

# Chapter 6

## New Zealand's international obligations

### SUMMARY

This chapter summarises the international legal framework and the obligations that New Zealand must take into account in formulating domestic drug policy. One of the key issues is the extent to which the conventions require parties to criminalise personal use of controlled drugs.

**INTRODUCTION** 6.1 As a party to three United Nations drug conventions, New Zealand has undertaken to impose controls on narcotic drugs and psychotropic substances in its own territory and to co-operate with other countries to combat the trafficking of drugs. In many areas, the obligations are specific and reasonably clear-cut. In other areas, including some obligations to prohibit conduct through the criminal law, there is both more latitude and less certainty.

6.2 This chapter summarises the international legal framework and the obligations that New Zealand must take into account in formulating domestic drug policy. One of the key issues is the extent to which the conventions require parties to criminalise personal use of controlled drugs.<sup>360</sup>

### THE UNITED NATIONS CONVENTIONS

6.3 New Zealand is a party to the following United Nations drug conventions:

- Single Convention on Narcotic Drugs 1961, as amended by the 1972 Protocol (the 1961 Convention);
- Convention on Psychotropic Substances 1971 (the 1971 Convention);
- Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (the 1988 Convention).

<sup>360</sup> In this chapter, “controlled drugs” is used as a collective term for both “narcotic drugs” governed by the Single Convention on Narcotic Drugs (30 March 1961) 520 UNTS 151 [1961 Convention] and “psychotropic substances” governed by the Convention on Psychotropic Substances (21 February 1971) 1019 UNTS 175 [1971 Convention].

## Single Convention on Narcotic Drugs 1961

- 6.4 In the first half of the 20<sup>th</sup> century, several international treaties were adopted to control addictive drugs such as opium, cocaine and derivatives. Following the establishment of the United Nations (UN) after World War II, the UN's Economic and Social Council began to develop a single treaty that would consolidate all previous drug treaties<sup>361</sup> and provide a durable framework for international co-operation in drug control. The result was the Single Convention on Narcotic Drugs 1961.
- 6.5 The Convention, which covers over 100 drugs,<sup>362</sup> essentially consolidated a policy of prohibition at the international level and committed parties to adopting additional measures to implement prohibition in respect of a broader range of drugs. It requires parties to establish controls over the production, cultivation, supply, import, export, possession and use of narcotic drugs. There is specific regulation of the opium poppy, the coca bush and the cannabis plant.<sup>363</sup> Co-operative action against illicit traffic is mandated. The Convention requires parties to establish criminal offences for specified conduct contrary to its provisions.<sup>364</sup> Parties must take all necessary measures to limit the use of specified narcotic drugs<sup>365</sup> to medical and scientific purposes and to co-operate in doing so.<sup>366</sup>
- 6.6 The Convention also establishes the UN's organisational framework for oversight and administration of the Convention, including specific functions for the World Health Organisation (WHO),<sup>367</sup> the Commission on Narcotic Drugs (CND)<sup>368</sup> and the International Narcotics Control Board (INCB).<sup>369</sup> Countries are required to report annually to the INCB on the quantities of drugs to be produced, stocked and consumed for legitimate purposes<sup>370</sup> and to provide other information as requested by the CND.<sup>371</sup>
- 6.7 The 1972 Protocol amending the Single Convention restated the importance of international co-operation against illicit traffic and stressed the need for treatment and rehabilitation services for drug addicts.

361 Article 44 of the 1961 Convention, *ibid*, lists the treaties that the Convention replaced.

362 These were divided into four schedules with some differences in the controls that applied to the drugs in the different schedules. This is discussed in chapter 5.

363 1961 Convention, above n 360, arts 21–28.

364 *Ibid*, art 36.

365 Drugs covered by the 1961 Convention are listed in Schedules I-IV to the Convention and are known as the “Yellow List”. See [www.incb.org/incb/yellow\\_list.html](http://www.incb.org/incb/yellow_list.html) (accessed 27 January 2010) for the current list.

366 1961 Convention, above n 360, art 4.

367 *Ibid*, art 3.

368 *Ibid*, art 8.

369 *Ibid*, arts 9 and 14.

370 *Ibid*, art 19.

371 *Ibid*, art 18.

### Convention on Psychotropic Substances 1971

- 6.8 The 1971 Convention responded to the rapid growth in the production and use of hallucinogens (such as LSD and mescaline), stimulants (such as amphetamines), and depressants (such as barbiturates, sleeping pills and tranquillisers), most of which were not covered or able to be brought under the 1961 Convention. The 1971 Convention established a companion control regime for the substances listed in its four Schedules.<sup>372</sup>
- 6.9 The Preamble to the Convention expresses the parties' determination to combat illicit traffic and abuse of such substances, while recognising that their use for medical and scientific purposes remains "indispensable". Parties are required to adopt appropriate measures to limit manufacture, export, import, trade, distribution, use and possession to such purposes.<sup>373</sup> Like the 1961 Convention, the controls adopted by each country are to be supported by criminal offences.<sup>374</sup> WHO, CND and INCB also have similar functions as under the 1961 Convention.<sup>375</sup>

### Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

- 6.10 The 1988 Convention represented a major change of emphasis by the UN. Parties to the 1988 Convention resolved to adopt a wide range of criminal law measures directed specifically at illicit traffic and the economic base that supports it. At the forefront of the Convention are strengthened penal provisions that expressly require criminalisation of the organisation and financing of drug crime, and of money laundering.<sup>376</sup> Parties are required to adopt further measures to extend jurisdiction over their nationals,<sup>377</sup> ensure all serious offences are extraditable,<sup>378</sup> confiscate profits,<sup>379</sup> provide mutual legal assistance,<sup>380</sup> and maintain high levels of communication and co-operation.<sup>381</sup>
- 6.11 The Convention also extended the scope of international drug control by requiring parties to impose controls over specified precursor substances<sup>382</sup> commonly used in the creation of controlled drugs – for example, ephedrine and pseudoephedrine.<sup>383</sup> The CND and INCB were also given additional responsibilities.<sup>384</sup>

372 The list of psychotropic substances covered by the 1971 Convention is referred to as the "Green List". See [www.incb.org/incb/green\\_list.html](http://www.incb.org/incb/green_list.html) (accessed 27 January 2010).

373 Compared to article 4 of the 1961 Convention, this central obligation is stricter in respect of Schedule I substances (see 1971 Convention, above n 1, art 5(2)) and arguably weaker in respect of substances listed in Schedules II-IV (see 1971 Convention, above n 360, art 7).

374 1971 Convention, above n 360, art 22.

375 See *ibid*, arts 2, 3 and 17–19.

376 Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 95, art 3 [1988 Convention].

377 *Ibid*, art 4.

378 *Ibid*, art 6.

