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FINAL REPORT

CONCEPTUALISATION, MOTIVATION AND KEY PROVISION FOR AN ENABLING REGULATORY FRAMEWORK FOR CANNABIS

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EXECUTIVE SUMMARY

1. We were instructed by Eastern Cape Rural Development Agency ("**ECRDA**") to prepare a report on the conceptualisation, motivation and key provisions of an enabling regulatory framework for cannabis (the "**Report**"). In doing so, we conducted extensive research in respect of the best practices to regulate cannabis in a manner that is fit for purpose and with specific reference to the South African context and also hosted a number of consultations with the Project Steering Committee ("**Steering Committee**") and relevant stakeholders. In light of the key regulatory aspects covered by the Report as well as a proposed draft outline for the enabling regulatory framework for cannabis we, *inter alia*, recommend:

1.1 That a central piece of regulatory legislation should be adopted as the mechanism for the regulation of cannabis and cannabis products, for example, a single cannabis bill which makes provision for appropriate cross-referencing to existing legislation. This is the preferred approach as it is more likely to result in greater conceptual coherency and uniformity.

1.2 The establishment of three institutional structures namely:

1.2.1 firstly, the Cannabis Regulatory Authority, which we propose should be responsible for, *inter alia*, the licensing and authorising of controlled activities as well as the development of guidelines and public awareness in respect of cannabis and cannabis products;

1.2.2 secondly, the establishment of the Cannabis Advisory Committee, which should be tasked with consulting and advising on national plans relating to cannabis and cannabis products; and

1.2.3 lastly, a Cannabis Dispute Resolution Board, which should be tasked with administering and adjudicating disputes relating to cannabis and cannabis products.

1.3 That, as a foundational principle, there be a move away from arbitrary tetrahydrocannabinol ("**THC**") thresholds in regulating cannabis and that cannabis and cannabis products instead should be regulated according to their proposed uses.

1.4 That retailers, processers and operators of cannabis consumption premises should be subject to certain controls, for example, licensing in limited instances as well as

reporting and notification requirements. This regulatory burden is more appropriately placed on this leg of the supply chain as opposed to on cultivators of cannabis, and additionally, is more practical.

1.5 No licenses should be required for the cultivation of cannabis for industrial purposes and only reporting and notification requirements should be required in this regard. Measures should be implemented to ensure that small-scale and/or rural cannabis farmers are empowered and participate in the cannabis value chain. We propose, for example that, a quota system should be established to ensure that a certain percentage of cannabis is sourced from small farmers for industrial purposes.

1.6 That provision should be made for the establishment of cannabis clubs which would consist of small to medium sized groups of private individuals who pool resources towards communal cultivation of cannabis and as a result, the products will be distributed internally to members of the club for personal consumption.

1.7 Traditional Growers should not be subjected to onerous licensing requirements, instead they should be "grandfathered" into the cannabis value chain through codified provisions. It is further proposed that a hybrid model be established which distinguishes between Traditional Growers subscribing to customary law and those residing closer to towns. It would therefore follow that Traditional Growers residing in Traditional/Administrative Authorities should self-regulate under the control of their Chieftain/Chieftainess, whereas Traditional Growers residing outside of Traditional/Administrative Authorities should be permitted to supply cannabis in a manner of their choosing.

1.8 That a cannabis regulatory framework should focus on redress measures and that past injustices should be corrected. A cannabis regulatory framework should involve measures that make provision for amnesty and expungement of records, commuting of sentences and/or circumscribed reparations for individuals that were persecuted and imprisoned for cannabis related crimes.

1.9 Having regard to Landrace cannabis, provision should be made for seed saving as well as the urgent collection and cataloguing of landrace cultivars. Provision should equally be made for the protection of intellectual property in relation to landrace cultivars. It is therefore proposed that an origin control system should be implemented to ensure proper global recognition of landrace cultivars and the communities who cultivate them.

2. Accordingly, the Report has crafted a fit for purpose cannabis regulatory framework for South Africa. It enables the rapid industrialisation and commercialisation of the cannabis economy in a manner which seeks to empower rural subsistence farmers and place them at the forefront of the development and growth of the cannabis industry.

VOTE OF THANKS AND ACKNOWLEDGEMENTS

3. We thank everyone for their assistance and input in the preparation of the Report. We appreciate the time, efforts, contributions and invaluable insight which ensured that the Report is comprehensive, researched-based and fit for purpose. More specifically, we would like to thank the following members of the Steering Committee:

3.1 Gareth Prince;

3.2 Paul-Michael Keichel;

3.3 Taryn Vos;

3.4 Andrew Lawrie; and

3.5 Kenzi Riboulet-Zemouli;

4. This Report was prepared by Webber Wentzel on the mandate of the ECRDA. The following individuals contributed in this regard:

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4.1.3 Mirren Sharp;

4.2 Ricky Stone (consultant);

4.3 **ECRDA**:

4.3.1 Nicholas Heinamann; and

4.3.2 Nokuphiwa Mbandezi.

1. Introduction

1.1 The regulation of cannabis is a complex undertaking that requires careful consideration from the outset to ensure that policy objectives are achieved in a manner that places health and human rights at the forefront over ideological and political desires.

1.2 The complexity is primarily attributed to the fact that cannabis has been widely used by humankind for millennia for a myriad of human and animal uses, ranging from traditional and cultural uses, medical and health uses, to industrial applications. Over a century of prohibition has not achieved any meaningful reduction in cannabis usage, and arguably, the use of cannabis (for consumption and industry) has increased particularly in recent years, although the ability to research the medical and other benefits of cannabis has largely been stymied due to global cannabis prohibition notwithstanding the allowances contained in the International Drug Control Conventions.

1.3 An added complexity involves the various attempts to regulate a plant as something other than an agricultural commodity, which cannabis undoubtedly is, and the arguably arbitrary distinction between “cannabis” and “hemp” revolving around the percentage of THC present in the germplasm (seeds, clones or tissue culture) and final cultivated product. The need to treat and regulate cannabis as an agricultural commodity is essential since it would open up access to agricultural support and inputs, crop insurance, and other entrenched support mechanisms of an enabling agricultural industry.

1.4 Notwithstanding the complexity involved in regulating cannabis, the exercise may be simplified by narrowing the purposes for which cannabis is used into “consumable cannabis” and “industrial cannabis”.

1.5 Consumable cannabis is cannabis ingested by humans (and animals) or applied topically (to humans and animals). It should attract differing regulations based on whether it is used in a medical or pharmaceutical setting versus a non-medical setting such as responsible adult use and traditional uses.

1.6 Industrial cannabis refers to cannabis used for industrial applications only and where industrial products are fashioned from cannabis biomass and fibre. A fit for purpose cannabis strategy for South Africa needs to cater for any type of cannabis plant being permitted to be used for either “consumable cannabis” or “industrial cannabis” without any focus on the arguably arbitrary THC percentages in the cannabis

germplasm or end products being used to distinguish between which type of cannabis may be used for which purpose. A cannabis farmer should be free to cultivate whichever variety of cannabis will achieve the desired end-use, be it consumable or industrial. However, if any THC thresholds are to be utilised in South Africa to distinguish between consumable and industrial cannabis, then such thresholds need to be evidence based.

1.7 Any attempt to regulate cannabis domestically to enable the rapid industrialisation and commercialisation of a new "sunrise industry" needs to strike a careful balance against South Africa's international law obligations. Too often, the need to reform cannabis laws and policy is avoided due to concerns around international commitments to the various International Drug Control Conventions. Notwithstanding such international law obligations, many jurisdictions (such as Canada, certain US States, Spain and Uruguay) have proceeded to regulate the full spectrum of cannabis across the medical and adult use markets indicating a radical shift away from arguably outdated international law instruments aimed at (unsuccessfully) eradicating the use of "drugs".

1.8 South Africa would, therefore, not be seen to be a global pariah by adopting large-scale cannabis reform provided a sensible approach is followed by taking the lead from those countries that have regulated cannabis across all platforms whilst still respecting the international instruments and their obligations towards them. We will outline the various options available to South Africa to achieve this outcome and have elected to do so through a separate annexure to avoid unnecessarily burdening this Report.

1.9 The global recognition of cannabis as an economic activator presents essential questions about how best to regulate legal markets for cannabis. This effort is challenging because robust illicit supply chains exist to satisfy the historical demand for cannabis. Thus, policymakers and regulators are faced with the challenge of:

1.9.1 establishing a legal market in an industry with which they are largely unfamiliar;

1.9.2 balancing the trade-offs between ensuring sufficient oversight and public safety;

1.9.3 generating public revenue through taxation; and

1.9.4 simultaneously creating a business environment in which legal suppliers are not just able to compete, but hopefully, are able to drive out illicit market suppliers. It is accepted that the success of a country's cannabis reform effort is directly proportional to the size of the existing illicit market.

1.10 Since regulatory and tax burdens increase production costs for legal operators relative to illicit market suppliers, these goals are often in conflict. Other jurisdictions have developed vastly different approaches when establishing their legal cannabis markets and balancing these competing objectives. No method has been perfect in totality, but these jurisdictions have experienced success to greater or lesser degrees within certain aspects of their regulatory frameworks. Thus, South Africa can learn from the best (and worst) practices explored by other jurisdictions to ensure that a fit for purpose regulatory framework is developed.

1.11 Ultimately, the intention is to arrive at a landing where cannabis is rationally regulated with limited barriers to entry and regulatory burdens (for the State and market participants alike), subject to certain exceptions, and where core governmental oversight and regulation enters at the points of processing and manufacture, and distribution and sale, with intended end use markets attracting differing regulation. This is likely preferable to simply regulating the entire value chain through licensing schemes which, with a few exceptions, is unlikely to be fit for purpose in the South African context.

1.12 The emphasis is therefore placed on treating cannabis as an agricultural commodity with differing regulation depending on the intended end-use markets. A departure from the arguably arbitrary THC thresholds (of between 0.2% to 1.0%) used to distinguish human consumption of cannabis from industrial uses is mooted as the only reasonable and practical mechanism to achieve broadly inclusive cannabis reform that will benefit rural subsistence cannabis farmers whilst protecting their indigenous cannabis genetics. Without such a departure, the effect would likely be that these indigenous farmers would be forced into a regulatory system with significant barriers to entry or into a space where the only mechanism to supply the industrial cannabis value chain is through the importation of foreign cannabis varieties or waiting a few years for South Africa to commercialise and multiply the low-THC varieties of its own industrial cannabis cultivars (in line with the arguably arbitrary THC limits) which have been bred by the Agricultural Research Council ("**ARC**"), notably SA Hemp 1 and SA Hemp 2.

1.13 As such, certain sections of this Report contain more substance than others, with the focus being on; providing initial comfort that South Africa can achieve cannabis reform which includes responsible adult usage and trade whilst honouring its international law obligations (as set out in our annexure); a mechanism to include traditional and small-scale cannabis farmers as the stronghold of the cannabis economy; and to encapsulate our thoughts on the various policy mechanisms which should be invoked to ensure policy coherence and achieve an enabling regulatory framework for cannabis in South Africa.

