

Looking beyond the government’s response to the recommendation of the Commission of Inquiry into the Drug ‘Ice’ to decriminalise drug possession and use: justification for a citizens’ assembly

By Sean O’Brien

In its final response to the Report of the Ice Inquiry¹, the NSW government led by Premier Dominic Perrottet declined to support the Commissioner’s recommendation to decriminalise the use and possession of prohibited drugs for personal use. Despite taking more than two-and-a-half years, the government’s formal written response failed to articulate a single reason for rejecting that recommendation.² In those circumstances, it is open to speculate that the reason was the desire to avoid any political controversy rather than adopt an evidence-based approach to drugs policy.

The NSW Bar Association in its submission to the Ice Inquiry drew attention to the considerable harms associated with penal drug laws. Such harms include the criminogenic effect of exposure to more serious offenders in jail, hindering or preventing employment, housing and education opportunities, increased risk of mortality, the effect of social stigma on personal wellbeing and relationships, and law enforcement activities which



counteract the implementation of harm reduction strategies.

It is well known that the collateral consequences of penal drug laws impact disproportionately upon individuals and groups who already experience a high degree of social disadvantage, here and overseas – notably those in poor urban and regional areas, African American and Australian

Indigenous people.³ When lauded poet Nasir bin Olu Dara Jones (aka ‘Nas’) imagined ruling the world, not only did he picture people like him walking the streets without being arrested for using cannabis, but also, ‘going to court with no trial’.⁴ That is, having the life opportunities that could lead them to appearing in court in a role other than as the accused. Conversely, the increased likelihood of that not happening where drug prohibition laws are implemented, partly justifies Nas in concluding, ‘Evidently, it’s elementary, they want us all gone eventually.’⁵

UK barrister and academic Jamie Susskind discusses the nature and function of deliberative ‘mini-publics’ in his recently published book, *The Digital Republic*.⁶ Acting much like a jury, such bodies are called upon to consider, deliberate and decide upon intractable political issues. Rather than simply reinforce entrenched ideas and prejudices, a deliberative mini-public is premised upon the ability of people to change their minds through listening to



Commissioner Dan Howard SC with the Report in hand (centre), President of the NSW Law Society, Joanne van der Plaats (left) and President of the NSW Bar Association, Gabrielle Bashir SC (right)



African American poet Nasir bin Olu Dara Jones aka Nas, c. 1998

others, weighing competing arguments, examining the presented evidence and reaching a conclusion in an environment of mutual respect. The available evidence suggests that:

With balanced information, expert testimony and careful facilitation, people grow less extreme, less wedded to the dictates of identity, less reliant on partisan framing and more inclined to change their minds.⁷

De-politicisation of the subject matter is crucial for resolving what has become an intractable political issue. A possible flaw of the Report may have been to seek to depoliticise the subject matter by appealing to the compassion of politicians to effect drug law reform. It is a notorious fact that the compassion bone of a politician instantly dissolves upon exposure to a hint of political risk causing total spinal collapse.

A mini-public may take different forms and its decision can be binding or put to a referendum or parliamentary committee for consideration. It provides a forum for people's voices to be heard on matters affecting their lives that cannot so easily be buried in a report, and casts a brighter and wider beam upon the law's unjust operation and effect. As one Dublin nurse observed

about the Irish Citizens' Assembly on the prohibition of abortion:

'It got balanced and truthful information out among the people of Ireland.'⁸

A Dublin engineer commented:

'The facts brought logic to an apparently intractable issue.'⁹

And an education worker from County Louth stated:

'It took the debate out of the realm of fearful self-interested calculation.'¹⁰

Susskind points out that a transparent and fair process of deliberation engenders respect for the outcome.

Between 2012 and 2014 the Irish Constitutional Convention deliberated upon the legalisation of same-sex marriage. Of the ninety-nine members, two-thirds were randomly selected citizens and one-third selected by political parties. Since 2016 all members of the successor body, known as the Citizens' Assembly, have been randomly selected citizens. The rationale for random selection is to ensure participants are there in their own right, not as lobbyists for vested interests or to represent political parties.¹¹

The Convention's deliberations paved the way for a referendum to amend the constitution in 2015. The result was 62.07% in favour of legalising same-sex marriage¹², leading to the enactment of the *Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015*.

That was in striking contrast to the prediction made by a parliamentary committee in 2006. In the course of conducting hearings concerning the legal definition of the family and the rights of same-sex couples to marry, the committee received a large volume of written submissions, around 60% of which were against constitutional change to permit same-sex marriage.¹³ It concluded that a referendum to amend the constitution to permit same-sex marriage was doomed to fail.

Between 2016 and 2018 the Irish Citizens' Assembly was convened to deliberate upon one of the most divisive and difficult topics in public life in Ireland – removing the constitutional prohibition on abortion. The chairperson observed:

The importance of structuring a discussion, which was balanced, fair and above all informative and evidence based, was the guiding principle with which I undertook all of our work at the Assembly.¹⁴



Meeting of the Irish Citizens' Assembly, 2016

Procuring or facilitating an abortion had been a criminal offence in Ireland since at least the *Offences against the Person Act 1837*. The law took a compassionate turn with the passage of the *Offences against the Person Act 1861* when the death penalty was replaced with penal servitude for life. In 1983 an amendment to the Constitution of Ireland, approved by referendum, inserted an acknowledgement and guarantee of the 'right to life of the unborn, with due regard to the equal right to life of the mother', known as the Eighth Amendment. The legal effect of the amendment was that abortion was constitutionally prohibited except in cases of medical emergency where the life of the mother was threatened.

