

Reforms to Minor Cannabis Offences in the United Kingdom & Western Australia

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Summary

This paper considers the different paths taken in the United Kingdom (UK) and Western Australia (WA) to cannabis law reform. In both jurisdictions significant changes were introduced in early 2004 to the way in which minor cannabis offenders are dealt with. Contrary to the shrill cries of those opposed to these reforms, in neither jurisdiction do the reforms alter the legal status of cannabis and thus it remains a prohibited substance.

In WA new legislation establishes the criteria and process for police to issue an infringement notice, with a scale of monetary penalties, to a person who commits one of three defined minor cannabis related offences. If the offender expiates the infringement notice within 28 days by either paying the penalty or attending an education session there are no further consequences. Compared to the WA scheme, in the UK police discretion has been formalised through guidelines issued by the Association of Chief Police Officers, which give the option of cautioning an offender for possession of an amount of cannabis considered to be intended for personal use. The WA scheme shows that legislative reform which maximises the advantages of a combined health and law enforcement framework to divert offenders from the criminal justice system is possible.

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Introduction

Significant reforms in the year 2004 in both the State of Western Australia (WA) and the United Kingdom (UK) have substantially changed the manner in which police deal with minor cannabis offences. This paper examines how two jurisdictions which share similar legal and legislative cultures have followed divergent approaches in reforming the law concerning minor cannabis offences. In WA the approach was to enact specific legislation to establish a framework for police to use when dealing with minor cannabis offenders, whereas in the UK the approach involved minimal legislative activity and instead relies upon guidelines issued to police to shape their discretion to issue cautions.

Our purpose is to examine the divergent approaches that have been followed in these two jurisdictions, identify features of the respective schemes, potential shortcomings and what lessons may be learnt about these reforms. To do this the paper examines the process of reform in WA demonstrating how this shaped the State's cannabis infringement notice (CIN) scheme, presents major features of the CIN scheme and shows that the CIN scheme has built upon the schemes that expiate minor cannabis offences in three other Australian jurisdictions.

The following detailed review of the CIN scheme will be of interest to those in other jurisdictions advocating drug law reforms as it demonstrates how limited drug law reform is achievable. It will also be of interest to those concerned about the wide spread use of cannabis in spite of the existence of criminal sanctions and whether other mechanisms may be implemented to regulate supply to address some of the harms associated with the drug's use.

Australian Context

Prior to March 2004 when the CIN scheme commenced in WA, three Australian jurisdictions already had schemes to expiate minor cannabis offences: the cannabis expiation notice (CEN) scheme in South Australia (SA) which commenced in April 1987; the simple cannabis offence notice (SCON) scheme in the Australian Capital Territory (ACT) which commenced in October 1992 and the drug infringement notice (DIN) scheme in the Northern Territory (NT) which commenced in July 1996. The four remaining jurisdictions (New South Wales, Victoria, Queensland and Tasmania) continue to

provide for the prosecution of minor cannabis users but have cautioning schemes. (Baker & Goh, 2004; Hales, Mayne, Swan et al, 2004)

In Victoria police have had the option of issuing cautions for minor cannabis offences since 1998, with voluntary attendance at an education session. This is a non legislation based scheme and applies to first or second time offenders aged over 17 years of age and where the offence involves the possession of up to 50 grams of cannabis. In New South Wales (NSW) police have had the option of issuing a caution for minor cannabis offences since March 2000, applicable to circumstances involving the possession of not more than 15 grams of cannabis. The NSW cannabis cautioning scheme, like the Victorian, is not legislation based and is established through police guidelines. It was modified in September 2001 to allow police to issue a caution for a second offence requiring attendance at a mandatory education session conducted by telephone. A cannabis cautioning scheme was introduced in Queensland in June 2001 and permits only one caution that requires attendance at a face to face assessment and education session for offences involving possession of not more than 50 grams of cannabis or possession of a smoking implement. This scheme is legislation based through the Police Powers and Responsibilities Act 2000. In Tasmania, where police have been able to issue cautions for cannabis offences since February 2000, there is a three level approach, with a formal caution and the provision of educational materials to first time offenders, referral of second time offenders to a brief face to face counselling session and diversion of third time offenders to a drug assessment and treatment program (which is part of an overall diversion program for drug offenders).

It is arguable whether the CEN, SCON or DIN schemes have had more than a marginal impact on the manner by which cannabis offences are dealt with by police in Australia. For instance, in the 2002/2003 financial year there was a total of 55,689 cannabis offences in Australia, of which only 6,081 (10.9 per cent) resulted in offence notices and 49,608 resulted in an arrest. (Australian Crime Commission, 2003, Table 1.2.) It is not known what proportion of the 89 per cent of arrestable cannabis offences involved minor offences. In the Australian Crime Commission's 2002/2003 Illicit Drug Data Report there is a breakdown of the 55,689 cannabis offences into 'consumer' (ie possession, use or possession of implements) and 'provider' (ie supply type offences such as importation, trafficking, selling, supply, cultivation and manufacture) offences which shows a total of 46,615 (83.7 per cent) consumer offences in Australia (Australian Crime Commission, 2003, Table 1.2). It should also be noted this breakdown under-counts the number of minor (ie 'consumer') cannabis offences in all jurisdictions, as the 2002/2003 report, like the predecessor series of annual reports published by the Australian Bureau of Criminal Intelligence, the Australian illicit drug reports, defined the cultivation of any number of plants as a 'provider' offence. This is despite the fact that cultivation of cannabis plants is an expiable offence in SA (1 plant), in the ACT (up to 5 plants) and in the NT (up to 2 plants).

