DRUG POLICY MODELLING PROGRAM

MONOGRAPH 22

LEGAL THRESHOLDS FOR SERIOUS DRUG OFFENCES: EXPERT ADVICE TO THE ACT ON DETERMINING AMOUNTS FOR TRAFFICABLE, COMMERCIAL AND LARGE COMMERCIAL DRUG OFFENCES

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THE DRUG MODELLING POLICY PROGRAM

This monograph forms part of the Drug Policy Modelling Program (DPMP) Monograph Series.

Drugs are a major social problem and are inextricably linked to the major socio-economic issues of our time. Our current drug policies are inadequate and governments are not getting the best returns on their investment. There are a number of reasons why: there is a lack of evidence upon which to base policies; the evidence that does exist is not necessarily analysed and used in policy decision-making; we do not have adequate approaches or models to help policy-makers make good decisions about dealing with drug problems; and drug policy is a highly complicated and politicised arena.

The aim of the Drug Policy Modelling Program (DPMP) is to create valuable new drug policy insights, ideas and interventions that will allow Australia to respond with alacrity and success to illicit drug use. DPMP addresses drug policy using a comprehensive approach that includes consideration of law enforcement, prevention, treatment and harm reduction. The dynamic interaction between policy options is an essential component in understanding best investment in drug policy.

DPMP conducts rigorous research that provides independent, balanced, non-partisan policy analysis. The areas of work include: developing the evidence-base for policy; developing, implementing and evaluating dynamic policy-relevant models of drug issues; and studying policy-making processes in Australia.

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22. Legal thresholds for serious drug offences: Expert advice to the ACT on determining amounts for trafficable, commercial and large commercial drug offences

DPMP strives to generate new policies, new ways of making policy and new policy activity and evaluation. Ultimately our program of work aims to generate effective new illicit drug policy in Australia. I hope this Monograph contributes to Australian drug policy and that you find it informative and useful.

Alison Ritter

Director, DPMP

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In Australia one of the key measures for distinguishing drug users from traffickers and for determining the seriousness of drug trafficking offences is the quantity of drug involved. Legislative thresholds define the quantity of drug necessary for an offence of trafficking or an offence of minor, mid or high end trafficking, with three thresholds defined in most jurisdictions. The threshold is never the sole factor considered in sentencing drug offenders. But the quantity threshold is arguably the most important factor affecting the sentencing of drug offenders (Model Criminal Code Officers Committee, 1998).

To date there has been surprisingly little use of research to inform decisions on *how* threshold quantities should be set or *what* threshold quantities should be used. This is a noted absence since there is considerable variability in the threshold systems across Australia. Moreover, while with good design thresholds can increase the likelihood that sanctions will reflect the offence committed, increase public confidence in sentencing and increase the potential to deter current and would-be offenders, poorly designed quantitative thresholds may do the reverse. Most importantly they may inadvertently increase the risks of disproportionate sanctioning, such as erroneously convicting and imprisoning drug users as drug traffickers or giving overly lenient sanctions to serious drug traffickers. Either consequence could be potentially damaging to the accused and the community.

This report outlines a new approach to informing the design of drug trafficking thresholds using evidence on Australian drug markets, drug trafficking and the impacts of drug use/trafficking on the community. It provides expert advice to the ACT Department of Justice and Community Safety on the drug trafficking thresholds specified in Schedule 1 of the ACT Criminal Code Regulation 2005 as they apply to the five most commonly used illicit drugs (heroin, methamphetamine, cocaine, MDMA and cannabis). The current threshold quantities, specified in terms of pure drug or active principle, are listed in Table A (Criminal Code Regulation 2005, ACT).

Table A: Current ACT legal thresholds for trafficable, commercial and large commercial quantities as per Criminal Code Regulation 2005 (pure grams), by drug type and threshold category

Drug	Trafficable quantity	Commercial quantity	Large commercial quantity
Heroin	2.0	800	1,500
Meth/amphetamine	2.0	1,000	2,000
Cocaine	2.0	1,000	2,000
MDMA	0.5	250	500
Cannabis	300.0*	25,000*	125,000*

* Purity not taken into consideration.

The purpose of this work is:

1. To evaluate current ACT drug trafficking thresholds for trafficable, commercial and large commercial offences; and
2. To evaluate proposed ACT drug trafficking thresholds (under the Model Criminal Code) for trafficable, commercial and large commercial offences; and
3. If necessary, to put forward metrics to assist in the determination of appropriate threshold quantities: how and what threshold quantities should be set.

This report puts forward five evidence-informed metrics through which to evaluate current and potential drug trafficking threshold design. It examines whether the existing ACT thresholds as they apply to heroin, methamphetamine, cocaine, MDMA and cannabis:

1. Provide reasonable grounds to assume that all who exceed the trafficable threshold quantities constitute drug traffickers. Do they enable the ACT judiciary to filter out drug users, and minimise the chance that users get charged/sentenced as traffickers for possession for personal use alone? and
2. Are proportional to the potential seriousness of the drug trafficking offence. Do the thresholds enable the ACT judiciary to determine the level of criminality of the alleged trafficker, taking into account traders in different controlled drugs?

Metrics of the likelihood that a drug user will exceed the trafficable threshold for possession for personal use alone included:

- Metric 1: User patterns of consumption i.e. quantity of drugs that a user is likely to possess for a single session of personal use.
- Metric 2: User patterns of purchasing i.e. quantity of drugs that a user is likely to possess following a single purchase.

Metrics of the relative seriousness of a drug trafficking offence included:

- Metric 3: Retail value i.e. amount of revenue that could be made by traffickers of a particular drug.
- Metric 4: Harm to individuals and society i.e. amount of harm that could result to ACT drug users and the community from trafficking in a particular drug.
- Metric 5: Social cost i.e. annual cost of healthcare and criminality from each gram of drug that is trafficked in the ACT.

Publicly available data was used for each metric, including retail price and purity from the Illicit Drug Data Report (IDDR) and user patterns of use and purchasing from the Illicit Drug Reporting System (IDRS) and the Ecstasy and related Drug Reporting System (EDRS). Indicators of harm to individuals and society were derived from Nutt et al. (2010) and social costs were derived from Moore (2007).

Do the current trafficable threshold quantities provide reasonable grounds to assume that all who exceed the trafficable threshold quantities constitute drug traffickers?

Metric 1 (user patterns of consumption) showed that regular users of heroin, methamphetamine and cannabis consume much less than the current threshold quantity for each drug. This holds regardless of whether they are undertaking a typical or heavy session. But when undertaking a heavy session, users of MDMA may consume more than twice the current trafficable threshold quantity (8.7 grams versus the trafficable threshold set at approximately 3.3 mixed grams).

Metric 2 (user purchasing patterns) indicated that most users purchase less than the current trafficable threshold quantities. Nevertheless, individuals who purchase large quantities of cocaine and MDMA are at risk of exceeding the current thresholds for these drugs. For example, users of cocaine reported purchasing up to 7.5 grams of cocaine in a single buy, yet the trafficable threshold is set at approximately 3.3 mixed grams.

Both metrics suggest that the current trafficable threshold quantities place users of MDMA (and to a lesser extent cocaine) at risk of exceeding the trafficable threshold for an offence involving

possession for personal use alone. This increases the likelihood that users will be inadvertently charged and sanctioned for an offence of drug trafficking.

Are the current thresholds (trafficable, commercial and large commercial) proportional to the relative seriousness of a drug trafficking offence?

Metric 3 (retail value) showed that the potential retail value for a trafficable quantity of MDMA and cocaine is much lower than the potential retail value of a trafficable quantity of heroin, methamphetamine or cannabis. Indeed, a trafficable quantity of MDMA and cocaine was worth only $223-338 and $814-1,465 respectively. In contrast, a trafficable quantity of methamphetamine affords much greater potential for revenue ($7,000-10,000).

Metric 4 (harm to individuals and society) showed that the potential attributable harm for a trafficable quantity of 'drugs' differed greatly across drug types, with the current ACT trafficable quantity of cannabis capable of causing up to 200 times more harm than the trafficable quantity of MDMA.

Assessed against Metric 5 (social cost) the potential social cost from a trafficable threshold quantity is low for cocaine (costing less than $1,758), somewhat higher for cannabis, but very high for heroin and methamphetamine (costing a minimum of $33,064 and $34,200 respectively).

This demonstrates that regardless of which metric is adopted the current legal thresholds are not proportional to the seriousness of drug trafficking offences, and instead vary markedly based on the particular drug that a defendant is found in possession of. This increases risks that some serious traffickers will escape with less serious sanction and some minor traffickers will receive disproportionately harsh sanction. Threshold quantities for commercial and large commercial thresholds are also disproportionate to the potential seriousness of drug trafficking offences, but in their current form, the trafficable threshold is the *least* justifiable or equitable.

A further challenge with the current thresholds as specified in the Criminal Code Regulation 2005 (ACT) has been the use of a purity-based system. This is problematic as:

- The ACT currently assesses purity for some drugs, not others.
- The system is not transparent to buyers or sellers.
- The system adds to the time and cost of prosecuting serious drug offenders.
- The system is very subject to fluctuations in purity, increasing the likelihood that responses to drug traffickers will vary across time periods.

In its current design the law thus conflicts with the intended purposes of drug trafficking thresholds: increasing the proportionality and fairness of legal responses. The proposed thresholds under the Model Criminal Code for serious drug offences are equally if not more problematic: if adopted they would increase the risks that users get charged as traffickers.

Towards a more rational response

This report puts forward a methodology to inform the debate about trafficable threshold quantities that *could* enable more proportional and evidence-informed responses (with commercial and large commercial thresholds to be devised based on the base trafficable threshold). The general principles for a more rational system of thresholds quantities include increasing the proportionality and potential fairness of the law, enshrining principles of harm minimisation (including reducing the potential harm from thresholds themselves) and increasing certainty for offenders, police and prosecutors over what constitutes a low, mid and high-level drug trafficking offence.

Seven potential sets of trafficable threshold quantities for heroin, methamphetamine, cocaine, MDMA and cannabis have been put forward. Under all proposed approaches mixed drug have been adopted (not pure drug).

Approaches 1 and 2 seek to minimise the chance that users will exceed the trafficable thresholds for possession for personal use alone (see Table B). Threshold quantities for approach 1 are based on evidence of the maximum quantity that a user is likely to consume (Metric 1). In approach 2 threshold quantities are based on the maximum quantity that a user is likely to purchase (Metric 2). While these thresholds may reduce risks to users, there remains a clear divergence between these, which reflects in part weaker data on Metric 2. A second clear drawback with either approach is that thresholds would remain disproportionate across traffickers in different controlled drugs.

Table B: Threshold quantities (mixed grams) under approaches 1 and 2 (that seek to reduce risks to drug users), by drug type and approach, versus the current ACT drug trafficable thresholds for pure and mixed drug

Drug	Approach 1 (Metric 1: Maximum grams consumed by users in one occasion)	Approach 2 (Metric 2: Maximum grams purchased by users in one occasion)	Current ACT trafficable threshold quantity	
			Pure grams	Mixed grams
Heroin	1[1]	1	2.0	8.1
Methamphetamine	4	4	2.0	20.0
Cocaine	4	8	2.0	3.3
MDMA	9	145	0.5	3.3
Cannabis	11	28	300.0	300.0

[1] Systematic data on the number of grams of heroin used in a typical and maximum session was not available; hence this may underestimate the maximum grams consumed by users in one occasion.

Approaches 3 to 7 seek to both reduce potential risk to users of an unjustified charge of trafficking and increase proportionality across traders, so that regardless of the drug, legal thresholds enable more severe traffickers to be readily distinguished and sanctioned. Accordingly, they take into account both knowledge of user patterns (Metric 1) and the severity of drug trafficking offences, across traders in different controlled drugs (Metrics 3-5). Each proposal is based on a single or combination of metrics of the seriousness of a drug trafficking offence (and hence represent different ways of valuing the seriousness of drug trafficking). For example, under approach 3 threshold quantities are proportionate to the potential retail value for each drug type. In contrast, under approach 7 threshold quantities are proportionate to the potential retail value and harm and social cost for each drug type (an option that would balance the potential revenue that could be garnered by drug traffickers with the harm and economic burden that might ensue on the community). In spite of quite different ways of valuing the impacts of drug trafficking, there remain some very clear synergies across approaches 3-7, most notably that to reduce risks to users and attain more proportionality across traffickers, threshold quantities for MDMA and cocaine ought be higher, and threshold quantities for heroin and methamphetamine ought be lower than in the status quo.

