

Chapter 11

Personal use

SUMMARY

This chapter proposes that a new approach be taken to drug possession, drug use, and other offences related to personal use, and outlines what some of the options for that approach might be.

INTRODUCTION 11.1 In New Zealand, there is some limited distinction in law and in practice between the approach taken to drug possession, use, and related offences, particularly in relation to Class C drugs, and other drug offences such as commercial production and supply.⁷⁷⁴ Many jurisdictions, including all Australian states and territories, the United Kingdom, and various European states, have gone further. This chapter considers whether anything more is required in this country.

OUR INTERNATIONAL OBLIGATIONS IN RELATION TO PERSONAL USE OFFENCES

- 11.2 We have earlier noted our view that the approach that New Zealand takes to drug regulation must comply with its obligations under the 1961, 1971, and 1988 international conventions. Those obligations in relation to personal use activities were discussed in chapters 6 and 8. In summary:
- possession and use of convention drugs for other than medical or scientific purposes must continue to be restricted and unlawful;
 - there is no requirement to establish criminal offences in respect of the use of drugs per se, although it is arguable that offences may be required in relation to obtaining drugs for personal use;
 - it may be open to parties to interpret the conventions as not requiring the establishment of criminal offences for possession and cultivation of convention drugs for personal use;
 - where criminal offences are in place for conduct related to personal use, there are a number of permissible responses under the conventions when those offences are detected, ranging from the application of a non-prosecution policy to the use of non-custodial sentences if a prosecution is taken.

⁷⁷⁴ This includes a statutory presumption against imprisonment in relation to possession or use of a Class C drug (see section 7(2)(b) of the Misuse of Drugs Act 1975), and the availability of the Police Adult Diversion Scheme.

11.3 Most recently, the United Nations Office on Drugs and Crime has stated that drug possession cases are a “non-priority” and that arrest is only appropriate in a small proportion of those cases. The Office has also stated that “the law must allow for non-custodial alternatives when a police officer stumbles upon small amounts of drugs”, with imprisonment in these cases rarely being beneficial.⁷⁷⁵ In addition:

...law enforcement should shift its focus from drug users to drug traffickers. Drug addiction is a health condition: people who take drugs need medical help, not criminal retribution. Attention must be devoted to heavy users. They consume the most drugs, cause the greatest harm to themselves and society – and generate the most income to drug mafias.⁷⁷⁶

11.4 The remainder of this chapter is written with these obligations and views in mind. There are, of course, no similar obligations in relation to drugs not included in the conventions.

CURRENT OFFENCES

Drug possession and use

11.5 Under section 7 of the Misuse of Drugs Act 1975, it is an offence to procure, possess, consume, smoke or otherwise use a drug unless that occurs under a statutory exemption or pursuant to a licence.⁷⁷⁷ This offence carries a maximum penalty of six months imprisonment and/or a \$1000 fine in relation to a Class A drug, and a maximum penalty of three months imprisonment and/or a \$500 fine in relation to a Class B or C drug.⁷⁷⁸ There is a statutory presumption against the use of imprisonment in relation to a Class C drug.⁷⁷⁹

11.6 In Canada, the United Kingdom, Queensland and the Northern Territory, drug use itself is not a criminal offence. Individuals who police detect using drugs are instead charged with the offence of possession.

11.7 We are uncertain whether a separate criminal offence for drug use remains necessary in this country. Although our international obligations require that drug use be limited to medical or scientific purposes, they do not require that drug use for other purposes is itself a criminal offence.

⁷⁷⁵ United Nations Office of Drugs and Crime *World Drug Report 2009* (United Nations Office of Drugs and Crime, New York, 2009) 167.

⁷⁷⁶ *Ibid.*, 2.

⁷⁷⁷ Misuse of Drugs Act 1975, s 7(1)(a).

⁷⁷⁸ Misuse of Drugs Act 1975, s 7(2)(b).

⁷⁷⁹ *Ibid.*, which provides that a judge should not impose a custodial sentence unless he or she considers one should be imposed by reason of the offender’s previous convictions or any exceptional circumstances relating to the offence or the offender.

- 11.8 The use offence has not itself caused any difficulty, and its retention would not cause any harm. In addition, removing the offence may provide a signal that drug use itself is acceptable. That is undesirable and would not assist the overall goal of reducing drug-related harm. However, because anyone caught using drugs can also be charged with possession,⁷⁸⁰ there is arguably little to be gained by both activities being offences.
- 11.9 New Zealand statistics indicate that there are very few instances where the police take action against an individual for use instead of possession. In relation to offences recorded by the police in 2008, for example, 93 % of cannabis possession and use offences, and 97 % of non-cannabis possession and use offences, related to possession.⁷⁸¹
- 11.10 Some use arguably involves greater culpability and criminality than simple possession. This includes, for example, use in public that is likely to cause offence (such as “shooting up” in a public street) or use that occurs in front of children. It may be appropriate that use in those circumstances remains a criminal offence.⁷⁸² Alternatively, use in these circumstances could have the effect of aggravating the offence of possession (for example, so that it would not fall within the ambit of any new approach taken to personal use offences – see paragraphs 11.70–11.71).

Q41 Should there continue to be a criminal offence for drug use?

Q42 If so, should that offence encompass all drug use or only use in specified circumstances?

Q43 What circumstances, other than those identified in paragraph 11.10, could be considered an “aggravated” form of use?

780 Note that an individual caught using drugs could not be charged with separate offences of possession and use.

781 Possession includes procurement. However, we assume most if not all “possession” offences relate to possession itself. Table Builder (<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>, accessed 3 November 2009).

782 Drug use in public may fall within the ambit of section 4 of the Summary Offences Act 1981, which makes it an offence punishable by a maximum penalty of \$1000 to behave in an offensive manner in or within view of any public place. However, explicitly criminalising use in public, rather than relying on it being caught by section 4, would provide extra clarity and transparency. Use in front of children may not fall within the scope of section 4, for example, if it occurred in a private residence.

Possession of utensils

11.11 Under section 13, it is an offence to:

- (a) Possess any pipe or other utensil (other than a needle or syringe) for the purpose of committing an offence against the Act.⁷⁸³ The maximum penalty is 12 months imprisonment and/or a fine not exceeding \$500.⁷⁸⁴
- (b) Possess a needle or syringe for the purpose of committing an offence against the Act, when that needle or syringe has been obtained outside the authorisations contained in the Health (Needle and Syringes) Regulations 1998 or has been obtained from someone other than a pharmacist, pharmacy employee, approved medical practitioner, or authorised representative.⁷⁸⁵ The maximum penalty is 12 months imprisonment and/or a fine not exceeding \$500.⁷⁸⁶

11.12 Both offences are most commonly, if not exclusively, prosecuted in relation to the possession of utensils for the purpose of using drugs. In relation to that purpose, the offence has at least two related rationales. The first is that prohibiting possession of the utensils in which drugs are used prevents drug use by making it more difficult. The second is that these utensils are inherently harmful (because they facilitate drug use) and, on that basis, their possession should be prohibited.

