

Turning gold into lead: The troubling fate of the police drug diversion initiative

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Abstract

Introduction: This paper explores the fate of South Australia's highly regarded Police Drug Diversion Initiative over the past 10 years.

Methods: The paper uses historical and legal analysis, including publicly available data as to rates of drug use, arrests and diversions, media reports, legislation and Hansard debates.

Results: In the mid-2010s, amidst growing anxiety about levels of amphetamine-type stimulants use in Adelaide, a coroner's report became the poster child for what was seen by the Liberal opposition as the excessive leniency and 'waste of resources' of the Police Drug Diversion Initiative. Despite being universally praised for its efficacy, the Liberal government, when elected, passed amendments to the legislation which 'capped' diversions at two. This ended the period in which diversions from criminal to social justice systems was mandatory for all persons charged with simple drug possession. But since then, the diversion rate in South Australia has plummeted in ways that cannot be explained merely because of these amendments.

Discussion and Conclusions: The most highly regarded scheme for diversion of minor drug offenders to treatment is no longer effective. Indeed, the best scheme in the country may now be the worst. The essay draws attention to a catastrophe whose extent is not yet fully appreciated and suggests ways in which we can begin to explain why such a small change has had such dramatic and unforeseen consequences. Like some sort of perverse alchemy, Australia's gold standard for drug diversion has been turned into lead.

KEYWORDS

Controlled Substances (Drug Offence Diversion) Amendment Act 2000, drug diversion, harm reduction, South Australia, *Statutes Amendment (Drug Offences) Act 2018 (SA)*

Key Points

- Media publicity influenced legislative change of the highly praised Police Drug Diversion Initiative in South Australia in 2018.
- The amendments removed mandatory diversion for those found in simple possession of a controlled substance more than twice, that is, drug diversion was 'capped'.

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- Despite government estimates that the amendments would only affect a small number of offenders, diversion rates in South Australia have since plummeted by over 75%.
- The dramatic collapse of diversion is little appreciated, and even less well understood.
- It is difficult to find convincing explanations for this precipitous decline.
- The capping of mandatory diversion has had a catastrophic effect on diversion rates: the best diversion program in the country has become far less effective, with significant costs to lives and well-being among some of our most vulnerable citizens.

1 | INTRODUCTION

South Australia set up Australia's first decriminalised penalty regime for the personal use of cannabis in 1987 [1]. From 2002, the Police Drug Diversion Initiative (PDDI) operated in relation to a wide range of illicit drugs and without much controversy [2]. It radically diminished the number of arrests for simple possession offences, requiring arresting officers to divert offenders to treatment and thereby ensuring that they did not end up with a criminal conviction except in limited circumstances. According to a comprehensive study by Caitlin Hughes and others, between 2010 and 2015 the diversion rate in Australia for those arrested with a 'principal offence' of use or possession of an illicit drug was 55%. In Queensland and Western Australia the figure hovers around a third; in NSW it is less than half. But in South Australia, fully 98% of simple use or possession offences did not end up in court [3]. Cannabis offenders end up paying a civil fine; for other drugs, diversion to treatment mainly involves counselling. It would appear that almost no simple drug possession offences were prosecuted in South Australia, a truly astonishing state of affairs.¹ The Hughes study does not stint in its praise.

'To date South Australia is the model exemplar of the benefits of a legislated approach, through firstly, the PDDI program that makes it a requirement for police to offer diversion to all adults detected for possession of drugs other than cannabis and secondly, their Cannabis Expiation Notice scheme that requires police to offer an expiation notice for all simple cannabis possession offences. The almost universal levels of diversion in this jurisdiction are directly attributable to these decisions'. [3, p. 54]

In particular, the mandatory nature of the diversion scheme avoided problems associated with the exercise of police discretion. In Queensland a mandatory diversion

scheme operated for many years, although only with respect to cannabis. In other states, diversion is still largely left to the individual discretion of police officers. An insider interviewed for the study explained, 'For us ... it was a cultural thing. If we left it to police discretion it wouldn't have been successful. In 2000 it would have been a hard sell'. [3].

