

Working Group to Consider Alternative Approaches to the Possession of Drugs for Personal Use

Report to:

- Minister for Health, Simon Harris T.D. and Minister for Justice and Equality, Charles Flanagan T.D.
- Minister of State for Health Promotion and the National Drugs Strategy, Catherine Byrne T.D.

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Preface

Message from the Chair

The Minister for Health Promotion and the National Drugs Strategy, Catherine Byrne TD established a Working Group in November 2017 to consider alternative approaches to the possession of drugs for personal use. The group met on 19 occasions between December 2017 and March 2019.

I would like to especially thank Ms. Therese Molyneux, Assistant Principal, Dr. Sarah Waters, Assistant Principal and Mr. Colin Lavelle, Administrative Officer, for their great work in preparing this report and getting it over the line. I would also like to thank all the members of the Working Group for their participation in the deliberations of the Group.

This is a majority report.

Garrett Sheehan

Chairperson

Terms of Reference

The Department of Health and the Department of Justice and Equality were tasked with establishing a Working Group to consider the approaches taken in other jurisdictions to the possession of small quantities of drugs for personal use in light of the Report of the Joint Committee on Justice, Defence and Equality on a Harm Reducing and Rehabilitative approach to the possession of small amounts of illegal drugs to examine:

- a) the current legislative regime that applies to simple possession offences in this jurisdiction and the rationale underpinning this approach, and any evidence of its effectiveness;
- b) the approaches and experiences in other jurisdictions to dealing with simple possession offences;
- c) the advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current system for the individual, the family and society, as well as for the criminal justice system and the health system;
- d) the identification of the scope of any legislative changes necessary to introduce alternative options to criminal sanctions for those offences;

- e) a cost benefit analysis of alternative approaches to criminal sanctions for simple possession offences; and
- f) make recommendations to the relevant Minister within twelve months.¹

¹ On 11 December 2018 the Chair requested an extension of three months

1 Executive Summary and Summary of Main Recommendations

1.1 Drugs policy in Ireland is aligned to the public health goals of improving health and reducing harms caused by drugs. *Reducing Harm, Supporting Recovery*,² our national drugs strategy, aims to remove obstacles to rehabilitation and afford people the opportunity to recover from addiction. It promotes a more compassionate and humane approach with problematic substance use being treated as a health issue.

1.2 A growing number of governments, UN and EU agencies and professional bodies have called for a public health response to the possession of drugs for personal use. The Programme for a Partnership Government contains a firm commitment for Ireland to support a health-led rather than criminal justice approach to drugs use.³ The three UN drug control conventions,⁴ as well as the European Union Drugs Strategy 2013-2020 encourage states to introduce an alternative to conviction or punishment for drug using offenders.⁵ A new position statement on drug policy from the United Nations Chief Executives Board (CEB) chaired by the UN Secretary General and representing 31 UN agencies, calls on member states to “promote alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use”.⁶

1.3 The Oireachtas Joint Committee on Justice, Defence and Equality recommended the introduction of a harm-reducing and rehabilitative approach to the possession of a small amount of illegal drugs for personal use.⁷ They highlighted the need for more research to ensure that the adoption of any alternative approach would be appropriate in the Irish context. Therefore, research was commissioned on behalf of the Working Group in May 2018 to synthesise the evidence of approaches and experiences in other jurisdictions and to recommend models that may work in the Irish context.⁸

1.4 The research report (**Annex I**) identified six approaches in the nine selected jurisdictions and explored the advantages, disadvantages, outcomes and process of each approach, and discussed evidence of their effectiveness. The researchers suggested that Ireland could adopt a number of the approaches, but they recommended a hybrid of two approaches: depenalisation of the most minor drug possession offences such as cannabis or for a first or second offence and decriminalisation with targeted diversion for higher-risk offenders.

² Department of Health. Government of Ireland. 2017. *Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025*. Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

³ A Programme For A Partnership Government, May 2016, available at:

https://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf

⁴ Council of the European Union. Council Conclusion: Promoting the Use of Alternatives to Coercive Sanctions for drug Using Offenders, March 2018, Brussels

⁵ European Union Drugs Strategy 2013–2020 Brussels: General Secretariat of the Council

⁶ United Nations System Chief Executives Board for Coordination, Second Regular Session Report (November 2018, New York) 2018 CEB/2018/2- <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>

⁷ Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality: *Report on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs (2015)*

⁸ Hughes, C., et al., ‘Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences’, p. 5

1.5 The researchers highlighted that:

Any alternative approach to dealing with simple drug possession comes with risks. The research in this area is complex, incomplete and not capable of providing definitive answers about what the outcome of any given approach will be in the Irish context. The current approach also entails risk, including that costs and burdens are placed on citizens (taxpayers and people who use drugs) that are not justified by the effects in reducing social and health harms.⁹

1.6 The Working Group conducted a wide-ranging public consultation (**Annex II**) to inform its deliberations and to hear the views of communities, service users, families, stakeholders and the general public. There were three strands to the consultation process, namely an online questionnaire, focus groups with people who have been prosecuted for the possession of drugs for personal use, and an open policy debate with relevant stakeholder organisations. There was overwhelming support for a change to the current approach to simple possession offences in Ireland across all three elements of the consultation. The vast majority of people were of the view that criminalising drug use does not prevent or reduce drug use, and they supported a more health-centred approach which would encourage people to seek treatment for addiction. The respondents to the online questionnaire should not be considered a representative sample of Irish society.

1.7 The Working Group noted difficulties with the application of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) definition¹⁰ of the term “decriminalisation” in the Irish legal context and the constitutional difficulties that might arise were Irish legislators to try and decriminalise drugs. In terms of the particular matter of decriminalisation in the Irish context i.e. the removal of the offence, the group considered a number of issues. This included whether there might be legal or constitutional issues with An Garda Síochána directing people to the health system when no criminal offence has been committed. The group also formed the view that within the Irish legal system it would not be possible to set up Dissuasion Committees or a new body with vast powers of civil sanction along the lines of those of the Portuguese model. In Portugal drug possession remains an offence under law though not leading to a criminal conviction for personal use because they have powers to apply civil sanctions.

1.8 The Group noted that there were significant differences between the codified legal system of Portugal and the legal system which operates in Ireland. Ireland, like other common-law jurisdictions maintains a clear divide between the criminal law (which is enforceable by agents of the State, though with limited provision for private prosecution). The civil law for the most part is invoked by private individuals who wish to secure redress for wrongs which they claim to have suffered.

⁹ Hughes, C., et al., ‘Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences’, p. 4

¹⁰ “Decriminalisation – the status of the offence is reclassified from a criminal offence to a non-criminal offence within a country’s legal framework. It is still an offence, it is still prohibited behaviour that will be stopped by police and punished but it is no longer considered criminal”. B Hughes EMCDDA 2018

1.9 The Working Group recognised that any alternative should address the following principles, whilst remaining cognisant of potential difficulties imposed by our legal system:

- a person should be afforded the opportunity to avoid a criminal conviction for the possession of drugs for their personal use;
- a person should be supported to avoid, reduce and recover from drug-related harm;
- a person with problematic drug use should be referred to appropriate treatment or other support.

1.10 The Working Group has developed recommended policy options based on these principles, consultations, discussions with experts and the evidence summarised above.

1.11 In proposing alternative approaches for dealing with the offence of simple possession the Working Group was cognisant that statutory arrangements are in place for young people under the Children Act, 2001.

Recommended Policy Options

Option 1: Adult Caution

The Adult Caution Scheme is a discretionary alternative to prosecution, whereby a person found in possession of drugs for personal use could be given a formal caution by An Garda Síochána, who could also provide the individual with a health and social services information leaflet.

Option 2: Multiple Adult Cautions

Subject to the agreement of the DPP, a person could be given the benefit of an Adult Caution by An Garda Síochána more than once. This could provide a discretionary alternative to prosecution and criminal conviction on more than one occasion. The individual would also be provided with a health and social services information leaflet whenever they are given an Adult Caution in respect of possession of drugs for personal use.

Option 3: Diversion to Health Services

This option is based on a public health approach to drug use. People found in possession of drugs for personal use would be supported to address the harms of their drug use. A person in possession of drugs for personal use would be diverted for a brief intervention and screening; where necessary high-risk drug users would be offered onward referral for treatment or other supports.

Other Recommendations

- (i) The Working Group recommends in principle amending the penalty scheme in Section 27 of the Misuse of Drugs Act 1977 so that imprisonment is no longer an outcome for the possession of drugs for personal use, subject to a full examination of the legal implications and any unforeseen consequences.
- (ii) The Working Group recommends a change to the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 so that all convictions for drug possession for personal use (Section 3 MDA) can be spent. In addition, the group recommends decreasing the seven year period to three years between the conviction and it becoming spent.
- (iii) The Working Group considers it important that a dismissal or non-conviction under the Probation Act be recorded correctly and that this court outcome is clear when a person's records are being checked.
- (iv) The Working Group does not propose the introduction of threshold limits under current legislation. The Group recommends the retention of the statutory presumption to the effect that where the quantity of drugs involved renders it reasonable to assume that they were not for immediate personal use, they were possessed for the purpose of sale or supply.
- (v) The Working Group recommends that there are pathways available at all levels of the criminal justice system to refer people to treatment following prosecution.
- (vi) The Working Group recommends additional investment in services to support the policy option that is chosen.
- (vii) The Working Group recommends a campaign to increase awareness of the treatments available and of the harms associated with drug use.
- (viii) The Working Group recommends that any alternative approach introduced is monitored, has a data collection mechanism, an evaluation of the implementation and scope for appropriate modification.

The following table shows how the report addresses the specific Terms of Reference of the Working Group.

Terms of Reference	Response
Examine the current legislative regime that applies to simple possession offences in this jurisdiction and the rationale underpinning this approach, and any evidence of its effectiveness	<ul style="list-style-type: none"> - See Chapter 3 - See recommendations 10.2.1; 10.2.2
Examine the approaches and experiences in other jurisdictions to dealing with simple possession offences	<ul style="list-style-type: none"> - Research commissioned (Annex I) - See Chapter 6
Examine the advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current system for the individual, the family and society, as well as for the criminal justice system and the health system	<ul style="list-style-type: none"> - Research commissioned (Annex I) - Meetings held with experts from countries/jurisdictions with alternative approaches - See Chapter 6 - See Consultation Report (Annex II)
Identify the scope of any legislative changes necessary to introduce alternative options to criminal sanctions for those offences	<ul style="list-style-type: none"> - Discussions with legal experts - See Chapter 8 - Further deliberations will be required
Undertake a cost benefit analysis of alternative approaches to criminal sanctions for simple possession offences; and	<ul style="list-style-type: none"> - See Chapter 9 - See Costings Report (Annex III)
Make recommendations to the relevant Minister within twelve months	<ul style="list-style-type: none"> - See recommended policy options 1-3 - See recommendations 10.2.1 – 10.2.8

2 Introduction

2.1 Background to the Establishment of the Working Group

Report of the Joint Committee on Justice, Defence and Equality on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs

2.1.1 The Oireachtas Joint Committee on Justice, Defence and Equality on 5 November 2015 launched its Report on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs.¹¹

2.1.2 In June 2015, members of the Committee visited Portugal and discussed the approach to drug addiction adopted there since 2001. It was reported that the approach in Portugal, which is therapy based rather than punitive, has had a very positive result for the communities concerned. Following the visit and subsequent public hearings, the Committee concluded that a health-led approach may be more effective and more appropriate for those found in possession of a small amount of illegal drugs for personal use rather than a criminal sanction, as appropriate in an Irish context.

2.1.3 The Committee received in excess of 80 submissions from a wide range of organisations and individuals with a lot of expertise and knowledge of the issues involved. Public hearings took place on 14 October 2015 where a number of those who made submissions engaged with the Committee.¹²

2.1.4 Based on the evidence presented to it, the Committee therefore recommended the introduction of a harm-reducing and rehabilitative approach whereby the possession of a small amount of illegal drugs for personal use, could be dealt with by way of a civil or administrative response rather than via the criminal justice route. The Committee also highlighted the need for more research to ensure that the adoption of any alternative approach would be appropriate in the Irish context.

2.1.5 The report made the following recommendations:

- (i) The Committee strongly recommends the introduction of a harm reducing and rehabilitative approach, whereby the possession of a small amount of illegal drugs for personal use, could be dealt with by way of a civil/administrative response and rather than via the criminal justice route.
- (ii) The Committee recommends that discretion for the application of this approach would remain with An Garda Síochána/Health Providers in respect of the way in which an individual in possession of small amounts of drugs for personal use might be treated.

¹¹ Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality: *Report on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs (2015)*

¹² Submission made to the Committee are available online at:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_defence_and_equality/2015-10-14/2/

- (iii) The Committee recommends that any harm reducing and rehabilitation approach be applied on a case-by-case basis, with appropriately resourced services available to those affected, including resources for assessment (e.g. similar to the Dissuasion Committees used in Portugal) and the effective treatment of the individuals concerned
- (iv) The Committee draws attention to the success of 'informal' interaction with users when referred to the 'Dissuasion Committees' in Portugal and recommends that such an approach should be employed in Ireland if the recommendations in this report are to be adopted.
- (v) The Committee recommends that resources be invested in training and education on the effects of drugs and that appropriate treatment be made available to those who need to avail of same. The Committee feels that out-of-school 'informal' interaction by Youth Services could have a major role to play in this context.
- (vi) The Committee recommends that research be undertaken to ensure that the adoption of any alternative approach is appropriate in an Irish context.
- (vii) The Committee recommends that in addition to other measures, enactment of legislation in relation to Spent Convictions be prioritised.¹³

Criminal Justice *Strategic Committee Working Group on Alternatives to Prosecution (2016)*

2.1.6 The Working Group on Alternatives to Prosecution (WGAP) was established by the Criminal Justice Strategic Committee (CJSC) to review alternatives to prosecution and make recommendations in regards to the introduction of measures to amend/complement/replace existing alternatives. The following recommendations provided the rationale for the CJSC to establish the WGAP:

- (i) ...that the relevant agencies review the offences covered by the Adult Cautioning Scheme with a view to including a wider range of offences.¹⁴
- (ii) ...convene a working group to consider extending the legislation governing the Adult Cautioning scheme to include possession of drugs and other suitable offences.¹⁵
- (iii) ...convene a working group to consider extending the legislation governing the Adult Cautioning scheme to include conditional cautioning.¹⁶
- (iv) ...convene a working group to consider extending the use of fixed charge penalty notices to include other minor crime...¹⁷

¹³ Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality: *Report on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs (2015)*, p.10

¹⁴ The report of the Strategic Review of Penal Policy (2014), Recommendation 5, p. 35

¹⁵ 'Crime Investigation Report', An Garda Síochána Inspectorate (2014), Recommendation 11.9, p. 27

¹⁶ Ibid., Recommendation 11.10, p. 27

¹⁷ Ibid., Recommendation 11.12, p. 27

2.1.7 With regards to the extension of the Adult Cautioning Scheme to include the offence of possession of drugs for personal use, the WGAP determined that the inclusion of this offence for first time offenders would be “in the best interests of the criminal justice system, the offender and the wider public, as well as better according with Government policy generally”.¹⁸

2.1.8 The WGAP was of the view that the application of the Adult Cautioning Scheme to the offence of personal possession should not differentiate between substances in the same way cannabis and other drugs are differentiated in the Misuse of Drugs Act, with this approach considered more equitable for a first time offence.

2.1.9 With regards to the extension of the scheme to include conditional cautioning, the WGAP determined that it would have to be developed on a statutory basis, and “a definitive view on whether to introduce a conditional cautioning scheme would be best attained through dedicated deliberation in an appropriate cross-sectoral forum”.¹⁹

2.1.10 The WGAP determined that a broad range of representatives would comprise such a forum, having regard for the complexity of the matter and the specific “level of legal, financial and cross-sectoral analysis” required. It was suggested that “policy-makers and practitioners from the justice, health, education, local government and social protection sectors, along with stakeholders from academia and civil society (e.g. representatives of victim support groups and the business community)” could be represented on such a forum.²⁰

Controlled Drugs and Harm Reduction Bill (2017)

2.1.11 On 31 May 2017 Senator Lynn Ruane introduced a Private Member’s Bill to the Seanad – The Controlled Drugs and Harm Reduction Bill 2017. This Bill provides for the amendment of the Misuse of Drugs Act 1977 by the insertion of a new Section 3 into the principal Act. This provides that a person with a controlled drug in their possession is not guilty of an offence providing the amount possessed is for personal use only and does not exceed the authorised amount as regulated by the Minister.

2.1.12 The Bill provides for the establishment of a Drug Dissuasion Service to case manage persons found in possession of controlled drugs and to divert people away from the courts by providing a system of harm-reduction measures including drug awareness, drug rehabilitation and community engagement programmes.

2.1.13 The Private Members Bill was considered to be lacking in a number of key areas. The stated purpose of the Bill is to provide for the “decriminalisation for possession of controlled drugs for personal use” stating in Section 3 that “a person who has a controlled drug in his possession shall not be guilty of an offence where the possession is for personal use only, and the quantity possessed does not exceed the maximum amount for personal use and

¹⁸ The report of the Working Group on Alternatives to Prosecution (2016), unpublished, p.7

¹⁹ Ibid., p. 14

²⁰ Ibid., p. 4,14

possession in accordance with this Act”. The Misuse of Drugs Act is designed to prevent the abuse of certain drugs and to regulate the various professional activities associated with them. The Act imposes a prohibition on controlled drugs in their entirety and then provides certain provisions and positive obligations to enable certain persons to do certain things with those drugs. This is to ensure that certain controlled drugs are available for medical and scientific purposes.

2.1.14 The Bill commenced Second Stage in the Seanad on 31 May 2017. Minister of State Catherine Byrne indicated during the Second Stage debate that she has reservations with parts of the Bill. The Bill would mean that a person in possession of controlled drugs could not be prosecuted under the Misuse of Drugs legislation where the quantity is determined to be for personal use. It would become effectively legal to possess heroin, cocaine, cannabis, so-called ‘legal highs’ or any of the other drugs which were re-controlled by emergency legislation by the Oireachtas in 2015. This could lead to a situation akin to de facto legalisation. As stated in the Seanad debate on 31 May 2017, without the fundamental prohibition and offence of possession there can be no practical or legitimate mechanisms for controlling the import, manufacture, production, preparation or transportation of controlled drugs for the many legitimate and important medical, industrial and scientific uses. This includes the use by healthcare professionals or patients with a prescription.

2.1.15 The Second Stage debate in the Seanad was adjourned pending the outcome of the deliberations of this Working Group.

2.1.16 Senator Ruane addressed the Working Group on 24 April 2018; details of which are set out in section 7.2.2

Reducing Harm, Supporting Recovery (2017)

2.1.17 Internationally there is an emerging view that the application of criminal sanctions to certain drug users could be counter-productive.²¹ Criminal sanctions can also stigmatise the person concerned and can have far-reaching consequences, such as difficulties gaining employment and access to services, for example, housing, travel visas etc.²² The United Nations General Special Assembly on the World Drug Problem, which met in April 2016, called for the development of “alternative or additional measures with regard to conviction or punishment in cases of an appropriate nature, in accordance with the three international drug control conventions”.²³

²¹ Council of Europe, Pompidou Group (2018). Costs and Unintended Consequences of Drug Control Policies. Strasbourg: Council of Europe Publishing.

Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem New York, 19-21 April 2016, available at : <https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf>

²² Department of Health. Government of Ireland. 2017. *Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025*. p.57 Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

²³ Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem New York, 19-21 April 2016, p. 16

2.1.18 The drug situation is constantly evolving as is the policy response at national and international level. The drafting of the current National Drugs Strategy was informed by the political will at the time as highlighted in A Programme for a Partnership Government,²⁴ which committed to supporting a health-led rather than a criminal justice approach to drugs use. In addition, stakeholders, experts and the public were consulted for their views and experiences. This consultation further highlighted the changing attitudes towards people who use drugs, with calls for drug use to be treated first and foremost as a health issue.

2.1.19 Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025 is Ireland's third national drugs strategy.²⁵ Ireland's previous drugs strategies covered the period from 2001 to 2008 and 2009 to 2016 respectively. Both previous strategies were based on a balanced approach to the drug problem, focusing on the key pillars of supply reduction, prevention, treatment, rehabilitation and research. Substance misuse continues to be a significant challenge facing our country, and the nature and scale of the drug problem is constantly changing. As the drug situation changes, so too do the needs of those with drug problems.

2.1.20 This new strategy aims to provide an integrated public health response to substance misuse. It places a greater emphasis on health-led responses reflecting a human rights and equality perspective, while continuing to tackle the risks and harms to the wider community and society from the illegal drug trade and the use and misuse of substances. The vision for the strategy is:

A healthier and safer Ireland, where public health and safety is protected and the harms caused to individuals, families and communities by substance misuse are reduced and every person affected by substance use is empowered to improve their health and wellbeing and quality of life.²⁶

2.1.21 Many contributors to the strategy pointed to Portugal's public health response and the recommendations from the Joint Oireachtas Committee. Therefore, a strategic action was included in the National Drugs Strategy to address this growing movement toward a person-centred approach to drug policy rooted in public health. This strategic action, 3.1.35, called for the establishment of a working group to "consider the approaches taken in other jurisdictions to the possession of small quantities of drugs for personal use with a view to making recommendations on policy options to the relevant Minister within 12 months".

²⁴ A Programme For A Partnership Government, May 2016, available at:

https://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf

²⁵ Department of Health. Government of Ireland. 2017. Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025. Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

²⁶ Ibid., p. 8

2.2 Terms of Reference

2.2.1 The Department of Health and the Department of Justice and Equality was tasked with joint lead responsibility for the establishment of a Working Group, with the following Terms of Reference (TOR) to examine:

- a) the current legislative regime that applies to simple possession offences in this jurisdiction and the rationale underpinning this approach, and any evidence of its effectiveness;
- b) the approaches and experiences in other jurisdictions to dealing with simple possession offences;
- c) the advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current system for the individual, the family and society, as well as for the criminal justice system and the health system;
- d) the identification of the scope of any legislative changes necessary to introduce alternative options to criminal sanctions for those offences;
- e) a cost benefit analysis of alternative approaches to criminal sanctions for simple possession offences; and
- f) make recommendations to the relevant Minister within twelve months.

