

A growing market

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A growing market

The domestic cultivation of cannabis

**Mike Hough, Hamish Warburton, Bradley Few, Tiggey May,
Lan-Ho Man, John Witton and Paul J. Turnbull**

The **Joseph Rowntree Foundation** has supported this project as part of its programme of research and innovative development projects, which it hopes will be of value to policy makers, practitioners and service users. The facts presented and views expressed in this report are, however, those of the authors and not necessarily those of the Foundation.

Joseph Rowntree Foundation, The Homestead, 40 Water End, York YO30 6WP
Website: www.jrf.org.uk

Mike Hough is Professor of Social Policy and Director of the Criminal Policy Research Unit at South Bank University, where Paul J. Turnbull is Deputy Director, Tiggey May is a Senior Research Fellow, and Hamish Warburton and Bradley Few are Research Assistants.

John Witton is a Health Services Research Co-ordinator at the National Addiction Centre at King's College, London, where Lan-Ho Man was a Senior Researcher until she moved to the Home Office Research Development and Statistics Directorate.

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First published 2003 by the Joseph Rowntree Foundation

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ISBN 1 85935 084 4 (paperback)
ISBN 1 85935 085 2 (pdf: available at www.jrf.org.uk)

A CIP catalogue record for this report is available from the British Library.

Cover design by Adkins Design

Prepared and printed by:
York Publishing Services Ltd
64 Hallfield Road
Layerthorpe
York YO31 7ZQ
Tel: 01904 430033; Fax: 01904 430868; Website: www.yps-publishing.co.uk

Further copies of this report, or any other JRF publication, can be obtained either from the JRF website (www.jrf.org.uk/bookshop/) or from our distributor, York Publishing Services Ltd, at the above address.

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Acknowledgements

We would like to thank our funders, the Joseph Rowntree Foundation. Without their generosity this study would not have been possible.

A large number of people were very generous with their time. Particular thanks are due to Matthew Atha for letting us have information from the Independent Drug Monitoring Unit annual survey, including unpublished material for 2002. We are very grateful to a number of individuals who put us in touch with people willing to talk about their experience as cannabis growers. We are also very grateful to all those people who responded to our requests for respondents, and gave up their time to talk to us or to complete questionnaires for us.

Many people abroad were generous in providing information on policy and practice in their country: Paul Christie (South Australia); Benedikt Fischer (Canada); Guillaume Fournier (France); Jörg Jenetzky (Germany); Martin Killias (Switzerland); Maria Moreira (Portugal); Tim Boekhout van Solinge and Willemien Hogewind (the Netherlands).

Others to whom we would like to extend our thanks include Geoff Wootton from HM Customs and Excise who kindly collated statistics relating to seizures, and officers from the 16 forces who took time to complete our questionnaire on cannabis cultivation and production.

We are particularly grateful to Nicholas Dorn, Cindy Fazey and Ruth Runciman for their comments on earlier drafts.

Summary

This report provides a snapshot of domestic cultivation of cannabis in England and Wales. It presents the findings of a small-scale, exploratory study. This examined the extent and nature of home cultivation in England and Wales, and the enforcement of the law in relation to cultivation. It also examined the implications of the United Nations drug conventions, and the law in seven other countries. The study largely draws on desk research, official statistics and a survey of police forces, but it also incorporates the views and experiences of a sample of home cultivators who agreed to be interviewed or to complete a questionnaire.

Cannabis cultivation raises some important policy issues. The Home Secretary has announced that he proposes to reclassify cannabis as a Class C drug, treating the possession of cannabis as a less serious offence than hitherto. Originally it was thought that this would make possession of cannabis a non-arrestable offence. However, at the time of writing the government was planning to retain the power of arrest for possession offences, issuing administrative guidance to ensure that the police gave on-the-spot warnings in all but the most serious of cases. On the other hand, there will be tougher action against cannabis dealers. Nothing has been said about the small-scale cultivation of cannabis for personal use and use with friends. It is unclear whether this will be treated as dealing or as possession. If the government's strategy is to free up resources to focus on more harmful drugs, such as heroin and crack, then there is a strong case for the law treating small-scale cultivation as a variant of possession.

Cannabis use and cultivation in England and Wales

Cannabis use is widespread in England and Wales. At least three million people used it in 2001; around a quarter of young adults (aged 16 to 29) did so. Traditionally cannabis has been imported into the country by drug traffickers, but rapid changes are occurring. There is no precise information on the extent of home cultivation, but it is clear that it has increased steeply over the past decade. Cannabis cultivated in England and Wales may now account for half of all consumption, and much of this domestically cultivated cannabis will be home-grown for personal use. This trend calls into question any policy that is premised on sharp distinctions between cannabis users on the one hand and suppliers on the other.

Cannabis cultivators may be charged under section 4 (production) or section 6 (cultivation) of the Misuse of Drugs Act 1971 (MDA). Both sections carry a maximum sentence of 14 years' imprisonment or an unlimited fine. The Drug Trafficking Act 1994 renders the section 4 offence of production a trafficking offence, which means that anyone convicted of production is liable to asset confiscation. Furthermore, under the provisions of the Crime (Sentences) Act 1997, anyone who has two previous trafficking convictions could face a mandatory seven-year prison sentence.

Most cultivators grow cannabis to be smoked in herbal form, and the production of cannabis resin is rare. Cannabis seeds can be purchased from UK-based seed companies and growing equipment is readily available from gardening outlets and 'hydroponic growshops'. We found that cultivators used a variety of

growing techniques, which tended to reflect differences in experience, knowledge and technical expertise. The actual yield from a cannabis plant is highly variable.

The home growers in our sample began to grow cannabis mainly to ensure quality of product, to save money or as a means of avoiding contact with drug sellers. They fell into five groups:

- the sole-use grower – cultivating cannabis as a money-saving hobby, for their personal use and use with friends
- the medical grower – motivated mainly by the perceived therapeutic values of cannabis to those with medical conditions
- the social grower – growing to ensure a supply of good quality and affordable cannabis for themselves and friends
- the social/commercial grower – those who grew for themselves and friends, at least in part to supply an income
- the commercial grower – growing to make money, and selling to any potential customer.

Enforcement

Home Office statistics do not distinguish between production and cultivation offences. Both are recorded as production. There were 1,960 cannabis production offences in the UK during 2000. Of these offenders, just under a quarter (458) received a police caution and the remainder (1,502) were dealt with in court; just under a fifth (243) received a custodial sentence. The number of persons cautioned and convicted

for cannabis production was the lowest for ten years, having peaked in 1995. Seizures of cannabis plants also peaked in 1995 and, mirroring production offences, recorded seizures are now at their lowest since 1992. These trends are likely to reflect enforcement activity, rather than levels of involvement in cultivation.

Our survey of police forces indicated considerable variation in decisions about charging or cautioning cultivators, and in decisions about charging with production or cultivation offences. Decisions were generally taken on a case-by-case basis, with extensive discretion exercised by arresting officers and custody sergeants. The survey suggests that few forces are following the guidance issued by the Association of Chief Police Officers (ACPO), and that operational and custody officers are largely unaware of this guidance.

The United Nations conventions

International treaties impose various requirements on signatory countries in relation to home cultivation. The United Nations 1961 Single Convention on Narcotics and the United Nations 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances are the most relevant ones. The latter formalises the requirement that each signatory country makes both possession and cultivation of cannabis criminal offences – provided that this is consistent with the country's constitutional principles. Although possession and cultivation must be criminal offences, the conventions do not require that offenders are actually dealt with under the criminal law. The

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1988 Convention permits the use of administrative penalties for minor offences of cultivation for personal use. It also allows cultivation for personal use to be dealt with by means other than conviction or punishment, including interventions such as ‘treatment, counselling, education’.

Approaches in seven other countries

Several – mainly European – developed countries were selected to illustrate a range of legislative approaches to offences of cannabis cultivation.

- Some countries treat cultivation for personal use on a par with possession.
- Some have decriminalised – or plan to decriminalise – cultivation for personal use.
- Some countries impose administrative penalties (ticketing offenders, or imposing fixed-penalty fines) whilst others offer warnings, counselling or treatment.
- The treatment of social and social/commercial growers varies widely.
- One of the seven countries – Switzerland – is actively considering a system of governmental regulation of cultivation that verges on legalisation.

Dealing with cultivation

It is unclear whether or how the new government policy towards cannabis will affect home growers. Given the growing scale of domestic

cultivation, there are important policy choices to be made about the sorts of cultivation that should be treated as trafficking offences and those that should be treated akin to possession. These decisions turn on whether the policy objective is to eradicate illicit drug markets or to ensure that they take the least harmful form. In our view the latter is more realistic.

The ‘gateway’ or ‘stepping stone’ theory that cannabis use leads on to riskier forms of drug taking is largely unsupported by the evidence (see Police Foundation, 2000; Witton, 2001a). However, it seems likely that when cannabis markets and Class A markets are closely intertwined, cannabis sellers may well pressure their customers to buy other sorts of drug. Thus cannabis could well prove a gateway to riskier drugs if the handling of markets were mismanaged by enforcement agencies. The aim of policy in this field should be to maximise the separation of cannabis markets from those for heroin and crack. The government’s proposals to ‘crack down’ on cannabis dealers by increasing the maximum custodial penalty for cannabis supply to 14 years is likely to have the opposite effect.

If the government were to treat small-scale home cultivation as a variant of possession, there would be two consequences: first, many cannabis users would choose to cultivate in preference to using a distribution system populated by criminal entrepreneurs. Second, the low cost of home growing would destabilise this criminalised distribution system. With a reduced return on investment in cannabis, criminal entrepreneurs might abandon the market. How might such changes operate in practice? There are four sets of issues to consider.

Cultivation for personal use

One issue is the seeming anomaly of distinguishing between cultivation of a cannabis plant for personal use and the possession of cannabis from the same plant once it has been harvested. Simply to achieve coherence and consistency in the law there are persuasive grounds for treating cultivation for personal use on a par with possession. However, home cultivation also insulates users from criminal suppliers, and this benefit provides further reasons for differentiating between cultivation for personal use and other forms of cultivation, treating the former as a form of possession.

This would mean that when cannabis is reclassified as a Class C drug, the police would only rarely arrest those found cultivating cannabis for personal use, but would usually warn them on the spot, confiscating the plants. If legislation is enacted to retain police powers of arrest for possession offences, then all that would be required would be to issue guidance to the police about cultivation in parallel with that relating to possession. Parliament may yet make possession of cannabis completely non-arrestable. If so, there would be a strong case for creating a new offence of cultivation for personal use. The offence would mirror that of possession by having a maximum sentence of two years, and thus be non-arrestable.

Either way, law or practice would require some criterion for defining cultivation for personal use. There are a number of possible approaches:

- specifying a weight below which any cultivated cannabis is regarded as being for personal use

- specifying a maximum number of plants that would be deemed to be for personal use
- specifying a variable maximum number of plants, which would be dependent on the estimated yield of the plants
- leaving decisions about personal use to the discretion of the police, allowing such decisions to be tested, if necessary, in court.

Any arbitrary threshold will yield inequities and inconsistencies. Nevertheless these inconsistencies are probably preferable to an approach that is dependent on police discretion, which will inevitably lack transparency. The Canadian proposals set a fairly low threshold of 30 grams (or just over an ounce), and any amounts below this level will be deemed to be for personal use. The South Australian expiation scheme originally set a higher threshold, at ten plants.

If cultivation for personal use is treated akin to possession, there are consequential implications for the handling of ‘premises’ offences under section 8 of the MDA. If on-the-spot warnings for small-scale home growing were to become the norm, it would be perverse to treat anyone who had allowed their premises to be used for the offence to be dealt with more severely than the grower.

Non-commercial social cultivation

Those who cultivate cannabis for their own and their friends’ use on a non-commercial basis are a significant and important group for drug policy. A more careful distinction in law between social and commercial cultivation

could serve to drive a wedge between a significant proportion of users and the criminally sophisticated suppliers who might otherwise sell them cannabis – and other drugs. If the government accepts this argument, there are two possible policy options:

- creating offences of social supply and of social cultivation of cannabis. Social supply would be defined as the non-commercial distribution of cannabis to non-strangers
- leaving the legislation unchanged, but issuing criminal justice agencies and courts with guidance on appropriate charges and sentences for social or not-for-profit cultivation offences.

Differentiating between those who cultivate on a not-for-profit basis and commercial growers presents problems similar to those in defining cultivation for personal use. A threshold could again be set in terms of number of plants or weight, or the authorities could make decisions on a case-by-case basis. As with defining personal possession, crude but objective yardsticks are probably preferable to discretionary decision-making by the police and Crown Prosecution Services (CPS). Sanctions for not-for-profit, social cultivation might range from a small fine for an offence that fell just above the threshold for personal use to a much larger fine for an offence falling just below the threshold for commercial cultivation.

Commercial cultivation

The government's proposals in relation to cannabis possession do not carry implications for commercial cultivation in the direct way that

they do for personal and social cultivation. Indeed, under clause 248 of the Criminal Justice Bill, it is proposed to raise the maximum penalty for Class C trafficking offences to 14 years – the same as for Class B. The intention is clearly that a commercial cultivator charged with production will be treated no differently after reclassification.

Whilst the government's tough stance towards cannabis dealing could be seen as the political price to be paid for the policy of on-the-spot warnings for possession, it may also have unwanted consequences. Cracking down on dealers, of whom an increasing number will be commercial cultivators, will drive out the risk-averse, leaving the distribution system to be peopled by more criminal and risk-tolerant operators. This may bring about a greater convergence of Class A and cannabis markets. By contrast, a pragmatic policy would be to treat cannabis dealers and commercial growers *less* like suppliers of Class A drugs, *not more* like them – and would leave the maximum sentences for trafficking in Class C drugs unchanged.

