



**Review of the Dangerous Drugs Act
[Cap 12] and the Penal Code [Cap 135]**

Issues Paper No. 01 of 2013

*You are invited to make a submission or comment on this
Issues Paper.*

15 March 2013

About the Vanuatu Law Commission

The Vanuatu Law Commission was established on 30 July 1980 by the *Law Commission Act* [CAP115] and was finally constituted in 2009.

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Making Submissions

Any public contribution to an inquiry is called a submission. The Vanuatu Law Commission seeks submissions from a broad cross-section of the community as well as those with a special interest in a particular inquiry. Comments and submissions from the public are welcome.

The closing date for submissions is 15 April 2013. There are a range of ways that a submission can be made and you can respond to as many or as few questions and proposals as you wish. You can write a submission, send an email or fax, or ring the Commission and speak to one of our staff at the Commission office or elsewhere to talk about your submission

You must indicate in your submission whether you wish your submission to be confidential as in the absence of such an indication your submission will be treated as non-confidential.

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Introduction and Background

Since the 1960s all countries in the Pacific region have experienced a marked increase in the use and supply of illegal narcotic and pharmaceutical drugs. Vanuatu has not escaped this drug culture, although to date local drug activity has largely been with cannabis or cannabis derivatives, also known as marijuana and ganga, which has been locally cultivated or produced and then supplied within Vanuatu.

Drug use raises serious concerns among local and international communities and causes enormous costs to individuals, families and their communities. As a mark of Vanuatu's concern, in 2003 it adopted the ***Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances***. ('2003 Convention')

In June 2009 the Vanuatu Police Force and the Ministry of Justice and Social Welfare issued a Discussion and Consultation paper on 'Development of a National Drugs Policy for Vanuatu'.

That paper discusses a number of health and education initiatives for Vanuatu from the village level upwards, which could go a long way towards improving the way that Vanuatu and its people meet the drugs problem. The broad range of measures outlined in the paper is also consistent with several Articles in the Convention adopted by Vanuatu some years previously.

Some of these other issues are referred to briefly here, but this paper is primarily in response to a reference from the Vanuatu Police Force in May 2012. As such this paper is more focused on changing the criminal laws which seize these drugs and punish those who use or supply them to others by 'dealing' or 'trafficking' in drugs.

Background

The current Vanuatu law, the ***Dangerous Drugs Act***, commenced in 1939 and attempts to deal with all narcotic and psychotropic ('mind-changing' or 'mood – altering') drugs - as well as medically prescribed and pharmaceutical ('healing' or 'restorative') drugs.

The Vanuatu Police Force, through its Prosecution and Drugs Units, has requested a review of the Act, and have especially suggested

- increasing the types of criminal offences to include possession of illegal drugs, supplying to others, trafficking or selling large quantities of drugs for profit and cultivating drug plants or producing or manufacturing chemical drugs;
- Permitting police to use surveillance, tracking devices, covert or undercover operations and seizing any profits or proceeds of drug supply or trafficking;
- Providing a range of penalties for drug offenders from official police cautions, through community or village custom process under the authority of the chiefs, to increased fines and imprisonment. These penalties should be varied according to the type and quantity of illegal drug involved.

The Vanuatu Law Commission seeks to examine the ***Dangerous Drugs Act*** and review its use as a law which forms part of a national drugs policy in Vanuatu. It will consider whether regulation of prescribed and pharmaceutical drugs should continue to be included in one law, and the role of police in enforcing drug laws. The paper

also looks at the range of penalties and sanctions which should be available to the police, customs officers and the courts when dealing with drug offenders.

Vanuatu's laws have not been adapted to the rapid international changes in use and availability of drugs since the 1960s. Other Pacific nations, including Fiji, Tonga and Niue have repealed old drug laws and replaced them with more modern updated laws in the last 10 years, or made some amendment to their old laws (as in Kiribati). Currently drug offences form approximately 10% of criminal charges in the courts of Vanuatu. Of these almost all charges are for possession, cultivation or supply of cannabis, cannabis resin or related substances - sometimes called marijuana or ganga.

