

IMPROVING CANNABIS REGULATION IN WESTERN AUSTRALIA: LESSONS FROM PROHIBITORY, DECRIMINALISATION AND LEGALISATION REGIMES

Paris McNeil

I INTRODUCTION

Cannabis, often termed marijuana, is the most widely used illicit drug in Australia,¹ and around the world.² In 2019, 36% of surveyed Australians had used cannabis in their lifetime,³ and 11.2% of surveyed Western Australians over the age of 14 had used cannabis in the previous 12 months.⁴ In 2018-2019, there were 71,151 cannabis arrests in Australia with 91% being consumer arrests (the amount of cannabis was deemed to be for personal use).⁵ Cannabis is a depressant drug which affects brain function and produces a sensation of being high when a person consumes dried cannabis buds or leaves.⁶ Recreational cannabis is currently legal in Canada, Georgia, South Africa, Malta, Mexico, Uruguay, and twenty-one states in the United States. Similarly, with 41% of Australians supporting the legalisation of recreational cannabis for personal use in 2019,⁷ reforming WA's cannabis legislation is a topical issue which has not been sufficiently explored in empirical literature.

In Western Australia ('WA'), it is illegal to possess, cultivate or supply cannabis in any form.⁸ WA attempts to deter cannabis use by imposing the most punitive drug laws in Australia with the maximum statutory penalty for possessing cannabis with intent to sell or supply being a fine of \$100,000 or 25 years' imprisonment, or both.⁹ However, many jurisdictions, and some Western Australian politicians are echoing the sentiment that a punitive approach to cannabis

¹ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2019* (Drug Statistics Series No 32, 2020) viii ('*National Drug Strategy Household Survey 2019*').

² World Health Organization, 'Cannabis', *Alcohol, Drugs and Addictive Behaviours Unit* (Web Page) <<https://www.who.int/teams/mental-health-and-substance-use/alcohol-drugs-and-addictive-behaviours/drugs-psychoactive/cannabis>>.

³ *National Drug Strategy Household Survey 2019* (n 1) 34.

⁴ 'Drug Use Statistics', *Drug Aware* (Web Page) <<https://drugaware.com.au/get-the-facts/drug-use-statistics/>>.

⁵ Australian Criminal Intelligence Commission, *Illicit Drug Data Report 2018-19* (Report, September 2020) 56 ('*Illicit Drug Data Report 2018-19*').

⁶ Alcohol and Drug Information Service South Australia, 'What is Cannabis?', *SA Health* (Fact Sheet, March 2017)

<<https://www.sahealth.sa.gov.au/wps/wcm/connect/eeb691004f50b5aeaccfed330cda8a00/What+is+cannabis+%2800499%29+2017.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-eeb691004f50b5aeaccfed330cda8a00-nwLINF5>>.

⁷ *National Drug Strategy Household Survey 2019* (n 1) 74.

⁸ *Misuse of Drugs Act 1981* (WA) ss 6-7.

⁹ *Ibid* s 34: intent to sell or supply is presumed if a person possesses over 100g of cannabis or more than 10 plants.

enforcement causes significant harm to individuals and the community, and that a new approach is required.¹⁰ The Australian National Drug Strategy suggests governments should apply a harm minimisation approach to drug policy; making drug use a public health, opposed to a criminal law issue.¹¹ WA's punitive prohibition results in high enforcement costs; a burden on prisons and courts; unrealised economic benefits; a lack of effective public health campaigns; and social costs arising from interactions with crime, and subsequently, the criminal justice system.¹²

A Scope of Article

This paper examines the efficacy of WA's current cannabis policy and provides recommendations on how the regime can be reformed to improve public health, economic and social outcomes by conducting a comparative analysis of WA's punitive prohibition framework, decriminalisation in the Australian Capital Territory ('ACT') and legalisation regimes in the United States and Canada. This research paper advocates for WA to take steps to implement a less punitive cannabis regime, drawing lessons from the ACT and ultimately, legalise recreational cannabis using a harm-minimisation framework. Legalising cannabis and regulating consumption in a manner similar to alcohol or tobacco will likely minimise social costs, promote public health outcomes, and create economic benefits of cannabis which are currently lost to the black market. However, legalisation is currently not feasible as the federal prohibition on cannabis sales renders any state legalisation regime invalid under s 109 of the *Commonwealth Constitution*. Until cannabis sales are legal at a federal level, legalisation will be untenable in WA. The legalisation of cannabis for medicinal purposes, while an important topic, is beyond the scope of this paper.

II HARM MINIMISATION APPROACH

¹⁰ Nicole Lee and Alison Ritter, 'Australia's recreational drug policies aren't working, so what are the options for reform?', *The Conversation* (Web Page, 2 March 2016) <<https://theconversation.com/australias-recreational-drug-policies-arent-working-so-what-are-the-options-for-reform-55493>>; Nathan Hondros, 'Are WA's 'Tough on Drugs' Politicians about to Drop their Rhetoric?', *WA Today* (online, 22 October 2018) <<https://www.watoday.com.au/politics/western-australia/are-wa-s-tough-on-drugs-politicians-about-to-drop-their-rhetoric-20181022-p50b70.html>>; Tomas Fitzgerald, Submission No 058 to Select Committee into Alternate Approaches to Illicit Drug Use and its Effects on the Community, Legislative Council, *Submission to Legislative Council Select Committee into Alternate Approaches to Illicit Drug Use and its Effects on the Community* (11 January 2019) 13, 26.

¹¹ *National Drug Strategy Household Survey 2019* (n 1) 2.

¹² Fitzgerald (n 10) 21.

This section describes the benefits of applying a harm minimisation approach to drug policy, a model which successfully reduced drug related harm in Portugal.¹³ A harm minimisation approach to drug use involves applying public health policies to reduce the harms associated with drugs, rather than merely reducing drug use,¹⁴ making drug use a public health, rather than a criminal justice issue. The Australian National Drug Strategy supports a harm minimisation approach to drug policy, thereby shifting the focus of drug policy from criminal justice responses to health interventions including treatment and support.¹⁵ A health-based approach is currently the dominant method for reducing social harms arising from drug use as individuals can seek help with less stigma and discrimination, education campaigns about harms and risks can be facilitated, and harms associated with a criminal conviction can be mitigated.¹⁶ As fines or sentences of imprisonment are unlikely to address the social issues that drive drug use, a health-focused approach will likely have greater success in reducing drug related harm.¹⁷

A Utility of the Harm Minimisation Approach

The harm minimisation approach was successful in Portugal where in 2001 all illicit drugs were decriminalised, allowing users to more easily seek treatment and support services, vastly improving health outcomes.¹⁸ Portugal's increased education and support also reduced usage rates and drug related harm.¹⁹ Similarly, the utility of this framework is demonstrated in Australia's approach to alcohol regulation. Possession and consumption of alcohol is not a criminal offense despite undesirable health and social harms related to excessive drinking; instead of imposing criminal sanctions, the government focuses on prevention, treatment and education to reduce demand for alcohol and its related harms.²⁰ The Legalise Cannabis WA Party uses a grape analogy to explain its approach to cannabis policy: you can grow grapes, make those grapes into wine and share the wine with your friends and family without a licence,

¹³ Drug Policy Alliance, *Drug Decriminalization in Portugal: A Health-Centred Approach* (Fact Sheet February 2015) 1 ('*Drug Decriminalization in Portugal*').

¹⁴ Select Committee into Alternate Approaches to Reducing Illicit Drug Use and its Effects on the Community, Legislative Council of Western Australia, *Help, Not Handcuffs: Evidence-Based Approaches to Reducing Harm from Illicit Drug Use* (Final Report, November 2019) 64 [5.41] ('*Help, Not Handcuffs*').

¹⁵ *National Drug Strategy Household Survey 2019* (n 1) 2.

¹⁶ *Help, Not Handcuffs* (n 14) 72 [6.25].

¹⁷ *Ibid* 69 [6.11].

¹⁸ *Drug Decriminalization in Portugal* (n 13) 1.

¹⁹ *Ibid*.

²⁰ *Help, Not Handcuffs* (n 14) 70 [6.12].

however, if you want to sell that wine, you require a licence, must meet quality control standards and pay the applicable fees.²¹

B Harm Minimisation in WA

The Western Australian Alcohol and Drug Interagency Strategy 2018-2022 purports to apply a harm minimisation framework for the regulation of alcohol and drugs.²² The framework comprises three pillars: supply reduction (reducing the supply of illicit drugs and regulating the supply of licit substances), demand reduction (preventing uptake and supporting users with evidence-based treatment) and harm reduction (reducing the adverse social and economic costs of substance use to individuals and communities).²³ Despite including harm minimisation principles in its drug strategy, WA continues to push its ‘tough on drugs agenda’,²⁴ creating a system whereby resources are allocated to punishing drug use, rather than preventing the drug-related harms. In WA, the largest cohort of prisoners, comprising 22% of all people incarcerated in WA, are people whose most serious offence is possession or supply of a prohibited substance.²⁵ WA has the highest per capita rate of drug incarceration in Australia, with more people in prison for drug offences than Victoria, a state with three times WA’s population.²⁶ WA’s Alcohol and Drug Interagency Strategy suggests a harm minimisation framework should underpin all discussions relating to WA’s cannabis policy,²⁷ however, this intention has not manifested in current drug policy. To obtain the benefits of a harm minimisation framework, the WA government should implement a coherent, evidence-based regime which weighs the relative harms of the substances it purports to regulate with the harms arising from regulation.