11.13 A prohibition on utensils will obviously be more effective for some drugs than for others. For example, cigarette paper to roll a cannabis cigarette is legally available, and drugs in tablet form can be taken without the aid of any utensils. Allowing users to possess utensils may also encourage safer drug use. Smoking cannabis via a bong or pipe is a less harmful way of using cannabis than smoking a cannabis joint.⁷⁸⁷ A similar rationale lies behind the Health (Needles and Syringes) Regulations 1998, which enable intravenous drug users to buy new needles and syringes and return used ones without committing an offence.⁷⁸⁸

11.14 It is not often that police only charge a person with a utensils offence.⁷⁸⁹ In addition, many people found in possession of utensils for personal use will also have some drugs in their possession. In that sense, the utensils offence does not reflect any additional criminality on their part. Taking action against an individual in relation

783 Misuse of Drugs Act 1975, s 13(1)(a).

784 Misuse of Drugs Act 1975, s 13(3).

785 Misuse of Drugs Act 1975, s 13(1)(aa).

786 Misuse of Drugs Act 1975, s 13(3).

787 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 means more people consume cannabis in cigarette papers, which is the form of consumption most damaging to lungs.

788 From a registered pharmacy, an approved medical practitioner, or an authorised representative.

789 The Ministry of Justice has provided us with figures which indicate that where a prosecution for this offence was taken in 2008, it was the only offence prosecuted in 16 % of cases and was prosecuted with an offence of possession/use in 52 % of cases. These proportions are comparable to the previous four years.

to possession should usually provide a more than adequate response to the user's behaviour. The only circumstance in which it may not is when use occurred in the past, and no drugs are currently in the individual's possession.⁷⁹⁰

- 11.15 We therefore think an argument can be made for the abolition of this offence. There is no specific obligation in the international conventions to prohibit the use of utensils. It is instead one way in which parties comply with their general obligations under the conventions to limit the use of prohibited drugs.⁷⁹¹
- 11.16 However, if pipes and utensils were no longer prohibited, there would be no justification for enabling their forfeiture. If forfeiture was considered desirable (for example, on the basis that pipes and utensils are harmful items in themselves), their continued prohibition would be required.
- 11.17 Finally, we note that it is currently possible for a more severe sentence to be imposed for possessing a utensil to use a Class B or C drug than for possessing or using the drug itself.⁷⁹² Therefore, if this offence does remain, its maximum penalty should be revised to ensure it has appropriate relativity with the possession/use offence.
- 11.18 It is also an offence to import or supply utensils for using cannabis or methamphetamine.⁷⁹³ We consider this offence further in chapter 12.

Q44 Should the possession of utensils for the purpose of using drugs remain a criminal offence?

A NEW APPROACH TO PERSONAL USE OFFENCES

- 11.19 Chapter 7 outlined the arguments for and against drug prohibition and reviewed the development of less punitive approaches in other jurisdictions to personal use. These approaches aim to provide a more proportionate response to the harm that personal use causes, and to address or mitigate some of the harms that inevitably result from prohibition. All Australian states and territories, the United Kingdom, and many European countries have adopted variants of these approaches. We are of the view that a less punitive approach is also appropriate for New Zealand.

790 Note there is conflicting authority about whether, in order for an offence to be committed, the purpose for which a utensil is possessed must relate to a future purpose to commit an offence against the Act or a purpose in the past (i.e. past use). The Court of Appeal has recently held the latter – see *R v Jones* [2007] NZCA 187, 59.

791 For example, as required by article 4(c) of the Single Convention on Narcotic Drugs 1961.

792 But see *Mackay v Police* (19 March 1993) HC TM AP 27/93 where a sentence for possessing a pipe to smoke cannabis was reduced for this reason. It is likely that judges would take this approach in practice.

793 Misuse of Drugs (Prohibition of Cannabis Utensils and Methamphetamine Utensils) Notice 2003 made under regulation 22(1A) of the Misuse of Drugs Act 1975.

- 11.20 A significant amount of effort in our criminal justice system appears to focus on the enforcement of personal use offences. Possession and use offences comprised 46 % of the approximately 20,000 drug offences recorded by police in 2008.⁷⁹⁴ Police detection of these offences is, in many cases, likely to be incidental to the detection of other offences.⁷⁹⁵ However, a possession or use offence was the most serious offence in 36 % of the approximately 8000 drug cases prosecuted in 2007.⁷⁹⁶ Approximately two-thirds of these cases resulted in a conviction.⁷⁹⁷
- 11.21 In addition to the effect on individual users, particularly those users who would otherwise not come to police attention, it is questionable whether this is the best use of a limited resource. In our view, it is more productive to focus enforcement resources and activity on more harmful drug-related offending, particularly commercial dealing. This is where most drug-related harm occurs.
- 11.22 A less punitive approach may also mitigate the likelihood of inequitable enforcement of drug prohibition on users. Despite the significant proportion of criminal justice resource spent enforcing possession and use offences, most users do not come to police attention.⁷⁹⁸ New Zealand research has found that those most likely to be arrested or convicted for cannabis-related offences are male, Māori, have a previous arrest record for non-cannabis related offences and report involvement in violent or property offending.⁷⁹⁹
- 11.23 The criminal justice system can play a key role in identifying individuals whose drug use is causing harm to themselves or to others and diverting them into drug education, assessment, and treatment. For some people, being apprehended may be a crisis point that encourages them to address their drug use. In this sense, simply punishing a drug user, without taking steps to address their drug use, is a wasted opportunity.

794 20,732 drug offences were recorded. 8903 offences were recorded in relation to possession for purposes other than supply and 592 offences were recorded in relation to use. The same offences comprised 52 % of all prosecuted drug cases in 1999. Table Builder (<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>, accessed July 2009).

795 These offences may be more serious or less serious than the possession or use offence.

796 There were 7972 prosecuted drug cases in total. In 2400 cases, cannabis possession or use was the lead offence. In 501 cases, possession or use of other drugs was the lead offence. Of the remainder, 34 % of prosecuted cases related to dealing and 30 % related to other drug offences. The number of drug cases prosecuted for possession and use represents a decrease from a high of 44 % in 1998–2000. Table Builder (<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>, accessed 18 March 2009).

797 There were 1614 convicted cases for cannabis, and 316 convicted cases for other drugs. Table Builder (<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>, accessed 18 March 2009).

798 For example, we estimate that less than 1 % of all cannabis users in 2006 were prosecuted in relation to their cannabis use – see chapter 7.

799 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.

