

## 4 Case Studies of Cannabis Law Reform

### 4.1 Introduction

This chapter examines some of the key processes that have occurred to reform the law concerning minor cannabis offences in WA, the UK and NZ since the 1970s. These three jurisdictions have been selected as they have similar political and parliamentary systems, share a common legal heritage<sup>323</sup> and in relation to drug laws, have a very similar trajectory in the evolution of drugs laws and policies that have been adopted.<sup>324</sup>

Our interest in examining the UK and WA is that reform through the parliamentary process resulted in legislation to establish a legal framework in early 2004 for police to have alternatives to prosecute minor cannabis offenders, whereas in NZ legislative reform has so far not occurred in spite of similar debates about policy reform. Although NZ may have progressed a short distance along the road to cannabis law reform, this has been confined to administrative measures for limited formal cautioning of minor cannabis offenders.

The interest in NZ is how reform has been stymied largely due to political constraints because of the leverage by minority parties who used their position to enable Helen Clarke to form a minority Labour government, but included restrictions on cannabis law reform in the enabling agreement. The NZ situation also demonstrates the value and importance of non-parliamentary avenues to create support for reform when the parliamentary process is unable to implement legislative reform.<sup>325</sup>

A number of threads evident in these three jurisdictions will be examined. One thread concerns the strength and advantages a government having control of the parliamentary process to reform cannabis laws. In the UK as the Labour government had an absolute majority, it was relatively unfettered in what it could achieve, whereas in WA and NZ the role of minor parties was (and continues to be in the case of NZ) a critical factor for government to achieve reform through legislative means.

Another thread is the tension of whether reform of cannabis laws should be regarded as a process of being largely based on 'objective' evidence from scientific and research activity or whether reform should be primarily regarded as involving the adjudication of ethical values and philosophical principles. This tension is most clearly demonstrated by a debate of whether doctors should be licensed to be prescribed cannabis for medicinal purposes. As will be shown, in these three jurisdictions, government has relied extensively on expert *ad hoc* groups and parliamentary inquiries as mechanisms to negotiate this tension.

These three jurisdictions have a number of similarities. These include how controlled (ie 'illicit') drugs are administered by police, whereas pharmaceutical drugs are administered by health authorities and the Misuse of Drugs Acts have similar categories of offences and arrangements for scheduling groups of drugs according to perceived harmfulness. Also in each jurisdiction there is a system for licensing doctors<sup>326</sup> to prescribe opioid replacement pharmacotherapies to registered addicts.<sup>327</sup> In each jurisdiction the prescribing of substitute opioids to heroin dependent individuals has been embraced (in contrast to the US), referred to

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<sup>323</sup> Western Australia and New Zealand are former colonies of the United Kingdom.

<sup>324</sup> The UK's first piece of legislation which prohibited drugs such as opium and heroin was the *Dangerous Drugs Act 1920*, in New Zealand it was the *Dangerous Drugs Act 1927* and in WA it was the *Police Offences (Drugs) Act 1928*. In the UK the *Misuse of Drugs Act 1971* repealed the *Dangerous Drugs Act* and related laws, New Zealand followed suit with the *Misuse of Drugs Act 1975* and in WA with the *Misuse of Drugs Act 1981* (which transferred drug offences previously in a section of the *Police Act 1892*).

<sup>325</sup> A general election was held in New Zealand in October 2005.

<sup>326</sup> Under health legislation.

<sup>327</sup> Police Foundation. *Drugs and the law: Report of the independent inquiry into the Misuse of Drugs Act 1981*. (Runciman Chairman) London, Police Foundation, 2000, Ch 1.

as the ‘British system,’ to treat drug dependent individuals.<sup>328</sup> The 1924 Rolleston Committee in the UK formalised this system, by stating the principle that “*addiction is a disease ... that may in some cases require treatment by the prescription of the drug of addiction, either as a prelude to withdrawal or as a form of maintenance of an incurable condition.*”<sup>329</sup>

The fact that in these three jurisdictions the principal legislation concerned with illicit drugs is called the Misuse of Drugs Act further underscores the close correspondence between the philosophical approaches and the legal and administrative frameworks in each jurisdiction which defines and regulates the use of illicit drugs. The cornerstone of all three jurisdictions is that the policy structure is underpinned by

*“an essentially medical view of the world. This is reflected in the continued dominance of the ‘disease’ model of ‘addiction’ and is enshrined in existing legislation. The Misuse of Drugs Act 1971 established a legal framework within which illicit substances are classified according to their perceived dangerousness/harmfulness and, while legal classification has become increasingly contested, the medicalised philosophy which underpins the existing system has remained largely unchallenged.”*<sup>330</sup>

The approach for the 2004 reforms in the UK, achieved by reclassification of cannabis from a Class B drug to a Class C drug, highlights the dominance and continuing adherence to this medicalised model.<sup>331</sup> The perception that cannabis is still a drug with some degree of dangerousness can be contrasted with the regulatory framework in each country concerning alcohol and tobacco.

Whilst these case studies are principally concerned with identifying the processes by which cannabis law reform has occurred and what other factors have driven and sustained reform in these three jurisdictions, it is suggested that the outcomes may also be of value to those in other jurisdictions interested in law reform, as many of these drivers are common to other jurisdictions.

### 4.1.1 International character of law reform

Western Australia (through the Australian federal government),<sup>332</sup> NZ and the UK have been long standing adherents to drug prohibition in concordance with all other nations. This framework was initially developed in 1909 by a meeting of the Opium Commission in Shanghai and subsequently ratified in 1912 as the Hague Convention.<sup>333</sup> The primary purpose of these early measures was to control the production of opium, subsequently expanded in the 1920s to encompass other substances, including cannabis.

In a history of the introduction of the provisions of the 1925 Convention into domestic law it is noted that the US, which was the major force behind the failed attempt to have cannabis

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<sup>328</sup> Manderson DRA. ‘Rules and practices: the ‘British system’ in Australia.’ (1992) 22 *Journal of Drug Issues* 521-533.

<sup>329</sup> Stimson GV. ‘Treatment or control? Dilemmas for staff in drug dependency clinics.’ In West DJ (ed). *Problems of drug abuse in Britain*. Cambridge, Institute of Criminology, University of Cambridge, 1978, 55.

<sup>330</sup> Shiner M. ‘Out of harm’s way? Illicit drug use, medicalisation and the law.’ (2003) 43 *British Journal of Criminology* 772.

<sup>331</sup> A recent review has examined the evidence base to the classification of amphetamines, ecstasy, cocaine, cannabis and magic mushrooms with respect to the UK, the USA, the Netherlands and Sweden: Levitt R, Nason E & Hallsworth M. *The evidence base for the classification of drugs*. Santa Monica, CA, RAND Corporation, 2006.

<sup>332</sup> Western Australia belongs to a federation of States. Whilst WA has apparent exclusive power to pass and enforce criminal laws, through the national government’s power under the Commonwealth Constitution to enter into treaties and conventions - the Commonwealth’s foreign relations power - the provisions in treaties and conventions ratified by the Commonwealth will only have effect in WA if the Western Australian government is prepared to enact laws which give effect to such provisions. This means that a State such as WA could have a greater degree of latitude than apparent in being able to pass laws which may offend or avoid the requirements of the treaties or conventions.

<sup>333</sup> Musto DF. ‘Opium, cocaine and marijuana in American history.’ *Scientific American*, July 1991, 20-27.

included in the 1912 Hague Convention, was able in the mid 1920s with the support of South Africa, Egypt and Turkey, to have cannabis included, without scientific inquiry, into the 1925 Convention.<sup>334</sup> Thus it would appear the grouping of cannabis alongside harmful drugs such as heroin, occurred either because of a misunderstanding of the intent of the 1925 Convention or was a consequence of increasing emphasis on the criminalising the prohibition of these particular drugs due to strong pressure from the US.

It has been argued the 1925 Convention imposes only a limited obligation upon signatories to enact measures limited to medical and scientific purposes involving Indian hemp, with the remaining obligations being merely to

*“control the import and export of the dried flowering or fruiting tops of the pistillate plant cannabis sativa from which the resin has not been extracted and to prohibit or exercise effective control over the export of the resin extracted from Indian hemp as well as the preparations of which the resin formed the base.”<sup>335</sup>*

The Conventions between 1912 and 1925 plus later treaties were consolidated in 1961 and then extended by two further UN treaties in 1971 and 1988 to include additional areas and classes of drugs.<sup>336</sup> The operation of the rigid and complex regulatory system prohibiting the use of cannabis and other drugs in Australia and other nations is determined by the operation of the these three UN conventions<sup>337</sup> which establish the international drug control framework.<sup>338</sup>

*“Global drug prohibition is a world wide system structured by a series of international treaties that are supervised by the UN. Every nation in the world is either a signatory to one or more of the treaties, or has laws in accord with them.”<sup>339</sup>*

Australia is bound by the three UN drug conventions, the Single Convention on Narcotic Drugs 1961,<sup>340</sup> the Convention on Psychotropic Substances 1971<sup>341</sup> and the Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.<sup>342</sup> Together these conventions purport to limit acceptable use of drugs to medical or research purposes, which as a noted in a recent review, means that they represent

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<sup>334</sup> Dawkins K. 'Cannabis prohibition: taking stock of the evidence.' (2001) 10 *Otago Law Review* 39-89.

<sup>335</sup> Id, 41.

<sup>336</sup> There is an emerging body of literature critical of the dominant role of these conventions: Albrecht HJ. 'The international system of drug control.' In Gerber J & Jensen EL. (eds). *Drug war, American style. The internationalisation of failed policy and its alternatives*. NY, Garland Publishing, 2001; Bewley-Taylor DR. 'The American crusade: the internationalisation of drug prohibition.' (2003) 11 *Addiction Research & Theory* 71-81; Gerber J & Jensen EL. 'The internationalisation of US policy on illicit drug control.' In Gerber J & Jensen EL. (eds). *Drug war, American style. The internationalisation of failed policy and its alternatives*. NY, Garland Publishing, 2001; Room R & Paglia A. 'The international drug control system in the post Cold War era. Managing markets or fighting a war?' (1999) 18 *Drug & Alcohol Review* 305-315; Ryan KF. 'Toward an explanation of the persistence of failed policy. Binding drug policy to foreign policy 1930-1962.' In Gerber J & Jensen EL. (eds). *Drug war, American style. The internationalisation of failed policy and its alternatives*. NY, Garland Publishing, 2001.

<sup>337</sup> The 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances and the 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

<sup>338</sup> For a description of each Convention see Lenton S, Heale P, Erickson P, Single E, Lang E & Hawks D. *The regulation of cannabis possession, use and supply. A discussion document prepared the Drugs and Crime Prevention Committee of the Parliament of Victoria*. Perth, National Drug Research Institute, 2000 95-104.

<sup>339</sup> Levine HG. 'Global drug prohibition: its uses and crises.' (2003) 14 *International Journal of Drug Policy* 145.

<sup>340</sup> The 1961 Convention came into force generally on 13 December 1964 and came into force for Australia on 31 December 1967: Australian Treaty Series 1967 No. 31.

<sup>341</sup> The 1971 Convention came into force generally on 16 August 1976 and came into force for Australia on 17 August 1982.

<sup>342</sup> The 1988 Convention came into force generally on 11 November 1990 and came into force for Australia on 14 February 1993.

*“a high level of international consensus on a complex policy issue that impacts on different societies in different ways. There is near universal recognition of the gravity of ‘the drug problem’ and a shared recognition that it has an irreducibly global dimension.”*<sup>343</sup>

As a consequence of the Commonwealth Government being a signatory and having ratified each of the three UN Conventions a series of complex and varying laws has been introduced by each of the Australian jurisdictions to implement the minimum requirements of these conventions. There is little consistency in the legislation passed by the States and Territories as in each jurisdiction drug laws have been driven by local factors, measures to counteract and anticipate emerging local and national trends and issues involving the use of cannabis and other drugs. In addition to separate laws concerned with prohibited drugs in each jurisdiction, there is a raft of complex Commonwealth, State and Territory laws covering other matters, such as confiscation of the proceeds of crime and money laundering.<sup>344</sup>

Because of the interlinked relationship between domestic and international debate about reform, discourse about law reform in a specific jurisdiction inevitably includes references to and acknowledges DLE developments in other jurisdictions. The dominance of the UN framework means that reform in one jurisdiction are likely to be of significance in other signatory countries and an exemplar of how policies may apparently conform to the strictures of the UN conventions by adapting to domestic circumstances and values. There is also a sequential nature to drug reform as innovations and investigations undertaken in one jurisdiction tend to be built upon and developed by subsequent reforms in other countries.

However, the strictures from the UN drug conventions have attracted growing criticism, as it has been recognised the possibilities for law reform and policy development in jurisdictions like WA, NZ and the UK can be constrained by the extent to which legislators believe they have to defer to these conventions. In practice the majority of jurisdictions have adhered closely to the principles embodied in an international prohibition framework concerning both naturally occurring drugs (such as cannabis) and synthetic drugs.<sup>345</sup>

*“There is ... a North American bias in both drug policy and drug policy research. This bias takes many forms and contains a number of contradictions. Global drug policy, for instance, is being marketed to the general public as an emanation of the global villagers' *volonté générale*, while serious analyses convincingly show that it really rests on a highly coercive consensus masterminded by just one international moral entrepreneur: the United States. Had it not been for a century of big stick diplomacy, contemporary ‘narcotics control’ would display the diversity of present day alcohol controls instead of the uniformity of international conventions.”*<sup>346</sup>

It has been argued that the dominance by the US and the key UN bodies responsible for implementation of the various drug conventions, the INCB and the UN Drug Control Program (UNDCP), has meant that policy development in Australia and other signatory nations has been substantially hampered.

*“Both the UNDCP/INCB and the government of the USA have explicit policies that other nations should apply their (prohibitionist) approaches to drugs in society. The provisions of the international treaties recognising that legislation and its enforcement may reflect the*

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<sup>343</sup> Roberts M, Klien A & Tace M. *Towards a review of global policies on illegal drugs*. Report One. Beckley Foundation, Drug Policy Program, 2004.

<sup>344</sup> It has been argued that the Commonwealth would probably be able to legislate to enable it to exclusively cover drug offences in Australia. Cf: Brown R. ‘Federal drug control laws: present and future.’ (1977) 8 *Federal Law Review* 435-452.

<sup>345</sup> For a comprehensive review of the historical progression in the development of the international framework, see Chapter 19 ‘The international legal environment.’ Volume III in Canada, Parliament, Senate, Special Committee on Illegal Drugs. *Cannabis: our position for a Canadian public policy*. (3 Vols). Ottawa, Canadian Parliament, 2002.

<sup>346</sup> Scheerer S. ‘North American bias and non American roots of cannabis prohibition.’ In Böllinger L (ed). *Cannabis science: From prohibition to human right*. Frankfurt, Germany, Peter Lang, 1997.

*cultures of individual nations is generally ignored. In this context, it is worrying that many nations have incorporated the Conventions into domestic law without critical examination of (1) the implications of doing so and (2) the potential usefulness, for individual nations, of the provisions which apparently permit deviation from total prohibition where this reflects local cultures.*"<sup>347</sup>

There is also concern that policy makers in a jurisdiction may uncritically apply research and principles developed according to the specific historical, social, ethnic and legal circumstances in the US. An example is the centrality of the concept of zero tolerance in American drug policy – embodied in the so called ‘War on Drugs’. There have been some divergence from the dominant principles of zero tolerance in some US States, as in spite of the overarching framework of prohibition applied at a Federal level, individual States are able to enact laws for dealing with minor offences whilst still remaining with the prohibition framework.<sup>348</sup> However, as toleration of divergence from Federal law depends on the extent to which the Federal government has been prepared to enact laws to override state legislation, only limited reforms have occurred.

Over the past three decades a number of major North American inquiries have identified the policy options to regulate the use and availability of cannabis and other drugs. Two of these inquiries, the Shafer National Commission on Marihuana and Drug Abuse (NCMDA)<sup>349</sup> and the Le Dain inquiry<sup>350</sup> are of particular significance. Both reported in 1972 to the American and Canadian Federal governments respectively and although they provided an impetus for rethinking cannabis policy in other jurisdictions, ironically had limited influence in bringing about the reforms they recommended in their own jurisdictions.

It has been noted that for the US “*the key triggering event in decriminalisation was the 1972 NCMDA report*”<sup>351</sup> which resulted in reforms of minor cannabis offences in a number of States during the 1970s to ameliorate some of the harshness of prohibition.

*“By early 1978, ten American States had followed this general approach, basically in an attempt to overcome what was seen as the harsh and arbitrary nature of the cannabis laws as applied to users and to reduce sharply the costs of enforcing those laws through the orthodox criminal justice system.”*<sup>352</sup>

Until relatively recently there has been a reluctance to challenge the hegemony of the UN sponsored prohibition framework and for signatory nations such as Australia there is the added complexity of how far individual Australian States may be able to legislate and undertake *de*

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<sup>347</sup> McDonald D. *A focus on the goals of drug policy, not just its form*. Paper presented at International symposium - Regulating cannabis: Options for control in the 21<sup>st</sup> century. Regents College, 5 September 1998.

<sup>348</sup> The American national approach, the ‘War on drugs’, whilst intended to develop and maintain a high level of punitiveness for drug use, may be applied less rigorously at a local level, due to the complex structure of Federal laws, State legislative variations and local level ordinances. For example, in a case study of the activities of a police officer who stationed full time at an American high school, this officer when dealing with cannabis use by students where the amount is less than 10 grams, will issue the student with a minor fine under a local ordinance, whereas for larger quantities or dealing the student will be charged and appear in a county court. Cf: Graff JL. ‘High times at New Trier High. A model school struggles with a vexing issue: kids on pot.’ *Time* 9 December 1996.

<sup>349</sup> United States, National Commission on Marihuana and Drug Abuse. *Marihuana: a signal of misunderstanding*. Washington DC, US Government Publishing Office, 1972.

<sup>350</sup> Canada, Commission on Inquiry Into the Non medical Use of Drugs. *Cannabis*. Ottawa, Information Canada, 1972.

<sup>351</sup> DiChiara A & Galliher JF. ‘Dissonance and contradictions in the origins of marihuana decriminalisation.’ (1994) 28 *Law & Society Review* 48.

<sup>352</sup> South Australia, Royal Commission Into the Non-medical Use of Drugs. *Cannabis: A Discussion paper*. Adelaide, Royal Commission Into the Non Medical Use of Drugs, 1978., 9.

*jure* versus *de facto* reform without being seen as undermining overall Australian commitment to the UN framework of prohibition.<sup>353</sup>

*“Over the past seventy years Australian drug law and policy has developed more as a response to international pressure than as a well targeted response to the dimension and character of the real problems of drug abuse in this country. Drug policy, as it related to opium, then heroin and later cannabis and other drugs used non-medically (ie socially or recreationally primarily by young people) developed as a result of international and national forces.”*<sup>354</sup>

There has been some concern that Australia as a signatory to the three UN drug conventions has lost some of its sovereignty and freedom to develop drug policies and undertake law reform appropriate to its circumstances and preferences. However, a closer examination of the issue indicates there is probably more scope and flexibility than has been recognised in the past for sovereign states to craft their domestic cannabis policy. For instance, Article 36 of the *1961 Single Convention on Narcotics* imposes an obligation upon signatory nations to enact legislation to prohibit drug use and drug trafficking. The *1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* mandates that the possession, purchase or cultivation of illicit drugs for personal use should be made criminal offences by signatories.