²¹ ‘About the Legalise Cannabis WA Party’ *Legalise Cannabis WA Party* (Web page) <<https://lcwparty.org.au/>>.

²² Government of Western Australia Mental Health Commission, *The Western Australian Alcohol and Drug Interagency Strategy 2018-2022* (Report, 2018) 15 (‘*The Western Australian Alcohol and Drug Interagency Strategy 2018-2022*’).

²³ *Ibid.*

²⁴ Jacob Kagi, ‘Festival Pill Testing off the Table as Premier Mark McGowan Favours ‘Tough on Drugs Approach’, *ABC News* (online, 2 February 2019) <<https://www.abc.net.au/news/2019-02-02/pill-testing-off-the-table-in-wa-despite-drug-deaths/10771770>>; Nathan Hondros, ‘Are WA’s ‘Tough on Drugs’ Politicians about to Drop their Rhetoric?’, *WA Today* (online, 22 October 2018) <<https://www.watoday.com.au/politics/western-australia/are-wa-s-tough-on-drugs-politicians-about-to-drop-their-rhetoric-20181022-p50b70.html>>; Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 November 1980, 4235, (William Hassell).

²⁵ Fitzgerald (n 10) 12.

²⁶ *Ibid* 12-13.

²⁷ *The Western Australian Alcohol and Drug Interagency Strategy 2018-2022* (n 22) 15.

III WA'S CANNABIS REGIME

A History of the Regime

In 1895, the British government commissioned an extensive cannabis report which made recommendations that have been echoed in modern harm minimisation and cannabis commentary.²⁸ The Indian Hemp Commission Report stated that 'total prohibition of the cultivation of the hemp plant for narcotics, and of the manufacture, sale, or use of the drugs derived from it, is neither necessary nor expedient in consideration of their ascertained effects, the prevalence of the habit of using them, the social and religious feeling on the subject, and of the possibility of its driving the consumers to have recourse to other stimulants or narcotics which may be more deleterious'.²⁹ The report also argued that cannabis policy should be based on control and restriction to suppress excessive use and constrain moderate use within acceptable limits,³⁰ reasoning adopted in WA's harm minimisation strategy.³¹

In 1925, the League of Nations (apparently unaware of the findings in the 1895 report) drafted the International Opium Convention which banned opioids, coca, cannabis and their derivatives for recreational use.³² Although cannabis was not originally part of the convention, Egypt with backing from Turkey suggested that cannabis was as dangerous as opium and should be subject to the same controls.³³ In response to cannabis' inclusion in the convention, the Australian Health Department director stated that there was no need to ban cannabis.³⁴ Despite cannabis being one of the most frequently prescribed medicines in Australia in the 1930s, after increased pressure from the United Kingdom and the United States to conform with the obligations, all Australian states made recreational use illegal and medicinal products were phased out by the 1960s.³⁵ The prohibition was accompanied by an aggressive scare campaign, with cannabis depicted as 'a drug that causes insanity, criminality, and death — the most violence-causing

²⁸ Transform Drug Policy Foundation, *How to Regulate Cannabis* (Report, No 2, 2016) 217 ('*How to Regulate Cannabis Report*'). For example, *The Western Australian Alcohol and Drug Interagency Strategy 2018-2022* (n 22) 15; *National Drug Strategy Household Survey 2019* (n 1) 2.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ For example, *The Western Australian Alcohol and Drug Interagency Strategy 2018-2022* (n 22) 15; *National Drug Strategy Household Survey 2019* (n 1) 2.

³² Paul Gregoire, 'Vote to Legalise Cannabis in the WA Election: An Interview with LCWA's Leo Treasure', *Sydney Criminal Lawyers* (Blog Post, 10 February 2021) <<https://www.sydneycriminallawyers.com.au/blog/vote-to-legalise-cannabis-in-the-wa-election-an-interview-with-lcwas-leo-treasure/>> 1.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

drug in the history of mankind'.³⁶ The scare campaign ran rife in Australia and introduced the word 'marijuana' which was described as 'an evil sex drug that causes its victims to behave like raving sex maniacs'.³⁷

B *Misuse of Drugs Act 1981* (WA)

In WA, cannabis is regulated under the *Misuse of Drugs Act 1981* (WA) ('*MoDA*') which provides for two main offences: possession of a prohibited plant or substance,³⁸ and possession with intent to sell or supply.³⁹ The latter offence occurs when a person possesses over 100g of cannabis⁴⁰ or more than 10 plants,⁴¹ and has a statutory maximum penalty of a \$100,000 fine or 25 years' imprisonment, or both.⁴² Possession with intent to sell or supply is tried summarily with a maximum statutory penalty of a \$2,000 fine or two years' imprisonment or both⁴³ where the offender possesses less than 500g of cannabis⁴⁴ or less than 20 plants.⁴⁵ The *MoDA* was enacted to 'substantially target criminals and those who seek to profit'⁴⁶ from drug use. Parliament recognised that targeting addicts would not reduce the problem,⁴⁷ rather, the legislation aimed to 'cut off market supply'.⁴⁸ However, many consumers of illicit drugs are charged and subject to these harsh penalties,⁴⁹ meaning the *MoDA* is not effectively fulfilling its purpose to target suppliers who are motivated by profit. Similarly, the *MoDA* is a blunt instrument and does not consider the relative harms of the various prohibited substances, meaning the penalty for possessing cannabis is the same as for methamphetamine, a more harmful drug.⁵⁰ Likewise, the *MoDA* is arbitrary in the prescribed quantity of drugs which give rise to the presumption of intent to sell or supply⁵¹ as there has been little attempt to scale and standardise the quantities into usual doses. For example, an intention to sell or supply is deemed

³⁶ *How to Regulate Cannabis Report* (n 28) 220.

³⁷ Nick Kilvert, 'Hemp is an eco-friendly material, but anti-marijuana campaigns a century ago set the Australian industry back', *ABC News* (online, 24 January 2020) <<https://www.abc.net.au/news/science/2020-01-24/hemp-cannabis-growing-australia-industry/11788030>>.

³⁸ *Misuse of Drugs Act 1981* (WA) ss 6(2) and 7(2).

³⁹ *Ibid* ss 6(1) and 7(1).

⁴⁰ *Ibid* sch 5.

⁴¹ *Ibid* sch 6.

⁴² *Ibid* s 34.

⁴³ *Ibid* s 34.

⁴⁴ *Ibid* sch 3.

⁴⁵ *Ibid* sch 4.

⁴⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 November 1980, 4235, (William Hassell).

⁴⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 August 1981, 2376, (William Hassell).

⁴⁸ *Ibid*.

⁴⁹ *Illicit Drug Data Report 2018-19* (n 5) 13.

⁵⁰ David Nutt et al, 'Drug Harms in the UK: a Multicriteria Decision Analysis' (2010) 369 *The Lancet* 1558.

⁵¹ *Misuse of Drugs Act 1981* (WA) s 11.

at around 200 usual doses of cannabis whereas a person can possess 250 usual doses of heroin before the stronger penalties apply.⁵²

Since the 1960s, Australian drug policy has relied heavily on enforcement measures, however, during the following forty year period, drug markets and violent crime increased,⁵³ suggesting tough penalties were not curbing use. Conversely, between 1993-2019, Australian crime rates (recorded as the number of victims for homicide, robbery, unlawful entry with intent, motor vehicle theft and other theft) declined,⁵⁴ and drug use data indicates that less people used illicit substances in 2019 than in 2001,⁵⁵ however, these trends are likely unrelated to a tough on drugs criminal justice system response. Additionally, non-users of cannabis more frequently cite cannabis' adverse health consequences than harsh penalties as the reason for abstaining.⁵⁶ Moreover, the penalties do not appear to have any significant impact on subsequent cannabis use as many offenders who received an expiation notice or a conviction stated that they would continue to use cannabis, even if they were caught again.⁵⁷ Moreover, in 2016, the ACT had the least punitive drug enforcement regime and the lowest overall rate of cannabis use at 8.4% of the population.⁵⁸ Although the demographics of the ACT differ when compared to states with higher cannabis use statistics, the ACT's low rate and lower incidences of associated harms suggests that a less punitive regime may illicit better health and social outcomes than a prohibitive approach. If the purpose of WA's punitive approach to drug enforcement is to deter—or at least reduce—cannabis use, the statistics suggest the *MoDA* is ineffective.⁵⁹

C Cannabis Infringement Notice Scheme in WA

In 2004, cannabis was decriminalised in WA under the *Cannabis Control Act 2003* (WA), meaning that while cannabis remained illegal, offences concerning personal cannabis possession did not result in a criminal penalty.⁶⁰ If a person possessed less than 30g of cannabis

⁵² Fitzgerald (n 10) 9-10.

