

Modernising Drug Law Enforcement

Report 4

Practical implications of policing alternatives to arrest and prosecution for minor cannabis offences

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Key Points:

- Globally, cannabis has dominated law enforcement seizure, arrest and case-disposal statistics for decades.
- Over the years, a number of governments have introduced various measures to decriminalise, depenalise or otherwise relax the laws and/or policies pertaining to the use, possession and cultivation of cannabis.
- While beneficial in many respects, the practical implications of enforcing these developments have been largely neglected in the academic literature and by those advocating drug policy reform. What is clear from the limited research is that many difficulties confront police services as they adjust their strategies and tactics to reflect new legislation and priorities.
- Countries introducing similar schemes to those described that are intended to reduce arrest and/or prosecution and/or incarceration rates for minor cannabis offences should be aware of the risk of net-widening.
- The various alternatives to arrest and/or prosecution are underpinned by the notion of police discretion. Consequently, many police services need to do more to ensure that the exercise of discretion is properly managed in terms of being 'reasonable, bona fide, principled and consistent'.
- Governments (and for that matter, police services and civil society organisations advocating reform) should be careful not to overstate the benefits of such schemes in terms of cost-savings, at least in the short term.
- Chief police officers should endeavour to ensure that their officers are well briefed on changes in policy and that compliance is routinely monitored.

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- Countries minded to introduce schemes that allow for the arrest of offenders for minor cannabis offences in circumstances deemed to be 'aggravating' should ensure adequate guidance and training is provided to police officers for the purpose of reducing the likelihood of breaching those articles in the international rights-based treaties which afford protection against arbitrary or unjustified deprivations of liberty.
- To reduce the risk of arrest on administrative grounds, governments working with police services and civil society organisations should consider publishing guidance as to which documents cannabis offenders would need to produce to the police to establish their identity and/or place of residence in order to be eligible for a 'street warning' or 'on-the-spot' fine.

Introduction

Reflecting high levels of global production and prevalence of use, cannabis¹ has dominated law enforcement seizure, arrest and case-disposal² statistics for decades.^{3,4} During this time, and driven by a range of imperatives, a number of governments (both at national and subnational levels) have introduced various measures to 'decriminalise',⁵ 'depenalise'⁶ or otherwise relax the laws and/or policies relating to the use, possession and cultivation of cannabis. Probably the best known, and longest standing, departure from punitive measures in this regard has taken place in the Netherlands when the Dutch government introduced major policy changes in the 1970s and 1980s. These resulted in the emergence of 'coffee shops' within which, while not *de jure*, the sale of cannabis for personal consumption is formally permitted; but only in accordance with strict regulations.⁷ More recently in Europe, 'cannabis social clubs' have emerged in Belgium, Germany and Spain, and are being considered in other countries. These clubs are co-operative arrangements whereby members pool resources to cultivate cannabis for their personal use.⁸ Elsewhere, as a result of the Portuguese legal and policy changes that took effect in July 2001, the acquisition, possession and personal use of cannabis (and other specified drugs) ceased, in the circumstances prescribed by law, to be criminal offences but

attract administrative disposals and sanctions such as fines and alternatives to punishment, including counselling and treatment.⁹ In the United States of America (USA), in what can be regarded as several waves of drug policy reform dating back to the 1970s, many states have taken steps to decriminalise, depenalise, and/or to regulate the medicinal use of, cannabis – often referred to within the USA and other countries as 'marijuana'.¹⁰ Colorado for example, removed 'jail time' for possession of small amounts of the drug in 1975 and approved the use of medical marijuana in 2001.¹¹ In November 2012, that state went further when it voted by referendum to amend the state constitution to effectively regulate cannabis in a manner similar to alcohol.¹² At the same time, Washington State also introduced similar measures, again after a ballot initiative, in November 2012.¹³ Similarly, a number of Latin American countries have taken steps to decriminalise, depenalise or regulate the use of cannabis in prescribed circumstances. It is reported that in May 2009, for example, the Argentine Supreme court ruled that the imposition of criminal sanctions for the possession of small quantities of marijuana for personal use was unconstitutional.¹⁴ That same year, while resulting in problems surrounding low threshold quantities, Mexico passed a law removing all penalties for possession for personal use of small amounts of a range of drugs, including marijuana, cocaine and

LSD.^{15,16} More significantly, the Uruguayan government's recent and unprecedented 'cutting edge experiment' to allow 'registered' cannabis users to buy up to 40 grams of cannabis a month from a pharmacist, grow up to six cannabis plants at home or cultivate up to 99 plants as part of a 'cannabis club' is now well on its way to making it onto the statute book.¹⁷

However, the purpose of this report is not to present a comparative study of legal rules and policies pertaining to cannabis in these or other countries (many such studies already exist)^{18,19,20,21} but to examine an issue largely neglected in the academic literature and by those advocating drug policy reform: namely the practical implications of policing and enforcing these developments. Indeed, research is needed to critically evaluate the effectiveness, as well as benefits and costs of measures that substitute, or exist as alternatives to, criminal sanctions. Given that relatively little information is available regarding these issues, this report aims to provide an overview of some of the many difficulties that may – and do – confront police services when tasked to implement such measures (including the exercise of discretion) through examination of the rules and experiences of four jurisdictions, namely, Australia, England and Wales,²² Portugal and Switzerland.²³ Along with some examples from the USA, specific aspects of each case study are scrutinised with the intention of highlighting points likely to be of interest to policy makers and practitioners alike.

This report does not cover the therapeutic use of cannabis in either its natural or synthetic forms, save to note that the medicalisation of cannabis in some states in the USA and the attendant raft of regulations do from time to time pose problems for police officers and state prosecutors (see Box 6). Doubtless, other states have also experienced some problems relating to the enforcement of their own regulations.

While not our focus here, we acknowledge the manifold benefits relating to a relaxation of the laws and/or policies pertaining to the use, possession and cultivation of cannabis, for example in terms of long-term cost savings to police services and courts, reductions in prison populations, the reduction of stigmatisation associated with arrest and prosecution and encouraging problematic users to seek assistance from health and social services.²⁴ However, it must also be noted that on the basis that the various policies and practices discussed have not been rigorously evaluated from the point of view of their costs, benefits and drawbacks, the report does not advocate any specific model or approach.²⁵ Furthermore, we are acutely aware that the legal, policy and operational implications raised here are far from exhaustive. Nonetheless, acting as an initial foray into this increasingly important issue area, it is hoped that what follows will encourage discussion among, and ultimately the initiation of research by, policy makers, police services and drug policy reformers in the countries discussed as well as in other parts of the world.

Policing alternatives to arrest and prosecution: Some general benefits and drawbacks

Police services can derive a range of benefits from alternative approaches to policing minor cannabis offenses. For example, in terms of effectiveness, research suggests that diversion from the criminal courts and criminal sanctions tends to reduce re-offending, particularly in the case of young and 'first time' offenders.²⁶ Furthermore, an important facet to the development of alternatives to prosecution is the fact that the police services and other criminal justice agencies simply no longer have the resources to prosecute all offenders coming to their notice. In truth, they never did, but the gap between numbers of users and the capacity of law enforcement

agencies to identify and arrest them has become better understood. Indeed, those police services recently subjected to some of the most swinging budgetary cuts are now more hard pressed than ever to find the time and staff to meet the many challenges facing the communities they service. At the same time, these communities are becoming increasingly anxious for greater attention to their needs and priorities. Added to these problems are the ongoing racial tensions in many countries between police services and minority communities. To varying degrees, these tensions are linked to the policing of drugs, particularly cannabis, since possession arrests for this drug are usually focused on poor and minority communities.²⁷ Having said this, we should remember that significant numbers of arrests for cannabis in many countries are a 'by-product' of investigation into other offences (see Box 1).

Yet, there are also costs, both fiscal and other, that result from changes in approach. For instance, it is self-evident that new legislation and policies covering alternatives to arrest and/or prosecution, while potentially producing

long term savings, can also trigger new costs for police services and administrative agencies. These include those relating to training, the preparation and publication of policy and guidance, the design of data capture systems (to meet performance indicators, race and sex monitoring and 'freedom of information' requirements) and independent evaluation and monitoring.²⁸

There is also some research and anecdotal information that gives reason to think that (or at least show the need to investigate whether) in some countries alternative disposals to arrest and/or prosecution have created a 'net-widening' effect.^{29 30} That is to say, simplified procedures have provided police officers with a quick and effective means of dealing with minor cannabis offences that they might have previously ignored. Accordingly, there is the potential for many more people to be exposed to the criminal justice system with the consequence (among others) that their personal details become stored on police databases as a result of which their reputations; livelihoods and opportunities for foreign travel might be at risk.^{31,32,33}

Box 1. Detecting cannabis use, possession and cultivation offences

Research by May et al, makes the point that the means by which cannabis offences are detected in England Wales fall into three main groups, namely:

- as a by-product of investigation of other offences
- because of obvious and unavoidable evidence of cannabis use
- as part of an intended strategy or tactic targeting cannabis

In fact, this observation holds true for all other countries where cannabis is subject to legal controls. May and her colleagues noted 'In the long term, it seems very likely that the balance between these three groups has shifted from the intentional to the accidental [or more accurately, "incidental"].' They go on to say, 'Thirty years ago, the policing of cannabis was largely the responsibility of drug squads; and the policing of cannabis constituted the bulk of these squad's work. With the growth of cannabis use over time, the police have become increasingly likely to encounter cannabis possession as a by-product of other work'. It is more than likely that this shift has been replicated in many other countries.³⁴

Furthermore, some evidence suggests that when alternative enforcement models are piloted in cities/boroughs/states and so on, there is a risk that cannabis possession offences increase, at least in the short term, on account of so-called 'drug tourism' and other factors.³⁵ For example, in their evaluation of the London Borough of Lambeth Cannabis Warning Scheme (LCWS), which ran from July 2001 to July 2002, Adda, McConnell and Rasul found that cannabis possession offences increased by 18 per cent in Lambeth.³⁶ In contrast, over the same policy and post-policy periods, they found no evidence of London-wide increases in cannabis possession rates.³⁷ In addition, the authors found evidence suggesting that cannabis users had relocated to Lambeth from neighbouring boroughs following the introduction of the LCWS.

