Addressing the question:

“What are the likely costs and benefits of a change in Australia’s current policy on illicit drugs?”
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Executive summary

This is a background paper for the Australia 21 Roundtable, to be held in early 2012, at which national opinion leaders familiar with Australian and international public policy, and drug policy experts, will discuss the question ‘What are the likely costs and benefits of a change in Australia’s current policy on illicit drugs’. It is shaped around the following 15 questions.

What core concepts are used in this paper?

- In this paper the term drug refers to illegal (illicit) psychoactive substances.
- Prohibition means that all behaviour related to drugs, including use, possession, cultivation/manufacture and supply are criminal offences. Different jurisdictions implement drug policy in different ways within a prohibition policy.
- Decriminalisation means specified proscribed behaviour is removed from the criminal law and is dealt with under the civil law (e.g. on-the-spot infringement notices).
- Depenalisation means reducing the severity of penalties, e.g. removing custodial penalties and replacing them with fines.
- Legalisation means that the specified forms of behaviour are no longer offences dealt with by law.
- Regulation means establishing a strictly controlled legal market for a drug, as is the case with pharmaceutical drugs, tobacco products and alcoholic beverages.

What are the main sources of drug-related harm in Australia?

The main sources of drug-related harms are the use of drugs; interpersonal violence and other crime that occurs in drug markets; the illegal status of drugs; and societal responses to drugs, drug use and drug users.

What is the extent and nature of illicit drug availability and use, and drug-related harms, in Australia?

Drugs cause many types of harms in Australian society. These include deaths and disease (including mental illness, blood-borne viral diseases such as hepatitis C, and injury). Harms are found in domains as diverse as motor vehicle crashes, workplace injuries, family stresses and violence, inter-personal and acquisitive crime, corruption of public officials, environmental damage, etc. Drug market harms include murders and other serious offences.

Most categories of illegal drugs are rated as ‘easy’ or ‘very easy’ to obtain, according to the Australian Crime Commission. Australia has approximately one drug overdose death each day.

In 2010, approximately 15% of the national population 14 years and above had used one or more illicit drugs in the past 12 months, with cannabis the most commonly used illicit drug (10.3%), followed by MDMA (‘ecstasy’) (3.0%), and amphetamines and cocaine (each used by 2.1%).

The social cost of illicit drug use in Australia in 2004–05 was estimated to be $8.2 billion.
What is Australia’s current policy stance on drugs?

Australia’s National Drug Strategy (NDS), which was initiated in 1985, is based around three pillars: (1) reducing the supply (availability) of drugs through law enforcement, (2) reducing the demand for drugs through prevention and treatment, and (3) reducing the harms related to drug among people who continue to use them. These three pillars together compose the ‘harm minimisation’ approach that has characterised the NDS since its inception. The NDS is intended to operate as a partnership between the health and law enforcement sectors.

What forces have shaped Australian drug policy to date?

The most prominent of the currently illegal drugs, including opium, heroin, MDMA, cocaine and cannabis, were all legal products in Australia in the first half of the 20th century. Drug availability, use and related harms were low until the 1960s when so-called ‘recreational’ drug use became commonplace, driven in part by social change and in part by American servicemen in Australia on R&R who had acquired drug using habits in Vietnam.

What core challenges does Australia face today with respect to drug policy?

Australia faces diverse contemporary challenges with respect to public policy on drugs, including the following:

- Law enforcement agencies have had little success at reducing the availability of illicit drugs.
- Very large numbers of Australians—many of them young people—are being treated as criminals, many receiving criminal convictions, for minor drug offences, behaviour that creates very little harm (if any) to themselves or other people, such as occasionally smoking cannabis.
- Drug education interventions in schools and the community at large have little measurable impact on the demand for drugs.
- In many parts of the nation there are serious shortages of treatment places available, and long waiting lists for treatment.
- The mis-allocation of resources between illicit drugs, alcohol and tobacco, and between prevention, treatment and law enforcement is frequently commented upon, with the bulk of funding going to law enforcement and punishment (for which there is little evidence of cost-effectiveness) rather than to the areas that have been shown to be most cost-effective, especially treatment and harm reduction.

Why is now the right time to consider alternatives to prohibition?

The evidence-based policy movement is now prominent in Australia, with senior commentators calling for priority to be given to interventions for which we have sound evidence of effectiveness and, especially, cost-effectiveness. This is important in these days of financial stringency. Australian public opinion (as expressed through the NDS Household Survey program) supports a more rational approach to drug policy. At the international level there is increasing awareness that the international drug controls have failed to achieve their goals of reducing the availability of drugs and the extent and impacts of drug-related harms.
What is the international community saying about alternatives to prohibition?

In recent years there have been a number of reports from scholars, opinion leaders and advocacy groups not only calling for rethinks of drug policy internationally and within individual jurisdictions, but also proposing blueprints or roadmaps for how this can be achieved. Prominent among the calls for reform is framing drug use and drug-related harms as a population health issue, rather than one best responded to with criminal justice interventions. This reflects a sound evidence base comparing and contrasting the relative effectiveness of the two approaches.

What alternatives to prohibition have been adopted abroad, and with what outcomes?

It is useful to differentiate between *de jure* and *de facto* reforms to drug policy and drug law. *De jure* approaches refer to the wording of the drugs legislation. *De facto* approached refer to how the legislation is implemented within the criminal justice system. The Netherlands, Portugal and some other nations have made significant changes to their drug policies over the years, with positive outcomes in most instances.

Can society signal its disapproval of the use of particular drugs without recourse to the criminal justice system?

The nations that have decriminalised drug-consumer-type offences (e.g. drug use, possessing drug use implements, grow/possess/supply small quantities, etc.), through law reform, or have legalised these behaviours *de facto* while remaining within the international drug treaty provisions, do not condone or promote drug use. They continue to educate the public about the harms associated with these drugs, and provide expanded treatment services.