⁵³ *Help, Not Handcuffs* (n 14) 12 [3.7], citing Alex Wodak, 'The Abject Failure of Drug Prohibition' (2014) 47(2) *Australian and New Zealand Journal of Criminology* 190.

⁵⁴ Australian Bureau of Statistics, '27 years of Recorded Crime – Victims Data', *ABS* (Web Article, 16 September 2020 <<https://www.abs.gov.au/articles/27-years-recorded-crime-victims-data#cite-window1>>.

⁵⁵ Australian Institute of Health and Welfare, 'Illicit Drug Use', *AIHW* (Web Article, 2 September 2022) <<https://www.aihw.gov.au/reports/illicit-use-of-drugs/illicit-drug-use>>.

⁵⁶ Eric Single, Paul Christie and Robert Ali, 'The Impact of Cannabis Decriminalisation in Australia and the United States' (2000) 21(2) *Journal of Public Health Policy* 157, 160; *Help, Not Handcuffs* (n 14) 26 [3.63].

⁵⁷ Single, Christie and Ali (n 56) 165; National Drug Strategy Committee, *The Social Impacts of the Cannabis Expiation Notice Scheme in South Australia* (Summary Report, 4 May 1998) 26.

⁵⁸ Australian Institute of Health and Welfare, National Drug Strategy Household Survey 2019; *data table S.34*, in *Drug Statistics series 2020*: Canberra.

⁵⁹ *Help, Not Handcuffs* (n 14) 13 [Finding 8]; Fitzgerald (n 10) 13.

⁶⁰ *Help, Not Handcuffs* (n 14) 68 [6.4].

or up to 2 plants, they would be issued a Cannabis Infringement Notice ('CIN') meaning they could undertake a cannabis education session or pay a civil penalty in lieu of a criminal conviction. This decriminalisation framework employed a harm minimisation ideology and treated cannabis use as a public health, rather than a criminal law policy issue. Then Premier Geoff Gallop stated the decriminalisation regime was successful and met its intended goals:⁶¹ the scheme mitigated the adverse effects of a criminal conviction, reduced pressure on WA's criminal justice system and WA's cannabis usage rate did not increase.⁶² Regrettably, the public was not educated on the difference between decriminalisation and legalisation meaning the legislation likely did not fulfil any deterrent purpose.⁶³

In 2010, the decriminalisation model was overturned by the Barnett government who stated that 'more people...will not only experiment with, but also use or perhaps cultivate cannabis, become addicted, move on to harder drugs and die' and that 'young people will lose their lives because of this legislation'.⁶⁴ The *Cannabis Law Reform Act 2010* (WA) implemented the Cannabis Intervention Requirement Scheme ('CIR'), which is not dissimilar to the CIN, which allows a person over the age of 14 who is caught with less than 10g of cannabis or a smoking implement containing detectable traces of cannabis to attend a Cannabis Intervention Session with a counsellor instead of receiving a criminal conviction.⁶⁵ Adults are only entitled to receive one CIR notice whereas children aged between 14-17 can receive two.⁶⁶ A person who commits a subsequent minor cannabis offence will be prosecuted. In 2018-2019, WA arrested 10,463 individuals for cannabis offences, with 1,546 people receiving CIR notices.⁶⁷ In 2017-2018, 79% of the CIR notices issued by WA Police were expiated through treatment.⁶⁸ Diversion away from the criminal justice system and towards health interventions is an empirically-supported method of reducing social and economic harms associated with drug use.⁶⁹ However, Western Australians are the least likely in Australia to be diverted away from

⁶¹ Rebecca Turner, 'WA and the ACT both decriminalised marijuana, but they have gone in very different directions since', *ABC News* (online, 27 September 2019) <<https://www.abc.net.au/news/2019-09-27/cannabis-reform-happened-in-wa-long-before-the-act/11552294>>.

⁶² *Ibid*; *Help, Not Handcuffs* (n 14) 31 [4.18].

⁶³ Turner (n 61).

⁶⁴ *Ibid*.

⁶⁵ Government of Western Australia Mental Health Commission, 'Cannabis Intervention Requirement (CIR)', *Government of Western Australia Mental Health Commission* (Web Page) <<https://www.mhc.wa.gov.au/getting-help/diversion-support-programs/cannabis-intervention-requirement-cir>>.

⁶⁶ *Ibid*.

⁶⁷ *Illicit Drug Data Report 2018-19* (n 5) 57.

⁶⁸ *The Western Australian Alcohol and Drug Interagency Strategy 2018-2022* (n 22) 8. Note the data is inconsistent regarding how many CIR notices were issued in WA in 2017-2018.

⁶⁹ *Help, Not Handcuffs* (n 14) 31 [4.15].

the criminal justice system, primarily due to the strict eligibility to participate in the CIR scheme.⁷⁰ A survey of CIR participants found that 82.6% of those who had completed the intervention session contemplated reducing their cannabis use and 73.5% considered ceasing use.⁷¹ This data suggests the CIR and diversionary programs are effective at mitigating the harmful effects of drug convictions. Unfortunately, WA's current regime is of limited utility because of the 10g eligibility condition. In June 2021, the Legalise Cannabis WA Party moved a motion to reintroduce the decriminalisation measures contained in the *Cannabis Control Act 2003* (WA), effectively increasing the CIR eligibility limit to 30g of cannabis, which would divert more individuals away from the criminal justice system.⁷² This motion was backed by the Greens Party,⁷³ however, subsequently lapsed as it did not receive the support of WA Labor (who held the majority of seats in Parliament).⁷⁴

IV ARGUMENTS FOR LEGALISATION

In 2018, the World Health Organization ('WHO') made a recommendation to the United Nations that cannabis be removed from the international drug control schedule of most dangerous drugs.⁷⁵ Around the globe, nations are reforming their cannabis policy with recreational cannabis legalised or decriminalised in 38 countries.⁷⁶ Legalisation—removing legal prohibitions and penalties for the possession, sale and cultivation of cannabis—has predominately occurred using two overarching regimes: a commercialised model with the goal of attaining economic benefits, or non-commercialised model where the government strictly regulates the production, sale, distribution and advertising of cannabis.⁷⁷ Some jurisdictions have implemented a social club model where not-for-profit clubs produce cannabis for members' personal use.⁷⁸ Transform Drug Policy Foundation argues in their report titled 'How

⁷⁰ Ibid 34 [4.27-4.28].

⁷¹ Ibid 36 [4.38].

⁷² Western Australia, *Parliamentary Debates*, Legislative Council, 3 June 2021, 1223 (Sophia Moermond).

⁷³ Ibid 1224 (Brad Pettitt).

⁷⁴ Ibid 1225 (Stephen Dawson).

⁷⁵ World Health Organization, '40th WHO Expert Committee on Drug Dependence' (Media Release, 13 September 2018).

⁷⁶ Keith Speights, 'Marijuana Legalization Around the World', *The Motley Fool* (Blog Post, 17 July 2021) <<https://www.fool.com/investing/stock-market/market-sectors/healthcare/marijuana-stocks/marijuana-legalization/>>; Terry Hacienda, 'The 2021 Guide to Cannabis Laws Around the World', *Chicago Tribune* (Web Page, 15 July 2021) <<https://www.chicagotribune.com/marijuana/sns-tft-liststory-cannabis-laws-around-the-world-20210715-n6bdtyofrnaddj7x4ipiesmxdq-list.html>>.

⁷⁷ *Help, Not Handcuffs* (n 14) 99 [7.17]; Alcohol and Drug Foundation, 'Cannabis legalisation: what model for regulation?', *Alcohol and Drug Foundation* (Web Page, 5 June 2019) <<https://adf.org.au/insights/cannabis-legalisation/>>.

⁷⁸ *Help, Not Handcuffs* (n 14) 103 [7.40].

to Regulate Cannabis' that all policies regarding drug regulation fall on a spectrum between ultra-prohibition (with harms arising from the unregulated criminal market), and commercial promotion in an unregulated legal market.⁷⁹ Both options at the extremes of the spectrum cause harm as the models are almost exclusively motivated by profit (legal and illegal).⁸⁰ Policies falling between the extremes appear to deliver the best social and health outcomes.⁸¹

The literature considering the efficacy of cannabis legalisation regimes frequently discuss three key themes: public health and safety concerns, the economic impacts of a commercialised model, and social costs associated with prohibition. Effective drug policy should weigh the relative harms of legalising the drug with the harms which arise from prohibition. In WA, it is arguable that the harms and opportunity costs associated with a punitive prohibition on cannabis outweigh the harms from which the legislation attempts to protect.⁸² A harm minimisation framework suggests cannabis policy should be evidenced-based, improve public health outcomes, reduce cannabis related crime, be economically viable, and protect the youth and vulnerable.⁸³ In order to meet these objectives, the WA government would be prudent to take steps to transition to a less punitive regime, and ultimately, legalisation.

