

Chapter 7

Models of drug regulation

SUMMARY

This chapter identifies and discusses the reasons why regulation of drug use may be justified. It concludes that, with some limited exceptions in respect of the young and those whose mental faculties are impaired, regulation of drug use is generally only justified to the extent necessary to prevent harm to others. The benefits arising from that reduction in harm must also outweigh the costs arising from regulation itself. With this justification in mind, the chapter then goes on to consider the ways in which drug use may be regulated (the “models of drug regulation”).

WHY REGULATE DRUGS?

- 7.1 At the outset of this paper, we noted the view, at one end of the spectrum, that taking mind-altering substances which affect judgement and the functioning of the mind for recreational purposes robs an individual of free will and essential humanity. That view is based on the premise that use of drugs is a moral issue,⁴⁷⁸ and that the justification for their prohibition or other regulation rests in part on their immorality.⁴⁷⁹
- 7.2 We accept that the law has a vital role in reflecting, enforcing, and sometimes shaping moral values. As Neil MacCormick has argued, “the question cannot be whether the criminal law should be morally loaded, but, rather, what moral load it should bear.”⁴⁸⁰ However, there are at least two reasons why it is difficult to justify the use of law to enforce moral values relating to drug use.
- 7.3 First, there is no clear community view that use of mind-altering substances is immoral. As we noted in chapter 1, few see all use of mind-altering substances as contrary to core moral values. Many of us will have drunk alcohol in the recent past, itself a mind-altering substance, without feeling morally compromised. Most of us also recognise, again perhaps with alcohol mainly in mind, that using

478 See, for example, James Q Wilson “Against the Legalisation of Drugs” (1990) 89 *Commentary* 21, 26.

479 Douglas N Husak “Recreational Drugs and Paternalism” (1989) 8 *Law and Philosophy* 353, 359.

480 Neil MacCormick *Institutions of State: An Essay in Legal Theory* (Oxford University Press, Oxford, 2007) 216.

these substances can bring benefits. In the main, these benefits relate to the short-term and immediate effects of use, such as increased sociability and relaxation. Many drugs also have recognised therapeutic uses.

- 7.4 Social attitudes to mind-altering substances are therefore deeply ambivalent, contradictory, and divisive. Distinctions in how communities and groups view particular substances are more an accident of history and circumstance than the product of rational policy or a firmly-grounded moral view.⁴⁸¹ We see no basis for using the law to perpetuate those distinctions on moral grounds alone.
- 7.5 Secondly, it is arguable that the values that preclude the use of mind-altering substances (or at least some of these substances) are not integral to social solidarity, and regulation is not justified to maintain them. In fact, it is equally arguable that drug regulation in itself undermines other values that are at least, if not more, important to our social fabric. These include, for example, the ability for individuals to exercise freedom of choice and personal autonomy. By preventing a drug user from engaging in an activity in which he or she would otherwise choose to engage, regulation itself is impinging on a value that most if not all of us would see as integral to how society functions.
- 7.6 In chapter 2, we outlined the variety of harms associated with cannabis and methamphetamine use. Methamphetamine users, for example, are at increased risk of a range of physical and mental health problems, from minor ailments like skin irritations and blurred vision to very serious conditions like heart disease and psychosis. If the enforcement of morality is not a justification for drug regulation, what about the prevention of these harms to users themselves?
- 7.7 We accept that regulation is justified to prevent individuals from acting contrary to their best interests when they substantially lack the capacity or information to prevent harm to themselves. Our statute book has many examples of regulation being used for this purpose. Legislation to protect the personal and property rights of people who no longer have the capacity to look after their own affairs is one example,⁴⁸² as is the raft of legislation that prevents children and young people from engaging in certain activities before they reach a certain age.⁴⁸³
- 7.8 This paternalistic approach arguably has particular applicability to drug use. For example, individuals do not have the ability (due to a lack of information, time, or otherwise) to assess the safety of every drug they use. For this reason, it is appropriate that regulation is in place to ensure that this assessment is made on

481 For example, Ethan Nadelman “Drug Prohibition in the United States: Costs, Consequences, and Alternatives” (1989) *Science* 939 argues:

Only the Mormon and a few other like-minded sects, who regard as immoral any intake of substances to alter one’s state of consciousness or otherwise cause pleasure, are consistent in this respect; they eschew not just the illicit drugs but also alcohol, tobacco, caffeinated coffee and tea, and even chocolate. “Moral” condemnation by the majority of Americans of some substances and not others is little more than a transient prejudice in favour of some drugs and not others.

482 Protection of Personal and Property Rights Act 1988.

483 For example, young people under the age of 15 are prohibited from driving, young people under the age of 18 are prohibited from placing a bet at the TAB, buying tobacco, or buying alcohol on or from any licensed premises. See Ministry of Youth Development *Does Your Policy Need an Age Limit?* (Ministry of Youth Development, 2005) 6.

behalf of us all. There is also likely to be little disagreement that young people and those whose mental faculties are impaired should be protected from the harms of drug use.⁴⁸⁴

- 7.9 However, we do not support more general use of the law for paternalistic reasons. Fundamentally, using the law in this way is at odds with the value society places on an individual's ability to make his or her own choices and decide what is in his or her own best interests. If someone, fully aware of the risks involved, chooses to participate in an activity that risks causing harm only to themselves, most of us would respect the right to make that choice, even if we consider the choice to be wrong or misguided. Not doing so also seems counter-productive because the law would be preventing one harm by creating another (that is, the harm of restricting an individual's ability to act as he or she chooses).
- 7.10 This is not to say that drug regulation is never justified. In particular, an individual should not be able to engage in drug use that harms other people, because this compromises others' ability to live life as they choose.⁴⁸⁵ As outlined in chapter 2, these harms range from the impact of drug use on a user's family, friends and workplace to the costs to the health budget from treating drug-related conditions.
- 7.11 However, in deciding whether regulation is the best way to prevent this harm, it is also necessary to consider and weigh up the harm that regulation itself causes. Heavy-handed regulation to prevent a very small harm is not justified as a matter of principle and risks being counter-productive.
- 7.12 It is also important to note that, while the distinction between regulation to prevent harm to users themselves and regulation for other reasons is an important distinction in conceptual terms, it is somewhat artificial in reality. For example, the distinction between the protection of values and the prevention of harm is in many respects a false dichotomy. The values that underpin our social structure forge social consensus and maintain social harmony; and the undermining or disintegration of those values ultimately runs the risk of destroying social solidarity, reducing the effective functioning of society and harming the quality of life of us all.
- 7.13 Even more fundamentally, few activities only cause harm to the individual who engages in them. The old adage "no man is an island" applies. Any activity that causes significant harm to the individual is likely to also cause harm to others. For example, the requirement to wear a seatbelt is as much due to the likely health care and other social costs of being in a car accident while not wearing a seatbelt, as it is due to the increased harm that we may cause to ourselves.

484 Although note that there is some controversy about the view that regulation is justified because the effects of drug intoxication or addiction impair users' ability to make rational decisions that are in their best interests. While some commentators accept that the effects of intoxication or addiction can impair a user's judgment in this way, others are less convinced. See Robert MacCoun and Peter Reuter *Drug War Heresies: Learning from Other Vices, Times and Places* (Cambridge University Press, New York, 2001) 64 and Husak, above n 479, 377–378.

485 See discussion in MacCoun and Reuter, *ibid.*, 60–61.

- 7.14 Bearing these matters in mind, our view is that regulation of drug use is generally only justified to the extent necessary to prevent harm to others. Regulation is also justified in limited circumstances to protect the young and those whose mental faculties are impaired. The benefits arising from the reduction in harm must outweigh the costs arising from regulation itself. This is, in essence, the approach taken in our issues paper on the regulation of alcohol.⁴⁸⁶ We see no reason to take a different view in this context.

HOW SHOULD DRUGS BE REGULATED?

Introduction

- 7.15 As with decisions about *whether* to regulate, decisions about *how* to regulate can also be presented as a choice between two extremes. At one extreme is complete prohibition. At the other extreme is legalisation, in which a drug is freely and legally available, with its use subject to few, if any, controls. In reality, however, models of drug regulation are more varied and nuanced than that kind of formulation would suggest. We now go on to consider what these models might be. In doing so, we focus our attention on the regulation of drugs for non-medicinal (“recreational”) purposes. The way in which drugs should be made available to facilitate their medicinal and scientific use is considered in chapter 13.

Full prohibition

Description

- 7.16 Under a full prohibition model, all activities in relation to drugs (for example, use, possession, production/manufacture, import/export, sale, and supply) are illegal and subject to criminal offences and criminal penalties.

Rationale

- 7.17 The basis of prohibition is the view that drugs pose such an unacceptable threat to human health that their production, trade, and use should be regulated for most purposes,⁴⁸⁷ and prohibited altogether for recreational purposes. Prohibition, accompanied by strong enforcement and clear messages about the dangers of drug use,⁴⁸⁸ should deter people from using and selling drugs, restrict the availability of drugs, and increase their price. By doing so, prohibition should reduce, if not eliminate altogether, recreational drug use.
- 7.18 In theory prohibition enables an approach to drug control that balances strategies of supply control, problem limitation, and demand reduction. However, in practice, the substantial law enforcement effort that prohibition requires means that supply control tends to become the dominant approach to drug control in comparison to other strategies.

486 See New Zealand Law Commission *Alcohol in Our Lives: An Issues Paper on the Reform of New Zealand’s Liquor Laws* (NZLC IP15, Wellington, 2009) [*Alcohol in Our Lives*].

487 Commission on Narcotic Drugs “Making Drug Control ‘Fit for Purpose’: Building on the UNGASS Decade” (7 May 2008) E/CN.7/2008/CRP.17, 10.

488 International Drug Policy Consortium *The 2006 World Drug Report: Winning the War on Drugs?* (International Drug Policy Consortium, London, 2006) 2.