1.14 The content of this Report, encapsulating the conceptualisation, motivation and key provision for an enabling regulatory framework for cannabis, has been informed by our consultations with and mandate from the ECRDA, as well as our research on the best practices to regulate cannabis in a manner that is fit for purpose to the unique challenges presented in the South African context. We have also taken into account the comments and views of the Steering Committee and the constructive engagements in this regard.

1.15 On the basis of the various high-level issues discussed in this Report and associated research, coupled with the aforementioned constructive engagements we have also proposed a draft outline for a South African cannabis regulatory framework, which is annexed to this Report.

2. Qualifications and Limitations

2.1 The views and opinions expressed herein are given solely in connection with our mandate from the ECRDA, and solely for the benefit and information of the ECRDA and the Steering Committee members as identified and/or appointed by the ECRDA.

2.2 The views and opinions expressed herein and the regulatory framework proposed are based on and informed by, amongst others, extensive research, consideration and analysis of considerable documentation and information from both local and international sources (including policy documents, statutory instruments and relevant law), consultation with various role-players across the cannabis sector (both locally and internationally), as well as best practice in various industries and international jurisdictions. However, a specific Regulatory Impact Assessment ("**RIA**") or Socio-Economic Impact Assessment ("**SEIA**") has not been conducted in respect thereof and we recommend that an RIA and/or SEIA be conducted so as to assess the economic, social and environmental impacts, costs and benefits of the proposed regulatory framework prior to introduction thereof.

3. Overview and Note on Terminology

3.1 When drafting, evaluating and implementing cannabis reform policies, policymakers face many detailed choices, from specific agency authority to issues like licensing, tracking and testing. While certain of these details are often overlooked, they can mean the difference between success or failure of policy implementation. Most jurisdictions have stumbled and seen early hiccups in their regulated cannabis markets, which are lessons South Africa can draw from when crafting its own cannabis regulatory framework.

3.2 The Report proposes a framework for a well-regulated market for all uses of cannabis by establishing markets that can efficiently supply consumers and generate reliable tax revenue for Government. This Report does not examine every imaginable facet of regulating a cannabis market in detail. However, it will provide a broad overview of possible approaches in each significant aspect of a regulatory framework and recommend to policymakers the preferred approach within each of the major components of cannabis reform and regulation.

3.3 However, before addressing each policy component, it is important to be clear about the terminology used. Many jurisdictions use different terms or definitions when referring to cannabis, such as “marijuana”, “Indian hemp”, “hemp”, and locally “dagga”, and those differences must first be reconciled before an analysis of policy options can take place. We use the term “cannabis” throughout the remainder of this Report to specify the plant being regulated while attributing different meanings to the type of cannabis being used, such as medicinal cannabis, responsible adult use cannabis, craft cannabis, indigenous cannabis, industrial cannabis, amongst others.

4. Aims and Themes of Cannabis Regulation & underlying Policy or Conceptual considerations

4.1 At the outset it must be emphasised that any proposed cannabis regulatory model in South Africa must be fit for purpose. In other words, the regulatory model must incorporate and take cognisance of the following key pillars, which will inform the substance and content of the model:

4.1.1 Proportionality: The burden of rules and their enforcement should be proportionate to the benefits that are expected to result.

4.1.2 Certainty: The regulatory system should be predictable enough to provide certainty and be consistent with other policies, i.e., like cases must be treated alike (e.g., alcohol and tobacco regulation).

4.1.3 Flexibility: a system that should be capable of adopting least cost and innovative approaches to meeting legal obligations. This necessitates an underlying regulatory approach that is principles or performance based.

4.1.4 Durability: the system must be capable of evolving. This might mean that mechanisms are built in to reassess certain aspects when new information comes to hand.

4.1.5 Transparency & Accountability: rules development and enforcement should be transparent, i.e., regulators must be able to justify decisions and be subject to public scrutiny.

4.1.6 Capable Regulators: the regulator has the people and systems necessary to operate an efficient and effective regulatory regime.

4.1.7 Appropriate Weighting of Economic Objectives: economic objectives are given an appropriate weighting relative to other specified objectives, such as health, safety, or environmental protection.

4.2 Before considering what the precise content of a fit for purpose cannabis regulatory model should look like for South Africa, it is important to be clear about what the aims of cannabis policy and reform should be. It should furthermore be accepted that cannabis policy to date has primarily been driven by political and ideological agendas that have ignored scientific, public health and social policy norms.

4.3 As such and against this backdrop, our research has identified the following potential underlying policy considerations of an effective cannabis reform policy which should be considered for purposes of the South African context:

4.3.1 Rapid industrialisation of cannabis and facilitation of potential high-value cannabis value chain, particularly value chains relating to seed, bio-fuel and plastic, building, textiles, paper and medicine;

4.3.2 Protecting and improving public health and preventing any potential harms: By focussing on these aspects, any potential harms can be minimised and prevented against and the potential benefits maximised. After all, the essence of regulating cannabis is precisely to avoid the harms to consumers engaged in the illicit market whilst enabling a licit market that is safe and where consumers are educated on responsible cannabis use. In this respect, the "Scale of Harms" principle, i.e., the need to balance commercial interests and public health is indicative and should be utilised;

4.3.3 Balancing the risks of over-commercialisation while ensuring that sufficient provision is made for an enabling commercial environment together with the creation of industry and employment opportunities: This is necessary to prevent a scenario where corporate interests are advanced at the expense of public health due to industry manipulation, however at the same time, it is also necessary to promote economic development and empowerment;

4.3.4 Coherent approach to cannabis regulation and cannabis policy that is science and evidence based;

4.3.5 Not inadvertently doing more harm than is sought to be prevented;

4.3.6 Protecting the health and wellbeing of the young and vulnerable;

4.3.7 Reducing drug-related crime;

4.3.8 Promoting education and awareness around cannabis usage;

4.3.9 Protecting human rights;

4.3.10 Inclusivity;

4.3.11 Empowerment of traditional/small-scale farmers and acknowledgment of past injustices that must be redressed;

4.3.12 Conservation of landraces and associated traditional knowledge;

4.3.13 Addressing past injustices;

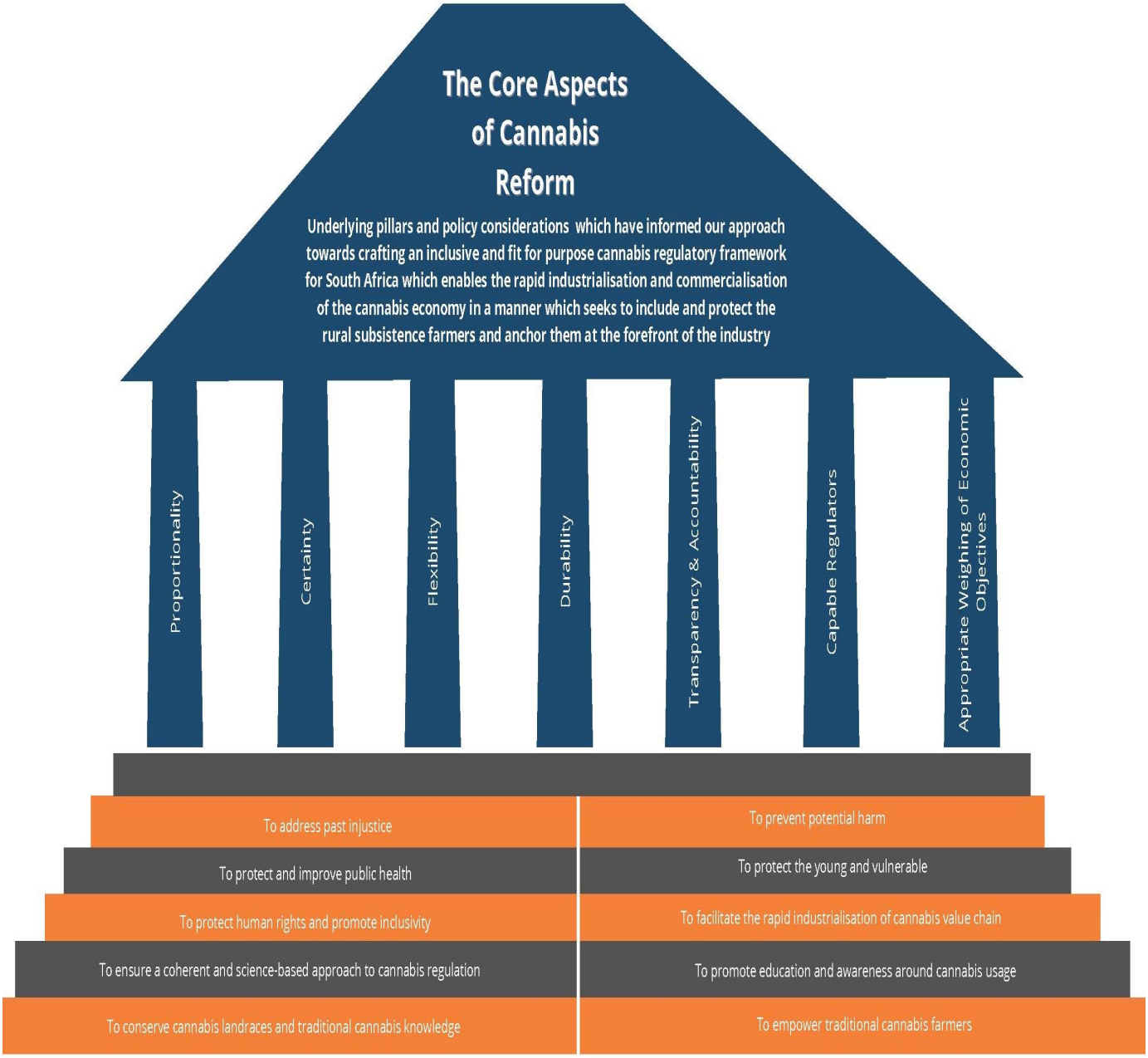
4.3.14 Improving security and development; and

4.3.15 Access to safe and quality assured products and providing good value for money to consumers of cannabis products.

4.4 Identification of underlying policy is essential for maintaining conceptual coherency within any proposed cannabis regulatory model and moreover facilitates fit for purpose regulation. In other words, if a robust policy framework is identified and put into place, this will allow for a principles-based approach to cannabis regulation, which in turn enables flexibility and unity within the system.

4.5 It ought to be borne in mind that any shift in policy direction contains an element of risk that will need monitoring as the policy is implemented and it is proposed that a comprehensive and properly resourced monitoring and evaluation framework should be built into any new policy from the outset. It will therefore be important that a clearly legislated review and reporting mechanism is developed, which will enable an evaluation against the key agreed outcome indicators.

4.6 Furthermore, commentary suggests that adopting a cautious approach to cannabis policy reform as a point of departure is appropriate. Thus, the regulation of cannabis, at least at the outset, should be more, rather than less, restrictive. Lessons learnt from trying to reverse-engineer alcohol and tobacco polices down the line is indicative in this regard due the resistance of the entrenched corporate interests. It is trite that it is far easier to relax and amend policy and legislation than to introduce more stringent measures once the policy has already been implemented.