Table C: Threshold quantities (mixed grams) under approaches 3 to 7 (that seek to reduce risk to users and increase proportionality across drug traffickers), by drug type and approach, versus the current ACT drug trafficable threshold for pure and mixed drug

Drug	Approach 3 (Metric 3: Retail value)	Approach 4 (Metric 5: Social cost)	Approach 5 (Metric 3 & 5: Retail value & social cost)	Approach 6 (Metric 4 & 5: Harm & social cost)	Approach 7 (Metric 3, 4 & 5: Retail value, harm & social cost)	Current ACT trafficable threshold quantity	
						Pure grams	Mixed grams
Heroin	5	2	3	2	3	2.0	8.1
Methamphetamine	4	4	4	4	4	2.0	20.0
Cocaine	5	50	16	15	11	2.0	3.3
MDMA	20	50	32	26	25	0.5	3.3
Cannabis	140	1400	450	95	110	300.0	300.0

By necessity, designing an alternate set of drug trafficking threshold quantities requires considerations of multiple factors: the evidence-base, value decisions, technical and legislative feasibility and so on. This report considers only the evidence-base. Nevertheless, given the critical role that drug trafficking thresholds play in the sentencing of drug offenders, and demonstrated presence of disproportionate and potential for harmful responses, inserting more rationality into legislative thresholds would be a valuable step. It would also put the ACT at the forefront of developing rational, proportionate sanctioning of serious drug offenders.

INTRODUCTION

In Australia one of the key measures for distinguishing drug users from traffickers and for determining the seriousness of drug trafficking offences is the quantity of drug involved. Legislative thresholds define the quantity of drug necessary for an offence of trafficking or an offence of minor, mid or high end trafficking, with three thresholds defined in most jurisdictions. The threshold is never the sole factor considered in sentencing drug offenders. The nature and circumstances of the alleged trafficking act such as the presence/absence of scales, bags or large sums of money, act as mitigating and evidentiary circumstances. But the quantity threshold is arguably the most important factor affecting the sentencing of drug offenders for two key reasons (MCCOC, 1998). First, the quantity thresholds trigger the applicable penalty ranges that can be applied to drug offenders. Second, in many parts of Australia possession of the threshold amount will constitute *presumption* of intent to traffic (or to commit mid or high end trafficking), placing the onus on the alleged offender to prove that the possessed amount was *not* for the purposes of trafficking.

For example, in the ACT possession of 2g pure heroin (a trafficable quantity) is sanctionable with <10 years imprisonment, possession of 800g pure heroin (a commercial quantity) with <25 years imprisonment and 1.5kg pure heroin (a large commercial quantity) with a maximum of life imprisonment (Criminal Code 2002, ACT). Moreover under section 604 (Criminal Code 2002, ACT), if the defendant possessed a trafficable (or larger) quantity of a controlled drug "it is presumed, unless the contrary is proved, that the defendant had the intention or belief about the sale of the drug required for the offence."

There is considerable variability in the design of threshold systems across Australia. For example even looking only at the trafficable threshold (see Tables 1 and 2) jurisdictional systems vary in terms of whether they are specified in terms of pure drugs (active principles only) or mixed drugs (including inert substances), the relative rankings of drug types and the quantities themselves. The differences are most evident in regards to cannabis, where possession of only 50 mixed grams in the Northern Territory will constitute an offence of trafficking, yet in Tasmania someone would need to possess 1,000 or more mixed grams.

Table 1: Trafficable threshold quantities in Australia (pure grams), by drug type and jurisdiction for purity-based systems

Drug	ACT	Qld	Victoria
Heroin	2.0	2	3
Meth/amphetamine	2.0	2	3
Cocaine	2.0	2	3
MDMA	0.5	2	3
Cannabis	300.0*	500	250

* Purity not taken into consideration.

Table 2: Trafficable threshold quantities in Australia (mixed grams), by drug type and jurisdiction for mixed-based systems

Drug	NT	NSW	SA	Tas	WA[1]
Heroin	2.0	3.00	2	25	2
Meth/amphetamine	2.0	3.00	2	25	2
Cocaine	2.0	3.00	2	25	2
MDMA	.5	.75	2	10	2
Cannabis	50.0	300.00	250	1000	100

[1] Refers to threshold for = 'sell or supply'.

In 1998, recognition of this variability led to the specification of a single set of threshold quantities, known as the Model Criminal Code on serious drug offences (MCCOC, 1998). In May 2007 the Ministerial Council on Drug Strategy (2007, 16 May) noted jurisdictions may consider adopting, in the interest of national consistency, the model schedules and quantities. The model quantities have been adopted in South Australia (in November 2007) (Controlled Substances (General) Regulations 2000, SA) and considered in a number of other jurisdictions (Attorney-General's Department, 2011).

Yet, to date there has been surprisingly little use of research to inform decisions on *how* threshold quantities should be set or *what* threshold quantities should be used or whether the proposed Model Criminal Code would provide a better response for the ACT or other jurisdictions to adopt. This is a noted absence for two reasons; first these are tools that bring risks, and second through strong emphasis upon these tools, Australia stands at odds with many parts of the world.

As summed up by the UK Sentencing Council (2011, p. 4) the principal aim of using quantitative threshold is to ensure sentencing is fair, consistent and "proportionate to the offence committed". With good design thresholds can increase the likelihood that sanctions will reflect the offence committed, increase public confidence in sentencing and increase the potential to deter current and would-be offenders. However poorly designed quantitative thresholds may do the reverse. They can lead to overly mechanistic sentencing practices and foster ignorance or de-prioritisation of offender intent (Harris, 2011a, 2011b; Home Office, 2006; Walsh, 2008). Most importantly they may inadvertently increase the risks of disproportionate sanctioning, such as erroneously convicting and imprisoning drug users as drug traffickers or giving overly light sanction to serious drug traffickers. Indeed, these risks were made explicit at the time of the adoption of the Model Criminal Code for serious drug offences:

> An unjustified conviction for dealing will often impose social and individual harms which far exceed the harm associated with use of the drug in question (MCCOC, 1998, p. 87).
>
> Unrealistic specifications, which fail to reflect the realities of the illicit market, confuse serious commercial offences with minor dealing. There are consequential risks of unnecessarily draconic punishment for minor figures, whilst major players escape with undeservedly light sentences (MCCOC, 1998, p. 19 and 21).

It is also often forgotten that the Australian use of thresholds is unique. Many parts of the world do not adopt quantitative thresholds, or if they do, they use them very differently. For example, in Europe most countries recognise quantity of drug to be an important factor to consider in

sentencing serious drug offences, but relatively few *establish* quantitative thresholds in the law (Hughes, 2003, 2010). Many instead retain only abstract notions such as 'large' or 'not small' quantities and leave it up to the judiciary to decide what this means in practice in concert with other relevant indicators. Equally importantly, jurisdictions are very hesitant to use thresholds as presumption of intent to traffic, due to the potential unintended consequences that may result (Hughes, 2003). Whether the use or minimal use of a quantitative threshold system fosters fairer or more proportional sanctioning is contested (for example the absence of threshold quantities arguably increases the potential for inequity in sentencing). Nevertheless, it is clear that legislative quantitative thresholds are but one means of attaining proportional sanctioning of drug offenders. Countries such as Australia which emphasise the use of these tools ought therefore ensure they are carefully designed.

CURRENT PROJECT

The Drug Policy Modelling Program at the University of New South Wales has been engaged as a consultant to provide expert advice to the ACT Department of Justice and Community Safety on determining amounts for trafficable, commercial and large commercial drug offences for five main classes of illicit drugs: heroin, methamphetamine, cocaine, MDMA (ecstasy) and cannabis. This forms part of the ACT Government's broader review of drug legislation. Within the ACT thresholds for controlled drugs, controlled plants and controlled precursors are listed in three schedules of the Criminal Code Regulation 2005. For this analysis we confine our focus to Schedule 1 drugs (controlled drugs), and more specifically to heroin, methamphetamine, cocaine, MDMA (ecstasy) and cannabis. Thresholds for the other controlled drugs (Schedule 1), controlled plants (Schedule 2) and controlled precursors (Schedule 3) are not examined here, due to both reasons of practicality and data availability, nevertheless the five most commonly used illicit drugs are covered herein (Australian Institute of Health and Welfare, 2008). The current thresholds for heroin, methamphetamine, cocaine, MDMA and cannabis are listed in Table 3 (Criminal Code Regulation 2005, ACT).

Table 3: Current ACT legal thresholds as per Criminal Code Regulation 2005 for trafficable, commercial and large commercial quantities (pure grams), by drug type and threshold category

Drug	Trafficable quantity	Commercial quantity	Large commercial quantity
Heroin	2.0	800	1,500
Meth/amphetamine	2.0	1,000	2,000
Cocaine	2.0	1,000	2,000
MDMA	0.5	250	500
Cannabis	300.0*	25,000*	125,000*

* Purity not taken into consideration.

A particular concern is that the law ought to minimise the risk that users get charged as traffickers. In the ACT (with a trafficable threshold of 2g pure heroin) someone detected in possession of 1.9g pure heroin is likely to be charged with an offence of possession (Drugs of Dependence Act 1989, ACT) and may receive a diversion if it happens to be their first offence (Hughes & Ritter, 2008). However, the same person in possession of 2g of pure heroin may be charged with up to 10 years imprisonment (Criminal Code 2002, ACT). Moreover, even if they are not convicted they may also be subject to forfeiture of any property or assets that were derived from or used in connection with the drug offence (Confiscation of Criminal Assets Act 2003, ACT).

A further concern is that the law should be human rights compliant. The ACT has adopted the *Human Rights Act 2004* (HRA) which ensures that, to the maximum extent possible, all Territory statutes and statutory instruments are interpreted in a way that respects and protects the human rights set out in the HRA. In particular the HRA provides that: "everyone is equal before the law and is entitled to the equal protection of the law without discrimination" (HRA, section 8.3). While, human rights are not absolute and may be subject only to reasonable limits set by Territory laws that can be demonstrably justified (HRA, section 28), this arguably increases the potential onus on the ACT to ensure proportional sanctioning of all offenders.

The purpose of this work is:

1. To evaluate current ACT drug trafficking thresholds for trafficable, commercial and large commercial offences; and
2. To evaluate proposed ACT drug trafficking thresholds (under the Model Criminal Code) for trafficable, commercial and large commercial offences; and
3. If necessary, to put forward metrics to assist in the determination of appropriate threshold quantities: how and what threshold quantities should be set.

Approach

This report puts forward a new approach to evaluating the design of drug trafficking thresholds using a number of evidence-informed metrics based on publicly available data on Australian drug markets, drug trafficking and impacts on drug use/trafficking on the community. In so doing we seek to determine whether the existing threshold quantities as they apply to heroin, methamphetamine, cocaine, MDMA and cannabis:

1. Provide reasonable grounds to assume that all who exceed the trafficable thresholds constitute drug traffickers. In particular do the thresholds enable the ACT judiciary to filter out users and minimise the chance that users get charged/sentenced as traffickers for possession for personal use alone? and
2. Are proportional to the potential seriousness of the drug trafficking offence. Do the thresholds enable the ACT judiciary to determine the level of criminality of the alleged trafficker, taking into account traders in different controlled drugs?

Both such goals comply with the notion of proportional sanctioning (Beccaria, 1764), with the principles set out within the Model Criminal Code for serious drug offences (MCCOC, 1998), and with the principles of harm minimisation in Australia's National Drug Strategy (MCDS, 2011).

Three key points to note:

1. The central premise is that current/future drug trafficking thresholds should be justifiable in terms of evidence of the intent and the relative seriousness of drug trafficking offences.
2. There are a number of ways that these issues can be examined. To enable the ACT to consider application from a number of different but equally rational perspectives we use two evidence-informed metrics of the quantity of drug that a user is likely to possess for personal use alone and three evidence-informed metrics of the relative seriousness of a drug trafficking offence.
3. In order for thresholds to enable determination of the level of criminality across traders in different controlled drugs, a drug that will lead to more serious consequences for society should have a lower threshold than a drug that will lead to less serious consequences. Equally, a drug that has great potential for revenue should have a lower threshold than a drug that has a small potential for revenue.

Methodology

Metrics of the likelihood that a drug user will exceed the trafficable threshold for possession for personal use alone included:

- Metric 1: User patterns of consumption i.e. quantity of drugs that a user is likely to possess for a single session of personal use.
- Metric 2: User patterns of purchasing i.e. quantity of drugs that a user is likely to possess following a single purchase.