Examples of the model in practice

- 7.19 Prohibition is the dominant global approach taken to controlling the use of illegal drugs for recreational purposes. This is primarily a result of the international drug conventions which, as discussed in chapter 6, aim to maintain a system of global prohibition of narcotic drugs, psychotropic substances, and precursor substances. Prohibition is the predominant regulatory model reflected in New Zealand's Misuse of Drugs Act 1975.

Costs and benefits

- 7.20 It is difficult to identify the impact of prohibition on recreational drug use and the recreational drug market – that is, whether the “war on drugs” is being won. The extent to which people would have used drugs in the absence of prohibition is unknown. The United Nations Office on Drugs and Crime (UNODC) considers that global prohibition has at least led to drug use being contained. Around 5 % of the adult population worldwide (or between 140–250 million people) report using illegal drugs at least once in the past year. These proportions, which have remained relatively stable over recent years, are substantially smaller than for legal psychoactive substances such as tobacco and alcohol.⁴⁸⁹
- 7.21 However, trends over recent years need to be considered in the context of over 40 years of global drug control. Even if some kind of plateau in levels of drug use has now been reached, the International Drug Policy Consortium argues that there has been a “massive increase in the scale and diversity of international markets for illegal drugs, and increasing rates of drug use in almost every country” over this time.⁴⁹⁰ The United Nations itself has said that the drug “problem” may get worse before it gets better.⁴⁹¹
- 7.22 New Zealand's experience provides some support for this view. For example, methamphetamine, a drug of particular community concern, is a relatively new drug on the illegal drugs market, only coming to prominence in New Zealand in the late 1990s.⁴⁹²

489 United Nations Office of Drugs and Crime (UNODC) *World Drug Report 2009* (United Nations Office of Drugs and Crime, New York, 2009) 169. The World Health Organisation estimates that in 2000, there were 185 million users of illegal drugs worldwide, compared to 2 billion alcohol users and 1.3 billion tobacco smokers – see Marcus Roberts, David Bewley-Taylor and Mike Trace *Facing the Future: The Challenge for National Drug Policy* (R6, The Beckley Foundation Drug Policy Programme, 2005) 5.

490 International Drug Policy Consortium, above n 488, 2.

491 Commission on Narcotic Drugs, above n 487, 10.

492 See chapter 1, paragraphs 1.16–1.17.

- 7.23 The scale of the global drugs market remains immense. The wholesale international illegal drugs market was valued at US\$94 billion in 2003 (compared to \$17.4 billion for wine, \$6.7 billion for beer, and less than \$6 billion for coffee) and the retail international illegal drugs market at \$322 billion.⁴⁹³ It is claimed that the illegal drugs market is the third most profitable market in the world, behind the markets in oil and arms.⁴⁹⁴ In New Zealand, the cannabis market was estimated to have a wholesale value in 2005 of between \$74 million and \$95 million, and a retail value of between \$183 million and \$235 million.⁴⁹⁵ Some of the value of the illegal drugs market will reflect the illegality of the substances involved and the risk in making them available. Nevertheless, figures such as these may be one reason why UNODC now considers the reduction or elimination of drug use to be an “aspirational goal akin to the elimination of war and poverty”.⁴⁹⁶
- 7.24 It is far from clear that drug prohibition itself is responsible for any stabilisation in drug use. In particular, the extent to which prohibition does and should deter drug use is debatable and uncertain. As applied to drug use, deterrence theory requires drug users to make rational decisions about whether to use drugs, by weighing up the costs and benefits of doing so.⁴⁹⁷ The illegality of drug use, and the fear of the legal consequences that flow from that illegality, should mean that the costs to the user of engaging in drug use, regardless of the pleasure to be derived from it, are simply not worth it. The greatest deterrent effect should occur when the user perceives the legal consequences or punishment to be both certain (that is, there is a high likelihood of being caught) and severe.
- 7.25 For some new or potential users, fear of being caught, or of the legal consequences if caught, may be sufficient to deter experimentation with drugs. However, the same is unlikely to be true of dependent users. Drug dependence does not lend itself to a rational calculation of the costs and benefits of engaging in drug use.⁴⁹⁸ Therefore, current users who are drug dependent are unlikely to be deterred by the legal framework in place at the time.
- 7.26 Research has demonstrated that the certainty of punishment has a much greater deterrent impact than its severity.⁴⁹⁹ However, in relation to the most widely used illegal drug in New Zealand, cannabis, we estimate that less than 1 % of all

493 UNODC, above n 489, 127–128.

494 Roberts, Bewley-Taylor and Trace, above n 489, 1.

495 New Zealand National Drug Intelligence Bureau “*New Cannabis: The Cornerstone of Illicit Drug Harm in New Zealand, 2007 Strategic Assessment* (New Zealand Police, Wellington, November, 2007) 53.

496 UNODC, above n 489, 163. For critique of this comparison, see International Drug Policy Consortium *The 2009 World Drug Report: A Response From the International Drug Policy Consortium* (International Drug Policy Consortium, London, 2009) 10.

497 MacCoun and Reuter, above n 484, 78.

498 *Ibid*, 86.

499 Andrew von Hirsch and others *Criminal Deterrence and Sentence Severity: an Analysis of Recent Research* (Hart Publishing, University of Cambridge Institute of Criminology, 1999) 5; Andrew Ashworth *Sentencing and Criminal Justice* (Cambridge University Press, 2005) 79.

users in New Zealand in 2006 were prosecuted for their cannabis use.⁵⁰⁰ New Zealand research has also found that most cannabis users are not prosecuted or convicted for cannabis-related offences.⁵⁰¹

- 7.27 In other jurisdictions, research has estimated that cannabis users have an average annual risk of arrest of about 3 % and cocaine users an average annual risk of arrest of about 6 %.⁵⁰² The risk per transaction for both drug users and drug dealers has been estimated at being even lower – at around one in 3000.⁵⁰³ Therefore, the vast majority of users and their associates will be able to use drugs with little, if any, legal consequence. New Zealand research reinforces that current drug laws are not seen as a deterrent to personal use, either by the general public or by current users.⁵⁰⁴
- 7.28 This is supported by research suggesting that factors other than the certainty and severity of punishment have a greater influence on whether an individual uses, or continues to use, drugs⁵⁰⁵ and that fear of punishment or the drug's illegal status is not a major driver in a decision to stop using drugs.⁵⁰⁶ This decision is instead driven by the impact of drug use on a user's family relationships, home and work life, and physical health.⁵⁰⁷ Similarly, Australian research of cannabis users in Western Australia and South Australia indicates that being apprehended for cannabis use did not stop them from using drugs.⁵⁰⁸

500 The national household survey on drug use amongst those aged 15–45 found that 18 % of respondents reported using cannabis in the last 12 months – see chapter 1, para 1.22. This equates to 306,977 users based on the 2006 census figures for usual resident population aged 15–45 (n = 1,705,431) – see Statistics New Zealand Table Builder wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx (accessed 7 October 2009). 1438 people were prosecuted for using cannabis in 2006 (see 2006 conviction statistics on Statistics New Zealand Table Builder wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx (accessed 7 October 2009)). The prosecution figures are not limited to the 15–45 age group so some over-counting is likely. We have not been able to make a similar estimate for the number of cannabis users arrested for cannabis use. In Australia, it has been estimated that fewer than one in 50 cannabis users are arrested in any one year – see Wayne Hall “A Cautious Case for Cannabis Depenalization” in Mitchell Earleywine *Pot Politics: Marijuana and the Cost of Prohibition* (Oxford University Press, New York, 2007) 102. New Zealand Police apprehension statistics indicate that approximately 2 % of users are apprehended for a possession or use offence (Statistics New Zealand Table Builder <http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx> (accessed 23 December 2009)). However, unlike prosecuted cases, apprehensions statistics are not organised according to the most serious offence and more than one apprehension will be recorded for one incident if more than one offence has been committed. Some over-counting is therefore likely.

501 D M Fergusson, NR Swain-Campbell and L J Horwood “Arrests and Convictions for Cannabis-Related Offences in a New Zealand Birth Cohort” (2003) 70 *Drug and Alcohol Dependence* 53.

502 MacCoun and Reuter, above n 484, 82.

503 Ibid.

504 Acqumen Quality Solutions and UMR Research *Research into Knowledge and Attitudes to Illegal Drugs – A Survey among the General Public and People with Experience of Drug Use* (Ministry of Health, Wellington, 2009) 31 and 88; Richie Poulton and others “Persistence and Perceived Consequences of Cannabis Use and Dependence among Young Adults: Implications for Policy” (2001) 114 *New Zealand Medical Journal* 545; Fergusson, Swain-Campbell and Horwood, above n 501, 53-63.

505 David Ryder, Noni Walker and Alison Salmon *Drug Use and Drug-Related Harm: A Delicate Balance* (2 ed, IP Communications, Melbourne, 2006) 124; Robin Room and others *The Global Cannabis Commission Report – Cannabis Policy: Moving Beyond Stalemate* (The Beckley Foundation Global Cannabis Commission, September 2008) 148 [*Global Cannabis Commission Report*].

506 Dave Bewley-Taylor, Mike Trace and Alex Stevens *Incarceration of Drug Offenders: Costs and Impacts* (Briefing Paper 7, the Beckley Foundation Drug Policy Programme, 2005) 6.

507 Ibid.

508 Simon Lenton and others *Infringement versus Conviction: The Social Impact of a Minor Cannabis Offence under a Civil Penalties System and Strict Prohibition in two Australian States* (Monograph Series No 36, National Drug Strategy, 1998) 25.

