

RECENT DEVELOPMENTS IN CANNABIS LAW REFORM: THE RISE AND FALL OF THE CANNABIS INFRINGEMENT NOTICE SCHEME IN WESTERN AUSTRALIA

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ABSTRACT

In early 2004 both the United Kingdom (UK) and Western Australia (WA) introduced reforms aimed at avoiding the harms associated with minor cannabis offenders appearing before the courts. As the reforms involved different approaches available to police to divert someone who had committed an offence and one of the reforms – the Cannabis Infringement Notice (CIN) scheme in WA – was repealed in October 2010, it is useful to consider what lessons these two examples may provide for other jurisdictions contemplating reform. While WA introduced the Cannabis Infringement Notice scheme, allowing police to issue an infringement notice for a number of expiable offences, a more flexible approach to diversion was adopted in the UK. The UK reform was administratively simpler, largely reliant on police exercising their discretion to issue cannabis warnings and built upon earlier reforms to improve relations between police, young people and minority groups. Compared with the UK model, the WA CIN scheme involved complex eligibility and compliance requirements, was difficult to administer and resulted in substantially more cannabis offenders coming to official attention than before the reform. The experience with the now abandoned CIN scheme in WA shows that the extensive use of police discretion, as was followed in the UK, is a preferable and more sustainable model for managing minor cannabis offending.

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I INTRODUCTION

In 2004 reforms were introduced in both the United Kingdom (UK) and Western Australia (WA) to provide an alternative to prosecuting ‘minor’ cannabis offenders. While police in the UK were required to give a formal cannabis warning, in WA police had the option of issuing a Cannabis Infringement Notice (CIN) as an alternative to prosecution. An examination of these two approaches for dealing with minor cannabis offenders is warranted, as they have had divergent outcomes since their introduction. In the UK, although minor changes were made in January 2009, the police in England and Wales continue to be able to issue a cannabis warning to first time offenders possessing a small amount of cannabis, with escalated consequences for second and third time offending. However, in WA the CIN scheme was abandoned with the repeal of the *Cannabis Control Act 2003* (CCA) in October 2010. Now in WA a conditional cautioning scheme will be introduced for dealing with first time minor cannabis offenders who commit either of two minor offences.

Given the turn around in WA this article seeks to examine the reasons for the lack of support for the CIN scheme. To do so key aspects of CIN scheme will be examined in some detail and where appropriate contrasted to the UK approach which emphasises the cautioning of minor cannabis offenders to ensure they remain outside the court system. In our opinion there are conceptual and philosophical advantages to the UK model for cannabis law reform, including its simplicity from a policing point of view, its reliance on police exercising their discretion, the minimal cost and the avoidance of sanctions required to sustain attendance at therapeutically styled interventions. It is our contention that policy makers should ensure that police involvement is given a central role in reforming the structure and enforcement of cannabis laws. As the use of discretion is well established in relation to how police manage those engaging in anti-social behaviours and various minor offences, cannabis law reform should favour the use of police discretion over the implementation of prescriptive, complex legislative schemes.

II BACKGROUND TO THE 2004 REFORMS

In WA a pilot cannabis cautioning scheme was conducted by the WA Police Service in two Police Districts between October 1998 and September 1999,¹ which was expanded on a state-wide basis in March 2000, as the cannabis cautioning mandatory education scheme (CCMES). This meant that first time offenders who possessed not more than 25 grams of cannabis could receive a formal caution - conditional on attendance and completion of a cannabis education session (CES). It has been suggested that the CCMES covered two offences, the possession of cannabis or the possession of a used cannabis smoking implement.² However, a joint Ministerial statement in December 1999 announcing the success of the pilot and its expansion by the Minister for Police and the Minister Responsible for WA Drug Abuse Strategy specifically refers to the sole offence of possession of cannabis.³

In mid 2001 a six month pilot trial of police warnings for possession of cannabis had commenced in the London Borough of Lambeth, which paved the way for the introduction of warnings for possession of a 'small quantity' of cannabis.⁴ Police in England and Wales were able from January 2004 to issue a 'cannabis warning' in accordance with broad principles contained in a set of administrative directions issued by the Association of Chief Police Officers (ACPO). The adoption of cannabis warnings was located within a

¹ Colin Penter, Noni Walker and Mark Devenish-Meares, 'Evaluation of the pilot West Australian cannabis cautioning and mandatory education system: Final report' (Perth, Drug Abuse Strategy Office, 1999).

² Simon Lenton and Steve Allsop, 'A tale of CIN – the Cannabis Infringement Notice scheme in Western Australia' (2010) 105 *Addiction* 808-816.

³ Kevin Prince and Rhonda Parker, 'State-wide expansion of the cannabis cautioning and mandatory education system', Media statement, 8 December 1999, <www.mediastatements.wa.gov.au/media/aarchivemedia.nsf>.

