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1 September 2020

## **CANNABIS: FROM PROHIBITION TO PRODUCTION**



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## EXECUTIVE SUMMARY

On **18 September 2018**, the Constitutional Court of South Africa, in a unanimous decision,<sup>1</sup> in the matter of, *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC<sup>2</sup>*, upheld and extended a Western Cape High Court judgment, which found the criminalisation of personal use of cannabis by adults, as specified in the Drugs and Drug Trafficking Act of 1992 (Drugs Act) and the Medicines and Related Substances Act of 1965 (the Medicines Act), as unconstitutional. The Court suspended the operation of the court order for a period of **24 months** from the date of the handing down of the judgment to enable Parliament to rectify the constitutional defects in the two Acts.

Subsequently, in the **2020 State of the Nation Address**, the President announced that,

“this year we will open up and regulate the commercial use of hemp products, providing opportunities for small-scale farmers; and formulate policy on the use of cannabis products for medicinal purposes, to build this industry in line with global trends. The regulatory steps will soon be announced by the relevant ministers.”

**Cannabis policy and law is now being actively reconsidered in mainstream public, media and political debate in most parts of the world, and in many places real reforms are already underway.**<sup>3</sup> Almost universally, these reforms are moving away from ‘war on drugs’ enforcement models, and towards less punitive approaches to users, with a greater emphasis on public health interventions and human rights, and now serious exploration of the legal regulation of cannabis production and availability.<sup>4</sup>

Parliament will have a fundamental role to play in this reform process as it unfolds in South Africa. To assist with this process this paper considers a range of issues including a brief background on the cannabis trade before criminalisation and during prohibition in South Africa as well as some consideration of the following:

### International Legal Framework

Cannabis is one of the psychoactive substances included within the United Nations (UN) drug control regime, based on three treaties: the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The drug conventions are, on the surface, among the most widely adhered to of all UN instruments.<sup>5</sup> However, there are

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<sup>1</sup> Zondo ACJ (Cameron J, Froneman J, Jafta J, Kathree Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring)

<sup>2</sup> Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others (2018)

<sup>3</sup> UNODC (2014)

<sup>4</sup> Ibid

<sup>5</sup> Cannabis Regulation and the UN Drug Treaties (2016)



increasing tensions arising from the decision to place cannabis under strict controls. This has led to a “quiet revolution” of decriminalization.<sup>6</sup> Unless the drugs treaty system can begin to prove itself capable of modernising, it risks drifting into irrelevance.<sup>7</sup>

### **The Constitutional Court judgment decriminalising cannabis for personal use.**

The Court gave Parliament **24 months** (i.e. by the 18 September 2020) to amend the unconstitutional and invalid provisions of the Drugs Act and the Medicines Act. Although the court gave some broad guidelines in its judgment, it has left the details to Parliament.<sup>8</sup> Some practical challenges that will have to be addressed including defining privacy and quantity, protection for minors, and the impact on road traffic regulations and employment law.

### **The decriminalisation of cannabis for adults and child justice.**

The Constitutional Court in the Prince case omitted to expressly include children to benefit from cannabis decriminalisation; it is still a crime for children to possess cannabis. Thus, children may very well end up in detention (albeit a secure care facility) as happened in four cases currently under review by the South Gauteng High Court. The review cases highlight the extent to which children, while ostensibly being protected by the Child Justice Act 75 of 2008, are nonetheless left extremely vulnerable by the narrow interpretation of drug laws and diversion provisions in cannabis-related cases. This prompted a magistrate to refer these cases to the South Gauteng High Court for review, especially in light of the decriminalisation of cannabis for private use by adults in the Prince judgment.

### **Substance abuse support at correctional centres**

Substance abuse treatment forms an integral part of rehabilitation programmes in correctional facilities in many countries. A number of instruments, both domestic and international, provide guidelines on treatment programmes provided in correctional facilities. In South Africa, the legislative and policy framework on treatment programmes in correctional facilities includes: the Correctional Services Act, Act 111 of 1998; the White Paper on Corrections, 2005; and the National Development Plan, Vision 2020. Of particular importance, the NDP recommends that substance-abuse programmes should be a component of any pre-release programme given the relationship between drug abuse and the commission of crime in society. An international comparison between South Africa, Canada, and England and Wales revealed that Canada, and England and Wales provide a number of different substance abuse treatment programmes in their facilities, while South Africa only provides one programme, structured into ten different sessions.

### **Health Implications**

According to the US National Institute of Drug Abuse (NIDA) when people smoke or ingest cannabis, they experience “a pleasant euphoria and sense of relaxation, a heightened sensory perception (e.g. brighter colours), laughter, altered perception of

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<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Kriegler, A (2018)



time, and an increase in appetite”<sup>9</sup>. However, some users experience anxiety, fear, or panic instead of relaxation and euphoria. Furthermore, the World Health Organisation’s (WHO’s) Expert Committee on Drug Dependence (ECDD) notes that there are therapeutic or medicinal benefits associated with cannabis and cannabis extracts<sup>10</sup>. A number of countries have already approved the use of selective cannabis products as treatment for different conditions including chronic pain and epilepsy in children. However, the WHO Committee also acknowledges that more research needs to be done to get a full understanding of the effects of cannabis and cannabis related products on people’s health.

### **Commercial Potential**

Based on the Prohibition Partners’ market value forecast, the cannabis industry in South Africa has a potential to grow from its low base of an estimated R91.2 million in 2018 estimates to about R25 billion by 2023.<sup>11</sup> Therefore, the legalisation of cannabis could be the much-needed job creating disruption that will help boost the economy. However, the minimum cost of R3 million for obtaining a licence for the cultivation of medicinal cannabis tends to exclude small-scale farmers who were able to make a small profit in the underground market.

### **Legal and Regulatory Reform**

There is a spectrum of legal/policy frameworks available for regulating the production, supply and use cannabis. At one end is absolute prohibition, moving through less punitive prohibition models, partial/de facto/quasi-legal supply models, legally regulated market models with various levels of restrictiveness, to legal/commercial free markets at the other end.<sup>12</sup>

### **International Experiences**

Increasing numbers of countries have liberalised controls on cannabis by decriminalising and/or legalising some instances of production, sales, possession, and use. African countries are also participating in this global wave of cannabis liberalisation. This section considers various comparative examples. The Annexure at the end of the paper provides a wider international overview.

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<sup>9</sup> National Institute on Drug Abuse (2019a)

<sup>10</sup> World Health Organisation (2018)

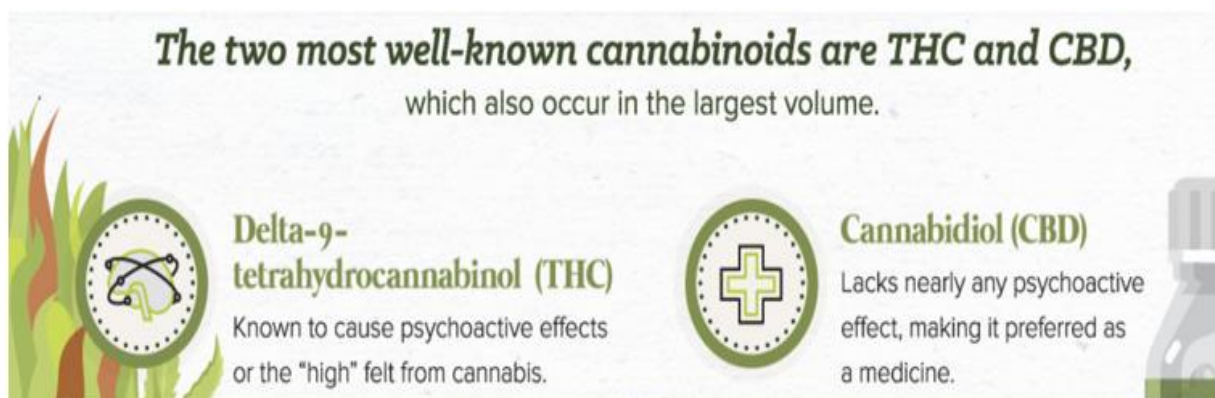
<sup>11</sup> Democratic Staff of the Joint Economic Committee (2018)

<sup>12</sup> UNODC (2014)



## 1. WHAT IS CANNABIS?

There are three distinctive subspecies of the cannabis plant: *cannabis sativa* (which tends to grow tall and stalky), *cannabis indica* (which tends to grow smaller and bushier), and *cannabis ruderalis* (found primarily in Russia and Eastern Europe.)<sup>13</sup> The plant contains cannabinoids, which are a class of diverse chemical compounds. Over one hundred different cannabinoids have been isolated from the cannabis plant. Experts have not yet determined what each cannabinoid does, but they have a good understanding of two them, known as cannabidiol (CBD) and tetrahydrocannabinol (THC).<sup>14</sup>



(Source Shutterstock)

Each cannabinoid has its own effects and uses.

- **Cannabidiol (CBD)** is often used for medical purposes to help reduce inflammation and ease pain. It also helps with nausea, migraines, seizures, and anxiety. Researchers are still trying to fully understand the effectiveness of its medical use.
- **Delta 9-tetrahydrocannabinol (THC)** is the compound responsible for the intoxicating effect of cannabis. It is most concentrated in the flowers of the female cannabis plant.

According to the World Health Organisation (WHO), cannabis products are usually obtained from the female *Cannabis sativa* plant.<sup>15</sup> Cannabis plant products, according to the International Narcotics Control Board (INCB), include the following:

- Herb (marijuana),
- Cannabis resin (hashish),
- Cannabis oil (hash oil)
- Concentrated cannabis extracts (waxes) and
- Edible preparations (e.g. infusions, biscuits and chocolates).

<sup>13</sup> NORML.org (2020)

<sup>14</sup> Kimberly Holland Components (2018).

<sup>15</sup> World Health Organisation (2016a)



The United Nations Office on Drugs and Crime (UNODC) notes that cannabis herb is the most common product and is made up of dried and crushed flower heads and surrounding leaves.

There is also a lab-created synthetic drug **Dronabinol**, which is derived from the cannabis plant and has been approved for use in a number of countries. The WHO notes that evidence shows that Dronabinol is “partially effective” in the following:<sup>16</sup>

- Decreasing neuropathic pain,
- Reducing anxiety in patients with chronic pain,
- Increasing weight gain in patients with anorexia nervosa,
- Decreasing pain intensity and increasing patient satisfaction when given as an adjunct to opioids for chronic pain,
- Reducing spasticity in patients with multiple sclerosis, and
- Improving tics (or a trend towards such improvement) in patients with Tourette’s syndrome.

Currently there are two main types of registered medicines that contain Dronabinol, namely Marinol and Syndros. These medicines are taken orally and are approved for use in a number of countries. They cannot be used for non-medical purposes and there is no evidence to show that they can lead to abuse and dependence.<sup>17</sup>

## 2. ORIGINS OF THE CANNABIS TRADE IN SOUTHERN AFRICA

Historically, humans have used various parts of the cannabis plant for a multitude of purposes. It is believed that the cannabis plant may be indigenous to Asia and came to Africa through Arab merchants.<sup>18</sup> Accounts of cannabis use and trade during the colonial era in Africa are difficult to assess because analysts note that information is either scant<sup>19</sup> or was based on skewed and often racist versions of history.<sup>20</sup> However, by many accounts cannabis trade took place well before the 1600s when colonisers arrived in South Africa.

According to Paterson, Khoi people traded cannabis with the Xhosa, Sotho as well as the Nama-speakers from Namibia. The “former Transkei (Eastern Cape), Lesotho, KwaZulu-Natal (KZN) border regions, (eSwatini) as well as parts of southern Mozambique and Mpumalanga Province’s warm, humid climate was and still is ideal for the cultivation of cannabis”.<sup>21</sup>

When the Dutch arrived, the Dutch East India Company sought to monopolise dagga in the Cape but failed because they could not compete with local traders. Duval notes that by 1668, “Africans in Eastern South Africa who specialised in cannabis traded with European merchants

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<sup>16</sup> World Health Organisation (2017)

<sup>17</sup> World Health Organisation (2019)

<sup>18</sup> NORML.org (2020)

<sup>19</sup> Theron (1974).

<sup>20</sup> Ibid.

<sup>21</sup> Paterson (2009)



who bought dagga to barter with locals in Cape Town.”<sup>22</sup> However, when it became clear that the government could not control the use of cannabis they decided to criminalise it.

## 2.1 CRIMINALISATION OF CANNABIS

By **1923**, debates on dagga had become highly racialized, and the South African government supported the inclusion of cannabis alongside opium in an international drugs convention.<sup>23</sup> In 1925, the Geneva Convention on Dangerous Drugs effectively fixed the entire cannabis plant as a subject of criminal law in domestic and international contexts. “In one dramatic action the deeply diverse forms and commodities of cannabis in Africa and Asia were swept aside.”<sup>24</sup>

- In **1928**, authorities in South Africa introduced the first drug legislation concerning cannabis. This criminalised cannabis under the Medical, Dental, and Pharmacy Act, for political and moral reasons.
- In **1937**, the government introduced the Weeds Act, which made the occupant or owner of a property accountable for preventing the growth of cannabis, or any other plant classified as a "weed", on the property.
- In **1971**, increased concern about the extent of dagga use in South Africa resulted in the enactment of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act (the so-called Drugs Act). This Act increased the punitive jurisdiction of courts and added much harsher minimum sentences and sanctions requirements.
- In **1992**, the Drugs Act of 1971 was repealed and replaced by the Drug and Drug Trafficking Act 140 of 1992. In terms of this Act, dagga is listed in Part III of Schedule 2 to the Act as an “undesirable dependence-producing substance”. Under the Drugs and Drug Trafficking Act, **people** found in possession of more than 115 grams of dagga were presumed to be guilty of dealing.<sup>25</sup> However, following the adoption of the interim Constitution of South Africa, courts found that this unjustifiably infringed the constitutionally enshrined presumption of innocence, and consequently invalidated those parts of the Act.

Despite the prohibition, the cultivation and sale of cannabis continued and developed from the 1920s to date. According to Paterson, rural communities of KwaZulu-Natal and the Eastern Cape have been cultivators and wholesaler traders of cannabis for decades.<sup>26</sup> With connections in both the rural and urban areas, sellers would transport large bags of cannabis in a wide range of vehicles, including minibus taxis. The bags are broken into smaller, but sizeable units and distributed to sellers at various locations in the urban areas. The seller then repackages the dagga into even smaller units such as paper wraps, bank change bags, paper envelopes, or matchboxes rolled into cigarettes (joints), wrapped in small pieces of newsprint (called ‘zol’) or packed into cigars.<sup>27</sup>

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<sup>22</sup> Duvall (2019)

<sup>23</sup> Chattopadhyaya (2020)

<sup>24</sup> Ibid

<sup>25</sup> Minaar (2015)

<sup>26</sup> Leggett (2006)

<sup>27</sup> Ibid



### 3. INTERNATIONAL LEGAL FRAMEWORK FOR THE REGULATION OF CANNABIS

International regulation of cannabis is primarily based on three treaties: the **1961 Single Convention on Narcotic Drugs** as amended by the 1972 Protocol, the **1971 Convention on Psychotropic Substances**, and the **1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**. Under this international legal framework, the use of cannabis is allowed only for medical and scientific purposes.

Member States have implemented these treaties through organs and bodies of the United Nations. The *Economic and Social Council* (ECOSOC) established the **Commission on Narcotic Drugs (CND)** through resolution 9(I) of 1946. The CND was created to supervise the implementation of the international treaties on drug control. In 1991, the authority of the CND was extended by the General Assembly to empower it to be the governing body of the United Nations Office on Drugs and Crime (UNODC). The three goals of the UNODC align with the Millennium Declaration's goals, namely to:

- Counter the world drug problem
- Develop research to improve knowledge
- Establish policies to control illicit drugs
- Utilise UNODC normative work to contribute to the ratification and implementation of these relevant international treaties and help develop domestic legislation on drugs

Each Convention has definite revised schedules for substances, including a list or table of drugs, issued in a separate document. When the CND makes a decision regarding scheduling, the mechanism used to update schedules is to bring the CND's decision before the World Health Organisation, Member States, and the International Narcotics Control Board through notification from the Secretary-General. After this, the new schedule is posted on the United Nations Office on Drugs and Crime's website.<sup>28</sup>

#### 3.1 INTERNATIONAL DRUG TREATIES

##### 3.1.1 The 1961 Single Convention on Narcotic Drugs as Amended by the 1972 Protocol

The Single Convention on Narcotic Drugs, 1961 was signed in New York on 30 March 1961, and entered into force on 13 December 1964. There are 154 parties to this Convention.

The 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol ("the 1961 Convention") entered into force on 8 August 1975. The current number of parties to this treaty is 185

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<sup>28</sup> The revised schedules of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, as of 18 May 2016, are published under document symbol ST/CND/1/Add 1/Rev.2. The revised schedules of the Convention on Psychotropic Substances of 1971, as of 13 November 2016, are issued under document symbol ST/CND/1/Add.2/Rev.2.31 Also, the revised tables of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as of 6 October 2014, are issued under document symbol ST/CND/1/Add.3/Rev.1.



as of 10 February 2017.

The Convention defines cannabis 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 not been extracted, by whatever name they may be designated.”<sup>29</sup>

The Convention excludes the seeds and leaves.<sup>30</sup> The Convention also adds the definition of “cannabis plant” and “cannabis resin,” where the first refers to any plant categorised as genus cannabis, and the second includes the separated resin that can be crude or purified. The definition of “cultivation” is extended to cannabis, opium, and coca in the Convention. The “production” of cannabis is the process to separate cannabis resin from the plant.

- Article 2 of the 1961 Convention states that cannabis is “subject to all measures” of control established in the Convention. Cannabis is also subject to Article 28, which specifically refers to the Control of Cannabis and applies to cannabis the same control as is applied to opium poppy, establishing very restrictive controls in the cultivation under the management of a governmental agency with an exclusive right of importing, exporting, and keeping stocks for medicinal purposes only.<sup>31</sup> On the other hand, the use of cannabis for fibre and seed is not under the scope of this Convention, although measures should be taken to avoid illicit traffic.
- Article 22 of the Convention establishes a “special provision applicable to cultivation”, requiring appropriate measures to seize any plants illegally cultivated and destroying them, with exceptions only for scientific or research purposes.
- Article 49 allows specific reservations to permit the temporary “use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes” when the use of cannabis was traditional in the territory for which the reservation was made and only if the practice was permitted on 1 January 1961. However, the export of cannabis is not allowed. The Convention establishes that the use of cannabis should be for medical and scientific purposes. Any use for other purposes must cease, with cessation occurring no more than twenty-five years after the Convention entered into force. Because the 1961 Convention only entered into force on 8 August 1975, the only permissible use of cannabis today is for medical or scientific purposes.

The Convention has four Schedules of controlled substances, ranging from Schedule I, the most restrictive to Schedule IV, the least restrictive.<sup>32</sup>

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<sup>29</sup> Article 1, Paragraph 1

<sup>30</sup> The United States Code legal definition includes “all parts of the plants whether growing or not.”

<sup>31</sup> Paragraph 1 of Article 28

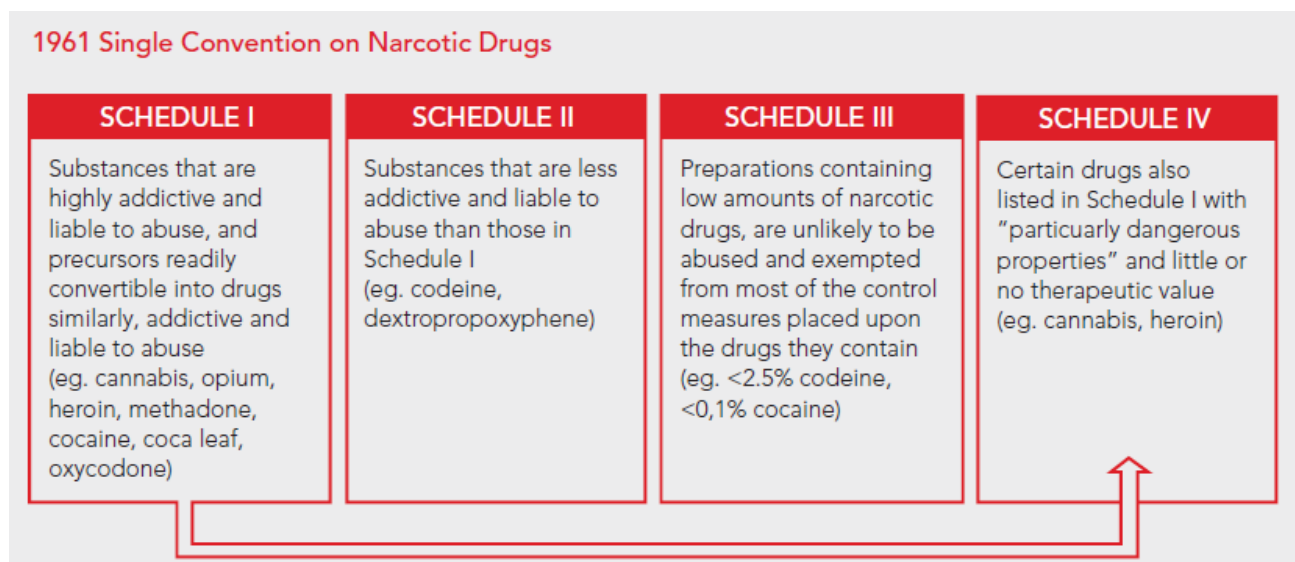
<sup>32</sup> European Monitoring Centre for Drug and Drug Addiction (2019)



The European Monitoring Centre for Drug and Drug Addiction reports that the UN Conventions of 1961 and 1971 divide substances into four schedules, in order to establish controls for international trade.

According to the Global Commission before 1961, different countries had different laws on prohibited drugs. As a result, the global drug control system focused on imposing international trade restrictions to accommodate on national differences. The objective was to “to prevent the uncontrolled export of certain substances to states that prohibited those substances”<sup>33</sup>.

Scheduling groups the substances according to their “therapeutic value and risk to public health”. The 1961 Convention has four Schedules of controlled substances, ranging from Schedule I, the most restrictive to Schedule IV, the least restrictive<sup>34</sup>.



The European-Monitoring Centre for Drug and Drug notes that the inclusion of cannabis in Schedule IV makes it very difficult to trade for medicinal purposes, because according to the schedule, cannabis is dangerous and has no medicinal value.<sup>35</sup>

### 3.1.2 The 1971 Convention on Psychotropic Substances

The Convention on Psychotropic Substances signed in Vienna on 21 February 1971, entered into force on 16 August 1976.<sup>36</sup> The number of parties is 183 as of February 16, 2017. The scope of the 1971 Convention is to control certain substances listed. Under article 2 of this Convention, the World Health Organisation has authority to determine if a substance can produce a “state of dependence” and affect the central nervous system or behaviour or perception in a manner similar to those

<sup>33</sup> Global Commission on Drugs (2019)

<sup>34</sup> European Monitoring Centre for Drug and Drug Addiction (2019)

<sup>35</sup> World Health Organisation (2003)

<sup>36</sup> Article 26(1).



substances listed in Schedules I-IV of this Convention. The World Health Organisation must communicate to the Commission an assessment with recommendations on control measures of any such substance.

Cannabis, as a psychotropic substance, is included in Schedule I and II. Schedule I establishes the strictest control, prohibiting all use except for scientific and medical purposes, and then only by authorised professionals or scientific establishments under government control. Any trade or possession requires a special license or prior authorisation. Substances in Schedule II can be traded and distributed under license or comparable control. However, these substances do not require government approval of use for medical purposes if the person is “authorised to perform” medical or scientific practices.

1971 Convention on Psychotropic Substances			
SCHEDULE I	SCHEDULE II	SCHEDULE III	SCHEDULE IV
Drugs presenting a high risk of abuse, posing a particularly serious threat to public health with little or no therapeutic value (eg. LSD, MDMA, cathinone)	Drugs presenting a risk of abuse, posing a serious threat to public health, which are of low or moderate therapeutic value (eg. dronabinol, amphetamines)	Drugs presenting a risk of abuse, posing a serious threat to public health, which are of moderate or high therapeutic value (eg. harbiturates, puprenorphine)	Drugs presenting a risk of abuse, posing a minor threat to public health, with a high therapeutic value (e.g. tranquilizers, including diazepam)

### 3.1.3 The 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was signed in Vienna on 20 December 1988, and entered into force on 11 November 1990.<sup>37</sup> As at 16 February 2017, there were 189 parties to this Convention. The 1988 Convention defines in Article 1 a “cannabis plant” as a plant “of the genus Cannabis”. Article 3 of the Convention suggests that the parties adopt criminal offences in their domestic laws for possession, cultivation, trafficking and personal consumption of cannabis. Article 3.2 has been the subject of several interpretations regarding the implementation of this provision.

For example, EU Member States have incorporated into their national legislations the UN Drug Conventions regarding the penal and administrative control of cannabis, but the application of these regulations are based on national characteristics. Therefore, each country has different rules regarding the use of cannabis for personal use. Tables of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, provide lists of substances regulated under the 1988 Convention.<sup>38</sup> The substances listed in tables I and II have additional

<sup>37</sup> Article 29(1)

<sup>38</sup> As of 6 October 2014



controls, including special monitoring for cannabis. Article 14.2 of the 1988 Convention establishes that each party should prevent illicit cultivation of cannabis. The measures adopted by each party should not only respect fundamental human rights, taking into consideration historical “traditional licit uses,” but should also protect the environment.