- 7.29 People also obey the law because they believe it is morally appropriate to do so, either because they agree with the content of the law itself or, even if they do not, because they agree that the law was legitimately made.⁵⁰⁹ Social and cultural attitudes towards the activity and law in question are therefore crucial.
- 7.30 Changes in patterns of drug use are, in part, simply a reflection of wider social and cultural changes. For example, we noted in chapter 4 the association between experimentation with cannabis and hallucinogens and the development of the psychedelic “hippie” counterculture in the 1960s and 1970s. More recently, the use of ecstasy and party pills has been associated with the emergence of New Zealand’s dance scene.
- 7.31 There is little recent New Zealand research on the public’s attitudes towards our current drug laws.⁵¹⁰ However, perhaps not surprisingly, Australian research of cannabis users in Western Australia and South Australia indicates that most people that were apprehended for cannabis use did not support its continued prohibition.⁵¹¹
- 7.32 Irrespective of their illegality, some drugs in New Zealand appear to be readily available, particularly drugs that are locally manufactured or cultivated. For example, when asked about search time for purchasing illegal drugs, 45 % of frequent drug users in New Zealand who had purchased cannabis in the last six months said that it took less than 20 minutes; 65 % of those who had purchased methamphetamine and 51 % of those who had purchased amphetamine were able to do so in one hour or less. In contrast, 43 % of those who had purchased ecstasy and 35 % of those who had purchased LSD said the purchase took days or weeks.⁵¹²
- 7.33 The effectiveness of prohibition in restricting the availability of illegal drugs therefore differs from drug to drug. It seems clear that prohibition is more effective for some drugs than for others. In particular, the way in which a drug is produced, distributed, and consumed may have as great an impact on a drug’s availability as its illegal status. For example, it is likely to be more difficult to restrict the availability of a drug like cannabis that can be easily grown, and tends to be consumed, in a private residence; that has relatively high rates of use; and that many consider to be less harmful than legal drugs like tobacco and alcohol.

509 von Hirsch and others, above n 499, 3.

510 Some research has been undertaken on attitudes towards enforcement of drug prohibition, as opposed to prohibition. In relation to cannabis, those surveyed tended to the view that enforcement of cannabis possession laws was “too heavy” while enforcement of cannabis sale laws was “too light”. In relation to other drugs, those surveyed considered that the enforcement of laws against both possession and sale was too light. See Chris Wilkins and others *Drug Use in New Zealand: National Surveys Comparison 1998 & 2001* (Alcohol and Public Health Research Unit, University of Auckland, 2002) 51.

511 Lenton and others, above n 508, 15.

512 C Wilkins, M Girling and P Sweetsur *Recent Trends in Illegal Drug Use in New Zealand, 2005–2007 – Findings from the 2005, 2006, and 2007 Illicit Drug Monitoring System* (Centre for Social and Health Outcomes Research and Evaluation, Massey University, Auckland, 2009) 24. At page 34 a frequent drug user was defined as being someone who used methamphetamine or ecstasy at least monthly or who injected a drug intravenously at least monthly. The respondents to the survey are not a random sample of frequent drug users, but were instead recruited through promotional campaigns and “snowballing”.

In contrast, it is likely to be easier to restrict the availability of a drug like cocaine or heroin that cannot be manufactured or produced locally; that is not widely used; and that many consider to cause an unacceptable amount of harm.⁵¹³

- 7.34 There is some evidence that prohibition impacts on price. For example, it has been estimated that a milligram of morphine sulphate that costs 6 cents in New Zealand's medical system sells for \$1 in the black market.⁵¹⁴ In the United States, it has been estimated that a pound of cannabis which costs \$US3000 on the black market could be produced for as little as \$US1.07 in the legal market.⁵¹⁵ Other analysis indicates that the mark-ups for heroin and cocaine, from the farm gate to the consumer, are about 16,800 % and 15,800 % respectively.⁵¹⁶ The sheer fact of a drug's illegal status increases its price by, for example, increasing the level of risk to the dealer at each point of the supply chain.⁵¹⁷
- 7.35 However, price is also a function of supply and, therefore, also depends on the availability of the drug concerned. In relation to cannabis, for example, while its price may be significantly higher than it would be if it could be legally produced, it remains "readily available in many Western societies at a cost that allows [it] to compete with alcohol as a source of intoxication."⁵¹⁸ In New Zealand, a tinnie of cannabis, which is enough for two to three joints, is available from around \$14 to \$30,⁵¹⁹ comparable to a bottle of wine or spirits, or a dozen beer.
- 7.36 The benefits of prohibition must also be weighed against its costs. These costs were discussed in chapter 2 in relation to cannabis and methamphetamine, and include law enforcement costs as well as costs for individual users. Costs such as these have led some to argue that the harm caused by prohibition outweighs the harms caused by drug use itself.⁵²⁰
- 7.37 For example, prohibition may inhibit users from accessing treatment for addiction or dependence due to fear of arrest or prosecution.⁵²¹ Prohibition can also make public education about safe use of drugs difficult, not only because this seems inconsistent with the overall aims of prohibition, but also because prohibition makes it more difficult to identify and access target groups.

513 Robert MacCoun, Peter Reuter and Thomas Schelling "Assessing Alternative Drug Control Regimes" (1996) 15 *Journal of Policy Analysis and Management* 330, 346.

514 Chris Wilkins *A Framework for Assessing Alternative Drug Control Regimes* (Centre for Social and Health Outcomes Research and Evaluation, Massey University, Auckland, 2008) 27.

515 Ibid.

516 Laura Wilson and Alex Stevens *Understanding Drug Markets and How to Influence Them* (R 14, the Beckley Foundation Drug Policy Programme) 2.

517 See discussion in *ibid.*

518 *Global Cannabis Commission Report*, above n 505, 75.

519 New Zealand National Drug Intelligence Bureau, above n 495, 52.

520 Ryder, Walker and Salmon, above n 505, 201.

521 See, for example, Wilkins, Girling and Sweetsur, above n 512, 162. 23% of frequent drug users cited "fear of police" as a reason for not seeking drug treatment.

Prohibition also means that there are no controls on the ingredients contained in a substance or the production process. As a consequence, harm arising from drug use may not be reduced, and may even be increased.⁵²²

- 7.38 In addition, that so many individuals engage in recreational drug use at some point in their lives suggests that there is some benefit to be derived from it.⁵²³ In the main, these benefits will relate to the short-term and immediate effects of drug use, such as euphoria, increased energy, or relaxation. Many prohibited drugs also have recognised therapeutic uses.⁵²⁴ Depriving people of these benefits as a result of drug prohibition is itself harmful, particularly if one drug cannot be substituted for another.
- 7.39 Harm also results from a user's interaction with crime and the criminal justice system as a result of a drug's illegality. Drug prohibition means that an offence is committed with every instance of use⁵²⁵ and usually requires a user to have direct contact with criminal elements (if only to obtain a drug supply). Those instances of use that are detected may lead to the user having direct involvement in the criminal justice system.⁵²⁶ Further difficulties may arise from a drug conviction including, for example, difficulties in obtaining employment.
- 7.40 The UNODC has itself identified five unintended consequences of prohibition.⁵²⁷ These are:
- (a) A huge criminal black market “that now thrives in order to get prohibited substances from producers to consumers... There is no shortage of criminals competing to claw out a share of a market in which hundred fold increases in price from production to retail are not uncommon.” UNODC considers the violence and corruption associated with the black market to provide the “strongest case” against the global drug control system.⁵²⁸
 - (b) Policy displacement, in which available funds have been drawn into public security and law enforcement and away from public health interventions.
 - (c) Geographical displacement, in which tightening controls in one country or geographical area inevitably produces an increase in drug production or supply in another country or geographical area. For example, as cocaine supply reduced in Peru and Bolivia in the second half of the 1990s, it increased in Colombia.⁵²⁹

522 See, for example, Commonwealth of Australia *Legislative Options for Cannabis Use in Australia* (Monograph Number 26, 1994) 51 which notes that the illegality of water pipes for cannabis use mean more people consume cannabis in cigarette papers, which is the form of consumption most damaging to lungs.

523 See, for example, discussion in Academy of Medical Sciences *Brain Science, Addiction and Drugs – An Academy of Medical Sciences Working Group Report Chaired by Professor Sir Gabriel Horn FRS FRCP* (The Academy of Medical Sciences, London, 2008) 64–65 and Husak, above n 479, 365. This argument may not apply to users who are addicted.

524 See MacCoun, Reuter and Schelling, above n 513, 341.

525 See MacCoun and Reuter, above n 484, 110 who argue that this is itself harmful, even if the particular instance goes undetected and unpunished.

526 37% of frequent drug users questioned as part of New Zealand's 2007 Illicit Drug Monitoring System reported legal or police problems that were related to their drug use. See Wilkins, Girling and Sweetsur, above n 512, 160.

527 Commission on Narcotic Drugs, above n 487, 10.

528 UNODC, above n 489, 163.

529 Commission on Narcotic Drugs, above n 487, 11.

- (d) Substance displacement so that suppliers and users move on to other drugs with similar psychoactive effects when their current drug-of-choice is controlled. Most recently, for example, UNODC has noted that while the markets for cannabis, cocaine, and opiates appear to be shrinking, the market for synthetic stimulants appears to be increasing and the problem caused by these stimulants is worsening.⁵³⁰
- (e) The way that we perceive and deal with drug users. As noted by the UNODC, “a system appears to have been created in which those who fall into the web of addiction find themselves excluded and marginalised from the social mainstream, tainted with a moral stigma, and often unable to find treatment even when they may be motivated to want it.”⁵³¹

7.41 These harms and unintended consequences of drug prohibition have led some jurisdictions, as well as the United Nations itself,⁵³² to consider less restrictive approaches to prohibition. These approaches continue broadly with prohibition but, at least in relation to personal use offences, place greater emphasis on limiting prohibition’s harms and give more attention to strategies of demand reduction and problem limitation.

Prohibition models that encompass diversionary approaches

Description

7.42 Under this model, the use, possession, cultivation, importation, exportation, sale and distribution of a drug for recreational purposes remain prohibited and subject to criminal offences and penalties. However, informal or intermediate measures are available to divert some drug offenders from the formal criminal justice system when an offence is detected or prosecuted. These measures may be used at various stages, including pre-sentence and post-conviction, but are most commonly used at the pre-arrest and pre-trial stages.