What are the implications of Australia’s treaty obligations for domestic drug policy?

Australia has considerable flexibility, within the bounds of the three main drug treaties, with regard to how we implement drug policy. We are required to maintain a full range of drug offences but do not need to have them all in the criminal law. Civil penalties, cautioning, diversion to drug education and/or treatment, etc., are all permissible alternatives. Were Australia to legalise drugs we would be in breach of the treaties and could expect a strong adverse response from much of the international community.

What are the key arguments supporting changes to Australia’s prohibition policy?

Many arguments have been proffered. Among the most prominent is that the current approaches are not ‘fit for purpose’, in the sense that they are failing to achieve their primary goals of reduced drug availability and harms. Instead they produce many unintended adverse consequences, including overdose deaths, corruption and other forms of crime. Expenditures on drug law enforcement have low returns on investment, especially when compared with expenditures on treatment and harm reduction interventions.

What are the key arguments supporting maintaining the current policy settings?

Rational arguments supporting the current policy settings on illicit drugs, underpinned by research evidence, are rarely proffered. The strongest arguments are those based on religious or moral positions, rather than on science. Some argue that creating even small changes in a direction away from total prohibition ‘sends the wrong message’ to the community about
drugs, particularly about their harm potential. Linked to this is concern that alternative approaches may cause an increase in the prevalence of drug use and/or the extent of drug-related harms.

**How is the international community likely to respond to Australia pursuing alternatives to the current policy of total prohibition?**

So long as Australia does not move beyond the framework provided by the international treaties, the international community is unlikely to respond negatively to our nation considering new alternatives to a total prohibition regime. On the other hand, we could expect a significant backlash if Australia sought to act alone in breach of the international treaties.

**What drug policy options could be considered as alternatives to total prohibition?**

A range of policy options exist within the current treaty framework, some requiring law reform, others being able to be implemented administratively. These include expanding programs to divert minor drug offenders from the criminal justice system, decriminalising some offences and the regulated and taxed supply of some drugs. Blueprints for action have been published. Withdrawing from the treaties is another option.

**Conclusion**

Now is apposite time for leading Australian thinkers to come to grips with evidence-informed drug policy reform options for this nation. In the words of the Global Commission on Drug Policy that reported in June 2011: ‘Getting drug policy right is not a matter for theoretical or intellectual debate—it is one of the key policy challenges of our time...Break the taboo on debate and reform. The time for action is now.’
What core concepts are used in this paper?

Some of the key terms used in debates about drugs and drug policy have diverse definitions. Here we provide the definitions underpinning the use of the terms in this paper.

**Drug:**
Australia’s National Drug Strategy (NDS) defines ‘drug’ as follows:

> The term ‘drug’ includes alcohol, tobacco, illegal (also known as ‘illicit’) drugs, pharmaceuticals and other substances that alter brain function, resulting in changes in perception, mood, consciousness, cognition and behaviour.¹

Since this paper focuses on the currently illegal drugs, unless stated otherwise, hereafter ‘drug’ refers specifically to the illegal drugs.

**Policy:**

> A statement of government intent, and its implementation through the use of policy instruments.²

**Prohibition:**

> Under the system of total prohibition the use, possession, cultivation, importation, sale and distribution of any amount of [specified drugs or categories of drugs] are treated as criminal offences. People importing or dealing in [drugs] may be liable to severe sanctions, and those using or found in possession of the drug are subject to arrest and prosecution. If convicted, they acquire a criminal record and may be subject to a variety of sanctions including imprisonment.

> ‘Total prohibition’ can take a number of forms. For example, although both The Netherlands and the United States have legislation that can be described as total prohibition, the differences in the strategies used to enforce, or not enforce, the legislation mean that the drug policies in these two nations are dramatically different.³

**Decriminalisation, depenalisation, legalisation and regulation:**

The following explanations come from the Transnational Institute (emphases added):

> There is much confusion in the literature and public debate about the terms decriminalisation, depenalisation, legalisation and regulation. Universally accepted definitions do not exist and interpretations frequently vary even within the same language.

> In the most common English usage decriminalisation is the elimination of a conduct or activity from the sphere of criminal law, while depenalisation is simply the relaxation of the penal sanction provided for by law. The term decriminalisation is most commonly used in reference to offences related to drug consumption and usually manifested by the imposition of sanctions of a different kind (administrative) or the abolition of all sanctions; other (non-criminal) laws can then regulate the conduct or activity that has been decriminalised.

Depenalisation can refer to consumption-related offences (which may be dealt with through referral schemes or alternative sanctions for drug users) but also to small-scale trading, generally indicating elimination or reduction of custodial penalties, although the conduct or activity remains a criminal offence...
Legalisation is the removal from the sphere of criminal law of all drug-related offences: use, possession, cultivation, production, trading, and so on.

Regulation refers to a strictly controlled legal market, in which administrative rather than criminal law regulates production, distribution and price (by taxation); and limits availability and access, using models developed for pharmaceutical drugs, alcohol and tobacco.  

What are the main sources of drug-related harm in Australia?

There are a number of types of drug-related harm, including those in the domains of health, social and economic functioning, safety and public order, criminal behaviour, corruption and environmental damage.

It is useful to be aware of the sources of these drug-related harms. The main sources are

- drug use
- inter-personal violence and other crime within drug markets
- the illegal status of drugs and
- societal responses to drugs, including stigmatising users and the unintended adverse consequences of some drug interventions including those in prevention, treatment and law enforcement.

In this context it is also useful to think about who bears the drug-related harms. They can include:

- people who use drugs
- suppliers of drugs
- drug users’ intimates and employers
- neighbourhoods
- the broader society, etc.