379 *Ibid*, art 5.

380 *Ibid*, art 7.

381 *Ibid*, art 9.

382 Precursor substances that are subject to the 1988 Convention are listed in the "Red List": [www.incb.org/incb/red\\_list.html](http://www.incb.org/incb/red_list.html) (accessed 27 January 2010).

383 1988 Convention, above n 376, art 12.

384 *Ibid*, arts 22 and 23.

INTERNATIONAL  
DRUG CONTROL:  
ADMINISTRATION

- 6.12 The UN system of international drug control is administered by a number of organisations. The United Nations Economic and Social Council (ECOSOC) is responsible for developing and maintaining the international drug control system. ECOSOC can call international conferences and prepare draft conventions for submission.<sup>385</sup> The three conventions and the 1972 Protocol were adopted by conferences called by ECOSOC.
- 6.13 The CND, established by ECOSOC, is the principal body responsible for drug control policy in the UN system. It is elected by and reports to the member states of ECOSOC. It monitors the world drug situation, develops proposals to deal with it, and advises ECOSOC on all matters relating to drug control. That may include developing new treaties or recommending changes to existing treaties. The CND makes decisions, on the basis of recommendations by the WHO, to amend the Schedules of narcotic drugs and psychotropic substances.<sup>386</sup> It also decides on additions and changes to the Tables of precursor substances in the 1988 Convention based on INCB recommendations.<sup>387</sup>
- 6.14 The WHO is responsible under each of the conventions for providing expert advice on which narcotic drugs and psychotropic substances should be brought under international control.<sup>388</sup>
- 6.15 The INCB was established under the 1961 Convention.<sup>389</sup> It is an independent body and has a mandate to monitor implementation of all three conventions and promote compliance with them. It receives and examines regular statistical reports and other information from all parties to the conventions. The INCB may require a party to provide explanations for apparent non-compliance, and may recommend that a government take remedial measures to address that non-compliance. The INCB cannot issue binding interpretations of the conventions and cannot itself enforce the conventions' provisions. However, the nature of the INCB's role is such that its interpretations of the conventions' requirements nevertheless may be politically, if not legally, persuasive.
- 6.16 The United Nations Office on Drugs and Crime (UNODC) was established in 1997 (as the Office for Drug Control and Crime Prevention) and has broad responsibilities to provide member states with technical assistance, research, analysis and policy development in the fields of illicit drugs, crime and terrorism. UNODC also carries out much of the day-to-day work of the INCB and houses the CND and INCB secretariat.

SUMMARY OF  
INTERNATIONAL  
OBLIGATIONS

- 6.17 The three conventions are not self-executing. Each party must take steps by way of domestic law, enforcement, and administrative measures to comply with the conventions' provisions. Parties must co-operate with each other according to the terms of the conventions.

385 United Nations Charter, arts 62(3) and (4). The three Conventions and the 1972 Protocol were adopted by plenipotentiary conferences called by ECOSOC.

386 1961 Convention, above n 360, art 3; 1971 Convention, above n 360, art 2.

387 1988 Convention, above n 376, art 12.

388 1961 Convention, above n 360, art 3; 1971 Convention, above n 360, art 2.

389 1961 Convention, above n 360, art 9.

- 6.18 Countries must therefore each assess not only what the conventions mean, but how their implementation should be expressed in legislative, administrative and operational terms. In many areas, there is considerable scope for parties to shape national drug policy within the conventions' parameters.
- 6.19 The following section of this chapter summarises the main obligations that New Zealand must discharge, focusing on those that are relevant to our review.

### Coverage and control

- 6.20 The conventions establish a system of controls over the narcotic drugs, psychotropic substances and precursor substances listed in their Schedules and Tables.<sup>390</sup> The controls vary depending on the categorisation of the drug or substance.

#### *1961 Convention – narcotic drugs*

- 6.21 The 1961 Convention covers over 100 drugs<sup>391</sup> categorised into four overlapping Schedules.<sup>392</sup>
- 6.22 The key features and requirements of the Convention shaped the regulatory framework for drugs in New Zealand that is contained in the Misuse of Drugs Act 1975 and related legislation, such as the Medicines Act 1981. With the exception of a short list of “preparations” in Schedule III (which are only subject to rather loose regulatory requirements), these requirements include the following:
- manufacture, trade, import, export, distribution, possession, and use must be limited to medical and scientific purposes;<sup>393</sup>
  - manufacture, trade, import, and export can only be conducted by government organisations or under licence;<sup>394</sup>
  - supply to individuals requires a medical prescription (for drugs other than those in Schedule II);<sup>395</sup> and
  - possession is not permitted except under lawful authority.<sup>396</sup>

#### *1971 Convention – psychotropic substances*

- 6.23 As with the 1961 Convention, the 1971 Convention has four Schedules of controlled substances, subject to different levels of restriction. While the 1971 Convention covers a different group of drugs from that covered by the 1961 Convention, it imposes very similar requirements in relation to these drugs to those imposed by the earlier Convention. The manufacture, trade, import,

390 See 1961 Convention, above n 360, art 2; 1971 Convention, above n 1, art 2; 1988 Convention, above n 376, art 12.

391 Drugs commonly used in industry for other than medical or scientific purposes are exempt from the provisions of the Convention provided that the drugs are rendered safe for use – 1961 Convention, above n 360, art 2(9).

392 Ibid, art 3 describes the criteria for additions and amendments to the Schedules.

393 Ibid, art 4.

394 Ibid, arts 29–31. Licensees and senior persons in government organisations must be adequately qualified to carry out duties in accordance with the law – article 34(2).

395 Ibid, art 30(2)(b(i)).

396 Ibid, art 33.

export, distribution, possession and use of these substances must be limited to medical and scientific purposes.<sup>397</sup> It is “desirable” that parties not permit possession of such substances except under legal authority.<sup>398</sup>

- 6.24 Together with the requirements imposed by the 1961 Convention, these key elements of the 1971 Convention are reflected in New Zealand’s legal framework, including the Misuse of Drugs Act.

