

The Chairman
Dr Janet Woollard
Education and Health Committee – Legislative Assembly
Western Australian Parliament

Re: Inquiry into the Adequacy and Appropriateness of Prevention and Treatment Services for Alcohol and Illicit Drug Problems in Western Australia

This submission is to provide the Committee with information that has been generated through research that has been undertaken by Associate Professor Thomas Crofts, School of Law, Murdoch University and Greg Swensen a post graduate student at Murdoch University's School of Law, related to some aspects of cannabis law reform.

We are attaching copies of two short reports we have prepared over the past year that address some of the matters set out in your terms of reference, particularly with respect to your second term of reference:

(2) To inquire into the impact on communities, and the social costs, of alcohol and illicit drug problems in Western Australia.

The two attached papers are:

- Cannabis law reforms: Recent developments
- Cannabis smoking paraphernalia: A case for reform

Whilst there is a more detailed consideration of cannabis law reform in WA and other jurisdictions in a monograph published in 2008 (Swensen G. *The 2004 cannabis law reforms in Western Australia and the United Kingdom: A case of too much caution?* Saarbrucken, Germany, VDM Verlag, 2008), these two papers provide additional information about recent developments that have occurred in Western Australia (WA).

As noted in the papers, the marked variations in approach that have occurred in WA since late 1998 of how minor cannabis offenders may be best managed have been largely shaped by whether a conservative or progressive (ie social democratic) government has been in power.

As you would be aware, following the change in government in WA in September 2008 and the re election of a conservative government, this has resulted in another disjunction in policy. The government has introduced the *Cannabis Law Reform Bill 2009* in the WA Parliament and the Bill has reached the second reading stage. When it is passed, it will completely repeal the *Cannabis Control Act 2003* and re establish a limited conditional cautioning scheme that be an integral part of the State's *Misuse of Drugs Act 1981*.

There are some shortcomings of the cannabis infringement notice (CIN) scheme outlined in the first paper which are relevant to the wider problem of implementing law reforms involving minor cannabis offenders, as compared with the approach followed in the UK of issuing cannabis warnings, which is largely reliant on police discretion.

We have argued that the WA Police (WAPOL) experienced difficulties in administering the CIN scheme, which was introduced in March 2004, due to its administrative complexity. This meant that a much greater number of minor cannabis offenders came to official attention than prior to the CIN scheme, when police would have most likely only informally cautioned minor cannabis offenders. (It should be noted that very few offenders participated in the pre Liberal government's cannabis cautioning mandatory education scheme.)

There were a number of other problems of implementation of the CIN scheme which are also discussed in the first paper. These include an expectation by government that community based education about the harms of cannabis, the provision of brochures and health oriented materials at the point of sale of retail outlets who sold cannabis smoking paraphernalia and attendance at 'cannabis education sessions' would improve knowledge and attitudes of users about cannabis related harms.

We have argued that another factor relevant to the inadequate implementation of the health and preventative aspects of the *Cannabis Control Act 2003* reforms was that the responsible health agency restricted the cannabis education intervention, along with other existing diversion programs, so that it was only delivered by specialist service providers.

As outlined in the paper a preferred approach would have been to have located programs that provided support and assistance to those with problematic cannabis use with community based health providers and not with Community Drug Service Teams and other specialist service providers. Whilst the approach followed with the CIN scheme may have been justified on the grounds that it may have been cost effective, it would appear such a narrowly defined approach to the provision of services could have also been motivated by a desire for the agency to retain control over a large amount of the earmarked Commonwealth drug diversion funds it managed.

The second paper outlines a case that cannabis smoking paraphernalia should be decriminalised, rather being an offence under the State's *Misuse of Drugs Act 1981*. In the paper we draw upon the experience in WA since the late 1980s, as well as many other jurisdictions, where it has been recognised that the transmission of blood borne viruses (BBVs) is a unequivocal consequence of prohibition oriented drug policies.

A point to be noted is that cannabis is widely used by West Australians. For instance, in the 2007 National Drug Strategy Household Survey it was found that 10.8% and 6.0% of West Australians aged 14 years and older had used cannabis in the past year and the past month, respectively. Based on these prevalence rates, this means that in 2007 approximately 185,650 West Australians had used cannabis in the past year and 103,140 had used in the past month. These high rates of cannabis prevalence mean there is the potential for a relatively large numbers of people to experience cannabis health related harms, for a variety of reasons, such as due to dependence, method of use and of changes in preferences for different types of cannabis depending on potency.

Besides being clearly a trivial offence, the prohibition on cannabis smoking paraphernalia means that as well as conviction harms, the prohibition of the sale and possession of cannabis smoking paraphernalia means that government will be largely impotent and unable to promote lower risk methods of use, like has been successfully done in relation to injecting drug users.

As pointed out in the paper, one of the important lessons from the development of needle and syringe programs around the world is that it is entirely feasible to maintain the overarching framework regarding the possession and use of illicit drugs, whilst also giving primacy to the minimising the public health risks to both users and the wider community due to an over reliance on deterrence through law enforcement measures. This approach is clearly also applicable to managing cannabis health related harms and would be achievable by the decriminalisation of cannabis smoking paraphernalia.

Greg Swensen

10 May 2010

Cannabis Law Reforms: Recent Developments

Greg Swensen and Thomas Crofts

1. Introduction

In early 2004 both the United Kingdom (UK) and Western Australia (WA) undertook important reforms which sought to provide police with formal alternatives to prosecuting 'minor' cannabis offenders. In the UK police were given the power to give a formal cannabis warning¹ while in WA the police were able to issue a cannabis infringement notice (CIN) for specified offences. As reform has the potential to deliver multiple benefits for policing and to activate mechanisms to manage minor cannabis offenders as a health rather than law enforcement issue, these reforms are of interest to those concerned generally with cannabis law reform. More particularly, those interested in the expanded use of diversion programs which target minor drug offenders, will find aspects of these reforms of relevance as they also incorporate principles of therapeutic jurisprudence to justify coercive processes to manage offenders outside the courts.²

The 2004 WA reform involved a new piece of legislation, the *Cannabis Control Act 2003* (CCA), which was crafted to not disturb the underlying existing framework concerning cannabis and other drugs in the *Misuse of Drugs Act 1981* (MDA). As the WA reform included a requirement for a statutory review after three years, some of the rich source of published data associated with this review will be referred to. Because proponents of cannabis law reform may claim it provides a range of beneficial law enforcement and health related outcomes, a detailed consideration of data from the WA statutory review will illustrate some of the difficulties proponents can face in identifying the benefits of cannabis law reform.

This article also provides commentary on recent developments in relation to cannabis laws in WA, as the Liberal Government, which was elected September 2008, had vowed in its pre election manifesto to repeal the CCA and re-establish a mandated cautioning scheme for possession of up to 10 grams of cannabis.³ The Barnett Liberal government introduced the Cannabis Law Reform Bill 2009 in October 2009 and whilst the Bill has not yet proceeded past the second reading stage, it is expected the CCA will soon be repealed.

A test of the Liberal government's reforms will be the extent to which the reinstated cautioning scheme discounts evidence from other jurisdictions that prohibition has largely failed because of a growing, if somewhat cautious acceptance by the community, that cannabis use has becoming 'normalised.'

*"For societies which maintain and enforce blanket prohibition of all popular illicit drugs and refuse any review of their drug laws, the notion of normalisation to explain the growth of recreational drug use is anathema because it highlights the loss of moral and social authority of the law and, by implication, the government and enforcement agencies."*⁴

Whilst this paper will examine in some detail outcomes of the CIN scheme which was introduced in WA in March 2004, it will also refer to a number of aspects of the January 2004 reforms in the

¹ Since January 2007, the term 'cannabis warning' has been adopted as it was considered use of the former term of a 'street warning' caused confusion with other types of warning police could give, such as a formal warning, a formal cautioning or a final warning: Association of Chief Police Officers. *Policing guidance following reclassification of cannabis*. Press release 18/07, 16 January 2007.

² Freiberg A. "Therapeutic jurisprudence in Australia: paradigm shift or pragmatic incrementalism?" (2002) 20 *Law in Context* 6-23; Wexler DB. "Reflections on the scope of therapeutic jurisprudence." (1995) 1 *Psychology, Public Policy & Law* 220-236.

³ Liberal Party of WA. *Liberal government to smash Labor's soft drug stance*. <www.wa.liberal.org.au>; Phillips Y. Drug laws 'back to dark ages'. *The West Australian* 31 October 2008; Spagnolo J. Premier Colin Barnett's war on drugs. *PerthNow* 3 January 2009 <www.news.com.au/perthnow/story/0,21598,24868863-948,00.html>; Taylor R. Cannabis plan fails to enthrone voters. *The West Australian* 13 June 2009.

⁴ Parker H, Williams L & Aldridge J. The normalisation of 'sensible' recreational drug use: further evidence from the North West England longitudinal study. (2002) 36 *Sociology* 943.

UK to highlight by comparison, that there were a range of alternatives available in the approach to how minor cannabis offenders can be dealt with outside the criminal justice system. In the UK while there were minor amendments to the *Misuse of Drugs Act 1971* the circumstances under which a warning could be issued was determined by administrative directions issued by the police. In addition to its flexibility, this approach signalled primary responsibility rested with the police and that they were able to actively exercise their discretion in each situation. In contrast, the WA March 2004 reforms were intended to limit police discretion as the CCA set out specific criteria as to when a CIN could be issued for each of the four expiable cannabis offences in the CIN scheme.⁵

2. Background for reform

Prior to the 2004 reforms both the UK⁶ and WA⁷ had trialled non-legislatively backed⁸ cautioning schemes for possession of a small amount of cannabis established by administrative directions issued by the Association of Chief Police Officers (ACPO) in the UK and the Police Commissioner in WA. It should be noted that cautioning was also implemented in a number of other jurisdictions involving cannabis as well as other drugs.⁹ This reflected a growing understanding that the criminal justice system was not an effective place for managing minor drug offenders, those who are drug dependent or offenders who otherwise had little or no prior contact with the criminal justice system.¹⁰

The major impetus for the 2004 cannabis law reforms in WA was the election in February 2001 of a Labor government, which had included in its pre-election manifesto a commitment to reform the law concerning minor cannabis offences.¹¹ Another stimulus for reform was community concern about allegations of police misconduct, including drug law enforcement (DLE) procedures. Soon after taking office, in December 2001, the Labor government established a Royal Commission to address these concerns, as part of its pre election

⁵ Sutton A & Hawks D. The cannabis infringement notice scheme in Western Australia: a review of policy, police and judicial perspectives. (2005) 24 *Drug & Alcohol Review* 331-336.

⁶ The London Borough of Lambeth conducted a cannabis cautioning trial in June 2001, which was a precursor to the wider use of cautioning by police: MORI Social Research Institute & Police Foundation. *Policing the possession of cannabis: Residents' views on the Lambeth experiment*. London, Police Foundation, 2002.

⁷ Penter C, Walker N & Devenish-Mearns M. *Evaluation of the pilot West Australian cannabis cautioning and mandatory education system: Final report*. Perth, WA Drug Abuse Strategy Office, 1999.

⁸ The cannabis cautioning mandatory education scheme (CCMES) was introduced in March 2000 by the previous Liberal government and operated until March 2004. It permitted police to issue a caution for a first time offenders who possessed up to 25 grams of cannabis, conditional on attendance at and completion of a cannabis education session (CES). The WA Police did not appear to regard the non legislative basis of the CCMES as problematic, as it was established by Commissioner's guidelines: Atherton TJ. *Managing police discretion: incorporating the Western Australian cannabis cautioning mandatory education system (CCMES)*. <www.nceta.flinders.edu.au/pdf/proceedings2001/atherton.pdf>.

⁹ Baker J & Goh D. *The cannabis cautioning scheme three years on: An implementation and outcome evaluation*. Sydney, New South Wales Bureau of Crime Statistics & Research, 2004; Hales J, Mayne M, Swan A, Alberti A & Ritter A. *Evaluation of Queensland illicit drug diversion initiative (QIDD) police diversion program: final report*. Brisbane, Queensland Health & Queensland Police Service, 2004; Victorian Department of Human Services. *Evaluation of drug diversion pilot program*. Melbourne, Drugs and Health Protection Services Branch, Public Health Division, Department of Human Services, 1999.

¹⁰ Australasian Centre for Policing Research. *The role of police in supporting illicit drug related public health outcomes*. Payneham, SA, Australasian Centre for Policing Research, 2000; Australasian Centre for Policing Research. *The impact of the national focus on harm minimisation on the uptake of illicit drugs in Australia*. Payneham, SA, Australasian Centre for Policing Research, 2002; Australasian Centre for Policing Research. *The impact of the general law enforcement on the illicit drugs market*. Payneham, SA, Australasian Centre for Policing Research, 2003; Burton K. *Illicit drugs in Australia: Use, harm and policy responses*. Canberra, Social Policy Section, Parliamentary Library, Australian Parliament, 2004; Morrison S, Burdon M. *The role of police in the diversion of minor alcohol and drug related offenders*. Canberra, Commonwealth Department of Health and Aged Care, 2000.

¹¹ "We propose a decriminalised regime which would apply to the possession of 50 grams of cannabis or less and cultivation of no more than two plants per household. A person who admitted to a simple cannabis offence would be issued with a cautioning notice as a first offence, be required to attend an education and counselling session for a second offence or, in lieu of accepting that option, face a fine as a civil offence, and be fined for any subsequent offence." Australian Labor Party, WA Branch. *Drugs and crime direction statement*. 2000.

manifesto.¹² Another possible influence was that WA, like most of the other Australian jurisdictions which had expiation schemes, generally had somewhat higher rates of cannabis use prevalence compared to the non-expiation Australian jurisdictions which had cautioning schemes.¹³

The CCA was enacted in WA in October 2003 and represented a partial response to DLE related concerns raised by the Royal Commission into Police Misconduct, by codifying the circumstances when police were permitted to either charge or alternatively issue a CIN if someone had committed a minor cannabis offence. The government indicated it expected that the CCA would facilitate changes in DLE priorities as issuing minor cannabis offenders with a CIN instead of pursuing prosecution would allow resources to be freed up to enable police to focus on offences related to the use of more harmful drugs, such as heroin and amphetamines. It was also contended that the reform of minor cannabis offences would enable the police to target those engaged in more serious cultivation, supply and selling offences related to cannabis.¹⁴

In the UK the government also sought to emphasise the goal of redirecting police resources to more serious drug offending when it had introduced cannabis warnings in January 2004. The government restated this objective when it reversed the classification of cannabis from a Class C drug back to a Class B drug, which took effect in January 2009.

"In reaching its decision the Government has also taken into account wider issues such as public perceptions and the needs and consequences for policing priorities. Reclassifying cannabis to Class B will help drive the enforcement priorities to reverse the massive growth in commercial cultivation and will support the comprehensive package of measures used to tackle cannabis use as part of the Government's drug strategy."¹⁵

3. WA reforms

The 2004 reforms were a continuation of earlier legislative reform in three other Australian jurisdictions, in SA, the ACT and the NT, which had established infringement notice schemes to expiate minor cannabis offences in 1987, 1992 and 1996, respectively.¹⁶

The WA reform involved three legislative actions - amendment of the MDA, enactment of a new piece of legislation (ie the CCA) and issuing of regulations applicable to retailers of cannabis smoking paraphernalia.¹⁷ The CCA created a hybrid group of expiable drug offences, involving a small number of existing offences in the MDA,¹⁸ for which police could issue an infringement notice.

The CIN scheme commenced on 22 March 2004 and contained four expiable offences:

- possession of smoking implements on which there are detectable traces of cannabis (modified penalty \$100);
- use of or possession of not more than 15 grams of cannabis (modified penalty \$100);

¹² The final report of the Royal Commission into Police Misconduct was tabled in January 2004.

¹³ Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Table 3-4.

¹⁴ Minister for Health (Hon. Bob Kucera). Second Reading Speech, Cannabis Control Bill 2003. Western Australian Parliament, Legislative Assembly. Hansard. 20 March 2003, 5697.

¹⁵ Home Office. *Explanatory memorandum to the Misuse of Drugs Act 1971 (Amendment) Order 2008 No. 3130*. London, Home Office.

¹⁶ The SA cannabis expiation notice (CEN) scheme commenced 30 April 1987, the ACT's simple cannabis offence notice (SCON) scheme commenced September 1992 and the NT's drug infringement notice (DIN) scheme commenced July 1996.

¹⁷ Cannabis Control Regulations 2004.

¹⁸ *Misuse of Drugs Act 1981*: s. 5(1)(d)(i) – possession of pipes or utensils for smoking a prohibited plant on which there are detectable traces of a prohibited plant, s. 6(2) possession or use of a prohibited drug and s. 7(2) possession or cultivation of a prohibited plant.

- use of or possession of more than 15 grams and not more than 30 grams of cannabis (modified penalty \$150); and
- cultivation of not more than two non-hydroponically grown cannabis plants at a person's principal place of residence (modified penalty \$200).

