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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.

Sentencing for social supply of illicit drugs in Australia

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Controlling 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 of those who come to the attention of law enforcement are users themselves, and the challenge is how to distinguish drug traffickers from those who purchase illicit drugs for personal use.



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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). State and territory as well as Commonwealth drug legislation specifies threshold amounts of drugs over which offenders are either presumed to possess a drug ‘for the purposes of supply’ and are liable to sanction as ‘drug traffickers’—up to 15 years in most states—or, as is the case in Queensland, liable to sanctions equivalent to drug traffickers: up to 25 years (Hughes et al. 2014). The threshold 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).

Research by Hughes et al. (2014) indicates that this approach is problematic and impacts negatively on marginalised heavy users, as well as on recreational drug users who might make small bulk purchases for distribution among their networks but whose supply activity is ultimately ‘minimally commercial’. This is because in practice it can be difficult for the courts to discriminate between heavy users or ‘social suppliers’—supplying to friends and acquaintances for little or no profit—and ‘drug dealers proper’.

Social supply is now widely accepted as a distinctive form of drug distribution that can be separated from that of profit motivated commercial drug supply. There is currently no official definition, but international research seems to agree that social suppliers can be broadly understood as non-commercial suppliers who distribute drugs to non-strangers for little or no profit (Coomber 2015; Coomber & Moyle 2014; Lenton et al. 2016).

Drawing on this research, typical characteristics of social supply include:

- supply of recreational drugs such as MDMA, cannabis, cocaine, hallucinogens, methamphetamine and possibly heroin;
- supply undertaken as an act of altruism, where the buyer effectively acts as a go-between (purchasing on behalf of a group), or where drugs are shared or exchanged;
- selling off small quantities of drugs resulting from a bulk purchase, to fund personal drug use or make a small amount of profit to cover risk and effort;
- individuals who are often employed or in education and have apparently supportive social networks; and
- individuals who do not consider themselves to be dealers proper (Coomber & Moyle 2014) and often drift into supply with little awareness of the seriousness of sentencing tariffs.

In contrast to social supply, the term ‘minimally commercial supply’ was developed to encapsulate a wider range of low-level, not-for-profit supply offences, going beyond recreational social supply and incorporating addicted ‘user–dealers’. Coomber and Moyle (2014) outline the concept, reasoning that drug dependent user–dealers have more in common with social suppliers, being less predatory and their supply activity being minimally commercial and motivated by the need to satisfy their use desires. That is, they are users first and suppliers second. This type of drug supply is also far less associated with other harms, like violence and intimidation, which are commonly linked with drug trafficking (Coomber 2015). Compared with social supply, suppliers in this category are typically:

- users of drugs including heroin, methamphetamine, cannabis, cocaine, and pharmaceuticals like opioids, benzodiazepines and Ritalin;
- heavy users who are likely to be dependent and sell drugs for a small amount of profit or gain, nearly all of which is used to offset the costs of their own drug use needs;
- users who are socially marginalised—for example, homeless, living in temporary accommodation—many of whom have chaotic lives;
- users who have limited legitimate and/or available options to fund their drug use; and
- individuals engaged in supply activities that are minimally commercial.

Internationally, the challenge of dealing in a proportional way with these groups has been recognised in the criminal justice system. Erroneous sanctions associated with threshold quantities, inconsistency in sentencing (between and within jurisdictions), along with sentencing outcomes that are not proportionate to the offence committed, 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). To date, no systematic qualitative analysis of Australian sentencing outcomes has been done that provides a nuanced account of how the judiciary navigate the relationship between different types of supply and the consistency and proportionality of the sentences applied.

Aim and methodology

This research investigates how judicial officers understand the concepts of social supply and minimally commercial supply and the extent to which those officers might be perceived as applying them in their decision-making.

The key objectives 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 categories 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.