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Cannabis Law Reform in WA

Background

The Cannabis Control Act 2003 (CCA) is the culmination of a decade of intense policy debate in Australia, at both the State and national level, split largely along conservative ie Liberal Party versus progressive ie Australian Labor Party (ALP) political lines. The mid 1990s marked a point of substantially increased community concern in WA about the growing use of illicit drugs, particularly heroin and to a lesser extent cannabis. In 1992 the Commonwealth Government 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. (Atkinson & McDonald 1995)

Inquiries into drug issues

In 1994 the WA Liberal government, which was elected in February 1993, established the Task

Force on Drug Abuse (TFDA) to undertake a comprehensive 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.” (Western Australia, Task Force on Drug Abuse 1995, 244) The TFDA observed that, during community consultations, it had found strongly polarised views on the issue of cannabis law reform. There had been 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.” (Western Australia, Task Force on Drug Abuse 1995, 189)

Whilst not accorded the status of being a recommendation, there was also a suggestion, in response to evidence of the adverse social impact of a 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.” (Western Australia, Task Force on Drug Abuse 1995, 198)

In June 1997 a Parliamentary Select Committee of the Legislative Assembly was established, primarily in response to rising community concern since the mid 1990s about the marked increase in heroin related deaths. 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 by amendment to the Misuse of Drugs Act 1981 (MDA). (Select Committee Into the Misuse of Drugs Act 1981, 1997) The issue of cannabis law reform was addressed in a minority report by the Committee’s two Labor (Opposition) members, Hon Jim McGinty (who is now Attorney General in the 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 to establish a scheme to expiate minor offences, along the lines of the South Australian CEN scheme.

Cautioning for minor cannabis offences

Some five years after the rather cursory review of the issue of cannabis law reform in 1995 by the TFDA, the Liberal government, in what could be interpreted as a concession for reform, albeit of limited scope, introduced in March 2000 the cannabis cautioning mandatory education scheme (CCMES) on a Statewide basis.^[1] The CCMES obviated the need for legislative reform as it involved an administrative direction by the Commissioner for Police that gave police the option of issuing a formal caution for first time cannabis offenders who possessed up to 25 grams of cannabis. It did not apply to other minor cannabis offences, such as possession of smoking implements or cultivation of a small number of plants. A person issued with a caution under the CCMES was required as a condition of the caution to attend an education intervention of an hour and half’s duration at one of the State’s 12 specialist non government service providers, known as community drug service teams (CDSTs). The caution in effect suspended prosecution for the offence, contingent on the individual attending and completing the education session. If an individual failed to attend an education intervention within two weeks of receiving a caution they would be charged with the original offence under section 6 of the MDA. This involved an appearance at a Court of Petty Sessions, with a conviction and either a fine, a community service or intensive supervision order, with the attendant stigma of a criminal record.

Community Drug Summit

The election of the Labor government in February 2001 signalled the possibility of legislative reform concerning minor cannabis offences in WA. The ALP’s pre election platform included 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 region 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.” (Australian Labor Party 2000)

Drug summits have been a popular tool in Labor Party pre-election platforms in a number of Australian States to canvass public opinion, identify issues and priorities and make recommendations on drug policy. Except for an ‘alcohol summit’ in New South Wales in 2003, all have been largely focussed on illicit drugs. The first drug summit held in Queensland, with a ‘youth’ focus, was held in March 1999. This was followed by the New South Wales drug summit in May 1999, which unlike the Queensland summit consisted of members of parliament and invited ‘community representatives’. South Australia held a drug summit in June 2002. During the New South Wales election campaign in March 2003, the incumbent Labor Premier Bob Carr announced that a State alcohol summit would be held as part of the ALP’s election platform. The NSW alcohol summit was held in August 2003 and was attended by both members of parliament, key government departments, community representatives and a range of experts. (Haber, Conigrave & Wodak 2003) The WA drug summit was held in August 2001 and consisted of 80 ‘community representatives’ plus 20 delegates with specialist experience in areas such as policy, service delivery or research, from public nominations. The WA drug summit was held at Parliament House with proceedings recorded and all resolutions resolved by majority vote. Recommendation 39 of the drug summit supported the adoption of a system of “prohibition with civil penalties”^[2] for adults who either possessed or cultivated “small amounts of cannabis”. This recommendation supported the proposed model in the ALP’s pre election manifesto, accompanied by a detailed statement that sought to outline the rationale for a legislation based system for the expiation of minor cannabis offences. (Working Party on Drug Law Reform 2002)

Legislative process

In December 2001 the Minister for Health appointed the Drug Law Reform Working Party (DLRWP) to advise on setting up a model consistent with the objectives in Recommendation 39. The DLRWP reviewed the operation of the three established Australian schemes, each of which prohibit cannabis but permit expiation for a range of minor cannabis offences by payment of monetary penalties. The DLRWP reported to the Minister in March 2002 and recommended separate legislation to set up a scheme in WA to expiate minor cannabis offences as:

- this would signify a shift in emphasis in regulating those who use cannabis as being a health rather than a law enforcement issue;
- “the community will be able to identify and obtain all information about relevant offences, penalties and provisions in a single statute” (Working Party on Drug Law Reform 2002, 14); and
- the State had already legislated within a broad public health framework for the use of alcohol (in the Liquor Licensing Act 1988) and tobacco (in the Tobacco Control Act 1990), it was therefore logical to treat cannabis in a similar fashion.

