Spent conviction orders and cannabis law reform in Western Australia: The triumph of rhetoric?

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1 Abstract

The article describes a cannabis law reform which implemented a scheme for cautioning minor cannabis offenders in Western Australia (WA) in 2011 but which resulted in manifest unfairness of the manner by which the reform determined criteria for expungement of a record for a minor cannabis offence, depending on whether the person had been convicted before or after 1 August 2011.

As a consequence, those convicted before August 2011 for a minor cannabis offence in WA will need to wait 10 years before they can apply for a spent conviction order, whereas someone convicted from 1 August 2011 can apply after three years. This is an extraordinary outcome in how it treats some offenders as more worthy than others.

It is argued the 2011 cannabis intervention requirement (CIR) scheme, the third reform over the past 15 years for dealing with minor cannabis offenders, has the unenviable distinction of reaching a new high water mark of muscular policy by a government high on drug war rhetoric.

2 Background

A new approach, the CIR scheme, commenced in Western Australia (WA) on 1 August 2011, which enabled police to issue a caution for two specific minor cannabis offences. The CIR had been showcased as a key plank of a series of "law and order" measures that were a part of the Barnett Liberal government's pre-election platform at the September 2008 State election. As one Liberal MP proclaimed during debate on the Cannabis Law Reform Bill 2009:

> I believe that the bill will send a clear message to the community that the Barnett Liberal government is serious about addressing the drug problem in our society. … (It) will reinforce the message that cannabis is not a soft drug and that soft approaches do not get us where we need to be as a society. The scientific evidence is very clear. Smoking cannabis is extremely damaging to health, even more so than tobacco.[2]

The *Cannabis Law Reform Act 2010,* which repealed the *Cannabis Control Act 2003* (CCA), was described in a newspaper report as reflecting the government's intention to "toughen" its approach concerning the use of cannabis in WA.

> After 2 ½ years of promising to get tough on marijuana users, dealers and growers, the Liberal-National Government's "war on drugs" is about to begin. The penalty for possessing less than 30g of cannabis will jump from a $100 fine to a maximum of $2,000 and the possibility of two years in jail. The penalty for growing up to marijuana plants is a $200 fine, but that will jump to a maximum $2,000 fine and prosecution with the prospect of two years behind bars for growing any number of plants.[3]

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[1] Working draft as at March 2014.

[2] Abetz P. Cannabis Law Reform Bill 2009, Second reading speech debate. *Hansard*. Legislative Assembly, 21 April 2010, 1936. <www.parliament.wa.gov.au/Hansard/hansard.nsf/0/B4EEC5CF66607BC8482577120022AB11/$File/A38%20S1%2020100421%20All.pdf>.

[3] Spagnolo J. 'Dopes to feel the heat under new pot laws.' *Perth Now,* 16 July 2011. <www.perthnow.com.au/news/western-australia/wa-government-readies-for-pot-shot/story-e6frg14c-1226095864452>.

The purpose of this article is to not canvass the totality of the CIR reform but to highlight a perverse and unfair consequence depending on whether or not someone had been convicted of these minor cannabis offence in WA before or after 1 August 2011 to obtain a spent conviction order if they had dealt with in a Magistrates Court (ie a CIR was not issued), by an application to the Commissioner of Police.

3 The CIR scheme reform

The *Cannabis Law Reform Act 2010* added a new section to the *Misuse of Drugs Act 1981* (MDA), Part IIIA – Cannabis intervention. Part IIIA means an adult or a juvenile (a "young person") may be issued with a CIR if they had committed a "minor cannabis related offence", either –

(a) possession of any drug paraphernalia in or on which there is cannabis (MDA Section 7B(6)) or
(b) possession of not more than 10 grams of cannabis (MDA Section 6(2)).

The feature of the CIR scheme is it operates as a conditional cautioning system as it retains the sanctions under either Sections 6(2) or 7B(6) MDA of being able to subsequently charge an offender with the offence if they fail to attend and complete a cannabis intervention session (CIS).

This contrasts with the previous cannabis infringement notice (CIN) scheme established by the CCA, where offenders who did not expiate a CIN (ie they did not complete a cannabis education session (CES) or did not pay a fixed monetary penalty), could not be charged under the MDA, but faced administrative sanctions through the Fines Enforcement Registry (FER) for recovery of the unpaid infringement.