This project was conducted in two phases. Phase 1 involved an analysis of sentencing remarks collected from 551 cases across all Australian states and territories. Trafficking cases are heard in the superior courts (district, county and supreme courts and courts of appeal), and sentencing remarks are publicly available from these courts. Sentencing remarks for drug trafficking cases were collected from finalised drug supply and trafficking cases for jurisdictions across Australia for the period from 1 January 2012 to 31 December 2014. The data for this study was a convenience sample that was drawn from sentencing remarks available in each jurisdiction.

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 they supplied;
- substance(s) involved—quantity or quantities of substance, and purity where available;
- signs of supply;
- other offences—apart from drug supply/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.

This database was used to develop a descriptive taxonomy of offenders and of offences appearing in the courts, to map if and how thresholds are able to distinguish between different types of supply—that is, distinguish between users and dealers—and to look at how sentencing outcomes for cases involving social supply and minimally commercial supply compared with cases of commercial and large commercial supply. The summary of the results of phase 1 provided the foundation for phase 2 of this study.

Phase 2 consisted of interviews with 12 judicial officers from four jurisdictions (New South Wales, Victoria, Queensland and South Australia) that focused on sentencing decisions on drug supply offences. Our aim was to investigate how judicial officers understand the concepts of social supply and minimally commercial supply and whether or not they apply them consistently. Interviews were recorded and transcribed, and then subjected to inductive thematic analysis (Braun & Clarke 2006) framed by the aims of this project. Participants have been assigned anonymous identifiers and are referred as J1 through to J12.

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

Results

Case and offender characteristics

Our overall sample of cases (Table 1) involved the supply of a broad range of drugs, and matters were heard in the district court, supreme criminal court and supreme court of appeal. Matters coming before the courts included supply, trafficking, commercial trafficking and large commercial trafficking, with almost 60 percent of cases judged to be supply and trafficking, which are at the lower end of scale.

Table 1: Total cases by drug and jurisdiction (*n*)

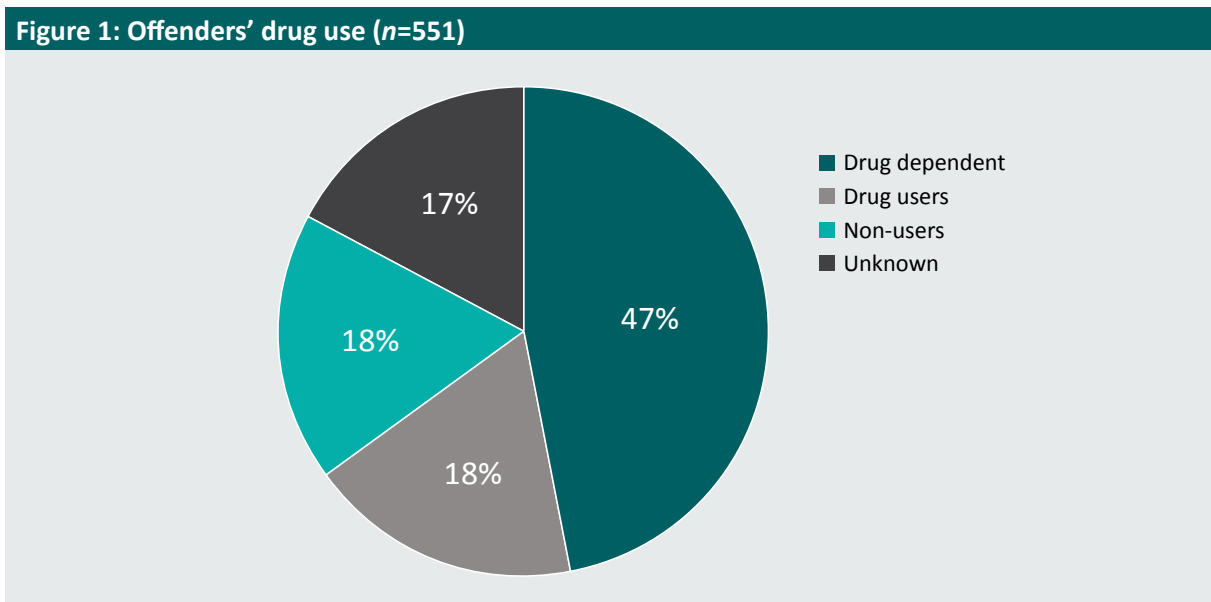
Jurisdiction	Total cases	ATS	Cannabis	Heroin	Cocaine	MDMA	Other
NSW	138	79	20	23	22	25	12
Vic	78	55	11	10	3	20	9
Qld	53	32	26	3	9	20	4
WA	41	32	7	4	2	8	2
SA	18	9	5	1	0	1	3
Tas	105	39	57	0	1	3	30
ACT	16	7	3	2	5	2	0
NT	101	27	82	0	0	6	3
Total	551	280	211	42	42	86	68

