

# Is the removal of criminal penalties for drug use consistent with the International Drug Control Conventions?

Australia is a signatory to the three international drug control conventions. A commonly asked question is whether the removal of criminal penalties for drug use (retaining criminal penalties for drug supply) is consistent with the treaties or not. This evidence brief explores that issue.

There are three United Nations conventions regarding drugs: The Single Convention on Narcotic Drugs (1961 as amended by the 1972 Protocol), the Convention on Psychotropic Drugs (1971) and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). More than 150 nations are signatories to these conventions, including Australia. All three conventions have historically been interpreted as taking a prohibitionist stance towards illicit drugs for purposes other than "medical and scientific uses". As such the conventions have been seen to be an obstacle in the reform of drug policies for UN member states (Hall, 2018).

However, the last 15 years has witnessed a shift away from a hard stance on prohibition by many UN agencies and a move towards a health and human rights-focused approach. In some cases, UN agencies have openly advocated for the decriminalisation of drug use and possession (Chief Executives Board for Coordination, 2018; UNAIDS, 2019; UNAIDS et al., 2017; UNDP et al., 2020; World Health Organization, 2019). It has also been argued, including by members of the UN Office of Drugs and Crime (UNODC), that the treaties have enough flexibility within them to allow member states to reorient responses to drug use and possession towards a public health approach, and indeed the treaties perhaps encourage it if states are true to the common goal of 'protecting public health' that is central to all three treaties (Carpentier et al., 2018; Collins, 2018; Csete et al., 2016; Muganga, 2015; UN System Coordination Task Team, 2019).

Additionally, a range of UN agencies argue that maintaining a zero-tolerance and prohibitionist stance towards drug use conflicts with state responsibilities under international human rights treaties including in the provision of health and harm reduction initiatives (note the Lancet paper on this by Csete et al., (2016)). Many member states have started to remove criminal penalties for drug use and possession, and in a handful of cases, create legal access to scheduled substances (i.e. cannabis) (Eastwood et al., 2016; Room, 2018; Stevens et al., 2019; The Lancet, 2023).

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The main legal arguments for flexible interpretations of the drug control treaties outlined by members of the UNODC and the UN system coordination Task Team are below (Carpentier et al., 2018; Muganga, 2015; UN System Coordination Task Team, 2019):

1. The Conventions do not impose obligations on signatory countries to incarcerate people for consuming drugs
2. Conventions suggest the possibility to apply alternatives to incarceration “in particular for offences of a minor nature and possession for personal consumption” (Carpentier et al., 2018)
3. The Conventions all support and call for Member States to implement prevention, treatment and rehabilitation of people experiencing drug problems
4. The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) encourage the use of non-custodial measures at all stages of criminal proceedings, including diversion and alternatives to pre-trial detention, as well as alternatives to imprisonment at the sentencing and post-sentencing stages (UN System Coordination Task Team, 2019).

Additional arguments for flexibility in the treaties are summarised in a document by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA, 2023):

5. A safeguard clause appears in each of the three treaties that provide each country with the obligation to implement the treaties “subject to its constitutional limitations”<sup>1</sup>. This is interpreted to mean that the requirement to criminalise drug use and possession (and in the case of cannabis, cultivation and purchase for personal consumption), is subject to each State Party’s constitutional principles and basic concepts of legal system
6. There is a variety of different national interpretations of what constitutes a criminal offence
7. The Conventions provide explicit possibilities of providing alternatives to conviction or punishment for drug use and possession.

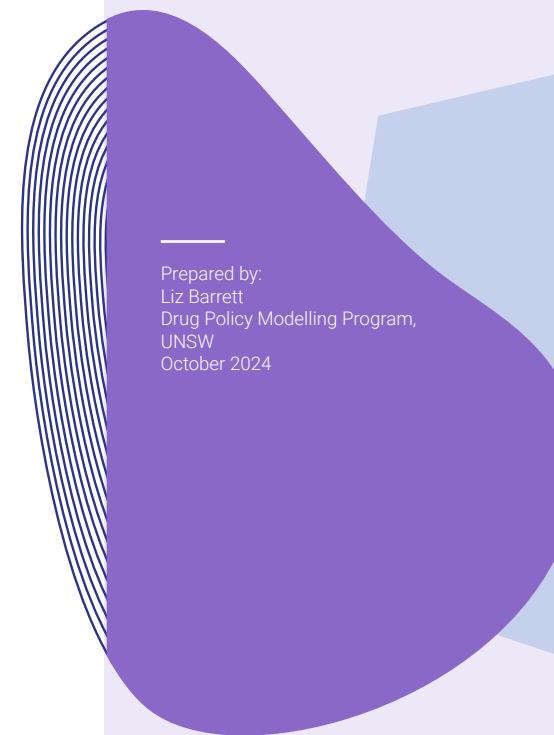
In summary, there is a growing consensus among different UN bodies and experts that international drug control treaties do not act as a legal limitation on states and territories in pursuing the decriminalisation of drug use or possession for personal use.