⁴ Geoff Monaghan, 'Policing cannabis reclassification - easy as A B C', *Druglink*, January/February 2002, <<http://www.ukcia.org/research/policingcannabisreclassification.pdf>>.

framework of other policing reforms designed to constrain the rigorous use of ‘stop and search’ tactics in order to improve rapport between police and young people, especially those from disadvantaged communities.⁵

There were similarities between the CCMES and the later UK approach of cannabis warnings, as both involved possession of a small amount of cannabis and were established by administrative directions issued by the ACPO in the UK and the Police Commissioner in WA. The lack of a legislative basis for police cautioning of minor cannabis offenders, at least in WA, was not regarded as problematic.⁶ As has been noted by a number of commentators,⁷ cautioning had also been implemented in a number of other Australian jurisdictions involving cannabis as well as other drugs. It has been suggested that this reflects a belief that the criminal justice system is not necessarily a useful option to achieve therapeutic ends.⁸

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- ⁵ MORI Social Research Institute & Police Foundation, ‘Policing the possession of cannabis: Residents’ views on the Lambeth experiment’ (London, Police Foundation, 2002).
- ⁶ Tim Atherton, ‘Managing police discretion: incorporating the Western Australian cannabis cautioning mandatory education system (CCMES)’ (Adelaide, National Centre for Education & Training on Addiction, Flinders University, 2001).
- ⁷ Joanne Baker and Derek Goh, ‘The cannabis cautioning scheme three years on: An implementation and outcome evaluation’ (Sydney, New South Wales Bureau of Crime Statistics & Research, 2004); Jim Hales, Melinda Mayne, Amy Swan, Silvia Alberti and Alison Ritter, ‘Evaluation of Queensland illicit drug diversion initiative (QIDDI) police diversion program: final report’ (Brisbane, Queensland Health & Queensland Police Service, 2004); Caitlin Hughes and Alison Ritter, ‘A summary of diversion programs for drug and drug-related offenders in Australia’ (Drug Policy Modelling Program Monograph 16. Sydney, National Drug and Alcohol Research Centre, UNSW, 2008); 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).
- ⁸ Australasian Centre for Policing Research, ‘The role of police in supporting illicit drug related public health outcomes’ (Payneham, 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

While the UK was experimenting with the cautioning model, the tide in WA was turning towards a new decriminalisation model. In the run up to the 2001 state elections the Labor Party outlined its proposal for cannabis law reform, which in part sought to remedy the perceived failure of the previous Liberal government's limited reform through the CCMES:

“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”.⁹

Another influence on the direction of reform was the Labor government's pre-election commitment to hold a Royal Commission to consider allegations of compromised policing, including the enforcement of drug laws. The Royal Commission's final report was tabled in January 2004.¹⁰ It is clear that the perceived lack of accountability and oversight of policing was influential in formulating the CIN scheme which sought to almost totally exclude discretion in how police deal with minor cannabis offenders.

in Australia' (Payneham, Australasian Centre for Policing Research, 2002); Australasian Centre for Policing Research, 'The impact of the general law enforcement on the illicit drugs market' (Payneham, Australasian Centre for Policing Research, 2003); Kate Burton, 'Illicit drugs in Australia: Use, harm and policy responses' (Canberra, Social Policy Section, Parliamentary Library, Australian Parliament, 2004); Shona Morrison and Marilyn Burdon, 'The role of police in the diversion of minor alcohol and drug related offenders' (Canberra, Commonwealth Department of Health and Aged Care, 2000).

⁹ Western Australian Branch of the Australian Labor Party, 'Drugs and crime direction statement' (2000).

¹⁰ Royal Commission into Whether There Has Been Corrupt or Criminal Conduct by Any Western Australian Police Officer, Final Report (Perth, Royal Commission, 2004).

III THE 2004 REFORMS

A *Rationale*

When the Cannabis Control Bill 2003 was first introduced into the WA Parliament in March 2003 the Government stated that issuing CINs to minor cannabis offenders, instead of arresting and charging offenders, would enable police resources to be redirected to offending involving more harmful drugs, such as heroin and amphetamines. It was also contended by the Minister for Health, in the second reading speech, that the reform would facilitate police targeting those engaged in more serious cannabis related offences such as cultivation, distribution, supply and selling.¹¹

Although the Labor government could have presented the CIN scheme as a refinement of the previous Liberal government's CCMES, the reform was instead presented as a refinement of the three expiation schemes that already operated in South Australia (SA), the Australian Capital Territory (ACT) and the Northern Territory (NT). With the commencement of the CIN scheme in March 2004, there were four jurisdictions in Australia with cannabis expiation schemes, while cautioning schemes operated in the remaining jurisdictions. In Victoria a cannabis cautioning program had operated since 1998 and cautioning schemes were introduced in Tasmania and New South Wales (NSW) in February and April 2000, respectively. Queensland was the last state to implement cautioning, when it introduced a police diversion program for cannabis as well as other minor drug offences in June 2001.

