

Overview of Australian Cannabis Infringement Notice Schemes

by Greg Swensen (September 2009)

1. South Australia

1.1 Introduction

The CEN scheme came into effect on 30 April 1987, following amendment to the *Controlled Substances Act 1984* (CSA), eight years after the recommendation for establishing such a scheme in 1979 by the Royal Commission Into the Non Medical Use of Drugs.

The scheme provides for a CEN to be issued for a range of ‘simple cannabis offences’ - possession or use of cannabis, possession of cannabis resin, possession of smoking paraphernalia and cultivation. A feature of the CEN scheme is that it requires police to issue a CEN to a person who has committed a simple cannabis offence.¹

From the inception of the CEN scheme in April 1987 up to February 1997 if a person failed to expiate within 60 days by paying the specified penalty, the only option was for a fine defaulter to be summonsed and prosecuted for the original offence. Reforms in February 1997 introduced an expanded range of options for payment of specified penalties, such as payment by instalment and payment by completion of a community service order. These reforms also occurred due to administrative improvements by electronic enforcement to address the earlier problem of a substantial number of unpaid CENs and to establish a special expiation unit in the South Australian police.

As a result of the February 1997 reforms, if a person fails to expiate by adopting one of the alternative methods of payment, they will be sent a reminder notice plus an incurred administrative fee. If payment is still not forthcoming after the reminder notice an order is made by the Registrar of the Magistrates Court for ‘enforcement’ of the outstanding expiation notice and an automatic conviction will be recorded for the original offence.²

This administrative process for dealing with defaulters obviates the pre-February 1997 process of dealing with non-expiators by arresting or summonsing them to have the matter dealt with personally in a Magistrates Court. The Registrar’s order means a fine is imposed which will be equivalent to the unpaid expiation fee plus additional administrative costs.

The original legislation in 1987 did not specify the number of plants considered to be cultivation for personal use, the number being simply described in the CSA as a “*small number for non-commercial purposes*”. The legislation was changed in 1990 to define an expiable offence as being the cultivation of up to 10 plants. In 1999 the number of expiable plants was reduced by regulation to three, in response to evidence that the shift to hydroponic cultivation had increased plant yields and that commercial syndication had become involved.³

However, in July 2000 a resolution of the Legislative Council disallowed this regulation and the limit returned to ten plants. Subsequently in August 2000 the limit was again reduced by regulation to a maximum of three plants.⁴ In 2001 an amendment to the regulations decreased the limit to one plant.⁵

¹ *Controlled Substances Act 1984* s. 45A(2).

² 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.

³ Bullock C. ‘Background briefing. Adelaide – ‘cannabis capital.’ *ABC Radio National* (transcript) 28 November 1999; Australian Broadcasting Corporation. “PM. South Australia cracks down on pot.” *ABC Radio National* (transcript), 25 July 2001; Williams T. ‘Cannabis culture curse.’ *Weekend Australian* 5-6 January 2002.

⁴ *Controlled Substances (Expiation of Simple Cannabis Offences) Regulations 1987*. Amended Reg 4(3), *South Australian Gazette*, 24 August 2000, 833.

A change concerning the method of cultivation occurred in December 2002 with an amendment of Section 45A of the CSA by inclusion of a definition of “*artificially enhanced cultivation*”.⁶ This amendment came into operation in February 2003 and means that now in SA artificially enhanced cultivation of cannabis is excluded from the CEN scheme.

1.2 Synopsis of legislation

45A. Expiation of simple cannabis offences

(1) A prosecution for a simple cannabis offence cannot be commenced except by—

- (a) the Director of Public Prosecutions; or
- (b) a member of the police force; or
- (c) a person authorised in writing by the Director of Public Prosecutions to commence the prosecution.

(2) Subject to this section, 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.

(3) Expiation fees (which may vary according to any factor) may be fixed by regulation for the purposes of this section.

(7) Non-compliance with subsection (2) does not invalidate a prosecution.