But the recent fate of South Australia's PDDI provides a salutary lesson in the fragility of drug reform. Even a program as long-lasting and as highly regarded as the Police Drug Diversion Initiative is sensitive to political capture. This essay explores its fate over the past decade. In the particular climate of the mid-2010s, amidst growing anxiety about levels of the use of amphetamine-type stimulants (ATS) in Adelaide, a coroner's report became the poster child for what was seen by the Liberal opposition as the excessive leniency and 'waste of resources' of the PDDI. Despite being universally praised for its efficacy, the Liberal government, when elected, passed amendments to the legislation which 'capped' diversions at two. This ended the period in which diversions from criminal to social justice systems was mandatory for all persons charged with simple drug possession. Yet since then, the diversion rate in South Australia has plummeted in ways that cannot be explained merely because of these amendments. The most highly regarded scheme for diversion of minor drug offenders to treatment is no longer effective. The essay draws attention to a catastrophe whose extent is not yet fully appreciated and suggests ways in which we can begin to explain why such a small change has had such dramatic and unforeseen consequences. There is a broader lesson here. Reforms that follow the lead of the recent South Australian approach will catastrophically undermine their own policy objectives.

2 | PRESSURE AND CHANGE

The period after 2010 was characterised by heightened community concern around the harms caused by ATS use, notably the potent form of methamphetamine

known as ice. Adelaide was in some ways the epicentre of these problems. Although overall lifetime and recent use had steadily declined after 2007 [4, pp. 67–9; 5, Table 7.28] wastewater analysis in Adelaide showed significant increases in the amount and intensity of use during the 2010s: a 50% rise from 2012 to 2014, and again by 50% from 2014 to 2017. A similar picture was evident around the country, but the changing profile of drug use was somewhat more pronounced in South Australia [6, 7]. Overall, there were fewer users but increasing use among ‘severely affected individuals who were injecting crystal methamphetamine in a dependent fashion and were experiencing huge amounts of harm’ [8, para. 10.10]. A period of intense media interest in the ‘ice epidemic’ followed, accompanied by a rash of official inquiries, and the Abbott government’s *Ice destroys lives* campaign. Adelaide is a one newspaper town. The *Advertiser*, a stablemate of the *Daily Telegraph*, embarked on a high-profile cascade of reporting that saw no less than 18 lead stories in the first 6 months of 2015: ‘Deadly Descent is Rapid’, ‘Addicts’ Living Hell’, ‘Devastating Impact of New Ice Age’, ‘Ice users wreak havoc on society’, ‘Leaders take ice pact as fight against drug begins’ and so on [9].

The *Advertiser*’s media frenzy was accompanied by a truly remarkable escalation in police arrests in South Australia over the same period. Before 2015, there had never been as many as a thousand ATS arrests in any 1 year. In 2015–2016 arrest numbers skyrocketed to over 5,000 and have stayed there since [10]. This represented a six-fold increase in a single year. Per capita South Australia went from one-quarter to one and a half times the Queensland consumer arrest rate.² While there seems little doubt as to the increasing visibility of ATS users in some parts of the city, the extent of the rise remains difficult to explain. The stereotypes constructed around the pathological effects of ATS use, so vigorously disseminated in the media at this time, bears little relation to either the complexity or the diversity of consumers’ actual experiences [11]. Indeed, the construction of ATS use itself as the problem, rather than the particular harms suffered by a specific sub-group of dependent users—a construction adopted not only in mass media representations of ‘the ice age’ but also in government reports and policy documents that followed suit [12, 13]—provide evidence, if evidence were needed, that police practices such as the ATS blitz in South Australia, while they may often be described as reflecting changing drug use patterns, are at least as much a bellwether of political attitudes and social anxieties. The precipitous rise in arrest rates suggests not an explosion in users, since the data suggests the opposite, but an explosion in public attention.

In such a tinder-dry climate, a single story can ignite the imagination, against which statistics struggle to compete. A tragedy in which the process of diversion in relation to cannabis was implicated came, over time, to stand for the supposed weaknesses of the PDDI as a whole. On New Year’s Eve 2012, Lewis McPherson, aged 18, was shot to death by Liam Humbles, 17 years. The findings of the coronial inquest were handed down in 2017. The Deputy Coroner, Anthony Schapel, concluded that the police had been told that the boy was in illegal possession of a firearm for many months and had missed multiple opportunities either to arrest him (including on suspicion of cannabis trafficking) and/or to search the premises and to find the gun [14]. On the night in question, Humbles had a blood alcohol reading of between 0.252 and 0.284—close to a toxic dose—as well as ‘a level’ of methylenedioxyamphetamine, or ecstasy and of tetrahydrocannabinol, the active ingredient in cannabis [14; 1.7]. In addition the coroner observed that Humbles had been found in possession of cannabis on five separate occasions since March 2010. In each case, he was issued a pro forma diversion requiring him to undergo counselling and nothing more was done. The coroner’s report argued that the legislation setting up the PDDI did not apply to a child under the age of 18. Indeed, in the course of the second reading speech introducing the Initiative, the then Minister of Health specifically stated that ‘children will continue to be dealt with in terms of the *Children’s Protection and Young Offenders Act*. The Government is adamant that this is the appropriate manner of dealing with children in this area’ [14; 3.6–3.7]. Overall, then, the 2017 coroner’s report into McPherson’s death was critical of lax practice and a lack of inter-agency communication in relation to young people. Deputy Coroner Schapel was not recommending a change in the law but rather its proper application with respect to children.