The chairperson described the informed and evidence-based approach taken by the Assembly in its deliberations on the Eighth Amendment:

*We began our consideration of this topic by looking at the current position with regard to the Eighth Amendment: tracking a history of the development of the law in Ireland; and then hearing first hand from medical practitioners about how the current legislation... operates in practice in Irish hospitals. This grounding provided to the Members was given without commentary as to the perceived advantages or disadvantages of the Eighth Amendment.*¹⁵

The Assembly's recommendations led to a referendum in which a majority voted to remove the Constitutional prohibition on abortion. It can be seen that a properly informed assembly of citizens is capable of deliberating upon issues involving a certain degree of legal as well as moral complexity.

Such has been the success of the Citizens' Assembly that in 2023 it will be convened to deliberate upon drugs policy, potentially paving the way for decriminalisation. The minister for health and national drugs strategy recognised the appropriateness of involving citizens in decision-making on drugs policy, consistent with a health-led response to drug use, given that it affects all members of society, directly or indirectly, and imposes very significant social and financial costs.¹⁶

There is evidence suggesting that the Perrottet government's response to the recommendation for decriminalisation fails

to reflect the views of most electors. In 2021, a poll taken in five NSW electorates held by government MPs confirmed that 78% of people were against criminal sanctions for the possession of small quantities of illegal drugs.¹⁷ Further, the 2019 National Drug Strategy Household Survey revealed a significant increase in the number of Australians supporting legalisation of cannabis use. Whereas in 2013 only 26% of Australians supported such a measure, in 2019 the number in support increased to 41% – the first time since the annual survey began in 1998 that more people supported legalisation of cannabis than opposed it.

While political stasis on this issue abides in NSW, the national and international trend towards decriminalisation continues apace. Recently that trend gained powerful momentum when the President of the United States pardoned historical federal convictions for simple possession of marijuana. He remarked that since 1965 nearly 29 million Americans had been arrested for marijuana related violations, for conduct most voters no longer believed ought to be a crime, and that criminal sanctioning had failed to achieve its objectives.¹⁸ He said the pardon was aimed at helping, 'relieve the collateral consequences arising from these convictions', and added that, 'no one should be in jail just for using or possessing marijuana'.¹⁹ It seems that in America reality is beginning to mirror Nas's dream.

In Australia, the Australian Capital Territory continues to lead the way on drug law reform, recently decriminalising the possession and use of small quantities of illicit drugs, including heroin, speed and cocaine. The health minister's view was that this was consistent with expert advice that a health-based approach to harm-reduction delivers the best outcome for drug users, rather than criminal sanction.²⁰ That reform follows the decriminalisation in early 2020 of possession and use of small quantities of marijuana.

Such reforms and their consequences would be appropriate matters for a NSW citizens' assembly to take into account in its deliberations.

The government's failure to support decriminalisation can be seen as a failure

to take an evidence-based approach to drug policy as well as a failure of political will to enact laws that reflect the widespread view of electors who are against criminal sanction for the use and possession of prohibited drugs. A citizens' assembly could play an important role in requiring or at least convincing the government to adopt an evidence-based approach to law-making on this issue consistent with the objective of harm reduction.

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ENDNOTES

- 1 Report of the Special Commission of Inquiry into the Drug Ice.
- 2 The NSW government's response to the Special Commission of Inquiry into the Drug ice, p. 8, Recommendation 11 'Not supported', <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/Final-Government-Response-to-the-Special-Commission-of-Inquiry-into-the-Drug-Ice-September-2022.pdf>
- 3 See for example, Alana Rosenberg, Allison Groves, and Kim Blankenship, 'Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming', *J Drug Issues*, 2017; 47(1): 132–142.
- 4 Nas featuring Lauryn Hill, 'If I Ruled the World (Imagine That)', *It was Written*, 1996, Colombia Records.
- 5 As above.
- 6 Jamie Susskind (Bloomsbury Publishing, 2022).
- 7 Susskind, p. 157.
- 8 Caroline Bannock, "'Transparency and fairness': Irish readers on why the Citizens' Assembly worked", *The Guardian*, 22 January 2019 <https://www.theguardian.com/commentisfree/2019/jan/22/irish-readers-citizens-assembly-worked-brex>
- 9 As above.
- 10 As above.
- 11 David Farrell, Clodagh Harris, Jane Suiter, 'The Irish vote for marriage equality started at a constitutional convention', *Washington Post*, 5 June 2015, <https://www.washingtonpost.com/news/monkey-cage/wp/2015/06/05/the-irish-vote-for-marriage-equality-started-at-a-constitutional-convention/>
- 12 Wikipedia, 'Same-sex marriage in the Republic of Ireland', https://en.wikipedia.org/wiki/Same-sex_marriage_in_the_Republic_of_Ireland
- 13 As above.
- 14 First Report and Recommendations of the Citizens' Assembly, 2017, p.1.
- 15 As above, p.2.
- 16 Citizens assembly on drug use pushed to 2023, *Irish Legal News*, 7 March 2022 <https://www.irishlegal.com/articles/citizens-assembly-on-drug-use-pushed-to-2023>
- 17 Uniting Life, 'The results are in! More than 78% of people from key seats in NSW are against criminal sanctions for minor drug possession', <https://www.uniting.org/blog-newsroom/uniting-life/fair-treatment-drug-law-reform/against-criminal-sanctions-for-minor-drug-possession>
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- 19 As above.
- 20 Australian Associated Press, 'ACT becomes first Australian jurisdiction to decriminalise illicit drugs in small quantities', *The Guardian*, 20 October 2022 <https://www.theguardian.com/australia-news/2022/oct/20/act-becomes-first-australian-jurisdiction-to-decriminalise-illicit-drugs-in-small-quantities>