The Government accepted the proposal for separate legislation, along with a number of the other recommendations, to establish the CIN scheme. However, two key recommendations were not accepted by the Government:

- repeal of 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, be an expiable offence.

Cannabis Infringement Notice Scheme

With the passage of the CCA on 23 September 2003 WA became the fourth jurisdiction in Australia to reform its laws on minor cannabis offences. The CCA was proclaimed to come into operation on 22 March 2004. The CIN scheme is principally concerned with three types of minor cannabis offences:

- possession of smoking implements with detectable traces of drugs (CCA s 5);
- possession of not more than 30 grams of cannabis (CCA s 6); and
- cultivation of no more than two non hydroponically grown cannabis plants (CCA s 7).

Each of these offences are dependent on the three correlative sections under the MDA, sections 5(1)(d)(i), 6(2) and 7(2), respectively.

Juveniles

It needs to be understood that the CIN scheme is only applicable to adults, ie persons aged 18 years and older. In WA juveniles, persons aged between 10 and 17 years, who have possession of non traffickable amounts of cannabis will continue to be dealt with separately by way of cautions. The Young Offenders Act 1994 (YOA) provides that juveniles in possession of non traffickable quantities of cannabis and other drugs covered by the MDA can be given either a caution or referred to a juvenile justice team. S 22B of the YOA specifically requires that police must first consider alternative approaches before a juvenile can be charged with an offence.

“A police officer, before starting a proceedings against a young persons for an offence, must first consider whether in all the circumstances it would be more appropriate (a) to take no action; or (b) administer a caution to the young person.”

Schedules 1 and 2 of the YOA prohibit a juvenile from being issued with a caution if the offence involves a charge under Sections 6(1)(a), 6(1)(c), 7(1)(a) or 7(1)(b) of the MDA. This means that in relation to cannabis, juveniles who cultivate 10 or more cannabis plants^[3] or who possess 100 grams or more of cannabis cannot be cautioned but must be dealt with by a court.

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Relationship with Misuse of Drugs Act

Whilst the CIN scheme is established by the CCA it must also be read in conjunction with the MDA, the State's primary source of illicit drugs legislation. In this regard the CIN scheme resembles the legislative approach followed to establish the CEN scheme (by amendment to the Controlled Substances Act 1984), the SCON scheme (by amendment to the Drugs of Dependence Act 1989) and the DIN scheme (by amendment to the Misuse of Drugs Act).

Discretion

An important distinction between the CIN scheme and the CEN, SCON and DIN schemes, is that police discretion is preserved as each of the three CIN offences in the CCA states that “[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 can be contrasted to the South Australian CEN scheme which specifically excludes police discretion “... 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” (Controlled Substances Act 1984 s 45A(2)). This suggests that the WA scheme aims to avoid some of the criticisms of the other three Australian schemes, whilst also retaining some degree of flexibility for police in enforcing the CIN scheme. A major concern has been that police should be able to prosecute those who flaunt the scheme as whilst they have technically committed only an expiable offence, there is strong evidence of selling and supplying cannabis to others.

The Cannabis Control Act 2003 Cannabis Infringement Notice Scheme Guidelines issued by the WA

Police Service state that: “When an offence is detected, police are encouraged to exercise their discretion to issue the person with an infringement notice (CIN), provided all the criteria for its issue are met.” There are three criteria: that the issuing officer is able to verify the identity of the offender, that there is sufficient admissible evidence and that the cannabis is only for “personal use (and that if) the circumstances indicate something other than personal use, then a CIN cannot be issued.” (Guidelines, 3) There is also 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 most likely be dealt with at the time of the trial for the serious concurrent offence (or offences). This degree of procedural flexibility is important as in South Australia there was for some time a belief that police had to issue a CEN for minor cannabis offences regardless of the circumstances. This resulted in a significant number of people who had been concurrently charged with a serious offence failing to expiate their CEN. (Hunter 2001) As there was little incentive for expiation to occur, the overall expiation rate fell and resulted in adverse criticism of the CEN scheme on the grounds it had apparently failed to achieve one of its aims: a reduction in the number of persons before the courts for minor cannabis offences. In its first report the Drug Law Reform Working Party noted that 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.” (Working Party on Drug Law Reform 2002, 8)

Place of cultivation

The CCA provides that an individual may only receive a CIN for the cultivation of cannabis 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.” (CCA s 7 (2)) This approach is intended to rectify the perceived shortcoming of the South Australian CEN scheme that it had facilitated organised commercial cultivation of cannabis at a household where a number of adults resided, as the scheme set the plant limit per adult. (Australian Broadcasting Corporation 1999; Williams 2002; Mason 2002) When the CEN scheme came into operation in SA in 1987 it did not specify the actual number of plants considered to be cultivation for personal use, being only defined as the cultivation of a “small number for non commercial purposes”. The CEN scheme was amended in 1990 to specify that the cultivation of up to 10 plants was an expiable offence and then in 1999 further amended to three plants. The number of plants reverted to 10 plants in July 2000 following disallowance of the regulation but returned to a maximum of three plants in August 2000. In November 2001 the limit was set at one plant per adult