A number of features of the CIN scheme were designed to overcome perceived shortcomings in the cannabis expiation schemes that already operated in SA, the ACT and the NT. One criticism of the three existing schemes was the low rate of expiation, as perhaps between one quarter and one third of offenders failed to expiate. However, there was some evidence that administrative arrangements contributed to low rates of expiation, such as in the CEN scheme which because of its rigid time frame for payment resulted in large numbers of people returning to court as there was no option of time to pay arrangements.¹⁹

In response to this problem, the CIN scheme provided for expiation by either full payment of the prescribed penalty or by attendance at a CES within the first 28 days, when police were responsible for enforcement. However, if a person failed to expiate within a further 28 days after police had issued a final demand, enforcement passed to the Fines Enforcement Registry (FER), an agency based within the courts system responsible for recovery of all types of unpaid infringement notices, as well as unpaid court fines. When enforcement of a fully unexpiated CIN is transferred to the FER, the provisions of a specific part of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (FPINEA) applied.²⁰ The recovery process by the FER meant a person continued to receive further demands for payment, each of which involved additional administrative fees. If a person failed to respond to these demands they were required under the FPINEA to enter into a time to pay arrangement or otherwise their motor driver's licence would be suspended until full payment was made.²¹

Another shortcoming that the CIN scheme sought to overcome related to those who failed to expiate multiple CINs, ie 'recidivists.' Section 9 of the CCA provided that if a person had been issued with three or more CINs on separate occasions within the previous three year period, they could not expiate any further CINs by payment but could only expiate by attending a CES. Furthermore, if a person issued with a CIN under these circumstances failed to complete the CES they could not avail themselves of the procedures in the FPINEA, but were to be charged with the relevant offence under the MDA for which a CIN had been issued.

The CIN scheme also sought to maximise expiation through completing a CES, by providing that if a person was issued with multiple CINs on a single occasion, these could be expiated contemporaneously by attendance at a single CES. This option was especially attractive to a person issued with a number of CINs on a single occasion, as otherwise they would be liable for the aggregate value of issued CINs if expiated by payment.²²

¹⁹ Working Party on Drug Law Reform. *Implementation of a scheme of prohibition with civil penalties for the personal use of cannabis and other matters*. Perth, Western Australia, Drug & Alcohol Office, 2002.

²⁰ Part 3 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* provides a different enforcement process related to unpaid infringement notices which bars imprisonment for failure to expiate, whereas under Part 4, which applies to enforcement of unpaid fines imposed by courts, imprisonment for non payment is an available sanction. The Fines Enforcement Registry (FER) is responsible for the enforcement of a wide range of infringement notices, such as traffic infringements and infringements issued by state and local government authorities, who refer enforcement to FER.

²¹ If an unexpiated CIN went through all stages of the FER enforcement process, a total of an additional \$96.50 in administrative charges would have been incurred, per infringement notice. This was in addition to original modified penalty according to the expiable offence.

²² The theoretical maximum aggregate value for three concurrent expiable was \$450 (ie \$100 for possession of a cannabis smoking implement, \$150 for possession of more than 15 grams of cannabis and \$200 for cultivation of up to two plants).

4. WA reforms compared with UK

A key difference between the UK and WA reforms was that the CCA did not mandate that police issue a CIN,²³ whereas in the UK police were (and continue to be) required as standard practice to give a cannabis warning.²⁴ Another difference is that in the UK police were granted a wide measure of discretion as to whether the amount of cannabis could be dealt with by way of a cannabis warning, as the APCO guidelines refer to possession of a 'small amount' of cannabis.²⁵

*"In reclassifying cannabis from Class B to Class C, the Government has made it quite clear that should an offender be found with a 'small amount' of cannabis intended for personal use they should not, wherever possible, be arrested."*²⁶

In comparison, as the CIN scheme sought to largely exclude police discretion, police were expected to weigh the quantity of cannabis²⁷ to determine whether the offence qualified for the expiable offences of possession or use of up to 15 grams of cannabis or possession or use of more than 15 grams and not more than 30 grams of cannabis. Another prescriptive aspect of the CCA was that the expiable offence involving cultivation was restricted to the cultivation of not more than two plants, that such plants were cultivated non hydroponically and that they were cultivated at the person's principal place of residence.²⁸

5. First three years of the CIN scheme

5.1 Overview

The following analysis is based on the first three years of the CIN scheme, as contained in the statutory review of the CCA, covering the period from 1 April 2004 to 31 March 2007.²⁹

In the three year period a total of 9,328 CINs were issued, of which 3,408 (36.5%) were for possession of a smoking implement, 5,422 (58.1%) were for possession of 15 grams or less of cannabis, 243 (2.6%) were for possession of more than 15 grams and up to 30 grams of cannabis and 255 (2.7%) were for non-hydroponic cultivation of not more than two plants.³⁰ This indicates that two expiable offences accounted for the majority of CINs issued.³¹

²³ *Cannabis Control Act 2003* s. 5(1): "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."

²⁴ Association of Chief Police Officers. *Policing guidance following reclassification of cannabis*. Press release 18/07. 16 January 2007. "A police officer finding a person aged 18 or over in possession of a substance that they can identify as cannabis and is satisfied that the drug is intended for that person's own use should not normally need to arrest the person."

²⁵ Association of Chief Police Officers of England, Wales and Northern Ireland. *Policing guidance following reclassification of cannabis*. Reference 18/07. Press release, 16 January 2007. Previously referred to as a 'street warning': Association of Chief Police Officers. *Cannabis enforcement guidance*. Press release, 12 September 2003, Can/guide/03; Association of Chief Police Officers. *Cannabis enforcement guidance: Frequently asked questions*. 12 September 2003. Can/FAQ/03.

²⁶ Association of Chief Police Officers. *Cannabis enforcement guidance: Frequently asked questions*. 12 September 2003, Can/FAQ/03, 2.

²⁷ Implementation of the CIN scheme included that every police station in WA be issued with a digital set of scales. As the guidelines did not distinguish between weighing 'fresh' or 'green' cannabis and dried cannabis, it is likely that if fresh cannabis was reweighed some time after it was seized it could weigh appreciably less due to loss of moisture.

²⁸ It should be noted the CIN scheme applied to only adults. Police in WA were also required to explain to offenders the two specified methods of expiation - attendance at a cannabis education session (CES) or payment of fixed modified penalties and specified time limits within which expiation was required.

²⁹ Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007; Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Supplementary data tables and figures*. Perth, Western Australia, Drug and Alcohol Office, 2007.

³⁰ A further 390 CINs were issued but were excluded from analysis as they were withdrawn by the police.

³¹ Very few CINs were issued for the offence of possession or use of more than 15 grams and up to 30 grams of cannabis and may indicate police either detected very few people who had this amount of cannabis in their possession or were unwilling to issue a CIN to someone with this amount of cannabis. The more likely explanation is that police regarded possession of such an amount as not being for personal use. Possession of this amount of cannabis could be regarded as facilitating some form of supply, as the threshold of a maximum of

There was a total of 6,790 unique individuals issued with CINs in the three year period, with 6,348 (93.5%) issued on a single day, 414 (6.1%) issued on two separate days, 25 (0.3%) issued on three separate days and three issued on four or more separate days. Out of these 6,790 unique individuals, 4,595 (67.7%) received only one CIN, 1,687 (24.9%) received two CINs on one day and 66 (1.0%) received three CINs on one day.

In summary this means that more than nine out of ten persons were issued with one or more CINs on only one occasion and that just over two thirds of persons received only one CIN in the three year period. Whilst this data may suggest there may have been little apparent recurrent contact with police by this large cohort of individuals, without further study it is not possible to identify other patterns of offending.

Figure 1: Quarterly offences - CINs, cautions & convictions, March quarter 2002 – March quarter 2007

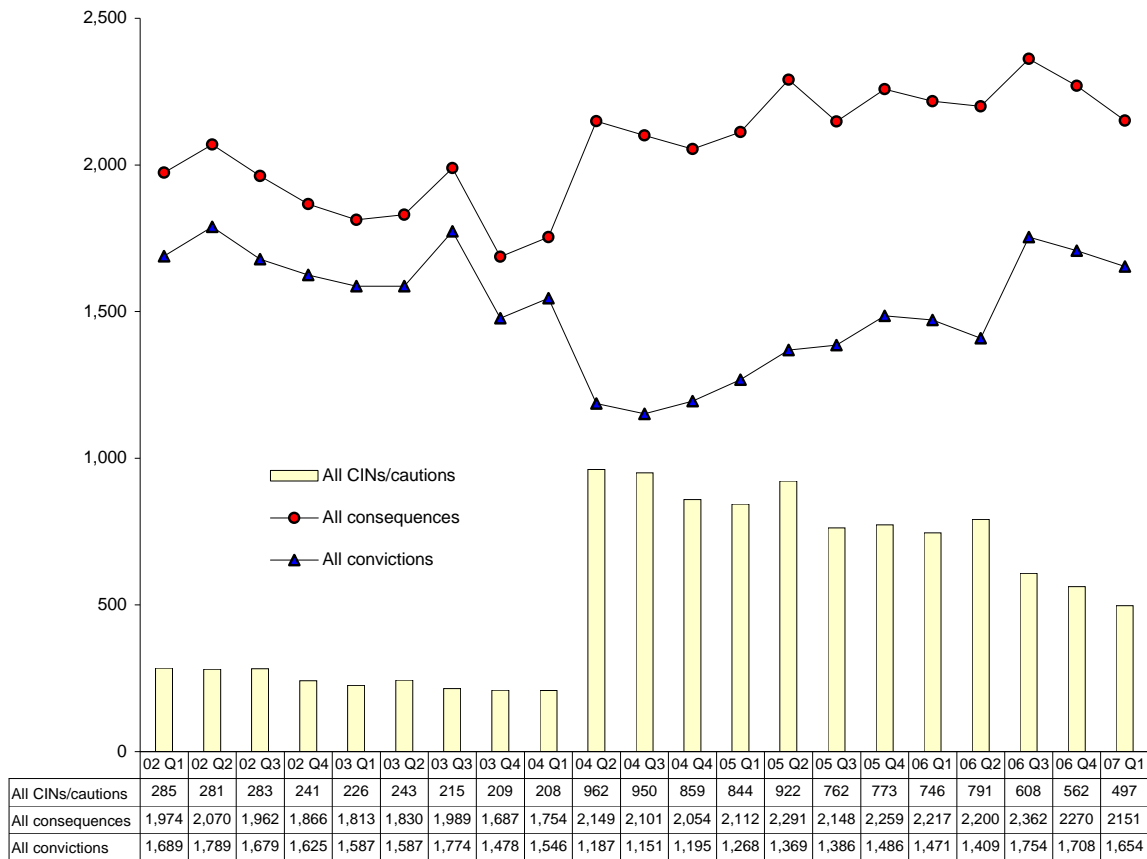


Figure 1 provides quarterly trends in the number of consequences related to minor cannabis offences in terms of CINs and cautions (issued under the previous CCMES) and cannabis related convictions, covering the nine quarters before the CIN scheme and the first 12 quarters of the scheme up to the March quarter 2007. This shows the number of CINs issued each quarter steadily declined from the June quarter 2004 (962 CINs) to the March quarter 2007 (497 CINs). Overall, there was an average of a total of 773 CINs issued per quarter over the 12 quarters from 1 April 2004 to 31 March 2007.

30 grams was to encompass possession of up to an 'ounce' (ie 28 grams) of cannabis and therefore it is not unexpected that police would have been reluctant to issue a CIN for amounts in the 15 to 30 gram range.

5.2 Expiation

Although a high rate of expiation was regarded an important objective of the CIN scheme, in reality the actual rate was difficult to ascertain due to the interaction with the FER system. Because the FER system continually updates outcomes of all offenders with unpaid infringements registered its database, after registration the proportion of fully completed CINs increases as offenders pay off the debt owed. As an unpaid infringement registered with FER remains a debt until fully paid, in theory this means some unexpiated CINs may not be fully paid off for some time. Because of the delay in registering unexpiated CINs with FER issued up to 31 March 2007, the statutory review was based on FER status at 30 September 2007. It was determined, based on 9,328 CINs issued up to 31 March 2007, that overall 2,741 (29.4%) were paid in full within the first 28 days, 2,286 (24.5%) resulted in suspension of motor driver's licence, 2,228 (23.9%) were paid in full through the FER system and 1,250 (13.4%) were completed by attendance at a CES.

Data on outcomes of CINs, once they have been registered with FER, shows the proportion of unexpiated CINs successfully finalised through the FER enforcement process steadily increased after registration due to ongoing pressure to pay the outstanding debt. This indicates that in the long term around an additional 25% to 30% of all CINs were expiated by the FER system.³²

Figure 2: Proportion (%) of CINs expiated by quarter issued and expiation outcome, March quarter 2004 – March quarter 2007

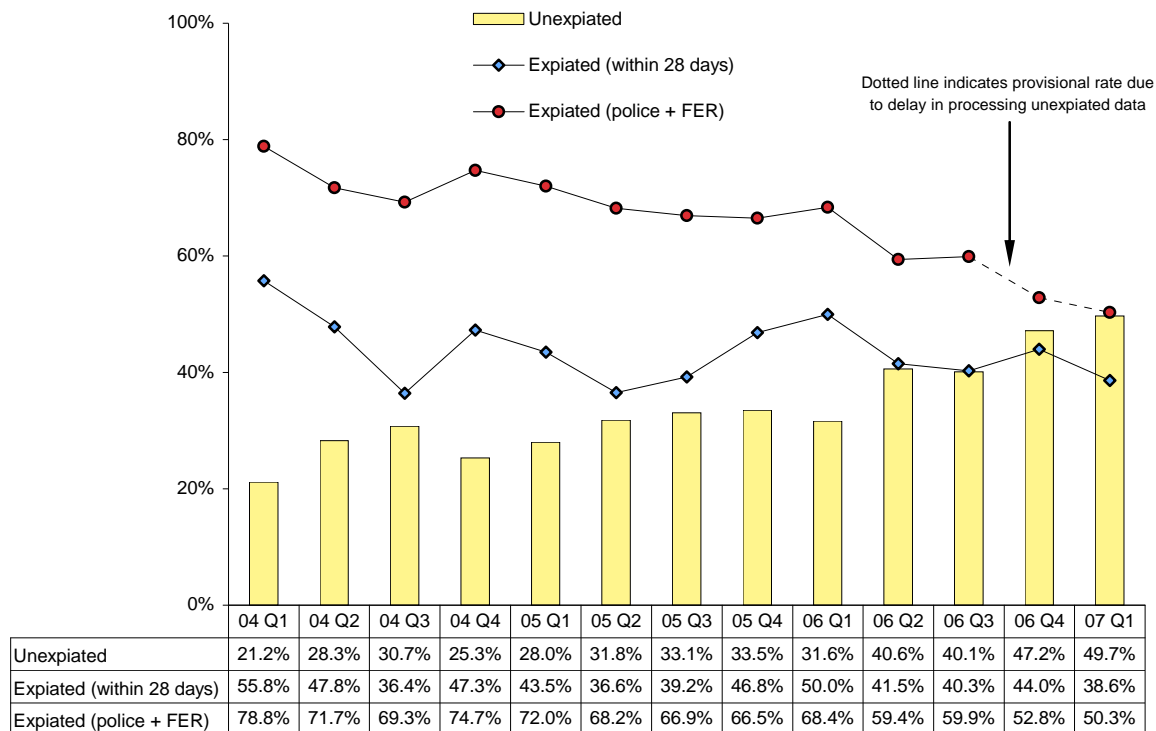


Figure 2 contains two separate trends, CINs expiated within the first 28 days (ie those who fully expiated at the police enforcement stage) and the combined rate for CINs expiated through the police enforcement stage plus the FER system (ie unpaid CINs registered with FER as they were not expiates within the police enforcement stage).

³² See Table A1-2 in Appendix 1 in Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report.* Perth, Western Australia, Drug and Alcohol Office, 2007.

As the data in Figure 2 tracks aggregated outcomes of CINs on a quarter by quarter basis dependent on the quarter in which a CIN was issued, the correct reading of this data is from the right to the left. This means, for instance, at 30 September 2007, that 49.7% of the CINs issued in the March quarter 2007 were still unexpired, that 47.2% of the CINs issued in the December quarter 2006 were still unexpired, that 40.1% of the CINs issued in the September quarter 2006 were still unexpired, etc.

Figure 2 demonstrates that the proportion of all CINs expired in the first three years of the CIN scheme increased from half to more than three quarters after three years. The increased rate of expiration shown in Figure 2, which occurs by a combination of both the police and FER enforcement stages, means that the proportion of CINs issued in a quarter which had been expired increased from 50.3% in the March quarter 2007 to 78.8% in the March quarter 2004.³³

It can be seen in the long term that the combined outcome for both enforcement stages means that at least two thirds of all CINs will be fully expired within 12 months of a CIN being issued. In summary, of the 9,328 CINs issued up to 31 March 2007, a total of 3,991 (42.8%) were expired at the police stage and a further 2,192 (23.5%) were expired by FER, such that two thirds (66.3%) of all CINs that were issued in the first three years of the CIN scheme had been fully expired.

6. Some lessons from cannabis law reform

It would appear that governments in both the UK and WA were tentative about the extent of community acceptance of the 2004 reforms, as in both jurisdictions the government stated they would be subject to ongoing review. As in WA a formal review of the first three years of the operation of the CCA was a specific requirement of the enabling legislation, a report was tabled in the WA Parliament on 29 November 2007 to evaluate the operation of the CIN scheme between April 2004 to March 2007.

In the UK, whilst there was not a statutory requirement for evaluation of the reforms, nevertheless on two occasions³⁴ the Government requested a reconsideration by the Advisory Council on the Misuse of Drugs (ACMD) of the recommendation in its 2002 report that cannabis be reclassified from a Class B to a Class C drug under the Misuse of Drugs Act 1971.³⁵ Whilst on both occasions the ACMD supported its earlier recommendation for reclassification, in October 2008 the government announced it would revert to the pre 2004 position of cannabis being a Class B drug.³⁶ However, whilst cannabis reverted to being a Class B drug from 26 January 2009, police in the UK were able to continue to issue cannabis warnings for minor cannabis offences where it involved “possession for personal use”, but if there were other aggravating factors they were encouraged to adopt options of issuing a penalty disorder notice or otherwise arrest and charge an offender.³⁷

6.1 Cannabis reform as a law enforcement issue

Figure 3 provides an overview of published law enforcement data for the seven Australian jurisdictions and other selected jurisdictions to identify variations in the rate of cannabis

³³ In the March quarter 2004 a total of 52 CINs were issued between 22 to 31 March 2004.

