

# Cannabis Control in Canada: Options Regarding Possession

A Canadian Centre on Substance Abuse policy discussion document prepared by the CCSA National Working Group on Addictions Policy<sup>1</sup>

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## INTRODUCTION

This policy discussion document details the considerations in choosing the most effective policy response to the problems caused by cannabis use, with a particular focus on the legislative options regarding cannabis possession. Information is presented regarding current trends in rates and patterns of use, and the potential health consequences of use are summarized. The paper then considers experiences with alternatives to criminal prohibition and various options regarding cannabis possession offenses.

There is little doubt that cannabis use adversely affects the public health and safety of Canadians. Cannabis users are subject to a variety of adverse health consequences, summarized below, and cannabis use is associated with poor work and school performance. While there is little evidence that cannabis is a causal factor in crimes of violence or crimes of acquisition, cannabis is implicated in a small but significant number of motor vehicle accidents. Furthermore, recent national and provincial surveys indicate that the use of cannabis is increasing among youth.

At the same time, the development of an effective response to the potential problems caused by cannabis use is hampered by funding cutbacks to prevention programming and difficulties faced by the criminal justice system in enforcing drug laws aimed at deterring use. The current law prohibiting cannabis possession and trafficking appears to have had a very limited deterrent effect, yet it entails high social costs and diverts limited police resources from other pressing needs.

It should be noted from the outset that the existence of health and safety risks *per se* does not dictate the legislative response to cannabis use. The goal of cannabis policy is not only to minimize the harm resulting from use, but also to minimize the costs and harm that may result from attempts to control use. This entails a balancing of considerations. Attempts to minimize harms of cannabis use through rigorous enforcement can increase enforcement costs and adverse individual consequences of criminalization. While reduced enforcement and more lenient sanctions against users would address the latter concerns, this could potentially result in increases in cannabis use and the consequent health and safety risks. Thus, the key issue concerns selecting the legislative option which provides the best balance between reducing levels of cannabis-related harm and at the same time reducing enforcement costs and adverse individual consequences.

By the same token, the existence of medical uses for cannabis does not dictate the legislative response to recreational cannabis use. While there is increased evidence that cannabis has medical uses, the following paper focuses on issues involved in how to best control recreational cannabis use and prevent problems associated with such use. There are mechanisms by which THC may be made available for legitimate medical purposes, regardless of the policies in place regarding non-medical use. This policy discussion document only concerns non-medical use of cannabis.

## Extent and health effects of cannabis use

After caffeine, alcohol, tobacco and certain prescription medications, cannabis is the most popular psychoactive drug in Canada. It is the most commonly used illicit drug in Canada. In 1994, 7% of Canadians 15 years and older reported using cannabis during the previous year, and roughly one in four had used it at some point in their lives. Reported rates of cannabis use are particularly high among street youth, ranging from 66% in Halifax to 92% in a Toronto street youth study.

The rate of cannabis use has remained relatively stable for the past 10 years. For example, the yearly prevalence was 7% in both of the last two national alcohol and drug surveys in 1989 and in 1994. However, cannabis use in the previous year increased from 6.5% in 1989 to 8.4% in 1995 in Alberta. There are also recent indications that cannabis use is increasing among youth. A 1997 student survey in Manitoba found rates of use in the prior year increased from 32% in 1993 to 44% in 1997. Nova Scotia also experienced a substantial increase, from 17% in 1991 to 32% in 1996. Current use among students in New Brunswick increased from 17% in 1992 to 21% in 1996. A recent student survey conducted by the Addiction Research Foundation in Ontario found 23% of students reported use in the past year in 1995, up from 13% in 1993. The trend toward increased rates of young users in Ontario is consistent with trends in the US and Europe.

Most use of cannabis in Canada is sporadic or experimental. According to the 1995 Ontario student survey, less than 2% of students had used it daily in the previous four weeks. In a 1994 survey of Ontario adults, less than 1% reported daily use. Even weekly use is relatively uncommon-about 2% of the total sample had used cannabis at least once a week in the last year and more than 80% of users had used cannabis less than 40 times in the past year.