The Core Aspects of Cannabis Reform
Underlying pillars and policy considerations which have informed our approach towards crafting an inclusive and fit for purpose cannabis regulatory framework for South Africa which enables the rapid industrialisation and commercialisation of the cannabis economy in a manner which seeks to include and protect the rural subsistence farmers and anchor them at the forefront of the industry
Proportionality
Certainty
Flexibility
Durability
Transparency & Accountability
Capable Regulators
Appropriate Weighing of Economic Objectives
To address past injustice
To prevent potential harm
To protect and improve public health
To protect the young and vulnerable
To protect human rights and promote inclusivity
To facilitate the rapid industrialisation of cannabis value chain
To ensure a coherent and science-based approach to cannabis regulation
To promote education and awareness around cannabis usage
To conserve cannabis landraces and traditional cannabis knowledge
To empower traditional cannabis farmers

5. International Law Obligations and Considerations

5.1 South Africa's international law obligations need to be properly understood before embarking on broadscale cannabis policy and legislative reform. In this regard, and to avoid unnecessarily burdening this Report, we have included separate annexures to provide the necessary comfort that South Africa can proceed to regulate the entire cannabis value chain without limiting reform to medical and research purposes only.

5.2 The annexures deal firstly; with South Africa's obligations in terms of the International Drug Control Conventions; secondly, with the protections and rights afforded to traditional and indigenous persons and communities under International Law; and thirdly, with the aspect of industrial cannabis in the context of the International Drug Control Conventions.

6. Administration

6.1 Form of cannabis regulation

6.1.1 At the outset it is necessary to consider whether the regulation of cannabis should be regulated by one central piece of legislation or whether it should be regulated via amendments to existing pieces of legislation.

6.1.2 Considering that South Africa has adopted a cooperative governance system and given that our legislative frameworks are interconnected and interdependent, it would be theoretically feasible to institute amendments to existing pieces of legislation in order to regulate cannabis. However, a successful approach in this regard would necessitate a seamless amendment process, with various pieces of legislation being amended simultaneously. However, this is unlikely to occur in practice. A case in point in this regard, are the recent amendments to the Schedules to the Medicines and Related Substances Act 101 of 1965 ("**Medicines Act**") which removed cannabis from Schedule 7, but which did not take place simultaneously with amendments to the Drugs and Drug Trafficking Act 140 of 1992 ("**Drugs Act**"); resulting in uncertainty as to the correct status of cannabis. It is likely therefore that amendments to existing pieces of legislation may result in further fragmentation of the industry, would likely be piecemeal and would be prone to legislative 'gaps'.

6.1.3 The advantage of a single piece of legislation on the other hand is likely an increased degree of coherency, as well as the facilitation of a more unified and holistic approach towards cannabis regulation. It is therefore recommended that any cannabis regulation takes place via a single piece of legislation, with appropriate cross-referencing to existing pieces of legislation for purposes of effecting any consequential amendments, for example, in order to delete or amend any necessary provisions currently contemplated by the Drugs Act as further discussed below.

6.2 Repeal and Amendment of Existing Legislation

6.2.1 Policymakers and legislators will need to amend and/or repeal provisions in other existing pieces of legislation in order to remove conflicts with any new cannabis regulatory regime in order to render it workable in practice.

6.2.2 This Report includes a table which sets out the various pieces of legislation which conceivably regulate cannabis in one form or another, with a view that those pieces of legislation be amended and/or repealed through appropriate enabling provisions contained in any new legislation. The purpose of suggesting amendments and/or repeals is confined solely to those provisions of existing legislation which are perceived to create obstacles to the policy and/or intended regulation of cannabis.

6.3 **Institutional Structures**

6.3.1 An important consideration when determining how cannabis reform policy should work in practice, is the need to decide whether a single regulatory agency or authority should be established to regulate all production and trade in cannabis, or whether it is preferable to have separate regulatory bodies, such as South African Health Products Regulatory Authority ("**SAHPRA**") , the Directorate of Foodstuffs, and the Agricultural Ministry, each responsible for regulating the specific categories of cannabis use.

6.3.2 It has been observed that in general terms, existing regulatory bodies are better able to assume new responsibilities in a judicious manner than entirely new agencies, which necessarily need to be designed from scratch. However, existing regulatory agencies may have obvious institutional biases that would affect the implementation process.

6.3.3 The best practice would naturally be to select the option with the most regulatory flexibility to ensure that cannabis reform is effective and achieves its stated policy objectives. This is so because the regulation of cannabis presents a number of unique challenges, particularly as the regulation thereof would likely involve various sectors and/or industries as well as their associated legislative and/or regulatory frameworks.

6.3.4 In this regard, there are potential implications from a licensing; quality control; security; and enforcement perspective, as well as considerations relating to tax, pricing controls, packaging, marketing and advertising, manufacture, production, distribution and sale. In addition, depending on the intended purpose or use of cannabis or cannabis product in question, there are several potential industries (and their associated legislative and/or regulatory regimes) that could become relevant. Thus, the question of whether there ought to be

a single piece of legislation regulating cannabis, or whether amendments should be effected to existing pieces of legislation, is a key consideration.

6.3.5 It is similarly necessary to consider what institutional structures may need to be established in order to address the aforementioned concerns and which institutions ought to be given the responsibility for decision-making, implementation and enforcement in this context, as some form of national-level entity or coordinating body with a cross-departmental brief may be required. This could involve cannabis regulation becoming a new responsibility for existing bodies, such as in Washington State, where regulatory decision-making has been delegated to the State Liquor Control Board, or become the responsibility of a new, dedicated agency or authority, as in the case of Uruguay where the legislation establishes an Institute for the Regulation and Control of Cannabis. The advantages and disadvantages of these approaches are outlined below.

6.3.6 In terms of the institutional structures that should be responsible for decision-making and regulation/administration of the cannabis regulatory framework, there are several potential courses of action.

6.3.7 **Cannabis Policy Council in conjunction with existing departments:**

6.3.7.1 A Cannabis Policy Council akin to the National Liquor Policy Council could be established. This Council would function as a forum for intergovernmental cooperation and would be responsible for consulting on: -

6.3.7.1.1 national norms and standards for the cannabis industry;

6.3.7.1.2 national policy in respect of the cannabis industry;

6.3.7.1.3 cannabis legislation or regulations, including the promotion of uniform national and provincial legislation in respect of cannabis norms and standards; and

6.3.7.1.4 any matter concerning the cannabis industry within the spheres of government.

6.3.7.2 The Council would promote and facilitate intergovernmental relations in relation to the cannabis industry and facilitate the settlement of intergovernmental disputes. In terms of the composition of the Council,

relevant Ministers could be appointed, such as the Ministers from the Department of Trade, Industry and Competition ("**DTIC**"); the Department of Agriculture, Land Reform and Rural Development ("**DALRRD**"); Department of Justice and Constitutional Development ("**DoJ**"); Department of Health ("**DoH**"); Department of Small Business Development ("**DSBD**") as well as Members of the Executive Council ("**MECs**"), Director-Generals ("**DGs**") and any other appropriate persons. Any existing ministerial advisory committee on cannabis could also ultimately transition into this body.

6.3.7.3 In theory, and if sufficiently empowered, the advantages of such a Council would be a reduction in 'red-tape' or unnecessary bureaucracy associated with a centralised cannabis agency or authority.

6.3.7.4 The disadvantages of this approach, however, would be that existing bodies, such as the DALRRD would be responsible for facilitating matters such as licensing or quality control etc., and it is not clear that such bodies would have the necessary resources or expertise to deal with this and might be driven by the prevailing political inclinations as opposed to furthering the goals of appropriate cannabis regulation. This approach may accordingly result in a fragmented or incoherent approach to cannabis regulation.

6.3.8 **Centralised Cannabis Regulatory Body:**

6.3.8.1 In terms of this approach a new body could be established specifically for the regulation and control of cannabis. This body would be responsible for the majority – if not all - aspects of cannabis regulation, including licensing, for example, along the lines of the Cannabis Licensing Authority which has been established in Jamaica.

6.3.8.2 The advantages of this approach are that it would likely result in a more coherent approach to cannabis regulation as it would be administered by one central body specifically geared towards cannabis regulation. Ideally, this body would have at its disposal the appropriate and necessary resources and expertise to properly fulfil its functions.

6.3.8.3 The disadvantages of this approach are that it would likely create further layers of 'red tape' and might be susceptible to the corrupt practices frequently seen in existing State-Owned Enterprises ("**SoEs**").

6.3.8.4 Notwithstanding the aforementioned potential disadvantages, it is likely that a centralised cannabis agency or body is preferable as opposed to relying on a number of bodies to regulate cannabis. Currently, South Africa's state departments are arguably somewhat disjointed. In order to avoid the fragmentation associated with this, a centralised cannabis body would be preferred. That being said, the interplay between such a body and existing departments and agencies would need to be carefully considered.

6.4 **Dispute Resolution Board**

6.4.1 It is recommended that a dispute resolution board, akin to the Financial Services Board, to handle cannabis-based disputes should be implemented alongside or incorporated within any cannabis institutional structure.

6.4.2 There are likely to be a myriad of practical issues relating to cannabis that will need to be dealt with and it is likely that an independent cannabis dispute resolution board is best placed to deal with such matters.

6.5 **Self-regulation**

It may be appropriate in certain contexts or in relation to certain cannabis applications that self-regulation take place alongside any state led regulation. For example, via co-operatives, hubs or social clubs.

6.6 **Substance versus Micro-Management**

6.6.1 We have observed that in most jurisdictions, the regulations governing commercial production and sales are highly prescriptive, including specific ratios to which licensees must adhere for testing of product, maintenance of seed-to-sale data, and other aspects of the supply chain.

6.6.2 It is submitted that the primary concern of the regulatory authority should be that commercial producers of cannabis adhere to the regulatory intent rather than follow a prescriptive formula. In other words, commercial producers should be given the autonomy to innovate, create new business models and discover different methods of satisfying regulatory intent. The legislation introduced in California to regulate their responsible adult use market is indicative in this regard as it provides this needed flexibility and room for innovation by including a reference within the law to the state’s Business and

Professions Code that requires all adopted regulations to be necessary to achieve statutory purposes based on the best available evidence.

6.6.3 It is therefore necessary to place an emphasis on cannabis product safety over prescriptive regulations which go beyond the intent of preventing any potential harm to consumers of cannabis.

6.7 **Criminal Reform, Expungement and Reparations**

6.7.1 It is necessary to include measures to correct the past injustices associated with the persecution and imprisonment of people for cannabis-related crimes which would no longer be crimes in any future cannabis regulatory framework.

6.7.2 Although the Cannabis for Private Purposes Bill makes provision for the expungement of charges and convictions for "use" and "possession" of cannabis, it falls short by failing to consider those persons who were charged and convicted for "dealing" in cannabis or who were found in possession of larger quantities of cannabis than now delineated in the Bill. It stands to reason as a foundational principle of equality of the law, that if cannabis is to be commercialised in South Africa, then those persons previously convicted of dealing (where no other violent or serious crimes were committed) should equally be eligible for expungement.

6.7.3 It is similarly necessary to assess the previous presumption (which has been declared unconstitutional[1]) that the possession of more than 115 grams of cannabis constituted dealing, without more, and how those persons would become eligible for expungement of their convictions and sentences.