#### *1988 Convention – precursors and materials*

- 6.25 The 1988 Convention focuses on precursor substances commonly used for the purpose of illicit manufacture of controlled drugs.<sup>399</sup> These substances are listed in two Tables to the Convention. Parties must take “appropriate” measures to prevent controlled precursors being diverted into illicit traffic and co-operate accordingly.<sup>400</sup> Parties must also take “appropriate” measures to monitor the manufacture and distribution of precursors within their own territory.<sup>401</sup> In particular, they must maintain systems for monitoring international trade; identifying and reporting suspicious transactions; documenting and labeling imports and exports; and seizing precursors used in illicit manufacture.
- 6.26 In addition to the regulation of precursors, the Convention also requires parties to take “appropriate” measures to prevent trade in and diversion of materials and equipment used to produce controlled drugs.<sup>402</sup>
- 6.27 The 1988 Convention also aims to reinforce controls already established by the 1961 and 1971 Conventions,<sup>403</sup> particularly those concerned with illicit cultivation. Parties must adopt appropriate measures to prevent illicit cultivation of and eradicate plants containing narcotic drugs and psychotropic substances.<sup>404</sup> Such measures must respect fundamental human rights and traditional licit uses, as well as protect the environment.<sup>405</sup> However, these measures must not be less stringent than the controls on cultivation required by the 1961 and 1971 Conventions.<sup>406</sup>
- 6.28 Alongside the many supply control measures in the three conventions, the 1988 Convention introduces a general obligation to adopt appropriate measures aimed at reducing illicit demand for controlled drugs, “with a view to reducing human

397 1971 Convention, above n 360, arts 2(7)(a), 5(2) and 7.

398 Ibid, art 5(3). This is a weaker requirement than the 1961 Convention’s plain statement (article 33) that parties “shall not permit” possession of narcotic drugs except by legal authority

399 1988 Convention, above n 376, art 12.

400 Ibid, art 12(1).

401 Ibid, art 12(8)(a). Subparagraph (b) suggests, but does not require, regulation by way of licensing.

402 Ibid, art 13.

403 See also *ibid*, art 16, which reinforces the export documentation requirements established by the earlier Conventions.

404 Ibid, art 14(2).

405 Ibid.

406 Ibid, art 14(1).

suffering and eliminating incentives for illicit traffic”.<sup>407</sup> No specific measures are mandated, however, and none are indicated in the official United Nations Commentary on the 1988 Convention.<sup>408</sup>

### Criminal law measures

- 6.29 The system of controls established by the three conventions is reinforced by requirements to establish and use a range of criminal law measures. In the 1961 and 1971 Conventions, the measures are concerned primarily with offences and punishment. As outlined earlier, the 1988 Convention is concerned specifically with illicit traffic and seeks to tackle it with a comprehensive law enforcement response at the national and international level.

### *Criminal offences*

- 6.30 Each of the conventions requires parties to criminalise specified conduct.
- 6.31 The 1961 and the 1971 Conventions require parties, subject to their constitutional limitations, to treat as “punishable offences” certain conduct that is committed intentionally.
- 6.32 In the 1961 Convention, a wide range of prohibited conduct is specified:<sup>409</sup>
- [C]ultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention.
- 6.33 In the 1971 Convention, the definition of prescribed conduct is less clear:<sup>410</sup>
- [A]ny action contrary to a law or regulation adopted in pursuance of [a party's] obligations under this Convention.
- 6.34 Both Conventions provide that the offences are to include all forms of secondary participation (for example, aiding, inciting, counselling), conspiracies, attempts, and preparatory acts.<sup>411</sup> Countries have wide discretion to formulate such provisions according to their domestic criminal law principles.<sup>412</sup>
- 6.35 The 1988 Convention is much more extensive in its coverage. It requires “criminal offences” to be established to cover two categories of proscribed conduct.

407 Ibid, art 14(4)

408 United Nations *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1998).

409 1961 Convention, above n 360, art 36(1)(a).

410 1971 Convention, above n 360, art 22(1)(a).

411 1961 Convention, above n 360, art 36(2)(a)(ii); 1971 Convention, above n 360, art 22(2)(a)(ii).

412 The obligation is “subject to the constitutional limitations of a Party, its legal system and domestic law.” See 1961 Convention, above n 360, art 36(2); 1971 Convention, above n 360, art 22(2).

6.36 Paragraph 1 offences<sup>413</sup> cover the following matters:

- Production and distribution:
  - (a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any controlled drug contrary to the provisions of the 1961 and 1971 Conventions;<sup>414</sup>
  - (b) the possession or purchase of any controlled drug for the purpose of any of the activities in (a);<sup>415</sup>
- Cultivation:
  - (c) cultivating the opium poppy, coca bush or cannabis plant contrary to the 1961 Convention;<sup>416</sup>
- Precursors, equipment and materials:
  - (d) the manufacture, transport or distribution of equipment, materials or listed precursor substances, knowing they are to be used for the illicit cultivation, production or manufacture of controlled drugs;<sup>417</sup>
  - (e) possession of equipment, materials or listed precursor substances, knowing they are to be used for the illicit cultivation, production or manufacture of controlled drugs;<sup>418</sup>
- Organisation and financing:
  - (f) the organisation, management or financing of any of the activities in (a)–(d);<sup>419</sup>
- Money laundering:<sup>420</sup>
  - (g) knowing that property is derived from any offence in respect of the activities in (a)–(d) and (f):
    - (i) converting or transferring the property for the purpose of hiding or disguising its illicit origin or helping anyone involved in the offence to evade justice;<sup>421</sup>
    - (ii) hiding or disguising the true nature, source, location, disposition, movement, rights with respect to, or ownership of the property;<sup>422</sup>
    - (iii) acquiring, possessing or using the property.<sup>423</sup>

413 1988 Convention, above n 376, art 3(1)(a)–(c).

414 Ibid, art 3(1)(a)(i).

415 Ibid, art 3(1)(a)(iii).

416 Ibid, art 3(1)(a)(ii).

417 Ibid, art 3(1)(a)(iv).

418 Ibid, art 3(1)(c)(ii).

419 Ibid, art 3(1)(a)(v).

420 Ibid, arts 3(1)(b)(i)–(ii) and (c)(i).

421 Ibid, art 3(1)(b)(i).

422 Ibid, art 3(1)(b)(ii).

423 Ibid, art 3(1)(c)(i).

- 6.37 Paragraph 1 also requires that offences fully cover all acts of participation, attempt and conspiracy, as well as “public” incitement or inducement to commit any of the prescribed offences.<sup>424</sup> These requirements and the offences in (e) and (g)(iii) above are subject to a party’s “constitutional principles and the basic concepts of its legal system”.
- 6.38 Paragraph 2 is concerned just with the establishment of “personal use” offences in respect of:<sup>425</sup>
- [T]he possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.
- 6.39 The requirement to establish these “personal use” offences is also subject to a party’s “constitutional principles and the basic concepts of its legal system”.<sup>426</sup>
- 6.40 Additional provisions are included to bolster and support the prosecution of offences. These include, for example, the requirement that parties shall, where appropriate, establish a long limitation period for the prosecution of paragraph 1 offences and an even longer period for those who have evaded justice.<sup>427</sup>