The FER is responsible for the recovery of a wide range of debts incurred by unpaid infringements, such as parking "fines", speeding "fines", liquor licensing offences, failure to have a bus or train ticket, as well as unpaid court fines.[4]

4 Spent conviction orders and minor cannabis convictions

An unexpected but important outcome of the CIN scheme, which operated between 22 March 2004 and 31 July 2011, was that magistrates were required to consider an application for issuing a spent conviction order for someone convicted of a minor cannabis offence who had not received a CIN but been charged and appeared at a Magistrates Court.

The necessity for a more sympathetic and proportionate response by magistrates to issue spent conviction orders for minor cannabis offenders occurred in November 2004 due to a successful appeal in the case of *Harper v Page.*[5]

The appellant in *Harper v Page* was convicted in the Fremantle Magistrates Court on 5 March 2004 for three offences[6] that met the criteria for her to have been issued with a CIN for each offence. The basis of the appeal was although when the matter was dealt with the CIN scheme had not been

[4] There are potential adverse implications for a person having a "substantial" amount of unpaid fines, when their details have been published by the FER: https://www.wa.gov.au/sites/default/files/2020-07/Fines%20Enforcement%20Registrars%20Website%20Fact%20Sheet%20AFH%20address.pdf
[5] *Harper v Page.* Unreported judgement, Supreme Court of Western Australia. SJA 1018/2004, BC200409165; 19 November 2004.
[6] There were - possession of 1.7 grams of cannabis, possession of a smoking implement with detectable traces of cannabis and cultivation of two plants in the backyard of her principal place of residence, which arose from a single incident when the police searched the appellant's house on 1 February 2004.

proclaimed until 9 March 2004[7], nevertheless the appellant was entitled to have the three convictions declared spent in accordance with the *Spent Convictions Act 1988*.

The Supreme Court held that as a result of the CCA reforms a number of minor cannabis offences[8] in WA had become "trivial offences" within the meaning of Section 46 of the *Sentencing Act 1995:*

46. Release without sentence
A court sentencing an offender may impose no sentence if it considers that –

(a) the circumstances of the offence are trivial or technical; and
(b) having regard to –

(i) the offender's character, antecedents, age, health and mental condition; and
(ii) any other mater that the court thinks is proper to consider,

that it is not just to impose any other sentencing option.

The Court held the appellant should have received a spent conviction order as it considered the lower court had failed to place sufficient weight on the appellant's individual circumstances and good character as provided in Section 39(2)(a) of the *Sentencing Act 1995.*

As will be elaborated further below, the concept of justice in sentencing of minor cannabis offenders has not been embraced for some years by the courts in WA, as prior to the CCA reform, spent conviction orders were unlikely to have been granted by Magistrates under either limb in Section 39(2).

This suggests the accepted view had been that any cannabis offence was prima facie not trivial and were apparently likely to reoffend, in spite of the ambit of the tests in either Section 46 of the *Sentencing Act 1995* that an offender was of "previous good character" or in Section 45 of "antecedents, health and mental condition … or any other matter."

45. Spent conviction order: making and effect of
(1) Under section 39(2), a court sentencing an offender is not to make a spent conviction order unless –

(a) it considers that the offender is unlikely to commit such an offence again; and

(b) having regard to —

(i) the fact that the offence is trivial; or
(ii) the previous good character of the offender, it considers the offender should be relieved immediately of the adverse effect that the conviction might have on the offender.

The decision of *Harper v Page* could be described as being in effect a minor revolution, as from November 2004 Magistrates were required to affirmatively consider issuing a spent conviction

[7] Government Gazette. Proclamation, Cannabis Control Act 2003. *Government Gazette*, 9 March 2004, Issue No. 40, 733.
[8] The CIN scheme contained four *expiable* offences involving three offences under the MDA – (a) possession of a smoking implement on which there were detectable traces of cannabis (modified penalty $100) - [Section 5(1)(d)(i)]; (b) use of or possession of not more than 15 grams of cannabis (modified penalty $100) - [Section 6(2)], (c) use of or possession of more than 15 grams and not more than 30 grams of cannabis (modified penalty $150) - [Section 6(2)] and (c) cultivation of not more than two non-hydroponically grown cannabis plants at a person's principal place of residence (modified penalty $200) - [Section 7(2)].

order if someone had been convicted of a minor cannabis offence. In his judgement LeMiere J stated (at para 41):

> 'If it were not for the provisions of the Cannabis Control Act, I would consider that the offences of which the appellant was convicted are not trivial. In general, an offence is not to be regarded as trivial if it is a typical example of the behaviour prescribed for such an offence.
>
> There must be something that distinguishes the circumstances of the offence under consideration from what is to be regarded as typical breach of the particular provision.
>
> However, in my view, the offences of which the appellant was convicted should, since the Cannabis Control Act has come into effect, be considered to be trivial for the purposes of s 45(1) of the Sentencing Act.'