Both metrics provide a means of assessing whether a user of a particular drug is likely to exceed the trafficable threshold quantity (for that drug type) for possession for personal use alone. Data are available for regular users. Given regular users are at greatest risk of exceeding the trafficable threshold, it is reasonable to assume that if they do not use or purchase more than the trafficable threshold quantity for a single session then nor will an occasional user.

Data for user patterns of consumption (Metric 1) were derived using estimates from the Illicit Drug Reporting System (IDRS) and Ecstasy and related Drug Reporting System (EDRS). Both surveys are based on sentinel surveys of approximately 850 regular (at least monthly) users from across Australia, but target different populations: IDRS targets regular injecting users and EDRS targets regular ecstasy users. Annual data has been collected since 2000 for the IDRS and since 2003 for the EDRS (for an overview of key limitations of IDRS and EDRS see Degenhardt & Dietze, 2005). Two types of data were collected: use during a typical session and use during a heavy session (using mean, minimum and maximum for each). Data were derived for the ACT specifically unless otherwise indicated. Data on user purchasing patterns (Metric 2) were derived from the IDRS and EDRS (using ACT estimates wherever possible) and supplemented by research studies that have assessed purchasing patterns of particular drugs (McKetin, McLaren, & Kelly, 2005; Shearer, Johnston, Kaye, Dillon, & Collins, 2005; Wilkins, Reilly, Pledger, & Casswell, 2005). Two limitations of the data on purchasing patterns are that it does not distinguish between drugs purchased for personal use versus drugs sold or passed on to others. Many drug users also do not purchase drugs, receiving them through non-cash means (Gaffney, Jones, Sweeney, & Payne, 2010). This makes this indicator less reliable than user patterns of consumption.

The relative seriousness of the drug trafficking offence has been examined using three metrics:

- Metric 3: Retail value of the drugs i.e. amount of revenue that could be made by traffickers of a particular drug.
- Metric 4: Harm to individuals and society i.e. amount of harm that could result to ACT drug users and the community from trafficking in a particular drug.
- Metric 5: Social cost i.e. annual cost of healthcare, criminality and road accidents from each gram of drug that is trafficked in the ACT.

Each metric provides a means to assess whether the trafficking threshold quantities for heroin, methamphetamine, cocaine, MDMA and cannabis are proportional to the relative seriousness of a drug trafficking offence involving each drug.

Retail value (Metric 3) represents a conventional way of thinking about drug trafficking: in terms of the amount of money that could be derived through street sale. Potential revenue through street price has been calculated. While it is acknowledged that potential revenue will be reduced through sale in larger quantity and may differ between drug types, the lack of certainty surrounding the extent of quantity discounting means that potential profit at street/retail price provides a more conservative and reliable estimate that can be computed across drug types. Such estimates were derived from the Illicit Drug Data Report (IDDR), an annual report that collates estimates of price (sourced from police covert operations and police informants), purity, arrests and seizures from Commonwealth, state and territory police agencies and forensic laboratories (Australian Crime Commission, 2010). Data on price is reported for different drug types, forms, and quantity. For example, cannabis prices are reported for three forms: hydroponic, bush and resin. Hydroponic and bush sales are reported for a "deal" which is approximately one gram, an "ounce bag" which is approximately 28 grams, a "pound" and a "kilogram" (Australian Crime Commission, 2010, p. 128). Data reported herein used gram prices for heroin,

methamphetamine, cocaine and MDMA, and gram and ounce prices for cannabis. All used ACT prices unless otherwise indicated.

Harm (Metric 4) takes into account the amount of harm that could result to ACT drug users and society, based on expert assessment of the harmfulness of different illicit drugs (Nutt, et al., 2010). The Nutt et al. (2010) harm metric encompasses 16 different types of harms, 9 to individuals and 7 to society. Harms to individuals included drug specific and drug-related mortality, drug specific and drug-related damage to physical health (such as blood borne virus and liver cirrhosis), dependence, drug specific and drug-related impairment of mental functioning, loss of tangibles (such as income or housing) and loss of relationships. Harms to society included injury (such as increased risk of domestic violence or traffic accident), crime, environmental damage, family adversities (such as family breakdown and child neglect), international damage (such as destabilisation of countries and new markets), economic cost (such as direct costs to health care, prisons and indirect costs through loss of productivity) and community (such as a decline in social cohesion). The assessments were conducted by the Independent Scientific Committee on Drugs in the UK using multi criteria decision analysis. For each drug the likelihood of harm against each of the 16 criterion were ranked on a purpose built scale from 0 to 100. Harms were then weighted to take into account the relative importance of each harm for society e.g. whether drug specific mortality is more or less important than international damage.

Social cost (Metric 5) encompasses the potential economic impact of drug trafficking/drug use on the ACT (Moore, 2007). It includes three major types of social costs from illicit drug use that that have been quantified in Australia per gram of drug consumed, namely:

- Health costs = dependence, low birth weight, infectious diseases such as hepatitis C and HIV/AIDS;
- Crime costs = property and violent crime e.g. burglary, robbery, theft, fraud, assault, criminal damage and sexual assault attributable to drugs; and
- Road accident costs.

The estimates constitute annual costs and were calculated based on best available data in 2003 (Moore, 2007). Moore (2007) excluded other social costs, for example impairment of mental health, family breakdown, community decline and loss of productivity due to the absence of available data on economic impact.

It is important to recognise that both Nutt et al. (2010) and Moore (2007) are subject to critique and may be superseded in the future. For example, Rholles and Measham (2011) have criticised the Nutt et al. (2010) harm rankings for being derived using subjective judgements and failing to disaggregate harms related to drug use from those related to drug policy. Application of this particular metric to the Australian context has not been tested to date. Nevertheless, in the absence of an Australian metric (Ritter, 2008, 2009), this is the best and most comprehensive metric that encompasses a broad array of harms from drug use. Moreover, the findings have been replicated and confirmed using a Dutch group of 17 experts ($r=0.87$) (van Amsterdam, Opperhuizen, Koeter, & van den Brink, 2010), which gives increased confidence in the generalisability to other contexts.

SUITABILITY OF THE CURRENT ACT DRUG TRAFFICKING THRESHOLDS

Thresholds for trafficable quantities

Trafficable threshold quantities, which as previously noted is the most important of the legal thresholds, is evaluated first; those exceeding the threshold will be liable to be charged with a trafficking offence whereas those under the threshold will be liable to be charged for a simple possession offence.

What does a trafficable quantity refer to?

In order to evaluate the ACT trafficable threshold against the different metrics it is necessary to take into account the purity for each drug (as per the purity-based system). One complication is that while according to the Criminal Code Regulation 2005 (ACT) threshold quantities are specified within the ACT in terms of pure drug (active principle), in practice purity is not taken into consideration for cannabis (ACT Drug Schedules Working Group, 2010). The prosecutors merely want to establish that there is some active THC within the cannabis. This may reflect practical reasons or the gaps in knowledge regarding cannabis purity within Australia (McLaren, Swift, Dillon, & Allsop, 2008).

The consequence is that purity is a relevant consideration for heroin, methamphetamine, cocaine and ecstasy, but not for cannabis. Table 4 outlines the ACT trafficable quantity as per Schedule 1 of the current Criminal Code Regulation 2005 and retail purity for the relevant drugs. It also calculates the mixed grams equivalent; that is the number of grams that constitute a trafficable quantity for each drug at the retail level based on 2008-09 purity. For all subsequent calculations (Tables 5 to 9) we use the same data on the ACT trafficable threshold quantity (column 2) and purity (column 3).

Table 4: 'Pure' ACT trafficable quantities, by drug type, as per Criminal Code Regulation 2005, versus retail purity in 2008-09 (for relevant drugs) and the equivalent 'mixed' ACT trafficable quantities

Drug	ACT trafficable quantity	Purity for deals < 2g[1]	Mixed gram equivalent
Heroin	2.0g pure	24.8%	8.1
Methamphetamine	2.0g pure	10.0%[#]	20.0
Cocaine	2.0g pure	61.4%	3.3
MDMA	0.5g pure	15.2%	3.3*
Cannabis	300.0g	n.a.	300.0

[1] Illicit Drug Data Report 2008-09 (Australian Crime Commission, 2010).

[#] Based on NSW estimate as none available for ACT.

* 1 pill=0.29g according to the agreed estimate of the Australian Customs, Australian Federal Police (AFP) and Australian Bureau for Criminal Intelligence (ABCI) (Australian Crime Commission, 2010). Hence 3.3g MDMA equates to 11.3 pills.

Evaluating the trafficable threshold quantities against metrics of the quantity of drugs that a user is likely to possess for personal use alone

The likelihood that a drug user will exceed the trafficable threshold for possession for personal use alone was assessed using user patterns of consumption (the quantity of drugs that a regular user is likely to consume in a single session) and user purchasing patterns (the quantity of drugs that a regular user is likely to buy in a single purchase).

Table 5 outlines the number of mixed grams that regular users consume in a single session of use, distinguishing between a typical and heavy session. Low and high estimates are also reported, reflecting the range of estimates reported for each drug type in 2009 (with the exception of heroin, for which data were not available). Based on these data Table 5 also outlines the maximum quantity of drugs that a regular user would be expected to consume in a single session of use, versus the current ACT trafficable threshold quantity for each drug type.

The results indicate that for a typical session, users of MDMA consume less than the current trafficable threshold quantity, but when undertaking a heavy session, users of MDMA may consume more than twice the current trafficable threshold quantity (8.7 grams versus the trafficable threshold quantity set at 3.3 mixed grams). In contrast, regardless of whether undertaking a typical or heavy session, regular users of heroin, methamphetamine and cannabis consume much less than the current threshold (for example users of methamphetamine report consuming a maximum of 4.0 grams for a single session, but the threshold is set at 20.0 grams). This indicates that there is a risk that users of MDMA will exceed the current trafficable threshold, for possession for personal use alone. Conversely, there is no such risk of this occurring for methamphetamine, heroin or cannabis (and a negligible risk for users of cocaine).

Table 5: Number of mixed grams consumed by regular users in a typical and heavy session (Metric 1), by drug type, indicating maximum grams that a user is likely to possess for a single session of use versus the current ACT trafficable threshold quantity (mixed gram equivalent)

Drug	Typical		Heavy		Maximum grams for one session	ACT trafficable threshold quantity
	Mean[1]	Range[1]	Mean[1]	Range[1]		
Heroin	0.1[2]		0.3[2]		0.3[2]	8.1
Methamphetamine (speed/powder)	0.5	0.1-2.0	0.5	0.1-4.0	4.0	20.0
Methamphetamine (base)	0.2	0.1-1.0	0.2	0.1-1.0	1.0	20.0
Methamphetamine (ice)	0.2	0.1-0.5	0.4	0.2-0.5	0.5	20.0
Cocaine	0.5	0.1-3.5	0.8	0.1-3.5	3.5	3.3
MDMA	2 pills (0.6g*)	0.5-10 pills (0.15-2.9g)	4 pills (1.2g*)	1-30 pills (0.3-8.7g)	8.7	3.3
Cannabis	4 cones (0.4g^) 1 joint (0.3g^)	1-60 cones (0.1-5.4g) 1-30 joints (0.3-10.2g)			10.2	300.0

[1] IDRS 2009 (Stafford & Burns, 2010), EDRS 2009 (Sindicich & Burns, 2010).
[2] Systematic data on the number of grams of heroin used in a typical and maximum session was not collected. Thus, the indicated mean estimates (based on injection frequency x IDRS estimate of 0.1g per injection) are less reliable than for other drug types. Moreover, there was no range available which means the reported data is likely to underestimate the maximum grams for a single session of heroin use.
* 1 pill=0.29g – Australian Customs/AFP/ABCI agreed estimate (Australian Crime Commission, 2010).
^ 1 cone=0.09g & 1 joint=0.34g (Mackenzie, Norberg, & Copeland, 2010).

Table 6 outlines the quantity of drugs that regular users report buying in a single purchase and the maximum number of grams reported purchased in one purchase. This indicates that most users purchase less than the current trafficable threshold quantities. But, individuals who purchase large quantities of cocaine and MDMA are at risk of exceeding the current thresholds for these drugs (see Table 6). For example, cocaine users interviewed for a National Drug Law

Enforcement Research Fund (NDLERF) study reported having spent up to $2,000 in one transaction in the last 6 months (Shearer, et al., 2005). The exact quantity was not specified but given cocaine costs a maximum of $500 per gram and usually costs $266 per gram this suggests cocaine users bought up to 4-7.5 grams in any one transaction. Interviews with dealers illustrated a number regularly sold cocaine in 3.5 gram deals (eight-balls) to peers. A purchase of 7.5 mixed grams would equate to 4.5 grams of pure cocaine (more than double the current threshold).