Cannabis or marijuana is by far the most commonly used illegal drug in Vanuatu – especially among local residents. The few court cases for using or possessing other drugs like heroin and cocaine involve tourists - and often the tourists are taking the drugs through Vanuatu to destinations such as Australia or New Zealand. Most marijuana cases involve locally grown and supplied plants and leaf. Most individual offenders have less than 100 grams when arrested, and the amount and value of drugs seized is at the opposite extreme to heroin, cocaine, amphetamine and ecstasy drug crimes.

The 2012 Vanuatu Correctional Services ('VCS') Detainee Census, issued in September 2012 records that that 82% of those in custody (roughly 200 in total) were first offenders (p18). While drug offenders were only 5% of first offenders they made up 26% of repeat offenders. Put another way 23% of repeat offenders then in custody in Vanuatu (for whatever offence) had been first time drug offenders (see p19-20). This compared with 51% of persons in custody whose first offences were property – related (theft, arson, robbery) , and 6% of those in custody whose first offences were violence or offences against the person.

These figures alone provide good reason for reviewing the drug laws which apply in Vanuatu, particularly in relation to criminal offences and the range of sentencing available to judges and magistrates.

Should all dangerous drugs be covered by one law?

Should Vanuatu have a separate law for illegal drugs such as cannabis and heroin? If so, should the current laws continue to apply to medical and pharmaceutical drugs and a new law be passed especially for identifying and prohibiting illegal drugs?

*If not, how should the **Dangerous Drugs Act** be re-organised so that there is a different set of laws for illegal drugs and for medical and pharmaceutical drugs, instead of one general set of rules and penalties?*

In Vanuatu all drugs - whether they are prescribed for medical or pharmaceutical reasons to heal or improve patients' health, or illegally prepared enhanced and sold as narcotic or mind altering substances - are governed by one law and criminal charges are heard in one court – the Supreme Court.

Other countries such as Samoa, Tonga, Niue, Australia and New Zealand have separate laws and regulations for the two types of drugs – even though pharmaceutical or prescription drugs can also be misused and sold or taken illegally.

The advantages of this approach are that illegal drugs are usually dealt with by the criminal law, police, customs officers and the courts. Misuse or misprescription of pharmaceutical and prescription drugs by medical practitioners, pharmacists or nurses may sometimes be dealt with in this way for serious offences, but usually are dealt with by professional boards – for example by restrictions on the practitioner's powers to prescribe or dispense drugs.

Also, new illegal drugs – usually those produced or manufactured from other chemicals or derived from new combinations of substances – can be quickly added to the prohibited list of illegal drugs for criminal purposes.

Testing can take many months before results can be relied upon to show whether the substance is harmful or risky to health, but during this time the substance can be prohibited. Only when it is shown not to be harmful may it be legalized. However for medicinal and pharmaceutical drugs Vanuatu, like other countries, can require very thorough testing and approval processes at the manufacturers' cost if these 'health promoting' drugs come under a different law with totally different processes.

The **Dangerous Drugs Act** lists pages of drugs which are all covered by one Act, because it has to cover illegal and legal drugs. This is a difficult and confusing way of setting out all the drugs which may be used or brought into Vanuatu.

Vanuatu's adoption of the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* is an indication that Vanuatu supports the separate treatment of these illegal drugs from other medical and pharmaceutical drugs prescribed for health reasons.

Tonga and Fiji have more simplified lists of illegal or prohibited drugs which could be used as a start in Vanuatu (although these are still long) - because most medical and pharmaceutical drugs are not included. The simplified list is still long enough to cover the importing or bringing of many new chemical drugs and other addictive substances into Vanuatu.

Object and statements of principle

Should any new drug laws include objects and statements of principle? If so which ones do you think are most important?

If Vanuatu adopts separate laws should each new law have the broad policy objects and principles set out, as has been done with Vanuatu's public health and environmental protection laws?

The new laws could set out the principles such as the protection of the people of Vanuatu – particularly its young people, balancing the public good with allowing individual offenders the chance to show they have learned from their mistakes, and directing police, court and community resources to the areas where they are most needed and most beneficial.

This will make new drug laws easier to understand and guide police, communities and courts in interpreting the new laws. It is also useful to set out Vanuatu's international powers and duties under the 2003 Convention and other treaties such as the Convention of the Rights of the Child.