An example of the harsh and rigid approach which had prevailed in WA pre *Harper v Page* is the 1997 Supreme Court case of *Riley v Gill.*[9] In this case the appellant was fined $125 on each of two charges, possession of a smoking implement and possession of 1 gram of cannabis, both of which occurred at appellant's living quarters at a mine site near Port Hedland.

The appeal in *Riley v Gill* involved the issue of whether a spent conviction order should have been granted as it was contended that the appellant was of good character and the offence was trivial. The appellant also sought to have the court accept if the convictions were not spent he was likely to suffer considerable and disproportionate harm in his occupation as leading hand shot firer, as he would be precluded from future employment opportunities.

It would seem the court did not recognise or otherwise ignored the significance of conviction harm in *Riley v Gill*, which had been clearly demonstrated in the seminal research in 2000.[10] This research formed part of a growing recognition of the magnitude and lasting "adverse effect" of a conviction entailed for a conviction of a minor cannabis offence by the time of *Harper v Page* in 2004.

An interesting question, is whether the reforms introduced by the *Cannabis Law Reform Act 2010* mean defendants who now appear before the courts for minor cannabis offences will be denied a spent conviction order, as the law has returned to the *Riley v Gill* standard?

Although *Harper v Page* was decided in relation to the four expiable offences established under the CCA, it is suggested the possibility of receiving a spent conviction order for a minor cannabis conviction has not been lost, but only eroded and remains with respect to the two offences that fall within the CIR scheme.

It is submitted that as Part IIIA refers to "minor cannabis related offences" under the CIR scheme, possession of cannabis smoking paraphernalia or possession of not more than 10 grams of cannabis, that Magistrates should continue to construe these as being "trivial" offences within Section 45 of the *Sentencing Act 1995*.

It is contended the principles enunciated by His Honour Justice LeMiere J continue to reflect the law regarding spent convictions for minor cannabis offences.

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[9] *Riley v Gill*. Unreported judgement, Supreme Court of Western Australia. SJA 1125/1997, BC9707453; 8 December 1997.

[10] Lenton S & Heale P 2000 'Arrest, court and social impacts of conviction for a minor cannabis offense under strict prohibition.' *Contemporary Drug Problems*, 27, 805 – 833.

'Drug offences are not to be treated differently from other offences when determining whether to grant a spent conviction order. Furthermore, in considering the seriousness of the offence, the offence to be considered is the offence committed by the offender and not the offence in the abstract.

Seriousness is not to be determined by reference to the class of offence committed, but must be ascertained by reference to the conduct which constitutes the offence for which the offender was convicted and to the actual circumstances in which the offence was committed.'[11]

5 Expunging a minor cannabis conviction

Concerns since the *Cannabis Law Reform Act 2010* reform stems from the divergent criteria which now confront someone convicted of a minor cannabis offence when they seek to have the record of their conviction expunged (ie declared "spent") under the *Spent Convictions Act 1988*.

Applications to have a record of a conviction declared spent are of an administrative matter and dealt with on application to the Commissioner of Police under the *Spent Convictions Act 1988*.

Because of the approach adopted by the *Cannabis Law Reform Act 2010,* which amended the *Spent Convictions Act 1988*, there are now two pathways to obtain a spent conviction order for a minor cannabis offence, depending on whether the person was convicted before or after 1 August 2011.

The differences in the time between conviction and when an application may be lodged, are considerable because for a pre August 2011 conviction the prescribed period is 10 years, whereas for a conviction from 1 August 2011, the prescribed period is three years.

This is frankly a bizarre outcome and from an offender's point of view is grossly unfair and is difficult to explain, except most likely because of the politicised nature of the CIR reform. The stark arbitrary difference between the approach appears to be designed to trade on the political rhetoric embraced by the Liberal government to support its "war on drugs" rather than recognise key commonalities in both the CIR and its predecessor, the CIN scheme, of trying to ameliorate, albeit in different ways, the harshness of the penalties in the MDA and consequent conviction harm that fell upon a minor cannabis offender.