Many commentators see aspects of the operation of the criminal justice system as an important source of drug-related harm. For example, they point to the fact that, in the 2009-10 year (the latest for which data have been published) there were 85,252 arrests for drug-related offences nationally. 81% of these were classified as ‘consumers’ rather than ‘providers’. Cannabis consumers composed 57% of all drug arrests that year: 48,883 in total, or almost 1,000 per week nationally. Having so many people being in contact with the criminal justice system for offences such as consuming cannabis or possessing small quantities for personal use is seen by many as a disproportionate response to cannabis in society.
What is the extent and nature of illicit drug availability and use, and drug-related harms, in Australia?

Broadly speaking, the prevalence of illicit drug use has been falling since the late 1990s, though the use of some drugs has increased over that period. A recent authoritative report summarises the trends as follows:

- Illicit drug use declined in Australia between 1998 and 2007, while 2010 has shown a significant increase in use. This increase is primarily driven by an increase in cannabis use (from 9.1% [of the population aged 14 years and above stating they had used the drug in the previous 12 months] in 2007 to 10.3% in 2010) and non-medical pharmaceutical use (0.2% to 0.4%).

- Looking at other illicit drugs, population surveys conducted in 2007 and 2010 show an increase in cocaine use in Australia, although still at an overall low prevalence (2.1% of general population in 2010). Patterns of use [of cocaine] among those surveyed however remain sporadic.

- Ecstasy use declined significantly in 2010 for the first time since 1995.

- Increases have been recorded in the prescription of pharmaceutical opioids, and prescriptions are most prevalent among older Australians. Harms related to these drugs remain relatively low at this stage in Australia.

- Small minorities of regular ecstasy users in Australia report the use of emerging psychoactive substances such as mephedrone, with a decline seen from 16% in 2010 to 13% in 2011.

Data on the prevalence of recent illicit drug use its social costs have been summarised by the Australian Institute of Health and Welfare:

In 2010, most Australians aged 14 years and over (60%) had never used an illicit drug. However, around 15% had used one or more illicit drugs in the past 12 months. Cannabis was the most common illicit drug used recently (10.3%) followed by ecstasy (3.0%) and amphetamines and cocaine (each used by 2.1% of people). Many people who used an illicit drug in 2010 also used other drugs, illicit or licit.

The social cost of illicit drug use in Australia was estimated at $8.2 billion in 2004–05, including costs associated with crime, lost productivity and healthcare. Illicit drug use accounted for 2.0% of Australia’s total burden of disease in 2003. Much of this was caused by hepatitis C, which can be contracted by risky injecting practices.

Around 8% of people in Australia aged 16–85 years have had a drug use disorder (including harmful use/abuse and/or dependence) in their lifetime.

Illicit drugs remain readily available in Australia, with users reporting that most drug types are ‘easy’ or ‘very easy’ to obtain. MDMA (‘ecstasy’), while readily available, is of very low purity, a factor that may be driving users to potentially more harmful drugs including LSD, methamphetamines and synthetic cannabinoids.

The number of deaths from opioid overdose—around one per day nationally—is well below the level seen during the heroin glut of the late-1990s, but is still far too high as many of these deaths are preventable. This figure may be compared with land transport accidents (around 1,500 p.a.) and suicides (around 2,100 p.a.).
Very large numbers of people are in prison owing to either a drug-defined crimes (such as drug trafficking) or because of property or inter-personal offences such as burglaries committed to obtain drugs or money to buy drugs. In 2010, 10.2% of sentenced prisoners had a drug-defined crime as the most serious offence for which they were imprisoned (up from 9.2% in 1992). Some 66% of Australian prisoners reported using illicit drugs in the twelve months prior to incarceration, and 62% of people arrested by police tested positive to illicit drugs in 2010. In the most careful study conducted in Australia of the involvement of psychoactive substances in the offending that leads to imprisonment, 30% of male prisoners reported that illegal drugs alone, or illegal drugs and alcohol in combination, were the cause of the offences that resulted in their imprisonment.

Drugs cause many types of harms in Australian society, in addition to their impacts on mortality and morbidity (including mental illness, blood-borne viral diseases such as hepatitis C, and injury). These harms are found in domains as diverse as motor vehicle crashes, workplace injuries, family stresses and violence, inter-personal and acquisitive crime, corruption of public officials (as revealed in Royal Commissions and at trials of corrupt law enforcement officials), environmental damage, etc. Drug market harms include murders and other serious offences as observed in Victorian methamphetamine market disputes over the last decade.

Some of these are referred to as ‘hidden harms’. A study is currently being developed under the National Drug Strategy to better identify and, if possible, cost the dollar impacts of these ‘hidden harms’ in Australia to complement the existing assessments of drug-related harms and governments’ expenditures in preventing and responding to them.

What is Australia’s current policy stance on drugs?

Three broad approaches to drug policy may be seen around the world:

1. those that focus on reducing the prevalence of drug use
2. those that focus on reducing the amount of drug-related harm in society, and
3. prevalence reduction and harm reduction combined.

