
Blurred Vision – Cannabis and Reporting

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On 17 October, Canada legalised the recreational use of marijuana, following the passing of *The Cannabis Act 2018* this summer. This marks a further step in the drug's deregulation in Canada, where its medical use has been lawful since 2001 under a licensing regime. It is, however, still unlawful to produce, import and export cannabis without a licence and licences to import and export are restricted to medicinal use. Canada is the third country worldwide to legalise the drug's recreational use, after Uruguay in 2013 and Georgia this year. In the US, most States have either legalised or decriminalised marijuana usage to some degree,¹ although at a Federal level it remains illegal. The drivers of this trend are complex and varied, both economic and social. However, a growing recognition that the drug has manifold medical applications has arguably been the principal catalyst and, particularly in the UK, has dominated public debate.

Deregulation and changing societal attitudes present commercial opportunities: cannabis is big business and has become an attractive area for investment globally. Indeed, Deloitte estimates that the legal cannabis market in Canada will be worth some \$4.34 billion in 2019 alone.² In this context it is worth revisiting the scope and application of the UK's Proceeds of Crime Act (POCA), which defines the proceeds of crime by reference to whether the predicate activity ("criminal conduct") is lawful in the UK, not where it was committed. As such, revenue derived from a (legal) Canadian cannabis company, for example, would constitute the proceeds of crime. The growing deregulation and (global) commercialisation of cannabis exposes a policy paradox that warrants reform: secondary legislation could be introduced to extend the scope of the statutory defence and thereby alleviate the burden on the regulated sector.

The UK's cannabis laws

In the UK it is illegal to possess, grow and sell cannabis. Until recently it was listed on Schedule 1 of the Misuse of Drugs Regulations 2001, classified as having no therapeutic value and unable to be lawfully possessed or prescribed for medical use.³ In a series of high-profile cases over the last 12 months, children with intractable epilepsy were denied access to cannabis oil, which had proved highly effective at stemming their seizures. The public outcry moved the Home Secretary to add cannabis-derived medicinal products onto Schedule 2, and since 1 November a collection of those

products can be legally prescribed.

Despite the fact that cannabis was, until very recently, categorised as having no therapeutic value, for many years it has been grown legally in Britain for research purposes under a very stringent licensing regime. A United Nations report recently found that the U.K is the largest exporter of legal cannabis in the world, producing 95 tonnes in 2016, a large portion of which is used for medical products. Understandably, commentators had questioned how the licensing regime was compatible with the Government's position that the drug has 'no therapeutic value'.⁴

The scope of POCA's statutory defence

The substantive offences of money laundering, as set out in Part 7 of POCA, specify a range of conduct (e.g. transference, conversion or possession) which, when performed in relation to 'criminal property', amount to a criminal offence. Property is 'criminal property' where it represents or constitutes the benefit of conduct which would be unlawful were it committed in the UK.⁵

In 2005 a statutory defence to money laundering was introduced. The Serious Organised Crime and Police Act 2005 (SOCPA) amended POCA to exclude from criminal liability those who knew or believed that the predicate 'criminal conduct' occurred in a country where it was lawful. However, the statute left it open to the Secretary of State (by way of statutory instrument) to prescribe certain predicate conduct where the defence would not apply. When the Bill for SOCPA was discussed in Parliament members naturally sought to understand what offences would likely be prescribed under secondary legislation. The Government's representative stressed that, in prescribing any offence, the Secretary of State would seek to protect against serious crime, such as "paedophilia, drug cultivation and the trafficking of people".⁶ She went on to clarify: "The main purpose of [the statutory defence] is to filter out the need for the regulated sector to report activities such as, for example, the profit from bullfighting in Spain ... or companies engaging in what is apparently lawful business abroad."⁷

The following year the Government passed secondary legislation prescribing specific conduct, including any criminal offence which carries a maximum sentence exceeding 12 months' imprisonment.⁸ Currently under UK law it is illegal to possess, cultivate and supply cannabis and all cannabis-related offences carry a maximum sentence exceeding 12 months' imprisonment.⁹ Accordingly, cannabis-related offences fall outside the scope of the statutory defence.

The current position - time for reform?

As it stands therefore, any person in the UK who receives (and possesses) a payment derived from the revenue of a legal foreign cannabis business commits a criminal offence, provided they know or suspect its origin. On one hand, there is little alarming about a money laundering framework which defines criminal conduct by reference to the domestic law. As a matter of policy, it makes sense to criminalise, and therefore stymie, the movement of money derived from activity considered unlawful in the UK, irrespective of its legality in the jurisdiction where conducted.

However, the practical implications of the law in the context of Canadian cannabis companies seem confused and at odds with the underlying policy, especially given the UK Government's

acknowledgement of the medicinal benefits of cannabis. For example, an over-the-counter sale in Canada of a cannabis product, which is categorised as a Schedule 2 substance in the UK, could constitute a predicate offence; had the sale been conducted in the UK it would have been unlawful without a prescription. Moreover, any UK investor who receives a dividend from a lawful Canadian cannabis company, even one focusing on the medicinal market, would be committing money laundering.

It is difficult to imagine the UK's criminal enforcement agencies investigating, let alone prosecuting, such conduct. However, this has little effect on how the regulated sector must interpret and comply with its ongoing duty to monitor transactions and report suspected money laundering, as defined under POCA. Where a bank is deemed to know or suspect that funds originate from a Canadian cannabis company its obligation to submit a suspicious activity report (SAR) would technically be triggered. This position makes little sense and calls for reform. Payments relating to a lawful market in Canada should - to quote the Government which introduced the statutory defence - be "filtered out" from the regulated sector's reporting obligations. One cannot imagine why the National Crime Agency (NCA) would ever want to act upon or investigate a SAR based on lawful cannabis business conducted in Canada, a democratic ally. Consent for such transactions are inevitable and their reporting places an unnecessary burden on both the regulated sector and UK authorities.

Accordingly, the UK Government should consider how the provisions of the statutory defence could be extended to exclude lawful cannabis business - especially that relating exclusively to medicinal applications - from the scope of the regulated sector's reporting obligations. To do otherwise would be inconsistent with both the rationale which drove the statutory defence and the purpose of the reporting framework.

¹ Nine States, plus the District of Columbia, have legalised its recreational use, seven of those states allow cannabis to be sold for recreational use. Vermont and DC only allow possession and growing.

² www2.deloitte.com/content/dam/Deloitte/ca/Documents/consulting/ca-cannabis-2018-report-en.PDF

³ The only exception to this prohibition was Sativex, an oral spray that contains THC and was prescribed to patients suffering from multiple sclerosis.

⁴ See e.g. www.telegraph.co.uk/news/2018/03/06/britain-largest-exporter-legal-cannabis-world-despite-ban/

⁵ Section 340(2) POCA

⁶ publications.parliament.uk/pa/cm200405/cmstand/d/st050113/pm/50113s09.htm

⁷ Caroline Flint, 13 January 2005, Standing Committee discussions for the Serious Organised Crime and Police Bill, available at publications.parliament.uk/pa/cm200405/cmstand/d/st050113/pm/50113s09.htm

⁸ Proceeds of Crime Act 2002 (Money Laundering Exceptions to Overseas Conduct Defence) Order 2006 (SI 2006 No. 1070))

⁹ For example, possessing cannabis (s. 5(1) *Misuse of Drug Act 1971*) carries a maximum of 5 years.