Medical cultivation

Cannabis-based drugs are currently undergoing clinical trials. In the intervening period, and probably thereafter, significant numbers of people will continue to cultivate cannabis to relieve their own or others' medical symptoms. These cultivators run the same risks of arrest and prosecution as non-medical cultivators. There is much to be said for the current Canadian system for medical cultivation and use of cannabis. Individuals can obtain 'authorisation to possess' cannabis for medical purposes, and can possess a maximum quantity

equal to a 30-day treatment supply specified by a medical practitioner. They or their representative can apply for a licence to grow a specified amount of cannabis.

Beyond reclassification: reassessing the UN conventions

The aim of this report has been to examine the implications of the planned change to the laws on cannabis for offences of cultivation. If the government were to bring the treatment of cultivation for personal use into line with the amended law on possession, there would be no breach of the limits imposed by the UN drug conventions.

These changes would place Britain in line with practice in many other developed countries, where a more pragmatic approach to the control of cannabis use has also been adopted. Some countries are now beginning to move beyond the UN conventions – Portugal is removing possession offences from the criminal law, for example, and Switzerland is proposing virtual legalisation and regulation. These more radical policies have been left unexamined by this report as policy options for Britain simply because it is most unlikely that the government will be prepared to challenge the conventions.

If any political will to move further away from prohibition develops, findings from this study suggest that there are three ways of handling the constraints of the conventions. One

would be to ‘denounce’ or withdraw from the conventions. This is a legal possibility, but not practical politics for Britain. This country has a long track record in encouraging compliance with a wide range of UN conventions, and a volte-face on drug issues would be politically unacceptable. There are also more recent and specific factors, relating to the centrality of UN mandates in pursuing the ‘war on terror’.

Another possibility is to explore the other avenues within the conventions which allow a country to deviate from their requirements where these conflict with its constitutional principles. Whilst this strategy may be practical politics for some countries, critics will ask why it has taken almost half a century to discover that the UN conventions conflict with a constitutional principle. The argument is particularly difficult to deploy for countries like Britain, where constitutional principles are not formalised or codified to any significant degree.

The final option would be to encourage a review of the UN conventions. These were originally developed at a time when illicit drug use remained at low levels, and when the full human and social costs of both drug misuse and the prohibition of drug misuse had yet to emerge. As increasing numbers of countries develop approaches which are at odds with the spirit of the conventions, a review would seem timely and necessary. The United Nations General Assembly Special Sessions (UNGASS) provides the opportunity for this.

1 Introduction

Cannabis has been much in the news over the last two years. Most of the British debate has been about how to deal with the possession of cannabis, on the one hand, and its supply, on the other. Some people have advocated tolerance of possession for personal use, coupled with tougher action against suppliers. Others have argued for liberalisation of the laws in relation to both possession and supply. Throughout this debate, issues relating to cultivation for personal use have been largely ignored. However, the policy questions posed by cultivation are important ones. The rapid growth in the home-growing market is one of the key factors limiting governmental capacity to contain cannabis use. This study assembles some factual information to help inform the development of policy on cultivation.

Background

Twenty-five years ago a much smaller proportion of the British population had any experience of cannabis, and the vast majority of these will have smoked herbal cannabis or cannabis resin imported from Morocco, Lebanon, Afghanistan or other producer countries. Since then, the number of users has risen sharply. The technology for growing cannabis in temperate climates has also changed in two significant ways. Stronger strains have been developed, and the technology for growing cannabis indoors with the use of ultra-violet lights and hydroponic techniques has been refined. As a result, a large minority, or even a majority, of cannabis in this country is now domestically produced. Much of it is cultivated on a small scale, for personal use or for use with friends.

Policy statements on cannabis have been silent on questions of cultivation. The Home Secretary's decision to reclassify cannabis as a Class C drug was announced in July 2002 as part of a package: greater lenience in relation to possession would accompany tougher crackdowns on suppliers. Little consideration appears to have been given to the status of home producers who grow for their own and their friends' use. Broadly speaking, policy has two options: small-scale cultivation can be treated as a form of supply – attracting the crackdowns intended for any dealer; or else it can be regarded as a variant of possession – to be tolerated to the same degree. Policy decisions will depend partly on the empirical realities of home production, and partly on the external constraints imposed, for example by international treaties and conventions. This report aims to provide a snapshot of home cultivation in England and Wales, to describe the implications of the United Nations conventions on the control of illicit drugs and to summarise approaches taken in various other countries.

Defining terms

British legislation at present does not differentiate between different forms of cultivation; for the purposes of this report, however, it is helpful to make some distinctions. Throughout this report 'domestically cultivated' cannabis is that which is grown in the United Kingdom. It is to be distinguished not only from cannabis imported from countries with a long tradition of cultivation, but also from cannabis grown in the Netherlands and other European countries. The small-scale cultivation of

cannabis for personal use or use with friends is referred to as ‘home cultivation’, by analogy with home-brewed alcohol. A minority of cannabis is home-grown *exclusively* for personal use. Home growers are likely to share their produce, give it away, or sell any that is surplus to their own needs.

At the other end of the spectrum, some domestic – i.e. UK-based – cultivation is done primarily to make money. (Commercial cultivators are likely to use their own produce, just as English commercial wine-growers may drink their own wine.) There is no hard-and-fast cut-off point between home growing and commercial production, though we would regard someone as a commercial grower when the majority of their produce was sold. As we shall see, the distinction is blurred partly because some home growers may evolve into commercial ones, and commercial ones may revert to being home growers. Chapter 2 offers a more detailed classification of types of cultivator.

In the latter part of the report, we make frequent use of the term ‘decriminalisation’. We use it to refer to any measures that retain possession or cultivation as offences, but avoid criminal prosecution and punishment. Different countries have decriminalised in different ways. Some have downgraded the legal status of offences, to make them administrative rather than criminal offences. Others have retained the status of criminal offence whilst allowing for administrative sanctions to be imposed. Yet others have retained the criminal offence on their statute books, but issued guidance to police or prosecutors to avoid enforcement in specified circumstances. Confusingly some commentators use decriminalisation as an

equivalent for legalisation – i.e. removing the offence from both the administrative and the criminal law. Others, mainly European commentators, tend to refer to decriminalisation (as we have defined it) as ‘depenalisation’, to emphasise that no penalties are imposed under the criminal law, even if the offence remains a criminal offence. The term reflects the fact that penal law and criminal law are synonyms in many European systems.

Aims and methods

This study is small-scale and exploratory. Its main aims are to give some indication of the role of home cultivation in the cannabis distribution process in England and Wales,¹ to describe the law – in principle and in practice – as it applies to cultivation, to examine the constraints on domestic policy imposed by the United Nations conventions on illicit drugs, and to examine practice in other countries.

Given the dearth of previous research on the topic, we have been opportunistic and pragmatic in following up promising leads about the nature of home cultivation. We recruited a small sample of 37 cannabis cultivators primarily using the Internet. We contacted a number of cannabis-related websites which posted information about our study on their site. Growers who contacted us filled in and returned semi-structured self-completion questionnaires. Two questionnaires were completed as face-to-face interviews. Given the size of our sample and the way in which it was assembled, we regard the findings as indicative rather than definitive. The sample was self-selected; respondents were cannabis enthusiasts, and many were passionate about

cultivation and believed cannabis should be legalised.

To collect information on current enforcement practice we identified a drug squad, drug liaison or drug strategy officer in each of the 43 police forces in England and Wales. We attempted to make contact with that officer, to ask whether they would be willing to complete a short questionnaire about enforcement practice in their force. Some were completed over the telephone, others were self-completed and returned by fax or email. We received 16 completed questionnaires.

Finally, we assembled information about law, policy and practice in other countries through library and Internet searches, as well as contacting local experts who were able to speak with authority on the situation in their country.

The structure of the report

Chapter 2 provides a snapshot of domestic cultivation and home cultivation in England

and Wales, drawing largely on the information given to us by growers and by police officers. Chapter 3 covers cultivation and the law as it applies to England and Wales. Chapter 4 considers the implications of the United Nations conventions on illicit drugs as they affect cultivation. Chapter 5 describes law and practice in various developed countries – mainly European, though we have included Canada and Australia. Chapter 6 summarises key findings and draws out implications for policy.

Debate about drugs raises strong emotions, and we anticipate that parts of this report will be misconstrued or misrepresented by those who want tougher enforcement of the drug laws. We should stress at the outset that cannabis use carries a variety of risks, and that we are concerned to find the best ways of containing these risks. The fact that we have described home growing in some detail should not be construed in any way as an endorsement of the cultivation or use of cannabis.

2 Cannabis cultivation for personal use

This chapter provides a snapshot of domestically cultivated cannabis (cannabis which is cultivated in England and Wales) for personal use at the start of the twenty-first century. To set the context, it summarises what is known about the extent of use and about the nature of cannabis markets. It then assembles what information is available about home growing for personal use, and discusses the characteristics of home producers.

The use of cannabis

Cannabis is the most commonly used illicit drug in England and Wales. The best source of information on the extent of use is the British Crime Survey (BCS). According to the 2001/02 BCS just under half of the population in England and Wales aged 16–29 have used cannabis at some stage in their lives and just under a quarter had done so in the previous year (see Aust *et al.*, 2002). The 2000 BCS indicates that there are over two million cannabis users annually in this age group (16–29) and around four million users aged 16–59 (Ramsay *et al.*, 2001). Levels of use have undoubtedly increased year on year since the 1980s, though improvements in methodology mean that the BCS cannot quantify the trend with any precision (Mott and Mirlees-Black, 1995; Ramsay and Partridge, 1999).

The cannabis market

Historically the cannabis market relied very largely on importation from producer countries. In the past cannabis resin was more readily available than grass (or herbal cannabis), and Morocco was regarded as the biggest source

country. Many of those involved in supply were ‘amateurs’, whose motivation was at least in part ideological, and associated with the values of the ‘counterculture’ of the 1960s and early 1970s. Dorn *et al.* (1992) have described how the distribution system thereafter became colonised by more conventional criminal entrepreneurs, attracted by the scale of the potential profits.

The average UK cost of an ounce of cannabis is £82, £85 or £145 dependent on whether it is herbal, resin, or ‘skunk’, according to figures gathered by the police and collated by the Home Office (Corkery, 2002b). The standard cost for an eighth of an ounce (equivalent to about 3.5 grams) is £15, although ‘skunk’ is more expensive.¹

In an illicit market such as that for cannabis it is inevitable that the boundaries between ‘wholesale’ and ‘retail’ distribution are somewhat blurred. In an analysis of drug markets amongst young people in the North West, Parker (2000) describes how people ‘get sorted’ through the help of people in their social networks, who are better able than themselves to reach reliable sources of supply. In other words, for a large proportion of illicit drug users, the retail supplier is in fact a friend, or a friend of a friend, whose motivation is as much altruistic as commercial – though the transaction may subsidise the seller’s own drug purchases. Such sellers would be regarded as drug dealers neither by themselves nor their customers.

This distribution process serves to buffer the majority of users from criminal entrepreneurs. However, an unknown proportion of retail purchases must necessarily be made from commercially motivated people who more accurately fit the stereotype of a ‘dealer’. In other words, their interest would be in retaining

their customer base and maximising their sales and profits. Such operators might well have an interest in promoting sales of other drugs besides cannabis, such as heroin or cocaine.

Home cultivation

Over the last ten years domestic cultivation of cannabis has started to change the shape of the cannabis market, and home cultivation for personal use has come to account for a significant proportion of consumption. The plethora of 'Grow your own' guides, the ready availability of a wide range of cannabis seeds and growing equipment through the Internet and other outlets, and the publishing success of regular magazines for the cannabis user all illustrate the widespread interest in home cultivation. The publication of these magazines and the sale of paraphernalia are legal, provided that there is no criminal intent on the part of those involved.

It is hard to say precisely what share of the market home cultivation accounts for. The little information we do have comes from the regular surveys of cannabis users carried out by the Independent Drug Monitoring Unit (IDMU). Since 1984, the IDMU has been distributing questionnaires to regular cannabis users at music festivals and has provided a valuable picture of drug consumption patterns, prices and markets in the UK. Although lacking the finer points of sample representativeness, these regular surveys are probably a reliable barometer of gross changes in the UK drug market.

The findings from the most recently published survey for 2001 found that domestically cultivated cannabis was now

taking a dominating role in the UK cannabis market and made up nearly half of UK cannabis consumption. For the first time domestically cultivated cannabis had overtaken Moroccan (soap-bar²) resin, hitherto the major product in the cannabis market. This compares with the 1984 survey's finding that just 10 per cent of respondents used home-grown (IDMU, 2002). The IDMU surveys do not differentiate between home-grown cannabis cultivated on a commercial scale and that which is cultivated solely for the use of the grower and their social network.

The mechanics of home growing

Some home growing is done with only primitive horticultural skill – planting a seed in the ground and letting it grow. However, most of the home-grown cannabis in England and Wales is cultivated indoors. Growing indoors enables the experienced cultivator to control the variety, quality and quantity of their produce. From the perspective of the grower, as well as providing a controlled, secure and private environment, it also decreases the likelihood of police detection and theft. The vast majority of home growers grow cannabis to be smoked in herbal form; producing cannabis resin is rare in England and Wales.

Most growers initially grow from seed, although many on subsequent harvests propagate cannabis by taking cuttings, once they are satisfied with a particular strain. As will be discussed in Chapter 3, seed purchase is legal in Britain,³ and UK-based seed companies import different varieties from seed breeders located mainly in Holland, Switzerland, Spain, South Africa, Australia and Canada. Depending

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on the variety, prices can range from between £7 and £90 for ten seeds. The equipment required for indoor growing is also readily available from gardening outlets and other 'hydroponic growshops'. Basic starter kits can be bought for around £150. The more technically adept may also use additional equipment to control the odour of the plant, the pH, humidity and temperature.