Indeed, it is contended that the Liberal government's CIR reform with its three year waiting period reflects a perverse degree of political payback, to maximise disparagement of the merits of the preceding Labor government's CIN scheme, in relation to its objective to minimise conviction-related harm associated with minor cannabis offences.

As the legislation is silent on whether someone who has completed a CIS for an offence involving either Sections 7B(6) or 6(2) is regarded as having been 'convicted', this suggests when an offender accepts the caution to attend the CIR, this may represent acknowledgement of guilt and is equated by the police as being a conviction.

Under the CIN scheme a person issued with a CIN would not have a conviction recorded regardless of whether they expiated the offence or were transferred to the FER system. The CIN scheme had a two stage process, with stage 1 involving expiation by within 28 days of receiving the CIN either attending a CES or paying the prescribed monetary penalty, or otherwise in stage 2 if the CIN remained unexpiated after 28 days, being dealt with by the FER process. Stage 2 involved recovery by the FER of an outstanding debt owed to the state, which then consisted of the prescribed monetary plus additional administrative charges.

[11] *Harper v Page.* Unreported judgement, Supreme Court of Western Australia. SJA 1018/2004, BC200409165; 19 November 2004, para 26.

The key feature of an unexpiated CIN was that it was not a conviction, as recovering of an infringement falls under Part 3 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (FPINEA), which in Section 23 states that –

> "The making of an order to pay or elect does not constitute a conviction of the alleged offender for the alleged offence, except as provided in sections 25 and 26."

As under the CIR scheme a person appears to be regarded as having a technical conviction if they complete the prescribed CIS, this results in a similar outcome if someone who committed an offence had gone to court and been convicted for an offence that otherwise met the criteria of the CIR scheme, ie possession of less than 10 grams of cannabis or possession of drug paraphernalia on or in which there was cannabis.

This conclusion is also supported by the effect of the amendment made in 2010 to Section 11(6) of the *Spent Convictions Act 1988* that enables someone "convicted" of either of the two offences under the CIR scheme to apply to the Commissioner of Police for a spent conviction order after three years.

> **11. Prescribed period, defined**
> ....
> (6) The prescribed period for a conviction is 3 years if the conviction —
>
> (a) is for an offence that involves cannabis under the Misuse of Drugs Act 1981 —
>
> (i) section 5(1)(d)(i) or 7B(6); or
> (ii) section 6(2), but does not involve a cannabis plant under cultivation, cannabis resin or any other cannabis derivative;
>
> and
>
> (b) was not incurred before the commencement of the Cannabis Law Reform Act 2010 Part 4.

As Section 11(6) does not specifically limit the three year period to only those who complete a CIS and thus deemed "convicted", the three year waiting period to apply for a spent conviction order would encompass an offender who had appeared before a court and been convicted of the same offences under either Sections 6(2) or 7B(6) after July 2011.

There are some additional considerations which may be potentially relevant to the argument of whether an offender could obtain a spent conviction, due to variations in terminology in the MDA which applies to the two offences, such as "minor cannabis related offence", a "lesser conviction" and a "serious offence". One concept is that as the possession of 100 grams or more of cannabis in Schedule 5 of the MDA is defined as a "serious" offence, this also supports an argument the MDA differentiates seriousness involving cannabis offences depending on the amount involved.

There is also a lack of clarity as to the meaning of a "lesser conviction", which is defined in Section 3 of the *Spent Convictions Regulations 1992* as being when a fine of $500 or less was imposed. The differentiation of seriousness by the size of a fine may also support arguments that minor cannabis offences could be "trivial", involving fines below this threshold imposed by a Magistrate.

6 Conclusion

It is contended there is now a manifest unfairness in the *Spent Convictions Act 1988* in how a conviction for a minor cannabis offence can be expunged, depending on whether the person was convicted in WA before or after 1 August 2011.

In WA those convicted of a minor cannabis conviction before this date need to wait 10 years whereas an offenders convicted from this date may apply after three years for the record of their conviction to be expunged.

The latest round of reforms for dealing with minor cannabis offenders in WA has been driven by a government high on drug war rhetoric and has resulted in a fragmented and disjointed approach that treats some offenders as more worthy than others.

It is difficult to avoid the conclusion that the war on drugs in WA has achieved new heights of hyperbole and has become driven by muscular politics, such that reform has been used in a political fashion to stigmatise some offenders, largely on the basis of whether the law they had been convicted under had been passed by either a Labor or a Liberal government.