### **3.2 CURRENT INTERNATIONAL TRENDS IN THE MANAGEMENT AND REGULATION OF CANNABIS**

South Africa is one of more than 185 Parties to the three United Nations drug control conventions: the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 protocol), the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In addressing its international commitments, South Africa’s steps towards the regulation of cannabis shares the objectives agreed to by member states in multilateral declarations, namely to (a) protect vulnerable citizens, particularly youth; (b) implement evidence-based policy; and (c) put public health, safety and welfare at the heart of a balanced approach to treaty implementation.<sup>39</sup>

Despite enforcement efforts under these treaties, cannabis remains the most widely used illicit drug in the world. Although the ultimate aim of the drug treaties is to ensure the "health and welfare of humankind, there is a growing recognition that cannabis prohibition has proven to be an ineffective strategy for reducing individual or social harms, including decreasing burdens on criminal justice systems, limiting negative social and public health impacts, and minimizing the entrenchment of illicit markets."<sup>40</sup>

The last time cannabis and cannabis resin were reviewed was in 1935 by the Health Committee of the League of Nations. The Expert Committee on Drug Dependence of the World Health Organisation never provided a formal review of cannabis under the 1961 and 1971 Conventions. In 2015, the Committee asked the WHO to collect data in order to start “the pre-review of cannabis, cannabis resin, extracts, and tinctures to identify any therapeutic advantages that they may have compared to other therapeutics.”<sup>41</sup>

The religious and traditional aspects of cannabis are important in countries such as Jamaica, where there is a conflict between the UN treaties on human and indigenous rights and the UN drug control conventions. Although the 1961 Convention allowed a period of 25 years to abandon the use of cannabis gradually, the deadline has long since passed and some countries continue to ignore this provision.

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<sup>39</sup> Task Force on Cannabis Legalization and Regulation, A Framework for the Legalization and Regulation of Cannabis in Canada (Accessed at <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>)

<sup>40</sup> Eliason A and Howse R, A Higher Authority: Canada’s Cannabis Legalization in the Context of International Law (Accessed at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1946&context=mjil>)

<sup>41</sup> World Health Organisation (Accessed at [https://www.who.int/medicines/access/controlled-substances/UNSG\\_SignedDGletter.pdf?ua=1](https://www.who.int/medicines/access/controlled-substances/UNSG_SignedDGletter.pdf?ua=1))



The United Nations General Assembly on 19 April 2016, adopted the A/RES/S-30/1 Resolution about the outcome of the Special Session of the United Nations General Assembly on the world drug problem, entitled, “[o]ur joint commitment to effectively addressing and countering the world drug problem”.<sup>42</sup> The Resolution emphasised the need for cooperation at all levels to prevent, reduce, or eliminate the illicit cultivation of cannabis.

**Some Member States are calling on the Commission on Narcotic Drugs to re-evaluate some aspects of the current UN drug control treaty framework. The global trend is to legalise cannabis for non-medical and non-scientific purposes, even though such legalisation potentially violates the international conventions.** For example, Uruguay was the first country to legalise and regulate marijuana. The Uruguay Law 19.172 regulates the production, consumption, and marketing of cannabis, with the State managing and controlling the entire industry. In 2012, the states of Colorado and Washington in the United State established legally taxed and regulated marijuana markets, followed by Alaska and Oregon. Elsewhere, countries such as Mexico, Guatemala, and Morocco are considering new legislative proposals to regulate cannabis. These new regulations continue to violate existing treaties, thereby raising the question whether the UN drug treaties should be amended as to cannabis regulation.

#### **GLOBAL DRUG REGULATION INSTRUMENTS NEED TO BE URGENTLY UPDATED**

International law has not kept pace with domestic legislative trends or public opinion.<sup>43</sup> A 2019 report from the Global Commission on Drug Policy states that:<sup>44</sup>

“The sharp distinction that is made between legal and illegal substances is the result of a long history of cultural and political domination. It is not based on any scientific assessment of the substances’ potential harms for the people who consume them and for society as a whole, or of their possible benefits for those who use them in a reasonable way. The order in which they are scheduled according to their potential harms, and the degree to which they must therefore be subjected to repressive measures, suffers from a similar lack of scientific assessment.”<sup>45</sup>

Certain international drug conventions currently classify cannabis as a Schedule IV drug. It is the most restrictive schedule, reserved for substances of negligible medical value. In 2019, the WHO recommended that cannabis be moved to Schedule I, the least restrictive schedule, which includes substances with a medical value. It also recommended de-scheduling cannabis that is high in CBD but low in THC.<sup>46</sup> The WHO report recommends several changes to how cannabis is scheduled, which could have significant implications for the cannabis industry.<sup>47</sup> For instance, pure CBD and CBD preparations containing no more than 0.2% THC would not be included in any way in the

<sup>42</sup>United Nations Office on Drugs and Crime, Outcome Document Of The 2016 United Nations General Assembly Special Session On The World Drug Problem (Accessed at <https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf>)

<sup>43</sup>Price, S (n.d.)

<sup>44</sup> Global Commission on Drug Policy (2019)

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup>Pascual, A (2019a).



international drug control conventions. Pharmaceutical preparations containing 9-THC, if they follow certain criteria, would be added to Schedule 3 of the 1961 Convention, recognising the unlikelihood of abuse. If the WHO recommendations are adopted, it would amount to the first rescheduling of cannabis since the Single Convention on Narcotic Drugs was created in 1961.<sup>48</sup>

The Global Commission on Drug Policy criticised the UN scheduling of cannabis and its related products as having little or no medicinal usefulness. The Commission added “some of the most dangerous substances – tobacco, alcohol escaped prohibition to allow established and respectable corporations to make huge profits.”<sup>49</sup> Citing a UK draft paper on reviewing the classification system, the Commission notes that many young people have “problems in understanding the rationale behind controlling drugs such as cannabis and ecstasy when their misuse contributes less overall harm to society than widely available drugs such as alcohol and tobacco.”<sup>50</sup>

The Commission adds that the UN classification of drugs “is too often influenced by ideology, prejudice and the discrimination of marginalized populations, not to mention the financial interests of the pharmaceutical industry.”<sup>51</sup> The Commission argues that the classification should be based on scientific evidence rather than political considerations and an inherent bias towards prohibiting new substance especially for cannabis and cannabis related substance.<sup>52</sup>

**The Commission states that many countries have legalised cannabis use for medicinal purposes and as a result, there have been calls to amend the scheduling of cannabis under the UN conventions to resolve inconsistencies as well as improve the scheduling criteria.** In 2015 the Expert Committee on Drug Dependence (ECDD) released a report that recognises the following:

- An increase in the use of cannabis and its components for medical purposes;
- The emergence of new cannabis-related pharmaceutical preparations for therapeutic use;
- Cannabis had never been subject to a formal pre-review or critical review by the ECDD.

The Fortieth meeting of the Expert Committee on Drug Dependence (ECDD) was held in Geneva, Switzerland, 4-7 June 2018. The 40<sup>th</sup> ECDD was a specially convened session dedicated to carrying out pre-reviews of cannabis and cannabis-related substances.<sup>53</sup> The ECDD summarised the recommendations of the WHO Expert Committee on Drug Dependence on cannabis as follows;

- Cannabis and cannabis resin: remove from Schedule IV (keep in Schedule I) as it is not ‘particularly harmful’ (for example: use is not associated with a significant risk of death).
- ‘Extracts and tinctures’: remove from the Conventions as it is a complicated term to interpret, covering preparations that have psychoactive properties as well as those that do not. Effectively this will be replaced by a new entry in Schedule III of the 1961 Convention referring

<sup>48</sup> Green M, United Nations Pushes Crucial Cannabis Vote Back to December (Accessed at <https://grizzle.com/united-nations-pushes-crucial-cannabis-vote-back-to-december/>)

<sup>49</sup> Global Commission on Drug Policy (2019)

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> World Health Organisation (2018a)



to pharmaceutical preparations of cannabis that do not pose a risk to public health.

- Delta-9-THC/dronabinol: delete from the 1971 Convention Schedule II and move to the 1961 Convention, Schedule I (with cannabis and cannabis resin). Previously considered a pharmaceutical preparation, it primarily refers to the main psychoactive component of cannabis. This will be a similar approach as for coca leaf/cocaine and opium/morphine.
- THC isomers: delete from the 1971 Convention Schedule I and move to the 1961 Convention Schedule I, based on current knowledge.
- Cannabidiol (CBD): add a footnote that products containing predominantly CBD and not more than 0.2 per cent Delta-9-THC are not under international control. They are explicitly excluded, as there is no relevant risk to public health.<sup>54</sup>

The Global Commission on Drug Policy, notes that the ECDD limited its recommendations to condoning medical uses only and not on recreational use as this might fuel “political tensions over the policy trend towards legal regulation” due to stigmas associated with cannabis use. The Global Commission notes the recommendations keep cannabis in Schedule I and only certain mixtures, which can be prepared and patented by a few pharmaceutical companies, are exempted under Schedule III. The Global Commission argues that this recommendation favours pharmaceutical products over a wide array of more natural cannabis products with similar medicinal properties. This implies that the WHO ECDD recommendations will benefit pharmaceutical companies to the exclusion of small companies that would have gained from a scientifically based review and on more less capital-intensive natural cannabis products.

The Global Commission on Drug Policy, notes although WHO “has finally recognised the medical usefulness of cannabis, the ECDD recommendations demonstrate the incapacity of the current scheduling system to correct historical errors and to ensure that scientific evidence prevails over ideology.”<sup>55</sup>

The UN Commission on Narcotic Drugs (CND) was initially set to consider rescheduling cannabis at its annual meeting in March 2019.<sup>56</sup> However, this was pushed back to 2020 to allow more time for member states to review the WHO recommendations. The CND was expected to vote in January 2020 on the recommendations. However, the vote has now been postponed to December 2020.<sup>57</sup> The reason given for the delay is to “clarify the implications” of the WHO recommendations. This is a contested area and it appears that not all states are convinced. **A common theme expressed by several countries – including Russia, Nigeria, Japan, Sudan, Brazil and Palestine – was the “social, legal, administrative” and other types of implications of the WHO recommendations.**

**In contrast, South Africa** has said that “the (WHO) recommendations are sound, balanced and based on the critical review of the scientific evidence” and that they “will serve as an important

<sup>54</sup> European Monitoring Centre for Drug and Drug Addiction (2019)

<sup>55</sup> Global Commission on Drugs (2019)

<sup>56</sup> Pascual, A (2020).

<sup>57</sup> Ibid



guide on how member states should schedule the substances under domestic legislation.”<sup>58</sup>

The Global Commission on Drug Policy contends that:<sup>59</sup>

- The international community must recognise the incoherence and inconsistencies in the international scheduling system, and must trigger a critical review of the current models of classification of drugs.
- The international community must prioritise the role of the World Health Organisation and interdisciplinary scientific research in further developing evidence-based scheduling criteria based on a rational scale of harms and benefits.
- UN Member States must refocus the international scheduling system on the original impetus of controlling transnational trade and allow for innovative national classification systems to be developed.

## 4. SOUTH AFRICA’S LEGISLATIVE AND REGULATORY FRAMEWORK

### 4.1 LEGISLATION

As a signatory to and in line, particularly, with the 1961 UN Single Convention on Narcotic Drugs, cannabis in South Africa is controlled through various pieces of legislation:

- **Drugs and Drugs Trafficking Act 140 of 1992**  
According to the Long Title of the Drugs Act, its aim is to “provide for the prohibition of the use or possession of, or the dealing in drugs”.<sup>60</sup>
  - o Section 1 of the Drugs Act defines an “undesirable dependence-producing substance” as any substance or plant from which a substance can be manufactured, listed in Part III of Schedule 2 to the Act, including cannabis.
  - o Section 4(b) of the Drugs Act prohibits the use and possession of;
    - (a) any dependence-producing substance; or
    - (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, *except* for the Director-General: Welfare, medical practitioners, nurses and nursing assistants, pharmacists, veterinarians, veterinary nurses and assistants, dentists, buyers, manufacturers or medical patients who manufactured, acquired or bought such substances *in accordance with the Medicines Act and Regulations; or has otherwise come into possession of any such substance in a lawful manner.*
  - o A contravention of section 4(b) is an offence,<sup>61</sup> punishable with a fine or up to 15 years imprisonment or both a fine and imprisonment.<sup>62</sup>

<sup>58</sup> Ibid

<sup>59</sup> Global Commission on Drug Policy (2019)

<sup>60</sup> Section of the Drugs and Drug Trafficking Act, 1992.

<sup>61</sup> Section 13(d) of the Drugs Act

<sup>62</sup> Section 17(d) of the Drugs Act



- o Section 5(b) of the Drugs Act prohibits dealing in any dangerous dependence-producing substances or undesirable dependence-producing substance unless the exceptions detailed under section 4(b) of the Drugs Act apply. Currently cannabis falls within the ambit of dangerous dependence-producing substance and undesirable dependence-producing substance.

- **Medicines and Related Substances Act 101 of 1965**

According to the Medicines and Related Substances Act, cannabis is a controlled substance:

- **Schedule 7 with Section 22A (9)(a)(i) of the Act.** The section prescribes the following:
  - o No person may acquire, use, possess, manufacture or supply cannabis as the whole plant or any portion or product hereof, and includes synthetic cannabinoids (see below).
  - o The Director-General may issue a permit authorising a medical practitioner, analyst, researcher or veterinarian to use cannabis, on the prescribed conditions, for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research.<sup>63</sup>
- **Section 22A(9)(a)(i) provides that:** “No person shall— (i) acquire, use, possess, manufacture or supply any Schedule 7 unless he or she has been issued with a permit by the Director-General for such acquisition, use, possession, manufacture or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7...substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research”. (***Cannabis “the whole plant or any portion or product thereof” is one of the prohibited substances listed in Schedule 7 of the Medicines Act.***)

The Medicines Act also allows for cannabis to be used as hemp fibre or in a processed product. However, this is on condition that the product does not contain more than 0.1 per cent THC or in the case of a processed product, not more than 0,001 percent THC and is in a form that does not contain cannabis seeds and is not suitable for ingestion, smoking or inhaling purposes.<sup>64</sup>

- **Criminal Procedure Act 51 of 1977**

Section 40(1)(h) of the Criminal Procedure Act provides as follows:

“40. Arrest by peace officer without warrant

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<sup>63</sup> Parliamentary Monitoring Group (2014)

<sup>64</sup> Ibid



- (1) A peace officer may without warrant arrest any person-
- (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition.”

## 4.2 REGULATORY BODIES

The **South African Health Products Regulatory Authority (SAHPRA)** is South Africa’s drug regulatory authority. SAHPRA is governed by the Medicines and Related Substances Act and is responsible for regulating all medicines and medical devices in South Africa by ensuring that they meet standards of efficacy, safety and quality.

Cannabis is classified as a Schedule 7 substance in terms of the Medicines Act in South Africa, making it subject to special restrictions and controls. SAHPRA defines medical cannabis as the “crude, standardised and quality-assured cannabis plant material that is cultivated, harvested, processed and packaged to be used in the manufacture of pharmaceutical preparations which are required to meet the requisite quality, safety and efficacy standards.”<sup>65</sup> In addition, cannabis is also legal when used in, among others, hemp fibre and other products that are not suitable “for ingestion, smoking or inhaling purposes.”<sup>66</sup>

In terms of the Medicines Act, medical practitioners can apply to the SAHPRA for permission to access and prescribe unregistered medicines including cannabis for their patients in certain exceptional circumstances. Medicinal cannabis products may thus be made available to specific patients under medical supervision. Only registered medical practitioners may apply for authorisation to prescribe a controlled medicine for a specific patient. There are currently procedures for the approval of importation of suitable cannabis products for medicinal application.

In order to cultivate cannabis for medicinal purposes on a commercial basis a company needs to obtain a license from SAHPRA (as the sector regulator) and a permit from the Director-General: Health in accordance with the Medical Act. SAHPRA may issue a license for the following activities:

- Growing and producing cannabis and cannabis resin;
- Extracting and testing cannabis, cannabis resin and/or cannabinoids;
- Manufacturing a cannabis-containing or cannabinoid-containing medicine;
- Importing a cannabis-containing medicine or cannabinoid-containing medicine;
- Exporting a cannabis-containing medicine or cannabinoid-containing medicine; or
- Distributing a cannabis-containing medicine or cannabinoid-containing medicine.<sup>67</sup>

<sup>65</sup>Ibid.

<sup>66</sup>South African Health Products Regulatory Authority (2020)

<sup>67</sup>South African Health Products Regulatory Authority (2020).



In 1994, the International Narcotic Control Board (INCB) recommended that member countries establish licensing and registration regulations, define the control systems for hemp cultivation and properly define which cannabis varieties are authorised for cultivation.

In 2017, SAHPRA and the Department of Health introduced a licencing framework for domestic cultivation of cannabis and manufacture of cannabis-related pharmaceutical products for medicinal and research purposes. The aim is to ensure that the medicinal cannabis grown locally is quality-assured for the manufacture of suitable pharmaceutical products.<sup>68</sup>

In **May 2019**, the Department of Health published a notice that exempted cannabidiol (CBD) products from classification as scheduled drugs. The exemption is for products that:

- a) Contain a maximum daily dose of 20 mg CBD with an accepted low risk claim or health claim **which only refers to:**
  - o General health enhancement without any reference to specific diseases;
  - o Health maintenance; or
  - o Relief of minor symptoms (not related to a disease or disorder); or
- b) Alternatively consist of processed products made from cannabis raw plant material, where only the naturally occurring quantity of cannabinoids found in the source material are contained in the product, and which contain no more than 0,001 per cent of THC and not more than 0,0075 per cent total CBD.<sup>69</sup> The notice makes it legal to manufacture, sell, purchase, possess, and consume the prescribed CBD preparations by anyone, not just pharmacists.<sup>70</sup> **The exemption expired in May 2020.**

Currently, the cultivation of cannabis for medicinal use and the manufacturing of cannabis containing pharmaceutical products are required to comply with Good Manufacturing Practice (GMP) standards. A company has to apply for a license to manufacture, import or distribute the product. SAHPRA inspectors are responsible for conducting compliance investigations and inspection of sites and plans of the facility. If, after review, SAHPRA finds the product to be safe, effective and of good quality, and the manufacturer is GMP-compliant, it will be registered, allowing it to be available on the market.<sup>71</sup>

SAHPRA is a new entity that replaced the Medicines Control Council (MCC) in February 2018. The Regulator reported that it inherited problems from the MCC and did not have adequate corporate service support and technical staff to deliver on its “expanded mandate”.<sup>72</sup> Nonetheless, SAHPRA has a key role to play in the economic development of the cannabis industry and the downstream markets. It is important that it is adequately capacitated.

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<sup>68</sup> Ibid.

<sup>69</sup> Government Gazette (2019).

<sup>70</sup> Hanekom and Slabbert (2019).

<sup>71</sup> South African Health Products Regulatory Authority (2020).

<sup>72</sup> South African Health Products Regulatory Authority (2019).



### 4.3 NATIONAL DRUG MASTER PLAN 2019-2024

The **National Drug Master Plan (NDMP) 2019-2024** is the blueprint for combating drug abuse and misuse in South Africa. The United Nations Drug Control Programme (UNDCP) defines a drug master plan as a single document covering all national concerns regarding drug control.<sup>73</sup> It summarises national policies authoritatively, defines priorities and allocates responsibility for drug control efforts. In essence, a drug master plan is a national strategy that guides the operational plans of all departments and government entities involved in the reduction of the demand for and supply of drugs in the country.<sup>74</sup>

The Central Drug Authority (CDA) was established to give effect to the NDMP. The CDA is a statutory body established and functioning in terms of Chapter 10 of the Prevention of and Treatment for Substance Abuse Act (13), as amended.<sup>75</sup> The CDA serves for a period of five years, advises the Minister of Social Development on any matter associated with abuse and misuse, and is responsible for reviewing the national drug strategy every five years.<sup>76</sup> **In 2016, in a Position Statement on Cannabis the CDA stated there was limited data to indicate that supply reduction via criminalisation is effective in reducing cannabis abuse.**<sup>77</sup> At the same time, the CDA was of the view that there was insufficient data to indicate that the legalisation of cannabis will not be harmful. The immediate focus should therefore be decriminalisation rather than legalisation.<sup>78</sup>

According to the recently released NDMP 2019-24, the National Department of Social Development (DSD) and the Central Drug Authority (CDA) facilitated a round table discussion on cannabis with different stakeholders in order to formulate a Position Paper on Cannabis.<sup>79</sup> **The round table concluded that:**

- **There is a need to strengthen community education and awareness on cannabis for medicinal use;**
- **More research about different cultural, traditional and religious perspectives on the use of cannabis in South Africa is needed to inform a common position paper;**
- **The effectiveness of existing cannabis related treatment programmes must be critically assessed;**
- **Accurate information about cannabis should be disseminated through the media;**
- **Consideration should be given to obliging traditional, religious and cultural groups to obtain a license for the possession and use of cannabis;**
- **Access by vulnerable groups to cannabis should be monitored;**
- **Scientific investigation needs to be conducted to develop medication using cannabis without tetrahydrocannabinol (THC);**

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<sup>73</sup> National Drug Master Plan 2019-24 (Accessed at <https://www.gov.za/documents/national-drug-master-plan-2019-2024-24-jun-2020-0000>)

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> Central Drug Authority, Position statement on cannabis (Accessed at <http://www.samj.org.za/index.php/samj/article/view/10863/7392>)

<sup>78</sup> Ibid

<sup>79</sup> Ibid



- **A comprehensive cost analysis should be conducted in South Africa on the economic implications of cannabis use, and**
- **Alternative uses of cannabis should be explored, with a view to seeing how they can contribute to the economy.**<sup>80</sup>

The NDMP 2019-24 also notes the findings of the Constitutional Court in the matter of *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC*. According to the NDMP, currently the relevant departments as outlined in the ruling are in the process of aligning specific section on the cited legislations to comply with the ruling, and to make sure that there is no ambiguity in the possession and private use of Cannabis. The NDMP as a framework will also facilitate an action plan and provide remedies and interventions to be implemented to curb Cannabis abuse.<sup>81</sup>

## 5. THE CONSTITUTIONAL COURT AND DECRIMINALISATION OF CANNABIS FOR PERSONAL USE

In September 2018, in the case of *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC*, in a unanimous judgment delivered by justice Zondo ACJ (Cameron J, Froneman J, Jafta J, Kathree Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring) the Constitutional Court ruled that *“the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption.”*<sup>82</sup> The Court found that sections 4(b) and 5(b) of the **Drugs and Drug Trafficking Act 140 of 1992** and section 22A(9)(a)(i) of the **Medicines and Related Substances Control Act 101 of 1965** "are inconsistent with the right to privacy entrenched in section 14 of the Constitution and, therefore, invalid."

In making its ruling, the Constitutional Court considered various issues. These included:

- **Privacy.** Specifically, the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption. The State failed to prove that the existing limitation of privacy was reasonable and justifiable.<sup>83</sup>
- **Health concerns.** The Court found no persuasive medical evidence that dagga in small amounts was harmful to users, particularly compared to the harm resulting from use of alcohol. Nor was there proof that marijuana use caused violent or aggressive behaviour or that its use led to the use of more potent or dangerous drugs.<sup>84</sup>

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC (Accessed at <http://www.saflii.org/za/cases/ZACC/2018/30.html>)

<sup>83</sup> Ibid

<sup>84</sup> Nel, M (2018)



- **The status quo in other parts of the world.** The Court noted that the personal consumption of small quantities of marijuana had been decriminalised or legalised in many other democratic countries.<sup>85</sup>

The Court also decided to grant interim relief by inserting an exclusion in the relevant sections of the Drugs and Drug Trafficking Act and Medicines and Related Substances Act, which means that these sections do not apply in respect of “the cultivation of cannabis by an adult in a private place for his or her personal consumption in private.”<sup>86</sup> The Court was of the view that:<sup>87</sup>

“if no interim relief is granted, there are many adult people who will continue to be arrested by the police and who will face criminal charges and, if convicted, possible imprisonment for the use or possession or cultivation of cannabis in private for personal consumption in private – something that this judgment says nobody should be arrested for or charged with.”