Cannabis can be cultivated using hydroponics (produced in water, without using soil as a medium) or organically. Organic cultivators use natural fertilisers and soil mixtures, whereas hydroponic cultivators use chemical fertilisers, nutrients and artificial rooting systems. Between 1994 and 2000, the IDMU's surveys show that the proportion of growers using hydroponic cultivation systems trebled from 6 per cent to 19 per cent, and use of high-power lighting increased from 17 per cent to 41 per cent while natural light usage fell from 77 per cent to 56 per cent. Over the same period the proportion of growers using seeds found in imported cannabis bush⁴ that they had bought fell from 49 per cent to 21 per cent (probably reflecting changing market preferences), while the proportion using 'pedigree' seeds rose from 35 per cent to 57 per cent. In 2000, growers tended to use more lights, with an average of 4.5 lights with an average total wattage of 1067W, compared to just under two lights with total wattage of 421W in 1999. This increasing high-tech trend was also reflected in the quantity grown: in 1998 growers produced an average of 12 plants with a total yield of 189 grams; in 2000 the figure was 23 plants with an average yield of 462 grams.

Our sample of growers ($n = 37$) was split equally between hydroponic and organic

cultivators. They employed a range of horticultural techniques, which tended to reflect their experience, knowledge and level of technical expertise. Some employed a simple approach, for example:

I just grew the seeds in a grow-bag. Then I moved them into pots when they got bigger. They grew in a conservatory. The only thing I did was to add tomato fertiliser every now and then.

Others showed a much greater level of technical proficiency. Some cultivators could specify the flowering cycle of different strains of cannabis plants and the exact pH and carbon dioxide levels which would maximise growth and yield in the shortest possible time. In sum, they possessed an encyclopaedic knowledge of cultivating cannabis, which the most avid horticulturalist would envy:

If you plant a batch of seeds, after about six weeks they should be about one foot high. Cuttings are then taken and placed into smaller pots and kept on a specified light/dark cycle. Once the plants have successfully rooted the cycle can be changed and this will force the plants to flower. You can then tell which plants are male and which are female. Take further cuttings from the female plants and again place them in smaller pots. Once the second batch of female plants have successfully rooted, they are placed on a flowering cycle. They will then flower within five to 12 weeks depending on the strain. I tend to stagger the flowering of the plants and normally have about 20 plants growing at any one time.

Potential yields reported by respondents ranged from a quarter of an ounce to ten ounces per plant. One grower reported having many

small plants with little individual yield. Another respondent reported having four plants that yielded between seven and ten ounces a plant. Many respondents commented that the potential yield of a plant is dependent on many factors. These included the plant strain, size, the type of equipment used and the method of growing. For example:

You can get an ounce from a plant grown to one foot, or a kilo from a plant grown to six feet. A decent grower can quite easily get one gram of dried flower head per watt of lighting used.

Twenty plants under the stairs will hardly compete with one 12 foot monster outside.

Given all the variables involved, it is difficult to generalise about the length of time or number of plants it takes to grow a specific yield. Cuttings from a single mother plant will be harvestable between seven and 14 weeks after rooting if they are placed immediately on a flowering cycle. They will grow to a height of one to two feet, and could each yield between half an ounce and three ounces. If ten cuttings are grown, the total harvest will be about 15 ounces. A staggered cycle of cultivation, with sets of ten cuttings rooted every five weeks, would provide the grower with roughly two ounces a week. Obviously, if the plants are grown for longer before their flowering cycle is initiated, the time taken to complete this process will be increased, but the overall yield would be larger too.

Very little cannabis resin or hashish is domestically produced. The process is labour- and resource-intensive. Creating cannabis resin involves the removal of the glandular trichomes or resins of a flowering plant that contain

tetrahydrocannabinol (THC). Glandular trichomes make up less than 10 per cent of the herbal flowers or buds of a cannabis plant. Resin can be produced in a number of ways: cold water separation techniques, butane oil extraction, passive trichome collection and 'scuffing' or screening. Most cannabis growers have what they call 'sugar trim material', a by-product of cultivating herbal cannabis. This can be retained for hashish production, as it contains a high percentage of resin.

One of our respondents had attempted the process. He reported that he had hung a large number of flowering plants to dry for ten days. He then extracted the THC using the screening method. The resulting powder was then heated up and bound together to form a resin. This resin, he claimed, was completely free of adulterants, unlike much of the resin available from the illegal market.

Types of home grower

Our sample of 37 growers were mainly in their twenties or thirties, and all except two were men. Most had jobs, or else were students. Some had had lengthy careers as cannabis cultivators – in one case for 25 years – though almost half of our sample had been growing for two years or less.

Motivations for growing varied. Five of our respondents were clearly growing on a commercial scale, with profit as the main motive. Most of the remainder shared their produce with, or sold it to, others, though nine grew simply for their own use. We have grouped the sample into the following five types:

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- the sole-use grower ($n = 9$) – cultivating cannabis as a money-saving hobby, for personal consumption⁵ only
- the medical grower ($n = 3$) – motivated mainly by the perceived therapeutic value of cannabis to those with medical conditions
- the social grower ($n = 10$) – growing to ensure a supply of good quality cannabis for themselves and friends
- the social/commercial grower ($n = 10$) – those who grew for themselves and friends, at least in part to supplement their income
- the commercial grower ($n = 5$) – growing to make money, and selling to any potential customer.

This classification is little more than an elaboration of one made by the Court of Appeal in 1999 (*R v. Lawrence Dibden*,⁶ documented in 2000). In upholding a sentence of 21 months passed on a person whom we would regard as a ‘social/commercial grower’, the judges commented that there were four sorts of cultivator: those who grew cannabis for their own use; those who grew for themselves and for friends at no charge; those who grew cannabis to supply to friends for money; and those who grew in massive quantities for ‘all and sundry’. We have simply added a fifth category, that of medical grower.

There were common themes in the reasons given for starting home cultivation. Two-thirds mentioned the poor quality of the cannabis resin that they had previously bought, and also the risks associated with adulterated produce. Half mentioned the high prices charged by dealers.

The following quotes give a flavour of these reasons:

I enjoyed using cannabis in Amsterdam but didn't want to get poisoned by soap bar in this country.

The reason I started to cultivate was primarily because of the high price and low quality of cannabis that is readily available from commercial dealers where I live.

The quality of cannabis widely available locally is of very poor quality and contains all sorts of 'unknown ingredients'.

I started for two reasons, one to escape using dealers and the black market, which increases the risks of being arrested; also because I discovered just how many contaminants were contained within soap bar.

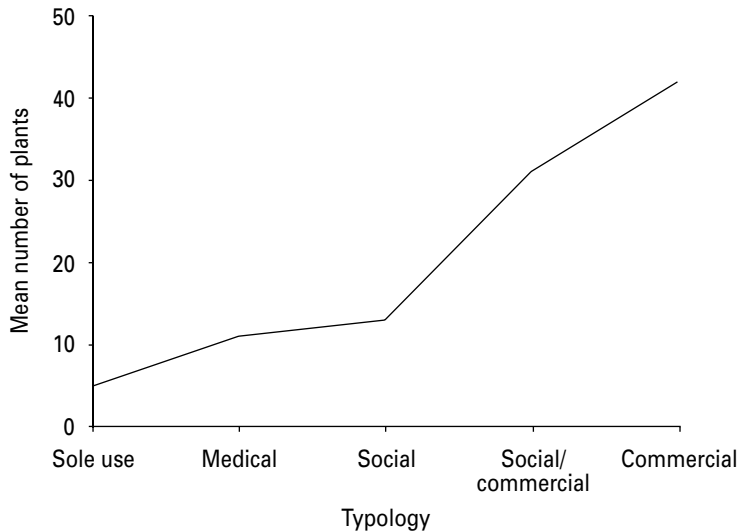
A third mentioned the desire to avoid contact with criminally involved dealers; some mentioned that they did not wish to subsidise dealers who were dealing in Class A drugs and involved in organised crime. Others referred to the risk of arrest associated with buying or collecting cannabis from dealers.

The sample varied according to both the sophistication of their growing techniques and the scale of their operation. Some small-scale growers were as sophisticated as volume producers. Figure 1 shows the average number of plants under cultivation at any one time for each type of grower.

Sole-use growers

Our nine ‘sole-use’ growers had between one and two dozen plants at any one time. Seven grew organically and two used hydroponics. Most had been growing for one or two years. They grew their own cannabis to secure good

Figure 1 Average number of plants under cultivation, by type of grower



quality, to save money and to avoid contact with dealers and with the criminal justice system. An equally important reason was the enjoyment. For example:

I was interested in starting a new hobby which I very quickly realised was a very rewarding one.

Medical growers

Medical growers typically want to secure a cheap and dependable supply of high-quality cannabis with little legal risk. We located five cannabis growers who supplied cannabis to medical users. We classified three of these as medical growers, as this was their main reason for growing. (The other two said that they would continue to grow even if they did not supply to medical users.) One of the medical growers has a wife with multiple sclerosis (MS) and has now been cultivating for over eight years. More recently he has been supplying cannabis to other MS sufferers and states he would not sell to anyone else. Both medical

growers had been charged with various offences relating to possession and supply of cannabis.

Social growers

We identified ten people as social growers. Their motivation for growing was similar to that of sole-use growers, but with the added dimension of social rewards. They either gave cannabis to their friends or charged a nominal price to cover their expenses. Like sole-use growers, they seemed to derive a great deal of satisfaction from the process:

... it has become a pleasurable pastime that has many rewards and results that you can be proud of. It is very satisfying to produce a quality product.

Consistent with Weisheit’s (1991) study of cannabis growers, our social growers took satisfaction from the status they achieved within their social networks of producing a high-quality and highly valued product.

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Case study 1 Roger – a social supplier

Roger, now in his late thirties, first grew cannabis when he was 14. He progressively developed his growing technique over time and now uses sophisticated growing methods to cultivate a variety of strains hydroponically and organically.

By cultivating cannabis himself, he is able to support his own use, which is currently between ten and 20 spliffs a day. Any excess he will either give away or sell at cost price to friends and medical users:

I've made money on it in the sense that like, I've sold it on to people, I give quite a lot away too, I've some friends who have got MS and other diseases, I've four of them, they get it more-or-less free, but I don't grow weed to make a commercial profit out of it. On a harvest I might end up with £300 in cash, which in the end doesn't really cover everything, once I've paid for the electricity and everything. It doesn't cover the fuel or other stuff, so it's not a profit business for me.

He also expressed great pleasure and took pride in what he had grown. Discussing his preference for organically grown cannabis, he states: 'it's more the bouquet, the aroma, the taste of it, rather than the psychedelic effect of it all ... it's just like wine sampling, but it's with weed'. He took pride in what he had produced, asserting that it was the best in East London. He considered himself a connoisseur of cannabis. Last Christmas he met with friends to sample each other's cannabis, which was especially harvested for the occasion.

Social/commercial growers

Ten of our respondents grew cannabis for profit, but restricted sales to their social networks. Their orientation towards cultivation was similar to that of social growers, and most had graduated from being social suppliers. Now, however, their main motivation was to supplement their incomes. One saw cultivation as a means of covering rent payments. They had between two and 100 plants under cultivation at any one time, half using hydroponics and half using organic methods.

Commercial growers

We classified five respondents as commercial growers. They would supply cannabis to anyone who presented themselves as a

customer. Rather than buying cannabis from 'wholesale suppliers', they cultivated their own crop as this guaranteed them a high-quality potent product as well as consistency of supply. This allowed them to charge premium prices. All of them used hydroponics; like social growers they staggered their growing cycles. The smallest-scale commercial grower generally had two plants under cultivation; the most active had over a hundred. One grew between 40 and 90 plants at any one time. He originally started to cultivate to supplement his income, but then decided that he could retire from his 'day-job', which he found stressful. He said that he earns about £2,500 a month, including sales to medical users at a 'reasonable cost'.

Case study 2 Jason – an ex-commercial grower

Jason is 31 and has been cultivating for the last six years. At times he has grown over a hundred plants; however, he does not consider himself a large-scale producer, rather a cultivator. He started to cultivate at the age of 25 after visiting Amsterdam on holiday. He had what he described as a 'half-arsed' attempt at growing and produced a few weedy plants. Jason then contacted a friend he knew who grew professionally and he borrowed some lights from him.

Initially, I began growing in partnership with a friend who had grown before. The reasons were mainly because, at that time, herbal cannabis was very difficult to obtain, and I was beginning to learn about how bad 'soap bar' was for you. The other consideration was obviously financial. Not only could my friend and myself keep ourselves in herbal cannabis, but we could also give ourselves a nice financial lift, as we were both unemployed at the time. Our first crop brought in around 1.5 kilos of flower heads, which worked out at roughly £3,000 each.

This continued for a while until Jason found himself in a 'bit of financial trouble. I had become a bit of a pill-head'. He spent New Year 2000 in Amsterdam and decided to make some money from cultivating, to sort out his financial worries. Jason and a friend rented a flat specifically to grow and began to cultivate 250 plants. He had become highly professional at cultivating and through both research and trial and error he was growing 'some particularly nice weed'. Unfortunately, Jason could not control the smell of the cannabis and a nearby neighbour called the landlord. This eventually led to his arrest and conviction for production and possession. He was sentenced to 200 hours' community service.

Whilst serving the order Jason stopped cultivating. Some time later he started to grow again, but only for himself and a few friends. As he said, 'I don't want to grow commercially any more, I just want to be able to pay my council tax and car insurance. I just want to be able to enjoy my wages a bit more.'

Jason had never been in trouble with the police prior to his arrest and has not been since. He does not consider that he is breaking the law and believes that home cultivation should be tolerated. Jason stated that he now cultivates because 'I honestly enjoy it'. He believes the law should be based on the professionalism of the equipment, for example the amount of watts of power that are used, or the staggering of plants, or perhaps the dried weight of the cannabis as this provides a better indicator of the intention to produce. Jason believes that the Home Secretary's decision to increase the penalty for selling cannabis will increase the number of home growers, but will also send out mixed messages to young people.