It is important to note that information on normal buying behaviour of users is less systematically collected and/or reported than for information on patterns of use and often does not differentiate drugs destined for personal use versus others (something that would constitute grounds for trafficking). Nevertheless, both data sources suggest that the current trafficable threshold quantities do not successfully filter out users from traffickers and that there is high likelihood that at least some cocaine and MDMA users have or will be found to exceed the current trafficable quantities for possession for personal use alone.

Table 6: Quantity of drugs purchased by regular users in sentinel surveys and ad hoc studies (Metric 2), by drug type, showing median purchase (mixed grams), range and maximum reported in a single purchase versus the current ACT trafficable threshold quantity (mixed gram equivalent)

Drug	IDRS/EDRS		Other studies		Maximum grams in a single purchase	ACT trafficable threshold quantity
	Median	Range	Median	Range		
Heroin	0.3[1]	0.1-0.5[1]			0.5	8.1
Methamphetamine (speed/powder)	0.1[1]	0.1-3.5[1]	0.5-1.0[4]	0.1-3.5[4]	3.5	20.0
Methamphetamine (base)	0.1[1]	0.1-0.5[1]	0.1[4]	0.1-3.5[4]	3.5	20.0
Methamphetamine (ice)	0.1[1]	0.1-3.5[1]	0.1[4]	0.1-3.5[4]	3.5	20.0
Cocaine	1.0[2]			4.0-7.5[5]	7.5	3.3
MDMA	4 pills[3] =1.2g*	1-500 pills[3]= 0.3-145.0g*			145.0	3.3
Cannabis		1-28[1] 7-28[2]	7.0-14.0[6]	1.5-28.0[6]	28.0	300.0

[1] ACT IDRS 2009 (Cassar & Burns, 2010b).
[2] National EDRS 2009 (Sindicich & Burns, 2010).
[3] ACT EDRS 2009 (Cassar & Burns, 2010a).
[4] NDLERF study of methamphetamine supply and use (McKetin, et al., 2005).
[5] NDLERF study of cocaine supply and use (Shearer, et al., 2005).
[6] New Zealand study of cannabis supply and use (Wilkins, et al., 2005).
* 1 pill=0.29g – Australian Customs/AFP/ABCI agreed estimate (Australian Crime Commission, 2010).

Evaluating the trafficable threshold quantity against metrics of the relative seriousness of a drug trafficking offence

Tables 7 to 9 estimate what a trafficable quantity of heroin, methamphetamine, cocaine, MDMA is "worth" under the current ACT Criminal Code Regulation 2005 Schedule 1 in terms of:

- the retail value (Metric 3) (Table 7);
- the potential harm to individuals and society (Metric 4) (Table 8); and
- the annual social cost (Metric 5) (Table 9).

Table 7 and Figure 1 outline the estimated retail value for a trafficable quantity of 'drugs' under the current ACT threshold (Metric 3). Low, high and mid point estimates have been calculated and reflect the range of reported retail prices for each drug type in 2008-09. Assessed against Metric 3 the potential retail value for a trafficable quantity of MDMA and cocaine is much lower than for a trafficable quantity of heroin, methamphetamine or cannabis. Methamphetamine stands out as affording much greater potential for revenue under the current trafficable threshold, particularly once you take into account the standard method of cannabis sale (ounces/not grams).

Table 7: Retail value in ACT (Metric 3), per mixed gram/ounce, per pure gram and per ACT trafficable threshold quantities

Drug	Retail value per mixed gram / ounce[1]	Retail value per pure gram[2]	Retail value per ACT trafficable threshold[3]
Heroin	$250-450	$1,008-1,814	$2,016-3,629
Methamphetamine	$350-500	$3,500-5,000	$7,000-10,000
Cocaine	$250-450	$407-732	$814-1,465
MDMA	$20-30 per pill 1 g=3.4 pills*=$68-103	$447-677	$223-338
Cannabis – per ounce (28g)	Hydro/Bush $300-400	n.a.	$3,214-4,285
Cannabis – per gram	Hydro head $20-35 Bush head $25-30	n.a.	$6,000-10,500

[1] Illicit Drug Data Report 2008-09 (Australian Crime Commission, 2010).
[2] Using purity as per Table 4.
[3] Using ACT trafficable threshold as per Table 4.
* 1 pill=0.29g – Australian Customs/AFP/ABCI agreed estimate (Australian Crime Commission, 2010).
Figures in the table have been rounded to avoid creating the impression of false precision.

Figure 1: Retail value per current ACT trafficable threshold quantity, by drug type and estimate

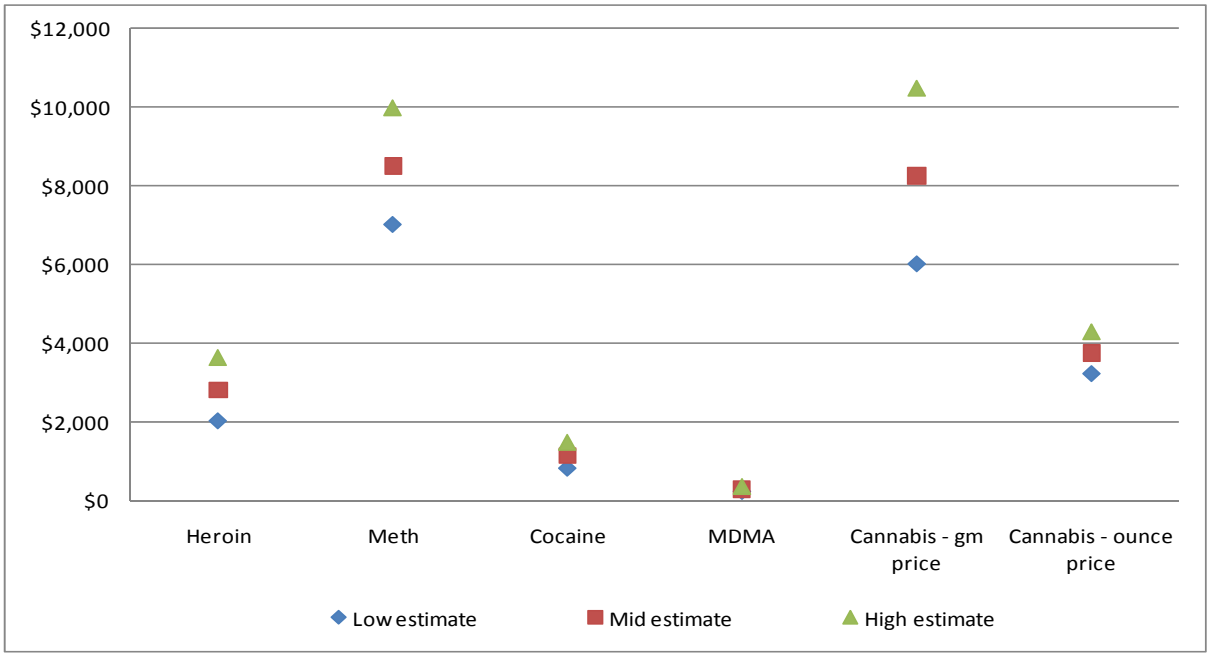


Table 8 outlines the potential attributable harm under the current ACT trafficable quantities (Metric 4). This indicates that the potential attributable harm is very low for MDMA and cocaine, higher for heroin and methamphetamine and very high for cannabis. The high potential harm for cannabis is largely an artefact of the large number of grams that are allowed, but it means that a trafficable quantity of cannabis could cause 202 times more harm than a trafficable quantity of MDMA.

Table 8: Attributable harm that could result (Metric 4), per unit of mixed drug, per unit of pure drug and per ACT trafficable threshold quantities, using Nutt, King and Phillips (2010)

Drug	Harm per unit of mixed drug[1]	Harm per unit of pure drug[2]	Harm per ACT trafficable threshold[3]
Heroin	55	221	443
Methamphetamine	33	330	660
Cocaine	27	43	87
MDMA	9	59	29
Cannabis	20	20	6,000

[1] Nutt, King and Phillips (2010).
[2] Using purity as per Table 4.
[3] Using ACT trafficable threshold as per Table 4.
Figures in the table have been rounded to avoid creating the impression of false precision.

Table 9 outlines the economic costs to society (criminal justice, health and road accidents) that could result from drug trafficking and use (Metric 5). This indicates that a trafficable quantity of heroin and methamphetamine has the potential to cause a very large economic burden, whereas a trafficable quantity of cocaine and cannabis has the potential to cause only a small economic burden.

Table 9: Social cost (criminal justice, health and road accident) (Metric 5), per mixed gram, per pure gram and per ACT trafficable threshold quantities, using Moore (2007)

Drug	Social cost per mixed gram[1]	Social cost per pure gram[2]	Social cost per ACT trafficable threshold[3]
Heroin	Low:$4,100 High:$14,891	Low:$16,532 High:$60,004	Low:$33,064 High:$120,088
Methamphetamine	Low:$1,710 High:$6,983	Low:$17,100 High:$69,830	Low:$34,200 High:$139,660
Cocaine	Low:$147 High:$540	Low:$239 High:$879	Low:$478 High:$1,758
MDMA	-	-	-
Cannabis	Low:$4.47 High:$19.86	Low:$4 High:$19	Low:$1,341 High:$5,958

[1] Moore (2007).
[2] Using purity as per Table 4.
[3] Using ACT trafficable threshold as per Table 4.
Figures in the table have been rounded to avoid creating the impression of false precision.

Application of metrics 3, 4 and 5 reveals that the current trafficable quantities are not rational against any of the outlined ways of looking at drug trafficking and its social impacts. This means the current thresholds deal with drugs in a manner that is disproportionate to the potential retail value or the potential amount of harm or social costs that may ensue. They are also disproportionately excessive for some drugs (MDMA and cocaine) and disproportionately light for others (methamphetamine and cannabis).

Thresholds for commercial and large commercial quantities

One would expect that the thresholds for all commercial and large commercial quantities would be higher but proportional to the base weight for trafficable quantities. This is because, while there is a greater quantity, the potential harm or retail value of "the drug" remains similar/equivalent. For example, methamphetamine remains intrinsically more harmful than MDMA, regardless of whether someone carries a trafficable or large commercial quantity of it, and hence the threshold quantity should reflect that relationship.

This can be assessed in terms of whether, across all drugs, an equal multiplier is used from one threshold to the next. As shown in Table 10 the current ACT drug thresholds do not use the same multiplier from trafficable to commercial or large commercial quantities. The most notable difference concerns the multiplier from trafficable to a commercial quantity, with a trafficker in methamphetamine being able to possess 500 times more drug before they are found to have exceeded a commercial quantity, whereas a trafficker in cannabis can possess only 83 times more product. The thresholds can thus be viewed as relatively harsher on large scale traffickers of heroin and cannabis than they are for methamphetamine, cocaine and MDMA, or too lenient on small scale traffickers of heroin and cannabis. Either way it is clear that none of the thresholds deal with the set of drugs in the same way, which poses a potential problem for ensuring equitable and rational sentencing.

Table 10: Current ACT drug trafficking threshold quantities (trafficable, commercial and large commercial) and multipliers between threshold quantities

Drug	Trafficable quantity (g)	Multiplier (from trafficable to commercial)	Commercial quantity (g)	Multiplier (from commercial to large commercial)	Large commercial quantity (g)
Heroin	2.0	400	800	2	1,600
Meth/amphetamine	2.0	500	1,000	2	2,000
Cocaine	2.0	500	1,000	2	2,000
MDMA	0.5	500	250	2	500
Cannabis	300.0	83	25,000	5	125,000

Appendix B and C summarise the results across the three metrics (Metric 3, 4 and 5) of the seriousness of a drug trafficking offence for the commercial and large commercial threshold quantities. While there are some similar issues to those raised for the trafficable thresholds, particularly that thresholds are lower for MDMA and cocaine than for heroin, methamphetamine or cannabis, two key points of difference are:

- At the commercial level, the lower relative threshold for cannabis moderates the inflated potential for revenue and harm that exist in the trafficable (and large commercial) thresholds.
- At the large commercial level, the lower relative threshold for heroin moderates some of the higher retail value, harm and social cost that exist in the trafficable thresholds.

The net consequence is that none of the three ACT thresholds are proportionate to the relative seriousness of drug trafficking offences, but the trafficable threshold is the least justifiable or equitable (and the commercial threshold the most justifiable). Moreover, the trafficable, commercial and large commercial thresholds all deal with drug traffickers in a slightly different manner. This means that the current law varies based on both the particular drug and the quantity of the drug that a defendant is found in possession of.

