International Journal of Drug Policy xxx (2014) xxx–xxx

Contents lists available at ScienceDirect

International Journal of Drug Policy

journal homepage: www.elsevier.com/locate/drugpo

Research paper

Legislating thresholds for drug trafficking: A policy development case study from New South Wales, Australia

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ARTICLE INFO

Article history:
Received 8 October 2013
Received in revised form 10 February 2014
Accepted 13 March 2014

Keywords:
Drug
Trafficking
Law
Policy process
Australia

ABSTRACT

Background: Legal thresholds are used in many parts of the world to define the quantity of illicit drugs over which possession is deemed "trafficking" as opposed to "possession for personal use". There is limited knowledge about why or how such laws were developed. In this study we analyse the policy processes underpinning the introduction and expansion of the drug trafficking legal threshold system in New South Wales (NSW), Australia.

Methods: A critical legal and historical analysis was undertaken sourcing data from legislation, Parliamentary Hansard debates, government inquiries, police reports and research. A timeline of policy developments was constructed from 1970 until 2013 outlining key steps including threshold introduction (1970), expansion (1985), and wholesale revision (1988). We then critically analysed the drivers of each step and the roles played by formal policy actors, public opinion, research/data and the drug trafficking problem.

Results: We find evidence that while justified as a necessary tool for effective law enforcement of drug trafficking, their introduction largely *preceded* overt police calls for reform or actual increases in drug trafficking. Moreover, while the expansion from one to four thresholds had the intent of differentiating small from large scale traffickers, the quantities employed were based on government assumptions which led to "manifest problems" and the revision in 1988 of over 100 different quantities. Despite the revisions, there has remained no further formal review and new quantities for "legal highs" continue to be added based on assumption and an uncertain evidence-base.

Conclusion: The development of legal thresholds for drug trafficking in NSW has been arbitrary and messy. That the arbitrariness persists from 1970 until the present day makes it hard to conclude the thresholds have been well designed. Our narrative provides a platform for future policy reform.

Introduction

Legal thresholds are used in many parts of the world to determine whether possession of an illicit drug is deemed "trafficking" as opposed to "possession for personal use" based on the quantity of drug involved (Hughes, 2003, 2010a). For example, in New South Wales (NSW), the largest state in Australia, possession of 0.75 grams of MDMA or three grams of heroin, methamphetamine, cocaine or synthetic cannabinoid will amount to 'deemed supply' with a maximum penalty of 12 years imprisonment (Drug Misuse and Trafficking Act, NSW, 1985). In contrast, anyone possessing less than the specified quantities will face a maximum penalty of two years imprisonment or a diversionary response (Hughes & Ritter, 2008). Given the import of such legal tools, it is perhaps surprising that there remains very limited knowledge about why or how such laws were developed (Harris, 2011). In this article we provide a detailed analysis of the introduction and expansion of the NSW drug trafficking legal threshold system.

While used in many parts of the world including the United States, Canada, Australia, Spain, Portugal, Greece, Finland, Hungary, Mexico and Argentina (Harris, 2011; Hughes, 2003; Walsh, 2008), legal thresholds for drug offences have received little academic attention to date, and there has been no formal evaluation of their impact. The European Monitoring Centre for Drugs and Drug Addiction has conducted a comprehensive review of threshold designs, focusing specifically on European systems (updated in 2010) (Hughes, 2003, 2010a). This reveals considerable diversity in threshold use and application. Most nations employ at least

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http://dx.doi.org/10.1016/j.drugpo.2014.03.002
0955-3959/

one threshold, but some nations (such as France) explicitly avoid their use. The most common threshold is used to distinguish "trafficking" from "possession for personal use", but others are used to distinguish other offence types, to determine the court of action, applicable sentence range or eligibility of offenders for non-criminal sanctions. Designs vary in terms of the number of drug types for which thresholds are specified (only cannabis, a select number of drugs, or all drugs), how the quantity of drug is specified (weights, units or dollars, or abstract terms such as "large" or "small") and how the drug is measured (inclusive of inert material or not). A commonality to most European nations is that possession of the threshold quantity is only indicative of an offence (not presumptive), which necessitates that other indices of use and supply (such as the presence or absence of large sums of money) are considered in determining the offence (Hughes, 2003). This differs to NSW where it is presumptive (Drug Misuse and Trafficking Act, NSW, 1985).

While thresholds can be employed for many reasons, there are two key rationales. The first rationale is to make it easier for the criminal justice system (police, prosecutors and the judiciary) to prosecute and sentence alleged drug offenders (Harris, 2011; Hughes, 2003; Walsh, 2008). For example, by providing simple benchmarks (such as, does the offender possess more or less than 20 grams of ecstasy?) quantity thresholds speed up decision making processes. In so doing they overcome some of the barriers to establishing criminal liability for drug offenders. In places such as NSW (where possession of the threshold quantity amounts to "deemed supply"), they further remove the need for police and courts to provide proof of actual trafficking or intent to traffick. The second rationale is to increase consistency in the prosecution and sentencing of drug offenders. It is argued that this will in turn lead to more effective use of criminal justice resources (particularly ensuring prison is used for traffickers, not users), and increase community satisfaction and deterrence of current and would-be traffickers (MCCOC, 1998; Sentencing Council, 2011).