- 11.24 Concern that a less restrictive approach to prohibition will increase drug use, by increasing both the number of users and the frequency of their use, has been the critical issue in law reform debates in this area. This includes concern that any relaxation in drug prohibition would signal society's increased tolerance of drug use and would make illegal drugs more available.
- 11.25 The effect of strict prohibition and less punitive approaches on rates of use is discussed in more detail in chapter 7. In other jurisdictions, the impact of less punitive approaches on levels of use remains a controversial issue. However, most studies in this area have concluded that changes in use levels are independent of the regulatory approach in place. While less punitive approaches do not reduce drug use, neither do they increase it.⁸⁰⁰ This conclusion is supported by comparisons of actual use levels and rates of increase in jurisdictions with different regulatory approaches.⁸⁰¹
- 11.26 A reduction in drug use is not usually an explicit objective of less restrictive approaches. They instead aim to reduce drug-related harm. Reducing drug use is one way of reducing drug-related harm, but it is not the only way and may not be the most effective way. For example, drug-related harm may decrease despite an increase in use of a particular drug if that drug is being used in lower doses or at a lower strength, or if it is being used as a substitute for another more harmful drug.
- 11.27 In summary, therefore, we consider that a less restrictive approach to personal use would:
- provide a more proportionate response to the harm that drug use causes;
 - enable law enforcement resources and activity to focus on more harmful drug-related offending like commercial dealing;
 - address or mitigate some of the harms and costs that inevitably result from drug prohibition;
 - provide greater opportunities in the criminal justice system to divert drug users into drug education, assessment and treatment;
 - be in line with the approach taken in all Australian states and territories, the United Kingdom, and many European countries.
- 11.28 In proposing a new approach to personal use offences, we do not intend to downplay the significant harm that drug use, either on its own or in combination with other factors, can cause to the user, his or her family, and the wider community. Our aim is to find the most effective way to address this harm. In our view, the current approach is not that way.

800 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*].

801 See chapter 7 for a discussion about the available evidence relating to the impact of different regulatory approaches on levels of use.

Introduction

11.29 Table Three identifies the range of options that we consider are available at the time police apprehend an individual for a personal use offence. These options draw on the discussion in chapter 7 about models of prohibition, particularly those models that include diversionary approaches or that preclude the possibility of criminal conviction. These are the models that appear permissible under our international obligations.

TABLE THREE:
Possible approaches when a personal use offence is detected

Option	Description	Overseas examples
Formal non-arrest/ non-prosecution policy	Introduce formal police policy which states that police will not take any action in relation to personal use offences, although drugs/ utensils could be confiscated.	The Netherlands [all illegal drugs], United Kingdom (2004–2009) [cannabis only]
Confiscation only	Confiscation of drugs or utensils, with no other action taken.	–
Confiscation and referral to community panel	Refer users to a community panel that imposes an appropriate sanction in light of the user’s level of drug use and treatment needs. May include referral to drug treatment.	Portugal [all drugs]
Confiscation and monetary penalty	Personal use offences become infringement offences with a fixed infringement fee attached. Non-monetary penalties may also be possible.	Some Australian states and territories – ACT, Northern Territory, South Australia, Western Australia [cannabis only]
Formal cautioning scheme in lieu of arrest and prosecution	Formal caution issued when personal use offence detected. May also include referral to health services or provision of information on harm from drug use. Gradated approach possible, so that intensity of response increases the more times an individual is caught.	All Australian states and territories ⁸⁰²
Greater use of Police Adult Diversion Scheme	Extension of Scheme to wider range of drug offences, for example, possession of Class A and B drugs.	–

11.30 If criminal prosecution for a personal use offence remains possible, there is also a range of options for what may happen at later stages of the criminal process including, for example, diversion into treatment or rehabilitation programmes prior to conviction or sentence. We consider those options later in the chapter.

11.31 Much is made in the literature about the legal status of relevant offences and penalties – that is, whether the offences are criminal offences or civil offences. Arguably, however, this legal distinction makes little difference in practice.

802 Those jurisdictions that have an infringement offence regime for cannabis (Australian Capital Territory, Northern Territory, South Australia and Western Australia) apply their cautioning scheme to other illegal drugs. The cautioning schemes in New South Wales and Queensland apply to cannabis only. The cautioning schemes in Victoria and Tasmania apply to all illegal drugs.

For example, if an infringement offence regime is adopted, a conviction for a personal use offence would not be possible even though the offence remained a criminal offence. Nor is the distinction between civil offences and criminal offences a distinction that is well understood by members of the community. Those individuals who incur a parking fine or a speeding ticket would not consider themselves to be criminals for doing so. Technically, however, they have committed a criminal offence. In our view, the focus should be on finding the most effective way of responding to a personal use offence when it is detected. The legal status of that offence, while important, is a secondary consideration.

- 11.32 The debate in New Zealand tends to focus on law reform in relation to cannabis. The arguments for a different approach to personal use may apply more strongly to a drug like cannabis because it is the most widely used illegal drug (indicating that prohibition has not been particularly effective in deterring its use or restricting its availability) and is also perceived to be the least harmful of all illegal drugs (indicating that the harms caused by the current approach may not be proportionate to the harm caused by cannabis use itself). In addition, applying a less restrictive approach only to a less harmful drug like cannabis may also provide an incentive to use that drug as a substitute for more harmful drugs.
- 11.33 However, our discussion in this chapter is not limited in this way. In our view, the main arguments for a different approach apply regardless of the nature of the drug involved. In addition, the reality of drug use is that most drug users do not specialise in any one drug, but use a range of substances.⁸⁰³ That is why many jurisdictions have not limited any new approach to cannabis, but have put in place a new approach to personal use of all illegal drugs. In Australia, for example, New South Wales and Queensland are the only two states that apply their less restrictive approach only to cannabis.
- 11.34 This is not to say that a drug-specific approach is also not required. However, the characteristics of particular drugs and the nature of their use are more relevant to determining which approach is preferable, and how that approach might work, rather than to deciding whether a new approach is required at all.

Preferred options

- 11.35 In our view, any new approach to personal use must be provided in legislation. A legislative scheme provides certainty and transparency, both for the police who will be primarily responsible for its implementation and for drug users. In addition, the approach to be taken to personal use is a matter of significant public and political interest. Implementing that approach via legislation will give elected politicians and the public the opportunity to have input into the approach through the parliamentary process.

803 See, for example, Joseph M Boden, David M Fergusson and L John Horwood “Illicit Drug Use and Dependence in a New Zealand Birth Cohort” (2006) 40 *Australian and New Zealand Journal of Psychiatry* 156, which found evidence of substantial poly-drug use amongst the Christchurch Longitudinal Study cohort; and 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* (Massey University Centre for Social and Health Outcomes Research and Evaluation (Massey University SHORE), Auckland, 2008) 51, which found that frequent drug users had tried an average of 14 drug types in their lifetimes and an average of seven drug types in the past six months.