Note: ATS=amphetamine-type stimulant

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. To provide some indication of the nature of our sample, the age distribution of the offenders was slightly higher than the distribution in Australian Bureau of Statistics (ABS) reports on offenders held in custody across all types of offences for the same period (ABS 2012, 2013, 2014). Between 2012 and 2014, the average age of all adult prisoners was just over 34. The mean age (where this data was available) in our study's group of offenders was 37. The gender distribution of our sample was similar to Australian data on prisoner populations over 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, in 2014, they were the second most common offences (17%) for which female prisoners were held.

Figure 1 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'). Seventeen and a half percent of those appearing before the court were definitively identified as non-users. The remainder were said to be people who use drugs: 65 percent ($n=359$). Seventy-three percent ($n=262$) of these individuals were dependent on drugs. 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 and exposure to family violence and victimisation through physical and/or sexual abuse.

Figure 1: Offenders' drug use ($n=551$)



Social supply case distribution and court decisions across states

Our analysis identified a small but significant number of cases that could be categorised as social supply. Social supply cases constituted 5.6 percent of our sample and were distributed across all jurisdictions except Victoria. A higher number were noted 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. It could also be related to the types of courts in which the sentencing remarks were made. The majority of cases in the Northern Territory and Tasmania, for example, were not matters heard on appeal.

Table 2 describes social supply cases by jurisdiction and the supply decision implemented by the court. When examining the decisions implemented, most cases were convicted for supply or trafficking. The main drugs involved in social supply cases were cannabis (73% of cases, $n=22$), MDMA (17% of cases, $n=5$), and 'other' drugs (13% of cases, $n=5$). ('Other drugs' include new psychoactive substances, performance and image enhancing drugs, and legal pharmaceutical substances that have been diverted to the illicit market.)

Table 2: Court decisions in social supply cases by jurisdiction (n)

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	–

Court acknowledgement of social supply characteristics

Despite social supply cases making up a small proportion of cases analysed, courts displayed some evidence of accommodating social supply characteristics in sentencing decisions. Sentencing remarks for cases heard in the Northern Territory, New South Wales, Tasmania and Queensland noted occasions where the defendants did not benefit financially from the transaction, possessed drugs for personal use and use by friends, had not intended to profit from a transaction, and no money changed hands for the supply. In such cases, these supply practices were compared with commercially oriented trafficking and consequently suggested to be located at the 'very lowest end of the [supply] scale'.

The connection 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. When the relationship between the defendant and the persons whom the applicant supplied were friends rather than ‘customers’, harm to the community was deemed to be restricted. Sentences that failed to acknowledge that the defendant supplied ‘only to a handful of people’, or that drugs were possessed for personal use and ‘the use of friends’ provided the basis for a defence that the original sentence was manifestly excessive or inadequate.