There is currently considerable misinformation about the physiological consequences of cannabis use. Although occasional use often occurs with relatively little or no

subjective negative effects for the user, it is a myth to consider cannabis to be a benign drug. There is no doubt that heavy cannabis use has negative health consequences. The most important of these are the following:

### ***Respiratory damage***

Marijuana smoke contains higher concentrations of some of the constituents of tar than tobacco smoke, is hotter when it contacts the lungs, and is typically inhaled more deeply and held in the lungs longer than tobacco smoke. Research has shown a link between chronic heavy marijuana use and damage to the respiratory system similar to that caused by tobacco. The adverse respiratory effects of cannabis are, of course, related to smoking as a means of ingestion, and do not occur when cannabis is eaten or otherwise ingested.

Long-term marijuana smoking is associated with epithelial injury to the trachea and major bronchi, and with alterations in cells mediating the immunological response of the lungs—changes which leave the lung open to injury and infection. Heavy, habitual consumption has been linked with bronchitis. Although a link between marijuana smoking and cancer has not been firmly established, there are case reports of cancers of the aerodigestive tract in young adults with a history of cannabis use. These are of concern because such malignancies rarely occur under the age of 60.

### ***Physical co-ordination***

Cannabis impairs co-ordination. This brings with it the risk of injury and death through impaired driving and other accidental causes. North American studies of blood samples from drivers involved in motor vehicle crashes have consistently found that positive results for THC, the main psychoactive compound in cannabis, are second only to alcohol. However, blood levels of THC do not necessarily demonstrate that the driver was intoxicated at the time of the accident. In addition, many drivers with cannabis in their blood have also been found to be intoxicated with alcohol.

Inferences drawn from the THC levels in drivers involved in motor vehicle accidents are, however, consistent with experimental studies of driving. These studies have shown that cannabis can impair components of driving behaviour such as braking time and attention to traffic signals. However, subjects appear to realize that they are impaired, and compensate where they can. For example, they slow down and focus their attention on the driving task when they know a response will be required. Such compensation is not possible when unexpected events occur, or if the task requires continued attention. In many respects the effects of cannabis on driving behaviour are similar to those of alcohol, but there are differences. For example, in one study alcohol was found to increase risk-taking behaviour by drivers, while cannabis tended to decrease it. The combined use of alcohol and cannabis is particularly likely to cause impairment.

### ***Pregnancy and post-natal development***

Cannabis use by women who are pregnant may affect the fetus. Maternal cannabis use has been linked to a shortened gestation period and low-birth-weight infants. The longer-term, post-natal consequences of maternal cannabis use appear to be subtle. Recent research has suggested that exposure to cannabis *in utero* can affect the mental development of the child in later years. For example, up to three years of

age there appear to be no consequences of maternal cannabis use. By four years of age, offspring of regular cannabis users showed reduced verbal ability and memory, and by school age these deficits were supplemented by decreased attentiveness and increased impulsiveness in children of the heaviest users.

### ***Memory and cognition***

The effects of cannabis on memory appear to be variable, and may depend on the test that is used. Overall, the effects seem to be modest. However, the question of whether chronic use would produce serious impairments of memory, particularly if such use occurs during development, is not yet answerable. Studies of adult cannabis users, conducted several decades ago, suggested that the drug has little effect on cognitive function. More recent research has demonstrated that long-term use produces deficits in the ability to organize and integrate complex information, and this may arise from attentional or memory impairments.

### ***Psychiatric effects***

Cannabis use has been linked to a number of psychiatric effects. The most significant of these is the cannabis dependence syndrome. Cannabis-dependent individuals will continue to use the drug despite adverse consequences to physical, social and emotional health. Impairment of behavioural control in dependence, and accompanying cognitive and motivational impairments, can adversely affect productivity at work or at school. The risk of developing dependence increases with use; it has been reported that one-third to one-half of those who use cannabis daily for protracted periods of time may become dependent.