Possession of Drugs, Drug Equipment, Utensils, Manuals and Instructions

Does Vanuatu need special laws which explain and define possession of drugs? Or should the law require police to prove that a person knew that illegal drugs were in their possession or on their property, including their boat, bus or truck?

Should Vanuatu have a law making a person guilty of possession of drugs found on their premises, vehicle, boat or plane? Should Vanuatu have laws making a person guilty of possession if they have agreed or arranged for someone else to control or hold the drugs for that person?

Should Vanuatu laws expressly state that possession of syringes or needles for genuine medical reasons is legal and cannot be prosecuted under any law against illegal drugs?

Should Vanuatu have a similar law so that even if police cannot prove a person was using or supplying drugs, simply having a pipe or bong is a crime? Or should the police have to prove that the pipe or bong was for drug use or was shared with others for that purpose before the person can be punished?

Vanuatu's ***Dangerous Drugs Act*** makes 'possession in Vanuatu' of a prohibited substance or material a criminal offence. There is no definition or explanation of the word 'possession' – which is the most important part of proving most drug offences.

In Niue possession of drugs includes control of drugs in the custody of another. Drug laws in Fiji, Tonga, Australia and New Zealand also presume that any drugs on property which is under a person's control are treated as if the person possessed those drugs. It is up to the offender to prove that he did not have 'possession' of the drugs by showing that he did not know they were there.

Drug utensils, manuals and equipment

The ***Dangerous Drugs Act*** also does not mention or deal with any aids to drug preparation or use. Common tools or utensils include pipes or crack pipes and bongs or waterpipes, as well as needles or syringes.

Special care needs to be taken in punishing possession of needles or syringes as there are some legal and acceptable reasons for people to have used or unused needles and syringes. This is usually because they are required for medical or pharmaceutical treatment prescribed by a health practitioner, (for example to inject insulin in the case of diabetes patients).

Some countries exclude any criminal responsibility or charges being brought where a person can show they use needles or syringes for medical reasons.

Laws in Niue, Tonga and Fiji make possession of any of these chemicals, items or utensils a crime unless the person can show they were not for use with illegal drugs. This approach is supported by the UN's 2003 Convention adopted by Vanuatu.

Other things that may aid drug use are written or printed manuals or instructions on how to prepare or manufacture certain drugs, how or increase their effect, and some types of machines or laboratory equipment. There are also a number of chemicals and prescription drugs which can be used to manufacture or produce more dangerous and expensive new drugs.

Sending drugs, manuals and equipment by mail

The current Vanuatu laws also do not deal with use of the post office or national mail to convey or provide drugs, or

Should the new laws also penalize any person who sends or conveys drugs, drug utensils, drug manuals or instructions and drug equipment through the post office or national mail service? If so should the penalties be directly linked to the quantity and type of drugs involved or should this be left to the Magistrate or judge in court?

drug utensils, instructions, manuals or equipment. Article 19 of the 2003 Convention refers to this practice and supports national laws against sending drugs and material connected with drugs in this way.

There is further discussion of manufacturing or producing drugs in the next section.

Longer Prison Terms for Drug Dealing, Drug Trafficking, Manufacturing or Supplying Drugs

Do you think Vanuatu should also have heavier penalties based on selling or trafficking in drugs? If so should there be an increase by half as much again or what rate of increase should be set for these penalties?

Should the penalties be made higher for drug dealing with young persons, or is the current system which allows the judge or magistrate hearing the case to take these things into account when punishing an offender good enough?

Should Vanuatu also have laws which specifically punish manufacture and production of drugs – including possessing or supplying chemicals or other equipment that may be used for manufacture or production?

If so, should these penalties be long prison sentences as in other countries, or should the penalties be fines and confiscation of the chemicals and equipment and any money or rewards received for producing or manufacturing the drugs? Or both?

Should Vanuatu's criminal laws have a presumption that a certain quantity of drug by an offender is treated as trafficking or commercially dealing in that drug? If so what increased penalties should apply?