An influence on the growing use of schemes to 'divert' minor cannabis offenders in Australia was generous Commonwealth

¹¹ Minister for Health (Hon. Bob Kucera), Second Reading Speech, Cannabis Control Bill 2003, WA, *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 5696.

funding for the States and Territories to develop police and court diversion programs for minor cannabis and other illicit drug offenders. The second influence was growing support from drug law enforcement (DLE) agencies for the incorporation of some of the harm minimisation principles into police practices. Another influence was a growing perception that the traditional criminal justice system paradigm of punishment was not an effective mechanism for managing minor drug offenders, some of whom may be drug dependent and others who have had little or no prior contact with the criminal justice system.¹²

The expansion of pre-trial diversion arrangements to facilitate the development of education and therapeutic programs was driven through the Commonwealth Government's National Illicit Drug Strategy.¹³ The Illicit Drug Diversion Initiative (IDDI), also known as 'Tough on drugs', was created by the Howard Federal government after a 1999 inter-governmental agreement by the Ministerial Council on Drug Strategy to expand police powers to divert minor drug offenders. Interestingly, the CIN scheme was largely underwritten by IDDI funds, even though it did not embrace the main principle of the IDDI that offenders should be 'diverted' to therapeutic and treatment oriented programs. As outlined below, the two alternative methods of expiation in the CIN scheme, attendance at a cannabis education session (CES) or payment of the prescribed monetary penalty, reinforced how the system of consequences was removed from the courts.

B *Features of the CIN Scheme*

The *Cannabis Control Act 2003* (CCA) contained a hybrid group of four expiable drug offences located in the *Misuse of Drugs Act 1981* (MDA) involving adults':

¹² Burton, above n 8.

¹³ Australian Institute of Criminology, 'Australian responses to illicit drugs'. <www.aic.gov.au/crime_types/drugs_alcohol/illicit_drugs/diversion.aspx> 15 October 2010.

- 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);
- 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).

One shortcoming of the SA, ACT and NT schemes that the CIN scheme was expected to resolve was the low rate of expiation under these schemes, with between one quarter and one third of infringements not being expiated.¹⁴ The CIN scheme sought to improve the rate of expiation by providing for two methods of expiation - by either full payment of the prescribed penalty or by attendance at a CES, within the first 28 days of issuance of the notice. The CIN scheme sought to increase the attractiveness of expiation by a CES, by providing that someone issued with multiple CINs on a single occasion, could expiate all of these contemporaneously by attending a single CES.

The CIN scheme provided that if a person failed to expiate after police had issued a final demand, enforcement passed to the Fines Enforcement Registry (FER), an agency which is responsible for recovery of all types of unpaid infringement notices, as well as unpaid court fines under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (FPINEA). The FER system provided flexibility in payment by enabling offenders to negotiate the payment of unpaid fines and infringements through time to pay arrangements. An unforeseen negative consequence of referring unpaid CINs to the FER system was that an unpaid CINs resulted in the person continuing to receive further demands for payment, each of which incurring additional administrative fees of up to \$96.50. A

¹⁴ 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, Drug & Alcohol Office, 2002).

person not responding to these demands and failing to enter into a time-to-pay arrangement could face the final sanction under the FPINEA of suspension of their driver's licence and being unable register a motor vehicle until full payment was made.

C *Police discretion*

In WA the CCA did not mandate that police issue a CIN: "A police officer ... may, subject to subsection (2), within 21 days after the alleged offence is believed to have been committed, give a cannabis infringement notice to the alleged offender."¹⁵ This contrasts with the UK cautioning scheme where police are required as standard practice to give a cannabis warning: "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."¹⁶

Police in the UK were also granted a wide measure of discretion to determine whether the amount of cannabis could be dealt with by way of a cannabis warning, as the guidelines referred to possession of a 'small amount' of cannabis.¹⁷

"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."¹⁸

Compared with the approach in the UK, the CIN scheme limited police discretion, as police were required to weigh the quantity of cannabis to determine whether the offence qualified as an expiable

¹⁵ CCA 2003 s 5(1).

¹⁶ Association of Chief Police Officers, 'Policing guidance following reclassification of cannabis' Press release 18/07, 16 January 2007.

¹⁷ Association of Chief Police Officers, 'Policing guidance following reclassification of cannabis' Press release 18/07, 16 January 2007.

¹⁸ Association of Chief Police Officers, 'Cannabis enforcement guidance' Press release, 12 September 2003.

offence of possession or use of up to 15 grams, or of more than 15 grams and not more than 30 grams of cannabis. This strict approach required that every police station in WA be issued with a digital set of scales.