A Public Health and Safety

1 Cannabis Related Harms

Many critics argue that recreational cannabis should be prohibited because of the risks to public health and safety. In 2011, when cannabis was re-criminalised in WA, the Police Minister stated that evidence of a link between cannabis and schizophrenia was a motivating factor for prohibiting cannabis.⁸⁴ Similarly, when refusing to support the Legalise Cannabis WA Party's motion to reinstate decriminalisation measures, WA Labor Minister, the Hon. Stephen Dawson MLC stated that 'non-medicinal cannabis has the potential for significant adverse impacts on the broader community' including an increased risk of mental health and respiratory problems as well as the impact on brain development, especially in children and adolescents.⁸⁵ The Select Committee into Alternate Approaches to Reducing Illicit Drug Use and its Effects on the

⁷⁹ Transform Drug Policy Foundation, *How to Regulate Cannabis* (Executive Summary No 2, 2016) 6 ('*How to Regulate Cannabis Executive Summary*').

⁸⁰ *How to Regulate Cannabis Report* (n 28) 29.

⁸¹ *Ibid.*

⁸² Fitzgerald (n 10) 14.

⁸³ *How to Regulate Cannabis Executive Summary* (n 79) 5-6.

⁸⁴ Turner (n 61).

⁸⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 3 June 2021, 1226 (Stephen Dawson).

Community stated in their report titled 'Help, Not Handcuffs: Evidence-Based Approaches to Reducing Harm from Illicit Drug Use' that recreational cannabis use creates physical and social risks, with the long-term effects of cannabis use potentially including respiratory damage, brain damage (resulting in reduced concentration, memory and learning ability), reduced libido, irregular menstrual cycles and lowered sperm counts, impaired immune systems and a number of mental health conditions (especially in individuals with a family history of psychotic mental illness).⁸⁶ These links suggest that long-term cannabis use, like any drug, can be harmful, however, these physical and social risks should be interpreted in light of the harms associated with the alternatives. There exists a large body of evidence which demonstrates cannabis is less harmful and poses less risks than many other drugs, including licit substances.⁸⁷

2 Cannabis Harms Compared to Other Drugs

An ACT parliamentary debate outlined that many people erroneously assume that drugs are illicit because they are inherently dangerous,⁸⁸ citing a 2010 study which ranked licit and illicit drugs on 16 harm measures (relating to individuals and the community) including health damage, economic costs and crime.⁸⁹ The 2010 study ranked alcohol as the most harmful drug with tobacco in sixth place and cannabis ranked eighth.⁹⁰ The Australian Drug Harms Ranking Study conducted a similar analysis, ranking alcohol as most harmful, cigarettes as fifth and cannabis in thirteenth place.⁹¹ These studies show that cannabis presents a lower risk of harm to both individuals and those around them than licit substances such as alcohol or tobacco, and demonstrate the failure of WA's drug policy to adequately weigh the harms from usage with the harms of criminalisation when formulating drug policy.⁹² Furthermore, unlike other substances, cannabis has a very low acute toxicity meaning it is nearly impossible to fatally overdose on cannabis.⁹³ Cannabis dependence is also rare when compared to other substances such as nicotine or alcohol.⁹⁴ The effects of cannabis are often described as pleasant,⁹⁵ and are

⁸⁶ *Help, Not Handcuffs* (n 14) 97 [7.10].

⁸⁷ Nutt et al (n 50).

⁸⁸ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly for the ACT, 20 February 2019, 493 (Caroline Le Couteur).

⁸⁹ Nutt et al (n 50).

⁹⁰ *Ibid.*

⁹¹ Yvonne Bonomo et al, 'The Australian drug harms ranking study' (2019) 33(7) *Psychopharmacol.* 759.

⁹² Fitzgerald (n 10) 21-22; Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly for the ACT, 20 February 2019, 493 (Caroline Le Couteur).

⁹³ Fitzgerald (n 10) 15.

⁹⁴ World Health Organization, *The Health and Social Effects of Nonmedical Cannabis Use* (Report, 2016) 11 ('*The Health and Social Effects of Nonmedical Cannabis Use*').

⁹⁵ Single, Christie and Ali (n 56), 172.

not associated with aggression, unlike alcohol or other drugs.⁹⁶ It is arguable that this disjunct between the relative harm of cannabis and severity of cannabis policy is driving the movement towards policy reform.

3 Cannabis and Psychosis

There is a large body of literature documenting the link between psychosis or schizophrenia and cannabis use, however, it is unclear whether that link is causal in nature.⁹⁷ Some studies show that regular cannabis use can lower the age of onset of schizophrenia.⁹⁸ A longitudinal study found that a person who used cannabis more than 10 times before the age of eighteen was 2.3 times more likely to develop the illness than people who had not used cannabis.⁹⁹ However, this finding could be explained by reverse causation; that people with schizophrenia are more likely to use cannabis, perhaps to relieve their symptoms.¹⁰⁰ By contrast, researchers in an Australian study did not find a marked increase in the incidence of schizophrenia after a significant increase in cannabis use between 1980-2000.¹⁰¹ Although the evidence on the subject is mixed, it suggests cannabis use has a modest contributory causal role in schizophrenia.¹⁰² This conclusion is contrary to the position advanced by the media,¹⁰³ demonstrating the need for public education regarding the health implications of cannabis consumption on an individual and community level. WA's prohibition on recreational cannabis limits the government's willingness to run education campaigns about the risks of using cannabis, indirectly increasing individual and public harm.¹⁰⁴ Given that 11.2% of Western Australians use cannabis each year,¹⁰⁵ there exists a need for evidence-based education on cannabis use.

4 Cannabis Impaired Driving

⁹⁶ Gregoire (n 32).

⁹⁷ Fitzgerald (n 10) 16.

⁹⁸ *The Health and Social Effects of Nonmedical Cannabis Use* (n 94) 26.

⁹⁹ *Ibid* 27.

¹⁰⁰ *Ibid*; Fitzgerald (n 10) 17.

¹⁰¹ *The Health and Social Effects of Nonmedical Cannabis Use* (n 94) 27.

¹⁰² *Ibid* 28.

¹⁰³ Benedict Carey, 'Does Marijuana Use Cause Schizophrenia?', *The New York Times* (online, 17 January 2019) <<https://www.nytimes.com/2019/01/17/health/cannabis-marijuana-schizophrenia.html>>.

¹⁰⁴ Fitzgerald (n 10) 19.

¹⁰⁵ 'Drug Use Statistics', *Drug Aware* (Web Page) <<https://drugaware.com.au/get-the-facts/drug-use-statistics/>>.

There is consensus that cannabis related traffic accidents pose a large risk to the community.¹⁰⁶ Tetrahydrocannabinol ('THC') is the psychoactive compound in cannabis which produces the sensation of being high. THC impairs cognition and psychomotor responses, including reaction speed, which impairs driving performance.¹⁰⁷ It is evident that combining THC and alcohol, even at low doses, significantly impairs performance and increases the risk of a crash.¹⁰⁸ The WHO noted that 'even though the effect is small compared to the effects of alcohol, traffic injury may be the most important adverse public health outcome for cannabis'.¹⁰⁹ However, there is a lack of consensus on the amount of THC which constitutes a level impairment comparable to a 0.05% blood alcohol concentration.¹¹⁰ In Colorado and Washington, drug-impaired driving is prohibited and is defined as driving with greater or equal to 5 nanograms/mL of THC in the blood.¹¹¹ This threshold is not universally accepted with some studies showing 1 nanogram/mL of THC can cause an unacceptable level of impairment.¹¹² It is important to note that cannabis can be detected in the blood for up to a week after use,¹¹³ and that only recent cannabis use increases the risk of motor vehicle accidents.¹¹⁴ Imposing a limit based on THC content or a total prohibition on driving with THC in the blood will likely lead to the prosecution of drivers with residual THC in the blood, but who are not impaired and are otherwise fit to drive.¹¹⁵ A fairer system could include a test of the driver's behavioural impairment in addition to blood THC content, rather than THC's presence automatically triggering an offence.¹¹⁶ If WA moves towards legalising recreational cannabis, Parliament should consider whether driving under the influence of cannabis would be regulated in a similar way to alcohol (with a threshold limit) or whether it would be prohibited as currently exists under the *Road Traffic Act 1974* (WA).

5 Legalisation and Usage Rates

¹⁰⁶ *Help, Not Handcuffs* (n 14) 97 [7.10]; *How to Regulate Cannabis Report* (n 28) 175-191; Jan Ramaekers et al, 'Dose Related Risk of Motor Vehicle Crashes after Cannabis use' (2004) 73 *Drug and Alcohol Dependence* 109.

¹⁰⁷ Ramaekers et al (n 106) 117.

