

Written evidence submitted by Amber Marks, Lecturer in Law, Queen Mary University of London (DRU0020)

1. My organisation (School of Law, Queen Mary, University of London) is a centre of national and international excellence in legal study and research. I submit evidence to this inquiry on account of having undertaken legal research on its terms of reference.

THE UK DRUG FRAMEWORK

Question Addressed: Does the current framework, or a particular aspect of the framework, need to be reformed? If so, how? Could reform align with the UK's international obligations under the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol; the Convention on Psychotropic Substances of 1971; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988?

2. A punitive approach towards people who use drugs directly undermines both public health and individual rights. This submission focuses on how the law might be reformed in alignment with public health, human rights and the UK's international obligations under the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol; the Convention on Psychotropic Substances of 1971; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. In the words of the Executive Director of the United Nations Office on Drugs and Crime: "It is important to reaffirm the original spirit of the conventions, focusing on health."¹

The International Framework

3. A clear distinction is drawn within the international drug framework between conduct committed with the intention of drug "trafficking", which must be criminalised, and conduct related to "personal use" of a drug, that need not be. Three legal models for dealing with controlled drug "possession" and cannabis "cultivation" for "personal use" are canvassed in the international treaty framework.² It is submitted that choice of model should be determined by its effectiveness at achieving public health goals and the extent of its interference with human rights, including the rights to privacy and self-determination and the right to health. It is worth noting here that the right to health should not be confused with a right to be healthy. The right to health "contains both freedoms and entitlements. The freedoms include the right to control one's health and body... and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation".³

(i) *The first and least punitive model canvassed is the exclusion of conduct that is for personal possession from the scope of a country's criminal law.* Spain is an example of a European country that has always excluded possession for personal use from its criminal drug offences and on human rights grounds.⁴

¹ Yury Fedotov, United Nations Office on Drugs and Crime, *Contribution of the Executive Director of the United Nations Office on Drugs and Crime to the High-Level Review of the Implementation of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem, to Be Conducted by the Commission on Narcotic Drugs in 2014*. UNODC/ED/2014/1. (2013) <https://www.unodc.org/documents/hlr/V1388514e.pdf>

² See Article 3 (2) the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and Marks, A. (2019a) "Defining 'Personal Consumption' in Drug Legislation and Spanish Cannabis Clubs" *International and Comparative Law Quarterly*, 68 (1), 193-223

³ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' http://data.unaids.org/publications/external-documents/ecosoc_cescr-gc14_en.pdf, Paragraph 8

(ii) *The second model is to include conduct that is for personal possession within the scope of criminal laws but for this to be excluded from prosecution or punishment by the provision of an alternative in the form of social reintegration, treatment, education, aftercare, or rehabilitation measures.* Portugal and the Czech Republic are European examples of this approach. Further afield, Australia lists diversion from criminal prosecution amongst its core drug policy responses and has produced a wealth of empirical data on the effectiveness of such schemes.⁵

(iii) *The third model is to include conduct that is for personal possession within the scope of criminal laws and prosecute and punish it accordingly.* This third and most punitive option is that which is presently used in England and Wales (with the exception of a growing handful of police diversion schemes and the very narrowly prescribed circumstances in which the Crown Prosecution Service guidance advises that prosecution would not be in the public interest).

How to Reform the Law

4. Research indicates there is no causal relationship between the toughness of a country's enforcement against drug possession, and levels of drug use in that country.⁶

5. Section 5 (1) of the Misuse of Drugs Act 1971 (MDA 1971) creates a criminal offence for being in possession of a controlled drug for personal use. It is distinct to the offence of possession with *intention to supply* (section 5 (3)) and distinct to the offence of drug *supply* (section 4). It carries a maximum penalty of 2,5 or 7 years imprisonment depending on the Class of drug possessed. Section 6 of MDA 1971 creates a criminal offence for the cultivation of cannabis. Unlike the possession offences created in section 5 MDA 1971, no distinction is drawn between cultivation for personal use and cultivation with the intention of supply. It carries a maximum penalty of 14 years imprisonment.