D *Operation of the CIN scheme*

The statutory review of the first three years of the CIN scheme, up to 31 March 2007, found a total of 9,328 CINs had been issued, of which 95 percent were accounted for by two offences - 3,408 (36.5 percent) were for possession of a smoking implement with detectable traces of cannabis and 5,422 (58.1 percent) were for possession of 15 grams or less of cannabis.¹⁹

It was determined, based on the 9,328 CINs issued up to 31 March 2007, that 2,741 (29.4 percent) were paid in full within the first 28 days, 2,286 (24.5 percent) resulted in suspension of driver's licence, 2,228 (23.9 percent) were paid in full through the FER system and 1,250 (13.4 percent) were completed by attendance at a CES. Data on outcomes of CINs, once they had been registered with FER, shows the proportion of unexpiated CINs successfully finalised through the FER enforcement process steadily increased, with an additional 25 to 30 percent of all CINs expiated by the FER system in the long term.²⁰

In summary, of the 9,328 CINs issued up to 31 March 2007, a total of 3,991 (42.8 percent) were expiated at the police stage and a

¹⁹ Drug and Alcohol Office, 'Statutory review of the Cannabis Control Act 2003' Report to the Minister for Health: Technical report (Perth, 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, Drug and Alcohol Office, 2007).

²⁰ Drug and Alcohol Office, 'Statutory review of the Cannabis Control Act 2003' Report to the Minister for Health: Technical report (Perth, Drug and Alcohol Office, 2007), Table A1-2.

further 2,192 (23.5 percent) were expiated by FER debt recovery process. Overall 66.3 percent of all CINs issued in the first three years of the CIN scheme were fully expiated, revealing that the CIN scheme failed to achieve a significantly higher rate of expiation than the three other Australian jurisdictions with infringement schemes.

IV SOME LESSONS FROM REFORMS

A *Cannabis Prevalence*

Prevalence data can be used to draw conclusions about whether a particular reform may be associated with changes in the use or availability of cannabis.²¹ However, there is some concern that this information can be used in a selective fashion to favourably support changes in policy. While there has not been an apparent increase in the prevalence of cannabis use in WA following the reforms in 2004, the limited availability of prevalence data did not stop policy makers from claiming the CIN scheme had not contributed to increased cannabis use, even before data was available.

In Australia, prevalence data is obtained through the National Drug Strategy Household Surveys (NDSHS) which are conducted on a triennial basis, with the two most recent surveys occurring between June/July and November in 2004 and again in 2007. Media statements issued on 27 April 2005 and 13 October 2005, referring to the release of two reports concerning the first six and 12 months of the CIN scheme, stated in effect that there was no evidence from treatment or police data “to suggest an increase in the availability or use of cannabis compared to the period before the introduction of the

²¹ Drug and Alcohol Office, ‘Statutory review of the Cannabis Control Act 2003’ Report to the Minister for Health: Technical report (Perth, Drug and Alcohol Office, 2007), Chapter 7; James Fetherston and Simon Lenton, ‘Effects of the Western Australian cannabis infringement notice scheme on public attitudes, knowledge and use: Comparison of pre and post change data’ (Perth, National Drug Research Institute, Curtin University of Technology, 2007).

scheme.”²² This assertion is surprising as it was based on limited information. The WA analysis of the 2004 NDSHS data was not published until June 2006.²³ This meant that in 2005, when these media statements were issued, the only available data was from the 2001 NDSHS, which had been published in February 2003.²⁴ WA prevalence data did not become available in relation to the period over which the statutory review was based (1 April 2004 and 31 March 2007), until December 2007, after the review had already been completed and tabled in the WA Parliament. Results from the 2007 NDSHS for each Australian jurisdiction were not available until August 2008, when a State and Territory supplement was published.²⁵ The only data available for this period was a report published in December 2007 which contained the results of a survey conducted by a research team at the National Drug Research Institute (NDRI) in February and March 2007.²⁶

B *Policing and implementation issues*

The statutory review found evidence that police were reluctant to issue a CIN to repeat offenders. For example, an internal WA police review covering the period 1 July 2004 to 30 June 2005, which found that nearly three quarters (74.8 percent) out of a total of 853 persons eligible for a CIN were not issued with one, concluded that:

“[T]his may have meant that police did not believe the CES option was an acceptable ‘penalty’ for those who were eligible for a CIN,

²² Drug and Alcohol Office, ‘New cannabis laws have positive results’ Media statement, 27 April 2005, <www.dao.health.wa.gov.au/>; Drug and Alcohol Office, ‘Cannabis law results remain positive’ Media statement, 13 October 2005, <www.dao.health.wa.gov.au/>.

²³ Glenn Draper and Stella Serafino, ‘2004 National Drug Strategy Household Survey: Western Australian results’ (Perth, Department of Health WA, 2006).

²⁴ Drug and Alcohol Office, ‘2001 National Drug Strategy Household Survey: First results for Western Australia’ (Perth, Drug and Alcohol Office, 2003).

²⁵ 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).

²⁶ Fetherston and Lenton, above n 21.

as they did not have sufficient knowledge about the potential advantages of expiation.”²⁷

It is possible that the restrictive approach followed by the police was influenced by the changes in operational instructions on the definition of ‘personal use’ in the first edition of OP-52.1 (Cannabis infringement notice scheme) in the Commissioner’s Orders and Procedures Manual issued in March 2004 compared with the second edition of OP-52.1, issued in October 2006. The later definition was:

“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.”