¹⁰⁸ *Ibid.*

¹⁰⁹ *The Health and Social Effects of Nonmedical Cannabis Use* (n 94) 21.

¹¹⁰ *How to Regulate Cannabis Report* (n 28) 176.

¹¹¹ Wayne Hall and Megan Weier, 'Assessing the Public Health Impacts of Legalizing Recreational Cannabis Use in the USA' (2015) 97(6) *Clinical Pharmacology & Therapeutics* 607, 611.

¹¹² *How to Regulate Cannabis Report* (n 28) 176.

¹¹³ Scot Thomas, 'How Long Do Drugs Stay In Your System? (Drug Half-Life & Drug Tests)', *American Addiction Centers* (Web Page, 16 June 2021) <<https://americanaddictioncenters.org/how-long-drugs-system>>.

¹¹⁴ Ramaekers et al (n 106) 117.

¹¹⁵ *How to Regulate Cannabis Report* (n 28) 176.

¹¹⁶ *Ibid.*

The literature is unsettled regarding the impact of legalisation on rates of cannabis use. Some studies suggest that legalisation results in a decline in adolescent usage rates,¹¹⁷ while others reported an overall increase in use after legalisation.¹¹⁸ Some commentators have attributed findings that usage increased after legalisation to reporting bias (users may be more willing to report their behaviour when it is legal).¹¹⁹ One source suggested that clear data regarding any increase in new users could take up to ten years after legalisation.¹²⁰ Another study suggested that cannabis use may increase slowly after legalisation (similar to alcohol use after the repeal of the United States' prohibition in 1932) as social stigma may act as a barrier to use and it may take time for producers to enter the market, especially if production is regulated heavily by the state.¹²¹ If WA amends its cannabis policy, (legalisation or otherwise) the government should collect robust usage data before and after the change to effectively measure its impact on usage and supply patterns.¹²²

6 Conclusions

Legalising recreational cannabis under a harm minimisation framework could improve drug-related health outcomes if legalisation is accompanied by a rigorous, health-focused education campaign outlining the health implications of use (especially regarding driving under the influence of cannabis). Providing individuals the tools to make informed decisions about their consumption choices (such as implementing dose measurements similar to standard drinks for alcohol) could mitigate some public health and safety concerns. Similarly, the government could apply the plain-packaging laws and bans on advertising imposed on tobacco producers to cannabis production to ensure that a commercial legalisation model does not promote over-consumption.

¹¹⁷ Julia Dilley et al, 'Prevalence of Cannabis Use in Youths After Legalization in Washington State' (2018) 173(2) *JAMA Pediatrics* 192.

¹¹⁸ Liberty Vittert, 'Opinion: Here's what the numbers show about the impact of legal marijuana', *MarketWatch* (Web Page, 19 April 2019) <<https://www.marketwatch.com/story/heres-what-the-numbers-show-about-the-impact-of-legalizing-marijuana-2019-04-09>>.

¹¹⁹ *Ibid.*

¹²⁰ Hall and Weier (n 111) 612.

¹²¹ *Ibid.*

¹²² *Ibid.*

B Economic Impacts

Global cannabis policy is comprised of a number of different regimes, each with varying degrees of economic viability. This section will consider the economic impacts of a legalisation regime, social club model and decriminalisation policy.

1 Legalisation Model

Legalisation involves individuals being able to possess, purchase and sometimes, cultivate cannabis without legal prohibition or penalty. This can be achieved through a commercialised model motivated by profit, or a non-commercialised model where production, distribution, supply and advertising is controlled by the government.¹²³ Jurisdictions including California, Colorado and Washington in the United States have successfully implemented commercialised legalisation regimes (similar to the regulation of alcohol) and are reaping the economic rewards. In 2020 alone, cannabis sales in California reached \$4.4 billion.¹²⁴ Approximately \$1.032 billion of that figure was returned to the government through taxation.¹²⁵ Additionally, 20,000 jobs are expected to be created within the first 5 years of legalisation.¹²⁶ In Massachusetts, the legal recreational market sold over \$440,000 worth of cannabis products on its first day of operation in 2018.¹²⁷ Massachusetts taxes sales at 17% (6.25% sales tax and 10.75% excise tax on cannabis) amounting to \$74,800 tax revenue from the first day of sales alone.¹²⁸ The towns in which the two cannabis stores are located imposed an additional 3% local cannabis tax,¹²⁹ providing additional benefit to the community. Washington laws contain the highest rate of taxation at 37% of all retail sales.¹³⁰ Economic modelling suggests that if

¹²³ *Help, Not Handcuffs* (n 14) 99 [7.17]; Alcohol and Drug Foundation, 'Cannabis legalisation: what model for regulation?', *Alcohol and Drug Foundation* (Web Page, 5 June 2019) <<https://adf.org.au/insights/cannabis-legalisation/>>.

¹²⁴ Lindsey Bartlett, 'Cannabis Sales in California Reach \$4.4 Billion in 2020: 'Essential', Edibles, And the Election', *Forbes* (online, 29 January 2021) <<https://www.forbes.com/sites/lindseybartlett/2021/01/29/cannabis-sales-in-california-reach-44-billion-in-2020-essential-edibles-and-the-election/?sh=313a9201313c>>.

¹²⁵ Carl Davis, 'State and Local Cannabis Tax Revenue Jumps 58%, Surpassing \$3 Billion in 2020', *Institute on Taxation and Economic Policy* (Blog Post, 15 March 2021) <<https://itep.org/state-and-local-cannabis-tax-revenue-jumps-58-surpassing-3-billion-in-2020/>>.

¹²⁶ 'Cannabis Industry Statistics 2021: How the essential industry performed last year', *Flowhub* (Web Page, 2021) 21 <<https://flowhub.com/cannabis-industry-statistics>>.

¹²⁷ Penelope Overton, 'Maine records \$1.4 million in recreational cannabis sales in first month', *Press Herald* (online, 23 November 2020) <<https://www.pressherald.com/2020/11/23/maine-records-1-4-million-in-legal-recreational-cannabis-sales-in-first-month/>>.

¹²⁸ Dan Adams, 'Consumers spent \$440,000 on marijuana products in Massachusetts on first day of recreational sales', *Boston Globe* (online, 21 November 2018) <<https://www.bostonglobe.com/news/marijuana/2018/11/21/marijuana-math-consumers-spent-more-than-pot-products-tuesday/dwVB7T1SK243YVHsUS3NaM/story.html>>.

¹²⁹ *Ibid.*

¹³⁰ 'How Do Marijuana Taxes Work', *Tax Policy Center* (Web Page, May 2020) <<https://www.taxpolicycenter.org/briefing-book/how-do-marijuana-taxes-work>>.

Australia legalised recreational cannabis, the net social benefit would be valued at \$727.5 million per year, with the Parliamentary Budget Office estimating that cannabis tax revenue could reach \$259 million per year.¹³¹ These figures illustrate the significant economic impact that a legalisation framework could provide Australia, especially when compared with the current estimated revenue from fines being \$295 million per year.¹³²

(b) Commercialised Legalisation and Harm Minimisation

A commercial legalisation model aligns with a harm minimisation framework as taxation revenue can be used to fund health interventions, the commercial model would provide consumers with a safe, legal market which undercuts illegal transactions on the black market, removes the criminality from production and sale, and reduces the harms associated with cannabis.¹³³ In Australia, black market cannabis transactions reached an estimated total of nearly \$4 billion dollars in 2016-17.¹³⁴ Commercialised legalisation could significantly reduce black market cannabis transactions, especially if the framework is economically viable with competitive pricing based on supply and demand. Even if the price of legally obtained cannabis exceeds the price of black market cannabis, many consumers will likely pay a premium to source their cannabis legally.¹³⁵ Moreover, the strength of commercial cannabis has increased from 2% THC in the 1980s to 20% in 2018.¹³⁶ Illinois is currently the only United States jurisdiction to tax cannabis by THC content.¹³⁷ One argument suggests that a pragmatic

¹³¹ Letter from Phil Bowen of the Parliamentary Budget Office to Senator David Leyonhjelm, 9 October 2015, <https://www.aph.gov.au/-/media/05_About_Parliament/54_Parliamentary_Depts/548_Parliamentary_Budget_Office/Costings/Publicly_released_costings/17122015_-_PBO_-_Legalising_marijuana_MS_Word.docx?la=en&hash=9D9B83A8DB834F4C9E28E16D511AD2F6B1CB5900> 2; Legal and Constitutional Affairs Legislation Committee, The Senate, *Criminal Code and Other Legislation Amendment (Removing Commonwealth Restrictions on Cannabis) Bill 2018* (Report, September 2018) 15 [2.19] (*'Removing Commonwealth Restrictions on Cannabis Bill Report'*); Nicole Lee and Jarryd Bartle, 'Should Australia legalise cannabis? The arguments for and against', *SBS* (online, 17 April 2018) <<https://www.sbs.com.au/news/should-australia-legalise-cannabis-the-arguments-for-and-against/18495822-ba0a-4edd-95c6-d7bc7e7103e4>>.

