Law Reform Concerning Minor cannabis Offences in WA[1]

by Greg Swensen[2] and John Prior[3]

Introduction

With the passage of the *Cannabis Control Act 2003* (CCA) on 23 September 2003, Western Australia (WA) became the fourth jurisdiction in Australia to reform its laws on minor cannabis offences.[4] This short article outlines the background to the WA scheme, some of its goals and shortcomings, its major provisions and how it builds upon the three already established schemes which expiate minor cannabis offences in South Australia[5] (SA), the Australian Capital Territory[6] (ACT) and the Northern Territory[7] (NT).[8]

Cannabis infringement notice scheme

As the CCA will only be applicable to adults in WA, persons aged between 10 and 17 years who have possession of non traffickable amounts of cannabis[9] will continue to be dealt with separately by the way of cautions.[10] Whilst the cannabis infringement notice (CIN) scheme is established by the CCA, it can only be understood when read in conjunction with the *Misuse of Drugs Act 1981* (MDA),[11] the State's primary legislation concerned with illicit drugs.

The CIN scheme is principally concerned with three types of minor cannabis offences:

- possession of smoking implements on which there are detectable traces of drugs;[12]
- use of or possession of not more than 30 grams of cannabis;[13] and

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[4] Proclaimed on 22 March 2004.

[5] The cannabis expiation notice (CEN) scheme which commenced April 1987.

[6] The simple cannabis offence notice (SCON) scheme which commenced October 1992.

[7] The drug infringement notice (DIN) scheme which commenced July 1996.

[8] It is arguable the three cannabis expiation schemes have had a marginal impact on the manner by which cannabis offences are dealt with in Australia, as in the 2001/2002 financial year there was a total of 55,494 offences, of which a total of 7,965 (14.4%) resulted in offence notices and 47,529 resulted in arrest. Australian Crime Commission. *Australian Illicit Drug Report 2001/2002*, Tables 2.3 and 2.4. It is not known what proportion of 85% of the arrestable cannabis offences involved minor offences. A breakdown of the 55,494 cannabis offences in the AIDR 2001/2002 report 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, shows there was a total of 45,793 (82.5%) consumer offences in Australia (Table 8.2). However, this breakdown under counts the number of minor (or 'consumer') cannabis offences in all jurisdictions, as the AIDR report defines the cultivation of any number of plants as a provider offence. The cultivation of cannabis plants is an expiable offence in SA (1 plant since November 2001), the ACT (up to 5 plants) and in the NT (up to 2 plants) regardless of method of cultivation), However, as from January 2003, the CEN scheme has excluded a plant from the definition of being a simple cannabis offence if it is grown by 'artificially enhanced cultivation': *Controlled Substances Act 1984 s 45A (8) (d)*.

[9] Schedules 1 and 2 of the *Young Offenders Act 1994* 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 *Misuse of Drugs Act 1981*. This means that in relation to cannabis, juveniles who cultivate 10 or more cannabis plants (the *Cannabis Control Act 2003* s 32 amended Schedule 6 of the *Misuse of Drugs Act 1981* by reducing the number of plants from 25 to 10 which are presumed to be cultivation with intent to sell or supply), possess 100 grams or more of cannabis cannot be cautioned.

[10] The *Young Offenders Act 1994* provides that juveniles in possession of non traffickable quantities of cannabis and other drugs covered by the *Misuse of Drugs Act 1981*, can be given either a caution or referred to a juvenile justice team. *"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."*: s 22B.

[11] In this regard the WA CIN scheme is similar to the legislative framework 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*)

[12] *Cannabis Control Act 2003* s 5.

[13] *Cannabis Control Act 2003* s 6.

- cultivation of no more than two non hydroponically grown cannabis plants.[14]

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

The option of an individual being issued with a CIN for any of these offences depends on police discretion, as each offence contains the provision 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."*[15] The WA scheme contains a number of refinements compared to the three other Australian schemes as follows.

Firstly, 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."*[16] This approach is intended to rectify a perceived shortcoming of the South Australian CEN scheme, that it had facilitated commercial scale cultivation of cannabis by households consisting of a number of adults,[17] as it sets plant limits per adult person.[18]

Secondly, the CCA[19] extends the ambit of the law in relation to hydroponically cultivated cannabis, with 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"*[20] Furthermore, the CCA provides that either the police or the Director of Public Prosecutions upon conviction of someone for this offence may obtain an order prohibiting them from selling or supplying, or offering to sell or supply any thing that could be used to hydroponically cultivate cannabis for up to two years.[21]

In South Australia, the rationale for establishing a system to regulate those who sell and supply hydroponic equipment is 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."*[22]