*“Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation or narcotic drugs or psychotropic substances for personal consumption.”*<sup>355</sup>

However, in spite of this structure, the 1988 Convention also provides that signatories can implement alternatives to the criminal penalties as part of their domestic law in accordance with the Convention, by distinguishing the relative degree of harmfulness of different drugs.

*“In appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social integration, as well as, when the offender is a drug abuser, treatment and aftercare.”*<sup>356</sup>

It has been noted that with respect to the 1988 Convention that “(t)here is thus considerable flexibility in the requirements of the convention. It is clearly within the terms of the convention to retain criminal sanctions for possession, but not to prosecute or punish the offender.”<sup>357</sup> The possibilities for reform of cannabis law reform in NZ in relation to the obligations and restrictions that may apply through it being a signatory to the 1961 and 1972 Conventions, but not the 1988 Convention, will be examined in further detail below.

### 4.1.2 European developments

Although a detailed review of European developments is beyond the scope of this thesis it should be noted that there is a divergence in approach in continental Europe, ranging from the ‘coffee shop’ policy in the Netherlands under the expediency principle which permits sale of cannabis from registered coffee shops to strict prohibition in Sweden.<sup>358</sup> In spite of the strictures of the UN conventions it can be seen that a range of responses have been developed by a

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<sup>353</sup> Wodak A. ‘The international drug treaties: ‘paper tigers’ or dangerous behemoths?’ (2003) 14 *Journal of Drug Policy* 221-223.

<sup>354</sup> Kirby M. ‘Drugs – an international prohibition?’ (1992) 18 *Commonwealth Law Bulletin* 313.

<sup>355</sup> Article 3, Clause 2.

<sup>356</sup> Article 4 c.

<sup>357</sup> May T, Warburton H, Turnbull PJ & Hough M. *Times they are a-changing: Policing of cannabis*. London, Joseph Rowntree Foundation, 2002, 12.

<sup>358</sup> For a consideration of how the various countries have approached minor drug offences cf: European Monitoring Centre for Drugs & Drug Addiction. *The role of the quantity in the prosecution of drug offences. ELDD comparative study*. Lisbon, European Legal Databases on Drugs, European Monitoring Centre for Drugs & Drug Addiction, 2003.

number of European countries in relation to the issue of dealing with minor cannabis offenders, which have been devised to be within the requirements of the three UN Conventions. See Table 4.<sup>359</sup>

A meeting in Frankfurt in November 1990 attended by representatives from the cities of Amsterdam, Frankfurt, Hamburg and Zurich has been regarded as influential on the course of development of European drug policy. The Frankfurt Resolution, which emanated from this meeting, represents a declaration that the prohibition of drugs exemplified by the American national policy of the ‘War on Drugs’ has failed.

*“Drug using is for the majority of users a temporary part of their biography, which can be overcome within the process of maturing out of addiction. Drug policy may not render this process more difficult, but it must support this process... A drug policy fighting against addiction exclusively with the criminal law and the compulsion to abstinence and offering abstinence only has failed... Criminalisation is a counterpart to drug aid and drug therapy and is a burden for police and justice they cannot carry. ... The aid for drug users must no longer be threatened by criminal law... it is necessary to lay stress on harm reduction and repressive forms of intervention must be reduced to the absolute necessary minimum.”<sup>360</sup>*

The excerpt shows that the perspective advocated by the Frankfurt Resolution bears many of the hallmarks of harm minimisation. For example in the Italian approach, whilst personal possession is no longer a criminal offence, persons who are involved in conduct which would amount to an offence, can be subject to other sanctions, such as the suspension of their driver’s license.<sup>361</sup> See Table 4. For a detailed consideration of approaches within particular European countries also see the NORML study of European drug policy.<sup>362</sup>

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<sup>359</sup> May T, Warburton H, Turnbull PJ & Hough M. *Times they are a-changing: Policing of cannabis*. London, Joseph Rowntree Foundation, 2002, 13.

<sup>360</sup> Gatto C. *European drug policy: analysis and case studies*. NORML Foundation, 1999.

<sup>361</sup> Those in WA who fail to expiate and transferred to the Fines Enforcement Registry process for recovery of unpaid infringement debts.

<sup>362</sup> Gatto C. *European drug policy: analysis and case studies*. NORML Foundation, 1999; Gatto C. *European drug policy: 2002 legislative update*. NORML Foundation, 2003.

**Table 4: European approaches to cannabis offences**

Country	Approach
Italy	Personal possession is not a criminal offence. Civil sanctions such as the suspension of a driver's license are, however, applied. Effectively, Italy has 'decriminalised by law'.
Netherlands	Possession, selling and growing small amounts are not prosecuted. Small amounts (5g or less) are sold through 'coffee shops'. The Netherlands' approach could be viewed as 'grudging toleration.'
Portugal	An individual found in possession of a small amount (not specified) has the drug seized from them and they are referred to a local commission. The commission's remit is to (where possible) divert the individual from prosecution and into treatment. Effectively, Portugal has 'decriminalised by law'.
Spain	Personal possession of less than 50g is not a criminal offence. It may attract a civil penalty or a fine. When an individual is caught in possession, the drug is seized and they are referred to the administrative authorities. Effectively, Spain has 'decriminalised by law'.
Sweden	No distinction is made between drugs that are considered 'hard' and those considered 'soft'. Usual court sentences are a fine or imprisonment for a maximum of six months. Sweden is widely known for its tough stance against drugs and it would appear that cannabis possession will remain – for the foreseeable future – within the criminal law.
Switzerland	Proposed legislation will legalise consumption of cannabis. Only adult Swiss residents will be able to purchase Swiss grown cannabis. The Government is to place greater emphasis on drug prevention policies, and will decide in the near future what quantities and prices will be acceptable. Switzerland – if proposals go ahead – will effectively have 'decriminalised by law'. <sup>363</sup>
France	Both simple possession and (uniquely) use are prohibited and punishable by one year's imprisonment and/or 4,000 Euros. However, in practice, those found in possession of small amounts receive a warning which is often accompanied by a suggestion (from the police) to attend a social or health service. This process is termed 'no further action with orientation'.
Germany	Possession is a criminal offence. However, the Public Prosecutor retains the right not to prosecute where the amount is small and for personal use and it is not in the public interest to prosecute.
Belgium	Possession of less than 5 grams cannabis, or anyone smoking cannabis in private will no longer be prosecuted from 27 March 2003. <sup>364</sup>

**Source:** Adapted from May T, Warburton H, Turnbull PJ & Hough M (2002). Table 1.

### 4.1.3 Law reform developments in other jurisdictions

The progress of drug law reform is influenced by contemporaneous policy developments in some jurisdictions, which in turn stimulates law reform in other jurisdictions which continue to maintain a strict prohibition framework. There are also eras when paradigm shifts have triggered reform elsewhere, such as the Shafer Commission (ie NCMDA) in the US, which was commissioned by President Richard Nixon and which presented its first report on cannabis law reform options in March 1972.<sup>365</sup>

The NCMDA was a watershed and recommended major reforms, including that cannabis should cease to be prohibited and that a social control policy be developed to discourage cannabis use, while concentrating primarily on the prevention of problematic drug use. Its key recommendation was based on the recognition that prohibition through the criminal law, which had placed cannabis in the Schedule I (ie most restrictive) group of drugs, was fundamentally flawed and that instead cannabis should be decriminalised.

*“The criminal law is too harsh a tool to apply to personal possession even in the effort to discourage use. It implies an overwhelming indictment of the behaviour which we believe is not appropriate. The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behaviour, a step which our society takes only with the greatest reluctance.”<sup>366</sup>*

<sup>363</sup> However in June 2004 the Swiss parliament refused to undertake proposed reform: Oomen J. *Cannabis legislation and practice in Europe*. Antwerp, ENCOD, 2004. It is also noted that in Switzerland as there are 26 Kantone (states), there are in effect 26 different drug policies.

<sup>364</sup> 'Belgium decriminalises cannabis.' (2003) 326 *British Medical Journal* 728.

<sup>365</sup> National Commission on Marihuana and Drug Abuse. *Marihuana: a signal of misunderstanding*. (Shafer chairman). Washington DC, Office of US President, 1972.

<sup>366</sup> Wikipedia. *National Commission on Marihuana and Drug Abuse*.

A study of the cannabis decriminalisation reforms during the 1970s in 11 American states<sup>367</sup> has found wide variance in the approach undertaken of the scope of reform and of the role played by groups and consultative bodies in achieving reform. A key factor was that if cultivation was included as part of a proposition to effectively decriminalise minor cannabis offences this would result in failure.

*“No matter what the traditions of the local political culture, if the bills proposed violated the narrow boundaries of successful decriminalisation legislation, the initiative inevitably failed. For example, in Virginia a legislative subcommittee recommended removing jail terms for marihuana possession and cultivation. The proposal got nowhere. Suggesting that cultivation be treated the same as simple possession apparently was beyond the bounds of possible reform.”*<sup>368</sup>

The Canadian Commission of Inquiry into the Non-Medical Use of Drugs (the Le Dain Commission) was established in 1969 to consider a wide range of drug issues and reported to the Canadian government in 1970.<sup>369</sup> It adopted a different approach to the Shafer Inquiry in relation to cannabis and argued against liberalisation of the law, as it believed cannabis should be prohibited because decriminalisation would result in increased levels of use. It was also considered that the long term effects of cannabis use posed a particular risk for young people who used the drug.

More recently in the UK there have been a number of reviews which have examined the operation of the legal framework prohibiting drugs. The most notable of these has been the 2000 Runciman inquiry under the auspices of the Police Foundation, which undertook a considered investigation of the operation of the UK’s *Misuse of Drugs Act 1971*. The Runciman inquiry dealt with a large range of issues, including the specific issue of cannabis law reform, recommending that cannabis should be reclassified to schedule in the *Misuse of Drugs Act 1971* to more closely reflect its lower level of harm compared to other drugs.<sup>370</sup>

In Australia the need for reform of minor cannabis laws was tackled along with other drug issues by the Royal Commission Into the Non Medical Use of Drugs, chaired by Professor Ronald Sackville, which reported to the South Australian Dunstan Labor government in 1978.<sup>371</sup> In 1993 and 1994 a total of five studies, which provide a unique body of research addressing many of the issues and dimensions of cannabis use in Australia, were produced by the National Task Force on Cannabis which had been established by the Keating Australian Labor Party (ALP) Commonwealth government.<sup>372</sup>

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<sup>367</sup> Eleven states which decriminalised: Oregon (1973), Alaska, Maine, California, Colorado and Ohio (1975), Minnesota (1976), Mississippi, New York and North Carolina (1977) and Nebraska (1978). No states have decriminalised since 1978 and in 1990 Alaska recriminalised cannabis. Cf: DiChiara A & Galliher JF. ‘Dissonance and contradictions in the origins of marihuana decriminalisation.’ (1994) 28 *Law & Society Review* 41-77.

<sup>368</sup> DiChiara A & Galliher JF. ‘Dissonance and contradictions in the origins of marihuana decriminalisation.’ (1994) 28 *Law & Society Review* 63.

<sup>369</sup> Canada, Commission of Inquiry Into the Non-Medical Use of Drugs. (LeDain Chair). *Interim report: the non-medical use of drugs*. Harmondsworth, England, Penguin, 1971.

<sup>370</sup> Police Foundation. *Drugs and the law: Report of the independent inquiry into the Misuse of Drugs Act 1981*. (Runciman Chairman) London, Police Foundation, 2000.

<sup>371</sup> South Australia, Royal Commission Into the Non-medical Use of Drugs. *Cannabis: A Discussion paper*. Adelaide, Royal Commission Into the Non Medical Use of Drugs, 1978.

<sup>372</sup> Bowman J & Sanson-Fisher R. *Public perceptions of cannabis legislation*. Monograph Series No. 28. Canberra, Australian Government Publishing Service, 1995; Donnelly N & Hall W. *Patterns of cannabis use in Australia*. Monograph Series No. 27. Canberra, Australian Government Publishing Service, 1995; Hall W, Solowij N & Lemon J. *The health and psychological consequences of cannabis use*. Monograph Series No. 25. Canberra, Australian Government Publishing Service, 1995; Hall W. *Public perceptions of the health and psychological consequences of cannabis use*. Monograph Series No. 29 Canberra, Australian Government Publishing Service, 1995; McDonald D, Moore R, Norberry J, Wardlaw G & Ballenden N. *Legislative options for cannabis in Australia*. National Drug Strategy Monograph No. 26. Canberra, Australian Government Publishing Service, 1994.

In 1994 the MCDS commissioned a research program to specifically examine the CEN scheme by funding the *Social impacts of the cannabis expiation scheme in South Australia*, which culminated in the publication in 1999 of a set of studies on the operation of the scheme.<sup>373</sup> A recent examination of the possible options for reforming cannabis laws was dealt with in a report commissioned by the Victorian Parliament's Drugs and Crime Prevention Committee which was published in April 2000.<sup>374</sup>

## **4.2 Case study 1: Western Australia**

### **4.2.1 Introduction**

The cannabis law reforms in WA that resulted in the CIN scheme were the culmination of a decade of intense policy debate, at both a State and national level, split largely along party political lines ie conservative (Liberal Party and National Party) versus progressive (ALP).

In 1992 the Commonwealth Government had sponsored the National Task Force on Cannabis through the National Drug Strategy Committee to conduct a wide ranging inquiry into cannabis use in Australia, including options for law reform.<sup>375</sup> However, the National Task Force report was not favourably received by the incumbent conservative government in WA. Further consideration of cannabis law reform stalled in the early 1990s due to increased community concern in WA about the growing use of illicit drugs, particularly evidence of increasing levels of heroin related mortality and morbidity.

In 1994 the Court Liberal State government, which was elected in February 1993, established the Task Force on Drug Abuse (TFDA) to undertake a review of issues involving alcohol, tobacco and illicit drugs in WA and to suggest reforms. In relation to cannabis the TFDA recommended to the Government in its September 1995 report that policy concerning this particular drug should “*reflect unambiguous opposition to the use of cannabis and actively seek to discourage its use and entail continuing focus by law enforcement agencies on higher level traffickers and street dealers.*”<sup>376</sup>

The TFDA observed that during community consultations it had found strongly polarised views on the issue of cannabis law reform, with a

*“forceful case ... mounted by campaigners for the decriminalisation or legalisation of cannabis that there should be a radical change in the State’s approach and that such a change was inevitable ... (whereas on the other hand there were) a large number of submissions and views put at public hearings vehemently opposed (to) any revision to cannabis’ status as an illegal drug.”*<sup>377</sup>

Whilst not accorded the status of being a recommendation, there was also a suggestion, in response to evidence of the adverse social impact of the conviction for a minor cannabis offence, that “*the Police Department should examine the area of formal cautioning for simple cannabis offences, and report back to government on this issue.*”<sup>378</sup>

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<sup>373</sup> Ali R, Christie P, Lenton S, Hawks D, Sutton A, Hall W & Allsop S. *The social impacts of the cannabis expiation notice scheme in South Australia. Summary report presented to the Ministerial Council on Drug Strategy 4 May 1998.* Canberra, Department of Health & Aged Care, 1999.

<sup>374</sup> Lenton S, Heale P, Erickson P, Single E, Lang E & Hawks D. *The regulation of cannabis possession, use and supply. A discussion document prepared the Drugs and Crime Prevention Committee of the Parliament of Victoria.* Perth, National Drug Research Institute, 2000.

<sup>375</sup> Atkinson L & McDonald D. *Cannabis, the law and social impacts in Australia.* Trends and Issues No. 48, Australian Institute of Criminology, 1995.

<sup>376</sup> Western Australia, Task Force on Drug Abuse. *Protecting the community. Volume 1: Reviews and recommendations.* Perth, Ministry of Premier & Cabinet, 1995, 244.

<sup>377</sup> Id, 189.

<sup>378</sup> Id, 198.

In June 1997 a Parliamentary Select Committee of the Legislative Assembly was established (by a Liberal and National Party government), in response to rising community concern about increasing heroin related deaths in WA. The overall emphasis of this investigation, as outlined in the first report of the Select Committee, was to strengthen police powers and activity in relation to serious levels of crime through amendment of the MDA.<sup>379</sup>

The issue of cannabis law reform was addressed in a minority report by the Committee's two Labor (Opposition) members, Hon. Jim McGinty (now Attorney General in the incumbent Labor government) and Hon. Megan Anwyl. The minority report forcefully argued that as the law in WA had been ineffective in stopping or containing the cultivation, possession and use of small amounts of cannabis, it should be reformed by establishing a scheme to expiate minor offences, along the lines of the South Australian CEN scheme.

### 4.2.2 Community Drug Summit

The election of the Gallop Labor government in February 2001 signalled the possibility of legislative reform of minor cannabis offences in WA. The ALP had included in its pre-election platform a commitment to convene a 'community drug summit' to canvass the depth of support in the community for drug policy reform, including cannabis law reform.

*"We propose a decriminalised regime which would apply to the possession of 50 grams of cannabis or less and cultivation of no more than two plants per household. A person who admitted to a simple cannabis offence would be issued with a cautioning notice as a first offence, be required to attend an education and counselling session for a second offence or, in lieu of accepting that option, face a fine as a civil offence, and be fined for any subsequent offence."<sup>380</sup>*

The WA drug summit was held in August 2001 and consisted of a total of 100 delegates, 80 'community representatives' from public nominations plus a further 20 appointed because they possessed specialist experience in areas such as policy, service delivery or research.

Recommendation 39 of the drug summit, which supported the creation of a scheme to avoid minor cannabis offenders being charged with an offence, referred to as being a system of 'prohibition with civil penalties' for adults who either possessed or cultivated 'small amounts of cannabis'. The full text of Recommendation 39 is as follows:<sup>381</sup>

*"For adults who possess and cultivate small amounts of cannabis the government should adopt legislation that is consistent with prohibition with civil penalties, with the option for cautioning and diversion. For those under 18 years old, the government needs to take the best possible steps to avoid young people commencing cannabis use (eg prevention and other effective strategies).*

*The same principles (as adults) of prohibition with civil penalties should be provided, with the expansion of options for cautioning and diversion to education or treatment programs and coercive treatment options should be available, that include the opportunity for parents and carers to influence outcomes. Implementation of these resolutions needs to be accompanied by:*

- *education for the public;*
- *this will include education on the implications of the legislation, education on the risks of cannabis use/misuse in general and in specific circumstances (eg for people*

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<sup>379</sup> Western Australia, Parliament, Legislative Assembly, Select Committee Into the Misuse of Drugs Act 1981. *Taking the profit out of drug trafficking. An agenda for legal and administrative reforms in Western Australia to protect the community from illicit drugs.* Perth, Western Australia, Legislative Assembly, 1997.

<sup>380</sup> Australian Labor Party, WA Branch. *Drugs and crime direction statement.* 2000.

<sup>381</sup> Working Party on Drug Law Reform. *Implementation of a scheme of prohibition with civil penalties for the personal use of cannabis and other matters.* Perth, Drug and Alcohol Office, 2002, Appendix 1.

- who are vulnerable to mental health problems, for people who may be operating machinery, including vehicles) and education on available treatment options;*
- *the evaluation and monitoring of the impact of this legislation on patterns of cannabis use and related harms and coincidentally there should be routine monitoring of potency of available cannabis;*
  - *the re-affirmation of relevant responsibilities and legislation (eg preventing intoxication while driving, preventing intoxication while at work); and*
  - *to measure the overall impact of cannabis in the community, the Government should implement a comprehensive scheme to collect data through the health and justice systems.”*

This recommendation supported the model proposed in the ALP’s pre-election manifesto, accompanied by an over prescriptive statement that sought to outline the rationale for a legislatively based system for the expiation of minor cannabis offences.