‘As seen earlier, there was no legislative or other requirement that police should in this indiscriminate and limitless fashion have issued serial diversions to a person such as Humbles. If anybody was to interpret the reference to there being “no limit to the number of diversions” as contained within either the PDDI Clinician Manual or in the SAPOL General Order as mandating limitless and indiscriminate serial diversions as distinct from enabling repeated diversions to occur in appropriate circumstances, such an interpretation would have to be regarded as patently perverse. I intend making a recommendation that the stipulation within both the PDDI and SAPOL General Order—Drug Diversion that there is no limit to the number of diversions that a child can undergo be deleted’. [14]

At the same time, Schapel offered several general expressions of disquiet about attitudes to drug offenders. He recommended that the maximum penalty for cannabis possession be increased, surmising that ‘in reality society cares so little about the deleterious effects of the abuse of that substance, particularly on the young, that it is prepared to allow its criminality to be eroded practically out of existence’ [14; 3.2]. This remark seems to ignore the fact that the State’s expiation scheme renders that criminal offence of very limited relevance. Elsewhere, the coroner condemned ‘the undue tolerance that this community exhibits in respect of the possession and consumption of illicit substances by minors as well as the level of tolerance to antisocial behaviour that is displayed by the same people’ [14; 1.22]. Again the remark is more or less gratuitous and lacks a grounding in any evidence presented to the inquest. Nevertheless, despite the narrow basis of the coroner’s specific recommendations, the case became more or less notorious in South Australia—the poster child for a system of misguided leniency in which the endless merry-go-round of diversions allowed ‘menaces’ like Humbles to stay on the streets rather than putting them behind bars.

In the leadup to the next State election, the Liberal Party, which had been out of office since 2002, campaigned on a law-and-order platform. After its election in March 2018, the *Advertiser* referred to Attorney General Vickie Chapman’s proposals to amend the *Controlled Substances Act* as ‘the war on weed’. On numerous occasions, she explicitly tied them to the coroner’s report into the death of Lewis McPherson [15, 16]. Yet the amendments introduced by the government later that year went far beyond the specific aspects of cannabis addressed by Schapel. The government itself had taken to characterising the case as an object lesson in a wider problem of petty criminals ‘rotting the system’ [17]. The Liberal Party excoriated the existing scheme of mandatory diversion as a whole, describing it as ‘an appalling waste of taxpayers’ resources and goodwill’ [15, 16]. Initially, the Bill proposed a limit of two diversions in 10 years before offenders would be subject to court proceedings. After some pressure from community, medical and legal groups [18], the cap was reduced to a maximum of two diversions in 4 years. It was in this form that the *Statutes Amendment (Drug Offences) Act 2018* was passed [19]. From now on, mandatory diversion for simple possession offences would not apply in relation to third and subsequent offences.

Let us leave aside the rather spurious assumption that a revolving door of diversions for the most difficult of dependent users is a waste of resources, given that there is much evidence to suggest that court proceedings are by far the most expensive way of dealing with a drug

offender and the least likely to achieve a positive outcome [20–23]. Let us acknowledge that a comprehensive 10-year evaluation of the PDDI conducted for the government by Melanie Millsteed in 2012 had itself conceded that ‘compliance with diversions is high but tends to decrease as number of diversions per individual increases, suggesting a potential need to re-visit the idea of capping the number of diversions an individual receives’ [24, pp. 3, 33]. Yet the Millsteed report seemed to disregard the legislative schema that underpins the PDDI. As the coroner had himself pointed out, there is no reason to think that the PDDI had ever mandated ‘limitless and indiscriminate serial diversions as distinct from enabling repeated diversions to occur in appropriate circumstances’ [14]. A failure to attend diversion or to comply with undertakings imposed by assessment centres was already grounds to terminate the diversion and refer the matter for criminal prosecution [2, s. 4]. No legal change was needed to deal with the small minority of offenders for whom diversion was not seriously entered into. All the 2018 amendment did was make automatic an option that had always been available where appropriate.