Another difficulty was the narrow and legalistic interpretation by the police of Section 12 of the CCA, which *inter alia* provided a CIN could be withdrawn by police regardless of whether it had been paid or not, except if it had been expiated by attendance at a CES. This meant that police felt that this required them to store and retain all evidence seized from offenders, in spite of the unlikely possibility that a CIN would be withdrawn and an offender charged.

The interaction of the CCA with other legislation also created complexity for police administering the CIN scheme, such as Section 16(6) of the *Criminal Investigation (Identifying People) Act 2002*. This meant that although offenders were not arrested, they nevertheless were routinely taken to a nearby police station to confirm their name and address. Attendance at a police station, 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.

²⁷ Drug and Alcohol Office, ‘Statutory review of the Cannabis Control Act 2003’ Report to the Minister for Health: Technical Report (Perth, Drug and Alcohol Office, 2007) 72.

This approach may be contrasted to the cautioning scheme in the UK, where there was a presumption in favour of police issuing a cannabis warning in the ‘street’ (where an offence usually occurred), emphasising that an offender should not be further processed by the criminal justice system.

C *Net-widening*

Net-widening has been identified in a number of studies as a consequence of diversion and cautioning schemes, including in the CEN scheme,²⁸ in the early stage of the CIN scheme²⁹ and in the NSW cannabis cautioning scheme.³⁰ As noted in a 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.”³¹

The CIN scheme appeared to have facilitated net-widening by enabling police to more easily formally record all minor cannabis

²⁸ Adam Sutton and Rick Sarre, ‘Monitoring the South Australian cannabis expiation notice initiative’ (1992) 22 *Journal of Drug Issues* 579-590; Lynn Atkinson and David McDonald, ‘Cannabis, the law and social impacts in Australia’ *Trends and Issues in Criminal Justice*, No. 48, 1995.

²⁹ Adam Sutton and David Hawks, ‘The cannabis infringement notice scheme in Western Australia: a review of policy, police and judicial perspectives’ (2005) 24 *Drug & Alcohol Review* 331-336.

³⁰ Baker and Goh, above n 7.

³¹ Emma Pritchard, Janette Mugavin and Amy Swan, ‘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.

offences. Prior to the CIN scheme it is submitted police were more likely to have exercised 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 of evidence.

The statutory review of the CCA reforms found 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, as a total of 9,276 CINs were issued in the three year period, an estimated additional 5,904 minor cannabis offences came to official attention (ie 9,276 – 3,372). If this ratio of charged offenders was applied to the period before the CIN scheme commenced, then only about one third - 36.4 percent (3,372/9,276) of minor cannabis offenders in WA were formally charged and the remaining 63.6 percent were informally cautioned by the police.

D *Description of Nature of Reform*

Proponents of reform in WA adopted the phrase “prohibition with civil penalties for the personal use of cannabis” to describe the 2004 reforms, possibly in an attempt to bolster the perception that cannabis continued to be illegal.³² However, this phrase may have supported a perception that the government was paving the way for more comprehensive reforms to decriminalise the use of other drugs, as it was accused of going ‘soft’ on drugs.³³ It is our belief that there may have been greater community support for the 2004 reforms if the reforms had been described as ‘partial decriminalisation’, as it could have signalled that the change to drug policy aimed to “reduce

³² Lenton and Allsop, above n 2.

³³ Ben Harvey, ‘Drug reform under fire. New laws stop short of full decriminalisation of cannabis’ *The West Australian*, 9 April 2003; Wendy Pryer, ‘Roberts in dark on drugs let off.’ *The West Australian*, 29 October 2004.

some of the societal costs of complete cannabis prohibition while retaining some of the benefits of criminalising cannabis.”³⁴

E *Inter-agency Management as a Health Problem*

The WA Labor Government stipulated as part of the 2004 reforms that the health sector would perform a major role in dealing with minor cannabis users. The concept of cross-sectoral approaches to drug issues had been an outcome of the five day ‘Community Drug Summit’, held in August 2001,³⁵ encapsulated in its policy ‘Putting People First’.³⁶

There were 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 therapeutic services to drug users. The WA approach having CES provided through the 13 authorised bodies, the State’s 12 Community Drug Service Teams (CDSTs) and the Aboriginal Alcohol and Drug Service, may have limited the effectiveness of the CIN scheme.

This approach in WA can be contrasted with a cannabis specific program in the ACT (Effective Weed Control) that had been 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 was intentionally located in community health centres, outside specialist service providers as “many people see their cannabis use in quite

³⁴ Wayne Hall and Rosalie Pacula, *Cannabis use and dependence* (Cambridge, Cambridge University Press, 2003) 191.

³⁵ Community Drug Summit, Final report, Vol 1 (Perth, Community Drug Summit Office, 2001).