The final point to make is that whilst some senior police officers in a number of countries have supported calls for alternatives to arrest and/or prosecution for minor cannabis offences and a few have actually instigated policy changes along these lines,³⁸ some police officers continue to arrest cannabis offenders in circumstances where service/department policy otherwise dictates. Research by Harry

Levine and Deborah Peterson Small reveals that between 1996 and 2007 the number of marijuana possession arrests made by the New York Police Department (NYPD) increased from 9,800 to 39,700.³⁹ These arrests 'certainly violate the spirit and intent of the 1977 law which explicitly sought to eliminate the pot possession arrests and the stigma of criminal records, especially for young people.'⁴⁰ According to Levine and Small the increase had no relationship to rising levels of use or the arrest of cannabis users involved in serious crime. Rather, it was driven by the immense utility derived from targeting cannabis users, including in regard to arrest rates and overtime pay.⁴¹ That said, if arrests are made which contravene stated policy, then the police service/department concerned might find itself expending substantial sums of money contesting law suits and perhaps, paying substantial damages to people unlawfully arrested. In fact, as is illustrated in the *New York Times* story reproduced in Box 2, this scenario currently appears to be unfolding in New York City.

With some of these general issues in mind, what follows is a more specific discussion of the chosen case studies.

Box 2. Lawsuit accuses police of ignoring directive on marijuana arrests

New York Times, 22 June 2012, Wendy Ruderman and Joseph Goldstein

Nine months ago, Police Commissioner Raymond W. Kelly [issued a memorandum](#) directing police officers not to make misdemeanor arrests for possession of small quantities of marijuana discovered when suspects are ordered to empty their pockets in [stop, question and frisk](#) encounters. But police officers have continued to charge New Yorkers with misdemeanor crimes – rather than issuing them tickets for violations – for possession of small amounts of marijuana despite Mr. Kelly's directive, according to a lawsuit filed on Friday by the Legal Aid Society.

"It's certainly a sad commentary that the commissioner can issue a directive that reads well on paper but on the street corners of the city doesn't exist," said Legal Aid's chief lawyer, Steven Banks. The 28-page lawsuit, filed in State Supreme Court in Manhattan against the city and the Police Department, seeks a court order declaring the practice illegal under state law and prohibiting officers from making such arrests. The Police Department would not immediately comment on the lawsuit.

Legal Aid lawyers brought the suit on behalf of five New Yorkers who, they say, were victims of “gotcha” police tactics. The five men were all arrested since mid-April, four in Brooklyn and one on Staten Island; they were charged with misdemeanor possession after small amounts of marijuana were found on them during police stops. In each case, the marijuana became visible only after officers searched the men or asked them to empty their pockets, the suit says.

Under state law, possession of marijuana is a misdemeanor offense when the drug is being smoked or “open to public view.” Possession of less than 25 grams of marijuana out of public view — for example, inside an individual’s pocket or backpack — is a violation, warranting only a ticket. “These five individuals are New Yorkers who were essentially victimized by unlawful police practices,” Mr. Banks said. “The lawsuit is aimed at stopping a pernicious police practice, which is harming thousands of New Yorkers a year and clogging up the court system with one out of seven criminal cases and diverting resources and attention from more serious criminal matters.”

One plaintiff, Juan Gomez-Garcia, said he was waiting for a food order outside a Kennedy Fried Chicken restaurant in the Bronx on May 16 when an officer approached, began to question him and asked if he had any drugs on him. Mr. Gomez-Garcia, 27, said that after he admitted to the officer that he had marijuana in his pocket, the officer reached inside the pocket and removed a plastic bag containing a small amount of the drug. He was arrested and charged with “open to public view” possession for having marijuana “in his right hand.” He spent about 12 hours in a jail cell and was let go after he pleaded guilty to a disorderly conduct violation, according to the lawsuit.

In New York City, many of the tens of thousands of misdemeanor marijuana arrests made each year have been a result of stop-and-frisk encounters in which drugs hidden on a person are brought into public view only because of a police officer’s frisk or instructions that a person empty his or her pockets, according to lawyers in the suit. In an effort to end these prosecutions, Gov. Andrew M. Cuomo sought this month [to decriminalize small amounts of marijuana](#) in public view. The Legislature [did not act](#) on the proposal.

Critics of the Police Department’s enforcement policy said that police officers have been wilfully misinterpreting the state’s marijuana laws for more than a decade to produce more arrests. Earlier this month, testifying before the City Council, Mr. Banks presented statistics that he said showed that officers had also been ignoring Mr. Kelly’s order, issued in September 2011. In August 2011, 4,189 people were arrested in New York City for misdemeanor marijuana possession, Mr. Banks said. While the arrests dipped below 3,000 in December, the “decline was only temporary,” he said, adding that by March, the number of arrests had risen to 4,186.⁴²

Table 1. Australian jurisdictions that have decriminalised minor cannabis offences

Jurisdiction and year of initiation	Maximum amount of cannabis allowed for option of fine	Exclusions	Fine	Alternatives to paying fine
South Australia (1987)	<ul style="list-style-type: none"> ▪ 100 grams plant material ▪ 20 grams resin ▪ 1 plant 	<ul style="list-style-type: none"> ▪ Artificial cultivation ▪ cannabis oil 	\$50–\$150	Criminal conviction
Australian Capital Territory (1992)	<ul style="list-style-type: none"> ▪ 25 grams plant material ▪ 2 plants 	<ul style="list-style-type: none"> ▪ Artificial cultivation ▪ cannabis resin and oil 	\$100	Attend the Alcohol and Drug Program – an assessment and treatment program
Northern Territory (1996)	<ul style="list-style-type: none"> ▪ 50 grams plant material ▪ 10 grams resin ▪ 1 gram oil ▪ 10 grams seed ▪ 2 plants 		\$200	Debt to state, no conviction – juveniles are sent to assessment

Source: *Cannabis and the law* Pharmacist Factsheet 1 (The Pharmacy Guild of Australia and **ncpic** National Cannabis Prevention and Information Centre (1 April 2013) <http://ncpic.org.au/static/pdfs/pharmacy/factsheets-for-pharmacists/cannabis-and-the-law.pdf>

Australia

It is illegal (that is to say, unlawful in some states and territories, and criminal in others) to use, possess or cultivate cannabis in Australia, but the penalties for these offences are different in each jurisdiction.⁴³ The Australian Capital Territory (ACT), the Northern Territory (NT), Western Australia and South Australia (SA) have ‘decriminalised’ the possession of small amounts of cannabis for personal use. In some jurisdictions, if someone is found in possession of a ‘small amount’ of cannabis they have the option of paying a small fine (AUS 50 to 200) and up to 28-60 days to ‘expiate’ (pay).⁴⁴ The definition of a ‘small amount’ of cannabis differs between states and territories ranging from 10 to 100 grams⁴⁵ (see Table 1 for further details).

In the rest of Australia, if someone is charged with possession of cannabis and found guilty, they could receive a substantial fine or even a term of imprisonment and will have a criminal record.⁴⁶ It is unlikely, however, that someone caught with a small amount of cannabis for the first time would be prosecuted because of the cautioning and diversion programmes that run

in these states and territories. For example, in Victoria a police officer may give someone a caution and offer him or her the opportunity to attend a cannabis education programme if they are caught with no more than 50 grams of cannabis (see Table 2 for further details).

Under the Drug Misuse and Trafficking Act No. 226, 1985,⁴⁷ the possession of any amount of cannabis is a criminal offence in New South Wales (NSW). However, since 2000, NSW police officers have been able to issue a formal caution to adults in possession of up to 15 grams of cannabis, under a diversion programme known as the Cannabis Cautioning Scheme (CCS). Only two cautions can be issued to the one person, and those with a conviction involving a drug or violence are excluded from the scheme. Police officers can issue the cautions at their discretion and can choose to charge the individual instead. Those that receive a caution under the CCS are provided with information on the legal and health aspects of cannabis use and are given a number to call for treatment information and referral. Since September 2001, on the second (and final) caution, an education session about cannabis use is mandatory.⁴⁸

Table 2. Diversion programmes for minor cannabis offences

Jurisdiction (year of legislation)	Maximum amount of cannabis allowed for option of diversion	Maximum number of cautions allowed	Diversion programme description
Tasmania (1998)	50 grams	3 in 10 years	<ul style="list-style-type: none"> First offence: caution plus information and referral Second offence: brief intervention Third offence: assessment and either treatment or brief intervention
Victoria (1998)	50 grams	2	Cautioning notice plus voluntary education programme
New South Wales (2000)	15 grams	2	Caution, plus information and referral
Queensland (2001)	50 grams	1	Mandatory assessment and brief intervention session
Western Australia (2011)	10 grams	1 (Adults) 3 (Juveniles)	Caution, plus Cannabis Intervention Session

Source: *Cannabis and the law* Pharmacist Factsheet 1 (The Pharmacy Guild of Australia and **ncpic** National Cannabis Prevention and Information Centre (1 April 2013) <http://ncpic.org.au/static/pdfs/pharmacy/factsheets-for-pharmacists/cannabis-and-the-law.pdf>)

In the 2004 evaluation of the CCS conducted by the NSW Bureau of Crime Statistics and Research (BOCSAR), the practical and institutional problems of enforcing the NSW scheme have been identified.⁴⁹ They include the following:

- the difficulty of issuing a caution in the field when bulky equipment (e.g. weighing scales) were necessary
- variation in acceptance of the scheme between the NSW Police Force's Local Area Commands
- a lack of knowledge amongst police officers about the second cautions, leading to a lack of appropriate issuing of second cautions

Other problems were related to the outcome of the CCS. For example, the researchers found that few offenders who received a caution actually called the Alcohol and Drug Information Service (ADIS). Even when it was

mandatory to do so (on the second caution), less than half of those cautioned called ADIS. The researchers suggest that this could be explained by the fact that many of the CCS participants did not believe they had a problem with cannabis and indeed may not have been dependent on the drug.⁵⁰

The BOCSAR evaluation also found evidence of 'net-widening', in that individuals who would not previously have been dealt with in a formal manner by police received a cannabis caution. Furthermore, Aboriginal and Torres Strait Islander peoples were less likely to meet criteria for eligibility for a caution than non-Indigenous individuals, which has in effect increased the over-representation of Aboriginal and Torres Strait Islander peoples in the courts.⁵¹

However, a more recent (2011) evaluation of the NSW CCS is, on the whole rather more encouraging (see Box 3).

Box 3. Performance audit: The effectiveness of cautioning for minor cannabis offences

*The Audit Office of New South Wales, The Auditor-General's Report New South Wales
NSW Police Force, NSW Health*

Extracts from the Executive Summary

Conclusion

Over the last ten years the NSW Police Force (Police) has used cautioning to divert over 39,000 minor cannabis offenders from the courts, saving at least \$20 million in court costs. People cautioned for minor cannabis offences are also less likely to reoffend than those dealt with by the courts. Adults are more likely to be cautioned for minor cannabis offences today than when cautioning was introduced ten years ago. However this is not the case for young offenders who are more likely to be charged today. Cautioning may help people think about the consequences of their cannabis use. However few people seek help to reduce it with only 1.6 per cent of offenders contacting the drug helpline under the adult cautioning scheme. And there have been no evaluations yet on whether cautioning reduces drug use in NSW.