- 11.36 We do not support the introduction of a formal non-arrest or non-prosecution policy. The requirements of police independence mean that the content of the policy could not be provided in legislation but would instead be a matter for the police. If the policy simply formalised the current approach that police already take to minor or inconsequential offences, it may have little real impact in practice.⁸⁰⁴ In addition, this option risks creating an uneasy distinction between law and practice and confusion in the public's mind about what the law actually is.
- 11.37 For many of the same reasons, we have reservations about simply making greater use of the Police Adult Diversion Scheme. There are some positive aspects of the Scheme in the drugs context, including the ability for drug users to be put in touch with treatment services. However, there is no statutory basis for the Scheme, and its substantive content and implementation is a matter for the police. It is also limited to first offenders and, generally, to minor Class C drug offences. In the context of other projects, the Law Commission has queried key aspects of the Scheme, particularly the requirement that a prosecution commence before diversion is offered.⁸⁰⁵ In the context of this discussion, we prefer an approach that limits users' contact with the criminal justice system, including their exposure to prosecution, as much as possible, and that places the criminal justice response to users on a more systematic and transparent footing.
- 11.38 We do not support an option based solely on confiscation. This option would maintain the illegality of personal use activities for the sole purpose of complying with the international conventions. It reflects an assumption that these activities are so minor and cause so little harm that no action other than confiscation is justified (if even that can be justified). We do not believe this can be said of all drug use. Nor do we believe it is appropriate to put in place an approach that effectively pays only lip-service to the requirements of the international conventions. Public and political pressure also means such an approach is unlikely to be durable over the longer term.
- 11.39 We have also considered but discarded an option based on the Portuguese approach. Although this approach appears to have been effective in Portugal,⁸⁰⁶ we believe its infrastructure of Commissions of Dissuasion is too resource-intensive for New Zealand. In addition, we have concerns about some aspects of the approach including the level of coercion that is potentially applied through what is essentially a civil process. We believe that the outcomes of the Portuguese approach can be achieved in a less costly and less intrusive way.
- 11.40 It is important to note that none of the options presented below are without their difficulties. We have therefore identified below the options that we believe are worth further consideration and consultation, without indicating a preference for any particular one.

804 We are aware that the New Zealand Police is developing some new initiatives in this area, which would apply to all offending. This includes, for example, a more formal approach to issuing warnings for minor offences that is being piloted in Auckland.

805 New Zealand Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, Wellington, 2005) 27–29.

806 Caitlin Hughes and Alex Stevens *The Effects of Decriminalisation of Drug Use in Portugal* (The Beckley Foundation Drug Policy Programme, Briefing Paper 14, 2007); Glenn Greenwald *Drug Decriminalisation in Portugal: Lessons for Creating Fair and Successful Drug Policies* (Cato Institute, Washington, 2009).

- 11.41 There are two particular difficulties that are common to more than one option. First, whichever option is implemented, it is likely that some individuals who previously would have received an informal warning or had no action taken against them will instead be subject to some more formal police action (“net-widening”). This is the case even though it would remain possible for the police to issue an informal warning or take no action under any new approach that is adopted. The experience of other jurisdictions in implementing similar options indicates that some net-widening is unavoidable.
- 11.42 Secondly, two of the options (options one and three) depend on the availability of appropriate treatment services. As we discuss further in chapter 15, there is already concern that current treatment services available to the justice system are insufficient to meet demand. This is a critical issue that would need to be addressed before either of those options could be implemented.

Option 1: Formal cautioning scheme for all drugs

- 11.43 This option is based on the cautioning schemes implemented in most Australian jurisdictions. Its key components are that:
- Police would be able to issue a caution notice when a personal use offence was detected.
 - The drugs and any utensils in the user’s possession would be confiscated whenever a caution notice was issued.
 - A caution notice would only be issued with the user’s consent and when the user acknowledged responsibility for the offence. Otherwise, the user would be prosecuted.
 - The first and second caution notices would be accompanied by information on the legal and health consequences of drug use, and the contact details of treatment providers. No other enforcement action would be taken.
 - The third caution notice would require the user to attend a brief intervention session and be assessed to identify whether he or she was in need of specialist drug treatment. There would be no requirement as part of the caution conditions for the user to attend any specialist drug treatment that was identified as needed as a result of the brief intervention session.
 - If the police considered that a user who came to police attention for the first or second time was in immediate need of a drug assessment, the user could be escalated to the level of a third caution and be required to attend a brief intervention.
 - A user who came to police attention for a personal use offence for a fourth time would be prosecuted.
- 11.44 The primary advantage of this option is that it provides a formal opportunity, at the earliest stages of the criminal justice process, to consider the drug treatment needs of those apprehended for a personal use offence. Because it is unlikely that all of those apprehended will be in need of drug treatment, access to treatment is limited to those users who come to police attention for a personal use offence on more than two occasions. However, it would be possible to “leapfrog” the first two levels of cautions in other cases if that was considered necessary or desirable.

- 11.45 There would be little consequence for a user who police apprehended once or twice for a personal use offence, other than the confiscation of any drugs/utensils. The main consequence is that he or she would move closer to a mandatory brief intervention session (and prosecution) in the event of another apprehension for a personal use offence. A user apprehended for a third time would be required to attend the brief intervention session or face prosecution.
- 11.46 We think our proposed approach to a cautioning scheme strikes an appropriate balance between the needs of users who may require drug assessment and treatment, and other users. However, there is no consensus in the overseas approaches about the critical components of an effective cautioning scheme. For example, there is significant variation between the Australian cautioning schemes in how many cautions can be issued, if and when users are required to attend a brief intervention or similar session, and how many sessions they must attend.⁸⁰⁷
- 11.47 This option would not remove the possibility of prosecution for a personal use offence altogether. In particular, a prosecution would commence if a user who came to police attention had exhausted all of his or her caution options. Prosecution may also be appropriate in other circumstances – for example, if a user was being charged with other more serious offences or had a criminal history of serious drug offending.⁸⁰⁸ These users may be less likely to benefit from a diversionary response. In addition, in both situations, there is likely to be a greater public interest in prosecution with any diversionary approach more appropriately subject to court oversight. This is the approach taken in most Australian cautioning schemes.
- 11.48 Brief interventions are discussed in more depth in chapter 15. For the purposes of this option, we envisage that they would provide a mechanism to identify those users who are experiencing problem drug use,⁸⁰⁹ and to refer them to specialist drug treatment services. Further consideration would be required about how and by whom brief interventions would be provided and the likely cost.
- 11.49 That a caution notice can only be issued when a user acknowledges responsibility for an offence and consents to the caution being issued is both a necessary safeguard and required as a practical matter. A user who disputes that an offence

807 In South Australia (non-cannabis only) and the Northern Territory (all drugs), there are no limits on the number of cautions that may be issued. In Queensland (all drugs), only one caution can be issued. In the Australian Capital Territory (non-cannabis only), New South Wales (cannabis), and Victoria (all drugs), two cautions can be issued. In Tasmania, referral for a brief intervention occurs after one caution is issued. In Victoria, referral for a brief intervention occurs at the first caution. In Western Australia's scheme for drugs other than cannabis, the individual must attend three treatment and counselling sessions within 30 days. In Victoria's drug diversion programmes for drugs other than cannabis, the individual must attend two sessions within ten days. Jason Payne, Max Kwiatkowski and Joy Wundersitz *Police Drug Diversion: A Study of Criminal Offending Outcomes*. (Australian Institute of Criminology, Canberra, 2008) 77–80.

808 Note that we would not want to exclude offenders with a criminal history for any offending, because this would severely limit the application of the programme – see Chris Wilkins, Paul Sweetsur and Richard Griffiths *Conviction and Sentencing for Cannabis Use Offences in New Zealand, 1990-2008* (Massey University SHORE, Auckland, 2009) 18, which found that of 1044 people convicted for the use of cannabis in 2008, 89.4% had previous convictions for drug or other offending.