3 Cultivation and the law

The Misuse of Drugs Act 1971 (MDA) classifies drugs according to the risks they pose. Cannabis is currently a Class B drug, although, as will be discussed below, the Home Secretary has announced that it will be reclassified as a Class C drug by mid-2003. Possession of a Class B drug carries a maximum penalty of five years' imprisonment and/or an unlimited fine. Possession of Class C drugs carries a maximum penalty of two years' imprisonment. In practice, however, prison sentences are very rarely passed for the possession of cannabis; most offenders are cautioned, and where cases *are* prosecuted the sentence is usually a small fine (see Corkery, 2002a, 2002b; May *et al.*, 2002).

Cannabis cultivators may be charged with either the production of cannabis or the cultivation of cannabis under section 4 and section 6 of the MDA respectively. People charged under either section face a maximum sentence of 14 years' imprisonment and/or an unlimited fine. However, there is an important distinction between these two sections. The section 4 offence of production is classified as a trafficking offence under the Drug Trafficking Act 1994. This means that anyone convicted under section 4 is liable to asset confiscation. Furthermore, under the provisions of the Crime (Sentences) Act 1997, anyone who has two previous trafficking convictions faces a mandatory seven-year prison sentence.¹ Cultivation offences are not subject to these provisions (see Police Foundation, 2000, for a fuller discussion).

Where a cultivator is using someone else's property to grow cannabis, the occupier or manager of the premises may also be liable to prosecution under section 8 of the MDA, if they 'knowingly permit' the cultivator's activities.

This offence carries a maximum penalty of 14 years' imprisonment for Class B drugs.

Whilst the cultivation of cannabis is illegal in Britain, the importation, sale and purchase of cannabis seeds are not. The MDA forbids importation and sale only where the seeds are intended for cultivation.² The equipment needed for growing high-yield cannabis plants, such as carbon dioxide cylinders, hydroponics and heaters, can be legally purchased. In their marketing material, British-based seed and equipment companies usually stress the illegality of cultivation and emphasise the licit horticultural uses to which this equipment can be put. This presumably confers some protection against prosecution under section 4(2)(b) of the MDA. Some such disclaimers are low-key, others heavily sardonic:

Please note germination of these seeds is illegal in the United Kingdom. With legislation concerning the legality of this collection being inconsistent, contradictory and ever-changing across the globe, we strongly advise all potential customers to check their national guidelines before placing any orders. All customers are responsible for their own actions. We have no wish to encourage anyone to act in conflict with the law and cannot be responsible for those who do.

The lovely F1 cannabis seeds we supply are only to be grown in sensible countries where it is legal to do so, such as Holland, Belgium and Switzerland. If you live in the UK, we will be able to sell you some very expensive fishing bait or budgie food, but you must under no circumstances grow them. Remember just because it is all right for Jack Straw's son to get caught dealing or for the 3rd in line to the British

throne to get wasted on cannabis, it is not all right for you to do this. We cannot emphasise this point strongly enough!

Policing policy on cultivation

In 1999 the Association of Chief Police Officers (ACPO) recognised that case disposals varied among forces, particularly in respect to drug offences. In response they issued guidance aimed at both operational and custody officers to help achieve greater consistency and fairness in disposal (ACPO, 1999). In relation to cannabis cultivation, the guidance is intended to help officers decide between two main disposal options:

- arrest and caution
- arrest and charge (as a cultivation or production offence).

The guidance is premised on an assessment of case seriousness. Offences committed by adults are placed on a scale of 1 to 5, taking into account a series of aggravating and mitigating factors. For offences scoring 5 there is a presumption of prosecution, and for those scoring 1 a presumption of a formal warning or no further action. A slightly different system has been devised for juvenile offenders, using a four-point scale. Those scoring 4 on the scale, according to the guidance, should always be charged.

The guidance stresses that when making a decision about case disposal, the circumstances and history of the offender are to be considered as well as the seriousness of the offence itself. The guidance lists general gravity factors, such as the criminal history of the offender, the likely sentence if prosecuted, and the impact of this

sentence on the offender. It then goes on to specify the 'entry point' on the scale for each drug offence, and to list specific aggravating and mitigating factors relevant to that offence.

The ACPO guidance states that offences of cultivation should be dealt with either as production (section 4) or possession (section 5) offences, not as offences of cultivation (section 6). According to the guidance, prosecutions for growing cannabis have tended to be brought under section 4 of the MDA 1971, as the term 'production' incorporates the offence of cultivation (see s. 37(1) MDA 1971). Production of cannabis has an entry point on the scale of 5 for adults and 4 for juveniles. Factors to be taken into account in deciding whether growers should be charged under section 4 with production include a commercial motive, a sophisticated set-up and the procurement of scheduled substances. The cultivation of a small number of cannabis plants is the only specific mitigating factor, although the guidance does not define how many plants constitute a small number. The guidance, however, also states that adults 'will normally be prosecuted; mitigating gravity factors are unlikely to affect the decision to prosecute'.

The ACPO guidance provides case scenarios as illustration. Only two relate to cannabis cultivation. Neither are representative of the average cultivation case. Although the example in the box below is atypical, it does offer some insight into how the police are expected to tackle the offence.

The second example involves someone who smokes cannabis to ease the pain caused by chronic arthritis and rheumatism. The person cultivates 35 plants solely for personal use. In this case, as with all cultivation cases, it is

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advised that the most appropriate offence category is that of production. However, on the basis of previous court disposals, the individual's severe physical illness and their good character, a caution is recommended as the

most appropriate disposal option. So, despite the presumption of prosecution for offences of production, it is clear that in some cases an alternative disposal may be sought.

Scenario

D and P (both adults) unlawfully cultivate 30 cannabis plants, intending to sell the cannabis once harvested. They cut and harvest the mature plants and then ask Q (a friend) to assist in stripping them – i.e. removing and discarding the stalks and unusable parts. Q himself smokes cannabis and expects to receive a small amount of the harvest material in return for his assistance. While stripping the plants all three are arrested. D and P are prosecuted. Q, who is aged 19 and of good character, admits his part in the venture.

Appropriate offence

Unlawful production of a Class B drug, i.e. cannabis by Q: section 4(2)(a) Misuse of Drugs Act 1971.

Recommendation

A caution is appropriate.

- No convictions
- No cautions
- No formal warnings
- Likely penalty: non-custodial sentence
- Young offender
- No commercial motive.

Supporting notes

The stripping of cannabis plants after they have been cut and harvested amounts to 'production' of cannabis. The definition of 'produce' in s. 37(1) MDA 1971 refers specifically to 'manufacture, cultivation or any other method'. The 'other method' in this example is the preparation of the plants by discarding those parts that are not usable and putting together those parts that are.

References: *R v. Harris and Cox* (1996) 1Cr. App. R. 369; The Code for Crown Prosecutors, June 1994, p. 12, para. 6.8.

Source: ACPO (1999).

The ACPO guidance is the only formal statement of current policy. Nevertheless we found no mention of these guidelines by the forces ($n = 16$) who completed our questionnaire about enforcement practice and force policy. Mirroring the view of a number of forces, and the ACPO guidelines, one force respondent stated that for cases involving cultivation an officer has to decide whether it is a production/supply offence or an offence of cultivation for personal use. As no definition exists to distinguish between the two types of offence, this decision was considered problematic.

Seven forces had individual guidance on which section of the MDA to charge individuals with if they are arrested for growing cannabis. This guidance took several forms: a policy document detailing the MDA; Home Office guidance (although it was unclear what this was); verbal advice from the Drug Strategy Unit; information on the force intranet; and the National Drug Database. In general, the responses to this section of our questionnaire point towards considerable disparity and a degree of confusion about the most appropriate way of handling cultivation offences under the MDA.

Enforcement in practice

Home Office statistics do not differentiate between offences of production and cultivation. Both are collated as production offences. There were 1,960 cannabis production offences in the UK during 2000, a rate of four per 100,000 of the population. Of these offenders, 458 received a police caution. Just over three-quarters of production offences (1,502) were dealt with in court. The most common court disposal was a

fine, which accounted for 24 per cent of those 1,960 offenders who were cautioned or convicted. The volume of production offences peaked in 1995, when cautions and convictions reached 5,045. They have subsequently decreased every year since. The current number of persons cautioned and convicted for production offences is the lowest since 1992 (Corkery, 2002a). Similarly the number of seizures involving cannabis plants has also decreased from a peak of 6,128 in 1995 to 2,020 in 2000. Mirroring the volume of production offences, this is also the lowest number of seizures since 1992 (Corkery, 2002b).

As discussed above, the national statistics conflate information referring to section 4 (production) and section 6 (cultivation) offences, making it impossible to say whether individuals are actually charged under section 4, as the ACPO guidance suggests. Six of the 16 forces that completed our questionnaire said that they would generally charge under section 4. For example:

... defendants are normally charged with the 'production' offence, on the basis that, evidentially, it is easier to prove because there is a tangible item in the form of the plant, irrespective of its maturity.

The remaining forces did not, as a matter of course, charge all cultivation cases as offences of production. Some forces stated that the offences were determined on a case-by-case basis, whereas others felt that the discretion of an individual officer or custody sergeant was the determining factor. One force said that they commonly bring cultivation charges, but rarely charge individuals with production.

As part of an earlier study on the policing of

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cannabis (May *et al.*, 2002), we collected detailed custody record data on 1,312 cannabis cases for the year 2000. These data were gathered from four Basic Command Units (BCUs) in two police force areas. For one of the areas, we were also provided with force-wide statistics relating to cannabis cases for the year 2000. Across the four BCUs 18 cultivation charges were brought, while only one individual was charged with production. If ACPO guidance had been applied to the 18 cultivation offences the charges should have been either possession or production offences.

The force-wide breakdown of cannabis cases provides a more detailed analysis of production and cultivation charges. Overall, there were 17 production charges. The number of plants involved ranged from one to 19 and the corresponding value ranged from £10 to £1,900. In comparison, there were 57 cultivation charges. The number of plants ranged from one to 133, while the value of the seized plants was estimated to range from £5 to £13,300. Court disposals also varied significantly. For example, an individual who grew 20 plants received a caution, another who grew 28 plants was imprisoned for nine months, someone who grew 30 plants was fined £60, another who was arrested with 50 plants received a conditional discharge and someone who grew a single plant was fined £100.

Within this particular force there were clear disparities in the decision making that leads to an individual being charged with either production or cultivation and the subsequent case disposal. Clearly there was little evidence of national or force-level guidance filtering through to officers on the ground. Evidence from our police questionnaires also highlighted

a number of forces where disparities were likely. Most drug squads no longer deal with cannabis offences; the lack of specialist knowledge coupled with the relative rarity of the offences means that the risk of idiosyncratic decision making is high.

There are no nationally available statistics which could shed light on the 'going rate' for the small-scale cultivation of cannabis. As discussed, the statistics collated by the Home Office do not distinguish between production and cultivation. However, as discussed in the previous chapter, a Court of Appeal judgment in 1999 gave a clear signal that a custodial sentence was appropriate for what we would regard as a social/commercial grower.³ In the year 2000, just under one-fifth (243) of those convicted in court (1,502) received a custodial sentence for the production/cultivation of cannabis (Corkery, 2002a).

The reclassification of cannabis

Whilst there have been calls over many years for reform of the MDA, there seemed little political will to do this until recently. The first sign of a change of mood was the publication of the Independent Inquiry into the Misuse of Drugs Act 1971 (Police Foundation, 2000). This recommended that cannabis should be reclassified within the MDA from Class B to Class C. The change would have the effect of reducing maximum sentences for cannabis offences and of removing powers of arrest for possession. (Any offence with a maximum sentence of less than five years is non-arrestable.) The second change is potentially more far-reaching than the first, because court sentences for possession are already far below

the maximum even for Class C drugs.

The government initially and very rapidly rejected this recommendation in spring 2000. However, the media lent their support to the proposals, and over the following year there were calls for legalisation or decriminalisation from both the main political opposition parties. The public mood seemed to have changed. Following the 2001 election, the Parliamentary Home Affairs Committee announced that it proposed to mount an inquiry into the government's drugs policy. When giving evidence to this inquiry in October 2001, David Blunkett, the new Home Secretary, announced that he was considering reclassifying cannabis in the way proposed by the Independent Inquiry. He said that he would be seeking advice from the Advisory Council on the Misuse of Drugs (ACMD) with a view to announcing a decision in early 2002. His view was that reclassification would signal a change in priorities for drug policing, and would free police resources to focus on Class A drugs such as heroin and cocaine.

The ACMD and the Home Affairs Inquiry both recommended reclassification of cannabis as a Class C drug. In July 2002 the Home Secretary announced that he would introduce reclassification by July 2003 at the latest. In the period between his initial request for advice from the ACMD and his final announcement, however, the public mood had perceptibly changed once more, and questions were being raised, especially in the mass media, about the wisdom of reform. The Home Secretary made it clear that the police would be expected to take firm action against those in possession of cannabis where circumstances warranted it. It was envisaged that 'aggravated possession'

would include cases where an individual's name and address were withheld from an officer; where police authority was flouted – the example of 'blowing smoke in an officer's face' is often cited; where an individual refused to surrender the cannabis in their possession; where the offence occurred in proximity to schools; whilst driving under the influence; and when linked to certain public disorder offences.

At the time of writing the legislation to put this into practice was passing through Parliament. The government's approach is to:

- reclassify cannabis as a Class C drug, which would *remove* powers of arrest for possession of cannabis
- but then to legislate to *reintroduce* powers of arrest for possession of Class C drugs
- and then to issue guidance, in collaboration with ACPO, to the effect that the police should generally *avoid* using these powers, except in special circumstances.