### **4.2.3 Legislative process**

In December 2001 the Minister for Health appointed the Drug Law Reform Working Party (DLRWP) to advise him on a model to expiate minor cannabis offences consistent with the objectives in Recommendation 39. In its report to the Minister in March 2002 the DLRWP reviewed the operation of the three established Australian schemes and identified areas of shortcomings of those schemes which the proposed WA scheme should overcome. It made a total of 22 recommendations, two of which outlined the core aspects of the CIN scheme as follows.<sup>382</sup>

*That an offender will be eligible to receive a cannabis infringement notice (CIN) if they possess a ‘small amount of cannabis’, which is defined as being two growing plants and/or a total of up to 30 grams of cannabis. [page 6]*

*That there be graduated penalties for the possession of cannabis, with a penalty of \$100 for the possession of not more than 15 grams of cannabis and a penalty of \$150 for the possession of between 15 grams and not more than 30 grams of cannabis. That there be a penalty of \$200 for the cultivation of not more than two cannabis plants. [page 7]*

A number of other matters addressed in the remaining 20 recommendations from the DLRWP, including that separate legislation should be used to set up a scheme in WA to expiate minor cannabis offences. The reason for this approach was that it would emphasise, it was contended, there had been a shift in emphasis to regulating cannabis as a health rather than as a law enforcement issue, that the community would be able to identify and obtain all information about relevant offences, penalties and provisions if contained a single statute and that it was logically consistent with a broad public health framework concerning the use of alcohol (in the *Liquor Licensing Act 1988*) and tobacco (in the *Tobacco Control Act 1990*).<sup>383</sup>

The Government accepted the proposal for separate legislation to establish the CIN scheme along most other recommendations, with the exception of two key recommendations which it rejected - to repeal the offence in MDA s 5(1)(d)(i) concerned with the possession of pipes or utensils for smoking cannabis on which there are detectable traces of cannabis and that the cultivation of up to two cannabis plants regardless of the method of cultivation should be an expiable offence.

However, reforms to the MDA that were accepted and implemented were that a new offence be created concerned with selling equipment for use in the hydroponic cultivation of cannabis (MDA s 7A), the threshold for the presumption of possession with intent to sell or supply be

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<sup>382</sup> See Appendix 7 for full text of the 22 recommendations.

<sup>383</sup> Working Party on Drug Law Reform. *Implementation of a scheme of prohibition with civil penalties for the personal use of cannabis and other matters*. Perth, Western Australia, Drug & Alcohol Office, 2002, 14.

reduced from cultivating 25 plants to cultivating 10 plants and it not be an offence to be found in a place where cannabis was being smoked (MDA s 5(1)(e)).<sup>384</sup>

#### **4.2.4 Impact of CIN scheme**

The second reading speech on 20 March 2003 by the Minister for Health, the Hon Bob Kucera, when the Cannabis Control Bill 2003 was introduced into the Legislative Assembly, sets out a number of criteria the Government indicated it would use to evaluate the success of the CIN scheme.<sup>385</sup> These criteria were to:

- improve help seeking behaviour of those with cannabis related problems;
- increase the understanding of and knowledge about the harms associated with cannabis use among West Australians;
- prevent the adverse social and economic costs from convictions for minor cannabis offences;
- reduce the costs incurred by law enforcement organisations and the courts to prosecute and enforce those charged and convicted for minor cannabis; and
- focus the activities of police on the detection and prosecution of those engaged in the commercial cultivation and supply of cannabis.

#### **4.2.5 Outline of the scheme**

Even though the CIN scheme was established by the *Cannabis Control Act 2003*, the operation of the scheme requires an understanding of the relationship between the CCA and the *Misuse of Drugs Act 1981*, the State's primary source of illicit drug legislation. A similar approach occurs in the three other Australian infringement schemes, the CEN scheme (established by the *Controlled Substances Act 1984*), the SCON scheme (established by the *Drugs of Dependence Act 1989*) and the DIN scheme (established by the *Misuse of Drugs Act*).

##### **4.2.5.1 Police discretion preserved**

An important distinction between the CIN scheme and the CEN scheme, is that in WA police discretion is preserved in relation to each of the four expiable offences by the inclusion of the term 'may'.

*"A police officer ... may, subject to subsection (2), within 21 days after the alleged offence is believed to have been committed, give a cannabis infringement notice to the alleged offender."*

The enshrining of police discretion contrasts with the South Australian CEN scheme which specifically excludes police discretion by stating that a police officer 'must' give a CEN.

*"(If a person (not being a child) is alleged to have committed a simple cannabis offence, then before a prosecution is commenced, an expiation notice must be given to the alleged offender under the Expiation of Offences Act 1996".*<sup>386</sup>

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<sup>384</sup> See Appendix 4 for the text of s 5(1)(e) as now amended. The exception for cannabis means that *smoking* a prohibited drug or prohibited plant other than cannabis still remains an offence in WA. The difficulties of police charging someone under this section supported repeal of s 5(1)(e) altogether. The phrase *'then being used'* in the section means that it would not be an offence for a person to be present at a place which being regularly used for smoking drugs other than cannabis. To be successful a prosecution would require evidence that the place or premises were actually employed for the purpose of smoking drugs, as it would not appear to be an offence to be present at a place where others are using drugs other than cannabis.

<sup>385</sup> Kucera B. Second reading speech. Cannabis Control Bill Act 2003. *Hansard Parliamentary Debates*, Legislative Assembly, 20 March 2003, 5697.

<sup>386</sup> Controlled Substances Act 1984 s 45A(2).

### **4.2.5.2 Concurrent offences**

There is a recognition that a CIN should not be issued in a situation where a person is concurrently charged with other serious offences. In these circumstances the person would be charged under the MDA with committing a minor cannabis offence, which would be dealt with concurrently at the trial for the serious offence (or offences). This degree of procedural flexibility is important as in SA police believed they were required to issue a CEN for a minor cannabis offences regardless of the circumstances. This interpretation resulted in those who had been concurrently charged with a serious offence also being issued with a CEN, which not unexpectedly they largely failed to expiate.<sup>387</sup> As it was highly improbable that an offender would separately pay the outstanding CEN debt after having been dealt with by a court for the serious offence(s), the scheme was saddled with a growing number of unexpiated CENs.

A shortcoming of the CEN scheme was that as it provided little incentive and had limited flexibility for expiation, the overall expiation rate fell, resulting in adverse criticism of the CEN scheme on the grounds it had apparently failed to achieve one of its aims to reduce the number of persons before the courts for minor cannabis offences. In its first report the Drug Law Reform Working Party noted that as in

*“these circumstances there is little advantage for the individual to settle the expiation notice as he or she is facing much greater penalties for other offences ... (therefore) it is inappropriate and administratively complex for an individual to receive a separate expiation notice for an eligible minor cannabis offence.”*<sup>388</sup>

### **4.2.5.3 Household where cannabis being cultivated**

The CCA provides that an individual may only receive a CIN for the cultivation of two or less plants if they are *“all located on the same premises and those premises are the alleged offender’s principal place of residence (and) there are no other cannabis plants being cultivated on the premises by any other person.”*<sup>389</sup>

This approach rectifies another shortcoming of the CEN scheme by setting a limit on the number of plants based on a household, as it had been contended that organised commercial cultivation of cannabis was facilitated under the South Australian scheme in households where a number of adults resided, each of whom could cultivate up to the statutory limit, as the scheme set the plant limit per adult, not household.<sup>390</sup>

### **4.2.5.4 Cannabis smoking paraphernalia**

The CCA expands the law in WA in relation to cannabis smoking paraphernalia by making it a summary offence to sell or offer to sell such items *unless* the retailer displays prescribed warning notices advising of the adverse consequences of cannabis use.<sup>391</sup> A retailer must also make available prescribed educational materials to purchasers of smoking paraphernalia.<sup>392</sup> The penalties for these offences are a fine of \$1,000 in the case of a natural person or a fine of \$5,000 if it involves a body corporate. The CCA also creates a new summary offence of selling

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<sup>387</sup> Hunter N. *Cannabis expiation notice (CENs) in South Australia, 1997 to 2000*. Information Bulletin No. 27. Adelaide, Office of Crime Statistics, Attorney General’s Department, 2001.

<sup>388</sup> Working Party on Drug Law Reform. *Implementation of a scheme of prohibition with civil penalties for the personal use of cannabis and other matters*. Perth, Drug & Alcohol Office, 2002, 8.

<sup>389</sup> *Cannabis Control Act 2003* s 7 (2).

<sup>390</sup> Australian Broadcasting Corporation. ‘Background briefing. Adelaide – ‘cannabis capital’.’ *ABC Radio National* (transcript), 28 November 1999; Williams T. ‘Cannabis culture curse.’ *Weekend Australian* 5-6 January 2002; Mason G. ‘SA police warn on cannabis.’ *Sunday Times* 5 May 2002.

<sup>391</sup> *Cannabis Control Act 2003* s 22. The *Cannabis Control Regulations 2004*, s 7, prescribes the text of the warning notice to be displayed by retailers: *“Health warning. Cannabis may cause serious health and psychological problems. It is particularly dangerous to drive or operate machinery whilst under the influence of cannabis.”*

<sup>392</sup> *Cannabis Control Act 2003* s 23. The *Cannabis Control Regulations 2004*, s 8, prescribes the text of the education materials to be made available by retailers.

‘cannabis smoking paraphernalia’ to persons under 18 years of age.<sup>393</sup> The penalty for this offence is a fine of \$5,000 in the case of a natural person or a fine of \$25,000 if it involves a body corporate.

#### **4.2.5.5 Methods of expiation**

Compared to the three other Australian schemes, the CIN scheme provides broadened methods for expiation, by either payment within 28 days of the aggregate fine if more than one expiable offence was committed (technically known as a ‘prescribed modified penalty’) or attendance at a CES.<sup>394</sup> The scheme specifically provides an individual can elect within the first 28 days to go to a Magistrates Court<sup>395</sup> to contest any of the expiable offences for which a CIN was issued, instead of opting to expiate a CIN.<sup>396</sup>

Attendance at a CES does not involve the payment of any fees<sup>397</sup> by the person and completion of a CES will expiate all CINs that had been issued for one or more offences committed on a single day. A final demand will be issued by the police if a CIN is not expiated within 28 days of it being issued, which provides a further 28 day period of grace to expiate any CINs issued. However, in the second stage expiation by payment of the relevant modified penalty is only permitted, as the CES option is only available in the first 28 days.

A CES is defined in the legislation as being for the purpose of educating an individual about “*the adverse health and social consequences of cannabis use, the treatment of cannabis related harm and the laws relating to the use, possession and cultivation of cannabis.*”<sup>398</sup> Expiation by attendance at a CES is proven when the provider has issued a prescribed certificate of completion. (CCA s 18). The power to approve providers of CES and the content of education sessions rests with the Director General of Health, ie the Chief Executive Officer of the Department of Health.<sup>399</sup>

#### **4.2.5.6 Failure to expiate**

Expiation under the CIN scheme can be understood as involving a three stage process. The first stage requires expiation by either payment or by attendance at a CES within 28 days of a CIN being issued.

The second stage occurs at the end of the first 28 day period if expiation was not effected within the first 28 day period. This involves the police issuing a final demand which gives notice that if payment is not made within the next 28 days, enforcement will be transferred to the Fines Enforcement Registry (FER).<sup>400</sup> The only method for expiation during the second stage (ie second 28 day period) or thereafter is payment of the relevant modified penalty.

The third stage occurs if a person has failed to respond to the final demand by not paying the modified penalty enforcement and recovery of the unpaid fines will be transferred to the FER, where the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (FPINEA) apply. When enforcement of an unpaid CIN passes to the FER a person will continue to receive further demands for payment, in addition to incurred administrative fees. If a person

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<sup>393</sup> *Cannabis Control Act 2003* s 24.

<sup>394</sup> *Cannabis Control Act 2003* s 8(4).

<sup>395</sup> On 1 May 2005 the former Court of Petty Sessions, which heard minor criminal matters, became part of the newly established Magistrates Court of WA, that was created as part of a major reform of the courts in WA and where minor criminal offences are now heard.

<sup>396</sup> *Cannabis Control Act 2003* s 8(3).

<sup>397</sup> However, CES providers are paid a sessional fee per attendance, as part of the funding agreements they hold with the Department of Health (through the Drug and Alcohol Office).

<sup>398</sup> *Cannabis Control Act 2003* s 17(1).

<sup>399</sup> *Cannabis Control Act 2003* s 17(2).

<sup>400</sup> The FER is a statutory agency administered by the Department of Justice, which has responsibility for the enforcement of unpaid traffic infringement notices.

fails to respond to these demands for full payment they will eventually need to enter into an arrangement with FER to satisfy the outstanding debt, such as a time to pay arrangement.<sup>401</sup>

If an individual fails to meet further demands for payment of the unpaid CIN, there is the power under the FPINEA to suspend his or her motor drivers licence and refuse motor vehicle registration. Additional administrative charges are also incurred as demand notices are issued. The FER process does not permit enforcement of unpaid infringement notices through imprisonment.<sup>402</sup>

#### **4.2.5.7 Multiple infringements on one day**

The CIN scheme also provides that if a person has been issued with multiple infringement notices for offences committed on one day and has received a CIN in relation to each offence, then for purposes of expiation by CES, attendance at one CES will be taken to have expiated each of the separate CINs issued on that day.<sup>403</sup>

It would appear that it may be possible for an individual to receive up to four separate CINs on one day.<sup>404</sup> This could arise for example if an individual had committed the following offences - possession of not more than 15 grams of cannabis (\$100 modified penalty \$100), possession of more than 15 grams but not more than 30 grams of cannabis (\$150 modified penalty), possession of a smoking implement with detectable traces of cannabis (\$100 modified penalty) and the non hydroponic cultivation of not more than two cannabis plants (\$200 modified penalty).

However, this provision needs to be read in conjunction with the second stage penalty structure (see recidivism section below), which removes the option for expiation by payment of the modified penalty(ies) incurred if an individual has been issued with two or more CINs on separate days within the past three years.<sup>405</sup>

#### **4.2.5.8 Recidivism**

Whilst the philosophy of the CCA is that individuals should not go to court if they fail to expiate a cannabis offence covered by the CIN scheme, the legislation contains a contrary provision targeted at those who might be described as ‘CIN recidivists’, who can be charged with the relevant offence under the MDA if they fail to expiate.

This provision was not in the original Cannabis Control Bill 2003 when first introduced into Parliament in 2003, but was inserted as an amendment by the Legislative Council and adopted by the Government on the final day of debate on the legislation on 23 September 2003.

*“The amendment is directed at ensuring that repeat offenders take the opportunity for education and access to treatment services available under the CES option. Available*

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<sup>401</sup> The FER is also responsible for the enforcement of unpaid traffic infringement notices.

<sup>402</sup> The original purpose of the infringement notice legislation was to deal with offences under the *Road Traffic Act 1974*, as the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

<sup>403</sup> *Cannabis Control Act 2003* s 14.

<sup>404</sup> It is unclear whether the two different expiable offences concerning the possession of cannabis would permit in some circumstance the issuing of two CINs, such as if an individual had in their possession two separate amounts of cannabis, one of which weighed less than 15 grams and the other which weighed between 15 and 30 grams. In the alternative if the two separate amounts were treated as being one sample of cannabis which in aggregate weighed more than 30 grams then the person would be considered to be ineligible to receive a CIN and accordingly charged with possession of cannabis under s. 6(2) of the *Misuse of Drugs Act 1981*. The setting of the two sub amounts (ie not more than 15 grams and between more than 15 grams and not more than 30 grams) within the overall maximum amount of 30 grams [set out in s. 6(2) of the *Cannabis Control Act 2003*] which can qualify as expiable offences is not part of the *Cannabis Control Act 2003* but is contained in Schedule 1 of the *Cannabis Control Regulations 2004*. The Cannabis infringement notice scheme guidelines, reproduced in Appendix 9, issued by the WA Police Service is silent on this issue.

<sup>405</sup> *Cannabis Control Act 2003* s 9.

*evidence indicates that giving up drug dependence will often require more than one attempt, and exposure to treatment is the best option for changing drug using behaviour.*<sup>406</sup>

Section 9 of the CCA provides that if a person has been issued with two or more CINs on separate days within the past three years, they cannot expiate any additional CINs by payment of the relevant modified penalty, but *only* expiate by attending a CES. The option of electing to challenge an offence in a Magistrates Court remains. The wording of the applicable part of section 9(1) is as follows.

*“This section applies to a CIN issued for an alleged offence (the ‘new offence’) if, within 3 years before the new offence was allegedly committed, the alleged offender has been given a CIN for each of 2 or more offences, at least 2 of which are alleged to have been committed on separate days previous to the date on which the new offence is alleged to have been committed.”*<sup>407</sup>

This means that it is possible for a CIN recidivist to be convicted of an offence if they fail to expiate because the CIN scheme has a two stage penalty structure. The second stage applies to the situation where an individual has been issued with two or more CINs, two of which must have been issued on separate days within the past three years. An individual subject to a second stage penalty who fails to complete the CES cannot avail themselves of the procedures outlined in Part 3 of the FPINEA: CCA s 9(4). Under these circumstances failure to complete a CES within the 28 day period means that a person will be charged with the relevant offence under the MDA. A flow chart of the CIN scheme that demonstrates the operation of the arrangement with respect to recidivists is included in Appendix 8.

There is some misunderstanding as to the operation of section 9, as it has been stated that *“people receiving more than three notices in a 3 year period would not have the option of paying a fine to expiate the offence.”*<sup>408</sup> Contrary to this interpretation, as the cut off is set at two offences, this means on the third offence, once the requirement in section 9(1) has been met (ie there have been at least two prior offences which have occurred on at least two separate days in the past three years), the CCA operates in a more coercive and punitive fashion. It has been suggested, apparently in defence of this provision and possibly as an opinion, that

*“(r)eppeat offenders, who are often dependent on the drug, are more likely to respond to education and contact with a treatment service than they are to a criminal conviction.”*<sup>409</sup>

Based on published data on the operation of the CIN scheme in the 12 month period April 2004 – March 2005, very few individuals had been issued with two or more CINs on two or more separate days. In the period April 2004 to March 2005 a total of 3,591 CINs were issued to a total of 2,643 unique individuals, of whom 2,525 (95.5%) had only one occasion of contact, 117 (4.4%) had two separate occasions of contact and one person had three separate occasions of contact.<sup>410</sup>

In the 12 month period from April 2004 to March 2005, of the 2,643 unique individuals, 1,797 (68.0%) had been issued with one CIN, 697 (26.4%) had been issued with two CINs on one occasion and 31 (1.2%) had been issued with three CINs on one occasion. In relation to the 117 unique individuals issued with CINs on two separate occasions, 61 (2.3%) had been issued with 2 CINs on two separate occasions, 46 (1.7%) had been issued with 3 CINs on two separate occasions and 10 (0.4%) had been issued with 4 CINs on two separate occasions.

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<sup>406</sup> Legislative Assembly, Hansard 2003, 1166.

<sup>407</sup> Cannabis Control Act 2003 s 9(1).

<sup>408</sup> Lenton S. ‘Pot, politics and the press – reflections on cannabis law reform in Western Australia.’ (2004) 23 *Drug & Alcohol Review*, 228.