Australia’s policy, since 1985, has been the third of these: reducing both the prevalence of drug use and the harms caused by drugs and by societal responses to drugs. This is referred to as ‘harm minimisation’ which is described in Australia’s National Drug Strategy as follows:

*The aim of the National Drug Strategy 2010–2015 is to build safe and healthy communities by minimising alcohol, tobacco and other drug-related health, social and economic harms among individuals, families and communities...*

*The overarching approach of harm minimisation, which has guided the National Drug Strategy since its inception in 1985, will continue through 2010–2015. This encompasses the three pillars of:*

- demand reduction to prevent the uptake and/or delay the onset of use of alcohol, tobacco and other drugs; reduce the misuse of alcohol and the use of tobacco and other drugs in the community; and support people to recover from dependence and reintegrate with the community
- supply reduction to prevent, stop, disrupt or otherwise reduce the production and supply of illegal drugs; and control, manage and/or regulate the availability of legal drugs
- harm reduction to reduce the adverse health, social and economic consequences of the use of alcohol, tobacco and other drugs.*
It is important to note that, contrary to what some people claim, Australia’s illicit drug policy is not one of harm reduction alone. Rather, it aims to reduce drug availability, drug use and drug-related harm within a comprehensive, integrated strategy that covers all drugs, both legal and illegal. All eight States and Territories operate under this national framework, with a large degree of flexibility to accommodate local circumstances. The Strategy sits within a legal framework of full prohibition at the Commonwealth level and in NSW, Vic., Qld and Tas. By contrast, some minor cannabis offences have been decriminalised in SA, WA, NT and ACT (civil rather than criminal penalties apply in these jurisdictions) and all States and Territories have programs of cautioning for some categories of minor drug offenders and/or programs to divert them from the criminal justice system into drug education and treatment.

What forces have shaped Australian drug policy to date?

The most prominent of the currently illegal drugs, including opium, heroin, MDMA, cocaine and cannabis, were all legal products in Australia in the first half of the 20th century. The first prohibition legislation related to the smoking of opium—an overtly racist policy against Chinese people. The subsequent history of criminalisation of drugs has been described as follows:

Heroin was legally available on prescription in Australia until 1953. It was so widely used as a painkiller and in cough mixtures that Australia was the world’s largest per capita user of heroin. The 1953 prohibition of heroin was the result of international pressure on Australia to conform to the prohibition of heroin adopted by other countries, with some opposition from the AMA. Ironically, heroin, cannabis, and other drugs were prohibited in Australia well before their use became a major social issue. Before the 1960s, drug use was not completely unknown, but dependent drug use was typically the result of the use of opiates after first using them for medical reasons. There were drug dependent doctors (and their wives), and a small bohemian subculture that used drugs. Many Australian arrests for drug offences involved visiting jazz musicians.

Among the significant social changes of the 1960s was the emergence of the concept of ‘recreational’ drug use - the consumption of cannabis, heroin, LSD and other psychoactive drugs for pleasure, or in pursuit of spiritual enlightenment. For the first time, drug use became widespread—if not quite mainstream—rather than an activity pursued by a few painters or poets. The official response was increased law enforcement, and legislative change to extend the range of offences and increased penalties for drug offences.

The ‘old’ Australian drug laws were mostly under the various state Poisons Acts, reflecting an underlying approach of regulation and control of medicinal substances, with potentially addictive drugs legally available only on a doctor’s prescription. The ‘new’ drug laws introduced a distinction between use and possession offences, and supply offences. Penalties for possession and use increased, but very substantial penalties were introduced for drug supply, and especially supply of large quantities (‘drug trafficking’). By 1970, all the states had enacted laws that made drug supply a separate offence to drug use or possession offences.

During the 1980s and 1990s, Australia was acknowledged as a world leader in drug policy with its adoption of the National Drug Strategy addressing all psychoactive substances in one package; seeking to attain a balance between demand reduction, supply reduction and harm reduction interventions; and having law enforcement and health agencies working in
partnership. Over the last decade, however, few innovations have occurred in Australian illicit drug policy other than the national diversion initiative, leaving Australia behind some other nations in this regard, as illustrated below. Furthermore, the trend in legislative reform has been towards harsher penalties for drug offences.

What core challenges does Australia face today with respect to drug policy?

Australia faces a number of pressing challenges related to illicit drugs policy at present. They include the following:

- **Law enforcement agencies have had little success at reducing the availability of illicit drugs. Even large, well-publicised drug seizures have few medium- to long-term impacts on drug availability as they represent such a small proportion of the total drug market.**

- **Drug manufacturers and traffickers readily adapt to changing drug market forces and, indeed, sometimes shape them.**

- **Very large numbers of Australians—many of them young people—are being treated as criminals, many receiving criminal convictions, for minor drug offences: behaviour that creates very little if any harm to themselves or other people, such as smoking cannabis.**

- **Drug education interventions in schools and the community at large have little measurable impact on the demand for drugs.**

- **In many parts of the nation there are serious shortages of treatment places available, and long waiting lists for treatment.**

- **Drug overdose mortality incidence remains far too high, considering that many of these deaths are preventable. High levels of morbidity are also associated with non-fatal overdoses.**

- **The majority of the Australian population opposes aspects of the current prohibition policy. For example, in 2010, 66% of the population aged 14 years and above opposed or strongly opposed the possession of cannabis being a criminal offence, and 69% favoured legislative change to allow cannabis to be used for medicinal purposes. At the same time, the majority of the population supports harsher penalties for the sale or supply of illicit drugs.**

- **New designer drugs are continually emerging on the markets (frequently referred to as ‘legal highs’). The harm potential of these drugs is generally not clear but many are far more harmful than the more familiar drugs such as cannabis, MDMA and methamphetamine. To date Australia has had a single response, legislative prohibition. Other, potentially more effective, responses have received little or no attention by policy-makers.**

- **The decline in the quality of the MDMA (‘ecstasy’) found in Australian drug markets (possibly driven by stronger controls on precursors) is thought to be driving an increase in the use of the far more dangerous drug, LSD.**

- **The unlawful use of diverted opioid pain relievers is increasing, as are overdoses from these drugs. Australia may be following the USA experience with these drugs: in that nation there are now more deaths each year from opioid pain relievers than from heroin and cocaine combined.**
• Concern exists with the governance of the National Drug Strategy (NDS). This includes the recent abolition of its peak decision-making entity, the Ministerial Council on Drug Strategy, and the lack of transparency in decision-making processes within the NDS.