809 The nature of problematic drug use is discussed more fully in chapter 15. In terms of the continuum presented in that chapter, we are using the term “problem drug use” to including anything from hazardous use to dependence.

occurred should be able to require the case against him or her to be proved in court. The need for consent may also make the user more likely to comply with the caution requirements. In addition, when a user is being referred to a brief intervention session with a view to possible treatment, it is appropriate that he or she has a choice about whether or not to participate. (We recognise that consent in this context may not be truly voluntary, because if consent is withheld prosecution is likely to follow. However, we still consider that consent should always be obtained for the reasons explained above.)

- 11.50 The possibility of prosecution in the event that a user does not comply with caution conditions, or does not consent to a caution being issued, also means that a caution should only be considered when a prosecution for the offence would otherwise commence (that is, the police consider that there is sufficient evidence to support a charge and a prosecution is justified in the public interest). This may also limit the extent of net-widening that may otherwise occur.

Option 2: Infringement offence regime for less harmful drugs

- 11.51 This option is based on the current approach taken to the personal use of cannabis in Western Australia and other Australian jurisdictions.⁸¹⁰ The key components of this option are that:
- An infringement notice would be issued when police detected a personal use offence.
 - The infringement notice would be accompanied by information on the legal and health consequences of drug use, and the contact details of treatment providers.
 - The infringement penalty would include confiscation of the drugs/utensils in the user's possession, as well as payment of a fixed fee.
 - An alternative non-monetary option of participation in a drug education session could also be available – for example, for users who could not afford to pay a monetary penalty.
 - Criminal prosecution and conviction would not be possible; police could only impose an infringement notice or take a lesser response (for example, informal warning).
 - The user would not be required to consent to an infringement notice being issued or be required to acknowledge responsibility for the offence.
 - If the user disputed responsibility for the offence, he or she would be required to challenge the notice in court. If the challenge was unsuccessful, the user would be required to pay or complete the original infringement penalty.
 - Standard enforcement procedures would apply if the penalty was not completed. As with all infringement offence regimes, the unpaid infringement fee would be enforced as a court fine.
- 11.52 The primary aim of this option is to keep drug users out of the criminal justice system, and provide a low-key response that is more commensurate with the seriousness of, and harm caused by, personal use offences. There is no possibility

⁸¹⁰ 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 grams of cannabis to participate in an education session.

of users being prosecuted or convicted, and no limit on the number of notices that could be issued. Unless they have also committed other offending, users' contact with the criminal justice system would be very limited.

- 11.53 Because users would not be required to consent to the imposition of an infringement notice or acknowledge responsibility for the offence, this option lacks a safeguard that option one includes. However, this is how all infringement offence regimes operate. The trade-off is that a user could never be convicted for a personal use offence. Moreover, they would still have the opportunity to contest responsibility for the offence in court.
- 11.54 Unlike a cautioning scheme, there would also be no scope for the circumstances of individual users to be considered, including any treatment needs they may have. The only opportunity to address the health consequences of drug use would be through the provision of information with the infringement notice and the proposed education session, the attendance at which would be a decision for the user. Imposition of an infringement notice would be the standard response when police detect a personal use offence.
- 11.55 The prospect of persistent users continually being issued with infringement notices does risk the regime as a whole being brought into disrepute, on the grounds that an infringement notice is a meaningless sanction. However, the same could be said of any other infringement notice regime.
- 11.56 We are not aware of any evidence suggesting that this has become an issue in the Australian infringement offence schemes. However, partly as a way to address this concern, Western Australia's scheme requires a user to attend an education session if he or she has been issued with two or more notices on separate days in the past three years. We do not support this approach. It is unlikely to be cost-effective to require users who are resistant to receiving education and who may therefore derive little benefit from it to attend a mandatory session.
- 11.57 Our proposed education session would be aimed at achieving two complementary goals. First, it would provide an opportunity to educate users about the health and social consequences of drug use, the treatment of drug-related harm, and the laws relating to personal use. Secondly, it may provide a useful alternative for users facing financial hardship who could not afford an infringement fee and would otherwise be dealt with through the fines enforcement system.⁸¹¹ There is, however, a trade-off for the State between avoiding the costs of the fines enforcement system and the costs of providing education to those who may not otherwise benefit from it.
- 11.58 In our view, option 2 is only appropriate for drugs that cause a lower level of harm and/or that generally only cause harm to the user. Cannabis may be one example. For those drugs that cause a higher level of harm, like methamphetamine or the opiates, we consider that a more rehabilitative response is required which aims to address the needs of these users, perhaps along the lines of option one above.

811 These are the broad purposes of Western Australia's Cannabis Education Session – see Cannabis Control Act 2003 (WA), s 17(1).

- 11.59 This option aims to reduce the costs to the State of enforcing prohibition of minor drug offences. However, costs may not be minimised if enforcement action is required to recover the infringement fee – the Australian schemes tend to have an initial compliance rate before enforcement action is taken of around 50%.⁸¹² Because there would be no limit on the number of infringement notices that could be issued, there is also the potential for some users to accumulate large amounts of unpaid drug infringement fines. If this occurs, the integrity of the scheme as an effective enforcement approach to personal drug use would be compromised. There would also be costs associated with establishing the required infrastructure for the proposed education sessions (including the need for a provider approval and monitoring process).
- 11.60 Introduction of an infringement offence regime also has implications for the enforcement powers discussed in chapter 14. A search warrant cannot be obtained for an infringement offence.⁸¹³ The use of the coercive powers that currently exist for drug offences, including warrantless searches when a person is suspected of possessing a controlled drug⁸¹⁴ or an internal search of a person under arrest,⁸¹⁵ could therefore not be justified. Nor would there be a power of arrest.

Option 3: A menu of options

- 11.61 The final option is effectively a combination of the above two options, with the approach taken when an offence is detected tailored to the individual case. The key components of this option are that:
- There would be a number of responses open to police depending on the circumstances of the offence and the offender. These responses would range from the issuing of a caution or infringement notice, to referral to drug assessment with a view to treatment, to prosecution.
 - The user would be prosecuted if he or she denied the offence or refused to attend a drug assessment session as required.
- 11.62 This option has parallels with the approach taken to cannabis possession in the United Kingdom, although that approach requires a more structured escalation through the “menu” than what we are envisaging here. In the United Kingdom, the police can issue either a cannabis warning or an infringement notice, or arrest the user with a view to prosecution.⁸¹⁶
- 11.63 The primary advantage of this option is that it enables the police response to individual users to be targeted to the circumstances of that use. This recognises that not all drugs and not all users can be dealt with in the same way; the problems posed by an addicted methamphetamine user, for example, are quite different from

812 In New Zealand, it has been estimated that only 39 per cent of infringement fees by value are paid to the prosecuting authority without enforcement action being taken. Ministry of Justice and New Zealand Law Commission *Review of the Infringement System: Options for Reform* (Wellington, 2004), 39.

