

## **Policing cannabis reclassification - easy as A B C**

Geoff Monaghan

In March 2000 the Independent Inquiry into the Misuse of Drugs Act 1971 set up by the Police Foundation published its recommendations for legal reform. The Inquiry made 81 recommendations, nine on cannabis.

One controversial recommendation (number 61) was to transfer cannabis from Class B to Class C of Schedule 2 of the Misuse of Drugs Act (MDA), and cannabinol and its derivatives from Class A to Class C. The government initially rejected the idea but is now willing to entertain it and has asked the Advisory Council on the Misuse of Drugs (ACMD) for advice. And, since 2 July 2001, the police in the London borough of Lambeth have operated a pilot scheme where they simply issue a warning to those caught in possession of small amounts of cannabis and confiscate the drug.

According to Commander Brian Paddick: 'the arrest and charging of individuals in Lambeth [for cannabis possession] is an ineffective use of police resources. The purpose of the pilot warning scheme is to deal with all cases of possession of cannabis in Lambeth promptly and professionally in order to enable us to focus our resources on current Metropolitan Police Service priorities which are also shared community concerns.'

The pilot is due to end on 31 December 2001 and the results of evaluation will be published. But what are the consequences for 'front-line' police officers if recommendation 61 is implemented? According to the Home Office witnesses giving evidence to the Home Affairs Select Committee, the police will still be able to caution and prosecute offenders following the reclassification of cannabis. In order to underscore the point, one of the witnesses said, 'we are not talking about decriminalisation in any shape or form'.

However, I believe that if the government wants the police service to adopt a system similar to the Lambeth model, it will need to amend not only the Misuse of Drugs Act 1971, but also the Police and Criminal Evidence Act (PACE) 1984 and the Crime and Disorder Act 1998. Moreover, it will need to review the 'case disposal' system. If the government does all this - then possession of cannabis will indeed be decriminalised.

Interpretation of the application of police powers in this area is clouded by terminology such as 'arrestable offence', 'section 18 searches' and 'recordable offence'. A debate on the workability of police powers following reclassification of cannabis must start with an understanding of the relevant sections of PACE. You also need to understand 'case disposal' and the options available in the system (1.1).

### **1.1: Case disposal - definition**

Case disposal means the decision - making process to prosecution of an offender by way of:

- summons (for an offence or to answer complaint)
- charge and/or indictment
- taking an offence into consideration.

OR

The decision-making process leading to diversion of an offender from prosecution by way of:

- formal warning
- caution
- reprimand (this applies to offenders 10-17 years-old)
- final warning (this applies to offenders 10-17 years-old)
- compounding
- conditional offer (i.e., fiscal fine - Scotland only)
- where the case is not proceed with (including post sentence visits)

or

- where another form of disposal is used by some other statutory agency. (e.g., HM Forces, HM Prison Service and Local Authority]

### **Powers of Arrest**

Under section 24(1)(b) of PACE 1984, if an offence carries a maximum penalty of imprisonment of five years or more it is an 'arrestable offence'. Reclassification of cannabis would reduce the maximum imprisonment for its unlawful possession from five to two years - it would no longer be an arrestable offence.

The police would have to rely on the powers in section 25(1) of PACE to effect an arrest for possession of cannabis. In summary, this section gives the police a general power of arrest for any offence:

- If the name and address of the offender are unknown and cannot readily ascertained, or are believed to be false;
- If the offender fails to furnish what the police consider a satisfactory address for service of a summons.

Under section 27(1) PACE, provision is made for fingerprinting offenders after conviction for certain offences. A police officer may, within one month of an offender's conviction, require that offender to attend a police station for fingerprints to be taken. This is provided the person has been convicted of a 'recordable' offence (i.e. those offences which can be recorded in national

police records) has not at any time been in police detention for the offence and has not had fingerprints taken in the course of the investigation of the offence or since conviction.

The offender must have a period of seven days within which to attend the police station, and can be directed to attend at a specified time or between specified times of day. Under section 27(3) PACE, should offenders fail to comply with the requirement made under this section they may be arrested.

### **Powers of Search**

Under section (1) PACE police may enter and search any premises occupied or controlled by someone arrested for an arrestable offence, and if the police have reasonable grounds to suspect the premises contains evidence relating to the offence or to some other arrestable offence connected with or similar to the offence. There are limits on the power to enter and search a premises after arrest. Generally it must be authorised in writing by an officer of at least the rank of inspector (s.18(4)PACE).

Section 32(2)(a)(ii) PACE makes provision for constables to search arrestees in certain circumstances, if an arrest takes place elsewhere than a police station the officer may search the arrestee if the officer has reasonable grounds to believe the arrestee may possess anything which might be evidence of an offence.

Under section 54(1) PACE the custody officer must ascertain and record the property of an arrestee, so the offender may be searched under this section.

The code of practice (made under s.66 PACE) allows an officer to strip search an offender at a police station, to remove an article an offender is not allowed to keep, and the officer reasonably considers the offender might have concealed such an article (Code C. Annex, Part B, paragraph 10).