2.3 Membership

2.3.1 In order to meet the obligations of producing comprehensive, impartial and objective recommendations within a tight time-frame, it was agreed that the Working Group would be a technical expert group with the skills and background necessary to oversee the research, consultation and deliberative phases of work. At the request of Minister of State Catherine Byrne, retired Court of Appeal Judge Mr Justice Garrett Sheehan agreed to act as a Chairperson of the Working Group. The members of the Group are listed at **Appendix I**.

2.4 Work Programme

2.4.1 To ensure the terms of reference were sufficiently addressed, the work plan for the WG consisted of three distinct but overlapping phases:

A. Research Phase:

- (i) research the current legislative regime in this jurisdiction and evidence of its effectiveness;
- (ii) research the approaches and experiences in other jurisdictions);
- (iii) outline the advantages, disadvantages, impact and outcomes of any alternative approaches;
- (iv) develop a report setting out possible options for responding to the offence of simple possession.

B. Consultation Phase:

- (i) conduct a wide ranging and comprehensive consultation to engage with and hear the views of Government Departments and agencies, the public, service users, service providers, families, communities, representative groups and organisations, elected representatives;
- (ii) prepare a report on the outcomes of the consultation.

C. Deliberation Phase:

- (i) identify the scope of potential legislative impacts of the identified options and arising from the consultation process consolidate any required legislative changes;
- (ii) conduct a cost-benefit analysis of alternative approaches;
- (iii) deliberate on the reports from the research and consultation phases;
- (iv) develop draft recommendations;
- (v) Working Group to present recommendations to relevant Ministers.

3 The Current Legislative Regime, Rationale and Evidence of Effectiveness

3.1 The Irish Legal System

3.1.1 Ireland is a common-law jurisdiction governed by a written constitution (Bunreacht na hEireann) which protects several fundamental rights and provides for the judicial review of legislation. The defining characteristic of a common-law jurisdiction is that, historically, much of its law will have resulted from judicial decision-making as opposed to legislation. While more and more areas of our administrative, social and commercial life are now governed by legislation, the common law remains a vibrant source of the rules by which we live. Most continental European countries are civil law jurisdictions, their essential characteristic being that their law is encapsulated in codes which are to be applied by the courts.

3.1.2 In keeping with its common-law tradition, Ireland maintains a clear distinction between its criminal and civil law. The law prohibits many kinds of wrongdoing and undesirable behaviour, some of which is criminal and some of which is treated as a civil wrong such as a tort or a breach of contract. The essence of a crime is that it is regarded as a wrong against the community as a whole and not just against a particular victim (when there is one). All crimes of any appreciable degree of gravity are so defined as to include both a material (or external) element and a mental element. This means that before a person can be convicted of a crime, he or she must have performed the prohibited act or omission and have done so with a particular state of mind (which may be intention, knowledge, recklessness or, very rarely, negligence). Every person charged with an offence is presumed innocent until proved guilty and the burden of proving an accused person's guilt beyond a reasonable doubt rests with the prosecution.

3.1.3 The court in which a person is tried for an offence depends on the nature and gravity of the offence. Minor offences may be dealt with in the District Court, which is a court of summary jurisdiction and which has a general power to impose a sentence not exceeding 12 months for any one offence and not exceeding two years for a combination of offences. More commonly, it imposes non-custodial penalties such as fines or probation bonds. Virtually all serious offences are tried in the Circuit Court, where a defendant has the right to be tried by jury unless he or she pleads guilty. The Central Criminal Court, which is the High Court exercising criminal jurisdiction, has exclusive jurisdiction over murder and some other serious offences. The only formal limitation on the sentencing powers of the Circuit Court and the Central Criminal Court is the maximum sentence prescribed by statute for the offence of conviction. The Special Criminal Court is a non-jury court which, in effect, has jurisdiction to try any offence, but only in circumstances where it is determined that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order. A person convicted in the District Court may appeal against conviction, sentence or both to the Circuit Court. A person convicted in the Circuit Court, Central Criminal Court or Special Criminal Court may appeal against conviction, sentence or both to the Court of Appeal.

3.1.4 During the past few decades in Ireland, as in many other countries, there has been increasing recourse to the criminal law in order to enforce regulation. This has led to a

significant growth in the number of so-called regulatory offences. The term “regulatory offence” has proved difficult to define. In many cases at least, responsibility for the investigation of such offences rests, not with the police, but with a specialist agency such as the Health and Safety Authority. Many regulatory agencies and other public bodies have limited prosecution powers although, in accordance with Article 30 of the Constitution, prosecutions for serious offences to be tried in the higher criminal courts must be taken in the name of the People by the Director of Public Prosecutions.

3.1.5 Some regulatory agencies have significant enforcement powers outside of the criminal justice system. The Central Bank, for example, has important regulatory powers and may impose very heavy financial penalties on institutions and individuals found to be in breach of relevant regulations. However, enforcement powers of this nature require, first of all, a specialist and well-resourced regulatory body that can properly investigate suspected breaches and determine the appropriate penalty, if any, to be imposed. Secondly, the measures adopted must be practically enforceable in the sense that the body or person against whom they are directed must be clearly identifiable and also have a vested interest in being compliant with the regulations involved. A regulatory regime of this nature, therefore, would scarcely be practical for dealing with minor offences or infractions committed by a potentially large number of individuals. Securing compliance in that kind of environment would be practically impossible.

3.1.6 The apparatus of the criminal justice system – police, courts, prisons and so forth – is available solely to deal with suspected or confirmed breaches of the criminal law. As already noted, Ireland, like other common-law jurisdictions maintains a clear divide between the criminal law (which is enforceable by agents of the State, though with limited provision for private prosecution) and the civil law which, for the most part, is left to be invoked by private individuals who wish to secure redress for wrongs which they claim to have suffered.

3.2 The Misuse of Drugs Acts 1977 – 2016

3.2.1 The Misuse of Drugs Act 1977 and the Regulations made thereunder control the cultivation, licensing, possession, administration, supply, record-keeping, prescription-writing, destruction and safe custody of substances controlled under the Act – either by being listed in the Schedule to the Act or declared controlled by Government order. These include substances which have legitimate and therapeutic uses but which are open to abuse, e.g. heroin, cocaine, benzodiazepines, and substances which have no recognised or known legitimate and therapeutic uses. The Act provides for criminal offences and penalties are set accordingly, including for possession for personal use and possession for the purpose of unauthorised supply. Penalties for conviction for personal use are listed at **Appendix II**.

3.2.2 The effect of declaring a substance controlled under the Act (either in the Schedule to the Act or by Government Order) is to make it an offence to possess that substance. However, the Minister for Health may then make orders and regulations to give effect to the Government Decision by placing the substances which have been declared controlled into schedules, in accordance with Ireland’s obligations under international conventions.

Different levels of control apply to substances in different schedules, based on the health risk, potential for misuse and validity of legitimate use. Section 4 allows the Minister to regulate which persons or groups of persons may possess a substance (e.g. pharmacists) and for which purposes. A breach of regulations made under Section 4 results in an offence of possession. The Minister may make an order under Section 3 of the Act exempting from the offence of possession certain substances where the potential for abuse is considered low. These are primarily medicines with small quantities of active ingredients. There are approximately 260 individual substances controlled under the Misuse of Drugs Acts. This does not include substances controlled by the generic paragraphs and does not account for isomers or salts of those drugs. The schedules for controlled substances are explained in Table 1 below:

Schedules	Harmfulness	Degree of Control	Examples
1	Substances presenting a very high risk of abuse, posing a particularly serious threat to public health which are of very little or no therapeutic value	Very strict; use is prohibited except for scientific or research purposes. It is prohibited to import, export, produce, supply or possess these substances, except when specifically licensed to do so.	Cannabis, Coca Leaf, Raw Opium
2 & 3	Substances presenting a risk of abuse, posing a serious threat to public health which have therapeutic use.	Strict; import and export is by license only, with production, supply and possession restricted to license holders, listed health professionals and specified categories of persons.	Cocaine, Fentanyl, Diamorphine (Heroin)
4 & 5	Substances with therapeutic value, but lesser risks associated with misuse.	These substances are exempted from many of the controls under the Misuse of Drugs legislation i.e. licenses are not required for import and export.	Diazepam, Zopiclone

Table 1: Explanation of controlled substances Schedules

Source: Department of Health

The Evolution of the Misuse of Drugs Legislation

3.2.3 The 1977 Act was drafted to update Ireland's control of drugs in accordance with international thinking on the subject. The significant change in the approach with this legislation was that it sought to "prevent the misuse of certain dangerous or otherwise harmful drugs...." rather than just control their production and circulation.²⁷

3.2.4 It is noteworthy that the aim of the 1977 Act was to prevent drug possession and supply and to provide for the treatment and rehabilitation of drug offenders. The Act provided for the mandatory preparation of medical and Probation and Welfare Service reports for drug users brought before the courts. The courts were also authorised to arrange for medical treatment as necessary. In addition, the Central Mental Hospital was designated as a treatment centre for drug-using offenders in 1980.

²⁷ Dáil Éireann debate, Misuse of Drugs Bill, 1973: Fifth Stage (31 Mar 1977), available at: <https://www.oireachtas.ie/en/debates/debate/dail/1977-03-31/5/>

3.2.5 Most of these treatment options were little used however, and with an increase in drug taking during the early 1980s, the 1984 amendment of the Misuse of Drugs Act lessened the provisions aimed at providing treatment and rehabilitation. Section 14 of the Act substituted the mandatory provision of medical reports for discretionary provision.²⁸ The Central Mental Hospital never operated properly as a drug treatment centre and was de-designated a short time later.²⁹

Offences

Possession, trafficking and conveying drugs into prison

3.2.6 Section 3 of the 1977 Act provides:

(1) A person shall not have a controlled drug in his possession.

(2) A person who has a controlled drug in his possession in contravention of subsection (1) shall be guilty of an offence.

3.2.7 This is a general provision which makes it a criminal offence to have unauthorised possession of a controlled drug, irrespective of the nature or quantity of the drug involved.

3.2.8 Section 3 of the Misuse of Drugs Act must be read in conjunction with Section 15 as the law does not create a precise or watertight distinction between possession of drugs for immediate personal use and possession for sale or supply. Possession for immediate personal use is not defined in any quantitative or monetary terms, e.g. weight in grams, value of drugs, dosage levels, or qualitative statements as thresholds; it is for the trial court to determine the purpose for which the drugs were possessed. There is a statutory presumption to the effect that, where the quantity of drugs involved renders it reasonable to assume that they were not for immediate personal use, they were possessed for the purpose of sale or supply. However, this presumption may be rebutted. An offence contrary to Section 15 i.e. possession for sale or supply, carries a maximum sentence of life imprisonment.

3.2.9 It is noteworthy that the Misuse of Drugs (Supervised Injecting Facilities) Act 2017 provides for an exemption of authorised users from the offence of possession of controlled drugs under certain conditions, when in in a designated facility (e.g. a Supervised Injecting Facility) and with the permission of the licence holder. Section 7 of the Act defines “authorised user” as a person who is permitted to be on the premises for the purpose of consuming drugs by injection. A person is an “authorised user” only while on the premises.

3.2.10 It is also noteworthy that the Criminal Justice (Psychoactive Substances) Act 2010 works in tandem with the Misuse of Drugs Legalisation but does not impose any criminal

²⁸ 1984 amendment to Misuse of Drugs Act Seanad debate: <https://www.oireachtas.ie/en/debates/debate/seanad/1984-07-10/13/>

²⁹ O'Mahony, P (2008) *The Irish War on Drugs. The seductive folly of prohibition*. Manchester University Press; UK.

prohibition on the possession of such a substance for personal because this is already provided for in the Misuse of Drugs Acts. The Act gives a very wide definition to “psychoactive substance” which means, very broadly speaking, a substance that has the capacity to have a mind-altering effect. The Act is aimed at prohibiting the sale, importation, advertising, etc. of the prohibited substances and orders continue to be made under the Misuse of Drugs legislation bringing New Psychoactive Substances (NPS) under control.

Search and arrest powers

3.2.11 Section 23 of the Misuse of drugs Act 1977 confers important powers upon members of the Gardaí to search and, if necessary, arrest a person suspected of being in possession of a controlled drug. The section does not include any qualification as to the nature or amount of the drug involved, which means that the power may be exercised even where it is suspected that a person is in possession of a small quantity of a drug for personal use.

3.2.12 A person who fails to comply with a requirement made of him or her under Section 23 (as amended) is guilty of a summary offence which is currently punishable with a maximum fine of €500.

Sentencing

3.2.13 The maximum penalties applicable to the various offences created by the Misuse of Drugs Act 1977 are set out in Section 27 of the Act which was substantially amended by Section 6 of the Misuse of Drugs Act 1984. The penalties for the more serious offences (such as possession for sale or supply) have already been outlined above. The distinction between possession for personal use and possession for other purposes is most clearly drawn in Section 27 as it makes a distinction in the first instance between cannabis and other drugs. Then, in relation to cannabis itself, it distinguishes between first, second and subsequent convictions.

Cannabis

3.2.14 Possession of cannabis or cannabis resin for personal use is punishable by a fine only following a first or second conviction and this applies irrespective of whether it follows a summary conviction (in the District Court) or a conviction on indictment. In the case of a third or subsequent cannabis offence, the maximum sentence following summary conviction is a fine, up to 12 months imprisonment or both. Following conviction on indictment it is a fine, up to three years’ imprisonment or both.

Other drugs

3.2.15 In any other case, possession of drugs contrary to Section 3 of the 1977 Act carries a maximum sentence of a fine, up to 12 months’ imprisonment or both following summary conviction, and a fine, up to seven years’ imprisonment or both following conviction on

indictment. This particular provision, unlike that relating to cannabis, does not specify that the drugs must have been for personal use. However, it is to be inferred that this was the intention given that Section 27(3) provides much heavier maximum sentences, up to life imprisonment, for the possession of drugs, of any kind, for sale or supply.

Treatment orders

3.2.16 Section 28 of the 1977 Act, as amended by the 1984 Act, permits a court to remand a person convicted of certain drug offences, including offences of personal possession contrary to Section 3, to allow for the preparation of medical and other reports. On receipt of those reports, a court may, instead of imposing sentence, permit the person to enter into a recognisance containing certain conditions requiring him or her to undergo medical treatment or some kind of supervision. Alternatively, the court may:

order the person to be detained in custody in a designated custodial treatment centre for a period not exceeding the maximum period of imprisonment which the court may impose in respect of the offence to which the conviction relates, or one year, whichever is the shorter.

3.2.17 Information from the Probation Service indicates that this Section 28 provision is not used by the courts.

3.3 Garda Síochána Act 2005

3.3.1 An Garda Síochána Act 2005 was enacted with the purpose to reform administrative and management structures and procedures, and improving the operational functionality of An Garda Síochána. A specific aspect of note that was newly introduced was Part 2, Section 8(4) that allows for a member of An Garda Síochána to charge and prosecute in the name of the Director of Public Prosecutions (DPP) under general or specific directions:

8. — (4) The Director of Public Prosecutions may give, vary or rescind directions concerning the institution and conduct of prosecutions by members of the Garda Síochána.

3.3.2 On 8 November 2011, the DPP signed General Direction no.3 giving specific directions as per section 8 above, with 4.1(e) relating to drug offences under the Misuse of Drugs Act 1977:

4. (1) The Director of Public Prosecutions elects for summary disposal in the following category of cases without submission of a Garda file:

(e) Any offence under section 3 of the Misuse of Drugs Act, 1977, (for all controlled drugs).

(ee) An offence under section 15C of the Misuse of Drugs Act, 1977 (as inserted by section 83 of the Criminal Justice Act 2006) [supply of controlled drugs into prisons etc.], provided the accused is not employed by the State, where in the opinion of the Garda the market value of the drug does not exceed

- (I) in the case of cannabis or cannabis resin an amount of €1,500
- (II) in the case of diamorphine, LSD (lysergic acid diethylamide) or cocaine an amount of €500 and
- (III) in relation to any other controlled drug an amount of €1,000.³⁰

3.4 The Criminal Justice (Spent Convictions and Certain Disclosures) Act

3.4.1 The provisions of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 provides for certain convictions to become spent once 7 years has passed since the date of conviction bringing Ireland into line with most other EU Member States in providing that people convicted of relatively minor offences can eventually leave their past behind them and get on with their lives. This approach reflects the aim of assisting those who incur a conviction to rebuild their life, secure employment or training and make healthier choices.

3.4.2 Drugs offences are currently treated as other offences where a conviction results in a penalty of less than 12 months imprisonment. A person can have one conviction spent where the conviction resulted in a penalty of less than 12 months imprisonment. The Government previously decided against allowing more than 1 such conviction be spent because the Government (and the Oireachtas) considered it would not be proportionate to treat drugs offences in the same way as minor road traffic or public or minor public order offences.

3.4.3 The Act also included amendments to the National Vetting Bureau Act 2012 to provide that minor convictions will not be disclosed in Garda Vetting under that Act. However, because of the need to protect children or vulnerable persons, the non-disclosure provisions under that Act are more restrictive. It will still be the case that all offences against the person will be disclosed where persons are applying to work with children or vulnerable persons.

3.4.4 Regarding employment and travel prospects for individuals, the Irish spent convictions legislation cannot be used to prevent disclosure when you are required to disclose information about your criminal convictions to another state.

³⁰ Section 8 Garda Síochána Act 2005, General Direction No. 3 (DPP, 2011)

3.5 Effectiveness of the Current Approach

3.5.1 While there has been little research conducted on the effectiveness of criminalisation of personal possession in Ireland, there is evidence from Government Reports, from grey literature and from other countries that can help surmise whether the current approach is effective. In addition, we can draw on research conducted for other purposes, such as the impact of convictions or of incarceration.

3.5.2 One of the main aims of criminal law and sanctions is the deterrence effect.³¹ Deterrence can work both at the level of the general public and more specifically can deter an individual from re-offending. Whether a law is effective as a deterrent or not is more correlated with the probability of being arrested than the severity of the punishment.³² The probability of being caught for drug possession offences is very low (estimated at less than 1% for cannabis use³³), because of the private nature of drug use; most people will consume drugs in their own homes.

3.5.3 The fact that the prevalence of drug use has been rising constantly in Ireland since the early 1980s may be interpreted as evidence that the criminal justice response on its own has limited deterrence effect. On the other hand, some suggest that the current approach is deterring people from using drugs as 74% of adults over the age of 15 in Ireland have not used illegal drugs (based on prevalence data 2014/15³⁴). In a study of college students in Canada the law was cited as one of a number of deterrents for those respondents who did not take illegal drugs.³⁵ Other deterrents included cultural and family expectations and health reasons.

3.5.4 Many studies comparing different countries find no evidence that criminalisation or decriminalisation affect drug taking or prevalence rates.^{36,37,38} Regarding the age of onset, however, the research is less conclusive; one study demonstrates that policy change does not affect the age of onset of cannabis use,³⁹ while another study found that cannabis “decriminalisation” affected the uptake of cannabis among young people in the first five years following the policy change.⁴⁰

³¹ Law Reform Commission (2013) *Report: mandatory sentences*. LRC 108–2013. Dublin: LRC. Available at www.drugsandalcohol.ie/20242

³² Law Reform Commission (1993) *Consultation Paper on Sentencing* (LRC CP 2-1993). Dublin: LRC.

³³ Nguyen, H. & Reuter, P. (2012). How risky is marijuana possession? Considering the role of age, race and gender. *Crime & Delinquency*, 58(6), 879-910

³⁴ *Drug Use in Ireland and Northern Ireland Drugs Prevalence survey, 2014/15* (NACDA, 2016)

³⁵ Hathaway, A., Mostaghim, A., Kolar, K., Erickson, P.G. & Osborne, G. (2016). A nuanced view of normalisation: Attitudes of cannabis non-users in a study of undergraduate students at three Canadian universities. *Drugs: Education, Prevention and Policy*, 23:3, 238-246

³⁶ Reuter, P., & Trautmann, F. (2009). *A report on global illicit drugs markets 1998-2007*. Brussels: European Commission

³⁷ Reinerman, C., Cohen, P. & Kaal, H. (2004). The limited relevance of drug policy: Cannabis in Amsterdam and in San Francisco. *American Journal of Public Health*, 94, 836-842

³⁸ European Monitoring Centre for Drugs and Drug Addiction (2018), Cannabis legislation in Europe: an overview, Publications Office of the European Union, Luxembourg

³⁹ Cerveny, J., Chomynova, P., Mravcik, V., van Ours, J.C. (2017). Cannabis decriminalisation and the age of onset of cannabis use. *International Journal of Drug Policy*, 43, 122-129

⁴⁰ Williams, J. & Bretteville-Jensen, A.L. (2014). Does liberalizing cannabis laws increase cannabis use? *Journal of Health Economics*, 36, 20-32

3.6 Unintended Consequences of the Current Approach

3.6.1 Concerns have been expressed about the unintended consequences of the current legislation for drug possession, from within the Criminal Justice system and from the public and the Government. The Nally Report on the Public Prosecution System (1999) acknowledged an increase in numbers of cases being prosecuted before the courts and recommended the issuing of formal warnings instead of prosecution as a better method of “deflecting the offender from the path of crime”.⁴¹ In 2014, The Garda Inspectorate’s Crime Investigation report highlighted the concerns expressed by some of its members about “taking a young person to court for a small amount of cannabis”.⁴² The report acknowledged the devastating consequences that a court conviction for drugs can have.