³⁴ Advisory Council on the Misuse of Drugs. *Further consideration of the classification of cannabis under the Misuse of Drugs Act 1981*. London, Home Office, 2005; Advisory Council on the Misuse of Drugs. *Cannabis: classification and public health*. London, Home Office, 2008.

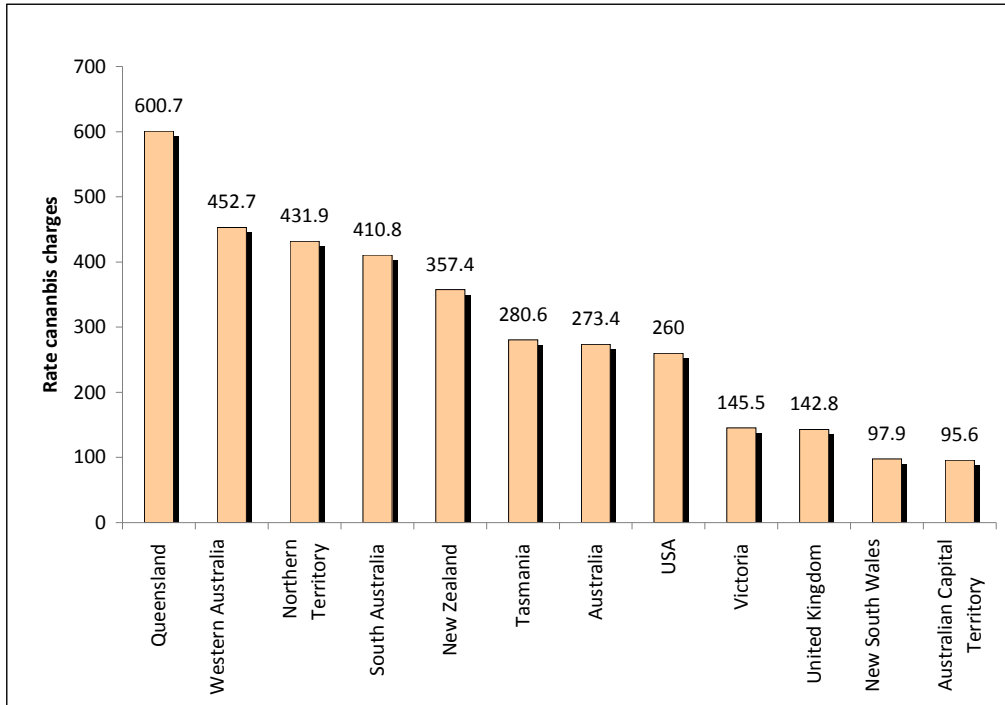
³⁵ The government had requested the ACMD in October 2001 to review the classification of cannabis under the UK's drug legislation: Advisory Council on the Misuse of Drugs. *The classification of cannabis under the Misuse of Drugs Act 1971*. London, Home Office, 2002.

³⁶ HM Government. Government response to the recommendations made by the Advisory Council on the Misuse of Drugs in its report Cannabis: classification and public health

³⁷ Association of Chief Police Officers. *ACPO guidance on cannabis possession for personal use: Revised intervention framework*. London, Association of Chief Police Officers, 2009.

offences dealt with by the police in the year 2004. Data for cannabis and all drug offences is summarised in Table 1.³⁸

Figure 3: Rate of cannabis offences per 100,000 (total population), selected jurisdictions, 2004



³⁸ *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report.* Perth, Western Australia, Drug and Alcohol Office, 2007: Chapter 8 and Table A1-2 in Appendix 1.

Table 1: Estimated rates and number of cannabis arrests for Australia and selected jurisdictions, 2004

	Cannabis offences (arrests + infringements)		All drug offences	Estimated resident population	Rate/100,000	
	n	%			Cannabis	All drugs
Queensland	23,355	72.5	32,226	3,888,077	600.7	828.8
Western Australia	8,955	69.5	12,880	1,978,079	452.7	651.1
Northern Territory	863	87.7	984	199,834	431.9	492.4
South Australia	6,296	92.6	6,800	1,532,727	410.8	443.7
New Zealand	14,654	80.2	18,280	4,100,600	357.4	445.8
Tasmania	1,353	88.1	1,535	482,236	280.6	318.3
Australia	54,936	71.0	77,333	20,091,504	273.4	384.9
United States of America					260	
Victoria	7,221	58.5	12,347	4,962,970	145.5	248.8
United Kingdom	85,438	60.0	142,338	59,834,300	142.8	237.9
New South Wales	6,583	65.2	10,101	6,720,791	97.9	150.3
Australian Capital Territory	310	67.4	460	324,119	95.6	141.9

Source: Crime data: Australia: *Illicit drug data report 2004-05*. Canberra, Australian Crime Commission, 2006 (Tables 17 & 18); USA: from NORML New Zealand. *Research: Recorded cannabis offences down 19%: NZ still number one pot arresting country*, 8 June 2007 <www.norml.org.nz/article567.html>; New Zealand: from *New Zealand crime statistics 2004/2005: A summary of recorded and resolved offence statistics*. Office of the Police Commissioner, August 2005; UK: from Nicholas S, Povey D, Walker A & Kershaw C. *Crime in England and Wales 2004/2005*. Home Office Statistical Bulletin 11/05. London, Research, Development & Statistics Directorate, Home Office, 2005 (Table 2.04). Population data: Australia: from Australian Bureau of Statistics. *Australian historical population statistics*. Cat. No. 3105.0.65.001; UK: from *National Statistics*; New Zealand: from *New Zealand crime statistics 2004/2005: A summary of recorded and resolved offence statistics*.

Note: Australian data refers to 2004/2005, other jurisdictions refer to 2004.

Table 1 indicates that cannabis constitutes a major DLE issue in these jurisdictions. If cannabis arrests are included in all drug arrests this clearly shows the majority of drug offences in all jurisdictions involved cannabis, which in the case of Australia as a whole, made up 71.0% of all drug offences. It is difficult to accurately determine the seriousness of offending involving cannabis offences due to classifying offences as 'consumer' and 'provider' offences in annual Illicit drug data reports published by the Australian Crime Commission.³⁹

It can also be seen there were some variation in the proportion of all drug arrests that involved cannabis in the various Australian jurisdictions. This varied from just under six out of 10 (58.5%) in Victoria, two thirds in NSW and the ACT (65.2% and 67.4%), about seven out of 10 in WA and Queensland (69.5% and 72.5%) and nine out of 10 or more in the NT (87.7%), Tasmania (88.1%) and SA (92.6%).

Further investigation is required to determine how much of this variation is attributable to the priority that DLE agencies in different jurisdictions give to cannabis compared to other drugs

³⁹ This classification treats all cannabis cultivation offences as 'provider' offences, regardless of number of plants involved.

and whether arrests are related to underlying prevalence or legislative arrangements.⁴⁰ It is worth noting that cannabis infringement notices issued in Australia constitute a relatively small proportion of all cannabis arrests, declining from a national average of 21.1% in 1995/1996 to 16.6% in 2005/2006.⁴¹ Overall, the annual total number of cannabis infringements in Australia has declined from 16,696 in 1995/1996 to 9,252 in 2005/2006.⁴²

6.2 Describing cannabis reform

A range of descriptors and nomenclature, such as decriminalisation, partial decriminalisation and depenalisation can be used to describe cannabis law reform.⁴³ Although the term 'decriminalisation'⁴⁴ has frequently been used to encompass the administrative and legal approaches that have been adopted to reform minor cannabis offences, it should be understood in the context in which it occurs.

*"Although widely used in discussions regarding alternative marijuana policy regimes, decriminalisation is a policy that to date has gone largely undefined in the international policy arena. The term literally implies a reduction in the criminal status of marijuana possession offences, however, numerous countries and sub jurisdictions that are recognised as having decriminalised marijuana in fact merely reduce the penalties associated with the possession of specified amounts. Hence, the term marijuana depenalisation has evolved in the scientific literature as a more accurate term reflecting diversity in policies that exist across countries."*⁴⁵

Proponents of the 2004 WA reforms appear to have believed that the term 'decriminalisation' has a negative connotation and therefore its use was to be avoided in favour of the phrase 'prohibition with civil penalties for the personal use of cannabis'. The phrase 'prohibition with civil penalties' possibly enjoyed its greatest popularity in the 1970s when describing the reforms in the US following the 1972 Shafer inquiry.⁴⁶ This term has also been used to describe the South Australian reforms of 1987 which established the CEN scheme, nearly ten years after being recommended by the Sackville Royal Commission in 1979.⁴⁷

The following statements give an accurate description of 'decriminalisation' and therefore we suggest that this is the appropriate term to use when describing the 2004 reforms that occurred in both the UK and WA.

⁴⁰ The 23,355 cannabis arrests in Queensland in 2004/2005 requires additional explanation, as these made up 42.5% of the total of 54,936 cannabis arrests for Australia in 2004/2005. In Queensland there has been an increase in the annual number of cannabis arrests since the Police Diversion Program (PDP) was introduced in June 2001, which required police to offer a person a 'drug assessment program' if they had committed a minor cannabis offence: s. 379 *Police Powers and Responsibilities Act 2000*. See annual *Illicit drug reports* for 2001/2002 onwards. A contentious aspect of the PDP, is that if someone who had been cautioned failed to attend the compulsory assessment session, they would be charged with an offence of failure to follow the direction of a police officer, which had a fine of up to \$3,000: Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, chapter 1.

⁴¹ See annual *Illicit drug data reports* produced by the Australian Crime Commission and its predecessor body the Australian Bureau of Criminal Intelligence which published the *Australian illicit drug reports* up to 2000/2001.

⁴² The reduction in the number of CENs in SA that has occurred since the late 1990s is believed to be due to an administrative reform introduced in February 1997 of recording multiple offences on one notice. This would mean that only one arrest would be counted regardless of the number of separate offences recorded on the CEN.

⁴³ See Chapter 3 Models of cannabis law reform in Swensen G. *The 2004 cannabis law reforms in Western Australia and the United Kingdom: A case of too much caution?* Saarbrücken, Germany, VDM Verlag, 2008.

⁴⁴ Greenwald G. *Drug decriminalisation in Portugal. Lessons for creating fair and successful drug policies*. Washington DC, Cato Institute, 2009.

⁴⁵ Pacula RL, MacCoun R, Reuter P, Chriqui J, Kilmer B, Harris K, Paoli L & Schaefer C. *What does it mean to decriminalise marijuana? A cross national empirical examination*. Working Paper 25. Berkeley, Center for Study of Law and Society, University of California, 2004, 2.

⁴⁶ National Commission on Marihuana and Drug Abuse. *Marihuana: a signal of misunderstanding*. (Shafer chairman). Washington DC, Office of US President, 1972.

⁴⁷ Royal Commission Into the Non-Medical Use of Drugs. *Final report*. Adelaide, South Australia, Royal Commission Into the Non Medical Use of Drugs, 1979.

“Under a decriminalisation regime, cannabis use and possession remain illegal but those who break the law are not subjected to arrest and prosecution, thereby alleviating some of the social harms that can result from treating users as criminals.”⁴⁸

“Decriminalisation ... literally implies a reduction in the criminal status of marijuana possession offences, however, numerous countries and sub jurisdictions that are recognised as having decriminalised marijuana in fact merely reduce the penalties associated with the possession of specified amounts.”⁴⁹

It is submitted that community suspicion about the WA 2004 reforms may have been aggravated by the use of the phrase ‘prohibition with civil penalties for the personal use of cannabis’, which as well as being a complex and formalistic description, created a perception the government was paving the way for more comprehensive reforms to decriminalise the use of other drugs.⁵⁰

It is conceivable there may have been less opposition to and greater acceptance of the 2004 WA reform if the CIN scheme had been formally referred to as ‘partial decriminalisation’ rather than as ‘prohibition with civil penalties for the personal use of cannabis’. The term ‘partial decriminalisation’ had been used in the mid 1990s by a number of researchers to describe the SA reforms of 1987.⁵¹ This term was used in the Australian Labor Party pre-election manifesto regarding WA cannabis law reforms and also by the popular press in describing the nature of the proposed reform, when the legislation was before Parliament and in subsequent public debate.

An advantage of the term ‘partial decriminalisation’ is that its use could have signified that an important change was being made to drug policy in WA, that had the goal of wanting to “reduce some of the societal costs of complete cannabis prohibition while retaining some of the benefits of criminalising cannabis.”⁵² Finally, the partial prohibition would also have indicated the 2004 reform was an intermediate step along the continuum of possibilities instead of prohibition.

6.3 Impact of cannabis reform on policing

As governments are not ordinarily able to direct police to selectively enforce the law with regards to a specific class of offenders, it was always going to be questionable whether the police would fully embrace the reforms. This is a particular concern in WA, as the CCA sought to restrict police discretion, whereas in the UK police were expected to actively expand their discretion.

In WA there was an expectation the police would issue a CIN to offenders regardless of their prior history of offending, as the object of the CIN scheme was to divert all minor cannabis offenders from the court system. The exception to this principle was that if a minor cannabis offence was detected in conjunction with other ‘serious’ offences, then a CIN would not be issued.⁵³ However, the statutory review of the CCA provides evidence that the police in WA were not generally prepared to issue a CIN to repeat offenders, even in circumstances where they had

⁴⁸ Fielding A. Cannabis and crime. *New Scientist* 4 February 2009.

<www.newscientist.com/article/mg20126940.500-cannabis-and-crime.html>

⁴⁹ Pacula RL, MacCoun R, Reuter P, Chriqui J, Kilmer B, Harris K, Paoli L & Schaefer C. *What does it mean to decriminalise marijuana? A cross national empirical examination*. Working Paper 25. Berkley, Center for Study of Law and Society, University of California, 2004, 2.

⁵⁰ In January 2004 a cautioning scheme, based on police discretion, was introduced in WA for first time offenders with small amounts of a number of illicit drugs (other than cannabis) to receive a caution if they participated in a brief treatment intervention. Later in 2004 newspaper publicity about this scheme implied it was part of a Government approach of going ‘soft’ on drugs: Pryer W. “Roberts in dark on drugs let off.” *The West Australian* 29 October 2004.

⁵¹ Donnelly N & Hall W. ‘The effects of partial decriminalisation on cannabis use in South Australia, 1985 to 1993.’ (1995) 19 *Australian Journal of Public Health* 281-287; Sarre R. ‘The partial ‘decriminalisation’ of cannabis: the South Australian experience.’ (1994) 6 *Current Issues in Criminal Justice* 196-207.

⁵² Hall W & Pacula RL. *Cannabis use and dependence*. Cambridge, Cambridge University Press, 2003, 191.

⁵³ Working Party on Drug Law Reform. *Implementation of a scheme of prohibition with civil penalties for the personal use of cannabis and other matters*. Perth, Western Australia, Drug & Alcohol Office, 2002.

only committed only a minor cannabis offence.⁵⁴ For example, an internal WA police review covering the period 1 July 2004 to 30 June 2005, found that nearly three quarters (74.8%) out of a total of 853 persons eligible for a CIN were not issued with one. It was concluded that “*this may have meant that police did not believe the CES option was an acceptable ‘penalty’ for those who were eligible for a CIN, as they did not have sufficient knowledge about the potential advantages of expiation.*”⁵⁵

Implementation of this aspect of the CIN scheme was determined by the definition of ‘personal use’ provided in the police operational procedures that informed day to day policing in WA. The first edition of OP-52.1 (Cannabis infringement notice scheme) in the Commissioner’s Orders and Procedures Manual, which was issued in March 2004, contained the following provision:

“Drugs must be for personal use

Investigating police must be satisfied prior to issuing a CIN that the drugs are for personal use. If the circumstances indicate something other than personal use, then a CIN cannot be issued and the matter should proceed to prosecution. There must be no other offence involved, detected or under investigation for which a brief of evidence will be submitted. The exception will be where an offender is detected committing another offence at the time, which can be dealt with by the issue of a caution or penalty notice (eg Traffic or Liquor Licensing Infringement).

In the second edition of OP-52.1, issued in October 2006, this definition had been shortened, as follows:

“Drugs must be for personal use

Investigating police must be satisfied prior to issuing a CIN that the drugs are for personal use. If the circumstances indicate something other than personal use, then a CIN cannot be issued and the matter should proceed to prosecution.”

Explanations of the circumstances when a CIN could not be issued, ie when it involved more than personal use, can be inferred from documentation for police training concerned with the All Drug Diversion (ADD) scheme, which encompassed the CIN scheme.⁵⁶ The ADD scheme precluded diversion if an offender had prior convictions that included ‘serious violent offences’. The criterion as to what may constitute a ‘serious violent offence’ is in turn determined on whether the offence was one of a list of offences contained in the *Criminal Code of Western Australia*.

Another difficulty in administering the scheme was the narrow interpretation by the police of Section 12 of the *Cannabis Control Act 2003*, which *inter alia* provided that police could at any time withdraw a CIN regardless of whether it has been paid or not, except if it has been expiated by attendance at a prescribed CES. This meant that police could withdraw a CIN and instead charge most of those issued with a CIN with a relevant offence. As such the police felt required to store and retain all evidence seized from offenders which might be needed if a CIN was withdrawn and the offender charged with the relevant offence.