The Court gave Parliament **24 months (by 18 September 2020)** to amend the unconstitutional and invalid provisions of the Drugs Act and the Medicines Act. Although the court gave some broad guidelines in its judgment, it has left the details to Parliament.<sup>88</sup> Some practical challenges that will have to be addressed include:<sup>89</sup>

- Defining privacy.** What is meant by “in private” and “in a private place”? The Constitutional Court envisages that, provided dagga is used “in private and not in public”, its use is protected by the right to privacy, even if the adult in question is not at home or in a private dwelling. It is not clear whether this means being in possession of and using cannabis in the privacy of your car falls within the definition of “in private” and “private use” as contemplated by the Court.<sup>90</sup>
- Quantity.** There is no clarity on the quantities for “personal consumption”. According to the Drugs and Drug Trafficking Act 140 of 1992, anything under 115 grams can be successfully argued as being possessed for “personal use”. The Constitutional Court has left the determination of the amount to Parliament.<sup>91</sup> This has implications for law enforcement as police officers will need to consider factors such as; (i) the quantity of

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<sup>85</sup> Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC, para [94] (Accessed at <http://www.saflii.org/za/cases/ZACC/2018/30.html>)

<sup>86</sup> Ibid para [106] and [107]

<sup>87</sup> Ibid para [104]

<sup>88</sup> Kriegler, A (2018)

<sup>89</sup> Smit M and Gilbert R, The Constitutional Court, cannabis — and important caveats (Accessed at <https://www.businesslive.co.za/bd/opinion/2019-10-23-the-constitutional-court-cannabis-and-important-caveats/>)

<sup>90</sup> Smit M and Gilbert R, The Constitutional Court can learn from Canada’s Cannabis Act (Accessed at <https://www.businesslive.co.za/bd/opinion/2019-11-26-the-constitutional-court-can-learn-from-canadas-cannabis-act/>)

<sup>91</sup> Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC, para [80] (Accessed at <http://www.saflii.org/za/cases/ZACC/2018/30.html>)



cannabis in the person's possession and (ii) whether they can give a satisfactory account of their possession.<sup>92</sup> There is also a need to guard against a "net-widening" effect, where policy liberalisation ends up drawing even more people into conflict with the criminal justice system. South Africa will need to interrogate whether it is still justifiable for people to be jailed for supplying a product that consumers have a right to possess.<sup>93</sup>

- (iii) **Acquiring cannabis.** Currently it is unclear how an adult user of cannabis supposed to acquire the marijuana they are allowed to use in private if they do not buy it from a dealer of some sort (which the Constitutional Court explicitly says is illegal). In the words of the Court, "*dealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy. We have no intention of decriminalising dealing in cannabis.*"<sup>94</sup> Presumably, the users could grow their own. The Court stated that "it may or may not be that cannabis can also be grown inside an enclosure or a room under certain circumstances. It may also be that one may cultivate it in a place other than in one's garden if that place can be said to be a private place."<sup>95</sup> But even then, they would need to obtain the seeds or buy them from someone else – who is, by definition, a dealer. The judgment's implication seems to be that to exercise one's (constitutionally-protected) right to use marijuana in private, one must inevitably act illegally since any purchase of marijuana and related products makes one an accomplice to dealing in cannabis.<sup>96</sup>
- (iv) **Protecting non-users.** Specifically, the protection of minors. Regular cannabis use appears to pose risks for adolescent brain development, so it is important that the country works out how best to discourage its consumption among or near children.
- (v) **Criminal penalties.** Almost 300 000 people are arrested for drug-related crimes each year, mostly for possession of small amounts of cannabis.<sup>97</sup> The question will be what to do with the many people who have been criminalised for an activity that is now considered an expression of a basic constitutional right. The court was clear that its judgment was not to be applied retrospectively. However, other jurisdictions – as in the US – have already begun offering pardons on request or discussing whether pardons should happen *en masse*.<sup>98</sup>

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<sup>92</sup> Kriegler, A (2018)

<sup>93</sup> Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC, para [80] (Accessed at <http://www.saflii.org/za/cases/ZACC/2018/30.html>)

<sup>94</sup> Ibid para [88]

<sup>95</sup> Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC, para [85] (Accessed at <http://www.saflii.org/za/cases/ZACC/2018/30.html>)

<sup>96</sup> Kriegler, A (2018)

<sup>97</sup> Kriegler, A (2018)

<sup>98</sup> Ibid



Additional issues include:

- **Cannabis in the workplace.** The potentially challenging issue for employers is where employees use cannabis in private, outside of the workplace, and thereafter report for duty.<sup>99</sup> Cannabis can affect an employee's occupational capacity in various ways, including performing tasks more slowly, difficulty in multi-tasking, difficulty in taking instructions from superiors, difficulty in making crucial decisions (especially in high risk situations), difficulty in operating machinery and/or motor vehicles.<sup>100</sup> It is these consequences that an employer will have to consider when the employee reports for work and tests positive for cannabis use. Unlike alcohol, cannabis may be detected in the human body for months after use, which at that time may no longer cause impairment.<sup>101</sup>

Medical testing of employees remains regulated by section 7 of the Employment Equity Act (EEA). Testing of employees is permitted if it is justifiable in light of medical facts, employment conditions, social policy or the inherent requirements of a job.<sup>102</sup> A number of tests (some of which are not available in South Africa at present) are used to test for cannabis: breath, blood, oral fluid (saliva), urine, sweat and hair.<sup>103</sup> Most employers enforce a zero tolerance approach to the use of any drugs and/or alcohol in the workplace. Prior to Prince, it was relatively easy to deal with cannabis at work as cannabis use, possession and cultivation was a criminal offence. Following Prince, and given that traces of cannabis may remain in the body for months after use (which does not automatically result in impairment) employers may need to regulate cannabis as a separate issue and by implication through a separate policy and procedure.<sup>104</sup>

- **Road Traffic regulations (cannabis impaired driving).** According to section 65 of the National Road Traffic Act, no person may drive a vehicle or occupy the driver's seat of a motor vehicle of which the engine is running on a public road while under the influence of intoxicating liquor or drug having a narcotic effect.<sup>105</sup> Unlike alcohol, testing for marijuana intoxication is a lot more complex than simply doing a breathalyser. Laws and limits exist for driving under the influence of alcohol but, as Tetrahydrocannabinol (THC) – the principal psychoactive constituent of marijuana – remains in a user's system far longer than alcohol does, it makes it tricky to establish limits and laws around marijuana use.<sup>106</sup> Because it can remain in a person's bloodstream for hours to days after use, a person who tests positive for marijuana is not necessarily intoxicated. At present, no limit has been established to determine how much THC needs to be present in the bloodstream for a person to be considered intoxicated.<sup>107</sup> Breathalyzer tests have traditionally been used to determine

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<sup>99</sup>Louw, L and Johnson, S (2019)

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Businesstech (2018)

<sup>106</sup> Ibid

<sup>107</sup> Ibid



whether a person is driving under the influence of alcohol and whether their blood alcohol level are within the legal limit. A similar test is being developed in SA, which could tell employers or traffic officers if a person is high on cannabis at the time of taking the test.<sup>108</sup>

## 6. THE CHILD JUSTICE ACT AND THE IMPACT OF THE DECRIMINALISATION OF CANNABIS ON CHILDREN'S USE AND POSSESSION OF CANNABIS

The Constitution, 1996<sup>109</sup> guards against the arbitrary arrest of children and protects children's rights, which include the right to a fair trial. In respect of children in conflict with law, the Constitution recognises that children are particularly vulnerable and in need of special protection, different from that of adults, and should only be detained as a measure of last resort. Thus, legislative measures and the criminal justice system must consider the best interests of the child at all times.

### 6.1 OVERVIEW OF CHILD JUSTICE IN SOUTH AFRICA

The Child Justice Act 75 of 2008 (CJA) came into effect on 01 April 2010 and created special mechanisms, processes and procedures for children in conflict with the law. The Act promotes the spirit of *ubuntu* in the child justice system; provides special treatment for children in the justice system with the aim of breaking the cycle of crime; and promotes the cooperation between government departments (DOJCD, SAPS, Social Development, Health and Education) and civil society.<sup>110</sup>

An Intersectoral-Committee for Child Justice (ISCCJ) was established through the CJA and is responsible for submitting an annual intersectoral report to Parliament, which highlights progress with the implementation of the CJA.

The DGs ISCCJ (there is also a National Operational ISCCJ) comprises the Director-Generals of Justice and Constitutional Development (as Chairperson), Social Development, Health, the National Director of Public Prosecutions, the National Commissioner of the South African Police Service (SAPS), and the National Commissioner of the Department of Correctional Services.

The child justice system provides that:

- Arrested children or those who need to appear in court, must be assessed by a probation officer to determine whether the child (a) is in need of care and must be referred to Children's Court for placement by the Department of Social Development and (b) child has criminal capacity by determining the child's age i.e. whether the child had the ability to (i) distinguish between right and wrong and (ii) conduct himself/herself in accordance with this insight into right and wrong, at the time of the commission of an offence.
- *The Child Justice Amendment Bill [B32B – 2018] (passed by Parliament on 26 November*

<sup>108</sup> Ibid

<sup>109</sup> Constitution of the Republic of South Africa, 1996

<sup>110</sup> Wakefield, L (2011).



2019) proposes to raise the age of criminal capacity to 12 years of age. A child who lacks criminal capacity may be reported to a probation officer or social worker and can thus be referred to the Children's Court (if the child is neglected) or to counselling and the State can divert them away from the formal criminal justice system if the magistrate believes they can benefit from diversion programmes.

- Alternative sentences are imposed rather than custodial sentences.<sup>111</sup>

From 2008, the CJA has drastically reduced the prison population of children through providing alternative sentences and diversion. However, there has been a slight increase in the number of children detained in correctional facilities awaiting trial, and more children sentenced to imprisonment following convictions of serious offences like rape, robbery with aggravating circumstances and murder. Because the Constitutional Court in the Prince case **omitted to expressly include children to benefit from cannabis decriminalisation, it is still a crime for children to possess cannabis. Thus, children may very well end up in detention (albeit a secure care facility) as happened in *The State and LM and Three Other Related Matters (Accused(s)) and Centre for Child Law (Amicus Curiae) and the Minister of Justice and Correctional Services (Respondent)*<sup>112</sup> ("the review cases"), sent for urgent special review by the South Gauteng High Court in November 2018.**

The said review cases highlight the extent to which children, while ostensibly being protected by the CJA, are nonetheless left extremely vulnerable by the narrow interpretation of drug laws and diversion provisions in cannabis-related cases, which prompted a magistrate to refer these cases to the South Gauteng High Court for review, especially in light of the decriminalisation of cannabis for private use by adults in the Prince judgment.

**Following an initial order in February 2019, the court eventually handed down final judgment in the matter on 31 July 2020, in which it declared section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992, unconstitutional to the extent that it criminalised the use and/or possession of cannabis by children. The court also placed a moratorium on the arrest, prosecution and diversion of children under the impugned section, pending the enactment of legislative amendments to rectify the constitutional defect.**

## 6.2 DRUG-RELATED LEGISLATION APPLICABLE TO CHILDREN

The following may be noted:

- **Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Control Act 101 of 1965** Neither Act differentiates between adults and children as the two terms do not appear in the wording of the Acts.

<sup>111</sup> Currently, South Africa has three One Stop Child Justice Centres (Nerina in the Eastern Cape, Matlosana in the North West and Mangaung in the Free State) which provide co-ordinated, co-operative service provision by a range of role-players and services providers, from Government and Non-Governmental Organisations in one place.

<sup>112</sup> Case no. 97/18; 98/18; 99/18; 100/100 Gauteng Local Division, Johannesburg



- **South African Schools Act 84 of 1996 and Regulations.** The South African Schools Act 84 of 1996, regulates drug testing at school. Section 8A of the South African Schools Act 84 of 1996 (“Schools Act”) and Regulations provides that:
  - o A school principal can only search and test a learner for drugs if he/she has a reasonable suspicion that the learner is using drugs. In the absence of a reasonable suspicion, the search and results can be challenged in court.
  - o Drug tests, as a rule, remain strictly confidential.
  - o No criminal proceedings may be instituted against the learner even if he/she is found in possession of illegal drugs or tests positive for use of illegal drugs - the only sanction allowed is the institution of disciplinary proceedings.
  - o The appropriate response to a learner found in possession of an illegal drug or who has tested positive for an illegal drug is to first address the issue with the parent. The child can thereafter be referred for counselling and/or rehabilitation, but only if requested.

### **6.3 CASE STUDY: The State and LM And Three Other Related Matters (Accused) and Centre for Child Law (Amicus Curiae) and the Minister of Justice and Correctional Services (Respondent)<sup>113</sup>**

The four matters were sent for urgent special review on 28 November 2018, to the South Gauteng High Court. The record of proceedings did not clearly indicate whether the children were arrested, in terms of section 20 of the Child Justice Act 75 of 2008 (CJA), summoned, in terms of section 19 of the CJA, or issued with a written notice to appear, in terms of section 18 of the CJA. The Centre for Child Law (“*amicus*”) believed that the children were in fact arrested and raised concerns that the circumstances surrounding their enrolment in the criminal justice system was not properly conveyed.

The *amicus* set out the facts of the matters as follows:

- The four children, aged 16, 14, 15 and 15 respectively, appeared in the Krugersdorp Magistrate’s Court in 2018, on charges of cannabis possession, in contravention of Section 4(1)(b) of the Drug and Drug Trafficking Act 140 of 1992 (“Drugs Act”).
- In each case, the child was “referred” to the criminal justice system after testing positive for cannabis during a drug test administered by the Pro-Practicum School.
- In each case, in contravention of the CJA, the assessment of the child by a probation officer before his first appearance was not done (ostensibly to deal swiftly with the matter “in the best interests of the child”.)
- They were convicted solely based on urine testing conducted at school - they were not physically in possession of cannabis.
- The children were diverted and ordered, on strict and onerous conditions, to attend the Drug Child Programme for three months.
- The children allegedly did not comply with the programme or condition(s) and were brought back to court.

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<sup>113</sup> Return date 18 March 2020.



- No enquiry was held in terms of section 58(2) of the CJA, which states that “the magistrate, inquiry magistrate or child justice court must inquire into the reasons for the child’s failure to comply with the diversion order and make a determination whether or not the failure is due to the child’s fault”.
- According to section 58(3)(c) of the CJA, if the child was not at fault, the court could “make an appropriate order [to] assist the child and his or her family to comply with the diversion option initially applied, with or without altered or additional conditions”.
- Inexplicably, the court ordered the children, in terms of section 58(4)(c) of the CJA (applicable only applies if the enquiry found that the child was at fault) **to attend a residential diversion programme, for an unspecified period, at the Mogale Leseding Child and Youth Care Centre** owned and operated by BOSASA.

### 6.3.1 Review court proceedings in South Gauteng High Court

By the time the matters came up for review by the South Gauteng High Court (“the review court”) the children had already spent three months at the Mogale Leseding Youth Care Centre.

- **The review court found that the children had been unlawfully placed in this in-patient facility for 12 weeks.**<sup>114</sup>
- **The review court consequently ordered the children’s release.**
- The review court invited the Centre for Child Law as *amicus curiae* and the Minister of Justice and Constitutional Development to make submissions on the untenable position of children regarding cannabis legislation and how they should be dealt with in light of the Prince judgement.
- On 19 September 2019, the review Court again extended the *Rule Nisi* (an interim order granted *ex parte* calling on a specific person or persons to appear in court on a certain fixed date (return date)) to show cause why the interim order should not be made final.<sup>115</sup>
- The original was granted on 8 February 2019 and was amended from time to time. The new return date of the *Rule Nisi* was extended to 18 March 2020, when the review court will consider all submissions on the matter, including those of the other Ministers responsible for implementing the CJA, viz. Police, Social Development, Health and Basic Education.<sup>116</sup>
- **The Centre for Child Law (“the *amicus*”), in its submissions, asked the review court to declare Section 4(1)(b) of the Drug and Drug Trafficking Act 140 of 1992, unconstitutional, insofar as it criminalises the use and/or possession of cannabis by children, especially now that the Constitutional Court has decriminalised possession and use of certain amounts of cannabis for private use by adults.**

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<sup>114</sup> Centre for Child Law (2019).

<sup>115</sup> Ntshangase, S (2019).

<sup>116</sup> Email correspondence by L Stwayi, 28 January 2020. Centre for Child Law, University of Pretoria.



## Draft Order<sup>117</sup>

The Rule Nisi issued on 8 February was amended as follows:

- The Bosasa Youth Development Centre and the Walter Sisulu Child and Youth Care Centre were ordered to **conduct an audit of all children referred to them in terms of section 41 and/or 54(3) and/or 58 of the Child Justice Act 75 of 2008 and for the possession of cannabis in terms of which they were diverted to undergo compulsory residence at the two centres.**
- The respective Heads of Acting Heads of the two centres was ordered to appear in person on 18 March 2020 to present the audit to the court and provide all supporting documents of children identified in the audit.
- The Office Manager of the Krugersdorp Magistrates Court had to provide the Director of Public Prosecutions, Johannesburg with certified copies of all registers, charge sheets and documentation relevant to all children referred to the Bosasa Youth Development Centre and the Walter Sisulu Child and Youth Care Centre under the Drug Programme, within 20 days from 19 September 2019 (date of the order).
- The Ministers of Police, Social Development, Health and Basic Education were joined and had to file affidavits by 12 December 2019, to assist the court to further consider the available alternatives to deal with children who use and/or possess cannabis.
- The Director of Public Prosecutions, Johannesburg, the Centre for Child Law and the Minister of Justice could file further submissions in response to any matter arising from the affidavits and/or submissions of the joined Ministers.<sup>118</sup>

### 6.3.2 Centre For Child Law Submissions on Constitutionality of Section 4(1)(b) of the Drugs Act <sup>119</sup>

The review court was asked to decide:

- (i) Whether section 4(1)(b) of the Drug and Drug Trafficking Act 140 of 1992, insofar as it criminalises the use and/or possession of cannabis viz-a-vis children is **unconstitutional**;
- (ii) Whether **the criminalisation of such offences violates a child's right to *inter alia*:-**
  - (a) Equality<sup>120</sup>

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<sup>117</sup> Amended on 7 October 2019

<sup>118</sup> Not available to the researcher at time of writing.

<sup>119</sup> Email correspondence by L Stwayi, 28 January 2020. Centre for Child Law, University of Pretoria.

<sup>120</sup> Section 9 of the Constitution, 1996 provides that:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.



- (b) Have his/her best interests considered to be of paramount importance<sup>121</sup>;
  - (c) Not to be detained, except as a measure of last resort<sup>122</sup>;
  - (d) Human dignity; and
  - (e) Freedom of security?
- (iii) If so, **whether there were less restrictive means to achieve the desired governmental purpose** (whatever that may be)?

The *Centre for Child Law* alerted the review court to hundreds of criminal cases involving children with circumstances similar to the matter under review, due to a “reckless crusade” conducted by the stakeholders (supported by the office of the Director for Public Prosecutions (DPP) for Krugersdorp). The *Centre* also sought for the review court to censor the conduct of the stakeholders (supported by the office of the DPP) for conducting an unlawful self-imposed crusade to fight “*the evil of drug addiction*”; and under the rubric “best-interests, arrest and initiate criminal proceedings against children in violation of children’s constitutional rights, the provisions of the Schools Act, and the protections of the CJA”.

- o 819 learners had their right to privacy and dignity infringed upon by being tested, likely without a reasonable suspicion, for use of drugs.
- o 178 learners were referred to the criminal justice system (possibly unlawfully arrested and detained) and diverted in instances not permitted by the Schools Act and where there were likely no *prima facie* case against them.
- o 24 learners were unlawfully detained for failing to allegedly comply with diversion orders that were, most likely, void *ab initio* (from the start).

### **6.3.3 Minister of Justice and Correctional Services submissions on Constitutionality of Section 4 of the Drugs Act vis-a-vis children and any other matter that arises from the submissions<sup>123</sup>**

The submission by the Minister followed a similar trend as that of the *amicus*. The submission:

- Addressed the constitutionality of section 4(b) of the Drugs Act insofar as it criminalises the use and/or possession of cannabis vis-a-vis children.<sup>124</sup>
- Did not challenge the application (by the *amicus*) for a declaration of invalidity.
- Took cognisance of the fact that:

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(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

<sup>121</sup> Section 28(1)(g) of the Constitution provides that every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child’s age.

<sup>122</sup> According to Section 28 (2) and (3) of the Constitution, a child’s best interests are of paramount importance in every matter concerning the child; and a ‘child’ means a person under the age of 18 years.

<sup>123</sup> Email correspondence by L Stwayi, 28 January 2020. Centre for Child Law, University of Pretoria.

<sup>124</sup> The Minister does not make submissions on the other points raised by the State and the Centre for Child Law, unless they bear directly on the constitutional issue raised.



- (i) Cannabis falls under the definition of an “*undesirable dependence-producing substance*” in the Drugs Act listed in Part III of Schedule 2 to the Act.
- (ii) The Drugs Act criminalises the use and possession of any undesirable dependence-producing substance including cannabis, in respect of which a fine or 15 years’ imprisonment can be imposed.
- (iii) The Constitutional Court in the Prince judgment declared **with effect from the date of the handing down of the judgment** the provisions of sections 4(b) and 5(b) of the Drugs Act 140 of 1992, read with Part III of Schedule 2 of that Act, and the provisions of section 22A(9)(a)(i) of the Medicines Act 101 of 1965, read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) **inconsistent with the right to privacy entrenched in section 14 of the Constitution and therefore constitutionally invalid** to the extent that they (a) made the use or possession of cannabis in private by **an adult** person for his or her own consumption in private a criminal offence and (b) prohibit the cultivation of cannabis by **an adult** in a private place for his or her personal consumption in private.
- (iv) The operation of the orders were suspended for a period of 24 months to allow Parliament to rectify the constitutional defects.
- (v) **The Court in Prince did not determine whether section 4(b)’s criminalisation of children’s use and possession of cannabis is unconstitutional**, as the matter did not involve children at the time.
- (vi) The use of cannabis has serious health and social consequences for both adults and children. The capacity of the brain during childhood is limited in its ability to make long-term decisions. There was undisputable evidence that arresting young persons for cannabis possession has a negative effect on them.
- (vii) If children cannot make decisions for themselves and if cannabis is legal for their parents or other adults, it should be the responsibility of the law to protect children by creating laws that will benefit them.
- (viii) The Minister did not condone the use of cannabis by children or the possession of small quantities of cannabis for personal use by children.
- (ix) Although the CJA has as an objective to deal with child offenders through a criminal justice system for children, the use of cannabis or the possession of a small quantity of cannabis, which is a Schedule 1 offence, may result in the arrest of a child, detention of a child pending diversion by the prosecutor or proceedings before a child justice court.
- (x) The child may have to comply with diversion options which may in certain circumstances result in a de facto custodial sentence. A continuous child offender may even be prosecuted for a Schedule I offence.
- (xi) The CJA proceedings have not been effective in addressing child drug abuse.
- (xii) Despite a legitimate governmental purpose to protect children from the use and abuse of harmful substances, **putting children through the criminal justice system is not an effective and appropriate manner to achieve this purpose.**
- (xiii) It would be in the best interest of the child,<sup>125</sup> to follow a children-orientated approach to deal with drug abuse by children, which may include drug awareness and educational

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<sup>125</sup> Section 28(2) of the Constitution.



programmes, drug prevention programmes, treatment and rehabilitation.

- (xiv) **To the extent that section 4(b) of the Drugs Act criminalises the use and/or possession of cannabis for children under the age of 18 simply because of their age, it is unconstitutional** for the following reasons:
- (a) It is unfair to subject children to criminal prosecution and incarceration for the use and possession of cannabis when their adult counterparts who use cannabis are able to do so without having to suffer the consequences of criminalisation. Children face the risk of a criminal record and suffering social stigma.
  - (b) Placing custodial penalties on children for drug use is an ineffective form of protection.
  - (c) A more constructive approach to deal with drug abuse by children would be to provide for legal powers by welfare authorities to intervene in cases of child drug abuse.
  - (d) The declaration of invalidity was necessary in order to ensure that children are not arrested and dealt with through the criminal justice system as provided for in the CJA for the use and/or possession of cannabis.
  - (e) There were other legislation and procedures available to deal with children both in and outside the child justice system without exposing them to the penal consequences of the criminal justice system, and at the same time achieve the same objective of protecting children from drug use and abuse.<sup>126</sup>
- (xv) The selling and provision of cannabis to minors and the use and possession in public is and will, however, remain a criminal offence.

#### 6.3.4 International Law

The Minister's submission also compared South Africa's legislative position concerning children and cannabis use and possession in relation to South Africa's obligations in terms of international instruments and those measures employed by countries like Canada and the USA where cannabis use have been decriminalised.

The submission concluded that:

- South Africa's Constitutional protections against non-discrimination and the guarantee of equality are in line with, and give effect to, South Africa's obligations under international and regional law and instruments.
  - o South Africa has ratified the International Covenant on Civil and Political Rights, 1966 (ICCPR); and the United Nations Convention on the Rights of the Child, 1989 (CRC).
  - o The CRC requires States Parties to take legislative, administrative, social, educational and all other appropriate measures, to protect children from illicit use of narcotic drugs

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<sup>126</sup> Section 36 of the Constitution provides *inter alia* that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right and whether less restrictive means exist to achieve the same purpose.



and psychotropic substances as defined in the relevant international treaties.<sup>127</sup>

- o According to the Committee on the Rights of the Child, which oversees the implementation of the treaty and guides its interpretation, a drug dependent child should be treated as a victim, not a criminal.
- o The CRC and the Committee on the Rights of the Child provide that criminalisation for drug use or possession is inconsistent with a child rights approach in light of the accepted principle that the detention of minors under 18 should only be a measure of last resort, and for the shortest possible time. Both instruments promote diversion from the criminal justice system for such children.
- o According to the United Nations International Children's Emergency Fund (UNICEF), applying harsh penalties to children who use drugs is a "deeply ineffective form of protection".
- o The criminalisation of the possession of small quantities of drugs for personal use and the use of drugs are inappropriate measures to protect children.
- o Article 47 of the Guidelines on Action for Children in the Justice System in Africa of the African Child Policy Forum (2012) requires Member States to decriminalise status offences and minor drug offences for children and youth; and introduce alternatives to prosecution and imprisonment for children and youth.