#### *Sentencing and punishment*

- 6.41 Alongside the description of required offences, the three conventions give considerable attention to the punishment and treatment of offenders.
- 6.42 The 1961 and 1971 Conventions strike a balance between punishment and rehabilitation. “Serious” offences are to be “adequately” punished, particularly by imprisonment or other loss of liberty.<sup>428</sup> However, for offences by drug users, rehabilitative measures (for example, treatment, education, after-care or social reintegration) may be considered as an alternative or in addition to conviction or punishment.<sup>429</sup>
- 6.43 In the 1988 Convention, rehabilitative measures as an alternative to conviction or punishment are confined to the paragraph 2 personal use offences and “appropriate cases of a minor nature” involving paragraph 1 offences.<sup>430</sup> In all other paragraph 1 cases, rehabilitative measures are permissible only in addition to conviction or punishment.<sup>431</sup> Use of such measures may, however, be considered in respect of all offenders, not just drug users.
- 6.44 The 1988 Convention therefore places a strong emphasis on punishment in relation to paragraph 1 offences. First, there is a general statement that sanctions are to correspond to the “grave nature” of paragraph 1 offences, in particular through use of imprisonment and other deprivations of liberty, pecuniary

424 *Ibid*, arts 3(1)(c)(iii) and (iv).

425 *Ibid*, art 3(2).

426 *Ibid*.

427 *Ibid*, art 3(8).

428 1961 Convention, above n 360, art 36(1)(a); 1971 Convention, above n 360, art 22(1)(a).

429 1961 Convention, above n 360, art 36(1)(b); 1971 Convention, above n 360, art 22(1)(b).

430 1988 Convention, above n 376, arts 3(4)(c) and (d).

431 *Ibid*, art 3(4)(b).

sanctions, and confiscation.<sup>432</sup> This is reinforced by a requirement that courts and other competent authorities take into account aggravating factors that render some paragraph 1 offences “particularly serious”.<sup>433</sup> These factors are:

- involvement in the offence of an organised crime group to which the offender belongs;
- the offender’s involvement in other organised crime activities;
- the offender’s involvement in other illegal activities facilitated by the drug offending;
- use of violence or arms;
- the offence being connected to a public office held by the offender;
- victimisation or use of minors;
- commission of the offence in or near a prison, educational establishment or social service facility or in other places used by school children and students for sport, leisure or education;
- prior convictions, whether foreign or domestic, to the extent permitted by domestic law.<sup>434</sup>

6.45 Finally, authorities responsible for releasing offenders from penal custody are also to “bear in mind” the serious nature of paragraph 1 offences and the presence of the specified aggravating factors when considering parole or early release.<sup>435</sup>

#### *Other criminal law measures*

6.46 The conventions contain a number of provisions which encourage effective international co-operation to aid the enforcement of the criminal law requirements in the conventions. These include:

- issues of jurisdiction and a general strengthening of requirements relating to extradition;<sup>436</sup>
- endorsement of the technique of “controlled delivery” (the incorporation of this technique into the Misuse of Drugs Amendment Act 1978 is discussed in further detail in chapter 14);<sup>437</sup>
- mutual legal assistance in the investigation, prosecution, and adjudication of offences;<sup>438</sup>
- transfer of proceedings between parties where this is in the interests of the “proper administration of justice”.<sup>439</sup>

432 Ibid, art 3(4)(a).

433 Ibid, art 3(5)(a)–(h).

434 Subject to similar qualifications, the 1961 and 1971 Conventions also provide for foreign convictions to be taken into account for the purpose of establishing recidivism. See 1961 Convention, above n 360, art 36(2)(a)(iii); 1971 Convention, above n 360, art 22(2)(a)(iii).

435 1988 Convention, above n 376, art 3(7).

436 1961 Convention, above n 360, art 36; 1971 Convention, above n 360, art 22; 1988 Convention, above n 376, arts 4 and 6.

437 1988 Convention, above n 376, art 11.

438 Ibid, art 7.

439 Ibid, art 8.

### Problem limitation

- 6.47 The conventions also include stand-alone provisions with a “problem limitation” or “harm reduction”<sup>440</sup> character. They are not prominent but they do constitute clear obligations that need to be read together with the controls and criminal law measures outlined above.
- 6.48 The 1961 Convention requires parties to “take all practicable measures for the prevention of the abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration” of drug users.<sup>441</sup> The 1971 Convention extends this obligation to the abuse of psychotropic substances.<sup>442</sup>
- 6.49 As highlighted earlier, rehabilitation may also be used in the enforcement of the criminal law.

### Other obligations under the conventions

- 6.50 The conventions also require parties to take other miscellaneous measures to support the system of international drug control, including requirements to:
- report on implementation of and compliance with the conventions, and on developments in drug use and drug crime;<sup>443</sup>
  - co-operate with other parties in preventing and repressing illicit traffic in drugs;<sup>444</sup>
  - maintain a “special administration” for the purpose of applying the provisions of the conventions;<sup>445</sup>
  - ensure that controlled drugs and equipment used in the commission of offences are liable to seizure and confiscation<sup>446</sup> and adopt measures to enable confiscation of not only controlled drugs but also the proceeds and instruments of paragraph 1 offences.<sup>447</sup>
- 6.51 There are also provisions to deal with identification, tracing, freezing and seizure of proceeds and instruments liable to confiscation, and mutual assistance in the execution of the confiscation process.<sup>448</sup>

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440 These concepts are not separately defined in any of the Conventions.

441 1961 Convention, above n 360, art 38(1).

442 1971 Convention, above n 360, art 20(1).

443 1961 Convention, above n 360, arts 3 and 18; 1971 Convention, above n 360, arts 2, 3 and 16; 1988 Convention, above n 376, arts 5, 12 and 20.

444 1961 Convention, above n 360, art 35; 1971 Convention, above n 360, art 21; 1988 Convention, above n 376, arts 10, 15 and 17–19.

445 1961 Convention, above n 360, art 17; 1971 Convention, above n 360, art 6.

446 1961 Convention, above n 360, art 37; 1971 Convention, above n 360, art 22(3).

447 1988 Convention, above n 376, art 5(1).

448 *Ibid*, art 5.

6.52 This section considers the application of the penal provisions to activities involving personal use of controlled drugs.

### Personal use

6.53 The overarching obligation in the 1961 and 1971 Conventions is to limit the use of drugs to medical and scientific purposes. Parties may rely on a range of legislative and administrative measures to achieve this end, including criminalisation of conduct related to personal use (such as possession, purchase, or cultivation). However, there is no requirement in the conventions to criminalise the use of drugs per se.<sup>449</sup> “Use” is not mentioned in either article 36 of the 1961 Convention or in article 3 of the 1988 Convention.

### Possession for personal use

#### *Commentaries on the Conventions*

6.54 The official UN Commentary on the 1961 Convention<sup>450</sup> acknowledges that governments take different views about whether simple possession must be criminalised and does not attempt to resolve the difference. The Commentary does, however, make it plain that parties must nevertheless take such measures as are necessary to limit the use of drugs to medical or scientific purposes, in accordance with their fundamental obligations under article 4, and cannot therefore legally authorise possession and use for other purposes.