The interaction of the CCA with other pieces of legislation also created an additional level of complexity for police administering the CIN scheme, in particular the *Criminal Investigation (Identifying People) Act 2002*, which meant although offenders were not arrested, nevertheless offenders were to be routinely taken to a nearby police station.⁵⁷ Attendance at a police station,

⁵⁴ Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Chapter 1.

⁵⁵ *Id.*, 72.

⁵⁶ In early 2004 the All Drug Diversion (ADD) scheme replaced the WA Comprehensive Diversion Program (WACDP), which had been introduced in November 2000.

⁵⁷ Section 16(6) *Criminal Investigation (Identifying People) Act 2002* meant that as police could ask any person to provide their name, address and other personal details.

rather than processing the charge *in situ* where the offence occurred, was regarded by the police as necessary so they could accurately weigh seized cannabis, verify an offender's identity and ensure that the offender had witnessed and confirmed the seizure and retention of cannabis and paraphernalia as prerequisites to receiving a CIN.⁵⁸ This outcome may be contrasted with the approach in the UK, where there was a presumption in favour of police issuing a cannabis warning in the 'street' (ie where an offence occurred), emphasising that an offender should not be further processed by the criminal justice system.

The adoption of the 2004 reforms in WA also required shifts in long standing community and police values and beliefs about the cannabis use, for instance, that it is a precursor or 'gateway' to more serious drug use.⁵⁹ Without such a shift it was clear that the reforms would not reach their diversionary aims. For instance, as minor cannabis offences appear to be commonly detected as an incidental consequence of general police activity, a reduction in the number of minor cannabis charges detected as incidental offences may have required a reconceptualisation of general policing strategies.

For these reasons, we believe that there was a serious lack of appreciation of the need for substantial additional resources to be made available for police to develop clear administrative procedures, for them to provide additional training across all levels of the service throughout the State. There also needed to be a high level of support for the reforms from within and outside of the police service to emphasise that the shift away from prosecuting minor cannabis offenders was designed to allow police resources to focus on protecting the community from the harms associated with the activities of serious drug offenders rather than minor cannabis offenders.

6.4 Reform and cannabis related harms

The first review of the UK reform, completed in December 2005, reaffirmed the decision made by the former Home Secretary David Blunkett to reclassify cannabis from a Class B to a Class C drug under the *Misuse of Drugs Act 1971*. A second review of the reclassification was initiated in July 2007, soon after Gordon Brown replaced Tony Blair as Prime Minister.⁶⁰ The second ACMD report given to the Home Secretary Jacqui Smith in March 2008, restated its previous position that cannabis was not sufficiently harmful to warrant reclassifying it back to a Class B drug, as contended by the government.⁶¹ The ACMD's Chairman, Professor Michael Rawlins, pointed out that

*"the Council wishes to emphasise that the use of cannabis is a significant public health issue. Cannabis can unquestionably cause harm to individuals and society. The Council therefore advises that strategies designed to minimise its use and adverse effects must be predominantly public health ones. Criminal justice measures – irrespective of classification – will have only a limited effect on usage."*⁶²

In May 2008 the Home Secretary announced she would nevertheless reverse the 2004 decision and reclassify cannabis as a Class B drug. The revised UK scheme, which came into operation in

⁵⁸ Two pieces of legislation, passed after the CCA, the *Criminal Procedure Act 2004*, which commenced on 2 May 2005, which sets out procedures in Part 2 in relation to infringements and the *Criminal Investigation Act 2006*, which commenced on 16 November 2006, appear to underpin this approach. For instance, Section 28 of the *Criminal Investigation Act 2006* codifies the circumstances when police may ask a person to accompany them "for the purposes of assisting in the investigation of an offence".

⁵⁹ Bailey GW. "Perspectives in drug abuse in youth." (1989) 28 *Journal of the American Academy of Child & Adolescent Psychiatry* 151-162; Victoria, Parliament, Drugs and Crime Prevention Committee. *Interim report of the inquiry into the Victorian government's drug reform strategy*. Melbourne, Victorian Parliament, 1997.

⁶⁰ Elliott F & Ford R. 'Gordon Brown planning clampdown on cannabis over health concerns.' *TimesOnline*, 9 January 2008. <www.timesonline.co.uk/toi/news/politics/article3156255.ece>

⁶¹ Porter A. 'Gordon Brown's tough stance on cannabis.' *Telegraph* 11 January 2008. <www.telegraph.co.uk>

⁶² Advisory Council on the Misuse of Drugs. *Cannabis: classification and public health*. London, Home Office, 2008.

January 2009, permits a cannabis warning to be given for possession of cannabis by first time offenders. However, second time offenders are issued with a Penalty Notice of Disorder (PND) which involves an £80 on the spot fine and third time offenders should not be issued with a warning, but instead be arrested and charged.⁶³ If police identify the existence of 'aggravating factors,' such as that cannabis had been smoked in a public place or that there were locally identified policing problems, then this would preclude the issuing of a cannabis warning.⁶⁴

The then Home Office Minister, Alan Campbell, also emphasised that the decision to reverse the classification was intended, in conjunction with proposed health campaigns, to reduce the risks posed especially for young people from cannabis use. "*Cannabis is a harmful drug and while fewer people are taking than before, it poses a real risk to the health of those who do use it. We are reclassifying cannabis to protect the public and future generations.*"⁶⁵ In July 2007, when the Home Secretary requested a second review by the ACMD, Jacqui Smith referred to 'new evidence' that supported concerns about cannabis which justified her request to examine the relationship between cannabis use and mental health of users. In the UK mental health concerns acquired increased salience as part of the debate about reclassification of cannabis as a Class B drug because of a perception the reforms had facilitated the increased availability and use of higher potency forms of 'skunk (ie hydroponically cultivated) cannabis.'⁶⁶

*"Though statistics show cannabis use has fallen significantly, there is real public concern about the potential mental health effects of cannabis use, in particular the use of stronger forms of the drug, commonly known as skunk. This is in addition to longitudinal studies undertaken in New Zealand and the Netherlands that link cannabis use to mental health problems."*⁶⁷

Similarly, the appearance of reports on the use of hydroponic cannabis in a number of Australian jurisdictions⁶⁸ confirms a community perception of a linkage between hydroponic cannabis, increased potency and mental health harms. These concerns had also already been a factor for Parliamentary inquiries in New Zealand (NZ) in 1998 by the Health Committee of the House of Representatives⁶⁹ and a further inquiry in 2003 into public health issues and of measures to regulate cannabis use.⁷⁰

⁶³ BBC News. *Debate over cannabis classification*. 26 January 2009; Ford R. Cannabis becomes Class B drug today, but no spot fines. *TimesOnline* 26 January 2009.

⁶⁴ Byrne S. *ACPO guidance on cannabis possession for personal use. Revised intervention framework*. Association of Chief Police Officers, 28 January 2009.

⁶⁵ Press Association. Fine free period for cannabis users. *Guardian* 26 January 2009.

⁶⁶ There were reports from a number of Australian jurisdictions concerning hydroponic cannabis: Englert G. When a house is not a home: Asian operated hydroponic cannabis cultivation. (2007) 61 (March) *Australian Police Journal* 16-19; Salusinszky I & Richardson T. 10 years jail for growers of hydroponic marijuana. *Weekend Australian* 4-5 February 2006; Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Chapter 8. Hydroponic cultivation was also treated as a more serious offence, such as in South Australia, which in February 2003 excluded plants which had involved 'artificially enhanced cultivation' from the CEN scheme and in June 2004 the ACT excluded hydroponically or artificially cultivated plants from the ambit of the SCON scheme. In WA the *Cannabis Control Act 2003* included an amendment to the *Misuse of Drugs Act 1981*, which added Section 7A, which sought to make it an offence for someone to sell any thing used to 'cultivate cannabis by hydroponic means' and in 2006 in New South Wales penalties were increased and new offences were created involving cannabis which had been 'cultivated by enhanced indoor means.'

⁶⁷ Letter to Professor Sir Michael Rawlins, Chair, ACMD from Jacqui Smith, Home Secretary, 26 July 2007. <<http://drugs.homeoffice.gov.uk/acmd/cannabis-class-review-2007.pdf>>

⁶⁸ Englert G. When a house is not a home: Asian operated hydroponic cannabis cultivation. (2007) 61 (March) *Australian Police Journal* 16-19; Salusinszky I & Richardson T. 10 years jail for growers of hydroponic marijuana. *Weekend Australian* 4-5 February 2006; Swensen G. The 2004 cannabis law reforms in Western Australia and the United Kingdom: A case of too much caution? Saarbrücken, Germany, VDM Verlag, 2008, chapter 7.

⁶⁹ Health Committee. *Inquiry into the mental health effects of cannabis*. (Chairman Neeson) Wellington, New Zealand, House of Representatives, 1998.

⁷⁰ Health Committee. *Inquiry into the public health strategies related to cannabis use and the most appropriate legal status*. (Chadwick Chairman) Wellington, House of Representatives, 2003.

Australian policy makers have responded to these concerns with recent reforms such that hydroponic cultivation has been treated as a more serious offence in some jurisdictions. In South Australia amendments were made to the *Controlled Substances Act 1984*, which from February 2003 excluded plants which had involved 'artificially enhanced cultivation' from the CEN scheme. Similarly in June 2004 the ACT excluded hydroponically or artificially cultivated plants from the ambit of the SCON scheme, with amendments to the *Drugs of Dependence Act 1989* and in 2006 in New South Wales penalties were increased and new offences were added to the *Drug Misuse and Trafficking Act 1985* involving cannabis which had been 'cultivated by enhanced indoor means.' In WA the *Cannabis Control Act 2003* amended the *Misuse of Drugs Act 1981* by adding Section 7A, which sought to make it an offence for someone to sell any thing used to 'cultivate cannabis by hydroponic means'.

6.5 Reform and prevalence

An argument used by opponents of cannabis law reform is that any 'softening' of the legal status of cannabis will lead to an increase in its prevalence.⁷¹ As part of their pre election manifesto in 2008, Colin Barnett, the Liberal Party of WA's leader outlined the rationale for repeal of the CCA. *"If elected, a Liberal government will repeal Labor's soft on cannabis laws. They were a mistake when they were introduced and they have had a damaging effect on young people in WA."*⁷²

Whilst there has not been clear evidence of an apparent increase in cannabis prevalence following the decriminalisation of cannabis in either the UK or WA in 2004, this has not allayed public perceptions that cannabis related harms will increase due to the watering down or removal of sanctions provided by criminalisation. An attempt to capitalise on the lack of evidence of increased prevalence after the WA 2004 reforms is contained in a media statement of 27 April 2005, which even though the CIN scheme had only been operating for six months, asserted the reforms had not had a discernible detrimental impact.⁷³

This assertion is perhaps surprising as it was based on limited information, as the WA report of the 2004 National Drug Strategy Household Survey (NDSHS) of alcohol, tobacco and other drug use was not published until June 2006⁷⁴ and at that time only prevalence data from the 2001 NDSHS was available, which had been published in February 2003.⁷⁵ In relation to the statutory review covering the first three years of the CIN scheme, further WA prevalence data was not available until publication in December 2007 of the results of a WA survey conducted by a research team at the National Drug Research Institute (NDRI) in February and March 2007.⁷⁶

Aside from the fact that there was limited prevalence data available for the timeframe of the WA reforms, there are some methodological reservations about the reliability of the more recent data. Both the 2004 and 2007⁷⁷ NDSHS national surveys, as well as the NDRI study, largely relied upon randomised telephone surveys, which utilise a Computer Aided Telephone Interviewing (CATI) methodology. Concerns have been raised about sample incompleteness of surveys based on this methodology, as telephone surveys depend on high levels of landline telephone access,

⁷¹ See letter from Home Secretary Jacqui Smith to ACMD 26 July 2007; Chapter 3 of *Technical report of statutory review of Cannabis Control Act 2003* and Fetherston J & Lenton S. *Effects of the Western Australian cannabis infringement notice scheme on public attitudes, knowledge and use. Comparison of pre and post change data.* Perth, Western Australia, National Drug Research Institute, Curtin University of Technology, 2007.

⁷² Banks A. 'Libs take tougher line on cannabis.' *The West Australian* 13 August 2008.

⁷³ Drug and Alcohol Office. *New cannabis laws have positive results.* Media statement 27 April 2005.

⁷⁴ Draper G & Serafino S. *2004 National Drug Strategy Household Survey: Western Australian results.* Perth, Epidemiology Branch, Department of Health WA, 2006.

⁷⁵ Drug and Alcohol Office. *2001 National Drug Strategy Household Survey: First results for Western Australia.* Perth, Drug and Alcohol Office, 2003.

⁷⁶ Fetherston J & Lenton S. *Effects of the Western Australian cannabis infringement notice scheme on public attitudes, knowledge and use. Comparison of pre and post change data.* Perth, Western Australia, National Drug Research Institute, Curtin University of Technology, 2007

⁷⁷ A breakdown of the 2007 NDSHS for WA and the other Australian jurisdictions was not published until August 2008: Australian Institute of Health and Welfare. *2007 National Drug Strategy Household Survey: State and territory supplement.* Cat. No. PHE 102. Canberra: Australian Institute of Health and Welfare, 2008.

whereas young people are increasingly reliant on mobile telephones. It has been found, for instance, that as significant decreases in the three health behaviours of young adults (involving cigarette smoking, binge drinking and heavy alcohol consumption) were not replicated in probability surveys, the claimed significant reductions are more likely to be due to under-coverage in the survey.⁷⁸ Further research is required to determine whether the key source of prevalence of cannabis, as well as other drug use, as provided by NDSHS triennial surveys, can be used as a measure of an impact of cannabis law reforms.

6.6 Inter agency management as a health problem

The WA Labor Government stipulated as part of the 2004 WA reforms package that the health sector should perform a complementary role with the police in dealing with minor cannabis users. This was to include public education about the reforms, monitoring compliance with the restrictions on the sale of cannabis smoking paraphernalia, promotion of the CES expiation option and providers of therapeutic interventions for problematic cannabis users. There was a total of 13 authorised providers, the State's 12 Community Drug Service Teams (CDSTs) and the Aboriginal Alcohol and Drug Service, who provided the CES and also provided therapeutic services to drug users.

The Drug and Alcohol Office (DAO)⁷⁹ was the primary government agency which funded services delivered by non government specialist service providers, who provided the bulk of alcohol and other drug services in WA. The statutory evaluation of the CCA included a review of the health aspects of the reforms, such as help seeking behaviour, mitigation of cannabis related harms and regulation of sale of cannabis smoking paraphernalia.

The approach of locating the CES only with the CDSTs may have been superficially attractive as an apparently cost effective approach of implementing the CES aspect of the CIN scheme. However, doubts arise about cost effectiveness of restricting provision of the CES to the CDSTs. Over the three year period covered by the statutory review, almost all of the \$12 million provided to the CDSTs through the WA Comprehensive Diversion Program (WACDP), which encompassed the CES, originated from the Commonwealth.⁸⁰

The approach followed in WA of locating the CES component within CDSTs can be contrasted with a cannabis specific program in the ACT, referred to as Effective Weed Control, which was conducted through the ACT's Community Care's Alcohol and Drug Program. The ACT program specifically targeted cannabis users wishing to reduce or completely abstain from cannabis use. It had been intentionally located outside specialist service providers in community health centres as it was recognised that *"many people see their cannabis use in quite different terms to those people with alcohol and other illicit drug problems."*⁸¹

The limitations of locating programs targeted at cannabis dependent individuals as part of the specialist drug treatment service delivery model has also been noted by other commentators:

⁷⁸ Delnevo CD, Gundersen DA & Hagman BT. Declining estimated prevalence of alcohol drinking and smoking among young adults nationally: artifacts of sample under coverage? (2007) 167 *American Journal of Epidemiology* 15-19.

⁷⁹ The DAO was established by an administrative order issued by the Gallop Government soon after it assumed office. However, whilst this was to signify the new government's change of direction, the underlying legal entity, the Western Australian Alcohol and Drug Authority (WAADA), continues to operate. This body was established by the *Alcohol and Drug Authority Act 1974*. The WAADA established a separate corporate identity in April 1999 with respect to its clinical services in East Perth, when the title 'Next Step Specialist Drug & Alcohol Services' was registered under the *Business Names Act 1962*.

⁸⁰ Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Table 7-3; Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Supplementary data tables & figures*. Perth, Western Australia, Drug and Alcohol Office, 2007, Part 4.

⁸¹ Australian Capital Territory, Legislative Assembly, Standing Committee on Health and Community Care. *Cannabis use in the ACT*. Report No. 7. Canberra, Legislative Assembly, 2000, 34.

“There is a common perception that the service needs of substance dependent young people are largely dictated by alcohol and opiate dependence. In our community sample only 9% of those with cannabis dependence were also diagnosed with alcohol dependence. Furthermore, the vast majority (87%) of cannabis dependent individuals had never injected an illicit substance. Indicating that the service needs of this community-based group were probably predicated largely on their cannabis use.”⁸²

As there are large numbers of regular cannabis users, we believe there is a compelling case for broadening the range of authorised providers of the CES to agents who are not part of the drug and alcohol specialist provider network, for example, GPs and clinical psychologists. These agents are likely to be better able to target a wider spectrum of problematic cannabis users, not just those who wanted to expiate a CIN.⁸³ GPs and other mainstream health providers are well placed to be the first point of contact. As GPs have been regarded for some years as a key first point of contact for people concerned about their alcohol use, a similar approach should be considered for determining the provision of services for problematic cannabis users and those who have come to official attention because they have committed a minor cannabis, such as was the case with the CIN scheme. The WA Branch of the Australian Medical Association supported the development of community based health service providers, such as doctors in its submission to the statutory review.

