CANNABIS: AUTHORITARIANISM v. LIBERTARIANISM

K. E. Dawkins*

Introduction

Perhaps no other substance is surrounded by such a mass of conjecture and unsubstantiated assertion as cannabis.[1] And no other drug has stimulated such tension and debate between those who see it as a threat to the contemporary social order and those who regard it as a relatively innocuous substance that should not be the subject of social and legal prohibition. The polemic is by no means novel for there have always been "those who felt that the road to Hades was lined with hemp plants, and others who felt that the path to Utopia was shaded by the freely growing *Cannabis sativa*".[2] At present the debate waxes hotter than ever, particularly in the area of cannabis law reform.

Amidst this increasingly irreconcilable polarity of opinion, the view is presented that cannabis is not the serious social pollutant it is often alleged to be. Nevertheless, the index of the purported dangerous effects of the drug grows daily in the literature, commanding an attentive audience of legislators reluctant to depart from the instrument of the criminal law as the sole social response to drug use.[3]

The arguments that follow are not intended to suggest that cannabis is harmless, nor do they collectively amount to an apology for use of the drug. They are directed towards a rejection of the present scheme of control as an over-response to cannabis—a response that criminalises use of the drug, exaggerates its harmfulness, and is itself counter-productive. It is suggested that if the choice is between authoritarian or libertarian principles in respect of cannabis, future policy should adopt the latter and reject the uncompromising premises that characterise the current legal regime.

1. *A Profile of Cannabis Use in New Zealand*

A recent North American report[4] has noted that New Zealand

* B.A., LL.B., Post-Grad.Dip.Law(Otago). Lecturer in Law, University of Otago.

1 In the present context "cannabis" means all parts of the plant *Cannabis sativa.* It does not include synthetic cannabinols.

2 Grinspoon, *Marijuana Reconsidered* (Cambridge Massachusetts, 1971) 1.

3 See, for example, the remarks of the Minister of Health, Hon. R. J. Tizard, introducing the Drugs (Prevention of Misuse) Bill 1974: ". . . because a recent report claiming that there is evidence that use of marijuana is harmful has not yet become available to the Government, it has been decided not to include a clause reducing the penalty for use or possession of that drug." (1974) 390 N.Z.P.D. 1278.

4 *Marijuana and Health*: Second Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare 1972 (Washington D.C., 1972) 64.

has a relatively low incidence of illicit drug use because of its comparatively isolated position as an oceanic community, the rural complexion of many of its areas, little if any use of intoxicating substances by the pre-European inhabitants, the lack of an illicit drug-using tradition, and low levels of immigration from countries with such traditions. However, New Zealand has not completely escaped encounters with illicit drug use[5] and the last decade has witnessed a marked increase in the use of drugs subject to the regime of control imposed by the criminal law. One drug in particular—cannabis—has led the ground-swell of this pursuit of substances that alter mind and mood.

Although it is probable that cannabis was first available in New Zealand last century in the form of extracts and tinctures used for quasi-medical purposes, isolated instances of non-medical use, introduced by American seamen and servicemen, were first reported in the 1940s. During the following decade use of the drug was detected among coteries of musicians and entertainers, groups of students and certain immigrant communities.[6] Outside these areas cannabis use was relatively unknown.[7]

> Prior to 1965 the drug was virtually unknown in New Zealand. It had been seized occasionally by customs officers but the number of people known to be using the drug was very small indeed. No cultivation of the plant was known and few of the general public knew anything about it.

An immediate difficulty in attempting to delineate the incidence of cannabis use since this time is the lack of accurate information. Several sources—among the more useful are reports of departments of government and the conclusions of investigatory bodies established to examine and report on drug use in New Zealand—provide certain indications of use patterns, which, supplemented by studies directed at the epidemiology of cannabis use, provide the basis for constructing a profile of the use of this drug in New Zealand.

Statistics of the Police and Customs Departments are often challenged by some as representing no more than the tip of the epidemiological iceberg[8] and by others as reflecting nothing more than the

5 An informative account of these encounters is provided by Ashforth, "A Short History of Drugs of Abuse and Drug Abuse Control in New Zealand", Appendix VIII, First Blake-Palmer Report—First Report of the Board of Health Committee: *Drug Dependency and Drug Abuse in New Zealand* (Wellington, 1970) 111.

6 The diffusion of cannabis use to Europe and areas of European influence and settlement such as Australia and New Zealand followed the sharp increase in the use of the drug in North America in the 1950s and 1960s: Le Dain Cannabis Report—Report of the Commission of Inquiry into the Non-Medical Use of Drugs: *Cannabis* (Ottawa, 1972) 185.

7 Henwood, *A Turned on World: Drug Use in New Zealand* (Wellington, 1971) 23-24.

8 This qualifying factor was recognised in the First Blake-Palmer Report, supra n. 5 at 38-39. The Committee recognised that for every drug user identified through court action at least several remain unknown; however, it declined to adopt overseas estimates setting figures between 10 and 20, taking the view that in New Zealand the number was "probably lower".

current levels of law enforcement priority and activity.[9] Nevertheless, while these figures are not conclusive in themselves, they do provide a degree of quantitative information which is otherwise difficult to obtain in an area where the prohibited conduct involves consensual activity.

Prior to 1967 there were very few prosecutions in New Zealand for possession, use of, or dealing in cannabis; for the years 1967-1969 the number of prosecutions totalled 161.[10] By contrast, the experience of the present decade has been a constant increase in the number of drug offences generally and cannabis offences in particular. By 1972 cannabis prosecutions accounted for more than two-thirds of total drug prosecutions in New Zealand.

Total Drug Offences 1970-1974[11]

	Reported	Prosecuted
1970	408	390
1971	740	675
1972	973	852
1973	1,566	1,420
1974	2,355	2,113

Total Cannabis Offences 1970-1974[12]

	Reported	Prosecuted
1970	159	158
1971	293	270
1972	321	280
1973	889	818
1974	1,583	1,425

Quantities of illicitly imported cannabis intercepted by both Police and Customs have also shown significant increases in the same period. Until 1968 most seizures of drugs involved small amounts of opium brought into New Zealand by Asian seamen for their own use.[13] Since that time, however, the majority of seizures have concerned cannabis and not opiate drugs.

9 The formation of drug squads by the Police Department and the adoption of new strategies including the use of *agents provocateurs* have undoubtedly increased detection capabilities. By the beginning of 1975 drug squads had been established in several larger centres in addition to the four main cities and most C.I.B. offices now have staff trained to conduct drug investigations. The establishment of a preventive service and "flying" and "rummage" squads by the Customs Department has also increased detection of illicit importation. Furthermore, the establishment in 1972 of the National Drug Intelligence Bureau, jointly staffed by the Police, Customs and Health Departments, following resolutions passed at the 1971 South-East Asian Conference on Illicit Trafficking, has also aided collective programmes.

10 Reports of the Police Department for the Years ended 31 March 1968-1970.

11 Reports of the Police Department for the Years ended 31 March 1971-1975.

12 Ibid. Cannabis offences are classified, in these reports, into two categories: (1) in possession of or using *cannabis sativa*; and (2) dealing in or in possession to sell *cannabis sativa.*

13 Infrequently, quantities of cannabis were seized. For example, in 1963 12 lbs of marijuana were taken from a ship in Auckland: Report of the Customs Department for the Year ended 31 March 1964.

Total Amount of Cannabis Preparations Seized by Customs Department 1970-1974[14]

	Amount Seized (grammes)				
Drug	1970	1971	1972	1973	1974
Cannabis leaf and seeds (marijuana)	4,395	10,122	17,563	28,723	14,741[15]
Cannabis resin (hashish)		1,497	1,394	4,932	6,278
Cannabis oil				796	455

Domestic cultivation of cannabis has always constituted a useful supplementary source of the drug and since the cannabis plant grows untended in any temperate climate (the plant grows for a season, dies down, and re-appears the following year from its own seeds) it can be readily cultivated in New Zealand. The plant is also commonly grown under artificial conditions. While it is unlikely that cannabis will become part of the roadside flora of New Zealand, local production has shown signs of increasing,[16] and users, assisted by a sizeable volume of literature on the cultivation of the plant,[17] will continue to engage in clandestine cultivation as a means of retaining supply of their preferred substance.