6. Repealing Section 5(1) MDA 1971 (in alignment with the first model canvassed above) or excluding such conduct from prosecution (in alignment with the second model) would better align the UK drug laws with public health, human rights and its broader international obligations. Section 6 MDA 1971 could accordingly be reformed (i) by adding a requirement for intention to supply in accordance with the first model canvassed above or (ii) along the lines of the present-day section 5 MDA 1971 by distinguishing between conduct intended to facilitate personal use and that intended for supply; diversion schemes or other alternatives to prosecution could then be applied to the former in accordance with the second model canvassed. Several UN Agencies have supported calls for ending criminal sanctions for personal use, on account of the proven negative health outcomes and human rights infringements directly and indirectly attributable to such criminalisation.⁷ The provision of alternatives to conviction and punishment for personal use and its decriminalisation now has the unanimous support of the Chief Executives Board for Co-ordination of the United

⁴ Marks, A. (2019a)

⁵ Hughes, C., Seear, K. And Mazerolle, L. (2019), Monograph No.27: Criminal Justice Responses Relating to Personal Use and Possession of Illicit Drugs: The REAch of Australian Drug Diversion Programs and Barriers and Facilitators to Expansion. DPMP Monograph Series. Sydney: National Drug and Alcohol Research Centre, UNSW Sydney. For a summary of such initiatives globally see N Eastwood et al., *A Quiet Revolution: Drug Criminalisation Across the Globe* (Release, 2016).

⁶ UK Home Office, *Drugs: International Comparators*, October 2014, (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf) accessed 25 February, 2016

⁷ World Health Organization, 'Joint United Nations Statement on Ending Discrimination in Health Care Settings' (2017) http://www.unaids.org/sites/default/files/media_asset/ending-discrimination-healthcare-settings_en.pdf and World Health Organisation *A Technical Brief: HIV and Young People who inject drugs* (2015)

Nations System.⁸ The evidence from countries which have ended criminal sanctions for drug possession for personal use, is that prevalence of drug use does not significantly increase, and positive health and social benefits are achieved.⁹ Declarations on the unconstitutionality of personal use offences (on grounds of disproportionate interference with human rights) by senior courts in a growing number of jurisdictions have generally been applied to both cultivation for personal use as well as for possession.¹⁰

7. “Personal use” is not defined in legislation in England and Wales but the Divisional Court has interpreted it narrowly; a person who holds drugs on behalf of themselves and a friend will be treated as a drug supplier.¹¹ There is scope for minimising harm to drug consumers by reforming the common law to create a broader definition of personal use (or narrower conception of supply) which at least includes (or excludes) not for profit social supply. In Spain and Chile the concept of personal consumption is more broadly defined: in Spain it includes closed circles of drug consumers known to each other, and in both Spain and Chile a cannabis plant can be cultivated on behalf of several people for their collective consumption under the protective umbrella of “personal use”.¹² In England and Wales even minimal conduct such as the sharing of a cannabis joint would amount in law to drug supply (section 4 MDA 1971, carrying a maximum penalty of 14 years or life imprisonment depending on the class of drug). This is in stark contrast to the United States of America, for example, where such conduct is treated as personal use (“joint possession”) and not drug supply.¹³

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⁸ Chief Executives Board for Coordination CEB/2018/2, Second regular session of 2018, Manhasset, New York, 7 and 8 November 2018 (see https://unsceb.org/sites/default/files/imported_files/CEB-2018-2-SoD.pdf)

⁹ European Monitoring Centre for Drugs and Drug Addiction, *Illicit Drug Use in the EU: Legislative Approaches* (2005); and Eastwood N, Fox E and Rosmarin A, *A Quiet Revolution: Drug Decriminalisation Across the Globe* (2016)

¹⁰ See Marks, A. (2019a)

¹¹ *Holmes v Chief Constable Merseyside Police*

¹² Ministerio Publico C/ Paulina Patricia González Cespedes R.U.C. Nº 1.300.243.332-4 R.I.T. Nº 14-2015. See also Marks, A. (2019)

¹³ *United States v. Swiderski* 548 F.2d 445 (2d Cir.1977). For a discussion of the position in the European Union see "Legal perspectives on drug trafficking" [2019] ELECD 2993; in Mitsilegas, Valsamis; Hufnagel, Saskia; Moiseienko, Anton (eds), "Research Handbook on Transnational Crime" (Edward Elgar Publishing, 2019) 261