• The mis-allocation of resources between illicit drugs, alcohol and tobacco, and between prevention, treatment and law enforcement. The illicit drugs, and law enforcement related to them, consume a significantly higher proportion of governments’ budgets than is warranted in terms of the proportion of the drug-related harms that they cause, and the relative lack of cost-effective law enforcement interventions. Applying an ‘inputs-activities-outputs-outcomes’ interventions framing, it is no surprise that huge numbers of people committing minor offences related to their own drug use are caught up in the criminal justice system rather than receive health interventions that are effective in reducing drug use and drug-related crime. This is because the preponderance of funding goes to the least effective set of interventions, law enforcement and punishment.

Why is now the right time to consider alternatives to prohibition?

The evidence-based policy movement has become quite strong in Australia in recent years. Prime Ministers and senior public servants have spoken about its importance. Unfortunately, however, illicit drug policy has not been sufficiently subject to the scrutiny that evidence-based policy entails. We continue to implement the same old policies, knowing that they are of very limited effectiveness in terms of reducing drug use and drug-related harm. The current era of financial stringency is an ideal time to give higher salience to policies that have been demonstrated, through research, to be the most effective and cost-effective. The current approaches to illicit drugs, emphasising legislative prohibition and law enforcement, do not meet these criteria.

At the international level, there has been increasing acknowledgement, in recent years, that the current prohibition policy is, in the words of the former Executive Director of the United Nations Office for Drugs and Crime, not adequately ‘fit for purpose’. Furthermore, both he and policy researchers have drawn attention to the extensive, serious adverse unintended consequences of many current policies and their implementation modalities. New approaches that minimise the harms caused by interventions, particularly law enforcement, are needed. As documented below, prominent international bodies are calling for reform of the international drug control system to make it more suitable for the contemporary world.

The 1998 United Nations General Assembly Special Session (UNGASS) on the World Drug Problem committed governments to taking action to ‘eliminate or significantly reduce’ drug production and demand over the following decade. The UN’s 2009 review, undertaken by the United Nations Commission on Narcotic Drugs, documented the failure to achieve those goals. Rather than use that as an opportunity to rethink the global and national strategies, governments simply recommitted themselves to doing more of what had been demonstrated to be unsuccessful in the past! Nonetheless, the ten-year review provided an opportunity for civil society organisations to think systematically about other ways of dealing with the globe’s drug problems.

Closer to home, as noted above Australian public opinion not only opposes aspects of our current prohibition policy (particularly as it relates to cannabis) but also supports innovative
approaches that challenge the traditional prohibition orientation, including trialling heroin assisted treatment for opioid dependent people, more supervised injecting facilities, expanding needle and syringe programs for priority populations including prisoners, and directing resources from law enforcement to prevention and treatment.

What is the international community saying about alternatives to prohibition?

The dominant prohibition approach has had its critics ever since it was established. Nonetheless, the amount of scholarly attention and serious reflection by drug policy reform advocates increased substantially in the lead-up to the 2009 United Nations Commission on Narcotic Drugs review of the previous decade’s progress towards meeting the General Assembly’s 1998 commitment to ‘eliminating or significantly reducing’ illicit drug cultivation, manufacture, supply and demand. Prominent bodies such as the European Union acknowledged the failure of the international community to meet its self-imposed goals in addressing the global drug problem, and opened space for discussion of alternative goals and approaches.

As discussed below, in 2008 the Global Cannabis Commission presented a thorough, scholarly report on cannabis and proposed a new regulatory scheme, using the UN Framework Convention on Tobacco Control as its starting point. The British NGO Transform published a landmark report in 2009 setting out what they see as a ‘blueprint’ for establishing a regime of government regulation of the currently-illicit drugs. Drug policy think-tanks such as the Transnational Institute, the Beckley Foundation, the International Drug Policy Consortium and the Trimbos Institute, along with drug law reform advocacy organisations such as the Drug Policy Alliance, Families and Friends for Drug Law Reform and the Australian Drug Law Reform Foundation, have all proffered suggestions for actions that they believe will constitute improved responses to illicit drugs.

2009 also saw the release of the report of the Latin American Commission on Drugs and Democracy, convened by the former presidents of Brazil, Colombia and Mexico. (This is part of a wider trend of retired and/or serving Heads of State publicly arguing that current policies are not effective.) The Commission’s report, and the background documents developed to support its work, have precipitated reconsideration of drug policy in a number of Latin American nations. Among its major themes are:

- ‘The long-term solution for the drug problem is to reduce drastically the demand for drugs in the main consumer countries’
- ‘Treating drug users as a matter of public health and promoting the reduction of drug consumption are preconditions for focusing repressive action on two critical points: reduction of production and dismantling the networks of drug trafficking’ and
- ‘Each country must face the challenge of opening up a large public debate regarding the seriousness of the problem and the search for policies consistent with their history and culture’.

The most recent high-profile call for finding better alternatives to the current prohibition regime has come from the Global Commission on Drug Policy which reported in June 2011. Its theme is that ‘Getting drug policy right is not a matter for theoretical or intellectual debate - it is one of the key policy challenges of our time’. The Commission consisted of 19 current
and former heads of state and other dignitaries from around the world including Kofi Annan, former Secretary General of the United Nations, George P. Shultz, former United States Secretary of State, Enesto Zedillo, former President of Mexico, George Papandreou, the Prime Minister of Greece and Richard Branson, entrepreneur.

The Commission’s stated purpose was ‘...to bring to the international level an informed, science-based discussion about humane and effective ways to reduce the harm caused by drugs to people and societies’. Its goals were to review the basic assumptions, effectiveness and consequences of the ‘war on drugs’ approach; evaluate the risks and benefits of different national responses to drug problems; and develop actionable, evidence-based recommendations for constructive legal and drug policy reform.