Very little information concerning undetected cannabis use is available in New Zealand. The First Blake-Palmer Report[18] considered that a full and comprehensive perspective of total marijuana use in New Zealand could not be constructed and limited itself to the identification of four groups of users: multiple, single drug, experimental, and spree or occasional users.

The most recent comprehensive study on cannabis use in New

14 Reports of the Customs Department for the Years ended 31 March 1971-1975. By 1974, Police seizures of cannabis were reported as a daily occurrence: Report of the Police Department for the Year ended 31 March 1975. Among the countries, listed by the Customs Department, from which cannabis is illicitly imported into New Zealand are Australia, India, the West Indies and countries in the South-East Asian region: New Zealand Customs Department, *Narcotics: You Can Help Us Beat the Drug Traffic* (Wellington, 1969).

15 The decrease in the quantity of cannabis leaf material seized in 1974 has been partly attributed to the trend of packaging cannabis in stick form: Report of the Customs Department for the Year ended 31 March 1975.

16 In 1973 the National Drug Intelligence Bureau reported a noticeable increase in the availability of cannabis, especially in the new year period when plants cultivated outdoors mature.

17 Among publications of this type currently available in New Zealand are Anon., *The Cannabis Cultivator: A Complete Guide to the Cultivation of the Deadly Narcotic Marijuana* (Wellington, 1971); Drake, *The Cultivator's Handbook of Marijuana* (Eugene Oregon, 1970); and Stevens, *How to Grow Marijuana Indoors Under Lights* (2nd revised ed., Seattle, 1971).

18 Supra, n. 5 at 75. The absence of reliable informative data was also noted in a 1971 report submitted to the Medical Research Council of New Zealand: Medlicott, "Psychosocial Aspects of Cannabis Usage", Appendix III, Report of the Ad Hoc Committee on Marijuana to the Medical Research Council of New Zealand (Unpublished, 1971).

Zealand[19] concentrated on aspects of marijuana use. This study centred on Auckland but included cross-country comparative studies in 14 other areas. 1,289 informants were identified during field studies and from this group 160 users, taken from 186 distinct "marijuana social networks",[20] provided the basic data for research. In 1965 those informants who were using marijuana could identify approximately 500 users consuming the drug throughout New Zealand; a 100 percent increase annually since 1965 would mean an estimated 64,000 users in 1973.[21] This estimated yearly increase compared closely to the number of marijuana users—61,800—calculated by projecting user estimates, based on informants' personal knowledge, over the total New Zealand population.[22] The study concluded that excluding persons over the age of 55 years and those under the age of 15 years, approximately 4 percent of the total New Zealand population, or one out of every 25 New Zealanders, has used this most common form of cannabis.[23]

Student-conducted surveys in the 1973 study estimated that at least 40 percent of students at New Zealand universities have used marijuana at some time.[24] This represents a much higher figure than disclosed in two other surveys directed specifically at student use. The first,[25] conducted by questionnaire among a random sample of male students in their third or later year of study at the University of Canterbury, revealed that 12.5 percent of the respondents admitted to the use of cannabis while 31.4 percent expressed a desire to use the drug. The second,[26] conducted after the 1973 study, also employed a questionnaire submitted to 536 New Zealand and Asian first-year students at the Victoria University of Wellington. It reached a result statistically similar to the Canterbury study: marijuana use extended to 13.5 percent of the New Zealand students and 8.6 percent of the Asian students.

New Zealand shares the experience of increasing cannabis use with many other western countries. In both Australia[27] and the

19 McFerran *Marijuana Use in New Zealand: A Micro-Sociological Study* (Dunedin, 1973). This study was initiated in response to the recommendation of the New Zealand Board of Health Committee "[t]hat international efforts to obtain more reliable knowledge about certain drugs of abuse and their background, notable cannabis (marijuana), and of drug abusers, be augmented by support for research carried out within New Zealand by well qualiifed responsible individuals." First Blake-Palmer Report, supra, n. 5 at 92.

20 Ibid., 51.

21 Ibid., 52.

22 Id.

23 Id.

24 Supra, n. 19 at 51.

25 Riley, Jamieson & Russell, "A Survey of Drug Use at the University of Canterbury" (1971) 74 N.Z.Med.J. 365.

26 Hines, "Attitudes and Practices of University Students Related to Tobacco, Alcohol and Marijuana Use" (1974) 80 N.Z.Med.J. 1.

27 A 1970 survey showed cannabis to be the most commonly used illicit drug, preceding the opiates, amphetamines and lysergide: Davis & Milte, "Drug Use in Australia: A Survey" (1970) 3 Aust. & N.Z.J.Crim. 131. The high incidence of cannabis charges was noted in the Marriott Report—Report from the Senate Select Committee of the Parliament of the Commonwealth of Australia: *Drug Dependency and Drug Abuse* (Canberra, 1971) 53.

United Kingdom[28] cannabis is the most commonly used controlled drug, while North American estimates[29] have suggested that 8-20 million persons in that region have at least tried the drug. In Canada cannabis use has been estimated to have increased from 4 percent of the total population in 1970[30] to approximately 7 percent in mid-1971.[31] Despite margins of variation United States estimates also furnish converging evidence of a steady level of cannabis use: recent surveys[32] have reported that at least 12 percent of adults 18 years and over have tried marijuana.

Western Europe shares a cannabis user population estimated in the millions and the extent to which the drug is being used has led several countries, particularly the Netherlands, to consider alternative strategies such as decriminalisation or control of the drug by administrative devices.[33]

To a large extent New Zealand has escaped the compounding problems of illicit drug use that have occurred elsewhere. Cannabis use, however, is a visible social phenomenon in this country at the present time. The pattern of the last few years has been one of steady increase and if similar developments in other countries give cause for any expectation it must be that use of the drug will continue to burgeon in New Zealand.

2. *An Alternative Strategy*

It remains clear and constant that cannabis, while not harmless, does not possess the capacity for personal and social disruption so

28 In 1968 estimates of between 30,000 and 300,000 users were suggested: Wootton Report—Report from the Hallucinogens Subcommittee of the Advisory Committee on Drug Dependence: *Cannabis* (London, 1968) 9. Convictions for cannabis offences in the United Kingdom have risen from 3,071 in 1968 to 13,827 in 1973: *Social Trends* No. 5, 1974 (London: H.M.S.O., 1970).

29 Interim Le Dain Report—Interim Report of the Commission of Inquiry: *Non-Medical Use of Drugs* (Ottawa, 1970) 72-73.

30 Kalant & Kalant, *Drugs: Society and Personal Choice* (Ontario, 1971) 108.

31 Le Dain Cannabis Report, supra n. 6 at 202.

32 Studies sponsored by the National Commission on Marijuana and Drug Abuse have suggested that approximately 24 million Americans over the age of 11 years (over 15 percent of adults 18 years and over and more than 14 percent of those in the 12-17 age group) have used marijuana at least once with 8.3 million being current users: First Shafer Report—First Report of the National Commission on Marijuana and Drug Abuse: *Marijuana—A Signal of Misunderstanding* (New York, 1972) 38. A study in mid-1972 estimated total nationwide use for persons 11 years of age and over at 14.2 percent or more than 22 million persons: McGlothlin, "Marijuana: An Analysis of Use, Distribution and Control" (1972) 1 Contemporary Drug Problems 467. More recently, a Gallup Poll reported that 12 percent of those 18 and older have used marijuana: Gallup Poll, *The Washington Post*, 25 February, 1973—referred to in *Marijuana and Health*: Fourth Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare 1974 (Washington D.C., 1974) 16.