6.7 Size of modified penalty

Even before the evaluation of the CCA reform had been completed, the then Attorney General made clear that he believed that the prescribed monetary penalties payable by a person with a CIN were inadequate and that he intended to *“significantly increase the current CIN fine of \$100 for possessing up to 15 grams of cannabis - providing an extra incentive for offenders to attend an education session.”⁸⁴*

Whilst it may now be regarded as academic, as the current Liberal government have plans to repeal the CCA, it is worth commenting on shortcomings of increasing penalties for minor cannabis offences dealt with by way of infringement. This proposal fails to appreciate the advantage of having a differential between the size of prescribed modified penalties⁸⁵ and the average value of a fine if a minor cannabis offence is dealt with by a court.

The statutory review found that in the three year period up to 31 March 2007, that the average fine for offenders convicted with possession of a cannabis smoking implement was \$246 and \$266 for possession of cannabis.⁸⁶ By contrast, the fixed penalties under the CIN scheme were \$100 for both of these offences (assuming the amount of cannabis was less than 15 grams).

A key purpose of both the CIN scheme, as also applies in the UK scheme, are to provide a mechanism for offenders to avoid contact with the criminal justice system because of the attendant risk of conviction related harm. However, if the ‘cost’ of consequences become too

⁸² Coffey C, Carlin JB, Degenhardt L, Lynskey M, Sanci L & Patton GC. ‘Cannabis dependence in young adults: an Australian population study.’ (2002) 97 *Addiction*, 192.

⁸³ For instance, based on the 2004 NDSHS, it was estimated in WA there was a total of 220,744 persons aged 14 years and older who had used cannabis in the past year, of whom 127,290 had used in the last month: Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Table A5-4.

⁸⁴ Western Australian Branch of the Australian Labor Party. *Review recommends strengthening of Western Australia’s cannabis laws*. Press release 29 November 2007. <www.wa.alp.org.au/news/1107/29-04.php>

⁸⁵ Prescribed modified penalties under the CIN scheme - \$100 for expiable offences involving possession of cannabis smoking implement or possession of not more than 15 grams of cannabis, \$150 for expiable offence of possession of more than 15 grams and not more than 30 grams of cannabis and \$200 for expiable offence of non hydroponic cultivation of not more than two cannabis plants: *Cannabis Control Regulations 2004*, Schedule 1.

⁸⁶ Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Table A4-27.

stringent this will most likely mean that some minor cannabis offenders will opt for going to court to contest the charge.

6.8 Reform and net widening

Another consequence potential consequence of partial decriminalisation which has been identified in studies of the South Australian CEN,⁸⁷ the WA CIN⁸⁸ and the NSW cannabis cautioning schemes is net widening.⁸⁹ As noted in a recent discussion paper:

“Diversion programs carry with them the risk of three forms of net widening (examples of these phenomena have been found in programs across Australia): an increase in people who become subject to criminal justice proceedings and are thus introduced to the criminal justice system; penalties for non compliance with a diversion order can lead to greater sanctions than would ordinarily have applied to the offence; and individuals may become enmeshed in the treatment system in addition to the criminal justice system. These raise ethical issues in relation to policy and cost.”⁹⁰

The statutory review of the CIN scheme suggests that net widening did occur in WA, as it was found that in the three year period there was an estimated 3,372 fewer minor cannabis convictions than would have otherwise been dealt with by Magistrates Courts, however, over the three year period a total of 9,276 CINs were issued.⁹¹ This meant an estimated additional 5,904 minor cannabis offences came to official attention than if the CIN scheme had not operated. If this ratio of charged offenders is applied to the period when the CIN scheme did not operate, then only about one third - 36.4% (ie 3,372/9,276) of minor cannabis offenders in WA were formally charged and the remaining 63.6% were informally cautioned by the police.

The CIN scheme may well have facilitated net widening as it enabled police to more easily formally record all minor cannabis offences compared to situation in WA before 22 March 2004.⁹² Prior to the CIN scheme police found it easier to exercise their discretion to informally caution offenders in preference to charging them with a minor cannabis offence, given the significant resource implications involved in laying a charge, such as preparation of a brief evidence.

7. Conclusion

A number of issues can identified and lessons learned from the reforms implemented in both WA and UK in early 2004, even though there were some important differences in the approach taken in each jurisdiction.

The first lesson from comparing these two reforms is that police discretion is an important determinant of how successfully minor cannabis offenders will be dealt with outside the criminal justice system. As noted, the CIN scheme involved highly circumscribed discretion and

⁸⁷ Sutton A & Sarre R. 'Monitoring the South Australian cannabis expiation notice initiative.' (1992) 22 *Journal of Drug Issues* 579-590. Atkinson L & McDonald D. Cannabis, the law and social impacts in Australia. *Trends and Issues in Criminal Justice*, No. 48, 1995.

⁸⁸ Sutton A & Hawks D. 'The cannabis infringement notice scheme in Western Australia: a review of policy, police and judicial perspectives.' (2005) 24 *Drug & Alcohol Review* 331-336.

⁸⁹ Baker J & Goh D. *The cannabis cautioning scheme three years on: An implementation and outcome evaluation*. Sydney, New South Bureau of Crime Statistics and Research, 2004.

⁹⁰ Pritchard E, Mugavin J & Swan A. *Compulsory treatment in Australia. A discussion paper on the compulsory treatment of individuals dependent on alcohol and/or other drugs*. ANCD Research Paper No. 14. Canberra, Australian National Council on Drugs, 2007, 99.

⁹¹ Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Chapter 7.

⁹² Operation of the CIN scheme required police to establish a database to record and track all CINs, to determine if expiation had occurred and when a person was ineligible to receive additional CINs within a three year period because of the effect of Section 9 of the CCA. It is unclear whether or not this database was generally accessible to police as a source of information for all types of offenders, such as background checking of motorists etc.

required that if police issued an infringement for each offence it was necessary for a complex recording system to be established to monitor compliance and track defaulters. This contrasts with the UK system which mandated police should issue a warning which, as a rule, should be delivered where the offence was detected and that it was reliant to a large degree on the discretion of police as to whether the amount of cannabis was judged as being a “*small amount intended for personal use*”.⁹³ This relative simplicity contrasts with the WA CIN scheme, which involved complex procedures, such that police were to weigh any cannabis to determine the relevant infringement and identify an offender to determine their age and whether they had previously received a CIN. Another complexity of the WA scheme, for both police and offenders, was that recovery of unpaid CINs was transferred to the FER system, which had responsibility for enforcement for non payment of a wide range of fines.

The second lesson is that the proponents of the CIN scheme appear to have overstated the importance of the complementary role of the health sector in changing cannabis using behaviours or attitudes. Whereas attendance at a CES was an alternative method of expiation, this was not well understood, as there seemed to be a community expectation that offenders should be required to undertake a therapeutic intervention. As noted, the impact of the health intervention was always going to be limited, for as well as attendance at the CES being an optional method of expiation, a CES was only accessible through a narrowly defined group of specialist service providers.

The third lesson from the reforms in the UK and WA is the community’s perception of the scope of reform. In WA the Labor government introduced a new piece of legislation that sought to link the reforms to a broader agenda redefining drug law enforcement as a health problem. For this to have succeeded it would have required a high level of police support as well as an understanding by the wider community as to the underlying objectives. Indeed, one might have expected that the government would have encouraged debate about cannabis harms and supported educational strategies that specifically sought to answer and respond to widely held popular concerns, such as that cannabis was a ‘stepping stone’ or gateway drug to more serious drugs⁹⁴ and that cannabis causes psychosis and other mental health issues.⁹⁵ In comparison, in the UK the introduction of cannabis warnings was located within a framework of other policing reforms, such as avoiding the rigorous use of ‘stop and search’ tactics intended to improve rapport between police and young people, especially those from disadvantaged communities, which had been identified as a factor in the Brixton riots in the UK in the early 1980s.⁹⁶

Whilst this paper has focussed on the difficulties of the reform in the UK and WA between 2004 and up to the present, it is acknowledged cannabis reform was also a highly contentious over this period in NZ and elsewhere.⁹⁷ At present the NZ Law Commission is conducting a far reaching review of the country’s Misuse of Drugs Act 1975, including examination of alternative frameworks for managing minor cannabis offenders.⁹⁸

In WA the Cannabis Law Reform Bill 2009 was introduced in October 2009 and at the time of writing has reached the second reading stage in the WA Parliament; confirming that since the change of government in September 2008, the CIN scheme has effectively ceased to operate in WA. Once this new legislation is proclaimed, first time minor cannabis offenders will be

⁹³ Association of Chief Police Officers. *Cannabis enforcement guidance: Frequently asked questions*. 12 September 2003, CAN/FAQ/o3, 2.

⁹⁴ Zimmer L & Morgan JP. *Marijuana myths, marijuana facts*. NY, Lindesmith Centre, 1997.

⁹⁵ McLaren J, Lemon J, Robins L & Mattick RP. *Cannabis and mental health: put into context*. NDS Monograph No. 68. Canberra, ACT, Department of Health & Ageing, 2008.

⁹⁶ MORI Social Research Institute & Police Foundation. *Policing the possession of cannabis: Residents’ views on the Lambeth experiment*. London, Police Foundation, 2002.

⁹⁷ Beckley Foundation Global Cannabis Commission. *Cannabis policy: moving beyond stalemate*. London, Beckley Foundation, 2008.

⁹⁸ Law Commission. *Controlling and regulating drugs. Issues paper No. 16*. Wellington, NZ, 2010. <<http://talklaw.co.nz/talkdrugs>>

compelled to attend a therapeutic intervention as a condition for receiving a formal caution and will mean that WA will have a much more restrictive approach towards dealing with minor cannabis offenders than the UK system of cannabis warnings that has operated since January 2004, including the January 2009 reforms.

The abandonment of expiation for minor cannabis offences in WA suggests that the community has a deep ambivalence about reform and that proponents of reform will need to more comprehensively address community understanding about the relationship between cannabis use and mental health concerns, especially in relation to young people. Given the experience of the reforms in WA, which sought to locate the reforms within a wider health framework, we consider it essential that a broad spectrum of mainstream health providers be involved in providing assistance and support to those concerned about their use of cannabis. As alcohol and other drug specialist service providers deal with large numbers of referrals of offenders with significant histories of offending and drug use, it is inappropriate to also require attendance of minor cannabis offenders.

The difficulties in being able to sustain the reforms that occurred in 2004 in both the UK and WA may mean that other avenues will be utilised by cannabis law reformers to achieve change in how minor cannabis offenders can be dealt with outside the criminal justice system. For instance, in NZ and the United States, efforts have been made to utilise the medical use of cannabis as a vehicle for debate about the legal status of cannabis.⁹⁹ A vigorous debate about medicinal options has been identified in other jurisdictions where it has been suggested that this can be used as a 'back door' or proxy method for the legalisation of cannabis.

"Cannabis is unlikely to be legalised simply because it has medical uses. Legalisation requires a much stronger political justification. ... some proponents of 'medical marijuana' have arguably used citizen initiated referenda as a way to legalise cannabis by stealth and to embarrass intransigent defenders of prohibition who refuse to concede that cannabis may have any therapeutic uses. There are, however, ways in which patients could be given access to cannabis or cannabinoids for medical use without removing the prohibition on recreation cannabis use."¹⁰⁰

We can therefore expect to hear more in the future about the medical use of cannabis, which will in turn require a re-evaluation of the framework that has been created with the goal of prohibiting the use of cannabis.

It is unlikely that reforms of minor cannabis laws in WA, along the model that occurred under the *Cannabis Control Act 2003* are likely occur again in the near future in WA because of the administrative complexity of the scheme. However, it is possible that reform modelled on the UK experience, based on warnings, which have been largely explained as a policing reform, could enjoy support from both the police and the community frustrated with the limited impact of the current prohibition framework, which results in significant numbers of minor offenders receiving convictions.

⁹⁹ NORML. *New Zealand: Parliament to debate measure to legalize medical cannabis*. NORML News, 15 June 2006. <www.norml.org/index.cfm?Group_ID=6929>; New Zealand Drug Foundation. Drug Foundation policy on medicinal cannabis, February 2006. <www.nzdf.org.nz/medicinal-cannabis-february-2006-policy>

¹⁰⁰ Hall W & Pacula RL. *Cannabis use and dependence*. Cambridge, Cambridge University Press, 2003, 227.

Cannabis smoking paraphernalia: A case for reform

Greg Swensen and Thomas Crofts

1. Introduction

There has been a growing debate about the need to reform the law relating to cannabis to reduce the harms associated with the large numbers of individuals currently being drawn into the criminal justice system. Given that cannabis continues to be widely used,¹ it appears that the criminal law has failed to achieve one of its primary objectives of deterrence, which has focussed debate on the legal status of cannabis. In addition to the social and conviction related harms that fall on those who are charged with a minor cannabis offences and processed through the criminal courts, it is clear that this approach is wasteful use of scarce law enforcement resources.² Indeed, there are legitimate grounds to question whether some cannabis offences, such as possession of a cannabis smoking implement, should be decriminalised and whether other minor cannabis offences should be dealt with by infringement notices, in a similar way to how a number of traffic and other types of offences are currently processed.

This debate about the reform of minor cannabis laws and their enforcement has occurred in parallel with the need to re-evaluate law enforcement practices to identify areas where harm minimisation³ principles can be adopted. A harm minimisation approach holds that public health and law enforcement interventions should focus on minimising the consequences of drug use rather than on responding to transgressions of the law. “*Today most European countries and Canada have embraced the idea that society benefits most when drug policy is designed to help people with drug problems to live better lives rather than to punish them.*”⁴ The incorporation of harm minimisation principles has engendered a wider debate about the wisdom of adhering to the supply reduction and abstinence driven tenets of the ‘War on drugs’.⁵

Whilst up to now reforms have largely drawn upon harm minimisation measures to reduce the transmission of blood borne viruses (BBVs) through unsafe injecting practices, it would seem policy makers have either ignored or been unaware of emerging concerns about health related harms associated with other methods of drug use. This is especially surprising in relation to the smoking of cannabis, the most widely used illicit drug, given that there is now a substantial amount of research showing the adverse health effects related to tobacco smoking.

There has been a realisation that in relation to BBVs it is crucial to identify and remove legal barriers to enable injecting drug users (IDUs) to have unrestricted and unconditional access to sterile injection

¹ It has been estimated in 2004 that 40% of all West Australians aged 14 years and older had ever used cannabis in their lifetime, with just under two thirds (64%) of those aged 20 to 39 and nearly half (49%) of those aged 40 to 49 having ever used the drug. In 2004 it was also found that one in five of those aged 14 to 19 (21%) and 30 to 39 years had used cannabis in the past year, with just under two thirds (31.7%) of those aged 20 to 29 having used in the past year: Drug and Alcohol Office. *Statutory review of Cannabis Control Act 2003. Report to the Minister for Health: Technical report.* Perth, WA, Drug and Alcohol Office, 2007, Table A5-3.

² Australian illicit drug reports from 1995/1996 to 2005/2006 show that cannabis offences made up nine out of 10 of all annual drug arrests at the beginning of the period and subsequently have declined, to two thirds of all annual drug arrests since 2003/2004. A breakdown of annual cannabis arrests by type of offender indicates that over this 11 year period that the proportion of provider (ie serious offences) declined from just over two thirds of cannabis arrests to 13% by 2005/2006: Drug and Alcohol Office. *Statutory review of Cannabis Control Act 2003. Report to the Minister for Health: Technical report.* Perth, WA, Drug and Alcohol Office, 2007, Table A4-12.

³ There is a degree of overlap in the use of the terms of ‘harm reduction’ and ‘harm minimisation’. The latter term is used in this paper, as best represents “the view that the overall goal of drug policy should be to minimise drug related harm, in all its manifold forms”: Weatherburn D. “Dilemmas in harm minimisation.” (2008) 104 *Addiction*, 336.

⁴ Melamede R. “Harm reduction – the cannabis paradox.” (2005) 2 *Harm Reduction Journal*, 1.

⁵ MacCoun RJ & Reuter P. *Drug war heresies: Learning from other vices, times and places.* Cambridge, UK, Cambridge University Press, 2001; Manski CF, Pepper JV & Petrie CV (eds). *Informing America’s policy on illegal drugs: What we don’t know keeps hurting us.* Washington DC, National Academy Press, 2001; Miron JA. *Drug war crimes: The consequences of prohibition.* Oakland CA, The Independent Institute, 2004; Schaler JA (ed). *Drugs: Should we legalise, decriminalise or deregulate?* Amherst, NY, Prometheus Books, 1998.

equipment. The community's acceptance of the modest law reforms that had occurred in Western Australia (WA) and the other Australian jurisdictions by the mid 1990s, accompanied by high levels of government funding of services, suggest a willingness to countenance reforms that will mitigate drug related health harms. It is our contention that lessons from the reforms related to injecting drug use should be applied to reform the cannabis smoking paraphernalia laws that continue to operate in Western Australia (WA), and in most other Australian jurisdictions. There is sufficient literature available revealing the emerging health concerns which justify the decriminalisation of possession, sale or supply of cannabis smoking paraphernalia for public health reasons.