At the time of writing, the Criminal Justice Bill under parliamentary debate included in clause 9 an amendment to the Police and Criminal Evidence Act 1984 that would provide for powers of arrest for Class C drugs. The circumstances in which offenders should be arrested are expected to be defined through non-statutory guidance, drawn up in collaboration with ACPO, the aim being to ensure that arrest was the exception rather than the rule.

Towards the end of 2002 ACPO announced their proposals for dealing with cannabis possession offences under the new system. In doing so ACPO stressed that they were still in a consultative phase; nothing had been finalised,

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and they would welcome comments and views on their proposals. The proposals, in essence, were to introduce procedures not dissimilar to those piloted in Lambeth, London, during 2001. The national scheme would involve confiscation, whenever people were discovered in possession of cannabis. On the first and second such occasion, adult offenders⁴ would be given an on-the-spot street warning. On the third occasion an individual would be arrested and cautioned, and subsequent offences would result in prosecution. The warnings would have a life cycle of 12 months; they would not have the legal status of a caution or conviction and would therefore not be cited in court. A record of the street warnings will be kept locally. The circumstances under which possession offences should be treated as 'aggravated' – and subject to arrest – were broadly as outlined by the Home Secretary.

In announcing plans to reclassify cannabis the Home Secretary stressed that whilst *possession* of the drug would receive greater

tolerance, he intended to crack down more firmly on offences involving *dealing*. There is legislative provision for this. Clause 248 and Schedule 20 of the Criminal Justice Bill raise the maximum sentence for trafficking offences for Class C drugs from five to 14 years. MDA section 8 offences (permitting use or production on premises) will also become a trafficking offence under the Proceeds of Crime Act 2002 when this Act comes into force.

Precisely what implications these changes have for home growing remains unclear. Public debate about cannabis has been premised on the assumption that there is a readily-made distinction between dealers and users. As the previous chapter has shown, this is not the case. There is an obvious case for treating cultivation by 'sole-use' growers simply as offences of possession. They could be given an on-the-spot warning like anyone else found in possession of cannabis. The position of social growers is more complex; we shall return to this issue in the final chapter.

4 Cultivation and the United Nations conventions

One frequently advanced argument in discussion about reforming drug laws is that international treaties limit the room for manoeuvre domestically. This chapter examines the relevant United Nations (UN) conventions and considers how they constrain domestic policy in relation to home cultivation of cannabis.¹

The 1961 Convention

The United Nations 1961 Single Convention on Narcotics (as amended by the 1972 Protocol) lays the foundations of the current UN approach of control of drugs through prohibition. It was concerned mainly with drug cultivation, production and trafficking, though Article 28(3) imposes a duty on countries to prevent the use of cannabis (or at least misuse). Section 36 requires signatory countries to ensure that, subject to constitutional limitations in individual countries, the ‘cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery ... shall be punishable offences ... and that serious offences shall be liable to adequate punishment, particularly by imprisonment’. Significantly, the 1961 Convention did not require that the offences should be punishable under the *criminal law*.

Although the 1961 Convention explicitly refers to possession, it has often been assumed from the context and from the overall tone of the document that regulation of *supply* rather than *demand* was its main target. It was not explicit about criminal sanctions except for

serious offences, though it provided for alternatives to conviction and punishment where the offenders were ‘abusers of drugs’.

The 1988 Convention

The United Nations 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Convention) is tougher than the 1961 one, and is framed to tackle both supply and demand. It is more binding than the 1961 Convention, obliging signatories to share intelligence and co-operate with one another against international drug trafficking and to make efforts to eradicate narcotic plants grown on their territory and to eliminate demand for illicit drugs (Article 14, para. 1). It is also explicit that offences should be punishable under criminal law.

Article 3 requires that criminal offences should be established under domestic law to cover production, supply and possession with intent to supply, for a wide range of drugs including cannabis. The cultivation of cannabis is explicitly specified in Article 3:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally ... the cultivation of cannabis.

(Article 3, para. 1a(iii))

It states that the possession, purchase or cultivation of illicit drugs for personal use should be criminal offences encompassed under the criminal legislation of each country in the following terms:

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Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption. (Article 3, para. 2)

As did the 1961 Convention, the 1988 Convention allows for considerable discretion in the disposal of minor cases. In the first place, decisions about appropriate sanctions are clearly left to signatory countries, and are expected to be in accordance with the constitutional principles of that country. Furthermore, two sections are explicit about non-punitive options in relation to minor cases *generally* and in cases involving possession, purchase or consumption for *personal use*:

... in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

The Parties may provide, as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender. (Article 3, paras 4c and 4d)

Finally, Article 14 of the 1988 Convention requires signatory countries to take 'appropriate measures to prevent illicit cultivation and to eradicate plants ... such as opium poppy, coca

bush and cannabis plants cultivated illicitly in its territory'.

The 'room for manoeuvre': a stocktaking

The UN conventions set some clear limits to the range of reform options, whilst leaving individual countries considerable room for manoeuvre (see Dorn and Jamieson's book *European Drug Laws: The Room for Manoeuvre* (2001), and De Ruyver *et al.*, 2002, for fuller discussions). In respect of cannabis cultivation (or indeed possession) the conventions clearly allow no scope whatsoever for *legalisation*. However, they equally clearly allow for some forms of *decriminalisation*. As discussed in Chapter 1, decriminalisation is usually taken to include measures which retain the offence in question as an offence, but avoid criminal prosecution and punishment. This can be done either by downgrading the legal status of offences, so that they are administrative rather than criminal offences, or by retaining the status of criminal offence whilst avoiding the imposition of criminal penalties.

Decriminalisation can thus include any or all of the following:

- the imposition of administrative rather than criminal sanctions, such as fixed-penalty fines along the lines of parking tickets²
- substituting counselling or treatment for criminal sanctions
- the issuing of non-statutory guidance to prosecutors about non-prosecution in the public interest.³

As we shall see in the next chapter, there tend to be several variants of decriminalisation. The substitution of administrative sanctions (e.g. fixed-penalty tickets) for punishments imposed by criminal courts is not specifically mentioned by the conventions, but neither is it ruled out. Non-penal alternatives *are* specified by both the 1961 and 1988 conventions. The 1988 Convention signals that cultivation for personal use is a minor offence for which non-penal options may be appropriate. Thus our 'sole-use' growers discussed in Chapter 2 could be eligible for 'treatment, education, aftercare, rehabilitation or social reintegration' rather than punishment. It does not require a very broad interpretation of this section to regard police warnings as measures intended to educate, rehabilitate or reintegrate.

Equally, it can be argued that the conventions permit police warnings and other diversionary strategies for our 'social growers'. Even though the cultivation is not simply for personal use, it can clearly be argued that these constitute 'appropriate cases of a minor nature' under Article 3. Where cultivation is on a commercial basis, it is rather harder to see how decriminalisation (or depenalisation) is consistent with the conventions, although signatory countries have no explicit obligation to impose sentences of imprisonment for such offences.

Those variants of decriminalisation that involve *inaction* rather than alternatives to criminal prosecution and punishment cannot obviously draw their justification from any parts of the conventions except those that refer to the need to respect the country's constitutional limitations, such as the

requirement of proportionality in the official response to infractions of the criminal law.

It is impossible to state with any greater certainty what the conventions allow or prohibit. Countries are allowed considerable latitude in the handling of cases. This flows partly from the expectation that countries should properly seek consistency with their constitutional principles, and partly from the conventions' failure to define serious or minor cases. As a result, the precise extent of countries' obligations is hotly contested, and within the small world of international drug policy, debate about the conventions has become highly politicised.

The politics of the conventions

Signatories to the conventions are divided about the need for reform. There is a strong 'zero-tolerance' axis, which includes countries as diverse as the USA, Sweden, Japan, some Middle Eastern states, ex-USSR states and Africa. These countries have been dubbed the 're-affirm camp' because of their desire to maintain or strengthen the current approach in the conventions (Bewley-Taylor, 2002; Fazey, 2002). In opposition to this, there is an axis of pragmatism (or harm reduction) that includes most of Europe, Canada and Australia, often called the 're-assess' camp due to their unwillingness to take a wholly prohibitionist stance on drug control (Jelsma, 2002; Fazey, 2002; TNI, 2002).

Both groups recognise that international and national attempts to get to grips with problems associated with illicit drugs have achieved little global impact to date (see Jelsma, 2002).

However, there are sharp differences about the response that is required to this. The 're-affirm' camp argues for 'more of the same' – further intensive efforts to reduce demand and supply through enforcement, supplemented by other preventive approaches. The 're-assess' camp is much more pessimistic about the scope for controlling illicit drug use through enforcement of criminal laws; they argue for a different balance of strategies, including the toleration of some drug use, coupled with strategies to reduce the harm associated with drug use.

The countries following this approach have been influenced by countries such as Switzerland and the Netherlands and have pursued policies including decriminalisation of consumption, toleration of possession of cannabis and other drugs for personal use and harm-reduction initiatives such as needle exchange programmes (TNI, 2002). Most of these countries have regarded (or at least presented) their policies as consistent with the UN conventions. This is because possession of cannabis has in most cases remained on their statute book as a criminal offence, as required by the conventions.

Although European countries vary in their policy and law enforcement practice, many have moved towards more tolerance of cannabis use, as suggested by the EU (Commission of European Communities, 2001). Although EU countries are committed to a process of progressive harmonisation of domestic criminal law, it is unlikely that a consensus will evolve rapidly (Chatwin, in press); nor does it seem likely that there will be a unified European call for change to the UN conventions, not least because the Swedish government is clearly committed to 're-affirm' policies (Fazey, 2002).

Though countries in the 're-affirm camp' are united in their desire to retain prohibitionist policies, the political motivation for this is varied (Jelsma, 2002; Fazey, 2002). Religious laws against drugs have resulted in opposition to change from Islamic states. Sweden's social democratic tradition, where the state has a duty to protect its citizens against any perceived threat to undermine the fabric of society, has led it to adopt a prohibitionist stance. However, the US government is probably the most significant player in the 're-affirm' camp. It has been the principal force promoting a global prohibitionist regime, tending at the same time to blur the drugs issue with other foreign policy and security agendas, notably that relating to terrorism (Jelsma, 2002). It has been the staunchest defender of the UN regime's disciplinary framework and has used its position in the UN to maintain the global drug prohibition regime.

The UN International Drug Control Programme (UNDCP) co-ordinates UN drug control activities. As part of the secretariat to the United Nations it has no powers to impose sanctions on countries in breach of their obligations to the conventions. However, several commentators have remarked on its partisan alignment with the 're-affirm' camp. Especially in the late 1990s, its reports were regarded by many as political documents, designed to promote the appearance of international consensus on drug policy and the appearance of imminent victory in the international 'war on drugs'. The task of encouraging compliance with the conventions falls formally to the International Narcotics Control Board (INCB), a committee of member countries. Some have argued that the INCB has

gone well beyond its brief in 'naming and shaming' countries whose policies are at odds with those of the 're-affirm' camp, such as Switzerland and the Netherlands (see TNI, 2002; relevant reports are INCB, 2000, 2001).

All the UN conventions include provisions for revision. However, to be viable a proposal must have support from two-thirds of signatory countries, and for the time being at least, there is no realistic prospect of this happening. There are also provisions that allow individual countries to derogate from, or 'denounce', the conventions, but this is seen by most as a theoretical rather than a realistic possibility. It is a time-consuming process and would meet with criticism not only from the UN organisations

who strive for consensus, but from the USA (TNI, 2002). Many of the countries in the 're-assess' camp may be unprepared to threaten the appearance of consensus at a time when this is a scarce and fragile commodity within UN member states (Jelsma, 2002). For reasons that are entirely political, the middle-term future of the UN conventions on narcotic drugs may well turn on the outcome of the 'war on terrorism' (see TNI, 2002). In particular the extent to which the USA can exert leverage on countries in the 're-assess' camp might be greatly reduced if it were to act outside of a framework of UN mandates in taking action against those countries that it regards as a significant threat.

5 Approaches in other countries

This chapter describes the law in theory and practice as it applies to various developed countries around the world. We have not aimed to be comprehensive; rather we have selected countries that are illustrative of a range of approaches. Most have drug problems that are not dissimilar to those in the UK.

Switzerland: beyond the UN conventions

Switzerland was a signatory to the 1961 UN Convention and to the subsequent amendments, but it has not signed the 1988 Vienna Convention. At the time of writing it was considering fairly far-reaching reform of its drug legislation.

At present, Swiss law permits the cultivation of hemp or cannabis plants that have a THC content of less than 0.3 per cent. Hemp is generally produced for use in the production of rope, textiles and foodstuffs. Cultivation of stronger strains for consumption as cannabis is illegal. However, the existence of the parallel legal hemp market has created practical difficulties for enforcement, and domestic cultivation of cannabis is widespread.

The Swiss Federal Office of Agriculture (BLW) statistics for 1998 showed that 60 hectares were under cannabis cultivation in Switzerland for the purposes of a renewable raw material. However, the BLW estimated that an area of around 250 hectares was then under cultivation for 'other uses', which it assumed was for the production of smokable cannabis (Swiss Federal Commission for Drug Issues, 1999, p. 16). The trend for cannabis cultivation is upward, and it is thought that Switzerland is now one of the two major cannabis-exporting countries in Europe, the other being Holland (Swiss Federal

Commission for Drug Issues, 1999, p. 18).

'Hemp shops' are tolerated to a degree by the authorities. There were 135 hemp shops in 1998 according to the Swiss Federal Commission for Drug Issues (1999, p. 16). More recent estimates show that there are now around 230 hemp shops in the country (Collin, 2002). Because shops claim the products are not intended to be used as an illegal drug, it is legal to sell cannabis, but the shops must package and sell the product for purposes other than smoking, such as 'scent sachets', 'hemp tea', 'perfuming homes' or 'scented pillow cases'.