¹³² *Ibid.*

¹³³ *Help, Not Handcuffs* (n 14) 99 [7.20].

¹³⁴ Richard Finlay, Andrew Staid and Max Wakeflied, *Where's the Money? An Investigation into the Whereabouts and Uses of Australian Banknotes* (Research Discussion Paper, Reserve Bank of Australia, December 2018) 28.

¹³⁵ *Help, Not Handcuffs* (n 14) 99 [7.19].

¹³⁶ *Help, Not Handcuffs* (n 14) 100 [7.25]; Roberts et al, 'Legalised Cannabis in Colorado Emergency Department: A Cautionary Review of Negative Health and Safety Effects' (2019) 20(4) *Western Journal of Emergency Medicine: Integrating Emergency Care with Population Health* 557.

¹³⁷ 'How Do Marijuana Taxes Work', *Tax Policy Center* (Web Page, May 2020) <<https://www.taxpolicycenter.org/briefing-book/how-do-marijuana-taxes-work>>.

approach would be to tax cannabis by both THC content and sales; THC content by weight being the taxable unit.¹³⁸

The literature describing the impact of legalisation on public health is unsettled with some sources suggesting that a commercial legalisation model may have indirect health benefits by providing separation between cannabis and more harmful illicit drugs,¹³⁹ while others suggest that the capitalism mindset encourages more people to use, and consume greater quantities of cannabis, leading to adverse health outcomes.¹⁴⁰ In Colorado cannabis related traffic deaths and hospitalisations have increased since legalisation in 2012.¹⁴¹ Moreover, legalising recreational cannabis in Colorado has not eliminated the cannabis black market, but rather has created an incentive for cross-border trafficking into states where cannabis is illicit.¹⁴² Should WA choose to employ a commercialised model, it may be prudent to allocate some tax revenue to enforcing cannabis border control.

(b) Non-commercialised Legalisation

Canada utilises a non-commercialised legalisation regime. In 2015, Canada legalised recreational cannabis with the aims of ‘keeping cannabis out of the hands of youths, keeping profits out of the pockets of criminals and protecting public health and safety by allowing adults access to legal cannabis’.¹⁴³ The 2020 Canadian Cannabis Survey found that 27% of respondents used cannabis in 2019,¹⁴⁴ with this figure reducing to 25% in the following year.¹⁴⁵ The Canadian government strictly controls the nation’s dispensaries, manufacturers, wholesalers and retailers (including private licensed and government-operated stores).¹⁴⁶ Unfortunately, the Canadian regime is inefficient; overseeing production, distribution and sales is very expensive, and it appears the government struggles to meet consumers’ demand,¹⁴⁷ with 12% of respondents indicating that their desired product was often unavailable in a provincially

¹³⁸ *How to Regulate Cannabis Report* (n 28) 86.

¹³⁹ *Help, Not Handcuffs* (n 14) 99 [7.20].

¹⁴⁰ *Ibid* 102 [7.32].

¹⁴¹ *Ibid* 100 [7.24].

¹⁴² *Ibid* 101 [7.28].

¹⁴³ ‘Legalising Cannabis in Canada’, *Alcohol and Drug Foundation* (Web Page, 6 May 2019) <<https://adf.org.au/insights/legalising-cannabis-canada/>>.

¹⁴⁴ Government of Canada, *Canadian Cannabis Survey 2020: Summary* (Summary Report, 2020).

¹⁴⁵ Government of Canada, *Canadian Cannabis Survey 2021: Summary* (Summary Report, 2021).

¹⁴⁶ Western Australia, *Parliamentary Debates*, Legislative Council, 13 May 2020, 2556c [1] (Aaron Stonehouse).

¹⁴⁷ Robin Levinson-King, ‘Why Canada’s Bubble Burst’, *BBC News* (online, 29 December 2019) <<https://www.bbc.com/news/world-us-canada-50664578>>; Western Australia, *Parliamentary Debates*, Legislative Council, 13 May 2020, 2556c [1] (Aaron Stonehouse).

regulated retailer in 2020,¹⁴⁸ however, this figure dropped to 7% in 2021.¹⁴⁹ In 2021, 53% of Canadians reported sourcing their cannabis from a legal storefront, up from 41% in 2020. Similarly, 63% of respondents indicating that they never obtain cannabis from an illegal source, up from 55% in 2020.¹⁵⁰ Between April 2019 and March 2020, Canada collected \$32 million in tax revenue from the cannabis industry,¹⁵¹ palling in comparison to California's \$1.032 billion over the same period,¹⁵² although dwarfing WA's non-existent cannabis tax revenue.

2 Social Clubs

Cannabis social clubs are registered non-profit organisations which produce and distribute cannabis to members for personal consumption. This model has been successful in Spain, Uruguay, Slovenia, Belgium, France, the United Kingdom and San Francisco.¹⁵³ Although the frameworks are different in each jurisdiction, similarities include: members are usually vetted upon registration, members must sign an agreement not to distribute cannabis to non-members, the amount of cannabis is restricted for each member, members must be willing to receive information about harm reduction, and membership is typically limited to adult residents, limiting the scope for 'drug tourism'.¹⁵⁴ However, in Spain, a lack of regulation has fostered opportunism leading to social clubs being promoted to tourists.¹⁵⁵ Cannabis social clubs are useful because they provide a legal avenue for cannabis use which also ensures that certain health and safety requirements are met.¹⁵⁶ While the non-profit model which social clubs operate under does not provide the same level of revenue, economic growth or taxation, they indirectly provide economic benefit by reducing black market transactions.

3 Decriminalisation

Conversely, extended decriminalisation regimes (such as the ACT), arguably create more economic costs when compared with a prohibition regime. As the sale or supply of cannabis is prohibited, the ACT cannot reap the economic rewards associated with legalisation. This model

¹⁴⁸ Government of Canada, *Canadian Cannabis Survey 2020: Summary* (Summary Report, 2020).

¹⁴⁹ Government of Canada, *Canadian Cannabis Survey 2021: Summary* (Summary Report, 2021).

¹⁵⁰ Ibid.

¹⁵¹ 'Canada's haul from cannabis tax reaches CA\$32 million', *MJ Mix Daily* (Blog Post, 4 June 2020) <<https://mjbizdaily.com/canadas-haul-from-cannabis-tax-reaches-ca32-million/>>.

¹⁵² Davis (n 125).

¹⁵³ Tom Decorte et al, 'Regulating Cannabis Social Clubs: A Comparative Analysis of legal and Self-Regulatory Practices in Spain, Belgium and Uruguay' (2017) 43 *International Journal of Drug Policy* 44, 44-56; *Help, Not Handcuffs* (n 14) 104 [7.44].

¹⁵⁴ Ibid.

¹⁵⁵ Decorte et al (n 153) 47.

¹⁵⁶ Ibid 45.

potentially encourages more engagement with the black market as more individuals wish to use the substance, but cannot access it through legal avenues. The cost of law enforcement would likely remain the same, if not increase as ACT Police would be required to enforce the 50g or 2 plant limit. However, court and prosecutorial costs would likely decrease as a result of less low-level, consumer cannabis charges, providing some economic benefit.

C Social Costs

WA's punitive approach to cannabis regulation creates a number of social costs (both real and opportunity costs) that could be reduced under a legalisation regime. These costs include the burden of drug enforcement, prosecution and incarceration on the justice system, the harm suffered by the individual through exposure to the criminal justice system and harms affecting the community.

1 Exposure to the Criminal Justice System

Despite WA's tough drug laws, cannabis continues to circulate through the community, suggesting the harsh penalties are not having the desired deterrent effect. Cannabis has a weakly inelastic demand, meaning that as the price of cannabis increases, demand does not decrease at the same rate.¹⁵⁷ Alcohol, tobacco and petrol also have inelastic demands as the products are considered essential or are addictive in nature, meaning consumers are willing to pay the increased price. As Western Australians continue to purchase cannabis despite the criminal prohibition, cannabis supply is left in the hands of those who have little regard for the law. Consequently, otherwise law-abiding individuals are exposed to criminal activity and its associated harms in order to purchase and use cannabis.

Mere contact (and especially early contact) with the criminal justice system is criminogenic.¹⁵⁸ A criminal conviction creates significant personal, social and financial costs for the offenders and their community.¹⁵⁹ On top of the court imposed penalty, offenders may pay for legal representation, they may have restrictive bail conditions which prevent international travel, and a conviction may impact their current employment and capacity to secure work in the future.¹⁶⁰ Diversion programs, including the CIR scheme and the *Cannabis Control Act 2003* (WA) decriminalisation regime, are successful across a number of metrics including being cost

¹⁵⁷ Jason Payne et al, 'The Price Elasticity of Demand for Illicit Drugs: A Systematic Review' (2020) 606(1) *Trends & Issues in Crime and Criminal Justice* 1, 12.

¹⁵⁸ Fitzgerald (n 10) 18.

¹⁵⁹ Ibid 19.