33 "International Drug Control", Working Paper, *Abidjan World Conference on World Peace Through Law* (Washington D.C., 1973) 26-27. See also *Marijuana and Health*: Second Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare 1972 (Washington D.C., 1972) 66-80.

often proclaimed.[34] But more significant than the charges founded upon misinformation, hyperbole, deliberate distortion and falsity and constituting "a kind of latter-day Malleus Maleficarum",[35] are the undesirable social consequences attendant upon present New Zealand policy towards cannabis. The ultimate objection to prohibition emerges from the imbalance of the costs-benefits equation under the present regime. From criminalisation of the drug, a variety of harms flow, far outweighing any benefits that accrue from suppression of use of the drug.[36]

Above all, a special genus of "criminals" has been created to which the stigmata of criminalisation attach in their various manifestations. Although under the criminal law in New Zealand penalties for personal possession and use of cannabis occupy a relatively low place on the sentencing tariff when compared with equivalent penalties in other countries, prosecution and conviction on a cannabis charge may seriously interfere with educational, vocational and travel opportunities as well as impinging upon social and family relationships. The prolonged legislative characterisation of cannabis as a narcotic has reduced the credibility of drug education programmes. Present legal policy has also engendered, especially among youth, a feeling of social alienation, or at least disillusionment towards the criminal law as a rational instrument of social control. A structure of illicit distribution has been created, together with consequent dangers—for example, the opportunity of association with substances a great deal more potent and dangerous than cannabis. A large number of persons is subjected to undesirable and discriminatory detection and enforcement practices and the institutional costs in maintaining special enforcement facilities and the necessary diversion of resources from serious criminal situations have not produced corresponding benefits. Nor is there any reason to believe that they will in the future.

In short, the process of "social cost-accounting"[37] discloses an imbalance of social costs as the price of prohibition. The feature common to proposals for legislative change of the existing control regime is the minimisation of these costs. It is towards these proposals and alternative strategies that attention is now directed.

Movements for cannabis law reform exist as three levels:

1. Mitigation of penalties for cannabis offences providing for punishment of minor offences by minor penalties.
2. Decriminalisation or partial legalisation of cannabis with the removal of all criminal sanctions against acquisition, possession and use of the drug.
3. Total legalisation of cannabis with the removal of all existing penalties relating to the drug and the establishment of a licen-

34 "It is idle to pretend that cannabis was brought under its present criminal law proscription on the basis of clear and unequivocal scientific evidence of its potential for harm." Interim Le Dain Report, supra n. 29 at 246.

35 Grinspoon, supra n. 2 at 323.

36 The costs-benefits issue is thoroughly investigated by Kaplan, *Marijuana: The New Prohibition* (New York, 1970) Chs.II-VII.

37 The term is borrowed from Packer, *The Limits of the Criminal Sanction* (Stanford California, 1968) 251.

sing system to regulate the production and distribution of cannabis.[38]

The first proposal is the most popular and the least satisfactory. It is essentially cautious and eschews any fundamental modification of policy. It merely treats certain less serious offences as nothing more than pecadillos but retains extant controls for those activities viewed as serious infractions. In terms of policy it is designed to eliminate use of cannabis. The second and third proposals offer a wider range of policy options:[39]

1. Approval of use.
2. Neutrality towards use.
3. Discouragement of use.

Approval of use is rejected as a policy option since it does not follow that change in the legal regime controlling cannabis must be accompanied by official approval of use. Commonly however, the assumption is made that any retreat from a position brooking no compromise with drug use signifies social acceptance of this use. But decriminalisation does not demand condonation of drug use — rather, it is a response to recognition of the limits of the criminal sanction. Kaplan, referring to marijuana, puts the issue plainly.[40]

> A decision not to criminalise marijuana would represent approval of the drug's use only if it were based on the conclusion that the drug somehow was "good". In fact, by far the most important reason to repeal the prohibition of marijuana is not that the drug is good but that the costs of criminalisation are out of proportion to the benefits of this policy.

Neutrality towards use is similarly rejected as not logically compelled by relaxation of current controls. No doubt, in some quarters, it would also be misconstrued as official approval of use. Discouragement remains the recommended policy.[41] It avoids granting the seal of institutional condonation to the use of cannabis; it takes account of existing public opinion; and, since knowledge of the properties and effects of any drug can never be finally stated, it does not preempt opportunities for policy change.

Of the various models available for control of various substances and activities, three are of particular relevance to the issue of drug control.[42] The first is the "licensing" model, whereby substances such as alcohol and tobacco are controlled within regulatory systems through taxation, limitation of distribution outlets, and a number of restrictions including prohibitions against sale to certain persons and sale at certain times. This model is designed to control availability through distribution, price and quality control. Those who view the issue as one

38 There have also been proposals for a moratorium or suspension of prosecutions in respect of cannabis offences. The Interim Le Dain Report, supra n. 29 at 245, rejected one such proposal as amounting to no more than *de facto* legalisation. Another novel suggestion is the establishment of so-called "Marijuana Houses" where the drug may be used without fear of prosecution: this possibility was rejected by the Marriott Report, supra n. 27 at 59.

39 These are the policy options, together with elmination of use, considered in the First Shafer Report, supra n. 32 at 161-169.

40 Kaplan, supra n. 36 at 312.

41 This is the policy opted for in both the First Shafer Report, supra n. 32 at 168, and the Le Dain Cannabis Report, supra n. 6 at 301.

42 See Kaplan, supra n. 36, Ch.IX.

of legal symmetry often argue for inclusion of cannabis within the alcohol licensing model. It is not proposed to enter the cannabis-alcohol and cannabis-tobacco arguments, often used to invoke the disparity of legal treatment of these substances to rationalise legalisation of cannabis. They are peripheral to the central issue of finding an acceptable alternative to the present cannabis control regime; indeed, the cannabis-alcohol argument appears to have only a specious appeal.[43]

> Alcohol is one of the most dangerous drugs, when used to excess, and from everything we know now it is probably considerably more dangerous than cannabis, if only for its capacity to produce strong physical, as well as psychological dependence. Secondly, the anomaly in the legal treatment of cannabis and alcohol is not logical, if the criterion is consistency. But there is no virtue in pursuing an unwise policy merely to be consistent. The argument of consistency—because alcohol has been made legally available cannabis should be made legally available—would apply to the non-medical use of all dangerous drugs, since few, if any of them, are more dangerous than alcohol when used to excess. It is alcohol which is the anomaly; not the other dangerous drugs whose distribution for non-medical use is prohibited.

Legalisation of cannabis within a licensing or regulatory system is frequently proposed as an alternative to the drug's criminalisation.[44] The essential features of such proposals are: administration of a licensing system by a state-controlled agency; production and distribution of cannabis by a state-controlled enterprise or a licensed private agency; regulation of price and standard potency and monitoring of quality by the administering agency; taxation of consumption at a rate comparable to that presently imposed upon alcohol and tobacco; prohibitions on advertising and a requirement that all cannabis distributed bear a warning, similar to that found upon packages of cigarettes,[45] fairly stating the possible hazards of use of the drug; restrictions on the times and places of distribution, and age limits for licit consumption; retention of the criminal sanction for unauthorised sale or possession of the drug; and treatment of unlicensed production of cannabis as a revenue offence, punishable by penalties including deprivation of liberty when commercial quantities are produced.

The overriding benefit of the licensing model is stated to be "that it allows about all the control society is able to impose while minimising the costs attributable to that control".[46] However, this scheme can offer no assurance of realising its principal objective—potency control. Users can regulate the dose level they desire by regulating the quantity of the drug consumed. Alternatively, a moderate potency concentration "might drive them to seek more potent products on

43 Le Dain Cannabis Report, supra n. 6 at 297.

44 See especially Grinspoon, supra n. 2 at 367-368; Kaplan, supra n. 36 at 332-347 and "The Role of Law of Drug Control" (1971) Duke L. J. 1065, 1100-1103.

45 Some of these warnings are more positively stated than others. The New Zealand warning — "Government Warning: Smoking May Damage Your Health" — was instituted pursuant to an agreement in March 1973 between the Minister of Health and the major cigarette manufacturers. It bears a close resemblance to that found in the United Kingdom—"Warning by H.M. Government: Smoking Can Damage Your Health". In contrast, both the United States warning — "The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health"—and the Australian model —"Warning: Smoking is a Health Hazard"—are more positive.