(8) For the purposes of this section

artificially enhanced cultivation means—

- (a) cultivation in a solution comprised wholly or principally of water enriched with nutrients;
or
 - (b) cultivation involving the application of an artificial source of light or heat;
- child, in relation to a simple cannabis offence, means a person who was, on the date of the alleged commission of the offence, under the age of 18 years;*

simple cannabis offence means—

- (a) an offence arising out of the possession of cannabis or cannabis resin, not being an offence involving the possession of quantities of cannabis or cannabis resin in excess of limits fixed by regulation for the purposes of this paragraph;
- (b) an offence arising out of the smoking or consumption of cannabis or cannabis resin except an offence alleged to have been committed in—
 - (i) a public place; or
 - (ii) a place of a kind prescribed by regulation;
- (c) an offence arising out of the possession of equipment for use in connection with—
 - (i) the smoking or consumption of cannabis or cannabis resin; or
 - (ii) the preparation of cannabis or cannabis resin for smoking or consumption, not being an offence involving the possession of such equipment for commercial purposes;

⁵ Controlled Substances (Expiation of Simple Cannabis Offences) Regulations 1987. Amended Reg 4(3), *South Australian Gazette*, 29 November 2001, 5250.

⁶ Defined in *Controlled Substances Act 1984* Section 45A as 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.*”

- (d) *an offence arising out of the cultivation (not being artificially enhanced cultivation) of not more than the prescribed number of cannabis plants.*

1.3 Expiable offences and penalties

Possession of cannabis

Where the amount is:

- less than 25 grams (\$150 penalty)
- 25 grams or more but less than 100 grams (\$300 penalty).

Possession of cannabis resin

Where the amount is:

- less than 5 grams (\$150 penalty)
- 5 grams or more but less than 20 grams (\$300).

Use of cannabis

Smoking or consumption of cannabis or cannabis resin⁷ (\$150 penalty).

Paraphernalia

Possession of equipment (one or more pieces) for use in connection with smoking or consumption of cannabis or cannabis resin (\$150 penalty).

But if this offence is accompanied by another simple cannabis offence relating to possession, smoking or consumption of cannabis or cannabis resin, then penalty of \$30.

Cultivation

Cultivation of 1 non-artificially cultivated cannabis plant (\$300 penalty).⁸

2. Australian Capital Territory

2.1 Introduction

The simple cannabis offence notice (SCON) scheme has operated in the ACT since June 1993 based on amendments to the *Drugs of Dependence Act 1989*, as detailed below.

SCONs are issued to adults or juveniles and provide them with the option of paying the fine within a prescribed time or otherwise, if payment is not made, they will be summonsed to appear in court, with the possibility of a conviction.

More recently the ACT has developed an early intervention and diversion program based on police discretion which has been adapted to include the SCON scheme. Participants in this program must have committed an offence, such as possession of an illicit drug or illicit possession of pharmaceutical drug. Diversion will not be available where a violent crime has been committed.

In June 2004 the ACT Government undertook a major reform of the Territory's laws concerning serious drug offences by introducing the *Criminal Code (Serious Drug Offences) Amendment Act 2004*. These reforms were designed to expand the scope of the framework for dealing with illicit drugs and was part of an ongoing commitment by the ACT Government to implement recommendations from the work of the Standing Committee of Attorneys General, which had initially agreed in 1990 for there to be a national Model Criminal Code (MCC).⁹

This 2004 Act included an amendment to the *Drugs of Dependence of Act 1989* to reduce the number of cultivated cannabis plants from five to two artificially cultivated plants for which a person could be

⁷ Not being an offence committed in a public place or other prescribed place.

⁸ *Controlled Substances (Expiation of Simple Cannabis Offences) Regulations 2002*.

⁹ A total of nine draft chapters have been published. Cf Model Criminal Code <<http://www.aic.gov.au/links/mcc.html>>.

issued a SCON and came into effect on 4 March 2005.¹⁰ The June 2004 amendment also excluded from the SCON scheme any plants that were either hydroponically or artificially cultivated.¹¹

A summary of the 2004 law reforms on the Australian Federal Police website provides an explanation for the amendment of Section 162 of the *Drugs of Dependence of Act 1989*.