The political will for reforming the drug legislation stems from two main sources. First, the Swiss government has come under growing pressure to contain the export of cannabis to other European countries. Second, Swiss criminal law is intended to operate in accordance with the 'legality principle' whereby laws should be enforced as long as they are on the statute book, as opposed to the 'expediency principle' where non-enforcement of some laws is acceptable.¹ Partial legalisation coupled with tight regulation provided a means to control the export of cannabis whilst reconciling enforcement practice with the letter of the law.

At the time of writing the Swiss upper parliamentary house had approved a new Narcotics Act which would leave cultivation of cannabis as a crime, whilst providing statutory guidance to prosecutors not to prosecute commercial cultivators if:

- they have less than a specified number of hectares under cultivation
- they have notified the Department of Agriculture of this fact

- cultivation is solely for the domestic market, and will result in no export.

Below a certain threshold cultivation for personal use will not be subject to the requirements of notification. The process of wholesale and retail distribution is to be subject to equally tight regulation. The aim of the legislation is to allow the authorities to regain some control on the cannabis market, minimising the illicit market and containing exportation to an acceptable level.

The primary legislation will be debated by the lower parliamentary house in spring 2003 and, assuming it is enacted, the prosecutorial guidelines will be placed before parliament by the end of the year. There is considerable opposition to the legislation as well as support for it. The Swiss constitution allows for enacted legislation to be put to a national referendum if a petition with 50,000 signatures opposing it can be assembled. It is likely that this will occur in relation to the Narcotics Act, in which case the referendum will take place in 2004.

The Narcotics Act *decriminalises* rather than *legalises* cultivation. The offence of cultivation will remain on the statute book. On the other hand the guidance for prosecutors – which will also be in the statute book – provides cultivators with a guarantee of non-prosecution, provided that they meet certain conditions. This rules out the possibility of prosecution, placing their activities on the borderline of legality. Whether this is regarded as legalisation or decriminalisation, it is clearly inconsistent with the 1961 and 1988 UN conventions' requirement for countries to take action to prevent domestic cultivation – though of course Switzerland is not a signatory to the latter.

Perhaps the most noteworthy feature of Swiss drugs policy is its intention of distancing drug users from criminal distribution networks. The proposed cannabis legislation is intended to paralyse the illicit market in cannabis cultivation and export. At the same time Switzerland's experimentation with the prescription of diamorphine (or pharmaceutical heroin) has aimed at detaching dependent heroin users from the illicit market and from drug-related crime. An unexpected side effect of this policy appears to have been to destabilise the illicit heroin market, given the central role played by dependent users as low-level distributors and runners (Killias and Aebi, 2000): the programme appears to have removed these low-level operators from the streets in sufficient numbers to make a difference.

The Netherlands: tolerance through decriminalisation

The Opium Act 1928 is the basis for the present legislation. Dutch law distinguishes between 'hard' and 'soft' drugs and cannabis is considered to be less harmful and categorised as a soft drug. The aim of Dutch law is to avoid the criminalisation of young people and those in possession of small quantities of cannabis and to prevent them becoming involved in a criminal underworld (ELDD, 2002).

In contrast to the Swiss, the Dutch Public Prosecution Service operates an expediency principle, which allows for executive discretion not to prosecute. In relation to cannabis this means non-prosecution for the sale of cannabis (under 5 grams to one person) from coffee shops and of possession of small amounts (Blom, 2001). The cultivation of cannabis for personal

consumption is prohibited by law, but such acts are not actively investigated or prosecuted (INCB, 2001; Blom, 2001) and are tolerated on a small scale (Blom, 2001). In fact the possession of cannabis for personal use has the lowest judicial priority of investigation or prosecution. The Dutch Public Prosecution Service may decide not to prosecute and the police can dismiss cases if they meet the criteria of the expediency principle (ELDD, 2002). If, however, a case is prosecuted, there are distinctions in the sanctions between small- and large-scale cultivation. The sanctions for smaller-scale cultivation are as follows:

- Up to five plants and for personal use (i.e. no lamps and no fertilisers) – no sanctions, although the plants will be confiscated.
- Five to ten plants result in a fine of 22 euros per plant.
- For a second offence five to ten plants result in a fine of 34 euros per plant.
- Ten to 100 plants would result in a fine of 55 euros and/or half a day's imprisonment per plant.
- The maximum penalty for the cultivation of cannabis is two years' imprisonment and/or a fine of 10,000 euros.
- Cannabis cultivation offences that have resulted in prosecution have attracted community service-type penalties ('task penalties') and imprisonment for repeat offenders.

There have been calls by some mayors for a trial involving coffee shops being legally supplied with cannabis from selected growers.

This has been supported by a small majority in parliament, but the current government is not keen to pursue it because of the 'international context'.

Despite a widespread belief that cannabis has been legalised in the Netherlands, this is not the case. The policy of the Netherlands is – or at least can be presented as being – in accordance with the UN conventions, as use and cultivation are criminal offences and there is no statutory guarantee of non-prosecution. However, the Netherlands made a reservation at the 1988 Convention to enable them to tolerate the sale of cannabis through coffee shops. The INCB has criticised the Netherlands for its continued toleration of the cultivation of cannabis and coffee shops, stating that these policies do not meet the requirements of the 1961 Convention (INCB, 2001).

Portugal: tolerance and treatment – but not for cultivation

The main law regarding the control, use and traffic of narcotic drugs is Decree Law 15/93, in which a clear distinction is made between offences of trafficking and those of use. This law was amended by Law 30/2000, which introduced measures to decriminalise use and possession of all illicit drugs. This amendment, which took effect in July 2001, had the effect of transforming the criminal offences of drug use, possession and acquisition for personal use into administrative offences, allowing for disposal through administrative sanctions such as fines and alternatives to punishment, such as counselling and treatment.² If an individual is found in possession of modest amounts of drugs for personal use, the drug will be

confiscated and the case submitted to a local commission consisting of a lawyer, doctor and social worker. The commission assesses the individual's situation; it can arrange for treatment in cases of dependence, and put in place other rehabilitative measures. It also has powers to fine offenders (with fines ranging from 25 to 150 euros), to confiscate personal property and to ban a range of activities. The scheme largely diverts from punishment those whose offences involve only personal use, and criminal enforcement activities are reserved for commercial trafficking.

Cultivation of cannabis for personal use is *not* covered by the scheme, and it continues to be covered under the previous Decree Law 15/93. Article 28 of Law 30/2000 explicitly excludes cultivation from its provisions. This has the effect of retaining cultivation as an imprisonable offence, distinguishing between small-scale and commercial activities. Even though the cultivation of drugs is defined as a trafficking offence by Decree Law 15/93, the authorities are likely to prosecute only in cases involving commercial cultivation. Nevertheless, there remains an obvious legal anomaly, that the possession of a plant under cultivation is a criminal offence, but the possession of the same plant once removed from the soil is an administrative offence. We were unable to find out how the Portuguese system deals with this illogicality.

In Portuguese national drug strategy documents, it is argued that the new system is compatible with the UN conventions. The 1961 Convention requires possession to be punishable, but not necessarily a *criminal* offence. It is argued that making possession an administrative offence is consistent with the

1988 Convention – which requires possession to be a criminal rather than an administrative offence – on the grounds that the administrative status of the offence is consistent with the country's constitutional limitations.³

South Australia: the expiation scheme

The state of South Australia enacted its Cannabis Expiation Scheme in 1986. The scheme, which took effect from 1987, may have provided a model for the Canadian proposals for decriminalisation, discussed below.⁴ The expiation scheme allows for the police to deal with 'simple' cannabis offences by issuing an expiation notice to the offender. If the fee specified by the notice is paid within 60 days, no further action is taken. However, failure to pay the fine can result in prosecution, conviction and a criminal record. Simple offences are defined as possession and cultivation for personal use, the judgement about personal use being left to police discretion. However, if the offence involves any commercial transaction, or if consumption takes place in public or if the offence involves cannabis oil, the offence is non-expiable and will result in prosecution.

The penalty for cultivation – originally for a maximum of ten plants⁵ – for personal use is \$A150 if it is dealt with by expiation. If the police judge that the plant is being grown commercially they will charge with commercial cultivation, and prosecute rather than issue an expiation notice. If the court fails to convict on this charge, but does so for possession, the maximum penalty is \$A500, though in practice court fines are in line with those dealt with through expiation. Around 3,000 expiation notices for cultivation are issued annually;

numbers of prosecutions for cultivation are much less common.

The scheme's rationale was to treat simple offences more leniently, whilst getting tougher with offences of supply, including the supply of cannabis. However, critics of the scheme argue that in practice the scheme has resulted in 'net-widening', with the police issuing expiation notices in situations where previously they would have dealt with the matter informally. This is because relative to preparing a case for prosecution the expiation process is unbureaucratic and easy to manage (Christie and Ali, 2000). There have also been criticisms that the ten-plant threshold was set too high, allowing commercial exploitation.

The scheme would appear to be consistent with the UN conventions because possession and cultivation are retained as criminal offences, and whilst penalties are imposed, these do not constitute criminal convictions. In this regard, it is a form of decriminalisation.

Canada: towards decriminalisation and 'ticketing'?

The Canadian approach to cannabis appears to be in a process of rapid change, and the introduction of new cannabis control legislation has been announced for the first part of 2003 that will open up the possibility of decriminalisation of possession and cultivation of small amounts of the drug. At the time of writing, the legal position is as set out in the Controlled Drugs and Substances Act 1996 (CDSA). This distinguishes between various categories of drugs organised by schedules and corresponding punishment frameworks. The possession, cultivation and trafficking of

cannabis are regulated as criminal offences. (Simple) possession of cannabis is regulated under Schedule II, under which possession offences can result in a maximum punishment of six months' imprisonment and/or a \$CAN1,000 fine for first-time offenders (summary conviction), or double these amounts for repeat offenders (on indictment). However, Schedule VIII limits the maximum punishment for all cannabis possession offences to six months' imprisonment and/or a \$CAN1,000 fine if possession does not exceed the maximum amounts of 30 grams (marijuana) or one gram (resin). In practice, most first-time offenders convicted of a simple cannabis possession offence typically face a small fine or a conditional discharge, but acquire a criminal record upon conviction. Repeat offenders, or offenders with a criminal history, will attract higher fines, and in some cases are given short prison sentences (Fischer *et al.*, 1998). The maximum sentence for cultivation is seven years' imprisonment, but in many cases cultivation for personal use appears to be treated much the same as possession.

A Senate Special Committee on Illegal Drugs – focusing centrally on cannabis – reported in September 2002. This called for radical reform, recommending that most cannabis offences should be taken out of the realm of criminal law and control altogether. In December a House of Commons Special Committee on Non-Medical Use of Drugs also reported (Canadian House of Commons, 2002). This made less radical but still significant recommendations for the reform of cannabis control, including the decriminalisation of offences of possession and cultivation of small amounts of cannabis. The report proposes that possession and cultivation

should formally remain criminal offences – as required by the UN conventions – but those offences involving 30 grams (just over an ounce) or less should be decriminalised. There have been suggestions that such decriminalisation could occur through the establishment of a ‘ticketing offence’ system, in which the offender would receive a citation equivalent to a parking ticket; this ticket would entail an administrative fine. Offenders would not appear before criminal courts and would not acquire a criminal record for the offence *per se*. (However, some might very well end up in court and get a criminal record for fine default, as the South Australian experience shows.) The federal Justice Minister has announced that legislation is planned for the first four months of 2003.

The proposed Canadian approach resembles the South Australian one, but differs in emphasis from that of Portugal, in that the primary response to personal possession and cultivation will be a penalty – albeit an administrative rather than criminal one – rather than treatment or counselling. The proposals would of course entail that sole-use and social growers who are found with *more* than 30 grams of cannabis will normally⁶ be charged with possession for the purpose of trafficking and processed accordingly through the criminal courts. We saw in Chapter 2 that a single plant might yield a highly variable amount of cannabis, from under half an ounce (or 14 grams) to several ounces – well over the 30 grams threshold. Will it prove possible to maintain a system that criminalises some home growers and not others, depending on – amongst other things – their horticultural expertise? The South Australian expiation scheme sidesteps this problem – but may encounter others – by leaving it to the police to decide whether the offence

involves growing for personal use only.

A relevant additional feature of Canadian legislation is that an amendment has already been made to the regulations within the CDSA in 2001, allowing the use of cannabis by people suffering from serious illnesses and those who might experience some medical benefit from its use. Conditions for use are outlined in the Marihuana Medical Access Regulations (MMAR). Individuals must obtain ‘authorisation to possess’ cannabis for medical purposes from federal authorities and can possess a maximum quantity equal to a 30-day treatment supply specified by a medical practitioner. The patient or a representative of the patient can apply for a licence to grow a specified amount of cannabis indoors or outdoors and may store up to the maximum expected yield of 250 grams of dried cannabis.

The Canadian approach for possession of cannabis is presently consistent with the UN conventions because possession and cultivation are retained as criminal offences. However the INCB (2000) has criticised the lenient approach towards cannabis growers who they state receive little or no punishment in the court. The latest Canadian proposals push the UN conventions to their limits.

Sweden: approaching zero tolerance

The main Swedish law regulating narcotic drug offences is the 1968 Narcotic Drugs Act (ELDD, 2002). This states that any activity involving illegal drugs, including drug use, is unlawful (Zila, 2001). Swedish law does not distinguish between ‘soft’ and ‘hard’ drugs (Zila, 2001), but states that crimes should be punished according to the nature/quantity of the drugs involved

(ELDD, 2002). Pronouncements about the harmfulness of drugs are not outlined in any specific law, but a finely graded hierarchy of drugs has been established in case law (Zila, 2001). When judgments are made the circumstances of each case and purpose of the crime (e.g. whether it was pursued on a commercial basis or on a large scale, etc.) are taken into consideration (ELDD, 2002).