6.7.4 Coupled with the aforementioned considerations is the part-heard matter of *Stobbs and Clarke vs National Director of Public Prosecution and Others* (which is currently pending in the North Gauteng High Court awaiting the direction of Government's cannabis policy and strategy) wherein a constitutional challenge has been mounted against all aspects of cannabis prohibition, including the trade therein. Plainly, if the Government does not make provision for the trade in cannabis (outside of the medical setting) then this matter would in all likelihood be set down and our courts faced with yet another challenge against cannabis prohibition. The effect of this could well be that in a few years' time, Government is again seized with crafting new

[1] S v Bhulwana, S v Gwadiso (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579.

legislation to cure further constitutional defects in the existing legislation. The need to take advantage of this policy window and introduce broadscale cannabis reform cannot be overstated lest South Africa will lag further behind even other African countries which are quickly entering the cannabis economy.

6.7.5 Importantly, consideration should also be given to potential reparations or other types of compensation (having due regard to the risks of casting the net of liability too wide) for those rural subsistence cannabis farmers of the *amaMpondo Nation* and rural Kwazulu-Natal who were subjected to two decades of aerial eradication by the South African Police Services using the herbicide, glyphosate, which has since been declared to be probably carcinogenic, in the attempt to eradicate rural cannabis fields.

7. Fiscal Management

7.1 Taxes

Globally and locally, many politicians and policymakers support cannabis reform due to the possible fiscal boon to State coffers. In particular, by formalising the existing illicit market, the State stands to benefit substantially. Policymakers need to recognise that regulated cannabis businesses will already be paying all standard business and sales taxes and sensibility when approaching additional types of taxes, if any, would need careful consideration. Regardless of any policymaker's desire for additional tax revenue, a cannabis reform effort should not cede market share to illicit market sources due to high prices on the legal market, as this would negatively affect both public revenues and safety.

8. Classification and Uses

8.1 Classification of Cannabis

8.1.1 A sound classification of cannabis and its derivatives is necessary and is essential to ensure policy coherence and enable an overall understanding by those tasked with regulating cannabis, and to those businesses, persons, and communities who intend participating in the cannabis economy.

8.1.2 To achieve policy coherence, it will be necessary to avoid distinguishing and categorising drug-type "cannabis" from fibre-type "cannabis" by utilising the word "hemp". The favourable approach is thus to refer to the botanical classification of cannabis as opposed to popular vernacular expressions. Therefore, cannabis which is intended to be used in industrial applications is better termed "industrial cannabis" or "cannabis used for industrial purposes".

8.1.3 A rational classification of cannabis would enable a scenario where the cannabis ordinarily used for human or animal consumption purposes can also be used for industrial cannabis purposes, particularly the fibre which remains after the cannabis plant material has been harvested and/or processed through extraction mechanisms, it being noted that tonnes upon tonnes of such fibre and other by-products from "medicinal cannabis" and "recreational cannabis" are discarded in the international cannabis industry. The only reason that this takes place is due to the arguably arbitrary THC thresholds which have been thrusted upon the cannabis plant. This should not be the

case and the full utility of the cannabis plant must therefore be encouraged and achieved to maximise the industrial and agro-processing value chains.

8.1.4 Furthermore, a sound classification of cannabis and its derivatives will provide clarity to regulators, patients, doctors and Traditional Healers, and consumers, thereby ensuring informative and accurate product labelling and the facilitation of broader cannabis education.

8.1.5 Although there exists a myriad of existing uses of cannabis in South Africa, it is sensible to compartmentalise these different uses into the following broad categories below, which will then serve to inform the level of regulation applied to each category.

8.1.6 At this juncture it is also necessary to emphasise, particularly on the basis of our engagements with the Steering Committee, that factually cannabis must be distinguished from alcohol and tobacco and for this reason, must also be distinguished on a conceptual level. Therefore, this Report does not treat these products as analogous and avoids unnecessary comparisons with such products.

8.1.7 **Medical, Health and Wellbeing Uses**

This category includes pharmaceutical or medicinal cannabis wherein cannabis is either used in its herbal form or extracted to formulate registerable medicines, in both cases pharmaceutical dossiers would be submitted to the SAHPRA before the cannabis medicines may be prescribed to patients. These cannabis medicines would include THC, cannabidiol ("**CBD**") and other cannabinoid preparations as scheduled in the Medicines Act together with "complementary medicines" (at this stage only low-dose CBD preparations are permitted) which are regulated under schedule 0 to the Medicines Act. A further sub-class would be the traditional health and wellbeing products ordinarily regulated in terms of legislation dealing with foodstuffs such as the Foodstuffs, Cosmetics, and Disinfectants Act 54 of 1972 ("**Foodstuffs Act**"). It may also be appropriate to regulate cannabis outside the framework of the existing Medicines Act.

8.1.8 **Responsible Adult Use / Adult Use**

The term Responsible Adult Use is preferrable to "recreational use" since many adult consumers of cannabis do so for more than pure recreational

purposes i.e., for self-medication and other personal health and wellbeing purposes. The emphasis is thus placed on ensuring that cannabis consumption by adults is done in a responsible manner and that consumers are educated as the risks of irresponsible use. However, it may also be more appropriate to adopt a more neutral approach to this type of cannabis use and refer to it simply as "Adult Use" as opposed to "Responsible Adult Use".

8.1.9 **Traditional, Indigenous, Cultural and Religious Use**

This category includes the indigenous and customary rights to use cannabis which are well entrenched in South African custom and culture. It would include “African Traditional Medicine”, other cultural practices which use cannabis (such as burning it as ceremonial incense), and the religious and sacramental use of cannabis by members of the Rastafari faith.

8.1.10 **Industrial Use**

The industrial applications of cannabis are vast, and due to ongoing research, further applications and uses are discovered as humans learn more about the profound ability of cannabis to replace non-renewable raw material sources. This category holds enormous potential to South Africa which we submit can only be realised by departing from the arguably arbitrary THC thresholds currently in force to distinguish industrial uses of cannabis from consumption uses.

8.2 For each of the aforementioned categories, it is necessary to clearly prescribe which uses are lawful and the type of regulation which should be applied to ensure that the broader policy objectives may be achieved.

9. Demand

9.1 Access to Safe and Quality Products

9.1.1 One of the most pertinent questions concerning cannabis reform, be it for medical, adult use purposes, or traditional, cultural and religious uses; is the method by which consumers will be able to purchase or otherwise procure the cannabis products they have the right to use, rights obtained either through existing legislative provisions (such as the Medicines Act) or through judicial pronouncement (such as the *Prince Judgment*) or through any future cannabis regulatory framework (which should propose mechanisms for the trade in cannabis across the identified categories).

9.1.2 In South Africa, as observed elsewhere in jurisdictions that have regulated medicinal cannabis, patients have the right to procure cannabis which doctors may prescribe to them. However, no specific means for patients to purchase these cannabis products exists commercially, with the Medicines Act only providing the Section 21 mechanism to access unregistered medicine (which medicinal cannabis is almost always imported) since SAHPRA has confirmed that no cannabis-derived pharmaceutical products have been registered (although certain applications are under assessment). These types of oversights therefore encourage patients to resort to the illicit market to purchase cannabis products, which many do, and it is therefore necessary to set out in a cannabis regulatory framework means of achieving the existing legislative intent from domestic supply sources.

9.1.3 In respect of responsible adult use/adult use, and traditional, cultural and religious uses, consumers similarly have a right to access cannabis pursuant to the *Prince Judgment* however they are only entitled to cultivate it themselves. This is problematic for those adult persons who desire using cannabis but have no means (space, time or skill) to cultivate their own cannabis.

9.1.4 A cannabis regulatory framework must therefore include provisions to authorise the commercial production and sale of cannabis products to adult consumers across the various consumption categories in a manner which ensures safety of the products and point-of-sale education on responsible consumption. It is also necessary to ensure that patients are able to access medicinal cannabis through mechanisms which appreciate that medical needs

are usually urgent (thus patients cannot be expected to wait for authorisation of “registrable medicines” submitted to SAHPRA or the finalisation of a Section 21 application in terms of the Medicines Act).

9.1.5 In respect of traditional, cultural, and religious uses of cannabis, we would caution against applying prescriptive conditions to those sectors since they have existed for many years in a safe environment with little to no harm to the users. Instead, a phased in approach may be adopted whereby these sectors are educated through necessary skills development programmes which are aimed at ensuring the ultimate safety of the cannabis products utilised within these sectors, and mechanisms are advanced for legitimising the existing trade of cannabis herbal preparations by Traditional Healers.

9.1.6 In respect of industrial cannabis, although product safety is never in question (since products are not ingested) it is clear that a significant local demand exists since South Africa is a net importer of industrial cannabis raw materials and many businesses manufacture products locally. We anticipate that local demand will increase substantially once an enabling regulatory framework for industrial cannabis production is legislated and as consumers and businesses move towards more conscious consumer behaviours in light of the challenges presented by the environmental crisis.

9.2 **Legal Public Consumption Opportunities**

9.2.1 Currently, there is a restriction on the legal consumption of cannabis by an adult which is confined to a “private place”. It is therefore necessary to consider best practice adult consumption places such as dispensaries, consumption lounges and the Cannabis Social Club model which operates on a non-profit basis, this model being widely accepted in other jurisdictions that have regulated adult use cannabis such as Spain, certain US States, and the existing trial of these “Clubs” underway in the European Union. These consumption opportunities would then be legislated and regulated in an appropriate manner which avoids the need for licences and focuses instead on the requirement of business registrations with the Companies and Intellectual Property Commission and a new cannabis agency or the nominated regulatory body (if not a new agency) and other statutory compliance aspects (such as taxation).

9.2.2 Traditional, cultural and religious users of cannabis should be permitted to continue observing their existing practices with little to no inference from Government provided basic prescripts concerning cannabis product safety are honoured.

10. Cultivation, Production and Supply

10.1 The demand for cannabis must necessarily be matched by reliable and consistent supply. Such production and supply channels should be appropriately regulated, with possible initial restrictions on commercial production volumes, to safeguard against a similar situation to that observed in Canada where there exists a glut of cannabis far exceeding the market demand. At the outset, it should be emphasised that production, and those responsible for production, should arguably form the heart of any cannabis regulatory model. Particularly, the empowerment of small-scale cannabis farmers is essential for a South African cannabis regulatory model and has the potential to stimulate economic growth and employment rates. A focus on production, appropriate regulation and minimum barriers to entry to facilitate the rural poor participating in the emerging value chain as well as to promote the empowerment of small-scale cannabis farmers will assist to ensure that South Africa's cannabis model is inclusive.

10.2 Due to the various categories of cannabis consumption users which exists in South Africa, separate regulatory provisions will be required to permit supply to each category of user (such as, Medical, Health and Wellbeing Users; Responsible Adult Users/Adult Users; and Traditional, Cultural and Religious Users).

10.3 It is anticipated that cultivation for the Medical Use market will attract the most onerous regulatory controls with licensing schemes, where appropriate, and the industrial market will attract the least regulatory oversight without the requirement for licencing. The markets in between (such as Responsible Adult Use/Adult Use and Traditional, Cultural and Religious Use) could entail a hybrid of self-regulation (in respect of Cannabis Social Clubs and Traditional Uses) and potentially licencing/permitting or simply notification and reporting requirements.

10.4 Our thoughts and recommendations in respect of cultivation, production and supply flow from an analysis of the existing licencing framework introduced through the Medicines Act. We therefore share those observations first before considering the other markets for which cannabis will need to be cultivated.