<sup>409</sup> *Ibid.*

<sup>410</sup> Drug & Alcohol Office & WA Police Service. *Cannabis infringement notice scheme, Status report April 2004 – March 2005*, Table A-3.

The CIN scheme has thus so far demonstrated a very low rate of recidivism. This may be contrasted with the outcome reported from the CEN scheme, where over the five year period from 1991/1992 to 1995/1996 there was a total of 7,730 repeat offenders who accounted for a total of 19,765 offences for which CENs were issued, representing 24% of all CENs issued.<sup>411</sup>

#### **4.2.5.9 Method of cultivation**

Hydroponically grown cannabis is now excluded in all four Australian expiation schemes, as both the CEN and SCON schemes removed hydroponically cultivated plants in February 2003 and June 2004 respectively. There has been some variation in how hydroponic cultivation is defined. In SA the CEN scheme contains the definition of “*artificially enhanced cultivation*” being the “*cultivation in a solution comprised wholly or principally of water enriched with nutrients or cultivation involving the application of an artificial source of light or heat,*”<sup>412</sup> such that any plant cultivated in this manner is not a simple cannabis offence. In the ACT the SCON scheme has a definition of “*artificial cultivation*” which is intended to address the hydroponic cultivation of cannabis, being to “*... hydroponically cultivate or cultivate with the application of an artificial source of light or heat.*”<sup>413</sup>

In the WA the CCA refers to the hydroponic cultivation of cannabis, but does not provide a definition as to the meaning of this term. However, there is a reference in the Minister for Health’s second reading speech of the Cannabis Control Bill 2003. “*Hydroponic cultivation in this context is intended to have its ordinary meaning; that is cultivation by placing the roots of the plant in a liquid nutrient solution rather than in soil.*”<sup>414</sup>

As can be seen, the lack of a definition in the CCA is in contrast to SA and the ACT, both of which recently added broad definitions to prohibit hydroponic cultivation, along with any other form of artificial cultivation. One commentator has suggested that under the CIN scheme artificial cultivation of cannabis, so long as it excludes hydroponic cultivation techniques, is not proscribed and thus should attract a CIN, if it is within the two plant limit.<sup>415</sup>

However, whilst it is arguable that by not having a definition, the CIN scheme permits artificial cultivation, recourse to the *Interpretation Act 1984* provides that when a court in WA interprets a provision in a statute, it *may*, when trying to ascertain the statute’s meaning, refer to certain extrinsic materials. A court may refer to these extrinsic materials under certain circumstances, namely, to confirm if the meaning of the provision is the ordinary meaning in accordance with the purpose or object of the statute or when the provision is “*ambiguous or obscure*” or when the ordinary meaning of the provision is “*manifestly absurd or unreasonable*”.<sup>416</sup>

The *Interpretation Act 1984* lists certain extrinsic materials that a court may consult, including, “*any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body*”, “*any explanatory memorandum relating to the Bill*” or the text of the second reading speech of a Bill or “*any official record of proceedings in either House of Parliament.*”<sup>417</sup>

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<sup>411</sup> Ali R, Christie P, Lenton S, Hawks D, Sutton A, Hall W & Allsop S. *The social impacts of the cannabis expiation notice scheme in South Australia. Summary report presented to the Ministerial Council on Drug Strategy 4 May 1998.* Canberra, Department of Health & Aged Care, 1999, 23.

<sup>412</sup> *Controlled Substances Act 1984* s 45A.

<sup>413</sup> *Drugs of Dependence Act 1989* s 162(2).

<sup>414</sup> Kucera, RC. Cannabis Control Bill 2003, Second reading speech by Minister for Health *Hansard*, Legislative Assembly. 20 March 2003, 5697.

<sup>415</sup> Lenton S, Chanteloup F, Fetherston J, Sutton A, Hawks D, Barratt M & Farrington, F. *An evaluation of the impact of changes to cannabis law in WA – Summary of the year 1 findings.* National Drug Law Enforcement Research Fund Monograph No. 12. Perth, National Drug Research Institute, Curtin University of Technology, 2005, 8.

<sup>416</sup> *Interpretation Act 1984* s 19(1).

<sup>417</sup> *Interpretation Act 1984* s 19(2).

The question of whether cannabis that is grown indoors, in soil and under artificial conditions is or is not within the meaning of hydroponic cultivation contemplated by the CCA is yet to be determined. It is submitted that if the application of artificial light to a plant growing indoors in soil is done for the purpose of accelerating growth and increasing the yield over and above may be achieved if a plant was grown outdoors, then is likely to be excluded from the CIN scheme. In his second reading speech the Minister also referred to rationale for the prohibition of hydroponic cultivation because “*greater yields*” are produced by hydroponically grown cannabis.

The CEN scheme in South Australia, by an amendment in December 2002, inserted the term “*artificially enhanced cultivation*” into the *Controlled Substances Act 1984*, to exclude hydroponically grown cannabis from the CEN scheme.<sup>418</sup> In the ACT hydroponically cultivated cannabis plants were excluded from the SCON scheme from June 2004 by the inclusion of the term ‘artificially cultivate’ into the *Drugs of Dependence Act 1989*.<sup>419</sup>

### 4.2.5.10 Review of the scheme

The CCA requires that the legislation should be reviewed after it has been in operation for three years (CCA s 26). Section 26 is cast in very broad terms, as it states that the review is to “*have regard to (a) whether there is a need for the Act to continue; and (b) any other matters that appear to the Minister to be relevant to the operation and effectiveness of this Act.*”

Prescribed review of legislation has not been a common provision in other WA criminal legislation and may reflect a change in approach by the legislature in matters which involve contested perspectives on the criminal law of areas of personal choice. A review is also a mechanism for renewed parliamentary debate about the law reform and places a government of the day under some pressure to demonstrate that the gains of the scheme outweigh its costs and that it was committed to the continuation of the CIN scheme.

### 4.2.5.11 Limitations of the scheme

The CIN scheme may have a too narrow definition of the meaning of cannabis as it is defined in the MDA as being the “*plant of the genus cannabis (by whatever name designated) or part of that plant*”.<sup>420</sup> The scheme explicitly excludes possession or use of any refined or extracted cannabis product. It could be argued this is justified as these forms are manifestations of organised activities as they are likely to be either imported or if produced locally undertaken by a well organised enterprise and that also these products may be more harmful because they contain higher levels of THC.

However, if the narrow definition of cannabis is interpreted as also excluding from the CIN scheme the possession of 30 grams or less of cannabis seeds, this could expose some minor offenders to being charged if they had retained seeds which remained as an unwanted product after extraction of leaf material from cannabis heads. It is not clear at this time whether this narrow definition can be sustained, even though in the operational instructions issued to police possession of seeds is said to be outside of the scheme.

Another limitation of the scheme is that if a person has possession of one or two cannabis plants, as distinct from being a cultivator of not more than two non hydroponically grown plants, they will be ineligible to receive a CIN. This circumstance would apply, for example, if a cannabis plant has been uprooted from the soil or been cut down, even if none of the leaf material or heads has been removed as it is no longer being cultivated. Distinctions between cultivated plants and plants which have just been harvested was a subject dealt with in an

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<sup>418</sup> Artificially enhanced cultivation is defined as the “*cultivation in a solution comprised wholly or principally of water enriched with nutrients or cultivation involving the application of an artificial source of light or heat.*” (*Controlled Substances Act 1984* s 45A)

<sup>419</sup> Artificial cultivation is defined as meaning “(a) *hydroponically cultivate* or (b) *cultivate with the application of an artificial source of light or heat.*” (*Drugs of Dependence Act 1989* s 162(2).

<sup>420</sup> *Misuse of Drugs Act 1981* s 3.

unsuccessful appeal in November 2001 to the Supreme Court of the Northern Territory, involving the case of *R v Myra and Sibin Pavlovic*, where there were two harvested plants which had produced 1.5 kilograms of cannabis which was in the process of being dried and two smaller plants still being cultivated.<sup>421</sup>

#### **4.2.6 Relationship with other legislation**

As the CCA does not operate as a separate piece of legislation but is linked to sections 5(1)(d)(i), 6(2) and 7(2) contained in the MDA, it provides police with the considerable advantages of the MDA, eg on the grounds of reasonable suspicion being able to stop, search and detain a person or their vehicle or any belongings or packages or any other thing<sup>422</sup> and also that police always have the option of charging someone instead of issuing a CIN.

There is an ancillary provision in the *Police Act 1892* which is relevant in those circumstances where a police officer who has given a CIN to a person but the person has provided insufficient or false information as to their name or address. There is a general power in WA for police to arrest someone without a warrant if that person refuses to provide their name and/or their address or if a police officer believes the person has given false information as to their name or address.<sup>423</sup>

In the MDA, which is the basis of the framework in WA for drug offences, cannabis has been treated for some years as being less serious than other illicit drugs. Well before the CCA amendments in 2003 cannabis had been treated as a different category of seriousness, through the optional summary trial procedure for those charged with certain types of serious cannabis offences. To understand the distinction the MDA makes between cannabis and other drug groups, it is helpful to briefly outline the working of the MDA.

The MDA breaks cannabis offences into two groups, simple offences (ie minor offences) which are dealt with summarily by the Courts of Petty Sessions (Table 5) and crimes (ie serious offences) which are dealt with by the higher courts (Table 6). The MDA distinguishes between those crimes which involve a conspiracy, with a lower range of penalties, compared to those who commit the principal offence,<sup>424</sup> whereas attempts or incitement to commit a crime do not attract a lower penalty.<sup>425</sup>

The scope of the MDA is augmented by including substances listed in the *Poisons Act 1964*.<sup>426</sup> Furthermore the MDA stipulates in s. 4(2) that it applies to plants – which means both prohibited plants as defined in s. 5 of the *Poisons Act 1965* and any other plants whether or not they are defined in the *Poisons Act 1964*, which are specified in Schedule 2 of the MDA.

Cannabis is specified in Schedule 2 of the MDA. The meaning of the term ‘prohibited plant’ is defined as being any plant or any part of that plant.<sup>427</sup>

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<sup>421</sup> *R v Myra and Sibin Pavlovic* Unreported Supreme Court of the Northern Territory, SC 20111031 & SC 20111029; 22 November 2001.

<sup>422</sup> *Misuse of Drugs Act 1981* s. 23.

<sup>423</sup> *Police Act 1892* s. 50.

<sup>424</sup> *Misuse of Drugs Act 1981* s 33(1)(2)(a).

<sup>425</sup> *Misuse of Drugs Act 1981* s 33(1) and s 33(3) respectively.

<sup>426</sup> Thus s. 4 of *Misuse of Drugs Act 1981* states that the Act applies to three types of drugs – ‘drugs of addiction’, ‘specified drugs’ and the drugs that are specified in Schedule 1 of the Act, regardless of whether they are a drug of addiction or a specified drug. A drug of addition and a specified drug are defined in s.5 of the *Poisons Act 1964*.

<sup>427</sup> *Misuse of Drugs Act 1981* s 4.

**Table 5: Offences and penalties – simple cannabis offences**

Description of offence	Legislation	Penalty	
		Range	Section
Occupier of any premises permitting premises to be used for the manufacture, preparation, sale, supply or use of cannabis	MDA 5 (1) (a)	\$3,000, 3 years or both	MDA 34 (1) (d)
Owner or lessee of any premises permitting premises to be used for the use of cannabis	MDA 5 (1) (b)	\$3,000, 3 years or both	MDA 34 (1) (d)
Person knowingly concerned in the management of any premises for the manufacture, preparation, sale, supply or use of cannabis	MDA 5 (1) (c)	\$3,000, 3 years or both	MDA 34 (1) (d)
Possession of pipes or utensils for smoking cannabis <sup>428</sup>	MDA 5 (1) (d) (i)	\$3,000, 3 years or both	MDA 34 (1) (d)
Possession of utensils for manufacture or preparation of cannabis for smoking <sup>429</sup>	MDA 5 (1) (d) (ii)	\$3,000, 3 years or both	MDA 34 (1) (d)
Being in a place where cannabis is smoked	MDA 5 (1) (e)	\$2,000, 2 years or both	MDA 34 (1) (e)
Possession of cannabis	MDA 6 (2)	\$2,000, 2 years or both	MDA 34 (1) (e)
Cultivation of cannabis	MDA 7 (2)	\$2,000, 2 years or both	MDA 34 (1) (e)
Contravention of order prohibiting sale of hydroponic equipment to cultivate cannabis	MDA 7A	\$2,000, 2 years or both	MDA 34 (1) (e)
Failure to display warning notice by retailer of cannabis smoking paraphernalia	CCA 22	\$1,000 (person) \$5,000 (body corporate)	CCA 22
Failure to provide education materials by retailer of cannabis smoking paraphernalia	CCA 23	\$1,000 (person) \$5,000 (body corporate)	CCA 23
Selling of cannabis smoking paraphernalia to person under 18 years of age by retailer of cannabis smoking paraphernalia	CCA 24	\$5,000 (person) \$25,000 (body corporate)	CCA 24

**Note:** MDA = Misuse of Drugs Act 1981, CCA = Cannabis Control Act 2003.

**Table 6: Offences and penalties - serious cannabis offences**

Description of offence	Legislation	Penalty (principal offence)		Penalty (conspiracy)	
		Range	Section	Range	Section
Possession of cannabis plants with intent to sell or supply	MDA 7 (1) (a)	\$100,000, 25 years or both	34 (1) (a)	\$75,000, 20 years or both	34 (1) (b)
Cultivation of cannabis plants with intent to sell or supply	MDA 7 (1) (a)	\$100,000, 25 years or both	34 (1) (a)	\$75,000, 20 years or both	34 (1) (b)
Sell, supply or offer to sell or supply cannabis plants	MDA 7 (1) (b)	\$100,000, 25 years or both	34 (1) (a)	\$75,000, 20 years or both	34 (1) (b)
Selling hydroponic equipment to cultivate cannabis	MDA 7A (1)	\$20,000, 5 years or both	34 (1) (c)		

In the MDA, when the offence involves cannabis, the place of trial is determined by the quantity of cannabis and/or number of plants involved, in effect provides the incentive of lower penalties for a person charged with an indictable ‘serious offence’ involving cannabis.<sup>430</sup> The option of a defendant selecting the option of having a trial in a summary court instead of in a higher court, is available for cannabis offences which involve possession with intent to sell or supply, cultivation with intent to sell or supply, sell or offer to sell or supply or offer to supply.

<sup>428</sup> On which there are detectable traces of cannabis.

<sup>429</sup> On which there are detectable traces of cannabis.

<sup>430</sup> *Misuse of Drugs Act 1981* s 9.

## Chapter 4: Case Studies of Cannabis Law Reform

The optional summary trial is not available if the charge involves a conspiracy. There is a scheme of different penalties depending on whether the person is convicted in a higher court or summary court (see Table 7). The MDA explicitly restricts the optional summary trial to offences only involving cannabis leaf or plants, but not any derivative of cannabis.<sup>431</sup>

**Table 7: Cannabis offences - optional place of trial**

Type of cannabis	Threshold	Legislation	Optional summary trial	Trial in higher court
Leaf	500 g	Schedule 3	\$5,000, 4 years or both	\$20,000, 10 years or both
Plants	100 plants	Schedule 4	\$5,000, 4 years or both	\$20,000, 10 years or both
Cigarettes <sup>432</sup>	400 cigarettes	Schedule 3	\$5,000, 4 years or both	\$20,000, 10 years or both
Hashish oil	-	-		
Resin	40 g	Schedule 3		
Tetrahydrocannabinols	4 g	Schedule 3		
Selling hydroponic equipment to cultivate cannabis	-	-	\$2,000, 2 years or both	\$20,000, 10 years or both

Another concept in the MDA is that cultivation of greater than a specified number of cannabis plants or possession of greater than a specified quantity of cannabis is a deemed presumption to sell or supply,<sup>433</sup> according to the thresholds in Table 8.

**Table 8: Cannabis offences - thresholds for serious offences (presumption of intention to sell or supply)**

Type of cannabis	Threshold	Legislation
Leaf	100 g	Schedule 5
Plants	10 plants	Schedule 6
Cigarettes	80 cigarettes	Schedule 5
Hashish oil	-	-
Resin	20 g	Schedule 5
Tetrahydrocannabinols	2 g	Schedule 5

The MDA requires that a court declare a person convicted of a 'serious drug offence' to be a convicted drug trafficker<sup>434</sup> if the offence involves more or greater than the following thresholds of cannabis (Table 9).

**Table 9: Cannabis offences - thresholds for declaration as a drug trafficker**

Type of cannabis	Threshold	Legislation
Leaf	3 kg	Schedule 7
Plants	250 plants	Schedule 8
Hashish oil	-	-
Resin	100 g	Schedule 7

<sup>431</sup> *Misuse of Drugs Act 1981* s 34 (2).

<sup>432</sup> Containing any portion of cannabis.

<sup>433</sup> *Misuse of Drugs Act 1981* s 11 (b).

<sup>434</sup> *Misuse of Drugs Act 1981* s 32A (b).

## 4.3 Case Study 2: United Kingdom

### 4.3.1 Introduction

This section examines the major steps of the reform process in the UK which culminated in the reclassification of cannabis in October 2003, when the Blair government effectively decriminalised the possession of cannabis. Whilst this discussion is concerned with recent stages of the reform process, this was predated by evidence of the growing use of cannabis over a number years prior to the recent era of reform. For instance, in mid 1967 the Home Office established an inquiry under the aegis of the Advisory Committee on Drug Dependence. The inquiry, known as the Wootton Committee, examined the specific issue of whether cannabis was a dangerous drug and if it should continue to be subject to same penalties that applied to other drugs prohibited under the existing *Dangerous Drugs Act 1951*.<sup>435</sup>

A theme of the Wootton Committee's examination of this issue was that cannabis was associated with deviant and socially marginalised groups,<sup>436</sup> a preoccupation that had close parallels with views articulated in the US where it was maintained cannabis was introduced in the first place to Americans by immigrant groups, taken up by those who were outsiders (such as musicians and hippies) and then some years later spread to wider American society. The Committee was particularly concerned that there had been a shift in use of cannabis in the UK during the 1950s from ethnically marginalised groups to mainstream British society.

*"In the early part of the period most seizures were of green plant tops, found in ships from Indian and African ports and thought to be destined for petty traffickers in touch with coloured seamen and entertainers in London docks and clubs. By 1950 illicit traffic in cannabis had been observed in other parts of the country where there was a coloured population. ... by 1954 the tendency for the proportion of white to coloured offenders to increase was well marked, and in 1964 white persons constituted the majority of cannabis offenders for the first time."*<sup>437</sup>

The Wootton Committee report presented statistics which showed a growth in the annual number of cannabis convictions, from 127 in 1951, to 288 in 1961 and reaching 2,393 in 1967. Since the Committee's report more recent research has confirmed the continuing growth in cannabis related offences throughout the 1970s up until the late 1990s in the UK.

*"Long run trends in possession offences are available only for the United Kingdom, but these indicate a tenfold increase in possession of cannabis since 1974. These trends are startlingly at odds with trends for all indictable offences, which increased by about a quarter over this period."*<sup>438</sup>

The significance of police activity largely involving cannabis offences is seen in trends in drug charges in the UK, which indicate about 90% of all drug charges relate to possession of a drug, of which three quarters are concerned with the possession of cannabis. In the UK the number drug offences grew from 26,278 in 1987 to a peak of 131,230 in 1998 and then fell to 113,050 in 2002.<sup>439</sup> In 1997 cannabis offences made up 86,000 of all drug offences.<sup>440</sup> There was also a similar trend with the number of seizures, consistent with the trend in drug charges, mostly

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<sup>435</sup> United Kingdom, Home Office, Advisory Committee on Drug Dependence, Hallucinogens Subcommittee. *Cannabis*. London, Home Office, 1968.