Some Australian laws provide that if an offender possesses more than a certain quantity of a drug then the offender is treated as if he/she was trafficking or selling the drug – and much heavier prison terms result. For example in New South Wales possession of more than 300 grams of cannabis leaf is treated as drug trafficking unless the offender proves it was for their own personal use – and the prison term may then be up to 10 years, instead of up to 2 years. Possession of 100 kg of cannabis leaf is treated as commercial drug trafficking and the prison term may be up to 20 years.

Also some Australian states punish supply or trafficking to young people, especially those under 16, more heavily. In New South Wales the maximum penalty is increased by one fifth if supply to a young person is proven, or in the cases of manufacturing or producing drugs, if a person under the age of 16 is exposed to or involved in the manufacture or production.

This additional punishment is endorsed by Article 3 of the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and is further supported by Vanuatu's ratification of the UN **Convention on the Rights of the Child**.

Currently no other Pacific island country has this type of increased prison sentences, even though Niue and Tonga have reviewed their drug laws in the last few years.

Manufacture and production of illegal drugs

Another type of offence which is covered by other laws is manufacturing or producing drugs – whether this be by a chemical process or by adding other substances to naturally occurring leaf, resin or juices – for example from a cannabis, hemp or opium plant. Tongan law defines manufacture as to carry out any process by which an illicit drug or controlled chemical is produced, and includes extracting, refining, formulating, preparing, mixing, compounding, making an illicit drug or controlled chemical into dosage form, and packing or transforming it into another drug or chemical.

The Tongan law also punishes (with long prison terms) anyone possessing, importing or supplying chemicals or equipment that may be used in manufacturing or producing drugs.

Niue, Fiji, Australia and New Zealand have laws with similar provisions on manufacturing or producing drugs, which is

supported by the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* ratified by Vanuatu.

Is this the kind of crime which should be punished with a minimum prison term of 12 months for any offender?

Or should the law require a judge or magistrate to impose double the 'normal' prison sentence? Or up to four or five times that sentence, as in Australia?

Should the increased sentence depend on the type of drug, so that there is only a small increase in sentences for cannabis but a much higher increased sentence for heroin, cocaine, amphetamines and 'manufactured' drugs?

Police Powers

Because of the increase in drug use in most countries there are many laws which give police and customs officers increased powers to catch drug offenders.

For example Tongan law allows senior police to apply to a Magistrate for permission to secretly record telephone conversations, meetings and other activity where they suspect that drug laws are being broken. Police in Tonga may also use tracking devices, and search vehicles, boats, planes and any person suspected of involvement.

Another special power is that senior Tongan police can order that a 'controlled delivery' of drugs occur. This means they can allow drugs to be delivered or transported to their intended destination (usually while also using tracking devices and surveillance) so that the people responsible for buying the drugs and organising their delivery can be caught and punished.

These drugs will not be sold or used in the community as the police seize the drugs when the offenders are caught.

Without this special law, police or customs officers would be required to stop the delivery and seize the drugs as soon as they suspected it was happening. Police cannot do these things when investigating other crimes such as robbery or murder.

However if a 'controlled delivery' goes wrong, and the drugs are sold and used in the village or community, then police would be held legally responsible for this if there was no special law allowing controlled deliveries to happen. Sometimes the police themselves may be suspected of selling the drugs where a 'controlled delivery' goes wrong and the drugs are lost.

In Australia and New Zealand there are similar laws about special powers and controlled deliveries. The *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* also encourages controlled deliveries on a case by case basis at the international level.

Search powers and strip searching

Another area where police in some countries have special powers is internal and 'strip' body searches of suspects.

In a number of international drug cases defendants have swallowed or secreted drugs in private places in their body. For this reason a number of countries including Australia, New Zealand, Niue, Fiji and Tonga allow police to conduct internal searches, or to arrange for medical examinations of people suspected of concealing drugs. If the person refuses to agree the police may apply to a Magistrate or Judge for permission to proceed.

These special laws giving powers to police and customs officers in drug matters are meant to make it harder for drug offenders to avoid the law. Some offenders would never be identified or taken to court if police could not use these special powers in those countries, but it is not certain that Vanuatu has suffered in this way.

