regarding the scope and application of key considerations such as aggravating and mitigating factors and the objectives of sentencing. (Bagaric, Wolf & Bagaric 2019: 3)

Bagaric, Wolf and Bagaric (2019) also argue that, in Australia's criminal justice system, sentencing is an area of law where judicial officers continue to have unrestricted discretion, which is protected on the basis that they are applying principles consistently and according to 'individualised justice'. Indeed, in our study participants consistently referred to the individualised nature of sentencing, defending the importance of responding to all the various levels of supply (from low level supply to commercial trafficking) that can arise in the range of cases that come before their courts. They explained that it was important to take into account the circumstances of the crime—noting that 'they are extremely varied'—as well as the individual committing it (J1, J3, J4 and J9). They pointed to instinctive synthesis (J2) in their approach. Bagaric, Wolf and Bagaric (2019) identify this as the overarching methodology and conceptual approach applied to making sentencing decisions in courts throughout Australia. They explain that undertaking instinctive synthesis to reach a specific sanction means judges need to make decisions regarding each of the factors that are relevant to sentencing, attach a particular weight to them and balance them against one another. This is not a precise mathematical exercise:

> The instinctive synthesis inevitably incorporates a considerable degree of subjectivity into the sentencing calculus. Indeed, current orthodoxy maintains that there is no single correct sentence, and that the 'instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ'. (*Hudson v The Queen* (2010) 205 A Crim R 199,206 in Bagaric, Wolf & Bagaric 2019: 10)

Focusing on the uncertainty in the application and scope of many of the aggravating and mitigating considerations that inform sentencing outcomes, Bagaric, Wolf and Bagaric (2019: 23) point out that, even when those factors are defined, judges remain free to ignore them due to the principle that the weight attached to sentencing considerations is a matter for the courts. They note that variations in the impact of aggravating and mitigating factors can be so extreme that the same consideration may be treated as an aggravating factor in one case and as a mitigating factor in another, or have no impact at all on the penalty in yet another. They use drug dependence as a prime example of a consideration that has had substantially inconsistent impacts on different cases, listing examples where it has been treated in apparently conflicting ways. This was evident from our analysis of both the sentencing remarks and the interviews (see *Sentences for minimally commercial supply* section).

Bagaric, Wolf and Bagaric (2019) argue that it is impossible for courts to achieve consistency without clear guidance on the content of the principle of proportionality, on the range and application of most aggravating and mitigating factors, and on the relevance of sentencing tariffs—that is, the circumstances in which judicial officers must reach sentences that align with current sentencing practice. They propose that greater clarity and specificity is needed regarding the scope and application of judicial considerations.

These sentiments are reflected in Roach Anleu, Brewer and Mack's (2017) critical assessment of the outcomes of doctrinal research focused on sentencing. They also note how, in social science research, judicial discretion has been cast as the key mechanism for sentencing disparities as well. In such research, the focus is not on doctrinal limitation but rather on how discretion provides an opportunity for a judge to insert personal or political preferences into sentencing (see also Moyle, Coomber & Lowther 2013). Presumptive sentencing guidelines, mandatory and voluntary, have been implemented in some jurisdictions to limit such discretion and so reduce unwarranted sentencing disparities (Roach Anleu, Brewer & Mack 2017: 51).

Such a solution is problematic. Nutting (2017) draws attention to this dilemma by introducing his analysis of the application of sentencing guidelines for drug trafficking with a quote from an unnamed judicial officer reported in a 1992 study by Weinstein, who said:

> [The] Guidelines…have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result. All under the banner of 'truth in sentencing'!

The role of judges

Historically, the Australian judiciary have been resistant to change that might challenge judicial discretion (Brown 1998: 384; Bull 2010). The judicial officers interviewed as part of this study were strongly of the view that any move to introduce a less flexible system, or grid sentencing, should be resisted. Participant J2 said:

> The High Court has said that it's a process of instinctive sentencing, and it is. It is. It's an art, it's not a science. I don't think it lends itself to a grid saying, this person has no previous convictions, it's this particular drug, it's that number of grams, it should be X. The sentence should be X. I just don't—it just can't possibly work because…with the *Penalties and Sentences Act*…if you have a look at the list of considerations, there's a place in there for compassion, and there is a place in there for hope. They're important things.