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[14] *Cannabis Control Act 2003* s 7.
[15] Compared to the WA scheme, the South Australian CEN scheme excludes police discretion over the issuing of a notice. *"... 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).
[16] *Cannabis Control Act 2003* s 7 (2).
[17] 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.
[18] When the CEN scheme came into operation it did not specify the actual number of plants that equated with cultivation for personal use, being defined as the cultivation of *"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 reduced to the cultivation of one plant per adult.
[19] When the Cannabis Control Bill 2003 was first introduced on 20 March 2003 it made it an offence for someone to sell or supply or offer 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 effect of the removal of the requirement for there to have been reasonable knowledge, was as the Attorney General (Hon Jim McGinty) observed to *"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." Hansard Parliamentary Debates*, Legislative Assembly 23 September 2003, 11664.
[20] *Misuse of Drugs Act 1981* s 7A.
[21] *Misuse of Drugs Act 1981* s 7A (2).
[22] *Law enforcement in the illicit drug market*. Issues paper prepared for South Australian drugs summit, June 2002.

The WA scheme does not define the hydroponic cultivation of cannabis. This is in contrast to the SA scheme, which by an amendment in December 2002, inserted the term *"artificially enhanced cultivation"*[23] into the *Controlled Substances Act 1984*, to exclude hydroponically grown cannabis from the CEN scheme.

Thirdly, the CCA creates offences concerned with *"cannabis smoking paraphernalia"*, by making the sale of such items an offence *unless* the retailer displays prescribed warning notices advising of the adverse consequences of cannabis use[24] and makes available to purchasers prescribed educational materials.[25] The CCA also creates a new offence of selling cannabis smoking paraphernalia to anyone aged less than 18 years of age.[26]

Fourthly, compared to the three other jurisdictions, the CIN scheme provides two methods of expiation,[27] either by payment within 28 days of a prescribed penalty[28] or attendance at a cannabis education session (CES). The scheme also specifically requires that an individual shall be advised in writing that he or she can elect to go to court to contest the matter as an offence under the MDA, instead of paying the prescribed penalty or attending a CES.[29]

The CIN scheme also provides that if a person has been issued with multiple infringement notices on one day[30] and has received a CIN in relation to each offence, then attendance at one CES will be taken to have expiated all separate CINs issued on that day.[31] This provision needs to be read in conjunction with the second stage penalty structure (below), which removes the option of payment of a prescribed penalty if an individual has been issued with two or more CINs on separate days within the past three years.[32]

The purpose of a CES[33] is to educate those who complete a CES,[34] 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."*[35] The power to approve providers of CES and the content of education sessions rests with the Director General of Health.[36]

After the first 28 day period, if a CIN has not been expiated, enforcement is transferred to the Fines Enforcement Registry (FER),[37] administered by the Department of Justice, which also has

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[23] 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"*: *Controlled Substances Act 1984* s 45A (proclaimed February 2003).
[24] *Cannabis Control Act 2003* s 22.
[25] *Cannabis Control Act 2003* s 23.
[26] *Cannabis Control Act 2003* s 24. The penalty for this offence is a fine of $5,000 in the case of a natural person and a fine of $25,000 if it involves a body corporate, a magnitude of five times more severe than offences involving offences under either sections 22 or 23.
[27] *Cannabis Control Act 2003* s 8(4).
[28] Penalties: $100 for CIN issued under s. 5, $100 for CIN issued under s. 6 involving not more than 15 grams of cannabis and $150 of CIN issued under s. 6 involving between 15 grams and 30 grams of cannabis, $200 for cultivation up to two cannabis plants.
[29] *Cannabis Control Act 2003* s 8(3).
[30] It would be possible to receive up to three separate CINs for one occasion, involving use or possession of cannabis (up to 15 grams penalty $100, more than 15 grams and up to 30 grams penalty of $150), possession of a smoking implement with detectable traces of cannabis ($100 penalty) and cultivation of cannabis ($200 penalty).
[31] *Cannabis Control Act 2003* s 14.
[32] *Cannabis Control Act 2003* s 9(1).
[33] The content of cannabis education sessions must be approved and provided by an approved person: s 4.
[34] Expiation is contingent on an individual completing a CES and being issued a certificate of completion by an approved provider: s 18.
[35] *Cannabis Control Act 2003* s 17(1).
[36] *Cannabis Control Act 2003* s 17(2).
[37] Part 3 of *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

responsibility for the enforcement of unpaid traffic infringement notices.[38] If an individual fails to meet further demands for payment of the unpaid CIN, there is the power under the fines infringement legislation to suspend a motor drivers licence and refuse registration of a motor vehicle.[39]

However, whilst the CCA has been carefully designed to avoid an individual being charged with the original minor cannabis offence under the MDA if they fail to expiate, there is a different provision which targets those who might be described as "CIN recidivists." This provision, which permits a person to be charged with the relevant offence under the MDA, was not in the original Cannabis Control Bill when first introduced into Parliament. An amendment was inserted by the Legislative Council, which was adopted by the Government on the final day of debate on the legislation.[40]

The possibility of a conviction due to failure to expiate occurs because the CIN scheme has a two stage penalty structure. There is a provision (the second stage) which stipulates that if an individual has been issued with two or more CINs within the past three years, two of which must have been issued on separate days, he or she cannot expiate by payment of the prescribed penalty, but can only expiate by attendance at a CES.[41]

If an individual who is subject to a second stage penalty fails to complete the CES, he or she is not able to avail themselves of the procedures outlined in Part 3 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.[42] Under these circumstances failure to complete a CES within the 28 day period means that such an individual will be charged with an offence under the MDA instead of under the CCA.