In spite of their widespread use, systematic evaluation of the impact of thresholds including their benefits and harms has yet to be undertaken. There remains scepticism about their worth. For example, opponents fear that they may unwittingly foster inappropriate or unjust sentencing, such as sanctioning users as traffickers (Sevigny, 2006; Walsh, 2008). In this regard evidence from a US study by Sevigny and Caulkins (2006) is important, as it showed that in 1997 11.9% of US federal and 15.6% of state inmates convicted of drug trafficking self-reported no trafficking involvement: instead at both the time of conviction and the year leading to the conviction they were a simple user/possessor. Our forthcoming work (Hughes, Ritter, Cowdery, & Phillips, 2014) similarly finds that Australian thresholds do not always differentiate users from traffickers. Most notably, in the state of NSW, users of heroin, methamphetamine and cocaine report consuming up to 2–3 times the threshold quantity for deemed supply and users of ecstasy report consuming up to 8.9 times the amount. It is also feared that quantity thresholds will lead to ineffective sanctioning of traffickers, particularly sanctioning mules or street level dealers more harshly than the financiers and leaders of drug trafficking networks (who frequently avoid possessing drugs) (Walsh, 2008). Finally, there are fears that if thresholds are set too low, they may actually fuel greater rates of imprisonment and hence increased demands on criminal justice resources (Zuffa, 2011). A particular concern is that the likelihood of such adverse outcomes will be greater if thresholds are poorly designed.

While limited, the existing literature on threshold development processes suggests thresholds have had a largely *ad hoc* development. For example as concluded at an international meeting on thresholds: "How these figures were set . . . is not a calculation for which the workings are generally in the public domain nor, did some jurisdictions retain their workings out even in the private domain" (Harris, 2011, p. 8). Moreover, threshold developments from the UK (Walsh, 2008) and US (US Sentencing Commission, 1995, 2005, 2007) reinforce that processes appeared more driven by Government agendas and public concern than expert opinion. The most notorious example of this comes from the US 1986 Anti-Drug Abuse Act decision to introduce mandatory minimum sentences of 5 years imprisonment for possession of 500 grams of powder cocaine but only 5 grams of crack cocaine. Tracing the development has proved difficult as "Congress bypassed much of its usual deliberative legislative process" (US Sentencing Commission, 2005, p. 5). That said it is clear that media and public opinion played critical roles in inciting a response; that traditionally consulted experts, such as the US Sentencing Council, were excluded from the process; that the 100:1 distinction was based on Congress's "assumptions" that crack was far more dangerous than powder cocaine; and that even when proved wrong the original assumption remained in law (US Sentencing Commission, 1995, 2005, 2007). Finally, Leader-Elliot's (2012) examination of a 2010 proposal (not yet implemented) to change legal thresholds in the Australian Commonwealth Codes, including expanding the number of substances for which threshold quantities would be set (from 15 to 256) found that no justification was put forward, other than they originated from a "working party of unnamed 'representatives from industry and relevant State and federal agencies'" (2012, p. 265).

Studies of other drug policy areas illustrate the potential benefits of critically analysing the policy process. For example it can help explain how issues rise onto the agenda, why particular responses are employed, the relative roles of factors including public opinion, research and stakeholders in the adopted policy response and future reform opportunities (see for example Houborg, 2013; Hughes, 2009; Lenton, 2004; Selin, Hakkarainen, Partanen, Tammi, & Tigerstedt, 2013; Uitermark & Cohen, 2004; Uitermark & Cohen, 2005). Such studies highlight how agenda setting opportunities often follow a confluence of events, including heightened media and public interest and perceived problems, but they also show that problem framing and stakeholder involvement is often critical to the policy response: including but not limited to the extent to which a policy is evidence-informed or not.

The context for this case study of threshold policy development is one jurisdiction in Australia, namely NSW. In Australia, drug law and the responsibility for its enforcement is shared between the Commonwealth, and the eight States and Territories. However all jurisdictions prohibit the cultivation, manufacture and trafficking of specified drugs (such as heroin, methamphetamine, cocaine, ecstasy/MDMA and cannabis), as well as possession and personal use. Reflecting the seriousness with which drug trafficking is viewed, the statutory maximum penalty for drug trafficking offences is 21–25 years (Northern Territory, Queensland, Tasmania, Western Australia) or life imprisonment (Australian Capital Territory, New South Wales, South Australia, Victoria and Commonwealth). All legislators employ thresholds as key components of their drug laws, which means that the quantity of drug involved is a key determinant of the offence and penalty range that can be applied to convicted drug offenders (Hughes, 2010b). However, consistent with European examples, the designs vary. Most states employ three different thresholds. NSW stands out for being the only state to have employed five thresholds. It also has one of the lowest thresholds for MDMA: 2.6–4 times smaller than almost all other states. The study aimed to analyse the policy processes that led to this particular drug trafficking threshold system. It is important to emphasise that the purpose throughout was to analyse the policy processes, not their effectiveness or impact, the exception being when evidence on impacts was fed into the threshold development process.

Please cite this article in press as: Hughes, C. E., et al. Legislating thresholds for drug trafficking: A policy development case study from New South Wales, Australia. *International Journal of Drug Policy* (2014), http://dx.doi.org/10.1016/j.drugpo.2014.03.002