An overview of key documents from UN-related bodies and agencies advocating for the removal of criminal penalties and implementation of health-based responses to drug use are below (noting this is not a comprehensive list of all supportive documents).

<sup>1</sup> 1961 Convention, art. 36, para. 1; 1961 Convention as amended, art. 36, para. 1, subpara. (a); 1971 Convention, art. 22, para. 1, subpara. (a)., contain the safeguard clause “subject to its constitutional limitations”. 1988 Convention, art.3, para.2 has similar language: “subject to its constitutional principles and the basic concepts of its legal system each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.”. See this UNODC presentation for more information: [www.unodc.org/roseap/uploads/archive/documents/2015/03/drug-law/International\\_Drug\\_Control\\_Conventions\\_presentation\\_Myanmar\\_CM\\_16.01.2015.pdf](http://www.unodc.org/roseap/uploads/archive/documents/2015/03/drug-law/International_Drug_Control_Conventions_presentation_Myanmar_CM_16.01.2015.pdf)

**Table 1: Selection of UN documents and reports that support removing criminal penalties for personal possession and use of drugs and/or prioritisation of a health-based response**

Date	UN Body/Agency	Doc Number/hyperlink	Key clauses that support removal of criminal penalties for drug use
2010	Report of the Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health	<a href="#">UN General Assembly A/65/255</a>	76. Member States should: • Decriminalize or de-penalize possession and use of drugs. • Repeal or substantially reform laws and policies inhibiting the delivery of essential health services to drug users, and review law enforcement initiatives around drug control to ensure compliance with human rights obligations.
2015	UN General Assembly Resolution (UNGASS)	70/1: <a href="#">Transforming our world: the 2030 Agenda for Sustainable Development</a>	65. Taking into account the severe impact that a conviction for a drug-related offence can have on a person's life, consideration should be given to alternatives to the prosecution and imprisonment of persons for minor, non-violent drug-related offences. Reforms aimed at reducing overincarceration should take into account such alternatives.
2016	UN General Assembly Resolution (UNGASS)	S-30/1: <a href="#">Our joint commitment to effectively addressing and countering the world drug problem</a>	Orientation towards health and human rights throughout doc – see preamble and section 4. 4.J. Encourage the development, adoption and implementation, with due regard for national, constitutional, legal and administrative systems, 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 and taking into account, as appropriate, relevant United Nations standards and rules, such as the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules);
2017	UNAIDS Joint UN Statement on Ending Discrimination in Healthcare settings (noting that UNODC only UN agency that did not endorse this statement)	<a href="#">Document here</a>	We, the signatory United Nations entities, call upon all stakeholders to join us in committing to taking targeted, coordinated, time-bound, multisectoral actions in the following areas:  Reviewing and repealing punitive laws that have been proven to have negative health outcomes and that counter established public health evidence. These include laws that criminalize or otherwise prohibit... drug use or possession of drugs for personal use.
2018	United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration	<a href="#">CEB/2018/2 (Annex I)</a>	Document reiterates UN commitment to evidence and human rights-based approach to world drug problem within framework of SDGs.  This document supports ‘policies that put people, health and human rights at the centre’ and promotes ‘measures aimed at minimizing the adverse public health consequences of drug abuse, by some referred to as harm reduction’, ‘sustainable livelihoods through adequately-sequenced, well-funded and long-term development-oriented drug policies in rural and urban areas affected by illicit drug activities’, and ‘ <b>alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use</b> ’.
2019	UN system coordination Task Team on the Implementation of the UN System Common Position on drug-related matters:  What have we learned over the past ten years: A summary of knowledge acquired and produced by the UN system on drug-related matters	<a href="#">Document here</a>	<b>3.4 Proportionate and effective policies and responses (including evidence on alternatives to incarceration and decriminalization/depenalization of drug use)</b>  The international drug control conventions expressly allow the provision of measures such as treatment and education as alternatives to conviction or punishment for personal consumption offences and for all other relevant offences in “appropriate cases of a minor nature”. Examples of this approach are the diversion of minor cases from the criminal justice system through the exercise of police or prosecutorial discretion, and the use of non-custodial measures as an alternative to pretrial detention or imprisonment. This is in line with the international drug control conventions and with the requirements of an effective and human rights-compliant penal policy.
2019	WHO - The public health dimension of the World Drug Problem	<a href="#">WHO/MVP/EMP/2019.02</a>	Addressing structural issues is part of a public health approach, and on the basis of evidence, WHO has recommended that countries work towards decriminalization of consumption and possession of drugs for personal use, recognizing the major health care needs of people who use drugs and the importance of providing holistic care for them and ensuring they are not discriminated against in health care settings (p.8)
2020	UNDP – International Guidelines on Human Rights and Drugs Policy	<a href="#">Document here</a>	<b>1.1 Harm reduction</b>  iv. Exclude from the scope of criminal offences, or other punitive laws, policies, or practices, the carrying and distribution of equipment, goods, and information intended for preventing or reducing the harms associated with drug use, ensuring also that criminal conspiracy laws do not capture people using drugs together for this purpose.



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