3.6.2 The stigma associated with drug use and its criminalisation may lead employers to identify people who use drugs as criminals and thereby lead to reduced employment prospects. Research has shown that Irish employers routinely require disclosure of a criminal record and that the existence of such a record adversely affects the prospect of employment irrespective of the type of offence,⁴³ the time that has passed since or even the relevance of the conviction to the position.⁴⁴ Unemployment, in turn, can cause anxiety, financial difficulties and disaffection and these are risk factors for intensification or resumption of drug use,⁴⁵ which has adverse effects on society. On the other hand, stable employment is associated with reduced recidivism.⁴⁶

3.6.3 Individuals from communities experiencing social and economic deprivation are disproportionately affected by drugs issues.⁴⁷ In addition, their lower educational attainment and lack of job opportunities can exacerbate the effects of a criminal record.

3.6.4 The consequences of a criminal record can be especially devastating for young people who may use drugs because they are vulnerable and/or at a risk-seeking stage of their lives. The criminal record and associated stigma will follow them for years after they have changed their lives and ‘paid’ for their offence.

3.6.5 A criminal record may also be an obstacle when looking to rent a place to live or to travel. Visa requirements in many countries exclude people from entering who have previous convictions for drug use. In addition, for some educational courses drug related offences constitute an exclusion criterion.⁴⁸

⁴¹ Public Prosecution System Study Group (1999), Report; Recommendation 5.10.10

⁴² Garda Síochána Inspectorate (2014), *Crime Investigation*; Recommendation 11.9

⁴³ Lawlor, P., & McDonald, E. (2001). *Story of Success: Irish Prisons: Connect Project 1998-2000*. Dublin: Stationary Office.

⁴⁴ Irish Law Reform Commission (2007), Report on Spent Convictions. Dublin: Law Reform Commission.

⁴⁵ Sumnall, H. & Brotherhood, A. (2012) *Social Reintegration and Employment: Evidence and Interventions for Drug Users in Treatment*. Luxembourg: Publications Office of the European Union; EMCDDA Insights No. 13.

⁴⁶ O’Reilly, M.F. (2014). Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland. *The Howard Journal*, 53(5), 468-486.

⁴⁷ Department of Health. Government of Ireland. 2-17. Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025. Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

⁴⁸ Council of Europe, Pompidou Group (2018). *Costs and Unintended Consequences of Drug Control Policies*. Strasbourg: Council of Europe Publishing.

3.6.6 Other consequences of criminalising personal possession include increased prices for drugs which can lead to increases in crimes to pay for the addiction. There is also an argument that people will be less likely to seek treatment.

4 Alternatives to Conviction in Ireland

4.1 General

4.1.1 Some other countries, in continental Europe and elsewhere, have introduced alternative approaches to dealing with possession of drugs for personal use only. The terminology can sometimes be confusing. For instance, decriminalisation might literally be understood to mean that the conduct in question (drug possession in this instance) is no longer to be a criminal offence. Yet, the term “decriminalisation” is more often used in this context to describe various strategies whereby there would be less focus on prosecution and punishment and more on various diversionary or treatment strategies. However, where the latter approach is adopted, possession of a controlled drug still formally remains a criminal offence, but one that will rarely be prosecuted. The term “depenalisation” is also used, and typically means removing or at least discouraging the use of heavy penalties, such as imprisonment, for persons found in possession of controlled drugs for personal use only.

4.1.2 In the course of the Working Group’s consultations with expert, Mr. Brendan Hughes, European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), he provided the following definitions of relevant terminology relating to alternatives to prosecution:

- (i) **Decriminalisation** –the status of the offence is reclassified from a criminal offence to a non-criminal offence within a country’s legal framework. It is still an offence, it is still prohibited behaviour that will be stopped by police and punished, but it is no longer considered criminal.
- (ii) **Depenalisation** – where something that is a criminal offence that was usually punished is changed so that it is no longer punished, but remains a criminal offence. A case can be closed, suspended, considered minor, or may not be in the public interest to prosecute.
- (iii) **Diversión** – redirecting from prosecution of an offence involving punishment to a rehabilitative response, e.g. treatment or counselling.
- (iv) **Legalisation** – move from a prohibited behaviour, criminal or not, to a permitted behaviour. Regulation is a part of legalisation, and exists as special rules to regulate supply i.e. age limits for alcohol and tobacco.

4.1.3 In Ireland the range of existing alternatives to coercive sanctions with a treatment element available for dealing with simple possession offences remains limited, in comparison to other European countries.⁴⁹ In the event of commencement of prosecution proceedings, there are a range of options available to the Court including; fines, custody, imposition of a Peace Bond/Probation Order or a suspended sentence (see **Appendix III** for schematic of current approach).

⁴⁹ Kruithof, K., Davies, M., Disley, E., Strang, L., & Ito, K. (2016) *Study on alternatives to coercive sanctions as response to drug law offences and drug-related crimes*. Brussels: European Commission.

4.2 Probation Act 1907

4.2.1 Where a person is before the District Court for a summary offence such as possession of drugs for an offence under Section 3 of the Misuse of Drugs Act 1977, the Judge has the option to apply the provisions of the Probation of Offenders Act 1907:

- (i) **Section 1(1)(i)** allows for the matter to be dismissed without proceeding to conviction. This means that a person will not have a criminal conviction recorded against them.
- (ii) **Section 1(1)(ii)** allows for the matter to be conditionally discharged and can include, among others, the condition that the person is supervised by the Probation Service. This option does not proceed to conviction unless there is a subsequent breach of the condition resulting in the matter being brought back before the Court and where the Judge may proceed to conviction.

4.3 Drug Treatment Court

4.3.1 The Drug Treatment Court (DTC) provides an alternative for persons with drug addiction who have pleaded guilty before, or have been convicted by, the District Court for minor, non-violent, criminal charges connected to their addiction. Where an accused person is admitted to the DTC programme, further proceedings in respect of the charges before the court are “suspended” while the accused person participates in the various programmes within the DTC programme. Where an accused person satisfactorily completes the treatment programme, the charges before the court are struck out. If the treatment programme is not satisfactorily completed, the accused person is remanded back to the original court, which referred him/her to the DTC to have the charges dealt with. Details in relation to eligibility of persons for referral to the DTC are set out in **Appendix IV**.

4.3.2 The Group was informed that in 2017:

- (i) 110 new participants were referred to the programme;
- (ii) 10 participants graduated at the highest (gold) level, i.e. completed the programme successfully;
- (iii) 59 people were discharged having not completed the programme (but may have benefited from their participation, i.e. back in contact with family, engaging with services);
- (iv) 126 people were deemed unsuitable for entry to the programme.

4.3.3 It is acknowledged that action 3.1.34 of Reducing Harm, Supporting Recovery calls on the Department of Justice and Equality to “map the future direction and objectives of the Drug Treatment Court”.⁵⁰

⁵⁰ Department of Health. Government of Ireland. 2017. *Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025*. p.58 Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

4.4 Juvenile Diversion Programme

4.4.1 The Juvenile Diversion Programme operates in accordance with Part 4 of the Children Act 2001, as amended, and under the general superintendence and control of the Garda Commissioner.

4.4.2 The aim of the Diversion Programme is to deal with young people who offend, by way of administering an informal caution or a formal caution (with Juvenile Liaison Officer (JLO) supervision), thus diverting the offender away from the courts and minimising the likelihood of further offending. The Diversion Programme embraces the principles of restorative justice and has high regard to the needs of the victims.

4.4.3 The Diversion Programme has proven to be successful in diverting young persons away from crime by offering guidance and support to them and their families.

4.4.4 In order to be admitted to the programme a child must:

- be over the age of criminal responsibility and under 18 years of age,
- accept responsibility for the offence(s) committed, and
- consent to being cautioned and supervised.

If the child is deemed suitable for admission to the programme then s/he is given either a formal (supervised) or an informal (unsupervised) caution. In certain circumstances the victim of the offence may be invited to attend the caution or the JLO may recommend that a family conference be held in relation to the child.

4.4.5 In general, informal cautions are, depending on the offence, a first caution. Although for relatively minor offences an informal caution may be appropriate for a further offence. Informal cautions are usually delivered in the young person's home with the parent(s) present by the JLO who will not be in uniform so as to maintain discretion from a family's point of view. An informal caution does not give rise to a period of supervision by the JLO.

4.4.6 Formal cautions are generally given for a repeat offence or a more serious offence and are usually delivered in the Garda Station by the JLO in uniform or a more senior officer, again depending on the nature of the offence. A formal caution is always linked to a period of supervision by the JLO. This may comprise one-to-one work with the JLO, a commitment to attend training or education or not to frequent certain places or mix with named peers. Supervision may also involve attendance at a Garda Youth Diversion Project.

4.4.7 A case is recorded as unsuitable if:

- the child does not accept responsibility for the behaviour
- it would not be in the interests of society to caution the child, or
- the child is offending persistently.

These matters are then returned to local Garda management who decide, following consultation with the DPP where appropriate, if a prosecution will be taken.

4.5 Adult Cautioning Scheme

4.5.1 The Adult Cautioning Scheme came into effect in 2006 as a discretionary alternative to prosecution for certain criminal offences, including, inter alia, offences contained in the Criminal Justice (Public Order) Act 1994, the Criminal Justice (Theft and Fraud Offences) Act 2001, the Intoxicating Liquor Act 2003, the Non-Fatal Offences Against the Person Act 1997 and the Criminal Damage Act 1991. A list of offences currently available for disposal under the Adult Cautioning Scheme is listed under **Appendix V**.

4.5.2 In considering issuing a caution, a member of An Garda Síochána has to consider the:

- (i) public interest;
 - a. *the offence is of a kind appropriate for consideration of a caution, and*
 - b. *the alleged offender is deemed to be a person suitable for consideration.*
- (ii) decision to caution;
 - a. *there must be prima facie evidence of the offender's guilt;*
 - b. *the offender must admit the offence;*
 - c. *the offender must understand the significance of a caution;*
 - d. *the offender must give an informed consent to being cautioned.*
- (iii) views of the victim.⁵¹

4.5.3 The caution is administered by a District Officer or an Inspector in an acting capacity. Acceptance of the caution must be confirmed in writing. Unlike the Juvenile Diversion Programme, there are no supervision arrangements under the Adult Cautioning Scheme. Additionally, the decision to administer the caution cannot be conditional upon the satisfactory completion of a specific task, e.g. a payment of compensation to a victim.

4.5.4 It is only in exceptional circumstances that a second caution be administered, subject to the approval of the Office of the DPP (ODPP).

4.5.5 As referred to in Section 2.1 of the report, the WGAP recommended the following in respect of the offence of simple possession to be included under the ambit of the Adult Cautioning Scheme:

- (i) that the scope of the Adult Cautioning Scheme be extended to encompass possession of a controlled substance for personal use;
- (ii) that the Garda authorities prepare (in consultation with the ODPP) and issue guidelines for officers on the application of the Scheme to simple possession offences;
- (iii) that the Garda authorities agree with the Department of Health/HSE the content of a drug awareness/advisory leaflet, to include national

⁵¹ Adult Caution Scheme: <https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Adult-Cautioning-Scheme.pdf> p. 1-2

- and local contact points for support, which would be given to each recipient of a caution for simple possession;
- (iv) that the Garda authorities issue a Directive to cease the practice of recording informal cautions in respect of named individuals on PULSE;
 - (v) that the addition of simple possession to the Scheme be the subject of a formal evaluation by the Garda authorities within 18 months of coming into effect and in consultation with other relevant stakeholders.⁵²

4.5.6 The WGAP determined that the recommendations provide a proportionate alternative to respond more effectively to simple possession cases involving first-time offenders while also introducing an advisory and welfare-oriented dimension in line with wider Government policy on drug use.

⁵² The report of the Working Group on Alternatives to Prosecution (2016), p.8-9. unpublished

5 Drugs Situation in Ireland

5.1 Prevalence Data

5.1.1 In Ireland, data in relation to the use of drugs has been gathered on an on-going basis since 2002/2003. The fourth and most recent prevalence study⁵³ was commissioned by the National Advisory Committee on Drugs and Alcohol (NACDA) in Ireland and fieldwork was carried out between August 2014 and August 2015. Information was obtained on key illegal drugs, such as cannabis, ecstasy, cocaine and heroin.

5.1.2 Trend data from this survey over the past decade point to an increase in the rate of last year (an indicator of recent use) and last month (an indicator of current use) drug use, with the greatest increases in drug use amongst younger people. Lifetime use of illegal drugs is highest amongst those aged 25-34 (43.8%), while past year and past month use is highest amongst the 15-24 year age group (18.7% and 9.6% respectively). In common with other European countries, the use of cannabis is considerably higher than any other form of drug, with 6.5% of adults using this drug in the last year.⁵⁴

5.1.3 The following provides a summary of prevalence data for lifetime use of the most common drugs:

- (i) within the Republic of Ireland, 26.4% (or 1 in every 4) of respondents aged 15 years or over reported using an illegal drug in their lifetime in 2014/15;
- (ii) lifetime usage of cannabis (24%) is considerably higher than any other form of drug with almost 1 in 4 respondents aged 15 or over reporting trying it at least once in their life;
- (iii) the second most commonly used drug is ecstasy (7.8%) with one in 12 reporting using it at least once in their life;
- (iv) lifetime use of cocaine (including powder and crack) is 6.6%;
- (v) smaller numbers of people reported use of other illegal drugs; 3.5% of people reported having used amphetamines in their lifetime, and 0.7% have used heroin.⁵⁵

5.1.4 The following provides a summary of prevalence data for last month use of the most common drugs:

- (i) just 4% of respondents aged 15 or over used illegal drugs in the month prior to the survey;
- (ii) last month usage of cannabis among respondents aged 15 or over is considerably higher than any other illegal drug (at 3.7%);
- (iii) the second most commonly used illegal drug in the last month is ecstasy at 0.8%;
- (iv) recent use of cocaine (including powder and crack) is 0.4%.⁵⁶

⁵³ *Drug Use in Ireland and Northern Ireland Drugs Prevalence survey, 2014/15* (NACDA, 2016)

⁵⁴ *Ibid.*, p. 8-9

⁵⁵ *Ibid.*, p. 6

⁵⁶ *Ibid.*, p.7

5.1.5 In relation to cannabis, respondents (aged 15 years or over) were asked to what extent they agreed that people should be permitted to take cannabis for recreational or medical reasons. Two-thirds of respondents disagreed (66.4%) with use of cannabis for recreational reasons, while 17.9% of respondents disagreed with the use of cannabis for medical reasons.⁵⁷

5.1.6 The following are other notable figures in relation to cannabis from the survey:

- (i) the median age of first use of cannabis has remained unchanged since 2002/03 (18 years);
- (ii) those aged 15 to 24 are most likely to have used cannabis both in the past year and past month with prevalence rates of 16.2% and 9.2% respectively;
- (iii) 1.5% of those aged 15 and over in the general population were classed as cannabis dependent;
- (iv) among those who used cannabis in the last year, 19.7% fulfilled the criteria for cannabis dependence. The rate was higher for males (22.8%) than for females (11.8%) and higher for adults aged 15-34 (22.3%) than for older respondents (10.4%).⁵⁸

5.1.7 A study undertaken in 2014 indicates that the prevalence of problematic opiate use in Ireland has stabilised. There are an estimated 18,988 opiate users in Ireland and more than half (60%) of those are in the 35-64 age group. There was a significant increase in the age of opiate users between 2011 and 2014, suggesting a definite ageing cohort. While the overall prevalence is stabilising, although 71% of the estimated number of opiate users lived in Dublin, the spread of opiate use across the country is apparent. There was a significant decrease in opiate use among the 15-24 age group from 1,631 in 2011 to 1,092 in 2014.⁵⁹

5.2 Drug Treatment Data

5.2.1 The National Drugs Treatment Reporting system (NDTRS) is an epidemiological database of treated problem drug and alcohol cases in Ireland. It records episodes of drug and alcohol treatment during the calendar year (note, it records only those entering treatment in the calendar year and it records episodes, not people).

5.2.2 The NDTRS reported that the number of treated problem drug use (excluding alcohol) cases in 2016 was 9,227, compared to 8806 in 2010. Other findings include:

- (i) the proportion of new cases decreased from 42.5% in 2010 to 38.2% in 2016.

⁵⁷ *Drug Use in Ireland and Northern Ireland Drugs Prevalence survey: Cannabis Results, 2014/15* (NACDA, 2017)

⁵⁸ Ibid

⁵⁹ Hay G, Jaddoa A, Oyston J, Webster J, Van Hout MC, Rael dos Santos A (2017) Estimating the prevalence of problematic opiate use in Ireland using indirect statistical methods. Dublin: National Advisory Committee on Drugs and Alcohol. Available at: <https://www.drugsandalcohol.ie/27233/>

- (ii) the primary problem drug was opiates (mainly heroin) for 58% of cases in 2010 and this remained the case in 2016 albeit with a lower percentage, 47% of cases in 2016.
- (iii) the number of cases where cannabis was reported as the main problem drug rose from 23% in 2010 to 26% in 2016
- (iv) seven in every ten cases were male and the median age of cases was 30.⁶⁰

5.3 Profile of People Who Use Drugs

5.3.1 The 2014/15 NACDA prevalence survey reported that approximately a quarter of the population aged 15 and above have tried illegal drugs at some stage.⁶¹ In relation to cannabis use, lifetime rates are highest in Socio-Economic Group B (Soc2000 Classification) which includes middle management, senior civil servants, managers and owners of own business, at 28.7%. The lowest prevalence is among Group F, farmers, at 9.6%. On the other hand, last month use is highest among Group D (semi-skilled and unskilled manual workers, trainees and apprentices), and cannabis abuse is highest among Group E (those dependent on the state long-term).

5.3.2 It is not possible to determine the profile of opiate users from a general population survey, as just 0.2% of the population used these substances over the past year.⁶² However, a 2017 study estimating problem opiate use in Ireland suggest that the majority of those using opiates are male (70%) and in the 35-64 age-group.⁶³ Treatment data from 2016 shows that 66% of those in treatment for opiate use were unemployed and that 10% were homeless.⁶⁴

5.4 National Drug-Related Deaths Index (NDRDI)

5.4.1 Data from the National Drug-Related Deaths Index (NDRDI), a national surveillance database which records drug and alcohol related deaths (such as those due to accidental and intentional overdose) and deaths among drug users (such as those due to Hepatitis C and HIV), shows that overdose deaths in Ireland have stabilised after an upward trend between 2004 and 2008. The average number of overdose (poisoning) deaths from drugs and alcohol was 354 in 2016 (the latest data available).

5.4.2 Males have accounted for the majority of deaths since 2004; 69% of all overdose deaths in 2016 were male. The median age of those who died in 2016 was 42 years. Opiates

⁶⁰ Health Research Board (2018) *Drug Treatment in Ireland NDTRS 2010 to 2016*. Available at: www.drugsandalcohol.ie/28986

⁶¹ Drug Use in Ireland and Northern Ireland Drugs Prevalence survey, 2014/15 (NACDA, 2016), p.7

⁶² Ibid, p.7

⁶³ Hay G, Jaddoa A, Oyston J, Webster J, Van Hout MC, Rael dos Santos A (2017) *Estimating the prevalence of problematic opiate use in Ireland using indirect statistical methods*. Dublin: National Advisory Committee on Drugs and Alcohol. <http://www.drugsandalcohol.ie/27233/>

⁶⁴ Health Research Board; NDTRS data

are the main drug group implicated in overdose deaths, although almost two-thirds involve more than one drug (polydrug use). The percentage of deaths due to polydrug poisonings rose from 44% in 2004 to 62% in 2016.

5.4.3 It is important to note that not all overdose deaths were caused by illicit drug use; prescription drugs (including diazepam, methadone and pregabalin) were implicated in 73% of those deaths (usually with another drug) and alcohol was implicated in over a third of deaths at 37%. Additionally, alcohol on its own was responsible for 16% of overdose deaths.⁶⁵

5.5 Drug Market

5.5.1 The illicit drugs market in Ireland has changed somewhat in recent years. In tandem with these changes, organised crime has also evolved to meet the demands of this new market. The emergence of a new range of psychoactive substances in recent years has altered the dynamic of drug misuse among young people in terms of how they source drugs in open and closed markets. The online availability of drugs via the open internet and 'darknet' represents the modern era of drug dealing, which brings with it significant challenges for law enforcement globally.

5.5.2 The illicit drug market in Ireland is more diverse than ever before in terms of pharmaceutical crime, technological advances and the new generation of substances of misuse. That said, organised crime in Ireland continues to profit most from the traditionally known drugs and many features of the criminal enterprise in terms of the importation and distribution of these drugs remain the same.

5.5.3 In 2017, €71.8 million worth of controlled drugs seizures were reported⁶⁶ (Garda only), compared to €29.7 in 2016⁶⁷ and €46.7 million in 2015.⁶⁸ In the seizures referred to for the previous years, Cannabis (mostly in the form of Cannabis herb or plants) continues to be the drug most commonly seized, followed by significant seizures of opioids, cocaine and ecstasy/MDMA.⁶⁹ An EU Commission-funded research project coordinated by Transcrime, published in 2015 estimated that the revenues generated by illicit drug markets in Ireland amounted to €806m.⁷⁰

⁶⁵ Health Research Board (2017) *National Drug-Related Deaths Index 2004 to 2015 data*. Available at: <http://www.drugsandalcohol.ie/28086>

⁶⁶ *An Garda Síochána Annual Report 2017*, p. 99

⁶⁷ *An Garda Síochána Annual Report 2016*, p. 56

⁶⁸ *An Garda Síochána Annual Report 2015*, p. 87

⁶⁹ Reported figures fluctuate dependant on significant seizures that occur in a given year. These figures are somewhat indicative of overall drug prevalence but no specific studies exist which indicate what proportion of the overall drug market these figures represent which is the comparator law enforcement agencies often refer to as the amount seized versus the amount actually consumed.

⁷⁰ Savona E.U., & Riccardi M. (Eds.). (2015). *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe (final report of project OCP – organised crime portfolio)*. Milan & Trento, Transcrime & Universta degli Studi di Trento.