Judicial officers valued the role of discretion:

> I try wherever possible to give someone who's worth a risk a chance to come good. Sometimes, it's not possible…because of the nature of the offending, because of their criminal record, because of their own inability to confront their demons. I try and do that where I can, so judicial discretion and the room to move or manoeuvre is very important… Having said that, there are factors which we have to have regard to in the Sentencing Act, and we must do so, and do do so. (J7)

Roach Anleu, Brewer and Mack's (2017) research on sentencing is critical of approaches that simplistically promote the introduction of greater constraints on judicial decision-making as the solution to sentencing disparities. They argue that such a response arises because, in research, judges are regarded primarily in the abstract; their decision-making is not socially situated. These researchers explain how doctrinal research on sentencing tends to treat the judge simply as a conduit for the operation of the law, even when recognising the legal confines of judicial discretion. The focus is mainly on abstract sentencing principles and purpose, rather than on how they are navigated and applied by the judiciary in practice. Similarly, in social science research focused on sentencing patterns, the judge figures as the mechanism through which social forces operate or are expressed—again with some acknowledgement of the discretion available in sentencing decisions. The judge is portrayed as the mechanism for the reproduction, even magnification, of factors which, statistically, are shown to affect sentencing outcomes. These authors are critical of this type of analysis because it ignores how sentencing decisions are actually made. Similarly, Travers (2007: 24) says, 'What happens in court, or what matters to the judge and other professionals involved in a particular legal case disappears or becomes irrelevant when [the researcher] tries to explain this using statistical methods or even when one interviews them about general sentencing principles.'

Roach Anleu, Brewer and Mack (2017) further argue that, in research, a judge should instead be conceived as a human participant rather than in the abstract or as a construct. This recognises that the judge operates within a distinct context comprising experiential, emotional and social dimensions. Citing Mackenzie (2005: 39), they note that 'of all the tasks of judging [sentencing] was the one where [judges] are most likely to show their human face'. For those researchers, the metaphor of showing a human face implies the significance of face-to-face interactions with others, as well as the courtroom performance in sentencing, beyond the individual judge's attitudes and behaviour (Roach Anleu, Brewer & Mack 2017; Roach Anleu & Mack 2005). In our study, this response from participant J6 effectively illustrates their point:

> You're sitting there thinking, oh this is hopeless. Why is this person appealing? Or this person is going to jail. One of the great experiences about being a judge is you go in the next day and you see the offender or the accused or the defendant. You hear their story. Your mind is changed. It's either changed by the presence of the person and or the submissions of counsel and the whole perspective. You've got to be open to that. So you can read the papers you're given about a deemed supply, and be thinking what was this person doing? Then you go in and you see the person. You hear evidence about the person [and you change your mind]. (J6)

To understand the sentencing process, it is important to see the judge in a societal context and take into account the social dimensions of sentencing. Researchers acknowledge that the variations in sentencing outcomes represent the actions of a number of participants in the criminal justice system, not just the action of the sentencing judge. This includes the influence of cumulative inequalities associated with things like police contact, arrests, prior imprisonment, or the dynamics of guilty plea production that can shape an offender's pathway to sentencing. In the context of this analysis, however, it is the interaction in the courtroom between the judge and the other participants that is above all significant. Judges operate as individuals working within a wider context, within society, and this shapes their sentencing decisions (Roach Anleu, Brewer & Mack 2017).