Other psychiatric disorders have been linked to cannabis. There is clearly an association between cannabis use and schizophrenia, but it is not yet known whether cannabis use precipitates schizophrenia, or whether the association reflects the increased use of drugs, including cannabis, as a consequence of schizophrenia. In addition, clinical observations have identified a range of so-called "cannabis psychoses" following heavy use of the drug, which remit within days of abstinence. The higher the concentration of THC, the higher the risk of psychiatric complications. However, these disorders have not been well defined, and it is not clear that they are different from the effects of high doses of the drug. Some of these cases may arise if pre-existing psychotic problems are unmasked by drug use. Reference has also been made to the existence of an "amotivational syndrome" resulting from extensive cannabis use. While there is reasonable evidence that heavy use of cannabis can affect motivation, the production of a syndrome with identifiable symptoms outlasting the period of drug use and withdrawal remains to be demonstrated. This question may have been clouded by studies of the effects of cannabis use on educational performance in adolescents in which individuals most likely to use the drug may have lower motivation to succeed academically.

### ***Other adverse health consequences***

Research has shown that cannabis can also alter hormone production, and affect both the immune system, and cardiovascular function. The implications of these findings for human health are unclear at present.

## Law enforcement and costs

Canada's enforcement of criminal drug control laws is relatively vigorous by international standards. In 1995, there were a total of 63,851 drug offenses under the Narcotic Control Act (NCA) or Food and Drug Act (FDA), or 220 offenses per 100,000 population. Of this drug offense total, 45,286 offenses were cannabis offenses, and of these 31,299 were cannabis possession offenses. In other words, 70% of all drug offenses that occurred in Canada in 1995 were offenses involving cannabis. As many as 49%-approximately half of all drug offenses-were offenses for the simple possession of cannabis. After a period of decline in the 1980s in the total of all cannabis offenses, as well as in cannabis possession offenses as a proportion of all drug offenses, these figures started to climb again from 1991 on. Offenses involving cannabis are the only category of drug offenses which have increased consistently since 1991, and they are therefore responsible for the overall increase in drug offense numbers since 1991 in Canada. Thus, enforcement of laws against cannabis possession-typically involving small amounts for personal use-now results in half of all Canadian drug offenses. While the enforcement costs are generally higher for trafficking and offenses involving other illicit drugs, clearly cannabis possession cases consume a considerable amount of law enforcement resources, diverting limited resources from other pressing needs.

Cannabis possession enforcement varies considerably among regions in Canada, and particularly with regard to urban and rural areas within regions. For 1995, the cannabis possession offense rate per 100,000 for British Columbia is 246, compared with 92 for Ontario and 52 for Quebec, with the rest of the provinces somewhere around the Canadian average of 104. Differences in rates of use would only account for a small part of these regional variations. Furthermore, differences in rates of use would not account for the generally lower rates of enforcement in particular urban areas. The cannabis possession offense rates in Toronto (41) and in Montreal (43) are lower than their respective provincial averages. On the other hand, the rate in Vancouver (260) exceeds the overall rate in British Columbia.

There is only imprecise data on the number of cannabis possession cases which result in custodial sentences. The most recent available data from Statistics Canada indicate that 14% of the Canadian prison population was in jail for drug offenses in 1991, but it is not clear what kind of drugs and what kinds of offenses contributed to this figure. Data on offenses, charges and convictions are not maintained and computerized by drug offense or drug category type, so that justice process and outcome data are not available for systematic large-scale analysis. When records were kept by drug category, the data indicate that cannabis possession offenders were infrequently sentenced to jail or prison; however, given the high number of possession cases, cannabis offenders constituted a significant number of persons given custodial sentences. In 1981, 5.2% of cannabis possession offenders received a custodial sentence, 64.8% received a fine and 25.3% were discharged.

More recent data suggest the same pattern may still exist. Information from the 1993/94 Adult Criminal Court Statistics Survey of nine Canadian jurisdictions (not including BC, Manitoba and New Brunswick) indicates that of 23,160 drug possession charges under Section 3 of the Narcotic Control Act (covering all scheduled substances including cannabis), 15% received a prison sentence (not including one-day jail sentences), 18% a probationary sentence, 59% a fine, and 8.2% another disposition (including discharges) as primary sentences. The average prison sentence

for this charge category in the nine jurisdictions surveyed was 41 days. There is considerable provincial variation in prison sentences for drug possession charges—the percentage of such charges receiving a jail sentence in Nova Scotia and PEI stands at 3%, compared with 20% in Ontario. Similar disparities are found with regard to the average length of prison sentences, which is nine days in Prince Edward Island compared with 55 days in Alberta. These figures include both cannabis and other illicit drug offenders, but it is likely that the same provincial and urban/rural differences occur with regard to cannabis possession cases.