46 Kaplan, supra n. 36 at 349.

the illicit market if it had the effect of making such a desired dose level too costly or inconvenient to attain".[47] Nor would it be possible to eliminate "efforts to convert the moderate substance that was legally available into more potent concentrations".[48] And, quite apart from these practical difficulties, such a model, necessarily involving a greater or lesser degree of state participation, would invite the notion of official approval of use.

The second alternative, the "medical" model, has only limited relevance to cannabis control. In several countries this model provides for a form of drug control by medical prescription—certain drugs, e.g. amphetamines and barbiturates, may be obtained from registered pharmacists only upon the prescription of a medical practitioner. The criminal sanction may apply only to the seller where the drugs are distributed without authorisation, or, additionally, may be extended to the user.

The final control strategy is the so-called "vice" model which imposes penal sanctions upon illicit supply but not consumption or use. Thus in many jurisdictions there exists a situation, de jure or de facto, where the supplier of the illegal service (e.g. prostitution, abortion and gambling) does not escape the reach of the criminal sanction although the user does. Transferred to the area of drug control it allows for the implementation of a policy of discouragement, removing the prohibitions against acquisition, use and possession, while retaining the prohibition against distribution. Both the First Shafer Report and the Le Dain Cannabis Report recommended partial legalisation schemes premised upon partial rather than total prohibition. Production and distribution would, according to this model, remain criminal activities (together with possession with intent to distribute commercially) while possession for personal use would be decriminalised. Such a control structure could be based upon the following provisions:[49]

1. Neither acquisition, possession nor use of cannabis in private would be subject to criminal sanction.
2. Possession of cannabis in public would not be an offence but the drug would be subject to summary seizure and forfeiture.[50]
3. Use of cannabis in public would be an offence punishable by fine only.
4. Possession of cannabis for the purpose of dealing would be an offence although possession of more than specified minimum

47 Le Dain Cannabis Report, supra n. 6 at 286.

48 Ibid., 287.

49 These proposals represent a synthesis of the recommendations of the First Shafer Report, supra n. 32 at 190-195; the Le Dain Cannabis Report, supra n. 6 at 302-303; Bonnie & Whitehead, "The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition" (1970) 56 Va.L.Rev. 971, 1178-1179; and Rosenthal, "Dangerous Drug Legislation in the United States: Recommendations and Comments" (1967) 45 Tex.L.Rev. 1037, 1117-1121.

50 This provision incorporates the discouragement policy and attempts to make some accommodation for treaty obligations in respect of cannabis: see infra, n. 75 and accompanying text.

quantities would no longer be presumptive evidence of possession for the purpose of dealing.[51]

5. Cultivation of cannabis, other than for the purpose of dealing, would not be an offence. Upon proof of cultivation it would be sufficient for a person charged with cultivation for the purpose of dealing to raise a reasonable doubt as to his purpose—it would not be necessary for him to discharge any special statutory onus of proof.
6. Dealing in cannabis would be an offence punishable by penalties including deprivation of liberty.
7. Distribution in private of small amounts of cannabis for no remuneration or insignificant remuneration not involving a profit would not be an offence.[52]
8. Distribution in public of small amounts of cannabis for no remuneration or insignificant remuneration not involving a profit would be an offence punishable by fine only.

In addition, the First Shafer Report, in its recommendations concerning marijuana for state law, included several further provisions relating to public activities associated with use of the drug.[53] It is suggested that they might have a relevance to the wider cannabis debate:

9. Disorderly conduct associated with public use of cannabis would be an offence, punishable by penalties including deprivation of liberty.
10. Operating a motor vehicle or dangerous instrument while under the influence of cannabis would be an offence punishable by penalties including deprivation of liberty and suspension of the licence or permit to operate such a vehicle or instrument.
11. A plea of acting under the influence of cannabis would not be a defence to any criminal act nor would proof of such influence constitute a negation of specific intent.
12. A person would be absolutely liable in civil proceedings for any damage or loss to person or property which he caused while under the influence of cannabis.

Like all proposals of its kind such a scheme has deficiencies. The recommendations of the First Shafer Report have been labelled as an "unsupportable middle way between present repression and future legalisation",[54] and again in relation to marijuana, partial legalisation

51 Such presumptions are generally undesirable because, apart from the limitations inherent in any arbitrarily fixed amount, quantity is only one factor relevant to the purpose of possession and "cases will arise in which possession of fairly large amounts will be as consistent with innocence as with guilt". Rosenthal, supra n. 49 at 1111.

52 The Le Dain Cannabis Report, supra n. 6 at 302, referred to the "giving without exchange of value, by one user to another of a quantity of cannabis which could reasonably be consumed on a single occasion". The feature common to the First Shafer Report and the Le Dain Cannabis Report in this respect is that both recognise that casual transfers of cannabis, totally or quasi-donative, are normal incidents of possession of the drug. In the United States the federal Comprehensive Drug Abuse Prevention and Control Act 1970 effectively treats such transfers as the functional equivalent of possession for personal use: First Shafer Report, supra n. 32 at 198.

53 First Shafer Report, supra n. 32 at 194-195.

54 Greenstein & DiBianco, "Marijuana Laws—A Crime Against Humanity" (1972) 48 Notre Dame Law. 314, 329.

proposals have been criticised as logically inconsistent.[55]

> If the dangers of marijuana do not support the criminal treatment of the user solely for his own use, it is submitted that they do not support the punishment of the distributor . . . . [t]he recommendation which advocates the elimination of penalties for simple possession, use and acquisition has implicit in it the proposition that the use of marijuana is not harmful, in which case there is no valid reason for prohibiting the distribution of marijuana.

Of course, there is no complete reply to this criticism. The only "valid reason" is the policy of discouragement which makes it less incomprehensible for the criminal law to withdraw from some areas while remaining in others. The policy is served by reducing supply, confining the limits of licit use and continuing efforts at drug education. The further objection that it is illogical to give those who wish to obtain and use cannabis no real opportunity to do so since dealing in the drug will still be proscribed, except in limited circumstances, can be met by another invocation of the discouragement policy:[56]

> . . . we acknowledge the inconsistency of legalising possession for personal use and yet criminalising conduct which must necessarily precede such possession at some point. However, we believe that this inconsistency is justified as an interim measure both by the need to keep users out of the courts and by the salutary effect of keeping most users out of contact with organised dealers through legitimation of some channels of distribution.

Another response in opposition to partial legalisation of cannabis is the argument of law enforcement authorities that removal of the prohibitions against possession and use would unduly impede the suppression of dealing in cannabis. The prohibition against possession, in particular, has several advantages for police authorities. Possesion offences are easier to prove than dealing offences since the necessity to prove dealing or possession for the purposes of dealing is obviated; in some cases, a person charged with a possessional offence may be disposed to reveal his source of supply; and such a prohibition can be used against persons suspected of dealing where it may be impossible to prove a dealing offence. Less realistically, it has occasionally been suggested that the prohibition against possession has a preventive aspect since it relates to conduct preparatory to use. Despite these arguments, the National Commission on Marijuana and Drug Abuse[57] was not convinced that the detective utility of the possession offence justified its retention and was opposed to criminalising conduct when its purpose and intent was directed not towards that conduct but towards other behaviour. Similarly, the Le Dain Commission[58] did not think that any marginal utility deriving from the possessional offence vindicated its retention.

No proposals for change in the legal status of cannabis will be devoid of a measure of inconsistency and illogicality. Indeed, the pattern of control of alcohol, the supreme social lubricant, may well be challenged on these grounds. The partial legalisation-prohibition approach is advocated here because it reflects an acceptable alternative

55 Note, "The Legalisation of Marijuana: A Realistic Approach, Part I" (1968) 21 Vand.L.Rev. 517, 540-542.

56 Bonnie & Whitehead, supra n. 49 at 1179.

57 First Shafer Report, supra n. 32 at 204-206.

58 Le Dain Cannabis Report, supra n. 6 at 301.

to total prohibition without demanding what many would consider a legislative volte-face. Any weaknesses in the scheme are counterbalanced by the obvious benefits to be derived under it.