¹⁶⁰ Ibid.

effective, reducing the burden on the criminal justice system (less court appearances and less sentences of imprisonment), and increasing uptake of treatment and improving social outcomes (mitigating the adverse effect on employment).¹⁶¹ The benefits associated with decriminalisation also extend to a legalisation regime by mitigating many negative effects associated with a criminal conviction.

2 Burden on the Justice System and Taxpayers

WA's cannabis prohibition creates a number of real and opportunity costs including the cost of enforcement, court proceedings and prosecutorial costs, and the cost and burden of incarceration on WA prisons.¹⁶² A 2013 study found that in 2009-2010, enforcement costs represented nearly two thirds of all government drug expenditure, costing Australian taxpayers between \$1.03-\$1.07 billion,¹⁶³ with approximately 70% attributable to cannabis.¹⁶⁴ Only 2% of the \$1.7 billion expended on illicit drugs in 2010 was used for harm reduction projects,¹⁶⁵ down from 3.9% in 2002-2003.¹⁶⁶ Drug enforcement costs encompass police detecting, arresting and charging drug offences; court, prosecutorial and legal aid costs for hearing and sentencing drug matters; expenditure associated with prisons and correctional facilities; and the Australia Federal Police and Customs and Border Protection Services enforcement activities.¹⁶⁷ A 2007 study found cannabis diversion programs in New South Wales had a significant impact with 2658 fewer arrests and court costs reduced by \$1 million in the first three years of the program.¹⁶⁸ As WA has a high cannabis usage rate¹⁶⁹ and the highest per capita drug incarceration rate in Australia,¹⁷⁰ a legalisation model would significantly reduce the costs associated with the cannabis prohibition. Similarly, legalisation would relieve a

¹⁶¹ *Help, Not Handcuffs* (n 14) 31 [4.18].

¹⁶² Fitzgerald (n 10) 19.

¹⁶³ Lorraine Mazerolle, Elizabeth Eggins and Angela Higginson, 'Street-level Drug Law Enforcement: An Updated Systematic Review' (2020) 599 *Trends & Issues in Crime and Criminal Justice* 1, 1, citing Alison Ritter, Ross McLeod and Marian Shanahan, *Government Drug Policy Expenditure in Australia – 2009/10* (Drug Policy Modelling Program Monograph No 24, 2013).

¹⁶⁴ Commonwealth, *Parliamentary Debates*, Senate, 15 October 2018, 7036 (David Leyonhjelm).

¹⁶⁵ Alison Ritter, Ross McLeod and Marian Shanahan, *Government Drug Policy Expenditure in Australia – 2009/10* (Drug Policy Modelling Program Monograph No 24, 2013) 1: Note, harm reduction projects include needle and syringe programs, medically supervised injecting centres and drug checking.

¹⁶⁶ *Ibid* 2.

¹⁶⁷ *Ibid* 8.

¹⁶⁸ Joy Wundersitz, *Criminal Justice Responses to Drug and Drug-Related Offending: Are They Working?* (Technical and Background Paper No 25, 2007) 59.

¹⁶⁹ 'Drug Use Statistics', *Drug Aware* (Web Page) <<https://drugaware.com.au/get-the-facts/drug-use-statistics/>>.

¹⁷⁰ Fitzgerald (n 10) 12-13.

considerable burden on WA's already overcrowded prisons.¹⁷¹ Finally, the money saved under the reforms could be directed towards health care, in particular, providing treatment, support and public health campaigns to users or pursuing enforcement measures for other, more harmful drugs. A legalisation model would reduce the significant cost which drug enforcement places on WA's taxpayers and relieve the strain that cannabis arrests put on the justice system.

V ACT LEGALISATION REGIME

In September 2019, the ACT Legislative Assembly passed *Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019* (ACT) to exempt people over 18 years old from criminal and civil penalties when in possession of cannabis. People within the ACT are allowed to carry up to 50g of dried cannabis,¹⁷² or 150g of fresh marijuana,¹⁷³ and cultivate up to two plants per person or up to 4 per household (hydroponic or artificial cultivation is not permitted).¹⁷⁴ However, it remains illegal to sell, share or gift cannabis (including plants and seeds) to another person.¹⁷⁵ Although termed 'legalisation' by the media, the ACT's cannabis regime is more accurately characterised as an extended decriminalisation regime.¹⁷⁶ This provides limited economic benefit as the sale and commercialisation of cannabis remains illegal. The amendments to the *Drugs of Dependence Act* have been drafted so that possessing and cultivating cannabis are still offences, however, people over the age of 18 in the ACT are exempt from the associated penalties.¹⁷⁷

The new laws protect children from the impacts of cannabis by making it an offence for a person to fail to store cannabis out of the reach of children.¹⁷⁸ It is a defence to this offence that the person proves they took all reasonable steps to ensure a child did not have access to the cannabis.¹⁷⁹ Moreover, consuming cannabis is prohibited in public spaces,¹⁸⁰ and it is an offence to expose a child to cannabis smoke or vapour.¹⁸¹ This offence can be defended if the

¹⁷¹ Jessica Hayes, 'Union and inmates say WA's overcrowded prison system is a 'ticking time bomb'', *ABC News* (online, 28 February 2020) <<https://www.abc.net.au/news/2020-02-28/wa-prison-inmates-and-union-say-overcrowding-taking-its-toll/12012494>>.

¹⁷² *Drugs of Dependence Act 1989* (ACT) ss171AA(1)(a) and 171AA(3).

¹⁷³ *Ibid* ss 171AA(1)(b) and 171AA(3).

¹⁷⁴ *Ibid* s 162(2)-(3).

¹⁷⁵ *Ibid* s 164.

¹⁷⁶ *Help, Not Handcuffs* (n 14) 108 [7.62]; 'Cannabis', *ACT Government* (Web Page) <<https://www.act.gov.au/cannabis/home>>.

¹⁷⁷ *Drugs of Dependence Act 1989* (ACT).

¹⁷⁸ *Ibid* s 171AAC(1).

¹⁷⁹ *Ibid* s 171AAC(2).

¹⁸⁰ *Ibid* s 171AB(1).

¹⁸¹ *Ibid* s 171AB(2).

person took all reasonable steps to ensure the child was not exposed to the smoke or vapour, or believed on reasonable grounds that the child was over the age of 18.¹⁸² The Minister must also prepare and publish guidance material to inform the community about the legal and health implications of the amended legislation, demonstrating the ACT's health-focused approach to cannabis policy.¹⁸³

A Inconsistency with Criminal Code Act 1995 (Cth)

The *Criminal Code Act 1995 (Cth)* ('*Commonwealth Criminal Code*') contains a number of drug offences which give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁸⁴ Cannabis in any form is considered a controlled drug and plant under the *Commonwealth Criminal Code* and *Criminal Code Regulations 2019 (Cth)* meaning it is illegal to sell, possess and traffic cannabis under federal law. This creates issues for any proposed legalisation regimes as s 109 of the *Commonwealth Constitution* states that when a State law is inconsistent with a Commonwealth law, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. In 2018, Senator David Leyonhjelm introduced a private members bill which if passed, would prevent cannabis from being defined as a controlled drug or plant in listed Commonwealth acts, removing the Constitutional inconsistency and allowing the States to regulate the use, possession and cultivation of cannabis.¹⁸⁵ The bill was referred to a Senate Committee who recommended that the Senate not pass the bill (which lapsed in July 2019), arguing that the bill was premature and flawed.¹⁸⁶

As the ACT regime has been drafted to preserve the original offences, but decriminalise the provisions for quantities deemed for personal use, the ACT regime does not appear to be inconsistent enough with federal laws to warrant the Commonwealth government exercising its power under s 122 of the *Commonwealth Constitution* to remake the Territory's laws. Moreover, as the Commonwealth has not challenged the legislation's validity, people in the ACT are likely able to rely on the provisions. Even if the Australian Federal Police charge a person for cannabis possession in the ACT, s 313.1 of the *Commonwealth Criminal Code*

¹⁸² Ibid s 171AB(3).

¹⁸³ Ibid s 171BA(1).

¹⁸⁴ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed 14 Feb 1989, ATS 1993 No 0004 (entered into force 16 Nov 1992).

¹⁸⁵ *Criminal Code and Other Legislation Amendment (Removing Commonwealth Restrictions on Cannabis) Bill 2018 (Cth)*.