It has been estimated that approximately 2,000 Canadians are sent to jail every year for cannabis possession. Data are lacking regarding the nature of these cases. It is likely that many of these cases involve more serious charges which were reduced to simple possession after plea-bargaining. Also, a considerable number of these offenders are likely to have been jailed for defaulting on payment of a fine. The potential effects of fine defaulting are thus an important issue to consider with cannabis possession sentences, especially since this offense often involves individuals from the lower socio-economic stratum or people not capable of paying substantial fines. Apart from the adverse consequences to the individual offenders of being jailed, considerable costs are involved for governments—the *per-diem* costs of incarceration in Canada are approximately \$150.

It has been conservatively estimated that the dollar costs of illicit drug enforcement to Canadian police, courts and correctional services total more than \$400 million a year. The costs of police investigations, court processing and custodial sentences are generally considerably higher for cases involving trafficking or illicit drugs other than cannabis. Nonetheless, as cannabis possession accounts for approximately half of drug charges, it is clear that cases involving possession of cannabis for personal use account for a substantial proportion of these costs.

In addition to costs to the justice system, cannabis possession cases involve other social costs such as the adverse consequences to the individual offenders. These include employment impacts, economic impacts due to payment of fines and lost time from work, and family discord caused by arrest. Even in cases involving a non-custodial sentence, there are serious and often poorly understood criminal record consequences for the offense. Over the past three decades, there have been more than a million arrests under Canada's drug laws, and there are hundreds of thousands of Canadians who have a criminal record as a result of a conviction for possession of small amounts of cannabis. There is little empirical data on the impact of a criminal record, but the list of potential adverse consequences is extensive. Anyone with a criminal record is at a disadvantage in subsequent criminal proceedings: a criminal record may influence a police officer to lay a charge; it may be grounds for denying bail; it can influence a crown attorney to proceed by way of indictment rather than by summary conviction; it may be raised to impeach the suspect's credibility as a witness; and it may result in more severe penalties as dictated by various criminal statutes. Entry to Canada or other countries may be denied to persons with criminal records and a drug conviction may prevent a landed immigrant from obtaining Canadian citizenship. Under federal and provincial statutes, a criminal record may be used to show a lack of good moral character and deny an offender employment in certain professions, such as law, architecture, veterinary medicine, psychology, ambulance driving, auctioneering, real estate and law enforcement.

A number of attempts have been made to mitigate the consequences of a drug offense, including the provision of pardons and discharges for offenders. Unfortunately, the discharge provisions of the Criminal Code and the pardon provisions of the Criminal Records Act provide very limited relief. A discharged offender is legally deemed not to have been convicted and can honestly deny a criminal conviction, but he or she would have to answer affirmatively to any of the following questions: "Have you ever been arrested, found guilty of, pled guilty to, or been sentenced for a criminal offense?" In a Toronto study of cannabis offenders, the likelihood of being unemployed or suffering other adverse consequences was unrelated to whether or not the offender received a discharge. Pardons also provide only very limited relief. A pardoned offender cannot truthfully deny having a criminal record-the pardon merely "vacates" a conviction or discharge, meaning it negates legal disabilities which automatically result under federal law. Thus, a pardoned offender regains the right to run for political office or apply for certain federal government jobs. However, a pardon has no impact on local or provincial police files or media data. In any case, most drug offenders are unaware of the pardon provisions and few have availed themselves of them.