In Vanuatu police may search a person suspected of concealing drugs or other things connected with drugs. However they cannot search a place or premises,

including a boat, car or truck unless a court issues them with a search warrant, and even the courts have no power to allow controlled delivery of drugs, or surveillance or tracking devices to be used.

Do you think that Vanuatu should have special powers for police investigating drug offences - or should they have the same powers as for other crimes such as murder or robbery?

Is there enough protection against misuse of these powers by police or customs officers?

Are drug crimes in Vanuatu so serious that police need to have extra powers, or are police still able to investigate and successfully prosecute most drug activity here – which is mainly cultivating and selling cannabis or marijuana/ganga?

If you think police need special powers, what should they be - for all of the suggested powers or only some? Should any special powers be limited to drugs other than cannabis, except where a judge issues a special court warrant allowing the use of these powers for cannabis or marijuana offences?

Are the community and the public interest protected enough by making the police apply in writing to a Magistrate or Judge?

Should the police be able to allow controlled deliveries, or is the risk of the drugs being sold and used in the community too great?

Should these special powers be available to senior police in an emergency or a serious drug matter (for example a matter involving large quantities of imported drugs), provided that the use is properly recorded for any later proceedings in court?

Or should these powers only ever be used after the police have been given written approval by a Magistrate or Supreme Court judge?

What about being able to stop and search any vehicle truck boat or person the police suspect of drug offences?

Is this power needed in Vanuatu? If so should it only be used after written approval by a Magistrate or judge?

*Should there be a special law for ‘strip searches’ or intimate body searches in drug cases (and especially for female suspects so that they are not searched by men) to strengthen the current law in s10 of the **Penal Code**?*

Should this power only be used when a Magistrate or Judge approves?

Protecting Informants

Do you think Vanuatu should have special protection for informers or undercover officers in drug cases?

Many other countries have laws to protect those who give information about drugs to the police or other authorities.

This protection is meant to encourage citizens, or even other criminals, to give their information to police without being scared off, and to make it harder for drug offenders to avoid the criminal law.

For example Tongan and Fijian law protects a police or customs office or any witness in court from having to identify or provide the personal details of an informer or undercover police or customs officer.

A Court may order that this identification be provided if the informer or undercover officer has made a false or untrue statement about the case.

Cautions and Alternative Sentences

The Vanuatu Police Force reference specifically mentions alternative sentencing models, including on the spot fines, referrals to the village chief or a drug course and community service. The ***Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*** suggests that member nations consider these alternative measures in cases of a minor nature.

As acknowledged in the 2009 discussion paper, the Ministry of Health does not currently enjoy the resources to provide or refer drug offenders to drug rehabilitation, counselling or full time education services.

However, there is scope to consider a number of sentencing alternatives. For example in some Australian states police have the power to officially caution minor drug offenders.

Official Cautions

The system works as follows

Under the scheme, police may caution adults or young offenders (under the age of 18) who possess up to 15 grams of dried cannabis for personal use and/or equipment for self-administering the drug. As a consequence, the offender does not attend court and no criminal conviction is recorded.

To be eligible for a caution, the offender must admit the offence, have no prior convictions for drug or violent offences, and must consent to sign the caution notice, which contains health and treatment information. An adult offender may receive a maximum of two cannabis cautions; a young offender may receive a further two cautions up to a maximum of 4.

Other eligibility criteria are:

- the drug is for personal use – the scheme does not apply to persons caught supplying cannabis, i.e. dealers or traffickers;
- the identity of the offender is confirmed;
- the offender is not involved in any other criminal offence.

A person cannot demand a caution. Police retain the power to charge the individual depending on the specific circumstances involved, even when he or she might have been given a caution.

Receiving a caution means that no criminal conviction is recorded and the person does not have to go to court.

The caution notice issued by police should provide health and legal information on cannabis use and a contact phone number for the Ministry of Health / private medical practice for seeking advice and treatment.

The scheme is intended to benefit the legal system by reducing court time and resources. Similarly, police do not have to attend court for minor cannabis matters, allowing them to concentrate on more serious crimes.

The limit of receiving cautions for adults is two. If an adult is caught for a minor offence on a third or fourth occasion, the person will be charged.

Diversiory programs

Another alternative sentencing approach for minor offences is a diversionary program offered on the first Court appearance.