3. *International Law and Domestic Change*

If New Zealand is not to act in violation of its obligations at international law any change in the law relating to cannabis should accomodate the provisions of the Single Convention on Narcotic Drugs 1961[59] to which this country is a party.

The issue of compatibility of new legislative strategies towards cannabis with treaty obligations has often been ignored or given scant attention in discussions of the juridical aspects of drug use. Interpretations of the Single Convention are as diverse as the putative effects of the drug itself. One commentator has argued that the Single Convention does not extend to leaf preparations of cannabis but only to hashish,[60] while another has suggested that a party might circumvent the Convention by eliminating low-potency cannabis from the list of controlled drugs.[61] Others have seen no obstacles in the Convention which would impede the implementation of a partial legalisation scheme.[62] Furthermore, governmental statements concerning treaty obligations in respect of cannabis frequently do no more than recite the relevant provisions of the Single Convention.[63]

The Single Convention does apply to "cannabis" which is defined as the "flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has been extracted, by whatever name they may be designated".[64] "Cannabis plant" and "cannabis resin" are further defined in the Convention.[65] The drug is included in both Schedules I and IV: drugs in Schedule I are subject to all measures of control,[66]

59 520 U.N Treaty Series 204; N.Z. Treaty Series (1965) No. 4. New Zealand deposited its instrument of ratification to this Convention in March 1963 and the Convention entered into force in December 1964.

60 Grinspoon, supra n. 2 at 367. The Convention does, however, impose an obligation, albeit general, in respect of the leaves of the cannabis plant: see infra, n. 68 and accompanying text.

61 Bloomquist, *Marijuana—The Second Trip* (1st revised ed., Beverly Hills, California, 1971) 256, suggests that this method of circumvention is open to the United States. Presumably, this is a reference to Art. 49 of the Single Convention which provides for transitional reservations permitting continuance of existing non-medical use of cannabis, *inter alia*, in territories where there has been a tradition of such use. Use of the drug must be terminated within 25 years of the Convention entering into force and such a reservation may only be made at the time of signature, ratification or accession.

62 For example, Rosenthal, supra n. 49 at 1121-1122, n. 424, takes the view that the Convention would not preclude the decriminalisation of marijuana acquisition, possession or use. The contrary view is taken by Scott, "The Single Convention on Narcotic Drugs vs. Decriminalisation of Marijunana: A Beginning or an End?" (1974) 49 Calif.S.B.J. 524; and Van Atta, "Effects of the Single Convention on Narcotic Drugs Upon the Regulation of Marijuana" (1968) 19 Hast.L.J. 848.

63 See, for example, the statement by the Department of State concerning the treaty commitments of the United States in respect of marijuana in "Contemporary Practice of the United States Relating to International Law" (1970) 64 Am.J.Int.L. 633.

64 Single Convention, Art. 1 (b).

65 Ibid., Art. 1 (c) and (d).

66 Ibid., Art. 2 (1).

while those listed in Schedule IV are subject to all Schedule I control measures and may be subject to additional and special measures of control which, in the opinion of a party, are necessary having regard to the particularly dangerous properties of a drug so included.[67]

Cannabis leaves are not included within the definition of "cannabis". The Plenipotentiary Conference which met in 1961 to consider the third draft of a convention prepared by the Commission on Narcotic Drugs decided to exclude the leaves of the cannabis plant from the general scheme of control except for a rather general and perhaps ambivalent obligation requiring the parties to "adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant".[68] This indefinite provision would appear not to inhibit the implementation of a partial legalisation policy in respect of the leaves of the plant since it does not necessarily require the criminalisation of possession and use. However, the result secured would be narrow indeed, leaving other forms of the drug outside its provision.

A more comprehensive result is achieved if the Convention can reasonably be interpreted as not compelling the criminalisation of possession and use of any form of cannabis. To this end, three provisions of the Convention are of particular relevance. The first is Article 4 (c) which obliges parties to "take such legislative and administrative measures as may be necessary . . . to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs". The second, Article 33, provides that the parties "shall not permit the possession of drugs except under legal authority". Neither article necessarily requires the imposition of penal sanctions and neither presents an insurmountable obstacle to the implementation of a partial legislisation policy.[69] The last in this trilogy is Article 36 (1) which requires that the parties make "possession . . . of drugs contrary to the provisions of this Convention" a punishable offence when committed intentionally. This provision has attracted divergent interpretation. On the one hand, it has been suggested that "possession" within Article 36 (1) includes possession for personal use,[70] while, on the other hand, the term has been understood as being directed at possession "as a link in illicit trafficking"[71] rather than at simple possession for personal use. It is suggested that both the contextual situation

67 Ibid., Art. 2 (5).

68 Ibid., Art. 28 (3). Measures required to prevent misuse of cannabis leaves might include prohibitions against sale of very potent leaves, sale of excessive quantities to one person, and sale to persons below a certain age: Lande, "The International Drug Control System", Technical Papers, Second Report of the National Commission on Marijuana and Drug Abuse: *Drug Use in America—Problem in Perspective,* Vol. III, The Legal System and Drug Control (Washington D.C., 1973) 6, 129.

69 One drug control model which has the effect of restricting drug use to medical and scientific purposes without making such use or simple possession for other purposes an offence is the Canadian Food and Drugs Act 1970. This Act imposes a regulatory scheme of control whereby "controlled drugs" such as amphetamines and barbiturates may only be obtained on medical prescription although their unauthorised possession is not a penal offence.

70 Le Dain Cannabis Report, supra n. 6 at 210.

71 First Shafer Report, supra n. 32 at 208.

of "possession" and the drafting history of Article 36 (1) support the latter interpretation. Article 36 (1) appears to contemplate possession for sale or other distribution. This view derives a measure of support from the other activities listed in Article 36 (1) itself: cultivation, production, manufacture, extraction, preparation, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation.[72] Furthermore, the history of Article 36 (1) evinces an intention to punish illicit trafficking in drugs. The first part of this provision reproduces article 45 (1) (a) of the third draft of the convention which served as the working document of the 1961 Plenipotentiary Conference, and article 45 (1) (a) was included in that chapter of the draft headed "Measures Against Illicit Traffickers".[73]

> The Draft's division into chapters was not taken over by the Single Convention and this is the reason why the above chapter heading was deleted; but article 36 still is in that part of the Convention devoted to the illicit traffic. The article is preceded by article 35, entitled "Action against the Illicit Traffic", and followed by article 37, entitled "Seizure and Confiscation".

It might also be added that Article 36 (1) does not refer to "use", although this term is found in Article 4 (c) alongside "possession"; and "purchase" (rather than the more general term "acquisition") is listed as a punishable offence.

Pursuing this interpretation, it remains to give some force and meaning to Articles 4 (c) and 33 of the Single Convention. The First Shafer Report,[74] in its recommendations for federal and state law, suggested that this accommodation might be achieved by classifying cannabis as contraband subject to summary seizure and forfeiture when possessed in public.[75]

> To affirmatively allow drugs to remain in the possession of persons for nonmedical use would in this view contravene articles 4 and 33 read together. From this perspective our international obligations may require the classification of marijuana as contraband.

Clearly, however, such an interpretation has not found favour with most parties to the Single Convention. For such states, wishing to adopt new policies towards cannabis, the Convention provides procedures for modification of and withdrawal from its obligations.

Two amendment procedures relevant to the present discussion are countenanced by the Convention.[76] First, a party wishing to remove cannabis from the Convention's control may propose that the drug be deleted from Schedules I and IV; the Commission on Narcotic Drugs may, in accordance with the recommendation of the World Health Organization, so amend the Schedules. However, the decision

72 The Le Dain Cannabis Report, supra n. 6 at 210, noted that the sense of the word used in the French text of the Single Convention—*détention*—gives support to the argument that "possession" appears in Art. 36 (1) in a context of distribution.