In our study—both in the analysis of sentencing remarks and in our interviews with judicial officers—the importance of the interactive nature of sentencing was emphasised. In our interviews, participants pointed in particular to the significance of their interaction with other courtroom players in the decision-making process. Our analysis of interviews (see the *Overview of data by jurisdiction* section) also revealed that ineffectual contributions of the prosecution and the defence could undermine judicial decision-making in a way that could not withstand scrutiny on appeal.

Roach Anleu, Brewer and Mack (2017) describe how in the courtroom the judge is one, albeit perhaps the most important, participant in a work group that includes lawyers, defendants, court staff, social workers, witnesses and victims. With this in mind, our research suggests that Eisenstein, Flemming and Nardulli (1988: 37) are correct in their assessment that the 'most crucial decisions' in courtroom settings are a product of the interrelation between work-group actors and the shared informal or formal understandings of appropriate case outcomes by all involved. Putting this sentencing decision-making process in a broader context, Roach Anleu, Brewer and Mack (2017: 55) conclude:

> Judges, in exercising their judicial role, must think and act strategically as they negotiate and respond to various conditions and legal requirements. They operate not in abstraction, wholly captured by their legal and social contexts or inputs; nor are they entirely free agents behaving independently of these contexts.

Based on our analysis, understanding how judicial officers navigate sentencing in social supply and minimally commercial supply cases requires consideration of a range of factors and how they interact. It requires:

- critical consideration of how existing sentencing frameworks work in practice, like systems of thresholds linked to deeming provisions;
- thoughtful assessment of the relevance of sentencing objectives like deterrence or rehabilitation, and whether they can be meaningfully applied or, simply, are expressed even when considered a meaningless 'mantra'; and
- reflection on the interpretation of legal constructs like proportionality.

To be meaningful, such consideration should also acknowledge the persona of the judicial officer, conceiving of them as a socially situated actor, rather than simply a conduit of the law or a mechanism that operationalises social norms and biases. Sentence decision-making is interactive, involving the work group within the court. It is also strategic, as judicial officers juggle the panoptic oversight of courts of appeal, the blunt influence of media, populism in current politics and sometimes evidence provided by academic research. In summary, the nature of and relationships between the different factors contributing to judicial sentencing decisions are highly complex.

Conclusion

This research is the first detailed empirical account of the ways that Australian courts currently respond to social supply and minimally commercial supply in drug trafficking cases heard within and across jurisdictions. It has analysed how judicial officers understand different categories of drug supply, including social and minimally commercial, and the factors they take into account in sentencing these types of drug trafficking cases. The goal was to identify opportunities to develop more consistent and proportionate sentencing practices and criminal justice responses to social supply and minimally commercial supply. This was a challenging objective, but it is clear from our discussion that there are some recommendations that we can make in this regard.

First, there should be a review of the system of drug thresholds that currently shapes sentencing practices in supply and trafficking cases. It is clear from our research that judicial officers apply the thresholds in ways that result in sentences for social supply and minimally commercial supply that are more consistent with sentencing levels for possession. This suggests that our participants had some justification in their assessment of thresholds as 'meaningless' and working only as policy settings to decide the jurisdiction of a matter, rather than to differentiate users from dealers. In fact, in two jurisdictions (Western Australia and the ACT) recent reviews have resulted in increased thresholds which could remove social supply and minimally commercial supply cases from the superior courts and reduce the potential for such cases to be subject to unjust sanctions in those jurisdictions.

In our study, one participant, participant 3, queried how the problem of distinguishing between users and dealers and ensuring proportionality in drug sentencing could be addressed, apart from the use of thresholds. In their qualified support for thresholds, they unwittingly offered a solution by underlining the importance of really 'look[ing] at the behaviour rather than the raw fact of the real quantity'. This response suggests that there is value in considering the system adopted in the England and Wales guideline, which includes quantities as a proxy for harm. These quantities, however, are only indicative: they are not 'thresholds' associated with deeming provisions. Such an approach has already been adopted in Queensland, the only jurisdiction without deeming provisions, where the sentence is not 'decided just by the amount of the drug'; all of the circumstances are taken into account (J1).