6.55 The Commentary on article 4 of the Convention, which requires that possession be limited to medical or scientific purposes, includes the following passages:

18. Article 4, paragraph (c), undoubtedly refers to both kinds of possession; but whether that provision must be implemented by imposing penal sanctions on possession for personal consumption is a question which may be answered differently in different countries. Some Governments seem to hold that they are not bound to punish addicts who illegally possess drugs for their personal use...

19. Parties ... which hold that possession of drugs for personal consumption must be punished under article 36, paragraph 1, may undoubtedly choose not to provide for imprisonment of persons found in such possession, but to impose only minor penalties such as fines or even censure...

21. It has ... been pointed out ... that the penalisation of all unauthorised possession of drugs, including that for personal use, facilitates the prosecution and conviction of traffickers, since it is very difficult to prove the intention for which the drugs are held...It may also be remarked that constitutional limitations, which can free a Party from all obligation to punish an action mentioned in article 36, paragraph 1, will generally not prevent the penalisation of the unauthorised possession of drugs.

22. It may finally be mentioned that Parties must prevent the possession of drugs for other than medical and scientific purposes by all the administrative measures which they are bound to adopt under the terms of the Single Convention, whatever may be

449 Use of controlled drugs is, however, currently an offence under New Zealand law by virtue of section 7(1)(a) of the Misuse of Drugs Act 1975.

450 United Nations *Commentary on the Single Convention on Narcotic Drugs* (1962).

their view on their obligation to resort to penal sanctions or on the kind of punishment which they should impose.

23. What has been said in regard to the need for penal sanctions for limiting the possession of controlled drugs exclusively to medical and scientific purposes pursuant to article 4, paragraph (c), also applies to the obligation of Parties under article 33 not to permit the possession of drugs except under legal authority.

6.56 It might be thought that article 3, paragraph 2 of the 1988 Convention resolved the doubt by expressly requiring the establishment of offences for “possession, purchase or cultivation of narcotic drugs and psychotropic substances for personal consumption.”

6.57 The official Commentary, published 10 years after the 1988 Convention was adopted, did not dwell long on the topic.<sup>451</sup> After noting the Commentary on the 1961 Convention, and uncertainty about the treatment of possession under the 1971 Convention, the authors of the 1998 Commentary said that the text of the 1988 Convention reflected several compromises:

- inclusion of the “safeguard” clause referring to constitutional principles and the basic concepts of a party’s legal system;
- the statement that the conduct must be contrary to the provisions of the earlier conventions;
- the separation of possession offences from the production and trafficking offences in paragraph 1.

6.58 In summing up the position, however, the 1988 Commentary appears to be unequivocal:

It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence. Rather, it approaches the issue of non-medical consumption indirectly by referring to the intentional possession, purchase or cultivation of controlled substances for personal consumption. In contrast to the position under the 1961 and 1971 Conventions, however, paragraph 2 clearly requires parties to criminalise such acts unless it would be contrary to the constitutional principles and the basic concepts of their legal systems to do so.

6.59 In 2009, the INCB indicated that in its opinion:<sup>452</sup>

[T]he 1988 Convention requires that illicit possession of controlled substances must be prohibited, but it does not require criminal prosecution for small quantities. At times, drug possession can serve as a pretext to detain an otherwise dangerous or suspect individual, but otherwise, the law must allow for non-custodial alternatives when a police officer stumbles upon small amounts of drugs. It is important that the incident be documented and the opportunity availed to direct the user to treatment if required, but it is rarely beneficial to expend limited prison space on such offenders.

451 *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, above n 408.

452 United Nations Office on Drugs and Crime *World Drug Report 2009* (United Nations Office of Drugs and Crime, New York, 2009) 167.

### *Latitude for interpretation*

- 6.60 Despite the apparently plain words of article 3, paragraph 2 of the 1988 Convention, there is considerable variation in national responses, particularly in Europe. In the European Union, for example, possession of drugs for personal use is unlawful in all member countries, but the use of the criminal law and penal sanctions is far from uniform.<sup>453</sup>
- 6.61 Alternative approaches adopted for possession of small quantities of controlled drugs include possession being:
- tolerated under official “non-prosecution” policies;
  - made a criminal offence but attracting only administrative sanctions;
  - treated as an administrative infringement only.
- 6.62 Krajewski notes that the conventions are formulated in very broad, sometimes vague, language that reflects political compromises as well as accommodating national legal differences.<sup>454</sup> This allows for considerable latitude in interpretation, identified by him as including the following:
- Criminalising small-scale demand side activity is such an exception to the conventions’ focus on illicit trafficking that different, less restrictive approaches should be adopted in respect of the article 3, paragraph 2 requirements.
  - Countries can interpret the requirements in light of the constitutional and political principles particular to their own legal system.
  - As personal use is not itself required to be criminalised by the conventions, provisions on possession for personal use can be interpreted consistently, particularly if a country’s domestic law does not criminalise drug use per se.
  - Approved “medical” and “scientific” uses are not defined.
  - “Depenalisation”, which retains the essence of criminality while allowing alternatives to criminal sanctions, is not only consistent with article 3, paragraph 2 but can also be supported by other articles.<sup>455</sup>

### *“Contrary to the provisions” of the conventions*

- 6.63 An important point that is often overlooked is that the 1988 Convention does not create a new prohibition in respect of possession for personal use. It requires offences to be created in respect of such conduct where the conduct is prohibited by the 1961 and 1971 Conventions. One must turn to those conventions to ascertain if possession for personal use is contrary to their provisions. This is not straightforward because of the generality of many provisions.

453 On variations in legislation amongst European countries see N Dorn and A Jamieson *Room for Manoeuvre – Overview of Comparative Legal Research into National Drug Laws of France, Italy, Spain, the Netherlands and Sweden and their Relation to Three International Drug Conventions* (DrugScope, London, 2000); European Monitoring Centre for Drugs and Drug Addiction *Illicit Drug Use in the EU: Legislative Approaches* (European Monitoring Centre for Drugs and Drug Addiction, Lisbon, 2005).

454 K Krajewski “How Flexible are the United Nations Drug Conventions?” (1999) 10 *International Journal of Drug Policy* 329.

455 For example, 1961 Convention, above n 360, art 36(1)(b); 1971 Convention, above n 360, art 22(1)(b); 1988 Convention, above n 376, art 3(4)(d).