A key message from the Global Commission’s Report is to ‘break the taboo on debate and reform’. The Report argues that the policies and strategies of the last fifty years have failed not only in curtailing the global drug market but have also had ‘devastating consequences for individuals and societies around the world’.

Key principles that the Global Commission argue should underpin drug policy include basing policies on ‘empirical and scientific’ evidence, on ‘human rights and public health principles’, taking account of nations’ ‘diverse political, social and cultural realities’, and pursuing drug policies ‘in a comprehensive manner, involving families, schools, public health specialists, development practitioners and civil society leaders, in partnership with law enforcement agencies and other relevant governmental bodies’. They also emphasise the need to end the stigmatisation and marginalisation of people who use drugs, as well as those involved in lower-end drug cultivation and production.

One of the overarching messages from the Commission is the sense of urgency and the risks of continuing with the current approach. This is highlighted in the final recommendation to ‘Act urgently: the war on drugs has failed and policies need to change now’.

The Global Commission’s 11 recommendations are summarised in Appendix 1.

What alternatives to prohibition have been adopted abroad, and with what outcomes?

It is useful to differentiate between de jure and de facto reforms to drug law. De jure approaches refer to the wording of the drugs legislation. De facto approached refer to how the legislation is implemented within the criminal justice system.

The Netherlands has a well-known de facto approach to drug law reform. Its policy is based on separating the cannabis markets from the markets for more dangerous drugs. It remains an offence to cultivate, supply and consume cannabis in The Netherlands (as required by the drug treaties), but the Government of The Netherlands has deemed that it is ‘inexpedient’ to prosecute certain cannabis offences, opening opportunities for the highly regulated ‘coffee shops’ where cannabis is sold and consumed. The Netherlands has lower prevalence of cannabis use than many other nations (around 5.5% of the adult population having used the drug in the past 12 months, compared with an Australian prevalence rate of 10%).

Portugal decriminalised all drugs in 2001, in the sense that possession was no longer a criminal offence (manufacture, supply etc. remains an offence punished through the criminal justice system). Importantly, as part of the policy package, Portugal established a comprehensive system of assessment and referral to treatment of people detected using illegal drugs.
Portugal’s ‘drug tsar’, João Goulão, is quoted in an October 2011 issue of the *BMJ* explaining ‘It’s very difficult to identify a causal link between decriminalisation by itself and the positive tendencies we’ve seen...It’s a total package. The biggest effect has been to allow the stigma of drug addiction to fall, to let people speak clearly and to pursue professional help without fear’.\(^{39}\)

The Portuguese decriminalisation has been scientifically evaluated with the researchers concluding that, ‘...contrary to predictions, the Portuguese decriminalization did not lead to major increases in drug use. Indeed, evidence indicates reductions in problematic use, drug-related harms and criminal justice overcrowding’.\(^{40}\)

**Can society signal its disapproval of the use of particular drugs without recourse to the criminal justice system?**

The nations that have decriminalised drug-consumer-type offences (e.g. drug use, possessing drug use implements, grow/possess/supply small quantities, etc.), through law reform, or have legalised these behaviours de facto while remaining within the prohibition international treaty provisions, do not condone or seek to promote drug use. They continue to educate the public about the harms associated with these drugs, and to provide expanded treatment services.

The message they seek to send to the community is that much drug use is problematic and that society disapproves of drug use, but that there are better ways of responding (especially to drug users and user/dealers) than through the criminal justice system. The alternative is to treat drug use as a health issue, and to respond to drug use with public health, rather than criminal justice, interventions. At the same time, the jurisdictions abroad that take this approach continue to rigidly enforce serious drug offences such as manufacturing drugs and commercial-level drug trafficking.

**What are the implications of Australia’s treaty obligations for domestic drug policy?**

Three main international treaties, to which Australia is a party, help shape Australian law and policy regarding illegal drugs. They are

- the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol
- the Convention on Psychotropic Substances of 1971
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.\(^{41}\)

While the primary purposes of these treaties is to ensure that certain psychoactive drugs are available for medical and scientific purposes, and to prevent them being diverted into illicit drug markets, the effect is to establish a prohibition regime covering the non-medical use of these drugs, and covering the drugs that are deemed not to have medical uses (e.g. cannabis and MDMA). In particular, the 1988 trafficking convention requires nations to ‘...adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions
of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention’ (Article 3 (2), emphasis added).

 Provision is made for the diversion of some offenders out of the criminal justice system:

*The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender’ (loc. cit.).*

These provisions are ‘Subject to [the party’s] constitutional principles and the basic concepts of its legal system’ (loc. cit.).

These provisions mean that Australia cannot legalise the currently illegal drugs unless it denounces the treaties. Nonetheless, the diversion provisions that allow for partial prohibition, and the requirement that the treaties have effect subject to Australia’s ‘constitutional principles and the basic concepts of its legal system’, mean that we have considerable flexibility on how we implement the prohibition regime, so long as we retain the offences specified in the treaties. This flexibility is illustrated by the COAG Illicit Drug Diversion Scheme and the legislation covering Sydney’s Medically Supervised Injecting Centre.