5.5.4 Illicit drug markets are attractive to organised crime gangs because of the high profit margins and the illegal flow of cash. There is a strong link between organised crime and the drug trade in Ireland; also observed with most other countries. The global nature of the drug trade and drugs market means that Irish Organised Crime Gangs (OCG) work at an international level to import controlled drugs. A number of recent major seizures indicate that Ireland acts as a hub for the onward transportation of drugs.

5.5.5 To tackle the supply of illicit drugs into Ireland, a multi-agency co-operative approach is utilised nationally incorporating An Garda Síochána, the Revenue Commissioners, the Health Products Regulatory Authority (HPRA) and the Defence Forces (Navy). A key element of tackling illicit drug markets is International co-operation via partnership with other Law Enforcement Agencies, e.g. Police Service of Northern Ireland, the National Crime Agency (UK), Europol, Interpol and the Maritime Analysis and Operations Centre – Narcotics (MAOC-N).

5.5.6 Associated harms of the illicit drug market in Ireland are levels of violence amongst OCGs and the concerns related to drug-related intimidation. This issue is of great concern to communities nationwide, and “requires a collaborative effort, across a range of agencies and sectors of society”.⁷¹

5.6 Drug-Related Offences

5.6.1 Table 2 outlines the total number and type of illicit drug offences in Ireland from 2008 to 2017.⁷² This data is from the Central Statistics Office, under reservation, therefore it is subject to change. The table shows that from 2008 to 2017 there has been an average of 17,804 recorded controlled drug offences per year. Possession of drugs for personal use offences accounts for between 71% and 77% of all controlled drug offences in any one year.

5.6.2 The number of recorded incidents of possession of drugs for personal use peaked in 2008 (at 18,077). This figure was nearly three times higher than that recorded in 2003. Between 2008 and 2015 the number for simple possession cases decreased by a total 40% for the period, from 18,077 to 10,931 in 2015. Since 2015, the recorded incidents of simple possession of drugs increased slightly year on year.⁷³

⁷¹ Department of Health. Government of Ireland. 2017. *Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025*. p. 17 Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

⁷² Table from <https://www.cso.ie/px/pxeirestat/Statire/SelectVarVal/saveselections.asp> (18 January 2019). Note that these are incidences and not offenders.

⁷³ The figure for 2017 of 16,800 for controlled drug offences and 12,173 for possession of drugs for personal use differ from the figure used in Chapter 9 (c.f. paragraph 9.2.2 and Table 7) and the Costings Report (Annexe III) due to Chapter 9 and the Costings Report being based on figures obtained from An Garda Síochána at an earlier date.

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
10 ,Controlled drug offences	23,356	21,872	19,793	17,572	16,380	15,325	15,863	15,050	16,032	16,800
1011 ,Importation of drugs	67	46	29	40	30	44	29	19	28	21
1012 ,Cultivation or manufacture of drugs	216	271	532	579	513	390	345	240	263	248
1021 ,Possession of drugs for sale or supply	4,265	3,967	4,097	3,817	3,459	3,241	3,563	3,366	3,623	3,865
1022 ,Possession of drugs for personal use	18,077	16,764	14,387	12,606	11,796	11,160	11,247	10,931	11,408	12,173

Table 2: Recorded incidents of Crime Offences Under Reservation (Number) by Type of offence and Year

Source: Central Statistics Office (18 January 2019)

5.6.3 Not all of the incidents (presented in Table 2) resulted in the person being charged for a Section 3 Misuse of Drugs Act offence and not all proceeded to court. In the three-year period, 2015-2017, there were 7,360 court outcomes that led to a conviction for unlawful possession of drugs contrary to Section 3 Misuse of Drugs Act (that were not linked to other non-Section 3 offences). This equates to 5,633 individuals in the three years and most had only one outcome.⁷⁴ High level analysis shows that the number of Section 3 offences not linked to any other offence in a single year (e.g. 2017) resulted in an average of 2,453 court outcomes from 2,337 incidents by 1,878 individuals.⁷⁵

5.6.4 There are a number of options available to the courts when a person is found guilty of an offence for personal possession, including a fine, striking the case out, applying the provisions of the Probation Act or imposing a custodial sentence (prison is not a sanction for a first or second offence for possession of cannabis). Data from the Courts Service show that 1,123 people were dismissed under the Probation Act for a Section 3 Misuse of Drugs Act offence in 2017 (resulting in no conviction). Based on data provided to them, Hughes and colleagues estimated that 980 people on average every year receive a criminal conviction for a Section 3 Misuse of Drugs Act offence and rarely will those criminal convictions result in a custodial sentence.⁷⁶ While there were 73 people in prison in 2017 for a Section 3 offence the circumstances of each case is not known.

5.6.5 In 2017, there were 6,037 committals to prison in Ireland, of which, 371 (6%) were for a controlled drug offence. As of 30 November 2017, there were 2,990 prisoners in custody, of which, 347 (11.6%) were for a controlled drug offence.⁷⁷ As table 3 shows, 73 people were imprisoned in 2017 for personal possession solely, reduced from 365 people in 2015.

2015	2016	2017	As at 31 July 2018
365	287	73	27

Table 3: Persons committed to prison solely for possession of drugs for personal use

Source: Department of Justice & Equality

⁷⁴ Hughes, C., Stevens, A., Hulme, S. & Cassidy, R. (2018). *Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences: A report for the Irish Department of Justice and Equality and the Department of Health.* UNSW Australia and University of Kent.

⁷⁵ Averages were calculated using the three year period 2015-2017

⁷⁶ Ibid., p. 10

⁷⁷ Irish Prison Service Annual Report (2017), p. 65-67

5.6.6 The strategic review of penal policy published in 2014 has, at its core, custodial sentencing as a last resort.⁷⁸ However it is not possible to state specifically what has caused the downward trend in people imprisoned for possession for personal as no research has been done on this trend. It is likely that the introduction of the Fines (Payment and Recovery) Act 2016 has contributed to this decrease.

5.7 Public Expenditure on Drugs

5.7.1 Broadly speaking, drug-related public expenditure is described as “labelled” or “unlabelled”. Labelled expenditure is identified as drug-related expenditure in government budgets. Often, though most drug-related expenditure is not identified as such, hence unlabelled, and must be estimated. Each year Ireland reports its labelled and unlabelled drug-related public expenditure to the EMCDDA (see table 4).

2010	2011	2012	2013	2014	2015	2016	2017
(€m)	(€m)	(€m)	(€m)	(€m)	(€m)	(€m)	(€m)
267.792	252.229	241.019	237.147	232.528	232.666	244.272	240.96

Table 4: Total estimated drug-related public expenditure for Ireland (labelled and unlabelled expenditure)
Source: Health Research Board

5.7.2 Total expenditure is categorised under the Classification of the Functions of Government (COFOG)⁷⁹ system. Table 5 shows the estimated expenditure for 2017 in relation to its category (see **Appendix VI** for explanation of subcategory). Based on this categorisation, the expenditure on treatment services is estimated to be €129.75m in 2017.

Sub-category (COFOG)	Total (€m)
03.1 Police services	65.68
03.3 Law courts	0.09
03.4 Prisons	4.20
07.2 Outpatient services	27.79
07.4 Public health services	97.76
07.5 R&D Health	2.52
07.6 Health (not elsewhere classified)	5.34
08.1 Recreational and sporting services	20.04
09.5 Education not definable by level	0.76
10.5 Unemployment	17.39
10.7 Social exclusion n.e.c.	0.59
Total	240.96

Table 5: Drug-related expenditure for 2017 by sub-category (COFOG)⁸⁰

⁷⁸ Strategic Review of Penal Policy, Final Report (2014)

⁷⁹ European Commission (2011). *Manual on sources and methods for the compilation of COFOG statistics — Classification of the Functions of Government (COFOG)*. Luxembourg: Publications Office of the European Union

⁸⁰ Further detail on the categories is available in **Appendix VI**

5.7.3 It should be noted that the figure of €65.68million for police services relates to operational and investigation expenditure by An Garda Síochána and Revenue (Customs Service) primarily to tackle the issues outlined above in section 5.5 regarding drug markets and OCGs involved in the sale/supply/importation of illicit drugs as well as possession offences.

5.8 Treatment Services Available

5.8.1 The range of services provided is aligned to prevalence trends and demand for particular services. Treatment initiatives have expanded in recent times to make them more available, for example, “community-based drug projects have contributed towards expanding the network of services by delivering an integrated holistic service on the ground in their communities on behalf of statutory agencies”.⁸¹ The HSE has continued to expand the range and provision of services particularly outside the Dublin region over the last number of years and by November 2018 there were 80 clinics nationwide.

5.8.2 Drugs.ie, managed by the National Social Inclusion Office, is Ireland's national drug information and support website and provides a comprehensive range of information and supports related to substance use. The website is being continually updated and provides an A-Z of different types of drugs and their effects, a wide range of support resources, including an interactive drug self-assessment and brief intervention resource (DUDIT) as well as several harm reduction campaign resources.

5.8.3 Additionally, Drugs.ie hosts the National Directory of Drug and Alcohol Services,⁸² which allows the user to find a broad range of drug treatment services and specialist drug programmes in Ireland based on the type of service and their location. Services listed include:

- (i) Information
- (ii) Support (Online, helpline, drop-in, harm reduction, support groups)
- (iii) Family Support
- (iv) Awareness, Prevention, Education and Training
- (v) Counselling and Psychotherapy
- (vi) Needle and Syringe exchanges
- (vii) Medical Supports
- (viii) Opioid Substitution Treatment
- (ix) Stabilisation Programmes
- (x) Detoxification Programmes
- (xi) Rehabilitation programmes
- (xii) CE Drug Rehabilitation Scheme

⁸¹ Department of Health. Government of Ireland. 2017. *Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025*. p. 35 Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

⁸² National Directory of Drugs and Alcohol Services, <http://www.services.drugs.ie/>

5.8.4 The HSE also operates a free confidential Drugs and Alcohol Helpline (1800 459 459) that can be utilised by the public via an active listening helpline and email support service offering non-directive support, information, guidance and referral to anyone with a question or concern related to drug or alcohol use. The service is accessible nationwide Monday to Friday, from 9.30am to 5.30pm.

6 Examination of Alternative Approaches

The Oireachtas Joint Committee on Justice, Defence and Equality that recommended the introduction of a harm-reducing and rehabilitative approach to the possession of a small amount of illegal drugs for personal use highlighted the need for more research to ensure that the adoption of any alternative approach would be appropriate in the Irish context. Research was therefore commissioned on behalf of the Working Group in May 2018.

6.1 Research Commissioned

6.1.1 The review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences (**Annex I**) was conducted on behalf of the Working Group.⁸³ The researchers commissioned, in accordance with procurement rules, were Professor Alex Stevens and Dr Rebecca Cassidy from the University of Kent, UK; and Dr Caitlin Hughes and Shann Hulme from the University of New South Wales, Australia.

6.1.2 As per the requirements in the request for tender, the report synthesises and maps the evidence and undertakes a rapid realist review of the legislative approach taken to the possession of small quantities of drugs for personal use in Ireland compared with other jurisdictions, outlining a number of possible options that could work in an Irish context, *viz a viz*:

- A. The current legislative regime that applies to simple possession offences in Ireland and the rationale underpinning this approach, and any evidence of its effectiveness.
- B. The approaches and experiences in nine other jurisdictions to dealing with simple possession offences.
- C. The advantages and disadvantages, as well as the potential impact and outcomes of any alternative approaches to the current Irish system for the individual, the family and society, as well as for the CJS and the health system.⁸⁴

6.1.3 More broadly, the aims of the review were:

- 1. To describe the current legislative regime for or policy approach to dealing with simple possession offences and its rationale in the jurisdictions selected.
- 2. To describe the legal or societal remedies for dealing with simple possession offences that applies in these jurisdictions.
- 3. To describe the experiences of these jurisdictions in using legal or societal remedies for dealing with simple possession offences.

⁸³ Hughes, C., Stevens, A., Hulme, S. & Cassidy, R. (2018). *Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences: A report for the Irish Department of Justice and Equality and the Department of Health*. UNSW Australia and University of Kent.

⁸⁴ Ibid; p. 5

4. To describe or synthesise the effectiveness (outcomes and impact) of legal or societal remedies for dealing with the offence of simple possession in these jurisdictions on the individual, the family and society, the CJS and the health system.
5. Using the research and information available in the review, describe policy options to deal with simple possession drug offences available to the Irish government and the advantages and disadvantages of each.⁸⁵

6.1.4 The report adopted a rapid realist review process to identify approaches taken in Ireland and other jurisdictions to simple possession drug offences, using a literature analysis and a qualitative comparative analysis to identify alternative approach options that would be possible in the Irish context. In total, a range of alternative approaches from the following nine jurisdictions were identified for analysis in regards to the context, mechanism and outcome(s):

- (i) England and Wales;
- (ii) Czech Republic;
- (iii) Denmark;
- (iv) Netherlands;
- (v) Germany;
- (vi) Portugal;
- (vii) Jamaica;
- (viii) Australia;
- (ix) USA.

6.2 Approaches and Experiences in Other Jurisdictions

62.1 Qualitative comparative analysis was used to derive six empirically-based, theoretically informed approaches for dealing with simple possession offences:⁸⁶

- (i) Model 1: Depenalisation
The aim is to avoid criminalising young people and save police time to focus on more serious criminal activity. Implicit in this approach is the belief that people found in possession of drugs do not warrant any sanction. This is a “doing nothing” or “doing little” approach.
- (ii) Model 2: Police Diversion (*de facto*)
The goal of this approach is to redirect people who use drugs away from the traditional criminal justice response and into other services that may be more beneficial. This model also points to the fact that police are one of the primary gatekeepers who initiate contact with

⁸⁵ Hughes, C., Stevens, A., Hulme, S. & Cassidy, R. (2018). *Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences: A report for the Irish Department of Justice and Equality and the Department of Health*. UNSW Australia and University of Kent. p. 5

⁸⁶ Ibid.

people who possess drugs for personal use and can adopt early intervention initiatives by means of referring people to services that they may not otherwise access. Diversion programmes can also retain the deterrent threat of prosecution.

- (iii) Model 3: Police Diversion (*de jure*)
The goal of the Police Diversion (*de jure*) is similar to that of Police Diversion (*de facto*) with the key difference being that police are required to offer referral to appropriate services to all in the target group, meaning that the model adopts a legislated approach.
- (iv) Model 4: Decriminalisation with no sanctions
The logic of this model is that drug possession should not be a crime and that the best response is complete removal of the offence from the law. This approach is legislated, with the aim of reducing stigma, humanising the person and overcoming any issues that may arise from a discretionary model.
- (v) Model 5: Decriminalisation with civil or administrative sanctions
This approach is similar to Model 4, except that it is acknowledged that drug possession should not be ignored. This model makes use of low level sanctions, such as fines or other civil sanctions.
- (vi) Model 6: Decriminalisation with targeted diversion to health/social services
The aim of this approach is to ensure that people are not criminalised for simple possession alone, while recognising that certain patterns of drug use can be harmful. It recognises that most people will use drugs in a non-problematic way, but a minority of people will have problematic use. As such, Government ought to use the point of detection as a means by which to screen and identify high-risk offenders and address their treatment and other needs.

6.2.2 Table 6 below shows the six models and examples of jurisdictions where they are practiced.

<i>Type</i>	<i>Legal basis</i>	<i>Pathways to education / therapy / social services</i>	<i>Administrative / civil sanctions</i>	<i>Examples</i>
Depenalisation	<i>De facto</i>	No	No	Netherlands Gedoogbeleid 'tolerance policy' (cannabis only), US police 'deprioritisation', UK cannabis and khat warnings, Denmark warnings
Police diversion (<i>de facto</i>)	<i>De facto</i>	Yes	No	Police diversion schemes in six Australian states, Netherlands diversion (hard drugs only), English police diversion schemes in Durham, West Midlands and Avon, US LEAD program, Baltimore pre-booking scheme
Police diversion (<i>de jure</i>)	<i>De jure</i>	Yes	No	South Australian Police Drug Diversion Initiative and Queensland Police Drug Diversion Program (police mandated by law to offer diversion to treatment)
Decriminalisation with no sanctions attached	<i>De jure</i>	No	No	Germany (by virtue of Constitutional ruling) and Vermont USA (since 2018)
Decriminalisation with civil or administrative sanctions	<i>De jure</i>	No	Yes	Czech Republic, Jamaica, Cannabis Expiation Notice schemes in three Australian states (ACT, SA, NT), 11-16 US states (e.g. Ohio, Mississippi, Massachusetts, Rhode Island)
Decriminalisation with targeted diversion to health / social services	<i>De jure</i>	Yes	Yes	Portugal and several US states (Maryland, Connecticut & Nebraska)

Table 6: Alternate approaches for dealing with simple possession drug offences

Source: Hughes, C., Stevens, A., Hulme, S. & Cassidy, R. (2018). *Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences: A report for the Irish Department of Justice and Equality and the Department of Health*. UNSW Australia and University of Kent p. 57

6.3 Effectiveness of the Alternative Approaches

6.3.1 The researchers synthesised and described the effectiveness of the various alternatives, in terms of their impact and outcomes. The researchers did highlight that the research is complex and often incomplete, and therefore it is difficult to presume a definite outcome in the Irish context. Nevertheless, the evidence of the effectiveness of each approach is summarised below:

- (i) Model 1: Depenalisation
Impacts of this model on drug use seem to be variable with increases in use and no change in use being observed in different jurisdictions.

There is evidence that this approach can reduce demands on police, courts and prisons, although it can lead to net-widening. This approach may increase voluntary access to drug treatment and harm reduction services.

- (ii) **Model 2: Police Diversion (*de facto*)**
Most programmes studied by the researchers led to more people accessing treatment and other services. However, the researchers noted that the therapeutic benefits of this approach are less if the referral is voluntary. This approach was also shown to lead to reductions in drug-related harms and increased knowledge and skills acquisition. Evidence shows a clear reduction in recidivism; some jurisdictions observed reductions of around 58%. Because this is a discretionary model, it may lead to unequal application.
- (iii) **Model 3: Police Diversion (*de jure*)**
There are few examples of this approach, and therefore the evidence is limited. The evidence does show very high treatment referrals and evidence of reductions in drug-related harm. In addition, those who complied with their diversions were significantly less likely to reoffend. Because this approach is non-discretionary, it can improve access for all.
- (iv) **Model 4: Decriminalisation with no sanctions**
The evidence of this approach is mainly from one jurisdiction, Germany. The research suggests that there may be reductions in drug-related harm and costs to the CJS from this approach. Access to services is not directly affected by this model.
- (v) **Model 5: Decriminalisation with civil or administrative sanctions**
This model has been shown to lead to a reduced burden on the CJS and takes less police time. There are social benefits associated, such as greater employment prospects and housing stability. By reducing stigma, this approach can facilitate provision of harm reduction and treatment services. There is inconclusive evidence around drug use; one jurisdiction saw significant declines in prevalence, while others observed no change or increases. There may also be net-widening with this approach.
- (vi) **Model 6: Decriminalisation with targeted diversion to health/social services**
This approach has shown lower rates of regular and of problematic drug use. There were also significant reductions in drug-related harms, including deaths and infectious diseases in one jurisdiction. This model can lead to significant reductions in the burden the CJS, in terms of arrests and imprisonments. The evidence shows increased

access to drug treatment services, especially for people who would not otherwise access those services.

6.4 Recommendations in the Irish Context

6.4.1 When considering the approach/approaches that could be implemented in Ireland, the researchers suggested that any alternative comes with risks. Because the research in this area is complex and sometimes incomplete, and the context in each jurisdiction is very different, it is not possible to give a definitive answer as to the possible outcome(s) of introducing alternative approaches. However, they also emphasised that the current approach places significant costs and burdens on the citizen that are not offset by any reduction in health or social harms.

6.4.2 Based on the research provided, a number of the options highlighted above could be implemented in Ireland, each of which could offer advantages to the current approach. The researchers, however, suggested that consideration could be given to a hybrid approach given Ireland's relatively high levels of cannabis and heroin use, for example combining "depenalisation of the most minor drug possession offences and decriminalisation with targeted diversion for those offenders who are more likely to need it".⁸⁷ They postulate that this hybrid approach would reduce costs to criminal justice system, would not lead to increases in drug use and would provide pathways to treatment and other services for people who need it, without overburdening the health system with people who do not need treatment.

6.4.3 The Working Group noted that there was not a lot of evidence about the approaches mentioned above and their impact on organised crime. The possible link between changing drug policies and increased organised criminal activity was raised within the group as a concern. The researchers were not tasked with considering this impact in their study, but they did discuss the lack of direct evidence with the group.

⁸⁷ Hughes, C., Stevens, A., Hulme, S. & Cassidy, R. (2018). *Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences: A report for the Irish Department of Justice and Equality and the Department of Health.* UNSW Australia and University of Kent. p. 4

7 Consultations Undertaken by the Working Group

7.1 Public Consultation Process

7.1.1 To inform their deliberations, a wide-ranging and comprehensive public consultation was undertaken by the Department of Health on behalf of the Working Group to engage with the public, service users (including people who use drugs and may avail of services in the future), families, communities, representative groups and organisations, elected representatives and other interested parties. There were three strands to the consultation process, namely an online questionnaire, focus groups with people who have been prosecuted for the possession of drugs for personal use, and an open policy debate with relevant stakeholder organisations.

Online Questionnaire

7.1.2 The online questionnaire was open from 31 May - 13 July 2018 inclusive, and was promoted widely through national and social media, receiving substantial attention across media channels and in public discourse. All interested parties were invited to make a submission online, and therefore the responses received should not be considered a representative sample of Irish society. There were a total of 22,149 responses to the questionnaire recorded, of which over one thousand provided no response to any question, resulting in a dataset of 20,813 responses to be included in analysis.