813 Summary Proceedings Act 1957, s 198(1) carried over into the Search and Surveillance Bill 45-1 (2009), cl 6, which limits the availability of search warrants to imprisonable offences and the ability to apply for them to constables.

814 Misuse of Drugs Act 1975, s 18(3) carried over into the Search and Surveillance Bill 45-1 (2009), cl 19.

815 Misuse of Drugs Act 1975, s 18A(2) carried over into the Search and Surveillance Bill 45-1 (2009), cl 22.

816 See Drug Laws and Licensing – Cannabis Reclassification www.drugs.homeoffice.gov.uk/drugs-laws/ (accessed 7 October 2009).

those posed by a first-time ecstasy or BZP user. For example, if the drug use was considered to be an isolated incident or otherwise unproblematic, an infringement notice would be the most likely response. If the drug use was considered to be problematic (for example, because the user was drug-dependent), the police could refer the individual to a drug assessment.

- 11.64 This option also enables the police to avoid some of the difficulties that may occur if a cautioning approach or infringement offence regime was implemented on its own. In relation to the latter, this includes the prospect of continually issuing infringement notices to a persistent user knowing that the fee is unlikely to be paid and that use will continue.
- 11.65 However, the corollary is that the decision about the appropriate option in an individual case would be left to police discretion, guided by any internal policy or guidelines that are developed. There is at least some prospect, therefore, of decisions in individual cases being based on criteria that are unrelated to the regime's overall objectives, as well as some inconsistency developing in the treatment of like cases.

Q45 Do you agree that a new enforcement approach should be taken to personal use offences?

Q46 If so, should there be a cautioning regime (option 1), an infringement regime (option 2) or an approach based on a menu of options (option 3)? Why?

Q47 Would you change any of the proposed key components of options 1 to 3?

Q48 Should any other options be considered (including any from Table Three that we propose not be progressed)?

Application of the regime to personal use offences

Possession

- 11.66 There are three potential approaches to determining eligibility for any new regime with reference to the offence of possession. The simplest approach is to apply the new regime to every possession offence. However, this assumes that everyone charged with a possession offence will only possess that drug for the purposes of personal use. This will not always be the case. In addition, if, as is one of the options discussed in chapter 10, the offence of possession for supply were abolished in favour of one broad possession offence, a way to isolate cases of possession for personal use would be required.

- 11.67 Most jurisdictions determine eligibility for their regime by identifying a specified amount of each drug that is deemed to be possessed only for personal use. This is the approach taken in some Australian regimes (which specify the applicable amount by numbers of grams or tablets), and in Portugal (which applies its regime to the average amount consumed by an individual over 10 days).
- 11.68 While this may be the clearest and most transparent approach, it also creates some difficulties. This includes, for example, the prospect of commercial suppliers tailoring the amount possessed to come within the scheme.⁸¹⁷ Whatever numerical amount is adopted will also lead to some arbitrariness on the boundary – for example, the difference between x grams and x.1 grams or y tablets and y.5 tablets might be small in practical terms but have quite different legal consequences for the user. In this respect, there seems no consistency in the amounts specified in other jurisdictions.⁸¹⁸ Finally, unless there was a residual discretion to exclude individuals from the regime, it would mean that an individual in possession of the applicable amount of drugs would come within any new regime even if the drug was possessed for the purposes of supply.
- 11.69 The final approach is not to identify a quantifiable limit, but to require the police to make an assessment in each case of whether the drugs are possessed for personal use. This approach is taken in the United Kingdom and in some Australian regimes.⁸¹⁹ It deals with the difficulties identified above, but makes the decision about whether a person is eligible for the new regime more complex and may lead to some inconsistency in how the regime is applied.

Q49 How should any new approach taken to personal use offences apply to the offence of possession?

Use

- 11.70 When discussing whether drug use itself should remain a criminal offence (see paragraphs 11.5–11.10 above), we argued that some use (for example, use that occurs in front of children) encompasses greater culpability and criminality than simple possession. If use remains a criminal offence, “aggravated” use could be excluded from any new approach taken to personal use offences.
- 11.71 For example, in the United Kingdom, cannabis use that occurs in a public place or view is an aggravating factor that makes prosecution for cannabis possession, rather than the issuing of a penalty notice for disorder, more likely.⁸²⁰ Similarly,

817 This seems more likely under an infringement regime given the relative lack of consequences an infringement notice carries compared to a cautioning scheme, and the unlimited number of times an infringement notice could be imposed.

818 Australia cannabis regimes range from 15 grams (New South Wales) to 100 grams (South Australia). Western Australia’s drug diversion scheme applies to the possession of no more than two tablets or, if the drug is “ambiguous” (for example, mushrooms), the amount that would give rise to a simple offence or, in other cases, a quarter of the amount in the Misuse of Drugs Act 1981 (WA) that would raise the sale/supply presumption.

819 For example, Tasmania’s diversion programmes and the South Australian diversion programme for drugs other than cannabis.

820 Association of Chief Police Officers *ACPO Guidance on Cannabis Possession for Personal Use: Revised Intervention Framework* (ACPO, London, 2009) para 2.2.1.

South Australia excludes from its infringement offence regime cannabis use that occurs in a public place, including in a motor vehicle, train, tram or any other vehicle while it is in public.⁸²¹

Q50 If use remains a criminal offence, should “agravated” use be excluded from any new approach taken to personal use offences?

Possession of utensils

11.72 We have argued above that there may be no purpose in retaining the prohibition on the possession of pipes and utensils for the purposes of using drugs. However, if that prohibition remains, we consider that the relevant offence should be included in the new approach. It seems illogical to apply any new approach to a substance without also applying it to the vessel or device in which the substance was used.

Q51 Should the possession of utensils for the purpose of using drugs, if it remains a criminal offence, be included in any new approach taken to personal use offences?

Cultivation of a prohibited plant

11.73 Cultivation of a prohibited plant is an offence under section 9 of the Misuse of Drugs Act with a maximum penalty of seven years imprisonment. We have already discussed this offence in chapter 10 in the context of dealing and proposed that, at a minimum, a presumption against imprisonment should apply where cultivation is for personal use.

11.74 Discussion of the approach that should be taken to personal use offences often includes a discussion about whether the same approach should be taken to cultivation, particularly cannabis cultivation. This is to ensure that users who grow their own supply are not subject to greater penalties than those who obtain their supply from others, and that users have less need to mix with criminal drug sellers to obtain their supply.

11.75 All Australian infringement offence regimes include limited cannabis cultivation for personal use within their approach to personal cannabis use. The amount of plants able to be cultivated is no more than two, and tends to be limited to plants that are not hydroponically grown on the basis that naturally-growing plants are less potent and less likely to be grown by commercial suppliers. Those Australian jurisdictions that have a cautioning scheme for cannabis tend not to include cultivation within it.