Supporting findings

We examined police response to minor cannabis offences over the last ten years and found that:

- Adult cautioning has increased at a faster rate than charging
- Young offenders now have a one in four chance of being charged for minor cannabis offences, compared to one in five ten years ago
- Cautioning rates vary significantly between Police commands. This means there could be scope for increasing cautioning rates, particularly for young offenders and in some Police regions. Police say the increase in youth charges could be because young people are not admitting the offence, making them ineligible for a caution. Simplifying Police processes for admitting guilt might help increase the cautioning rate for young offenders.

We found that most police issue cautions appropriately. They follow cautioning guidelines in most cases and can easily access equipment and information needed to issue cautions.

When compared to charging, cautioning keeps people out of the courts for longer. We found that between 2000-01 and 2006-07 over five per cent of adults cautioned for minor cannabis offences appeared in court for a similar offence within two years. This compares to almost 14 per cent for minor cannabis offenders who were initially dealt with by a court.

Cautioning may also help people think about the consequences of their drug use. This is because police provide information on the effects of cannabis when issuing cautions. However very few adult offenders cautioned for cannabis offences call the drug helpline and there is also a risk young offenders are not seeking help for their cannabis use.

To date 0.2 per cent of first time adult offenders have called the drug helpline. The results are better for people cautioned a second time, with almost 38 per cent calling the helpline

for the mandatory education session. But this is lower than expected given this is required for second cautions.

So overall cautioning has some positive outcomes. It keeps people out of the courts and saves police and court resources. However more needs to be done to increase the number of cannabis offenders getting help for their drug use. Unless this happens, there is a risk that some people may continue using cannabis which will cost the community more in the long term.⁵²

In his brief 2010 review of cannabis laws and policies, Peter Reuter notes the existence of 'net-widening' in Australia, but also outlines how police services may reduce it. In relation to the SA Cannabis Expiation Notice system he point out that 'Since many [offenders] did not pay their fines, the result was an increase in the number of individuals being incarcerated annually for marijuana offenses, albeit now indirectly for their failure to pay a fine'. He illustrates, however, that 'Other Australian jurisdictions have taken steps to prevent this 'net-widening'. For example, Western Australia uses threat of withholding driver's license renewal for non-payment of the fine and has thus increased the fine payment level within 2 months to over 75 per cent.⁵³

An additional problem for police officers working in some parts of Australia is posed by the inclusion of the terms 'non-hydroponic' and 'artificially cultivated'⁵⁴ cannabis plant, in the legislation – how are they expected to distinguish between artificially and naturally cultivated cannabis plants? Suppose P, a small-scale cannabis trafficker living in the ACT, collects two mature cannabis plants from Q, his friend. Q has grown the plants hydroponically in the basement of his home, which is located in the ACT. P knows how the plants have been cultivated and on occasions works with Q in his basement to help cultivate the illicit crops. Knowing the ACT law and policy regarding the possession of cannabis plants, P is always careful to carry no more than two plants at any one time. He takes the further precaution of carrying a couple of

plant pots filled with soil as a ruse to foil the police in case he is stopped. Having stored the plants in his car, P starts to drive home where he intends to prepare and package the plant material for sale.

However, on the basis of a minor traffic violation, P is stopped by a police officer and the plants are discovered in his vehicle. When questioned, P tells the officer that he has grown the plants in soil and indicates the pots filled with soil in support of his assertion.

In the absence of evidence suggesting artificial cultivation (rock wool, nutrients, a pH/TDS/ Temperature Monitor etc.) the officer has little to go on to determine the method of cultivation. Whilst it is true that cannabis plants artificially cultivated look different to soil-grown plants, it is unlikely that a patrolling officer (unless s/he receives specialist training) will be able to identify which is which.⁵⁵ It is perfectly possible to devise and provide such specialist training to police officers, but training of this nature for thousands of officers would be an expensive undertaking.

On the face of it, there is a dilemma here that is probably best resolved by chief officers issuing instructions that in cases of reasonable doubt, their officers should submit any plant(s) for forensic examination. However, according to Dr Leslie A King, former head of the Drugs Intelligence Unit of the UK Forensic Science Service, in some circumstances even a forensic scientist might have trouble in determining the method of cultivation,

although measurement of the THC content would help, particularly if it is greater than say 10 per cent.⁵⁶ Of course, if an officer decides to seize a plant on the basis that s/he is unsure as to how it was cultivated, then this will mean delaying the issuance of an expiation notice. This could prove time-consuming for police in those cases where the forensic evidence indicates that the cannabis plant has not been artificially cultivated or the expert evidence is inconclusive, since they would then need to contact the suspect again in order to issue the expiation notice. On the other hand, in those cases where the forensic evidence does confirm that the plants have been artificially cultivated but the officer had chosen not to arrest the suspect when the seizure was made, the police may have missed an opportunity to conduct further investigations (e.g. searching the suspect's home address) and recover other artificially produced plants or evidence supporting artificial cultivation.⁵⁷

England and Wales

At first sight, the penalties in England and Wales for cannabis possession appear to be considerably tougher than those in most Western countries. Moreover, successive British Governments, whether Labour, Conservative or the present Conservative/Liberal coalition, have consistently resisted any notion of 'tolerated' cannabis markets along the lines of the Dutch or even the less controversial Portuguese models. However, despite the penalties in the Misuse of Drugs Act (MDA) 1971,⁵⁸ the status of cannabis as a Class B drug⁵⁹ and the enduring political rhetoric, the reality is rather different. For the last three decades or more the overall policy trend regarding possession and minor cases involving cultivation, production and even the importation⁶⁰ of cannabis has become increasingly relaxed. Moreover, although possession of cannabis in England and Wales

is a crime and carries a maximum penalty on indictment of 5 years' imprisonment and/or an unlimited fine, from the early 1980s up until early 2012, 'first-time' adult offenders faced zero risk of imprisonment.⁶¹ Even taking into account the Sentencing Council's *Drug Offences Definitive Guidelines* that were published in 2012, a 'first-time' adult offender prosecuted for possession of cannabis will almost certainly avoid a term of imprisonment unless there are 'other aggravating factors' which increase the seriousness of the offence: i.e. the possession of cannabis in prison (in this example, as a visitor rather than an inmate), consuming cannabis in the 'presence of others, especially children and/or non-users', possession of the drug in a school or licensed premises or an attempt to conceal or dispose of the drug.⁶² In all these instances, the offender could easily reduce the 'seriousness' of the offence, for example, by simply demonstrating 'remorse' and/or making a submission that the offence was 'an isolated incident'.⁶³

Alternative approaches to prosecuting young and adult cannabis offenders alike are now well established in England and Wales (see Table 3). Indeed, the risk of prosecution (i.e. charge and referral to a criminal court) for adult offenders has decreased considerably since 1985 following the striking increase in the use of police 'cautions' and 'simple cautions'.^{64,65} Additionally, some police services in England and Wales in the early 1990s introduced 'formal warnings' (also known as 'warnings') as a means for dealing with minor offences including simple possession of cannabis.^{66,67} These were legitimate disposal options, supported by the Association of Chief Police Officers (ACPO) that dealt with an admission of guilt for minor offences, without giving the offender a criminal record.⁶⁸ Formal warnings could be given to young and adult offenders either in lieu of arrest or following their arrest. They were not citable in court.

Since 2004, the risk of *arrest* for adult offenders has been markedly reduced following the introduction of the non-statutory 'Cannabis Warning' scheme⁶⁹ and in January 2009, the inclusion of the offence of cannabis possession (for personal use) in the Penalty Notice for Disorder (PND) Scheme, which are both different forms of pre-arrest diversion.⁷⁰ Under the Scheme, a PND Upper Tier Penalty of GBP 80.00⁷¹ is deemed as appropriate for an adult found in possession of cannabis.⁷²

Given that adults in possession of cannabis for personal use now have a number of case disposal options available to them *before* consideration is given to their prosecution (see Table 3), police officers face the challenge of ensuring that they are conversant with a raft of laws, Codes of Practice and guidance issued by the ACPO, the Home Office the Ministry of Justice and the Crown Prosecution Service (CPS). In terms of policing cannabis possession offences, the first practical implication is that today's police require more training than did their predecessors operating in the late 1920s through to the mid-1980s.⁷³ In this period, officers needed to know little more than the fact that cannabis was a 'dangerous' or 'controlled' drug, their power of arrest (which they were under no legal or professional obligation to justify beyond the fact that they had reasonable grounds to suspect that an offence had been committed) and credible evidence to support a charge.

A second practical implication is that the various alternatives to prosecution still oblige police officers to complete a number of forms for evidential and procedural reasons. For example, if a police officer decides to issue a cannabis warning, s/he is required to complete a minimum of six forms.⁷⁴ In the case of a 'simple caution', a minimum of seven forms is required.⁷⁵ Whilst some of these forms require little in the way of text, arrest notes, the crime

report and the Custody Record⁷⁶ can easily run to several pages even in relatively simple cases. Additionally, if the investigating officer and/or custody officer fail to record in detail the reasons why s/he has adopted or rejected a particular disposal option (Cannabis Warning, PND, simple caution etc.) there is a risk that this could lead to his/her censure at some later stage. So despite the aspirations of Theresa May, the current Home Secretary, there is no escaping the fact that in order to be effective 'crime fighters', modern-day police officers also need to be competent 'form writers'.⁷⁷

In its 2009 *Guidance on Cannabis Possession for Personal Use Revised Intervention Framework*⁷⁸ ACPO anticipates some of the difficulties confronting officers when dealing with cannabis cases and advises accordingly. However, leaving aside the fact that ACPO guidance is peppered with terminology open to interpretation (e.g. 'aggravating factors', 'operational discretion' and 'locally identified policing problem'), the guidance is deficient in one major area; namely, it fails to address in detail potential problems arising from the statutory requirement that police officers must now decide - applying an objective test - whether an arrest is necessary.⁷⁹

As noted by Rudi Fortson in his review of powers of arrest under section 24 of the Police and Criminal Evidence (PACE) Act 1984 (as amended by the Serious Organised Crime and Police Act 2005)⁸⁰, 'Deciding whether to arrest involves an application of legal rules, the existence of discretion (appreciation of the limits of that discretion), and policy. In practice, the new framework [underpinning the revised powers of arrest] does not ease the burden on officers: indeed...the burden is increased'.⁸¹ Fortson goes on to say that: '...the issue facing most busy constables is ... uncertainty whether a decision to arrest may be viewed objectively as unlawful on the grounds that a purported exercise of power was not "necessary", or that it constituted

a disproportionate response (in [European Convention on Human Rights (ECHR) terms]).^{82,83} As is widely known, Article 5(1) of the ECHR (*Right to liberty and security*) provides that no one shall be deprived of their liberty save in cases that it prescribes and in accordance with the law.