73 Lande, supra n. 68 at 59.

74 Supra n. 32 at 191, 193.

75 Ibid., 208.

76 It may also be open to parties to the Single Convention to modify their obligations *inter se* in the manner contemplated by Art. 41 of the Vienna Convention on the Law of Treaties 1969 (1969) 8 Int.L.M. 679; N.Z. Treaty Series (1971) No. 3.

of the Commission is subject to review by the Economic and Social Council of the United Nations upon the request of any party to the Convention. The Council may confirm, alter or reverse the decision of the Commission and the decision of the Council on review is final.[77]

Secondly, a party may invoke Article 47 of the Convention. Several amendments appear to be available:[78] deletion of cannabis from the Schedules of the Convention; modification of the Convention to allow parties to implement partial legalisation policies towards cannabis; or the inclusion in the Convention of a strict definition of the term "narcotic", thereby excluding cannabis from the control regime. The text of the amendment would be communicated to the parties and to the Economic and Social Council, which may decide either that a conference should be called to consider the proposed amendment or that the parties should be asked whether they accept the proposed amendment and also asked to submit any comments on the proposals to the Council. If the proposed amendment, circulated in this manner, has not been rejected by any party within eighteen months of its communication, it enters into force; if, however, it is rejected by any party the Council may decide whether a conference should be called to consider the amendment. It may safely be predicted that any one of the suggested amendments would encounter some resistance from parties disinclined to accept any relaxation of the existing international control structure.

A party may withdraw from the Convention by depositing a notice of denunciation.[79] Denunciation of the Convention in its entirety would certainly remove any restrictions upon a party's freedom to introduce a partial legalisation policy in respect of cannabis, but it would also attract less desirable consequences, the most far-reaching being that the denouncing party would thereby remove itself from the international control regime in relation to other drugs. Moreover, in the New Zealand context, it is unlikely that this country would denounce a multilateral treaty which represents the synthesis of international drug control measures—New Zealand's support for efforts to eliminate cannabis use is well established.[80]

Finally, principles independent of the Single Convention have been invoked in order to overcome obligations imposed by the Convention in respect of cannabis. This approach, acknowledged to be a secondary means of overcoming the Convention's cannabis provisions,[81] derives from the general international law of treaties and argues for

77 Single Convention, Art. 3.

78 See Lande, supra n. 68 at 51; and Leinwand, "The International Law of Treaties and United States Legalisation of Marijuana" (1971) 10 Colum.J. Transnat.L. 413, 421-422.

79 Single Convention, Art. 46. Leinwand, supra n. 78 at 423-424, suggests an alternative method of invoking the denunciation clause i.e. denunciation followed by re-acceptance of the Convention subject to a reservation, under Art. 50 (3), permitting legalisation of cannabis by the re-accepting state.

80 In reply to a 1923 South African proposal that cannabis should be treated as an addictive drug and included within an international convention, New Zealand reported to the League of Nations Advisory Committee on Traffic in Opium and Dangerous Drugs in 1925 that it considered cannabis harmful and the proper subject of international control: "History of the Development of International Control", Appendix II, Wootton Report, supra n. 28 at 65.

81 Leinwand, supra n. 78 at 424.

selective denunciation of the cannabis provisions on the grounds of "error" and "fundamental change of circumstances".[82]

Even assuming, *arguendo*, that the cannabis provisions are separable from the remainder of the Convention, and that "error" and "fundamental change of circumstances" are available as grounds for invoking the principle of separability of treaty provisions,[83] it remains most unlikely, both on substantive and procedural grounds, that the desired result would be achieved. First, precedent does not presage a successful reliance on either ground. While "error" occupies a comparatively significant position as a factor vitiating consent to contracts in many municipal legal systems, instances in which substantive errors have been invoked as affecting the essential validity of treaties have not been frequent—"Almost all the recorded instances concern geographical errors, and most of them errors in maps".[84] The argument that the post-1961 state of medical and scientific knowledge concerning cannabis has altered to such an extent as to qualify as a "fundamental change of circumstances" would, it is suggested, founder on the exceptional and restrictive nature of the doctrine. This doctrine,[85] often termed *rebus sic stantibus* and aptly described as "the *enfant terrible* of international law",[86] is formulated in the Vienna Convention on the Law of Treaties as an essentially negative statement, contingent for its application upon the existence of several conditions. Principally, the change must be "fundamental" and must radically transform the extent of the obligations still be performed under the treaty. In two recent decisions,[87] the International Court of Justice examined the doctrine and referred to the "traditional view that the changes of circumstances which must be regarded as fundamental or vital are those which imperil the existence or vital development of one of the parties"[88] stating further that it is also necessary that such a change "must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken".[89]

82 Ibid., 424-441. The argument is based on the Vienna Convention on the Law of Treaties 1969, supra n. 76; the International Law Commmision's Draft Articles on the Law of Treaties (1966) 2 Y.B.Int.L.Comm. 177; and the *Second Restatement of the Foreign Relations Law of the United States* (1965). Although the Vienna Convention is not yet in force and cannot, in any case, apply to the Single Convention because of its non-retroactivity clause (Art. 4), it is nevertheless the most authoritative source of the modern law of treaties.

83 Ibid., 430.

84 Commentary on the International Law Commission's Draft Articles on the Law of Treaties (1966) 2 Y.B.Int.L.Comm. 187, 243.

85 See generally Koeck, "The 'Changed Circumstances' Clause After the United Nations Conference on the Law of Treaties (1968-69)" (1974) 4 Ga.J.Int. & Comp.L. 93; Lissitzyn, "Treaties and Changed Circumstances (*Rebus Sic Stantibus*)" (1967) 61 Am.J.Int.L. 895; Tiewul, "The Fisheries Jurisdiction Cases (1973) and the Ghost of Rebus Sic Stantibus" (1973) 6 N.Y.U.J.Int.L. & Politics 455; and Toth, "The Doctrine of *Rebus Sic Stantibus* in International Law" [1974] 19 Jur.Rev. 56, 147, 263.

86 Toth, supra n. 85 at 56.

87 *Fisheries Jurisdiction (United Kingdom* v. *Iceland; Federal Republic of Germany* v. *Iceland), Jurisdiction of the Court, Judgments, I.C.J. Reports 1973*, pp. 3, 49.

88 Ibid., 19, 64.

89 Ibid., 21, 65.

Secondly, both grounds have a procedural complement. A party invoking "error" as a factor vitiating its consent to be bound by a treaty must, under the Vienna Convention, notify the other parties to the treaty of its claim and allow them the opportunity of making objections.[90] In the case of the cannabis provisions of the Single Convention it would be unrealistic not to anticipate such objections and, in this event, the parties would be required to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.[91] If agreement is not reached at this stage further procedures for judicial settlement, arbitration and conciliation are provided.[92] Nor does a party invoking "fundamental change of circumstances" as a ground for terminating or withdrawing from a treaty or suspending its operation have a right of unilateral action. Once again the procedures prescribed in Section 4, Part V of the Vienna Convention and its accompanying annex would apply.

Resort to the general international law of treaties is neither necessary nor desirable in the present context. The Single Convention does not expressly require the imposition of penal sanctions against possession for personal use, and a partial legalisation scheme is consonant with the provisions of Articles 4 (c), 33 and 36 (1) of the Convention. Moreover, this approach is clearly more desirable than withdrawal, either total or partial, from the Convention since it preserves the integrity of the Convention and does not set a precedent which might produce widespread defection from the international drug control structure.

4. *The Misuse of Drugs Act 1975*

The First and Second Blake-Palmer Reports are among the most disappointing reports on drug use that have appeared in the last few years. Both adhered to total prohibition as the basis of cannabis control. The First Report recommended "[t]hat there should be no relaxation in the current control of cannabis (marijuana) and its preparations, considering the present state of knowledge of its properties".[93]

Similarly, the Second Report's recommendation in respect of cannabis endorsed present policy:[94]

> Since we support legislative measures aimed at strongly discouraging the [cannabis] habit, we recommend continuance of a prohibition policy so long as this can be shown to be largely effective.