Additional challenges with a purity-based system

Additional challenges with the current thresholds as specified in the Criminal Code Regulation 2005 (ACT) has been the use of a purity-based system. This is problematic as:

- The ACT currently assesses purity for some drugs, not others.
- The system is not transparent to buyers or sellers.
- The system adds to the time and cost of prosecuting serious drug offenders.
- The system results in suppositional and sometimes erroneous charges.
- The system contributes to potentially unfair delays in the disclosure of evidence to the defence.
- The system is very subject to fluctuations in purity.

The first challenge is that ACT uses a purity-based system for heroin, methamphetamine, cocaine and ecstasy but not for cannabis. While there are clear challenges in identifying and measuring the active properties of cannabis and there remain large evidence-gaps on purity of cannabis in Australia (McLaren, et al., 2008), the specifications of purity for only some drugs creates a clear inequity in responses. This is particularly when some international jurisdictions

have instituted purity-based systems for cannabis (such as Italy, Hungary and Austria) (Hughes, 2010).[1]

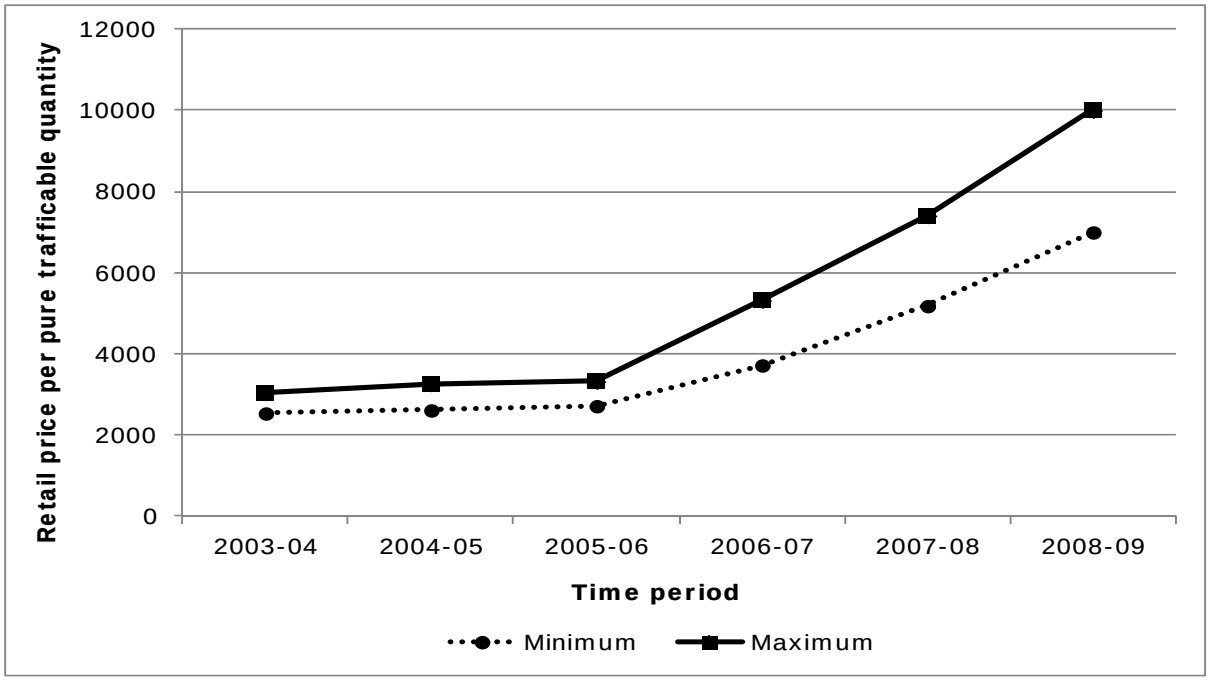
The second challenge is that the system is not transparent to buyers or sellers. To enhance deterrent effects laws ought be transparent and readily interpretable to buyers and sellers. The purity-based system is not so, and is particularly problematic when considering trafficable thresholds. Unless buyers or sellers have accurate knowledge of purity levels and do the mathematical conversions (e.g. 2 grams pure cocaine = 3.3 grams mixed cocaine using 2008-09 data) they are very unlikely to know whether or not they exceed the trafficable threshold. Conversions in relation to MDMA are even more problematic given the need to consider purity and the average size of a pill.

The system also creates challenges for the prosecution, defence and the accused. It adds significantly to the cost of prosecutions, as chemical analysis is expensive and time consuming. The extra time taken also creates increasing delays in complete disclosure of evidence to the defence. Further, under the purity-based prosecution, the actual charge laid is speculative, and based upon estimates derived from the mixed weight (Drumgold, 2011). This is because the charge needs to be laid before the purity is established. There are increasing circumstances in which this speculation is incorrect and trafficking charges using speculative presumption of trafficking weights are proffered, that turn out to be wrong because of lower than usual purity. This causes cost to the accused, and the broader criminal justice system.

The final challenge is that the use of a purity-based system makes the drug trafficking threshold system very subject to fluctuations over time. Purity, retail price, harm and social costs associated with drug trafficking can all vary over time, but the variable that is most subject to fluctuations is purity. There have been quite marked shifts in purity for some drugs, most notably ecstasy and methamphetamine in recent years, and heroin during the heroin shortage. The changes in retail value are clearly highlighted in relation to methamphetamine over the period 2003-04 to 2008-09 (Australian Crime Commission, 2005, 2006, 2007, 2008, 2009, 2010). In 2008-09 methamphetamine had a purity of 10% but in 2004-05 and 2005-06 it had a purity of 30-33%. As a consequence the potential retail value of a trafficable quantity of methamphetamine under the ACT law increased from $2,614-3,267 in 2004-05 to the current value of $7,000-10,000 (see Figure 2).

[1] The inequity in purity assessments also has relevance for other illicit drugs not considered in this report.

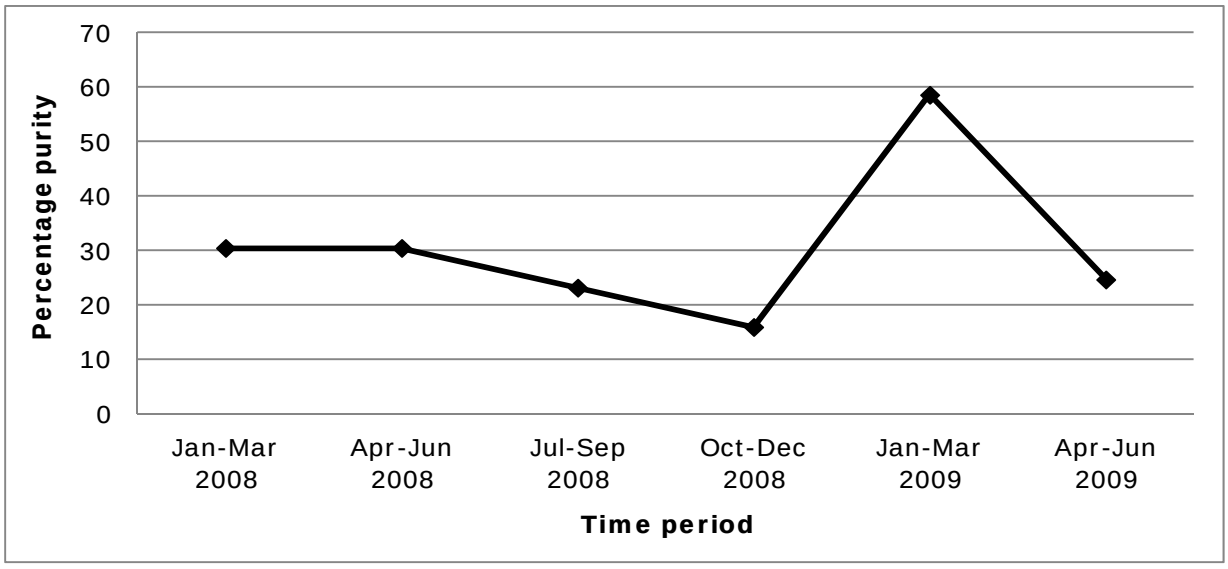
Figure 2: Retail price for a pure trafficable quantity of methamphetamine, 2003-04 to 2008-09



Source: Illicit Drug Data Report 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09.

In contrast, over the same time period, the potential retail value for a trafficable quantity of heroin remained at $2,000-3,000. Consequently, over this time period the purity-based system could be interpreted as increasingly providing more lenient responses to traffickers of methamphetamine than for heroin (who are able to earn up to $10,000 for a trafficable quantity of methamphetamine versus only $3,000 for the equivalent quantity of heroin). This is in spite of both being deemed the most harmful illicit substances in the ACT. Purity changes on a quarterly or monthly basis often even more marked (see Figure 3).

Figure 3: Retail heroin purity in ACT for <2g heroin, Jan-Mar 2008 to Apr-Jun 2009



Source: Illicit Drug Data Report 2008-09.

These concerns lead to the conclusion that a purity-based system is adding to the lack of parity between drug types and between the trafficable, commercial and large commercial thresholds.

SUITABILITY OF THE PROPOSED MODEL CRIMINAL CODE THRESHOLDS

The proposed Model Criminal Code thresholds (expressed in mixed grams) are outlined in Table 11. With only one exception (the proposed commercial quantity for MDMA) all threshold quantities are equivalent or lower than the current pure ACT thresholds (see Table 11 versus 3). Consequently, they are much lower than the current thresholds. We evaluate here the risks posed by the proposed trafficable threshold.

Table 11: Model Criminal Code legal thresholds (mixed grams), by drug type and category

Drug	Trafficable quantity	Commercial quantity	Large commercial quantity
Heroin	2	200	1,000
Meth/amphetamine	2	500	1,000
Cocaine	2	200	1,000
MDMA	2	500	1,000
Cannabis	250	2,500	12,500

As shown in Table 12 regular users of three different drugs - methamphetamine, cocaine and MDMA – all report consuming more than the proposed trafficable threshold quantity for a single session of use (see Table 13). Indeed, users of MDMA in the ACT report using up to 8.7 grams of MDMA, which is more than four times the proposed threshold quantity of 2 mixed grams. Equally importantly, regular users of methamphetamine, cocaine and MDMA would be at risk of possessing or exceeding the trafficable threshold under both a heavy and typical session.

Table 12: Number of mixed grams consumed in a typical and heavy session, by drug type, indicating maximum grams that a user is likely to possess for a single session of use versus the current ACT and proposed Model Criminal Code trafficable threshold quantity

Drug	Typical		Heavy		Maximum grams for one session	Current ACT threshold quantity	MCC threshold quantity
	Mean[1]	Range[1]	Mean[1]	Range[1]			
Heroin	0.1		0.3		0.3	8.1	2
Methamphetamine (speed/powder)	0.5	0.1-2.0	0.5	0.1-4.0	4.0	20.0	2
Methamphetamine (base)	0.2	0.1-1.0	0.2	0.1-1.0	1.0	20.0	2
Methamphetamine (ice)	0.2	0.1-0.5	0.4	0.2-0.5	0.5	20.0	2
Cocaine	0.5	0.1-3.5	0.8	0.1-3.5	3.5	3.3	2
MDMA	2 tablets (0.6g)	0.5-10 tablets (0.2-2.9g)	4 tablets (1.2g)	1 to 30 tablets (0.3-8.7g)	8.7	3.3	2
Cannabis	4 cones (0.4g) 1 joint (0.3g)	1-60 cones (0.1-5.4g) 1-30 joints (0.3-10.2g)			10.2	300.0	250

[1] IDRS 2009 (Stafford & Burns, 2010), EDRS 2009 (Sindicich & Burns, 2010).

As shown in Table 13 the proposed Model Criminal Code threshold quantities are also disproportionate to the potential retail value, harm or social cost of trafficking that could ensue to the ACT community. For example, under the Model Criminal Code the economic burden from someone with a trafficable quantity of heroin could be 27 times greater than someone with a trafficable quantity of cocaine.