7.1.3 The overall finding was that the vast majority of respondents would support the removal of criminal penalties for the offence of simple possession, which is contained within Section 3 of the Misuse of Drugs Act. Nearly 90% of respondents indicated that they would be in favour of removing these criminal penalties. Eighty eight per cent of respondents did not agree with the current approach where people found in possession of illegal drugs for personal use can be prosecuted before the courts and, if convicted, receive a criminal conviction. A further 6% were not sure if they agreed with current approach and only 6% agreed with the current approach.

7.1.4 In examining people's views of the current approach, it was found that:

- (i) 97% agreed that this approach can affect a person's future chances of getting a job;
- (ii) 96% agreed that it can affect a person's chances of travelling to certain countries;
- (iii) Only 9% agreed that the current approach prevents or reduces drug use.

7.1.5 If an alternative approach which removed criminal penalties were to be introduced:

- (i) 94% agreed that it would save time and resources for the Gardaí and Courts;

- (ii) 81% agreed that it would encourage people to seek treatment for drug addiction.

7.1.6 17,710 respondents declared their previous experience with drugs. Of these, 45% had used drugs on only a few occasions; 37% had used illegal drugs on many occasions and 18% had never used illegal drugs. It is noteworthy that seventy two per cent of those respondents who had never used illegal drugs before were in favour of removing criminal penalties.

7.1.7 Although there were some differences observed by gender and previous exposure to illegal drugs, this strong support for the removal of criminal penalties was evident across all groupings.

7.1.8 The findings illustrated that respondents thought that different drugs warranted a different response. This was reflected in the proportion of respondents who responded that no action should be taken when a person is found in possession of a particular drug for personal use:

- (i) 56% for cannabis;
- (ii) 23% for Ecstasy/MDMA;
- (iii) 13% for cocaine;
- (iv) 5% for heroin.

7.1.9 The range of actions considered appropriate tended to involve a higher level of intervention as they moved through the drugs from cannabis to heroin. For example referral to a drug treatment service was considered appropriate by:

- (i) 3% for cannabis;
- (ii) 8% for Ecstasy/MDMA;
- (iii) 16% for cocaine;
- (iv) 32% for heroin.

7.1.10 The final part of the online questionnaire was an open-ended question that invited participants to provide “any other feedback” that they might like to add - 5,353 did so. Responses covered a wide range of issues, including:

- (i) the form and structure of the questionnaire;
- (ii) the public consultation process itself;
- (iii) issues related to drug use in general and the people who use them;
- (iv) views and experiences related to the possession of drugs for personal use.

7.1.11 The range and content of these submissions reflect the complex nature of drug use and the diverse views on how best to address the associated issues. Responses illustrated views that criminalising people who use drugs causes harm to the individual, their families and their communities. Criminalising for personal possession was associated with stigmatising and marginalising people who were in need of help and support not punishment.

Decriminalisation, legalisation and regulation were identified as alternative approaches. Where respondents did not want personal possession decriminalised, this tended to be associated with a concern that it would make the drug situation in Ireland worse.

Focus Groups

7.1.12 Two focus groups were held to consult further with people who had been prosecuted for the possession of illegal drugs for personal use. These allowed for qualitative information to be gathered regarding the experiences of people who had been affected by the current approach, including the context surrounding their arrest and the impact that the prosecution had on their lives. Participants for the first Focus group were recruited with the assistance of the Ana Liffey Drug Project, Merchants Quay Ireland and the Union for Improved Services, Communication and Education (UISCE), all of which are Non-Governmental organisations (NGOs) that work with people that use illegal drugs. Participants for the second focus group were identified through submissions received through the online questionnaire. In total, fifteen people participated in these focus group discussions.

7.1.13 There was a strong consensus among those who had been prosecuted for simple possession offences that the current approach should be changed. It was revealed that the current approach had a negative impact on their psychological wellbeing, their families, and their long-term life chances. There was a perception that not everyone is treated equally under the current approach and social class was perceived to be a factor in the likelihood of being found in possession and prosecuted. Decriminalisation was seen as a positive alternative, with respondents drawing on the experiences of other jurisdictions. However, some believed that the approach adopted should not differ substantially from how alcohol, tobacco and medicines are treated and that all drugs should be legalised and regulated. There was consensus that the response to drugs should always be based on increasing awareness and health interventions and that criminal penalties have little impact on lessening the pervasiveness of drugs through society. The overall message was that people experiencing problems with their drug use who had not committed any crime other than being in possession of an illegal drug needed support, not punishment.

Open Policy Debate

7.1.14 The third and final strand of the consultation process was an Open Policy Debate. The purpose was to explore how an alternative health-led approach could operate in practice within the Irish context. Seventeen representatives from stakeholder organisations⁸⁸ and individuals participated in roundtable discussions that examined possible alternative responses to the possession of illegal drugs for personal use.

⁸⁸ List of organisation in Consultation Report (Annex II)

7.1.15 The majority participants were of the view that the decision on an appropriate referral should depend on the circumstances of the individual concerned and should not be determined by the specific substance which they were found to possess. Gardaí should remain the first point of intervention, after which the individual would be referred for an assessment where they can be referred onward to an appropriate treatment when required. This assessment should be made by a trained health professional or interdisciplinary panel and should occur as close to their local community as possible. Although treatment should always remain an option, it should never be coerced. Some representatives were of the view that subsequent civil or administrative penalties may be appropriate if people do not comply with the referral or advice that they receive. A minority of participants were in favour of retaining criminal penalties for people who are repeatedly found to be in possession of illegal drugs and who refuse to comply with the referral or recommendations.

Conclusions from Public Consultation

7.1.16 In summary, throughout the different strands of consultation that fed into this process, there was strong support for a change in the approach to simple possession offences in Ireland. Although there was some variation in how participants thought a decriminalised approach should be implemented, there was overwhelming support for removing criminal penalties. The vast majority of people who participated in the consultation process were of the view that criminalising drug use does not prevent or reduce drug use, and they supported a more health-centred approach which would encourage people to seek treatment for addiction. Those participating in the online questionnaire were of the view that different drugs required different approaches: they thought that the appropriate response to possession of cannabis was no action, whereas a referral to drug treatment was appropriate for possession of heroin. The participants of both the focus groups and the open policy debate thought that the response should be determined by the circumstances of the individual and not by the substance.

7.2 Presentations to the Working Group

Presentation by Mr. Brendan Hughes, Principal Scientific Analyst for legislation within the Public Health Unit, European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) (20 March 2018)

7.2.1 The EMCDDA is a centralised narcotic agency of the EU tasked with monitoring legal, policy, scientific and statistical narcotic activity by means of collating objective, reliable and comparable information from EU Member States. Mr. Hughes provided an overview of the various changes in legislation among EU member states in terms of the reduction, or in certain cases the increase, in penalties for drug possession for personal use. The definitions of decriminalisation and the methods employed to provide alternatives to punishments vary widely between the EU countries. In addition, there is limited information available in relation the success of these policy changes in practice as the data is not always adequately

collected in Member States. However, Mr Hughes' research points to no clear impact of penalty changes on cannabis use. There are numerous factors, e.g. user demand, cultivation, social, economic, available data, interpretation of data etc. that determine the success of any change within any country. He did highlight that countries should first identify the reason for change (whether it be to help individuals, to influence society's views or to take pressure from state structures) and then implement the most appropriate policy change to address that reason.

Presentation by Senator Lynn Ruane and Niall Neligan BL on the Private Members Bill entitled the Controlled Drugs and Harm Reduction Bill 2017 (24 April 2018)

7.2.2 Senator Ruane and Mr. Neligan discussed the Controlled Drugs and Harm Reduction Bill 2017, its purpose and the background to its introduction. The proposed legislative change in the Bill is to remove the offence of possession for personal use under Section 3 of the Misuse of Drugs Act, provided that the quantity possessed does not exceed a maximum amount to be prescribed by the Minister for Health. Supplying drugs would continue to be a criminal offence. Possession of drugs within the prescribed limit would instead be dealt with by way of referral to a drug dissuasion service. Senator Ruane emphasised that the purpose of the Bill is threefold; to mitigate the consequences of criminal conviction, to remove stigma and to identify people with addiction issues. The group highlighted issues with the compatibility of the Bill within the existing legal framework and how removing the offence from the Misuse of Drugs Act would result in *de facto* legalisation. The presenters acknowledged that this is not the intention of the Bill and that they are keen for an alternative that would address the health needs of those using drugs that can work within the existing legislative regime.

Presentation by Emer Darcy and Louise Dwyer on the work of the Drug Treatment Court (DTC) (22 May 2018)

7.2.3 Ms Darcy and Ms Dwyer updated the Working Group on the function and operations of the DTC. It is a District Court that provides supervised treatment, education and rehabilitation for offenders with problem drug use. To be eligible the person must have committed a non-violent crime and be dependent on drugs. Participants move through bronze, silver and gold phases of the programme and the ultimate aim is to become drug free and desist from reoffending. They presented the advantages to this programme as: providing a holistic approach to treatment, regular multi-agency team meetings to discuss progress of participants, low levels of re-offending while on the programme. They did highlight issues such as the lack of an overall budget for the programme and the evaluation criteria currently being used are very narrow. In addition, the DTC is only operational in Dublin at present.

Presentation by Captain Joseph Shellhammer, Northern Colorado Drug Task Force, Larimer County Sheriff's Office (17 July 2018)

7.2.4 Captain Shellhammer discussed the experiences in Colorado where in 2000 they legalised medical marijuana and then in 2012 they allowed the legal sale of marijuana. Throughout his presentation he expressed particular concern with the effects that legal marijuana was having on the youth in Colorado and with an increase in criminal activity. He also discussed a positive initiative that is in place in one jurisdiction where mental health and addiction counsellors are attached to police stations and they can assess and refer people for health interventions. He suggested that Ireland implement a similar health intervention and warned against legalising marijuana.

The following is a summary of key points and assertions as presented to the group, based on Captain Shellhammer's experience in Colorado:

- (i) Captain Shellhammer asserted that the black market has grown approximately three times as big as a result of legislative changes in Colorado and is considered to be a billion dollar industry;
- (ii) as regards the cost benefit of changes, he believes the revenue created through taxation has not been sufficient to address the problems created by legalisation, including the criminal element of the black market, and an increase of 35% in emergency department admissions related to marijuana;
- (iii) in Captain Shellhammer's opinion, legislative changes have had an impact on the transient nature of people through Colorado. The homeless population continues to rise with the age profile down from 47-53 years of age in 2000 to the current age range of 23-25 years; the increased level of homelessness has contributed to an increase in crime rates. In addition, there has been an increase in suicide rates in Colorado. The fact that the economy is good and unemployment in Colorado is at 0% is used to counter criticism of any potential connection between drug policy and its effect on homelessness and suicide rates;
- (iv) driving under the influence of drugs (DUID). He asserted that:
 - a. since Colorado legalized recreational marijuana, the four year average for marijuana-related traffic deaths increased 66 per cent between 2013 and 2016 as compared to the four-year average prior to legalization (2009-2012);
 - b. during the period 2013 and 2016, all traffic deaths increased 16 per cent;
 - c. there has also been an increase in poly-drug use, including alcohol, among DUID stats in Colorado;
- (v) he noted that the prevalence rate of children's/youth's marijuana use has increased significantly among various indicators (slides 27 and 28). There has also been an increase in poly drug use and THC levels, with grow house techniques significantly increasing the THC percentage;
- (vi) in terms of increased THC and prevalence being linked to mental health issues, Captain Shellhammer had no statistical comparison, as there is separate data on

- mental health. He believes that self-medicating and not treating the underlying psychosis are contributing factors. There is no study in relation to the potential impacts of 30-40% THC levels in marijuana;
- (vii) he believes that training of law enforcement officers in dealing with brief interventions is a major input, with additional health resources also available to patrol officers;
 - (viii) in Larimer County, SummitStone Health Partners are contracted by health services to assist front line agencies with interventions. There are mental health and addiction counsellors attached to police stations that attend a scene and do an evaluation of the individual and divert him/her to an appropriate treatment service, with a caseworker assigned to track progress over the following days/weeks/months. This process frees up human resources, time and money in front line law enforcement and health emergency agencies. The consequences for individuals not engaging with the assigned treatment depends on the circumstances and the progress being made by them. The Police can intervene again if the individual's engagement is considered to be insufficient;
 - (ix) prison sentences for first time possession offences of other drugs do not occur unless another offence, such as sale/supply or causing harm, is involved. In instances where an individual is caught multiple times for possession only offences, the likelihood is that probation or other conditional sanctions would be issued rather than a term of imprisonment;
 - (x) in summarising, Captain Shellhammer stated the following in regards to what Ireland should do or what he wishes that Colorado did differently:
 - a. if he went back in time to 2004 knowing the outcomes, he wouldn't have given in on some of the changes in drug policy;
 - b. from a health perspective, strict regulation access to medicinal marijuana is required for only those who really need it ;
 - c. the use of mental health teams attached to police stations and training of frontline law enforcement and health officials in interventions are positive initiatives from Colorado that Ireland could adopt.

Presentation by Nicola Corrigan, National Social Inclusion Office, HSE on the SAOR Screening and Brief Intervention programme (25 September 2018)

7.2.5 Ms Corrigan updated the group on the SAOR Screening and Brief Intervention programme. A brief intervention is a short, structured and helpful conversation about alcohol or drugs and SAOR provides the structure to have this conversation. Ms Corrigan provided evidence of the effectiveness of brief interventions and of the training programme provided by the HSE to a very broad cohort of frontline staff. It was noted that the Probation Service have recently incorporated the principles of the HSE SAOR model into their intervention approach. She discussed the evolution of the SAOR programme. SAOR II has a stronger emphasis on drugs, with the intervention and screening proofing a useful resource to direct people who do not think they have a problem or require an intervention to appropriate services. The group discussed whether the SAOR model could be used to provide assessment and a brief intervention for people found in possession of drugs.

7.3 Presentations Regarding the Portuguese Approach

7.3.1 In light of the heavy emphasis placed on the Report of the Oireachtas Joint Committee on Justice, Defence and Equality on the system in Portugal, the Working Group engaged extensively with agencies in Portugal inviting Dr João Goulão, Director, General Directorate for Intervention on Addictive Behaviours and Dependencies (SICAD), Portugal and Mr. Artur Vaz, Director, National Unit to Combat Trafficking in Narcotic Drugs, Judiciary Police, Portugal to address them so that a good understanding of the practices and processes relating to the operation of their model could be established.

On 19 February 2018, Dr Goulão attended the third meeting of the Working Group. His presentation has been summarised below:

7.3.2 Following the democratic revolution and end of colonial wars in the mid-1970s, there was an increase in the range and volume of drugs entering Portugal resulting in rising rates of addiction. By the 1980s, drug use, dependency and addiction had risen markedly across all segments of Portuguese society and a growth in intravenous heroin consumption had resulted in rising rates of HIV infection, fatal overdose, public nuisance and petty crime.

7.3.3 In the late 1990s, the Portuguese government established a commission of nine experts from health, law enforcement and academic fields that was tasked with developing strategic proposals to combat the drug problem while keeping within the ethos of the United Nations. The group visited a number of countries in order to examine their responses to drugs, and drawing upon their collective experience and knowledge, made a number of recommendations that were published within their 1998 report.

7.3.4 The commission concluded that criminal sanctions against drug users were ineffective, and proposed that a health-based approach be adopted to include a legislative change so that the use and possession of drugs for personal use be decriminalised / depenalised.⁸⁹ They also noted that universal interventions such as mass media campaigns aimed at preventing drug use were ineffective and instead proposed concentrating resources on targeted initiatives, such as employment programmes aimed at social re-integration.

7.3.5 In the 1990s, Portuguese prisons were at full capacity and there had been no systematic way to determine whether somebody who was arrested for the possession of drugs should be prosecuted or not. In exploring the possibility of decriminalising / depenalising the possession of drugs for personal use, a Professor in Criminal Law advised the commission that UN treaties would require some form of sanction, but that it would not necessarily need to be a criminal sanction, and could instead be an administrative sanction.

7.3.6 In 2000, the Bill to decriminalise / depenalise the use and possession of drugs for personal use was passed, thereby determining that people found to be in possession of the threshold of 10 days or less supply of a drug would be subject to an administrative sanction rather than a criminal one. The weighing by police of the substance detected removed the

⁸⁹ Hughes et al. describe Portugal as using decriminalisation with targeted diversion to health/social services and diversion to health/social services.

potential for differential treatment of drug users by police, as there were objective criteria to establish whether the person should be subject to further proceedings within the criminal justice system. If a person is found to possess less than 10 days' supply, they are given 72 hours to report to a local administrative body for drug addiction.

7.3.7 To operationalise the new system, the Ministry of Health established within each district an administrative body called a 'dissuasion committee' that was responsible for drug addiction. These would administer diagnostic tools that could assess the risks and related needs of the drug-using person in order to minimise the impact of drug use in their life, such as social work, psychiatric or psychological help. Most people were not addicted to drugs at the time of these interventions, but in cases where in-patient treatment is necessary, there are 1600 rehabilitation beds, which include 160 detoxification places available around the country in certified therapeutic centres. Most of these therapeutic centres are run by regulated non-governmental organizations (NGO) that are licensed to provide treatment, but the state maintains three therapeutic centres that are used for training purposes and as models of best practice. The State will pay up to 80% of the treatment costs, with the remaining 20% being paid for by the patient, their family, or the social welfare system. These treatment services have now reached a point where they have the capacity for treating addictions to a wide range of substances and activities, such as alcohol, gambling, online gaming etc.

7.3.8 Most of the people who use drugs that have an intervention are not addicted and that the administrative interceptions can address the social and environmental factors that contributed to their drug use often meaning that they do not become dependent. This allows for the persons trajectory towards more problematic drug use to be interrupted, and the administrative sanctions to perform as a preventative tool.

7.3.9 Since 2001, approximately 100,000 people have come before dissuasion committees, of which about 10,000 were assessed as addicted. Of these, approximately 80% accepted the treatment offered. Those who refuse treatment are not subject to any further sanction provided they do not come before the dissuasion committee within the next 6 months. In determining what groups should be targeted the centres meet with local police to discuss what opportunities for intervention are upcoming, such as music festivals, and the likely types of people and substances that they will include.

7.3.10 Regarding the impact of Portugal's legislative changes, decriminalisation / depenalisation of the use and possession of drugs for personal use, and the health-based interventions that are administered reduced the stigma associated with people who use drugs as the general public now understands drug dependence as a chronic and sometimes relapsing disease. There had also been a decrease in drug-related deaths and HIV infections. However, in relation to other initiatives, such as employment schemes for those in recovery, growth in unemployment rates resulting from the global economic crisis had resulted in growing resentment of those who were able to avail of employment opportunities as a result of their administrative sanctions. In addition, many small businesses closed, resulting in the redundancy of many former drug users that were in recovery. Many of these people relapsed in their drug use and this is currently presenting Portugal with new challenges.

7.3.11 It is not clear that decriminalisation alone can explain the decline in the number of people addicted to heroin reducing from 100,000 in 2001 to 25,000 in 2015. While some mention was made of increased employment opportunities for this group of people, it emerged that the placement of people in these programmes as a result of an intervention by the Dissuasion Committees was relatively low.

On 22 May 2018, Mr. Vaz addressed the sixth meeting of the Working Group by video conference. This discussion has been summarised below:

7.3.12 After initial scepticism among the majority of police officers when the model was introduced to Portugal in 2001, it is now viewed as the right approach to take allowing law enforcement agencies and prosecutors redirect their resources to prioritise the fight against drugs trafficking.

7.3.13 Drug trafficking in Portugal comprises of two different drug trafficking markets, one with Portugal being the final destination for some drugs, e.g. hashish, heroin, cocaine, NPS, the other Portugal being a transit market of drugs such as hashish from morocco and cocaine from South America to other European countries.

7.3.14 In Portugal, the possession of drugs for personal use is still illegal. However, the offence is not a criminal offence but considered a misdemeanour and a penalty/sanction can still be applied. Following an interception from a Police Officer, under the Portuguese penal procedure, the individual can be taken to a police station for a period of up to 6 hours to have their identity checked. Once the officer creates a report of the interception, the individual has a mandatory obligation to report to a drug dissuasion committee on referral from the Police Officer. There is no limit on the number of referrals. For an individual to be charged with trafficking (supply) there must be evidence of this.

7.3.15 With regards to testing substances, a field test is sufficient to proceed to court. Additionally, a forensic lab analysis would test purity, or a drug dissuasion committee can request tests.

7.3.16 Mr. Vaz provided the following additional information on the structure and impact of organised crime on the drug trade, the impact of the legislation on law enforcement, and other social issues that influence drug related crime in Portugal:

- (i) the market is normally controlled by internal organised crime groups, and there are normally no murders associated with drugs trafficking, although some other violent crimes can occur but are very unusual. Mr. Vaz attributed the lack of violence between competing drug suppliers in Portugal to the Portuguese temperament;
- (ii) as regards drug related intimidation, while there are some problems with violence, it is not very usual;
- (iii) Portugal no longer has public order crimes directly associated with consumption of drugs. The situation is different to the 1980's and

- 1990's when prevalence rates of heroin were higher and there were associated crimes. With decreased levels of prevalence there is now less problematic drug users with no problem of public order;
- (iv) in terms of the homeless population in Portugal, this social issue is primarily concentrated in Lisbon and Oporto;
 - (v) the impact on law enforcement officer's ability to collect information is sometimes affected, but also facilitated, by the introduction of decriminalisation / depenalisation.