<sup>436</sup> Musto DF. 'Opium, cocaine and marijuana in American history.' *Scientific American*, July 1991, 20-27.

<sup>437</sup> United Kingdom, Home Office, Advisory Committee on Drug Dependence, Hallucinogens Subcommittee. *Cannabis*. London, Home Office, 1968, 2.

<sup>438</sup> May T, Warburton H, Turnbull PJ & Hough M. *Times they are a-changing: Policing of cannabis*. London, Joseph Rowntree Foundation, 2002, vi.

<sup>439</sup> Haire K, Young R, Broadbridge S. *The Drugs (Sentencing and Commission of Inquiry) Bill. Bill 21 2004-05*. Research Paper 05/16. London, House of Commons Library, 2005, 38.

<sup>440</sup> Dean M. 'Why Britain is going Dutch.' *Guardian Unlimited*, 25 October 2001.

involving cannabis and with a peak of 151,750 seizures in 1998, of which cannabis made up 114,690 (76%) seizures.<sup>441</sup>

A key finding from the 2002 Joseph Rowntree Foundation (JRF) sponsored study of the policing of cannabis laws in the UK was how DLE practices and policies can have unintended major consequences, as demonstrated with increasing numbers of cannabis charges throughout the 1990s. It was suggested this increase did not appear to be due to a focus on cannabis, but because of a focus by police on groups in the community targeted through the extensive use of stop and searches as part of a street level law enforcement model associated which emphasised law and order issues. This approach to law enforcement, which is sometimes referred to as ‘crack downs,’ brought with it the attendant likelihood of inflated cannabis arrests as concurrent charges because of police attention on non cannabis offences.<sup>442</sup>

The 2002 JRF study found that in 1999 even though ostensibly three quarters of cannabis possession arrests involved simple possession (ie a minor offence) and the remaining cannabis arrests occurred concurrently with another offence, nevertheless

*“(i)f only a minority of possession arrests derive from arrests for other offences, they frequently result from stops and searches for other offences which lead only to the discovery of cannabis. In other words, the specific suspicion on which the search was based turns out to be unproven or unfounded, but cannabis is discovered in the process.”<sup>443</sup>*

There were profound cost implications for DLE agencies because of the increasing reliance on stop and searches, for as the JRF study found in 1999 *“the average time it took an officer to deal with a cannabis offence was five hours. In most cases officers were operating in pairs. This yields a figure of 770,000 officer hours.”<sup>444</sup>* The total cost would be considerable higher if the costs of prosecuting agencies and courts were taken into account – it is estimated that whilst it cost £10,000 to take a matter to court there was an average fine of only £46 per minor cannabis conviction.<sup>445</sup>

The police sought to manage the increased number of cannabis charges by issuing cautions, to such an extent that by the late 1990s over half of all cannabis arrests were dealt in this fashion. Even though this meant there was some concomitant reduction in the burden placed on the court system, considerable police resources were still required to process minor cannabis offenders. However, in addition to the considerable variation between police regions in the use of cautions, one of the major problems was that a criminal record was created when a caution was issued to an offender.<sup>446</sup>

Alongside the escalating law enforcement response to increasing use of cannabis in the UK, a number of prevalence surveys tracked the widespread nature of cannabis use, as determined through the British Crime Survey (BCS), the British equivalent to the household surveys that are conducted on a regular basis in the US, Australia and NZ.

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<sup>441</sup> Haire K, Young R, Broadbridge S. *The Drugs (Sentencing and Commission of Inquiry) Bill. Bill 21 2004-05*. Research Paper 05/16. London, House of Commons Library, 2005, 39.

<sup>442</sup> A useful study of policing in the Ottawa-Carleton region by the RCMP, which sought to demonstrate whether police over-targeted cannabis users, found that between 90 to 95% of drug charges were linked to other charges, which meant that the “vast majority” of those charged for simple cannabis offences were incidental to another offence. It was found that 19% of those charged with motor vehicle offences were in possession of cannabis and that in relation to cannabis offenders, 41.3% of arrests were concerned with traffickers and 8% were concerned with possession: Olson S & Loree D. *Drug crimes case study data analysis for the region of Ottawa-Carleton, 1996-1998. A preliminary report on cannabis*. Ottawa, Royal Canadian Mounted Police, 1999.

<sup>443</sup> May T, Warburton H, Turnbull PJ & Hough M. *Times they are a-changing: Policing of cannabis*. London, Joseph Rowntree Foundation, 2002, vii.

<sup>444</sup> Trace M, Klein A & Roberts M. *Reclassification of cannabis in the United Kingdom*. Briefing Paper No. 1. London, Drug Policy Program, Beckley Foundation, 2004, 2.

<sup>445</sup> Appleton J. “Cannabis reform: what is Blunkett on?” *Spiked-Online* 11 July 2002.

<sup>446</sup> Trace M, Klein A & Roberts M. *Reclassification of cannabis in the United Kingdom*. Briefing Paper No. 1. London, Drug Policy Program, Beckley Foundation, 2004.

Data from the seven most recent BCS surveys indicates cannabis use increased from the mid 1990s until about the year 2000 and since then has declined across all age groups up to the most recent survey in 2004/2005. Annual prevalence for the 16 to 59 age group increased from 1996 (9.5%) to 2002/2003 (10.9%) and has since declined to 9.7% in 2004/2005.<sup>447</sup> With respect to monthly prevalence of the 16 to 59 age group, use increased from 1996 (5.5%) to 2002/2003 (6.7%) and has since fallen to 5.6% in 2004/2005.

With respect to annual prevalence for the 16 to 24 age group, use increased from 1996 (26.0%) to 2000 (27.0%) and then declined to 23.5% in 2004/2005.<sup>448</sup> There was a similar pattern by the 16 to 24 age group with respect to monthly prevalence, with use increasing from 1996 (16.1%) to 1998 (18.0%) and then declining over subsequent surveys to 14.1% in 2004/2005.<sup>449</sup>

This data would indicate that cannabis use prevalence in the UK in the 16 to 24 age group had clearly peaked some years before the reclassification of cannabis, with declining annual and monthly rates of prevalence since 2000 and 1998 respectively. Although there has also been a more recent decline in the 16 to 59 age group, with both annual and monthly rates of prevalence peaking in 2002/2003 and subsequently declining over the two following surveys (in 2003/2004 and 2004/2005), this peak also predates the reclassification of cannabis, which came into effect on 29 January 2004 in England, Wales and Northern Ireland.<sup>450</sup>

### 4.3.2 Late 1990s to the present

The starting point for examining the recent history of British cannabis law reform is the November 1998 report by the Science and Technology Committee of the House of Lords. Whilst this inquiry was confined to the therapeutic uses of cannabis and recommended it be made legally available for medicinal and therapeutic purposes it precipitated a wider debate about the use of cannabis for non-medicinal purposes.<sup>451</sup>

Arguably one of the most influential reports on drug law reform was the Police Foundation's investigation by Viscountess Runciman, which released its report in March 2000 barely two years after the report by the House of Lords' Science and Technology Committee. The Runciman inquiry had a wide remit to canvass the operation of the *Misuse of Drugs Act 1971*, including the consequences of how cannabis offences were being dealt with.<sup>452</sup> The inquiry observed the law in the UK, as it existed at that time,

*“produces more harm than it prevents. It is very expensive of the time and resources of the criminal justice system and especially of the police ... It criminalises large numbers of otherwise law abiding, mainly young, people to the detriment of their futures. It has become a proxy for the control of public order.”*<sup>453</sup>

The Runciman report proposed that cannabis should be rescheduled from a Class B to a Class C drug in Schedule 2 of the *Misuse of Drugs Act 1971*, because of the comparative lower level of harm compared to the other drugs with which it was scheduled as a Class B drug. Other recommendations included that possession of cannabis not be an arrestable offence, that offences concerned with cannabis being used at a premises be repealed and that aggravating factors be introduced in sentencing guidelines.

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<sup>447</sup> Ibid Table A2.1.

<sup>448</sup> Rose S. *Drug misuse declared: Findings from the 2004/05 British Crime Survey – England and Wales*. Home Office Statistical Bulletin 16/05. London, Research, Development and Statistics Directorate, Home Office, 2005, Table A3.1

<sup>449</sup> Id, Table A3.5.

<sup>450</sup> United Kingdom, Home Office, Drug Legislation and Enforcement Unit. *Controlled drugs*. Home Office Circular 05/2004. 16 January 2004.

<sup>451</sup> United Kingdom, Parliament, House of Lords, Science and Technology Committee. *Cannabis: the scientific and medical evidence*. Ninth Report. Westminster, House of Lords, 1998.

<sup>452</sup> Police Foundation. *Drugs and the law*. London, Police Foundation, 2000.

<sup>453</sup> Id, 7.

The inquiry understood that for cannabis law reform to succeed it would be necessary to remove the profits which attracted highly organised groups distributing cannabis to the large numbers of recreational users in the UK. It recommended that the solution to this issue was to undermine the operation of a criminalised black market by reform so that

*“cultivation of small numbers of cannabis plants for personal use should be a separate offence from production and should be treated in the same way as possession of cannabis, being neither arrestable nor imprisonable and attracting the same range of sanctions.”<sup>454</sup>*

The Runciman report’s recommendations on cannabis, were stoutly rebuffed by the Blair Labour government soon after the report’s release in March 2000.

*“The government, however, rejected the proposals to reclassify LSD and ecstasy. A Home Office statement declared: ‘The government has a clear and consistent view about the damage which drugs can cause to individuals, their families and the wider community, the link between drugs and crime – and the corresponding need to maintain firm controls.’ The drugs tsar, Keith Hellawell, warned that reclassifying the drugs would do nothing to help the fight against illegal substances and said the proposed penalties for cannabis use were nothing more than a ‘slap on the wrist’.”<sup>455</sup>*

However, by October 2001 the government had reversed its earlier opposition when the former Home Secretary David Blunkett appeared before the Select Committee on Home Affairs<sup>456</sup> as part of its investigation into the UK Government’s drug policy, when it was announced the Government wanted cannabis to be reclassified to a class C drug.<sup>457</sup> The Home Secretary emphasised this did not equate with decriminalisation and accordingly *“cannabis would remain a controlled drug and using it a criminal offence.”<sup>458</sup>*

Statistics cited in an October 2001 article in the Guardian Unlimited indicate that the reclassification of cannabis was perhaps not unexpected, as there had already been a major shift in policing practice in respect to minor drug offences, as the number of drug charges had continued to climb.

*“(E)ven before the proposed new change, there has been a massive increase in the proportion of offenders cautioned over the past 25 years. Formal cautions now account for half of all sanctions against arrested drug offenders, compared with just 3% in 1974. Fines have dropped from almost 60% to just over 20%. Imprisonment has fallen from just above 10% to just below.*

*The large shifts related to the huge proportion of drug offences linked to possession. Over 90% of all drug charges related to possession, cannabis accounted for 75% of these. As the number of drug offences climbed from 12,500 in 1974 to 113,000 in 1997, cannabis possession continued to dominated, making up some 86,000 cases in 1997.”<sup>459</sup>*

Prior to the announcement of the reversal of policy a House of Commons research paper had been released in August 2000 to assist investigations by the House of Commons Select Committee on Home Affairs into options for cannabis law reform, as part of a wider ranging review of drug policy.<sup>460</sup> The Select Committee, which published its third report in 2002,

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<sup>454</sup> Id, 115.

<sup>455</sup> Travis, A. ‘Rebuff for drug reform: Government rejects inquiry’s call to reclassify cannabis, LSD and ecstasy.’ *Guardian Unlimited*, 29 March 2000.

<sup>456</sup> United Kingdom, Parliament, Select Committee on Home Affairs. *The Government’s drugs policy: Is it working?* Third Report. Westminster, House of Commons, 2002.

<sup>457</sup> Dean M. ‘Why Britain is going Dutch.’ *Guardian Unlimited*, 25 October 2001.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid.

<sup>460</sup> Sleator, A & Allen G. *Cannabis*. Research Paper 00/74. House of Commons Library, 2000.

included an examination of the reforms recommended by the Runciman inquiry.<sup>461</sup> In relation to the recommendation for separate offences of cultivation for personal use and cultivation to sell to others, the Committee believed it would be difficult to clearly distinguish between the serious offence of possession with intent to supply, referred to as ‘commercial supply’ and a proposed lesser offence described as ‘social supply’.

*“The second problem put to us was that the law does not distinguish adequately between ‘social supply’ – between friends and not for profit – and large scale commercial supply. We note that this type of ‘social use’ is the main cause of the proliferation of drug use. It seems likely that more new users are introduced to drugs by friends than by street dealers.”*<sup>462</sup>

Another trigger for cannabis law reform was a six month trial that commenced in July 2001 to evaluate a change in the way police in the London Borough of Lambeth dealt with adults who had committed a simple offence of possession of cannabis.<sup>463</sup> The trial involved police giving formal warnings instead of prosecuting offenders.<sup>464</sup>

In the Lambeth trial police issued a total of 450 warnings, which it was estimated saved at least 1,350 hours of police time by avoidance of custody procedures and interviews of suspects. In addition to the savings in police resources it was estimated that a total of 1,150 hours of time was avoided by prosecutors who did not need to prepare briefs.<sup>465</sup> Compared to the same six month period in the previous year, there were 35% more offences involving possession of cannabis, 11% more charges involving trafficking of cannabis and increased activity in offences involving Class A drugs.<sup>466</sup> It was concluded that the trial did have a wide measure of community support and was an effective method for diverting police resources to higher priority areas.<sup>467</sup>

### 4.3.3 Steps to reform

#### 4.3.3.1 Formal advisory process

In October 2001 the Government requested the Advisory Council on the Misuse of Drugs (ACMD), a statutory body established under the *Misuse of Drugs Act 1971*, to examine the classification of cannabis. The ACMD recommended in 2002 that cannabis be reclassified as a Class C instead of a Class A substance, as it could no longer be justified as classifying it in the same category as more harmful Class B drugs.

*“Cannabis, however, is less harmful than other substances (amphetamines, barbiturates, codeine-like compounds) within Class B of Schedule 2 to the Misuse of Drugs Act 1971. The continuing juxtaposition of cannabis with these more harmful Class B drugs erroneously (and dangerously) suggests that their harmful effects are equivalent. This may lead to the*

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<sup>461</sup> United Kingdom, Parliament, Select Committee on Home Affairs. *The Government's drugs policy: Is it working?* Third Report. Westminster, House of Commons, 2002.

<sup>462</sup> Id para 78.

<sup>463</sup> The Borough of Lambeth contains the locality of Brixton, which was identified in early 2002 as an area which had a ‘major crack market.’ This raises the possibility that the trial was triggered by pressure for police resources to be redirected to the crack market as a high priority. By September 2002 ‘over 100 crack houses’ had been closed, there had been a fall in robberies and arrests had been raided in response to local pressure. *“Much more action is underway as part of a comprehensive multi-agency plan to tackle the crack problem in the borough and much more is needed to sustain the progress made, but Lambeth shows that community pressure, coupled with a rapid response can make a difference.”*: United Kingdom, Home Office. *Updated drug strategy 2002*. London, Drug Strategy Directorate, Home Office, December 2002, 9.

<sup>464</sup> Travis A. ‘Decriminalisation is far from Lambeth.’ *Guardian Unlimited* 2 July 2001.

<sup>465</sup> Stop the Drug War. ‘London police extend cannabis decriminalisation experiment.’ 1 April 2002.

<sup>466</sup> Cf: Metropolitan Police Authority. *Drugs policy*. London, Metropolitan Police Authority, 11 April 2002.

<sup>467</sup> MORI Social Research Institute & Police Foundation. *Policing the possession of cannabis: residents’ views on the Lambeth experiment*. London, Police Foundation, 2002; Hopkins N. ‘Community backs cannabis pilot scheme.’ *Guardian Unlimited* 22 March 2002; Guardian. ‘Brian Paddick: my drugs policy is working.’ 7 January 2002

*belief, amongst cannabis users, that if they have had no harmful effects from cannabis then other Class B substances will be equally safe.*"<sup>468</sup>

The updated UK drug strategy, published in December 2002, indicates the Government believed an important advantage from the reclassification of cannabis would be economic because police resources could be allocated to more serious priorities.

*"One of the objectives behind the decision to reclassify cannabis from a Class B to a Class C drug is to free up the considerable amount of police time currently spent in dealing with minor cannabis possession offences. Most of these offences lead to small financial penalties – in 2000, 19,000 cannabis possession offences were prosecuted resulting in fines averaging £80. A new cannabis enforcement model being developed by the Association of Chief Police Officers will provide police with a clear and firm steer on dealing with cannabis possession, including any aggravating circumstances. Police time saved as a result can then be redeployed, supporting the wider strategy objective of refocusing efforts – including enforcement action – on the drugs that cause the most harm, ie heroin and cocaine."*<sup>469</sup>

In February 2003 the British government was harshly criticised in the 2002 INCB annual report, which contended that the intention to reclassify would send *"the wrong message and could lead to increased cultivation of cannabis destined for the United Kingdom and other European countries."*<sup>470</sup> In a response to this criticism the Parliamentary Under Secretary of State, Bob Ainsworth, claimed that the INCB had made a number of misleading statements viz:

*"I would find it extraordinary if the Board thought that the UK Government should have ignored the science and based our decision on what people in some quarters might think. ... In its report on cannabis, the Advisory Council on the Misuse of Drugs concluded on the basis of all the available evidence that, although cannabis use can unquestionably worsen existing mental illness, no clear causal link has been demonstrated between cannabis and the onset of mental illness. As to the health risks arising from smoking, the Advisory Council report made clear that while smoking cannabis may be more dangerous than tobacco, it needs to be set within the context that in general cannabis users smoke fewer cigarettes per day than tobacco smokers and most give up in their 30s, so limited long term exposure."*<sup>471</sup>

### 4.3.3.2 Reclassification of cannabis

Amendments to the *Misuse of Drugs Act 1971* were agreed to in late October 2003 which reclassified all cannabis and THC preparations as Class C drugs. Importantly, whereas all other Class C drugs were non arrestable offences, an amendment to the *Police and Criminal Evidence Act 1984* (PACE) ensured that cannabis was treated differently from other Class C drugs when the reforms came into effect on 29 January 2004.<sup>472</sup>

The amendment to the PACE reduced the maximum penalty for possession of cannabis from five years to two years but also created an exception with respect to cannabis to still make it an arrestable offence, as only offences with a maximum sentence of imprisonment of five years or

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<sup>468</sup> Advisory Council on the Misuse of Drugs. *The classification of cannabis under the Misuse of Drugs Act 1971*. London, Home Office, 2002, 12.

<sup>469</sup> United Kingdom, Home Office. *Updated drug strategy 2002*. London, Drug Strategy Directorate, Home Office, December 2002.

<sup>470</sup> Drug Reform Coordination Network. *Road to Vienna: British government chides international narcotics control board on cannabis rescheduling critique*. 28 March 2003. For a more recent criticism by the Executive Director of the UN Office on Drugs and Crime, at the release of its 2006 World Drug Report, see Daily Mail. 'Cannabis pandemic blamed on soft UK drug policy.' *Daily Mail (UK)*. 26 June 2006.

<sup>471</sup> Ibid.

