

## Going to pot? The social setting and implications of cannabis law reform.

### Introduction

In 2020, the people of New Zealand will be asked to take a stand on the legalisation of cannabis for recreational purposes. Changing the legal status of cannabis, and the laws around growth, supply and consumption is a complex issue. It requires careful consideration of what legalisation means in our current socio-political-economic climate. The debate around cannabis law reform has increasingly been framed in terms of seeing cannabis use as a ‘health issue’ rather than primarily a ‘justice issue’. Essentially, this approach involves moving away from a criminalisation method of deterring drug use through penalisation, toward a method “to protect the health of, and minimise harm from, drug use to individuals”.<sup>1</sup>

Rather than framing cannabis use as either a justice or a health issue, this article deems cannabis use to be a social issue that has broad societal implications.

### The current legal context regarding cannabis use in New Zealand

Currently in New Zealand, unauthorised possession of any amount of cannabis for any purpose is illegal. The exception to this is a statutory defence for the terminally ill, and people receiving palliation, to possess and use cannabis if it is deemed to improve their situation. This exception came into effect with the passing of the Misuse of Drugs (Medicinal Cannabis) Amendment Bill, on December 18<sup>th</sup> 2018.<sup>2 3</sup>

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<sup>1</sup> Eaqueb, S. (2019). *Estimating the impact of drug policy options: Moving from a criminal to a health-based model*. p. 13. Available at <https://www.drugfoundation.org.nz/assets/uploads/Cost-benefit-analysis-drug-law-reform.pdf> Last accessed 28 June 2019

<sup>2</sup> Misuse of Drugs (Medicinal Cannabis) Amendment Act, Dec 2018, NZ Ministry of Health. <https://www.health.govt.nz/our-work/regulation-health-and-disability-system/medicines-control/medicinal-cannabis/misuse-drugs-medicinal-cannabis-amendment-act>

<sup>3</sup> The Misuse of Drugs (Medicinal Cannabis) Amendment Bill also declassified non-psychoactive cannabis-derived products including cannabidiol (CBD) products, and allows medicinal cannabis products to be manufactured in New Zealand.

However, the *Misuse of Drugs Amendment Bill 2019*<sup>4</sup> – which has progressed to ‘second reading’ stage in Parliament at the time of writing – proposes that those caught in possession of and/or using a small amount of any controlled drug, including cannabis, should not be prosecuted unless it is in the public interest to do so. Police will be given the discretion to make this call.<sup>5</sup> Removing the criminal penalties for possession and use effectively decriminalises cannabis possession and use in certain proscribed circumstances without actually making them legal. We should note that there is already a practice of ‘diversion’ in New Zealand, that is used to keep people out of the criminal justice system. Where cannabis is found in small amounts and it is the first infraction for the person concerned, consequences other than prosecution, such as fines and health referrals are used. However, diversion schemes have not been applied consistently across New Zealand.<sup>6</sup>

The Minister of Health, David Clark, has stated that the Misuse of Drugs Amendment Bill 2019 is in line with the changes the government want to make towards a health-based response to drug use.<sup>7</sup> However, not all people agree that making cannabis use a health issue is the correct way forward. The effective decriminalisation of cannabis possession and use has been criticised from several perspectives. Janell Dymus-Kurei, the kaiwhakahaere of Hapai Te Hauora (Māori Public Health), has a health workforce who believe that drug issues should remain justice issues.<sup>8</sup>

Police Association President, Chris Cahill, has stated that “if there is a wish to decriminalise drug use, then that needs to be debated publicly, rather than slipped in under a discretion, which we believe this [Bill] does.”<sup>9</sup> We agree. If it is deemed that decriminalisation would achieve positive social goals, specific details around this need to be publicly debated including: how much cannabis counts as ‘a small amount’?; how are repeat offences to be treated?; how will it be ensured that appropriate/helpful and culturally responsive

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<sup>4</sup> This Bill can be located at <http://www.legislation.govt.nz/bill/government/2019/0119/latest/LMS167550.html>. Last accessed July 10th 2019