10.5 **Cannabis Cultivation falls outside of the scope of The Medicines Act**

10.5.1 CBD and THC are listed as Scheduled Substances under Schedules 4 and 6 respectively of the Medicines Act, while "cannabis" *per se* was recently de-scheduled with its recent removal from Schedule 7 of the Medicines Act.

10.5.2 Schedule 4 lists CBD, except:

10.5.2.1 in complementary medicines containing no more than 600 mg cannabidiol per sales pack, providing a maximum daily dose of 20 mg of CBD, and making a general health enhancement, health enhancement of relief of minor symptoms (low-risk) claim; (S0); or

10.5.2.2 processed products made from cannabis raw plant material intended for ingestion containing 0,0075 percent or less of CBD where only the naturally occurring quantity of cannabinoids found in the source material are contained in the product (S0).

10.5.3 Schedule 6 lists THC, except:

10.5.3.1 in raw plant material and processed products manufactured from such material, intended for industrial purposes and not for human or animal ingestion, containing 0,2 percent or less of THC;

10.5.3.2 processed products made from cannabis containing 0,001 percent or less of THC;

10.5.3.3 when raw plant material is cultivated, possessed, and consumed by an adult, in private for personal consumption.

10.5.4 *Prima facie* therefore, it appears that the Medicines Act places limitations and/or imposes controls in relation to the cannabis plant itself, notwithstanding its removal from Schedule 7 by virtue of controlling CBD and THC (which are present in cannabis plants) as Scheduled Substances.

10.5.5 That this is the case can particularly be inferred by the inclusion of paragraph 10.5.3.3 above – which would not have been included if the cannabis plant was capable of being freely used notwithstanding its THC content. It is submitted that these references, however, were included in the 2020 Amendment of the Medicines Act to align the Medicines Act with the *Prince Judgment* and to further ensure that industrial cannabis would fall outside of the Medicines Act.

10.5.6 Furthermore, it is trite that SAHPRA has sought to regulate the cultivation of cannabis seemingly empowered to do so by the provisions of the Medicines Act.

10.5.7 Arguably, however, the control of the cultivation of cannabis goes beyond the scope of the powers afforded to SAHPRA in terms of the Medicines Act, particularly since the removal of cannabis from Schedule 7, and upon a purposive interpretation of the Medicines Act.

10.5.8 While CBD and THC are regulated as a Scheduled Substances in terms of the Medicines Act, and while the Medicines Act is aimed at imposing controls in relation to Scheduled Substances, including for example, certain licensing requirements, limits on possession and use except under certain instances and so on, such controls on a proper construction of the Medicines Act arguably ought only to apply to the substances listed in the Schedules themselves and not to a plant which contains such substances.

10.5.9 By extension, the cultivation of the plant falls outside of the scope of the Medicines Act. Put differently, the Medicines Act (and SAHPRA) are only entitled to regulate CBD and THC once they have been extracted from the plant and are not entitled to regulate every aspect of the value chain relating to either THC or CBD, i.e., including cultivation, which is more appropriately dealt with as an agricultural commodity.

10.5.10 It is clear that the cultivation of cannabis (as a plant) falls outside the scope of the Medicines Act when considering the following points:

10.5.10.1 Notably, nowhere in the Medicines Act is the issue of the cultivation of cannabis as a plant dealt with (nor is the cultivation of any other plants from which medicines are manufactured included or regulated, such as opium poppy for example). However, aspects such as manufacture, production, distribution, sale and wholesale are dealt with in relation to medicines and Scheduled Substances. This provides a strong indication that cultivation *per se* was never envisaged to be dealt with via the Medicines Act regime.

10.5.10.2 In the preamble to the Medicines Act it is stated as follows: "*To provide for the registration of medicines and related substances intended for human and animal use…to provide for the control of medicines and scheduled substances…*" The majority of the preamble to the Medicines Act addresses issues relating to "medicines" and relates to administrative and/or institutional arrangements. The preamble does not speak at length to the control of scheduled substances and indeed

the only provisions contained therein are those above. It is clear from the above that the ambit of the Medicines Act is limited to "medicines" and substances related to medicines. The cultivation of cannabis in and of itself has nothing to do with medicines or related substances. It is only at the point of production, where the cultivated cannabis is used for medicinal purposes, or where either CBD or THC has been extracted therefrom (thereby triggering the operation of the Schedules) that the Medicines Act ought to find application.

10.5.10.3 In the Commentary to the 1971 Convention, which lists THC as a Schedule 1 Substance, it is made clear that notwithstanding THC's classification as a Scheduled Substance, the cultivation of the cannabis plant in its plant form falls outside the scope of the Convention. Arguably, the same reasoning should apply with equal force as regards the Medicines Act.

10.5.11 Although it is clear that the Minister of Health sought to introduce a medicinal cannabis cultivation regime through the provisions of the Medicines Act, it is arguable that the Medicines Act itself does not provide the necessary legislative authority to permit the regulation of cannabis cultivation by SAHPRA. We are thus of the view that SAHPRA's mandate in respect of cannabis which has been cultivated only finds application at the point of processing i.e., after harvesting and when cannabis-derived products will be manufactured. For this reason, any licencing of cannabis cultivation is better placed under either a new regulatory agency or DALRRD.

10.5.12 It is submitted that the quality control aspects introduced by the concepts of Good Manufacturing Practice ("**GMP**") only become relevant once the cultivated cannabis has been harvested. Self-evidently, GMP does not refer to cultivation practices but rather to manufacturing practices. The relevant standards mandated by Good Agricultural Practice ("**GAP**") and Good Agricultural Collection Practice ("**GACP**") should therefore be the maximum standards to which any cannabis intended for pharmaceutical purposes need abide by. GAP and GACP are well established within the agricultural sector and we submit that the regulation of all cannabis cultivation should therefore be viewed through an agricultural lens and regulated, and where necessary, regulated accordingly.

10.6 **Cannabis Germplasm**

10.6.1 The regulation of cannabis starting material such as seeds, clones or tissue culture is a complex matter due to concerns around the stability of cannabis seeds themselves (as opposed to clones or tissue culture) which might not necessarily fit neatly within existing agricultural certification schemes thereby rendering the registration of cannabis seeds challenging.

10.6.2 However, it takes considerable skill and effort to breed cannabis cultivars and those businesses and persons need a mechanism to seek intellectual property protection, be it through unique new legislative provisions or through existing legislation, such as the Plant Breeders Rights Act.

10.6.3 A core component of our mandate from the ECRDA includes investigating the steps which will need to be taken to protect the Landrace cultivars grown within the Eastern Cape, mainly, by the *amaMpondo* Nation in the Umzimvubu River Basin.

10.6.4 These Landrace cultivars offer tremendous genetic diversity which South Africa can utilise to breed cannabis cultivars which are adapted to our local conditions, and which importantly, offer drought resistance traits.

10.6.5 Aside from the well-established traditional uses of the Landrace, their potential use within the medical setting has received considerable attention in recent years from various researchers, most notably the University of the Free State ("**UFS**"), which demands urgent steps to preserve the Landraces before they are contaminated by foreign cannabis cultivars grown either for industrial or consumption purposes.

10.6.6 The UFS research on Landrace cannabis and its medicinal potential to patients with breast cancer and diabetes has established that "*The CBD-enriched variety of C. sativa found in South Africa may offer new hope for the regulation of insulin action on MAO-A- and IL-6/IL6Rregulated metastasis and angiogenesis in breast cancer of patients with diabetes…*"[2] Such groundbreaking research solidifies the urgent need to preserve the Landrace cultivars and explore their medicinal and industrial applications.

[2] Asis Bala and Motlalepula G. Matsabisa (2018) 'Possible importance of *Cannabis sativa* L. in regulation of insulin and IL-6R/MAO-A in cancer cell progression and migration of breast cancer patients with diabetes' *South African Journal of Science* pg 2.

10.6.7 In order to ensure conservation of the Landrace cultivars it would be necessary to:

10.6.7.1 Undertake the urgent collection and cataloguing of the Landrace cultivars by qualified researchers with the appropriate technology and cold-store chain to preserve the cultivar for further focused research and breeding purposes. Due to the understanding of the Landrace cultivars by various universities in South Africa, such as the University of Fort Hare ("**UFH**") and the UFS, it is submitted that the Department of Rural Development and Agrarian Reform should take the lead with this project in conjunction with UFH and ARC working closely with the Traditional Authorities in the *amaMpondo*. ARC already possess the resources to investigate cannabis cultivars and have notably concluded successful breeding projects in South Africa for industrial cannabis varieties such as SA Hemp 1 and SA Hemp 2.

10.6.7.2 Approach the conservation of the Landrace cultivars within the existing protections afforded to indigenous people through International Law instruments such as the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas ("**UNDROP**"), which led to the development of the Protection, Promotion, Development and Management of Indigenous Knowledge Act, 6 of 2019, ("**IKS Act**"). The IKS Act therefore presents the opportunity to register and protect the Landrace cultivars and the traditional cultivation practices as collective Intellectual Property ("**IP**").

10.6.7.3 Appreciate that the Counterfeit Goods Act and the Merchandise Marks Act already allow for the protection of community IP regarding "*traditional crops and genetic resources*".[3] The provisions of these Acts should be explored to commence with the process of protecting the collective IP on the Landrace cultivars while the cataloguing exercise is being conducted by UFS and ARC.

10.6.7.4 Consider the provisions of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization ("**Nagoya Protocol**") and to take steps to enforce the

[3] Van der Merwe (2008) 'Geographical Indication Protection in South Africa with particular reference to wines and the EU connection' *Journal for Juridical Science* pg 111-117.

Nagoya Protocol to recover compensation from known international cannabis seed companies who have exploited the Landrace cultivars for gain and to put a policy with appropriate regulations in place to enable access to the Landrace cultivars in a manner which results in fair and equitable benefits to the holders of the IP.

10.6.7.5 Ensure proper global recognition of the Landrace cultivars and the communities who cultivate them. In this regard, it is strongly recommended that South Africa accedes to the Geneva Act of the Lisbon Agreement on Appellations of Origins and Geographical Indications. By doing so, South Africa may take steps to ensure that not only are the Landrace cultivators protected in terms of International Law, but that brands and IP may be developed from such protections thereby positioning the communities into the global cannabis landscape.

10.7 Types of Cultivators and Producers

10.7.1 Private Use Producers

10.7.1.1 This type of cultivation is that permitted by the *Prince Judgment* where generally an adult person would annually produce the amount of cannabis required for his or her own consumption and for the consumption of members of their household. This type of cultivation will take place in a private place or space (such as a garden, greenhouse or indoor operation).

10.7.1.2 We note that the Cannabis for Private Purposes Bill intends to limit the number of cannabis plants an adult may cultivate which is seemingly intended to ensure that excess cannabis is not otherwise sold outside of personal consumption. Whilst there may be merit in setting a limit on the number of plants allowed for personal consumption, any such limits need to be evidence based and founded on a proper understanding of cannabis as a plant and the diversity which exists within the species. However, given that we recommend a move away from a prohibitive cannabis framework, it is likely preferable that there should be no plant limits and that instead other methods of control be utilised.