Fortson's comments regarding powers of arrest are particularly pertinent when read in conjunction with the 'policy of escalation', described in the ACPO guidance. Briefly, the policy comprises three options; (1) Cannabis Warning (for a 'first possession offence'), (2) PND (for a 'second possession offence') or (3) Arrest (for a 'third possession offence').⁸⁴ The circumstances of the offence (e.g. if the offender is smoking cannabis in a public place) and offender (e.g. if s/he has already received a Cannabis Warning or a PND), will determine which option is appropriate. However, the problem now facing officers is whether it is lawful to arrest in those circumstances where the ACPO advice rules out the issuance of the Cannabis Warning and PND options. The basic legal considerations guiding powers of arrest are neatly summarised in the PACE Codes of Practice – Code G *Statutory power of arrest by police officers*, paragraph 1.3:

The use of the power [to arrest] must be fully justified and officers exercising the power should consider if the necessary objectives could be met by other, less intrusive means. Absence of justification for exercising the power of arrest may lead to challenges should the case proceed to court. It

could also lead to civil claims against police for unlawful arrest and false imprisonment. When the power of arrest is exercised it is essential that it is exercised in a non-discriminatory and proportionate manner which is compatible with the Right to Liberty under Article 5.⁸⁵

The ACPO guidance does contain a cautionary note regarding arrests: "Arrest will never be 'automatic' – an arrest must always comply with the 'Necessity Criteria', as per the Serious Organised Crime and Police Act 2005."⁸⁶ However, this is largely negated by the 'only option' advice described above.

The scenario in Box 4 is intended to help the reader understand the difficulty arising from the 'necessity criteria' when viewed in the context of the ACPO guidance.

Although the ACPO guidance is silent on the point, there is in fact an alternative to arrest in the above scenario – P could report D for summons. Indeed, in the circumstances, it is submitted that this is the appropriate option. In failing to include this option and giving greater prominence to the 'necessity criteria' in the guidance, ACPO may have unwittingly triggered a wave of unlawful arrests for minor offences of cannabis possession. There is a long history of cases where British police services have been sued for damages resulting from wrongful arrests and/or false imprisonment (see for example, *Christie v. Leachinsky* [1947] A.C. 573; [1947] 1 All E.R. 567, H.L.).⁸⁷

Table 3. England and Wales: Statutory and non-statutory disposals available to Adults and Young People for offences involving the unlawful possession of cannabis or cannabis resin

Offence: unlawful possession of cannabis or cannabis resin contrary to Section 5 (2) of Misuse of Drugs Act 1971

Prosecution		Alternatives to prosecution ¹														
Maximum penalties		Sentencing alternatives to maximum penalties ²					Statutory alternatives					Non-statutory alternatives				
Crown Court		Magistrates' Court		Crown Court and Magistrates' Court			Young people (10-17)					Adults		Adults and Young people		
Imprisonment	Fine	Imprisonment	Fine	Absolute Discharge ³	Conditional Discharge ⁴	Community Sentence ⁵	Reprimand ⁶	Final Warning ⁷	2 nd Final Warning ⁸	Youth Conditional Caution ⁹	PND ¹⁰	Conditional Caution ¹¹	Cannabis Warning ¹²	Simple caution ¹³	TIC ¹⁴	Not Proceeded With ¹⁵
5 years	Unlimited	3 months	£2,500													

1 For further information on the alternatives available, see: Ministry of Justice (2013), *Quick Reference Guides to Out of Court Disposals*, <http://www.justice.gov.uk/downloads/oocd/quick-reference-guides-oocd.pdf>

2 The sentencing alternatives shown are not exhaustive. Rather, they are meant to provide the reader with an idea of what options are available to the courts

3 The term absolute discharge applies in cases where the convicted person is discharged from a court 'absolutely' without punishment

4 The term *conditional discharge* applies in cases where the convicted person is discharged from a court without punishment on condition that s/he does not re-offend within a specified period of time

5 Community Sentence, defined in section 33 Powers of Criminal Courts (Sentencing) Act 2000, includes curfew order, community punishment order, drug treatment and testing order etc.

6 See: section 65(2) of the Crime and Disorder Act 1998 <http://www.legislation.gov.uk/ukpga/1998/37/section/65>

7 See: section 65(3) of the Crime and Disorder Act 1998 <http://www.legislation.gov.uk/ukpga/1998/37/section/65>

8 See: section 65(3) of the Crime and Disorder Act 1988 <http://www.legislation.gov.uk/ukpga/1998/37/section/65>

9 Ministry of Justice (2013), *Code of Practice for Youth Conditional Cautions*, <http://www.justice.gov.uk/downloads/oocd/code-practice-youth-conditional-cautions-oocd.pdf>

10 Ministry of Justice (2013), *Penalty Notices for Disorder (PNDs)*, <http://www.justice.gov.uk/downloads/oocd/pnd-guidance-oocd.pdf>. The offence of cannabis possession (for personal use) was added to the PND Scheme on 28 January 2009. Offenders are issued a PND for £80.00.

11 See: Ministry of Justice (2013), *Code of Practice for Adult Conditional Cautions Part 3 of the Criminal Justice Act 2003*, <http://www.justice.gov.uk/downloads/oocd/code-practice-adult-conditional-cautions-oocd.pdf>

12 See: ACPO (28 January 2009), *ACPO Guidance on Cannabis possession for personal Use Revised Intervention Framework (London)*, <http://www.drugscope.org.uk/Resources/Drugscope/Documents/PDF/virtuallibrary/ACPOcannabisWarnings09.pdf>

13 The practice of *cautioning* (now described as *simple cautioning* in order to distinguish the practice from *conditional cautioning*) has a long history dating back to at least the sixteenth century. See: Ministry of Justice (2003), *Simple Cautions for Adult Offenders* (London), <http://www.justice.gov.uk/downloads/oocd/adult-simple-caution-guidance-oocd.pdf>

14 The 'taken into consideration' (TIC) procedure is regarded as a *convention* in English law. See: R v Syres (1908) 25 TLR 71. See: the Crown Prosecution Service's *Offences to be taken into Consideration (TICs)*, http://www.cps.gov.uk/legal/l_to_o/offences_to_be_taken_into_consideration_guidance_%28tics%29/

15 The *Not Proceeded With* procedure is used in cases where there is clear evidence of a person's guilt but for various reasons the case is not prosecuted or dealt with under any of the other options available to the police

Box 4. Necessity criteria for arrest under section 24 Police and Criminal Evidence act 1984

Suppose a police officer (P) happens to see a man (D) sitting on a park bench smoking what appears to be a cannabis cigarette. Nearby, a number of children and young people are enjoying a game of football. In the course of his duties, P has spoken to D on a previous occasion and knows where he lives. On seeing P, D throws the cannabis cigarette on the grass. P retrieves the cigarette and questions D, who readily admits that it contains cannabis. P quickly rules out the Cannabis Warning option, since smoking cannabis in a public place (in this case a park) is deemed to be an 'aggravating factor'. Additionally, P knowing that D was issued with a PND for a similar offence just a few months back, rules out the PND option. According to the ACPO guidance, the 'only option' now open to P is to arrest D.⁸⁸ However, since P knows D's identity and address there is no justification to arrest under the provisions of section 24 (5) (a) or (b). Similarly, since D has admitted the offence and the real (or physical) evidence has been secured, it is difficult to see how P could argue the arrest was justified for the 'proper and effective investigation' of the offence under the terms of section 25 (5) (e). It follows that if P arrested D in the circumstances described, the arrest would almost certainly be held to be unlawful on account of its failure to fulfill the 'necessity criteria'.

Interestingly, the Metropolitan Police Service's (MPS) *Policy on enforcement of cannabis possession as a Class B controlled drug* (along with other police services) recognises the summons option:

Where it can be verified that an offender has received one previous cannabis warning ... a further warning must not be considered and the next appropriate option considered (PND or arrest/summons).⁸⁹

Indeed, based on MPS data, some offenders are being summonsed but not it seems in great numbers. For example, from a total of 45,312 people proceeded against for possession of cannabis offences in 2011, only 177 involved the issue of a summons.⁹⁰

Taking these points into account, there is a strong case to be made for ACPO to urgently revise its 2009 guidance. In its current form, the guidance regarding the powers of arrest under section 24 PACE Act 1984 is misleading.

As a result, the 'policy of escalation' creates unnecessary legal risks for both police officers and suspects. Accordingly, the ACPO should ensure greater prominence is given to the statutory requirements regarding the 'necessity criteria' and in order to reflect this, revise its policy of escalation in the following terms: (1) Cannabis Warning (for a 'first possession offence' and where there are no aggravating factors), (2) PND (for a 'second possession offence' and where there are no aggravating factors), (3) Report for summons for a 'third possession offence' in circumstances which fail to meet the arrest 'necessity criteria', (4) Arrest (for a 'third possession offence') in circumstances where the arrest 'necessity criteria' is fulfilled.

According to the ACPO guidance, an adult offender is still eligible for a Cannabis Warning even though s/he has received a simple caution or conditional caution for a similar offence and/or has benefited from the 'compounding procedure' under s. 152 (a) of the Customs and Excise Management Act 1979, for an offence

of importing or exporting small amounts of cannabis. The fact that a person could receive a Cannabis Warning in such circumstances seems to run against the notion of ACPO's policy of escalation and its stated ambition to:

Re-emphasise a strategy of enforcement and prosecution that delivers the national message that cannabis is *harmful and remains illegal* (emphasis added).⁹¹

The ACPO policy regarding cannabis cultivation (s. 6 (2) MDA) or production (s.4 (2) MDA) is also problematic:

The growing, cultivation or production of cannabis is completely outside the remit of this ACPO Guidance. This includes a single small plant (cutting) being grown, by a non-vulnerable adult, for personal use. Neither a Cannabis Warning nor PND can be issued for this offence, in any circumstances.⁹²

Besides ruling out the Cannabis Warning and PND options, the guidance does not offer any further advice. In cases where officers discover cannabis plants in the homes of offenders, and no evidence of cultivation/production for commercial purposes or other 'aggravating factors' exist, then the appropriate course of action would appear to be to report the offender for summons. Other than the fact that cultivating cannabis is regarded as being a more serious offence than possessing the drug under the MDA 1971, there appears to be no compelling reason why a person growing a single soil-based plant for personal use in the privacy of his/her home should not be given a Cannabis Warning.⁹³

Another important area of concern regarding Cannabis Warnings is the fact that there is no national database on which to record these warnings. The upshot of this is that a police officer issuing a Cannabis Warning in, say London, may not be aware that the offender has already received a similar warning elsewhere.⁹⁴

Finally, it is interesting to note that in 2010, the Office for Criminal Justice Reform,⁹⁵ appeared to call into question the validity of ACPO's policy of escalation:

There is no hierarchy of out-of-court disposals for adults, and so no enforced escalation of response as an offender re-offends. Instead disposals are to be used as appropriate to the offence and the offender, and in line with the criteria set out in guidance.⁹⁶

Given that there clearly is a hierarchy and enforced escalation of responses – i.e.: Cannabis Warnings, PNDs, simple caution and then prosecution – it is difficult to make sense of this paragraph, but it does underscore the fact that on occasions, police officers will find themselves grappling with seemingly conflicting comments regarding policy.