*"Possession" under the 1961 Convention*

- 6.64 Article 4 of the 1961 Convention requires parties, subject to the exceptions expressly permitted by the 1961 Convention, to limit the possession of drugs exclusively to medical and scientific purposes. Parties may not therefore authorise the possession of drugs for other purposes.
- 6.65 Article 4 also has to be read in connection with both articles 33 and 36 of the 1961 Convention.
- 6.66 Article 33 provides that the parties shall not permit the possession of drugs except under legal authority. However, article 33 does not itself require that possession of drugs be made unlawful. It simply states that where possession is unlawful it shall not be "permitted". Further, article 33 does not specify either the mode of legal authorisation or the means by which a party might discharge its obligations not to permit unauthorised possession.
- 6.67 The Commentary on article 33 acknowledged that the obligations must be met but that methods other than criminalising possession are available:
- Whatever the position the Parties may take on [the] question of penal sanctions, it does not affect their obligation under article 33 not to permit the unauthorised possession of drugs for personal consumption, like any other possession of drugs without legal authority. If they choose not to impose penalties on the unauthorised possession for personal use, they still must use their best endeavours to prevent this possession by all those administrative controls of production, manufacture, trade and distribution which are required by the Single Convention, and whose basic objective is the prevention of the abuse of drugs and therefore also to prevent the unauthorised possession by addicts.
- 6.68 The penal provision in the 1961 Convention is article 36 which, as noted in paragraph 6.32 above, requires parties to treat as punishable offences a wide range of specific forms of conduct, including possession.
- 6.69 Against this background, it would seem there are two possible approaches.
- 6.70 In a plain sense, one might say that the purpose and intent of articles 4 and 36 of the 1961 Convention, when read together, are clear. Possession of drugs in whatever quantity, if not for medical or scientific purposes or otherwise excepted under the Convention, must be contrary to the Convention and therefore must be criminalised. It might be further argued that the 1961 Convention needs to be read together with, and in light of, the 1988 Convention. Despite the non-derogation provision<sup>456</sup> in the 1988 Convention, a supporter of this view might argue that the general obligations expressed in article 4 of the 1961 Convention should take into account the marked emphasis on criminal law measures in the 1988 agreement. This allowance, coupled with the express terms of article 3, paragraph 2, would support a requirement to criminalise possession for personal use.

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456 1988 Convention, above n 376, art 25. This article provides that the 1988 Convention does not derogate from the rights and obligations imposed under the 1961 and 1971 Conventions.

- 6.71 However, a number of factors point in the opposite direction. Article 4 is a very high-level statement of general obligations.<sup>457</sup> It expressly contemplates that each party will assess what legislative and administrative measures may be necessary to discharge these high level obligations. The activities of production, manufacture, trade, distribution, import and export, all mentioned in article 4, are supported by other articles creating specific obligations to prohibit, restrict and regulate such activities. In contrast, there are no similar substantive articles restricting simple possession of drugs.
- 6.72 To require the establishment of criminal offences for possession on the basis of article 4 itself would therefore necessitate “reading down” the article to such an extent that parties were deprived of its intended flexibility.
- 6.73 That leaves article 36, the penal provision. This article must be understood in the context of its location. The preceding article requires parties to take co-operative action against illicit traffic. “Illicit traffic” is defined as “cultivation or trafficking”<sup>458</sup> contrary to the provisions of the Convention. Given the minimal attention given to possession elsewhere in the Convention, it can therefore be argued that possession in article 36 is, in context, a reference to possession for the purposes of trafficking.
- 6.74 In their treatment of possession, there is no material difference in the character of the 1961 and 1971 Conventions. The preferred conclusion on this topic should apply equally to obligations arising from both Conventions.

### *Conclusion*

- 6.75 In summary, there is no international consensus about whether the conventions require possession of illicit drugs for personal use to be established as a criminal offence.
- 6.76 Full legalisation of possession “for other than medical or scientific uses” is not permissible on either view of the penal provisions because of the requirements of articles 4 and 33 of the 1961 Convention.
- 6.77 However, a legal argument can be made that, despite possession for personal use apparently being marked out for criminalisation in article 3 of the 1988 Convention, the terms of the earlier conventions are neither clear nor specific enough about such conduct to indicate that it must be treated as a criminal offence requiring criminal sanctions.
- 6.78 A more conservative view, supported by the official Commentary on the 1988 Convention, is that possession for personal use must be criminalised “subject to [a party’s] constitutional principles and the basic concepts of its legal system”.

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457 1971 Convention, above n 360, art 5 is of a similar character.

458 1961 Convention, above n 360, art 1.

It is accepted that there are no constitutional principles or basic concepts of the New Zealand system on which New Zealand could rely to justify not criminalising possession for personal use if that was a preferred policy choice.<sup>459</sup>

- 6.79 If possession remains a criminal offence, there is considerable scope to look at alternatives to prosecution, alternatives to conviction, the use of non-custodial criminal sanctions,<sup>460</sup> and the use of alternative civil or administrative sanctions.

### Purchase for personal use

- 6.80 Following the less conservative view of the conventions discussed above in relation to possession, it might be argued that because purchase is not specifically regulated by the conventions, it should not be treated as “contrary to the provisions” of the 1961 and 1971 Conventions and therefore something more is required to bring the conduct within the framework of the penal provisions.
- 6.81 The argument in favour of criminalisation is much stronger in relation to conduct that constitutes participation in trafficking. Taking into account that one of the fundamental aims of all three conventions is to combat illicit traffic in drugs, a “good faith” interpretation of the above articles supports the conclusion that they necessarily prohibit the purchasing as well as the supply side of such transactions.
- 6.82 On a more conservative interpretation of the conventions, the purchase of drugs for personal consumption is “contrary to the provisions” of the 1961 and 1971 Conventions when such conduct falls outside the schemes for trade in drugs and distribution of drugs required by article 30 of the 1961 Convention and articles 8 and 9 of the 1971 Convention. As these articles focus on regulation of supply side activities, this argument relies on its being implicit that unlawful purchase of drugs inherently contravenes the schemes.
- 6.83 This argument can also be extended to small-scale purchase for personal consumption, although it is not as compelling, despite the language of article 3, paragraph 2 of the 1988 Convention.
- 6.84 In summary, the legal position is unclear and the official Commentaries provide no real assistance on the point. However, in view of the aims of the three conventions, the better view may be that offences are required for any purchase of drugs outside the conventions’ required framework for trade and distribution.

459 It is conceivable that “constitutional” arguments might be made in a New Zealand court about punishment of personal drug use. However, there are not in New Zealand’s statute laws or jurisprudence any established constitutional notions about the regulation of conduct primarily involving self-harm or perceived self-harm.

460 The 1988 Convention does not require imprisonment for “personal use” offences in contrast to the very strong requirements to punish “trafficking” offences with substantial terms of imprisonment.