Hydroponic cultivation

The CCA extends the ambit of the law in WA in relation to hydroponically cultivated cannabis, by creating a new offence of selling or supplying, or offering to sell or supply “any thing that the person knows will be used to cultivate a prohibited plant ... by hydroponic means”. (MDA s 7A) When the Cannabis Control Bill 2003 was first introduced on 20 March 2003 it had an offence of someone selling or supplying or offering to sell or supply any thing if that person “knows or reasonably ought to know” that such a thing would be used to hydroponically cultivate cannabis (Clause 28). However, this provision was amended by the Legislative Council in early September 2003 by the Greens and Liberals. The removal of the requirement for reasonable knowledge meant, as the Attorney General observed, that it would

“raise the evidentiary requirement for the offence such that knowledge of the intended uses of hydroponic equipment would have to be proven in any prosecution ... [which] is likely to lessen the specific deterrent effect of the offence.” (Legislative Assembly, Hansard 2003, 1164)

Furthermore, the CCA provides that either the police or the Director of Public Prosecutions may upon conviction of someone for this offence obtain an order prohibiting them for up to two years from selling or supplying, or offering to sell or supply any thing that could be used to hydroponically

cultivate cannabis. (MDA s 7A (2)) A rationale for regulating those who sell and supply hydroponic equipment has been outlined in a paper prepared for the South Australian drug summit.

“Police claim that South Australia has a significant number of hydroponic shops compared with other jurisdictions, there are linkages between organised crime groups, cannabis producers and a significant number of hydroponic shops and that a proportion of the hydroponic retail industry is supported by illegal cannabis cultivation.” (South Australia, Drugs Summit 2002)

The CCA does not provide a definition of the meaning of hydroponic cultivation of cannabis. This is in contrast to the CEN scheme in South Australia, which 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. 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)

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 (CCA s 22). A retailer must also make available prescribed educational materials to purchasers of smoking paraphernalia (CCA s 23). 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 “cannabis smoking paraphernalia” to persons under 18 years of age (CCA s 24). 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.

Methods of expiation

Compared to the three other Australian jurisdictions, the CIN scheme provides broader methods of expiation (CCA s 8(4)), by either payment within 28 days of a prescribed “modified penalty” or attendance at a “cannabis education session” (CES). The penalties, which are determined by the Cannabis Control Regulations 2004 are:

- \$100 for a CIN issued under s 5;
- \$100 for a CIN issued under s 6 involving not more than 15 grams of cannabis;
- \$150 for a CIN issued under s 6 involving more than 15 grams and up to 30 grams of cannabis; and
- \$200 for a CIN issued under s 7(2) involving the non-hydroponic cultivation up to two cannabis plants.

The scheme also specifically requires an individual be advised in writing that he or she can elect to go to court to contest the matter as being an offence under the MDA, instead of paying the prescribed penalty or attending a CES. (CCA s 8(3)) The CIN scheme also provides that if a person has been issued with multiple infringement notices on one day and has received a CIN in relation to each offence, then for purposes of expiation by attendance at a CES, attendance at one CES will be taken to have expiated all of the separate CINs issued on that one day. (CCA s 14)

It would be possible to receive up to three separate CINs for one occasion, involving possession of cannabis, possession of a smoking implement with detectable traces of cannabis and cultivation of cannabis. However, this provision needs to be read in conjunction with the second stage penalty structure (below), which removes the option of expiation by payment of the modified penalty(ies) if an individual has been issued with two or more CINs on separate days within the past three years. (CCA s 9(1))

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.” (CCA s 17(1)) Expiation requires an individual to complete a CES, proven by the provider issuing 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. (CCA s 17(2)) If expiation has not occurred by either payment or by attendance at a CES at the expiration of the first 28 day period, then police issue a final demand, giving notice that if payment is not made within the next 28 days, enforcement will be transferred to the Fines Enforcement Registry (FER).[4] The only method for expiation during the second 28 day period or thereafter is payment of the relevant modified penalty. If an individual fails to meet further demands for payment of the unpaid infringement notice, there is the power under the fines infringement legislation to suspend his or her motor drivers licence and refuse motor vehicle registration. Additional administrative charges are incurred as demand notices are issued. The fines enforcement process does not, however, permit enforcement of unpaid infringement notices through imprisonment.

CIN recidivism

The CCA has been designed to largely avoid an individual being charged with the original minor cannabis offence under the MDA if they fail to expiate. However, there is a provision targeted at those who might be described as “CIN recidivists”, who are able to be charged with the relevant offence under the MDA. This provision was not in the original Cannabis Control Bill when first introduced into Parliament in 2003, but was inserted 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 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.” (Legislative Assembly, Hansard 2003, 1166)

It is possible for a CIN recidivist to be convicted of an offence if they fail to expiate as 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. CIN recidivists are not able to expiate by payment of the prescribed penalty, but can only expiate by attending a CES. (CCA s 9) An individual subject to a second stage penalty who fails to complete the CES within the 28 day period would be charged with the relevant offence under the MDA instead of being dealt with according to the provisions of the CCA. (CCA s 9(4))

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Impact of the CIN Scheme

The criteria that the Government would use to evaluate the success of the CIN scheme were set out by the Minister for Health in the second reading speech on the Cannabis Control Bill 2003. (Kucera 2003, 5697) These were that the scheme would:

- 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.