Rationale

7.43 This model reflects a view that some drug offences do not warrant the full intervention of the criminal justice system, and that a less formal response may be equally if not more effective in preventing re-offending and further drug use. It aims to reduce the negative and punitive effects of the criminal justice system on drug offenders, and to reduce the costs to the State. A less formal response to the offending may also be more proportionate to the offender’s culpability and the harm the offending caused. Many approaches based on this model include a rehabilitative or educative focus, to reduce drug use and limit the problems it causes.

530 UNODC, above n 489, 9.

531 Commission on Narcotic Drugs, above n 487, 10–11.

532 UNODC, above n 489, 166.

Examples of the model in practice

- 7.44 Approaches based on this model are not new, either in New Zealand or elsewhere. In New Zealand, there is a Police Adult Diversion Scheme that, in broad terms, is available to first offenders when the offence is minor or a conviction would be out of all proportion to the offence's seriousness. The Scheme is generally not available for Class A and B drug offences,⁵³³ but may be available for minor instances of Class C drug offending such as possession or use of a Class C drug, as well as cultivation of cannabis, and possession of needles or other utensils.⁵³⁴
- 7.45 The Scheme requires that a prosecution commence and an acknowledgement of guilt made before an offender can be considered for diversion. An offender must sign a diversion agreement which will also set out the conditions of diversion, such as participation in alcohol or drug counselling. If the offender successfully completes diversion (for example, by fulfilling the diversion conditions), the charge will be withdrawn. If not, the prosecution of the offender continues. There is no statutory basis for the Scheme, and its implementation is a matter of police discretion with the assistance of police guidelines.
- 7.46 All Australian states and territories have some form of cautioning schemes specifically for minor drug offences such as personal possession and use. These schemes operate in broadly similar ways – that is, offenders who are apprehended for minor drug offences are able to receive a caution for that offending rather than being prosecuted in court. There are, however, some important differences. These include the type of drugs and other activities that are covered,⁵³⁵ the amounts of drugs involved,⁵³⁶ the age-range of eligible offenders,⁵³⁷ the emphasis

533 However, it may be available in some circumstances for possession of a small amount of cannabis oil, a Class B drug.

534 Police Diversion policy as at 22 September 2009, 11 www.police.govt.nz/sites/default/files/services/diversion/Policy%20-%20Adult%20diversion%20scheme%20-%20updated%2022Sep09.pdf (accessed 19 October 2009).

535 The schemes in New South Wales and Queensland are limited to cannabis. South Australia has separate diversion schemes for cannabis, other illegal drugs, and prescription drugs, all of which operate in slightly different ways. Tasmania and Victoria also treat cautions for cannabis and for other drugs differently. The Northern Territory and Western Australia have caution schemes for drugs other than cannabis; these supplement infringement-offence systems for cannabis offending. The Australian Capital Territory's scheme applies to all illegal drugs in the same way. The schemes in New South Wales, Western Australia and Queensland extend to implement offences. See Jason Payne, Max Kwiatkowski and Joy Wundersitz *Police Drug Diversion: A Study of Criminal Offending Outcomes* (Australian Institute of Criminology, Canberra, 2008) 77–80.

536 For example, New South Wales' cannabis scheme appears the most restrictive, being limited to possession of not more than 15g of cannabis. Most other states appear to allow up to 50g of cannabis to be possessed. See Joanne Baker and Derek Goh *The Cannabis Cautioning Scheme Three Years On: An Implementation and Outcome Evaluation* (NSW Bureau of Crime Statistics and Research, Sydney, 2004) 2.

537 South Australia's schemes apply to those aged between 10 and 17. The New South Wales and Western Australia schemes apply to those aged 18 or over. The schemes in Tasmania, Australian Capital Territory, Queensland, and the Northern Territory apply from age 10. Victoria's cannabis scheme applies from age 17, while its scheme for non-cannabis applies from age 10. Payne, Kwiatkowski and Wundersitz, above n 535, 77–80.

placed on education and treatment,⁵³⁸ how many times an individual may be cautioned before he or she becomes ineligible for a caution,⁵³⁹ and whether the scheme is mandated by legislation.⁵⁴⁰

- 7.47 The New South Wales (NSW) Cannabis Cautioning Scheme commenced on 3 April 2000. Adults who are found using or possessing less than 15 grams of (dried) cannabis and/or equipment for using cannabis may receive a formal police caution. The cannabis must be possessed for personal use and sufficient evidence to prosecute the offender for the offence must exist. The offender must admit the offence, must not be involved in any other criminal offence at the time, and must have no prior convictions for drug, violent or sexual offences. Police are required to seize and secure the cannabis and/or equipment.
- 7.48 A caution can only be issued on two occasions. The notice issued with the first caution includes information on the health and legal consequences of cannabis use, and provides information about treatment and support services. Those who receive a second caution must participate in a mandatory education session over the telephone on cannabis use. As with New Zealand's Diversion Scheme, there is no statutory basis for the NSW Scheme; instead, there are a set of guidelines that guide the exercise of police discretion.
- 7.49 There are also opportunities at later stages in New Zealand's criminal justice system for diversion of drug offenders into treatment or other rehabilitative options. For example, a court may adjourn proceedings to enable an offender who has pleaded or been found guilty to undertake a rehabilitative programme prior to sentencing.⁵⁴¹ The offender's participation in that programme may then be taken into account in an offender's sentence. This option is available to any offender, and is not limited to drug offenders.
- 7.50 Similar opportunities exist in all Australian jurisdictions. However, these court-based diversion programmes tend to operate on a more formalised and systematic basis than in New Zealand and specifically target drug users or offenders whose offending appears to be related to their drug use. Successful completion of a programme, including participation in a drug treatment programme, may result in charges being withdrawn or that completion being taken into account in the offender's final sentence.⁵⁴²

538 Most schemes provide offenders with information about the legal or health consequences of drug use. Some provide the offender with contact details for health providers, with attendance voluntary (for example, Victoria, New South Wales). Some also require participation in a mandatory education session (for example, Queensland for any caution; New South Wales and Tasmania upon receiving a second caution; Northern Territory, Victoria, and Western Australia for any caution received for non-cannabis). Ibid.

539 There is no limit on the number of cautions in South Australia and Northern Territory; in New South Wales, Victoria, Queensland, and the Australian Capital Territory, a person can only be cautioned twice; in Western Australia a person can only be cautioned once. Ibid.

540 Queensland and South Australia are the only States with legislation.

541 Sentencing Act 2002, s 25.

542 Joy Wundersitz *Criminal Justice Responses to Drug and Drug-Related Offending: Are They Working?* (Australian Institute of Criminology, Canberra, 2007) 12.

Costs and benefits

- 7.51 It is important to note that, under this model, drug offenders remain subject to the criminal law, even if the response from the criminal justice system is sometimes less formal in nature. Most jurisdictions target their diversionary response to particular offenders or offending. Offenders and offending that fall outside those limits can still be prosecuted and convicted.
- 7.52 Most diversion or cautioning schemes at the pre-trial or pre-arrest stage aim to avoid prosecution and formal court proceedings for minor offenders, and are successful in this regard. A 2004 evaluation of the first three years of the NSW Cautioning Scheme found that the number of charges laid and dealt with by the courts, and the number of convictions, decreased over that time.⁵⁴³ However, the decrease in charges that the courts dealt with was not of the same magnitude as the number of cautions issued.⁵⁴⁴ This raises the issue of “net-widening” – that is, that some individuals who received a caution may have previously had no action taken against them, or been issued with an informal warning.⁵⁴⁵
- 7.53 The NSW evaluation also found that the Scheme resulted in savings in police and court time of approximately \$AUS1.4 million over the first three years. The net saving, once running and implementation costs were taken into account, was approximately \$AUS300,000.⁵⁴⁶
- 7.54 The impact cautioning schemes have on rates of drug use is unclear. As discussed above, the range of factors that may influence an individual’s decision to use drugs means that it is difficult to isolate the specific impact of a particular regulatory approach. However, the 2007 national household survey of drug use in Australia found that past-year cannabis use in NSW was the lowest of all Australian states and territories.⁵⁴⁷
- 7.55 A useful component of most cautioning schemes is the opportunity to educate users about the risks of drug use, and to divert users into drug treatment if required. In this regard, the education and treatment component of the NSW Scheme did not appear to be particularly effective. Few offenders sought

543 Baker and Goh, above n 536, 35. There were 2658 fewer people convicted per year.

544 Ibid, 26–29. Over 9000 cautions were issued in the first three years of the Scheme. The number of charges laid has decreased by less than 7000, the number of charges dealt with by the courts has decreased by less than 6000 and the number of people convicted has decreased by less than 3000.

545 Ibid, 32. The fact that caution notices tended to be issued for possession of very small amounts of cannabis suggested that net-widening had been a consequence of the New South Wales Scheme. 96% of the 9235 cautions issued were for possession offences rather than equipment offences. Over 75% of the possession offences for which a caution was issued involved 5 grams of cannabis or less.