## International treaty obligations

Canada is a signatory to the three main international drug treaties, namely the 1961 Single Convention, the 1971 Convention on Psychotropic Substances, and the 1988 Vienna Convention. The fundamental principle of the Conventions concerning the regulation of cannabis (and other scheduled drugs) is that the signatories are obliged to establish control systems that prohibit the availability of and trade in such drugs, except in specified circumstances such as for medical purposes. However, the treaties are ambiguous on the control of cannabis for personal or recreational use. The key questions that remain are (a) whether personal cannabis use and possession for such purposes are included in the punitive requirements and provisions, (b) whether the punishments need to be "criminal" in nature, or if other deterrents or diversion procedures may be used instead, and (c) whether and how exceptions to these requirements can be made, e.g., in response to national constitutional principles, or for special forms of cannabis, including use for medicinal purposes.

The parameters for personal cannabis use and possession are set out by the 1988 Vienna Convention which says in Article 3(2):

"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 offense under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention...."

However, in regard to these offenses, Article 3(4)d provides:

"The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offense established in accordance with paragraph 2 of this article [above], measures for treatment, education, aftercare, rehabilitation or social reintegration of the offender."

The International Narcotic Control Board (INCB) explicitly points to the fact that in terms of use and possession of controlled drugs, there is room for modified or alternative measures to punishment by the criminal law:

"None of the conventions requires a party to convict or punish drug abusers who commit such offenses even when they have been established as punishable offenses. The party may deal with drug abusers through alternative non-penal measures involving treatment, education, after-care, rehabilitation or social integration" (1992:4).

And a recent publication of the UN International Drug Control Programme noted that none of the

"three international drug Conventions insist on the establishment of drug consumption *per se* as a punishable offense. Only the 1988 Convention clearly requires parties to establish as criminal offenses under law the possession, purchase or cultivation of controlled drugs for the purpose of non-medical, personal consumption, unless to do so would be contrary to the constitutional principles and basic concepts of their legal systems. None of the Conventions requires a party to convict or punish those who commit such offenses, even when they have been established as punishable; alternative measures may always substitute for criminal prosecution." (UNDCP, *World Drug Report*, New York: Oxford University Press, 1997:185).

These parameters, set by the International Conventions and their executive enforcement bodies, thus imply in the Canadian context that there is a clear requirement to make the personal possession of cannabis a legal offense *de jure*, sanctioned with a form of legal punishment. There is also a requirement that illicit drugs, including cannabis, be subject to seizure and confiscation. However, the statute, procedure, or punishment does not necessarily have to be criminal in nature, and there is no *per se* exclusion of the wide realm of sanctions (including intermediate or conditional sanctions, such as fines, discharges, probation, or conditional and diversion sentences) available in contemporary legal practice. Moreover, education, treatment or social reintegration measures can clearly be substituted for any legal sanction.

## Deterrent effects of the current law

The Controlled Drugs and Substances Act (Bill C-8), proclaimed in 1997, provides maximum sentences of \$1,000 fine and/or six months imprisonment for first-time cannabis possession offenders, and double the amounts for repeat offenders under summary conviction proceedings. The extent to which the current law succeeds in deterring cannabis use is not clear.

With regard to the "general" deterrent effects of the law, i.e., the impact of the law in preventing cannabis use in the general population, it would appear that the enforcement of current law against cannabis possession has a very limited deterrent effect. Cannabis use remains high despite a high level of enforcement and there is no clear relationship between changes in enforcement and levels of illicit drug use over the past several decades. This is perhaps not surprising, as general deterrence is unlikely if actual and perceived risks of apprehension are low, as in the case of cannabis use. Cannabis users are likely to believe that their behaviour will go



undetected and there is empirical support for this belief. Despite the best efforts of enforcement agencies, less than 1% of cannabis users-and a much lower percentage of drug use incidents-are detected in Canada every year. This doesn't necessarily mean, however, that the current law has not had any general deterrent effect, because rates of cannabis use might have been even higher under a less punitive policy. Nonetheless, the available evidence suggests that the general deterrence has not been substantial. In surveys, most nonusers cite health concerns as the reason for their abstention rather than concerns about legal sanctions.