The paper will outline how by the early 1990s Australian policy makers, faced with the spectre of the spread of BBVs by injecting drug users (IDUs), were galvanised into public health reforms driven by fear of contagion and infection. These reforms reversed a long standing punitive approach which had supported more severe penalties for drug offences such as self administration and the possession and supply of drug injecting paraphernalia.

We will also refer to a number of examples involving expanded harm minimisation measures to mitigate BBV transmission involving other modes of drug use and of the impediments these measures have faced. This will include discussion of difficulties in achieving key public health objectives, such as engaging problematic cannabis users, that were part of a package of reform of managing minor cannabis offenders in WA introduced by the *Cannabis Control Act 2003*.

2. Example 1: Injecting drug paraphernalia as a public health issue

The first needle and syringe program (NSP) was introduced in New South Wales (NSW) in 1986 and was soon followed by similar NSPs in other Australian jurisdictions. In spite of legal uncertainty,⁶ in 1987 the Commonwealth Government commenced funding a wide range of BBV related programs to improved access to sterile injection equipment through needle and syringe programs (NSPs) throughout Australia. The Commonwealth funding also supported a limited provision of sterile needles and syringes (N&S) from health centres, public hospitals and drug treatment agencies, as well as underwriting the cost of providing and distributing pre packed containers of N&S through retail pharmacies on an unconditional and non restrictive basis.

In WA some Commonwealth funding had been used to underwrite the cost of FitPacks.⁷ This subsidy to pharmacies was discontinued within three years, which meant pharmacies were able to set prices on pre packaged N&S on a full cost recovery basis.⁸ A key point is that funding of NSPs, without concomitant legal reform, was driven by intense public concern about the transmission of HIV by IDUs, even though the possession and supply of N&S was criminalised in most Australian jurisdictions. Health workers identified the harms which arose from the continued criminalisation of

⁶ Schwartzkoff J & Watchirs H. *Legal issues relating to AIDS and intravenous drug users*. Canberra, ACT, Intergovernmental Committee on AIDS, Legal Working Party Department of Community Services & Health, 1991.

⁷ Swensen G, Westlund G & Baker MR. *Sales of needles and syringes in Western Australia: the SS5 pack project 1987 – 1990*. Occasional Paper No. 47. Perth, WA, Health Services Statistics & Epidemiology Branch, Health Department of WA, 1992.

⁸ Of interest, whilst initially the costs of establishing and running NSPs were underwritten by government, subsequently programs in WA (like other states) were required to operate on a cost recovery basis. This means IDUs are required to purchase sterile injection equipment and have therefore funded a substantial proportion of the cost of services. The increasing cost borne by IDUs could undermine the goal of expanding access to low cost injecting equipment, which has been the critical factor in IDUs changing their behaviour to not share used equipment and to dispose after it has been used once. Government funding has tended over time to be redirected to community 'education' and other types of 'prevention' programs: Australian Institute of Health and Welfare. *Public health expenditure in Australia, 2007-08*. Health and Welfare Expenditure Series No. 38. Cat No. HWE 47. Canberra, Australian Institute of Health and Welfare, 2009; Wilson D, Kwon A, Anderson j & Thein R. *Return on investment 2: Evaluating the cost effectiveness of needle and syringe programs in Australia*. Canberra, Department of Health and Ageing, 2009, Table 37.

by severely curtailing access by drug users to sterile injection equipment.⁹ However, despite criminalisation the law was overlooked for some time in the interests of harm minimisation, until limited law reforms occurred in the mid 1990s.

Although the first NSP was established in WA in 1987,¹⁰ it was not until 1994 that amendments were made to provide limited legal protection to those who supplied or sold sterile injection equipment.¹¹ The 1994 amendments to the *Poisons Act 1964* had an intentionally narrow ambit, to provide a defence against the aiding and abetting provisions in sections 7, 8 and 9 of the *Criminal Code*, as emphasised by the Minister for Health (also Attorney General) in August 1993.

“In order then for public health measures to continue to be responsive and control AIDS and other blood borne disease epidemics in Western Australia, provision of a defence for workers is vital. It is also important that the exemption only be to supply which takes place in accordance with a program approved by the Commissioner of Health so that it can be directed towards an appropriate health result.”¹²

The section 36A defence is available so long as the person supplying or selling sterile N&S facilitates, organising the safe disposal of used injection equipment or providing advice, counselling or information about safe injection practices, works at an approved NSP.¹³ The Minister for Health defended excluding a defence for possession of injection equipment, as police maintained that they needed to be able to use this as evidence that a person had committed or intended to commit an offence involving an illegal drug.¹⁴ As he conceded: “A powerful group against this sort of legislation is the police; they have concerns about its breadth.”¹⁵

This means that supply or sharing of injection equipment between users remains an offence, as provided by section 36 of the *Poisons Act 1964*, if this occurs outside the context of an approved NSP.¹⁶

“Subject to section 36A, a person shall not use or attempt to use, or prescribe, any drug of addiction or specified drug for the purpose of self administration; but a person for whom a medical practitioner has prescribed a drug of addiction or a specified drug in the course of treatment of that person as a patient may take or use that drug to the extent and for the purpose for which it was so prescribed.”

The defence also extends to prosecution for an offence of possession or use of a prohibited drug under Section 6(2) of the *Misuse of Drugs Act 1981* (MDA), so long as the conduct occurs within the parameters that apply to approved NSPs.

⁹ Legal Working Party of the Intergovernmental Committee on AIDS. *Final report*. Canberra, ACT, Department of Housing and Community Services, 1992.

¹⁰ Task Force on Drug Abuse. *Needles and syringes Western Australia, 1995*. Statistical Bulletin No. 3. December. Perth, WA, Drug & Alcohol Office, 1996.; Swensen G, Westlund G & Baker MR. *Sales of needles and syringes in Western Australia: the SS5 pack project 1987 – 1990*. Occasional Paper No. 47. Perth, WA, Health Services Statistics & Epidemiology Branch, Health Department of WA, 1992.

¹¹ *Poisons Act Amendment Act 1994*. Commenced 27 May 1994.

¹² Poisons Amendment Bill, second reading speech. Hon Peter Foss. *Hansard*, Proceedings of Legislative Council. 3 August 1993, 1520.

¹³ *Poisons Act 1964* s. 36A.

¹⁴ Criticisms about this shortcoming have been raised on a number of occasions: Working Party on Drug Law Reform. *Law enforcement measures to reduce harms associated with injecting drug use in Western Australia. Second report*. Perth, Drug and Alcohol Office, 2004.

¹⁵ Hon Peter Foss. *Hansard*, Proceedings of Legislative Council. 12 August 1993, 2389.

¹⁶ A separate administrative process was followed with respect to all of the State's retail pharmacies, who were given blanket approval to sell sterile injection equipment to IDUs, so long as this occurred if the equipment was sold in approved containers which included an inbuilt disposal chamber with a locking mechanism to retain used syringes for later safe disposal in domestic rubbish system. This approach precludes pharmacies from selling bulk boxes of loose needles and syringes.

The approach adopted in WA in 1994, which remains unchanged to the present, means that the sale or supply of injecting equipment has not been 'decriminalised' and therefore police still retain the power to lay charges related to either self administration or possession or use of a prohibited drug. The implications of the narrow nature of this reform was not lost on the Opposition at the time when the *Poisons Act 1964* was being debated in the WA Parliament:

*"Currently, a worthwhile agreement exists between police, health workers and the Government. Two classes of people are not prosecuted; namely, those working in Government approved exchanges and those who use these exchanges. ... I understand that the Minister, because of his personal views and predilections, considers that the second group of people are not as worthy as the first group; nevertheless, both groups require protection. It is a matter of whether the protection is to be a continuation of the current turn a blind eye arrangement or we give statutory legitimacy to a system we acknowledge is working."*¹⁷

Although reforms in Australia were initially concerned with the provision of N&S, over the past decade the role of NSPs has broadened by identifying new populations and risk behaviours. The expansion of the role of NSPs has been supported by research which demonstrates that expanded access to sterile injection equipment prevents the transmission of BBVs, as it reduces the necessity of sharing of non sterile (ie 'used') N&S and other items. This has produced substantial public health benefits, as demonstrated in a 2002 Australian study of the economic effectiveness (or return on investment) of NSPs which highlighted the significance of the modest law reforms undertaken in the early 1990s.¹⁸ An update of the return to the 2002 investment study estimated that over the period 2000 to 2009 in Australia NSPs had prevented 32,050 new HIV infections and 96,667 new hepatitis C infections. Thus, for an outlay by government of \$243 million there had been an estimated saving of \$1.28 billion in avoided health care costs in the ten year period.¹⁹

This has meant NSPs have been able to develop their role beyond the provision of sterile injection equipment, to the distribution of other items of drug injecting paraphernalia used by and shared between users, such as spoons in which drugs are dissolved, provision of swabs, citric acid, ampoules of sterile water and the dissemination of information about lower risk methods of injecting drug use.²⁰ Compared to the Australian approach to NSPs, similar reforms have not occurred in the United States (US),²¹ which largely relies on rigorous policing of the sale of a wide range of paraphernalia and other measures in pursuance of the aim of supply reduction.²² Rather than delivering the benefits of harm reduction the supply reduction approach, "*manifests itself in problematic policing strategies that punish the consumer (eg arresting IDUs for carrying sterile or used equipment), rather than the drug dealers and cartels.*"²³

¹⁷ Hon AJG MacTiernan. *Hansard*, Proceedings of Legislative Council. 12 August 1993, 2388.

¹⁸ Health Outcomes International and National Centre for HIV Epidemiology and Clinical Research. *Return on investment in needle and syringe programs in Australia*. Canberra ACT, Commonwealth Department of health and Ageing, 2002.

¹⁹ Wilson D, Kwon A, Anderson j & Thein R. *Return on investment 2: Evaluating the cost effectiveness of needle and syringe programs in Australia*. Canberra, Department of Health and Ageing, 2009, 8.

²⁰ Preston A, Derricott J & Scott J. *Providing citric acid sachets to injecting drug users*. Dorchester, UK, Exchange, 2001.

²¹ Substance Abuse and Mental Health Services Administration, Office of Applied Studies. *The NSDUH report: injection drug use and related risk behaviors*. Rockville MD, SAMHSA, 2009.

²² The 1994 Supreme Court case of *Posters 'n' Things* is a landmark case in this regard, where the owner of a shop selling bongos, roach clips and cocaine kits, was sentenced to nine years imprisonment: *Poster 'n' Things v United States* (92-903), (1994) 511 US 513. <<http://supct.law.cornell.edu/supct/html/92-903.ZS.html>>. In 2008 in the United States, the National Drug Control Policy spent nearly two thirds (64%) of all drug spending on supply reduction measures: Strathdee SA & Patterson TL. "Supply reduction's hidden casualties: a view from the trenches." (2009) 104 *Addiction* 340-341.

²³ Strathdee SA & Patterson TL. "Supply reduction's hidden casualties: a view from the trenches." (2009) 104 *Addiction*, 340.

3. Example 2: Cocaine kits

In the UK, which sought in the mid 1980s to ban the sale of 'cocaine kits' by an amendment to the *Misuse of Drugs Act 1971*, experience has shown that such a restrictive approach was fraught with difficulty as it undermined the capability of NSPs to be able to sell items necessary to prevent the transmission of BBVs amongst IDUs. Section 9A of the *Misuse of Drugs Act 1971*, states that it is illegal to sell or supply "any article which may be used or adapted to be used (whether by itself or in combination with another article or other articles) in the administration by any person of a controlled drug", if the person providing such an article "believes it may be used by the recipient to administer an unlawful drug or prepare an unlawful drug for administration."²⁴ This section impeded measures to reduce the transmission of BBVs, as it criminalised NSPs supplying a wide range of items to intravenous drug users (IDUs).²⁵

*"Section 9A has presented serious legal barriers to needle and syringe programs that provide sterile equipment for people who use drugs. Although provisions were made for the supply of syringes, no such allowances were made for the supply of other items that are essential to the preparation of a drug for injection – including widely available items such as matches, filters and foil."*²⁶

As such there have been campaigns to have this section repealed with some success such that after a number of amendments the supply of sterile injection equipment by NSPs is now permitted.²⁷

In the US, where cocaine is prevalent and its use is associated with harmful health and social consequences, there appears to have been a limited public health response as there has been a reliance on increasingly repressive law enforcement policies.²⁸ The reluctance in the US to provide public health measures, such as decriminalisation of cocaine smoking paraphernalia, can be compared with Canada where the identification of the harms associated with smoking of cocaine have led to support for the limited adoption of public health measures as a more effective policy option to reduce the transmission of BBVs from sharing of crack pipes. A recent development has been the funding and support by the provincial government of Ottawa for a program to supply sterile crack pipe smoking paraphernalia, even though it has been subject to intense criticism. For instance, the police chief has commented: "If we are making it easier for people to use drugs, that is not the answer ... There has to be an output or a result that is positive. Show me some evidence."²⁹

This program involves an expansion of harm minimisation measures for drug users other than just IDUs and commenced in April 2005, when the Ottawa Public Health Department conducted a one

²⁴ Bridge J. *Misuse of Drugs Act 1971 Section 9A: An ineffective law that is threatening public health*. Briefing No. 3. London, UK, Cross Party Group on Drug and Alcohol Treatment and Harm Reduction, 2008.

²⁵ Hunt, N. *Repeal section 9A Why section 9A of the Misuse of Drugs Act should be repealed*. Action on Hepatitis C. <www.exchangesupplies.org/drug_information/articles/repeal_section_9a.html>; UK Harm Reduction Alliance. *Home Office public consultation: Proposals to make lawful the supply of specific items of drug paraphernalia to drug users. Response from the UK Harm Reduction Alliance*. <www.ukhra.org/section9aresponse.html>

²⁶ Bridge J. *Misuse of Drugs Act 1971 Section 9A: An ineffective law that is threatening public health*. Briefing No. 3. London, UK, Cross Party Group on Drug and Alcohol Treatment and Harm Reduction, 2008.

²⁷ Home Office. *Circular 035/2003. Supply of drug injecting paraphernalia*. Statutory Instrument 2003 No. 1653. *Misuse of Drugs (Amendment) (No. 2) Regulations 2003*. <www.opsi.gov.uk/si/si2003/20031653.htm>

²⁸ However, there is an apparent disjunction in US policy, which treats 'crack' use as more serious than other forms of cocaine use, such as freebasing or inhalation. The differential treatment of forms of cocaine stems from amendments to the Sentencing guidelines issued by the Sentencing Commission, confirmed in 1987, which equated 1 gram of crack cocaine as being equivalent to 100 grams of powder cocaine. It has been argued this difference is racially based as crack use is most prevalent among socially disadvantaged groups such as Blacks: *Drugs and narcotics: crack cocaine, race and the war on drugs*. <<http://law.jrank.org/pages/6299/Drugs-Narcotics-CRACK-COCAINE-RACE-WAR-ON-DRUGS.htm>>. In July 2009 the Fairness in Cocaine Sentencing Act was approved by the House Judiciary Committee, which provided a mandatory five year sentence if a person possessed 500 grams of either powder cocaine or crack cocaine. <<http://hamptonroads.com/2009/07/bill-cocaine-sentencing-passes-house-panel>>

²⁹ Seymour, A. "New police chief 'not a fan' of crack pipe plan." *The Ottawa Citizen* 19 March 2007.

year trial of distributing a range of paraphernalia such as glass stems, rubber mouth pieces and brass screens to crack smokers.³⁰ The distribution of sterile paraphernalia was regarded as necessary as crack smokers were becoming infected by the transmission of BBVs through sharing used crack pipes, due to the severely restricted availability of sterile pipes and related paraphernalia.³¹ The trial has now been affirmed and continued.³²

Although there are lower rates of cocaine prevalence in Australia, use of other types of psychostimulant drugs, such as 'ice' and amphetamines has increased over recent years. In WA an 'Illicit amphetamine summit' was convened in July 2007 as a local response to this issue. Prior to the July 2007 forum there had been a debate about the magnitude of psychostimulant use and the proposition of whether paraphernalia for smoking ice should be prohibited as part of law enforcement demand and supply reduction measures was mooted.³³

The prohibition of ice and cocaine kits in WA is difficult under the MDA without amendment. However, even if the legislation were to be amended it would probably only cover the kit as a whole because the individual items comprising such a kit (such as a mirror, razor blade, spoon and a straw) are legitimately sold separately as everyday household items. Therefore the use of consumer affairs regulations was adopted to prohibit the sale of 'cocaine kits'. By proclamation in March 2006, the WA Commissioner for Fair Trading used a power in Section 23R(3) of the *Consumer Affairs Act 1971* to prohibit sale of glass pipes for smoking 'ice'. This power, whilst intended to be used primarily in relation to safety of consumer goods, was used to resolve the lack of a specific provision in the MDA. The order issued relied on a provision in Section 23R, that a prohibition order having been already issued for similar product (in this case glass pipes for smoking 'ice') by a consumer affairs authority in another Australian jurisdiction.³⁴ For this reason, the notice of the order refers to the potential harm if this product was permitted to be sold in WA, on the grounds that:

*"the supply of 'ice pipes' and similar products specifically used for smoking or inhaling methamphetamine crystals including 'crystal meth' or 'ice'. Methamphetamine causes increased heart rate and blood pressure and can cause irreversible damage to blood vessels in the brain, producing strokes. Its use can result in cardiovascular collapse and death."*³⁵

However, Order CE402 was regarded some critics as a 'soft' approach towards prohibiting drug using paraphernalia.³⁶ There were a number of problems with this approach, including police were not responsible for enforcement of consumer affairs legislation and this type of paraphernalia was potentially available through a wide range of small outlets, such as tobacconists and other outlets who legitimately sold cannabis smoking paraphernalia in accordance with the *Cannabis Control Act 2003*.