Portugal

The current 'Portuguese model' is based on legal and policy changes which led to the acquisition and possession for personal consumption of listed plants, substances and preparations, being decriminalised following the introduction of Law No. 30/2000 in July 2001.^{97,98} Contrary to some media statements, the Portuguese law does not treat such conduct as 'parking violations'.⁹⁹ Drug acquisition and possession for personal consumption are actions prohibited under Portuguese law, but they are treated as administrative violations rather than as crimes. Furthermore, the law makes no distinction between the types of drug (so-called hard or soft drugs) neither does it matter whether consumption is public or private.¹⁰⁰

These administrative offences are sanctioned through specially devised Commissions for the Dissuasion of Drug Addiction (CDDAs)

comprising lawyers, social workers and medical professionals.¹⁰¹ Offenders are referred by the police to the CDDAs, who then discuss with the offender the motivations for and circumstances surrounding their offence and are able to provide a range of sanctions, including community service, fines, suspensions of professional licenses and bans on attending designated places.¹⁰²

The crucial phrase 'acquisition and possession for own use' is defined in Article 2 (2) of the law of 2000, as a quantity not exceeding that which, on average, an individual consumes over a period of 10 days.¹⁰³ In accordance with Portuguese law and policy, the limits set for cannabis are as follows: 25 grams (herbal), 5 grams (resin – 'hashish'), 2.5 grams of cannabis oil and 0.5 grams of 'pure THC'.¹⁰⁴ Offenders found with more than this quantity are prosecuted, and depending on the circumstances, may face charges for trafficking or trafficking/consumption (where the offender is found in possession of more than the consumer amount, but deemed to have obtained plants, substances or preparations for personal use only).¹⁰⁵

Cannabis continues to be the drug for which the greatest percentage of drug offenders is summonsed to appear before the CDDAs.¹⁰⁶

The following paragraphs illustrate some of the areas of concern regarding policing issues. In his review of the Portuguese decriminalisation 'regime', published in 2009, Greenwald notes that:

The effect that the decriminalization regime has had on police conduct with regard to drug users is unclear and is the source of some debate among Portuguese drug policy experts. There are, to be sure, some police officers who largely refrain from issuing citations to drug users on the grounds of perceived futility, as they often observe the cited user on the street once

again using drugs, leading such officers to conclude that the issuance of citations, without arrests or the threat of criminal prosecution, is worthless.¹⁰⁷

However, he continues:

Other police officers, however, are *more* inclined to act when they see drug usage now than they were before decriminalization, as they believe that the treatment options offered to such users are far more effective than turning users into criminals (who, even under the criminalization scheme, were typically back on the street the next day, but without real treatment options).

In a case where a culprit is caught with an amount of cannabis that falls within the limits, and is unable to provide documentary evidence of his/her identity, under Article 4 (2) of the law of 2000 and in accordance with the legal rules on detention, s/he may be detained for up to six hours at a police station to enable the police to conduct the necessary enquiries. It is interesting to note that for the purposes of verifying the culprit's identity, the Portuguese police would not accept a photocopy or electronic copy of his/her passport¹⁰⁸ (this point is explored in the section below on Switzerland).

As is the case in some parts of Australia, there is also the question as to how patrolling officers are able to determine with a degree of accuracy if a person is in possession of an amount of cannabis (or other drug) which exceeds the agreed threshold. In the absence of scales, it is not unreasonable to assume that in some cases, Portuguese police officers overestimate the amount of cannabis (or other drugs) and arrest suspects on suspicion of a trafficking offence. It is also probably true that on occasions they underestimate the amount of drug they find and report the offender for summons instead of making an arrest.

Switzerland

Swiss federal and cantonal laws make it illegal to consume and possess cannabis. However, over the years all 26 cantons have implemented less restrictive enforcement policies and 'on-the-spot fines' are the usual punishments for adult offenders.¹⁰⁹ That said, there are some marked variations in policy and practice and it appears to be the case that the French-speaking cantons tend to have more restrictive cannabis laws and policies than elsewhere.¹¹⁰ According to Reuter, the vast majority of cannabis offenders going to court receive a fine of US\$250 or less.¹¹¹ He also notes that it is possible that no one in Switzerland receives 'jail time for a cannabis possession offense'.¹¹² In September 2012, the Swiss parliament approved a proposal to impose a fine on consumers of small amounts of cannabis instead of opening formal criminal proceedings. In effect, this law would recognise current cantonal policies at the Federal level. The new Federal law is expected to come into force in October 2013. Although the law clearly refers to *consumers*, according to one Swiss expert, it is likely that the German-speaking cantons will adopt a more flexible response and impose fines for *possession* offences as well.¹¹³ However, it is also likely that at least one canton will take the new law at face value and implement a "fine for consumption only" policy.¹¹⁴

As already mentioned, if a person is found smoking cannabis or has in his/her possession a small amount of cannabis for personal use, an 'on-the-spot' fine is likely to be imposed. Not unexpectedly, if the offender, for want of cash or ready access to cash, needs time to pay, the police officer concerned, will want to verify his/her identity and address. Since many Swiss citizens routinely carry their national identity cards and other forms of identification, verification of the Swiss offender's identity and address is easily done. However, the situation concerning foreigners is potentially more complicated. Although

some tourists and expatriates routinely carry their passports, many, fearing that they may be stolen, do not. Instead, they prefer to leave them locked in a hotel safe or in their homes. Indeed, a number of travel websites, including official government websites, advise tourists whenever possible to leave their passports and other valuable documents (e.g. driving licences, identity cards and travel documents) in a hotel safe as a safeguard against theft.¹¹⁵ Given that thousands of passports are stolen worldwide each week, this simple crime prevention measure makes sense.¹¹⁶ However, cannabis-using tourists and expatriates following this crime prevention advice run the risk of being detained by Swiss police if they are caught in possession of cannabis and are unable to comply with the conditions attached to the 'on-the-spot fine' procedure. Such a scenario is far from fanciful and according to Robert Schrader, the founder of the *Leave Your Daily Hell* website this is exactly what happened to him in the city of Bern having been caught smoking cannabis by 'two plainclothes police officers'. It appears that after paying a fine of CHF 180, he was released from the police station.¹¹⁷

It would seem to be the case that in some cantons, the legality of the procedure used to detain offenders in these circumstances is uncertain and according to one source, relies on the cooperation of the offender.¹¹⁸ However, in cases where the offender refuses to go to the police station, it appears that s/he may be arrested for disobeying a lawful order.¹¹⁹ Such a scenario may become an increasing concern if, as in other countries that are relaxing their approaches to cannabis use, Switzerland becomes a destination for, if not drug tourism, then travellers keen to use cannabis recreationally when away from home (see Box 5).

Finally, as is the case with cannabis warnings in England and Wales, there is no national database in place in Switzerland that allows the cantonal police to check if a person has any record of 'on-the-spot' fines imposed in another canton.¹²⁰

Box 5. The possible dilemmas of dealing with cannabis using tourists in Switzerland

Supposing D, a foreigner, although unable to produce his passport to a police officer when required to do so, produces a photocopy or better still, an electronic version, which he has taken the precaution of installing on his computer or cell phone. Would this satisfy the Swiss police and circumvent the detention of D? It is likely that the Swiss police, as is the case with their Portuguese counterparts, would not accept a copy of the original in these circumstances. In the absence of a passport, what if the offender is able to provide a bank credit or debit card bearing his photograph and documentary evidence of the address of the hotel where s/he is resident? Would these suffice? It appears the Swiss police procedure is unclear on these points.

If the offender is then detained at a police station in these circumstances in accordance with the *Polizeiliche Anhaltung* ('police detention') procedure could s/he subsequently claim that the procedure violated the provisions of Article 5 of the ECHR? The Strasbourg Court has frequently made clear that all the surrounding circumstances may be relevant in determining whether there is a deprivation of liberty: see for instance *HM v Switzerland* (2004) 38 EHRR 314, para 42:¹²¹

'In order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question'.

The circumstances stated here clearly demonstrate the potential dilemmas facing both the police and the offenders regarding the issue of arrest and subsequent detention at a police station.

Future challenges: Policing legally regulated cannabis markets

As we can see, even where policy makers and law enforcement managers have a shared objective of reducing penalties for simple cannabis possession, and reducing the amount of time spent on imposing them, the implementation of schemes has involved a new set of dilemmas for local management, and officers on the street. These dilemmas are likely to increase as the range and depth of cannabis law enforcement reforms increases. The most immediate challenges in this regard look set to be within the USA, and perhaps in the near future, Latin America.

Having passed ballot initiatives to allow for the creation of legally regulated markets for the non-medical use of cannabis, within the USA, both Colorado state and Washington state are currently developing the frameworks through which to implement policy shifts. These will no doubt reflect the specifics of each state's initiative. Washington's initiative 502 (I-502) legalised the possession of up to one ounce of dried marijuana, although the use of the product is not permitted 'in view of the general public'. The initiative also creates a system of taxed production, distribution and supply that will be overseen by the Washington State Liquor Control Board (LCB). This has announced that it wants to track cannabis from seed to store; a model that is similar to that existing for medical

marijuana in Colorado and that aims to reduce leakage into the black market. Unlike Colorado's regulations, so far the LCB has not issued rules on whether non-state residents will be able to purchase the same amounts of marijuana as state residents. Indeed, the issue of 'marijuana tourism' may be a concern to surrounding states. Colorado's Amendment 64 is broadly similar to I-502 in that it creates a system of legal production and supply that is subject to licensing, taxation and regulation as well as imposing age restrictions for purchase in line with the legal age for alcohol purchasing, which is set at 21 years old. That said, it also differs in a number of key ways, especially in that it allows for the personal production of up to six plants in total, only three of which may be mature plants at any one time.¹²² As noted above, at a national level, having overcome considerable difficulties to pass through the lower house in late July 2013, Uruguay's marijuana regulation bill will now go through what appears to be a less arduous senate approval process.¹²³ As such, as John Walsh, drug policy expert at the Washington Office on Latin America, points out 'Uruguay appears poised, in the weeks ahead, to become the first nation in modern times to create a legal, regulated framework for marijuana.'¹²⁴

The actual and likely policy shifts both within Washington and Colorado and in Uruguay are clearly still in various states of flux. Within the two US states regulative frameworks remain under development and despite recently updated guidance by the US Department of Justice it remains unclear precisely how, in policing terms, the relationship between Colorado, Washington

and the federal government will play out in practice.¹²⁵ It should be recalled that 'marijuana is and remains illegal under federal law'.¹²⁶ And although likely to pass through the senate, the Uruguayan marijuana regulation bill is still not law.