546 Ibid, 37. The running costs were approximately \$AUS1.1 million over evaluation period.

547 In New South Wales, 8% of the population aged 14 years or over used cannabis in the past 12 months, compared to Victoria: 8.8%; Queensland: 9.5%; Western Australia: 10.8%; South Australia: 10.2%; Tasmania: 10.8%; Australian Capital Territory: 9.1%; Northern Territory: 13.8%, and Australia overall: 9.1%. See Australian Institute of Health and Welfare 2007 *National Drug Strategy Household Survey: State and Territory Supplement* (AIHW, Canberra, 2008) 8.

assistance or treatment as a result of their cannabis use, and less than half of those offenders who were correctly issued with a second caution notice attended their mandatory education session.⁵⁴⁸

- 7.56 In NSW, there is no follow-up to ensure the offender completes his or her caution requirements. Other jurisdictions, such as Queensland and Tasmania, have made participation in education or treatment an enforceable requirement of a caution that may lead to charges being laid for the original offending (or for the failure to comply with the caution notice) in the event of non-compliance. While this may provide a necessary enforcement mechanism, it also lessens the scheme's diversionary nature. This is because the potential for escalation through the criminal justice process remains.⁵⁴⁹ It also increases a scheme's cost.
- 7.57 Jurisdictions that implement cautioning or diversion schemes for personal use offences also tend not to address the issue of supply. Consequently, a black market in the prohibited drug remains and, unless they make or produce their own supply, users must access illegal markets to obtain drugs.
- 7.58 Particularly where there is no mandating legislation, whether or not an individual is offered a caution or diversion depends in large measure on the exercise of police discretion, and the response of individual police officers when an offence is detected. In NSW, the use of cautions varied across the state. A key reason for the regional variation appeared to be the extent to which the Scheme was supported in the local area.⁵⁵⁰ While some variation in response to local conditions is appropriate and should be expected, it also raises the prospect of selective or inequitable use of police discretion.
- 7.59 It is also necessary to ensure that any education or treatment that is part of a cautioning or diversion scheme is appropriate and provided only to those who are likely to benefit from it. Otherwise, significant costs may be incurred for little advantage. There may be little to be gained, for example, in requiring users who will not use again or who may use only infrequently, or who experience no particular problems from their drug use, to participate in education or treatment.

Prohibition models that preclude the possibility of criminal conviction

Description

- 7.60 Under this model, the use, possession, cultivation, importation, exportation, sale, and distribution of a drug for recreational purposes remain prohibited and illegal. However, it is not possible for an individual to be convicted of an offence in relation to minor instances of some of those activities, and the offence is not dealt with through the usual criminal justice process. This can be achieved in one of two ways. First, the possibility of conviction can simply be removed, even though the offences remain criminal offences subject to criminal penalties.

548 The approach to second cautions was amended in 2001. There appeared to be a lack of training and communication to police about how the second cautions were to work, meaning that only 25 % of second caution notices were assessed as being issued correctly. But this only affected a small number of people, as only 187 people were cautioned on two occasions. Baker and Goh, above n 536, 22–24.

549 This appears to be the reason why New South Wales did not take this approach – see *ibid*, 5.

550 *Ibid*, 19.

This is the approach taken in New Zealand to the vast majority of infringement offences. Alternatively, criminal offences and penalties can be removed altogether and be replaced with civil ones.⁵⁵¹

- 7.61 The term “decriminalisation” is often used to describe both types of approaches. Technically, however, that term is only correct in relation to the latter approach – that is, where the status of the offences changes from criminal offences to civil offences, and where civil, rather than criminal, penalties apply.

Rationale

- 7.62 This model shares many of the goals of a diversionary model. It aims to reduce the punitive impact and costs of the criminal law, while still maintaining the illegality of the prohibited conduct. This maintains the normative message that drug use is “wrong” or harmful. However, by precluding the possibility of formal criminal proceedings and the possibility of conviction, it aims to reduce the harms and costs of prohibition to both the individual and the State.

Examples of the model in practice

- 7.63 There are two types of approaches operating in other jurisdictions. The first is essentially an infringement offence system, which requires the payment of a monetary fee or completion of some other fixed penalty when an infringement offence notice is issued for a minor drug offence. Some Australian States, and the United Kingdom, operate this type of approach in relation to cannabis offences. The second approach applies purely administrative or civil sanctions, including referral to or participation in an education or treatment session. This type of approach is more likely to be found in European jurisdictions.

Infringement offence systems

- 7.64 Infringement offence systems are intended to deal with high-volume and/or minor offences that are considered not to require the full intervention of the criminal law or the full extent of due process, or that would otherwise clog the court system. Most cases are resolved between the defendant and the prosecuting authority without court involvement. The court process is only used when the defendant denies the charge or wishes to make submissions as to penalty, or when the infringement fee is not paid on time (or another form of penalty is not complied with).⁵⁵²
- 7.65 Infringement offences are an established part of New Zealand’s justice system. Twenty different infringement offence regimes are currently in force, ranging from minor traffic offences, dog control, litter, and liquor licensing to resource management, biosecurity, civil aviation, and occupational health and safety. There is no infringement offence regime in New Zealand for drug offences.

551 Note that there are very few civil infringement offence regimes in New Zealand. The only regime that we are aware of is in Part 4A of the Telecommunications Act 2001 which enables a civil infringement notice to be issued in relation to a variety of statutory and regulatory breaches under the Act.

552 See New Zealand Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, Wellington, 2005) 2.

- 7.66 In Australia, infringement offence regimes for minor cannabis offences are in place in South Australia, the Northern Territory, Australian Capital Territory, and Western Australia.⁵⁵³ The longest-running scheme is the South Australian Cannabis Expiation Notice Scheme which was introduced in 1987. An adult who commits a minor possession,⁵⁵⁴ use,⁵⁵⁵ or cultivation⁵⁵⁶ offence must be issued with an expiation notice, rather than be prosecuted. There are prescribed infringement fees depending on the activity detected and the amount of cannabis involved. A maximum fee of \$300 applies when the offence involves cultivation, or when the offence involves possession of between 25 grams and 100 grams of cannabis or between five grams and 20 grams of cannabis resin.⁵⁵⁷
- 7.67 Since January 2009, when cannabis was reclassified from a Class C to a Class B drug, the United Kingdom has included cannabis possession in its Penalty Notice Disorder (PND) Scheme. An adult found in possession of a small amount of cannabis or cannabis derivatives that the police consider to be for personal use may be issued with a PND, which requires the payment of an £80 fine. A PND can only be issued once, and will not be issued when the cannabis is being used in a public place, when there is a related local policing problem,⁵⁵⁸ or when the possession of cannabis is creating a particular risk to young people (for example, because it is possessed in premises that young people use such as schools or youth clubs).⁵⁵⁹

Approaches that apply civil or administrative penalties

- 7.68 In some European States, individuals who are apprehended for minor drug offences are referred to administrative authorities for consideration of their education and treatment needs (with the drugs usually confiscated). In Portugal, this approach applies to the purchase, possession, and consumption of all drugs for personal use, all of which are civil offences. Other drug offences, in particular, production/manufacture, import/export, and supply remain criminal offences subject to criminal penalties.
- 7.69 A key component of Portugal's approach was the establishment of Commissions for Dissuasion of Drug Addiction. The commissions are locally-based panels that decide how individuals ("consumers") who are apprehended by the police for personal use offences should be dealt with. Consumers must appear in front of a commission

553 A Bill to replace the Western Australian scheme, the Cannabis Law Reform Bill 2009, was introduced into Western Australia's Legislative Assembly on 14 October 2009. That Bill replaces the infringement notice regime with a Cannabis Intervention Requirement Scheme, which requires those in possession of less than 10 gms of cannabis to participate in an education session.

554 Controlled Substances Act 1984 (SA), s 33L(2)(a) – Possession. This applies to a person in possession of 100gms of cannabis, 20 gms cannabis resin, or 0 ml of cannabis oil. Controlled Substances (General) Regulations 2000 (SA), reg 9B(2).

555 Controlled Substances Act 1984 (SA), s 33L(2)(b) – Use. This does not apply where the offending occurs in a public place or a prescribed place.

556 Controlled Substances (General) Regulations 2000 (SA), reg 9B(1) – Cultivation. This applies to a person who has cultivated one plant. This does not apply to hydroponic cannabis (Controlled Substances Act 1984 (SA), s 45A).

557 Controlled Substances (General) Regulations 2000 (SA), Schedule 5.

558 For example, "fear of antisocial behaviour associated with the use of cannabis". Association of Chief Police Officers *ACPO Guidance on Cannabis Possession for Personal Use: Revised Intervention Framework* (ACPO, London, 2009) 5.

559 Ibid.

within 72 hours of a police citation being issued. The commission then has a variety of options available to it, ranging from the imposition of a warning or a fine to more intensive and restrictive measures such as reporting requirements, a prohibition on being in a certain place, associating with certain people, or working in a particular occupation or profession.⁵⁶⁰ The commission can suspend the imposition of sanctions on the condition that the consumer seeks treatment.

- 7.70 Most cases dealt with by the commissions involve cannabis,⁵⁶¹ are committed by young people,⁵⁶² and result in proceedings being suspended while drug treatment is undertaken (83 % of cases in 2005). In those cases where sanctions are imposed (15 % of cases in 2005), the most common is the imposition of reporting requirements. The remaining cases result in “absolution”.⁵⁶³

Costs and benefits

- 7.71 These types of approaches tend to be implemented as part of an overall strategy to achieve a greater legal and practical distinction between drug users and suppliers, and to redirect law enforcement resources towards the latter.⁵⁶⁴ For example, introduction of South Australia’s Expiation Notice Scheme was accompanied by increased penalties for more serious cannabis offences such as commercial sale and supply. In Portugal, in the four years after the introduction of its Scheme, there was an 11 % increase in individuals charged with trafficking offences, as compared to the four years prior.
- 7.72 The impact of these types of approaches on rates of drug use remains contentious. An early study of the South Australian Scheme concluded that an increase in self-reported lifetime cannabis use among South Australians aged 14 years and older between 1985 and 1995 was unlikely to be a result of the Scheme, because a similar increase had been reported in other areas of Australia.⁵⁶⁵ Similar conclusions have been drawn about the impact of the Australian Capital Territory and Western Australian schemes.⁵⁶⁶

560 The full range of sanctions are: fines; warnings; banning the consumer from working in a particular profession or occupation, particularly where the consumer or a third party may be at risk; banning the consumer from being in certain places; prohibiting the consumer from associating with certain people; forbidding the consumer from travelling abroad without permission; reporting requirements; prohibiting the consumer from being granted with or renewing a firearms license for defence, hunting, precision shooting, or recreation; seizure of objects belonging to the consumer which represent a risk to him or her or to the community or which encourage the committing of a crime or other offence; privation from the right to manage the subsidy or benefit attributed on a personal basis by public bodies or services, which shall be managed by the organisation managing the proceedings or monitoring the treatment process, when agreed to by the consumer.