**What are the key arguments supporting changes to Australia’s prohibition policy?**

In 2004 scholars associated with the UK-based Beckley Foundation documented a set of principles and commitments that they believe should underlie contemporary thinking about drug policy. They provide useful guidance today:

1. *That the current global drug system—as enshrined in the three United Nations Conventions of 1961, 1971 and 1988—is not achieving its core objective of significantly reducing the scale of the market for controlled substances such as heroin, cocaine or cannabis.*

2. *That the consequences of the implementation of this system of drug control can themselves be a source of economic, social and political problems.*

3. *That reducing the harm caused to the many individuals who use drugs is not a sufficiently high priority in international policies and programmes.*

4. *That there is a growing body of evidence regarding what policies and activities are (and are not) effective in reducing drug use and associated health and social problems, but this evidence is not sufficiently taken into account in current policy discussions which continue to be dominated by ideological and political considerations.*

5. *That the current dilemmas in international drug policy can only be resolved through an honest review of progress, a better understanding of the complex factors that create widespread drug use and a commitment to pursue policies that are effective.*

6. *That analysis of future policy options, while identifying policy that has clearly failed, is unlikely to produce a clear ‘correct’ policy on psycho-active drugs. What may be appropriate in one setting or culture may be less so in another. In addition, there are likely to be trade-offs between different policy objectives—for example, to reduce overall drug use or to reduce drug related crime—that may be viewed differently in different countries.*

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Other arguments for reconsidering Australia’s policy settings include:

- Prohibition policies in Australia and abroad have clearly failed to achieve their aims of reducing drug availability, use and harms: ‘The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and 40 years after President Nixon launched the US government’s war on drugs, fundamental reforms in national and global drug control policies are urgently needed’.44
- Huge amounts of public funds are being expended on drug controls with a low return on investment. At the same time, organised crime groups generate immense, untaxed profits from the drug trade (said to be second, globally, only to the value of the oil market).
- The importance of adopting policies that have been demonstrated, through research, to be most effective and cost-effective.
- Acknowledging the abuses of human rights and the damage inflicted on poor nations that many drug policies and their implementation create.
- The unacceptable level of unintended adverse consequences of current approaches.
- The fact that public opinion supports an evidence-based approach rather than uncritically maintaining the status quo.
- Initiatives in other nations and at the United Nations to rethink drug policy to make it more ‘fit for purpose’ in the modern world.
- etc.45

What are the key arguments supporting maintaining the current policy settings?

Rational arguments for supporting the current policy settings on illicit drugs, underpinned by research evidence, are rarely proffered. The strongest arguments are those based on religious or moral positions that the use of certain drugs is wrong; that people who use those drugs are bad people; and that therefore the drugs should be prohibited and people who manufacture/cultivate, supply and use them be treated as criminals.

Some argue that creating even small changes in a direction away from total prohibition ‘sends the wrong message’ to the community about drugs, particularly about their harm potential. Linked to this is concern that other approaches may cause an increase in the prevalence of drug use and the extent of drug-related harms.

Some argue that the currently illegal drugs have that status because they have an extremely high harm potential (while failing to appreciate that many of the currently legal drugs have significantly higher harm potential than many of the illegal ones).

Australia’s treaty obligations and the informal relationships that exist between governments that lie behind these formal instruments are sometimes raised as reasons for maintaining the status quo.

Since many of the alternatives to total prohibition that are suggested are not actually being implemented anywhere else in the world, opponents of drug law reform sometimes argue that, because we cannot be sure exactly what the consequences of reform would be, we should not take even small steps in those directions. In other words, they invoke the precautionary principle.
How is the international community likely to respond to Australia pursuing alternatives to the current policy of total prohibition?

In the past, Australian governments have been heavily criticised by the International Narcotics Control Board (INCB) and the USA Government when they have moved away from total prohibition policies relating to drugs. For example, the ACT Government was subject to a major campaign by the US authorities in the early 1990s when it announced plans to introduce the partial decriminalisation of minor cannabis offences—issuing infringement notices (Simple Cannabis Offence Notices) instead of using the criminal law. From time-to-time INCB members and US officials have threatened to cut off international markets for Australia’s lucrative medicinal morphine industry if we move too far in drug policy reform.

The global atmosphere has changed, however, in recent years. The United Nations Office for Drugs and Crime and the US Government are both taking far more rational approaches to drug policy than they did in the past. The virtual lifting of their opposition to harm reduction interventions, and their support for human rights approaches to drug policy, illustrate this.

So long as Australia does not move beyond the framework provided by the international treaties, the international community is unlikely to respond negatively to our nation considering new alternatives to a total prohibition regime. On the other hand, we could expect a significant backlash if Australia sought to act alone in breach of the international treaties.

What drug policy options could be considered as alternatives to total prohibition?

The Global Commission on Drug Policy, many of whose Commissioners were former heads of state, government ministers or high-ranking UN officials, made an important point about leadership:

> Political leaders and public figures should have the courage to articulate publicly what many of them acknowledge privately: that the evidence overwhelmingly demonstrates that repressive strategies will not solve the drug problem, and that the war on drugs has not, and cannot, be won. Governments do have the power to pursue a mix of policies that are appropriate to their own situation, and manage the problems caused by drug markets and drug use in a way that has a much more positive impact on the level of related crime, as well as social and health harms.46

Many policy options exist as alternatives to the traditional prohibition-focused approach. In reviewing these, and as mentioned above, it is useful to differentiate between *de jure* and *de facto* reforms to drug policy, law and practice. *De jure* approaches refer to the wording of the drugs legislation. *De facto* approaches refer to how the legislation is implemented within the criminal justice system. Policy alternatives to total prohibition exist under both approaches.

The range of drug policy options may be classified as follows:47

- Full or total prohibition
- Prohibition with cautioning or diversion to education and/or treatment (‘depenalisation’)
- Prohibition with civil rather than criminal penalties (‘decriminalisation’)

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47. Ibid., 11.
• Partial prohibition including
  - De facto legalisation of drug use (e.g. prohibition with a policy that it is inexpedient to prosecute consumer-type offences such as possessing drug paraphernalia, cultivating or possessing small quantities of drugs, and drug consumption)
  - De jure legalisation of drug use (e.g. prohibition with consumer-type behaviours not an offence)
• Regulated availability (e.g. drugs available on a doctor’s prescription or in a regulated and taxed market either as a government monopoly or a commercial market)
• Free availability (total legalisation: no restrictions on manufacture/cultivation, supply, possession or consumption).