As such, it is difficult to make meaningful predictions regarding the policing implications of these significant changes in approach. However, mindful of the challenges already facing Colorado authorities when dealing with medical marijuana schemes (see the example in Box 6) it is likely that they have the potential to cause many more legal and administrative conundrums for police services. Indeed, as Mark Kleiman, Professor of Public Policy at UCLA, Visiting Fellow at the National Institute of Justice and director of BOTEK Analysis (the company hired in March 2003 by Washington state's LCB to consult on the design of the regulative framework) notes, in order to operate as intended, legally regulated markets will require considerable enforcement activity. 'The advocates promised greatly decreased enforcement expenditures as one of the advantages of legalization' says Kleiman. 'Not so', he continues. 'Not if you want the taxed and regulated market to displace the untaxed and unregulated illegal market'.¹²⁷ Within this context, among other things, it will no doubt be an operational and administrative challenge for police officers to distinguish between cannabis from the licit and illicit market. Moreover, in the case of Colorado, it will be interesting to learn police guidance on production for personal use and the definition of 'mature' plants. Watch this space.

Box 6. Judge scoffs at jail time for Denver dad in medical-pot case

Jessica Fender, *The Denver Post* 2 August 2011

It may not have been wise for Joseph Lightfoot to open a state-licensed medical-marijuana growing operation in his basement with three kids in the house, but his actions didn't warrant jail time, said a Denver County Court judge, who complained that prosecutors "overcharged" Lightfoot. Lightfoot was initially charged with felony child abuse under a statute designed to keep parents from operating highly explosive home meth labs.

Prosecutors dismissed the felony count in July after Lightfoot pleaded guilty to two misdemeanor child-abuse counts. On Monday, Lightfoot, 31, was sentenced to a year's probation and 60 days of in-home detention and ordered to take a responsible-parenting class. "This was overcharged," Judge Andre Rudolph told Lightfoot at his sentencing. "But you've got to make better decisions. This is not about the legalities of medical marijuana. It's about the kids." Defense attorney Daniel Murphy said the felony charge left his client struggling to find work and embroiled in a custody battle.

Felony child-abuse charges against pot growers are rare. Murphy argued that raising the plants doesn't constitute the manufacture of a controlled substance, as the meth-tailored statute requires. That legal question eventually led prosecutors to lessen the charges, though they remained concerned about the children's welfare, said Denver district attorney's office spokeswoman Lynn Kimbrough. "We had very serious concerns about the safety of the children in that home, where almost 60 marijuana plants were found. We went forward in good faith with the initial charges," she said.

Officers arrived at Lightfoot's house in June 2010 after a loud argument alarmed a neighbor. The strong odor of growing marijuana led them to the basement, according to police reports.

They charged Lightfoot and his wife, Amber Wildenstein, with felony child abuse, citing a number of potential hazards to the three children, ages 8 to 12: There wasn't a lock on the basement door. There were small amounts of cut marijuana elsewhere in the home. The growing operation – with its chemicals, ventilation problems and allure to would-be robbers – brought up "numerous concerns regarding the children," according to arrest affidavits.

University of Denver law professor and former New York prosecutor Kris Miccio said the concerns raised by the pot-growing operation also could be raised in homes where there's a liquor cabinet, cleaning supplies under the sink or valuables that could entice criminals to break in. "If a police officer brought that into my office, I would have thrown him out and called his supervisor," Miccio said. "It's crazy. It opens the door to anything."¹²⁸

Conclusions and Recommendations

Perhaps the main 'message' to be derived from this report is that, whilst an increasing number of countries have introduced substantial legal and/or policy reforms, few if any, appear to have taken the calculated risk of investing in major pieces of research to evaluate the enforcement aspects of the models they have introduced. Without this kind of research, it is difficult to get a sense of what the practical implications arising from these models really are. Moreover, with the relative absence of such research, it is difficult to understand in any detail how, or if, the schemes in place have made any significant contribution to the overall picture of cannabis use, police and community relations, or long-term savings in terms of police service budgets.¹²⁹ Nor is it clear that the schemes underway are always meeting expectations in terms of making substantial reductions in arrest (or re-arrest) rates or diverting offenders from the criminal courts. Indeed, as noted above, there is evidence that some of the models have created a net-widening effect. Although there are some who dispute the validity of this term, net-widening raises the question of overall cost-effectiveness despite apparent or actual savings for each case.¹³⁰ Having made these points, as noted above, it is of course the case that a number of models underway have produced a range of very real benefits. And, although early days, it is perhaps appropriate to describe the unfolding events in Colorado and Washington States and Uruguay as 'promising'.

It is clear that the perceived advantages – and disadvantages – associated with the kinds of schemes and related police policies and practices described are likely to receive increasing attention across the globe on the back of the intensifying support for the reform of cannabis laws and policies.

This report has identified a number of areas of concern common to a number of countries and these lead to the following general recommendations:

- Those countries minded to introduce schemes that allow for the arrest of offenders for minor cannabis offences in circumstances deemed to be aggravating (e.g. smoking cannabis in public places) should ensure adequate guidance and training is provided to police officers for the purpose of reducing the likelihood of breaches of the international treaties that afford protections against arbitrary or unjustified deprivations of liberty. This is particularly so in those countries which have signed and ratified the ECHR, namely the 47 nations comprising the Council of Europe, where the jurisprudence in this area is well developed.¹³¹
- Jurisdictions introducing similar schemes to those described that are intended to reduce arrest and/or prosecution and/or incarceration rates for minor cannabis offences should be aware of the risk of net-widening.
- The various alternatives to arrest/and prosecution described in this report and elsewhere are underpinned by the notion of police discretion. Whilst discretion is a 'ubiquitous and legitimate aspect of modern policing', its scope and limits are often poorly defined and understood.¹³² Too much or too little discretion are equally undesirable. The lack of clarity over discretion and the uncertainty of its effects are likely to give rise to a variety of problems: too many people needlessly stopped and searched/frisked, people wrongfully arrested, and inappropriate disposals issued. Governments and police services should ensure that the exercise of discretion is properly managed in terms of being 'reasonable, bona fide, principled and consistent'.¹³³

- Governments (and for that matter, police services and civil society organisations advocating reform) should be careful not to overstate the benefits of such schemes in terms of cost-savings, at least in the short term: costs relating to training, the preparation and publication of policy/guidance and the creation of national database systems and monitoring and evaluation are easily underestimated.
- Chief police officers should endeavour to ensure that their officers are well briefed on changes in policy and that compliance is routinely monitored. This is necessary to identify areas in which the policy appears to be failing. For example, there is little point in issuing directives if these are ignored or supplanted by performance targets or arrest quotas – something that appears to have happened within the New York City Police Department.
- In order to reduce the likelihood of arrest, governments working with police services and civil society organisations should consider publishing guidance as to what documents (passports, identity cards, driving licenses bearing a recent photograph etc.) cannabis offenders would need to provide to the police to provide evidence of their identity and/or place of residence in order to benefit from a 'street warning' or 'on-the-spot' fine.

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Modernising Drug Law Enforcement

A project by IDPC, with the participation of the International Security Research Department at Chatham House and the International Institute for Strategic Studies

Drug law enforcement has traditionally focused on reducing the size of the illicit drug market by seeking to eradicate drug production, distribution and retail supply, or at least on the stifling of these activities to an extent that potential consumers are unable to get access to particular drugs.

These strategies have failed to reduce the supply of, or demand for, drugs in consumer markets. Given this reality, and a wider policy context where some governments are moving away from a 'war on drugs' approach, drug law enforcement strategies need to be adjusted to fit the new challenge – to manage drug markets in a way that minimises harms on communities. A recognition that law enforcement powers can be used to beneficially shape, rather than entirely eradicate, drug markets is being increasingly discussed.

The objective of this project is to **collate and refine theoretical material and examples of new approaches to drug law enforcement, as well as to promote debate amongst law enforcement leaders on the implications for future strategies.**¹³⁴ For more information, see: <http://idpc.net/policy-advocacy/special-projects/modernising-drug-law-enforcement>.

Endnotes

- 1 Unless otherwise indicated, in this report the word *cannabis* is used in the generic sense to describe herbal cannabis (often referred to a 'marijuana'), cannabis resin ('hashish'), cannabis ('hash') oil and any plant of the genus *cannabis*. For an extended discussion on the definition of cannabis in all its forms see King, L. A. (2009) *Forensic Chemistry of Substance Misuse A Guide to Drug Control*, Royal Society of Chemistry, London
- 2 For one definition of this term, see: Monaghan, G (1998), 'Aspects of policing: Harm reduction or harm production?' In Stimson, G.V., Fitch, C. and Judd, A. (Ed.), *Drug Use in London* (London: The Centre for Research on Drugs and Health Behaviour), pp. 89-91
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- 4 United Nations Office on Drugs and Crime (2012), *World Drug Report 2012* (Vienna: UNODC), http://www.unodc.org/unodc/secured/wdr/wdr2013/World_Drug_Report_2013.pdf
- 5 In 2005, the EMCDDA defined 'decriminalisation' in the following terms: "Decriminalisation" comprises removal of a conduct or activity from the sphere of criminal law. Prohibition remains the rule, but sanctions for use [and possession] (and [their] preparatory acts) no longer fall within the framework of the criminal law (elimination of the notion of a criminal offence). This may be reflected either by the imposition of sanctions of a different kind (administrative sanctions without the establishment of a police record – even if certain administrative measures are included in the police record in some countries, such as France), or the abolition of all sanctions. Other (non-criminal) laws can then regulate the conduct or activity that has been decriminalised'. See: European Monitoring Centre for Drugs and Drug Addiction (2005), *Illicit drug use in the EU: Legislative approaches*, p. 13, <http://www.emcdda.europa.eu/html.cfm/index34041EN.html>
- 6 According to the EMCDDA: "depenalisation" means the relaxation of the penal sanction provided for by law. In the case of drugs, and cannabis in particular, depenalisation generally signifies the elimination of custodial penalties. Prohibition remains the rule, but imprisonment is no longer provided for, even if other penal sanctions may be retained (fines, establishment of a police record, or other penal sanctions)'. See: European Monitoring Centre for Drugs and Drug Addiction (2005), *Illicit drug use in the EU: Legislative approaches*, p. 13, <http://www.emcdda.europa.eu/html.cfm/index34041EN.html>
- 7 Reuter, P. H. (2010) *Marijuana legalization what can be learned from other countries?* Working Paper (Rand, Drug Policy Research Center), p.1, http://www.rand.org/content/dam/rand/pubs/working_papers/2010/RAND_WR771.pdf