¹⁸⁶ *Removing Commonwealth Restrictions on Cannabis Bill Report* (n 131) 25 [2.60].

provides that it is a defence to a federal charge conducted in a State or Territory if the conduct is justified or excused by or under a law of that State or Territory, although this provision does not completely remove the risk of people in the ACT being arrested under the *Commonwealth Criminal Code*. This situation is mirrored in the United States where multiple states legalised recreational cannabis despite possession being a serious federal offence.¹⁸⁷ In 2015, United States federal law enforcement raided and made arrests at cannabis dispensaries despite sales being legal under local laws.¹⁸⁸ In December 2020, the US House of Representatives voted in favour of the *Marijuana Opportunity, Reinvestment, and Expungement Bill* which if enacted, would remove cannabis from the *Controlled Substances Act* meaning that there would be no criminal penalties associated with cannabis under federal law.¹⁸⁹ Although the bill has gained limited traction, in October 2022, United States President Joe Biden pardoned over 6500 individuals who were convicted of a simple possession offence relating to cannabis dating back to the 1970s.¹⁹⁰ The pardon also applies to those convicted under laws in the District of Columbia and the President urged governors in other states to follow suit.¹⁹¹ This development, along with the President's indication that the government would review the classification of cannabis as a Schedule 1 substance under federal laws¹⁹² suggests that reforming cannabis policy at a federal level may receive more attention during the second-half of Joe Biden's term. As in the United States, if an Australian jurisdiction wanted to implement a legalisation regime, cannabis would need to be removed from the definition of a controlled drug and controlled plant in the *Commonwealth Criminal Code* and *Criminal Code Regulations 2019* (Cth) as recommended in the aforementioned private members bill.¹⁹³

¹⁸⁷ Jarryd Bartle, 'Cannabis Reform Raises Conflict Between State and Federal Laws', *The Sydney Morning Herald* (online, 29 September 2019) <<https://www.smh.com.au/national/cannabis-reform-raises-conflict-between-state-and-federal-laws-20190927-p52vhp.html>>.

¹⁸⁸ Ibid; Laura Entis, 'Weed Dispensaries Find Legalization Leaves them Vulnerable to Raids and Harassment', *The Guardian* (online, 19 August 2015) <<https://www.theguardian.com/sustainable-business/2015/aug/18/marijuana-dispensaries-california-cannabis-dea-police-raids>>.

¹⁸⁹ 'Federal Policy: Sens. Booker, Wyden, and Schumer Introduce Preliminary Draft of Bill to End Cannabis Prohibition', *Marijuana Policy Project* (Web Page, 14 July 2021) <www.mpp.org/policy/federal/#:~:text=2020%3A%20In%20December%202020%2C%20the,the%20federal%20prohibition%20of%20marijuana.>>.

¹⁹⁰ Michael Shear and Zolan Kanno-Youngs, 'Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law', *The New York Times* (online, 6 October 2022) <<https://www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html>>.

¹⁹¹ Christina Wilkie, 'Biden pardons thousands of people convicted of marijuana possession, orders review of federal pot laws', *CNBC* (online, 6 October 2022) <<https://www.cnbc.com/2022/10/06/biden-to-pardon-all-prior-federal-offenses-of-simple-marijuana-possession-.html>>.

¹⁹² Ibid.

¹⁹³ *Criminal Code and Other Legislation Amendment (Removing Commonwealth Restrictions on Cannabis) Bill 2018* (Cth).

The prohibition of the sale or supply of cannabis under the *Commonwealth Criminal Code* prevents WA from implementing a legalisation regime (be it commercial or non-commercial). While the ACT's regime is an important step towards creating a more health-centred cannabis policy, it is an unsatisfactory framework for cannabis users as the government permits possession for recreational use, however, turns a blind eye to how that cannabis is obtained. As people are unable to purchase seeds and plants or give them as gifts, consumers must first turn to the black market to purchase cannabis illegally, before consuming it legally on their property. The quantity of cannabis an individual can possess is also not pragmatic. An individual can only possess up to 150g of harvested cannabis, however, can cultivate two plants which typically produce between 28-500g of cannabis buds when grown outdoors.¹⁹⁴ As the plants have the potential to produce significantly more cannabis than a person is permitted to possess, the ACT government recommends progressive harvesting to ensure a person does not possess more than the allowed 50g of dried or 150g harvested cannabis at any given time.¹⁹⁵ Although, many growers may still fall foul of these arbitrary limits.

B Inconsistency with United Nations Drug Conventions

Another challenge to a legalisation regime is its inconsistency with United Nations Drug Conventions, to which Australia is a party.¹⁹⁶ These conventions prohibit the regulation of cannabis markets for recreational purposes, although there is scope medical or scientific purposes, home growing and the operation of social clubs.¹⁹⁷ A number of jurisdictions have paved the way with Uruguay, Canada and the United States all departing from the obligations under the conventions.¹⁹⁸ However, it remains to be seen what the legal and political repercussions of implementing a legalisation regime will be.¹⁹⁹ In the future, the conventions could be amended if the WHO recommends that cannabis be rescheduled or removed from the convention, and the Commission on Narcotic Drugs votes in favour of the change.²⁰⁰ Another option could be to follow Bolivia's lead and withdraw from the convention, then immediately re-accede with reservations concerning cannabis.²⁰¹ The most likely course of action would be

¹⁹⁴ 'How Much Weed Does one Plant Produce', *420 Growist* (Blog Post) <<https://420growist.com/how-much-weed-does-one-plant-produce/>>.

¹⁹⁵ Arthur Marusevich, 'The ACT Cannabis Bill: A Half-Baked Approach to Green Day' (2019) 252 (Winter) *ETHOS* 30, 33.

¹⁹⁶ *How to Regulate Cannabis Report* (n 28) 215.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid* 213.

²⁰¹ *Ibid* 240.

for WA to acknowledge its principled non-compliance and provide the United Nations with the reasons for doing so, citing the health and social implications and relating them to the wider United Nations Charter commitments.²⁰²

VI SUGGESTIONS FOR WA POLICY REFORM

It is clear that WA's current prohibitory policy is ineffective and counter-productive at best, and damaging according to a number of metrics. WA's punitive prohibition causes more harm than the regime potentially avoids and is an example of where the cure is worse than the disease.²⁰³ In order for WA to improve public health, economic and social outcomes, there must be cannabis policy reform (with a potential outcome being a harm-minimisation focused legalisation regime that is regulated in a way similar to alcohol or tobacco). However, until there is federal reform to remove cannabis from the definition of a controlled drug and controlled plant in the *Commonwealth Criminal Code*, a legalisation regime is untenable. In order to reduce the harms which are associated with the current prohibition, the government should reinstate the decriminalisation regime under the *Cannabis Control Act 2003 (WA)* or adopt an extended decriminalisation regime similar to the ACT. The similarities between the WA and ACT drug legislation (both are code jurisdictions with the *MoDA* and *Drugs of Dependence Act* regulating drug offences) mean that an extended decriminalisation regime could be implemented with relative ease.

If the adoption of a legalisation regime becomes feasible due to an amendment of federal law, the WA government would be prudent to move towards legalisation by first establishing a working group with experts from a variety of fields: public health, legal consequences (state, federal and international), regulation (including monitoring and evaluation), production, agriculture, and environmental science.²⁰⁴ This dedicated task force would oversee the entire legalisation process, making recommendations and reforms where necessary.²⁰⁵ Importantly, performance indicators for all aspects of the legalisation regime should be built into the regulatory framework with indicia such as usage rates (including adolescent use), crime levels,

²⁰² Ibid 214.

²⁰³ Fitzgerald (n 10) 21.

²⁰⁴ *How to Regulate Cannabis Report* (n 28) 46.

²⁰⁵ Ibid.

public health outcomes and economic impacts.²⁰⁶ These performance indicators should be evaluated and reviewed regularly.²⁰⁷

Effective cannabis legalisation policy should strike a balance between providing sufficient supply to meet demand in quantities that do not encourage use, and not being so restrictive that it facilitates a parallel black market.²⁰⁸ If legalising recreational cannabis, WA should aim to create a legal market which mirrors the current adult demand with regards to the available products, price and quantity.²⁰⁹ The current Western Australian illicit cannabis market is not sophisticated, meaning legalisation measures could start slowly, progressing to include other products (edibles or on-site consumption venues) as consumers' preferences change.²¹⁰ Cannabis legalisation with some government restrictions has additional benefits as controlling the scale of the cannabis industry may assist in preventing the emergence of large pharmaceutical or other companies from using their significant commercial interests to distort cannabis policy.²¹¹

VII FINAL REMARKS

Empirical literature demonstrates that WA's punitive prohibition on cannabis represents a cure that is worse than the disease it purports to prevent.²¹² WA's current drug policy does not adequately weigh the harms of the substances with the harms associated with criminalisation, resulting in social costs associated with interacting with the criminal justice system. Prohibition also creates opportunity costs with respect to the government's lack of preventative health-focused interventions and dismisses the potential for sizeable economic benefits through commercialising cannabis production and sales, and reducing enforcement and judicial costs. With WA's tough on drugs stance not yielding results, it is inescapable that WA's policy creates more harm than it prevents and is no longer possible to justify. To provide improved health, economic and social outcomes to its people, the WA government should take steps, following the ACT's lead, to decriminalise cannabis, and once feasible, create a

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid 48.

²⁰⁹ Ibid 47.

²¹⁰ Ibid.

²¹¹ Ibid 48-49.

²¹² Fitzgerald (n 10) 21.

commercialised legalisation regime that regulates cannabis in a similar manner to alcohol or tobacco.