Similarly, conclusive evidence is lacking but it appears that the law also does not have a substantial "specific" deterrent impact, i.e., the deterrent effect on subsequent cannabis use by convicted offenders. The Le Dain Commission found no evidence that the law had a significant "specific" deterrent effect on drug-taking behaviour following conviction, and a study of convicted cannabis offenders in Toronto found little or no impact on subsequent use. One year after being found guilty of cannabis possession, 92% of the drug users reported continuing use, typically at levels similar to those reported at the time of conviction. The few who ceased using were experimental or infrequent users before being arrested.

## Experience with alternatives to criminal prohibition

In light of the high costs of enforcement, the adverse individual consequences of criminalizing users, and the lack of evidence of a substantial deterrent effect, a number of jurisdictions have attempted to shift the control of cannabis possession or use away from the use of criminal law and/or to provide less severe punishment for users.

In the 1970s, 11 American states established a civil penalty model for possession of small quantities of marijuana. Most of these provisions applied to first-time offenders only, and imposed a fine of an amount between \$100 and \$250 on offenders. For example, the 1976 Moscone Act in California converted the possession of up to an ounce of cannabis from a felony into a misdemeanor. Enforcement was diverted to other illicit drugs and trafficking. It was estimated that the conversion of the cannabis offense saved the state of California \$1 billion each subsequent year in criminal justice expenditures. Follow-up evaluations of similar measures in other states similarly concluded that the removal of jail as a sentencing option reduced costs to enforcement and the justice system without leading to increases in cannabis use. While there were modest increases in cannabis use in many of these states following the change in law, there were greater increases in cannabis use in those U.S. states which retained more severe penalties. Thus, there was little change in the long-term trend in cannabis use, and there were no changes in cannabis use that could be attributed to the reduction of penalties.

Starting around the mid-1970s, the Dutch drug control system allowed its public prosecutions department a broad discretion not to prosecute cannabis possession offenders in circumstances "where prosecution would have no beneficial effect in reducing the risks involved". The effect of this discretionary prosecution policy has been that the possession of small amounts of cannabis is tolerated in legal practice by Dutch authorities, while law enforcement has continued to concentrate on large-scale traffickers. In recent years, most German states have followed the Dutch model, whereby prosecutors withdraw the majority of charges against simple cannabis possession offenders. In none of these jurisdictions has there been

evidence of an increase in cannabis use since these measures were put into place, and cost savings to the government have been considerable.

In the early 1990s, two Australian jurisdictions-South Australia and the Australian Capital Territory-converted the simple possession of cannabis (less than 25 grams or five plants) into a civil offense through the introduction of a "Cannabis Expiation Notice" (CEN) system. The offenses are not criminally prosecuted or penalized, there are no criminal consequences, and the maximum fine is \$150 (it should be noted that the consumption of cannabis in public places continues to be a criminal offense). However, offenders are required to go to court if they fail to pay the CEN fine within 60 days. From the available evaluations of the CEN system, the following conclusions emerge. First, there is no evidence of a differential change in cannabis use rates in CEN jurisdictions, as compared with rates reported from jurisdictions where the CEN model was not in effect. Second, the CEN system seems to have resulted in a considerable "threshold-lowering" effect in drug enforcement, since the CEN was procedurally easier to issue and sustain than an arrest. Thus, despite stable use rates, the number of offenses recorded by enforcement authorities increased disproportionately after the introduction of the CEN system. Furthermore, there have been substantial changes in offender characteristics. Enforcement under the CEN scheme seems to focus disproportionately on the male, and especially the lower socio-economic status and/or aboriginal, offender. An argument can thus be made that the conversion to civil penalty in Australia produced a sort of a "net widening" effect with an increased class bias. Also, a considerable number of CEN recipients-approximately 45%-fail to expiate (i.e., pay the fine), and thus eventually end up before the courts.

Finally, the Australian state of Victoria recently converted its cannabis control law so that the criminal offense remains and a court appearance is likely, but the court is directed to record a small fine without recording a conviction.