### **Models of enforcement**

Where does this take us in looking at the implications of reclassifying cannabis? As I see it, there are four basic models for policing cannabis

#### **1.2: Police Powers and disposal options - Model 1**

A police officer who has reasonable grounds to suspect an offender possesses cannabis (an arrestable offence) can stop and search the suspect under s.23(2) MUDA 1971.

- If cannabis is found and seized. The offender can be arrested under s.24(1)(b) of PACE,
- Following the arrest the offender can be searched again under Section 32(2)(a)(ii) PACE 1984.

- At the police station the offender can be searched again under s. 54(1), (3) and (6) PACE 1984.
- In some circumstances the custody officer can give authority for a strip search under PACE 1984 (Codes of practice C. Annex A, Part B, paragraph 10),
- an Inspector or above may also give authority for any property occupied or controlled by the offender under s.18(1) and (4) PACE 1984.

**The evidence and surrounding circumstances are then reviewed and the appropriate disposal option is chosen:**

- Formal warning – Offence not recorded on PNC
- Caution reprimand or warning (fingerprints, photo and DNA samples should be before caution reprimand or warning is issued – offence recorded on PNC.
- Charge (Fingerprints, photo and DNA samples taken – If the offender is convicted it will be recorded on PNC.

**To summarise the current position and police practice:**

Following an arrest under s24(1)(b) of Pace, the police have a number of opportunities to search an offender. Section 32(2)(a)(ii) permits a search for anything that might be evidence relating to any offence. Once the offender is at the police station they may be searched under s.54(1). The Codes of Practice allows the police to strip search the offender.

The police may also search premises occupied or controlled by the offender if they are under arrest for an arrestable offence (the bulk of recorded searches of premises are carried out under s.18 which reflects its usefulness).

In sum, these powers of search enable the police to detect other offences. For example following his arrest for possession of cannabis, the offender is strip searched and a small quantity of cocaine found. His home address is then searched and stolen property recovered.

These powers of search enable the police to detect other offences for example following a strip search of a person arrested for cannabis possession a small amount of coke is found. His home is searched and stolen property is found.

To discuss the three remaining enforcement models assume now that cannabis has been reclassified and the possession is no longer an arrestable offence. To bring these into sharper focus compare them to model 1.

### **Fig 1.3: Police Powers and disposal options - Model 2**

A police officer has reasonable grounds to suspect an offender to be in possession of cannabis (a non-arrestable offence) police officer can:

- stop and search the offender under s.(23(2) MUDA 1971.
- if cannabis is found and seized and the identity /address cannot be ascertained or is doubted.
- The offender can be arrested under s.25(1)(a)(b) and (c) PACE 1984.
- following the arrest the offender can be searched again under s.32(2)(a)(ii) PACE 1984.
- At the police station the offender can be searched again under s. 54(1) PACE 1984.
- In some circumstances the custody officer can give authority for a strip search under PACE 1984 (Code C. Annex, Part B, paragraph 10),
- if there are reasonable grounds for believing the offender has more cannabis at premises own or occupied by him/her the officer can obtain a warrant to search under s.23(3) MUDA 1971

#### **The evidence and surrounding circumstances are then reviewed and the appropriate disposal option is chosen:**

- Formal warning – not recorded
- Caution reprimand or warning (fingerprints, photo and DNA samples should be taken before caution reprimand or warning is issued) - Offence recorded on PNC
- Charge (Fingerprints, photo and DNA samples taken – offender convicted- Recorded on PNC.

This option describes the process if the offender is arrested under provisions of s.25 PACE. Following arrest the offender can still be searched under s.32 and s.54 and strip searched under the Codes of Practice.

While the police no longer have the power under s.18 to search premises own or occupied by the offender, they can if circumstances permit, search the offender's home by obtaining a search warrant under s.23(3) of the MDA 1971.

The loss of arrestability makes little difference to police powers in this model. But I doubt my colleagues will carry out many arrests following this model because of the difficulties of enforcing s.25. Before invoking the power of arrest under this section, a police officer should try to persuade offenders to give their names and addresses. Obviously, police officers would want to verify the information before allowing the offender to leave. So, how long could someone be required to wait while information is checked? In the case of *Bentley v Brulzinski*[1982] ten minutes was held to long.

The difficulties for police enforcing this section were recognised by JUSTICE in its report 'Drugs and the law' (1991) the committee chaired by Judge Peter Crawford said that the provisions of s.25 "would be 'very difficult to operate in the sort of circumstances which normally exist at street level'.

If unlawful possession of cannabis is made a non-arrestable offence the police will lose their power of search under s.18 PACE. If the police have reasonable grounds to suspect the offender has cannabis at their home they will have to obtain a search warrant under s.23(3)MDA 1971. This is an expensive and time consuming process so it is unlikely that many officers would want to follow this route.

The JUSTICE committee note special evidential difficulties in drug offences.

Suspected substances have to be packed up in exhibit bags and sent away for analysis. It is desirable that an offender should witness this procedure. If this procedure is not carried out in accordance with service guidelines, the CPS may shy away from authorising prosecution under the chain of evidence rule. We can be certain the defence will exploit this view.