561 65 % cannabis, 15 % heroin, 6 % cocaine in 2005. The proportion of cases involving cannabis has increased since 2001 (from 47 % in 2001 to 65 % in 2005) and the proportion of cases involving heroin has decreased (from 33 % in 2001 to 15 % in 2005). Caitlin Hughes and Alex Stevens *The Effects of Decriminalisation of Drug Use in Portugal* (Briefing Paper 14, the Beckley Foundation Drug Policy Programme, 2007) 3.

562 *Ibid*, 2.

563 Absolution presumably means no action being taken. These proportions have remained roughly the same since the law’s enactment – Glenn Greenwald *Drug Decriminalisation in Portugal: Lessons for Creating Fair and Successful Drug Policies* (Cato Institute, Washington, 2009) 6.

564 Alisen Brooks and others *Costs Associated with the Operation of the Cannabis Expiation Notice Scheme in South Australia* (Drug and Alcohol Services Council, South Australia, 1999) 8; Hughes and Stevens, above n 561, 2.

565 *Global Cannabis Commission Report*, above n 505, 131.

566 *Ibid*, 132.

- 7.73 More recently, the 2007 national household survey of drug use in Australia found that levels of cannabis use in those Australian jurisdictions with infringement offence regimes are the same as or higher than the other states and territories and the overall national level.⁵⁶⁷ Use in all Australian jurisdictions has been decreasing since at least 1998, with the greatest reductions occurring in jurisdictions with infringement offence regimes: Northern Territory, Western Australia, and the ACT. The Northern Territory, which implemented its infringement offence regime in 1996, has seen the annual prevalence of cannabis use drop from 36.5 % to 13.8 % between 1998 and 2007.⁵⁶⁸
- 7.74 It appears that drug use has increased overall in Portugal since 2001. However, there is evidence of a similar increase in neighbouring countries, Spain and Italy.⁵⁶⁹ In addition, the increase is not the same across all age groups and all drugs. For example, drug use has decreased amongst those aged 15–19, but increased amongst those aged 20–24.⁵⁷⁰ While there has been an increase in cannabis use, particularly amongst young people aged 16–18,⁵⁷¹ there has been a decrease in heroin use in that same age bracket.
- 7.75 The harm caused by heroin use was a particular public and political concern prior to the Portuguese reforms.⁵⁷² The decrease in heroin use and related harm is seen as a particular success of the reforms.
- 7.76 The number of users seeking treatment for drug abuse and addiction has also increased in Portugal. This includes a 147 % increase in the number of people in substitution treatment.⁵⁷³ There has also been an increase in the nature and number of drug treatment programmes, and drug-related deaths⁵⁷⁴ and disease⁵⁷⁵ have declined.
- 7.77 The infringement offence regimes tend not to have a significant emphasis on drug education or treatment. In Western Australia, those issued with an infringement notice may attend a 1.5 hour education session on drug use rather than pay a monetary fee, and those issued with a notice on two separate occasions in the past three years must attend that session. A three-year review of the Western Australian Scheme completed in 2007 found that most participants

567 Australian Institute of Health and Welfare, above n 547, 8.

568 Ibid, 8; Drug and Alcohol Office *Statutory Review: Cannabis Control Act 2003: Report to the Minister of Health* (Drug and Alcohol Office, Perth, 2007), 81.

569 Hughes and Stevens, above n 561, 5.

570 Greenwald, above n 563, 14.

571 Lifetime prevalence of cannabis use among students aged 16–18 increased from 9.4 % in 1999 to 15.1 % in 2003. Hughes and Stevens, above n 561, 3.

572 The United Nations reports a stable or declining trend in opiate use in Western Europe, and an increasing trend in Eastern Europe. UNODC, above n 489, 54.

573 From 6040 people in 1999 to 14,877 people in 2003. Hughes and Stevens, above n 561, 2.

574 There was a 59 % reduction in drug-related deaths between 1999 and 2003. This reduction was solely attributable to a reduction in heroin-related deaths (which reduced from 350 in 1999 to 98 in 2003). Deaths related to other drugs increased over the same period (from 19 to 54). Ibid, 3.

575 There has also been a reduction in drug-related disease. Between 1999 and 2003, a 17 % reduction in notification of new, drug-related cases of HIV was reported (*Global Cannabis Commission Report*, above n 505, 3). Since 2000, a mild reduction in the rates of new hepatitis B and C infections was also reported (Greenwald, above n 563, 16).

found the session to be somewhat to very useful, with the majority of participants considering that the session had increased their knowledge about the health, social, and legal issues associated with cannabis, and treatment options.⁵⁷⁶

- 7.78 The South Australian Scheme appears to have resulted in some savings in enforcement and justice costs.⁵⁷⁷ The impact on the criminal justice system in Portugal has also been significant. In 2000, 7592 individuals in Portugal were charged in relation to drug use. These individuals are now referred to the Commissions, and only appear before the criminal courts if there is evidence of drug trafficking or any other criminal offence.
- 7.79 In addition, a study comparing the social impact of receiving an infringement notice in South Australia versus the social impact of receiving a conviction in Western Australia prior to the introduction of its infringement offence regime concluded that the South Australian Scheme was effective in preventing the range of negative social outcomes that follow a conviction. These included the impact on employment opportunities and relationships, the ability to find accommodation, and consequences for travel.⁵⁷⁸
- 7.80 These regimes all contain an inherent trade-off between providing a simple, speedy, and inexpensive response to wrongdoing and reducing the due process protections that would be available to an individual as part of a conventional criminal justice response. For example, an offence must only be alleged (and not proved) for an infringement notice to be issued, although the individual is still given the opportunity to contest it.
- 7.81 As with cautioning schemes, the ease with which infringement notices or citations can be issued also means that there is likely to be some “net-widening”. This has particular implications in those jurisdictions, such as South Australia, where non-payment of an infringement fee can lead to conviction for the original offence.
- 7.82 If the only penalty available is payment of a fixed monetary fee, this can create particular hardship for the financially or socially disadvantaged. Australian states tend to have an initial compliance rate before enforcement action is taken of around 50%. Most jurisdictions have mechanisms in place that attempt to address this issue, such as the ability for a monetary penalty to be reviewed or paid in instalments. Non-monetary penalties (for example, attendance at an

576 Drug and Alcohol Office, above n 568, 148.

577 One study estimated that the cost of issuing expiation notices was \$AUS1.24 million in 1995/96, compared to a cost of \$AUS2.01 million to deal with those offences through standard criminal justice processes. Revenue generated through the payment of infringement fees and fines was also greater than what would have been generated through the payment of fines for those offences in the criminal justice system. Broadly, the cost of the expiation notice scheme was estimated by calculating the unit cost per infringement notice that was then aggregated to a total. This cost did not include infrastructure or detection costs. This was based on the 1995/96 expiation rate of 44%. Brooks and others, above n 564, iv–v.

578 Lenton and others, above n 508. The impact of a conviction in Western Australia compared as follows with a South Australian expiation notice: self reports of adverse employment consequences were 32% in Western Australia compared with 2% in South Australia; further contact with the criminal justice sector was 32% in Western Australia compared with 0% in South Australia; relationship problems were 20% in Western Australia compared with 5% in South Australia; accommodation difficulties were 16% in Western Australia compared with 0% in South Australia.

education session as in Western Australia⁵⁷⁹) are also possible. In New Zealand, it has been estimated that only 39 % of infringement fees by value are paid to the prosecuting authority without enforcement action being taken.⁵⁸⁰

De facto partial prohibition

Description

7.83 Under a model of *de facto* partial prohibition, the use, possession, manufacture, import, export, and other distribution of a drug remains illegal in law, but that law is not actively enforced and may even be openly tolerated at an official level.

Rationale

7.84 *De facto* partial prohibition shares many of the goals and aims of the other less punitive approaches to prohibition. These include a desire to reduce the social and economic costs of prohibition, and to separate minor drug activities and users from more serious drug activities and users. It also aims to achieve a more balanced approach to strategies of supply control, problem limitation, and demand reduction.

Examples of the model in practice

7.85 The exercise of police discretion means that in practice most jurisdictions, including New Zealand, operate some form of *de facto* partial prohibition in relation to many instances of offending. Minor or trivial offending, in particular, may often result in the police taking no action, or issuing an informal (usually oral) warning or caution, rather than taking any formal action. The appropriate action to be taken is a decision for individual officers, guided by any internal policy or guidelines.⁵⁸¹ In addition, the emphasis the police give to enforcing particular offences or activities depends on relative priorities and resources, and can be expected to change over time. This is partly reflected in police apprehensions statistics: police apprehensions for possession and use of drugs, for example, have decreased from 13,577 in 1999 to 9708 in 2008.⁵⁸²

579 13 % of all those issued with an infringement notice chose to attend the education session rather than pay the monetary fee – Drug and Alcohol Office, above n 568, 38.

580 Ministry of Justice and New Zealand Law Commission *Review of the Infringement System: Options for Reform* (Wellington, 2004) 39. In 2008/09, 47 % of infringement notices issued by the New Zealand Police were paid on time (figures supplied by the Ministry of Justice, December 2009).

581 See New Zealand Police *Illicit Drug Strategy to 2010* (New Zealand Police, Wellington 2008) 7, for example, which prioritises activities in relation to methamphetamine and cannabis. It sets out three key focus areas: methamphetamine, cannabis, and groups at risk.

582 Statistics New Zealand Table Builder <http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx> (accessed 4 November 2009).