Minimally commercial supply case distribution and court decisions

A much larger proportion of cases described by our sample, just over 35 percent ($n=195$), could be categorised as minimally commercial supply. This is perhaps not surprising, given that, in nearly 50 percent ($n=262$) of sentencing remarks, the offender was identified as drug dependent, which is a key aspect of minimally commercial supply. As Table 3 shows, these types of cases featured across all jurisdictions. A larger proportion of minimally commercial supply cases were evident in the Northern Territory and Tasmania (46.5 and 57 percent of the total number of cases in each of these jurisdictions, respectively). Amphetamine-type stimulants (ATS; 47%, $n=92$) and cannabis (45%, $n=87$) were the most common drugs involved in this type of supply. This distribution suggests a distinctive geography of supply and how it is policed in Australia. For example, the predominance of cannabis-related minimally commercial supply cases (79.5 percent) were recorded in relation to the Northern Territory and Tasmania. Also notable is the number of other drugs associated with minimally commercial supply. Ninety percent ($n=27$) of the 30 overall cases involving drugs in the ‘other’ category were detected in relation to minimally commercial supply, and 59 percent of these occurred in Tasmania. The substances in these matters included lysergic acid (LSD), BDPEA, JWH-018, 3,4-methylenedioxymethcathinone, PV8, MDPV, morphine, Kapanol, oxycodone, alprazolam, Ritalin and testosterone.

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 ^a	12	–	11	–	–	(1 unknown)
WA	8	8	–	–	–	–
SA ^a	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. In one minimally commercial supply case in Queensland, there was no clear determination in the sentencing remarks. The ultimate conviction in one case of social supply in South Australia was for possession of cannabis

Court acknowledgement of minimally commercial supply characteristics

Across all jurisdictions, judges noted the connection between drug use and other types of criminality. A defendant's drug use was most likely cited and acknowledged by the court when it was found to be chronic or chaotic, and 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. Judges frequently made distinctions between those who were motivated by a perceived need to support a personal drug dependency, and traffickers motivated by 'greed'. It was commonly reflected in sentencing remarks that supply was used as a way to 'finance a drug habit' and to support addiction and that this practice, in many cases, 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 a dependent drug user's 'unsophisticated' opportunistic supply with a commercially motivated operation.

Much like the way an addicted offender's role is contrasted with 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 distribution involved in these types of offences, which tended to be characterised by relatively closed supply networks where the individual 'had only supplied those already addicted' 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—provided a meaningful point of mitigation for counsel at the point of appeal.

Comparing the sentencing of social and minimally commercial suppliers across states

Table 4 below makes a descriptive comparison between the mean, minimum and maximum sentences for all matters heard across jurisdictions and those that we identified as social supply and minimally commercial supply. This comparison makes it clear that, on average, judges tended to respond to these cases in quantitatively different ways: the average sentence in months for large commercial (124.5), commercial (68.2) and trafficking (55.5) cases is substantially greater than for minimally commercial supply (20.1 months) and social supply (8.1 months).

There is also meaningful variance 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 (New South Wales). For minimally commercial supply, again minimum sentences ranged from a fine or a good behaviour bond but also included six months custodial sentence (Victoria and Western Australia), to a maximum of six years imprisonment (Victoria). Average sentences for large commercial, commercial and trafficking cases (125.4, 68.2 and 55.5, respectively) were substantially greater than those recorded.

Table 4: Comparison of mean, minimum and maximum sentences (months) across cases of 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: is 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 cases. 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 length of sentence was missing in a small number of cases. (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)

Sentencing frameworks and the future

Our analysis demonstrated that, across Australian jurisdictions, sentencing in drug trafficking cases does differentiate social supply and minimally commercial supply from other types of supply. Based on this analysis, we agree with Hughes et al. (2014) that thresholds are an ineffective means of differentiating between users and dealers. As those authors cautioned, the threshold system does impact in negative ways on marginalised heavy drug users, and, according to our research, this negative impact also extends to those who engage in social supply. We found that 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 those for commercial or large commercial supply. The results of our analysis of sentencing remarks were integrated with a thematic analysis of our (phase 2) interviews with 12 judicial officers with considerable experience in sentencing in drug trafficking matters from across four Australian jurisdictions (New South Wales, Queensland, South Australia and Victoria). The key themes that emerged from our research are outlined below.