### 6.3.5 Status Offences

In considering whether Section 4(b) of the Drugs Act violated section 9 of the Constitution by unfairly discriminating against children, the Minister and *amicus* both dealt with so-called "status offences" in their submissions.

- o Historically, status offences were discrimination, segregation/ apartheid laws and not merely laws with a possible discriminatory effect.
- o In status offences, the range of behaviour considered an offence is wider for juveniles than for adults (for example, truancy, school and family disobedience, public drunkenness, etc.)
- o **Section 4(b) of the Drugs Act, read against the Cannabis judgment, clearly discriminated against children. This discrimination was based on their age and status as children because it decriminalises the use and possession of cannabis for adults only, but not for children. This made it a status offence.**

Was this discrimination fair if its effect is to further disadvantage the children through a criminal record and the social stigma of being called "drug addict children", in addition to limiting future chances of employment, in the event they failed to comply with the diversion programme?

- Discrimination based on age and/or status as contemplated in section 9(3) of the Constitution, and as contained in the international and regional instruments discussed above,

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<sup>127</sup> Article 33



was there by operation of the order in the *Prince Judgment* to which the review court was bound. Such discrimination was presumptively unfair and called for objective justification.<sup>128</sup>

- Whereas the continued limitation would have a purpose, i.e. to protect children against drug use, which could lead to drug abuse, the means employed at the time were not rationally connected to the purpose.
- **Therefore, the discrimination was unfair because it did not meet the limitations test set out in section 36(1) of the Constitution, as there were less restrictive means available to achieve the purpose.**

Did section 4(b) of the Drugs Act infringe on section 28 (1)(g) and (2) of the Constitution?

- The fact that children could be criminally prosecuted and detained for the use and possession of cannabis in the absence of any legitimate justification infringed the provisions of section 28(1)(g) and 28(2) of the Constitution.
  - o The criminalisation of the use and possession of cannabis coupled with any form of custodial punishment could not be regarded as a measure to address drug abuse by children, nor was it in the best interest of a child.
  - o In countries like Canada and the majority of US States where the possession and use of cannabis by children is an offence, minors aged 18 to 21 can be charged with an infraction (violation), a fine, community service or driver's licence suspensions; while minors under 18 can be sentenced to drug education and counselling.
  - o In certain Australian Territories, New South Wales, Canada and certain US states that have decriminalised the possession and use of small quantities of cannabis, various legislative measures to deal with child drug offenders include a warning, a caution or a conference or up to two intervention notices for minors under 18.
  - o South Africa could equally regulate and put in place specific measures to deal with minors who are found in possession of, or use, small quantities of cannabis.
  - o There was no justification for the continued criminalisation of the use and/or possession of cannabis in respect of children to the extent that such measures are aimed at addressing drug abuse by children.
  - o Less restrictive means could achieve the same purpose - the Minister's position regarding the criminalisation of the use and possession of cannabis by children is based on the Court's decision in *Prince*, namely that less restrictive means must be employed to deal with the drug problem, a view shared by the Central Drug Authority.<sup>129</sup>
  - o A World Health Organisation study on the health and social effects of non-medicinal cannabis use, recommended the following methods of prevention and treatment: family prevention strategies (including the training of parents, children and family); life skills programmes at schools (including interactive drug curricula as opposed to lecture based drug curricula); interactive social programmes targeting vulnerable people through

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<sup>128</sup> Section 9(5) of the Constitution, 1996.

<sup>129</sup> A report from substance abuse centres in all nine provinces found that cannabis was the most common illicit drug used, especially among youth attending specialist treatment centres in the Eastern Cape, Northern Region and the Western Cape.



providing them with life skills development and team building content.

- o Short-term cannabis use had been shown to impair functions such as attention, memory, learning and decision-making.
- o Heavy cannabis use in adolescence or early adulthood could cause poor school performance, higher dropout rates, increased welfare dependence, greater unemployment and lower life satisfaction. Some researchers have suggested that factors such as peer influence, emotional distress or a tendency toward problem behaviour could predispose people to drug and poor life outcomes.<sup>130</sup> The probability that a particular drug would be abused was influenced by many factors, including the specific drug effects and availability of the drug.
- o Adolescent cannabis consumption can increase the risk of developing depression and suicidal behaviour later in life. **There was thus an urgent need to implement better drug-use prevention programs targeting cannabis use among adolescents; and interventions aimed at educating adolescents to develop the skills to resist peer pressure in respect of drug consumption.**

#### **6.3.6 Conclusion regarding the possible decriminalisation of cannabis use and possession by children:**

- (i) Section 4(b) of the Drugs Act, read in line with the operation of subparagraph 13(a) of paragraph [128] of the *Prince Judgment*, plainly differentiated between adults and children as regards the use and/or possession of cannabis.
- (ii) The review court's extension of the *Prince judgment's* interim relief to children would require various policy considerations which could best be dealt with through legislative reform and which fell within the functions of Parliament.
- (iii) The decriminalisation of the use and possession of cannabis by minors could also:
  - o Influence current legislative provisions that deal with the prevention of and the treatment of cannabis abuse by minors;
  - o Facilitate access to and the distribution of cannabis among minors and their exposure to cannabis, which could also expose them to abuse by adults to deal in cannabis;
  - o Impact on South Africa's international obligations, among others, the CRC and the AU Charter and resources of applicable Departments to implement measures to address drug abuse by children.
- (iv) New models to deal with cannabis abuse by minors need to be considered, researched, developed, enacted and implemented. This will require inputs from the Departments of Health, Social Development, Police and Basic Education in order to assist the Court to further consider how best to protect the interests of the child in relation to the issues discussed in the submission.

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<sup>130</sup> Weir, K (2015)





#### 6.4 South Gauteng High Court Judgment handed down on 31 July 2020

In its judgement on 31 July 2020, the High Court made the following order:

- **Section 4(b) of the Drugs Act 140 of 2002, is inconsistent with the Constitution and invalid to the extent that it criminalises the use and/or possession of cannabis by a child.**
- Until legislative reform corrects the Constitutional defects, a moratorium is placed on the arrest, prosecution and diversion of children for contravening the impugned provision.
- On page 53 of the judgment, the Court refers to submission by the Department that an amended Bill dealing with children was awaiting Cabinet permission to be introduced in Parliament. The Court therefore did not prescribe a time limit (usually 24 months) in which Parliament had to pass legislation to rectify the Constitutional defect.
- The Constitutional Court must confirm the order of Constitutional invalidity.
- The Court was informed that up to March 2020, in contravention of its February 2019 order, the DPP had continued to “divert” children for alleged Schedule 1 offences and Magistrates had continued to place children in temporary residence for these and other trivial offences.
- An audit of children diverted in this manner revealed, for example, that more than one child was placed in temporary residence for six months or longer, often with no documentary evidence of their placement. Registers were not kept in contravention of the Child Justice Act (CJA), to the extent that legal representatives were unable to trace and identify a child that had been mistakenly placed in temporary residence.
- The Court therefore declared that section 53(3) and (2) of the CJA do not permit, under any circumstances, the placement in temporary residence of a child accused of a Schedule 1 offence under the CJA.
- Section 58(4)(c) also does not allow a prosecutor to place a child accused of committing a Schedule 1 offence and who had failed to comply with a previous diversion order, in temporary residence as a “further diversion” option.

#### 6.5 Conclusion

On 13 August 2020, a draft Bill, the Cannabis for Private Purposes Bill, 2020 was tabled in Parliament in terms of Rule 159.<sup>133</sup> The draft Bill, curiously, adds more offences to the CJA by amending Schedule 1 of the CJA to include new offences listed in the Bill that concerns children. The only amendment made to the Drugs and Drug Trafficking Act 140 of 1992 is to Parts II and III of Schedule II to delete references to cannabis and parts of whole of the plant, as well as chemical components in this regard. **It is thus not clear whether the Bill gives effect to the judgment of the South Gauteng High Court on 31 July 2020 and is in fact the Bill the Court had referred to in the judgment.** What is encouraging though, is that the moratorium on placing children in temporary residences and charging or arresting them for cannabis use and/or possession is effective immediately and will remain in force until such time legislation addresses the defect.

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<sup>133</sup> Parliament of South Africa (2020)



## **7. SUBSTANCE ABUSE TREATMENT IN SOUTH AFRICAN CORRECTIONAL SERVICES**

### **7.1 LEGISLATIVE AND POLICY FRAMEWORK ON SUBSTANCE ABUSE TREATMENT**

#### **(i) The Nelson Mandela Rules, 2015**

Rule 91 of the Nelson Mandela Rules (Formerly, Standard Minimum Rules for the Treatment of Prisoners) makes provision for the treatment of persons sentenced to imprisonment. This Rule states that treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

Rule 92 states that all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment, counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account his or her social and criminal history, physical and mental capacities and aptitudes, personal temperament, the length of his or her sentence and prospects after release.<sup>134</sup>

#### **(ii) Correctional Services Act 111 of 1998**

Section 41 of the Correctional Services Act makes provision for treatment, development and support services for inmates in correctional facilities across the country. According to section 41(1), the Department of Correctional Services must provide or give access to as full a range of programmes and activities as is practicable to meet the educational and training needs of sentenced prisoners. This section also stipulates that sentenced prisoners may be compelled to participate in the programmes provided and to use other services provided, where in the opinion of the Commissioner their participation is necessary, having regard to the nature of their previous criminal conduct and the risk they pose to the community. Offenders who are incarcerated for crimes related to any substance use will form part and participate in those programmes provided in the correctional facility.

#### **(iii) White Paper on Corrections in South Africa, 2005**

The White Paper on Corrections is the principal strategic document aimed at directing the management and service provision of the Department over the next twenty years and beyond. Chapter Nine of this policy document outlines the needs-based Correctional Sentence Plan. These are plans that identify the causes of individual criminality and highlight interventions required to address those causes. The White Paper acknowledges that many of the causes of crime cannot be addressed by the Department alone. However, the Department can make a significant contribution

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<sup>134</sup> United Nations (2015)



towards the rehabilitation of offenders through the provision of:

- Basic academic education
- Vocational training
- Social education/orientation
- Psychological treatment
- Diagnosis and treatment of problems such as substance abuse
- Strengthening of family ties.

#### **(iv) National Development Plan, Vision 2030**

The National Development Plan (NDP) offers a long-term perspective, defines the desired destination and identifies the role various sectors of society need to play in reaching defined goals. Of relevance is Chapter Twelve (12) which on “Creating safer Communities”. The NDP makes six recommendations for correctional services, of which the following two recommendations are relevant to substance abuse:

- Substance-abuse treatment during imprisonment should be increased. Substance-abuse programmes should be a component of any pre-release programme given the relationship between drug abuse and the commission of crime in the broader society. Substance abuse is a widespread problem among the prison population with re-addiction after release. It is a frequent cause of recidivism and a barrier to obtaining stable employment.
- Capacitate community organisations to assist in sustaining the rehabilitation of former prisoners and assist with their reintegration into the community. Civil society can play an invaluable role in the continued rehabilitation of former prisoners and the prevention of re-offending. Civil society organisations need to be identified, vetted and adequately resourced to do this.<sup>135</sup>

## **7.2 SUBSTANCE ABUSE TREATMENT IN SOUTH AFRICAN CORRECTIONAL FACILITIES**

The Department of Correctional Services operates 243 correctional centres across the country. These centres differ in size, structure and accommodation capacity. At the end of March 2019, these facilities accommodated a total of 162 875 inmates, of which 115 147 were sentenced and 47 728 were remand detainees.<sup>136</sup>

The Department provides rehabilitation and correctional programmes as part of their efforts to change the offending behaviour of those entrusted in their care. Substance abuse treatment in correctional facilities falls under correctional programmes provided by the Department of Correctional Services. Correctional programmes are one of a number of endeavours, which the Department has embarked upon in its attempt to rehabilitate offenders and reintegrate them into communities as law-abiding citizens. The aim is to join forces with stakeholders and civil society in

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<sup>135</sup> National Development Plan, Vision 2030.

<sup>136</sup> Annual Report of the Department of Correctional Services, 2018/19



pursuance of the common goal of inducing and supporting some type of change in the people who are participating in the programmes. The desired change may include behavioural change, acceptance of positive values and morals, increased knowledge, the acquisition of skills and improved mental and physical health.<sup>137</sup>

### 7.2.1 Overview of Correctional Programmes

The Department of Correctional Services defines correctional programmes as needs-based programmes that address offending behaviour. The Department has made it compulsory for all sentenced offenders serving sentences of 24 months and longer to attend correctional programme sessions. Currently the Department has developed and sourced the following seven correctional programmes:

- Anger Management Programme
- Crossroad Correctional Programme
- Preparatory Programme on Sexual Offences
- Pre-release Programme
- Substance Abuse Correctional Programme
- Restorative Justice Orientation Programme
- New Beginnings Orientation Programme.<sup>138</sup>

### 7.2.2 Substance Abuse Correctional Programme

The main purpose of the Substance Abuse programme is to help participants gain insight into the negative effects of substance abuse. This programme is aimed at offenders sentenced to more than twenty-four (24) months and longer, based on the needs and risks identified in the offender's Correctional Sentence Plan. The Department of Correctional Services has developed the Substance Abuse Awareness Programme (Stop to Start) and is currently implementing it in its facilities. This programme provides offenders with information on addiction, causes of addiction and recovery from addiction.<sup>139</sup> There are several goals, which this programme intends to achieve, including the following:

- To help the offender overcome alcohol and drug addiction
- Empower participants with information related to substance abuse and the addiction process
- Educate participants on the signs and symptoms of substance addiction
- Enable participants to have a better understanding of themselves
- Empower participants with coping
- Provide participants with information on how to restore broken relationships.<sup>140</sup>

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<sup>137</sup> White Paper on Corrections in South Africa, 2005

<sup>138</sup> Department of Correctional Services (2019).

<sup>139</sup> Department of Correctional Services (2019a)

<sup>140</sup> Ibid



This programme comprises of 10 sessions, which cover the following:

- Introduction and overview of addictive substances
- Cycle and costs of addiction
- Causes and symptoms of substance abuse
- Addictive habits and how to deal with them
- Dealing with addiction
- Drug refusal techniques
- Decision-making
- Relapse prevention
- Coping during recovery
- Restoration of relationships.<sup>141</sup>

A number of offenders participate in this programme throughout correctional facilities. Between April 2019 and September 2019, approximately 5 096 offenders attended the Substance Abuse (Stop to Start) Correctional Programme.<sup>142</sup>

### **7.2.3 Key challenges encountered by the Department of Correctional Services in rendering Substance Abuse Programmes**

One of the main challenges reported by the Department in rendering substance abuse programmes in correctional facilities is the absence of an approved and financed structure for Correctional Intervention Officials to render programmes. Currently custodial officials are utilised on an interim basis, as Correctional Intervention Officials.<sup>143</sup> In some correctional centres, external service providers who are quality assured also render their own substance abuse programmes aimed at creating awareness, and are expected to report on the participation of offenders.<sup>144</sup>

### **7.2.4 Key successes related to Substance Abuse Programmes in Correctional Centres**

The Department of Correctional Services has reported that currently there has not been any formal long-term evaluation studies conducted to establish the outcomes and successes of the programmes. However, the Department intends to prioritise such studies in the near future. The Department notes testimonies of ex-offenders in public platforms on the positive outcomes of the programmes.<sup>145</sup>

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<sup>141</sup> Ibid

<sup>142</sup> Department of Correctional Services. Submission of information requested regarding substance abuse programmes in correctional centres.

<sup>143</sup> Ibid

<sup>144</sup> Ibid

<sup>145</sup> Ibid



## 7.3 INTERNATIONAL COMPARISON: CANADA, ENGLAND & WALES

### 7.3.1 Correctional Services of Canada

The Correctional Services of Canada (CSC) is the federal agency responsible for administering imprisonment of two years or more. Its role is to assist offenders to reintegrate back into society as law-abiding citizens, through institutional programmes designed to prepare offenders for return to society and the supervision of offenders on conditional release. The agency is responsible for 43 institutions, which include:

- Six maximum security facilities
- Nine medium security facilities
- Five minimum security facilities
- Twelve multilevel security facilities
- Eleven clustered institutions.<sup>146</sup>

Correctional Services of Canada is also responsible for 92 parole offices and sub-offices, 14 community correctional centres and four healing lodges. It has partnered with non-government agencies to run about 200 community residential facilities across the country. These agencies provide housing, 24-hour supervision, counselling and programming to offenders released under supervision.<sup>147</sup>

At the end of 2017/18, there were 23 060 offenders under the control of the CSC. Of these, 14 015 were in correctional facilities and 9 045 were supervised in the community. These offenders were serving sentences for a range of crimes - 18% were serving sentences for drug-related offences.<sup>148</sup>

#### (i) National Substance Abuse Programs

The CSC offers a variety of substance abuse programmes aimed at helping offenders avoid criminal behaviour and cope with challenging and stressful situations without using drugs and/or alcohol. These programmes include the following:

- **High Intensity National Substance Abuse Program.** The high intensity national substance abuse program targets men assessed as being at high risk to reoffend. It is for men whose substance use has been directly linked to their criminal behaviour. The program consists of 89 group sessions and several individual sessions as required. Each session lasts 2 hours. The program helps offenders explore the behaviours they have to change. They learn to identify risks and manage their behaviour, so they can avoid relapse.

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<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> Correctional Services Canada, CSC Statistics - Key facts and figures (Accessed at <https://www.csc-scc.gc.ca/publications/005007-3024-en.shtml>)



- **Moderate Intensity National Substance Abuse Program.** The moderate intensity national substance abuse program targets men who were assessed as being at a moderate risk to reoffend. It is for men whose substance use was directly linked to their criminal behaviour. The program consists of 26 group sessions and 1 individual session. Each session is 2 hours long. The program helps offenders explore the behaviours they have to change. They learn to identify risks and manage their behaviour so that they can avoid relapse.<sup>149</sup>

### 7.3.2 Prison and Probation Service in England & Wales

Prison services in England & Wales are under the control of Her Majesty's Prison and Probation Services (HMPPS). At the end of November 2019, there were 83 516 offender incarcerated in facilities across England and Wales. The official accommodation capacity of those facilities was 85 267.<sup>150</sup>

Offending behaviour programmes and interventions aim to change the thinking, attitude and behaviours that may lead people to reoffend. Most programmes and interventions in England & Wales are delivered in groups, but one-to-one provision is available in some circumstances. These programmes encourage pro-social attitudes and goals for the future and are designed to help people develop new skills to stop their offending. These include:

- Problem solving
- Perspective taking
- Managing relationships
- Self-management.

A range of programmes are available both in prisons and in the community for people on probation. These programmes include:

- Specific offences, for example sexual offending and domestic violence
- General patterns of offending behaviour
- Substance misuse related offending.<sup>151</sup>

#### (i) Accredited programmes on Substance Abuse treatment

The Ministry of Justice in England & Wales uses accredited programmes to both offenders and probationers under the control of Her Majesty's Prison and Probation Services. Accreditation ensures that (a) a programme's design is based on the best available evidence, (b) will be delivered as intended, and (c) will be evaluated to show the outcomes that are being met. These programmes

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<sup>149</sup> Ibid

<sup>150</sup> GOV.UK, Official Statistics Prison population figures: 2017 (Accessed at <https://www.gov.uk/government/statistics/prison-population-figures-2017>)

<sup>151</sup> GOC.UK, Guidance, Offending behaviour programmes and interventions (Accessed at <https://www.gov.uk/guidance/offending-behaviour-programmes-and-interventions>)



are accredited by the Correctional Services Accreditation and Advice Panel (CSAAP), which is a panel of independent, international experts.<sup>152</sup> Programmes offered include:

- **Substance Dependency Treatment Programme (SDTP).** This programme is a 16-21 week programme for men and women who are at medium-high risk of reoffending, with substance dependence. Phase one builds motivation and practices safe coping skills. Phase two works through the first five steps of the Alcoholics Anonymous (AA) / Narcotics Anonymous (NA) programmes. Phase three concentrates on relapse prevention.
- **Women's Substance Dependency Treatment Programme (WSDTP).** This programme is similar to SDTP, but it is designed particularly to support women in prison who depend on drugs. Phase one builds motivation and practices safe coping skills. Phase two works through the first five steps of the AA/NA programmes. Phase three consolidates learning and concentrates on relapse prevention.

### 7.3.3 Comparison of different substance abuse programmes in South Africa, Canada and England & Wales

There are some differences on how different correctional systems facilitate substance abuse treatment programmes in their facilities. These differences include the following:

- Canada and England & Wales provide a number of different substance abuse programmes tailored to need, while South Africa only provides one programme comprising of 10 different sessions.
- England & Wales has a programme specifically for women offenders, while South Africa and Canada provide the same programmes for both women and males offenders.
- Canada provides different (high and moderate) intensity programmes for different groups in its facilities, while South Africa and England & Wales do not provide for different intensity levels.
- The programmes offered by Canada (89 group sessions plus individual sessions or 26 group sessions and 1 individual session), and England and Wales (16 to 21 week programmes) are longer than the programme offered in South Africa (10 sessions).

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<sup>152</sup> Ibid



## 8. CANNABIS AND HEALTH CONCERNS

According to the WHO, cannabis is the most commonly used psychoactive substance under international control. A psychoactive substance has the ability to “change consciousness, mood, and thoughts”.<sup>153</sup> The United Nations Office for Drugs and Crime (UNODC) reports that approximately 3.8 per cent (188 million) of the world’s population consumed cannabis in 2017, compared with an estimated 1.1 per cent (53 million) of people globally, who used opioids such as heroin and opium,<sup>154</sup> and nearly 0.4 per cent (18 million) of adults aged 15–64, who used cocaine.<sup>155</sup> The WHO reports that the lower price of cannabis relative to other illicit drugs coincides with the higher levels of cannabis abuse.<sup>156</sup>

This section looks at the effect of cannabis products on the health of both recreational and medical users. There is a plethora of information and studies on this topic but the WHO notes that more research needs to be done to reach conclusions. Therefore, this section is based on the Critical Review Report of the WHO’s Expert Committee on Drug Dependence (ECDD). The ECDD was established to review the scheduling of illegal drugs including cannabis and cannabis resin related products and make recommendations to the United Nations (UN) in this regard. This section also provides information on the changes in potency of the cannabis plant and concludes that cannabis use can have both negative and positive effects depending on the purpose and the dosages, among other things.

### 8.1 CANNABIS POTENCY

The amount of THC present in a cannabis sample is generally used as a measure of cannabis potency.<sup>157</sup> Experts generally agree that cannabis has changed dramatically over time. One of the main reasons for this change is that users have increasingly more information about the distribution of THC in the cannabis plant. According to cannabis expert Rolana Londt<sup>158</sup> the highest concentration of THC is in the flowering buds of the plant, followed by the leaves closest to the buds. The leaves furthest from the buds have lower concentrations of THC, while stalks and the seeds of the cannabis plant do not possess any THC. The United Nations’ World Drug Report of 2009 quantifies the concentration stating that “THC content varies in the different parts of the plant: from 10-12 per cent in flowers, 1-2 per cent in leaves, 0.1-0.3 per cent in stalks, to less than 0.03 per cent in the roots”<sup>159</sup>. Cannabis users in the 1970’s mainly smoked the less potent leaves, while modern users smoke the more potent flowering buds.<sup>160</sup>

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<sup>153</sup>World Health Organisation (2016a)

<sup>154</sup> United Nations Office on Drugs and Crime (2019a)

<sup>155</sup> United Nations Office on Drugs and Crime (2019b)

<sup>156</sup> World Health Organisation (2016b)

<sup>157</sup> United Nations Office on Drugs and Crime (2009)

<sup>158</sup>Londt, R (2014)

<sup>159</sup> United Nations Office on Drugs and Crime (2009)

<sup>160</sup> Londt, R (2014)



An article on *Traditional Marijuana, High-potency Cannabis and Synthetic Cannabinoids: Increasing Risk for Psychosis* in the *World Psychiatry Journal* notes that in the 1960s, the amount of THC in the commonly used herbal cannabis and hashish was about 3 per cent or less, but subsequently it began to rise.<sup>161</sup> The article reports that over time growers discovered that preventing pollination increased THC amounts in a plant. One of the ways that producers use to maximise the production of the psychoactive THC, is the “sinsemilla” method. Sinsemilla is a Spanish term that means “without seeds” and refers to a type of cannabis where the female plant is left unfertilized so that it does not produce seeds and thus converts more of its energy into cannabinoids, especially with higher levels of THC concentration.<sup>162</sup> As a result, the cannabis resin can contain up to 20 per cent THC content. The UNODC notes that the most potent form of cannabis is cannabis oil, derived from the concentrated resin extract, which may contain more than 60 per cent THC content.<sup>163</sup>

The WHO reports an increase in the “average THC content of all confiscated cannabis preparations in the USA and in some European countries”.<sup>164</sup> The organisation notes that people are breeding different strains that are producing cannabis plants and resins with dramatic increases in THC content from around 3 per cent to between 12–16 per cent or higher in different countries.<sup>165</sup> For instance, in the USA the THC content of cannabis increased from less than 2 per cent in 1980 to 4.5 per cent in 1997 and 8.5 per cent in 2006 to 8.8 per cent in 2008. The WHO adds that by 2015, “retail cannabis seized by the US Drug Enforcement Administration (DEA) was found to contain as much as 20 per cent THC or more.”<sup>166</sup> In the US states where recreational cannabis or “medicinal marijuana” have been legalised, the new ways of extracting THC from the plant have produced resin oil with up to 80 per cent THC content.<sup>167</sup>

In South Africa, the *MarijuanaBreak* publication reports that *Durban Poison*, a “pure sativa strain with origins stretching back to a single ancestral relative from the south coast of Africa” has a lab tested THC content in the 17-26 per cent range. The publication remarks that this is “pretty unreal considering that it has not been bred or genetically selected for in any way.”<sup>168</sup> The *Power Plant* was originally created from the landrace strains of South Africa, by a Dutch seedbank, and was first bred by Dutch Passion Seeds in 1997. It has a 20 per cent THC level of concentration.<sup>169</sup>

Another form of cannabinoids that has increased dramatically are the use of synthetic cannabinoids which according to experts Murray et. al poses a greater health risk compared to the use of the organic cannabis plant.<sup>170</sup> A survey of 80 000 drug users showed that those who used synthetic cannabinoids were “thirty times more likely to end up in an emergency unit than users of traditional

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<sup>161</sup> Murray, Quigley, Quattrone, Englund, and Di Forti (2016)

<sup>162</sup> Murray, Quigley, Quattrone, Englund, and Di Forti (2016)

<sup>163</sup> United Nations Office on Drugs and Crime (2009)

<sup>164</sup> World Health Organisation (2016a)

<sup>165</sup> World Health Organisation (2016a)

<sup>166</sup> Ibid

<sup>167</sup> Murray et. al. (2016)

<sup>168</sup> *MarijuanaBreak* (2016)

<sup>169</sup> *Cannaconnection* (2020)

<sup>170</sup> Murray et. al. (2016)



cannabis.”<sup>171</sup> The UNOCD notes that over 200 synthetic cannabinoids have been reported available on the Internet. The UNOCD adds that synthetic cannabinoids substances are produced in the laboratory and can have unpredictable side effects.<sup>172</sup> This implies that countries need to regulate the use of synthetic cannabinoids to protect users from harm.