<sup>5</sup> <http://www.legislation.govt.nz/bill/government/2019/0119/latest/whole.html>

<sup>6</sup> <https://www.drugfoundation.org.nz/news-media-and-events/police-discretion-for-drug-offences-needs-greater-health-funding/>

<sup>7</sup> <https://www.rnz.co.nz/news/national/386568/maori-health-coalition-calls-for-less-punitive-drug-law-reform>

<sup>8</sup> <https://www.rnz.co.nz/news/national/388222/drug-law-change-goes-too-far-police-association>

<sup>9</sup> Ibid.

consequences to cannabis possession and use are put in place and carried through?; and do we need to decriminalise the growth, supply, possession and use of cannabis for decriminalisation to be completely effective?

Chris Macklin from the Law Society finds the notion of ‘police discretion’ problematic. Macklin notes that although there has been work done to help police identify and address unconscious bias as they exercise their powers, unconscious bias still remains a risk when police are asked to implement ‘discretion’.<sup>10</sup> The drug foundation’s Māori advocacy advisor, Jack MacDonald, concurs, stating that “police discretion is usually applied unevenly ... and sometimes in an outright discriminatory and racist way, so discretion for Māori is something we need to keep a close eye on”.<sup>11</sup>

### **Legalising cannabis?**

It is one thing to decriminalise the possession and use of a drugs, and another to legalise it. Legalisation condones and regulates the sale, use and supply of drugs in a way that decriminalisation does not.

Legalisation of cannabis will be voted on in a referendum in 2020. The government has indicated that the referendum question will be based on draft legislation (still being developed) that will enable people over the age of 20 to purchase cannabis from licensed premises. It will proscribe where cannabis can be consumed, and whether and under what regulations cannabis may be grown for personal use.<sup>12</sup> Without knowing the referendum wording, Chris Fowlie, spokesperson for the pro-cannabis group ‘Norml NZ’, manager of The Hempstore, and CEO of the medicinal cannabis startup PharmaCann New Zealand, states that “We are ready to campaign for a Yes vote, but we have concerns about the details, and we will work to ensure the legislation is the best it can be”.<sup>13</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> <https://www.rnz.co.nz/news/national/386568/maori-health-coalition-calls-for-less-punitive-drug-law-reform>

<sup>12</sup> <https://www.radionz.co.nz/news/in-depth/377347/flying-the-flag-for-cannabis-law-reform>

<sup>13</sup> <https://norml.org.nz/cannabis-reform-group-welcomes-referendum-details-%EF%BB%BF/>

At this point it is important to ask ourselves: **What is the purpose of the law?** One of the most significant roles that the law should fulfil is to convey what it is, as a people, we value. For values to be meaningful and worthwhile, they must be oriented toward the preservation and sustenance of people and place, guiding and enforcing responsible action. Anything other would be pathological, as it would be mandating societal demise.

It is arguable that, in our current market-driven society, the law is becoming more and more an instrument of corporate economic and political ‘systems’ in the service of profit, and uncoupled from nurturing people and place. Questions concerning meaningful and worthwhile values have been replaced by cost/benefit analyses and financial management questions. If those who propose, write and implement New Zealand law are to uphold the integrity of the law, any changes to the law must only be made after contemplation on the kind of world we want to live in and the kind of people we want to become, rather than in light of a partial (political and economic) cost-benefit analysis.