This Report advocated the introduction of legislation incorporating into a single statute existing legislative regimes "relating to the control of drugs and similar substances (other than alcohol and tobacco) which have a significant potential for misuse".[95] To give effect to this recommendation and to extend drug control to psychotropic substances in accordance with the Convention of Psychotropic

90 Vienna Convention, Art. 65 (1).

91 Ibid., Art. 65 (3).

92 Ibid., Art. 66.

93 First Blake-Palmer Report, supra n. 5 at 92.

94 Second Blake-Palmer Report—Second Report of the Board of Health Committee: *Drug Dependency and Drug Abuse in New Zealand* (Wellington, 1972) 89.

95 Ibid., 55, 100.

Substances 1971,[96] the Drugs (Prevention of Misuse) Bill[97] was introduced to the legislature in 1974 and referred to a Parliamentary Select Committee established to consider both the proposed legislation and the Second Blake-Palmer Report. The Bill, as reported back from the Select Committee, contained a number of significant amendments, These did not, however, alter the basic control regime which did little more than consolidate the existing legislation, adding a gloss derived from the Misuse of Drugs Act 1971 (U.K.). The new legislation maintains as its foundation a philosophy of prohibition and preserves the instrument of the criminal law as the most appropriate means for achieving this end. That the parallel English legislation provided the analogue for the new control regime is clearly demonstrated by the recommendation of the Select Committee that the short title be changed from the Drugs (Prevention of Misuse) Act to the Misuse of Drugs Act. In following the English model, the legislature is adhering to the traditional approach to drug legislation in this country that control regimes implemented elsewhere provide the exemplars for control in New Zealand.[98]

The Misuse of Drugs Act 1975 repeals the Narcotics Act 1965 and incorporates its provisions together with a number of the provisions of the Narcotics Regulations 1966. Commendably, it discards the term "narcotic"[99] which has perpetuated the bifurcation of legal and pharmacological definitions of cannabis and has continued the almost automatic transference of the characteristics of other drugs, notably the opiates, to cannabis. Instead, the Act uses the term "controlled drug" (derived from the Misuse of Drugs Act 1971 [U.K.]) and classifies drugs into three schedules according to their potential for harm. "Cannabis fruit", "cannabis plant" and "cannabis seed" are included within the Third Schedule as Class C controlled drugs;[1] "cannabis resin and extracts and tinctures of cannabis, except when occurring in natural proportions in a Class C controlled drug" are placed in the Second Schedule as Class B controlled drugs;[2] and tetrahydrocannabinols, except when contained in a Class B or a Class C controlled drug, are classified as Class A controlled drugs under the First Schedule. Clearly, "potential for harm" does not refer to potential to create dependence since cannabis is categorised in the schedules of the Act alongside morphine, opium, methdone, pethidine and codeine. From a pharmacological perspective, the classification is difficult to defend and the schedules are intelligible only if one has in mind the history of prior legislation and the knowledge that the new classification represents a cautious attempt at change within the old structure.

96 (1971) 10 Int.L.M. 261. The Convention, to which New Zealand is a signatory, has not yet entered into force.

97 The Bill was introduced and received a first reading on 28 March 1974. It received a second reading on 18 July 1975, and was enacted as the Misuse of Drugs Act 1975 on 10 October 1975. It will enter into force on a date to be appointed by the Governor-General by Order in Council.

98 The Dangerous Drugs Act 1927 followed the form of the Dangerous Drugs Act 1920 (U.K.). Indeed, the title of the 1974 Bill, as originally introduced, appears to have been taken from the Drugs (Prevention of Misuse) Act 1964 (U.K.).

99 This follows the recommendation of the Second Blake-Palmer Report, supra n. 94 at 55, 100.

1 Id.

2 Id.

The classification of drugs according to their potential for harm is matched by differentiation in penalties. The Second Blake-Palmer Report[3] recommended that differing maximum penalties, graded in severity, be provided for both possessional and dealing offences in terms of the relative potential for harm of the drugs concerned. The Act retains the existing prohibitions against acquisition, possession and use of cannabis.[4] In the case of cannabis section 7 of the Act actually increases the maximum penalty to 3 months' imprisonment and/or a fine of $500.[5] The Act does, however, recognise current sentencing practices. The Select Committee recommended that a proviso be added to section 7 relating to Class C controlled drugs to the effect that a person convicted of acquisition, possession or use of marijuana shall not be sentenced to a custodial sentence unless, in the opinion of the court, his previous convictions or any exceptional circumstances relating either to him or his offence require that such a sentence be imposed.

Predictably the prohibition against dealing is retained. In accordance with the recommendation of the Second Blake-Palmer Report[6] section 6 provides that the maximum penalty for dealing offences involving drugs with a high potential for harm is no greater than the present maximum penalty for all offences of dealing in "narcotics".[7] Dealing in Class A controlled drugs attracts a maximum penalty, on conviction on indictment, of 14 years' imprisonment (3 years' imprisonment and/or a fine of $3,000 on summary conviction); dealing in Class B controlled drugs is punishable by a maximum penalty, on conviction on indictment, of 10 years' imprisonment (2 years' imprisonment and/or a fine of $2,000 on summary conviction); and dealing in Class C controlled drugs renders a person convicted on indictment liable to a maximum penalty of imprisonment for 8 years (1 year's imprisonment and/or a fine of $1,000 on summary conviction). Section 6 (4) of the Act was subject to another Select Committee recommendation: the Committee suggested that the reference to "prison sentence" be replaced by "custodial sentence" and that such a sentence should be imposed unless, having regard to the particular circumstances of the offence or the offender, including the age of the offender if he is under 20 years of age, the court is of the opinion that he should not be so sentenced. Under the Narcotics Act the direction to the courts to impose a sentence of imprisonment applies to all drugs,[8] whereas, under the Misuse of Drugs Act, it is restricted to Class A controlled drugs.

Apart from the substitution of "custodial sentence" and the provision for special treatment for "youthful offenders", the Act as reported from the Select Committee contains another interesting amendment. The supply, but not sale, of a Class C controlled drug to a person over 18 years of age is not included within the scope of deal-

3 Id.
4 Narcotics Act 1965, s. 6.
5 At present acquisition, possession and use are subject to the maximum penalty of imprisonment for a term not exceeding 3 months and/or a fine not exceeding $400: Narcotics Act 1965, s. 15.
6 Supra n. 94 at 55, 100.
7 The present maximum penalty is 14 years' imprisonment: Narcotics Act 1965, s. 5 (2).
8 Narcotics Act 1965, s. 5 (3).

ing. However, proof of supply is presumptive evidence of sale until the contrary is proved, and the act of supply in these circumstances is treated as the equivalent of possession for personal use under section 7. Supply to a person under 18 years of age, even if totally donative, remains a dealing offence. This is no more than a cautious half-step which only partially recognises that casual transfers of marijuana, without remuneration, are outside the profit-motivated area of dealing. The Second Blake-Palmer Report noted the imprecision of "supply" under the Narcotics Act.[9]

> In the absence of a statutory definition the word "supply" does not enable the court to distinguish clearly in the matters of the methods of consumption of different drugs, in the scale of operations, or in the extent to which the profit motive is involved. Under the present legislation handing a marijuana reefer to another technically constitutes "supplying", yet sharing without profit is a feature of the way in which marijuana is commonly consumed among friends. We are confident from the evidence of the sentencing study that magistrates do in fact take such evidence into account, but we regard the proposed revision of the legislation as a good opportunity for clarifying the matter.

Section 6 of the new Act also includes the presumption that possession of specified minimum quantities of controlled drugs is possession for the purposes of sale or supply. In the case of cannabis the quantities listed are 5 grams of hashish, 28 grams of cannabis plant or 100 marijuana cirgarettes. The deficiences of such a presumption, aptly described as a "rule-of-thumb concept",[10] have been referred to already.[11]

Cultivation of "prohibited plants", which includes cannabis, is no longer classified as an offence of dealing and section 9 reduces the maximum penalty which may be imposed on conviction on indictment from imprisonment for 14 years to 7 years (2 years' imprisonment and/or a fine of $2,000 on summary conviction).