Before the offender has entered a plea to the charge, the Magistrate can grant bail on the condition that the defendant complies with the treatment regime. This allows defendants to focus on drug treatment without deciding on a plea.

Participants are granted bail by the Magistrate on the condition of being assessed before taking the treatment program for approximately 3 months.

Ideally, where national resources permit, a team of health workers employed by the Public Health Service assesses the defendants. (The assessment covers drug use problems, family and social situation, medical problems, mental health, and potential to engage in treatment.) The Ministry of Health does not have those resources – especially outside Port Vila – so that for Vanuatu the most realistic alternative is community and custom based.

Those defendants proposed for the program would be released into the supervision of the chief and other named elders of the defendant's village or community for a period of at least 3 and up to 6 months. This supervised treatment is decided on a case by case basis and may include total abstinence from drug use, detoxification, residential drug rehabilitation, community work and formal or informal counselling. Additional court appearances are also used to monitor the defendant's progress.

After the initial period, the chief and other elders prepare an assessment which is provided to the Magistrate recommending whether or not the defendant should continue to be monitored and supervised according to the custom process for a further period of up to 6 months.

The Magistrate can withdraw a defendant from the program for committing further offences, failing to appear in court, or not complying with other bail conditions.

Upon the defendant's completion of the custom program, the Magistrate receives a report on the defendant's participation from health and community representatives. This is taken into account at the final hearing and sentencing of the defendant.

On the spot fines

Another option which has been tried in some Australian states is that minor drug charges are penalised but not recorded against the person provided that a fine is paid or some other direction is followed.

If police find a person with no more than 25 grams of cannabis or that the person has cultivated no more than 5 cannabis plants, then they must charge the person with those drug offences and those charges must be properly recorded.

However, especially in the case of young offenders or those without criminal records, the police may choose to give the offender a notice (similar to an on the spot fine) requiring them to pay an amount of VT 1,000 to the court, or attend specified

Should all drug offences involving even very small quantities of cannabis be punished in court?

Are police and court time well spent on small cases like this, or should the laws be directed at serious large drug matters?

Should Vanuatu have an alternative for young offenders and people without a criminal record, which punishes them for the crime but does not record the offence permanently against them?

If so, should this alternative be limited to young offenders or those without any criminal record, or extend to those who have not been sent to prison before? In many countries a prison sentence is only imposed on the most serious drug crimes, because their experience is that too many people who are sent to prison for drug offences are imprisoned again as repeat offenders for other serious crimes.

counselling or drug treatment, before the case is heard. In Vanuatu another option would be to require community work to be done as directed by the local chief

If this payment is made, or the offender 's attendance is confirmed to the court, before the court is required to hear the case then the offence is marked as discharged on the court papers and no conviction recorded against the offender.

Young offenders, first offenders and first time prisoners

One advantage of allowing this to happen is that police and court resources are not spent on minor cases, and people who commit minor drug offences are not punished too heavily with a serious criminal record which may affect their employment and travel opportunities as well as other important aspects of their future.

The VCS in their 2012 Detainee Census appear to support this approach, though not limiting it to minor drug matters. The VCS concluded (in relation to all offenders, not only drug offenders) that 'this data supports the use of community based sentences and interventions such as diversion that keep offenders(especially young offenders) out of prison for as long as is reasonably possible' (p20)

Range of Penalties

Do you think Vanuatu should also adopt a range of penalties or prison sentences which can apply depending on the amount of each particular drug which is found or supplied by the offender?

Should Vanuatu have long minimum prison terms for the most serious crimes of manufacturing, producing or trafficking in large quantities of illegal drugs, especially where young persons are involved?

OR should Vanuatu continue to have one penalty for all drug offences and leave it up to the judge or magistrate to decide how serious the case is?

Should corporations and their directors and managers be liable to imprisonment and fines for breaching drug laws?

If breaches of the health laws can be punished in this way why should criminal drug offences be treated more lightly?

Should both the corporation and the directors be liable for the same offences, or is this taking the punishment for drug matters too far?

Currently s17 of the ***Dangerous Drugs Act*** contains the only power to punish drug offenders. It sets a maximum fine of 100 million VT and/or up to 20 years imprisonment.