³⁰ Reynolds A. "Crack pipe distribution program evaluation using SurVIDU/I-Track: Enhanced surveillance of risk behaviours among injecting drug users." Faculty of Medicine, University of Ottawa. <www.medicine.uottawa.ca/epid/eng/hiv_itrack.html>

³¹ Joint Together. "new Vancouver program gives crack pipes to addicts." 1 November 2004 <www.jointogether.org/news/headlines/inthenews/2004/new-vancouver-program-gives.html>; Cobb C. "Crack program cut disease: study. But free paraphernalia also increased drug use, AIDS conference told." *Ottawa Citizen* 18 August 2006; Tripp R. "Study examines drug users' sex lives." *Whig Standard (Ontario)* 18 August 2006. <www.dpna.org/drugarticles/8ottawa_harm_reduction.htm>

³² Leonard L, DeRubeis E & Birkett N. *City of Ottawa public health safer crack use initiative. Evaluation report*. Ottawa, Department of Epidemiology & Community Medicine, University of Ottawa, 2006.

³³ Question without notice No. 494: Drug use kits, legislation. *Hansard*, Legislative Council. 18 August 2005, 4221; Question without notice No. 827: Drug use kits, legislation. *Hansard*, Legislative Council. 8 November 2005, 6793.

³⁴ The original order prohibiting the sale of ice pipes in Victoria was made under that State's Fair Trading Act 1999: Order No. S11. *Victorian Government Gazette*, 22 January 2004.

³⁵ Order CE402 prohibiting supply of goods. *Government Gazette* No. 50, 24 March 2006, 1105.

³⁶ Question without notice No. 112: Drug use kits. *Hansard*, Legislative Council. 4 April 2006, 996; Question without notice No. 593: Cocaine kits – investigation by Consumer Products Safety Committee. *Hansard*, Legislative Council. 22 August 2006, 4877; Question without notice No. 629: Cocaine kits – Prohibition. *Hansard*, Legislative Council. 24 August 2006, 5182; Question without notice No. 1119: Drug use paraphernalia – ice pipes prohibition. *Hansard*, Legislative Council. 21 November 2007, 7457; Question without notice No. 1277: Drug use paraphernalia – Ban on sale. *Hansard*, Legislative Council. 6 December 2007, 8288

An example of these difficulties was revealed in July 2007, just before the ‘Illicit amphetamine summit’ when, it was reported glass ‘ice’ pipes could be purchased in Perth, more than a year after the Commissioner for Fair Trading issued the order.³⁷

4. Example 3: Cannabis smoking paraphernalia

4.1 Background

The criminalisation of the possession of drug paraphernalia can be traced in WA, as in other Australian jurisdictions, to concerns at the turn of the twentieth century about opium smoking by Chinese migrant workers. These laws “*did not emerge because opium was a dangerous drug. They did not develop out of a belief that addiction was unhealthy or immoral. They were racially based ... The real target of the law was not opium as a drug but the Chinese.*”³⁸

Opium smoking was first prohibited in Queensland in 1897, followed by South Australia and Victoria in 1905, New South Wales (NSW) in 1908 and by the Commonwealth which used its Customs power to ban the importation of opium for opium smoking. Whilst opium smoking was prohibited in WA in 1913 by the *Opium Smoking Prohibition Act 1913*, the possession of implements for the purpose of opium smoking was not made an offence until the 1928 reform of the *Police Act 1892*, when a new offence was created of “*possession of any pipes or other utensils for use in connection with the smoking of opium or any utensils used in connection with the preparation of opium for smoking.*”

The *Police Offences (Drugs) Act 1928* repealed the 1913 act and in its place inserted *Part VIA: Opium and dangerous drugs* in the *Police Act 1892*. Part VIA expanded the prohibition of opium to include the non medical use of morphine, heroin and cocaine and it was not until 1967 that the *Police Act 1892* was expanded to encompass a wider group of drugs, by inclusion of ‘drugs of addiction’.³⁹ A drug of addiction was defined as a substance contained in the Eight Schedule of the *Poisons Act 1964*. In 1968 a further amendment was made to the *Police Act 1892* to include cannabis as a specific drug as well as defining it as a ‘prohibited plant’.⁴⁰ Whilst the definition of a prohibited plant was already contained in the *Poisons Act 1964*, this amendment made prosecution easier as police were able to prosecute under the *Police Act 1892*.

There was a major reform to the State’s drug laws in 1981 when all drug offences were shifted from the *Police Act 1892* to a separate piece of legislation, the MDA. Prior to the 1981 reform, there had not been any change to the offence of possession of paraphernalia for smoking opium⁴¹ but after the 1981 reform, a new offence was created that covered paraphernalia for smoking cannabis or any other prohibited drug or prohibited plant: “*A person ... has in his possession any pipes or utensils for use in connection with the smoking of a prohibited drug or prohibited plant ... in or on which pipes or utensils there are detectable traces of a prohibited drug or prohibited plant*”.⁴² As the offence in section 5(1)(d)(i) requires the presence of detectable traces of cannabis on the implement, it is not an offence to have possession of an unused ‘bong’ or any other item of unused cannabis smoking paraphernalia. The penalty for this offence is a fine of up to \$3,000, imprisonment up to two years or both.⁴³

³⁷ O’Connell R. ‘Ice pipes on sale in shops despite ban.’ *The West Australian* 26 January 2007; Cox N & McKay H. ‘Ice pipes on sale in Perth.’ *Sunday Times* 7 July 2007.

³⁸ Manderson DRA. “The first loss of freedom: early opium laws in Australia.” (1988) 7 *Australian Drug and Alcohol Review* 439 – 440.

³⁹ Police Act Amendment Act (No. 2) 1967.

⁴⁰ Police Act Amendment Act 1968.

⁴¹ *Police Act 1892* s. 94B(1)(f).

⁴² *Misuse of Drugs Act 1981* s. 5(1)(d)(i).

⁴³ There is some variation in penalties between the Australian jurisdictions for possession of cannabis smoking paraphernalia, from not being an offence in Victoria or the Australian Capital Territory to being punishable with a fine of up to \$2,000 in Tasmania and the Northern Territory, of a fine of up to \$2,200 in New South Wales. In most of these jurisdictions there is also the option of imprisonment up to years. The potentially severe penalty in Queensland of a fine of up to \$12,375, arises from the interaction of the drugs legislation with overarching penalties legislation. The Queensland legislation, the *Drugs Misuse Act 1986*, provides only for imprisonment, but

In May 2007 a meeting of the Ministerial Council on Drug Strategy (MCDS)⁴⁴ endorsed the prohibition of cannabis smoking paraphernalia throughout Australia, even though this contradicted a provision in the National Cannabis Strategy 2006-2009 that was endorsed by the MCDS in May 2006.⁴⁵ Following the May 2007 MCDS meeting a number of jurisdictions amended their legislation to prohibit the sale of a range of items such as cigarette papers, 'roll your own' cigarette making gadgets, filter tips and reusable cones.⁴⁶ In June 2008 the South Australian Attorney-General justified the banning of the sale of a wide range of drug paraphernalia, including bongs, cocaine kits, hash pipes, hookahs and ice pipes on the basis that: "Allowing the devices of illegal drug use to be marketed openly is an affront to the laws of this state. ... It normalises the use of illicit drugs, particularly in the minds of impressionable young people."⁴⁷ The most recent reform has been in WA as a consequence of the election of the Barnett Liberal government in October 2008,⁴⁸ which announced before the election that the State's cannabis infringement notice (CIN) scheme established in March 2004 under the *Cannabis Control Act 2003* would be overturned.

A major reason for the proposed change in WA and for the continued criminalisation of cannabis smoking paraphernalia is the increasing community concern about increased levels of cannabis related harms. Over the past two decades attention has turned to the growth in the incidence of cannabis related mental health problems⁴⁹ and increased attendances at specialist service providers.⁵⁰ An often cited claim that the potency of cannabis has increased over recent years by "between 10 and 30 times" compared to the potency of twenty years ago⁵¹ has been influential on policy makers in a number of ways. A range of inquiries⁵² have been undertaken into the connection between cannabis use and mental health and the perception that there are increasing mental health problems has been used to justify amendments that will give a greater salience to law enforcement driven measures.

In a number of Australian jurisdictions more severe penalties have been established in relation to hydroponically cultivated cannabis compared to cannabis that has not been cultivated by assisted means. An example is an amendment in 2006 of the NSW *Drug Misuse and Trafficking Act 1985* to distinguish between method of cultivation of cannabis, by including a definition of "cultivation by

this is modified by the *Penalties and Sentences Act 1992*, which provides for offences with unspecified fines that a court can impose a fine on an individual of up to 165 penalty units. A penalty unit (PU) is presently worth \$75.

⁴⁴ 'Government moves to ban bongs'. *The Age* 16 May 2007.

⁴⁵ "For those jurisdictions that allow the sale of cannabis smoking equipment, the feasibility of regulating the sale of these products should be investigated." Ministerial Council on Drug Strategy. *National cannabis strategy 2006-2009*. Canberra, Department of Health and Ageing, 2006. <www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/content/cannabis-strategy>

⁴⁶ Sydney Morning Herald. "New laws set to ban the bong in SA." *Sydney Morning Herald* 14 February 2008; Duncan P. "Tassie rejects bong ban push." *The Mercury* 18 May 2007.

⁴⁷ Sydney Morning Herald. "Sale of drug equipment banned in SA." *Sydney Morning Herald* 8 June 2008.

⁴⁸ Cannabis Law Reform Bill 2009. Introduced 14 October 2009.

⁴⁹ Compton WM, Grant BF, Colliver JD, Glantz MD & Stinson FS. 'Prevalence of marijuana use disorders in the United States, 1991-1992 and 2001-2002.' (2004) 291 *Journal of American Medical Association* 2114-2121.

⁵⁰ However, the growing attendances at treatment programs of persons with cannabis as the principal drug of concern may be closely related to the growing number of cannabis related cautions linked to conditional attendance at an educational and/or brief intervention session. Cf. Australian Institute of Health and Welfare. *Alcohol and other drug treatment services in Australia 2003-04. Report on the National Minimum Data Set*. AIHW Cat. No. HSE 100. Canberra, Australian Institute of Health and Welfare, 2005.

⁵¹ Hall W & Swift W. *The THC content of cannabis in Australia: evidence and implications*. Sydney, National Drug & Alcohol Research Centre, University of New South Wales, 1999, 1; Copeland J, Gerber S & Swift W. *Evidence-based answers to cannabis questions: a review of the literature*. ANCD Research Paper 11. Canberra, Australian National Council on Drugs, 2006, 10; Mikuriya TH & Aldrich MR. "Old drug, new dangers: the potency debate." (1988) 20 *Journal of Psychoactive Drugs* 47-55.

⁵² Health Committee. *Inquiry into mental health effects of cannabis*. Wellington, New Zealand, House of Representatives, 1999; Advisory Council on the Misuse of Drugs. *Further consideration of the classification of cannabis under the Misuse of Drugs Act 1981*. London, UK, Home Office, 2005; Advisory Council on the Misuse of Drugs. *Cannabis: classification and public health*. London, UK, Home Office, 2008. Also the Social Development Committee, a committee of the Queensland Parliament, announced that it had been requested to report on a paper, Cannabis: suicide, schizophrenia and other ill-effects which had been published in 2009 by Drug Free Australia: *Social Development Committee Annual Report 2008-2009*.

enhanced indoor means". This reform also establishing thresholds concerned with hydroponic cultivation, so that cultivation of a 'small quantity' ie less than five plants, is now treated the same as outdoor cultivation (ie if dealt with summarily the maximum penalty is \$5,500 and/or up to two year imprisonment or both).

However, in spite of legislative enthusiasm for increase punitive measures, there appears to be limited support for claims that cannabis potency has substantially increased over the past two decades. For instance, the Potency Monitoring Project in US found there had been a small increase in THC content from 1980 to 1998, with potency increasing from 3.3% to 4.4% over this period: "*between 1989 and 1998, at least two thirds of all seizures had a THC content of 5% or less, with an average of only 3.9% of seizures containing more than 9% THC.*"⁵³ A review of potency levels throughout Europe also indicated that levels have been stable for many years at between 6 and 8% THC, with the exception of the Netherlands, where rates as high as 16% had been detected in 2000-2001.⁵⁴ This review also considered that: "*(s)tatements in the popular media that the potency of cannabis has increased by ten times or more in recent decades are not supported by the limited data that are available from either the USA or Europe.*"⁵⁵

The rationale for prohibition of hydroponic cultivation on the grounds of higher potency may not be as credible if high yields could also be obtained by non-hydroponic growing methods. Victorian research has suggested higher levels of THC in hydroponic plants is not due to the conditions of cultivation, but from the use of higher yielding plants from cloned stock.⁵⁶ This would mean that it is feasible for those growers who wanted access to higher potency cannabis to use cloned stock and cultivate plants in soil instead of under artificial conditions, which would avoid the increased penalties that might be enacted in legislation.

A 1999 Australian review has also pointed out the difficulty with substantiating claims about increases in potency.

*"Over the past two decades a large scale illicit cannabis industry has developed in Australia to meet the demand for cannabis products among a growing number of cannabis users. It has been estimated that daily and weekly cannabis users, who prefer the more potent forms of cannabis, account for 80% of cannabis consumed. Any increase in the number of regular cannabis users that may have occurred in recent decades may have increased the demand for and availability of more potent forms of cannabis. Any such increase in the availability of more potent forms of cannabis would have increased the amount of THC consumed by heavier cannabis users without there having been any increase in the average THC content of cannabis plants."*⁵⁷

However, it was observed by the 1999 review that whilst there may have been a modest increase in THC content, there are two more important factors concerning the cannabis market and cannabis related harms,

"an increase in the availability of more potent forms of cannabis and the increased use of these more potent forms by regular cannabis users. These trends have been encouraged by a rising prevalence of cannabis use among young people, earlier initiation of use and higher rates of

⁵³ Hall W & Swift W. *The THC content of cannabis in Australia: evidence and implications*. Sydney, NSW, National Drug & Alcohol Research Centre, University of New South Wales, 1999, 2.

⁵⁴ King LA, Carpentier C & Griffiths P. 'Cannabis potency in Europe.' (2005) 100 *Addiction* 884-886.

⁵⁵ King LA, Carpentier C & Griffiths P. *An overview of cannabis potency in Europe*. Lisbon, Portugal, European Monitoring Centre for Drugs and Drug Addiction, 2004.

⁵⁶ Fiddian S & Quin C. *Determination of the THC levels and variation in the physical appearance of cannabis*. NDLERF Monograph Series No. 8. Canberra, ACT, National Drug Law Enforcement Research Fund, 2004.

⁵⁷ Hall W & Swift W. *The THC content of cannabis in Australia: evidence and implications*. Sydney, NSW, National Drug & Alcohol Research Centre, University of New South Wales, 1999, ii.

regular use by adolescents and young adults. Law enforcement efforts to reduce large scale cannabis plantations may have also played a contributory role, although this is less certain.”⁵⁸

In addition to the active ingredient tetrahydrocannabinol (THC), there has also been research about the effects of another active ingredient, cannabidiol (CBD) on users, as well as on its usefulness as anti-convulsant, as a treatment for opiate withdrawal and an anti psychotic drug. It has been noted that selective breeding may mean that cannabis with higher levels of THC relative to CBD levels will become preferred.

“The market place for home grown varieties of cannabis seed does point to a worrying trend. A company selling cannabis seeds has published the relative rates of THC and CBD in their products.⁵⁹ They showed the claimed THC contents of between 5.7% and 19.5% of plant weight (mean – 11.6%), with CBD rates of between <0.01% and 0.6%. CBD rates are rarely published in research reports, despite the anxiolytic and antipsychotic effects. Earlier studies into cannabis did attempt to analyse CBD rates; these found wide variations but the most potent breed found was 3% THC and 0.5% CBD. This picture suggests that while THC rates are rising, CBD rates are remaining the same. If this is the case not only will high potency products be stronger they may have the potential to be more harmful.”⁶⁰

A widely held view that a large increase in cannabis potency over the past two decades is closely related to increased hydroponic cultivation of cannabis and that this has been largely responsible for the increase in cannabis related mental health problems, has supported legislators enacting more repressive measures related to hydroponically cultivated cannabis. This background of heightened concern about mental health issues and cannabis use has limited debate about cannabis law reform, such as decriminalisation of the possession of cannabis smoking paraphernalia as this is interpreted as supporting cannabis use.

4.2 Health risks and smoking paraphernalia

We have already identified a number of examples of negative consequences that have arisen from prohibition strategies in relation to heroin, where limited access to sterile injection equipment has fostered the spread of BBVs, and also from recent examples involving cocaine kits and crack smoking pipes. Of relevance to this issue is research which has sought to identify some of the health risks associated with the use of water pipes for smoking tobacco.

A 2008 Egyptian study had noted that the traditional use of water pipe smoking (WPS) posed significant health risks due to the air borne transmission of tuberculosis and infection through the sharing of water pipes and the uncontrolled manual preparation of water pipes.⁶¹ Infection was also found to be associated with WPS if the pipe had been used by someone with pulmonary TB, because even if the mouthpiece of the waterpipe was changed, bacteria contaminated tobacco could still remain in the tube of the pipe or be deposited in the water in the base of the water pipe.