- 7.86 In the drugs context, the most well-known example of *de facto* partial prohibition is the approach taken in the Netherlands since 1976 to cannabis offences.⁵⁸³ Cannabis remains a prohibited drug but there is a formal policy of not prosecuting offences that involve a small amount of cannabis (five grams or less) for personal use.⁵⁸⁴ Instead, personal use and possession of cannabis is “actively tolerated”⁵⁸⁵ in the home and in licensed coffee shops, where small amounts of cannabis can also be purchased.⁵⁸⁶ Coffee shops are officially sanctioned and regulated, with national guidelines about how they are to be run and where they are to be located. These guidelines include limits on advertising and the amount of cannabis that can be sold,⁵⁸⁷ and a ban on sale to minors or the sale or use of other illegal drugs.⁵⁸⁸ More recently, the Dutch Government has required that coffee shops not be located within a certain distance of schools.⁵⁸⁹ Official action, including prosecution, will only be taken against individuals (and coffee shops) who do not comply with the guidelines.
- 7.87 The Netherlands also applies partial prohibition to the possession of small quantities of other drugs for personal use. Anyone found in possession of less than half a gram of a drug included in List 1 of the Opium Act 1976 will generally not be prosecuted. Instead, the police will confiscate the drugs and consult a care or support agency about the individual user.⁵⁹⁰
- 7.88 For about five years in the United Kingdom, from 2004 to 2009, police guidelines included a general presumption against arrest for cannabis possession. This occurred as part of a reclassification of cannabis from Class B to Class C, and despite accompanying statutory changes that introduced a power to arrest in relation to Class C drugs. Police were required to confiscate any cannabis found, but otherwise no further action was to be taken.⁵⁹¹

583 There are also relevant police guidelines in the Netherlands in relation to other offences – for example, the guidelines give low priority to the investigation and prosecution of heroin possession <http://eldd.emcdda.europa.eu/html.cfm/index5174EN.html#> (accessed 14 August 2009).

584 Wilkins, above n 514, 29.

585 *Global Cannabis Commission Report*, above n 505, 113.

586 *Ibid.*

587 Ryder, Walker and Salmon, above n 505, 122.

588 *Global Cannabis Commission Report*, above n 505, 114.

589 See www.dutchamsterdam.nl/548-amsterdam-closing-coffeeshops (accessed 19 October 2009).

590 List 1 includes, for example, heroin, cocaine, methamphetamine, morphine, opium. See Netherlands Country Report, European Legal Database on Drugs <http://eldd.emcdda.europa.eu> (accessed 5 August 2009).

591 Mike Trace, Axel Klein and Marcus Roberts *Reclassification of Cannabis in the United Kingdom* (Drugscope Birefing Paper, No 1, Beckley Foundation Drug Policy Programme, 2004) 3. See also, L H Leigh “The Seamless Web? Diversion from the Criminal Process and Judicial Review” (2007) 70 MLR 654.

Costs and benefits

- 7.89 Research indicates that the approach taken to cannabis in the Netherlands has not, in itself, led to an increase in rates of cannabis use among adults,⁵⁹² although there remains a question about its impact on rates of use among young people.⁵⁹³ The approach does appear to have been particularly successful in separating the market for, and users of, cannabis from those of other substances.⁵⁹⁴
- 7.90 Partial prohibition is likely to attract concern from other jurisdictions on the basis that it undermines the global effort against drugs. In recent years, the Netherlands has been coming under increasing pressure, including from the European Union, United States, and UNODC, to move towards a more restrictive approach. It has been argued that the Netherlands' approach undermines the domestic drug policies of other jurisdictions, stimulates cross-border tourism, and undermines international efforts in the "war against drugs".⁵⁹⁵ This pressure has led to the Netherlands progressively tightening its approach.⁵⁹⁶ As a result, the number of coffee shops has decreased from approximately 1500 in the mid-1990s to just over 700 in 2004.⁵⁹⁷
- 7.91 There is also a risk of creating confusion in the public's mind about what the law actually requires. This is because the law as applied in practice differs markedly and officially from what the law says. Clear guidelines that are made widely available are one way to manage that risk, as is making any changes to practice widely known. Even then, however, application of the guidelines is likely to differ case-by-case due to the exercise of police discretion.

Legalisation with regulatory restrictions

Description

- 7.92 Under this model, specified drug-related activities would be legal, but subject to governmental regulation and control. Activities that occur outside those bounds would be illegal and subject to civil or criminal sanctions.

592 *Global Cannabis Commission Report*, above n 505, 143.

593 *Ibid*, 114:

On balance we would say that the case is still open about whether de facto legalisation led to more use by youth and an earlier age of onset; it cannot be ruled out that increases in youth prevalence may have been associated with increasing de facto legalisation, and subsequent decreases with tightening up of this policy...The Dutch experience raises the question about whether going beyond depenalisation to de facto legalisation may increase rates of use among the young, who are most vulnerable to the adverse effects of cannabis. Some will disagree with this analysis, but we believe at this stage a caution conclusion is warranted, pending further research.

594 *Ibid*, 143. A study shows 87 % of the Amsterdam sample bought cannabis from coffee shops, compared to 95 % of the San Franciscan sample who bought cannabis from friends who knew a dealer, or from "known dealers".

595 *Ibid*, 114.

596 See *ibid*, 114 and Dirk Korf "An Open Front Door: The Coffee Shop Phenomenon in the Netherlands" in Sharon Rodner Sznitman, Borje Olsson, Robin Room *A Cannabis Reader: Global Issues and Local Experiences* (European Monitoring Centre for Drugs and Drug Addiction, Lisbon, 2008). This includes reducing the number of coffee shops, increasing the minimum age of purchase from 16 to 18, increasing enforcement of cannabis use outside the tolerated bounds, and restricting the proximity of coffee shops to schools.

597 Korf, above n 596, 142.

Rationale

- 7.93 Some view legalisation with regulatory restrictions as a pragmatic approach to the reality that prohibition is either unachievable or infeasible.⁵⁹⁸ The focus therefore is to ensure that drug use takes place in as safe an environment as possible. For this reason, this model has been described as a model of “grudging tolerance”. Drug use and related activities are tolerated, but are not positively endorsed and may even be actively discouraged.⁵⁹⁹ This model also aims to address some of the harms of prohibition, including the existence of a criminal black market in an illegal substance. Recent proposals in the United States of America to legalise and regulate cannabis (see paragraph 7.95 below) have also been supported as a way to generate tax revenue from cannabis sales.
- 7.94 More fundamentally, legalisation with regulatory restrictions can be justified on a more principled basis; that is, in a free and democratic society, the decision to completely prohibit a drug should be a last resort when lesser regulatory options have proven ineffective in preventing the harm that use of that drug causes. In this sense, this model is an intermediate position between full legalisation (see below) and prohibition.

Examples of the model in practice

- 7.95 No jurisdiction has moved to regulate currently illegal drugs, although some proposals have been made.⁶⁰⁰ For example, in the United States of America, there are legislative proposals to legalise and regulate the cultivation, use, possession, and sale of cannabis in front of California’s State Assembly⁶⁰¹ and Massachusetts’ Senate and House Assembly.⁶⁰² In Australia, the Premier’s Drug Advisory Council recommended to the Victorian Government in 1996 that use and possession of less than 25 grams of cannabis and cultivation of up to five cannabis plants should no longer be offences. The Advisory Council noted that cannabis use was widespread and considered that:⁶⁰³

[S]trategies to reduce use and misuse are most likely to be effective if use of cannabis is no longer a criminal offence but is regulated in a number of important respects. Education and treatment will be facilitated by this change and respect for the law may also increase.

- 7.96 The recommendation was not adopted by the Victorian Government, which has since implemented a cannabis cautioning scheme.

598 MacCoun, Reuter and Schelling, above n 513, 336.

599 See discussion in Mark A R Kleiman “Neither Prohibition Nor Legalisation: Grudging Tolerance in Drug Control Policy” (1992) 121 *Daedalus*, 53.

600 *Global Cannabis Commission Report*, above n 505, 122. See also: Senate Special Committee on Illegal Drugs “Cannabis: Our Position for a Canadian Public Policy” (September 2002); Alex Wodak and Annie Cooney “Should Cannabis be Taxed and Regulated?” (2004) 23 *Drug and Alcohol Review* 139.

601 California – Marijuana Control, Regulation and Education Act AB 390.

602 Massachusetts – Cannabis Regulation and Taxation Act.

603 Premier’s Drug Advisory Council *Drugs and our Community: Report of the Premier’s Drug Advisory Council* (Victorian Government, Melbourne, 1996) 129.

- 7.97 There are a number of regulatory regimes in New Zealand that potentially apply to psychoactive substances. These include the restricted substances regime under the Misuse of Drugs Amendment Act 2005 (which regulates psychoactive substances that are not so harmful that they should be prohibited under the Misuse of Drugs Act) and the regulatory regime under the Hazardous Substances and New Organisms Act 1996. The details of these and other relevant regimes are discussed in detail in chapter 5.
- 7.98 Legalisation with regulatory restrictions is also the model applied in New Zealand and elsewhere to the control of alcohol and tobacco.

Costs and benefits

- 7.99 A key advantage of this model is that it enables regulatory decisions (including a decision about whether to regulate at all and, if so, how) to be informed by the purpose of an activity and the harms it causes. The vast majority of activities are regulated in this way. Restrictions by way of regulation are only imposed when that is considered necessary to prevent harm, and the benefits of those restrictions outweigh their costs. This is consistent with the needs of a free and democratic society.
- 7.100 A regulatory model enables restrictions to be tailored to the harm that they aim to prevent. Chapter 5 outlined the variety of ways in which restricted and hazardous substances may be regulated under their applicable regimes. The regulation of alcohol provides another example. That approach regulates:⁶⁰⁴
- (a) who may purchase, possess, or consume alcohol – there is a minimum age of 18 years to purchase alcohol on or from any licensed premise;⁶⁰⁵
 - (b) when alcohol may be sold or served – for example, licensees and managers of licensed premises must not serve minors or intoxicated persons,⁶⁰⁶ and there are restrictions on the sale of alcohol on Good Friday, Easter Sunday, Christmas Day or until 1pm on Anzac Day;⁶⁰⁷
 - (c) where the possession, consumption, or sale of alcohol is permitted or prohibited – for example, supermarkets and grocery stores cannot sell spirits or spirits-based drinks;⁶⁰⁸ most local authorities have liquor bans that prohibit the consumption of alcohol in specified public places;⁶⁰⁹
 - (d) what activities may or may not be associated with consumption of alcohol – for example, there are limits on the amount of alcohol that may be consumed before driving;⁶¹⁰
 - (e) labelling – alcoholic beverage containers must list the alcohol content and the number of standard drinks in the container;⁶¹¹

604 Based on the framework in MacCoun, Reuter and Schelling, above n 513, 336–337.

605 Sale of Liquor Act 1989, s 162(5).

606 Sale of Liquor Act 1989, ss 155(1) and 166(1).

607 Sale of Liquor Act 1989, ss 14 and 37.

608 Sale of Liquor Act 1989, s 37(3).

609 Research for the Law Commission's Review of the Sale of Liquor Act shows that 93% of territorial authorities have at least one liquor ban – *Alcohol in Our Lives*, above n 486, 196.