Vanuatu's drug laws have occasionally been used where drugs such as cocaine or heroin were found, but for large quantities of those drugs even 20 years is not a big prison term compared with other countries like Fiji or Australia which have life sentences.

In comparison a fine of VT 100 million is a big fine by other standards, even when dealing with drugs like cocaine, heroin or amphetamines.

Other nations have drug laws with a range of penalties depending on the type of drug, amount of drug, whether the offender was supplying or trafficking (selling) the drug or using it themselves, manufacturing or producing the drug, providing drugs to young people (under 16) and so on.

For example in Fiji while there are several general penalty laws setting the maximum at life in prison and fines of up to \$1 million - growing or 'cultivating' up to 10 cannabis plants may be punished by 3 months in prison; growing or cultivating over 50 plants may be punished by up to 14 years in prison.

Also in Fiji, selling or trafficking in opium or coca leaf weighing under 10 grams may be punished by up to 2 years in prison; selling or trafficking over 10 grams may be punished by up to 20 years in prison.

In Australia there are similar laws so that supplying a small quantity of cannabis, under 30 grams may be punished by up to 2 years in prison but supplying large 'commercial' quantity of 100 kg may be punished by up to 20 years in prison.

Some countries also have minimum prison sentences for the more serious drug offences such as trafficking large commercial quantities of an illegal drug, or manufacturing or producing illegal drugs. The *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* binds member nations to ensure that factors such as this are taken into account when considering the early release or parole of those imprisoned for these serious offences.

Lower range penalties would be left to the Magistrate's Courts, so that only the most serious crimes – those where a prison sentence was likely if the crime was proved - would be heard by a Judge in the Supreme Court.

Companies, businesses and commercial enterprises

A related issue is that there is no reference in Vanuatu laws to drug offences by a company or corporation, although it is arguable that a company could be fined up to VT 100 million if drugs were found on company premises.

Australia and New Zealand have laws which can charge companies or corporations with drug offences – which are usually connected with importing or manufacturing drugs like heroin, cocaine, or amphetamines - rather than cultivating or selling marijuana.

For example, in New South Wales any director or other person involved in managing the affairs of the corporation or company is also personally liable to imprisonment and fines for any breach of the law by that corporation or company.

This responsibility can only be avoided if the director or manager proves that the breach of the law occurred without their knowledge, or that they did all they could to prevent it, or that they had no say in the company's conduct.

Some Vanuatu laws have similar provisions for criminal offences by corporations, e.g. section 124 of the **Public Health Act**, but the **Dangerous Drugs Act** does not.

Seizing and Forfeiting the Proceeds of Drug Offences

Should Vanuatu have special laws for the seizure of money or property used in drug crimes? Should this be included in a new illegal drugs law, so that the same magistrate or judge who hears the criminal case also decides whether any money or property is seized or forfeited to the Government?

Will the savings in court time and resources be worthwhile in seizing the proceeds of drug dealing in Vanuatu?

If so should these special laws follow the Kiribati or Niue model? Or are Vanuatu's current proceeds of crimes laws effective and quick enough for drug crimes too?

Sections 10 and 16 of the ***Dangerous Drugs Act*** currently provides for the forfeiture of drugs and ships or aircraft used to carry or convey those drugs when a conviction is recorded.

Other nations' laws go further, reflecting the strong emphasis on laws for the confiscation of any equipment, property and proceeds of illegal drug activity in the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Niue and Fiji provide for the forfeiture on a drug conviction of all property and other things in their possession relating to the offence, for sale or destruction on court order. Money in an offender's possession which the court is satisfied was either for use in drug offences or received for drugs may be paid to the Government and any vehicle, truck, bus, boat or ship used in the offence is usually also forfeited in Niue.

Kiribati has amended its drug laws to provide that a person in possession of money or property reasonably suspected of being the proceeds of a drug offence must satisfy the court that they received the money or property lawfully or they will forfeit that property or money to the Government and may be sent to prison for up to 2 years.

Vanuatu and other countries including Tonga, Samoa, Solomon Islands and Fiji have similar laws which apply to all serious crimes, meaning offences which may be punished by imprisonment for over 1 year, such as drug offences (***Proceeds of Crime Act 2002***).