10.7.1.3 The primary consideration in relation to this aspect should in any event remain focused on the intention behind the personal use cultivation. For example, the juicing of cannabis is becoming increasingly popular due

to the health benefits thereof, and a person who cultivates cannabis for juicing purposes using the raw herbal material would be required to cultivate a greater number of cannabis plants than the person who only intends to smoke such cannabis. Similarly, many private use cultivators might manufacture their own cannabis tinctures and oils, which would equally require a greater number of cannabis plants.

10.7.2 **Small to Medium-Scale Producers**

10.7.2.1 These types of cultivators would ordinarily produce small to medium sized harvests of what is generally known as “craft cannabis”. This cannabis would be supplied to the adult use market and sold through dispensaries/consumption lounges/retail outlets.

10.7.2.2 A licencing scheme is likely not ideal to regulate such small-scale production and the focus should instead be placed on testing final products before they reach the end consumer together with reporting and notification requirements. One innovative mechanism that could be explored to regulate this segment of the cultivation chain is the concept of “Hubs” as introduced by civil society organisation, Fields of Green for All. Fields of Green for All proposed that "Hubs" are akin to community level cannabis agencies responsible for *inter alia,* quality control and certification that could act as an intermediary between certain cannabis growers and the retail market, should such growers wish to have their cannabis subjected to quality control measures.

10.7.2.3 Furthermore, many of these small-scale cultivators are those persons who have cultivated cannabis for many years during prohibition and they should be encouraged to participate in the legal value chain once an enabling regulatory framework is in place. Therefore, these small-scale cultivators likely need similar protections to those afforded to the traditional cannabis producers and we thus include this category of farmers within the section below which seeks to inform how small-scale and traditional cannabis producers could be protected in the emerging cannabis industry.

10.7.3 **Traditional Cannabis Producers/Rural Subsistence Farmers**

10.7.3.1 These cultivators are considered to be some of the most marginalised communities in South Africa who have been cultivating cannabis for

hundreds of years. For many, cannabis remains their only cash crop. Not only has the President remarked that they be included in the cannabis value chain but our mandate from the ECRDA and the Draft Cannabis Masterplan has as a core focus the inclusion of these farmers.

10.7.3.2 In the following section, we provide a comprehensive outlook on these traditional cultivators and set out initial policy considerations which might best serve to protect their interests and empower them as part of the cannabis value chain on a practical level.

10.7.4 **Industrial Cannabis Producers**

10.7.4.1 The cultivation of industrial cannabis is a sensitive topic in South Africa and one that needs an urgent solution to enable the rapid industrialisation of this sector. Research permits have been issued through the provisions of the Medicines Act to cultivate industrial cannabis for over two decades yet commercial cultivation is still not permitted. This situation is undesirable and South Africa is quickly lagging behind other African countries such as Malawi who are fast gaining momentum as a producer of industrial cannabis for domestic use and for export.

10.7.4.2 Some of the core challenges facing the industrial cannabis sector stem primarily from the arguably arbitrary THC thresholds used to determine which cultivars may be planted by farmers. Even in jurisdictions that have enabled an industrial cannabis sector and imposed THC thresholds, such as the USA through the Farm Bill, many thousands of hectares of crops have been destroyed due to what has been termed “THC creep” where the final crop tests out above the THC threshold of 0.3%.

10.7.4.3 To avoid such an untenable situation from ever arising in South Africa, a departure from the THC thresholds needs to be explored. It is therefore proposed that the focus should rather be placed on the intention of the farmer. If the farmers intention is to cultivate cannabis for industrial purposes, then he or she should be free to cultivate whichever cultivar of cannabis is best suited to their climatic conditions and which will provide the maximum crop yield.

10.7.4.4 A departure from the THC thresholds would equally enable the rural subsistence cannabis farmers to supply the industrial cannabis value chain with their Indigenous Landrace cannabis cultivars.

10.7.4.5 As mentioned in our introduction, if policymakers are determined to legislate THC thresholds to distinguish industrial cannabis from consumption cannabis, then any such thresholds need to be evidence-based. It is necessary to consider mechanisms to achieve a departure from such thresholds particularly to permit Landrace cannabis to be utilised for industrial purposes.

10.8 **Other Cultivation and Supply Requirements**

The following essential elements must be incorporated into the broader cannabis reform policy in respect of cultivation and supply such as:

10.8.1.1 the number of licenses and method of award; to the extent applicable;

10.8.1.2 application requirements;

10.8.1.3 carveouts, preferences and “grandfathering”;

10.8.1.4 licence terms, renewals, and transfer of ownership; to the extent applicable;

10.8.1.5 inventory tracking (seed-to-sale mechanisms of monitoring);

10.8.1.6 labour and staff;

10.8.1.7 local government control and retail location restrictions;

10.8.1.8 product testing; and

10.8.1.9 packaging and labelling of cannabis and cannabis-derived products.

11. Empowerment of small-scale cannabis farmers

11.1 In regulating the cannabis industry in the South African context, it is essential that such a framework is inclusive and seeks to empower traditional and small-scale cannabis farmers. As indicated above, it is essential in the South African context that the core focus of any regulatory model be on cannabis production. Not only is this necessary in order to acknowledge and to attempt to redress past injustices but it will also engender socio-economic development through increased licit trade in cannabis and the associated economic stimulus as well as job creation.

11.2 This need is reflected in South Africa's draft National Cannabis Master Plan, ("**SA Cannabis Master Plan**")[4] the purpose of which is *"…to provide a broad framework for the development and growth of the South African cannabis industry in order to contribute to economic development, job creation, inclusive participation, rural development and poverty alleviation.*"[5]

11.3 It is clear, therefore, that any South African cannabis regulatory framework must take into account, and focus on the empowerment of existing traditional and small-scale cannabis farmers, whose interests must be at the core of a cannabis framework. In order to do so, it is first necessary to consider and identify the specific current and historic challenges that small-scale farmers have and continue to encounter and to provide practical solutions to address such challenges.

11.4 In order to do so, this Report draws on the experiences of a number of similar jurisdictions, as well as having regard to relevant commentary on this subject, and the SA Cannabis Master Plan. This section thereafter summarises a number of policy considerations relevant to this discussion as regards traditional and small-scale cannabis farmers and practical mechanisms by which such farmers can be empowered through a cannabis regulatory framework.

11.5 Challenges faced by traditional and small-scale cannabis farmers

As indicated above, traditional and small-scale cannabis farmers currently and have historically faced numerous challenges that must be recognised and addressed in South Africa's cannabis regulatory framework. Currently, these challenges broadly relate to high barriers to entry for new entrants to the regulated cannabis industry; potential market capture of the cannabis industry by for-profit cannabis companies

[4] Draft National Cannabis Master Plan for South Africa, version 5 (2021).

[5] Draft National Cannabis Master Plan for South Africa, version 5 (2021) pg 4.

and the resultant exclusion of small-scale farmers from this industry and ancillary issues thereto; as well as the need to overcome the legacy of criminalisation and lack of recognition for traditional cannabis farmers. These challenges are discussed in more detail below with reference to the experiences of countries facing similar issues, as well as commentary on the subject.

11.5.1 **High barriers to entry**

11.5.1.1 The SA Cannabis Master Plan identifies that there are presently high barriers to entry into the cannabis market for new entrants; it stands to reason that this challenge is particularly acute in the context of traditional and small-scale cannabis farmers. In this regard, the SA Cannabis Master Plan states as follows:

"*Currently, the only route into the legal Cannabis trade in South Africa is by obtaining a South African [Health] Products Regulatory Authority license for medical marijuana. Nevertheless, for rural farmers, there are considerable barriers to entry, including an extensive list of quality control measures and infrastructure that need to be implemented, accompanied by prohibitive costs. It is estimated that the costs for setting up a facility to the requires licensing standards and prepare a license application would be as high as R6 million. The application fee alone is approximately R24 000. The current regulations also forbid anyone with a criminal record or any form of drug-related offence from applying for a license, which further restricts the number of small-scale growers.*

The current legislative framework allows permits to be issued only to those people or organisation who intend on undertaking research projects. No commercial permits are allowed at the current moment. Applicants are also required to pay application fees of about R900. They are also required to put up a 2 m high fence around their lands and ensure that the gates are locked for 24 hours. These measures are seen as creating high barriers to resource-poor farmers and companies that would like to enter and participate in the hemp industry."[6]

[6] Draft National Cannabis Master Plan for South Africa, version 5 (2021) pgs 18 - 19.

11.5.1.2 These challenges are also recognised by commentators on this subject, who also submit that those who attempt to transition out of illicit cannabis spaces, such as traditional and small-scale cannabis farmers, "*face huge difficulties due to a combination of the legacy of criminalization and legal and administrative barriers to entry*".[7]

11.5.1.3 It is accordingly essential that in crafting a cannabis regulatory framework that the barriers to entry for traditional and small-scale cannabis farmers in particular are lowered.

11.5.2 **Potential corporate capture and related issues**

11.5.2.1 Accompanying the recent policy shifts across the globe that have resulted not only in the proliferation of the medical cannabis market, as well as the increase in the number of countries moving towards the regulation of adult non-medical or recreational cannabis use,[8] is the growing concern that for-profit cannabis companies may compete to capture licit spaces now opening in the global cannabis market. This, according to commentators, constitutes a threat to traditional and small-scale cannabis farmers who are at risk of being excluded from the emerging cannabis markets, notwithstanding the fact that such farmers have supplied the illicit market for decades.[9]

11.5.2.2 The SA Cannabis Master Plan also recognises this risk and provides as follows in this regard:

"*There is a potential risk that big corporation with huge financial muscles are to dominate the new cannabis industry in South Africa. This scenario will lead to a situation in which smaller enterprises might be squeezed or even be taken out of the cannabis industry. The total dominance or takeover by big corporates remains one of the serious challenges for the new cannabis industry in this country. It is inevitable that there will be a few corporations which take over and take advantage*

[7] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 112.

[8] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 106.

[9] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 107.

of this industry. The global trend is that small-, medium- and large-sized cannabis businesses will be acquired by bigger companies unless they develop a dedicated target market. It will be important for government to use competition laws to deal with this challenge to create an inclusive cannabis industry.

Legalising cannabis will open opportunities to all interested stakeholders, including big business. The challenge for government will be how to avoid a situation where big corporation might try to dominate the whole dagga and hemp value chains at the expense of rural communities that have been growing these crops for hundreds of years. These communities have been suffering from arrests and imprisonment for years."[10]

11.5.2.3 The SA Cannabis Master Plan estimates that there are more than 900 000 small-scale (traditional) dagga farmers in the Eastern Cape and Kwazulu-Natal alone.[11] The cannabis industry regulatory framework must not overlook the needs of such farmers and instead seek to ensure that they benefit from and are empowered by the emerging cannabis market. [12]

11.5.2.4 It is further necessary to take cognisance of the fact that foreign investment opportunities are especially attractive in the global South and traditional cannabis countries, i.e., including South Africa[13] and this is also a priority of the current government. According to commentators, this interest can be attributed to *"…a combination of lower production costs, suitable cannabis plant varieties, possible medical cannabis export opportunities, and potential in-region consumer markets for both medical and recreational purposes…*"[14] For this reason, some commentators are of the view that controls ought to be placed on foreign

[10] SA Draft National Cannabis Master Plan for South Africa, version 5 (2021) pg 21.