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- 9 Greenwald, G. (2009), *Drug decriminalization in Portugal: Lessons for creating fair and successful drug policies* (Washington D.C.: Cato Institute), <http://www.cato.org/publications/white-paper/drug-decriminalization-portugal-lessons-creating-fair-successful-drug-policies>; Hughes, C.E. and Stevens, A. (2010), 'What can we learn from the Portuguese decriminalization of illicit drugs?', *British Journal of Criminology*, **50**: 999–1022, <http://kar.kent.ac.uk/29910/1/Hughes%20%20Stevens%202010.pdf>
- 10 See: Bewley-Taylor, D. R., (2012), *International Drug Control: Consensus Fractured* (Cambridge University Press), pp. 152-197
- 11 Zorumski, C. & Rubin, E. (6 September 2011), 'The Medicalization of Marijuana: Colorado and Medical Marijuana', *Psychology Today*, <http://www.psychologytoday.com/blog/demystifying-psychiatry/201109/the-medicalization-marijuana>
- 12 See: Amendment 64: Use and regulation of marijuana – Ballot title: *Shall there be an amendment to the Colorado constitution concerning marijuana and, in connection therewith, providing for the regulation of marijuana; permitting a person twenty-one years of age or older to consume or possess limited amounts of marijuana; providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permitting local governments to regulate or prohibit such facilities; requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first \$40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and requiring the general assembly to enact legislation governing the cultivation, processing, and sale of industrial hemp?*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251834064719&ssbinary=true>
- 13 See: http://en.wikipedia.org/wiki/Washington_Initiative_502
- 14 Jelsma, M. (2010), *Trends in drug law reform in Europe and Latin America*, Transnational Institute, Presentation at the Thai Office of the Narcotics Control Board – ONCB Bangkok, 26 January 2010, http://www.tni.org/sites/www.tni.org/files/Trends_Presentation_ONCB_Jan-2010.pdf
- 15 New York Times (21 August 2009), *Mexico Legalizes Drug Possession*, http://www.nytimes.com/2009/08/21/world/americas/21mexico.html?_r=0
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- 17 New Scientist (10 August 2013), *Uruguay set to legalise cannabis*, p. 6, <http://www.newscientist.com/issue/current>
- 18 Rosmarin, A. & Eastwood, N. (2012), *A quiet revolution: Drug decriminalisation policies in practice across the globe* (London: Release), http://www.release.org.uk/sites/release.org.uk/files/pdf/publications/Release_Quiet_Revolution_2013.pdf
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- 22 Since England and Wales share the same legal and policing systems, the two countries are treated as one for the purpose of this paper
- 23 The selection of these jurisdictions for study has been driven by available evidence and access to pertinent information
- 24 For example, see: Hughes, C. & Stevens, A. (2007), *The effects of decriminalization of drug use in Portugal*, Briefing Paper Fourteen (The Beckley Foundation Drug Policy Programme), http://kar.kent.ac.uk/13325/1/BFDPP_BP_14_EffectsOfDecriminalisation_EN.pdf.pdf
- 25 Reuter, P. H. (2010) *Marijuana legalization what can be learned from other countries?* Working Paper (Rand, Drug Policy Research Center), p.11, http://192.5.14.43/content/dam/rand/pubs/working_papers/2010/RAND_WR771.pdf
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- 28 For example, see: Fetherston, J. & Lenton, S. (2007), *Effects of the Western Australian Cannabis Infringement Notice Scheme on public attitude, knowledge and use comparison of pre- and post-change data* (Perth:

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- Also see: Bewley-Taylor, D.R., (2012) *International Drug Control: Consensus Fractured* (Cambridge University Press), pp. 194-197
- 31 For example, the Protection of Freedoms Act 2012 (UK) makes a number of significant changes to criminal record checks and checking against barred lists, which will be relevant to all groups working with children and young people. Individuals cannot request a 'Disclosure and Barring Service' (DBS) check for themselves; the request must come from the organisation recruiting the individual. Standard DBS checks contain details of an individual's convictions, cautions, reprimands or warnings recorded on police central records and includes both 'spent' and 'unspent' convictions. An enhanced DBS check contains the same details as a standard check together with any information held locally by police that it is reasonably considered might be relevant to the post applied for. See: <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=255538>
- 32 According to the Ministry of Justice, Cannabis Warnings may be disclosed as part of an enhanced DBS check if deemed relevant. See: Ministry of Justice (2013), *Quick reference guides to out of court disposals* (London: Ministry of Justice), p. 8, <http://www.justice.gov.uk/downloads/oocd/quick-reference-guides-oocd.pdf>
- 33 The way in which some British police services have used this catch-all provision has already drawn criticism from a judge and the press. See, for example: Private Eye No. 1346 (9 August – 22 August 2013), *Criminal Record Checks Tarnished Coppers* (London), p. 30, http://www.private-eye.co.uk/current_issue.php
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- See also: comments by Martin Killias, University of Zurich on the paper by Peter Reuter & Dominic Schnoz, *Assessing drug problems and policies in Switzerland, 1998-2007*, <http://www.bag.admin.ch/themen/drogen/00042/00624/06044/07683/index.html?lang=en>
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- 36 Adda, J., McConnell, B. & Rasul, I. (2011), *Crime and the depenalization of cannabis possession: Evidence from a policing experiment*, p. 4, <http://www.ucl.ac.uk/~uctpimr/research/depenalization.pdf>
- 37 Adda, J., McConnell, B. & Rasul, I. (2011), *Crime and the depenalization of cannabis possession: Evidence from a policing experiment*, p. 4, <http://www.ucl.ac.uk/~uctpimr/research/depenalization.pdf>
- 38 For example, Brian Paddick (http://en.wikipedia.org/wiki/Brian_Paddick) former Deputy Assistant Commissioner, Metropolitan Police Service set up the pilot Lambeth Cannabis Warning Scheme in the London borough of Lambeth in July 2001, because he believed that the Association of Chief Police Officers (ACPO) had no formal policy for dealing with cannabis offences other than by arrest (see: House of Commons, Home Affairs Committee (22 May 2002), EV 61, paragraph 372, *The Government's Drug Policy: Is It Working?*, Third Report of Session 2001-02 (London: The Stationery Office Limited), <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/cmhaff.htm>)
- In fact, the ACPO *Guide to Case Disposal Options for Drug Offenders*, published in February 1999, recognised that there would be circumstances where cannabis offences could be dealt with by means of a 'formal warning' without recourse to arrest (see Example 14, p. 43). Issuing 'formal warnings' to cannabis offenders without arresting them was also a practice endorsed by some Borough Commanders (Chief Superintendents) in the Metropolitan Police Service, London, in the mid-1990s. So, the Lambeth Cannabis Warning Scheme was really an extension of ACPO policy and MPS local practice
- 39 Levine, H.G., & Small, D.P. (2008), *Marijuana arrest crusade: Racial bias and police policy in New York City, 1997-2007* (New York Civil Liberties Union), p. 7
- 40 Levine, H. (10 August 2009), 'The epidemic of pot arrests in New York City', *Alternet*, www.alternet.org/drugreporter/14866/the_epidemic_of_pot_arrests_in_new_york_city/?page=entire
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- 43 See: National Cannabis Prevention and Information Centre (NCPIC), *Cannabis and the law*, Factsheet (published 1 June 2008, updated 1 November 2011 and revised 19 February 2013), <http://ncpic.org.au/ncpic/publications/factsheets/article/cannabis-and-the-law>

- 44 National Cannabis Prevention and Information Centre (NCPIC), *Cannabis and the law*, Factsheet (published 1 June 2008, updated 1 November 2011 and revised 19 February 2013), <http://ncpic.org.au/ncpic/publications/factsheets/article/cannabis-and-the-law>
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- 48 McLaren, J. & Mattick, R.P. (undated report) *Cannabis in Australia: Use, supply, harms, and responses*, Monograph series No. 57 Report prepared for: Drug Strategy Branch Australian Government Department of Health and Ageing National Drug and Alcohol Research Centre University of New South Wales, pp. 56-57, [http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/4FDE76ABD582C84ECA257314000BB6EB/\\$File/mono-57.pdf](http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/4FDE76ABD582C84ECA257314000BB6EB/$File/mono-57.pdf)
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- 52 See: <http://www.audit.nsw.gov.au/Publications/Performance-Audit-Reports/2011>
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- 57 See, for example: The Canberra Times (9 July 2013), *Almost 80 cannabis plants land duo in court*, <http://www.canberratimes.com.au/act-news/almost-80-cannabis-plants-land-duo-in-court-20130709-2pn13.html#ixzz2bzXgp22v>
- 58 See: <http://www.legislation.gov.uk/ukpga/1971/38/contents>
- 59 Under the Misuse of Drugs Act (MDA) 1971, 'controlled drugs' are listed under Schedule 2 and divided into Classes: A, B, C and a 'temporary class'. Drugs in the latter class are not 'controlled drugs' in that they do not fall directly within Classes A to C, but the practical effect is that they are treated as having been controlled and punishable as Class B drugs (with the exception of offences of possession under s. 5(1) and (2) of the MDA). On 29 January 2004, cannabis, cannabis resin, cannabinol and cannabinol derivatives were reclassified from Class B to C. From 26 January 2009, cannabis, in all its forms reverted to its Class B status. For an extended discussion on the MDA's classification system, see: Fortson, R. (2011), *Misuse of drugs and drug trafficking offences*, 6th Edition (London: Sweet & Maxwell)
- 60 HM Customs and Excise (now HM Revenue and Customs) first piloted the 'compounding procedure' for importing or exporting small amounts of cannabis in 1982 at Heathrow and Gatwick airports. 'Compounding' is an established administrative procedure under section 152 (a) of the Customs and Excise Management Act 1979, which enables HM Revenue and Customs officers to accept a financial payment out of court as an alternative to taking legal proceedings. Officers may decide in a particular case not to offer a compounded settlement and, where it is offered, the alleged offender has a right to decline, in which case proceedings would be instituted. A compounded settlement is confined to cannabis in herbal and resinous form, to quantities not in excess of 10 grams, and to persons with no previous UK convictions. Source: *Report on the National Drugs Conference 6-8 April 1983* (1983), ACPO, p. 57 (the report is not in the public domain.) A 2012 newspaper report states that Customs officers detecting passengers in possession of small amounts of cannabis at Gatwick Airport, UK, have simply issued 'warnings' to them instead of using the compounding procedure. It is not known whether this practice goes on at other airports in the UK. See: Mail Online, Jack Doyle (14 May 2012), *An open door to drug smugglers: Air travellers carrying cannabis let off with slap on wrist*, <http://www.dailymail.co.uk/news/article-2144454/An-open-door-drug-smugglers-Air-travellers-carrying-cannabis-let-slap-wrist.html>
- 61 Ordinarily, possession of a very small amount of cannabis for the defendant's personal use would not have resulted in a custodial sentence but a continuous or persistent flouting of the law might have justified a short custodial sentence. See: *R v Jones* (1981), 3 Cr. App. R. (S.) 5 ; *R v Osbourne* (1982), 4 Cr. App. R. (S.) 262 ; *R v Robertson-Coupar* (1982) Crim. L.R. 536. The point at which the 'continuous or persistent flouting' was reached seems to have been after the third or fourth conviction