Table 13: Retail value, harm and social cost under the proposed Model Criminal Code trafficable thresholds

Drug	Moderator	Retail value ($)			Harm	Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		500	900	700	110	8,200	29,782	18,991
Meth	Crystal	700	1,000	850	66	3,420	13,966	8,693
	Base	700	1,000	850	66	3,420	13,966	8,693
	Powder	700	1,000	850	66	3,420	13,966	8,693
Cocaine		500	900	700	54	294	1,080	687
MDMA		136	206	171	18	-	-	-
Cannabis	Cone – ounce price	2,679	3,571	3,125	5,000	1,118	4,965	3,041
	Joint – ounce price	2,679	3,571	3,125	5,000	1,118	4,965	3,041
	Cone – gram price	5,000	8,750	6,875	5,000	1,118	4,965	3,041
	Joint – gram price	5,000	8,750	6,875	5,000	1,118	4,965	3,041

Results under current ACT trafficable thresholds

Drug	Moderator	Retail value ($)			Harm	Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		2,016	3,629	2,823	444	33,064	120,089	76,577
Meth	Crystal	7,000	10,000	8,500	660	34,200	139,660	86,930
	Base	7,000	10,000	8,500	660	34,200	139,660	86,930
	Powder	7,000	10,000	8,500	660	34,200	139,660	86,930
Cocaine		814	1,466	1,140	88	479	1,759	1,119
MDMA		224	339	281	30	-	-	-
Cannabis	Cone – ounce price	3,214	4,286	3,750	6,000	1,341	5,958	3,650
	Joint – ounce price	3,214	4,286	3,750	6,000	1,341	5,958	3,650
	Cone – gram price	6,000	10,500	8,750	6,000	1,341	5,958	3,650
	Joint – gram price	6,000	10,500	8,750	6,000	1,341	5,958	3,650

The consequence is that if the proposed Model Criminal Code threshold quantities were adopted, the drug trafficking thresholds would remain disproportionate to the potential severity of drug trafficking/damage to society. In addition, wholesale adoption would increase the likelihood of unjustified charge or conviction of drug users as traffickers. Wholesale adoption in the ACT would therefore not be recommended.

TOWARDS A MORE RATIONAL SYSTEM OF DRUG TRAFFICKING THRESHOLDS

In this section we put forward a methodology to assist in the determination of appropriate threshold quantities: threshold quantities that *could* enable more proportional and evidence-aligned responses to drug offences. The general principles for a more rational system of drug trafficking thresholds are: to increase the proportionality and potential fairness of the law; to enshrine principles of harm minimisation (including reducing the potential harm from thresholds themselves); and to increase the certainty for potential offenders, police and prosecutors over what constitutes a low, mid and high-level drug trafficking offence (and thereby reduce the use of suppositional and potentially erroneous charges and increase the potential deterrent message to current and would-be offenders). Seven potential sets of trafficable threshold quantities for heroin, methamphetamine, cocaine, MDMA and cannabis are put forward (with commercial and large commercial thresholds to be devised based on the base trafficable threshold). Each reflects a different approach to threshold development. These are for the ACT to view and discuss. The two common features of all the outlined approaches, is that firstly, all are informed by one or more of the evidence-informed metrics. Some take into account more evidence (and are our preferred approaches), yet all reflect a more rational approach to threshold determination.

Secondly under all proposed approaches a mixed-drug system has been adopted (not pure drug). As outlined earlier a real concern with the purity-based system is that it makes thresholds subject to inequitable sentencing due to changes in market conditions. But, developing a purity-based system that was 'rational' is likely to be unworkable as it would demand constant assessments of purity and updates to legislative thresholds. This is not to say that a mixed-based system would resolve all challenges in parity (not that this is likely to ever be possible). Indeed, it may create new challenges including the risk that high end traffickers could get more lenient sentences if they trafficked in 'pure' forms (see Appendix C for discussion). But the biggest potential for disproportional responses, those due to systematic disparity between the threshold quantities and knowledge of drug trafficking seriousness are likely to be reduced, thus enabling more rational responses for most drug trafficking cases. The mixed-based approach is also more intuitive, affords greater transparency over thresholds, reduces delays and the burden on the police and prosecutors, and can be applied across all drugs (including emerging substances without the need for technological advances in the ability to test purity). Research and data on the potential seriousness of drug trafficking offences (including research and data used in the metrics) also rarely takes purity into consideration, hence the most relevant evidence-base relates to drugs in their mixed form.

Reducing the risk of unjustified charge/conviction of drug users

To minimise the chance that users will exceed the trafficable thresholds for possession for personal use alone, we put forward two sets of threshold quantities based on evidence of user practices.

Approach 1 and 2: Threshold quantities that are established against the maximum quantity that a user is likely to consume or purchase

Approach 1 draws on evidence of the maximum quantity that a regular user is likely to consume (Metric 1) (as per Table 5). Approach 2 is derived using evidence of the maximum quantity that a user is likely to purchase (Metric 2) (as per Table 6). The proposed thresholds, adjusted to whole grams to make laws clearly understandable by users and traffickers, versus the current ACT trafficable threshold quantity (for pure and mixed drugs) are shown in Table 14. While these thresholds may reduce risks to users, there remains a clear divergence between these (which

reflects in large part the weakness in data on which Metric 2 is derived). This may prove problematic for potential legislators. The biggest drawback with either approach is that thresholds would remain disproportionate across traffickers in different controlled drugs.

Table 14: Threshold quantities (mixed grams) under approaches 1 and 2 (that seek to reduce risks to drug users), by drug type and approach, versus the current ACT drug trafficable thresholds for pure and mixed drug

Drug	Approach 1 (Metric 1: Maximum grams consumed by users in one occasion)	Approach 2 (Metric 2: Maximum grams purchased by users in one occasion)	Current ACT trafficable threshold quantity	
			Pure grams	Mixed grams
Heroin	1[1]	1	2.0	8.1
Methamphetamine	4	4	2.0	20.0
Cocaine	4	8	2.0	3.3
MDMA	9	145	0.5	3.3
Cannabis	11	28	300.0	300.0

[1] Systematic data on the number of grams of heroin used in a typical and maximum session were not available; hence this may underestimate the maximum grams consumed by users in one occasion.

Reducing the risk of unjustified charge/conviction of drug users and increasing proportionality of responses across traffickers in different controlled drugs

Approaches 3 to 7 seek to reduce potential risk to users of an unjustified charge of trafficking and disproportionality across traders, so that regardless of the drug, legal thresholds enable more severe traffickers to be readily distinguished and sanctioned accordingly. They therefore adopt a more extensive change to threshold design, one that incorporates both evidence of drug user practices (to establish the minimum threshold quantity for each drug type) and the relative seriousness of a drug trafficking offence (to establish *how* proportionality is attained across different drug types).

By putting all the metrics of the relative seriousness of drug trafficking together (see Table 15) it is clear that choices (or value judgements) are needed as to which constitutes the best approach for valuing the seriousness of drug trafficking:

- Metric 3: Retail value i.e. amount of revenue that could be made by traffickers of a particular drug;
- Metric 4: Harm for individuals and the community i.e. amount of harm that could result from trafficking in a particular drug; and
- Metric 5: Social cost i.e. annual cost of healthcare, criminality and road accidents from each gram of drug trafficked.

For example, heroin and cocaine are identical in retail value (Metric 3), but heroin is more harmful (using Metric 4 - Nutt et al.'s ratings) and results in greater social costs (using Metric 5 - Moore's estimate) than cocaine.

Table 15: Relative seriousness of trafficking one gram of different controlled drugs, by metric (retail value, harm and social cost) and drug type

Drug	Moderator	Metric 3: Retail value/g			Metric 4: Harm/g	Metric 5: Social cost/g		
		Low	High	Average		Low	High	Average
Heroin		250	450	350	55	4,100	14,891	9,496
Meth*	Crystal	350	500	425	33	1,710	6,983	4,347
	Base	350	500	425	33	1,710	6,983	4,347
	Powder	350	500	425	33	1,710	6,983	4,347
Cocaine		250	450	350	27	147	540	344
MDMA		68	103	86	9	-	-	-
Cannabis*	Cone	11	14	13	20	4.5	20	12
	Joint	11	14	13	20	4.5	20	12

* Dependent on method of use.

Accordingly, five different approaches to threshold development are put forward. For all, estimates have been made using ounce prices for cannabis, making these estimates somewhat more conservative for cannabis than the other illicit drugs. Whole grams have also been used wherever possible so that the laws will be clearly understandable by users and traffickers. All outlined proposals are those that were deemed to have some political feasibility (one that was deemed not was a proposal for threshold quantities based purely on harm – proposed threshold quantities were higher for MDMA than cannabis).

For each proposal the maximum grams consumed by users on one occasion (Metric 1 – the most reliable indicator of drug user practices) was used to establish the minimum threshold quantity for each drug. Accordingly, the minimum trafficable quantity is equal to or exceeds the maximum dose consumed (as defined in Table 5) e.g. 4 mixed grams methamphetamine and 8.7 mixed grams MDMA. This reduces the chance of users being charged as drug traffickers. We then established the actual threshold quantity as proportional to one or a combination of metrics of the relative seriousness of a drug trafficking offence (Metrics 3, 4 and 5).

Approach 3: Threshold quantities that are proportional to retail value

In approach 3 we put forward threshold quantities that are proportional to the financial rewards/potential revenue that might be accrued through trafficking a trafficable quantity of each drug type i.e. to hold the retail value (Metric 3) of a trafficable quantity constant across all drugs. A trafficable quantity is defined as that resulting in a potential revenue at the retail market of $1,732. This value is equivalent to the minimum revenue that would enable all threshold quantities to equal or exceed the maximum doses (with the limiting factor being the retail value that could be accrued from sale of 4 grams of methamphetamine). The first table holds the chosen metric constant (highlighted column) and provides the calculated outputs for the other metrics assuming the chosen metric applies (e.g. average retail value of $1,750 gives an average social cost of $47,478). The second table displays the current situation for comparison purposes. The third table (Table 16) provides the proposed threshold quantities based on the chosen metric (and for comparison the current threshold quantities).

Approach 3: Holding retail value (Metric 3) constant, showing impact on harm and social cost metrics

Drug	Moderator	Metric 3: Retail value ($)			Metric 4: Harm	Metric 5: Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		1,250	2,250	1,750	275	20,500	74,455	47,478
Meth	Crystal	1,400	2,000	1,700	132	6,840	27,932	17,386
	Base	1,400	2,000	1,700	132	6,840	27,932	17,386
	Powder	1,400	2,000	1,700	132	6,840	27,932	17,386
Cocaine		1,250	2,250	1,750	135	735	2,700	1,718
MDMA		1,360	2,060	1,710	180	-	-	-
Cannabis	Cone	1,500	2,000	1,750	2,800	626	2,780	1,703
	Joint	1,500	2,000	1,750	2,800	626	2,780	1,703

Retail value, harm and social cost under current ACT trafficable threshold quantities

Drug	Moderator	Metric 3: Retail value ($)			Metric 4: Harm	Metric 5: Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		2,016	3,629	2,823	444	33,064	120,089	76,577
Meth	Crystal	7,000	10,000	8,500	660	34,200	139,660	86,930
	Base	7,000	10,000	8,500	660	34,200	139,660	86,930
	Powder	7,000	10,000	8,500	660	34,200	139,660	86,930
Cocaine		814	1,466	1,140	88	479	1,759	1,119
MDMA		224	339	281	30	-	-	-
Cannabis	Cone	3,214	4,286	3,750	6,000	1,341	5,958	3,650
	Joint	3,214	4,286	3,750	6,000	1,341	5,958	3,650

Table 16: The trafficable threshold quantities (mixed grams), by drug type, under the current ACT law and a situation where trafficable thresholds are proportional to retail value (Metric 3)

Drug	Proposed (grams)	Current (grams equivalent)
Heroin	5	8.1
Methamphetamine	4	20.0
Cocaine	5	3.3
MDMA	20	3.3
Cannabis	140	300.0

One downside of this approach is that price can also change over time, independently of changes in purity. Changes in price are much less frequent than changes in purity, but nevertheless occur.

Approach 4: Threshold quantities that are proportional to social cost

The fourth approach to defining threshold quantities is to attain proportionality of the estimated societal costs to criminal justice, health and road accidents from responding to trafficking (i.e. to hold the social costs constant across all drugs) (Metric 5). The proposed thresholds by drug type

(where social costs of a trafficable quantity would equate to approximately $17,551 per year) are listed in Table 17, where social cost is held constant. There is a notably much higher threshold for cocaine and cannabis than under the current ACT threshold quantities. Again this is the minimum social cost that would enable all trafficable thresholds to equal or exceed the maximum dose (with the limiting factor being the social cost that could be accrued from trafficking 4 grams of methamphetamine).

Approach 4: Holding social costs (Metric 5) constant, showing impacts on retail value and harm metrics

Drug	Moderator	Metric 3: Retail value ($)			Metric 4: Harm	Metric 5: Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		500	900	700	110	8,200	29,782	18,991
Meth	Crystal	1,400	2,000	1,700	132	6,840	27,932	17,386
	Base	1,400	2,000	1,700	132	6,840	27,932	17,386
	Powder	1,400	2,000	1,700	132	6,840	27,932	17,386
Cocaine		12,500	22,500	17,500	1,350	7,350	27,000	17,175
MDMA		3,400	5,150	4,275	450	7,350	27,000	17,175*
Cannabis	Cone	15,000	20,000	17,500	28,000	6,258	27,804	17,031
	Joint	15,000	20,000	17,500	28,000	6,258	27,804	17,031

* Estimated using social cost for cocaine.