The cultivation of cannabis for personal use is not mentioned in the law, although the acquisition of drugs for personal use is punishable, however they are acquired. This includes possession or 'other handling' of drugs for the intention of abuse, under section 6 of the Narcotic Drugs Criminal Act (Zila, 2001).

There are three degrees of penalties in Swedish law: minor, ordinary and serious. A drug offence is treated as a minor offence only if it involves personal use or possession for personal use only; there must be no exchange of drugs between individuals. If judged minor, cannabis offences usually attract a fine, though a short prison sentence can be passed. The maximum penalty for ordinary drug offences is a sentence of three years (ELDD, 2002).

Like Switzerland, the Swedish legal system follows the legality principle rather than the expediency principle; thus the prosecutor has a duty to initiate prosecution proceedings for an offence once it has come to light – though under certain conditions the prosecutor can discontinue an investigation or waive a prosecution for a minor offence.

Swedish law is in accordance with the UN conventions and may even be more stringent than is required. It is unclear how cannabis offences would be dealt with from the information gathered together, as the literature

suggests each case is dealt with individually. However, the evidence suggests Sweden operates a strict legality principle and that prosecution is likely (Zila, 2001).

France: heavy penalties but prosecutorial discretion

The current framework for French drugs law is established by the Law of 31 December 1970. This prohibits a range of drugs including cannabis. The thinking behind it is that trafficking offences should receive heavy penalties, whilst use of drugs should be treated more leniently; the law emphasises that drug-using offenders should receive treatment wherever possible, rather than punishment (ELDD, 2002). The response to trafficking offences was further toughened up in 1992 (New Penal Code (NPC)). Illicit substances are defined in the Decree Law of 22 February 1990, which allocates each illicit drug into one of four categories; cannabis is a List 1 drug, along with heroin and other drugs of dependence. Cannabis offences thus carry the same maximum penalties as the equivalent heroin offences (ELDD, 2002).

Unusually, the French criminal law creates an offence of *use*, but not of possession. This means that offenders must be charged either for use or trafficking. This has led to some confusion as possession of drugs could theoretically be tried as a trafficking offence (article 222-37 of the NPC) (Bisiou, 2001).

The offence of cultivation is specified under article 222-35 of the NPC (Bisiou, 2001). No distinction is made between small- and large-scale cultivation; the offence is treated as a form of trafficking and can attract a maximum sentence of 20 years' imprisonment or a heavy

fine. Given the gravity of cultivation charges, prosecutors sometimes proceed against minor cases using lesser charges, such as use or possession with intent to supply (Bisiou, 2001). Judicial authorities make decisions about the penalty for offences according to the nature of the substance, quantity, previous criminal records etc., and may choose not to prosecute the offender, although the implementation of the law varies between areas and courts (ELDD, 2002).

At the time of writing there were press reports that the French government was planning to toughen up its cannabis laws, to get to grips with the increasingly widespread practice of home cultivation (e.g. *Guardian*, 27 December 2002). Even without any such changes, the French policy on drugs is in accordance with UN conventions in their most prohibitive interpretation (Bisiou, 2001).

6 Discussion and conclusions

This report has offered a snapshot of cannabis cultivation and policy responses to cultivation in England and Wales. It has summarised how the law treats cultivation in seven other countries. It has also examined the extent to which our domestic legislation is constrained by the United Nations conventions to which Britain is a signatory. The key points to emerge are as follows:

On cannabis cultivation in England and Wales

- Domestic cultivation of cannabis is widespread, and may now account for around half of cannabis consumed in England and Wales.
- It is difficult to assess what proportion of domestically cultivated cannabis is grown for commercial purposes and what proportion is grown for personal use.
- The distinction between social growers and commercial growers is a blurred one, as people can make significant amounts of money simply by selling to their friends.
- Home growers often supply cannabis to people for medical purposes.

On criminal justice responses to cultivation

- There is extensive variation in the police response to cultivation.
- Those cultivating for personal use may be cautioned or prosecuted, and prosecutions are sometimes done under charges of production and sometimes under charges of cultivation.
- Where there is a commercial element to social growing, prosecution, conviction and imprisonment are likely.

On the United Nations conventions

- The UN conventions require signatory countries to prohibit cultivation of cannabis under the criminal law.
- They clearly permit cultivation for personal use to be dealt with by means other than punishment – such as treatment, counselling and education, and simply through warnings.
- Though they are less explicit on this point, they do not appear to rule out dealing with cultivation for personal use as a minor offence, dealt with by administrative penalties (such as ‘ticketing’ or fixed fines).
- There is progressively less scope for such strategies the more that cultivation is carried out on a commercial basis.

On approaches in seven other countries

- Several countries in practice if not in law equate cultivation for personal use with possession.
- Several have decriminalised – or plan to decriminalise – cultivation for personal use.
- Some countries impose administrative penalties (ticketing offenders, or imposing fixed-penalty fines) whilst others offer warnings, counselling or treatment.
- The response to social and social/commercial growers varies widely.
- One of the seven countries – Switzerland – is actively considering virtual legalisation and regulation of cultivation.

Public debate about cannabis use in England and Wales has become increasingly intense over the last two years. However, this debate has focused mainly on the offence of possession, and in particular on dealing with possession offences in ways that are financially and socially less costly. The Home Secretary has announced that cannabis will be reclassified as a Class C drug – although the Criminal Justice Bill that went before Parliament at the time of writing included provision to preserve the power of arrest for possession. It is expected that the majority of those found in possession of cannabis will have the drug confiscated and will be given an on-the-spot warning. Only those whose possession is in some way ‘aggravated’ will face arrest, followed by a caution or prosecution. In announcing reclassification, the Home Secretary has proposed a twin-track approach, where lenience towards users is counterbalanced by tougher action against dealers.

So far, little consideration appears to have been given to cultivation. Given the scale of domestic cultivation, it is important that policy on this should be developed in harness with the changes in the law as it relates to possession. There are four sets of issues to consider:

- how cultivation for personal use should be treated
- how non-commercial social growers should be treated
- how commercial cultivation should be treated
- whether medical growers deserve special treatment.

Cultivation for personal use

We have seen that the 1988 UN Convention brackets together cultivation for personal use and possession for personal use.¹ Provided that it can be established that cultivation is indeed for personal use, it is hard to see how a defensible distinction could be made. There would be little logic in a law that treated the cultivation of a cannabis plant for personal use as a more serious offence than the possession of cannabis from the same plant once it had been harvested.

There are grounds for treating cultivation for personal use akin to possession. It is less unacceptable that cannabis users should grow their own cannabis than that they should be exposed to a market populated by criminal entrepreneurs.

There are some arguments for treating cultivation for personal use more severely than possession. These are mainly ones of deterrence – this argument is mainly put forward by those that believe greater toleration of cultivation will promote higher levels of use. However, home growing is so readily concealable, so widespread, and so socially acceptable amongst young people, that any increase in deterrent threat is unlikely to affect the perceived risk unless the police devote totally disproportionate resources to the detection of cultivation offences. Whilst the financial costs in doing this would be heavy, they would be outweighed by the social costs associated with the tough enforcement of a law which commands little sense of legitimacy amongst young people.

If it is agreed that cultivation for personal use and possession should be treated equally, there is a strong case for ensuring, upon

reclassification, that cultivation for personal use does not usually result in arrest, followed by prosecution or caution. Rather, it should be treated as possession for personal use: the plant should be confiscated, and the grower given an on-the-spot warning. The legislative route for achieving this would depend on precisely how the reclassification is managed. As discussed in Chapter 3, the approach that is being taken by the government to possession offences is to retain powers of arrest for possession through an amendment in the Criminal Justice Bill, but to issue guidance to the police that offences of possession should not generally result in arrest. If this path is followed, then the guidance simply needs to include parallel provisions about cultivation for personal use.

Another option – that now seems unlikely – would be to follow the recommendation of the Independent Inquiry (Police Foundation, 2000), and to make both possession and small-scale cultivation of cannabis non-arrestable offences. In this case it would make sense to amend section 6 of the MDA, to make cultivation of cannabis a non-arrestable offence, whilst leaving section 4 (production) unchanged.

Whichever route is taken, there would be a need to establish criteria by which cultivation for personal use could be defined. There are several approaches here. The simplest is to specify the maximum number of plants that will be regarded as being for personal use. This was the approach recommended by the Independent Inquiry. This has the virtue of clarity and simplicity. Another equally simple and robust approach is to specify the weight below which any cannabis is regarded as being for personal use. It will be remembered that the Canadian proposals will involve ‘ticketing’ offenders if

they are found cultivating, or in possession of, 30 grams of cannabis or less.

The drawback to setting thresholds, whether in terms of weight or number of plants, is that wherever the threshold is set, it will result in arbitrary distinctions and thus in inequities. A threshold of 30 grams, for example, would mean that people who cultivated 35 grams of weak-strain cannabis would be criminalised, whilst those with a 25 gram strong-strain plant would be let off with a warning. Similar considerations apply to a threshold framed in terms of plant numbers. In the case of a weight threshold, people whose cultivation was discovered at an early stage in the cycle might be treated more leniently than those who were about to harvest. There would be perverse incentives on people to use strong strains. It would be inevitable that some sole-use growers would fall on the upper side of the boundary line, and some social or commercial cultivators would fall on the lower side. It is also likely that small-scale commercial cultivators would exploit the rigidities of the system, growing no more than one or two plants of strong-strain cannabis in any one location at any one time.

Less crude criteria for defining cultivation for personal use could be set. One might try to estimate potential yield and the frequency of that yield in relation to individual consumption patterns. With hydroponic cultivation, one might set the threshold according to the wattage of lighting used and the number of lights. The difficulty would still remain that the objective criterion relating to weight or strength of the crop would always remain a poor indicator of the intentions of the cultivator in growing cannabis in the first place.

The alternative is to follow the South

Australian approach and leave decisions about personal use to the discretion of the police, allowing their decisions to be tested if necessary in court. There is already a precedent for this in the way in which the police, the CPS and the courts distinguish between offences of possession and those of possession with intent to supply. Discretionary decisions about cultivation for personal use could obviously be structured through detailed guidance. The problem here is that police judgements about the intentions of cultivators would never be fully transparent; they would often be simply wrong; in some cases it would be impossible to say whether they were right or wrong – where, for example, a grower simply hadn't decided whether to give away any of the crop; and in practice only a small minority of these decisions would be exposed to judicial assessment, in contested court cases. There would be a clear risk that the police might use their discretion in ways that bore down disproportionately and unfairly on specific groups or individuals.

If the government decides to distinguish between cultivation for personal use and larger-scale cultivation, there is a choice to be made between an objective yardstick such as number of plants or weight, or a reliance on police discretion. Both sorts of approach would result in a degree of inequity, but at least the inequities that relate to decisions based on plant weight or numbers are predictable and comprehensible. However, if decisions are left to police judgement, the lack of transparency and the disparities that would inevitably arise between cases, and across police force areas, would be damaging to public confidence in the police.

Whatever approach is taken to cultivation for personal use, there is a strong case for

clarifying the appropriate charges to be brought for cultivation for personal use. Some police forces charge suspects with production, under section 4 of the MDA; others charge under section 6, as cultivation of cannabis. Production is a trafficking offence, and as such carries a seven-year mandatory sentence on the third conviction. Charging offenders under section 6 seems to us to be more appropriate.

Were the government to accept that offences of cultivation for personal use should be treated on a par with possession offences, there are consequential implications for the handling of 'premises' offences under section 8 of the MDA. If on-the-spot warnings for small-scale home growing were to become the norm, it would be perverse to treat anyone who had allowed their premises to be used for the offence to be dealt with more severely. It is unclear why the government sees a need to increase the maximum penalty for section 8 offences for Class B and C drugs from five to 14 years; it can only be hoped that this is not translated into tougher action against those who permit cultivation for personal use on their premises.

Non-commercial social cultivation

We saw in Chapter 2 that an important group of home growers are those who grow on a non-commercial basis for their friends as well as themselves. Indeed this group is likely to be larger than sole-use growers. Should they be treated differently from the latter? The constitutions of several of the countries we examined provide some justification for this, in requiring offenders to cause or risk harm to others besides themselves before a criminal prosecution can be mounted. If cannabis use is

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judged to carry risks (as it surely does), there is a case for discouraging people from social cultivation more intensively than from sole-use cultivation.

In the abstract this argument may seem compelling. But policy on social cultivation needs to be developed with the realities of the current cannabis market firmly in view. For those who wish to smoke it, cannabis is readily available, whether domestically cultivated or imported. Government policy needs to be set pragmatically and with realism. Arguably, the aim of policy in this field should be to push the entire drugs market into the least unacceptable shape, rather than to eradicate all aspects of it. Policy has to be set in recognition of the limited leverage it has over drugs markets. Cannabis markets are likely to have fewest unacceptable consequences when they are least populated by criminal entrepreneurs. Criminal entrepreneurs will maximise prices, and will have a vested interest in getting their cannabis clientele to buy other more profitable – and riskier – drugs.

One of the few effective policy levers available to government to destabilise the cannabis market operated by criminal entrepreneurs is greater toleration of social cultivation. Tolerating home growing to a greater degree would make this segment of the market thrive. This would then serve as a wedge between a significant proportion of users and criminally sophisticated suppliers. Those who relied on home cultivation would have reduced exposure to people selling more damaging drugs. A thriving home-grown market might also serve to depress prices, and thus tend to drive out criminal entrepreneurs.

If this argument is accepted, then there are several possible policy responses. One would be

to create offences of social supply of cannabis, and of cultivation for social supply of cannabis, as recommended by the Independent Inquiry, in which social supply would be defined as the non-commercial (or non-profit-making) distribution of cannabis to non-strangers. It would be a matter for judgement how much more seriously such offences would need to be treated than one of cultivation for personal use only. Another option would be to leave the legislation on cultivation unchanged, but to issue guidance to criminal justice agencies on how to deal with social cultivation. The Independent Inquiry proposed that where people were prosecuted for supply offences, there should be a defence of ‘social supply’. A similar defence could be instituted for charges of cultivation or production, under section 4 or 6 of the MDA.