7.4 Written Submissions Received

7.4.1 Voluntary submissions were received and acknowledged by the Group, including from:

- Simon Community
- Pavee Point
- National Family Support Network
- UISCE
- Councillor Mannix Flynn
- Irish Council for Civil Liberties
- Tallaght Drugs & Alcohol Task Force
- CityWide Drugs Crisis Campaign
- Ana Liffey Drugs Project - Not Criminals Report

8. Policy Approaches Considered

8.1 Rationale

8.1.1 The National Drugs Strategy is a health led and person centred response to the drug and alcohol use in Ireland. It highlighted the following problems related to personal drug use:-

Many people who use drugs problematically come into contact with the criminal justice system and acquire criminal convictions, either directly or indirectly related to their drug use. Criminal convictions can represent a serious impediment for people seeking to move on from drug misuse and involvement in crime, particularly in the areas of access to employment, housing and travel.⁹⁰

With this in mind, and taking all the views expressed, the Working Group considered that there are concurrent principles that should be addressed with any alternative approach to the current regime:

- (i) a person should be afforded the opportunity to avoid a criminal conviction for the possession of drugs for their personal use;
- (ii) a person should be supported to avoid, reduce and recover from drug-related harm;
- (iii) a person with problematic drug use should be referred to appropriate treatment or other support.

8.2 Range of Approaches

Adult Caution

8.2.1 The rationale of the Adult Cautioning Scheme is that it is an alternative to the prosecution of certain persons. The issuing of the caution is discretionary with detailed guidelines agreed between the DPP and the Garda Commissioner governing its application on a case-by-case basis in order to divert people away from prosecution in criminal courts. How the Adult Cautioning Scheme operates is set out in section 4.5.

8.2.2 Gardaí who come into contact with people who possess drugs can play a role in fostering early intervention, whereby in the course of issuing a caution, they could provide harm reduction information and information on health and social services to the person in possession of drugs which that person may not otherwise have been aware of.

⁹⁰ Department of Health. Government of Ireland. 2017. *Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025*. Available at: <https://health.gov.ie/wp-content/uploads/2018/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>

8.2.3 The issuing of an Adult Cautioning provides a proportionate alternative to respond more effectively to simple possession cases involving first-time offenders. It benefits the criminal justice system and the individual involved, in terms of the advisory referral to services in keeping with Government policy on drug use.

8.2.4 The extension of the Adult Cautioning Scheme to include the offence of simple possession of drugs for personal use is currently under consideration by the relevant authorities.

The issuing of a second or subsequent caution

8.2.5 Within the ambit of the Adult Caution Scheme it is only in exceptional circumstances that a second caution can be administered, subject to the approval of the DPP. However, there may be grounds for the use of a second caution for a Section 3 offence where the circumstances surrounding an individual's personal drug use suggests that the public interest does not require a prosecution.

8.2.6 The second caution would be considered on a case-by-case basis by the Gardaí and the Office of the DPP. The idea behind the administration of a second caution is to extend the possibilities of desistance and a further opportunity to avail of any necessary services.

8.2.7 To extend the possibility of further cautions beyond this would require an extensive revision of the guidelines underpinning the Adult Cautioning Scheme. Were such an approach to be adopted it would make sense to review whether or not other minor offences could also be considered. Any extension of the scheme would require the consideration and agreement of both the DPP and the Garda Commissioner.

Conditional Cautioning

8.2.8 Conditional Cautioning involves the imposition of conditions on a person or persons which would allow them to avoid a prosecution. The introduction of such a scheme would require legislation. In order for this to be effective such a scheme would need a multi-agency approach, which would carry resource implications. The Working Group on Alternatives to Prosecution has already made recommendations in respect of the development of a conditional cautioning scheme.⁹¹

⁹¹ See section 2.1.9 and 2.1.10

Fixed Charge Penalty Notices

8.2.9 The fixed charge penalty notice (FCPN) system was introduced under the provisions of the Road Traffic Act 2002. Over the years, the system has been extended to incorporate other minor offences as an alternative to prosecution in court.

8.2.10 Alleged offenders are given the option of voluntarily paying a specified fixed penalty to avoid legal proceedings being taken against them. The objective is to reduce the cost of penalising offenders in cases which are less serious in nature, where the facts are often not disputed and where fairly standard fines are imposed on conviction.

8.2.11 Prosecution and fine collection costs are minimised when most cases are settled without recourse to court proceedings. The Fixed Charge Processing System (FCPS) is part of a national computerised system, designed to enable Gardaí process offences under Road Traffic and Public Order Acts that are subject of a fixed charge.

8.2.12 Section 184 of the Criminal Justice Act, 2006 provides for the application of a FCPN to some minor public order offences, namely Sections 4 and 5 of the Public Order Act (intoxication in a public place and disorderly conduct in a public place).

8.2.13 Making an offence under Section 3 of the Misuse of Drugs Act available for disposal under the FCPN regime would extend the number of occasions a person could avoid a criminal conviction for personal drug use. It must be noted that drug possession would still remain a criminal offence; however a FCPN could be issued as an alternative to prosecution. By including Section 3 offences in this scheme it would be important to provide some level of services information or pathway to a health intervention.

8.2.14 By paying a FCPN a person is admitting that an offence took place. If the person does not agree that an offence has been committed, or considers that there were mitigating circumstances they may opt to have the case tried in court. Where the fixed penalty is not paid, the case may be pursued through the Courts.

8.2.15 Issues have arisen with the non-payment of FCPNs where drivers claim in court that they did not receive the notice. The third payment option which was introduced in the Road Traffic Act 2018 is designed to get over this by sending the summons to attend court by registered post and including an option to pay the fine at that stage.

8.2.16 An obstacle to applying the FCPN to Section 3 offences is that the Gardaí may encounter difficulty in identifying the individual in question and an address to which the notice can be issued. This problem has been encountered in relation to the public order offences included in the scheme. It may necessitate some people being brought to a Garda station to establish their identity.

Decriminalisation following the Portuguese approach

8.2.17 From the outset, and having regard to the views of the report of the Joint Committee on Justice, Defence and Equality on a Harm Reducing and Rehabilitative approach to possession of small amounts of illegal drugs, the Working Group sought to develop an understanding of the “decriminalisation” approach adopted in Portugal and the background to the introduction of the legislative changes made there. The details in this regard are set out in the commissioned research report at **Annex I** and in section 7.3 of this report.

8.2.18 The Working Group gave considerable time over the course of its meetings to examining how a similar approach could be adopted in Ireland considering the Irish context and how it compares with the situation that prevailed in Portugal in 2001. In this regard, difficulties were identified with the application of the EMCDDA explanation of the term “decriminalisation” in the Irish legal context. The Working Group took note of the meaning and effect of this term within the Irish legal system as compared with that in most other EU Member States where codified civil law systems are the norm. The details in this regard are set out in section 3.1 of this report.

8.2.19 The concept of a criminal offence with an administrative or civil sanction is not compatible with the Irish legal system. For an offence to be decriminalised in Ireland, it would need to be removed from the Statute Book by amending Section 3 of the Misuse of Drugs Act so that possessing an identified quantity of some or all controlled drugs for personal use would no longer be an offence.

8.2.20 There are a number of difficulties with removing the offence. Section 23 of the Misuse of Drugs Act may only be invoked where a member of An Garda Síochána “with reasonable cause suspects that a person is in possession in contravention of this Act of a controlled drug.” Gardaí would therefore no longer have the power to stop and search a person for possession of drugs for their personal use if it is no longer an offence under the Misuse of Drugs Acts. If possession for personal use was no longer to be an offence, consideration would need to be given as to whether or not threshold limits would be necessary to differentiate between possession of drugs for personal use and possession for sale and supply.

8.2.21 Within the Irish context organised crime gangs could utilise the limits set for personal possession to facilitate a supply chain just below these thresholds. The Working Group understands that people involved in the sale and supply of drugs already carry minimum amounts of drugs in order to avoid criminal prosecution for sale or supply at present in Ireland.

8.2.22 Removal of the offence could lead to *de facto* legalisation, and there may be unintended and undesirable consequences.

8.2.23 The Working Group considered whether the Gardaí powers to stop and search based on public health considerations could be preserved if possession for personal use was decriminalised, and formed the view that this could give rise to constitutional and legal difficulties.

Public Health Response

8.2.24 The national drug strategy provides an integrated public health approach to the misuse of drugs and alcohol. A public health approach aims to prevent and address health problems that may arise from drug use. A public health perspective seeks to improve and protect the health of populations and communities by reducing the harm linked to substance use while also facilitating treatment and rehabilitation.

8.2.25 The current public health approach focuses on developing a coordinated, comprehensive effort to create safer, healthier communities by supporting people to avoid, reduce and recover from drug-related harm. This is achieved by effectively recognising when a person has or is at risk of problematic substance use and signposting them to appropriate support and treatment.

8.2.26 The SAOR model is a public health tool widely used throughout the health service to enable staff to carry out a Screening and Brief Intervention and possible onward referral for problem substance use. A Brief Intervention is a short, structured conversation about a person's drug and/or alcohol use. SAOR provides the structure to have that conversation and to address the complexity of substance use presentations, including poly substance use. Brief Intervention has been shown to be effective for drug use in a variety of healthcare settings (Madras et al., 2008). The HSE have trained over 5,000 frontline employees in the SAOR model since 2014 in Ireland.

8.2.27 Under this approach, a person in possession of drugs for personal use would engage with the health service by attending the SAOR Screening and Brief Intervention. Any onward referral by the SAOR professional to treatment or other supports would be voluntary.

8.2.28 Similar health diversion approaches in other jurisdictions have been shown to be effective; more offenders accessed treatment, there was a reduction in recidivism and those being diverted were a distinct group who otherwise were not accessing the health system.⁹²

8.3 Policy Options Considered

Policy Option 1: Adult Caution

8.3.1 This proposed approach recognises a recommendation has been made by the WGAP to include the offence of possession of drugs for personal use in the Adult Cautioning Scheme thereby providing an alternative to prosecution, and is under consideration by the relevant authorities.

8.3.2 With this approach fewer people would be prosecuted for a first offence for possession of drugs for their personal use. With the addition of a health and social services information

⁹² Hughes, C., Stevens, A., Hulme, S. & Cassidy, R. (2018). *Review of approaches taken in Ireland and in other jurisdictions to simple possession drug offences: A report for the Irish Department of Justice and Equality and the Department of Health.* UNSW Australia and University of Kent

leaflet to be given to each person who receives a caution more people would receive information on the harms of drug use and advice about what services are available to them. People who use drugs problematically may access treatment on foot of the advice given.

8.3.3 While there are no legislative implications for this approach, guidelines for the Gardaí would need to be drawn up by the DPP. A relevant health and social services information leaflet would also need to be developed by the HSE for use by the Gardaí.

8.3.4 The Working Group can recommend this approach as appropriate in the Irish context.

Policy Option 2: Multiple Adult Cautions

8.3.5 With this approach, a person could avail of the benefit of the discretionary Adult Caution a number of times. They would receive the health and social services information leaflet each time. The idea behind this approach is to provide the individual with a further opportunity to avail of any necessary services. There would be no criminal sanctions applied for the repeat offences.

8.3.6 The Working Group considers that two Adult Cautions could be given before the exceptional circumstances criteria are applied for a possible third caution. However, the group is conscious of the barriers to this approach that arise in relation to the number of times diversions might be permissible without undermining the intention of the legislation as passed by the Oireachtas. The group notes that the administration of an Adult Caution under the Scheme would remain discretionary on a case-by-case basis. Any such proposal or recommendation for the scheme would require the consideration and agreement of both the DPP and the Garda Commissioner as well as examination of the matters set out in section 8.2.7 above.

8.3.7 The Working Group can recommend this approach as appropriate in the Irish context.

Policy Option 3 – Diversion to Health Services

8.3.8 This policy option is based on the public health approach discussed in section 8.2.28. People found in possession of drugs for personal use would be supported to address the harms of their drug use.

8.3.9 With this approach, individuals in possession of drugs for personal use could be offered a diversion for a brief intervention and screening, while high-risk drug users would be offered onward referral for treatment or other supports for their substance-use disorder⁹³.

⁹³ Much like model 6 *Decriminalisation with targeted diversion to health/social services* identified in the research report, see section 6.2.1

8.3.10 This diversion to health services would involve the following steps:

- Step 1 Gardaí who is satisfied that a person is in possession of drugs for personal use would offer that person a diversion to an appropriate service within their local Community Health Organisation (CHO).
- Step 2 The person would arrange an appointment for themselves to attend a SAOR Screening and Brief Intervention.
- Step 3 The person would attend the SAOR Screening and Brief Intervention with a trained healthcare professional, such as a counsellor.
- Step 4 If a person is identified as having or at risk of problematic use, they would be offered the appropriate treatment or support. Their attendance at the appropriate treatment/support would be voluntary.
- Step 5 Other referrals may also be identified and facilitated, such as to social services (e.g. homelessness) or harm reduction programmes.
- Step 6 The person's attendance at the brief intervention would be confirmed to AGS (with the person's consent).

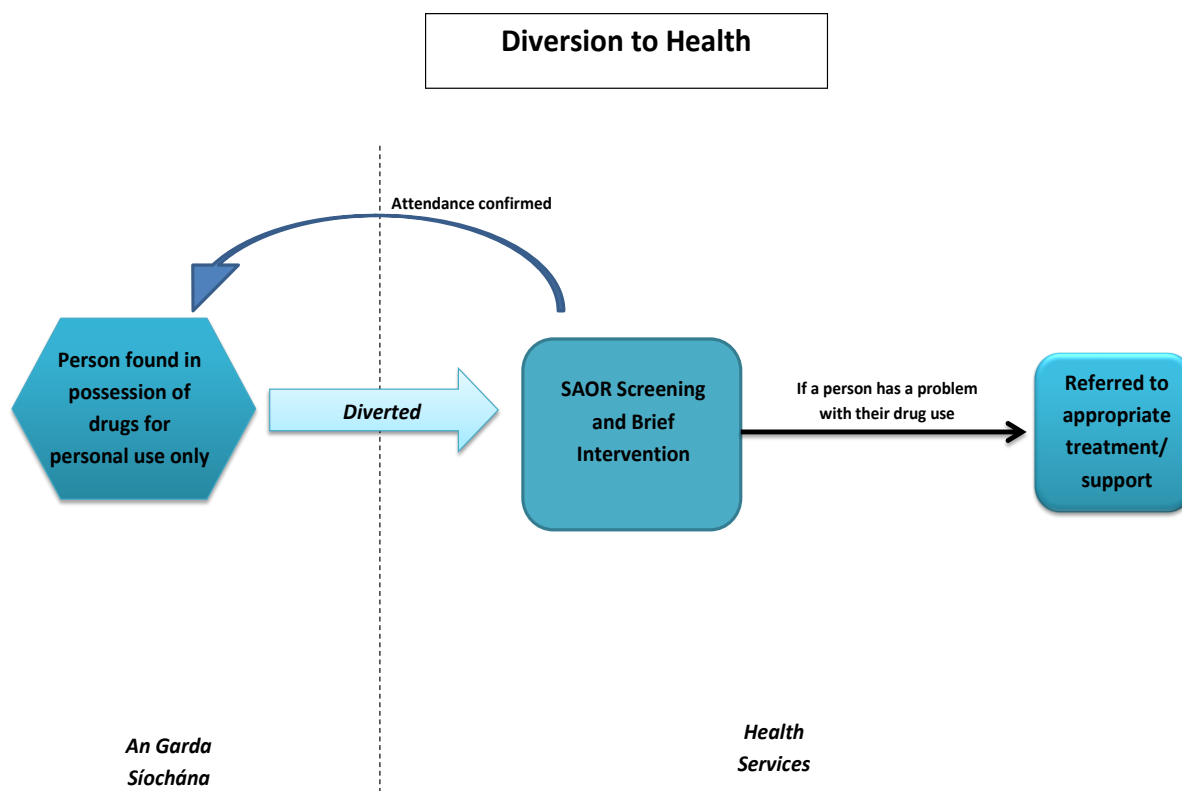


Diagram 1: Schematic of Diversion to Health Services approach

8.3.11 A Brief Intervention is a short, structured conversation about a person's drug and/or alcohol use. SAOR provides the structure to have that conversation and to address the complexity of substance use presentations, including poly substance use. Brief Intervention

has been shown to be effective for drug use in a variety of healthcare.⁹⁴ The HSE have trained over 5,000 frontline employees in the SAOR model in Ireland since 2014.

8.3.12 Designated SAOR trained counsellors would be recruited for each CHO to carry out the brief interventions and the onward referrals. Access issues would be considered and may necessitate a mobile option. In addition, senior counsellors would provide clinical supervision for the programme.

8.3.13 During the SAOR intervention a person may be identified as having or at risk of problematic use or addiction. There is a range of treatment or other social supports that they may need to achieve their personal recovery goal. The HSE works within a 4 tier continuum of care model to enable people to receive the support they need as close to home as possible and operate a case-management approach to people who present to the services. Among the range of treatment services available are counselling, community detoxification, opioid-substitution treatment, rehabilitation, inpatient detoxification and stabilisation and referral to mental health services, as required.

8.3.14 There are many other social services such as housing, employment or mental health supports that may be required to improve a person's chances of recovery. Under this proposal, the pathways to access these services will have to be identified and strengthened.

8.3.15 Attendance at the SAOR brief intervention would be mandatory. Therefore, a communication and information sharing structure between the CHOs and AGS would be required. A person attending for a SAOR intervention would confirm their agreement that their attendance can be notified to the local Garda management for this purpose. A person who refuses to attend or subsequently doesn't attend the SAOR intervention within the designated period without a good reason, would be liable to prosecution for possession of drugs for personal use.

8.3.16 A new system of diversion and associated guidelines would be required to enable Gardaí to divert people to the local CHO. Operational procedures would need to be defined around eligibility criteria, how a person would make an appointment for their brief intervention and the number of times that a person could be diverted to the health services. A minimum of 3 times is suggested because substance misuse is often a recurring condition and each person's recovery journey is different.

8.3.17 This proposal assumes that personal possession remains a criminal offence to counter the problems highlighted in section 8.2.21. Gardaí would remain the first point of contact however people would be diverted out of the criminal justice system to a public health intervention as a way of identifying their health and social needs and to reduce the harm caused by drugs.

⁹⁴ Madras, B.K., Compton, W.M., Deepa, A. et al. (2008). "Screening, Brief Interventions, Referral to Treatment (SBIRT) for Illicit Drug and Alcohol Use at Multiple Healthcare Sites: Comparison at Intake and 6 Months later". Drug and Alcohol Dependence. [Online]. Available at: http://findings.org.uk/count/downloads/download.php?file=Madras_BK_1.txt%20%281%20of%20329%20%5b27/07/09%2017:16:24%5d

8.3.18 This policy change would require new legislation. Determining the precise legal requirements, for example a conditional caution scheme, to support this proposed approach would require further detailed consideration

8.3.19 The advantages of this proposal are that it may reduce the harms associated with drug use, increase access to treatment, promote rehabilitation and reduce likelihood of reoffending. In addition, it may reduce the harms associated with criminal convictions and reduce demands on Gardaí and on the courts.

8.3.20 The Working Group can recommend this policy option as appropriate in the Irish context.

Policy Option 4: Fixed Charge Penalty Notices

8.3.21 The application of a fixed charge penalty means that a sanction could be applied which would not lead to a criminal conviction.

8.3.22 For each offence of possession of drugs for personal use, a Garda could issue a FCPN and provide a health and social services information leaflet instead of prosecuting the person for the possession offence. This would require legislative changes to enable the possession offence to be included in a fixed charge penalty scheme.

8.3.23 A real barrier to this approach could be the evidenced required for the prosecution of a Section 3 offence if it eventually ended up in court for the non-payment of the fine. Unlike a public order or Road Traffic Act offence the basis of a Section 3 offence would be the possession of a controlled substance which would require certification as such by Forensic Science Ireland.

8.3.24 Another issue is that of proportionality; people on low incomes, people who are homeless and people with problematic drug use and chaotic lives may still enter the criminal justice system for their personal drug use if they can't pay the fine. This could mitigate against them benefiting from the approach. The figures for 2016 show an average payment rate for public order offences of just over 50%. Non-payment of the fine within the specified time will result in a summons initiating proceedings for the original offence.

8.3.25 The Working Group would not recommend this approach as appropriate in the Irish context because of the difficulties set out above may render it impractical and disproportionate in its implementation.

Policy Option 5 – Decriminalisation with targeted referral to services

8.3.26 This proposal takes the approach that drug use should be dealt with outside of the criminal justice system and that there should be options for health or social services for those who need it. As stated in 8.2.20 this approach would require legislative change to remove the offence of personal possession. This may lead to *de facto* legalisation however, given that there would no longer be a criminal offence of possession for personal use. Consideration would also need to be given as to the necessary threshold limits that would be required to give Gardaí the ability to distinguish between possession and supply.

8.3.27 Decriminalisation in the Irish context may create a vacuum in terms of a mechanism for identifying and diverting those persons who might benefit from a health intervention. If the Gardaí do not have powers to stop and search a person suspected of being in possession of drugs solely for personal use, then another mechanism may need to be established to identify those who might have a health need relating to their drug use.

8.3.28 To incorporate a health led aspect to this approach it may be possible to develop legislation to give the Gardaí specific power to search people suspected of being in possession of a controlled substance for personal use, check the amount and then divert people below the threshold amount on to a health based intervention. Such a measure would be facilitated by the introduction of threshold limits. Although, this may still prove to be unconstitutional, since the purpose of giving the Gardaí this power is in the national interest and especially to promote health, it may stand up to judicial scrutiny.

8.3.29 Comparing this decriminalisation option with the Portuguese decriminalised system throws up potential difficulties with this approach in Ireland. In Portugal, following citation of the person found with drugs by the police, the Dissuasion Committee determines on the basis of the evidence brought before it whether or not the person is a drug trafficker. If so the Committee refers that person to the Courts. The law states that the Dissuasion Committee should consider a number of criteria in determining what action to take with a person who uses drugs. These criteria include: the type of drug used; whether use is in public or private; if the person is a problematic user, whether use is occasional or habitual and the personal and economic/financial circumstances of the person.