Some of those offences labelled "miscellaneous" under the Narcotics Act[12] are subject to sharply increased penalties under the Misuse of Drugs Act. The Select Committee recommended the inclusion of a separate provision, section 12, to deal with the use of premises or vehicles for the purpose of the commission of a drug offence and the maximum penalties for such an offence are increased from the general penalty under section 15 of the Narcotics Act (imprisonment for a term not exceeding 3 months and a fine not exceeding $400) to imprisonment for terms of 10 years for Class A controlled drugs, 7 years for Class B controlled drugs, and 3 years for Class C drugs. Section 13, following the Committee's recommended division of "miscellaneous" offences, retains proscriptions against the possession of any needle, syringe, pipe or other utensil for the purpose of the commission of an offence and the possession of any seed or fruit (not being a controlled drug) of any prohibited plant for which, there is no authorisation to cultivate. The maximum penalty is 1 year's imprisonment and/or a fine of $500.

9 Supra n. 94 at 37.
10 The Minister of Health, Hon T. M. McGuigan, rationalised the quantities specified as follows: ". . . anyone in possession of more than 1 month's supply for a regular moderate user, which is the equivalent of about 1 week's supply for an extremely heavy user, and 6 months' supply for a casual user or taster, is almost certainly a supplier." (1975) N.Z.P.D. 3143.
11 Supra n. 51.
12 Narcotics Act 1965, s. 7.

The controversial Police power of search and seizure without warrant under the Narcotics Act is further expanded by the Misuse of Drugs Act. Section 18 preserves the existing powers of the Police and specifies the drugs to which they apply (among which are included hashish and marijuana) instead of leaving them to be specified by Order in Council as is the procedure under the Narcotics Act.[13] To allay Police fears that the existing power of search without warrant under the Narcotics Act does not extend to the search of a person in a public place and to accommodate the Police view that such a power is both desirable and necessary,[14] the Select Committee recommended the inclusion of a further provision, subsection 3, which expressly recognises the power of the Police to conduct personal searches without warrant where there are reasonable grounds for believing that a person is in possession of any specified controlled drug and that an offence has been or is suspected of having been committed in respect of that drug. The second recommendation relating to section 18 added subsection 6 which transforms the administrative practice presently followed by the Police of submitting a written report to the Commissioner of Police following use of the existing power of search without warrant into a statutory obligation to furnish a report to the Commissioner within 3 days of the exercise of the power.

Section 32 relating to forefeiture of all articles in possession of a person convicted of a drug offence and related to the commission of that offence has also been expanded. Subsection 3, as recommended by the Select Committee, provides that the court may order the forfeiture to the Crown of any money found in the possession of a person convicted of a dealing offence where it is satisfied that this money was received by that person in the course of or consequent upon the commission of the offence, or was in the possession of that person for the purpose of facilitating the commission of a dealing offence. This penalty, which may be imposed in addition to any other form of punishment imposed pursuant to the Act, was apparently prompted by recent discoveries of large amounts of money in the possession of convicted drug dealers.[15]

Finally, section 29 of the new Act deals with mistake as to the nature of a controlled drug. As originally drafted, this provision was modelled on section 28 of the Misuse of Drugs Act 1971 (U.K.) and placed on a defendant the onus of proving absence of knowledge. In respect of possessional or dealing offences, section 29 provides that a defendant shall not be acquitted of the offence charged by reason only of the fact that he did not know or may not have known that the substance, preparation, mixture, or article in question was the particular controlled drug alleged. The Select Committee recommended that the original draft be amended in order preserve the so-called "Strawbridge principle"[16]: in the absence of evidence to the contrary, knowledge on

13 Ibid., s. 12 (4).

14 The Police submission related to the deterrent value of such a power. The Justice Department took the view that the Police already possessed this power. (1975) N.Z.P.D. 3144.

15 (1975) N.Z.P.D. 3145.

16 *R.* v. *Strawbridge* [1970] N.Z.L.R. 909. See also *Police* v. *Rowles* [1974] 2 N.Z.L.R. 756.

a defendant's part will be presumed but if there is evidence that a defendant honestly believed on reasonable grounds that his act was innocent, he is entitled to be acquitted unless the court is satisfied beyond a reasonable doubt that this was not so.

Conclusion

This new control regime represents little more than a newly-dressed version of the old model. The solution to the cannabis issue does not rest in the re-scheduling of drugs and the re-classification of penalties by legislative fiat. The solution lies rather in a change of direction in policy, away from the control measures developed in relation to opium, the archetypal drug as far as New Zealand is concerned, towards recognition of the social costs of prohibition and the limitations of the criminal law as an effective mechanism of social control. Even at an intermediate level there are many examples of an increasing awareness that suppression of drug use by recourse to penal sanctions inevitably produces its own evils. Recommendations for special treatment of "first offenders",[17] consisting of conditional and unconditional discharges and expungement of all official records have received legislative implementation overseas[18] and liberalised regimes of control in respect of cannabis have also been adopted.[19] A further reflection of a retreat from past intransigence has been evident in amendments to international obligations.[20]

17 See the Interim Le Dain Report, supra n. 29 at 251-252, which urged the adoption of the recommendations of the Ouimet Report—Report of the Canadian Committee: *Corrections* (Ottawa, 1969); Marriott Report, supra n. 27 at 92-93; and "A Suggested Legislative Proposal", Working Paper, *Abidjan World Conference on World Peace Through Law*, supra n. 33 at 35, 39-40.

18 In the United States the federal Comprehensive Abuse Prevention and Control Act 1970 incorporates provisions for discharge and expungement. Over 30 American states have adopted conditional discharge provisions, as contained in the Uniform Controlled Substances Act, for first-time possession offences: see Corcoran & Helm, "Compilation and Analysis of Criminal Drug Laws in the 50 States and 5 Territories", Technical Papers, Second Report of the National Commission on Marijuana and Drug Abuse: *Drug Use in America—Problem in Perspective,* Vol. III, The Legal System and Drug Control, supra n. 68 at 240, 243. The Canadian Government has abolished imprisonment for first offenders convicted on possession charges, implementing discharge and expungement provisions. *Bulletin of Legal Developments* No. 16, 19 August 1972, 186. In the United Kingdom the Rehabilitation of Offenders Act 1974 has introduced a scheme for expungement of criminal records generally.

19 In 1972 the city of Ann Arbor, Michigan, introduced an ordinance which imposed a $5 fine for possession, control, use or supply of cannabis: see "The Concurrent State and Local Regulation of Marijuana: The Validity of the Ann Arbor Marijuana Ordinance" (1972) 71 Mich.L.Rev. 400. In Oregon legislation of 1973 classifies the first offence of possession of marijuana as a simple "violation": see Scott, supra n. 62.

20 Art. 14 of the 1972 Protocol Amending the Single Convention on Narcotic Drugs 1961 (1972) 11 Int.L.M., amends Art. 36 of the Single Convention by adding a new subparagraph allowing parties to provide, as an alternative to conviction or punishment, that persons convicted of the offences set out in Art. 36 (1) (a) undergo measures of treatment, education, aftercare, rehabilitation and social re-integration. This Protocol, to which New Zealand is a signatory, has not yet entered into force.

The following statement of a former New Zealand Minister of Health concerning marijuana law reform is an accurate representation of official attitudes, past and present, towards any relaxation of current controls:[21]

> The New Zealand Government has for a long time taken the position that it is up to those who want marijuana decontrolled to prove that the drug is safe to individuals and to society. Up to the present time the evidence is clear that the drug is unsafe, harmful, and indeed socially disruptive.

In the context of the wider cannabis debate it is suggested that this onus has been discharged and the burden of proving that the drug is "unsafe, harmful, and indeed socially disruptive" should shift to those who seek to justify prohibition.

21 Hon. D. N. MacKay, *Statements by Ministers of the Crown*, No. 16/69, 20 August 1969, 270-271.