## Cultivation for personal use

- 6.85 There is a stronger argument that the conventions do not require an offence of cultivating drugs for personal use.
- 6.86 Article 22 of the 1961 Convention requires parties to prohibit cultivation of the opium poppy, the coca bush and the cannabis plant if they judge that the prevailing conditions in their country render a ban on cultivation the most suitable measure for protecting public health and preventing the diversion of drugs into illicit traffic. There is a corresponding duty to seize any plants unlawfully cultivated.
- 6.87 The critical question for each country is whether a ban on cultivation is “the most suitable measure”. The official Commentary on article 22 allows that prohibition may not be required if the overall risks to public health or of diversion are relatively small.
- 6.88 While the article does not differentiate between cultivation for trade and cultivation for personal use, it could be read as allowing parties to prohibit cultivation for some purposes but not others, depending on their assessment of the necessity of prohibition for those discrete purposes. In other words, a country might consider that prohibiting cultivation of small amounts for personal use was not the best way to protect the public health or was not necessary to prevent those drugs being diverted into illicit traffic.
- 6.89 Such an interpretation would seem consistent with the underlying purpose of article 22, although no support one way or the other can be found in the Commentary.

## TRAFFICKING AND SUPPLY

- 6.90 In contrast to the position with personal use of controlled drugs, the conventions afford very little scope for adopting wholly alternative approaches to the serious “trafficking” offences covered by article 3, paragraph 1 of the 1988 Convention. The Convention is clear that these offences are to be regarded as grave and should be met with the full force of penal and confiscation laws.<sup>461</sup> Moreover, the main requirements<sup>462</sup> for international criminal law co-operation are mandatory.
- 6.91 However, there are two areas where there may be more latitude in formulating national drug policy: social sharing (for example, sharing between friends or acquaintances for no profit); and the use of alternatives to imprisonment.

## Social sharing

- 6.92 It is not certain whether social sharing must be established as a criminal offence.
- 6.93 Commercial supply of controlled drugs is clearly contrary to the 1961 and 1971 Conventions,<sup>463</sup> is required to be criminalised under those conventions,<sup>464</sup> and falls squarely within the paragraph 1 offences in the 1988 Convention.<sup>465</sup>

461 See 1988 Convention, above n 376, art 3(4)–(6).

462 1988 Convention, above n 376, arts 4–7.

463 1961 Convention, above n 360, art 30 and 1971 Convention, above n 360, art 8 both require strict controls on trade.

464 1961 Convention, above n 360, art 36(1)(a); 1971 Convention, above n 360, art 22(1)(a).

465 1988 Convention, above n 376, art 3(1)(a)(i).

- 6.94 However, the position with sharing on a social scale is less certain. There are no specific provisions in the 1961 and 1971 Conventions regulating distribution at a personal level. Further, although the penal provisions in the 1961 and 1988 Conventions use broad terms such as “offering”, “distribution”, “delivery on any terms whatsoever”, these terms appear in provisions aimed squarely at commercial supply and trafficking.
- 6.95 The paragraph 1 offences generally attract punitive sanctions and must be the subject of special measures such as extraterritorial jurisdiction, extradition, and mutual legal assistance. It is difficult to conclude that the 1988 Convention intended social sharing, which is associated with personal use rather than illicit traffic, to be treated in that manner.
- 6.96 A better view may be that the international obligations to criminalise and punish social sharing extend no further than they do in respect of possession for personal use. If the less conservative interpretation of the conventions is preferred and they do not require criminal offences and penalties for possession for personal use, analogous reasoning supports a similar conclusion in respect of social sharing.

### Alternatives to imprisonment

- 6.97 There remains some flexibility for responses other than imprisonment.
- 6.98 The requirement to imprison paragraph 1 offenders is very strong but not absolute. The 1988 Convention also recognises that rehabilitative measures remain an option for responding to paragraph 1 offences, though primarily in addition to formal punishment unless the offence is minor, when rehabilitation can be considered as an alternative to conviction or punishment.<sup>466</sup>
- 6.99 The INCB has itself endorsed the consideration of alternative approaches to minor offending:<sup>467</sup>

There is a range of alternatives to conviction for relatively minor offences, including discontinuation of criminal proceedings, conditional discontinuance and admonishment or cautioning, as well as a range of alternatives to custody, including fines and suspended sentences, parole, probation, community service, corrective labour, treatment and supervision. It should, however, be clearly understood that the Board, in supporting appropriate recourse to treatment and non-custodial measures for minor offences, is in no way suggesting that drug-related offences should be decriminalised or that the implementation of the international drug control treaties should at all be weakened.

<sup>466</sup> See *ibid*, art 3(4).

<sup>467</sup> International Narcotics Control Board “Report of the International Narcotics Control Board for 1996” (1996) E/INCB/1996/1, ch 1, para 26.

- 6.100 In 2007, the INCB devoted the first part of its Annual Report to “The principle of proportionality and drug-related offences”.<sup>468</sup> One of its recommendations was:<sup>469</sup>

*Alternative sentencing.* Governments should consider widening the range of custodial and noncustodial options for drug-related offences by illicit drug users so that authorities can respond proportionately to the circumstances of each case. In some cases drug courts focusing on persons who frequently relapse into high-risk lifestyles and mandatory treatment programmes can offer drug abusing offenders effective alternatives to imprisonment.

- 6.101 It is for each party to determine, as a matter of prosecution policy or law, what kind of conduct might fairly be regarded as “relatively minor”. Depending on the circumstances, examples might include small-scale:

- non-commercial supply (if social sharing is criminalised);
- cultivation for the purpose of social sharing;
- one-off incidents of commercial supply;
- importing or exporting for personal use.

## PROBLEM LIMITATION

- 6.102 As outlined earlier, parties have a duty to take “all practicable measures” to prevent the abuse of drugs and minimise the harmful impact on drug abusers through treatment, education, care, and rehabilitation.<sup>470</sup> Implementation of such measures must take account of the fundamental obligation in the 1961 and 1971 Conventions to limit the use of narcotic drugs and psychotropic substances to medical and scientific purposes.

- 6.103 Some problem limitation programmes permit drug use on specified conditions or under controlled circumstances. This tests the balance between the above obligations. To what extent is it permissible under the conventions to implement programmes whose primary objective is to reduce the harm to drug users by facilitating safe drug use without necessarily preventing it?

### Official statements

- 6.104 The INCB sees problem limitation as an important strategy provided it is undertaken for demand reduction purposes – that is, to reduce the demand for drugs by drug users. In its 2000 Annual Report, the INCB acknowledged that some countries had begun placing more emphasis on problem limitation measures:<sup>471</sup>

The Board would like to reiterate that harm reduction programmes can play a part in a comprehensive drug demand reduction strategy but such programmes should not be carried out at the expense of other important activities to reduce the demand for illicit drugs, for example drug abuse prevention activities.