610 Land Transport Act 1989, s 11.

611 Australia New Zealand Food Standards Code, standard 2.7.1.

- (f) advertising – the Advertising Standards Authority has produced a Code for Advertising Liquor, which includes restrictions on the time at which alcohol can be advertised on television and the nature of advertisements that may be produced;⁶¹²
 - (g) taxation – the manufacture of alcohol is subject to an excise tax, which varies according to the type of product produced and its alcohol content;⁶¹³
 - (h) access – those who wish to sell liquor must have a licence, which will have a range of mandatory and discretionary conditions attached.⁶¹⁴
- 7.101 The benefits and costs of New Zealand’s current approach to alcohol regulation are discussed in depth in our recent issues paper on the reform of New Zealand’s liquor laws. Since the enactment of the Sale of Liquor Act 1989, a highly competitive industry has developed offering consumers unprecedented choice and access to alcohol. The alcohol industry is a multi-billion dollar sector, with our wine industry alone estimated to have contributed \$1.5 billion to New Zealand’s gross domestic product in 2008.⁶¹⁵ However, it has proven difficult to control or address the misuse of alcohol, which is a contributory factor to a range of social harms. For example, about 1000 deaths a year are directly attributable to alcohol,⁶¹⁶ and a significant proportion of crimes recorded by police are committed by people who had consumed alcohol prior to committing the offence.⁶¹⁷
- 7.102 The regulation of any other psychoactive substance, whether it is currently illegal or not, will not prompt the scale of the market and the extent of use that is apparent in relation to alcohol. Alcohol use is deeply embedded in New Zealand’s culture, in a way that is not comparable to the use of any other drug.⁶¹⁸ Nevertheless, the experience with alcohol does highlight some possible consequences of applying a regulatory model to other psychoactive substances. For example, it may be difficult to control misuse of a particular drug and the harm that then arises. In addition, there are likely to be significant costs associated with administering any new regime and enforcing the restrictions it imposes. This latter concern was one reason why the Expert Advisory Committee on Drugs recommended that BZP be reclassified from a restricted substance to a Class C drug.⁶¹⁹

612 Code reproduced in *Alcohol in Our Lives*, above n 486, 178.

613 Reproduced in *ibid*, 165.

614 For full discussion, see *ibid*, 9.

615 *Ibid*, 19.

616 *Ibid*, 72.

617 *Ibid*, 59.

618 For example, it is estimated that over 80% of the adult population drink occasionally (*Ibid*, 30). The 2006 National Household Survey of Legal Party Pill Use found that one in seven (15.3%) of the sample had used legal party pills in the preceding 12 months – see C Wilkins and others *Legal Party Pill Use in New Zealand: Prevalence of Use, Availability, Health Harms and “Gateway Effects” of Benzylpiperazine (BZP) and Trifluoromethylphenylpiperazine (TFMPP)* (Massey University Centre for Social and Health Outcomes Research and Evaluation, Auckland, 2006) 5 [*Legal Party Pill Use in New Zealand*].

619 Expert Advisory Committee on Drugs (EACD), to the Associate Minister of Health “Further EACD advice on Benzylpiperazine (BZP) and related substances” (4 December 2006) Letter, 5. The EACD was concerned about the significant enforcement and administrative capacity that would be required to control the availability, advertising, and supply of BZP if it were to remain a restricted substance, as was already in place for pharmaceuticals, tobacco, and alcohol.

- 7.103 Legalisation of a drug is also likely to increase its use. Unless carefully controlled, a commercial industry is likely to develop with a vested interest in increasing a regulated drug's availability and use.⁶²⁰ Legalisation may also be perceived as a signal of society's approval of the drug or as a message that a drug is safe to use.⁶²¹
- 7.104 Some have argued that the extent of any increase will depend more on the extent of commercial promotion of the drug, than on its legal status.⁶²² The link between commercial promotion and consumption of a substance is complex.⁶²³ The extent to which there is an increase in use as a result of commercial promotion will depend on the form and level of regulation used. As with alcohol, it would be possible to impose controls on the circumstances under which a regulated drug was sold, and on advertising and promotion. Alternatively, a government monopoly on production and supply could be established.
- 7.105 In addition, an increase in use does not necessarily mean an increase in drug-related harm. This is particularly so if users shift to using less harmful but more available regulated substances in preference to more harmful but less available prohibited substances. For example, there is some evidence to suggest that, prior to its reclassification, people used BZP in preference to more harmful illegal drugs.⁶²⁴
- 7.106 An important consequence of shifting from a prohibition model to a regulatory model is the removal of most activities relating to a regulated drug from the scope of the criminal justice system. Contravention of the regulatory regime may still result in a criminal prosecution. However, it would not be an offence to use a regulated drug. In addition, there is unlikely to be any impetus for the development of a black market in the drug (unless prices were unreasonably high and/or availability of the drug was severely restricted). As a result, many of the harms that arise from drug prohibition would be addressed.
- 7.107 This model does not comply with the requirements of the international drug conventions. A State could therefore not apply this model to drugs covered by the conventions and uphold its international obligations.

620 The "active marketing" of BZP was noted in the EACD's advice to the Government in relation to BZP reclassification – see *ibid*, 3.

621 See discussion in United States General Accounting Office *Confronting the Drug Problem: Debate Persists on Enforcement and Alternative Approaches* (DIANE Publishing Company, Darby (PA), 1993) 42–44. In New Zealand, there was a public perception of the safety of BZP based on its legal status – see *ibid*, 4.

622 See MacCoun and Reuter, above n 484, 77.

623 See discussion in *Alcohol in Our Lives*, above n 486, 179.

624 *Legal Party Pill Use in New Zealand*, above n 618, 43. Note, however, that the relationship between legal BZP and illegal substances is not particularly clear – 45 % of BZP users sampled reported that they used BZP so they did not have to use illegal drugs. 28 % reported that they used BZP when they could not get hold of illegal drugs, and 27 % reported that they used BZP with illegal drugs to enhance their effects or duration of their effects.

Legalisation without regulatory restrictions

Description

- 7.108 Under this model,⁶²⁵ some or all of the use, possession, manufacture, importation, exportation, sale, and other distribution of a drug would be legal and subject to no regulatory restrictions.

Rationale

- 7.109 This model rejects any role for the State in regulating drug use, either because the autonomy of the individual is considered paramount regardless of any harm his or her drug use may cause, or because a particular drug is not so harmful that restrictions on its use can be justified.

Examples of the model in practice

- 7.110 In reality, there are few substances (psychoactive or not) that can be bought and sold to which pure legalisation applies. All psychoactive substances that come onto the New Zealand market are, technically at least, subject to some form of regulation.⁶²⁶

- 7.111 Full legalisation also receives little support in the literature:⁶²⁷

With the exception of some libertarians...no one seriously advocates relaxing the drug laws so that the currently illicit substances would be as freely available as butter or gasoline, regulated only for purity, quality, or safety. Everyone seems to agree that children, at least, should not be able to buy cocaine at the local candy store. Thus “legalisation”, taken literally, is not under discussion. Indeed even for the presently legal drugs, except for caffeine (with high dependency potential but very modest stimulant effect and negligible health consequences), there is some age restriction.

Costs and benefits

- 7.112 The removal of criminal sanctions for drug use would eliminate many of the prohibition-related harms to the user. These include the exposure to legal risk and the social costs and consequences of receiving a conviction. Legalisation would also lower prices and eliminate the black market. However, the wide availability of drugs that is likely to follow legalisation is also likely to increase the frequency and duration of drug use.
- 7.113 Legalisation without regulatory restrictions may also be a derogation of the State’s responsibility to mitigate the harm to society that arises from drug use. Nor would it comply with the international drug conventions. Many activities that were previously unregulated are now subject to some form of regulation on this basis. This has led one report to conclude that full legalisation is “not a viable contemporary option”.⁶²⁸

625 This is also referred to as de jure partial prohibition in the literature.

626 See discussion in chapter 5.

627 MacCoun, Reuter and Schelling, above n 513, 332. Note other regulations apply to caffeine – for example, labelling requirements.

628 Commonwealth of Australia, above n 522, 8.

CONCLUSION

- 7.114 We have argued in this chapter that, with some limited exceptions in respect of the young and those whose mental faculties are impaired, regulation of drug use is only justified to the extent necessary to prevent harm to others, and where the benefits arising from that reduction in harm outweigh the costs arising from regulation itself. This justification provides an important foundation for the remainder of this paper, because it also guides decisions about the choice of model once a decision to regulate has been made.
- 7.115 The harm arising from prohibition has led many jurisdictions to apply less punitive models to personal use offences. The primary aim of these models is to reduce the costs to the individual and the State of prohibition and, by doing so, to reduce drug-related harm. Many jurisdictions have also taken a less punitive approach as part of an overall strategy to strengthen the distinction between users and suppliers by diverting users from the criminal justice system but coming down harder on commercial suppliers. There is clear evidence that they are successful in achieving these objectives.⁶²⁹ We consider the applicability of these types of approaches to New Zealand in chapter 11.

629 *Global Cannabis Commission Report*, above n 505, 148.