Addressing the current system's failure to deal with vulnerable people who are drawn into the bottom end of the commercial supply chain (whose offending would qualify as minimally commercial supply because of the limited profit), the England and Wales system, while not without limitations (Coomber et al. 2018), again is instructive. In that framework, along with the consideration of quantities, sentencers also decide whether the offender played one of three roles in importing the drug: leading, significant and lesser. According to Fleetwood, Radcliffe and Stevens (2015), this was an important policy reform that played a major part in achieving proportionality.

Second, the priority that is given to the sentencing objectives of general and specific deterrence in drug control legislation should be reconsidered in the context of social supply and minimally commercial supply. It is clear from our research that, even though these principles were often cited in sentencing remarks, judicial officers are sceptical about their usefulness—their potential denunciatory value aside. In the context of social supply and normalised drug use, general deterrence is ineffective because offenders are unaware of the seriousness of their behaviour and its potential legal consequences. Specific deterrence had some meaning for this group but ought to be weighed against the lifelong negative effect of a criminal conviction on an otherwise law-abiding individual. This goes to the distinction made between criminal and non-criminal drug trafficking (J9) and the view that was expressed by J10, particularly in the social context of cannabis use:

> It doesn't make people any more criminal than anyone else. Except that you know because it's illegal the likelihood is that they can then step over the line into a criminal world. But of course, you know, thousands and thousands of cannabis users don't do that. …I think generally, people do accept that cannabis is much more like alcohol as a social device if you, like it's used socially.

Both general and specific deterrence were considered ineffectual when it came to minimally commercial supply that involved dependent drug users. This is a point borne out in academic research. Here a more useful approach might be guided by pragmatic principles of harm minimisation (Bull et al. 2016): reducing harm to the community, which includes potentially vulnerable individuals; and reducing harm to individuals appearing in court on drug trafficking charges, and their families. Adopting such an approach might lead to a more meaningful response that prioritised the objective of rehabilitation (informed by therapeutic jurisprudence) for this particular group. Indeed, the need for greater access to rehabilitation programs—a broader range of options for referral, and significantly if not 'massively' increased investment in this area—was a persistent theme among our interviewees. This is pertinent to our final objective.

Our final objective was to consider if and how social supply and minimally commercial supply (and the relevant current informal judicial practices) might be included in a reconfiguration of Australia's program for the diversion of illicit drug offenders from the criminal justice system. Sentencing remarks and our interviews with judicial officers indicated that informal systems of diversion currently operate for social supply and minimally commercial supply cases. Despite harsh legislative provisions, alternative sentences could include informal judicial monitoring, intensive correction orders, good behaviour bonds, fines, and wholly or partially suspended sentences. In some jurisdictions, drug courts already exist or are under consideration at the county or district court level, but their reach and availability is limited. Informal systems of diversion operated in Australia long before the introduction in 1999 of the Illicit Drug Diversion Initiative for possession offences (Bull 2003). The benefits of codification through this initiative were as follows:

- the identification of specific roles and the distribution of tasks across law enforcement, justice, health and community based agencies in responding to illicit drug problems;
- a reduction in the likelihood that diversion was a matter of a 'lucky dip', dependent on the personal particularities of the law enforcement or judicial officer responding to a case; and
- the provision of a legitimate point of engagement for law enforcement and criminal justice agencies in Australia's drug policy of harm minimisation (Bull et al. 2016).