468 International Narcotics Control Board “Report of the International Narcotics Control Board for 2007” (5 March 2007) E/INCB/2007/1, ch 1.

469 Ibid, paragraph 60(c).

470 1961 Convention, above n 360, art 38(1); 1971 Convention, above n 360, art 20(1).

471 International Narcotics Control Board “Report of the International Narcotics Control Board for 2000” (2000) E/INCB/2000/1, paras 445 and 446.

...The Board regrets that the discussion on drug injection rooms and some other harm reduction measures has diverted the attention (and, in some cases, funds) of Governments from important demand reduction activities such as primary prevention or abstinence-oriented treatment.

- 6.105 The INCB has since indicated that it does not support “drug consumption rooms” that allow the illicit possession and consumption of controlled drugs.<sup>472</sup>

### Permissible measures

- 6.106 In 2002, the INCB requested the UN Drug Control Programme (UNDCP) to develop a legal position on the flexibility of the conventions in respect of problem limitation measures. The UNDCP examined five types of programme:<sup>473</sup>
- (a) drug substitution treatment (prescription of controlled doses of one drug by way of treatment for addiction to another drug);
  - (b) drug maintenance treatment (treatment of drug addiction by administering controlled doses of the drug in question);
  - (c) needle and syringe exchange (provision of sterile needles and syringes in exchange for used equipment);
  - (d) drug injection rooms (provision of facilities for safe injection by intravenous drug users);
  - (e) drug quality control (provision of facilities for drug users to test the quality or otherwise of their drugs, for example, ecstasy pill testing).
- 6.107 A further and more extensive opinion on the same topic was prepared by the British Institute of International and Comparative Law the following year.<sup>474</sup>
- 6.108 That opinion concluded that there was a strong case for arguing that, with the possible exception of drug quality testing, these programmes were permissible under the conventions.
- 6.109 In essence, the opinion considered that programmes may be compatible with the conventions’ allowance for medical use of controlled drugs<sup>475</sup> and the requirements to promote treatment and rehabilitation<sup>476</sup> if they were undertaken for legitimate health-related purposes. Much depends on the specific details of each programme. Compliance is much less likely to be achieved if the overall effect of the programme is to increase or encourage drug use and is more likely to be achieved if the programme is conducive to treatment and the reduction of drug dependence.

472 International Narcotics Control Board “Report of the International Narcotics Control Board for 2008” (19 February 2008) E/INCB/2008/1, para 29.

473 United Nations Drug Control Programme Legal Affairs Section “Flexibility of Treaty Provisions as Regards Harm Reduction Approaches” (30 September 2002) E/INCB/2002/W.13/SS.5.

474 British Institute of International and Comparative Law “Opinion on the Legality of Health Promotion Measures in Light of the United Nations Drug Conventions Regime” (Senlis Lisbon International Symposium on Global Drug Policy. Lisbon, 23 to 26 October 2003).

475 1961 Convention, above n 360, art 4(c); 1971 Convention, above n 360, art 5(1).

476 1961 Convention, above n 360, art 38; 1971 Convention, above n 360, art 20.

- 6.110 It is also important to have a sound evidence base for the health-related benefits claimed for the programme. The opinion was doubtful about the legitimacy of pill testing because it was still relatively new and there was not yet strong evidence that pill testing actually minimised risky behaviour.
- 6.111 The UNDCP opinion was more cautious. It identified some of the legal arguments without expressing a conclusive view. To the extent that its opinion offered support for programmes to be considered compatible with the conventions, it emphasised a treatment-related context aimed at reducing drug dependence.
- 6.112 Little guidance as to the acceptability of problem limitation measures can be obtained from the text of the conventions. Neither “medical purposes” nor “treatment” are defined and the articles that provide support for problem limitation measures are couched in general terms.<sup>477</sup> Notwithstanding reservations held by the INCB, it would seem that parties have considerable flexibility to implement practical measures to reduce the harmful consequences of drug use, taking into account the considerations mentioned above about the aims and effects of particular programmes.

## CONCLUSION

- 6.113 Two key points emerge from examination of the international drug conventions. First, the conventions require New Zealand to maintain a system of prohibition for the drugs that they cover. Second, although the 1988 Convention places considerable reliance on the criminal law, there is significant room for movement in the treatment of personal drug use and lower order offending in general. The main conclusions relevant to the development of national drug policy follow.
- 6.114 The conventions require parties to maintain a system of controls over the drugs included in the conventions. Those controls must limit the production, manufacture, import, export, trade, distribution, possession and use of convention drugs to legitimate medical and scientific purposes. Specific controls include:
- manufacture and distribution only under licence or other approval;
  - strict limits on cultivation;
  - import and export restricted and only under authorisation;
  - detailed record-keeping of permitted activities and transactions;
  - regular reporting to UN drug bodies.
- 6.115 Parties must also monitor and regulate the precursor substances listed in the 1988 Convention.
- 6.116 Trafficking in convention drugs (that is, production, distribution, import and export of drugs, and related conduct including money laundering) must be criminalised. Generally, trafficking is to be punished severely with imprisonment the norm. Punishment of trafficking must include the ability to confiscate the proceeds and instruments of offending. For minor trafficking offences, however, non-custodial and non-criminal sanctions can be considered and rehabilitative measures are permissible in addition to or as an alternative to punishment.

<sup>477</sup> Ibid.

- 6.117 Parties must co-operate with each other to combat illicit traffic in all convention drugs and prevent the diversion of precursors into illicit traffic. Parties must enable cross-border law enforcement by ensuring trafficking offences are subject to extraterritorial jurisdiction, extradition, and mutual legal assistance, including cross-border enforcement of confiscation.
- 6.118 The conventions do not allow full legalisation of convention drugs. Possession and use of convention drugs for other than medical or scientific purposes must continue to be restricted and unlawful. There is significant uncertainty about the approach that must be taken in relation to possession and cultivation of drugs for personal use, and social sharing at a personal level. It may be open to parties to interpret the conventions as not requiring the establishment of criminal offences for these activities. There is no requirement to establish criminal offences in respect of the use of drugs per se, although it is arguable that offences may be required in relation to obtaining drugs for personal use.
- 6.119 Where offences are maintained for conduct related to personal use, the permissible alternatives include:
- non-prosecution policy and discretion;
  - diversion;
  - treatment and rehabilitation as an alternative to prosecution;
  - civil or administrative sanctions;
  - treatment and rehabilitation as an alternative to punishment;
  - use of non-custodial sentences.
- 6.120 Parties must take practicable measures to prevent the abuse of drugs and address the treatment and rehabilitation of drug users. For these purposes, it is permissible to consider programmes that allow the use of drugs in controlled circumstances, such as drug maintenance and drug substitution treatment, needle exchange schemes, and drug injection rooms.