<sup>472</sup> While the *Misuse of Drugs Act 1971* is the primary source of drug legislation, there are also a number of other laws and associated regulations that contain relevant provisions, such as the *Medicines Act 1968*, the *Road Traffic Act 1972*, the *Customs and Excise Management Act 1979*, *Licensing Act 1964*, *Intoxicating Substances (Supply) Act 1985*, *Children and Young Persons (Protection from Tobacco) Act 1991*, *Drug Traffickers Offences Act 1994*, *Crime and Disorder Act 1998*, the *Criminal Justice and Police Act 2001*, the *Anti Social Behaviour Act 2003* and the *Drugs Act 2005*.

more are arrestable offences.<sup>473</sup> Without this amendment police would have been unable to make an arrest, as possession of a Class C drug is not ordinarily an arrestable offence. It should be noted that if a minor offence, such as possession of cannabis, is dealt with in a Magistrate's Court, the maximum term that can be given is a sentence of three months and/or a fine of up to £1,000.<sup>474</sup>

Whilst the amendment did not include giving police the power to arrest those found in possession of other Class C drugs, a related amendment increased the maximum penalty from 5 years to 14 years imprisonment for trafficking in any Class C drug. It has been suggested that the increase in the penalty for supply of a Class C drug may mean

*“that the judiciary will interpret this as Parliament's intention to treat the supply of Class C drugs more harshly than previously. This would be of particular concern where someone is found guilty of possession with to supply, where that supply was for a non-profit making purpose.”<sup>475</sup>*

The final step in the process of implementation of the reform involved the Association of Chief Police Officers (ACPO) issuing new guidelines which set out the procedures to be followed by police in England, Wales and Northern Ireland.<sup>476</sup> Although the amendment in October 2003 to the *Misuse of Drugs Act 1971* reclassified cannabis and THC preparations as Class C drugs applied to England, Wales, Northern Ireland and Scotland, the ACPO guidelines were only limited to police forces operating in England, Wales and Northern Ireland.<sup>477</sup> In April 2002, in anticipation of the reform, the ACPO issued a revised drugs policy which took account of the government's intention to reclassify cannabis from a Class B drug to a Class C drug.

*“The ACPO welcome recent government announcements dismissing decriminalisation as a policy proposal. ... From the policing perspective, the ACPO's concern is the impact on communities and criminal justice where the consequences are not fully known. We are firmly of the view that the status quo should be maintained ... That said, there is scope within the criminal justice system for greater consideration of alternative means of disposal for individuals found in possession of, or using, small quantities of illegal substances.”<sup>478</sup>*

### 4.3.3.3 Implementation of reclassification

The general provisions for police to implement the UK reform are contained in the *Cannabis enforcement guidance* issued on 12 September 2003 by the ACPO which stipulated that

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<sup>473</sup>Section 24(1)(b) of the *Police and Criminal Evidence Act 1984* gives police powers to arrest, detain and search offenders if an offence has a penalty of imprisonment of five years or more, by defining such offences as 'arrestable offences'. Without this amendment it was noted that police would have been unable to arrest minor cannabis offenders, if considered necessary, when cautioned under the UK reclassification of cannabis reform. Cf: Monaghan G. *Policing cannabis reclassification: easy as ABC*. UK Cannabis Internet Activists.

<sup>474</sup> Drug Policy Alliance. 'UK votes to decriminalise marijuana.' *Drug Policy News*, 31 October 2003.

<sup>475</sup> Release. *Reclassification of cannabis: Release's comments*. 2004

<sup>476</sup> Home Office Circular 05/2004, which outlined the specific legislative and administrative revisions that were made to effect the reclassification of cannabis (ie *Misuse of Drugs Act 1971 (Modification) (No. 2) Order 2003*, amendments to the *Police and Criminal Evidence Act 1984* and the *Criminal Justice Act 2003 (Commencement No. 2) Order 2004*), it provided inter alia that whereas these orders applied to England, Wales and Northern Ireland, "In Scotland, the existing conditional powers of arrest ... will remain, although it should be noted that arrest for possession of cannabis is not automatic and depends on the facts and circumstances in each case."

<sup>477</sup> Police services in England, Wales and Northern Ireland operate as nine police regions and in turn within this structure there are 44 separate sub-regional police forces, each of which operate within defined regional boundaries. There is a well established process of mechanisms like the ACPO to establish and maintain cross regional administrative arrangements to ensure a degree of uniformity and consistency in law enforcement in England and Wales.

<sup>478</sup> Association of Chief Police Officers. *A review of drugs policy and proposals for the future*. ACPO Drugs Committee, Association of Chief Police Officers, April 2002.

ordinarily there is a presumption against arrest by a police officer when dealing with someone in possession of cannabis.<sup>479</sup>

*“In reclassifying cannabis from Class B to Class C, the Government has made it quite clear that should an offender found with a ‘small amount’ of cannabis intended for personal use they should not, wherever possible, be arrested”*<sup>480</sup>

The importance of this principle may be insufficiently appreciated as it means because there is a presumption against arrest of someone with a small amount of cannabis there is limited scope or incentive for police, compared to the framework in WA, to perceive the process as a quasi-arrest situation or to insist on verification of the offender’s identity, determine the weight of cannabis involved and ensure secure handling of seized items. The UK approach makes it plain that once a police officer has made general inquiries as to the circumstances of the offence and has adequately identified the offender, the remaining duty is to seize any cannabis involved and place it in a tamperproof bag which is sealed and signed in the presence of the offender.

As the emphasis is on usually issuing a formal warning in the street, rather than at a police station, this means that offenders need not have any further involvement with the criminal justice system. An unusual feature of the UK scheme is that terms like ‘formal warning’ or ‘caution’ do not appear in the ACPO guidelines that outline the requirements of the scheme. Similarly the guidelines do not stipulate the quantity of cannabis to be regarded as possession for personal use, the latter issue being dealt with in a document with eight frequently asked questions that accompanied the cannabis enforcement guidance.

*“Both the ACPO Drugs Subcommittee and the Home Affairs Select Committee ... firmly believe that if a specific quantity is stipulated as to what constitutes simple possession then street dealers will only carry around amounts smaller than that prescribed and carry on dealing to individuals. Secondly, there are occasions when an individual may only have a small amount but also have scales, dealers lists etc. ... Finally, it could be problematic for officers to determine weight or quantities on the street causing greater potential for inconsistent application of any policy.”*<sup>481</sup>

However, the enforcement guidelines indicate there a number of aggravating circumstances that may be relevant and accordingly police may arrest someone if the offence involves conduct such as smoking in public, if the person is a repeat offender, that possession occurs in the vicinity of premises frequented by young people or “under circumstances that are causing a locally identified policing problem”.<sup>482</sup>

### 4.3.3.4 Reconsideration of reclassification

In May 2005 the UK the government requested the ACMD to provide it with new advice as to whether it should reconsider the reclassification of cannabis “in the light of new evidence that cannabis can lead to mental problems in later life.”<sup>483</sup> Prior to the Government’s announcement a private member’s bill, the Drugs (Sentencing and Commission of Inquiry) Bill had been introduced into the House of Commons on 12 January 2005, with its second reading scheduled in late February 2005.<sup>484</sup>

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<sup>479</sup> See also guidelines issued by the Crown Prosecution concerning the requirements for cautioning and diversion in general: United Kingdom, Crown Prosecution Service. *Cautioning and diversion*.

<sup>480</sup> Association of Chief Police Officers. *Cannabis enforcement guidance: Frequently asked questions*. 12 September 2003, Can/FAQ/03, 2.

<sup>481</sup> Association of Chief Police Officers. *Cannabis enforcement guidance: Frequently asked questions*. 12 September 2003, Can/FAQ/03.

<sup>482</sup> Association of Chief Police Officer. *Cannabis enforcement guidance*. Press release, 12 September 2003, Can/guide/03.

<sup>483</sup> Edwards J. ‘Don’t upgrade cannabis says top policeman. Law U-turn would ‘waste our time’.’ *The Mirror*, 20 May 2005.

<sup>484</sup> Haire K, Young R, Broadbridge S. *The Drugs (Sentencing and Commission of Inquiry) Bill. Bill 21 2004-05*. Research Paper 05/16. London, House of Commons Library, 2005.

It is plausible that as the proposed amendment (which subsequently lapsed), included a provision to establish an inquiry into the effects of cannabis and the consequences of the reclassification of cannabis, this was a trigger for the government to reaffirm its credentials by requesting a re-examination by the ACMD of the earlier decision.

Reactions from a number of quarters to the May 2005 announcement would indicate the cannabis decriminalisation enjoyed a wider degree of support than perhaps appreciated by the government. For instance, reported comments in May 2005 by the Metropolitan Police Commissioner, Sir Ian Blair, claimed the Government's decision was hasty and had very limited support within the police service. Of interest Sir Ian indicated that if the Government wanted to declassify cannabis from a Class C drug back to a Class B drug, then the police would lobby 'very hard' for 'fixed penalty notices'. It is not clear if this indicated support for the introduction of an expiation scheme based on infringement notices, as such schemes are based on the concept of a fixed penalty, regardless of guilt or circumstances of the offender.

*"In my view, we should stay where we are. ... I am talking about pragmatic policing. It's a waste of time, in terms of policing, to deal with small amounts of cannabis because the courts and the Crown Prosecution Service have consistently failed to do anything about it."*<sup>485</sup>

Another area of concern by some commentators was the Government's proposal to distinguish between cannabis on the basis of potency by retaining the Class C classification for low potency cannabis and shifting hydroponic cannabis back to a Class B classification. *"Police fear a decision that more potent forms of 'skunk' should carry heavier penalties will cause more confusion, as it will mean officers being expected to recognise the differences during a street search."*<sup>486</sup>

A further issue concerned the possibility the government would introduce reforms to revise the threshold amounts which determined whether the amount of a drug was for personal use or was possession with intent to sell or supply. This reform was not confined to cannabis, but involved a number of other drugs - with proposed thresholds of 500 gms for cannabis leaf, 500 cannabis joints with any amount of cannabis, 4 ounces of cannabis resin, 7 grams of heroin, crack or cocaine or 14 grams of amphetamine. Some commentators claimed these proposals would facilitate dealing, even though in the Home Secretary's proposal it was stated that police would always had the prerogative to charge someone with dealing regardless of the amount they possessed if evidence existed of that intent.<sup>487</sup> The Metropolitan Police Commissioner also criticised the proposed thresholds.

*"We have already made clear to the Home Office we are surprised by the amount being discussed for what would not be for personal use. It's a great deal higher than we would have expected. Our view is we would need to negotiate that figure a long way down."*<sup>488</sup>

In contrast to concerns that the proposed thresholds were too high, DrugScope, a major non government organisation, pointed out that even within the threshold amounts young people could be charged for a serious offence if they intended to share the drug with friends and acquaintances.<sup>489</sup>

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<sup>485</sup> Edwards J. 'Don't upgrade cannabis says top policeman. Law U-turn would 'waste our time':' *The Mirror*, 20 May 2005.

<sup>486</sup> Travis A. 'Senior police fear U-turn on classification of cannabis.' *Guardian Unlimited*, 21 September 2001.

<sup>487</sup> The Telegraph. 'New drug limits to allow 500 'joints' for personal use.' *The Telegraph* 30 November 2005.

<sup>488</sup> Steele J. 'Police chief says cannabis proposals far too lenient.' *The Telegraph* 7 December 2005.

<sup>489</sup> Young People Now. 'Drugs policy changes threatens 'social' suppliers.' *Young People Now* 7 December 2005.

The ACMD's new report on the issue was received by the Home Secretary, Charles Clarke, in early December 2005. The press had signalled before the report's release that as the ACMD had not been able to provide unequivocal advice on this matter, this meant that "*Ministers face a dilemma over the legal status of cannabis after a government review ducked the question of whether it should be reclassified and targeted with renewed priority by police.*"<sup>490</sup>

In early January 2006 the Home Secretary revealed that he believed that the public had been 'misled' about the dangers of cannabis use when it had been reclassified in January 2004.<sup>491</sup> While the justification for review was to determine whether mental health problems were linked to cannabis use, concern about this issue seemed to be offset by criticisms like those by the chief executive of DrugScope and Dame Ruth Runciman, the former Chair of the Police Foundation inquiry, that the government had not implemented the reforms adequately.<sup>492</sup>

The Home Secretary also agreed that over the period between January 2004 when reclassification had come into effect and early 2005 there had been a failure in implementation. This meant, the Home Secretary claimed, the public had become confused about the legal status of cannabis and thus it did not fully appreciate the harms that could arise from cannabis use. He stated

*"(w)hatever happens after this, let me reveal one recommendation of the advisory committee, which they make very, very strongly, which is a renewed commitment to public education about the potential effects of the consumption of cannabis, and the legal status of cannabis. That is well made, and I will accept it."*<sup>493</sup>

However, a number of commentators raised doubts as to the veracity of claims by the Government that the reason for conducting a review was that it had claimed it had come upon previously unavailable information. It was considered that the need for the ACMD review was ill-considered and the government's stated intention was based on data from a small number of studies.

*"These studies do not add any significant insights into the impact of cannabis on mental health. They do not, for example, show unequivocally that the drug ever causes schizophrenia in an otherwise health person. What they do highlight is the possibility that cannabis may increase the risk of psychosis in a small group of young people."*<sup>494</sup>

The Home Secretary's announcement that he wanted to review the impact of the reclassification of cannabis from being a Class B drug to a Class C drug highlighted a dilemma that the Government would face if it declassified cannabis.<sup>495</sup> This was that if the law reverted to its former classification and police resumed arresting people, it was doubtful this would bring about any reduction in cannabis use or reduce associated problems, unless declassification was accompanied by a comprehensive, intensive and expensive law enforcement campaign.

The another factor which precluded the declassification of cannabis was a widely held perception that reversal of the 2004 reclassification decision would be a return to an earlier and discredited response to cannabis.

*"It will only bring us back to where we started with vast numbers of otherwise law abiding people, many of them young, needlessly criminalised; with the police going back to*

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<sup>490</sup> Hurst G. 'Experts pass the buck on regarding of cannabis.' *TimesOnLine*. 12 December 2005.

<sup>491</sup> Bennett R. 'We misled public over downgrading cannabis – Clarke.' *TimesOnLine* 5 January 2006.

<sup>492</sup> Bennett R. 'Clarke urged not to reclassify cannabis.' *TimesOnLine* 5 January 2006; Bennett R. 'Clarke urged not to change tack on downgraded cannabis.' *TimesOnLine* 6 January 2006.

<sup>493</sup> Bennett R. 'We misled public over downgrading cannabis – Clarke.' *TimesOnLine* 5 January 2006.

<sup>494</sup> New Scientist. 'If it was right then, why change now?' (Editorial). *New Scientist* 185.2492. 26 March 2005, 5.

<sup>495</sup> It would appear the Government had failed to adequately consider some of the implications if it had decided to declassify cannabis because of the 'discovery' of new advice.

*enforcing a law that few care about; with the risible right suggesting stupidly harsh policies on drug possession only to be embarrassed by their own party members talking frankly about their own use.*<sup>496</sup>

The debate highlighted there was a broadly held view the criminal law was a blunt and imprecise instrument of policy and it would have a very limited effect on changing the perceptions and attitudes about cannabis use if it reverted to the earlier approach. The Government's decision in January 2006 to not declassify cannabis back to a Class B drug would suggest there had been an important shift in thinking, with the realisation that one of the potentially most important tools available to government to change community perceptions was to expand and mount a more effective education campaign and to improve the availability of treatment and support services.

#### **4.3.4 Preliminary outcomes of reclassification**

There have been a number of reports in the British press of claims by the Blair government there were already a number of positive consequences from the reclassification of cannabis, including high levels of awareness by 14 to 17 year olds through an intensive public education campaign,<sup>497</sup> a reduction in the proportion of cannabis arrests of all drug arrests<sup>498</sup> and that arrests for cannabis possession had fallen since the introduction of formal warnings.

It is helpful to understand the limitations in interpreting crime statistics in relation to the issue of the impact of the UK reforms of early 2004. An analysis of drug offence data from England and Wales for the year 2004 shows there was a total of nearly 106,000 drug offences, of which nearly 85% related to persons who had committed possession offences and that overall 56% of all drug offences related to specifically to persons who had committed cannabis offences.<sup>499</sup> It was noted in this 2005 report that of the 82,790 persons who had been found guilty, cautioned or otherwise dealt with, a total of 49,840 received 'cautions' for cannabis as a Class C substance.

Another Home Office publication with statistical information about crime in England and Wales for the year 2005/2006 indicates there was an increase of 23% in recorded drug offences in 2005/2006, compared to the previous year. However, this should be qualified because of the impact of the reclassification of cannabis on recording police activity concerning drug offences.

*"The increase, for the most part, was due to a 36 per cent increase in the recording of possession of cannabis offences that coincided with an increase in the number of formal warning for the possession of cannabis. This increase in formal warnings accounts for around two thirds of the increase in cannabis possession offences."*<sup>500</sup>

A number of examples illustrate how this data can be misinterpreted to support claims cannabis offending has increased as a consequence of decriminalisation and that therefore this represents a 'pandemic' of cannabis use. For instance, an article in the Daily Mail referred to the increases in the 2005/2006 Home Office report as a "*massive explosion in cannabis possession*" and that people in the UK were now "*smoking cannabis with impunity*" because of the purported failure of the "*softly softly approach*" embodied in the reclassification of cannabis.<sup>501</sup>

Government officials have also sought to make claims which may not be supported by the limited data that is available. For instance, a Home Office press release on 28 January 2005

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<sup>496</sup> Douglass J. 'Charles Clarke's bad trip.' *SpikeOnLine*. 6 January 2006.

<sup>497</sup> United Kingdom, Home Office. *Frank campaign results*. Home Office Press Release, 17 May 2004.

<sup>498</sup> United Kingdom, Home Office. *Drug offenders in England and Wales 2004*. Statistical Bulletin 23/05. London, Research, Development & Statistics Directorate, 2005.

<sup>499</sup> Mwenda L. *Drug offenders in England and Wales 2004*. Home Office Statistical Bulletin 23/05. London, Research, Development & Statistics Directorate, Home Office, 2005.

<sup>500</sup> Walker A, Kershaw C & Nicholas S. *Crime in England and Wales 2005/06*. Home Office Statistical Bulletin 12/06. London, Research, Development and Statistics Directorate, Home Office, 2006, 6.

<sup>501</sup> Slack J. 'Massive explosion in cannabis possession.' *Daily Mail* 20 July 2006.

referred to data from the five most recent BCS surveys (1998, 2000, 2001/2002, 2002/2003 and 2003/2004) that showed a decline in the annual prevalence of 16 to 24 year olds from 28.2% in 1998 to 24.8% in 2003/2004, whereas from 1998 to 2003/2004 the rate for the general population (aged 16 to 59) remained stable. It was claimed by Caroline Flint, the Parliamentary Under Secretary of State for Public Health, this result meant these

*“figures show that some predictions that cannabis use by young people would increase were wholly unfounded. Following a major Government information campaign to get across that cannabis is harmful and remains illegal, the figures show that young people’s cannabis use has remained stable since reclassification and is still significantly down from 1998 levels.”<sup>502</sup>*

Reductions in cannabis use were claimed in a report in September 2005 following the release of data from a major UK Department of Health funded study of young people.<sup>503</sup> It was asserted that the decline in adolescent prevalence reported by this study was proof that the

*“downgrading of cannabis to a non-arrestable offence has not been associated with an increase in adolescents’ use of the drug ... (with) the number of young people who admitted having consumed cannabis in the past year fell from 13 percent to 11 percent in 2004 – the first reported dip in four years.”<sup>504</sup>*

A Home Office spokeswoman was quoted in an article in The Scotsman newspaper as saying these reductions meant *“(t)his will help police and benefit the community by focussing police time and resources on the most serious drugs and offences.”<sup>505</sup>* However, reservations exist as to whether these purported positive changes in prevalence, arrests or other indicators could be claimed as a consequence of the decriminalisation so soon after its implementation in early 2004 in the UK and WA.<sup>506</sup>

For instance, claims of a fall in cannabis use from the UK Department of Health survey of young people requires qualification, as the decriminalisation specifically targets adults and therefore 11 to 15 year olds are not eligible to receive a formal warning.<sup>507</sup> As noted earlier, recent declines in cannabis use in the UK do not appear to closely related to the reform of January 2004, but rather due to other factors, such as changes in policing or shifts in the cannabis market independent of reclassification.