³⁶ Drug and Alcohol Office, ‘Putting People First: Western Australian Drug and Alcohol Strategy 2002-2005’ (Perth, Drug and Alcohol Office, 2002).

different terms to those people with alcohol and other illicit drug problems”.³⁷

The limitations of locating the CES and other programs which targeted those concerned about their use of cannabis within CDSTs have also been noted by other commentators:

“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 nine percent of those with cannabis dependence were also diagnosed with alcohol dependence. Furthermore, the vast majority (87 percent) 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.”³⁸

As there are potentially a large number of regular cannabis users this lends support to the proposition that therapeutic support programs for problematic cannabis users should be located within mainstream health services. While it is difficult to identify the number of dependent cannabis users, it has been conservatively suggested that about one in 10 regular users could be dependent. It has also been suggested that “about one in 10 people who ever try cannabis will become dependent on it at some point in their lives.”³⁹ The National Drug Strategy Household Survey estimated in 2004 in WA that 127,290 persons aged 14 years and older had used cannabis in the last month.⁴⁰ These figures taken together with the above estimate that 10 percent of those who use cannabis will become dependent

³⁷ Standing Committee on Health and Community Care, ‘Cannabis use in the ACT’ Report No. 7 (Canberra, Legislative Assembly, 2000, 34).

³⁸ Carolyn Coffey, John Carlin, Louisa Degenhardt, Michael Lynskey, Lena Sanci, and George Patton, ‘Cannabis dependence in young adults: an Australian population study’ (2002) 97 *Addiction* 192.

³⁹ Jan Copeland, Saul Gerber, Paul Dillon and Wendy Swift, ‘Cannabis: Answers to your questions’ (Canberra, Australian National Council on Drugs, 2006) 20.

⁴⁰ Drug and Alcohol Office, Statutory review of the Cannabis Control Act 2003, Report to the Minister for Health: Technical report (Perth, Drug and Alcohol Office, 2007) Table A5-4.

suggests that there could have been about 12,500 dependent cannabis users in WA. However, it may be argued that compulsory educational or therapeutic programs linked to police diversion will not be effective at targeting those for whom drug use is problematic. This is because police are more likely to apprehend young and less experienced recreational cannabis users than regular users, who are likely to be more adept at avoiding police attention.

F *Cannabis-related Health Concerns*

Since the introduction of the 2004 reforms in both the UK and WA, there has been intense and growing debate about whether cannabis-related mental health disorders, in particular psychotic disorders, are an under-recognised problem and whether this is aggravated by changes in the approach to cannabis, such as infringement schemes or warnings schemes. The introduction of the policy of ‘escalation of consequences’ in the UK from January 2009 reflects the government’s perception that cannabis related mental health disorders are related to the perceived increase in availability and use of higher potency cannabis. Following the 2009 changes, the UK has moved towards the greater use of sanctions through a Penalty Notice for Disorder (PND) for second offences and of charging offenders for a third offence. It is, however, debatable whether the adoption of escalated punitive consequences was justified given an extensive body of evidence from a range of jurisdictions that cannabis use has not been deterred by increasingly severe penalties.⁴¹

Despite intense debate, the UK Government has made limited changes to the principles of the system of warnings. On two occasions the UK government requested that the Advisory Council

⁴¹ Nicholas Dorn and Alison Jamieson A (eds), *European drug laws: the room for manoeuvre* (London, DrugScope, 2001); Charles Manski, John Pepper and Carol Petrie (eds), *Informing America’s policy on illegal drugs: What we don’t know keeps hurting us* (Washington, DC, National Academy Press, 2001); Robert MacCoun and Peter Reuter, *Drug war heresies: Learning from other vices, times & places* (New York NY, Cambridge University Press, 2001).

on the Misuse of Drugs (ACMD) review its initial recommendation in March 2002 that cannabis be reclassified from a Class B to a Class C drug under the *Misuse of Drugs Act 1971*.⁴² However, in both the first review released in December 2005 and the second review released in March 2008, the ACMD reaffirmed the advice it had provided to the former Home Secretary David Blunkett.⁴³ When the ACMD released its second report, its Chairman, Professor Michael Rawlins, in rebutting the government's contention that cannabis was sufficiently harmful for its classification to revert to a Class B drug, pointed out that:

“[T]he 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”.⁴⁴

In May 2008 the Home Secretary announced she would nevertheless reclassify cannabis as a Class B drug. Subsequently the Home Office Minister, Alan Campbell, also emphasised 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.⁴⁵

⁴² Advisory Council on the Misuse of Drugs, ‘The classification of cannabis under the Misuse of Drugs Act 1971’ (London, Home Office, 2002).

⁴³ Francis Elliott and Richard Ford, ‘Gordon Brown planning clampdown on cannabis over health concerns’ *TimesOnline*, 9 January 2008, <www.timesonline.co.uk/toi/news/politics/article3156255.ece>; Andrew Porter, ‘Gordon Brown’s tough stance on cannabis’ *Telegraph*, 11 January 2008.

⁴⁴ Advisory Council on the Misuse of Drugs, ‘Cannabis: classification and public health’ (London, Home Office, 2008).