## 8.2 EFFECTS OF CANNABIS USE

The UNOCD explains that when cannabis is in the brain, the THC acts on specific brain cell receptors that ordinarily react to natural THC-like chemicals. These natural chemicals are responsible for normal brain development and function. THC’s chemical structure is similar to that of the brain’s natural neurotransmitter in humans, as a result the human brain recognises THC. Therefore this cannabinoid is able to change the way brain communication works. It affects brain areas that influence pleasure, memory, thinking, concentration, movement, coordination, and sensory and time perception. The UNODC reports that THC attaches itself to brain neurons and “activates them, disrupting various mental and physical functions”. The UNODC notes that cannabis over-stimulates these parts of the brain “but the effects of THC are more potent and longer acting than the brain’s natural neurotransmitter” causing the high or euphoria that people feel.<sup>173</sup>

### 8.2.1 Adverse Effects of Cannabis use on Health

According to the US National Institute of Drug Abuse (NIDA) when people smoke or ingest cannabis they experience “a pleasant euphoria and sense of relaxation, a heightened sensory perception (e.g., brighter colours), laughter, altered perception of time, and an increase in appetite. However, the “pleasant experiences with cannabis are by no means universal”. NIDA notes that some users experience anxiety, fear, distrust, or panic instead of relaxation and euphoria.<sup>174</sup>

The adverse effects of cannabis use are called cannabis use disorders. They are mainly divided into short term and long-term effects. The WHO describes short-term effects as “those that can occur shortly after a single occasion of use”. These effects depend on the following, among others:

- Dose received,
- Mode of administration,
- User’s prior experience with cannabis,
- Any concurrent drug use.<sup>175</sup>

There are many studies that link the effects of cannabis use with disorders such as dependence, cognitive impairment, mental disorders such as psychoses, depression, anxiety and suicidal behaviour, as well as adverse physical health effects such as stroke, cardiovascular disease (CVD),

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<sup>171</sup> Ibid

<sup>172</sup> Ibid

<sup>173</sup> United Nations Office on Drugs and Crime (n.d)

<sup>174</sup> National Institute on Drug Abuse (2019a)

<sup>175</sup> World Health Organisation (2016a)



some respiratory and pulmonary disease and prostate and testicular cancers. The WHO notes that for some of these there is insufficient evidence to prove a relationship with cannabis use-disorders. Furthermore, there is a lack of global data on trends in the “prevalence of harmful cannabis use and of cannabis dependence (cannabis-use disorders)”.<sup>176</sup>

The WHO notes that most research is mainly on smokers in a small number of high-income countries and there is “some uncertainty as to whether the same risk factors apply in low- and middle-income countries”. It adds that more research is needed on the following:

- Cannabis use in low- and middle-income countries,
- Global assessments of the relationship between cannabis use and the use of other drugs,
- More data from properly-designed studies on the prevalence and health consequences of:
  - o Smoked cannabis only, as cannabis and tobacco are often mixed together,
  - o Different routes of cannabis administration,
  - o Potential added health risks from the use of cannabis in combination with tobacco, and
  - o The THC and other cannabis preparations, including pressed marijuana, in different parts of the world.

The WHO reports that it conducted a formal review on the scheduling of cannabis for the first time at its fortieth meeting of the WHO ECDD in June 2018. In light of the above-mentioned uncertainties in the research on cannabis use disorders, this section will focus mainly on the adverse effects as confirmed in the scheduling review.

- ***Effects on the Central Nervous System:*** According to the review, cannabis use can “stimulate appetite and produce dry mouth and dizziness” and induce “euphoria, laughter and talkativeness, change sensory and time perception, and compromise motor control and judgement”. The WHO notes that acute cannabis intoxication can lead to a “short-lasting psychotic state which reverses once the effects of the drug have abated.”<sup>177</sup> The risk of developing psychotic disorders increases when using cannabis with high levels of THC, particularly if there is a genetic exposure to psychosis.<sup>178</sup>

The ECDD report notes that acute cannabis use causes harm to certain types of cognitive function such as attention, learning and memory. As a result, when driving intoxicated, cannabis use “impairs reaction time, lane control, speedometer monitoring, hand and body steadiness and braking time as well as promoting inappropriate responses in an emergency scenario”<sup>179</sup>. The WHO posits that this could lead to a low-to-moderate (20–30 per cent) increase in the risk of accidents.<sup>180</sup> However, in its report on Social and Health Effects of Cannabis use, the WHO notes that the accident causing effect is relatively “small compared

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<sup>176</sup> World Health Organisation (2016a)

<sup>177</sup> World Health Organisation (2019)

<sup>178</sup> World Health Organisation (2019)

<sup>179</sup> World Health Organisation (2016a)

<sup>180</sup> World Health Organisation (2019)



to the effects of alcohol.”<sup>181</sup> Furthermore, cannabis is regarded as safer than alcohol and other psychoactive drugs such as Prozac, Codeine and Heroin among others.

- **Dependence potential:** Citing international clinical diagnostic guidelines, the WHO recognises the existence of cannabis dependence because of the onset of cannabis withdrawal symptoms once a person stops using cannabis. The symptoms include “mood changes, irritability, increased anger, anxiety, depression, cravings, restlessness, sleep impairment, gastrointestinal disturbance and decreased appetite”<sup>182</sup>. The WHO notes that these symptoms usually occur “within 1 to 2 days of stopping regular use, usually peak 2 to 6 days after last use, and may last for 2 to 3 weeks.”<sup>183</sup>

Various adverse effects are associated with long-term cannabis use, particularly an increased risk of mental health disorders such as anxiety, depression and psychotic illness. Chronic regular cannabis use is particularly problematic for young people because of its effects on the developing brain. Cannabis can cause physical dependence in people who use the drug daily or near daily. The WHO notes that cannabis use disorder is most common in people under 30 years of age. In addition, the regular use of cannabis with a low percentage of THC content may lead to dependence while withdrawal symptoms are more severe at a high percentage of THC content. The WHO review adds that about 1 in 10 cannabis users develop a cannabis use disorder, but this figure varies between studies and countries.<sup>184</sup>

- **Fatal Overdose:** According to the ECDD review, preclinical studies indicate that human beings are unlikely to reach the lethal doses of cannabis and cannabis resin use. “The risk of a fatal cannabis overdose is extremely small compared to the risks of opioid and stimulant drug overdoses.”<sup>185</sup>
- **Heart Attack:** The WHO notes that the acute use of cannabis appears to have a “minimal or transient” impact on the cardiovascular system such as tachycardia and increased blood pressure, and subsides with tolerance. “[S]ome studies have suggested a link between cannabis use and heart attack, but the association is uncertain”<sup>186</sup>. However, young children who eat cannabis “can experience respiratory depression, tachycardia and temporary coma.”<sup>187</sup>
- **Pregnancy and cancer:** According to the WHO review, women who smoke cannabis during pregnancy give birth to babies with birth weights that are, on average, lower than those of women who do not smoke cannabis during pregnancy. Cannabis smoking has been reported

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<sup>181</sup> World Health Organisation (2016a)

<sup>182</sup> Ibid

<sup>183</sup> World Health Organisation (2019)

<sup>184</sup> Ibid

<sup>185</sup> World Health Organisation (2016a)

<sup>186</sup> Ibid

<sup>187</sup> World Health Organisation (2019)



to lead to a 2.5-fold increase in the risk of testicular cancer.<sup>188</sup>

### 8.2.2 Therapeutic or medicinal effects

In its 2018 Critical Review Report, the WHO ECDD notes that there are some therapeutic or medicinal benefits of using different cannabinoids such as CBD, THC as well as cannabis extracts such as dronabinol. Some countries have already approved the use of some cannabis products as treatment for different conditions including chronic pain and epilepsy in children. However, the ECDD also acknowledges that more research needs to be done to get a full understanding of the effects of cannabis and cannabis related products on people's health.<sup>189</sup>

The ECDD Report notes that the CBD found in cannabis and cannabis resin, is not a psychoactive chemical, has no significant ill effects, no potential for abuse, no potential to produce dependence and no indication of recreational use of CBD or any public health-related problems related to the use of pure CBD.<sup>190</sup> Instead, there is evidence that CBD can be effective in the management of childhood epilepsy such as the Dravet syndrome and the Lennox-Gastaut syndrome (LGS). The Dravet syndrome is a childhood epilepsy disorder that is associated with drug-resistant seizures as well as a high mortality rate, and the LGS is an acute form of epilepsy that produces various types of seizures (including drop seizures) which do not respond to anti-seizure medications. The ECDD notes that on numerous occasions "CBD was able to reduce the number of seizures, and in some cases it was able to stop them altogether."<sup>191</sup> Furthermore, the ECDD notes that there is pre-clinical (first stage) evidence and, in some cases, limited evidence showing that CBD may be a useful treatment for various medical conditions.<sup>192</sup> The WHO, however, notes that the "research is considerably less advanced than for treatment of epilepsy".

The ECDD also notes that there are many CBD based products, which are sold online. These are sold as oils and capsules and manufacturers claim that the products can be used as treatment for a variety of disorders including epilepsy, cancer, AIDS/HIV, anxiety, arthritis, pain, and post-traumatic stress disorder (PTSD). The WHO Committee cautions however that the relevant authorities have not approved these products.<sup>193</sup>

In June 2015, the South African Medical Research Council (MRC) conducted a Systematic Review Evaluating the Medicinal use of Cannabis. The following are the findings of that review;

- There is evidence of **moderate quality** to support the use of cannabinoids for the treatment of chronic pain;
- There is evidence of **moderate quality** that the use of cannabinoids reduces spasticity in Multiple Sclerosis, but the clinical significance of this is unclear;

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<sup>188</sup> Ibid (2019)

<sup>189</sup> World Health Organisation (2018)

<sup>190</sup> Ibid

<sup>191</sup> Ibid

<sup>192</sup> World Health Organisation (2017)

<sup>193</sup> Ibid



- There is **low quality** evidence suggesting that cannabinoids are associated with improvements in nausea and vomiting due to chemotherapy, and weight gain in HIV infection;
- There is very **low quality** evidence that cannabinoids reduce intra-ocular pressure in patients with glaucoma.

The MRC raised safety concerns pertaining to short-term adverse events reported in those using cannabinoids, as well as a lack of information on appropriate dosages and long-term data on the impact of organic and synthetic cannabinoids on users.

**INTERVIEW WITH JULIAN STOBBS, DIRECTOR OF SOCIAL ACTIVISM OF FIELDS OF GREEN FOR ALL, A NON-PROFIT ORGANISATION THAT PROMOTES THE LEGALISATION OF CANNABIS**

**1. *Why do people use cannabis/ dagga (for non-medicinal reasons)?***

People start using cannabis for a number of reasons. Mostly, people start using cannabis as an act of rebellion or anti-establishment, or as a way to irritate their parents. Most teens experiment with cannabis, but we believe the majority of people who start using cannabis, stop using cannabis as a rational decision. It is unusual for adults to continue their cannabis use. This is mostly dictated by spouse, family, parenting commitments. We would say the overriding reason the vast majority of humans respond well to cannabis is it keeps them in balance. We believe all use of cannabis is therapeutic, whether it was prescribed by a doctor or bought at the taxi rank. Stress, blood pressure, calm, anxiety...the list goes on as to how and why people use cannabis.

**2. *Does the method people use for consuming cannabis matter?***

Different methods of consuming have different results. The effects of smoking happen almost immediately. Eating cannabis infused products have a delayed reaction and the effects last longer. For someone who cannot sleep because of pain, a self-medication of dagga cookies will bring on a deep sleep. For someone with an autoimmune disorder like lupus or Crohns diseases, smoking is the only way to control the symptoms. There is also an increase in the use of e-pens or vapes with cannabis oil inside. These are primarily used for health reasons. They can be used anywhere smoking is allowed without detection. Most long time cannabis users consume cannabis in a variety of ways depending on circumstances and their intentions.

**3. *Can using cannabis be dangerous or harmful to one's health?***

It is difficult to talk about the perceived dangers or harms of cannabis when over 6 000 South Africans died from paracetamol poisoning last year. Cannabis has never been attributed to a single cause of death and it is impossible to ingest an overdose amount. Long-term heavy smoking of any substance is bound to be detrimental to the respiratory system over time. We never refer to the plant as harmless. Nothing is harmless. There is a time and a place for cannabis and when used responsibly it can certainly enhance your life. When someone mentions medical marijuana



we say “don’t wait until you are sick’. People have been led to believe cannabis could be the cure for some ailments. We prefer to think of it as a medicine to prevent major ailments. Long-term cannabis users are generally very healthy people. There is an argument that suggests cannabis use before age 21 can be detrimental to the developing brain, but we still have to be convinced by such claims.

**4. *Could you please explain, in your view what makes cannabis not addictive?***

We would not say cannabis is physically addictive. There is nothing within cannabis that makes someone crave more cannabis. As best we could call it habitual, and we all have habits. Tobacco, chocolate, coffee, cheeseburgers to name but a few. The people who begin to use too much cannabis at the wrong time in the wrong place need assistance with their lives, not their dagga habit. Substance use disorders are complex and rarely have anything to do with the substance.

**5. *On your website the organisation says that cannabis is not a gateway drug. Could you please explain?***

There isn’t anything in dagga that triggers someone’s brain to get a more powerful high from something else. If dagga was the start of a person’s drug use, was tobacco or alcohol before that – two substances very easily obtained in most homes? Put it another way, IF dagga were some sort of gateway to a life of drugs, is it productive to society to criminalise someone for doing such a thing? We believe cannabis is the exit drug, not the gateway. An exit from alcohol cravings, prescription pain killers, tik and other problematic substance use.

**6. *From a health perspective what would be the pros and cons of regulating cannabis like alcohol?***

Cannabis cannot be regulated like alcohol. Cannabis is nothing like alcohol. Cannabis has medical properties, alcohol does not. Cannabis is nontoxic, alcohol is a proven killer. We agree there should be an age restriction of 18 years for both products. We are working towards a unique ministry of cannabis to deal with all cannabis affairs. Finally, it is important that cannabis isn’t regulated any more strictly than alcohol, as it is a safer product for both the individual and society<sup>194</sup>.

The WHO notes that cannabis use can lead to cannabis related disorders such as hallucination, but studies show that these are short lasting and there is no evidence that overdose can lead to death. However, the potency of cannabis and the new synthetic products contain a high concentration of the psychoactive THC content, which according to experts can worsen the short-term adverse effects of cannabis use. There are also concerns that cannabis use can cause harm to the development of the brain of children and young people, especially those whose brains are still developing.

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<sup>194</sup> Stobbs, J (2019) Questions via e-mail, dated 30 October 2019.



Despite its current UN scheduling, cannabis is used in other countries for medicinal purposes and for a myriad of conditions and this is putting pressure on the UN to review its schedules. In South Africa, the MRC reviewed the medicinal effects of cannabis as treatment for a number of health conditions. It found among others that cannabis was moderately effective in the treatment of pain while the quality of evidence for appetite stimulation in HIV/AIDS was low. **Nonetheless, the WHO ECDD notes that in many cases more research needs to be done to assess the effectiveness of medical cannabis and the adverse effect of recreational cannabis.**



## 9. COMMERCIAL IMPLICATIONS

*“These are boom times for the cannabis industry. As countries around the world lift restrictions on the drug, the legal market is soaring.”<sup>195</sup>*

Cannabis has been a prohibited drug for decades but the regulatory environment is changing and the cannabis industry is booming as countries around the world are considering legalisation for medicinal and recreational purposes.<sup>196</sup> Economic expectations are high with analysts dubbing it the “Green Rush”, linking the boom to the “California Gold Rush of 1849”, when thousands of non-native gold-seekers flooded the Pacific Coast along the West Coast of the United States (US) in search of gold.<sup>197</sup>

The United Nations (UN) notes that cannabis is the most widely used illicit drug in the world. The UN Office on Drugs and Crime estimates that “188 million people; roughly 3.8 per cent of the global population aged 15 - 64 years used cannabis at least once in 2017”<sup>198</sup>. As a result, the global demand for cannabis is met by supply even though it is still illegal in many countries. The overall number of annual cannabis users is estimated to have increased by roughly 30 per cent during the period 1998 - 2017.

The UNODC reports that the latest figures for South Africa are not available. However, in 2005 the UNODC was able to estimate that about 8.5 per cent of the population were cannabis users.<sup>199</sup> Assuming the figures have remained constant, using the current population figures of 58.8 million people,<sup>200</sup> this means that there is a sizeable market of about 5 million South African users even though the market is still illegal in the country. This is approximately 13 per cent<sup>201</sup> of the adults aged 15 - 64 years.<sup>202</sup>

Business Fortune Insights, a market research company, reports that costs of enforcing existing anti-cannabis use laws are very high and that legalisation provides new avenues for the revenue that can be generated from imposing tax on the use of cannabis.<sup>203</sup> In addition, the company expects that demand for cannabis edibles will grow at a “fast pace” leading to more business opportunities for entrepreneurs.<sup>204</sup> New cannabis-based sectors are expected to emerge because there are many uses of cannabis, “including building materials, bioplastics, textiles, human and animal products.”<sup>205</sup> Food products such as candies, chocolates, and

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<sup>195</sup> Okoye, I (2019).

<sup>196</sup> Allison and Moodley (2019).

<sup>197</sup> Protrader Today (2020).

<sup>198</sup> United Nations Office on Drugs and Crime (2007).

<sup>199</sup> United Nations Office on Drugs and Crime (2007).

<sup>200</sup> Statistics South Africa (2020).

<sup>201</sup> Based on StatsSA population figures, there are 38.4 million people aged 15-64 years in South Africa.

<sup>202</sup> Statistics South Africa (2019)

<sup>203</sup> Business Fortune Insights (2019)

<sup>204</sup> Business Fortune Insights (2019)

<sup>205</sup> Nunley K (2019)

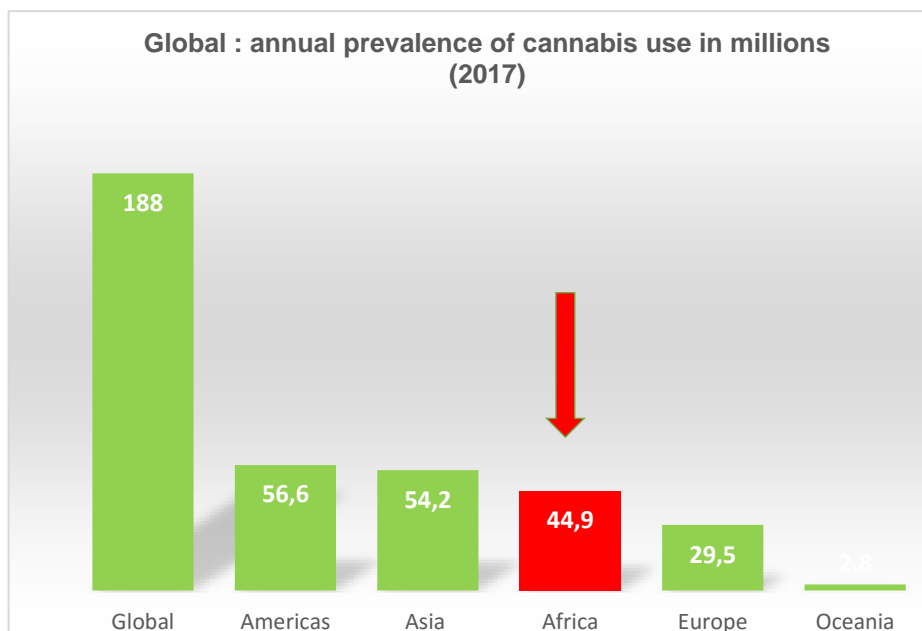


beverages are increasingly popular.<sup>206</sup>

New Frontier Data, a data analysis company, notes that cannabis for medical purposes is legal in more than 50 countries and medically an estimated 1.2 billion people worldwide are suffering from medical conditions for which cannabis has shown therapeutic value. Adopting medical cannabis treatment by even a small proportion of that population would create a massive market. In the US, where prescription use is legal more than two million patients use medical cannabis.<sup>207</sup>

Younger adults are supporting legalisation at far higher rates than older adults, which increases the likelihood of the “normalization of social attitudes toward cannabis.”<sup>208</sup> This generational trend will help increase the longevity of cannabis product sales.<sup>209</sup> Business Fortune Insights notes that there is an opportunity for regions such as Latin America, and Africa, to compete in the export market because they have low production costs and an ideal climate for cultivation. “Asia, while the slowest region to adopt legalization, also represents a wealth of opportunity in the forms of low-cost labour and a long history of hemp production.”<sup>210</sup>

Prohibition Partners add that Africa has one of the highest cannabis consumption rate in the world. Africa constitutes about 44.9 million or about 24 per cent of the global cannabis consumption. (See below - diagram on prevalence use).



Source: UNODC (2019)

<sup>206</sup> Ibid

<sup>207</sup> Morris, J. (2019)

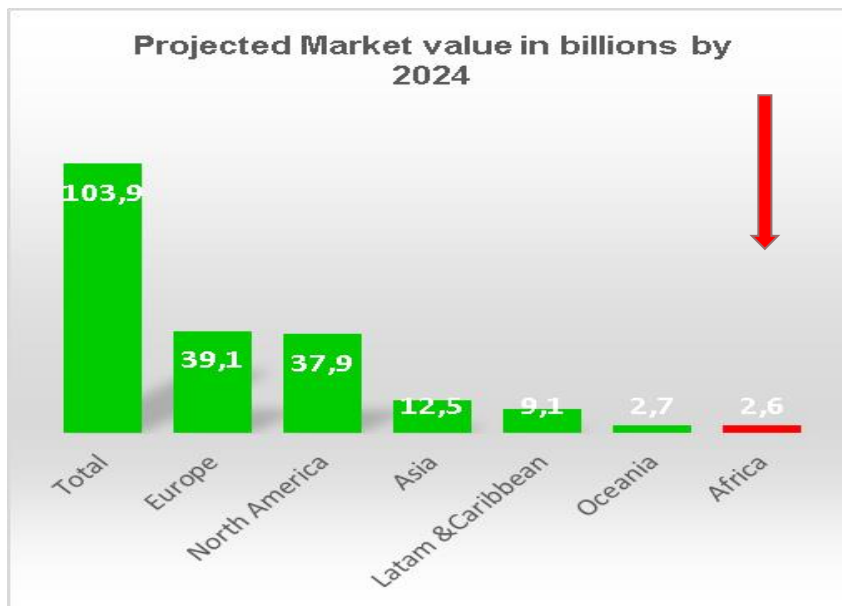
<sup>208</sup> Ibid

<sup>209</sup> Ibid

<sup>210</sup> Ibid



However, Prohibition Partners projects that by 2024, the value of the cannabis market will be US \$7.1 billion in Africa, which constitutes about 2.6 per cent of the global market value. As illustrated in the diagram below, the market value is proportionally smaller than the Africa's global share of consumption (2.6 per cent market value in contrast to 24 per cent of global consumption).