However these laws only apply after a court convicts a person and require separate court proceedings to be brought (in Vanuatu by the Attorney- General).

This is a slower and more costly process than in Niue or Kiribati, and can lead to the money or property being misplaced or forgotten or losing value.

Vanuatu's ***Proceeds of Crime Act*** seems to be directed at more complex and financially centred crimes such as money laundering and fraud.

Analysis and Disposal of Seized Drugs

In Australian states the Director –General of the Ministry of Industry may appoint an analyst for the purpose of analyzing cannabis leaf or cannabis plant but not other illegal drugs or drug derivatives. Is a senior officer in the Ministry of Agriculture and Fisheries, Biosecurity Vanuatu the nearest equivalent here?

Is the law in Vanuatu on evidence of drug analysis in need of amendment?

Should a certificate be able to be evidence of the number weight and type of cannabis plants without having to be obtained from a Government scientist overseas?

Should approved and properly trained police be able to give this evidence?

Or should the time and cost of this process be accepted as part of the need to strictly prove all criminal offences under s 5(2) of Vanuatu's Constitution – even drug offences?

The ***Dangerous Drugs Act*** currently provides for a certificate of contents to be obtained from a Government analyst of a country approved by the Minister of Health to be used as evidence in court proceedings.

In practice this requires an Australian or New Zealand Government scientist to test and sign the certificate before a drug case can go to court, which is slow and costly.

In Tonga the production of a scientific analysts' certificate on a sample of the seized drug is evidence of the drug content provided the defendant is given 4 weeks' notice of the certificate.

Another suggestion is that properly trained and qualified police officers be appointed to analyse cannabis leaf or cannabis plant.

Disposal of illegal drugs

Another issue which is not specifically dealt with under Vanuatu is disposal of seized drugs.

Retention of large quantities of illegal and valuable drugs can require strict and costly security to be maintained to preserve the drugs until a final court hearing.

Larger quantities of drugs such as cannabis often deteriorate and can become mouldy or rot over time – which may affect the health of the police and other public servants who have to guard or secure the drugs.

For this reason a number of countries have laws which allow the bulk of the seized drugs to be destroyed well before court proceedings are over.

Most of these countries also have laws with a presumption of fact that a sample of a seized drug or other substance has the same properties as the

remainder of the illegal drug or substance. This means that the amount and quality of seized drugs can be proved in court even if they have been destroyed before the court hearing. Vanuatu does not have this presumption in its laws.

In Fiji the Commissioner of Police with agreement from the Prosecutor may apply to the court for an order that the drugs be destroyed (incinerated).

In some Australian states a senior police officer may order that drugs be destroyed if he is satisfied that the drug cannot be reasonably secured while court proceedings take place. In New South Wales when a drug case first comes before a Magistrate,

they may order destruction of the drugs where the quantity exceeds 50 cannabis plants or 1kg of cannabis leaf for example.

Does Vanuatu need a law that allows a judge or magistrate to order that drugs be destroyed, so that they are not stolen or sold after the police have seized them?

Or should a committee of 3 senior police officers be able to order that drugs be destroyed, perhaps only where large quantities such as 100 plants or 10 kg have been seized and the Public Prosecutor agrees? Should the agreement of the Director- General of Health or the Director of Biosecurity Vanuatu be required before any destruction of drugs occurs?

And should this only be allowed after an analysis has been certified by an approved scientist or other person? Should this type of destruction be allowed only for cannabis where there is a large quantity – say over 5 kg or 50 plants, involved?

Should the law require that a sample of the drug be retained until there is a conviction or acquittal of the person or persons charged?

If so should any special security protection for the retained drugs be required, and who should be responsible – Biosecurity Vanuatu, police, customs?

Should the people who have to guard or secure the drugs have extra health protection such as breathing masks or other safety gear at work?

Opinions and Submissions

Any opinions expressed in this Paper do not represent the policy position of the Government of Vanuatu, the Vanuatu Police Force or the VLC.

You are invited to make a submission on any matter raised in the Paper or anything you think is relevant to drug laws in Vanuatu. Information on where and how to make submissions is found on page 2 of this Paper.