With this project, we were keen to consider the implications of our research for drug law reform. Specifically, we wanted to know if there was scope, or at least an appetite, for a reconfiguration of Australia's Illicit Drug Diversion Initiative in ways that could consistently and proportionately accommodate those involved in social supply and minimally commercial supply. Our participants, with their many years of experience on the bench, reacted to this suggestion with qualified enthusiasm, agreeing that diversion was a desirable goal for many who appeared in their courts, because 'just seeing it as a criminal justice problem is not going to provide a solution at all' (J1). The problem that arises, hence the qualified nature of their enthusiasm, is this:

> There aren't the programs. Diversion programs are a great thing governments like to talk about. Drug diversion, because it sounds great, but there just aren't the programs available to respond to the needs of offenders. (J2)

According to our participants, there is no single approach for responding effectively to the different types of supply, whether social supply or minimally commercial supply. Consistent with best practice for addressing and reducing the demand for illicit drugs, they suggested that a much-expanded range of options, including education and treatment, was needed for effective sentencing and diversion. But, importantly, this requires a considerable and credible (re)investment of resources. As we agree with this assessment, we recommend that consideration be given in the future to expanding the scope of current diversionary programs to accommodate the needs of the offenders and offending behaviour addressed in this study.

Limitations

One of the key limitations of our study was the difficulty in collecting data, as we detailed in the *Methodology* section. Although transcripts of sentencing remarks are available through LexisNexis for all Australian jurisdictions, they are not evenly available and the amount of detail provided is not always consistent. For example, very few trafficking cases were available for the Australian Capital Territory and South Australia, and those that could be accessed contained very little detail in comparison with those available in jurisdictions like New South Wales and Victoria, where more trafficking cases are heard. While best endeavours were made to supplement this data, it was not always possible, and as a consequence some of the information in relation to our demography and taxonomy of offenders and offences, and the nature of sentences, is incomplete. The large number of cases we included in our sample provides some mitigation of this limitation. There were, however, jurisdictional differences worthy of investigation that we were unfortunately unable to pursue.

To complement the national scope of the sentencing remarks collected as part of our documental dataset, we would have preferred to be able to interview judicial officers from all jurisdictions. The small size of some jurisdictions jeopardised the ability to ensure confidentiality and anonymity for participants from those states and territories. Moreover, exhaustive coverage and inclusion was not feasible within the time frame and budget of this project. Even our more modest target of securing an interview sample of 20 judicial officers from across four jurisdictions proved to be much more difficult to achieve than first anticipated. With persistence, though, we were able to engage 12 participants evenly distributed across our target jurisdictions. While this number was small, the saturation achieved across themes (and across jurisdictions) in our interviewing suggests that a larger sample would have been unnecessary. Having said that, participants self-selected for interview, which introduced a potential for bias that should be addressed in future research.

Throughout our analysis, we report statements made by judicial officers that reflect their subjective experience and perceptions of the flow of cases through their courts. Not all of these reflections are supported by research. For example, views that high levels of purity are an indication of intent to dilute drugs and distribute them more broadly (see *Aggravating factors: Harm* and *Aggravating factors: Culpability* sections) or that individuals involved in social supply or minimally commercial supply regularly introduce new users to drug use (see *Aggravating factors: Harm*) are contested. The inclusion of these statements is intended to reflect the role of such considerations in judicial decision-making in drug trafficking matters and to give us an insight into how judicial officers understand their working environment. While critical evaluation of the views they express is warranted, it is beyond the scope of this report to engage with each instance where contradictory evidence is available.

Opportunities for future research

This project provides a rich and detailed account of sentencing and judicial decision-making on illicit drug supply cases at the levels of social supply and minimally commercial supply across Australia. As we suggested in relation to the limitations of this study, fruitful future research could further investigate jurisdictional differences.

In our analysis we were able to recognise distinctive geographies of supply and sentencing practices shaped by, for example, Tasmania being an island state; and the Northern Territory's population distribution and density, and political history of law enforcement (the 'intervention'). An analysis of these variations would inform sentencing reform in specific contexts and jurisdictions, as well as highlight considerations that might ordinarily be overlooked in the process of policymaking at the metro-centric national level.

Future research should also engage with a broader sample of judicial officers, to canvass the possibly greater diversity of perspectives that might exist on drug trafficking at the lower end of the scale. In particular, we believe that there is valuable work to be done on investigating the distinction between criminal and non-criminal trafficking of illicit drugs, a key distinction we identified in our study.

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