Thresholds

The judicial officers interviewed as part of this project held views consistent with the results of Hughes et al.'s (2014) research in relation to thresholds. When asked about the usefulness of thresholds in distinguishing between users and dealers, and as a guide in proportionate sentencing, different participants (across the group) 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 judge explained 'you might have just got your stuff in. So the quantity may not reflect your real participation'. They described 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' (J3).

Deterrence

Deterrence is a key principle that guides sentencing decision-making in Australia and elsewhere in the world. 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 based on the idea that fear of harsh punishment will cause potential wrongdoers to act within the parameters of the law. Principles of general and specific deterrence were frequently referred to in the formulation of sentences outlined in our documentary analysis of sentencing remarks; however, when the judicial officers we interviewed were questioned about their perception of the role of deterrence in sentencing, they expressed a range of different views.

At best, according to our analysis, 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 as a direct punishment could work with some—but generally not drug dependent—offenders at the individual level. A number of participants were ‘sceptical’ (J3) about general deterrence in the context of responding to and preventing drug trafficking more broadly, giving the impression that the inclusion of this objective in sentencing remarks was more mechanical than meaningful. Others expressed much more negative views, describing it as a ‘bogus mantra’ (J7).

In the context of social supply, general deterrence was seen as ineffective because offenders were unaware of the seriousness of their behaviour and its potential legal consequences (Coomber et al. 2018). It was thought that specific deterrence had some meaning for this group but ought to be weighed against the lifelong negative effects of a criminal conviction on an otherwise law-abiding group. Both general and specific deterrence were considered ineffectual when it came to minimally commercial supply that involved dependent drug users. This is a point often reflected 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 to their families. Adopting such an approach, according to our participants, would lead to a more meaningful response that prioritised the objective of rehabilitation (informed by therapeutic jurisprudence; Freiberg 2003; Simon 2003) with 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 to make this more available—was a persistent theme among our interviewees.

Social supply, minimally commercial supply and diversionary programs

This research aimed to provide a clearer understanding of current practice in how judicial officers discriminate between types of drug use and supply when formulating sentences in drug trafficking cases. We were also keen to consider the implications of our research for drug law reform. Specifically, we wanted to know if there was scope for the 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. When asked about the possibility of diversion for those appearing on matters relating to social supply and minimally commercial supply, interviewees first drew a distinction between the needs of different offenders, saying there was no single answer for responding effectively to the different types of supply, whether social supply or minimally commercial supply. They went on to suggest that a range of options, including education and treatment, are needed. Most agreed that diversion should be a key consideration for drug dependent minimally commercial suppliers and that targeting and preventing the behaviour was not an issue for the criminal justice system alone.

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. 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, J10). As other participants suggested, a key issue for judges is the availability of options and resources.

Conclusion

One goal of this research 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; nevertheless, 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 tend to result in sentences for social supply and minimally commercial supply that are more consistent with sentencing levels for possession, which is two years (Hughes et al. 2014; see Table 4). This suggests that our judicial participants had some justification in their assessment of thresholds as ‘meaningless’, working only as policy settings to decide the jurisdiction of a matter rather than to differentiate users from dealers.

Second, the priority that is given to the sentencing objectives of general and individual deterrence in drug control legislation should be reconsidered in the context of social supply and minimally commercial supply. Even though these principles were often cited in sentencing remarks, our research indicated judicial officers are sceptical about their usefulness. The objective of harm reduction could be a more meaningful consideration in the context of social supply and minimally commercial supply cases.