8.3.30 The Dissuasion Committees in Portugal by law have powers to impose a broad range of sanction such as fines, bans on visiting certain places or travelling abroad or ceasing of allowances from public bodies.⁹⁵ So, while the person in possession of drugs there may not be criminalised as such, that person may have heavy sanctions imposed. The Dissuasion Committee has explicit power to suspend sanctions conditional on voluntary entry into treatment. Within the Irish legal system it is unlikely that the powers to impose such wide ranging sanctions can be held in Ireland outside of the Courts.

8.3.31 In light of the significant difficulties with a decriminalisation approach in Ireland, the Working Group concluded that the best way to mirror the Portuguese model is to retain Section 3 as an offence so that Gardaí have the power to stop and search and the ability to

⁹⁵ van het Loo, M., van Beusekom, I. & Hahan, J.P. (2002). Decriminalization of Drug Use in Portugal: The Development of a Policy. *The Annals of the American Academy of Political and Social Science*, 582; 49-63 p. 58

divert people to appropriate services. Therefore, the Working Group would not recommend this approach as appropriate in the Irish context.⁹⁶

Policy Option 6: Hybrid Approach

8.3.32 The researchers (see **Annex I**) suggested that consideration could be given to a mixed approach that could work for Ireland. They suggested a blend of depenalisation for cannabis or for a first or second offence and a decriminalisation approach with targeted diversion to health/social services for other drugs or additional offences.

8.3.33 Having accepted that under Ireland's legal system decriminalisation involves the removal of the offence the Working Group could not consider this approach as appropriate in the Irish context.

Net widening

8.3.34 The Working Group noted that each of the policy options above could lead to significant net-widening. This is where more people are brought into the criminal justice or health system because of a new clear pathway for dealing with the offence of personal possession. The necessary supports and resources would need to be put in place to meeting the extra demand on services that net widening would cause.

⁹⁶ One member of the Working Group wanted this approach to be recommended

9 Costings of Alternative Approaches to Personal Drug Possession

9.1 Overview of Costings Associated with the Current Approach

9.1.1 The terms of reference provided to the Group includes a cost benefit analysis (CBA). However, a full CBA was not completed due to the limited availability of data and specific details. Using the material available, the Irish Government Economic and Evaluation Service (IGEES) unit in the Department of Justice and Equality undertook a costings exercise and compiled costings based on high-level estimates and scenario based assumptions with data input from various sources. The full report is included at Annex III.

9.1.2 The reported estimates are high-level and formulated on assumptions that best describe the current approach and the alternative approaches recommended in chapter 8. This was done by disaggregating available data relevant to the offence of possession for personal use from within the criminal justice system and the health system where applicable.

9.1.3 In addition to the current approach the alternative approaches costed were:

- (i) Option 1: Adult Caution
Subject to agreement between the DPP and AGS, a discretionary alternative to prosecution involving a formal caution given by a District Officer (Superintendent) or an Acting District Officer (Inspector) who will also provide the individual with health and social services information leaflet.
- (ii) Option 2: Multiple Adult Cautions
Subject to agreement between the DPP and AGS, a discretionary alternative to prosecution given on more than one occasion involving a formal caution given by a District Officer (Superintendent) or an Acting District Officer (Inspector) who will also provide the individual with health and social services information leaflet.
- (iii) Option 3: Diversion to Health Services
An alternative to prosecution involving a mandatory referral by An Garda Síochána for a SAOR brief intervention and screening with a health professional during which there can be onward referral to treatment services or other supports for people with or at risk of problematic drug use. Minimum of three mandatory referrals costed.

9.2 Analysis of Costs of Current System

9.2.1 The costs to the criminal justice system due to possession of drugs for personal use are broadly distributed across An Garda Síochána, the Irish Probation Service and the Irish Prison Service. Significant costs are also incurred by interventions under the Garda Youth Diversion Projects (GYDP) and the Drug Treatment Court (DTC).

9.2.2 In 2017, there were 16,850 controlled drug offences recorded across the State – almost three-quarters of these related to possession for personal use.⁹⁷ It is estimated that youth referrals to the Juvenile Diversion Programme account for almost 7.6% of personal use offences or around 960 juveniles in 2017.⁹⁸ Furthermore, around 80 offenders were active in the DTC in 2017. There were 112 referrals, accounting for approximately 330 offences based on the typical three offences required for consideration.⁹⁹ That means the total number of offences set to pass through the criminal justice system was 12,589.¹⁰⁰ However, the proportion of incidents that went on to prosecution was on average 20% for each of the years 2015 to 2017,¹⁰¹ with an estimated 2,231 ending up in the District Court in 2017 when other offences are excluded.¹⁰² The number of incidents detected by the Gardaí involving a S3 MDA offence for the three year period 2015 to 2017 are in Table 7 below. Not all these incidents resulted in the person being charged for a S3 MDA offence and not all went forward to Court.

2015	2016	2017
11,149	11,740	12,589

Table 7: Recorded Personal Possession Offences used for costings¹⁰³

9.2.3 Combining the costs across the various intervention programmes, An Garda Síochána, the District Court, the Probation Service and the Irish Prison Service, produces a total cost of personal possession to the criminal justice system of around €7m.

9.2.4 Personal possession represents around 5.87% of all crimes and about 0.28% of the total budget for the Justice Vote.¹⁰⁴ It is expected that personal possession takes a smaller share of the budget than of all crime, so this estimate appears reasonable. Table 8 below provides a summary of the costs to the criminal justice system, with the probation service accounting for almost half of the total.

⁹⁷ CSO, *Recorded Crime Offences Under Reservation (Number) by Type of Offence and Year*.

⁹⁸ Number referred to the Diversion Programme is based on youth referrals as a share of all drug offences over a three-year period to obtain an average of 7.6%. The estimates are informed by figures from the CSO and the Irish Youth Justice Service.

⁹⁹ Drug Treatment Court – the figure of 80 is based on active participants across the gold, silver and bronze stages of treatment and includes existing participants at the time. Not all referrals are accepted into the DTC.

¹⁰⁰ Source: An Garda Síochána (August 2018)

¹⁰¹ Based on data provided by the Garda Analysis Service relating to Section 3 offences under the Misuse of Drugs Act 1977.

¹⁰² This figure strips out cases in which personal possession incidents are linked to other non-personal possession offences.

¹⁰³ The figures are based on data provided by the Garda Analysis Service on 13/06/2018 (IAS_2018_535) and 28/06/2018 (IAS_2018_594). References to drug types have been compiled by way of keyword searches and are estimates only.

¹⁰⁴ Expenditure for the Justice Vote was €2.54bn in 2017, covering An Garda Síochána; Courts Service; Prisons; Department of Justice and Equality; Irish Human Rights and Equality Commission; Policing Authority; Valuation Office and the Property Registration Authority –Available at <http://www.justice.ie/en/JELR/Pages/SP16000287>.

Estimated individual and total cost (€ m) of personal possession interventions to the Justice* sector	
GYDP	1.15
DTC	1.24
Gardaí	1.17
District Court	0.19
Probation Service	3.06
Prison Service	0.19
<u>Total</u>	<u>7.00</u>

Table 8 Estimated cost of personal possession interventions

Source: IGESS Unit, DOJE

**Due to limited data it was not possible to include costings for forensic analysis*

9.2.5 Health costs are not included in this analysis of the costs of the current approach although there is substantial interaction (e.g. supported referrals) between the justice sector and the health sector.

9.3 Scenario Analysis

9.3.1 The next section describes the estimated economic cost of the three recommended scenarios considered appropriate in the Irish context by the Working Group. Once again, it is important to highlight that these estimates are limited by the availability of relevant data and are high-level estimates. It is assumed that the 20% prosecution rate for 2015-2017 remains constant. For comparison purposes, it is assumed that the number of possession charges remains the same as 2017 at 12,589¹⁰⁵ which gives us the estimated number of people arrested for personal possession in a year.

9.3.2 The estimated Garda, Sergeant and Inspector hours are based on type of penalty. ¹⁰⁶ Drawing on UK Institute of Social and Economic Research data on hours spent by the police on various types of penalty, the estimates suggest that about sixteen hours are spent on an arrest leading to court,¹⁰⁷ while ten hours are estimated to be spent on an arrest leading to a caution. Applying this to An Garda Síochána structures amounts to around twelve hours of Garda time and four hours for a sergeant for an arrest leading to court and 8 hours of Garda time and two hours for a sergeant in the case of an arrest leading to a caution. Using average Garda, Sergeant and Inspector pay across years one to eight of the relevant pay scales, it was possible to estimate an hourly rate for each type of officer.¹⁰⁸ The unit cost of an action was then calculated by multiplying the estimated number of hours required for that action by the respective hourly rates. The total administrative cost to the Gardaí was estimated by multiplying the unit cost for each type of action by the total number of offences.

¹⁰⁵ Data sourced from Garda Pulse data in August 2018 and used throughout as the baseline number of offences in 2017.

¹⁰⁶ UK Institute for Social and Economic Research, *Licensing and Regulation of the Cannabis Market in England and Wales: Towards a Cost-Benefit Analysis*, 2011 – available at: <https://www.iser.essex.ac.uk/research/publications/521860>.

¹⁰⁷ Ibid.

¹⁰⁸ Inspector's average pay was calculated across years one to seven.

Adult Cautioning Scheme

9.3.3 This scenario examines the costs of the inclusion of all personal possession drug offences in the Adult Cautioning Scheme. The addition of an Adult Caution would add costs to the Gardaí similar to the 'Arrest leading to caution' with the addition of six inspector hours as in Ireland an adult caution¹⁰⁹ requires the input of a Garda Inspector. Assuming all individuals are administered with a caution and accounting for hours in terms of an Inspector, Sergeant and Garda, this generates a cost of €4.29m. This would replace the €1.17 million in costs to the Gardaí in the current system and therefore lead to an additional €3.13m in costs to the Gardaí. In Ireland the caution is administered by a District Officer (Superintendent) or an Inspector in an acting capacity.

Estimated Cost of Adult Cautions to An Garda Síochána for Personal Possession €m	
Adult Caution Scheme (ACS) [†]	€4.29
Change in Garda costs ^{**}	+€3.13

Table 9: Estimated costs of Policy Option 1

Source: IGEES Unit, DOJE

[†]Assuming all offences are given an ACS and this is administered by Gardaí

^{**} Additional Garda costs when compared with the estimated Garda costs for current policy approach

Multiple Adult Cautions

9.3.4 This intervention would act similar to the above adult caution option except with further adult cautions for recidivism. In this scenario a person would get a second adult caution for personal possession for a second offence and an additional adult caution for a third offence (in exceptional circumstances). Under the assumption that an adult caution would be applied to all offences with 10% reoffending a second time and a subsequent 10% reoffending on a third occasion, this scenario would cost an additional €5.15m replacing the €1.17 million in costs to the Gardaí in the current system. Therefore in contrast to the current approach this scenario adds an additional €3.99m.

Estimated Cost of Multiple Adult Caution to An Garda Síochána for Personal Possession €m	
Adult Caution Scheme (ACS) [*]	€5.15
Change in Garda costs ^{**}	+€3.99

Table 10: Estimated costs of Policy Option 2

Source: IGEES Unit, DOJE

^{*}Assuming all offences are given an ACS which is administered by Gardaí with addition ACS based on recidivism

^{**}Additional Garda costs when compared with the estimated Garda costs for current policy approach

¹⁰⁹ Adult Cautioning Scheme <https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Adult-Cautioning-Scheme.pdf>

Diversion to Health Services

9.3.5 A third scenario is based on an alternative approach involving a formal mandatory referral by An Garda Síochána for a brief intervention and screening with a health professional and onward referral to treatment services or other supports for people with or at risk of problematic drug use. This would be administered for a minimum of three offences and under this proposed option there are costs associated with:

- Costs to Gardaí associated with diversion to health services, including recording attendance and follow up on non-attendance
- Costs to Health Services associated with the SAOR brief intervention, and any onward referral to treatment

9.3.6 Firstly to estimate the costs to the Gardaí would require a cost taken for a Garda to be on patrol and administer a diversion to a health intervention. This is estimated as similar to the 'Arrest leading to caution' in section 9.3.2 above, however in this case, inspector hours have been excluded which would lead to an estimated cost of €2.24 million.

9.3.7 To estimate the costs associated with the diversion to a health intervention, we assume that the number of possession charges remains the same as 2017. Therefore 12,589 SAOR brief interventions would be delivered. There are nine Community Health Organisations (CHOs) with associated addiction clinics and services around the country. It is proposed that the HSE would employ a fulltime Counsellor in each of the CHOs to deliver the SAOR interventions and to communicate attendance with the Gardaí. In addition, clinical supervision of the programme will be provided by two Senior Counsellors. The cost of employing these staff to provide SAOR interventions (including overheads and PRSI) is estimated at almost €780,000.

9.3.8 In order to estimate the cost of treatment requires a number of assumptions. Based on Portuguese research, it is assumed that 10% of those who attend for a brief intervention will have problematic drug use and will require treatment. The current average treatment cost across all drug types is estimated to be €3,249 per treatment, which represents an average of high cost and low cost treatments and the proportions requiring such treatments. Assuming 10% of those arrested for personal possession will have problematic drug use leaves an estimate of 1,259 people requiring treatment. In total this leaves a cost of treatment at an estimated €4.09 million.

Estimated Cost of Health Diversion €m	
Gardaí Referral Cost*	€2.24
SAOR Brief Intervention **	€0.78
Costs of Treatment **	€4.09
Health Costs	€4.87
Total Costs	€7.11
Change in costs***	+€5.95

Table 10: Estimated Cost of Health Diversion €m

Source: IGEES DOJE Estimates based on HSE costs

*Assume same cost for referral as an adult caution without inspector.

**Provided by HSE

***Additional costs of intervention compared to the justice sector costs estimated for current policy approach

9.3.9 Combining all of the health associated costs (SAOR brief intervention and treatment) together leaves an estimated health cost of €4.87 million. Adding this cost to the estimated cost to the Gardaí gives a total of €7.11 million.

9.3.10 Table 12 beneath summarises the costs included across the different sectors, the additional costs involved and the percentage change when compared with the costs included in the current approach.

	Gardaí Costs	Health Costs	Total Costs of Intervention	Current Justice Costs	Additional Costs	% change***
Adult Caution	4.29		4.29	7.00	3.13*	45%
Multiple Adult Cautions	5.15		5.15	7.00	3.99*	57%
Diversion to Health Services	2.24	4.87	7.11	7.00	5.95**	85%

Table 12: Costs to Each sector by Scenario (€'m)

Sources: Estimates IGEES Unit DOJE

*Additional Gardaí costs compared to the current approach

** Additional Gardaí costs compared to the current approach plus estimated health costs

***Proportional change in costs of the addition of each intervention compared to current approach cost

9.3.11 The findings are very high-level estimates and based on a limited availability of data. There is a clear of indication of additional costs to An Garda Síochána within the justice sector and additional costs in the health sector depending on the selected approach. It should be recalled that the current approach included no health costs. The transfer of costs within the agencies would not lead to a reduction in workload or staffing which suggests no clear savings. Although all three models would lead to a reduction in numbers of people prosecuted and imprisoned for personal possession, this costings estimate did include any reduction in these costs.

10 Recommendations

10.1 Policy Options

10.1.1 The Working Group acknowledges that the Legislature may decide to continue with the current approach. However, in line with its mandate, the Working Group has considered a number of alternatives to the current approach, outlined in section 8.

10.1.2 Based on the deliberations of the group, including consideration of the presentations made to the group, the cost benefit analysis, the commissioned research and the discussions of the alternatives in section 8, the Working Group can recommend the following three options to the Legislature for their consideration:

Option 1: Adult Caution

- The Adult Cautioning Scheme is a discretionary alternative to prosecution, whereby a person found in possession of drugs for personal use could be given a formal caution by An Garda Síochána, who could also provide the individual with a health and social services information leaflet.

Option 2: Multiple Adult Cautions

- Subject to the agreement of the DPP, a person could be given the benefit of an Adult Caution by An Garda Síochána more than once. This could provide a discretionary alternative to prosecution and criminal conviction on more than one occasion.
- The individual would also be provided with a health and social services information leaflet whenever they are given an Adult Caution in respect of possession of drugs for personal use.

Option 3: Diversion to Health Services

- This option is based on a public health approach to drug use.
- A person in possession of drugs for personal use would be offered a diversion for a SAOR brief intervention and screening.
- A person with or at risk of problematic drug use would then be offered the appropriate onward referral for treatment or other supports.

10.1.3 Table 13 below compares the three policy options across a number of categories.

	Option 1 Adult Caution	Option 2 Multiple Adult Cautions	Option 3 Referral to Health Services
Alternative to Criminal Conviction	Yes For first offence	Yes For first two offences	Yes For a defined number of offences
Health and social services information leaflet	Yes	Yes	Yes
Health screening and intervention	No But advice will be provided on health and social services available	No But advice will be provided on health and social services available	Yes A SAOR screening and Brief intervention will be provided
Additional costs	Yes Garda intervention with Adult Caution	Yes Garda intervention with Adult Caution	SAOR intervention and screening Additional treatment episodes within the health system, as appropriate
Legislative change required	No	No	Yes Enable Gardaí to divert to health services
Operational Guidelines Required	Yes Would need agreement between DPP and the Garda Commissioner and operational guidelines for Gardaí	Yes Would need agreement between DPP and the Garda Commissioner and operational guidelines for Gardaí	Yes Would need guidelines around eligibility criteria, method of diversion and information sharing methodology

Table 13: Comparison of the three recommended policy options

10.1.4 The Working Group proposes the above policy options on the basis that it considers them to address the concerns of Government and the public to varying degrees, and believes that they could work in the Irish context.

10.2 Other Recommendations

10.2.1 Imprisonment is the ultimate sanction currently available to the courts for those convicted of possession of illegal drugs. As outlined in section 3 there has been a large

decrease in the number of people being committed to prison for this offence; from 365 in 2015 to 73 in 2017. However, there are many harms associated with imprisonment such as stigmatising groups, breaking down family and social networks and disenfranchising entire areas of city centres.¹¹⁰ In addition, it has been shown that incarcerating young males and thereby exposing them to that environment can make it less likely that they will grow out of their criminal behaviour at the usual pace.¹¹¹ **The Working Group recommends in principle amending the penalty scheme in Section 27 of the Misuse of Drugs Act 1977 so that imprisonment is no longer an outcome for the possession of drugs for personal use subject to a full examination of the legal implications and any unforeseen consequences.**

10.2.2 Under the provisions of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, a person can only have one drug conviction spent. However, with other types of convictions, such as minor public order offences, more than one conviction can be spent. The group believes that this runs counter to aim of supporting people to recover from their addiction. **Therefore, the Working Group recommends a change to the Act so that all convictions for drug possession for personal use (Section 3 MDA) can be spent. In addition, the group recommends decreasing the seven year period to three years between the conviction and it becoming spent.**

10.2.3 Under the Probation of Offenders Act 1907, two options are available to the judiciary when sentencing:

- Dismissal under the Probation of Offenders Act
- A Probation Order

As the name suggests, a dismissal is not a recorded conviction. A Probation Order puts an offender under the supervision of a Probation Officer for a period of up to three years. **The Working Group considers it important that a dismissal or non-conviction under the Probation Act be recorded correctly and that this court outcome is clear when a person's records are being checked.**

10.2.4 As the Working Group is considering possession of drugs for personal use only, it can be helpful to distinguish between what is meant by personal use versus that for sale or supply. Some countries have introduced threshold limits to help the authorities make this distinction, so that a person found in possession of a quantity of drugs greater than the limit are prosecuted under a more serious offence such as supply. There are many variations in how thresholds are set; weight of drugs, value of drugs, number of doses or weight of active ingredient in the drug. There is much debate about the harms that can be caused by setting threshold limits that are too restrictive or by encouraging small level suppliers to only possess an amount of drugs for sale below the threshold so as to avoid the full rigours of the law. Currently in Ireland, the Misuse of Drugs Act does not determine whether a person is in possession of drugs for personal use or for supply. It requires that account is taken of the context and of other factors to determine intent. In the context of the three options it recommends, **the Working Group does not propose the introduction of threshold limits under**

¹¹⁰ O'Sullivan, E. & O'Donnell, I. (2003). Imprisonment and the Crime Rate in Ireland. *The Economic and Social Review*, 43 (1); 33-64

¹¹¹ Goulab, A. (1990). *The Termination Rate of Adult Criminal Careers*. Pittsburgh: Carnegie Mellon.

current legislation. The Group recommends the retention of the statutory presumption to the effect that where the quantity of drugs involved renders it reasonable to assume that they were not for immediate personal use, they were possessed for the purpose of sale or supply.

10.2.5 Problem substance use is a chronic, often recurring condition. As a result, recovery is often seen as a journey and rehabilitation as a process that supports and encourages the individual at each stage along the pathway to recovery. The Working Group is keen that every opportunity should be made to support people on their recovery journey even if they are in the criminal justice system for an offence connected to their drug use. **Therefore, the Working Group recommends that there are pathways available at all levels of the criminal justice system to refer people to treatment following prosecution.**

10.2.6 Any change to the current approach for personal possession is likely to lead to greater demand for treatment and to put more pressure on policing services (so-called “net-widening”). Some of the proposed policy options will lead to greater treatment demand than others. **In light of this, the Working Group recommends additional investment in services to support the policy option that is chosen.**

10.2.7 A public health approach aims to prevent and address health problems that may arise from drug use. The national drugs strategy focuses on a coordinated, comprehensive effort involving all sectors to create safer, healthier communities by supporting people to avoid, reduce and recover from drug-related harm. The Working Group is aware of the growing harms associated with cannabis use because of increased THC (Tetrahydrocannabinol) levels. It is important that all sectors work together to inform the public about the harms associated with cannabis and all other illicit drug use. **The Working Group recommends a campaign to increase awareness of the treatments available and of the harms associated with drug use**

10.2.8 Based on international experience and presentations to the Group regarding the risk of unintended consequences in introducing alternative approaches, and to ensure an effectively governed structure is put in place for an alternative measure to successfully operate, **the Working Group recommend that any alternative approach introduced is monitored, has a data collection mechanism, an evaluation of the implementation and scope for appropriate modification.**

Addenda

The addenda that follow were not discussed by the working group and represent the views of their authors.