3 | A HIDDEN DISASTER

But here we come to the most perplexing aspect of the fate of the PDDI in the aftermath of the Liberal Party’s amendments. According to Millsteed in 2012, only 5% of offenders had received three diversions and only 4% four or more [24, p. 2; 17]. According to the government in 2018, capping access to the PDDI ‘will see approximately 1,400 fewer people receiving drug diversion and entering the justice system instead’ (Attorney General’s Briefing Paper, quoted in [18]). Curiously, this does not represent 9% of the total drug diversions in 2017–2018, but between 16% and 19%.³ It is not clear how these figures were arrived at. Millsteed’s data, to be sure, only covers the period up to 2012. With acute Ice use increasing, the number of repeat offenders may well have gone up. It may be that the 2018 figures were a better reflection of the total number of offenders expected to be affected by the new legislative scheme.

What eventuated after the new amendments came into force in April 2019 bore no relation to either of these predictions. By June, according to the Annual Report of the South Australia Police [25], diversions were already down 14.6%. The next year, the first full year of the new system, they fell a further 46.5%. The next year, they fell a further 33.3%. The next year, they fell yet again, this time by 23.1%. In 2017–2018, the last year before the introduction of amendments to the *Controlled Substances*

Act, there had been 7,441 drug diversions, the majority for ATS possession. Four years later, there were only 1,837 [25]. In each Annual Report, the South Australian Police included the same explanation in boilerplate language.

'This is due to the Illicit Drug Diversion Initiative implementing changes which took effect on 1 April 2019. An adult can only be referred to the Drug Diversion Program no more than twice in a four-year period, on the third detection the adult is referred directly to court'. [25; pp. 22–3]

Yet this explanation hardly seems adequate. Diversions have declined not of 9% or 16% but by over 75%. After unnecessary changes to the PDDI, drug diversion in South Australia fell off a cliff and has not stopped falling. The PDDI used to divert 98% of simple possession offences. The scheme was hailed as the gold standard in the field. The figure now is certainly less than 40% and may be little more than 20% [3].⁴ The best diversion scheme in the country, the fairest, the most comprehensive, the longest lasting, is now among the worst.

Neither do low diversion rates reflect a general decline in drug arrests. Between 2017–2018 and 2019–2020 (the latest year for which information is available), arrests went up, ATS arrests showing a slight decline and cannabis arrests, unaccountably, almost 250% higher [10]. This reflects another bewildering piece of the puzzle. The cannabis expiation scheme, which had been in place since 1987 and was not substantially modified in 2018, nevertheless also declined precipitously over this period—from 9068 in 2017–2018 to 3737 in 2021–2022: less than half [10]. It may be that increased fines, now \$250–\$400, are leading to more defaults and more prosecutions, but the decline in expiation notices and the dramatic rise in criminal prosecution represents another change in policing which leaves unanswered questions.

Patterns of ATS use and harm have changed markedly over the past decade. As the number of dependent users and the amount of harm they experienced have both significantly increased [8, 15], it is likely that they have become both more visible in the community—for example, through a sharp rise in hospitalisations [26, 27]—and, along with higher rates of dependence, more likely to come into contact with police more often. Capping diversions might therefore be expected to impact a considerably larger number of individual users than, say, 10 years ago. But changes may also have taken place in police attitudes and practices. It is difficult to believe that the disastrous and entirely unforeseen collapse of diversion has not been accompanied by an increased

police presence, and perhaps a greater commitment to arresting offenders on multiple occasions, either intentionally or incidentally ensuring their prosecution. Again, police actions offer a mirror on changing drug use in the community—but a fun-house mirror shaped by public, political and media discourses.

The reasons for the catastrophic decline in South Australian diversions for simple possession over the past 5 years leave more questions than answers. The previous data may have seriously understated the actual impact of capping diversions in a changing culture of drug use. Police practices may be subtly undermining the previous almost universal application of the scheme. Other factors may also be at work. It appears that at the same time that the legislation was changed, a decision was made to make registered diversionary programs far more demanding—certainly than the rather tokenistic approach excoriated by the Deputy Coroner in the case of Liam Humbles. This may have been with the not unreasonable view that if users were now only given two strikes before they were out, a greater effort ought to be made to ensure that diversion impacted their behaviour. But according to several users, the programs are sometimes poorly adapted to the education and life skills of users [28]. If that is the case, part of the reason for an increased rate of prosecution of users might be because they have been referred back to the police after a failed diversion. Recent figures provided by Drug and Alcohol Services South Australia lend some support to this hypothesis. They indicate a non-compliance rate of 42.5% in the period 2017–2023 [29]: this is much higher than Millsted, who in 2012 reported a non-compliance rate of less than 20% [24]. In other words, it is now the case that almost half of those diverted from the criminal justice system are now drawn back into it. Again, more complex diversionary programs are more time-consuming and resource intensive. It is possible that this is creating a backlog in which clients cannot even access diversion programs before the police commence prosecution.