As mentioned above, all of Australia’s states and territories have some form of cautioning and/or diversion from the criminal justice system into drug education or treatment (depenalisation) for some classes of offenders. Four jurisdictions (ACT, NT, SA & WA) have prohibition with civil rather than criminal penalties (decriminalisation) with respect to cannabis but not the other illegal drugs. No Australian jurisdictions have partial prohibition or regulated availability as described above. No serious commentators advocate totally-unregulated, free availability of psychoactive substances.

As the Global Commission on Drug Policy pointed out, many community leaders have stated privately that they understand that the current drug control regime is ineffective and indeed sometimes counter-productive, and in need of reform. In response to this, the British NGO Transform Drug Policy Foundation recently published a detailed report called After the War on Drugs: Blueprint for Regulation.48 This advocates establishing a regime for the regulated availability of drugs, and provides a set of practical steps that could be taken towards attaining this goal.

A slightly different approach has been taken by the Beckley Foundation’s Global Cannabis Commission. Its work led to the publication in 2010 of the book Cannabis Policy: Moving Beyond Stalemate.49 Although focusing specifically on cannabis, one of its strengths is its discussion of options for reforming the global treaty framework covering drug control. After discussing the various options available to nations to create change within the treaty framework, or to move out of it, the Commission draws attention to the WHO Framework Convention on Tobacco Control. It suggests that this treaty provides the starting point or model for developing new global agreements on the control of drugs based on a set of explicit principles more attuned to the contemporary world than were applied decades ago in the drafting of the current drug conventions. Although its recommendations apply specifically to cannabis, the general thrust could apply, with some modification, to other illegal drugs as well.
Conclusion

Some commentators are suggesting that the previously unimaginable might become reality, with some states of the USA legalising cannabis within the next few years. This is based on regular Gallup polling which shows the continuing increase in support by the American public for legalisation, with 50% of the population in 2011 answering ‘Yes, legal’ to the question ‘Do you think the use of marijuana should be made legal, or not?’.

Furthermore, in 2010 70% favoured making it legal ‘for doctors to prescribe marijuana in order to reduce pain and suffering’.

It is possible that the nation that imposed on the world its failed ‘War on Drugs’ will become one of the leaders in drug policy and law reform. This is one of the forces that makes the present an apposite time for leading Australian thinkers to come to grips with evidence-informed drug policy reform options for this nation.

To reiterate the words of the Global Commission on Drug Policy: ‘Getting drug policy right is not a matter for theoretical or intellectual debate—it is one of the key policy challenges of our time.’
Appendix: recommendations of the Global Commission on Drug Policy, 2011

1. Break the taboo. Pursue an open debate and promote policies that effectively reduce consumption, and that prevent and reduce harms related to drug use and drug control policies. Increase investment in research and analysis into the impact of different policies and programs.

2. Replace the criminalization and punishment of people who use drugs with the offer of health and treatment services to those who need them.

3. Encourage experimentation by governments with models of legal regulation of drugs (with cannabis for example) that are designed to undermine the power of organised crime and safeguard the health and security of their citizens.

4. Establish better metrics, indicators and goals to measure progress.


6. Countries that continue to invest mostly in a law enforcement approach (despite the evidence) should focus their repressive actions on violent organized crime and drug traffickers, in order to reduce the harms associated with the illicit drug market.

7. Promote alternative sentences for small-scale and first-time drug dealers.

8. Invest more resources in evidence-based prevention, with a special focus on youth.

9. Offer a wide and easily accessible range of options for treatment and care for drug dependence, including substitution and heroin-assisted treatment, with special attention to those most at risk, including those in prison and other custodial settings.

10. The United Nations system must provide leadership in the reform of global drug policy. This means promoting an effective approach based on evidence, supporting countries to develop drug policies that suit their context and meet their needs, and ensuring coherence among various UN agencies, policies and conventions.

11. Act urgently: the war on drugs has failed, and policies need to change now.

References


7. A number of indices of the relative harms of different drug types have been published. The best known recent one is Nutt, DJ, King, LA & Phillips, LD on behalf of the Independent Scientific Committee on Drugs 2010, ‘Drug harms in the UK: a multicriteria decision analysis’, *The Lancet*, vol. 376, no. 9752, pp. 1558-65.


30 The Transnational Institute has a clearinghouse containing some key documents: http://www.tni.org/archives/links_drugs-undrug .


34 Rolles, S 2009, After the war on drugs: blueprint for regulation, Transform Drug Policy Foundation, Bristol, UK.
35 Latin American Commission on Drugs and Democracy 2009, Drugs and democracy: toward a paradigm shift, Latin American Initiative on Drugs and Democracy, n.p., http://www.drogasedemocracia.org English/DocumentosComissao.asp.


40 Hughes, CE & Stevens, A 2010, ‘What can we learn from the Portuguese decriminalization of illicit drugs?’, British Journal of Criminology, vol. 50, no. 6, p. 999.

41 The texts of these treaties are online at http://www.unodc.org/unodc/en/treaties/index.html.

42 Earlier this year Bolivia announced its intention to denounce the Single Convention on Narcotic Drugs, and then to re-accede to it with a reservation regarding the status of coca leaf. This is because the Convention’s prohibition of the cultivation, supply and consumption of coca leaf is seen, by the Bolivian Government, to be inconsistent with the cultural practices of its people.


48 Rolles, S 2009, After the war on drugs: blueprint for regulation; executive summary, Transform Drug Policy Foundation, Bristol, UK.


51 Corresponding 2010 Australian National Drug Strategy Household Survey figures are 25% supporting the legalisation of cannabis and 69% supporting law reform to enable the medical use of cannabis.