Other members of the working group may not necessarily endorse any or all of the comments contained therein.

Addendum I

Statement by Padraic Taylor (ODPP)

I should explain the general context in which I make my comments. I am a lawyer in the Office of the Director of Public Prosecutions. The Director is independent of Government and the legislature, and her role is to prosecute such criminal offences as are set out in legislation. It is a matter of policy therefore for the Government and the legislature to decide what behaviours should be criminalised or decriminalised and to decide on any legislative responses to criminal behaviour.

I wish to comment specifically on recommendations 10.2.1 and 10.2.2. Where convictions result it is a matter for the courts to impose the applicable penalties appropriately. It is therefore not a matter for the Director or for me as one of her lawyers to recommend the removal of certain penalty options from criminal legislation. For that reason it would not be appropriate for me to endorse those recommendations.

Recommendation 10.2.1 concerns the penalty scheme under the Misuse of Drugs Acts for possession of drugs for personal use. I note the group's recommendation at paragraph 10.2.1 is said to be made subject to a full examination of the legal implications and any unforeseen consequences of such amendment. I wonder therefore about this recommendation being made by the group prior to any such examination being carried out.

I think it is worth noting some of the legal implications and unforeseen consequences that might flow from the removal of a custodial penalty for Section 3 possession. One immediate legal implication of removing the penalty of imprisonment is that community service orders would no longer be available as an alternative to a custodial sentence. Nor would suspended sentences be open to the sentencing judge, thus removing a potential deterrent from re-offending while the suspended sentence was hanging over the offender. Unforeseen consequences could include a range of scenarios where suspects are detected in possession of small amounts of drugs, but the public interest might require a penalty of imprisonment as an option. This could include, for example, suspects involved in drug dealing who carry small amounts of drugs or individual 'deals' as a matter of practice to avoid more serious penalties. Removing imprisonment as an option for such offenders or for recidivist repeat offenders, who are making no efforts to rehabilitate themselves, could remove the deterrent effect which is an essential element of all criminal penalties.

In relation to paragraph 10.2.2 concerning spent convictions, I would simply point out that for similar reasons as set out above, the question of whether and how many convictions can be spent is a policy matter and one ultimately for the legislature.

Addendum II

Preferred Recommendations of Tom O'Malley

- (1) The possession of drugs for personal use should remain a criminal offence, as it currently is under the Misuse of Drugs Act 1977 as amended. I take this view mainly because of the volume of criminal activity, including some horrendously serious crimes against the person, occasionally committed by offenders to finance their drug addiction. This is not to suggest that all drug users engage in crime (apart from the possession itself) and it is possible that the majority do not. However, the problem is sufficiently serious that it is sound policy to continue to outlaw the possession of controlled drugs and to ensure that those who possess such drugs, whether for personal use or sale or supply, can be dealt with by the criminal justice system.
- (2) Having said that, I accept that a conviction for a drug offence can, in many instances, have serious consequences for the person convicted. The formal penalty may be lenient (such as a fine) but having a criminal record for such an offence can have far more lasting consequences.
- (3) While the possession of a controlled drug for personal use should remain an offence, a suite of measures should be in place to promote desistance and to remove the adverse consequences of a conviction for those found in possession of drugs for personal use unless there is evidence of serious recidivist offending. These measures would include:
 - (a) diversion from prosecution for both juvenile and adult offenders, through the use of cautioning schemes, especially, though not necessarily exclusively, for first offenders;
 - (b) measures that would encourage those caught in possession of drugs to seek appropriate treatment and counselling if they have addiction problems;
 - (c) courts should be encouraged to adopt measures such as a dismissal or discharge under the Probation of Offenders Act 1907 when dealing with persons charged of possessing drugs for personal use (acknowledging that the courts already apply such measures in many cases);
 - (d) the sentencing regime that now applies to possession of cannabis for personal use under s. 27 of the Misuse of Drugs Act 1977 (as amended) should apply to all controlled drugs.
 - (e) the government should be encouraged to establish dedicated treatment facilities for persons who are convicted of drug and drug-related offences. Committal to such a facility be used as an independent sentencing option where there is clinical evidence that an offender was likely to benefit from such a measure.
- (4) I agree with all the recommendations at 10.2.2 to 10.2. 8 above

Addendum III

Observations of An Garda Síochána

The report of the working group established to consider alternative approaches to the possession of drugs for personal use has been considered by An Garda Síochána.

An Garda Síochána welcomes the implementation of the National Drugs Strategy, titled "Reducing Harm Supporting Recovery, A Health Led Response to Drug & Alcohol Use in Ireland 2017-2025". The support from other entities in dealing with users of controlled substances, who possess such substances only for their own use and are not otherwise engaged in the drug trade is a significant support to An Garda Síochána in tackling the illicit drug trade.

An Garda Síochána supports the objective of this Working Group in identifying any alternative approach, which would involve a person being afforded the opportunity to avoid a criminal conviction for drugs for their personal use, provided reasonable efforts are made to tackle their drug use related problem, including:

- (i) Support to avoid, reduce and recover from drug related harm;
- (ii) Problematic drug use being referred to appropriate treatment(s) and/or other support(s).

However, initiatives of this nature must include strong controls and monitoring of compliance with programmes. The continued behaviour of habitual drug users cannot be allowed to impact on the quality of life of the rest of society unchecked. Where habitual drug use is impacting on the local community, An Garda Síochána must be in a position to take appropriate action.

An Garda Síochána strongly cautions against adopting policies which would result in the inability of An Garda Síochána to tackle anti-social behaviour arising as a result of drug use. The most appropriate place to deal with such matters remains the Criminal Justice System where the Courts can divert individuals to appropriate supports and monitor compliance through the probation service or other appropriate body.

As you will be aware a review of the Adult Caution Scheme has been undertaken under the auspices of the Criminal Justice Strategic Committee (CJSC). It is understood that the matter of adult cautions in respect of possession of drugs for personal use is being considered by this group.

An Garda Síochána does not recommend the introduction of a system which would allow for multiple adult cautions. Such a policy will exacerbate criminal problems as the drugs market

would most likely prosper on the basis that Gardaí will no longer have effective tools to deal with offences under the provisions of Section 3 of the Misuse of Drugs Act, 1977.

Furthermore, illicit drug users may exploit that they are permitted to carry and possess drugs for personal use. Drug dealers and their couriers may adapt their behaviour to carry small quantities of drugs in the knowledge that they are permitted to possess a quantity for drugs for personal use. Experience in other jurisdictions has shown where the drugs market encourages growth it increases activities of organised crime gangs (OCG) and the risk of vicious territorial disputes.

There is little reflection of the impact of the drugs market on organised crime in Ireland, while reference is made to the attraction of the drugs market to organised crime due to the high profit margins, the report does not take full cognisance of this linkage. Further examination is required to establish the risk from organised crime should the report recommendations be adopted.

Having carefully considered the recommendations An Garda Síochána cannot recommend acceptance of the recommendation at 10.2.1 - amending the penalty scheme in section 27 of the Misuse of Drugs Act 1977 so that imprisonment is no longer an outcome for the possession of drugs for personal use.

The recommendation made at 10.2.1, if implemented, has the potential to encourage use of controlled substances and is not consistent with implementation of policies in the interest of the welfare of society in general and individuals who have become addicted to controlled substances, in particular. A full examination of the legal implications and any unforeseen consequences of implementation of a policy of this nature should be undertaken, in advance of making such changes.

An Garda Síochána also has reservations with regard to endorsing the recommendation made at 10.2.2, which suggests a change to the Misuse of Drugs Act so that all convictions for drug possession for personal use (Section 3 MDA) can be spent.

An Garda Síochána supports the Working Group's proposal to make the additional recommendations set out at 10.2.3, 10.2.4, 10.2.5, 10.2.6, 10.2.7 and 10.2.8 in its draft final report which are clearly designed to tackle issues associated with personal drug use and to discourage use of such substances.

It is clear that any alternative to the existing approach to illicit drug possession, will have an impact on An Garda Síochána, both from an operational and resource perspective. The procedural or legal impediments to any alternative approach to the issues involved, has not been fully explored by the Working Group.

For the reasons as outlined above, An Garda Síochána is not in a position to recommend full adoption of the final report of the working group established to consider alternative approaches to the possession of drugs for personal use in its current format.

Appendix I

Membership of the Working Group

Mr Justice Garrett Sheehan	Chairperson
Michael Kelly ⁱ	Department of Justice and Equality
Therese Molyneux	Department of Justice and Equality
Jim Walsh ⁱⁱ	Department of Health - Drugs Policy Unit
Dr Sarah Waters	Department of Health - Drugs Policy Unit
Eugene Lennon ⁱⁱⁱ	Department of Health - Controlled Drugs Unit
Mary Dowling ^{iv}	Department of Health - Controlled Drugs Unit
Det. Supt. Brian Woods	An Garda Síochána
Dr Eamon Keenan	HSE
David Kenny	Probation Service
Stephen Winders	Person with lived experience of using drugs
John Devoy	Person with lived experience of using drugs
Dr Jean Long	Health Research Board
Padraic Taylor	Office of the Director of Public Prosecutions
Tom O'Malley	Barrister and Senior Lecturer, NUI Galway
Colin Lavelle	Secretariat to the Working Group
Jane-Ann O'Connell	Secretariat to the Working Group

ⁱ Michael Kelly was a member of the group for 12 months. Una Dixon replaced Michael Kelly of Department of Justice and Equality from meeting seventeen.

ⁱⁱ Jane-Ann O'Connell deputised for Department of Health - Drugs Policy Unit at the first and second meeting

ⁱⁱⁱ Randall Plunkett replaced Eugene Lennon of Department of Health - Controlled Drugs Unit from meeting five

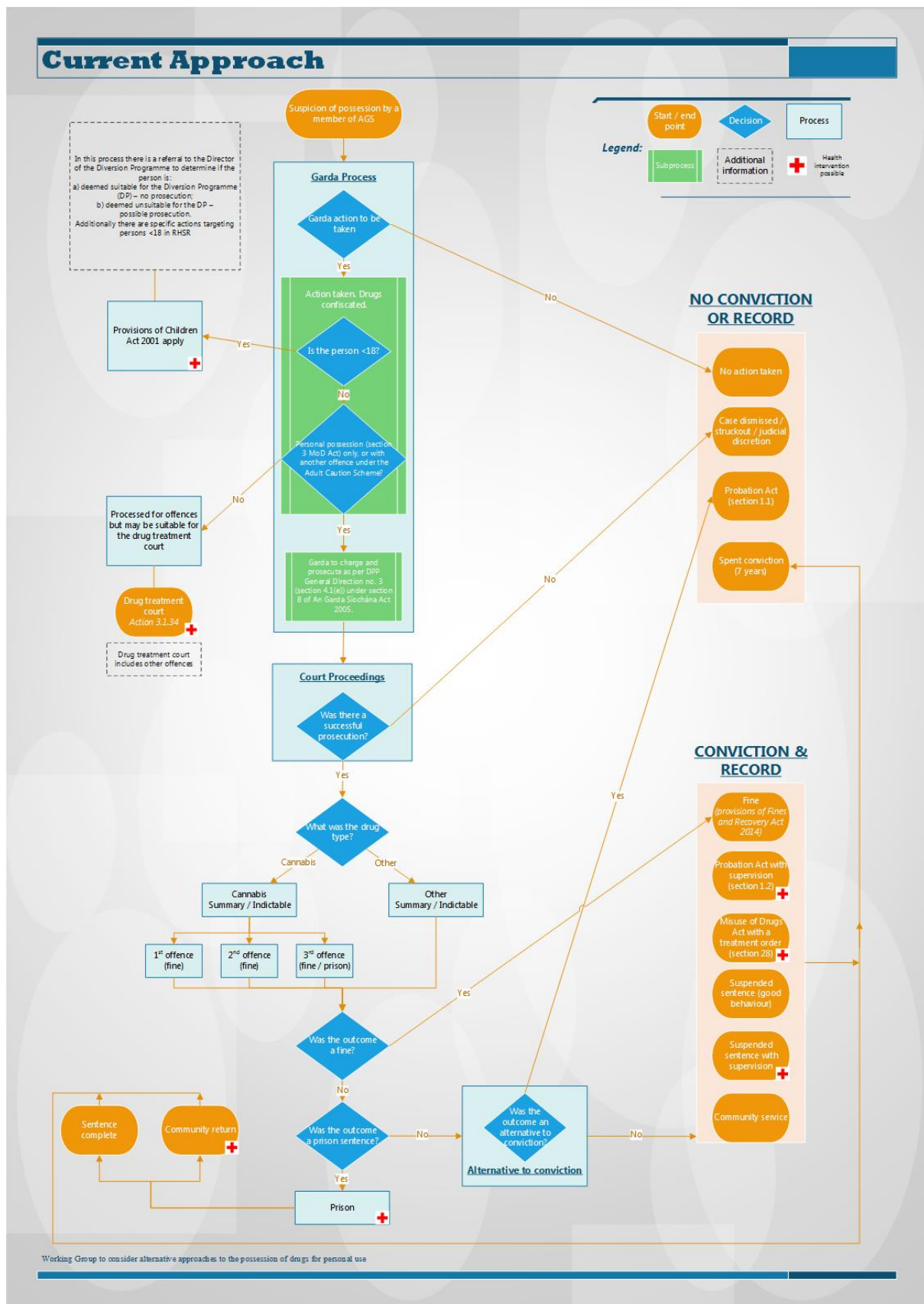
^{iv} Conor Brennan replaced Mary Dowling of Department of Health - Controlled Drugs Unit from meeting six

Appendix II

Penalties on Conviction for personal use

<p style="text-align: center;">Misuse of Drugs Act 1977 to 2016:</p> <p style="text-align: center;">Penalties on Conviction for personal use</p> <p>Section 27: Penalties on conviction are set out as in the table below, but subject to:</p> <p>Section 28: the Court power to request a report on the person convicted of the offence and, instead of imposing a penalty under section 27, arrange for the medical treatment or for the care of the person.</p>	
<p><u>Cannabis</u></p> <p>In the case of a first offence,</p> <ul style="list-style-type: none"> on summary conviction, to a fine not exceeding £300, or on conviction on indictment, to a fine not exceeding £500, <p>In the case of a second offence,</p> <ul style="list-style-type: none"> on summary conviction, to a fine not exceeding £400, or on conviction on indictment, to a fine not exceeding £1,000, <p>In the case of a third or subsequent offence,</p> <ul style="list-style-type: none"> on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months, or to both the fine and the imprisonment, or on conviction on indictment, to a fine of such amount as the court considers appropriate or, at the discretion of the court, to imprisonment for a term not exceeding three years, or to both the fine and the imprisonment; 	<p><u>In any other case</u></p> <p>on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months, or to both the fine and the imprisonment, or</p> <ul style="list-style-type: none"> on conviction on indictment, to a fine of such amount as the court considers appropriate or, at the discretion of the court, to imprisonment for a term not exceeding seven years, or to both the fine and the imprisonment.

Appendix III



Appendix IV

Eligibility for the Drug Treatment Court

The Court is open to receive participants who meet the following criteria:

- I. Be 18 years or older
- II. Have pleaded guilty or been found guilty and facts heard in the District Court of a non-violent criminal offence
- III. Be liable to be sentenced to a term of imprisonment if convicted
- IV. Road Traffic cases will not be accepted in the DTC
- V. Be dependent on the use of prohibited drugs and /or prescribed drugs
- VI. Be resident in the Dublin area
- VII. A participant should have no outstanding Circuit Court matters.
- VIII. Previous history of violent offending may be a bar to participation.
- IX. Participants will be remanded to Green Street Court House any Wednesday at 2pm

Appendix V

Offences currently available for disposal under the Adult Caution Scheme

Criminal Justice (Public Order) Act, 1994

Section 4: Intoxication in a public place

Section 5: Disorderly Conduct in a public place

Section 6: Threatening, abusive or insulting behaviour in a public place

Section 8: Failure to comply with direction of a member of An Garda Síochána

Section 9: Wilful Obstruction

Section 11: Entering building etc. with intent to commit an offence

Section 22: Surrender and seizure of intoxicating liquor

Intoxicating Liquor Act, 2003

Section 6: Offences by a drunken person

Section 8: Disorderly conduct

Intoxicating Liquor Act, 1927

Section 17: Persons on licensed premises during prohibited hours

Licensing Act, 1872

Section 12: Public Drunkenness

Non-Fatal Offences Against the Person Act, 1997

Section 2: Assault (*assaults on a member of An Garda Síochána shall be forwarded to the Director of Public Prosecutions*)

Criminal Justice (Theft and Fraud Offences) Act, 2001

Section 4: Theft (where the value of the property concerned is less than €1,000)

Section 8: Making off without payment (where the value of the payment is less than €1,000)

Section 17: Handling stolen property (where the value of the property concerned is less than €1,000)

Section 18: Possession of stolen property (where the value of the property concerned is less than €1,000)

Criminal Damage Act, 1991

Section 2: Damaging Property (where the value of the property damaged is less than €1,000)

Section 3: Threat to damage property

Dublin Police Act, 1842

Section 14 (12): Nuisances in Public thoroughfares (applies to Dublin Metropolitan (Court) District Only)

Summary Jurisdiction (Ireland) Amendment Act, 1871

Section 8: Offensive or riotous conduct in a theatre or other place of public amusement (applies to Dublin Metropolitan (Court) District only)

Appendix VI

Classification of the Functions of Government (COFOG) 1999

The Classification of the Functions of Government (COFOG) was developed by the Organization for Economic Cooperation and Development and published by the United Nations Statistical Division. It can be applied to government expense and the net acquisition of non-financial assets. COFOG has three levels of detail: Divisions, Groups, and Classes. The Divisions could be seen as the broad objectives of government, while the Groups and Classes detail the means by which these broad objectives are achieved. The initials “CS” or “IS” follow the title of each Class in parentheses to indicate whether the services produced by general government units and included in this Class are collective or individual services.

01 - General public services

- 01.1 - Executive and legislative organs, financial and fiscal affairs, external affairs
- 01.2 - Foreign economic aid
- 01.3 - General services
- 01.4 - Basic research
- 01.5 - R&D General public services
- 01.6 - General public services n.e.c.
- 01.7 - Public debt transactions
- 01.8 - Transfers of a general character between different levels of government

02 - Defence

- 02.1 - Military defence
- 02.2 - Civil defence
- 02.3 - Foreign military aid
- 02.4 - R&D Defence
- 02.5 - Defence n.e.c.

03 - Public order and safety

- 03.1 - Police services
- 03.2 - Fire-protection services
- 03.3 - Law courts
- 03.4 - Prisons
- 03.5 - R&D Public order and safety
- 03.6 - Public order and safety n.e.c.

04 - Economic affairs

- 04.1 - General economic, commercial and labour affairs
- 04.2 - Agriculture, forestry, fishing and hunting
- 04.3 - Fuel and energy
- 04.4 - Mining, manufacturing and construction
- 04.5 - Transport
- 04.6 - Communication

04.7 - Other industries
04.8 - R&D Economic affairs
04.9 - Economic affairs n.e.c

05 - Environmental protection

05.1 - Waste management
05.2 - Waste water management
05.3 - Pollution abatement
05.4 - Protection of biodiversity and landscape
05.5 - R&D Environmental protection
05.6 - Environmental protection n.e.c.

06 - Housing and community amenities

06.1 - Housing development
06.2 - Community development
06.3 - Water supply
06.4 - Street lighting
06.5 - R&D Housing and community amenities
06.6 - Housing and community amenities n.e.c.

07 - Health

07.1 - Medical products, appliances and equipment
07.2 - Outpatient services
07.3 - Hospital services
07.4 - Public health services
07.5 - R&D Health
07.6 - Health n.e.c.

08 - Recreation, culture and religion

08.1 - Recreational and sporting services
08.2 - Cultural services
08.3 - Broadcasting and publishing services
08.4 - Religious and other community services
08.5 - R&D Recreation, culture and religion
08.6 - Recreation, culture and religion n.e.c.

09 - Education

09.1 - Pre-primary and primary education
09.2 - Secondary education
09.3 - Post-secondary non-tertiary education
09.4 - Tertiary education
09.5 - Education not definable by level
09.6 - Subsidiary services to education
09.7 - R&D Education
09.8 - Education n.e.c.

10 - **Social protection**

10.1 - Sickness and disability

10.2 - Old age

10.3 - Survivors

10.4 - Family and children

10.5 - Unemployment

10.6 - Housing

10.7 - Social exclusion n.e.c.

10.8 - R&D Social protection

10.9 - Social protection n.e.c.

Annex I (separate attachment)

**Review of approaches taken in Ireland and in
other jurisdictions to simple possession drug
offences**

Dr Caitlin Hughes¹, Professor Alex Stevens²,
Shann Hulme¹ and Dr Rebecca Cassidy²

A report for the Irish Department of Justice & Equality and the
Department of Health (and the working group on this issue)
September 2018

¹ National Drug and Alcohol Research Centre, UNSW Australia

² University of Kent

Annex II (separate attachment)

Working Group to Consider Alternative Approaches to the Possession of Drugs for Personal Use

**Report of the Public
Consultation**

Annex III (separate attachment)

Costings of an alternative approach to personal drug possession

Disclaimer

This paper has been prepared by the IGEES unit of the Department of Justice and Equality. The views presented in this paper are those of the authors alone and do not represent the official views of the Department of Justice and Equality or the Minister for Justice and Equality. Analytical research papers are prepared on an ongoing basis and reflect the data available at the time. Please do not cite without permission.



**An Roinn Dlí agus Cirt
agus Comhionannais**
Department of Justice
and Equality



Irish Government Economic & Evaluation Service