The Independent Drug Monitoring Unit has reported a longer term trend of falling prices of a number of illicit drugs in the UK from 1995 up to present (most recent data is for 2003), with a reduction of 50% in retail prices for cannabis resin, but not for ‘skunk’ ie hydroponic cannabis,

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<sup>502</sup> United Kingdom, Home Office. *Cannabis reclassification*. Home Office Press Release, 28 January 2005.

<sup>503</sup> Fuller E (ed). *Smoking, drinking and drug use among young people in England in 2004*. Leeds, Health & Social Care Information Centre, 2005.

<sup>504</sup> National Organisation for the Reform of Marijuana Laws. *Britain: Pot reclassification associated with decline in teen use*. Media release, 8 September 2005.

<sup>505</sup> National Organisation for the Reform of Marijuana Laws. *Britain: Fewer pot smokers arrested under decriminalisation*. Media release, 17 June 2004.

<sup>506</sup> The importance government may try to attach to shifts in prevalence can be seen in a statement in a report on the first 12 months of operation of the CIN scheme. This sought to draw a link between released national data from the 2004 NDSHS conducted in the second half of 2004 and the CIN scheme by asserting a negative: *“Mr Salter said cannabis use remains illegal and none of the evidence from the report, in terms of treatment, police seizures or telephone calls to the Alcohol and Drug Information Service, suggested an increase in the availability or use of cannabis compared to the period before the introduction of the scheme.”* Drug and Alcohol Office. *New cannabis laws have positive results*. Media Statement, 27 April 2005. Cf: Drug & Alcohol Office & WA Police Service. *Cannabis infringement notice scheme: Status report, April 2004 – March 2005*. Perth, Western Australia, Drug & Alcohol Office, 2005.

<sup>507</sup> The survey involved a sample of 9,715 school students aged 11 to 15 years conducted in autumn 2004. Biennial national surveys in the UK of young people’s drug use commenced in 1982, when it was confined to smoking and which continued until 1998, when the survey was carried on an annual basis. Alcohol questions were included for the first time in the 1988 survey and in 1998 the survey was further expanded to include questions on smoking, alcohol consumption and the use of other drugs.

which has remained constant at around £20 per one eighth of an ounce.<sup>508</sup> If longer term price data indicates that cannabis prices continue to fall in real terms since reform and that hydroponic prices start to decline, this may undermine claims that the reclassification of cannabis has not impacted on the cannabis market. Further research over and beyond what has been cited by the Government would be required to be able to support claims decriminalisation has not resulted in increased cannabis use or that the market has not continued to develop.

## **4.4 Case Study 3: New Zealand**

### **4.4.1 Introduction**

It might have been expected that the reforms which established the expiation schemes in SA, the ACT, the NT and WA and the use of formal warnings in the UK for the possession of ‘small amounts of cannabis for personal use’ would have made cannabis law reform more acceptable in NZ. However, the reluctance for NZ to undertake *de jure* reform deserves some consideration given similarities with Australia, such as a common legal heritage, a similar framework of legal principles and judicial supremacy, concerns by the community about the growing and widespread use cannabis and cannabis related health issues, a number of official and scientific reviews of policy options and proposals for law reform.

### **4.4.2 Development of cannabis policy**

In NZ there have been a number of reviews over the past four decades into the rationale for maintaining the prohibition of cannabis.<sup>509</sup> These reviews have been underpinned by extensive research addressing law enforcement, policy options and health concerns, augmented by input by groups who have argued and lobbied for reform. Whilst research by academic researchers in Australia and to lesser extent in NZ has been an important factor in establishing the case for reform, it would appear an unusual feature in NZ has been the prominent and important influence of community based organisations, some with close affiliations to political parties, who have played a major role in articulating the case for law reform.

The two most enduring and well organised groups, the first of which is the New Zealand Drug Foundation, established in 1989 and although initially had concentrated on tobacco and alcohol related issues, expanded its ambit to encompass cannabis. The second is the National Organisation for the Reform of Marijuana Laws (NORML), which is loosely affiliated with NORML in the US and elsewhere, who have mounted high profile public campaigns to reform cannabis laws by supporting a partial prohibition model, which would make

*“the use, cultivation and possession of cannabis for personal use and non profit supply of small quantities of cannabis to adults (as) neither a criminal or civil offence. Commercial supply and supply to minors would remain offences but penalties would not be as strict.”<sup>510</sup>*

#### **4.4.2.1 1960s to late 1980s**

The first formal inquiry into drug issues, triggered by an increasing use of cannabis and other drugs, was undertaken in 1968 as a Board of Health Committee which reported to the Government in 1970.<sup>511</sup> In its first report the Blake-Palmer Committee, recommended that

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<sup>508</sup> Atha MJ. *Taxing the UK drugs market*. London, Independent Drug Monitoring Unit, 2004.

<sup>509</sup> Abel S & Casswell S. *Cannabis policy in New Zealand: A background paper*. Auckland, Alcohol & Public Health Research Unit, University of Auckland, 1993; Drug Policy Forum Trust. *Alternative systems of cannabis control in New Zealand: A discussion paper*. Wellington, Drug Policy Forum Trust, 1997; Drug Policy Forum Trust. *New Zealand should regulate and tax cannabis commerce: Final report*. Wellington, Drug Policy Forum Trust, 1998; Field A & Casswell S. ‘Options for cannabis policy in New Zealand.’ (2000) 14 *Social Policy Journal of New Zealand* 49-64; Webb M. ‘Does New Zealand cannabis policy need Dutch courage?’ (2000) 14 *Social Policy Journal of New Zealand* 30-48.

<sup>510</sup> Abel S & Casswell S. *Cannabis policy in New Zealand: A background paper*. Auckland, Alcohol & Public Health Research Unit, University of Auckland, 1993, 19.

<sup>511</sup> One of the influences for establishing the Committee was the circumstances of the death by drug overdose in June 1967 of a 17 year old young man in an Auckland suburb: Yska R. ‘Hemi’s rehab pad:

*“there should be no relaxation in the current control of cannabis (marijuana) and its preparations, considering the present state of knowledge of its properties.”<sup>512</sup>*

However, the Committee which reconvened in 1970 after concerns about the use of cannabis, delivered its second report in 1973.<sup>513</sup> The second report contained recommendations that included defining supply to exclude casual transfers of small amounts of cannabis without payment, to classify different forms of cannabis into separate schedules according to their potential for harm and to replace the blanket provisions of the legislation concerned with possession, use and dealing by graduated penalties based on relative potential harm. The Committee also *“urged the police to make wider use of their discretion in deciding how to deal with offenders and to explore alternatives to prosecution by diverting offenders to treatment or other programs.”<sup>514</sup>*

A number of the reforms of the second Blake-Palmer Committee were accepted and became part of the *Misuse of Drugs Act 1975*,<sup>515</sup> including the classification of cannabis and other drugs into three schedules, a differentiation between small scale supply to adults as equivalent to procuring or possession for personal use, whilst retaining supply to a person under 18 or sale as more serious dealing offences and the removal of cultivation of cannabis from being a dealing offence.

*“Compared with equivalent legislation then in force elsewhere, the 1975 Act could be fairly described as progressive in its approach to the classification of drugs and its penalty provisions, especially for less serious offences. Yet, in themselves, those changes were relatively modest initiatives and the opportunity to introduce more innovative measures was not taken.”<sup>516</sup>*

Over the period 1981 to 1991 in NZ the preponderance of drug offences dealt with by the courts were cannabis related, involving about nine out of 10 of all drug offences– a similar pattern also been reported in the UK, WA and other jurisdictions. The significance of the conviction harm (from DLE activity) can be seen by the marked increase in the annual number of cannabis offences dealt with by the courts, which increased from 8,130 in 1981 to 19,291 in 1991.<sup>517</sup>

Against this backdrop of growing prevalence of cannabis use, coupled with a growth in the annual number of convictions and associated costs borne by the courts and the justice system, by the early 1980s there was growing concern about the effectiveness of the legal framework and options for dealing with cannabis offenders. A public debate was held in Auckland in 1984, organised by the Auckland Criminal Bar Association, attended by over 1,200 people,

*“to present a range of perspectives on cannabis use and policy and to encourage informed public discussion on the issues related to it. Lively debate occurred on the effects of criminalisation and the health effects of cannabis use.”<sup>518</sup>*

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ideals and realities in 1960s Grafton.’ *Paper presented at PHANZA Historywork Conference*. Wellington, 23 November 2002.

<sup>512</sup> Dawkins K. ‘Cannabis prohibition: taking stock of the evidence.’ (2001) 10 *Otago Law Review*, 44.

<sup>513</sup> There was a major shift in how the Committee in its second report conceptualised the harmfulness of cannabis compared to its first report and in spite of pressure to conform with the dominant US view of the time said that *“cannabis was less harmful than narcotics and criticised penalties that were too harsh and carried too high a social cost”*: McIntyre S. ‘Prohibition in New Zealand 1945-1975: the Misuse of Drugs Act.’ *NORML News Summer 2003/04*. NORML New Zealand.

<sup>514</sup> Dawkins K. ‘Cannabis prohibition: taking stock of the evidence.’ (2001) 10 *Otago Law Review*, 45.

<sup>515</sup> O’Connell KP. *Misuse of Drugs Act 1975 New Zealand debate*. (Text of second reading speech of Minister of Health from Hansard House of Representatives, 18 July 1975.) Aotearoa Legalise Cannabis Party, 15 October 2000.

<sup>516</sup> Dawkins K. ‘Cannabis prohibition: taking stock of the evidence.’ (2001) 10 *Otago Law Review*, 47.

<sup>517</sup> Abel S & Casswell S. *Cannabis policy in New Zealand: A background paper*. Auckland, Alcohol & Public Health Research Unit, University of Auckland, 1993.

<sup>518</sup> *Ibid*, 15.

In response to a growing number of cases involving the cultivation of cannabis, the courts sought to differentiate between the levels of seriousness of cases involving use and supply in the 1981 Court of Appeal case of *R v Dutch*, which set out the criteria for the courts to follow to determine relevant penalties for those who cultivated cannabis for personal use as distinct from those who cultivated cannabis for commercial gain.<sup>519</sup>

### 4.4.2.2 1990s

Some of the statistics on trends in drug related offences from the 1980s and throughout the 1990s reveal a startling growth in DLE activity, especially concerning cannabis. For instance, the annual number of cannabis plants seized grew from nearly 37,000 in 1980 to a total of 231,000 in 1989 and continued to increase throughout the 1990s, reaching a peak of nearly 352,000 plants being seized in 1994/1995 – an annual average of about 225,000 plants throughout the 1990s. There was a corresponding increase in offences involving cannabis derivatives such as hash oil and resin produced from low grade cannabis sourced from local production.

Annual charges for cannabis offences also substantially grew over the two decades, constituting between 92 and 94 per cent of all drug offences, increasing from nearly 6,000 cannabis offences in 1980 to 18,000 in 1989 and continued to increase throughout the 1990s and then after reaching a peak of nearly 26,000 in 1994, had declined to about 25,000 cannabis offences by 1999.

In response to the growing number of cannabis offences a national adult pre trial diversion scheme for minor cannabis offences was introduced in 1990.<sup>520</sup> The scheme, which still operates, is based on police discretion and requires offenders to acknowledge guilt and in lieu of appearing before a court make a ‘donation’ to a chosen charity and/or perform community service. However, there is reason to believe that there is a relatively low rate of diversion of minor cannabis offenders in spite of official statements to the contrary.<sup>521</sup> A 1992 Justice Department review of the pre-trial diversion scheme cited in the 1993 Alcohol and Public Health Research Unit (APHRU) report two years after its introduction, found that

*“the scheme has resulted in some net widening in that some offenders who might otherwise have avoided penalty enter the scheme. Because the diversion scheme is punitive but does not entail obtaining a record some police officers chose to use it where previously they might have issued a warning or caution or taken no action. Some of those who have been diverted have actually ended up with more severe penalties than would be likely if they had gone through the courts and been fined.”<sup>522</sup>*

A number of other shortcomings were also noted in the 1992 review of the pre-trial diversion scheme. One issue was that contrary to initial expectations, it resulted in increased law enforcement costs due to the need for police to organise and supervise the diversion scheme. Another issue was that whereas previously offenders were fined if convicted, because offenders made ‘donations’ instead of being charged there was a net loss of revenue to the state in favour of private charities.

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<sup>519</sup> *R v Dutch* [1981] 1 NZLR 304.

<sup>520</sup> The introduction of pre trial diversion was linked to the shift towards restorative justice as a result of the *Children, Young Persons and Their Families Act 1989*, which provided for juveniles to be dealt with outside of the court system by minor matters being dealt with by Family Group Conferences. A similar approach has applied in WA through the role of Juvenile Justice Teams, because of the provision in Part 5 of the *Young Offenders Act 1994*, which requires police in WA to first consider before they charge a juvenile with an offence, of whether to take no action or issue a caution.

<sup>521</sup> Alcohol & Public Health Research Unit. *A submission to the Health Select Committee inquiry into the public health effects and legal status of cannabis*. Auckland, Alcohol & Public Health Research Unit, University of Auckland, 2001, 35.

<sup>522</sup> Abel S & Casswell S. *Cannabis policy in New Zealand: A background paper*. Auckland, Alcohol & Public Health Research Unit, University of Auckland, 1993, 22.

A comprehensive review and discussion of the policy options for the use, possession and supply of cannabis in NZ was undertaken in the early 1990s by the APHRU at the University of Auckland, funded by the New Zealand Police and the Department of Health.<sup>523</sup> The report of this review was published in May 1993 at around the same time as a major national inquiry into cannabis policy in Australia by the National Task Force on Cannabis was getting underway.

The 1993 APHRU study showed cannabis was widely used and that there was a growing number of cannabis convictions. The report cites a 1990 survey of just over 5,100 people<sup>524</sup> aged between 15 and 45 years, of whom 43% had ever used cannabis, 18% had used cannabis in the past year and 12% were current users.

A follow up household survey in 1998, based on the same regions as the 1993 APHRU study, found that prevalence had increased on all measures - 52% for lifetime prevalence, 21% for annual prevalence and 16% were current users compared to the 1993 survey.<sup>525</sup> Another finding from the 1998 survey was that there were high levels of cannabis use amongst the Maori population, with rates above non-Maori rates. For instance by 18 years 70% of Maori had ever used cannabis compared to 47% of non-Maori, which increased to 84% of Maori by 21 years of age compared to 67% of non-Maori.<sup>526</sup>

In addition to the increased levels of use, a number of longitudinal developmental studies of young people confirmed a similar upward trend in cannabis use and of higher rates involving Maori youth. For instance, in 1997 the Dunedin Multidisciplinary Health and Development Study found that adolescent use increased from 15% at age 15, to just over 46% at age 18 and continued to climb to 62% of 21 year olds. The Christchurch Health and Development Study also identified increasing rates of cannabis use by young people, with 9% of the 1,265 respondents in the study reporting ever use of cannabis by 15, with nearly 50% having ever used by age 18 and at age 21 just under 70% had ever used.<sup>527</sup>

A synopsis of the consequences of cannabis policy was provided in the speech given by the then leader of the opposition, the Hon Helen Clark, at the 'Great marijuana debate seminar' held at the University of Waikato in July 1994.

*"New Zealand's approach to marijuana today is a combination of total prohibition of marijuana under the Misuse of Drugs Act legislation, and limited and largely ineffective education on the drug undertaken by state and voluntary agencies."*<sup>528</sup>

The Drug Policy Forum (DPF), which had initiated community consultation on cannabis law reform by releasing a discussion paper in July 1997,<sup>529</sup> released a final proposal for reform in March 1998.<sup>530</sup> In its final report the DPF proposed large scale reform by bringing cannabis into line with the regulatory principles that already applied to the production, distribution, sale and use of alcohol and tobacco overseen by the creation of a Tobacco, Alcohol and Cannabis Authority. While the primary goal of these proposed reforms was to disrupt the operation of the illicit cannabis market by permitting the operation of a licit cannabis market, the reform also

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<sup>523</sup> Id.

<sup>524</sup> Of whom 4,088 were residents of Auckland and 1,038 were residents of the Bay of Plenty.

<sup>525</sup> Field A & Casswell S. *Drugs in New Zealand national survey, 1998*. Alcohol & Public Health Research Unit, University of Auckland, 2002.

<sup>526</sup> Dacey B & Barnes HM. *Te ao kin drug use among Maori, 1998*. Auckland, Alcohol and Public Health Research Unit, University of Auckland.

<sup>527</sup> Cited in Dawkins K. 'Cannabis prohibition: taking stock of the evidence.' (2001) 10 *Otago Law Review*, 62.

<sup>528</sup> Clark H. *Address to the great marijuana debate seminar*. University of Waikato, Hamilton. 30 July 1994.

<sup>529</sup> Drug Policy Forum Trust. *Alternative systems of cannabis control in New Zealand: A discussion paper*. Wellington, Drug Policy Forum Trust, 1997.

<sup>530</sup> Drug Policy Forum Trust. *New Zealand should regulate and tax cannabis commerce: Final report*. Wellington, Drug Policy Forum Trust, 1998.

sought to shift the regulation of cannabis from a law enforcement context to a public health framework. It was the view of the DPF that

*“New Zealand politicians grasp the nettle and take control of cannabis commerce. Abdicating such control to the black market only magnifies the harmful health effects of cannabis.”<sup>531</sup>*

A parliamentary inquiry by the Health Committee of the NZ House of Representatives was established in November 1998 in response to two developments, the presentation of a petition to the Parliament in 1996<sup>532</sup> and release in March 1998 of the DPF’s final report. Following release of the Health Committee’s report in June 1999 there was renewed debate about the issue of legal status of cannabis.<sup>533</sup> The Chair of the Committee, Brian Neeson, was cited in an article in New Zealand Herald as suggesting the government was unwilling to proceed any further without support from the community.

*“Mr Neeson, who does not personally favour liberalisation, said yesterday that while the Government had no plans to review the legal status of cannabis, that did not mean it was not being talked about. ‘What we’ve got to look at is the use of it, the recreational use of it. We have to understand that there is an epidemic out there as far as the distribution of cannabis is concerned’, he said. ‘The Government itself and the country and the community have to decide exactly what they want to do from now on.’”<sup>534</sup>*

The Committee had a narrow ambit as it focussed on issues concerned with health and other harms attributable to cannabis use, the adequacy of services and programs to prevent such harms and provision of treatment to those with problematic cannabis use. In spite of the Committee’s reluctance to address issues involving the legal status of cannabis, some of its comments were considered to provide support for decriminalisation.