It is possible to understand the desperation of people advocating to change the law around cannabis possession and use, **as significant harms come from the current and largely punitive approach.** A drug conviction has serious repercussions for a person’s future possibilities; it narrows life opportunities, making it more difficult to get employment, to travel and to move into more life-affirming and sustainable social spaces. Further, if imprisoned, individuals are exposed to more ‘hardened’ criminals and little is done to address the impetus for drug use. Such negative repercussions have been noted by the Law Commission, who state that individuals who receive criminal convictions as a result of their possession or use often experience levels of harm quite disproportionate to their offending.<sup>14</sup> The harms from a punitive approach to drug use extends beyond the individuals involved, also become woven into families and communities, becoming entrenched with each generation, all of which further alienates those concerned. Statistics show that many of those

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<sup>14</sup> Eaqueb, S (2019). *Estimating the impact of drug policy options: Moving from a criminal to a health-based model*, p.8. Available at <https://www.drugfoundation.org.nz/assets/uploads/Cost-benefit-analysis-drug-law-reform.pdf> Last accessed 28 June 2019

convicted on charges relating to cannabis possession and use are young people from already marginalised groups.<sup>15</sup>

These statistics also show that the level of **cannabis use in New Zealand is climbing**. During 2016/17, 12% of adults in NZ used cannabis. This figure is up from the 8% it was in 2011/12.<sup>16</sup> Ministry of Justice figures show that around 1,800 people are convicted for cannabis every year.<sup>17</sup> New Zealand is now estimated to have the highest use of cannabis in the world, which is why many argue that criminalising cannabis is not actually effective in deterring people.<sup>18</sup> In 2011, the Law Commission also concluded that the criminal justice approach to preventing and reducing harm from drug use was not fit for purpose.<sup>19</sup> Empirical evidence supports this. For example, drug checking at festivals in the year 2017-2018, (currently undertaken by volunteers), identified 44 different psychoactive substances. Twenty of these were identified for the first time.<sup>20</sup> The Ministry of Health's 2016 Drug Harm Index (DHI) estimated that the total harm and intervention costs of illicit drug use in NZ to be \$1.8b. Note here how harm is being measured fiscally, and not in terms of the impact on the lives of individuals and communities.

### **Reframing cannabis as a health issue**

If a punitive deterrent model is not working, as shown by the upward trends in drug consumption, it makes sense to take a different approach. The New Zealand Drug Foundation contends that it is time to move the conversation on from 'should we reform?' to 'how should we reform?',<sup>21</sup> and recommends removing the criminal penalties for "possession, use and social supply" of low level drugs including cannabis. Their suggestion is that people found

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<sup>15</sup> <https://www.drugfoundation.org.nz/assets/uploads/2019-uploads//STON-2018.pdf>

<sup>16</sup> New Zealand Drug Foundation (2019). *State of the Nation 2018: A stocktake of how New Zealand is dealing with drug issues*, p. 3. Available at <https://www.drugfoundation.org.nz/policy-and-advocacy/state-of-the-nation-2018/> Last accessed 29 June 2019.

<sup>17</sup> *Ibid.*, p. 6

<sup>18</sup> Kiwis World's Top Cannabis Smokers. NZ Herald June 2012 [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10815874](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10815874); United Nations Office on Drugs and Crime, 2014, *World Drug Report*, UNODC: Vienna; United Nations Office on Drugs and Crime - World Drug Report 2012 <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2012.html>

<sup>19</sup> Eaqueb, S (2019). *Estimating the impact of drug policy options: Moving from a criminal to a health-based model*, p. 31. Available at <https://www.drugfoundation.org.nz/assets/uploads/Cost-benefit-analysis-drug-law-reform.pdf> Last accessed 28 June 2019

<sup>20</sup> Drug Foundation *State of the Nation*, 2018, pg 10).

<sup>21</sup> <https://www.drugfoundation.org.nz/assets/uploads/Whakawatea-te-Huarahi-July2017.pdf>

with a small amount of drugs on them should be given a health referral and offered support, not a conviction.<sup>22</sup>

However, there is **a problem with reframing cannabis use as a health issue**. In our current society, health issues are viewed as medical issues, and the medical model typically views problems that manifest in a person as problems internal to that individual. The individualising of the problem of cannabis use ‘flattens’ the complexity of a person’s situation. In reality, our situations are always shaped by historically informed socio-political-economic forces, and the practices, institutions and relationships these forces configure. The practices and institutions we inherit structure the possibilities that are open to us, as well as the possibilities that are closed off. We come to understand ourselves and what we can do, as we live and move within these socio-political-economic configurations. Thus, when considering someone caught up in cannabis use, the proper question is not ‘What is wrong with this person?’, but rather, ‘What has happened to this person that has put them on a trajectory of cannabis use?’ A medical approach focussed on the individual will not achieve this.