Goals and shortcomings of the scheme

In the second reading speech, when the Cannabis Control Bill 2003 was introduced into the Legislative Assembly on 20 March 2003, the Minister for Health, the Hon Bob Kucera, identified the four criteria that the Government would use to evaluate the success of the CIN scheme.[43] These were:

- its impact on the willingness of young people, in particular, to seek help in dealing with cannabis-related problems;
- the success of public education campaigns and cannabis education sessions in raising awareness of the continuing prohibition on cannabis use and the harms associated with cannabis use;
- the prevention of the significant and disproportionate social and economic costs resulting from a conviction for a minor cannabis offence; and
- reducing the costs to the police and the court system of enforcing minor cannabis offences and allowing more active pursuit of those who commercially grow and supply cannabis.

One of the major difficulties with this type of reform is being able to evaluate its impact on the cannabis market and if it affects cannabis consumption patterns. A recent study undertaken by the NSW Bureau of Crime Statistics and Research indicates 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 compared to infrequent cannabis users, that for regular users, *"(l)aw enforcement measures designed to reduce the availability or increase the cost of cannabis ... appear likely to prompt drug switching."*[44]

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[38] The original purpose of the infringement notice legislation was to deal with offences under the *Road Traffic Act 1974,* as infringement notices can be issued to persons 17 years and older: *Fines, Penalties and Infringement Notices Enforcement Act 1994* s 12(3).
[39] The FER process does not permit enforcement of unpaid infringement notices through imprisonment.
[40] "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." Attorney General (Hon Jim McGinty) *Hansard Parliamentary Debates*, Legislative Assembly 23 September 2003, 11666.
[41] *Cannabis Control Act 2003* s 9.
[42] *Cannabis Control Act 2003* s 9(4).
[43] Kucera B. Second reading speech. Cannabis Control Bill Act 2003. Hansard, 20 March 2003, 5697.
[44] Jones C & Weatherburn D. "Reducing cannabis consumption." 2001 (60) Crime and Justice Bulletin, 7.

Another consideration of the CIN scheme is its impact on the operation of the cannabis market in WA. This issue has been identified by a number of commentators in relation to the South Australian scheme and operation of schemes in other jurisdictions. *"One of the principles underlying the expiation notice approach was that distinctions between private consumers of cannabis and large scale operators should be strengthened."*[45]

The WA scheme implicitly adopts one of the objects of the South Australian scheme, what has been referred to as establishing a *"simplistic dichotomy between innocent 'users' and harmful 'dealers'."*[46] However, this approach has been criticised in some quarters. For instance with reference to South Australian context, Dr Adam Sutton described it as being "unhelpful", as it meant 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."*[47]

As neither the West Australian or South Australian schemes countenance expiation for anyone involved on the supply side, this will mean that the majority of users will rely on organised commercial sources rather than cultivate cannabis for their own use. The issue of distinguishing between what has recently referred to as social and commercial cultivation has also been recognised a key problem confronting British policy makers.

> *"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."*[48]

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

> *"(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."*[49]

Conclusion

The State's CIN scheme has sought 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 which will determine the long term success of the CIN scheme, as recognised in the second reading speech, will be whether it is understood by the wider community as not being defacto decriminalisation or legalisation. Achievement of this outcome will be contingent on the scale

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[45] Sarre R. "The partial 'decriminalisation' of cannabis: the South Australian experience." (1994) 6 *Current Issues in Criminal Justice* 9.
[46] Sutton A. "Cannabis law and the young adult users: reflections on South Australia's cannabis expiation notice system." (2000) 28 *International Journal of the Sociology of Law*, 157.
[47] Sutton A. "Cannabis law and the young adult users: reflections on South Australia's cannabis expiation notice system." (2000) 28 *International Journal of the Sociology of Law*, 158.
[48] Hough M, Warburton H, Few B, May T,Man LH, Witton J, Turnbull PJ. *A growing market. The domestic cultivation of cannabis*. London, Joseph Rowntree Foundation 2003, x.
[49] Boyd N. "Rethinking our policy on cannabis." *Policy Options*, October 1998, 33.

of investment in public education campaigns which effectively inform the wider community as well as target groups, such as young people, about this philosophical goal of the scheme.