⁴⁵ Alan Campbell, ‘Home Office minister cited in ‘Cannabis Law change “illogical”’, *BBC News*, 26 January 2009, <http://news.bbc.co.uk/2/hi/uk_news/7850342.stm>.

The perception in Australia that there is a link between the greater use of hydroponic cannabis, increased potency and mental health harms has fuelled calls for the re-imposition of more restrictive laws and penalties.⁴⁶ These issues have also been a factor in the establishment of Parliamentary inquiries in New Zealand (NZ) in 1998 by the Health Committee of the House of Representatives and a further inquiry in 2003 into public health issues and of measures to regulate cannabis use.⁴⁷ There has also been concern related to the increased availability of hydroponically cultivated cannabis and the involvement of organised crime groups in the production and distribution of this form of cannabis.⁴⁸

These concerns have resulted in a number of jurisdictions amending their legislation to make artificially assisted or hydroponic cultivation of cannabis a more serious offence compared with plants which been cultivated outdoors ('bush cannabis'). For instance, in February 2003 plants which had been grown by 'artificially enhanced cultivation' were excluded from the CEN scheme in SA and in June 2004 the ACT excluded hydroponically or artificially cultivated plants. In WA the CCA added Section 7A to the MDA, which from March 2004 made it an offence for a person to sell any thing used to 'cultivate cannabis by hydroponic means'.

⁴⁶ Hall and Pacula, above n 34; Greg Swensen, *The 2004 cannabis law reforms in Western Australia and the United Kingdom: A case of too much caution?* (Saarbrücken, Germany, VDM Verlag, 2008).

⁴⁷ Health Committee, 'Inquiry into the mental health effects of cannabis' (Wellington, New Zealand, House of Representatives, 1998) (Chairman Neeson); Health Committee, 'Inquiry into the public health strategies related to cannabis use and the most appropriate legal status' (Wellington, New Zealand, House of Representatives, 2003) (Chadwick Chairman).

⁴⁸ Greg Englert, 'When a house is not a home: Asian operated hydroponic cannabis cultivation' (2007) 61 (March) *Australian Police Journal* 16-19; Imre Salusinszky and Tom Richardson, '10 years jail for growers of hydroponic marijuana' *Weekend Australian*, 4-5 February 2006.

G *Future Directions*

Following the passage of the Cannabis Reform Bill 2009 in October (the legislation is awaiting validation by the Legislative Assembly of minor amendments made by the Government in the Legislative Council), a cannabis cautioning scheme will commence operation in WA in the near future. The scheme will fulfil the Liberal Government's policy announcements prior to its election in September 2008 that it would repeal the CCA and amend the *Misuse of Drugs Act 1981* (MDA) as part of a toughened law and order approach.

The re-introduction of conditional cautioning, as well as the criminalisation of the sale or display of cannabis smoking paraphernalia⁴⁹ could be simplistically explained by the change in Government in September 2008 from Labor to the Barnett Liberal-National Government. More complex rationales, which were put forward in Parliament during debate on the Cannabis Law Reform Bill 2009, include that the CIN scheme meant offenders avoided being inflicted with a sufficient penalty or consequence, the scheme did not deter cannabis use, and that cannabis is a harmful drug and offenders should attend educational and treatment programs.⁵⁰

The amended *Misuse of Drugs Act 1981* (MDA) will now have a new offence related to cannabis smoking paraphernalia, with a penalty of a fine of up to \$5,000 for selling or displaying such items. It also provides police the power to require attendance at a 'cannabis intervention requirement' (CIR) in lieu of a person being charged with either the possession of cannabis smoking paraphernalia on

⁴⁹ Prior to the passage of the Cannabis Law Reform Bill 2009 only the possession of used paraphernalia was an offence in WA.

⁵⁰ See, eg, Western Australian Parliamentary Debates, Legislative Assembly: 14 October 2009, 8022 – 8024; 17 November 2009, 9147 – 9155; 21 April 2010, 1936 – 1945, 1957 – 1965; 5 May 2010, 2477 – 2483; 12 August 2010, 5522-5543; 17 August 2010, 5590-5592; 9 September 2010, 6247-6248; 14 September 2010, 6452-6462, 6524-6548; 15 September, 6624-6636; 16 September 2010, 6742-6760; 23 September 2010, 7217.

which there are detectable traces of cannabis (Section 5(1)(d)(i) MDA) or possession of not more than 10 grams of cannabis (Section 6(2) MDA).⁵¹ Furthermore, the amended MDA provides a framework of consequences if a person fails to attend and complete a prescribed ‘cannabis intervention session’ (CIS), as under the requirements of the CIR. Police can charge the person with the original offence, which in the case of s 5(1)(d)(i) has a fine of up to \$3,000 or imprisonment for up to three years or both, or in the case of s 6(2) has a fine of up to \$2,000 or imprisonment for up to two years or both.