To consider this latter question, we need to look at **the shape of contemporary New Zealand society**, which has been formed on the basis of an individualistic, competitive, market-driven ideology. This ideology – known as neoliberalism - has constructed a way of thinking and living that views people as ‘consumers’ of everything, from healthcare to electricity to information. Neo-liberalism has been extremely useful for governments and corporate elites concerned with making profit out of human activity. However, it has consistently concealed our vulnerable, interconnected human existence – the ways in which the vicissitudes and distresses of life confront us through our dealings in the world – and the way in which socio-political-economic structures and institutions can enhance or diminish our ability to live well together.<sup>23</sup>

A society structured on a competitive market model oriented towards rampant consumption will always generate ‘winners’ – those who happen to be ‘successful’ in finding well-paid work

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<sup>22</sup> These New Zealand Drug Foundation recommendations are in line with the moves made in the current Misuse of Drugs Amendment Bill discussed above.

<sup>23</sup> Bowyer L, Gillett G (2015) Suicide: The lonely path. *Advances in Medical Ethics* 2:3. doi:10.12715/ame.2015.2.3

that allows them to play the consumer game – and the ‘losers’ – those who aren’t. This results in inequality and the social marginalisation of large groups of people, and introduces significant stressors into people’s lives.

In this competitive ideological climate, one’s place in the world can be threatened or overwhelmed by a fraught situation such as: losing a job through no fault of one’s own, but due to the slings and arrows of financial markets; working excessive hours to keep a family warm, fed and clothed; or being left unable to participate in the ‘consumer’ world at an acceptable level. In such situations, it is possible to see how rendering oneself numb to one’s reality through the use of mind-altering substances such as cannabis, might be less an ‘individual choice’, and more a way of dealing with an unkind world. Similarly, when our young people find themselves in an environment in which they are consigned to grinding poverty, amidst family members who are hurting, along with a pervasive sense of helplessness, all contributing to a precarious future, smoking a joint to get through each day might present itself as a ‘better’ reality.

It is also highly plausible that a number of people who appear to be ‘successful’ in the individualistic, competitive neo-liberal game we have constructed, are suffering just as much as those on the margins, albeit from different pressures. In many situations, being ‘successful’ requires putting work goals ahead of family life, taking work home in order to meet deadlines, or trying to outshine one’s colleagues in order to keep one’s job. In such situations, rendering oneself comfortably numb through one’s drug of choice may be seen as the best way of coping.

If we are serious about the well-being of our people, then we should think twice about a regime that will ultimately create more ‘market-opportunities’ for ‘consumer choice’, by bringing cannabis into the profit-driven realm. Rather, we need to think about how we can better address our growing social inequalities, and ask ourselves whether it is more ‘choice’ people need, or more kindness.

The concept of ‘consumer choice’ that permeates every aspect of contemporary life is a necessary tool in the arsenal of neoliberal ideology. The prospect of cannabis law reform does not escape from the neoliberal gaze. Typically, the question of “what kind of world do

we want to inhabit, as a people?” does not arise. Instead, the discussion is shaped in terms of “how can we best make money from cannabis activity?”

### **The economy and cannabis law reform**

Shamubeel Equab’s economic assessment, undertaken on behalf of the NZ Drug Foundation,<sup>24</sup> suggests that there would be no net benefit to the New Zealand economy if cannabis is simply decriminalised. In order to tap into the increased tax revenue – which, ironically, it is stated is necessary for drug education programmes and the establishment of health services to deal with drug use – cannabis needs to be legalised. Research commissioned by Helius, a medicinal cannabis company, estimates that the recreational market in New Zealand could be worth \$700m.<sup>25</sup> The focus is on profit and the market-economy, not individual and community well-being.