The CCA requires that the legislation should be reviewed after it has been in operation for three years (CCA s 26), a provision that was adopted without amendment in the Cannabis Control Bill 2003. 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.” The requirement for review may reflect a recent shift in approach by the legislature in matters involving contested perspectives on the role of the criminal law in areas of personal choice. Such an example is the Prostitution Act 2000, which contained a provision (in s 63) for the legislation to expire two years after proclamation.^[5] Like the issue of the criminalisation of cannabis, reform of the law covering prostitution has engaged Governments of all political persuasions in WA, with limited reform occurring in spite of open support by law enforcement and health agencies.

Cannabis education intervention

One of the important features of the CIN scheme compared to the other three Australian schemes is its non-monetary option of expiation. Not only should this option improve the CIN scheme’s expiation rate, but it also provides an option for those with limited financial resources to be able to expiate without payment of the applicable modified penalties. There are arguably considerable political advantages of the CES component of the CIN scheme as it can help to rebut claims that the scheme has not ‘decriminalised’ cannabis laws, but instead has established a mechanism for police to bring cannabis users into contact with specialist alcohol and drug service providers.

“The cannabis infringement notice scheme will allow police to exercise a wider range of enforcement and disposal options to divert offenders away from the court process as well as offer an education aimed at discussing and considering the legal and health ramifications of their cannabis use, in an effort to change future behaviour towards cannabis use.” (WA Police Service, 2004)

However, whilst the role of the CES can be applauded, there are concerns about the effectiveness of locating the CES expiation option within mainstream drug and alcohol treatment service providers. These are explicitly funded to provide services to individuals with problematic drug use, often at the more serious end of the spectrum. Therefore provision of the CES within this setting could deter some from utilising this option.

An inquiry in 2000 into cannabis by a Standing Committee of the Legislative Assembly in the Australian Capital Territory included an examination of a program known as Effective Weed Control, which targeted those users wanting to reduce or completely abstain from cannabis.

“The committee was interested that the decision was made to operate programs in community centres than alcohol and drug centres ... Effective Weed Control noted that ‘We did not want to run them in health centres, we did not want to run them in alcohol and drug centres, because there are many people who are not accessing these services and will not access traditional alcohol and drug services for cannabis use problems and cannabis cessation’.” (Australian Capital Territory, Legislative Assembly, 2000, 34)

Another concern about the location of the CES within CDSTs is that attendance at a CES requires a person to be registered as a client of the particular agency, to enable each agency to meet its reporting requirements to government funding bodies. Whilst registration does not involve privacy concerns as named data is not transferred to the reporting body, it could be argued it can stigmatise someone as being ‘sick’ and/or deviant and in need of help and correction through education or treatment. This process could be construed as in effect being a shift from one system of social control, the criminal justice system, to a new system of social control by therapeutic agents or treatment providers.

Sentencing practices

It is unclear whether the CIN scheme will be interpreted by the lower courts as signalling that minor cannabis offenders should be dealt with leniently, as there may be some offenders who elect to

contest a minor cannabis offence before a magistrate. It is possible this option may arise in those instances where an individual has been issued with the maximum of three CINs on a single occasion, that is possession of an implement, possession of a small quantity of cannabis and non hydroponic cultivation of not more than two plants. A related concern is whether the CIN scheme compared to the experience in the other Australian jurisdictions will be able to achieve higher levels of expiation. If the scheme is able to achieve a high level of expiation this is likely to significantly enhance its continuation beyond the initial three year period of parliamentary review. There are other factors, besides the scale of penalties and the structured system of escalating consequences contingent on expiation failure which may also affect expiation. One such concern is that the CCA may be interpreted by the police as requiring them to rigorously ticket all minor cannabis offences, whereas previously they may have administered informal cautions because some offences were trivial. There is evidence from South Australia that for a number of years expiation was affected by the manner in which police implemented the CEN scheme.

“The introduction of the Cannabis Expiation Notice (CEN) scheme in 1987 appears to have had a substantial net widening effect; that is, there has been a significant increase since the scheme commenced in the total number of cannabis offences detected by police. At the same time, the National Drug Strategy drug use surveys show that use of cannabis in the community has increased only slightly, and at a rate similar to the other States. It is most likely that significantly increased detection of cannabis offences is a result of changes in police behaviour, rather than it being a reflection of greater use of cannabis within the community. Only about 45 per cent of CENs are paid. It is possible that inability to pay is one factor in the expiation rate not being higher.” (Atkinson and McDonald, 1995)

There are a number of scenarios that should be considered with this apparent shift in the punishment of minor cannabis offenders. One of these involves first time offenders who are convicted of a minor cannabis offence. Such persons may now have the expectation under the Spent Convictions Act 1988 that when they make an application to the Commissioner of Police to expunge a conviction after the expiration of 10 years if they have not re-offended over the intervening ten year period following conviction, that their application receives a favourable consideration. Another consideration is the option under the Sentencing Act 1995 (s. 45) for a court to make an order granting an immediate spent conviction to a first time offender if the court considers the person is unlikely to offend again. A spent conviction order also requires a determination by the Magistrate as to whether the offence is “trivial” and the person is of previous good character. However, following the Supreme Court of WA cases of *R v Bruno Tognini*; *R v Malcolm John McGuire*, 22 February 2000 [BC20000413] and *Game v Whitehead*, 23 February 2000 [BC20000758] this option is strictly interpreted. It is understood that courts have been very reluctant to issue spent conviction orders for minor cannabis offences. However, with the reforms brought about through the CCA it is possible that this may be regarded by the courts as proof that the community regards conviction for such offences as non-serious.