Table 17: The trafficable threshold quantities (mixed grams), by drug type, under the current ACT law and a situation where trafficable thresholds are proportional to social costs (Metric 5)

Drug	Proposed (grams)	Current (grams equivalent)
Heroin	2	8.1
Methamphetamine	4	20.0
Cocaine	50	3.3
MDMA	50	3.3
Cannabis	1400	300.0

Approach 5: Threshold quantities that are proportional to retail value AND social cost

Under the fifth to seventh approaches thresholds quantities are defined using multi-criteria i.e. against multiple metrics for examining drug trafficking and the impacts of drug trafficking. Given the complexity of defining drug trafficking thresholds and that each metric provides a uni-dimensional way of addressing the issue, there is merit in considering whether thresholds ought to be based on multiple metrics: i.e. take into account multiple indicators of trafficking impact on the community. This potentially provides a more coherent way of ensuring thresholds are proportional to the seriousness of drug trafficking offences.

The fifth approach to defining threshold quantities is to attain proportionality of the potential revenue that could be accrued from drug trafficking (Metric 3) and the estimated criminal justice, health and road accidents costs of drug trafficking (Metric 5). Thresholds are derived by multiplying the two highlighted columns (average retail value and social cost) such that across all drugs they have equivalent potential revenue and social costs. This means that drugs such as heroin which have a high likelihood of inflicting social costs end up with a threshold that limits their potential revenue, whereas drugs such as cannabis with low likelihood of inflicting social costs have greater potential for revenue. The proposed threshold quantities to attain this approach are listed in Table 18.

Approach 5: Holding retail value (Metric 3) and social cost (Metric 5) constant, showing impacts on harm metric

Drug	Moderator	Metric 3: Retail value ($)			Metric 4: Harm	Metric 5: Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		750	1,350	1,050	165	12,300	44,673	28,487
Meth	Crystal	1,400	2,000	1,700	132	6,840	27,932	17,386
	Base	1,400	2,000	1,700	132	6,840	27,932	17,386
	Powder	1,400	2,000	1,700	132	6,840	27,932	17,386
Cocaine		4,000	7,200	5,600	432	2,352	8,640	5,496
MDMA		2,176	3,296	2,736	288	4,704	17,280	10,992*
Cannabis	Cone	4,821	6,429	5,625	9,000	2,012	8,937	5,474
	Joint	4,821	6,429	5,625	9,000	2,012	8,937	5,474

* Estimated using social cost for cocaine.

Table 18: The trafficable threshold quantities (mixed grams), by drug type, under the current ACT law and a situation where trafficable thresholds are proportionate to retail value (Metric 3) and social cost (Metric 5)

Drug	Proposed (grams)	Current (grams equivalent)
Heroin	3	8.1
Methamphetamine	4	20.0
Cocaine	16	3.3
MDMA	32	3.3
Cannabis	450	300.0

Approach 6: Threshold quantities that are proportional to harm AND social cost

The sixth approach to defining threshold quantities is to attain proportionality using two metrics: Nutt's metric of harm to individuals and society (Metric 4) and Moore's metric of economic cost of drug use/trafficking for society (Metric 5). By using metrics that measure/value different aspects of the negative consequences of drug use to society, this provides a more comprehensive means of sanctioning traffickers on the basis of the potential harm inflicted by drugs. The proposed thresholds to attain this approach are listed in Table 19.

Approach 6: Holding harm (Metric 4) and social cost (Metric 5) constant, showing impact on retail value metric

Drug	Moderator	Metric 3: Retail value ($)			Metric 4: Harm	Metric 5: Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		500	900	700	110	8,200	29,782	18,991
Meth	Crystal	1,400	2,000	1,700	132	6,840	27,932	17,386
	Base	1,400	2,000	1,700	132	6,840	27,932	17,386
	Powder	1,400	2,000	1,700	132	6,840	27,932	17,386
Cocaine		3,750	6,750	5,250	405	2,205	8,100	5,153
MDMA		1,768	2,678	2,223	234	3,822	14,040	8,931*
Cannabis	Cone	1,018	1,357	1,188	1,900	425	1,887	1,156
	Joint	1,018	1,357	1,188	1,900	425	1,887	1,156

* Estimated using social cost for cocaine.

Table 19: The trafficable threshold quantities (mixed grams), by drug type, under the current ACT law and a situation where trafficable thresholds are proportionate to potential harm (Metric 4) and social cost (Metric 5)

Drug	Proposed (grams)	Current (grams equivalent)
Heroin	2	8.1
Methamphetamine	4	20.0
Cocaine	15	3.3
MDMA	26	3.3
Cannabis	95	300.0

Approach 7: Threshold quantities that are proportional to retail value, harm AND social cost

The final approach to defining threshold quantities is proportionate to the potential retail value (Metric 3), harm (Metric 4) and social cost of drug use (Metric 5). This again incorporates two metrics that measure/value different aspects of harms, plus the potential retail value, or revenue that might be afforded from retail sale. Thresholds are derived by multiplying the three highlighted columns (average retail value, harm and average social cost) such that across all drugs they have equivalent potential revenue, harm and social costs. This balances both potential incentives for traffickers and the potential negative consequences of trafficking on health, crime, social functioning, the economy and environmental damage. The proposed thresholds to attain this approach are listed in Table 20.

Approach 7: Holding retail value (Metric 3), harm (Metric 4) and social cost (Metric 5) constant

Drug	Moderator	Metric 3: Retail value ($)			Metric 4: Harm	Metric 5: Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		700	1,260	980	154	11,480	41,695	26,587
Meth	Crystal	1,400	2,000	1,700	132	6,840	27,932	17,386
	Base	1,400	2,000	1,700	132	6,840	27,932	17,386
	Powder	1,400	2,000	1,700	132	6,840	27,932	17,386
Cocaine		2,750	4,950	3,850	297	1,617	5,940	3,779
MDMA		1,700	2,575	2,138	225	3,675	13,500	8,588*
Cannabis	Cone	1,179	1,571	1,375	2,200	492	2,185	1,338
	Joint	1,179	1,571	1,375	2,200	492	2,185	1,338

* Estimated using social cost for cocaine.

Table 20: The trafficable threshold quantities (mixed grams), by drug type, under the current ACT law and a situation where trafficable thresholds are proportionate to potential retail value (Metric 3), harm (Metric 4) and social cost (Metric 5) of drug use

Drug	Proposed (grams)	Current (grams equivalent)
Heroin	2.8	8.1
Methamphetamine	4.0	20.0
Cocaine	11.0	3.3
MDMA	25.0	3.3
Cannabis	110.0	300.0

Summary

Thresholds under the more comprehensive approach to threshold design, which take into account both knowledge of user patterns and the severity of drug trafficking offences (approaches 3 to 7) are summarised in Table 21. A common finding across all approaches is to reduce risks to users and attain more proportionality across traffickers, threshold quantities for MDMA and cocaine ought be higher, and threshold quantities for heroin and methamphetamine ought be lower than in the status quo.

Table 21: Threshold quantities (mixed grams) under approaches 3 to 7 (that seek to reduce risk to users and increase proportionality across drug traffickers), by drug type and proposal, versus the current ACT drug trafficable threshold for pure and mixed drug

Drug	Approach 3 (Metric 3: Retail value)	Approach 4 (Metric 5: Social cost)	Approach 5 (Metric 3 & 5: Retail value & social cost)	Approach 6 (Metric 4 & 5: Harm & social cost)	Approach 7 (Metric 3, 4 & 5: Retail value, harm & social cost)	Current ACT trafficable threshold quantity	
						Pure grams	Mixed grams
Heroin	5	2	3	2	2.8	2.0	8.1
Methamphetamine	4	4	4	4	4.0	2.0	20.0
Cocaine	5	50	16	15	11.0	2.0	3.3
MDMA	20	50	32	26	25.0	0.5	3.3
Cannabis	140	1400	450	95	110.0	300.0	300.0

CONCLUDING REMARKS

This report outlined a new approach to informing the current and potential design of drug trafficking thresholds using five evidence-informed metrics based on knowledge of Australian drug markets and the impacts of drug use/trafficking on the community. While we provided advice to the ACT, we could equally have applied these metrics to examine threshold systems in other parts of Australia using local data. Indeed, the diversity of current threshold designs gives grounds to believe that many of the problems identified here may be similar in other states and territories.

Evaluating the drug trafficking thresholds against the quantity of drugs that a user is likely to possess for personal use and the metrics of the relative seriousness of the particular drug trafficking offence, it is clear that each metric provided a slightly different way of looking at these issues. Nevertheless, the commonality across the metrics was striking and indicates that the current ACT threshold quantities are not supported in terms of their ability to:

1. Distinguish drug traffickers from users (to filter out users and to minimise the chance that users get charged as traffickers for personal use alone); and
2. Enable sanction based on the relative seriousness of the drug trafficking offence (i.e. to enable the ACT judiciary to determine the level of criminality of the alleged trafficker, taking into account traders in different controlled drugs).

In its current form the law thus conflicts with the intended purposes of drug trafficking thresholds: increasing the proportionality and fairness of legal responses. It also conflicts with principles of harm minimisation and may possibly infringe upon the human rights requirement of equality before the law.

The current threshold quantities create risks that at least some users of MDMA (and to a lesser extent cocaine) have or will be found to exceed the current trafficable quantities for possession for personal use alone. They create risks for disproportionate sanction based on the particular drug that a defendant is found to possess: most notably excessive responses to minor traffickers of MDMA and cocaine and excessive leniency in regards to traffickers of methamphetamine and cannabis. Due to inconsistencies across the trafficable, commercial and large commercial thresholds and the use of a purity-based system there are further risks that the responses to defendants will vary based on the quantity of drug that a defendant possesses and the particular time period in which a defendant is detected. Of greatest concern is that the system that least fits the evidence is the trafficable threshold i.e. the threshold that most clearly defines the distinction between user and traffickers and that deals with the majority of user-dealers and minor dealers.

This report has also shown that the proposed Model Criminal Code is also problematic as it would not afford a proportional response to drug trafficking offences. Adoption would also increase the likelihood of users being found to exceed the trafficable threshold. Wholesale adoption within the ACT would therefore not be recommended.

This report therefore puts forward a methodology to establish new trafficable threshold quantities for the ACT, and five potential sets of trafficable threshold quantities (with commercial and large commercial threshold quantities to be devised based on the base trafficable threshold quantities). Each represent a different way of valuing the impact(s) of drug trafficking but each could reduce risks to drug users and enable more proportional and evidence-informed responses to drug traffickers.

By necessity, designing an alternate code requires considerations of multiple factors: the evidence-base, value decisions, technical and legislative feasibility, etc. This report considers only the evidence-base. It is for this reason that a range of approaches have been put forward, to enable the ACT and other stakeholders to debate the merits of each approach: ought for example drug trafficking be sanctioned solely on the basis of retail value or should the potential negative consequences from drug trafficking be a prime or additional consideration? Finally, while this report focused on thresholds for the five most used illicit drugs, threshold systems need to be capable of incorporating other current and future illicit drugs. Many of the data sources used throughout this report also contain information on other illicit drugs. For example, harm scores have also been calculated for GHB, Ketamine, Mephedrone, Khat, Benzodiazepines, Methadone, Butane, LSD, Buprenorphine and Mushrooms (Nutt, et al., 2010) and data on user patterns of consumption are available for Ketamine, LSD and MDA (Sindicich & Burns, 2010).

It is clear that many of the potential sets of threshold quantities vary markedly from the current thresholds. Indeed, in many ways the divergence between the current and the outlined systems of quantity threshold is not surprising given the absence of evidence-informed analyses to date.

Nevertheless, this means that it may not be possible for immediate wholesale adoption of one of the outlined systems. If interim/intermediate solutions are needed, key principles that should increase the proportionality of current thresholds and reduce potential risks to users are outlined:

- Thresholds should be specified in mixed drug (not pure drug) to reduce the potential for inequitable sanctioning due to changes in market conditions.
- To reduce risks to users, and to account for lower potential for revenue, harm and social costs the threshold quantities for cocaine and MDMA should be equivalent to or greater than those for heroin and methamphetamine.
- The multiplier between trafficable, commercial and large commercial quantities should be consistent across all drugs (e.g. x400 across all drugs between trafficable and commercial and x2 between commercial and large commercial).