[11] Draft National Cannabis Master Plan for South Africa, version 5 (2021) pg 17.

[12] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 107.

[13] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 111.

[14] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 111.

involvement in order to guard against corporate capture of the cannabis market.[15] For example, in Jamaica, foreign companies are required to have local partners who retain at least a majority control over a particular cannabis enterprise.[16]

11.5.2.5 Ultimately, therefore, in fashioning a cannabis regulatory framework in South Africa it is necessary to consider the extent to which controls should be placed on larger-scale corporate involvement in the cannabis space, and whether there ought to be regulation of foreign investment in the industry.

11.5.3 Insights from the CARICOM

11.5.3.1 As highlighted above, in identifying the potential challenges that traditional and small-scale cannabis farmers in South African currently – and may continue to – face, it is useful to consider whether any insights can be gleaned from the experiences of countries in similar circumstances.

11.5.3.2 This section accordingly considers the position of a number of countries in the Caribbean, i.e., Antiqua and Barbuda; Barbados; Belize; Jamaica; Saint Lucia; Saint Vincent and the Grenadines; and Trinidad and Tobago, which have also recognised the need to integrate and empower small-scale farmers into their regulated cannabis framework.

11.5.3.3 By way of background in this regard, in June 2018, the Caribbean Community ("**CARICOM**") Regional Commission on Marijuana prepared a report for the CARICOM heads of government ("**CARICOM Report**").[17] The CARICOM Commission was convened to interrogate the possible reform to the legal regimes regulating cannabis in CARICOM countries.[18]

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[15] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 112.

[16] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 113.

[17] CARICOM Regional Commission on Marijuana Report *Waiting to Exhale – Safeguarding our Future through Responsible Socio-Legal Policy on Marijuana* (2018).

[18] CARICOM Regional Commission on Marijuana Report *Waiting to Exhale – Safeguarding our Future through Responsible Socio-Legal Policy on Marijuana* (2018) pg v.

11.5.3.4 In terms of the CARICOM Report:

"*The evidence indicates that the existing legal prohibitionist regime on cannabis/marijuana is not fit for purpose. Both the financial and human costs are huge. The Commission is satisfied that there should be significant changes to the laws of the region to enable the dismantling of this regime to better serve Caribbean peoples. A public health / rights-based approach is better able to confront the challenging multidimensional parameters of the drug problem, including its health, social justice and citizen security aspects. Small farms and small businesspersons should be included in production and supply arrangements with appropriate controls limiting large enterprise and foreign involvement.*"[19]

(Emphasis supplied).

11.5.3.5 Following the CARICOM Report, the Fairtrade Cannabis Working Group prepared a position paper in relation to the emerging cannabis industry in the Caribbean and addressed small-scale farmers in this context.[20] The purpose of the position paper was to contribute to the debate on finding sustainable and realistic solutions to the challenges posed by the developing cannabis industry, with a particular focus on traditional and small-scale farmers.[21]

11.5.3.6 The position paper found that certain measures were aimed at small-scale farmers in the region, including for example: tiered licensing systems with lower costs for smaller cultivators; amnesty periods for certain licensees (i.e., traditional growers) with less onerous compliance requirements; quotas requiring certain licence holders to source a percentage of cannabis from small-scale producers; deferred payment or waiver schemes for the payment of license fees, however, that these measures were not sufficient to overcome all the challenges faced by

[19] CARICOM Regional Commission on Marijuana Report *Waiting to Exhale – Safeguarding our Future through Responsible Socio-Legal Policy on Marijuana* (2018) pg 66.

[20] Fairtrade Cannabis Working Group *Position Paper For Inclusive Business Models & Well-Designed Laws and Fair(er) Trade Options for Small-Scale Traditional Cannabis Famers* (2020).

[21] Fairtrade Cannabis Working Group *Position Paper For Inclusive Business Models & Well-Designed Laws and Fair(er) Trade Options for Small-Scale Traditional Cannabis Famers* (2020) pg 2.

small-scale farmers. In particular, the following issues were emphasised:

11.5.3.6.1 there was a pronounced difference in prices across the region, which undermined the ability for fair trade in cannabis;[22]

11.5.3.6.2 compliance with GAP and GMP standards, which are necessary for access to the international market, but which requires substantial resources, constituted a real challenge for small-scale farmers who did not have access to such resources;[23]

11.5.3.6.3 genetic varieties of cannabis indigenous to the region were at risk of being overtaken by foreign varieties;[24]

11.5.3.6.4 the lack of access to land and land titles for use for traditional cannabis cultivators which prevented the reform process in many countries;[25]

11.5.3.6.5 lack of unified research agenda and coordination on cannabis knowledge which resulted in information being scattered.[26]

11.5.4 After evaluating the existing legislative reforms on cannabis in the region and considering the potential for a sustainable and integrated model for cannabis in this region, the position paper outlined the following recommendations and conclusions as to how certain of the challenges experienced by small-scale farmers could be addressed, these included the following:

11.5.4.1 Traditional actors in the local cannabis markets in the region, i.e., farmers and intermediaries to be granted privileges and concessions as traditional cultivators to facilitate the transition from an illicit to a licit form of economic business;

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[22] Fairtrade Cannabis Working Group *Position Paper For Inclusive Business Models & Well-Designed Laws and Fair(er) Trade Options for Small-Scale Traditional Cannabis Famers* (2020) pg 11.

[23] Fairtrade Cannabis Working Group *Position Paper For Inclusive Business Models & Well-Designed Laws and Fair(er) Trade Options for Small-Scale Traditional Cannabis Famers* (2020) pg 11.

[24] Fairtrade Cannabis Working Group *Position Paper For Inclusive Business Models & Well-Designed Laws and Fair(er) Trade Options for Small-Scale Traditional Cannabis Famers* (2020) pg 11.

[25] Fairtrade Cannabis Working Group *Position Paper For Inclusive Business Models & Well-Designed Laws and Fair(er) Trade Options for Small-Scale Traditional Cannabis Famers* (2020) pg 12.

[26] Fairtrade Cannabis Working Group *Position Paper For Inclusive Business Models & Well-Designed Laws and Fair(er) Trade Options for Small-Scale Traditional Cannabis Famers* (2020) pg 12.

11.5.4.2 Legal recognition and legal definition of the 'traditional cannabis/ganja farmers';

11.5.4.3 Recognition and legal protection of traditionally known/grown areas of cannabis;

11.5.4.4 Further development of existing laws on drugs and cannabis and to make express provision therein for the privileges and concessions for traditional cannabis actors;

11.5.4.5 Cannabis legislation to be coherent and comprehensive and different departments, ministries and statutory bodies to adopt a harmonised approach to cannabis regulation;

11.5.4.6 Minimum prices to be set for the internal regional market to address the challenges posed by the different prices in the region;

11.5.4.7 An internal regional market to be facilitated to overcome the difficulties posed by abiding to GAP and GMP standards;

11.5.4.8 Cannabis to be regulated as other plants are, in order to ensure that farmers are able to access the ordinary benefits, concessions and subsidies provided for in the agriculture and manufacturing sectors;

11.5.4.9 Protection of local landraces that are at risk of being overtaken by foreign cannabis varieties;

11.5.4.10 The role of the traditional herbalist as a dispenser of medicinal cannabis to be recognised and recognition and regulation of herbalist paramedical use of cannabis;

11.5.4.11 Recognition of the traditional herbalist's intellectual property for the development of traditional treatment and medicinal-type products developed from cannabis;

11.5.4.12 Further scientific research in relation to cannabis to be undertaken and such research to be coherent and harmonised;

11.5.4.13 A fair-trade agenda in relation to cannabis to be developed;

11.5.4.14 A realistic, practical and affordable regime to be put in place to facilitate the processing and access to traditional medicines;

11.5.4.15 Farmers and foreign investors to be required to operate under a clear set of conditions allowing farmers to compete;

11.5.4.16 Facilitative security mechanisms to be put in place to assist traditional cultivators in properly securing their produce; and

11.5.4.17 Mechanisms to allow traditional farmers access to land to be considered.

11.5.5 **Fair(er) Trade Options for Emerging Legal Markets**

11.5.5.1 Various commentators affiliated with the Transnational Institute ("**TNI**") considered the challenges facing small-scale farmers including those as aforementioned and proposed a set of guiding principles and policy proposals upon which a more equitable, fair(er) trade cannabis regulation model could notionally be built.[27]

11.5.5.2 The TNI's policy comment argues that policymakers must grasp the opportunities afforded by the recent shifts in the cannabis market and help shape its growth and facilitate the movement out of illegality for cannabis growers. According to the commentators "*[m]oving beyond a set of minimum legal standards would pave the way for an approach that is fairer and more equitable than is currently the case within the nascent licit cannabis market*",[28] what the authors call a 'fair(er) trade cannabis model',[29] which is to be built around a rights-based, inclusive and environmentally sustainable approach to market engagement.

11.5.5.3 To this end, and drawing on the discussions of their policy comment and considering concerns such as those raised above, the authors proposed the following set of guiding principles and policy proposals upon which a 'fair(er)' trade cannabis can be built, including the following foundational principles:

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[27] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 106.

[28] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 108.

[29] David Bewley-Taylor, Martin Jelsma and Sylvia Kay, 'Cannabis Regulation and Development: Fair(er) Trade Options for Emerging Legal Markets' (2020) 12 *International Development Policy - Revue internationale de politique de développement* pg 108.

11.5.5.3.1 A commitment to solidarity and social justice, with initiatives going beyond pure profit and business making opportunities to integrate ethical concerns as a foundational part of the operation;

11.5.5.3.2 Producer empowerment and community benefit sharing through more equitable terms of trade, in which producers are not just seen as providers of raw materials but as value creators;

11.5.5.3.3 Environmental sustainability standards in relation to the use of energy, water and agricultural inputs;

11.5.5.3.4 Labour protections to ensure worker safety, health, and satisfaction;

11.5.5.3.5 Democratic control, participation and decision-making processes, through inclusive business models and systems of worker driven social responsibility;

11.5.5.3.6 Transparency and traceability in the operation of the cannabis market and supply chain; and

11.5.5.3.7 Longer-term strategies, with special attention placed on marginalized communities and rural areas in traditional producing countries.

11.5.6 **A Practical Approach to A Rights-Based and Inclusive Approach to Cannabis Regulation in South Africa**

Having regard to the above, this section proposes the following potential mechanisms aimed at the empowerment and recognition of traditional and small-scale cannabis farmers to be considered for use in a cannabis regulatory framework:

11.5.6.1 **Quotas**

The imposition of a quota system to require that a certain percentage of cannabis is sourced from small farmers. For example, in Colombia it is

necessary that companies in the medical cannabis market must obtain at least 10% of their cannabis from small growers.[30]

11.5.6.2 **Production ceilings**

Regulations on the maximum size of grow sites used to curtail corporate consolidation. For example, in California, cultivation sites are not permitted to exceed one acre until 2023.[31]

11.5.6.3 **Restrictions on foreign ownership and investment**

Restrictions regarding majority ownership by foreign persons and companies in licensed operations. For example, in Jamaica, domestic companies/producers must retain a minimum of 51% ownership. A complete moratorium on foreign investment can also be considered as part of a transition period to allow a domestic base to be developed before opening up the market to foreign entry and competition. Such a model has been implemented in Thailand.[32] In addition, restrictions on intellectual property rights over local cannabis strains and products may be imposed. Though, any such restrictions should not be overly onerous and should likely go no further than any existing restrictions in analogous scenarios.