Impact on the cannabis market

The impact of the scheme on the market has been the subject of considerable debate by commentators in a number of jurisdictions. A 2001 study undertaken by the NSW Bureau of Crime Statistics and Research indicates that as regular users of cannabis have a higher risk of negative outcomes from cannabis use, it is important to understand the behaviour of this group in response to law enforcement measures. It was concluded that for regular users compared to infrequent cannabis users “[l]aw enforcement measures designed to reduce the availability or increase the cost of cannabis ... appear likely to prompt drug switching.” (Jones & Weatherburn 2001, 7) It is contended that the impact of the CIN scheme on the operation of the cannabis market in WA should be an important part of the overall consideration of the consequences of the scheme. It is puzzling why this issue was not explicitly canvassed by the WA Government as the effect of reform on law enforcement strategies is recognised as significant by commentators in other jurisdictions. For instance, Sarre has noted that one of the goals of the South Australian CEN scheme was that law enforcement activity should affect the structure of the cannabis market by focussing on organised suppliers and distributors rather than minor offenders. “One of the principles underlying the expiation

notice approach was that distinctions between private consumers of cannabis and large scale operators should be strengthened.” (Sarre 1994, 9) It is clear the WA scheme has perpetuated this principle, of seeking to establish a “simplistic dichotomy between innocent ‘users’ and harmful ‘dealers’.” (Sutton 2000, 157) A flaw in perpetuating this dichotomy is that it does not countenance that there may need to be a mechanism for users to cultivate sufficient cannabis to meet their own needs or the needs of others belonging to reciprocal networks of partners, family members and friends.

This issue can be illustrated when we consider data from Australian prevalence surveys which show a substantial level of exposure to cannabis in the community. Data from the 2001 National Drug Strategy Household Survey shows that one in eight (12.9 per cent) of all Australians aged 14 years and older had used cannabis in the past year, with the annual rate for WA being 17.5 per cent. (Australian Institute of Health and Welfare 2002, Table 6). Other results from the same survey indicate a lifetime prevalence rate of one in three (33.1 per cent) of all Australians having ever used cannabis, with nearly one in six (58.9 per cent) Australians aged 20 to 29 having used in their lifetime. (Australian Institute of Health and Welfare 2002, Table 3.12) Therefore, there is some logic in having an approach which tolerates self supply given the sheer number of people who have ever used cannabis or who have used recently. This extent of exposure means that there is a significant demand for cannabis, providing a very real incentive for the organised large scale production of cannabis. Professor Adam Sutton has noted in a study of the CEN scheme that the adoption of this dichotomy means that:

“cultivating and distributing commercial quantities of cannabis for South Australian markets becomes even more the prerogative of specialist criminal networks... This problem could have been addressed, of course, if rather than perceiving every instance of the cultivation of cannabis for non-personal use as an activity which must be suppressed, relevant authorities had begun to see this also as an opportunity to undermine criminal networks’ capacity to dominate cannabis markets.” (Sutton 2000, 158)

The reluctance of either the West Australian or South Australian schemes to countenance expiation for those involved on the supply side means the majority of users are likely to continue to rely on cannabis provided by well organised cultivators and distributors rather than cultivate cannabis for their own use. This key issue has also been recognised in the UK, which has described this as the policy conundrum of how to distinguish between “social and commercial cultivation”.

“If the government were to treat small scale home cultivation as a variant of possession, there would be two consequences: first, many cannabis users would choose to cultivate in preference to using a distribution system populated by criminal entrepreneurs. Second, the low cost of home growing would destabilise this criminalised distribution system. With a reduced return on investment in cannabis, criminal entrepreneurs might abandon the market.” (Hough, Warburton, Few et al 2003, x)

Similar sentiments have also been echoed in Canada, where it has been suggested that whilst it is reasonable to prohibit the cultivation and distribution of cannabis for commercial gain,

“[a] different scenario is created, however, by the individual who grows enough for himself, choosing, through this action, to withdraw from the illicit market and its inherent criminality. In this situation, the state would again appear to have no reason to intervene.” (Boyd 1998, 33)

There has also been a debate in New Zealand over the past decade about reforming the law in relation to cannabis, including the introduction of schemes to remove minor cannabis offenders from the court system through expiation or cautioning. (Dawkins 2001; Field & Casswell 2000; Webb 2000) In New Zealand it has been recognised that reforms must include mechanisms to undermine the activities of criminally organised groups involved in the cultivation and distribution of cannabis. (Wilkins & Casswell 2002; Wilkins & Casswell 2003)

Given these views that successful reform must undermine the black market in cannabis, it is arguable that the cannabis market in WA will continue to prosper, in spite of the police gaining additional powers and focussing to a greater extent than before on those involved in the commercial

cultivation and supply of cannabis. Indeed it has been suggested that police intervention may have the unintended consequence of favouring those who are prepared and willing to engage in higher levels of criminal behaviour.