In addition to health concerns from multiple use and sharing of waterpipes, research has identified other concerns about WPS, particularly in relation to young people, whereby users may inhale high levels of tobacco due to extended periods of smoking and a perception that WPS are less harmful than smoking cigarettes.⁶² We would suggest, given there are a number of similarities with social patterns

⁵⁸ Hall W & Swift W. *The THC content of cannabis in Australia: evidence and implications*. Sydney, NSW, National Drug & Alcohol Research Centre, University of New South Wales, 1999, 11.

⁵⁹ Pukka Seed Company - <http://www.ganja.co.uk/>.

⁶⁰ Smith N. 'Letter to editor. High potency cannabis: the forgotten variable.' (2005) 100 *Addiction* 1559.

⁶¹ UN Office for the Coordination of Humanitarian Affairs. "Egypt: water pipe smoking a significant TB risk." *IRIN News*. 24 March 2008 <www.irinnews.org/reportid=77426>

⁶² Knishkowsky B & Amitai Y. "Water pipe (narghile) smoking): an emerging health risk behaviour." (2005) 116 *Pediatrics* e113-e119; Maziak W. "The waterpipe: time for action." (2008) 103 *Addiction* 1763-1767; Primack BA, Walsh M, Bryce C & Eissenberg T. "Water pipe tobacco smoking among middle and high school students in Arizona." (2009) 123 *Pediatrics* e282-e288.

of cannabis smoking involves the sharing of bongs, that it is plausible that similar concerns as have been identified with WPS, such as the spread of pulmonary TB, are applicable to the sharing of cannabis smoking implements.

There is also research which has examined young people's cannabis smoking, which indicates the method of use may be predictive of mental health problems. An example is a survey of 390 French students which found that users shifted to methods to deliver them higher doses of THC by using bongs and away from smoking joints which delivered lower doses of THC.⁶³ Another French study of cannabis use by high school students, which examined frequency and patterns of cannabis use and dependence, concluded "*Cannabis use in adolescents appeared to be characterised by the frequency of use, consumption by means other than 'joints' and by the frequency of dependence.*"⁶⁴

As Australian National Drug Strategy (NDS) household surveys gather a more limited range of data about cannabis use compared to similar New Zealand household surveys, the NDS provides limited data about patterns of cannabis by Australians.⁶⁵ A number of Australian NDS surveys suggest differences between younger and older cannabis users in the strength of cannabis and preferred method of use. Those aged between 14 and 29 prefer to smoke 'heads' and also to use bongs⁶⁶ rather than joints – the latter method of cannabis use preferred by older age groups.⁶⁷

The public health advantages from having a program of research that is related to the behaviours and practices of cannabis users is demonstrated in a conclusion from a recent study of the risks that can arise from the use of cannabis smoking devices which incorporate water filtration, such as bongs.

*"We have demonstrated that the use of heating devices for cannabis users in order to decrease the inhalation of toxic MW compounds (including tar) may increase the exposure to low MW toxic compounds such as ammonia. ... The risks involved in smoking cannabis have been assumed to be equivalent to those involved in smoking tobacco. Our finding that ammonia levels generated by heated 'street' cannabis are much higher than those from smoking tobacco may require a revision of the relative risks."*⁶⁸

There is a paucity of research into sharing and other practices associated with the use of bongs by cannabis users which points to a need for research that places a high priority on identifying lower risk methods of consumption.⁶⁹ An example of the need for better research is the question of whether the use of a water pipe provides any advantage through water filtration of substances that would otherwise be inhaled in cannabis smoke.⁷⁰ There are other examples, where because of limited research, it is difficult to determine the potential value of other harm reduction measures, such as whether cannabis vaporizers reduce both particulate matter and carbon monoxide levels compared to cannabis consumed by combustion.⁷¹

⁶³63 Chabrol H, Roura C & Armitage J. 'Letters to editor: Bongs – a method of using cannabis linked to dependence.' *Canadian Journal of Psychiatry* November 2003.

⁶⁴64 Chabrol H, Massot E, Montovany A, Choultha K & Armitage J. "Patterns of use, cannabis beliefs and dependence: study of 159 adolescent users." (2002) 9(8) *Archives de paediatric* 780-788.

⁶⁵65 There have been a total of nine NDS household surveys conducted in Australia between 1985 and 2007.

⁶⁶66 The 2001 NDS survey found that 80% of young people use a bong to smoke cannabis: Pfizer Australia. *Australians and cannabis*. Health report No. 33. February 2007. <www.healthreport.com.au/Reports/33.pdf>

⁶⁷67 Copeland J, Gerber S & Swift W. *Evidence-based answers to cannabis questions: a review of the literature*. ANCD Research Paper 11. Canberra, ACT, Australian National Council on Drugs, 2006, 9

⁶⁸68 Bloor RN, Wang TS, Spanel P & Smith D. "Ammonia release from heated 'street' cannabis leaf and its potential toxic effects on cannabis users." (2008) 103 *Addiction*, 1676.

⁶⁹69 Spronck HJW, Salemink CA, Alikaridis F & Papadakis D. "Pyrolysis of cannabinoids: a model experiment in the study of cannabis smoking." (1978) 3 *Bulletin on Narcotics* 55-59.

⁷⁰70 Cozzi N. "Effects of water filtration on marijuana smoke." (1993) 4(2) *Newsletter of the Multidisciplinary Association for Psychedelic Studies*.

⁷¹71 Gieringer D. "Marijuana water pipe and vaporizer study." (1996) 6(3) *Newsletter of the Multidisciplinary Association for Psychedelic Studies*; California NORML. "MAPS/CanORML vaporizer and waterpipe studies." 420 *Magazine* 22 January 2008.

4.3 WA cannabis expiation scheme: 2004 - 2009

In WA there was a short lived legislative reform between 2004 and 2009, which by defining four minor cannabis offences as expiable offences,⁷² meant offenders could be dealt with in a similar fashion to a wide range of other minor offences, such as traffic, parking and drinking alcohol in a public place. Some of the major outcomes of this reform were reported by the statutory review of the operation of the first three years of operation of the *Cannabis Control Act 2003* (CCA), which was tabled in the WA Parliament in November 2007.⁷³ One of the expiable offences was the possession of a cannabis smoking implement on which there were detectable traces of cannabis, which involved 3,408 (36.5%) out of the total of 9,276 CINs issued in the first three years of the CIN scheme.⁷⁴

However, as we have shown in another paper,⁷⁵ an unanticipated consequence of the CCA reforms was a marked increase in net widening as it became easier for police to issue a CIN for a minor cannabis offence. Prior to the commencement of the CIN scheme police were more likely to informally caution an offender because of the extra work involved in charging minor cannabis offenders. Our analysis of data for the first three years of the CIN scheme indicates that while there was an estimated 3,372 fewer minor cannabis convictions than otherwise would be dealt with by Magistrates Courts, over the same period police issued a total of 9,276 CINs.⁷⁶ This means that there were an estimated additional 5,904 minor cannabis offences issued with a CIN which would most likely not have come to official attention if the scheme had not operated. Furthermore, the CIN scheme required the creation of a database, because the CCA included a provision that offenders could not be issued with more than three CINs on more than three occasions in a three year period, but instead were to be charged. This equates to a quasi record of police contact, which would not have occurred if an offender had been informally cautioned.

Under Part 3 of the CCA the sale of cannabis smoking paraphernalia to adults was permitted so long as the retailer made prescribed educational materials⁷⁷ available to purchasers at the point of sale. The existence of prescribed materials was intended to underpin a strategy to improve the community's understanding of the health related harms associated with cannabis smoking and to facilitate problematic cannabis users seeking assistance. However, the health related measures would have to be regarded as having had a marginal impact, as there was only a three week public health campaign just before the introduction of the CIN scheme to inform the wider community about the reforms, as well as provide information about the harms and risks of cannabis.

We would also suggest in circumstances where there has been an intense community debate about reforms of the type that occurred in WA between when the legislation was introduced in March 2003 and finally passed in October 2003, that some care needed to be taken deliver educational messages. As has been noted by other commentators:

⁷² The *Cannabis Control Act 2003* reform authorised police to issue a CIN for four expiable offences, possession or use of not more than 15 grams of cannabis (penalty of \$100), possession or use of more than 15 grams and up to not more than 30 grams of cannabis (penalty of \$150), the cultivation of not more than two cannabis plants at a persons principal place of residence (penalty \$200) and possession of a cannabis smoking implement on which there are detectable traces of cannabis (penalty of \$100).

⁷³ The statutory review of the CCA consisted of three reports: Drug and Alcohol Office. *Statutory review of Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, WA, Drug and Alcohol Office, 2007; Drug and Alcohol Office. *Statutory review of Cannabis Control Act 2003. Report to the Minister for Health: Executive summary*. Perth, WA, Drug and Alcohol Office, 2007; Drug and Alcohol Office. *Statutory review of Cannabis Control Act 2003. Report to the Minister for Health: Supplementary data tables and figures*. Perth, WA, Drug and Alcohol Office, 2007.

⁷⁴ In the three year period covered by the statutory review up 31 March 2007, in addition to the 3,408 CINs issued for an offence involving s. 5(1)(d)(i), there were with a further 1,078 convictions recorded in Magistrates Courts.

⁷⁵ Swensen G & Crofts T. Cannabis law reforms: recent developments. 2009 (in press).

⁷⁶ Drug and Alcohol Office. *Statutory review of the Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, Western Australia, Drug and Alcohol Office, 2007, Chapter 7.

⁷⁷ Cannabis Control Regulations 2004, Schedule 4.

“It is difficult to provide credible advice to young individuals on the mental health risks of cannabis use because of the polarized views of the health risks of cannabis expressed in the larger cannabis policy debate. ... community debates about whether cannabis use should continue to be a criminal offence increase the prominence of conflicting messages about the association of cannabis with psychosis.”⁷⁸

Another shortcoming of the CCA reforms was the failure to survey cannabis users regarding the content and relevance of the educational messages and printed materials that were required to be available at point of sale of smoking paraphernalia. As well as the content of the educational materials remaining unchanged throughout the period that the CIN scheme operated, the relevance of some of this material must be questioned as most of it had been adapted from already published materials. An example of a shortcoming was that whilst educational materials referred to respiratory and other health consequences of smoking, this was not linked to specific risks related to method of cannabis use.⁷⁹

In addition to the public health components of the CCA reforms, information was also provided that was intended to motivate cannabis users concerned about their problematic use of cannabis to attend support services for assistance. We have some reservations about the narrowly focussed approach taken as to the services promoted as a point for treatment or advice, the Community Drug Service Teams (CDSTs), which were also the only approved providers of certificates of completion at a cannabis education session (CES).⁸⁰

There was some criticism of this restricting approach of promoting the CDSTs outlined in a submission to the statutory review, which instead suggested general practitioners (GPs) should have been promoted as a front line service:

“Family doctors are the first point of contact for most drug users, the vast majority of whom are neither in contact with the police or specialist drug users. Family doctors are an important resource in the prevention and management of drug related problems and are uniquely placed to work with offenders issued with a CIN.”

This suggestion is consistent with the approach which had been widely accepted for some years, that GPs should be regarded as a front line service for assisting people with problematic use of alcohol. The emphasis on the educational and support component of the CCA reforms within CDSTs diverges from an approach followed elsewhere, that cannabis specific programs should preferably be located within mainstream health oriented agencies. One example is the Australian Capital Territory (ACT), Effective Weed Control, which was conducted through the ACT’s Community Care’s Alcohol and Drug Program. This service was discussed in a report published in 2000 by the ACT Legislative Assembly, following an investigation into cannabis by the Assembly’s Standing Committee on Health and Community Care.

The ACT’s Effective Weed Control targeted cannabis users wishing to reduce or completely abstain from cannabis use and was explicitly located outside specialist service providers. in community health

⁷⁸ Hall W & Degenhardt L. “What are the policy implications of the evidence on cannabis and psychosis?” (2006) 51 *Canadian Journal of Psychiatry* 570.

⁷⁹ Gowing LR, Ali RL & White JM. *Respiratory harms of smoked cannabis*. DASC Monograph No. 8. Parkside, South Australia, Drug & Alcohol Services Council, 2000; Gill A. “Bong lung: regular smokers of cannabis show relatively distinctive histologic changes that predispose to pneumothorax. (Letters to the Editor).” (2005) 29(7) *American Journal of Surgical Pathology* 980-982; Treasure T & Tan C. “Cannabis, pneumothorax and lung bullae.” (2006) 99(4) *Journal of Royal Society of Medicine* 170.

⁸⁰ Attendance at a cannabis education session was an alternative method of expiation compared to payment of a fixed prescribed monetary depending on the expiable offence. Out of the total of 9,328 CINs issued in the first three years of the CIN scheme, 3,991 (42.8%) were expiated – out of which 1,250 (31.3%) were expiated by attendance at a CES: Drug and Alcohol Office. *Statutory review of Cannabis Control Act 2003. Report to the Minister for Health: Technical report*. Perth, WA, Drug and Alcohol Office, 2007, Table 2-3.

centres, as it was recognised that “... many people see their cannabis use in quite different terms to those people with alcohol and other illicit drug problems.”⁸¹

Others have also commented on the limitations of locating programs for dependent cannabis users as part of the specialist drug treatment service delivery model, as compared to establishing these services as part of mainstream health services.

“There is a common perception that the service needs of substance dependent young people are largely dictated by alcohol and opiate dependence. In our community sample only 9% of those with cannabis dependence were also diagnosed with alcohol dependence. Furthermore, the vast majority (87%) of cannabis dependent individuals had never injected an illicit substance. Indicating that the service needs of this community-based group were probably predicated largely on their cannabis use.”⁸²

4.4 Recent developments

There has been a claim in UK that as manufacturers of cigarette rolling papers appears to specifically target cannabis smokers, they should be compelled to include health warnings on their products. This debate stems from a finding by the UK Advertising Standards in 2003 that the use of the phrase ‘Twist and burn’ by Rizla, who manufactured king sized papers, in their advertising campaign had created the impression that these cigarette papers were intended to be used by cannabis smokers.⁸³ In early 2008, Rethink, a British non government organisation, opportunistically launched a campaign which further sought to exploit this earlier finding by lobbying government for a requirement that Rizla include warnings about mental health effects of cannabis on its king size cigarette papers. It was contended that this would be a beneficial extension of the mandated requirement that already applied to tobacco products which were required to sold with accompanying health warnings:

“Warnings on cigarettes and other tobacco products (which) have been very effective by displaying strong health warnings about the dangers of tobacco, targeting tobacco users at the point of consumption.”⁸⁴

Rethink was forced to withdraw reference to the Rizla brand of rolling papers in materials it had published in the face of threatened litigation by Imperial Tobacco, the owners of the company.⁸⁵ Rethink’s intention was that government should require mandated cannabis related health warnings on products used by cannabis users by providing accurate and relevant factual information to enable users to adopt less harmful methods of use.

Whilst there is much to commend this suggestion for including health warnings, it would seem whilst both the use of cannabis and possession or sale of paraphernalia continues to be criminalised, it would be very difficult to force manufacturers to include health warnings or to mount accompanying health education and awareness campaigns.

5. Conclusion

We believe that policy makers need to refamiliarise themselves with gains which have accrued over the past two decades by the adoption of a public health model, rather than the criminal law, to regulate the availability of sterile injecting equipment to IDUs. We would contend that emerging health

⁸¹ Australian Capital Territory, Legislative Assembly, Standing Committee on Health and Community Care. *Cannabis use in the ACT*. Report No. 7. Canberra, ACT, Legislative Assembly, 2000, 34.

⁸² Coffey C, Carlin JB, Degenhardt L, Lynskey M, Sanci L & Patton GC. ‘Cannabis dependence in young adults: an Australian population study.’ (2002) 97 *Addiction*, 192.

⁸³ Cozens C. “Rizla under fire over ‘drug’ ads.” *The Guardian* 19 November 2003.

⁸⁴ Rethink. *Educating reefer: Effective health education and warnings on cannabis*. Rethink, 2008, 13.

⁸⁵ Daly M. “Cannabis claim puts Rizla’s nose out of joint.” DrugLink, March/April 2008, 3; *Medical News Today*. “React responsibly Rizla – and put cannabis health warnings on your products, UK.” *Medical News Today* 5 February 2008; BBC News. “Call for roll up cannabis warnings.” *BBC News* 8 February 2008.

concerns we have identified relating to WPS and the use of bongs to deliver higher levels of THC to users should be a timely reminder to policy makers to re evaluate the justification for maintaining the prohibition of cannabis smoking paraphernalia.

It is our contention that if a public health model was implemented in association with reform of present laws that criminalise the possession and sale of cannabis smoking paraphernalia it would lead to a number of tangible gains compared to the current model of prohibition. One of the most important gains would be that information could be developed about cannabis use to promote low risk behaviours without this being regarded as encouraging drug use or 'sending the wrong message'.

It would also mean that less harmful methods of consumption could be identified and that cannabis users be encouraged to change patterns and methods of cannabis use. If necessary the costs of new and lower risk smoking paraphernalia could be subsidised for a period of time, as occurred when NSPs were introduced, to maximise uptake of new products.

As we have also indicated there is a need to reconceptualise the management of cannabis related problems through increasing the availability of services that specifically target cannabis users which are located within mainstream health services, rather than being primarily delivered by CDSTs and other specialist service providers as is the current practice. In conjunction with legislative reform to unequivocally remove the risk of prosecution from the possession or sale of cannabis smoking paraphernalia, we would argue that there is also a need for mainstream health service providers to be able to offer readily accessible and non stigmatised expert assistance required by cannabis users concerned about their problematic use of cannabis outside of the alcohol and other drug system.