4 | CONCLUSION

Something done has come undone in South Australia, and hitherto the scale of the problem has gone unremarked even by those most closely associated with the area. Like some sort of negative alchemy, Australia's gold standard for drug diversion has been turned into lead. This essay presents questions rather than answers. Nevertheless, two conclusions can be confidently drawn. The first is this. Any element of discretion within a diversionary scheme is susceptible to differential policing. To the extent that other States—notably Queensland [30, 31]—are belatedly following South Australia's lead

in expanding their diversionary programs to encompass a wider range of illicit substances, we ought to be wary of the impact of those reforms. Capping what was until then a clear mandatory process seems to have opened the door to new ways to exercise discretion, resulting in changes to the treatment of minor drug offenders far beyond those that had been anticipated. In this respect, no matter how sophisticated and ambitious the diversionary scheme, it will remain a tenuous accomplishment unless it is accompanied by express legislative change. If South Australia's PDDI amounted to a de facto decriminalisation of simple possession, we have been taught a lesson in how quickly, indeed surreptitiously, those reforms can be reversed.

The second conclusion to draw is this. Capping diversions ends up with many more criminal charges and far fewer therapeutic interventions than has been widely assumed. Drug users who accumulate three or four or even more diversions—and are now criminals—were imagined by the previous Liberal government to be wastrels and rogues, making a laughing-stock of our good intentions. That is to profoundly misread the situation. If there are more, perhaps far more, intractable ATS users than ever before, we are, by definition, talking about people who struggle most with their drug dependence, have the least resources, and the most severe underlying physical and psychological problems. We know how difficult dependence can be to deal with, and how harmful. We know how closely it is correlated with other indicia of disadvantage. The very people singled out for punishment by the 2018 legislative reforms are those most in need of our support and with the least likelihood of benefiting in some mysterious way from a criminal record. All of this points to the necessity for a regime of drug diversion which is mandatory and uncapped. To the extent that recent reforms, for example, in Queensland, have not adopted this path, they will, if the South Australian example is anything to go by, end up drastically undermining their own policy goals.

The *Statutes Amendment (Drug Offences) Act 2018* [19] was both a tragedy and a shame. Its tragedy lies in the fact that it identifies, only to abandon, the most vulnerable. Its shame lies in the unacknowledged extent of the destruction it has wrought.

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CONFLICT OF INTEREST STATEMENT

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ENDNOTES

- ¹ The figures are slightly misleading. Hughes' study omits arrests which resulted in prosecutions because the offender was charged with additional more serious offences (whether drug related or otherwise) than use or possession. The Illicit Drug Data Reports for the same years provides total consumer arrests in each state. Combining those figures with the diversion statistics provided in Hughes' report, I estimate that the percentage of diversions as a proportion of total consumer illicit drug arrests hovers somewhere between 80% and 85%. For example, in 2013–2014, 9,125 diversions/(1,954 consumer arrests + 9,204 cannabis expiation notices) = 81.78; in 2014–2015, 9,530/(2,210 + 919) = 83.5%. Obviously, this is still an exceptionally high rate of non-prosecution. The caveats explained here would of course also serve to reduce the 'real' diversion rate in other Australian jurisdictions.
- ² These figures are derived by comparing the Queensland and South Australian figures in the IDDRA for 2014–2015 and 2015–2016 against a population multiplier of 3.
- ³ Nineteen percent if the South Australia Police figures for 2017–2018 were available (South Australia Police, Annual Report, p. 22). However, this data was not publicly released until September. In 2016–2017 total diversions was at an all-time high, and the proposed reduction would represent about 16%. This is still a guesstimate because the Annual Report did not provide detailed information about diversions before 2017–2018.
- ⁴ A comparison of diversion data and arrest rates for 2019–2020, the last year for which both data sets are available, yields 8,031 arrests as against 3,441 diversions, giving a diversion rate of 42%. Since then, however, diversions have further declined to 1837. Assuming a constant arrest rate, more or less, the diversion rate would sit no higher than 23%.

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