Adapted from; Prohibition Partners (2019)

The analysts argue that more than 33 per cent of Africans live below the poverty line; therefore, “the recreational market is unlikely to achieve the per capita value sales potential of more affluent regions like Europe and North America”.<sup>211</sup>

On the positive side, Prohibition Partners, report that “Africa’s legal cannabis industry could be worth between \$5.6 billion (R84 billion) and \$US7.1 billion (R106.5 billion) annually by 2023 if cannabis were to be legalised in a number of the continent’s major markets.”<sup>212</sup> Nigeria has about 10.6 million users.

If the five countries on the below diagram were to legalise cannabis, Nigeria is expected to take up approximately US\$3.7 billion or 52 per cent of the continent’s market value, and South Africa would follow at US\$1.7 billion or 25 percent of the cannabis market value on the continent.<sup>213</sup>

<sup>211</sup> Prohibition Partners (2019)

<sup>212</sup> Prohibition Partners (2019).

<sup>213</sup> Prohibition Partner (2019).



Prohibition Partners state that Africa has agricultural expertise in cannabis farming, which puts them in a position to be one of the leading producers of cannabis in the world. Nevertheless, the continent needs to introduce innovative irrigation technologies because there is a likelihood that there will be insufficient water to support mass scale operations especially in “newer cultivation methods such as hydroponics” where plants are not grown in natural soil but in other platforms<sup>214</sup>. Otherwise, it will not be able to supply the demands of a maturing market and will not maximise the benefits of the cannabis market.<sup>215</sup>

## 9.1 POTENTIAL ECONOMIC IMPACT – SOUTH AFRICA

In South Africa, the potential of the cannabis economy has been called “The Great Green Gold Rush”<sup>216</sup>, relating the movement to the country’s national colours green and gold.<sup>217</sup> While in true Fourth Industrial Revolution terminology, others have labelled it an economic disruptor. This is primarily due to its potential impact on tax revenue, employment and productivity growth in countries, such as the US and Canada, which have legalised cannabis. This section provides more detail on the figures and the different tax regimes that enable these countries to generate substantial revenue. The economic figures are expected to continue to rise as more states move towards legalisation.

The Prohibition Partners Report of 2019 states that if cannabis were to be legalised, South Africa would become a powerhouse green economy. Prohibition Partners estimate that the legal global cannabis market will be worth up to US\$103.9 billion by the year 2024, given the legalisation of medicinal cannabis. Therefore, there is a significant market that South Africa can tap into both locally and internationally.

<sup>214</sup> Prohibition Partners (2019).

<sup>215</sup> Prohibition Partners (2019).

<sup>216</sup> Allison and Moodley (2019).

<sup>217</sup> South African History Online (2019).



Based on the prohibition market value forecast, the diagram below shows that the cannabis industry in South Africa has a potential of growing from its low base of an estimated R91.2 million in 2018 estimates to about R25 billion by 2023.



Source National Treasury 2019: Department of Fisheries and Forestry (2019) Prohibition Partners (2019)

Malyo and Pedra note that legalising cannabis is lucrative for South Africa because of the monetary benefits. They add that the country is attractive to investors because it is in a unique position of being a global supplier of cannabis seeds strains that are still in their “unhybridised, pure form” for which it is well-known globally<sup>218</sup>. Furthermore, many countries illegally source their seeds from South Africa because the African landrace strains (ALS) contain more tetrahydrocannabivarin (THCV) than strains elsewhere in the world. This cannabis chemical is “an appetite suppressant, not an appetite stimulant like tetrahydrocannabinol (THC), and is currently being tested as a treatment for Parkinson’s and other diseases.”<sup>219</sup>

Analyst Chris Duvall, however, raises concerns about what he terms ‘**canna-colonisation**’, where cannabis licences in some African countries have been issued to multinational corporations in exchange for social responsibility initiatives.<sup>220</sup> He also notes that African “countries are poorly equipped to undertake the type of techno centric production that now characterises cannabis commercial farming.”<sup>221</sup>

The changing methods and shifting trade patterns could put African countries at a disadvantage and lead to missed economic opportunities. This implies that South Africa and the continent should move swiftly to leverage the opportunity before other suppliers saturate the market with cannabis products. Paterson notes that the producers of dagga in South Africa are mainly poor small-scale farmers, mostly black, who supplement their subsistence

<sup>218</sup> Malyo and Pedra (2019).

<sup>219</sup> Malyo and Pedra (2019).

<sup>220</sup> Ibid

<sup>221</sup> Malyo and Pedra (2019).



agriculture with a “patch of easy-to-grow cash crop.”<sup>222</sup>

Duvall argues that the licensing and tax regimes on the legalisation of cannabis have allowed legal wealth generation by private companies and publicly traded corporations. He points out that the multinational businesses have paid African governments for policies that allow them to cultivate cannabis for export, through the payment of licensing fees that are too expensive for most citizens of the countries to pay.

In addition, Duvall notes, “licensing fees have been tiny relative to the value of the Global Northern cannabis industry, yet far exceed what most citizens of the relevant countries could pay for the opportunity to grow cannabis legally<sup>223</sup>.” He adds that currently, “cannabis liberalisation has demonstrably benefited few Africans, but has bolstered the prospects of many Global Northern companies and shareholders active in the stock exchanges in Toronto, Tel Aviv, and Frankfurt.”<sup>224</sup> Prohibition Partners notes that foreign capital is being used to exploit the continent’s resources – land, water, labor, and cannabis – rather than to offer meaningful opportunities for Africans to accumulate wealth.<sup>225</sup>

Lesotho is a case in point, where medicinal cannabis has been legalised, but the license to produce cannabis products was awarded to a British-owned company, Medi-Kingdom. Duvall notes that in Lesotho, a license to farm is about US\$13 000. Furthermore, licenses to manufacture, test, or export products cost more. Given that Lesotho’s per capita income in 2017 was \$2 925, Duvall notes that it would be difficult to get a license. He observed a similar pattern in eSwatini where the median income was \$8 640 in 2017 and the regulations require about US\$71 000 per license, and licensees must build high-security grow facilities.<sup>226</sup> A US company was awarded a 10-year license to produce and sell hemp and medical cannabis.<sup>227</sup>

According to the online publication *Business Insider SA*, the estimated cost of a setting up a GMP compliant facility for producing medicinal cannabis and preparing an application costs about R3 million to R5 million.<sup>228</sup> Therefore, the cost of obtaining a licence for the cultivation of medicinal cannabis excludes small-scale farmers who do not have access to a minimum of R3 million but were able to make a small profit in the underground market. Thus confirming Duvall’s observation that legalising cannabis for medical purposes caters for those with capital.

A range of new economic opportunities are presented through the legitimisation and commercialisation of the medicinal marijuana sector. Whilst the barriers to entry for medicinal product manufacturing are likely considerably higher than for recreational, there is still a critical need for this industry to embrace the principles of Broad Based Black Economic Empowerment

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<sup>222</sup> Ibid

<sup>223</sup> Duvall (2019)

<sup>224</sup> Ibid

<sup>225</sup> Prohibition Partners (2019).

<sup>226</sup> Ibid.

<sup>227</sup> Business Insider SA (2019).

<sup>228</sup> Business Insider SA (2019a).



and spread economic and social benefits to South Africa's poorest communities, many of whom are rural and regionally based.<sup>229</sup> Development of an appropriate and nuanced legislative environment is urgently required from government to ensure South Africa's marginalised people are fair recipients of this enormous economic opportunity.

It is essential that the structural conditions favouring corporate monopolisation are removed by levelling the playing field for BBEE and redressing injustices faced by recreational marijuana microenterprises. Ensuring that the regularisation requirements for permitting and licensing are fair, just and incentivised is necessary to voluntarily attract marijuana micro-enterprises into the regulatory framework. Furthermore, large formal businesses in the medicinal marijuana sector must be compelled to support and invest in the principles of BBEE and local economic and community development through programmes such as the successfully proven Renewable Energy Independent Power Producer Procurement Programme (REIPPPP).<sup>230</sup>

## 9.2 SOUTH AFRICA'S CURRENT REGULATORY ENVIRONMENT

South Africa is gradually legalising the use of cannabis for commercial purposes. However, the country has been slow in developing the necessary licensing and registration framework. For instance, it has taken South Africa 23 years to respond to the International Narcotic Control Board's 1994 recommendations to finally introduce and publish the licencing framework for domestic cultivation of cannabis and manufacture of cannabis-related pharmaceutical products for medicinal and research purposes; and to define the control systems for hemp cultivation and properly define which cannabis varieties are authorised for cultivation.

SAHPRA, the regulatory authority, reports that the current legislation does not permit the entity to issue licences for the cultivation of cannabis for non-medicinal commercial purposes, including use in food products.<sup>231</sup> Furthermore, the companies are required to comply with Good Manufacturing Practice (GMP) standards for the cultivation and manufacture of cannabis containing pharmaceutical products. Over and above the cultivation license, a company has to apply for a license to manufacture, import or distribute the cannabis products. SAHPRA inspectors are responsible for conducting compliance investigations and inspection and sites plans of the facility that will be used. If, after review, SAHPRA finds the product to be safe, effective and of good quality, and the manufacturer is GMP-compliant, it will be registered, allowing it to be available on the market.<sup>232</sup>

**SAHPRA has been criticised for 'frustrating investors' with delays in awarding companies the cultivation licences for medicinal use.** For instance, SAHPRA issued its first licence for cultivation in 2019 to House of Hemp (HoH), a 100 per cent black woman-owned South African company based in Johannesburg. It is commendable that they prioritised

<sup>229</sup> Petersen, L and Gaylard, M (2019)

<sup>230</sup> Ibid

<sup>231</sup> Businesstech (2019a).

<sup>232</sup> South African Health Products Regulatory Authority (2020).



the previously disadvantage for this opportunity. However, according to *Medicalbrief*, an online publication, in 2018 a Canadian-based LGC Capital terminated its agreement to acquire a 30 per cent equity stake in the HoH because the South African company “did not have the requisite commercial licences.”<sup>233</sup>

The Chief Executive Officer (CEO) of HoH, Dr Thandeka Kunene, confirmed that the Canadian-based company LGC Capital explained that LGC pulled out because of investor fatigue based on Government’s slow process of developing a licencing framework and for the terrible delays in issuing of legal permits and commercial cannabis licenses.<sup>234</sup> This kind of red tape negatively affects the ease of doing business as well as the country’s attractiveness as an investment destination.

SAHPRA has since awarded licenses for three more companies to cultivate, import and export cannabis.<sup>235</sup> Furthermore, *Businesstech*, an online news website reported that Felbridge, one of four licensees explained that the licenses are for cultivating, importing and exporting cannabis strictly. Felbridge added to the publication that, that means, “I can only grow the product, I can’t sell it to the public, only to another licenced entity – and those licences haven’t been issued yet.”<sup>236</sup> This regulatory restriction implies that the licensees cannot optimally use their potential for production, job creation and generating profits.

While **the sale of THC and marijuana products remains illegal in South Africa**, products containing **CBD and hemp (which contains low levels of THC) are available** for sale. Such preparations containing CBD must comply with the standards published by the Minister of Health on 23 May 2019.<sup>237</sup> There is some concern about the quality of some of the products that are now available. Cannabis products are now widely available, from farmers’ markets and health shops to mainstream retailers and online stores. Many of these products, widely available on the shelves of health shops, major retailers and sold online, are untested and do not fall within the exemption’s parameters, nor are they registered as medicines, which makes their sales potentially illegal.<sup>238</sup>

In November 2019, SAHPRA and the police issued a “joint” statement, warning that the establishment of illegal dispensaries/outlets, online sites and social media platforms marketing and selling cannabis and cannabis-related products to the public remains illegal, “except where specifically allowed in terms of the Medicines and Related Substances Act.”<sup>239</sup>

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<sup>233</sup> Medical Cannabis (2018).

<sup>234</sup> Ibid.

<sup>235</sup> South African Health Products Regulatory Authority (2020).

<sup>236</sup> Businesstech (2019a).

<sup>237</sup> Businesstech (2019b)

<sup>238</sup> Crouth G, Consumer Watch: What you need to know before buying CBD products (Accessed at <https://www.iol.co.za/news/south-africa/gauteng/consumer-watch-what-you-need-to-know-before-buying-cbd-products-40895977>)

<sup>239</sup> Crouth G, Consumer Watch: What you need to know before buying CBD products (Accessed at <https://www.iol.co.za/news/south-africa/gauteng/consumer-watch-what-you-need-to-know-before-buying-cbd-products-40895977>)



To import or manufacture CBD-containing medicines, sellers must be licensed in terms of section 22C(1)(b) of the Act and comply with the relevant standards.<sup>240</sup> They must be able to present verified assessments of the CBD/THC contents, conducted by an accredited laboratory, when requested to do so by SAHPRA. Manufacturers and importers of CBD-containing processed products which are not for medicinal purposes and which fall within the exclusion notice's parameters, do not require a licence but they must be able to provide verifiable proof of the CBD and/or THC content.<sup>241</sup>

According to the South African Health Products Regulatory Authority Government Notice No. 586, Government Gazette No. 43347, issued on **22 May 2020**, the Minister of Health has amended the scheduling of **cannabidiol** (CBD). Previous entries for cannabis, dronabinol, and tetrahydrocannabinol in Schedule 7 have been deleted.<sup>242</sup>

Significantly, Government Notice R586 not only cements the Schedule 4 status of CBD and descheduled CBD products, but also completely removes the cannabis plant from the Schedules to the Medicines Act, down-schedules tetrahydrocannabinol (THC) to a Schedule 6 substance, and completely deschedules THC when:

- (a) contained in raw plant material and processed products manufactured from such material, where intended for industrial purposes and not for human or animal ingestion, and containing 0.2% or less of THC;
- (b) contained in processed products made from cannabis containing at most 0.001% THC; or
- (c) raw plant material is cultivated, possessed, and consumed by an adult, in private for personal consumption.<sup>243</sup>

While Notice R586 recognises that cannabis contains medicinal and psychoactive compounds, the commercialisation and consumption of which continue to be regulated by medicines and criminal laws, it liberates cannabis as a raw agricultural commodity with a variety of industrial applications, namely: as hemp.<sup>244</sup> Notice R586 clearly casts hemp as cannabis with a THC concentration ceiling of 0.2%, a marker. However, this may initially stifle investment given that countries such as the United States define hemp with a 0.3% THC concentration ceiling.<sup>245</sup>

The robust legal framework required has not yet been finalised by the Department of Agriculture, Forestry and Fisheries. Additionally, as is noted by one commentator, there are no guarantees that this framework will meaningfully include the many rural cannabis-farming communities and appropriately incentivise SMEs and startup entrepreneurs.<sup>246</sup> However, the issuing of Notice R586 is a clear move by the Health Department to separate hemp within the agricultural sector, opening the door in principle to a multi-billion-rand sector with associated tax revenues.<sup>247</sup>

<sup>240</sup> Ibid

<sup>241</sup> Ibid

<sup>242</sup> South African Pharmaceutical and Cosmetic Review, CBD down-scheduled to a SO product in South Africa (Accessed at <https://www.pharmacos.co.za/cbd-down-scheduled-to-a-so-product-in-south-africa/>)

<sup>243</sup> Pollack B, New regulations: South Africa takes another step down the green cannabis road (Accessed at <https://www.dailymaverick.co.za/article/2020-06-23-new-regulations-south-africa-takes-another-step-down-the-green-cannabis-road/>)

<sup>244</sup> Ibid

<sup>245</sup> Ibid

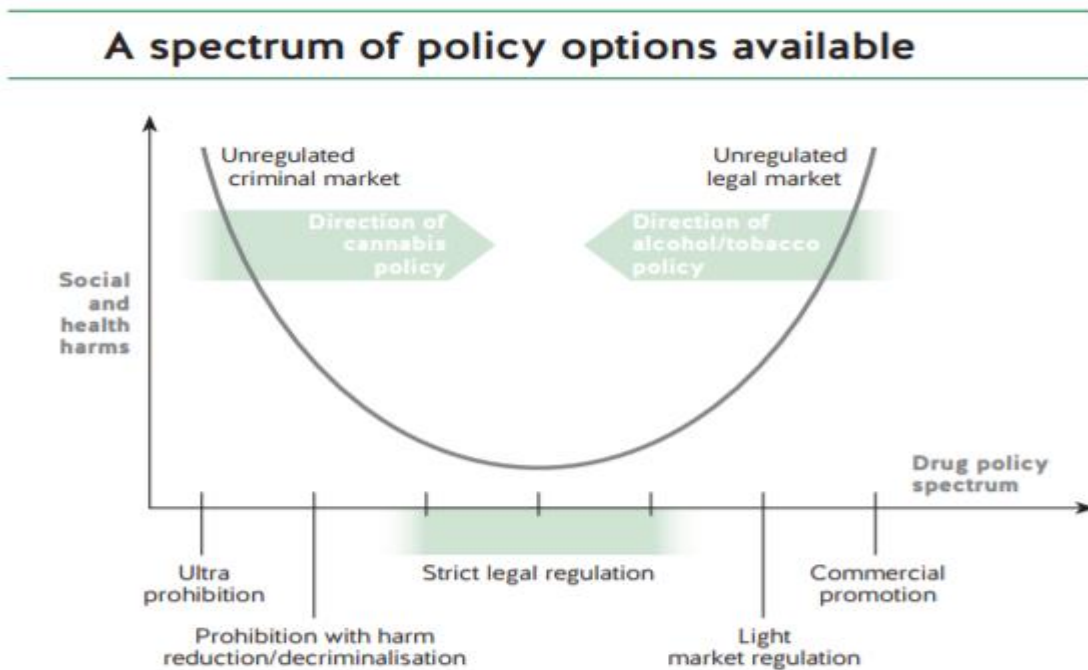
<sup>246</sup> Ibid

<sup>247</sup> Ibid



## 10. LEGAL AND REGULATORY REFORM: WHAT ARE SOME OF THE OPTIONS?

There is a spectrum of legal/ policy frameworks available for regulating the production, supply and use cannabis. At one end is absolute prohibition, moving through less punitive prohibition models, partial/de facto/quasi-legal supply models, legally regulated market models with various levels of restrictiveness, to legal/commercial free markets at the other end.<sup>248</sup>



Source. UNODC (2014)

In much of the debate on drug policy, “decriminalisation” is used interchangeably with “legalisation” or “legal regulation”, yet these terms mean very different things.

- **Decriminalisation.** A loosening of criminal penalties imposed for personal marijuana use even though the manufacturing and sale of the substance remain illegal.<sup>249</sup> This means removing the criminal penalty for possession of cannabis and possibly replacing with a civil charge, or an on-the-spot fine. With respect to the drug debate, this concept is usually used to describe laws addressing personal possession or use rather than drug supply. Supporters believe there are some major benefits to decriminalizing cannabis. Critics of decriminalization contend that it is only half the answer. As long as supplying drugs remains illegal, the business will remain a criminal monopoly.<sup>250</sup>

<sup>248</sup>UNODC (2014)

<sup>249</sup>Murse T (2020)

<sup>250</sup> Ibid



- **Legalisation:** The lifting or abolishment of laws banning the possession and personal use of marijuana. Legalisation allows the government to regulate and tax marijuana use and sales allowing the sale and consumption of cannabis as a legal product, subject to some form of regulation, akin to alcohol, tobacco or pharmaceuticals.<sup>251</sup> If a government decides to legalise cannabis, they also need to determine how it will be regulated. For instance, who can buy and sell it, in which forms, at which price, and can people grow their own? There are different reasons why cannabis is legalised and commercialised. The proponents of legalisation believe it “reduces crime, raises revenue, lowers criminal justice expenditure, improves public health, improves traffic safety, and stimulates the economy.”<sup>252</sup>
- **Regulation.** A set of rules and restrictions is placed around the supply or use of a substance, as is the case for alcohol and tobacco. Regulatory systems usually place limits on access, such as age limits and control of outlets, and may place restrictions on advertising. Penalties for breaching these rules may be criminal or non-criminal.<sup>253</sup> Regulatory models include a commercialised system developing in parts of the US, where businesses sell cannabis in much the same way as alcohol. The other is the medicalised model of Uruguay, where cannabis can be bought without prescription at pharmacies.<sup>254</sup>

Relevant authorities should consider establishing an independent commission of domestic and international experts to identify key issues, and make broad recommendations on reforming cannabis policy. Expertise should come from a broad range of fields, including public health, drug policy, international and domestic law, legal cannabis production, agriculture, environmental science, and monitoring and evaluation. This panel can then evolve into a dedicated task force to oversee and make recommendations on the detail of policy and its implementation.<sup>255</sup>

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<sup>251</sup> Ibid

<sup>252</sup> Million (2018).

<sup>253</sup> European Modelling Centre for Drugs and Drug Addiction, Perspectives On Drugs Models for the legal supply of cannabis: recent developments (Accessed at [http://www.emcdda.europa.eu/system/files/publications/2720/Legal%20supply%20cannabis\\_update%202016.pdf](http://www.emcdda.europa.eu/system/files/publications/2720/Legal%20supply%20cannabis_update%202016.pdf))

<sup>254</sup> Kriegler, A (2018)

<sup>255</sup> UNODC, How to Regulate Cannabis A Practical Guide (Accessed at <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transform-Drug-Policy-Foundation/How-to-Regulate-Cannabis-Guide.pdf>)



## 11. INTERNATIONAL BENCHMARKING

Increasing numbers of states have liberalised controls on cannabis by decriminalising and/or legalising some instances of production, sales, possession, and use. Although the use of cannabis for medicinal and recreational purposes remains illegal in most African countries. Some African countries are starting to participate in this global wave of cannabis liberalisation (Duvall, 2019). In 2017, Lesotho legalised the cultivation of cannabis for medicinal purposes, while in April 2018 Zimbabwe legalised the cultivation of cannabis for medicinal and research purposes, followed by Uganda in April 2019.

This section considers (i) Uruguay, the first country to legalise cannabis in 2014; (ii) Canada, which has recently legalised cannabis; (iii) Mexico, which is in the process of considering draft legislation and (iv) Malawi which has legislated for medical cannabis. In addition, the approach of a number of other countries are set out in a table at the end of the document (Annexure 1).

### 11.1 URUGUAY

Uruguay was the first country in the world to legalise the sale of marijuana for recreational purposes throughout its territory in 2014. Uruguay, like South Africa, is a developing country. However, its population size of about 3.4 million (July 2020 est.) is smaller than South Africa's 58.8 million people. The country has a GDP of \$78.16 billion (2017 est.) making it the 96th largest economy in the world. Uruguay's unemployment rate is high at about 24.8 per cent (2017).<sup>256</sup> The main objectives of legalisation in Uruguay is to eliminate the black market and its clandestine activities such as drug trafficking related violence. The decision to legalise was a political effort proposed and developed at government level without the involvement of other stakeholders.<sup>257</sup>



- The Bill to legalise and regulate the production and sale of cannabis was signed into law by President Mujica on 23 December 2013. (Law 19.172 stipulates that Uruguay's government is in charge of regulating all the import, export, growth, harvest, production, acquisition, distribution, storage and trade of cannabis and marijuana-derived products.)
- Users must be over 18 and either a citizen or permanent resident.
- The system is tightly controlled. The Uruguayan **Instituto de Regulación y Control del Cannabis or Institute of Regulation and Control of Cannabis (IRCCA)** is in charge of supervising the cannabis production process, formulating public policies, providing scientific data on cannabis and coordinating scientific cooperation.
- In 2017 Uruguay also became the first country in the world to allow commercial sales of marijuana.<sup>258</sup>

<sup>256</sup> Central Intelligence Agency (n.d.)

<sup>257</sup> Hudak J, Ramsey G, and Walsh J, Uruguay's cannabis law: Pioneering a new paradigm March 2018 (Accessed at <https://www.brookings.edu/research/uruguays-cannabis-law-pioneering-a-new-paradigm/>)

<sup>258</sup> Global 3000 (2019).



Uruguay's cannabis regulation outline three legal methods of accessing the drug:

- **Home-grown:** Adults can grow up to six female flowering cannabis plants per household for their own consumption. The total annual production of the drug must not exceed 480 grams, but cultivation of more than six plants is allowed so long as they are either male or not flowering. To access the drug, users must first register with the IRCCA.<sup>259</sup> Any excess marijuana produced is to be handed over to IRCCA.
- **Cannabis clubs:** Adults can join cooperatives to grow cannabis collectively. These “cannabis clubs” must first be registered with the IRCCA and other authorities, and must have between 15 and 45 members. The clubs may plant up to 99 plants in the same space, but cannot dispense more than 480 grams of the drug to each of their members per year. So far, authorities have registered 83 such clubs across the country.<sup>260</sup> Similar to home cultivation, clubs must register with the IRCCA and hand in any excess marijuana produced.
- **Pharmacies.** The legislation provided for a state controlled marijuana dispensary regime. Individuals who are registered with IRCCA can buy up to 40 grams of cannabis per month, with a 10 grams limit per week, using a fingerprint scan to verify their identity. Under the law, a handful of commercial growers can be licensed by the state to produce cannabis for commercial sales. The wholesale cannabis market is a duopoly because only two companies have been licensed to produce commercial cannabis, and 22 077 Uruguayans have registered as purchasers.<sup>261</sup> Uruguay allows cannabis to be sold at registered pharmacies without a prescription as the country does not offer a separate system for medical marijuana users. All cannabis produced is tested and approved by IRCCA before it could be supplied to pharmacies.<sup>262</sup> The regulator also controls how strong the marijuana is. The level of THC - the psychoactive part of cannabis - is limited and balanced with the level of CBD, another compound in the plant that's said to have a calming effect.<sup>263</sup> The price is also set by the regulator.