821 Controlled Substances Act 1984 (SA), s 45A and Controlled Substances (General) Regulations 2000 (SA), r 9B.

- 11.76 The primary reason for including cultivation within any new regime is to weaken the criminal black market in cannabis supply. Even though many cannabis users receive their supply through social networks, often for no or little charge,⁸²² that supply still represents the end of a criminal supply chain. Enabling users to “grow their own” therefore weakens the cannabis black market.
- 11.77 Including some cultivation in a new regime with reference to the number of plants that may be grown does cause some difficulties. In particular, the number of plants may not provide a reliable indication of the amount of cannabis that may actually be possessed and used. There is a vast difference in the amount of cannabis that may be extracted from a seedling than from a fully-matured plant.
- 11.78 In addition, depending on the maximum number of plants that are subject to any new regime, there is some risk that they will be grown for supply rather than personal use, or that commercial dealers will co-opt a number of growers and then sell the resulting combined amount on the black market. There was concern that this was occurring in the early stages of South Australia’s Cannabis Expiation Notice Scheme,⁸²³ and is one reason why the maximum number of cultivated plants subject to the Scheme has progressively reduced from 10 to one since the Scheme started.⁸²⁴ Western Australia addressed this issue in a different way, by requiring that the cannabis plants be located at the offender’s principal place of residence, with no other cannabis plants cultivated at that residence by any other person.⁸²⁵ A 2007 statutory review recommended that cannabis cultivation be removed from the Western Australian scheme.⁸²⁶
- 11.79 There seems a stronger argument for including cultivation in an infringement offence regime than a cautioning scheme. A cautioning scheme has a greater focus on identifying and addressing problematic use, whereas the focus of an infringement offence system is on keeping users out of the criminal justice system. To achieve the latter, it makes sense that users can cultivate a small supply of their own cannabis without being subject to criminal prosecution. The same argument does not apply to a cautioning scheme, because the possibility of prosecution remains.
- 11.80 As a matter of principle, the approach that is taken to cannabis cultivation should also be taken to the cultivation of any other prohibited plant. However, given that few, if any, other prohibited plants are cultivated in New Zealand, it may make little practical difference to the overall scope of the regime.

822 Chris Wilkins and others “Estimating the Dollar Value of the Illicit Market for Cannabis in New Zealand” (2005) 24 *Drug and Alcohol Review* 227, 229. In comparison to South Australia, for example, where the dealer was the main supplier of cannabis – see 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 Number 36, National Drug Strategy, 1998) 29.

823 A Sutton and E McMillian “Criminal Justice Perspectives on South Australia’s Cannabis Expiation Notice Procedures” (2000) 19 *Drug and Alcohol Review* 281.

824 The original ten plant limit was reduced to three plants in 1999, one plant in 2000, and then one non-hydroponic plant in 2001. *Global Cannabis Commission Report*, above n 800, 111.

825 Cannabis Control Act 2003 (WA), s 7.

826 Drug and Alcohol Office *Statutory Review: Cannabis Control Act 2003 Executive Summary Report to the Minister of Health* (Drug and Alcohol Office, Perth, 2007) 6. 94% of notices were issued in relation to possession of utensils or possession of cannabis. The Western Australian Police were of the view that the inclusion of cultivation of non-hydroponic plants contributed to the scheme being unnecessarily complex.

Q52 Should cultivation of a prohibited plant for personal use be included within any new approach taken to personal use offences?

Other “dealing” activities

- 11.81 In theory, the import, export, production, or manufacture of drugs can be committed in a personal use context. If cannabis cultivation is included in any new approach, it seems inconsistent not to make similar provision for these other “dealing” activities.
- 11.82 In chapter 10, we proposed that, at the least, the import, export, production, and manufacture of drugs for the defendant’s own use should be treated in the same way as proposed for social supply, so that a presumption against imprisonment should apply.
- 11.83 We do not propose to go further and apply any new approach taken to personal use offences to these offences as well. For convention drugs, there appears to be little, if any, scope to take such an approach anyway. Regardless of convention requirements, however, the potential harms inherent in the manufacturing process mean a less restrictive approach to those activities is not appropriate. Although the same harms do not apply to import/export, there is a risk that the amounts imported or exported would be tailored to comply with the amounts included within any new regime. In addition, taking a less restrictive approach to activities like import and export may also compromise the integrity of our borders and international efforts towards drug control.

Q53 Do you agree that the manufacture, production, and import or export of drugs for personal use should not be included in any regime that is applied to other personal use offences?

Approach to drug use by youth

- 11.84 If a new approach is taken to personal use offences committed by adults, there is a question about whether that approach should also be adopted in relation to the same offences committed by children and young people.
- 11.85 Available evidence indicates that the greatest drug-related harm, at least for cannabis and possibly for other drugs, is when use begins in adolescence and is frequent during young adulthood.⁸²⁷ The latest New Zealand research suggests that drug use before the age of 15 increases the risk of a range of poor outcomes, including involvement in crime and early pregnancy.⁸²⁸ The law in relation to personal use should reflect this evidence and, to the extent possible, protect young people from the harm of drug use.

827 See, for example, paragraphs 2.28 – 2.33 of chapter 2.

828 See Candice L Odgers and others “Is it Important to Prevent Early Exposure to Drugs and Alcohol among Adolescents” (2008) 19 *Psychological Science* 10.

- 11.86 However, for many youth, experimentation with drug use is a natural part of growing up. Rates of cannabis use are reasonably high amongst young people. The Christchurch and Dunedin longitudinal studies found that, at age 18, approximately 45 % of young people in their studies had at least tried cannabis.⁸²⁹ By age 21, approximately 9 % of these users were cannabis dependent.⁸³⁰
- 11.87 As with any offending committed by children and young people, personal use offences are dealt with in the youth justice system. That system already provides specific and tailored responses to offending by children and young people. These responses range from diversion via Police Youth Aid through to prosecution in the Youth Court, where a range of sanctions, from a discharge to residential sanctions, are available.⁸³¹ Youth offenders over 15 years may also be transferred from the Youth Court to the District Court for sentencing.⁸³²
- 11.88 In 2008, there were 1545 police apprehensions in New Zealand of children and young people aged 16 and under for illegal drug offences.⁸³³ The majority of apprehensions were for possession and use offences (68 %), involved cannabis (95 %), and were committed by 14–16 year olds (88 %). Most apprehensions resulted in a warning or caution (42 %) or referral to Police Youth Aid (38 %). Only a small proportion resulted in prosecution (16 %).⁸³⁴ The vast majority of personal use offences committed by children and young people are therefore dealt with outside any formal court process.
- 11.89 Our preliminary view is that any new regime that is applied to personal use by adults should not apply to young people. There is already significant scope within the youth justice system to identify and deal with any drug treatment or other rehabilitative needs a young person may have. It would be counter-productive to remove the ability to access those responses in appropriate cases. For example, mechanically applying an infringement offence to young people, without any opportunity for diversion into drug assessment or treatment and with the potential to accumulate large amounts of unpaid fines, is not appropriate.
- 11.90 There is a stronger argument for applying option one (a cautioning scheme) to youth if that option was adopted for adults. The proposed cautioning scheme for adults has parallels with the youth justice system, including its link to drug treatment in appropriate cases and its escalation towards prosecution if offending is persistent. The key difference is that the response provided through the cautioning scheme, including the progression through the cautioning levels, would be subject to legislative guidance, whereas the approach taken in individual

829 David M Fergusson and L John Horwood “Cannabis Use and Dependence in a New Zealand Birth Cohort” (2000) 113 *New Zealand Medical Journal* 156, 156; and 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* 544, 545.