Of interest, although the Liberal Government has maintained an emphasis on a stronger law and order approach, this has involved a degree of selectiveness in relation to minor offending. In September 2010 it announced its intention to expand the use of infringements for people who have committed ‘minor criminal offences’, such as stealing and disorderly behaviour, which are contained in the Criminal Code.⁵² This appears to run counter to the approach that the Government had adopted in relation to minor cannabis offences, with the repeal of the CCA and the infringement notice scheme. Given this new approach to minor criminal offences and the positive findings of the CIN scheme in the Statutory Review of 2007 it seems puzzling that there is such a lack of support for the CIN scheme. However, as we have noted the lack of support from the community, from those in the health or drug treatment field and particularly from the police who had the day to day responsibility for implementing the scheme meant that the CIN scheme was destined to be repealed.

⁵¹ Liberal Party of WA, ‘Liberal government to smash Labor’s soft drug stance’ 2008; Yasmine Phillips, ‘Drug laws “back to dark ages”’ *The West Australian*, 31 October 2008; Joe Spagnolo, ‘Premier Colin Barnett’s war on drugs’ *PerthNow*, 3 January 2009, <www.news.com.au/perthnow/story/0,21598,24868863-948,00.html>; Robert Taylor, ‘Cannabis plan fails to enthuse voters’ *The West Australian*, 13 June 2009.

⁵² Rob Johnson, ‘Police to give on-the-spot fines for minor crimes’ Media statement, 8 September 2010, <<http://www.mediastatements.wa.gov.au/Pages/WACabinetMinistersSearch.aspx?ItemId=133973&minister=Johnson&admin=Barnett>>.

V CONCLUSION

A number of issues and common themes have been identified from the review of the reforms implemented in relation to minor cannabis offences in 2004. The first lesson is that police discretion is an important determinant of whether police actively support minor cannabis offenders being dealt with outside the criminal justice system. In WA, police appear to have not been willing to support the CIN scheme as it highly circumscribed their discretion and required the maintenance of a sophisticated recording system to monitor compliance and identify defaulters. The complexity of the CIN scheme with regard to the thresholds for possession of cannabis also meant police perceived that they had to devote substantial resources to weighing any cannabis seized to determine the relevant thresholds. Police were also required to verify an offender's identity, to determine their age (as juveniles were not able to receive a CIN) and whether they had previously received a CIN. This contrasts with the UK system which mandates that police should issue a warning which, as a rule, should be delivered where the offence was detected. There is also reliance on a large degree of discretion in determining whether the amount of cannabis was judged to be a "small amount intended for personal use".

The second lesson is that the proponents of the CIN scheme appear to have overstated the importance of the role of the health sector in changing cannabis using behaviours or attitudes. The new piece of legislation sought to link the reforms to a broader agenda redefining some drug law enforcement activities 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 about the underlying objectives. However, 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 health sector needed to have mounted a well developed approach that sought to engage problematic cannabis

users to seek assistance through mainstream providers, involving for instance similar strategies as had been developed over some years in relation to assisting long term and dependent tobacco smokers to quit.

The third lesson relates to a perception that offenders were in effect being ‘let off’ as they were not required to undertake a mandated education session or to pay the prescribed penalty. To overcome this perception and to assuage community concern there needed to be a much clearer articulation of the scope of the reforms. One might have expected that the government would have encouraged debate and supported educational strategies that specifically sought to answer and respond to widely held popular concerns about cannabis, such as that it is a ‘stepping stone’ to more serious drugs⁵³ and that cannabis causes psychosis and other mental health issues.⁵⁴ Rather than packaging the reform of minor cannabis offences as part of a health agenda as was the case in WA, in the UK the introduction of cannabis warnings was located within a framework of other policing reforms which aimed to improve relations between the police and young people, especially those from disadvantaged communities. This led to greater community acceptance because it was not packaged as a completely new approach for dealing with cannabis and did not cause such concern that the approach was part of a wider drug reform agenda.

The repeal of the CIN scheme and its replacement by a cautioning scheme to compel first time minor cannabis offenders to attend a therapeutic intervention as a condition for receiving a formal caution means that in WA the role of the criminal law has resurfaced as the preferred approach for addressing a complex problem. This will mean that WA will have a more restrictive approach towards dealing

⁵³ Lynn Zimmer and John Morgan, *Marijuana myths, marijuana facts* (NY, Lindesmith Centre, 1997).

⁵⁴ Jennifer McLaren, Jim Lemon, Lisa Robins and Richard Mattick, ‘Cannabis and mental health: put into context’ (NDS Monograph No. 68. Canberra, Department of Health & Ageing, 2008).

with minor cannabis offenders than the UK's system of cannabis warnings. The abandonment of expiation for minor cannabis offences suggests the community has a deep ambivalence about cannabis law reform and that proponents of reform will need to 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, if the fraught approach of trying to locate reform within a wider health framework were to be followed, it would be essential that a broad spectrum of mainstream health providers are involved in providing assistance and support to those concerned about their use of cannabis.