Government not only places restrictions on the units of cannabis produced but it also fixes the prices of cannabis. Analysts note that government sets the price low “in order to displace larger portions of the underground market.”<sup>264</sup>

Challenges that have affected the implementation of the law include:

- **Small number of pharmacies enrolled in the scheme.** This affects users' ability to access

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Maybin S, Uruguay: The world's marijuana pioneer (Accessed at <https://www.bbc.com/news/business-47785648>)

<sup>264</sup> Ibid.



the drug. There are an estimated 1,200 pharmacies in Uruguay, but only 16 signed up to sell the product in 2017, most of which are located in the capital Montevideo. By 2018, only 12 pharmacies continued to sell marijuana, partly due to the banking difficulties caused by being registered sellers. In fact, two American banks operating in Uruguay refuse to hold accounts with pharmacies that sell the drug. As a result, only 12 pharmacies continued to sell marijuana operating on a cash basis.<sup>265</sup> These 12 pharmacies serve more than 22 000 buyers and are not able to meet the demand.<sup>266</sup> Moreover, five of those pharmacies are located in the capital Montevideo while 11 of Uruguay's 19 regions do not have a single cannabis-dispensing pharmacy. This has led to periods of deep shortages nationwide and slowing down the process of eliminating shadowy markets.<sup>267</sup>

- **Banking sector.** An unforeseen consequence of legalisation was the banks refusal to deal with pharmacies that sold marijuana because of international legal constraints.<sup>268</sup> American banks operating in Uruguay refuse to hold accounts with pharmacies that sell cannabis. The banks cited the USA Patriot Act of 2001, which prohibits setting up accounts for clients who are involved in “the manufacture, importation, sale, or distribution of a controlled substance.”<sup>269</sup> In addition, most Uruguayan banks have refused to do business with marijuana organisations fearing that they will be sanctioned or refused business from United States financial institutions and United Nations members that classify marijuana as an illegal drug. The banks cite the USA Patriot Act.
- **Matching demand to supply.** The legal supply system has not been able to keep up with demand, and has even been producing below its capacity of 10 tonnes per year. Commercial growers must individually apply to be licensed by the state to produce and sell cannabis. As of March 2018, there were only two such companies, leading to shortages in supply. Officials in February 2019 began issuing applications for more producers to grow marijuana for commercial purposes.<sup>270</sup>
- **Enforcement and Efficiency of the State Regulator.** The IRCCA is responsible for enforcing the regulations laid out in the legislation. However, there have been issues with the regulator in conducting its business and co-operating with the national police to ensure the law is enforced correctly. It has limited staff numbers to do so, and consequently the police also have to carry out inspections. However, at times there has been a lack of communication between the two, causing registered home-growers in compliance with the law to be wrongly arrested.

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<sup>265</sup> Hudak, Ramsey and Walsh (2018)

<sup>266</sup> Ibid

<sup>267</sup> Ibid

<sup>268</sup> Jordan E, Marijuana legalisation in Uruguay (Accessed at <https://www.centreforpublicimpact.org/case-study/marijuana-legalisation-in-uruguay/>)

<sup>269</sup> Centre for Public Impact (2018).

<sup>270</sup> Laws and Regulations Uruguay (Accessed at <https://weedmaps.com/learn/laws-and-regulations/uruguay/>)



## 11.2 CANADA

In 2001, Canada decriminalized medical cannabis. On 30 June 2016, the Minister of Justice and Attorney General of Canada, the Minister of Public Safety and Emergency Preparedness, and the Minister of Health announced the creation of a **Task Force on Cannabis Legalization and Regulation ("the Task Force")**.



Comprised of nine Canadians of varied experience and backgrounds, the Task Force was given a mandate to consult and provide advice to the Government of Canada on the design of a new legislative and regulatory framework for legal access to cannabis, consistent with the Government's commitment to "legalize, regulate, and restrict access". The Final Report of the Task Team - 'A Framework for the Legalization and Regulation of Cannabis in Canada' was published on 13 December 2016.

### 11.2.1 Task Force Recommendations

In considering the experience of other jurisdictions and the views of experts, stakeholders and the public, the Task Team sought to strike a balance between implementing appropriate restrictions, in order to minimize the harms associated with cannabis use, and providing adult access to a regulated supply of cannabis while reducing the scope and scale of the illicit market and its social harms. The Task Teams recommendations reflect a public health approach to reduce harm and promote health.<sup>271</sup>

#### (i) Minimising Harms of Use

In taking a public health approach to the regulation of cannabis, the Task Force proposed measures that will maintain and improve the health of Canadians by minimising the harms associated with cannabis use. In addition to considering scientific evidence and input from stakeholders, the Task Force examined how other jurisdictions have attempted to minimise harms of use. In order to minimize harms, the Task Force recommended that the federal government:

- Set a national minimum age of purchase of 18, acknowledging the right of provinces and territories to harmonise it with their minimum age of purchase of alcohol.
- Apply comprehensive restrictions to the advertising and promotion of cannabis and related merchandise by any means, including sponsorship, endorsements and branding, similar to the restrictions on promotion of tobacco products.
- Allow limited promotion in areas accessible by adults, similar to those restrictions under the Tobacco Act.
- Require plain packaging for cannabis products that allows the following information on packages: company name, strain name, price, amounts of delta-9-tetrahydrocannabinol

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<sup>271</sup> <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html#es>



(THC) and cannabidiol (CBD) and warnings and other labelling requirements.

- Impose strict sanctions on false or misleading promotion as well as promotion that encourages excessive consumption, where promotion is allowed.
- Prohibit any product deemed to be "appealing to children," including products that resemble or mimic familiar food items, are packaged to look like candy, or packaged in bright colours or with cartoon characters or other pictures or images that would appeal to children.
- Require opaque, re-sealable packaging that is childproof or child-resistant to limit children's access to any cannabis product.
- Set a maximum amount of THC per serving and per product.
- Prohibit mixed products, for example cannabis-infused alcoholic beverages or cannabis products with tobacco, nicotine or caffeine.
- Require appropriate labelling on cannabis products, including:
  - o Text warning labels
  - o Levels of THC and CBD
  - o For edibles, labelling requirements that apply to food and beverage products
- Provide regulatory oversight for cannabis concentrates to minimize the risks associated with illicit production.
- Develop strategies to encourage consumption of less potent cannabis, including a price and tax scheme based on potency to discourage purchase of high-potency products.
- Require all cannabis products to include labels identifying levels of THC and CBD
- Develop and implement factual public education strategies to inform Canadians as to risks of problematic use and lower-risk use guidance
- Conduct the necessary economic analysis to establish an approach to tax and price that balances health protection with the goal of reducing the illicit market
- Work with provincial and territorial governments to determine a tax regime that includes equitable distribution of revenues
- Commit to using revenue from cannabis as a source of funding for administration, education, research and enforcement.
- Design a tax scheme based on THC potency to discourage purchase of high-potency products.
- Implement as soon as possible an evidence-informed public education campaign, targeted at the general population but with an emphasis on youth, parents and vulnerable population.
- Facilitate and monitor ongoing research on cannabis and impairment, considering implications for occupational health and safety policies.

## **(ii) Establishing a Safe and Responsible Supply Chain**

The cannabis supply chain includes production (including cultivation and manufacturing), distribution and retail. As part of its deliberations, the Task Team considered the most appropriate roles for the federal, provincial, territorial and local governments, given their areas of responsibility, capacity and experience. To this end, the Task Force recommended that the federal government:

- Regulate the production of cannabis and its derivatives (e.g., edibles, concentrates) at the



federal level, drawing on the good production practices of the current cannabis for medical purposes system

- Use licensing and production controls to encourage a diverse, competitive market that also includes small producers
- Implement a seed-to-sale tracking system to prevent diversion and enable product recall
- Implement a fee structure to recover administrative costs (e.g., licensing)
- Regulate CBD and other compounds derived from hemp or from other sources

The Task Force recommended that the wholesale distribution of cannabis be regulated by provinces and territories and that retail sales be regulated by the provinces and territories in close collaboration with municipalities.

The Task Force recommended allowing **personal cultivation of cannabis for non-medical purposes with the following conditions:**

- A limit of four plants per residence
- A maximum height limit of 100 cm on the plants
- A prohibition on dangerous manufacturing processes
- Reasonable security measures to prevent theft and youth access
- Oversight and approval by local authorities

### **(iii) Enforcing Public Safety and Protection**

The Task Team believed that the new legal regime must be clear to the public and to law enforcement agencies, with enforceable rules and corresponding penalties that are proportional to the contravention. It carefully considered the scientific and legal complexities surrounding cannabis-impaired driving, recognising the concerns of Canadians about this issue. To this end, the Task Force recommended that the federal government:

- Implement a set of clear, proportional and enforceable penalties that seek to limit criminal prosecution for less serious offences. Criminal offences should be maintained for:
  - o Illicit production, trafficking, possession for the purposes of trafficking, possession for the purposes of export, and import/export
  - o Trafficking to youth
- Create exclusions for "social sharing"
- Implement administrative penalties (with flexibility to enforce more serious penalties) for contraventions of licensing rules on production, distribution, and sale
- Consider creating distinct legislation - a "Cannabis Control Act" - to house all the provisions, regulations, sanctions and offences relating to cannabis
- Implement a limit of 30 grams for the personal possession of non-medical dried cannabis in public with a corresponding sales limit for dried cannabis
- Develop equivalent possession and sales limits for non-dried forms of cannabis

With respect to impaired driving, the Task Force recommended that the federal government:

- Invest immediately and work with the provinces and territories to develop a national,



comprehensive public education strategy to send a clear message to Canadians that cannabis causes impairment and that the best way to avoid driving impaired is to not consume. The strategy should also inform Canadians of:

- the dangers of cannabis-impaired driving, with special emphasis on youth; and
- the applicable laws and the ability of law enforcement to detect cannabis use
- Support the development of an appropriate roadside drug screening device for detecting THC levels, and invest in these tools
- Invest in law enforcement capacity, including Drug Recognition Experts and Standardized Field Sobriety Test training and staffing
- Invest in baseline data collection and ongoing surveillance and evaluation in collaboration with provinces and territories

The Task Force further recommends that all governments across Canada consider the use of graduated sanctions ranging from administrative sanctions to criminal prosecution depending on the severity of the infraction. While it may take time for the necessary research and technology to develop, the Task Force encourages all governments to implement elements of a comprehensive approach as soon as feasible, including the possible use of administrative sanctions or graduated licensing with zero tolerance for new and young drivers.

#### **(iv) Medical Access**

In formulating its recommendations, the Task Team considered various aspects of access, including affordability, strains, potency, quality and adequacy of supply. To this end, the Task Force recommended that the federal government:

- Maintain a separate medical access framework to support patients
- Monitor and evaluate patients' reasonable access to cannabis for medical purposes through the implementation of the new system, with action as required to ensure that the market provides reasonable affordability and availability and that regulations provide authority for measures that may be needed to address access issues
- Apply the same tax system for medical and non-medical cannabis products
- Promote and support pre-clinical and clinical research on the use of cannabis and cannabinoids for medical purposes, with the aim of facilitating submissions of cannabis-based products for market authorisation as drugs
- Support the development and dissemination of information and tools for the medical community and patients on the appropriate use of cannabis for medical purposes
- Evaluate the medical access framework in five years

#### **(v) Implementation**

The successful implementation of a regulatory framework for cannabis will take time and require that governments meet a number of challenges with respect to capacity and infrastructure, oversight, co-ordination and communications.



- ❖ **Capacity:** Canada's governments will need to move swiftly to increase or create capacity in many areas relating to the production and sale of cannabis. Success requires federal leadership, co-ordination and investment in research and surveillance, laboratory testing, licensing and regulatory inspection, training for law enforcement and others, and the development of tools to increase capacity ahead of regulation.
- ❖ **Oversight:** To be satisfied that the system is minimising harms as intended, it will need close monitoring and rapid reporting of results in a number of areas, including regulatory compliance and population health.
- ❖ **Co-ordination:** The federal, provincial, territorial, municipal and Indigenous governments will need to work together on information and data sharing and co-ordination of efforts to set up and monitor all of the components of the new system. The Task Force believes that Canada should prioritise engagement of Indigenous governments and representative organisations, as Indigenous leaders have an interest in their communities' participation in the cannabis market.
- ❖ **Communications:** about it is important to communicate early, consistently and often with the general public. Youth and parents will need the facts about cannabis and its effects. Actors in the new system - including employers, educators, law enforcement, industry, health-care practitioners and others - will require information tailored to their specific roles.

To this end, the Task Force recommended that the Federal government:

- Take a leadership role to ensure that capacity is developed among all levels of government prior to the start of the regulatory regime
- Build capacity in key areas, including laboratory testing, licensing and inspection, and training
- Build upon existing and new organisations to develop and co-ordinate national research and surveillance activities
- Provide funding for research, surveillance and monitoring activities
- Establish a surveillance and monitoring system, including baseline data, for the new system
- Ensure timely evaluation and reporting of results
- Mandate a programme evaluation every five years to determine whether the system is meeting its objectives
- Report on the progress of the system to Canadians
- Take a leadership role in the co-ordination of governments and other stakeholders to ensure the successful implementation of the new system
- Engage with Indigenous governments and representative organisations to explore opportunities for their participation in the cannabis market
- Provide Canadians with the information they need to understand the regulated system
- Provide Canadians with facts about cannabis and its effects
- Provide specific information and guidance to the different groups involved in the regulated cannabis market
- Engage with Indigenous communities and Elders to develop targeted and culturally appropriate communications



- Ensure that Canada shares its lessons and experience with the international community

These recommendations, taken together, present a new system of regulatory safeguards for legal access to cannabis that aim to better protect health and to enhance public safety. Their successful implementation requires the engagement and collaboration of a wide range of stakeholders.

### 11.2.3 Legislation

In April 2017, Canada released a first draft of its proposed regulation expanding the legalisation of cannabis to cover recreational as well as medical purposes. **The law was passed on June 21, 2018, incorporating several proposed amendments, and came into effect on October 17, 2018.** Bill C-45, also known as the **Cannabis Act**, authorises the Canadian government to enact further regulations in addition to amending the Controlled Drugs and Substances Act and several other related Acts. The Act delegates authority over several important matters to the Minister of Justice and Attorney General of Canada to address through regulation.<sup>272</sup>

With the passing of this legislation Canada established a legal national marijuana marketplace, bringing the burgeoning black market into a regulated, taxed system. Its approach allows for unhampered banking for the industry, country-wide shipments of cannabis, online ordering and postal delivery.<sup>273</sup> The Cannabis Act creates a strict legal framework for controlling the production, distribution, sale and possession of cannabis across Canada. The Act aims to accomplish three goals:<sup>274</sup>

- Keep cannabis out of the hands of youth
- Keep profits out of the pockets of criminals
- Protect public health and safety by allowing adults access to legal cannabis

**As from October 17, 2018** Subject to provincial or territorial restrictions, **adults who are 18 years of age or older** are legally able to:

- Possess up to 30 grams of legal cannabis, **dried or equivalent** in non-dried form in public
- Share up to 30 grams of legal cannabis with other adults
- Buy dried or fresh cannabis and cannabis oil from a provincially-licensed retailer
  - In provinces and territories without a regulated retail framework, individuals are able to purchase cannabis online from federally-licensed producers
- Grow, from licensed seed or seedlings, up to 4 cannabis plants per residence for personal use

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<sup>272</sup> Eliason A, A Higher Authority: Canada's Cannabis Legalization in the Context of International Law (Accessed at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1946&context=mjil>)

<sup>273</sup> Isa M, Soaring to Incredible Highs (Accessed at [https://journals.co.za/docserver/fulltext/nm\\_finweek\\_n21\\_2018\\_a7.pdf?expires=1575023130&id=id&accname=58208&checksum=52DBB76EE9D9092207C8715292CACF6E](https://journals.co.za/docserver/fulltext/nm_finweek_n21_2018_a7.pdf?expires=1575023130&id=id&accname=58208&checksum=52DBB76EE9D9092207C8715292CACF6E))

<sup>274</sup> Department of Justice (Canada) Cannabis Legalization and Regulation (Accessed at <https://www.justice.gc.ca/eng/cj-jp/cannabis/>)



- Make cannabis products, such as food and drinks, at home as long as organic solvents are not used to create concentrated products

Other key elements of the Act include:

- **Possession limits for cannabis products.** The possession limits in the **Cannabis Act** are based on dried cannabis. Equivalents were developed for other cannabis products to identify what their possession limit would be.

One (1) gram of dried cannabis is equal to:

- 5 grams of fresh cannabis
- 15 grams of edible product
- 70 grams of liquid product
- 0.25 grams of concentrates (solid or liquid)
- 1 cannabis plant seed

This means, for example, that an adult 18 years of age or older, can legally possess 150 grams of **fresh cannabis**.

- **Cannabis for medical purposes.** The current regime for medical cannabis will continue to allow access to cannabis for people who have the authorisation of their healthcare provider.
- **Protecting youth.** The **Cannabis Act** has several measures that help prevent youth from accessing cannabis. These include both age restrictions and restricting promotion of cannabis.
- **Age restrictions.** No person may sell or provide cannabis to any person under the age of 18. There are 2 criminal offences related to providing cannabis to youth, with maximum penalties of 14 years in jail:
  - giving or selling cannabis to youth
  - using a youth to commit a cannabis-related offence
- **Restricting promotion and enticement.** The **Cannabis Act** helps discourage youth cannabis use by prohibiting:
  - products that are appealing to youth
  - packaging or labelling cannabis in a way that makes it appealing to youth
  - selling cannabis through self-service displays or vending machines
  - promoting cannabis, except in narrow circumstances where young people could not see the promotion
  - Penalties for violating these prohibitions include a fine of up to \$5 million or 3 years in jail.



- **Protecting public health.** The Act protects public health through creating strict safety and quality regulations. In addition, public education efforts are currently underway to raise awareness about safety measures and any potential health risks.
- **Strict regulation.** Federal, provincial and territorial governments share responsibility for overseeing the cannabis regulation system. The Federal government's responsibilities are to set:
  - strict requirements for producers who grow and manufacture cannabis
  - industry-wide rules and standards, including:
    - types of cannabis products available for sale
    - packaging and labelling requirements for products
    - standardised serving sizes and potency
    - prohibitions on the use of certain ingredients
    - good production practices
    - tracking requirements of cannabis from seed to sale to keep it out of the illegal market
    - restrictions on promotional activities
  - Provinces and territories are responsible for developing, implementing, maintaining and enforcing systems to oversee the distribution and sale of cannabis. They are also able to add their own safety measures, such as:
    - increasing the minimum age in their province or territory (but not lowering it)
    - lowering the personal possession limit in their jurisdiction
    - creating additional rules for growing cannabis at home, such as lowering the number of plants per residence
    - restricting where adults can consume cannabis, such as in public or in vehicles
- **Public education.** The Government of Canada has committed close to \$46 million over the next five years for cannabis public education and awareness activities. These are to inform Canadians, especially youth, of the health and safety risks of cannabis consumption.
- **Reducing criminal activity.** Statistics Canada reports that in 2017, almost 48,000 cannabis-related drug offences were reported to police. The majority of these (80%) were possession offences. A criminal record resulting from a cannabis offence, even a minor possession charge, can have serious and lifelong implications for the person charged. In allowing the production and possession of legal cannabis for adults, the Act helps keep Canadians who consume cannabis out of the criminal justice system, reducing the burden on the courts.
- **Criminal penalties.** Cannabis offences target those acting outside of the legal framework, such as organised crime. Penalties are set in proportion to the seriousness of the offence. Sanctions range from warnings and tickets for minor offences to criminal prosecution and imprisonment for more serious offences. Some offences specifically target people who make cannabis available to youth.



OFFENCE	PENALTIES
Possession over the limit	<ul style="list-style-type: none"> <li>• tickets for small amounts</li> <li>• up to 5 years less a day in jail</li> </ul>
Illegal distribution or sale	<ul style="list-style-type: none"> <li>• tickets for small amounts</li> <li>• up to 14 years in jail</li> </ul>
Producing cannabis beyond personal cultivation limits or with combustible solvents	<ul style="list-style-type: none"> <li>• tickets for small amounts</li> <li>• up to 14 years in jail</li> </ul>
Taking cannabis across Canada's borders	<ul style="list-style-type: none"> <li>• up to 14 years in jail</li> </ul>
Giving or selling cannabis to a person under 18	<ul style="list-style-type: none"> <li>• up to 14 years in jail</li> </ul>
Using a youth to commit a cannabis-related offence	<ul style="list-style-type: none"> <li>• up to 14 years in jail</li> </ul>

Further penalties related to cannabis-impaired driving are also included in Canada's impaired driving legislation.

#### 11.2.4 The Impact of Legalisation

Statistics Canada reports "in the first five and a half months following the legalization of cannabis, Canadian governments earned C\$186million (approximately R2.1 billion) from excise tax and general taxes on goods and services directly related to the sale of cannabis".<sup>275</sup> A year after the legalisation of cannabis, Canadian retailers of legal cannabis established more than 400 brick-and-mortar stores and online and retail store sales reached C\$908 million (approximately R10.2 billion).<sup>276</sup>

Federally licenced cannabis cultivators, processors and sellers, employed 2 630 people in fiscal year 2017/2018. Statistics Canada reports that in that year, 83 businesses were licensed to produce cannabis. Since then, the numbers of companies and employees have continued to grow rapidly, creating jobs for approximately 9 200 employees by April 2019.<sup>277</sup>

In addition, the Canadian Imperial Bank of Commerce (CIBC) World Markets notes that, the legalisation of cannabis could create a C\$10 billion (approximately R113 billion) a year industry. The Canadian government in turn would be able to "collect 50 per cent or more of the potential C\$10 billion if there is a high "sin tax" set on marijuana products<sup>278</sup>". The legalisation could result in the "employment of more workers who can grow and package marijuana for sale

<sup>275</sup> Statistics Canada (2019)

<sup>276</sup> Statistics Canada (2019a)

<sup>277</sup> Statistics Canada (2019)

<sup>278</sup> Ibid



in the Government approved grow-ops.”<sup>279</sup>

Cultivators, producers and packagers of cannabis products are required to obtain a cannabis licence from the Canada Revenue Agency (CRA) before production. In order to qualify for a CRA cannabis licence, applicants are also required to obtain a licence from Health Canada. Once licensed, they are required to:

- Purchase and apply cannabis excise stamps to their products (if they package cannabis products);
- Calculate the duty on their sales;
- File their return and remit excise duty to the CRA.

Consumers can confirm that they are purchasing legally produced cannabis products by verifying that there is a cannabis excise stamp on their product. Each province and territory has a different coloured cannabis excise stamp for products that are being sold in their respective jurisdiction. Consumers purchasing cannabis products are responsible for paying the applicable General Sales Tax (GST)/ Harmonised Sales Tax (HST) depending on the province or territory where the product is purchased.<sup>280</sup>

In Canada, almost all the provinces and territories signed Coordinated Cannabis Taxation Agreements with the federal government in 2017, facilitating the legalisation and taxation of cannabis in Canada. The signatories agreed the combined rate of all federal, provincial, and territorial cannabis-specific duties and taxes will not exceed the higher of \$1 per gram, or 10 per cent of a producer’s selling price.

The revenues from excise duties on cannabis (which are collected by the federal government) were shared, with approximately 75 per cent going to provincial and territorial governments (based on duties collected in their jurisdiction) and the remaining 25 per cent to the federal government. The federal government caps the excise duty revenues at \$100 million per year. Federal revenues exceeding the \$100 million cap are distributed to provinces and territories.<sup>281</sup>

Although Canada has collected billions in revenue from cannabis taxes, governments face a dilemma taxing cannabis, says Brock University business professor Michael Armstrong. “It’s a trade-off — the more you increase taxes the more revenue you get, but that increases prices and makes you less competitive with the black market.”<sup>282</sup>

Canada presents a useful comparative study for the regulation of cannabis for the following reasons:

- A similar constitutional architectural framework.
- The country provides a more detailed and comprehensive recent framework for the

<sup>279</sup>Hajidazedah (2016)

<sup>280</sup> Government of Canada (2019).

<sup>281</sup> Kluer, W (2018)

<sup>282</sup> Cain (2019)



regulation of cannabis, which offers lessons for maturing democracies like South Africa.

- The framework comes on the back of successive court challenges, which are similar to the recent Constitutional Court judgment on cannabis.
- The extensive body of recommendations emanating from the framework are more relevant for a country working on a framework for regulating cannabis.
- South Africa stands to benefit from experiences gained from the development of a Canadian framework, which provide guidance and/or assistance on matters relating to licensing and regulations, commercial production/supply and regulating non-medical use and cultivation.