“While a tough stance towards cannabis dealing could be seen as the political price for the policy of on-the-spot warnings for possession, it may also have unwanted consequences. Cracking down on dealers, of whom an increasing number will be commercial and semi-commercial cultivators, will drive out the risk adverse, leaving the distribution system to the more criminal and risk tolerant operators.” (Joseph Rowntree Foundation, 2003)

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UK Context

There are parallels between the process of reform in relation to minor cannabis offences in the UK and WA, although the outcomes are quite different. In both jurisdictions reform has been based on reports of expert and parliamentary committees focussing on the technical process and options for reform. A common theme in both jurisdictions is that reform is necessary to reduce both health and convictions harms while not disturbing the underlying principle that cannabis remains illegal. .

Inquiries

The starting point for the process of reform in the UK was the 1998 inquiry by the Science and Technology Committee of the House of Lords, which recommended that cannabis be made legally available for medicinal and therapeutic purposes. Whilst this inquiry was confined to the therapeutic uses of cannabis, it precipitated a wider debate about the use of cannabis for non-medicinal purposes. The Police Foundation’s report by Viscountess Runciman which was released in 2000, had a wide remit and canvassed the overall operation of the Misuse of Drugs Act 1971, including cannabis. (Police Foundation 2000) This inquiry noted that 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.” (Police Foundation, 2000, 7)

The Runciman report argued that cannabis should be rescheduled as a Class C instead of a Class B drug in Schedule 2 of the Misuse of Drugs Act 1971, in accordance with its relative harmfulness compared to other classes of drugs. Other recommendations included that possession of cannabis not be an arrestable offence, that provisions concerned with premises be repealed and that aggravating factors be introduced in sentencing guidelines. The inquiry understood that for cannabis law reforms to succeed it would be necessary to remove the profits which attracted highly organised groups that produce and distribute cannabis to the large number of recreational users. It was recommended that the solution to the problem of the operation of a criminalised black market was 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.” (Police Foundation, 2000, 115) The Runciman report’s recommendations on cannabis initiated a further cycle of review in a House of Commons research paper released in August 2000. (Sleator and Allen, 2000) The House of Commons Select Committee on Home Affairs, which examined British policy concerning illicit drugs, included an examination of the reforms recommended by the Runciman inquiry in 2000, to distinguish between the serious offence of possession with intent to supply (ie ‘commercial supply’) and the lesser offence of ‘social supply’. The Select Committee, which published its third report in 2002, did not support the Police Foundation’s views on the rationale for such a reform.

“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." (Select Committee, 2002, para 78)

At this time a major trial was undertaken to determine the outcomes of 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 by giving them a formal warning instead of being prosecuted. It was concluded that the trial did have a wide measure of community support and that such an approach was an effective method for diverting police resources to higher priority areas. (MORI Social Research Institute & Police Foundation, 2002)

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 current classification of cannabis. The ACMD recommended that cannabis be reclassified as a Class C instead of a Class B substance, as

"[t]he Council believes that the current classification of cannabis is disproportionate in relation both to its inherent toxicity, and to that of other substances (such as amphetamines) that are currently within Class B". (Advisory Council on the Misuse of Drugs, 2002, 1)

"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 belief, amongst cannabis users, that if they have had no harmful effects from cannabis then other Class B substances will be equally safe." (Advisory Council on the Misuse of Drugs, 2002, 12)

The ACMD's recommendation to reclassify cannabis was accepted and in late October 2003 amendments were passed by the UK Parliament such that all cannabis and THC preparations were reclassified as being Class C substances and to amend the Police and Criminal Evidence Act 1984 (PACE) so police had the power to arrest someone for possession of cannabis when the reforms came into effect on 29 January 2004. The amendment to PACE reduced the maximum penalty for possession of cannabis from five years to two years but also created an exception with respect to cannabis, as generally offences with a maximum sentence of two years or less are not arrestable offences. 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. (Drug Policy Alliance, 2003) Without this amendment police would be unable to make an arrest, as possession of a Class C drug is not ordinarily an arrestable offence. Whilst the amendment did not include giving police 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 substance. It has been suggested that the increase across the board in the penalty for supply of a Class C substance 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 intent to supply, where that supply was for a non-profit making purpose." (Release, 2004)

The framework for implementing the UK reforms is contained in the Cannabis enforcement guidance issued on 12 September 2003 by the Association of Chief Police Officers (ACPO). The ACPO guidance provides that ordinarily there is a presumption against arrest by a police officer when they are dealing with someone in possession of cannabis. However, the guidance stipulates aggravating circumstances when police may arrest someone who has committed a simple offence, such as smoking in public, 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". (Association of Chief Police Officers, 2003a)

An unusual aspect of the police cautioning scheme is that it does not stipulate the quantity of cannabis considered as being possession for personal use. Indeed this aspect of the scheme was

addressed 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.” (Association of Chief Police Officers, 2003b)