The police and CPS would need advice on the appropriate charge to use for social supply – section 6 of the MDA rather than section 4 – and guidance on the circumstances in which a caution is more appropriate than a charge. The courts would need advice from the Lord Chief Justice or from a Court of Appeal judgment (or, in time, from the Sentencing Guidelines Commission) on appropriate sentencing levels. Sanctions might range from a small fine for social cultivation which fell just above the threshold for personal use to a much larger fine for offences falling just below the threshold for commercial cultivation.

If arrangements of this sort were to work, it would be important to establish a means of differentiating between social supply and more serious offences, and to offer at least indicative guidance as to the threshold between social and commercial cultivation. This would inevitably

raise the same sorts of difficulty as for cultivation for personal use. A threshold number of plants or a threshold weight of cannabis seized has the advantage of simplicity, but would only differentiate very imprecisely between social/non-profit and social/commercial cultivators.

On the other hand, the problems in making such judgements on a case-by-case basis would be just as intense. Police officers or prosecutors or magistrates or juries would be required to answer a hypothetical question about whether a cannabis crop would have been sold for profit or simply to recover costs, had it not been seized. Inevitably commercial cultivators would run a defence of social supply whenever they were arrested. These difficulties strengthen the case for applying a simple but transparent weight limit below which *any* seizure is deemed to relate to social cultivation. A threshold might be set at 250 grams (or about nine ounces), for example. This would result in a degree of tacit toleration of social/commercial growers whose operation was on a small scale, of course.

Thus one might end up with a set of procedures where any seizure of herbal cannabis weighing less than an ounce was deemed to relate to cultivation for personal use, and would result in confiscation and on-the-spot warning. Any seizure relating to plants weighing more than one ounce but less than nine ounces would be deemed to relate to cultivation for social supply; this might result in confiscation, and a caution or a fine. The offender would of course have the right to contest in court a charge of social cultivation, arguing that the seized plants were all for personal use.

These arrangements would be perfectly consistent with the UN conventions. Whether

they are consistent with the government's determination to crack down on cannabis dealing is another matter.

Commercial cultivation

We identified two sorts of commercial cultivator: those who restricted their operation to supplying their friends – but nevertheless did so to make money; and those who operated on a larger scale, as a straightforward commercial venture. The government's decision to reclassify cannabis has very direct implications for the handling of personal and social cultivation, and we have discussed these at some length. Whether it implies any change in the response to commercial or even semi-commercial cultivation is questionable, however.

There are extraneous factors for reconsidering the official response to commercial cultivation. First, there are considerations about public confidence in justice. It will be remembered from Chapter 2 that the Court of Appeal upheld a 21-month prison sentence for an offence involving the cultivation of around 400 grams (or 14 ounces) of cannabis for sale to friends (*R v. Lawrence Dibdin*, 1999). The appellant had no relevant previous convictions; his motivation was commercial, though his activities were restricted to supplying his friends. It is unknown whether the general public would regard this sentence as consistent with the recent statement by the Lord Chief Justice that domestic burglars should receive a non-custodial sentence on their first conviction. However, our guess is that most people – and especially most young people – would regard the sort of social/commercial cultivation that featured in this case as a less

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serious offence than domestic burglary.

Second, it is important that policy takes account of the interactions between different elements of the illicit drugs market. A tough response to commercial cultivators of cannabis will drive out the risk-averse, and leave the market to more criminal and risk-tolerant operators. It may prompt a convergence of Class A drug markets and cannabis markets. There is a case for driving as large a wedge as possible between the cannabis market and those involving the sale of heroin and crack. This has been the rationale for the Dutch system for several years. It is understandable that the government should package its proposals for reclassification of cannabis alongside a crackdown on dealing. However, a sensible drugs policy would aim to treat cannabis suppliers *less* like suppliers of Class A drugs, not more like them.

Medical growers

We have said little in this discussion about those who grow cannabis for use by those with medical conditions, such as multiple sclerosis, whose symptoms are alleviated by the drug. The government's current proposals associated with reclassification do little to address the problems of the medical grower. The difficulty is that the proposed British approach is one of 'grudging toleration' in which people are warned, and have their cannabis confiscated. If one accepts to any degree the arguments for using cannabis for medical purposes, then the confiscation of cannabis grown or held for these purposes must seem simply mean-spirited.

In the middle term it obviously makes sense – as is being done – to test and develop cannabis

plants or cannabis-based drugs for medical prescription. Once this has been done, the government would need to move cannabis from Schedule 1 of the MDA Regulations to Schedule 2, thus permitting supply and possession for medical purposes. Rescheduling in this way was proposed by the Independent Inquiry.

In the meantime, considerable numbers of people will continue to cultivate and use cannabis for medical reasons. In doing so, they will continue to resent with some intensity a criminal justice system that they regard as unfair in its treatment of medical cultivation of cannabis. Recognising that there would be a time lag before plants with consistent dosages might be developed, the Independent Inquiry recommended that in the intervening period there should be a defence of 'duress of circumstances on medical grounds' for possession, cultivation and supply of cannabis. There would appear to be a strong case for moving beyond this position, to state explicitly that possession and cultivation of small amounts of cannabis for medical purposes will be tolerated.

We discussed in the previous chapter how Canada has already introduced a system that permits medical cultivation. So too have a number of American states. What is needed is some arrangements whereby the possession of small amounts of cannabis (whether bought or cultivated) can be medically sanctioned. The Canadian approach provides a model.

Beyond reclassification: reassessing the UN conventions

The previous chapter showed that the British proposals are fairly cautious in relation to some

European and Commonwealth countries. They involve little more than reducing some of the harms associated with criminalising cannabis use. Possession and cultivation will remain illegal; when discovered, cannabis will be confiscated, and the offenders will be warned. Prosecution will remain an option for persistent offenders and for those whose possession is defined as 'aggravated'. The proposals fall well within the terms of the UN conventions.

We have no doubt that there are risks associated with cannabis use, just as there are risks associated with alcohol use (WHO, 1997; Witton, 2001b). There are problems associated with short-term toxicity – not least those to do with driving whilst under the influence of cannabis. Heavy use can occasionally trigger psychiatric problems, and very persistent use can result in dependence. The favoured mode of delivery – smoking – poses cancer risks and can cause other respiratory problems. Any rational society would want to contain these risks as much as possible. The policy issue is not *whether* the risks should be contained, but *how best to do so*.

The UN conventions are premised on the view that countries' criminal justice systems provide them with the best means of doing so. The emphasis is on prohibition backed by criminal sanction. Increasingly, however, developed countries are reaching the conclusion that the costs in criminalising cannabis use outweigh the benefits, and that other approaches need to be developed. Regulation, coupled with education and harm-reduction measures, looks a promising option. At present the Swiss proposals travel furthest down the road to legalisation of cannabis.

This paper has examined how policy on

cultivation of cannabis might be developed in order to be consistent with the government's current stance towards possession offences. The British proposals – if they were adapted to include the suggestions in this chapter about cultivation – probably take us as far as possible with the room for manoeuvre that the conventions allow. However, there are already examples of greater toleration of cannabis in some parts of the country. For example, at least one police division has an informal agreement not to raid 'coffee shops' where cannabis is openly sold and smoked.² There are also British-based organisations which sell cannabis using the Internet. Toleration of these activities by the authorities arguably places Britain in contravention of its treaty obligations.

If there is political will to move further away from prohibition and to permit these experiments in toleration, then there are several options. One is to 'denounce' – or withdraw from – the conventions. This is a legal possibility, but it is not practical politics for Britain. The country has a long track record in encouraging compliance with a wide range of UN conventions, and a volte-face on drug issues would be politically embarrassing. There are also more recent and specific factors, relating to the 'war on terror'. The alliance with the US government is premised in large part on the assumption that this can help contain US action to fall within United Nations mandates. Denouncing the drugs conventions would hardly help support this enterprise.

Another option is to exploit the 'opt-out clauses' in the conventions that allow a country to deviate from their requirements if these conflict with its constitutional principles. We have seen that Portugal justifies its form of

decriminalisation in this way. Whilst this strategy may be practical politics for some countries, critics will ask why it has taken almost half a century to discover that the UN conventions conflict with their constitutions. The argument is particularly difficult to deploy for countries like Britain, where constitutional principles are not formalised or codified to any significant degree.

This leaves a final option, which is to encourage a review of the conventions. The quinquennial United Nations General Assembly Special Sessions (UNGASS) provide opportunities for this. At the last one, in 1998, the prohibitionist approach to drug control was endorsed. The publication of this report will coincide with the 2003 UNGASS. It is unlikely that governments that are uneasy with the straitjacket imposed by the conventions will feel able to voice their concerns, though campaigning NGOs (non-governmental organisations) will certainly do so. However, there are also countervailing pressures. There could well be attempts by the 're-affirm' camp to pass a resolution designed to slow down the trend towards cannabis decriminalisation. Realistically this leaves the 2008 UNGASS as the arena in which more pragmatic approaches to drug control might be considered. To make any progress on this front there would need to be a powerful coalition of European, Commonwealth and Latin American countries (see TNI, 2002).

Further research and monitoring

Too many research reports end with a self-serving call for further research, and we very reluctantly add to the list. However, the conclusions of this report rest on a knowledge base that is unacceptably slight. We need to know how the cannabis market is evolving and how it responds to enforcement. We certainly need to know what proportion of known cultivators are cautioned, what proportion are charged with section 4 (production) offences and what proportion are charged with section 6 (cultivation) offences.

We have argued that the aim of policy should be to maximise the degree of separation between markets for highly risky drugs and those for drugs with lower risks. Given that current policy, at least at a rhetorical level, is to crack down hard on cannabis dealing, then it is essential to monitor whether this policy is actually turned into reality. If so, it is of particular importance to monitor whether this triggers a convergence of Class A markets and cannabis markets in the way that we have predicted. Important indicators of market convergence include the proportion of offenders arrested for trafficking offences whose record includes both Class A and cannabis offences, and regular reports from cannabis buyers about the range of drugs that their seller can supply.

Notes

Chapter 1

- 1 The drugs legislation as framed by the Misuse of Drugs Act 1971 applies to England, Wales and Scotland. However, the legal system and arrangements for policing in Scotland differ from those south of the border. This report primarily addresses policy for England and Wales but has obvious relevance for the rest of Britain. In particular, the United Kingdom is signatory to the UN conventions on illicit drugs.

Chapter 2

- 1 Official price calculations are likely to overestimate street prices. The baseline figure (one-eighth) is likely to be factored up to provide the costing for an ounce. However, when users buy in larger quantities, the price usually decreases. It is not uncommon to buy an ounce of resin for under £60.
- 2 Poor-quality cannabis is often known as 'soap' or 'soap bar'.
- 3 The germination of seeds would count as cultivation, but the simple possession of seeds is not prohibited by the MDA, as the seeds are not 'cannabis' as defined by section 37.
- 4 Cannabis bush is a weaker strain of herbal cannabis.
- 5 Personal use here includes the sharing of cannabis spliffs with friends, but *not* giving cannabis to friends for their subsequent use.
- 6 Dibden [2000] 1 Cr. App. R. (S.) 64.

Chapter 3

- 1 Although the seven-year sentence is mandatory, sentencers retain some discretion to impose lighter sentences in exceptional cases.
- 2 Section 4(2)(b) creates an offence of 'being concerned in the production' of a controlled drug that another person was producing. If the seller of seeds or equipment could be shown to be aware of the buyer's intention to cultivate, then they would be in breach of the law.
- 3 The court accepted that the offender sold cannabis only to friends, but it was equally clear that his motivation was commercial.
- 4 Young people will still be dealt with through reprimands, final warnings and prosecution under the provisions of the Crime and Disorder Act 1998.

Chapter 4

- 1 The conventions are readily accessible at <http://www.incb.org/e/conv>.
- 2 However, the conventions do not allow for the status of the offence to be downgraded from criminal to administrative.
- 3 As will be discussed later, *statutory* instructions to prosecutors to avoid prosecution verges on legalisation.

Chapter 5

- 1 Many common law countries, as well as France, the Netherlands and a few other continental countries, allow extensive

- discretion about enforcement decisions to both police and prosecutors. In Switzerland, police and prosecutors expose themselves to criticism or even disciplinary proceedings for failing to proceed with viable cases whereas those of German-speaking tradition are less comfortable with prosecutorial discretion (Killias, 2001).
- 2 Article 2 of Law 30/2000 states: '1 – The consumption, acquisition and possession for own consumption of plants, substances or preparations listed ... in the preceding article constitute an administrative offence' (<http://www.ipdt.pt>).
 - 3 The argument is that 'criminalisation clashes with "basic concepts of our legal system", expressed in the above-mentioned principles of subsidiarity or ultima ratio of criminal law and proportionality, whose corollaries are the sub-principles of necessity, appropriateness and prohibition of excess' (Portuguese National Drug Strategy, 1999).
 - 4 The Australian Capital Territory (ACT) also introduced a similar scheme in 1992 whereby cannabis growers caught growing fewer than six plants were given an administrative fine of \$A100 – so that they did not have a criminal record – and the plants were confiscated.
 - 5 There are reports on cannabis websites that the number of plants was reduced to three in 1999, restored to ten plants and reduced to one plant in 2002 (e.g. www.hemp.on.net).
 - 6 In practice, the Canadian police may well exercise discretion when faced with borderline cases.

Chapter 6

- 1 Especially in Article 3, paragraphs 2 and 4.
- 2 However, the owners were informed that if the police received any complaints regarding the café, they would take action.

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