“The decision was made to exclude hydroponically grown cannabis plants from the SCON scheme as the trend towards hydroponic methods of cannabis cultivation indicates that the quantities of cannabis now able to be produced and potentially the potency of that cannabis, are no longer in the line with the original intentions of the scheme.”¹²

2.2 Synopsis of legislation

171A Offence notices

(1) *If a police officer reasonably believes that a person has committed a simple cannabis offence, he or she may serve an offence notice on that person.*

(2) *If an offence notice is served on a child and the police officer serving the notice reasonably believes that the child is residing with a person who stands in loco parentis to that child, the police officer shall serve a copy of the notice on that person.*

(3) *An offence notice shall –*

- (a) *specify the nature of the alleged simple cannabis offence; and*
- (b) *specify the date and time when and place where the simple cannabis offence is alleged to have been committed; and*
- (c) *contain a statement to the effect that, if the alleged offender pays the prescribed penalty for the alleged offence within 60 days after the date of service of the notice, no further action will be taken in relation to that offence; and*
- (d) *specify the amount of the prescribed penalty; and*
- (e) *specify the place where and how the prescribed penalty may be paid;*

....

(4) *If the prescribed penalty is paid in accordance with the offence notice—*

- (a) *any liability of the person in relation to the alleged simple cannabis offence shall be deemed to be discharged; and*
- (b) *no further proceedings shall be taken in relation to the alleged simple cannabis offence; and*
- (c) *the person shall not be regarded as having been convicted of the alleged simple cannabis offence.*

...

(7) *In this section:*

child *means a person who is under 18 years old on the date of the alleged offence.*

simple cannabis offence *means—*

- (a) *an offence against section 162 (Cultivation of 1 or 2 cannabis plants); or*
Note: Section 162 does not cover artificial cultivation of cannabis plants.
- (b) *an offence against section 171 (1) of possessing not more than 25g of cannabis; or*
- (c) *an offence against section 171 (2) of administering, or causing or permitting to be administered, to oneself cannabis.*

¹⁰ *Drugs of Dependence Regulation 2005.*

¹¹ *Drugs of Dependence Act 1989 s. 162.*

¹² *Australian Federal Police. ACT policing: ACT drug law reform. 26 October 2005.*

(8) In relation to a simple cannabis offence, the prescribed penalty is \$100.

171. Prohibited substances—possession, administration and disposal

(1) A person shall not possess a prohibited substance.

Maximum penalty:

- (a) if the offence relates to a quantity of cannabis not exceeding 25g in mass—1 penalty unit; or
- (b) in any other case—50 penalty units, imprisonment for 2 years or both.

(2) A person shall not administer, or cause or permit to be administered, to himself or herself a prohibited substance.

Maximum penalty: 50 penalty units, imprisonment for 2 years or both.

2.3 Expiable offences and penalties

Possession of cannabis

Where the amount is not more than 25 grams (\$100 penalty).

Cultivation

Cultivation of up to two non-hydroponically or non-artificially cultivated plants (\$100 penalty).

Use

It is an expiable offence to use (ie self administer) cannabis (\$100 penalty).

3. Northern Territory

3.1 Introduction

The drug infringement notice (DIN) scheme has operated in the NT since 1 July 1996 and permits adult offenders to be issued with a DIN, if they commit any of the offences covered by the scheme. The *Misuse of Drugs Act 1990* prescribes that a penalty of \$200 applies to any DIN.¹³

If the fine of \$200 for any of these offences is not paid within a specified time and still remains unpaid after a reminder has been issued, then an offender is taken into custody or the amount can be recovered by a warrant of distress. Offenders have the option of contesting their DIN in court, with the consequent possibility of a criminal conviction.

3.2 Expiable offences and penalties

Possession of cannabis

Possession of up to 50 grams of cannabis plant material (\$200 penalty).

Possession of cannabis resin

Possession of up to 10 grams of cannabis resin (\$200 penalty).

Cultivation

Cultivation of up to two plants (\$200 penalty).

¹³ *Misuse of Drugs Act 1990*, Schedule 3.