830 Fergusson and Horwood, above n 829, 157; Poulton and others, above n 829, 545.

831 Children, Young Persons, and Their Families Act 1989, s 283.

832 Children, Young Persons, and Their Families Act 1989, s 283(o).

833 The number of apprehensions does not equate to the number of individuals. An ‘apprehension’ means that a person has been dealt with by the police in some manner (e.g. a warning, prosecution, referral to youth justice family group conference etc) to resolve an offence.

834 Table Builder (<http://wdmzpub01.stats.govt.nz/wds/TableView/tableView.aspx>, accessed 8 October 2009).

cases in the youth justice system is a matter for police discretion. If greater legislative guidance was considered desirable for the police response to youth in these cases, option two could be considered further.

Q54 Do you agree that the approach that is taken to personal use offences committed by adults should not be extended to personal use offences committed by youth?

Review and evaluation

11.91 If a new approach is taken to personal use offences, it will be necessary to review the impact of that approach after it has been in force for a sufficient period. The review should be aimed at assessing the effectiveness of the approach in meeting its objectives, and identifying any changes to it that are required. The review should also report on any changes in levels of drug use that are apparent over the period for which the approach has been in place.

Q55 Should any new approach taken to personal use offences be reviewed after a specified period?

Introduction

11.92 The focus of this chapter has been on the regulatory approach that should apply at the time a personal use offence is detected. However, prosecution for a personal use offence will remain possible under at least two of the proposed options.⁸³⁵ In addition, if none of the three options are progressed, there may still be scope to do more once a personal use offence reaches court.

11.93 Those who are prosecuted will benefit from the existing regulatory approach which enables a less severe approach to be taken to these offences than to other drug offences. This includes the possibility of Police Adult Diversion, and the prospect of sentencing being adjourned to enable an offender who has been convicted of a personal use offence to undertake a treatment programme prior to sentencing.⁸³⁶ There is also a statutory presumption against imprisonment in relation to sentencing for the possession or use of a Class C drug. The question is whether anything further is required.

11.94 Unlike the earlier discussion about options for reform at the point an offence is detected, this discussion is limited to options for dealing with adults in the criminal justice system. The youth justice system remains an appropriate option for dealing with any offending by young people that falls outside any new approach that may be applied as a result of the discussion in paragraphs 11.84–11.90.

⁸³⁵ Under option one (a cautioning scheme) and option three (a menu of options), it will remain possible for an individual to be prosecuted for a personal use offence. In addition, under all options, prosecution may also be possible for some aggravated instances of use (for example, use that occurs in front of children).

⁸³⁶ Sentencing Act 2002, s 25.

11.95 Potential options to be applied in the court system include:

TABLE FOUR:
Possible approaches to personal use offences at later stages of the criminal process

Option	Description	Overseas examples
Greater use of Police Adult Diversion Scheme	Extension of Scheme to wider range of drug offences, for example, possession of Class A and B drugs.	–
Less severe penalties	Presumption against imprisonment could apply, or offences could become non-imprisonable.	Some Australian jurisdictions ⁸³⁷
More formal opportunities for court-based diversion into assessment and treatment	Diversion of offenders into treatment-based services pre-conviction or sentence.	Australian jurisdictions, United Kingdom, United States [all drugs]

Option 1: Greater use of Police Adult Diversion Scheme

- 11.96 It may be appropriate to extend the application of the Police Adult Diversion Scheme beyond its current focus on Class C drugs. If a less restrictive approach was taken to all drugs at earlier stages in the criminal process, there is no reason in principle to restrict the Scheme's application at this later stage in the process to a particular drug class.
- 11.97 There is a question about the overlap of the Scheme with any cautioning scheme that applies at the point an offence is detected. In particular, there seems little to be gained in requiring an offender who has exhausted all of his or her caution options (including attendance at a brief intervention session with a view to accessing voluntary treatment) to then be required to participate in drug assessment or treatment as part of the diversion conditions. The only point in offering diversion in these cases is if it was thought that the threat of imminent prosecution would give the offender additional motivation to attend treatment that had earlier been recommended as part of a brief intervention.
- 11.98 As noted in chapter 7, there is no statutory basis for the Scheme. Any extension of the Scheme would therefore be a matter for the police, and its implementation would be guided by internal police policy.

⁸³⁷ Primarily in relation to minor cannabis possession and related offences – see, for example, section 33K and section 33L of the Controlled Substances Act 1984 (SA), and section 171 of the Drugs of Dependence Act 1989 (ACT).

Option 2: Less severe penalties

- 11.99 Another option would be to lessen the severity of the penalties that currently apply to possession and use offences. This could be achieved by extending the statutory presumption against imprisonment to all personal use offences (including Classes A and B), or by making these offences non-imprisonable.⁸³⁸
- 11.100 In chapter 10, we proposed that there be a presumption against imprisonment in cases involving social supply of any drug. This is on the basis that social supply is a less serious offence than any other form of supply, and is of a similar criminality to possession. It therefore makes sense that there is also a presumption against imprisonment for personal use offences.
- 11.101 However, this presumption, or a reduction in the maximum penalty itself, may have little impact on sentence levels in practice. For example, although the percentages differ between drugs,⁸³⁹ most convicted cases of possession and use already result in a sentence of less than imprisonment.⁸⁴⁰

Option 3: Court-based diversion into assessment and treatment

- 11.102 In chapter 15, we discuss making greater use of the court system to provide the defendant with assessment and treatment where alcohol or drug abuse and dependence are identified.⁸⁴¹ There is no reason why any new approach that is adopted as a result of that discussion should not also apply to personal use offences.

Q56 Where prosecutions are initiated for personal use should any of the following options apply:

- (a) greater use of Police Adult Diversion Scheme;
- (b) less severe penalties;
- (c) court-based diversion into assessment and treatment?

Why?

Q57 Should any other options be considered?

838 If these offences were made non-imprisonable, the most severe sentences that could be imposed in terms of the current hierarchy of sentences would be a sentence of community detention or intensive supervision. Home detention would not be available, due to the statutory requirement that a judge cannot impose that sentence unless he or she would otherwise impose imprisonment (Sentencing Act 2002, s 15A).

839 For example, while 1% of convicted cases involving cannabis possession resulted in imprisonment in 2007, 10% of convicted case involving possession of other drugs resulted in imprisonment. Table Builder (<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>, accessed 18 March 2009).

840 In 2007, approximately 3% of convicted cases resulted in imprisonment. 62% of convicted cases resulted in a monetary penalty, 19% resulted in a community-based sentence, and 13% were ordered to come up if called upon or received a conviction and discharge. Table Builder (<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>, accessed 18 March 2009).

841 See paragraphs 15.50–15.66 of chapter 15.