- 62 Sentencing Council (2012), *Drug offences definitive guideline*, pp. 29-32, http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_%28web%29.pdf
- 63 Sentencing Council (2012), *Drug offences definitive guideline*, p. 31, http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_%28web%29.pdf
- 64 For a brief history of cautioning and its use by British police services when dealing with drug offenders, see: Monaghan, G. (2012), 'Harm reduction and the role of police services', In Riley, D.M. & Pates, R. (Eds.), *Harm reduction in substance use and high-risk behaviour* (Eds.) (Wiley-Blackwell Addiction Press), pp. 59-76
- 65 The simple caution (once known as a formal or police caution) is a non-statutory disposal for adult offenders aged 18 or over. The scheme is designed to provide the police and Crown Prosecution Service (CPS) with an alternative means for dealing with low-level, mainly first time offending when specified public interest and eligibility criteria are met. Only in very exceptional circumstances should it be used to deal with more serious offences. See: <http://www.justice.gov.uk/downloads/oocd/adult-simple-caution-guidance-oocd.pdf>
- 66 Metropolitan Police Service (1994), *Case disposal manual incorporating specific and general gravity factors for crime, traffic and licensing*, pp. 13-14
- 67 For example, the first author of this report issued a formal warning to a 39 year-old female music teacher on 16 May 1996 at 7.50 am for an offence of possessing a small amount of cannabis. The drug had been found during the course of a search of her home address in relation to another matter. She was not arrested. The matter was reported to Criminal Justice Unit at Holloway Police Station, north London (references NH/FW/232/96 and CRIS C 2016173/96)
- 68 Monaghan, G. & White, A. (1998), *A guide to case disposal options for drug offenders* (London: ACPO)
- 69 Ministry of Justice, Home Office, CPS (July 2007), *Out-of-Court disposals for adults: A guide to alternatives to prosecution* (London: Office for Criminal Justice Reform, Appendix A, http://www.unlock.org.uk/userfiles/file/iag/Out_of_Court_Disposals.pdf)
- 70 Ministry of Justice (April 2013), *Penalty Notices for Disorder (PNDs)* (London: Ministry of Justice), para.3.33, p. 13, <http://www.justice.gov.uk/downloads/oocd/pnd-guidance-oocd.pdf>
- 71 At the time of writing (August 2013), GBP 80.00 was equivalent to US\$ 124.33, EUR 94.23, CHF 116.18, AUS 138.43
- 72 Ministry of Justice (April 2013), *Penalty Notices for Disorder (PNDs)* (London: Ministry of Justice), para.3.33, p. 13, <http://www.justice.gov.uk/downloads/oocd/pnd-guidance-oocd.pdf>
- 73 The 'unauthorised' possession of cannabis was first controlled in Britain following the introduction of the Coca Leaves and Indian Hemp Regulations 1928 (Statutory Instrument 982) made under the Dangerous Drugs Act 1925. The first arrests and prosecutions for an offence of unauthorised possession of cannabis occurred on 7 March 1929 at 27 Limehouse Causeway, London (a Chinese restaurant) when PC (CID) Albert Edwards, Warrant No. 109930 and PC (CID) John Black, Warrant No. 112002, from Limehouse police station, arrested Abraham Jones, aged 40, 'a man of colour' and a seaman and Elizabeth Cocklin, aged 29. Both offenders were Limehouse residents. The officers had been keeping them under observation and had seen Jones pass Cocklin a paper packet which she concealed inside one of hers shoes. When questioned she produced the packet from her shoe and it was found to contain herbal cannabis. They were arrested, charged and subsequently convicted at Thames Police Court. Jones was sentenced to 3 months' imprisonment with hard labour and Cocklin was fined 40 shillings or 1 month's imprisonment. Source: Mepol 3/432 *Chong Sing and other Opium*, G.R. 216/UNC/1065. Report dated 18 July 1929 by Detective inspector Isaac Dennison, Warrant N. 91811.
- 74 Personal communication (emails): 20, 21 and 29 June, 25 July and 29-31 August 2013 with Abdul Hye, Detective Sergeant and Detective Constable Leon Ure, Metropolitan Police Service, London. The forms are: (1) Cannabis Warning Form, (2) Book 66 entry ('property concerned in crime' register), (3) Stop and Search Form (4) CRIS report (computerised crime report) (5) Exhibit bag for the cannabis and (6) Form recommending/authorising destruction of the cannabis
- 75 Personal communication (emails): 20, 21 and 29 June, 25 July and 29-31 August 2013 with Abdul Hye, Detective Sergeant and Detective Constable Leon Ure, Metropolitan Police Service, London. The forms are: (1) Incident Report Book (IRB) – seizure and arrest notes, (2) Stop and Search Form, (3) Custody Record (made by a Sergeant at the police station), (4) CRIS report, (5) Exhibit bag for the cannabis and (6) Form recommending/authorising destruction of the cannabis and (7) MG 3 Form ('Defendant' Details – name, DoB, address etc.)
- 76 A record kept by the custody officer at a place of detention facility (e.g. a police station) of every person brought there under arrest or arrested there having attended voluntarily. PACE prescribes a very long list of matters that should be recorded on the custody record relating to the reception, detention, and treatment of a person throughout their time in police or other detention. The custody record must be available for inspection by a detained person or his/her solicitor
- 77 See the Home Secretary's 'Foreword' in *Policing in the 21st Century: Reconnecting police and the people* (July 2010): 'Frontline staff will no longer be form writers but crime fighters: Freed up from bureaucracy and central guidance and trusted to use their professionalism to get on with their jobs'. Cm 7925, The Stationery Office Limited, UK, p. 3 <https://www.gov.uk/government/publications/policing-in-the-21st-century-reconnecting-police-and-the-people>

- 78 ACPO (28 January 2009), *ACPO guidance on cannabis possession for personal use – Revised intervention framework* <http://www.justice.gov.uk/downloads/oocd/quick-reference-guides-oocd.pdf>
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- Section 24 Arrest without warrant: constables
- (1) A constable may arrest without a warrant—
- anyone who is about to commit an offence;
 - anyone who is in the act of committing an offence;
 - anyone whom he has reasonable grounds for suspecting to be about to commit an offence;
 - anyone whom he has reasonable grounds for suspecting to be committing an offence.
- (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
- (3) If an offence has been committed, a constable may arrest without a warrant—
- anyone who is guilty of the offence;
 - anyone whom he has reasonable grounds for suspecting to be guilty of it.
- (4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.
- (5) The reasons are—
- to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);
 - correspondingly as regards the person's address;
 - to prevent the person in question—
 - causing physical injury to himself or any other person;
 - suffering physical injury;
 - causing loss of or damage to property;
 - committing an offence against public decency (subject to subsection (6)); or
 - causing an unlawful obstruction of the highway; - to protect a child or other vulnerable person from the person in question;
 - to allow the prompt and effective investigation of the offence or of the conduct of the person in question;
- (f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.
- (6) Subsection (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question <http://www.legislation.gov.uk/ukpga/1984/60/section/24>
- 81 Fortson, R. (February 2006), *Exercising powers of arrest under SOCPA – wither discretion?* p. 1, http://www.rudifortson4law.co.uk/legaltexts/ArrestPowers_CovertPolicingArticle_6thFeb_2006.pdf
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- 83 See: Fitzpatrick and Others v Commissioner of Police of the Metropolis (2012), EWHC 12 QB, <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2012/12.html&query=%22%22it+is+necessary+to+arrest+the%22%22&method=boolean>
- 84 See also: Ministry of Justice (April 2013), *Penalty Notices for Disorder (PNDs)* (London: Ministry of Justice), para.3.33, p. 13, <http://www.justice.gov.uk/downloads/oocd/pnd-guidance-oocd.pdf>
- 85 See: *Police and Criminal Evidence Act 1984 (PACE) codes of practice*, The Police and Criminal Evidence Act 1984 codes of practice (which regulate police powers and protect public rights), and recent revisions (London: Home Office), <https://www.gov.uk/police-and-criminal-evidence-act-1984-pace-codes-of-practice>
- 86 ACPO (28 January 2009), *ACPO guidance on cannabis possession for personal use – Revised intervention framework*, FAQ section Q. 22, p. 12, <http://www.justice.gov.uk/downloads/oocd/quick-reference-guides-oocd.pdf>
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- 99 See, for example: 'This Is Working': Portugal, 12 Years after Decriminalizing Drugs (27 March 2013) by Wiebke Hollersen Spiegel Online International, <http://www.spiegel.de/international/europe/evaluating-drug-decriminalization-in-portugal-12-years-later-a-891060.html>
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- 134 Dave Bewley Taylor is the editor of the Modernising Drug Law Enforcement project publication series

The International Drug Policy Consortium (IDPC) is a global network of NGOs and professional networks that promotes objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harms. IDPC members have a wide range of experience and expertise in the analysis of drug problems and policies, and contribute to national and international policy debates.

The purpose of this report is not to present a comparative study of legal rules and policies pertaining to cannabis in these or other countries, but to examine an issue largely neglected in the academic literature and by those advocating drug policy reform: namely the practical implications of policing and enforcing these developments. The report provides an overview of some of the many difficulties that may – and do – confront police services when tasked to implement such measures (including the exercise of discretion) through examination of the rules and experiences of four jurisdictions, namely, Australia, England and Wales, Portugal and Switzerland. Along with some examples from the USA, specific aspects of each case study are scrutinised with the intention of highlighting points likely to be of interest to policy makers and practitioners alike.

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