4. Western Australia

The cannabis infringement notice (CIN) scheme commenced on 22 March 2004 and enable a police officer to issue an adult with a CIN, if they committed an offence involving Sections 5(1)(d)(i), 6(2) or 7(2) of the *Misuse of Drugs Act* (1981) (MDA).

The *Cannabis Control Act 2003* (CCA) sets out in Sections 5, 6 and 7 that a police officer must be satisfied that the individual has committed an offence against these three sections of the MDA before a CIN may be issued.

As the CCA does not operate as separate piece of legislation but is linked to sections 5(1)(d)(i), 6(2) and 7(2) of the MDA, it provides police with the considerable advantages, such as reasonable suspicion to stop, search and detain a person or their vehicle or any belongings or packages or any other thing.¹⁴

There are two statutory elements that determine the fees applicable to each expiable offence. Whereas Section 10(2) of the CCA specifies that there is an upper limit of \$400 that can be prescribed as a penalty for any expiable offence, the actual amounts for the four expiable offences are determined by regulation in Schedule 1 of the *Cannabis Control Regulations 2004* as follows.

It should also be noted that Section 6(2) includes a qualification as regards the amount of cannabis which can be expiated by an infringement notice by stipulating that cannabis derivatives, such as hashish resin or hashish oil, cannot be dealt with by a CIN.

4.1 Expiable offences and penalties

Possession or use of cannabis

Where the amount is:

- not more than 15 grams (\$100 penalty)
- more than 15 grams but not more than 30 grams (\$150 penalty).

Cannabis smoking implement

Possession of cannabis smoking implement or utensil on which there are detectable traces of cannabis (\$100 penalty)

Cultivation

Cultivation of not more than two non hydroponically cultivated cannabis plants (\$200 penalty)

4.2 Synopsis of legislation

5. CIN for offence under Misuse of Drugs Act 1981 s. 5(1)(d)(i)

(1) A police officer, other than a police officer who is an authorised person for the purposes of section 8(4)(b)(i), 11(1) or 12(1), who has reason to believe that a person who has reached 18 years of age has committed an offence under section 5(1)(d)(i) of the Misuse of Drugs Act 1981 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.

(2) A CIN may be issued under subsection (1) if, and only if, the alleged offence involves cannabis.

6. CIN for offence under Misuse of Drugs Act 1981 s. 6(2)

....

(2) A CIN may be issued under subsection (1) if, and only if, the alleged offence -

(a) involves an amount of cannabis that is not more than -

(i) 30 grams; or

¹⁴ *Misuse of Drugs Act 1981 s. 23.*

- (ii) if an amount less than 30 grams is prescribed by the regulations - that amount;
- and
- (b) does not involve –
 - (i) cannabis resin or any other cannabis derivative; or
 - (ii) a cannabis plant under cultivation.

The CCA includes in Section 7(2) a qualification as regards the circumstances and method of cultivation when a CIN can be issued when the offence involves cultivation of cannabis.

7. CIN for offence under Misuse of Drugs Act 1981 s. 7(2)

....

(2) A CIN may be issued under subsection (1) if, and only if—

- (a) the alleged offence involves cannabis plants under cultivation, other than cannabis plants under hydroponic cultivation;
- (b) the cannabis plants are all located on the same premises and those premises are the alleged offender's principal place of residence;
- (c) there are no other cannabis plants being cultivated on the premises by any other person; and
- (d) the plants number no more than –
 - (i) 2; or
 - (ii) if the number one is prescribed by the regulations - one.

There is an ancillary provision in the *Criminal Investigation (Identifying People) Act 2002* which enables police when they issue a CIN to require a person to provide their name, address and other personal details.¹⁵ 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.¹⁶

It should be noted that for some years the MDA has treated drug offences involving cannabis as less serious than offences involving other drugs. This is illustrated by cannabis being placed in a lesser category of seriousness through the provision in the MDA for an optional summary trial procedure for those charged with certain types of serious cannabis offences.

¹⁵ *Criminal Investigation (Identifying People) Act 2002* s. 16(6).

¹⁶ *Criminal Investigation Act 2006* s. 128(3)(b).