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Conclusion

The West Australian CIN scheme attempts to overcome a number of the perceived shortcomings of the South Australian CEN scheme, particularly in relation to the hydroponic cultivation of cannabis, to provide more options for expiation of infringement notices and to redefine the response to minor cannabis offences as being primarily a health rather than law enforcement issue. One of the criteria of the long term success of the CIN scheme, as recognised in the Health Minister’s second reading speech, will be whether it is understood by the wider community as being de facto decriminalisation or not. Whether this outcome will be achieved will depend on the scale of investment in public education campaigns that inform the wider community about the goals of the scheme. As the primary purpose of this paper is to present a detailed analysis of the structure and features of WA scheme, it is difficult at this time to determine the extent to which some of the shortcomings of the scheme may constrain achievement of the stated goals until the scheme has been operating for a reasonable period of time. One of these shortcomings involves the meaning of “cannabis” as defined in the MDA, being the “plant of the genus cannabis (by whatever name designated) or part of that plant”: MDA s 3. If this is narrowly defined, then the CIN scheme will not be applicable to a person who has possession of any quantity of seeds, even if the amount is 30 grams or less. It should be noted as the CIN scheme explicitly excludes cannabis derivatives such as hashish, resin and hashish oil, (CCA s 6(2)(b)), possession or use of any refined or extracted cannabis product will result in offenders being dealt with by the courts. Another shortcoming 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 will be the case where a cannabis plant has been uprooted from soil or been cut down, even if none of the leaf or heads has been removed or if the quantity of the leaf material on the plant does not exceed 30 grams.

We have sought to present some of factors that have shaped the approach taken in Western Australia to reforming the law concerning minor cannabis offences. Recognising the role of these factors may also be relevant to other jurisdictions considering this type of reform. The first factor, also present in the UK, was that the Labor Government needed to avoid perceptions that it was ‘going soft’ on crime or that it was decriminalising the use of cannabis or by implication any other drug. Indeed it appeared that the reform gave the WA Government an opportunity to restate its credentials on this matter. This point was emphasised in the UK in an ACPO press release of 28 January 2004, which stated that “reclassification of cannabis will allow police to focus more time and resources on Class A drugs. That said, despite reclassification, it remains illegal to possess cannabis.” (Association of Chief Police Officers, 2004) The second factor concerns political constraints, for as the WA Government did not have a majority in both Houses of Parliament, the legislative process contained the inherent risk that it might have failed to be passed by the Legislative Council. Whilst one of the minor parties in the Upper House, the Greens, had specific references in their platform to the need for cannabis law reform, as the reform proposed by the Labor Government fell short of the type of reforms contemplated by the Greens, there was no guarantee that the legislation would be supported by the Greens or other minor parties. Another factor is the growing community concern about police corruption arising from the difficulty of implementing laws concerning cannabis (and to a lesser extent other drugs). Throughout 2002 and 2003 there were a series of well-publicised hearings conducted by the Police Royal Commission in WA into police corruption which revealed serious levels of police corruption by some of the police

involved in drug law enforcement. (Royal Commission 2003; Royal Commission 2004) Reform must then also maintain integrity and control the risk of police corruption because the police had not apparently been able to reduce the supply of cannabis or more harmful drugs in WA. As noted in the Minister's second reading speech, one of the objectives of the CIN scheme is to free up police resources so that these could be redirected towards serious levels of offending. This is supported by an amendment of Schedule VI of the MDA made by the CCA (s 32), which reduced from 25 to 10 the number of cannabis plants deemed to be cultivation with intent to sell or supply.

There are important implications arising from the UK research by Hough, Warburton, Few et al (2003) in considering the merits of these two schemes introduced in the first quarter 2004, the formalised CIN scheme compared to the UK cautioning scheme. In both schemes we should consider whether they will achieve their aims if they do not accept the distinction between personal and social cultivation. Whilst at this stage the UK scheme does not encompass cultivation of plants, it would seem this anomaly will need to be considered in the future. For instance, situations will arise where an individual could be cautioned for possession of a quantity of cannabis which has just been removed from a plant, but also be arrested for cultivation of a plant, yet if the cannabis has not yet been removed the person will be arrested as they are ineligible for a caution. The UK scheme would appear to be more flexible and could address this more readily, as "all that would be required would be to issue guidance to the police about cultivation, in parallel with that relating to possession." (Joseph Rowntree Foundation, 2003).

A common theme in both jurisdictions is that the measures put into place do not disturb the underlying principle that cannabis continues to remain illegal, that the reforms have been accompanied by an expansion in the scope of the law in relation to those who commit supply offences and that juveniles should be excluded. In both jurisdictions there has been a similar approach to the reform process by establishing expert groups and parliamentary committees to focus on the technical process and options for reform, with limited input from the community. Finally, a theme in both the UK and WA has been the emphasis on the harms associated with cannabis, consisting of both health and conviction harms.

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(1) This had been preceded by a 12 month trial of a formal cautioning scheme for first time cannabis offenders from October 1998 to September 1999 in two police districts, the Mirrabooka Police District (Perth metropolitan area) and the Bunbury Sub District (the State's major regional city). The trial involved cautions for possession of up to 50 grams of cannabis.

(2) The meaning of the term "prohibition with civil penalties" is contained in research paper from the National Task Force on Cannabis, established in 1992 by the National Drug Strategy Committee (as it was then known), a joint health and law enforcement body consisting of Commonwealth and State

Ministerial representatives. Five legislative options were identified in a National Task Force research paper. (McDonald, Moore, Norberry, Wardlaw & Ballenden 1994).

(3) The *Cannabis Control Act 2003* s 32 amended Schedule 6 of the *Misuse of Drugs Act 1981* to reduce from 25 to 10 the number of plants which are presumed to be cultivation with intent to sell or supply.

(4) The FER is a statutory agency administered by the Department of Justice, which has responsibility for the enforcement of unpaid traffic infringement notices.

[(5) The sunset clause in the *Prostitution Act 2003* was repealed in June 2003 by the *Prostitution Amendment Act 2003*, thereby extending the legislation.