The potential loss of revenue to the New Zealand government through not legalising cannabis has caught the attention of a number of commentators. It has been argued by Matthew Beck, from the University of Otago, that the current annual cost of cannabis prohibition to New Zealand is about \$400m, which is the estimated amount being circulated on the black market.<sup>26</sup> To actualise the benefits of legislation, the price of cannabis would need to reflect the black market price, or else people would continue to use the black market.<sup>27</sup> However, Beck suggests that “consumers are likely to prefer legal cannabis as the quality, consistency and range of products will be improved.”<sup>28</sup> Beck contends that “consumers” will pay a premium to avoid purchasing cannabis from criminals. Beck also proposes that legalising cannabis would also provide considerable potential benefits to New Zealand from cannabis tourism.<sup>29</sup>

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<sup>24</sup> Eaqueb, S (2019). *Estimating the impact of drug policy options: Moving from a criminal to a health-based model*. Available at <https://www.drugfoundation.org.nz/assets/uploads/Cost-benefit-analysis-drug-law-reform.pdf> Last accessed 28 June 2019

<sup>25</sup> <https://www.stuff.co.nz/business/112517484/government-wants-to-reduce-cannabis-market-through-legalisation-not-grow-it>

<sup>26</sup> Matthew Beck. Bachelor of Law (Honours Dissertation), University of Otago, 2016. Available at <https://www.otago.ac.nz/law/otago638164.pdf> Last accessed June 30 2019

<sup>27</sup> Ibid.

<sup>28</sup> Ibid., p. 61

<sup>29</sup> Ibid.

When profit maximisation becomes the focus, benefits to the economy are frequently overstated, and the potential threats to individuals and communities are overlooked or played down. If adequate consideration and discussion of the deeper issues associated with commodifying cannabis does not occur, we may end up with a law and policies that further compromise individual and societal well-being.

Whilst still accepting the commodification of cannabis, Chris Wilkins of Massey University has suggested that a not-for-profit model is needed for the sale of recreational cannabis.<sup>30</sup> This would allow regulated cannabis products to be sold by organisations structured in a similar way to how 'Pokie' trusts operate, which return about \$260m to community groups annually.<sup>31</sup> Wilkins proposes that, in addition to government levies, money from cannabis sales would be distributed to drug treatment and to community groups.

Like Beck, Wilkins also recommends a price in line with current black market pricing, and thinks that people would move to the legalised outlets as they would be ensured "product innovation, different types of products, accurate labelling, and they will be safely cultivated under agricultural standards in terms of pesticides and fertilisers and other contaminants."<sup>32</sup> Wilkins also suggests no internet sales and that local government authorities should determine the number of retail outlets in their area.

However, the fact that we already have a system in place that utilises the actions of a particular group of people – those that gamble using pokie machines – does not mean that this practice is a good one and should be emulated. Money from pokie machines is collected from a very vulnerable group of people – people who are already living an unsustainable existence, basing their hopes and aspirations on the promise of a fast influx of cash, which, they are led to believe will solve all their problems. In reality, most of the time these people lose more than they gain and return to their homes and families to face life's struggles with less finances than they began with.

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<sup>30</sup> Anthony, J. (2018). *Cannabis legalisation in New Zealand could bring in up to \$240m in tax revenue, economist says* <https://www.stuff.co.nz/business/industries/109443403/cannabis-legalisation-in-new-zealand-could-bring-in-up-to-240m-in-tax-revenue-economist-says> Last accessed June 27th 2019

<sup>31</sup> Ibid

<sup>32</sup> Ibid

Exploiting people's vulnerability, a vulnerability which is all too often a product of systemic injustices, whether in the form of gambling or cannabis use, simply adds in another layer of injustice that further distorts societal well-being.