*“It is acknowledged that cannabis prohibition enforced by traditional crime control methods has not been successful in reducing the apparent number of cannabis users in New Zealand. That the police are open minded on the issue of decriminalisation of cannabis is an indication that thinking on the subject is changing... Methods other than prohibition certainly deserve consideration.”<sup>535</sup>*

In its report the Health Committee acknowledged there were increased concerns about mental health issues due to the increased use of cannabis and also about law and order concerns arising from the development of a domestic industry which produced significant amounts of cannabis.

*“In recent years there have been numerous claims that cannabis consumption has led to mental illness and violent offending. Indeed, this view has gained widespread currency in New Zealand, though a considerable body of research refutes such claims. At the same time, figures show that a large number of New Zealanders use, or have used cannabis, and recent reports have shown that cannabis represents an important cash crop in some areas of New Zealand. The effects of cannabis and means of controlling its use have become increasingly significant issues for debate in this country.”<sup>536</sup>*

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<sup>531</sup> Ibid.

<sup>532</sup> A petition was presented by 327 persons requesting decriminalisation of the recreational use of cannabis (Petition 1996/686), which was in turn referred on 25 July 1997 to the Justice and Law Reform Committee of the House of Representatives, which in turn referred the matter to the Health Committee in November 1998, to undertake a public inquiry.

<sup>533</sup> New Zealand, Parliament, Health Committee. *Inquiry into the mental health effects of cannabis*. Wellington, House of Representatives, 1999.

<sup>534</sup> NORML New Zealand. *Cannabis inquiry '98: Advice to review dope law repeated*. New Zealand Herald, 11 June 1999.

<sup>535</sup> Cited in NORML New Zealand. *Selected quotes from the mental health effects of cannabis report, 1998*.

<sup>536</sup> New Zealand, Parliament, Health Committee. *Inquiry into the mental health effects of cannabis*. Wellington, House of Representatives, 1999, 4.

Thus it can be seen that by the end of 1990s a large body of information had accumulated about the use and the difficulties confronting DLE and health agencies in adequately managing the issue of cannabis. The development of comprehensive prevalence surveys also permitted policy makers and lobby groups to identify some of the dimensions of cannabis use, including the possibilities for law reform.

### 4.4.2.3 2000 to the present

By the year 2000 the possibilities for legislative change appeared to have largely stalled because of an inconclusive parliamentary inquiry and the inability of the Government to promote reform. This meant debate continued in NZ about how to respond to increased cannabis use by either law reform to mitigate some of the severity of prohibition or alternatively to expand police powers and use other coercive measures. In spite of the failure of the government to promote reform, there was an optimistic belief by some, such as articulated in a July 2000 paper, that

*“New Zealand may be moving towards a version of the cannabis expiation notice (CEN) scheme which operates in South Australia. This is despite worrying evidence of net widening and concerns over the automatic prosecution of CEN defaulters, which suggest that the South Australian model may not be the optimal approach.”<sup>537</sup>*

Areas for minimal reform that were identified included the expansion of schemes to remove minor cannabis offenders from the court system through either expiation or cautioning.<sup>538</sup> The pre-trial diversion scheme which had operated since 1990 “probably accounts for the small but steady decrease in the percentage of reported offenders who were prosecuted between 1991 and 1996. However, over that period, the number of cannabis related prosecutions did not change.”<sup>539</sup>

A number of adverse consequences from the implementation of rigorous supply side measures by police, especially the adoption of large scale crop eradication by aerial spraying of herbicides have been identified. One consequence has been a shift away from cannabis being largely supplied from imports up to the early 1980s, to the market becoming substantially based on domestic cultivation by the early to mid 1990s. It might be concluded that the increased emphasis on surveillance and border control failed to achieve the underlying goal of curtailing the prevalence of cannabis, as

*“within little more than a decade a thriving cannabis market had been established. Cannabis had become the most widely used of all the controlled drugs and although increased vigilance at the border had stopped large scale importation, the void had soon been filled by more intensive domestic plantation and production. ... By any measure, the cannabis market expanded in bounds.”<sup>540</sup>*

In May 2001 the Health Select Committee of the NZ House of Representatives, chaired by Hon Steve Chadwick, commenced a new inquiry into cannabis, with a specific term of reference –

*“To inquire into the most effective public health and health promotion strategies to minimise the use of and harm associated with cannabis and consequently the most appropriate legal status of cannabis.”*

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<sup>537</sup> Webb M. ‘Does New Zealand cannabis policy need Dutch courage?’ (2000) 14 *Social Policy Journal of New Zealand*, 44.

<sup>538</sup> Dawkins K. ‘Cannabis prohibition: taking stock of the evidence.’ (2001) *Otago Law Review*, 10: 39-89; Field A & Casswell S. (2000). ‘Options for cannabis policy in New Zealand.’ (2000) 14 *Social Policy Journal of New Zealand*; Webb M (2000). ‘Does New Zealand cannabis policy need Dutch courage?’ (2000) 14 *Social Policy Journal of New Zealand*.

<sup>539</sup> New Zealand Drug Foundation. *Law and policies*.

<sup>540</sup> Dawkins K. ‘Cannabis prohibition: taking stock of the evidence.’ (2001) 10 *Otago Law Review*, 53.

The Select Committee's report was tabled in parliament in August 2003, with recommendations for further research into issues such as cannabis and suicide<sup>541</sup> and the role of cannabis in road accidents, improved health and education campaigns to target both young people and the community about the risks of cannabis and consideration of the use of cannabis for medicinal purposes.

However, as the Select Committee was unable to reach a consensus on the legal status of cannabis, there was a recommendation that this issue should be further considered by the Expert Advisory Committee on Drugs, an advisory body created under the *Misuse of Drugs Act 1975*.<sup>542</sup> There was also a recommendation that there should be “*greater use of diversion for minor cannabis offences ... (who) should be diverted to compulsory health assessment for first possession and use offences, rather than receiving a criminal conviction.*”<sup>543</sup>

The Select Committee's report includes the costs for police of enforcing the *Misuse of Drugs Act 1975* concerning cannabis offences, which estimated that in the year 2000/2001 cannabis related law enforcement activities cost a total of \$19 million, approximately 2% of the total cost of police activities. It was also noted that there was about a 4% annual chance for a person in NZ to be arrested for a minor cannabis offence, somewhat higher than a rate of 1.25% in Australia and 2% in the US.<sup>544</sup>

An authoritative and comprehensive submission by the APHRU to the Chadwick inquiry, after canvassing the relative merits and shortcomings of the various policy options, concluded the preferred approach was not the decriminalisation model in three Australian jurisdictions because

*“there is little evidence to support such systems in their current form as the lead policy option from a public health perspective. These reduce the stigma associated with cannabis convictions and can reduce some administrative costs of convictions. However, fines impact most on people with lower incomes who are often subsequently convicted for non-payment. Such systems may also result in ‘net widening’ as fines are issued to people who would formerly have only received a warning and reduce the symbolic deterrence value of prohibition legislation.”*<sup>545</sup>

These reservations about net widening and the disproportionate impact of fines on those with lower incomes need to be qualified as the WA reforms of 2004, introduced some two years after the Chadwick inquiry, differ from the three earlier Australian schemes, as failure to expiate under the CIN scheme does not result in a person being charged.<sup>546</sup> The APHRU submission recommended that a trial be conducted of formal cautioning for first time minor cannabis offenders and diversion for those who commit subsequent minor cannabis offences.

The Select Committee's report reveals that a major impediment for cannabis law reform in NZ was the constrained parliamentary authority of the Labour government, which after the 2003 general election required the support of a number of minor political parties to form government

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<sup>541</sup> Some of the focus of Select Committee seems to have been influenced by emerging research at that time, such as a West Australian study: Hillman SD, Silburn SR, Green A & Zubrick SR. *Youth suicide in Western Australia involving cannabis and other drugs*. Perth, WA Drug Abuse Strategy Office, 2000.

<sup>542</sup> At the time of writing this issue had not considered or listed for consideration by the EACD: <[www.ndp.govt.nz/committees.eacd.htm](http://www.ndp.govt.nz/committees.eacd.htm)>

<sup>543</sup> New Zealand Drug Foundation. *Health Select Committee report on cannabis and the government's response*.

<sup>544</sup> New Zealand Green Party. *Briefing notes to the report of the Health Select Committee inquiry into cannabis*.

<sup>545</sup> Alcohol & Public Health Research Unit. *A submission to the Health Select Committee inquiry into the public health effects and legal status of cannabis*. Auckland, Alcohol & Public Health Research Unit, University of Auckland, 2001, 44.

<sup>546</sup> However, in WA there is arguably other serious outcomes from failure to pay, as the FER system results in suspension of a motor driver's license.

by entering into a 'Supply and confidence agreement'. The Government was reminded in the minority report by one of these parties, the United Future Party,<sup>547</sup> that

*"as part of our supply and confidence agreement with the Labour/Progressive Government ... (there is) an undertaking from the Government that there will be no government led move to change the legal status of cannabis during this term of government."*<sup>548</sup>

In its minority report the United Future Party also articulated strong opposition to *"the ideology that public health policy and programs should be planned, funded and delivered within a harm minimisation strategy."*<sup>549</sup> Prior to the 2003 election the Greens had held the balance of power and were the only one of the seven parties in the Parliament to have adopted cannabis law reform as part of their platform. In spite of the Greens increasing the number of seats they held from seven to nine, its position on cannabis failed to achieve sufficient leverage on the Government, because of the Clark Labour government's reliance on the minority support of United Future through a 'supply and confidence agreement' after the March 2003 general election.<sup>550</sup>

A response by NORML (NZ) to the formation of the Clark Government in 2003 by entering into an agreement with United Future suggested a number of avenues which might be open to the Government to reform minor cannabis offences that possibly avoided the restrictions placed on legislative reform because of this agreement. These avenues included a private member's bill with a free conscience vote to effect policy change through the expanded use of diversion or cautioning or that cannabis could be reclassified by an Order in Council to a lower level within Category C drugs.<sup>551</sup>

The New Zealand Green Party after the 2003 election continued to lobby for cannabis law reform. In its platform it distinguished between personal and commercial levels of cannabis use by proposing to eliminate penalties for personal cannabis use by adults, set a minimum age of 18 for cannabis (as already applied to alcohol) and permit cultivation of cannabis for personal use.<sup>552</sup> It developed a number of innovative strategies to maximise public knowledge about some of the consequences of the prohibition of cannabis such as a 'Cannabis arrest-o-meter' on its website, which displayed a progressive total of arrests for cannabis and other drug offences, based on analysis of official data. For instance, data for the years 1998 to 2003 showed that annual cannabis offences decreased from 25,309 in 1998 to 19,897 in 2003 and that cannabis offences as a proportion of all drug offences declined from 94.1% in 1998 to 84.8% by 2003.<sup>553</sup>

Another strategy used by the Greens was for one of its parliamentary members, Nandor Tanczos MP, to use the parliamentary process through questions of various Ministers to obtain detailed information on DLE activity.<sup>554</sup> For instance, in the year 2000 it was determined that 4,550 people had been arrested for possession or use of cannabis, 3,695 people were arrested for cannabis dealing offences and 2,109 were arrested for other types of cannabis offences (eg possession of smoking implements or using cannabis in a public place). In the financial year 1998/1999 there was a total of 298,000 hours spent by police enforcing cannabis laws at a total

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<sup>547</sup> Which has been referred to as a 'born again Christian party.' Cf: Damuzi R. 'NZ pot reform gets shafted.' *Cannabis Culture Magazine* (Vancouver), Issue 44, 16 April 2003.

<sup>548</sup> New Zealand, Parliament, Health Committee. *Inquiry into the public health strategies related to cannabis use and the most appropriate legal status*. Wellington, House of Representatives, 2003, 67.

<sup>549</sup> Ibid.

<sup>550</sup> Damuzi R. *NZ pot reform gets shafted*. Vancouver, Cannabis Culture Magazine, Issue 44, 16 April 2003.

<sup>551</sup> NORML New Zealand. Labour's Dunne Deal attempts to block law reform, but may leave the door open to medical use. Latest news articles. <[www.norml.org.nz/](http://www.norml.org.nz/)>

<sup>552</sup> New Zealand Green Party. *Drug law reform policy – towards a harm reduction model for alcohol, tobacco, cannabis and other drugs*. 19 May 2004.

<sup>553</sup> NORML New Zealand. *Cannabis arrest-o-meter*.

<sup>554</sup> NORML New Zealand. *Parliamentary questions*.

cost of \$21 million (at a cost of \$70 per hour), of which 74,658 hours involved possession offences.<sup>555</sup>

In July 2005 the Green Party introduced a private members bill, the Misuse of Drugs (Cannabis Infringement) Amendment Bill 2005, which proposed to introduce an infringement notice system (described as ‘instant fines’).<sup>556</sup> The Government’s response to the Bill was swift, with the release of a media release by the Justice Minister which stated that “*Labour party policy does not include support for legalising marijuana and it does not support taking action that might promote its use.*”<sup>557</sup> However, the Bill appeared to have some public support, as a newspaper article contained comments from Professor David Fergusson, the director of 27 year long Christchurch Health and Development Study, who stated it

*“was a pragmatic response to the fact that 80 per cent of New Zealand’s had used cannabis on at least one occasion by the age of 25. ‘The frequency with which it’s being used makes it unrealistic to continue with prohibition’, he said.”*<sup>558</sup>

The Green’s proposed amendment lapsed when the Parliament was prorogued in October 2005 for the 2005 general election - which resulted in the return of the Clark Labour Government. To form government in November 2005 Labour again required an agreement with United Future to form a minority government. Given the unlikely possibility of cannabis law reform following the November 2005 election, the Green Party’s high profile MP Nandor Tanczos relinquished his former role as party spokesperson on law reform, such that by the end of 2005 the parliamentary avenue for cannabis law reform had all but closed. Instead, an alternative course of action was proposed at the NORML New Zealand Conference in late November 2005, that reform would require the development of a broad constituency in the community to support decriminalisation, as

*“the momentum in favour of reform has been lost and that we therefore need to go back to the grass roots to build a massive public campaign for reform. This includes a renewed emphasis on forming NORML branches and increasing our membership base. It also recognises that to make progress we must engage the wider issues of drug law reform.”*<sup>559</sup>

### 4.4.3 Legislative framework

The key piece of legislation that prohibits cannabis and other substances is the *Misuse of Drugs Act 1975*, which classifies drugs into three groups according to their purported potential for harm, from the most harmful Class A group (eg heroin), Class B group (eg hash and hashish oil) to the less harmful Class C group (eg cannabis).

Since the 1920s NZ had pursued a similar approach as followed in the UK and Australia, by legislating to prohibit use of a number of cannabis and other drugs, with the passage of the *Dangerous Drugs Act 1927*. The trigger for 1927 legislation was the 1925 Convention on Traffic in Opium and Other Drugs, which was ratified in 1926, as had been done by Australia.<sup>560</sup> The approach followed in NZ of bringing cannabis within the definition of a ‘dangerous drug’ following the 1925 Convention meant that it was included alongside drugs like opium, heroin, morphine and cocaine, an approach consistent with legislation introduced in the UK and in Australia at the same time.

There are a number of points to be made from considering this early history of UN Conventions and their relationship to NZ domestic drug laws. This first point is that it set in place a broad

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<sup>555</sup> NORML New Zealand. Cannabis arrests 1990-2000.

<sup>556</sup> New Zealand Green Party. *Misuse of Drugs (Cannabis Infringement) Amendment Bill*. 19 July 2005.

<sup>557</sup> New Zealand, Minister of Justice. *Labour against legalising marijuana*. Media release 19 July 2005.

<sup>558</sup> Davis J. ‘Cannabis bill ‘reasonable’.’ *The Press*, 21 July 2005.

<sup>559</sup> Fowlie C. *NORML Conference 2005: ‘Respect the majority!’* NORML New Zealand.

<sup>560</sup> Carney T. ‘The history of Australian drug laws: commercialism to confusion?’ (1981) 7 *Monash University Law Review* 165.

framework of criminal sanctions which did not differentiate between the possible degrees of harm. The second point is that this framework has largely persisted to the present day and that there have further parallel amendments to domestic law in response to revisions in the UN conventions. The framework that was established by the *Dangerous Drugs Act 1927* remained largely unchanged until 1960 when amendments were made to make cultivation of cannabis an offence and to make possession of and supplying cannabis punishable with up to seven years imprisonment.<sup>561</sup>

In 1963 the definition of cannabis was expanded to include any part of the cannabis plant, not just its flowering or fruiting tops.<sup>562</sup> Further amendments were made in 1965 following ratification in 1963 by NZ of the 1961 Single Convention which created the offences of possession of pipes or utensils for smoking cannabis and the offence of possession with intent to sell or supply where there were 100 or more cannabis cigarettes or 28 grams or more of cannabis.

The penalties in the *Misuse of Drugs Act 1975* reflect the level of seriousness with respect to cannabis, where for ‘provider’ offences (ie dealing, supply or importing) there is a maximum penalty of up to eight years and for ‘consumer’ offences (ie possession, use or possession of paraphernalia) a maximum penalty of up to three months imprisonment or a fine of \$500, or both.<sup>563</sup>

It has been suggested cannabis law reform in NZ should not be constrained because whilst it was a signatory to the three to the UN drug conventions, because it has ratified only two of the three conventions, the 1961 Single Convention and the 1971 Convention,<sup>564</sup> this means that

*“(t)he fact that most parties to the 1961 Convention have criminalised activities involving cannabis is far from conclusive evidence that the Convention requires them to do so as a matter of international legal obligation.”<sup>565</sup>*

A 1997 study suggests that the 1961 Convention could be read as permitting the decriminalisation of cannabis in a narrowly defined manner, so long as the preparation consisted of the leaves of the plants but excluded the flowering or fruiting tops, as Article 28(3) of the Convention requires parties to adopt “*such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.*” This interpretation arises as both seeds and leaves were excluded from the definition of cannabis, being considered innocuous compared to the flowering tops and resin of the cannabis plant.

*“However, decriminalisation of the leaves and seeds alone would introduce an untenable legislative distinction between different forms of cannabis, leaving the two most commonly used preparations in New Zealand still subject to total prohibition.”<sup>566</sup>*

The 1961 Convention is a complex document which also needs to be read in conjunction with Article 3(2) of the 1988 Convention, as it appears is to be designed to require parties to implement “*such measures as may be necessary to establish a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs ...for personal consumption contrary to the provisions of the 1961 Convention.*”

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<sup>561</sup> At this time a number of UN conventions were consolidated into the 1961 Single Convention on Narcotic Drugs.

<sup>562</sup> In the terms of the legislation at this time cannabis was referred to as ‘Indian hemp’ – with Indian hemp being replaced by the term cannabis in 1963.

<sup>563</sup> Whilst possession of paraphernalia is classified as a simple offence, it attracts a higher penalty, of up to one year’s imprisonment, \$500 fine or both.

<sup>564</sup> However whilst New Zealand had signed the 1998 Convention it had not been ratified at the time the research was published.

<sup>565</sup> Dawkins K. ‘International law and legalising cannabis.’ [1997] *New Zealand Law Journal*, 283.

<sup>566</sup> *Id.*, 282.

However, as NZ has not ratified the 1988 Convention, it is arguable that it would be free to decide whether prohibition is the ‘most suitable measure,’ it has been argued that it could decriminalise private cultivation of amounts of cannabis which neither threaten the ‘public health and welfare’ nor contribute to the ‘illicit traffic’.<sup>567</sup>

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<sup>567</sup> Dawkins (1997) points out that this distinction arises as Article 22 provides that a party shall prohibit cultivation whenever prohibition is the “*most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic.*”