### Legislative options to reduce the adverse consequences of a cannabis possession charge

Thus far, information has been presented on rates and patterns of cannabis use, the associated health and other adverse consequences, and the problems involved in attempts to deter use via criminal sanctions. There are clearly major direct and indirect costs of the current control of cannabis possession through the criminal law with little evidence of a substantial benefit in reducing cannabis use. Considerable leeway is provided regarding policy options under the international drug control treaties and a number of other jurisdictions have attempted to reduce penalties for cannabis possession. In the Canadian context, the following policy alternatives should be considered. This is not an exhaustive list of potential legislative options. For example, it does not include various proposals for removal of the possession offense (decriminalization) or the provision of a legal source of supply of cannabis for users (legalization). It is limited to those options involving less dramatic changes to the current law which would retain the offense of cannabis possession (although not necessarily as a criminal offense) but reduce the penalties and other consequences to offenders.

## **1. "Fine Only" Option under the Controlled Drugs and Substances Act**

The "fine only" option refers to measures which would amend the Controlled Drugs and Substances Act to exclude jail as a sentencing option for simple cannabis possession, making a fine the maximum penalty for cases involving simple possession of cannabis. This modification would maintain simple cannabis possession as a criminal offense so the criminal record consequences would remain. However, the experience in other jurisdictions which have reduced the maximum penalty for cannabis possession to a fine indicates that there would be considerable savings to the criminal justice system with little, if any, impact on rates of cannabis use. It would also be in keeping with public opinion-in the most recent national survey, 27% of respondents stated that possession of cannabis should be legal and another 42% believed it should be against the law, but subject to either no penalty or a fine only. Only 17% favoured the current law whereby cannabis possession offenders are subject to a potential jail sentence, and the remaining 14% expressed no opinion. Thus, approximately two thirds (69%) of Canadians now favour removal of jail as a sentencing option for cannabis possession.

## **2. "Civil Offense" Option**

The "civil offense" option is another type of "fine only" option. It refers to proposals to exempt the offense of simple possession of cannabis from the criminal law by converting it into a civil offense with a fine under the recently enacted federal Contraventions Act. The "civil offense" option differs from the first option in at least two significant ways. First, the inability to pay a fine under the Contraventions Act does not lead to imprisonment. Second, a civil violation under the Contraventions Act is deemed not to be a criminal offense and a conviction for violating this Act is not deemed to constitute a criminal record. This would take the offense out of the criminal system, while ensuring some uniformity in the handling of cannabis possession offenses across Canada. It is expected that such a reform would result in a considerable savings in legal costs and other criminal justice system expenses, and the criminal record consequences of a cannabis possession offense would be ameliorated, if not entirely eliminated. A difficulty with this option is that some provinces have yet to agree on a Memorandum of Understanding with the federal government concerning the Contraventions Act, and the Controlled Drugs and Substances Act might have to be amended to provide an exact penalty for cannabis possession cases that are handled in this fashion.

## **3. "Diversion" Option**

This option refers to measures designed to specify and encourage use of post-trial diversion mechanisms for simple cannabis possession offenders. In particular, Bill C-41 (the "Alternative Sentencing" law) presents a number of such options, including "conditional sentences". Under such provisions, the offender's criminal sentence is suspended while the offender complies with alternative sentencing conditions, e.g., community service or treatment. A variety of concerns, however, arise with such an option. First, the use of such diversion alternatives falls into the discretion of the courts. Therefore, diversion in many instances does not reduce the workload of the court system, but rather increases it. Second, the alternative sentencing provisions in many instances are not proportionate to the severity of the offense; many conditional sentences involve a lengthy period of criminal probation. Third, all conditional sentences automatically result in a criminal conviction and record. Fourth,

widespread diversion should only be adopted once clear and justifiable guidelines are developed regarding the most appropriate circumstances in which to apply diversion, and agreements are reached with treatment agencies regarding workable treatment protocols that have a reasonable chance of helping the diverted offenders. If treatment is deemed appropriate, the treatment modality should be determined by the agency providing the treatment. Conditional sentences for drug offenders often involve mandatory treatment, which is of dubious effectiveness and may not be appropriate for the majority of cannabis offenders who are not regular users. Concerns have been expressed that the diversion option would combine the worst features of both criminal and non-criminal control, increasing costs with little or no benefit. Diversion to treatment or community service is certainly desirable in many cases, particularly for heavy cannabis users and those involved with other illicit drugs, but it does not appear to be a solution to the problems of the current law.