As we are going to be asked to deliberate on the legalisation of cannabis growth, supply and use in NZ, there are **many questions to consider**. These include:

- Do we need to legalise the growth, possession, use and supply of cannabis, or can we achieve our social goals by way of decriminalisation of these practices. Is there another way forward?
- To what extent is the push for legalisation in our current political and economic climate driven by financial considerations rather than social ones?
- If we take the legalisation route, will there be restrictions or prohibitions in regards to cannabis use around particular situations, for example: in relation to driving or operating machinery; being pregnant; in the workplace; in the sporting arena? How will these restrictions/prohibitions be enforced?
- If we are to legalise cannabis, how is it to be monitored and regulated for strength and safety of use?
- What is an acceptable age in relation to growing, possessing, using and selling cannabis?
- If we legalise cannabis will this lead to a logical progression of legalising all drugs?
- In what places can cannabis be consumed as a 'recreational' practice?
- At what point does 'recreational use' move into an addiction?
- Would the production and sale of cannabis be prohibited by individuals and taken over by corporations or other entities?
- If New Zealand follows other jurisdictions that have legalised cannabis for recreational use, a range of products containing CBD and/or psychoactive THC<sup>33</sup> could be put on the market. These include edibles, beverages, cosmetics, non-prescription health supplement and so forth. Are we happy to sanction this?

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<sup>33</sup> Stevens D. & Bowyer, L. (2019). 'A Cannabis Starter Kit', *The Nathaniel Report*, issue 57

## Conclusion

The rhetoric around cannabis decriminalisation and legalisation is framed in terms of moving cannabis use from a 'justice issue' to a 'health issue'. It is our view that an informed response to cannabis use in New Zealand has to go beyond the idea of a law change and the framing of cannabis use as an individual health issue. We also need to reflect on the purpose of the law, and the overall societal message we want to convey in regards to cannabis use. Laws informed primarily by politico-economic cost-benefit analysis are a travesty of justice.

We must also seriously consider the world we have come to inhabit, challenging the thinking around our current socio-political-economic structures and institutions that privileges financial outcomes over a richer understanding of well-being. A trajectory of cannabis use can be a consequence of the situations people find themselves in and the possibilities (or lack of) that present themselves to them. Our current socio-political-economic situation, based as it is on a market-driven competitive individualism, marginalises certain people and causes huge stresses in people's lives. Using cannabis (and other drugs) will, for many people, be a way of dealing with these stressors, if only for a while. In a caring society, it is more appropriate to address the underlying socio-political-economic factors and the inherent stressors, instead of framing the issue of cannabis use as a health issue internal to an individual whilst, ironically, setting up legal structures and social institutions that condone and supply that 'issue'.

The NZ Drug Foundation, who advocate for a strictly regulated cannabis market,<sup>34</sup> have acknowledged that to address drug use we need to make sure we address other social factors such as, housing, work, economic development and education, especially keeping young people in school and keeping them safe.<sup>35</sup> Te Rau Ora's chief executive Maria Baker also argues that tinkering with Aotearoa's drug laws is not good enough for tangata whenua. Instead a complete overhaul is needed. This overhaul involves a shift away from an

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<sup>34</sup> <https://www.drugfoundation.org.nz/assets/uploads/2019-uploads//STON-2018.pdf>

<sup>35</sup> Briefing to the Incoming Parliament 2017. New Zealand Drug Foundation.  
<https://www.drugfoundation.org.nz/policy-and-advocacy/briefing-to-the-incoming-parliament/>

individualised way of thinking to one that embraces the larger social context that a person is embedded within.<sup>36</sup>

What we do right now – or fail to do - in relation to taking action to transform our socio-political-economic structures, will determine what kind of world we inhabit, what kind of people we become, and what kind of message we leave behind for others. The debate about decriminalising or legalising cannabis is about so much more than the proper regulation of its use for individuals within a health framework.

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<sup>36</sup> <https://www.rnz.co.nz/news/national/386568/maori-health-coalition-calls-for-less-punitive-drug-law-reform>