The result - an increase in the number of discontinued cases or acquittals based on technicalities - and a waste of time and money.

#### **Fig 1.4: Police Powers and disposal options - Model 3**

A police officer has reasonable grounds to suspect an offender to be in possession of cannabis (a non- arrestable offence) the officer can;

- stop and search the offender under s.(23(2) MUDA 1971
- if cannabis is found and seized there would be no grounds for an arrest under s.25(1) PACE 1984.
- So the offender is reported.

#### **The evidence and surrounding circumstances are then reviewed and the appropriate disposal option is chosen:**

- Formal warning – not recorded on PNC
- Summons issued - offender convicted recorded on PNC
- The police may - Within one month of conviction the police may require the offender to attend a police station in order to obtain fingerprints. If the offender fails to attend within 7 days the police can arrest under s.27(3) PACE 1984. The offender can also be required to attend a police station for the purpose of providing DNA sample under 63(A) PACE 1998

The most striking aspect of this option is that while the police have no power to arrest the offender before conviction than can arrest the offender after conviction. If unlawful possession is to remain imprisonable (and therefore

recordable) offence, the police would be forced to rely on s. 27(1) PACE to obtain the offenders fingerprints. Enforcement of this provision would be expensive, moreover, in some circumstances, police action (for example, where the officer try to arrest the offender under this section at home) could create community tensions and even lead to public disorder. In any event, it would be difficult to carry out an arrest in this type of situation because PACE does not provide the police with the powers to enter premises.

#### **Fig 1.4: Police Powers and disposal options - Model 4**

A police officer has reasonable grounds to suspect an offender to be in possession of cannabis (a non-arrestable offence) the officer can;

- stop and search the offender under s.(23(2) MUDA 1971
- If cannabis is found and seized however, in accordance with service policy or local directive the offender is not arrested.

#### **The evidence and surrounding circumstances are then reviewed and the appropriate disposal option is chosen:**

- Informal warning - Not recorded on PNC
- Formal warning - Not recorded on PNC

This model describes the current situation in Lambeth. The police informally or formally warn offenders and the cannabis is confiscated. In comparison to the other three options there is no doubt that this is the cheapest option. But even in this model the police retain their discretion to arrest under s.25 or s.27 of PACE. If they retain their discretion then it is difficult to see how any savings could be made.

To ensure national compliance government would need to introduce legislation to exempt the possession of cannabis from the provisions of s.25 of PACE. This would mean there would be no power of arrest at all. Making the offence unique in English law. To remove the risk of officers using the power of arrest under s.27, parliament would need to make possession of cannabis a non-imprisonable (and therefore non-recordable) offence - a course of action recommended by the independent inquiry.

Without the power to take fingerprints, there is no way to verify the offender has been previously convicted or cautioned. The case disposal guidelines for adults would have to be rewritten. What to do with the case disposal option (reprimands and final warnings) of young offenders is more problematic. They are prescribed by s. 65 of the Crime and Disorder Act 1998. and this section would need amending if the Lambeth model is followed

#### **Missed opportunities**

If the police lose their powers of arrest they will also lose their power to obtain a DNA sample from cannabis offenders. Opportunities will be missed to clear up other more serious offences.

To summarise, if politicians decide to remove arrest and search powers; remove the police service's ability to identify, with certainly repeat offenders; cease the prosecution of possession offences and frustrate both their ability to clear up other crimes and intelligence gathering process - then so be it. But at least they should stop being mealy-mouthed and admit that this policy amounts to decriminalisation.

I understand that the reaction of many Druglink readers may be to support the notion that these loss of powers amounts to decriminalisation of cannabis, so the police can get on with tackling heroin and crack dealing, for example. But this sentiment doesn't square the Home Office view that the police will still be able to caution and prosecute offenders following reclassification. In order to comply with Home Office expectations, the police service needs to retain adequate enforcement powers.

The Independent Inquiry was keen to stress that the law should be 'realistically enforceable'. I agree - and I hope the ACMD keep this point firmly in mind when debating the issue.

**NOTE: These views do not reflect the opinions of the ACPO Drugs Subcommittee, or the Metropolitan Police Service.**

**Notes:**

- 1: Drugs and the Law (2000) Report of the Independent Inquiry into the Misuse of Drugs Act 1971 The Police Foundation London
- 2: Government Reply to the Report of the Independent Inquiry into the Misuse of Drugs Act 1971 (2000) Home Office London
- 3: MP's Pilot Scheme Lambeth Borough OCU Use of Warning for possession of Cannabis (2001) MP's Briefing Note.
- 4: Section 27 Pace 1984 grants the Home Secretary powers to make regulation by statutory instrument specifying the offence constituting 'recordable offences' and making provision for such offences to be recorded in national police records. The statutory instrument specifies as recordable (and therefore fingerprintable without consent) all offences punishable with imprisonment and a few other miscellaneous Acts.
5. Crim. L.R. 825
6. Drugs and the Law (1991) JUSTICE London p.11 para. 3.25

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**Drug Link is a DrugScope publication.**

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