#### **4. "Devolution to Provinces" Option**

This option refers to measures which would devolve the jurisdiction of the control of cannabis possession to the provinces. The federal government could legislatively concede jurisdiction over the control of cannabis possession to the provinces, and put the onus on them to establish suitable control schemes (as, for example, have been devised for various drinking and driving offenses) in their own jurisdictions. Such a devolution could be justified by emphasizing the primary nature of drug use control as a health-and thus a provincial-task, as implied in a Supreme Court decision in the early 1980s. On the one hand, this devolution model might lead to locally more acceptable solutions (e.g., the provinces might allow for municipal control schemes in the form of by-laws, as for tobacco smoking restrictions), as is currently discussed for the control of street prostitution. On the other hand, such a model would potentially undermine the equity and consistency principles of the law in Canada, due to discrepancies among provincial or local regulations. In particular, it could lead to jurisdictional disputes and problems regarding international treaty obligations if a province interpreted this measure as enabling it to remove all cannabis possession offenses and/or provide a legal source of supply. Without knowing the nature of the control systems that would replace the current arrangements, it is not possible to judge the relative merits of this option. However, it is clear that this option should only be adopted with the full agreement of the provinces and once the provinces have developed a coordinated strategy to take on this responsibility, including legislation that would be required for implementation.

## **RECOMMENDATIONS**

### **1. The severity of punishment for a cannabis possession charge should be reduced. Specifically, cannabis possession should be converted to a civil violation under the Contraventions Act.**

The current law involves considerable enforcement and other criminal justice costs, as well as adverse consequences to individual drug offenders, with little evidence of a substantial deterrent impact on cannabis use, and at best marginal benefits to the public health and safety of Canadians. As a minimal measure, jail should be removed as a sentencing option for cannabis possession. The available evidence indicates that removal of jail as a sentencing option would lead to considerable cost savings without leading to increases in rates of cannabis use. Punishing cannabis possession with a fine only would be consistent with current practices and prevailing public opinion. The vast majority of Canadians no longer favour jail sentences for simple possession of cannabis. Among the various options aimed at reducing the severity of a cannabis possession offense, discussed above, the civil violation option offers the best opportunity to achieve the most appropriate balance between the need to reduce the harms associated with cannabis use and the need to restrain the costs and harms involved in attempts to control use. Consistent with international treaty obligations, this option would retain a cannabis possession offense, albeit subject to a fine only. At the same time, it would remove cannabis possession from the criminal law, preclude imprisonment due to failure to pay fines, and eliminate the criminal record consequences of a conviction. However, this option will be limited to those Canadian provinces which have agreed on a Memorandum of Understanding with the federal government concerning the Contraventions Act. These provinces might serve as pilot jurisdictions to test the effectiveness of a civil violation option for cannabis offenders.

### **2. Diversion of cannabis offenders to treatment or community service should be available, particularly for heavy users and those experiencing problems from the use of other illicit drugs, but diversion will not resolve the difficulties involved in cannabis enforcement.**

The widespread diversion of cannabis offenders would do little, if anything, to reduce the burden that cannabis cases place on Canadian courts, nor would it have any impact on the criminal record consequences for offenders. Diversion is clearly desirable in many cases and should be available, but it is not the solution to the difficulties caused by cannabis cases. Accused persons should only be diverted to mandatory treatment following a complete assessment, and if treatment is deemed appropriate, the treatment modality should be determined by the agency providing the treatment.

### **3. Any change in law should be subject to systematic evaluation of its impact on cannabis use and indicators of cannabis related harm, as well as impacts on criminal justice practices and costs.**

A well designed, comprehensive study should be implemented to evaluate the impact of any policy or legislative change, in order to assess the need for further action and inform future policy directions.

**4. Any change in law which reduces the consequences for a cannabis offense should be accompanied by a strong message that this does not signal less concern with the potential problems caused by cannabis use.**

In particular, the change in law should be coupled with prevention programmes to address potential problems that may arise, and to indicate the government's continuing concern with the prevention of cannabis use and problems associated with it.

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