### 11.3 MEXICO

On 31 October 2018, the Mexican Supreme Court ruled that the prohibition of cannabis was unconstitutional – as it violated the “fundamental right to the free development of the personality.”<sup>283</sup> Effectively this judgment legalised the personal use, possession, private cultivation, and sharing of cannabis



amongst adults. In November 2019, the Supreme Court gave the Mexican Congress an additional six months (until the end of April 2020) to approve legislation that legalises all forms of cannabis. This would create the world’s largest adult-use market by population.<sup>284</sup> The proposed Bill would also legalise cannabis for medical and industrial (hemp) use.<sup>285</sup>

Below are some of the key issue highlighted in the draft legislation:<sup>286</sup>

#### (i) **Social responsibility**

- A market with “fair regulation” is a repeated theme throughout the Bill.
- The draft bill proposes to regulate cannabis and its derivatives, prioritising public health, human rights and sustainable development.
- The measure aims to empower vulnerable Mexican communities to reap the benefits of the law by, for instance, giving those communities special preferences to obtain licenses and authorisations.

#### (ii) **What’s being legalised.** If passed, the law would authorise the following uses of cannabis:

- Recreational, which would include personal use, shared use among members of associations and commercial purposes.
  - Adults would be allowed to consume cannabis in private spaces.

<sup>283</sup> Transform Drug Policy Foundation, Mexican Supreme Court Ruling Means Recreational Cannabis is Now Legal for Adults (Accessed at <https://transformdrugs.org/press-release-mexican-supreme-court-ruling-means-recreational-cannabis-is-now-legal-for-adults/>)

<sup>284</sup> Marijuana Business, Mexico has until April 30 to legalize cannabis, Supreme Court rules (Accessed at <https://mjbizdaily.com/supreme-court-gives-mexican-congress-until-april-30-to-legalize-cannabis/>)

<sup>285</sup> Pascual, A (2019b).

<sup>286</sup> Ibid



- Respecting the free will of individuals and their right to health, the state would promote the information based on scientific evidence about the risks associated with cannabis consumption, especially for people 18-25 years old.
- Scientific and investigation.
- Medical and pharmaceutical, therapeutic or palliative.
- Industrial.

(iii) **New institute.** The draft bill calls for the creation of a Mexican Cannabis Institute, an independent entity designed to regulate and implement the new law.

- The institute would need to be created by 1 January 2021, at the latest, meaning that even after the law is approved, it could take more than one year for commercial license opportunities to be available.
- Its functions would include drawing up regulations to support the proposed law, establishing potency limits, granting licenses, issuing “sustainability certificates” as well as other activities.
- One year after approval of the cannabis law, the institute would conduct a public review to identify areas of improvement and suggest legislative changes to the Congress.
- The Mexican Cannabis Institute would have its own budget, assigned by the lower House every year.

(iv) **Licenses.** The licenses that would be available and regulated by the institute are for:

- Cultivation.
- Transformation.
- Sales, the only item for which the bill specifies that it includes distribution and retail of psychoactive cannabis.
- Export and import, in compliance with international treaties that cover only medical cannabis and scientific use.

Licenses would include

- auxiliary activities of transport and storage.
- With the aim to prohibit vertical integration, a single person or company would not be able to have more than one type of license. That prohibition also would apply to partners, subsidiaries, shareholders and certain family members.
- A single licensee may have more than one license of a single type. The institute would establish the maximum number.
- The maximum number of retail licenses a single licensee could possess is three per federative entity.
- All licenses would be nontransferable, which would limit opportunities for mergers and acquisitions. The bill does not mention what would happen to the license if a business goes bankrupt.
- At least 20% of the cultivation licenses to be handed out by the institute would go to communal lands (known as campesinos or ejidos) in municipalities where the government eradicated illegal crops during prohibition.



- In the case of commercial and research licenses, foreign ownership would be limited to a maximum 20% of the licensee capital structure.
- Associations would be able to apply only for a cultivation license. A series of requirements would have to be met, including an internal ethics code.
- In the case of licenses, if the institute does not reply before the end of the expected deadline after application, it cannot be interpreted that the license was granted.
- In terms of permits, if the institute does not reply before the end of the expected deadline after application, it means the permit was granted.
- As for hemp manufacturing/processing, a permit – not a license – would be required, under certain conditions.
- A cultivation license would be required from the institute to grow regulated hemp.

(ii) **Commercial sales.** Licensed stores in Mexico would be able to sell recreational cannabis to adults. They would need to comply with a series of requirements that include:

- Offering information services according to what the Mexican Cannabis Institute mandates.
- Keeping licenses visible.
- Allowing only adults to enter the premises.
- Not selling products with a higher THC or CBD content than what the institute authorises.
- Selling cannabis mixed with other substances that could augment the psychoactive effect would remain prohibited. This includes alcohol, nicotine and caffeine, among others.

(iii) **Home growing and cannabis associations.**

- Up to four flowering psychoactive plants, as well as the harvest of those plants, would be allowed per adult. Plants and harvest must remain within the household of the grower.
- Users would not be required to apply for a “license” but must be granted a “permit.” Home growers would need to prove the legal origin of the seeds or clones. Certain precautions in the case of minors living in the household would be required.
- In a case where more than five adults live in the same household, the total number of plants cannot exceed 20.
- The bill defines cannabis associations as legally constituted civil associations without “mainly economic” purposes, with a minimum of two and a maximum of 20 members.
- Four plants per member would be allowed.
- Only adults could be members of associations, and an individual could not be a member of more than one association.

(iv) **Packaging.** Various restrictions would apply.

- Plain packaging would be the norm, without elements that could promote a brand.
- Packaging would need to be childproof and include “sustainable” materials approved by the



competent authority. (The Mexican Cannabis Institute would determine what qualifies as sustainable.)

- (v) **Prohibitions.** Certain products or activities would be prohibited, including:
- Advertising of any kind, with hemp or hemp-derived products exempted.
  - The use of cannabis and its derivatives for cosmetics products.
  - Edibles and drinks, with the exception of products for medical use.
  - Online, mail, phone or similar sales as well as self-service dispensers.
  - Driving under the influence of THC.
  - Smoking or vaping cannabis where tobacco is already prohibited. Extra restrictions apply to cannabis because it would be prohibited to smoke or vape in parks and other public and open areas where minors could have access.

#### 11.4 MALAWI

Malawi has passed a bill decriminalising cannabis for medicinal and industrial purposes, almost five years after a motion to legalise industrial hemp was adopted. Reportedly, the economic potential of the fast-growing global medicinal and industrial cannabis industry has been the main driver of the law change in Malawi. In 2019, the World Bank said Malawi “remains one of the poorest countries in the world despite making significant economic and structural reforms to sustain economic growth.”<sup>287</sup> The national poverty rate was more than 50% in 2016.<sup>288</sup>



While Malawi is famous internationally for its recreational cannabis strain “Malawi Gold”, the bill to legalise medicinal and industrial production faced huge opposition from social and religious conservatives in the country.<sup>289</sup> Agriculture offers employment to nearly 80% of Malawi’s population. Tobacco is the country’s major export, and the global decline in its use has impacted the economy. Malawi’s tobacco industry is also marred by exploitation, as international companies such as British American Tobacco have sought cheap labour – including child labour – and low tariffs on raw tobacco for export.<sup>290</sup>

Cannabis, which can thrive in dry conditions, is a good fit for Malawi’s climate, which has been impacted by the southern African drought. Invegrow became the first company in Malawi to get government authorisation to conduct research trials on low-THC industrial hemp in 2015. Invegrow completed trials in 2018 and reportedly advised on the draft Bill.<sup>291</sup>

<sup>287</sup> McCool A, Malawi legalises cannabis amid hopes of fresh economic growth (Accessed at <https://www.theguardian.com/global-development/2020/feb/28/malawi-legalises-cannabis-amid-hopes-of-fresh-economic-growth>)

<sup>288</sup> Ibid

<sup>289</sup> Ibid

<sup>290</sup> Ibid

<sup>291</sup> Ibid



## 12. ISSUES FOR CONSIDERATION/ RECOMMENDATIONS

“The question of how best to regulate cannabis must take into account and attempt to balance a range of different harms (and benefits) to different groups in society.”<sup>292</sup>

Across the globe multiple jurisdictions are considering, developing and implementing a range of regulated market models for cannabis. These include Spain’s non-profit ‘cannabis social clubs’, commercial enterprises in the US and the Netherlands, and Uruguay’s government-controlled model.<sup>293</sup> States seeking to explore, develop, or actively implement cannabis regulation models will all face different legal and political challenges, domestically and internationally.<sup>294</sup>

What is clear is the conflicting priorities that often arise as decisions are made when developing and implementing a cannabis regulation model. **In particular, the need to strike the right balance between the interests of commerce (that seeks to increase profits and so will err towards promoting use) and public health-based regulation (that seeks to minimise harms and so will err towards moderating or reducing use).**<sup>295</sup>

This matter involves a wide range of stakeholders and apart from a need for policy certainty, legislative amendments will be required from a number of Departments:<sup>296</sup>

Department	Relevant Legislation	Amendments which may be required
Department of Justice and Constitutional Development	Drugs and Drugs Trafficking Act, 1992 (Act 140 of 1992)	<ul style="list-style-type: none"> <li>Section 4(b)</li> <li>Part III of Schedule 2</li> </ul>
	Regulation of Cannabis Bill	<ul style="list-style-type: none"> <li>New Bill proposed</li> </ul>
Department of Social Development	Prevention of and Treatment for Substance Abuse Act, 2008 (Act 70 of 2008)	<ul style="list-style-type: none"> <li>Various amendments, including social, community based and early intervention programmes</li> <li>Align National Drug Master Plan</li> </ul>
Department of Agriculture, Land Reform and Rural Development	Plant Improvement Act, 1976 (Act 53 of 1976)	<ul style="list-style-type: none"> <li>Designate hemp as being subject to this legislation</li> <li>Allow for the regulation and certification of hemp seeds for industrial (non-medicinal) purposes.</li> </ul>
Department of Health	Traditional Health Practitioners Act, 2007 (Act 22 of 2007)	<ul style="list-style-type: none"> <li>Enable cultivation and extemporaneous preparation of cannabis as a category I medicine</li> </ul>
	Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act 54 of 1972)	<ul style="list-style-type: none"> <li>Promulgate regulations defining allowable cannabinoids and quantities in foodstuffs and cosmetics</li> </ul>
	Mental Health Care Act, 2002 (Act 17 of 2002)	<ul style="list-style-type: none"> <li>Address relevant mental health management issues</li> </ul>

<sup>292</sup> Shaw et Al, Balancing Harms in Cannabis Policy Some Considerations for the South African Context (Accessed at [https://daggacouple.co.za/wp-content/uploads/2017/11/The-Shaw-Report\\_Balancing-Harms-in-Cannabis-Policy.pdf](https://daggacouple.co.za/wp-content/uploads/2017/11/The-Shaw-Report_Balancing-Harms-in-Cannabis-Policy.pdf))

<sup>293</sup> Ibid

<sup>294</sup> Cannabis Regulation and the UN Drug Treaties (2016)

<sup>295</sup> European Modelling Centre for Drugs and Drug Addiction, Perspectives On Drugs Models for the legal supply of cannabis: recent developments (Accessed at

[http://www.emcdda.europa.eu/system/files/publications/2720/Legal%20supply%20cannabis\\_update%202016.pdf](http://www.emcdda.europa.eu/system/files/publications/2720/Legal%20supply%20cannabis_update%202016.pdf))

<sup>296</sup> SAHPRA Cannabis Presentation (July 2020)



In addition, various issues that may be considered include:

### **Justice**

- A Cannabis for Private Purposes Bill was finalised by the Justice Department in August 2020 and must now be considered by Parliament. It is unclear, however, whether the 24 month deadline which was set by the Constitutional Court to amend the unconstitutional and invalid provisions of the Drugs Act and the Medicines Act will be met.

### **Public Safety and Protection**

- Protecting the youth. There is a need to invest in substance use prevention and treatment to prevent unintended harms – particularly among children.<sup>297</sup> Government should ensure products are not sold to minors and that they are protected from the potential damaging effects of cannabis. This could include both age restrictions and restricting promotion of cannabis.

### **Land Reform and Agriculture**

- Address land issues, so that small-scale farmers from the underground market are not left without income but are included and able to participate in the legal cannabis sector.
- Address water and electricity challenges so that the industry at large is able to use the opportunities and adequately meet the demand for the cannabis products.
- Provide adequate financial and technical support to small-scale farmers from the licensing, marketing to selling cannabis and distributing cannabis products. Furthermore, government should ensure that the banking and development finance sectors are ready and well equipped to service the cannabis industry, in accordance with national and international laws.

### **Revenue**

- Develop a tax regime that will ensure that the underground market is eliminated while at the same time enabling government to generate reasonable revenues for the country. According to a Deloitte report, legalising cannabis trade offers a number of benefits such as safer products from a regulated industry and tax revenues, among others. However, given that, cannabis sales could “cut into those of beer, spirits, wine, and

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<sup>297</sup> Health 24, 'Cannabis use disorder' up in states that legalised recreational dagga (Accessed at <https://www.health24.com/Medical/Addiction/Dagga/cannabis-use-disorder-up-in-states-that-legalised-recreational-dagga-20191203>)



even tobacco” and on sin tax revenues, the net effect may not lead to higher revenue growth. Deloitte recommends that governments conduct proper assessments and develop programmes that will maximise rather than compromise revenues generated from sin taxes.<sup>298</sup>

## Health

- Establish a clear regulatory regime for medical cannabis.
- Ensure SAHPRA is fully capacitated to fulfil its mandate. Its work should be frequently monitored to ensure that it addresses its capacity challenges and it should formulate a clear communication and implementation strategy to help inform small-scale farmers and the public at large about the latest developments and opportunities in the cannabis industry.
- All spheres of government should be included in developing legislation for the production and use of cannabis products. Furthermore, there should be consistency in the application of relevant policies and laws across municipalities particularly regarding spaces of cannabis use for non-medical purposes.
- Dispensing regulations for medicinal cannabis should be clear and enforceable.
- Protect public health. The Department of Health and the Department of Trade and Industry should develop a licensing framework, which protects the safety of consumers from illegal and dangerous cannabis concentrates.

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<sup>298</sup> Deloitte (2018).



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## ANNEXURE 1

COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
<b>ARGENTINA</b>	Decriminalised	Legal	<p>Decriminalised for small amounts and private consumption, and for consumption in private locations as ruled by the Supreme Court in 2009. However, the debate on the decriminalisation of the possession of drugs in small quantities is still open and there are still no definitive legislative measures in place to guide the criminal justice system.</p> <p>Cultivating, selling and transporting large amounts is illegal and punishable.</p> <p>Medicinal cannabis has been legal nationally since 21 September 2017. Medical marijuana is legal for patients with a prescription from a licensed physician. However, this did not include legislation to permit in-country cultivation of cannabis for medicine or medical purposes. In May 2019, the government announced deregulation guidelines and approval of seed imports to a cultivation location in the Jujuy Province.</p>
<b>AUSTRALIA</b>	<p>Decriminalised in Northern Territory and South Australia.</p> <p>Legal in Australian Capital Territory beginning in</p>	<p>Legal at federal level and in all states.</p> <p>Qualifying conditions and other details vary by state.</p>	<p>In September 2019, the Australian Capital Territory became the first state or territory of Australia to legalise recreational use of cannabis.</p> <p>From 31 January 2020, the new legislation allows adults to grow cannabis plants at home, with limits</p>



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
	January 2020.		<p>of two plants per person and four per household, or to possess 50g of dried cannabis. No sales or other transfer will be permitted. Federal law will also remain enforceable.</p> <p>Cannabis plants can only be cultivated in parts of someone's home not generally accessible by the public, and only by people who usually live there.</p> <p>There is a 150g limit for fresh (or "wet") cannabis to account for cannabis that has been harvested but not yet dried.</p> <p>The law allows adults to possess cannabis within these limits without the need for a cannabis offence notice to be issued.<sup>299</sup></p>
<b>CANADA</b>	Legalised	Legal	<p>Legal for medicinal purposes since 2001 and for recreational purposes since October 17, 2018 with the Cannabis Bill (Bill- C – 45). Age and regulations of consumption vary by province.</p>
<b>CHILE</b>	Decriminalised for possession and cultivation	Legal	<p>Private personal use and recreational cultivation decriminalised since 2005 but sales and group usage still penalised. The legislation also provides no guidance for legal possession quantities, rendering the laws challenging to execute.</p> <p>Medicinal cultivation legal as from 2014 with the authorisation of the Chilean Agriculture Service (SAG).</p>

<sup>299</sup> Lee N and Bartle J, Home grown cannabis to be legal in the ACT. Now what? (Accessed at <https://theconversation.com/home-grown-cannabis-to-be-legal-in-the-act-now-what-124268>)



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
			Sale of medication allowed on prescription in pharmacies from December 2015.
<b>COLOMBIA</b>	Decriminalised up to 22 g or cultivation of 20 plants for personal use	Legal	<p>In 2012, the Colombian government legalised the possession of up to 20 grams (0.7 ounces) of cannabis for personal use.</p> <p>In 2015, the Colombian Supreme Court ruled that it is legal for any individual to grow up to 20 personal use cannabis plants. But this does not mean you can grow and sell, it is only for personal use. Individuals carrying greater amounts, or cultivating up to 20 plants, cannot be prosecuted if the drug is for personal use.</p> <p>Law 1787 of 2016 is one of the main laws on this topic, which regulates access to cannabis for medicinal and scientific purposes in Colombia. This law permits the cultivation of plants, the manufacture of cannabis products and the use of seeds as long as their purpose is medicinal or scientific.</p>
<b>CZECH REPUBLIC</b>	Decriminalised up to 15 g of herbal cannabis or cultivation of 5 plants	Legal	In 2010, the Czech Republic passed the Non Incrimination Act (Coll 467/2009). This law places the Czech Republic in the same group as European states such as Latvia, Italy, Bulgaria, Spain and other that do not pursue prosecution for the possession of small amounts of cannabis. <sup>300</sup>

<sup>300</sup>Conbiz, The Policy of the Czech Republic in regards to Cannabis (Accessed at <http://www.conbiz.eu/information/articles/cannabis-in-czech-republic>)



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
			<p>Possession of small quantities for personal use has been decriminalised, but is still punishable with a fine of up to CZK 15,000. Although individuals may grow up to five plants at home for personal, private use these may not be harvested for supply or sale to others, and the cannabis harvested may not be used in public spaces.</p> <p>Cannabis for medicinal use has been regulated since 2013 for patients with certain disorders and must be purchased from pharmacies.</p>
<b>ECUADOR</b>	Decriminalised up to 10 g	Illegal	Possession of small amounts decriminalised. Possession of under 10 g is considered personal use and not punished.
<b>IRELAND</b>	Illegal	Legal as part of 5-year pilot programme enacted in June 2019	<p>The National Drugs Strategy of 2009–2016 did not favour decriminalising cannabis. A review of policy on medicinal cannabis was announced in November 2016, and a private member's bill to legalise medical cannabis passed the second stage in the Irish Parliament (the Dáil) in December 2016. However, as a result of strong criticism of the Bill it did not advance to Committee stage. Subsequently in June 2019, the Minister for Health signed legislation to allow for the operation of a Medical Cannabis Access Programme on a pilot basis for five years. The signing of the legislation allows for commencement of the operation of the Access Programme, the first stage of which is for potential suppliers to apply to have their</p>



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
			<p>medical cannabis products considered for suitability for medical use under the scheme.</p> <p>The medicinal cannabis access scheme will now make it possible for a medical consultant to prescribe a cannabis-based treatment for a patient under his or her care, but only for patients with specific medical conditions, where the patient has failed to respond to standard treatments.<sup>301</sup></p>
<b>JAMAICA</b>	Decriminalised up to 2 oz or cultivation of 5 plants. Legal for Rastafari.	Legal	<p>Decriminalized since 2015.</p> <p>In 2018, the first medical cannabis dispensary opened.</p>
<b>NETHERLANDS</b>	Consumption and sale are tolerated in licensed coffee shops. Possession of up to 5 g is decriminalised. Cultivation of up to 5 plants is unenforced for non-commercial use (unless grown in a professional setup).	Legal	Personal possession decriminalised and sale allowed only in certain licensed coffee shops. Cultivation often tolerated but growers can still have their plants and equipment confiscated and face eviction or cancellation of their mortgage for one single plant.
<b>NEW ZEALAND</b>	Illegal (Legalisation referendum to be held in 2020)	Legal	<p><b>Current laws</b></p> <ul style="list-style-type: none"> <li>• Possession of any amount of cannabis is currently illegal in New Zealand. Cannabis use is controlled under the Misuse of Drugs Act 1975 and the</li> </ul>

<sup>301</sup>The Journal.IE, Access to cannabis for medical reasons is now allowed in Ireland under new law (Accessed at <https://www.thejournal.ie/medicinal-cannabis-access-scheme-4697671-Jun2019/>)



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
			<p>maximum sentence for possession of cannabis is 3 months imprisonment or a \$500 fine; although there is a presumption against imprisonment. The presumption of supply threshold is 28 grams or 100 joints; above this threshold it is presumed any cannabis possessed is for supply. Cultivation of cannabis carries a maximum penalty of 7 years imprisonment, while dealing in cannabis carries a maximum penalty of 8 years imprisonment.</p> <p><b>Referendum and draft legislation</b></p> <ul style="list-style-type: none"> <li>In handing down the nation's budget in May 2019, Prime Minister Jacinda Ardern announced a \$13.4 million allocation to hold a referendum on legalisation of cannabis in 2020. If more than 50 percent of voters approve the legislation, the incoming government will have to enact a law legalising marijuana for adult use. Draft legislation has also been published for submissions from the public and interested parties. The Cannabis Legalisation and Control Bill outlines the basic elements of establishing a regulated cannabis market for adults.</li> </ul> <p>Key restrictions on cannabis included in the draft Bill include:</p> <ul style="list-style-type: none"> <li>A minimum purchase and use age</li> </ul>



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
			<p>of 20;</p> <ul style="list-style-type: none"> <li>• Ban on all marketing and advertising of cannabis products;</li> <li>• Requires harm minimisation messaging in the retailing of cannabis;</li> <li>• Prohibits consumption in public places and limits use to private homes and specifically licenced premises;</li> <li>• Limits sale of cannabis to specifically licenced physical stores (not online or remote sales);</li> <li>• Strict controls and regulations on the potency of cannabis;</li> <li>• Establishes a state licencing regime that all stages of the growing and supply chain are licenced and controlled by the Government, and will limit the amount of cannabis that is allowed to be grown.</li> </ul> <p>The government would establish a body called the Cannabis Regulatory Authority to regulate the industry, approve licenses for marijuana businesses and promote public health. This body would also be tasked with setting a tax so that the government recoups the administrative costs of implementing a cannabis program.</p>
<b>NORWAY</b>	Illegal, but government has declared intention to decriminalise	Legal	Illegal, but government is working on a decriminalisation bill that would end all sanctions for use and possession of up to 15 g. Currently use and possession of up to 15 g are punished with heavy fines and risk of losing driver's license.



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
<b>PERU</b>	Decriminalised	Legal <sup>[167]</sup>	Possession of up to 8 g is not punished. Cultivation, production, and sale are punished with 8–15 years in prison.
<b>PORTUGAL</b>	Decriminalised (25 grams of marijuana plant material/ 5 grams of hashish.)	Legal since 2018.	In 2001, Portugal became the first country in the world to decriminalise the use of all drugs. Possession of personal amounts of cannabis (a 10-day supply) is not subject to any penalties for a first-time offense. Subsequent offenses may be subject to civil penalties or mandated treatment. <sup>302</sup>  Portugal's leniency towards drugs use does not extend to its sale or supply. If caught trafficking cannabis, offenders can be given a one to five-year prison sentence. This may be extended to four to 12 years, depending on the severity of the crime.
<b>URUGUAY</b>	Legal, but buying prohibited for foreigners. Cultivation allowed up to six plants.	Legal for all uses.	Legal since late 2013. Buyers must be eighteen or older, residents of Uruguay, and must register with the authorities. Authorities grow the cannabis that can be sold legally.
<b>UNITED STATES OF AMERICA</b>	Ten states and District of Columbia	Legal in 28 states and District of Columbia	There are 10 states that allow adults over the age of 21 to possess small amount of cannabis and permit licensed businesses to grow, process, and sell marijuana products within their state boundaries. It is, however, still illegal on the federal level.
<b>ZIMBABWE</b>	Illegal	Legal (As from 2018)	In April 2018, the government published a licensing regime that will allow the legal cultivation of

<sup>302</sup> Cannabis in Portugal – Laws, Use, and History (Accessed at <https://sensiseeds.com/en/blog/countries/cannabis-in-portugal-laws-use-history/>)



COUNTRY	RECREATIONAL CANNABIS	MEDICAL CANNABIS	COMMENTS
			<p>cannabis. The cannabis will only be produced for research and medical use under the new Regulations, the Statutory Instrument 62 of 2018, "Dangerous Drugs – Production of Cannabis for Medicinal and Scientific Use Regulations".<sup>303</sup></p> <p>The legislation sets out a strict licensing regime. Five-year licenses will allow growers to possess, transport and sell fresh cannabis, cannabis oil, and dried product. This will, however, be subject to strict regulations. Apart from medicinal cannabis, Zimbabwe is also weighing hemp production options.</p>

<sup>303</sup> De Wet P, Zimbabwe just became the second country in Africa to legalise cannabis cultivation (Accessed at <https://www.businessinsider.co.za/zimbabwe-has-legalised-marijuana-farming-2018-4>)



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