Given the critical role that drug trafficking thresholds play in the sentencing of drug offenders within the ACT and Australia more generally, and the demonstrated presence of disproportionate and potential for harmful responses, inserting more rationality into legislative thresholds would be a valuable step towards maximising the benefits and minimising the risks from using quantitative drug trafficking thresholds. It would also put the ACT at the forefront of developing fair, consistent and proportionate sanctioning of serious drug offenders.

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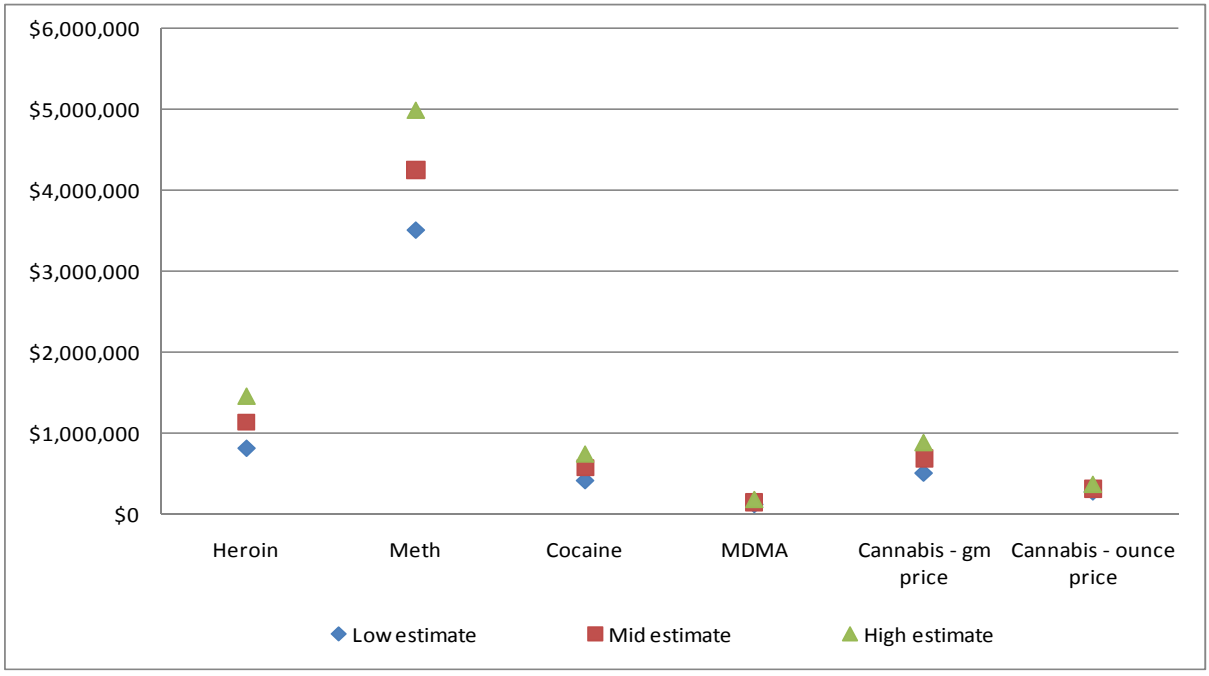
APPENDIX A: EVALUATING THE ACT COMMERCIAL THRESHOLD

Under the current law, a commercial quantity of cocaine, MDMA and cannabis is similar in terms of potential retail value from the sale of that drug (see Table 22). As illustrated in Figure 4 methamphetamine is the main drug, for which the commercial threshold affords much greater potential retail value.

Table 22: Retail value, harm and social cost under current ACT commercial threshold quantities

Drug	Moderator	Retail value ($)			Harm	Social cost ($)		
		Low	High	Average		Low	High	Average
Heroin		806452	1451613	1129032	177420	13225806	48035484	30630648
Meth	Crystal	3500000	5000000	4250000	330000	17100000	69830000	43465000
	Base	3500000	5000000	4250000	330000	17100000	69830000	43465000
	Powder	3500000	5000000	4250000	330000	17100000	69830000	43465000
Cocaine		407166	732899	570033	43974	239414	879479	559446
MDMA		111842	169408	140625	14803	-	-	-
Cannabis	Cone – ounce price	267857	357143	312500	500000	111750	496500	304125
	Joint – ounce price	267857	357143	312500	500000	111750	496500	304125
	Cone – gram price	500000	875000	687500	500000	111750	496500	304125
	Joint – gram price	500000	875000	687500	500000	111750	496500	304125

Figure 4: Retail value in ACT per pure commercial threshold quantity, by drug type and estimate



Under the commercial threshold quantities amount there is also much more similarity in the potential harm that could be inflicted. The consequence is that while there remain inequities, the commercial threshold quantities are more proportional than the trafficable thresholds (or the large commercial threshold quantities). This demonstrates in some ways, the possibilities, of adopting a more rational threshold system.

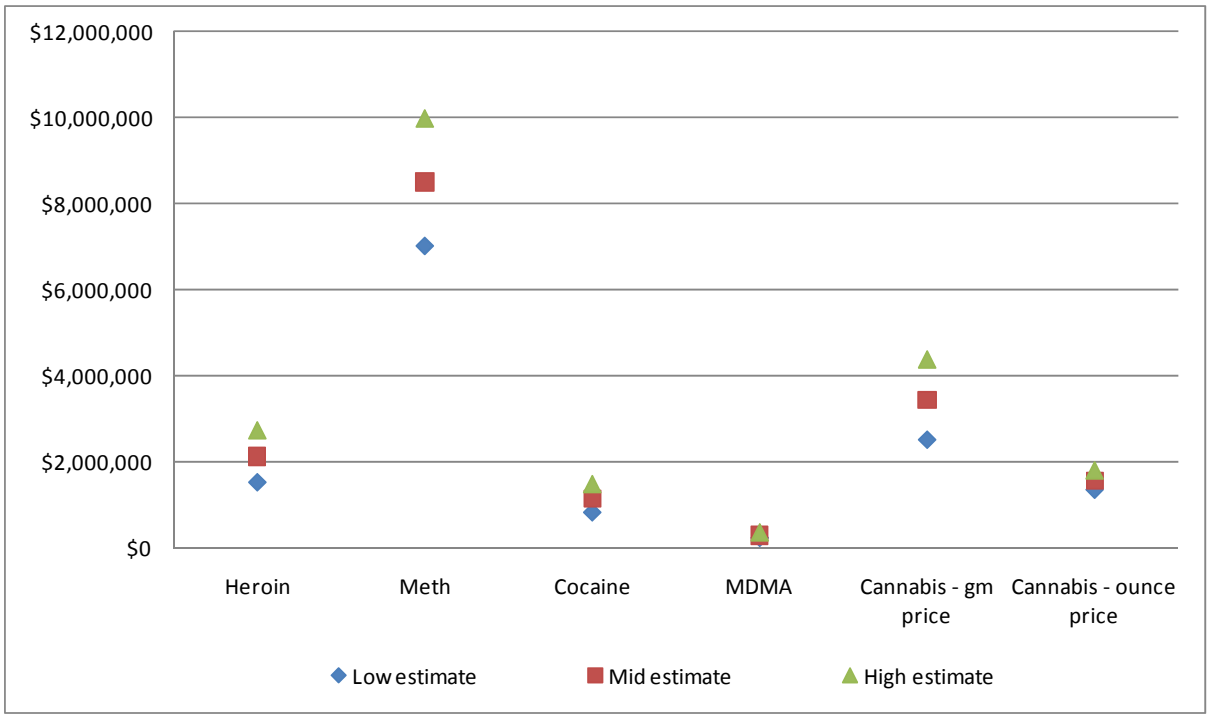
APPENDIX B: EVALUATING THE ACT LARGE COMMERCIAL THRESHOLD

Under the current law, the potential retail value for a large commercial quantity of methamphetamine is much higher than for any other illicit drug (see Table 23 and Figure 5). Conversely, the potential retail value from MDMA is very low (average of $281,250).

Table 23: Retail value, harm and social cost under current ACT large commercial threshold quantities

Drug	Moderator	Retail value ($)			Harm	Social costs ($)		
		Low	High	Average		Low	High	Average
Heroin		1512097	2721774	2116935	332661	24798387	90066532	57432460
Meth	Crystal	7000000	10000000	8500000	660000	34200000	139660000	86930000
	Base	7000000	10000000	8500000	660000	34200000	139660000	86930000
	Powder	7000000	10000000	8500000	660000	34200000	139660000	86930000
Cocaine		814332	1465798	1140065	87948	478827	1758958	1118893
MDMA		223684	338816	281250	29605	-	-	-
Cannabis	Cone – ounce price	1339286	1785714	1562500	2500000	558750	2482500	1520625
	Joint – ounce price	1339286	1785714	1562500	2500000	558750	2482500	1520625
	Cone – gram price	2500000	4375000	3437500	2500000	558750	2482500	1520625
	Joint – gram price	2500000	4375000	3437500	2500000	558750	2482500	1520625

Figure 5: Retail value in ACT per pure large commercial threshold quantity, by drug type and estimate



Examining the legal thresholds in terms of harm, it is clear that a large commercial threshold quantity of MDMA or cocaine will cause considerably less harm than the same threshold quantity of heroin or methamphetamine, and these will cause less again than the equivalent threshold of cannabis. Equity is again not at play.

APPENDIX C: CHALLENGES WITH A MIXED-BASED SYSTEM

The choice of a purity or mixed system had always been vexed and as outlined in the Model Criminal Code for serious drug offences (MCCOC, 1998) there are pros and cons with both systems. Here we outline some challenges with a mixed-based system.

Relative to a purity-based system adoption of a mixed-based system creates risks that:

- Minor traffickers could escape sanction by trafficking in 'pure' forms.
- High end traffickers could get more lenient sentences by trafficking in 'pure' forms.
- Low end traffickers could get more serious sentences by trafficking in 'impure' forms.

For example, the current ACT trafficable threshold equates to 8.1 mixed grams of heroin. Under a mixed-based system a defendant with a trafficable quantity that is 24.8% pure could result in 80.65 typical doses or a trafficable quantity that is 92% pure could be converted to 298.99 typical doses (median and maximum respective street purity over period 2008-2009 for deals less than 2 grams). This creates a potential opportunity for minor traffickers to possess under the trafficable quantity by trading in purer forms of heroin. That said, the risk is partly offset by legislation that enables charges for trafficking if there is evidence of repeated transactions on one or multiple occasions that sum to more than the trafficable threshold quantity.

The risks with a mixed-based system are more of an issue at the commercial threshold and large commercial threshold. For example, traffickers may avoid sanction as a large commercial trafficker by carrying a commercial weight in a purer form. Low end traffickers may also receive more serious sentences if they trafficked in impure forms e.g. a defendant with a large commercial weight in dilute form. Whether or not this would be deemed problematic would however depend upon which metric(s) were adopted. This is because someone with a large commercial quantity of dilute drugs may cause less harm to the community, but they may still be able to garner considerable revenue from sale of the drugs. From the perspective of potential revenue the defendant may be deemed to have committed a serious action which warrants sanction as a large commercial offender. However if harm is the only rationale for trafficking seriousness, sanctioning such a defendant as a large commercial trafficker may be disproportionate.

Adopting a mixed-based system would thus eliminate some of the systematic disparity between drugs that would be caused by frequent changes in purity, but leave open opportunities for disparity of individual offenders.[2] The primary concern is that this may create incentives to individual dealers to deal in purer quantities. The core question is how likely this is. Knowledge of drug market activity indicates that there are limits to how much traffickers are likely to modify behaviour to evade sanction, particularly if doing so increases time, inconvenience and/or reduces potential profit (Layne, et al., 2001; Matrix Knowledge Group, 2007).

Concerns about incentives to dealers could be ameliorated through the provision of a mixed and pure threshold system. As outlined in the Model Criminal Code (MCCOC, 1998, p. 25) parallel specification of pure and mixed quantities has the advantage that:

- "Commercial/large commercial dealers could not evade liability for higher level offences by dealing in small quantities of undiluted drug; and

[2] It should be recalled that the current ACT threshold system already provides potential for different responses in regards to cannabis. For example, someone with 25,000g cannabis may be trafficking in cannabis containing 1% THC or 6% THC, without distinction made upon sentencing.

- Street level dealers are not deterred from diluting what they sell by the fear of incurring liability for more serious trafficking offences".

Such a proposal has merit as it would allow purity to be considered, in cases where necessary. However, this may leave open the possibility of the defence arguing for the use of the lower liability threshold. Discussions with the South Australian judiciary may shed light on the likelihood of this occurring.