Our final objective was to consider if and how social supply and minimally commercial supply (and the relevant current informal sentencing practices) might be included in a reconfiguration of Australia’s Illicit Drug Diversion Initiative. Our participants, who had many years of experience on the bench, agreed that diversion was a desirable goal for many of those 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, however, 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)

Consistent with best practice for addressing and reducing the demand for illicit drugs, judges made a case for a much-expanded range of options, including education and treatment, which is needed for effective sentencing and diversion, but, importantly, this required 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.

References

URLs correct as at April 2021

- Australian Bureau of Statistics 2012–2014. *Prisoners in Australia* (various issues). ABS cat no. 4517.0. Canberra: ABS. <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia>
- Bagaric M & Edney R 2011. *Australian sentencing*. Sydney: Thomson Reuters (Professional)
- Belackova V, Ritter A, Shanahan M & Hughes C 2017. Assessing the concordance between illicit drug laws on the books and drug law enforcement: Comparison of three states on the continuum from 'decriminalised' to 'punitive'. *International Journal of Drug Policy* 41: 148–157. <https://www.doi.org/10.1016/j.drugpo.2016.12.013>
- Braun V & Clarke V (2006). Using thematic analysis in psychology. *Qualitative Research in Psychology* 3(2): 77–101. <https://www.doi.org/10.1191/1478088706qp063oa>
- Bull M 2010. *Punishment and sentencing: Risk, rehabilitation and restitution*. Melbourne: Oxford University Press
- Bull M, Denham G, Trevaskes S & Coomber R 2016. From punishment to pragmatism: Sharing the burden of reducing drug-related harm. *Chinese Journal of Comparative Law* 4(2): 300–316. <https://doi.org/10.1093/cjcl/cxw007>
- Coomber R 2015. A tale of two cities: Understanding differences in levels of heroin/crack market-related violence: A two city comparison. *Criminal Justice Review* 40(1): 7–31. <https://doi.org/10.1177/0734016814565817>
- Coomber R et al. 2018. The burgeoning recognition and accommodation of the social supply of drugs in international criminal justice systems: An eleven-nation comparative overview. *International Journal of Drug Policy* 58: 93–103. <https://doi.org/10.1016/j.drugpo.2018.05.010>
- Coomber R & Moyle L 2014. Beyond drug dealing: Developing and extending the concept of 'social supply' of illicit drugs to 'minimally commercial supply'. *Drugs: Education, Prevention and Policy* 21(2): 157–164. <https://doi.org/10.3109/09687637.2013.798265>
- Freiberg A 2003. Therapeutic jurisprudence in Australia: Paradigm shift or pragmatic incrementalism? *Law in Context* 20(2): 1–18
- Hughes C, Ritter A, Cowdery N & Phillips B 2014. Australian threshold quantities for 'drug trafficking': Are they placing drug users at risk of unjustified sanction? *Trends & issues in crime and criminal justice* no. 467. Canberra: Australian Institute of Criminology. <https://www.aic.gov.au/publications/tandi/tandi467>

Lenton S, Grigg J, Scott J & Barratt M 2016. The social supply of cannabis in Australia: Definitional challenges and regulatory possibilities. In B Werse & C Bernard (eds), *Friendly business*. Wiesbaden: Springer VS: 29–46. <https://www.doi.org/10.1007/978-3-658-10329-3>

Mizzi P, Baghizadeh Z & Poletti P 2014. *Sentencing Commonwealth drug offenders*. Judicial Commission of New South Wales monograph series no. 38. Sydney: Judicial Commission of New South Wales

Room R & Reuter P 2012. How well do international drug conventions protect public health? *The Lancet* 379 (9810): 84–91. [https://doi.org/10.1016/S0140-6736\(11\)61423-2](https://doi.org/10.1016/S0140-6736(11)61423-2)

Simon LMJ 2003. Proactive judges: Solving problems and transforming communities. In D Carson & R Bull (eds), *The handbook of psychology in legal contexts*. Chichester: Wiley. <https://www.doi.org/10.1002/0470013397>

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