11.5.6.4 **Minimum Pricing**

Producers are guaranteed a minimum price for delivery of cannabis so that growers can be assured of a specified income.[33]

11.5.6.5 **Licensing regulations**

Affirmative licensing laws which prioritises small and traditional growers and frontline communities. For example, Jamaica has introduced a

[30] Martin Jelsma, Tom Blickman, Sylvia Kay, Pien Metaal, Nicolás Martínez, Dania Putri, Transnational Institute *A Sustainable Future for Cannabis Farmers: 'Alternative Development' Opportunities in the Legal Cannabis Market* (2021) pg 72.

[31] Martin Jelsma, Tom Blickman, Sylvia Kay, Pien Metaal, Nicolás Martínez, Dania Putri, Transnational Institute *A Sustainable Future for Cannabis Farmers: 'Alternative Development' Opportunities in the Legal Cannabis Market* (2021) pg 72.

[32] Martin Jelsma, Tom Blickman, Sylvia Kay, Pien Metaal, Nicolás Martínez, Dania Putri, Transnational Institute *A Sustainable Future for Cannabis Farmers: 'Alternative Development' Opportunities in the Legal Cannabis Market* (2021) pg 72.

[33] Martin Jelsma, Tom Blickman, Sylvia Kay, Pien Metaal, Nicolás Martínez, Dania Putri, Transnational Institute *A Sustainable Future for Cannabis Farmers: 'Alternative Development' Opportunities in the Legal Cannabis Market* (2021) pg 72.

tiered licensing system for applications with different areas of land, licensing fees for small farmers are significantly less than for larger farms, and mechanisms exist to allow small farmers to postpone payment of licensing (and other) fees until after harvest.[34]

11.5.6.6 **Lower barriers to entry**

Lower barriers to entry for small and medium-sized producers from the perspective of administrative, compliance and security costs.

11.5.6.7 **Cooperative encouragement**

Cannabis growers should be encouraged and facilitated to organise and register themselves as cooperatives to pool resources and coordinate lobbying efforts and negotiations with governments and companies.

11.5.6.8 **Land reform programmes**

Land reform programmes should be established where cannabis growers do not have access to land or security of tenure, to the extent possible. Though, practically speaking this may not be feasible and would certainly pose a number of challenges.

11.5.6.9 **Amnesty and the expungement of criminal records**

Amnesty and the expungement of criminal records is necessary to facilitate cannabis growers to transition out of illegality and is essential for any South African cannabis regulatory framework.

11.5.6.10 **Cooperative laws**

Making use of cooperative laws and amending them where necessary to enable cannabis growers to register themselves as collecting bodies, which allows for the pooling of resources and risks. For example, Article 7 of Morocco's new proposed cannabis bill sets out eligibility criteria for licensed cannabis production, which stipulates those applicants must belong to a cooperative.

[34] Martin Jelsma, Tom Blickman, Sylvia Kay, Pien Metaal, Nicolás Martínez, Dania Putri, Transnational Institute *A Sustainable Future for Cannabis Farmers: 'Alternative Development' Opportunities in the Legal Cannabis Market* (2021) pg 72.

11.5.6.11 **Public cannabis research and development**

The establishment of cannabis seed banks, research stations and centres of excellence to collect information and further scientific knowledge on seeds, landraces, growing conditions, and medical benefits and uses. Focus should be on safeguarding of indigenous strains and native seeds. This should then be made available to cannabis growers to ensure their inclusion.

11.6 **Practical solutions to regulate industrial cannabis in South Africa to empower rural subsistence farmers in the industrial value-chain**

11.6.1 We have recommended that the cannabis reform efforts in South Africa need to explore a departure from the arguably arbitrary THC thresholds used to distinguish industrial cannabis from consumable cannabis. Currently, the THC thresholds are set between 0.2% (in the US and certain parts of Europe) to 1.0% (in Malawi, certain parts of Europe, and new proposals in the US). Any industrial cannabis crop which does not comply with the above thresholds is deemed to be consumable cannabis which cannot be used for industrial end use applications.

11.6.2 Independent third-party testing has confirmed that the majority of the Landrace cannabis cultivars grown in the Umzimvubu River Basin by the *amaMpondo* Nation contain between 5% - 10% THC. Many of these cultivars have developed drought resistance qualities which have added to the hardiness of the cultivar and its ability to serve industrial purposes. Due to the indigenous farming practices whereby as many seeds as possible are sown on the selected piece of arable land; the cultivar is currently grown in a similar manner to most industrial cannabis crops which are closely sown with no attention to removing male plants from the field.

11.6.3 Indeed, the cultural and traditional practices dictate that the seeds are used for nutritional purposes (and for the following seasons planting), the remaining fibre is used for animal bedding, and the leaf biomass as animal feed. The harvestable cannabis flower is used for traditional medicine and spiritual (ceremonial) purposes, and to supply the adult use market.

11.6.4 It is well established that the appeal of the Landrace cultivars, as currently cultivated, to the adult use sector is low to very low when sold in flower form and medium to high when sold as an extract (and used in tinctures or for

vaporization). It is important to appreciate that the demand for these cultivars has been impacted significantly by the *Prince Judgment* with the effect that many of the traditional cannabis farming communities have now been driven further into poverty.

11.6.5 Practical solutions to approaching the THC thresholds to ensure that the Landrace cultivars are capable of industrial application are mooted as a sensible means of incorporating the rural subsistence farmers into the cannabis value chain in a manner which is both beneficial to the industrialisation of the sector and to the upliftment of these indigenous farmers. Furthermore, finding this solution is deemed critical to preserving the Landrace cultivars and encouraging the continued cultivation of these genetically diverse varieties. The situation which transpired within Swaziland provides a cautionary tale to South Africa because the failure to protect the Swazi Landrace led to the decimation of the cultivar with a consequent loss of heritage and biodiversity. The traditional cannabis farmers in Swaziland started cultivating foreign cannabis cultivars due to the loss in adult use appeal of the native cultivar and the need to improve the bottom-line (the foreign varieties fetching more money per gram on the illicit market).

12. Industrial Cannabis

Evidence based solutions to approaching industrial cannabis in South Africa would include:

12.1 Intention of the Single Convention

12.1.1 The “distinction by purpose” principle contained in the Single Convention to distinguish industrial cannabis from consumable cannabis presents the opportunity to focus solely on the intention of the farmer when deciding on which cannabis cultivar is best suited to his or her agronomic conditions.

12.1.2 A practical solution would be to have commercial farmers notify DALRRD and/or a new cannabis agency or authority that they have elected to plant a specific variety of cannabis which will be used for industrial purposes only. No licensing or permitting is envisaged and a simple notification should suffice to record the intention of the farmer.

12.2 Identifying which cultivars may be planted Upstream

12.2.1 In this policy, farmers have the choice from a list of selected industrial cannabis cultivars, as used in Canada.[35] This list would only contain cultivars below a THC threshold of 1%.

12.2.2 If such a policy is adopted, it would be necessary to ensure that these cultivars are not planted in Landrace regions to avoid the inevitable genetic contamination which would ensue, and furthermore, to legislate steps to safeguard against the cross-pollination of existing cultivars being grown by SAHPRA licensed medicinal cultivators.

12.3 Identifying which cultivars may be planted Downstream

12.3.1 The farmer who cultivates industrial cannabis from cultivars not contained in the above list, would analyse their crops after harvest to validate whether they

[35] Government of Canada (2018) ‘List of Approved Cultivars from the 2019 Growing Sessions: Industrial Hemp Varieties Approved for Commercial Production’.

comply with the THC threshold (at whatever level it is set – see below on relative threshold). This is the policy position in the USA.[36]

12.3.2 It should be noted that the policy options contained in 12.2 and 12.3 can be used in conjunction as is the position in the European Union.

12.4 **Applying a "relative threshold"**

12.4.1 This principle is based on the relative threshold established by the United Nations Office on Drugs and Crime ("**UNODC**"). UNODC describes a "*simple way of distinguishing between drug-type and fibre-type Cannabis…using the ratio of the main cannabinoids THC, CBN and CBD.*" In this policy, the ratio is determined through a calculation whereby the percentage of THC and CBN is divided by the percentage of CBD, to determine whether a specific cultivar is "drug-type" or "fibre-type". If the ratio is greater than 1, then the cultivar is a "drug-type" and if it is below 1, then it is a "fibre-type".

12.5 **Introducing a dispensation for farmers of Landrace cannabis**

12.5.1 To allow traditional cannabis farmers the opportunity of supplying their cannabis fibre and biomass to the industrial sector, a dispensation and carveout may enable any such Landrace cannabis to be used for industrial purposes.

12.5.2 Practically, all that the farmer would be required to show is proof (in the form of a letter from the Traditional Authority) that he or she is resident within the indigenous cannabis cultivation regions and that the cannabis was farmed there.

[36] United States of America (2018) 'The Agricultural Improvement Act of 2018.

13. **Proposed Medicines Act and Cannabis Framework Interplay**

13.1 Lastly, it is necessary to broadly outline the manner in which any proposed cannabis regulatory framework can interact with the existing provisions of the Medicines Act, given that the Medicines Act has historically regulated cannabis and in light of the licenses awarded by SAHPRA in this regard. In particular, it is necessary to delineate what aspects of cannabis should likely be regulated in terms of a new cannabis regulatory framework and which should remain regulated by SAHPRA in terms of the Medicines Act.

13.2 The SAHPRA does not have the legislative authority to regulate cannabis cultivation for the reasons discussed above. As such, cultivation of cannabis should fall outside of SAHPRA's remit and should instead be regulated by a new cannabis regulatory authority or agency.

13.3 Existing cannabis cultivation license holders in terms of the Medicines Act should, however, not be prejudiced. As an interim position until a new cannabis regulatory authority or agency is established and functioning, SAHPRA should be entitled to continue issuing licenses but less onerous requirements should be imposed.

13.4 The manufacturing of cannabis-derived medicines (Western medicines, such as Sativex and Epidiolex) will continue to be regulated under the Medicines Act. In this regard, SAHPRA will continue to be responsible for issuing section 22C licenses to manufacturers and processors of cannabis (i.e. extraction) for registrable cannabis medicines.

13.5 For those persons wishing to enter into the medicinal cannabis market and the international export market, it will be necessary to comply with international benchmark standards such as GAP and GACP at the cultivation stage, and thereafter be sent to a section 22C SAHPRA facility for processing, testing, packaging, labelling and quality control.

13.6 Indigenous cannabis / smaller-scale producers can sell cannabis products to section 22C license holders that have the necessary testing and other protocols in place.

13.7 Further, incentives/requirements should be in place to ensure that section 22C license holders are required to purchase and sell indigenous cannabis / cannabis grown by smaller-scale growers.

13.8 The Medicines Act should be amended to include cannabis flower products via carve-in and blanket registration standard which could possibly be a framework, alternatively, this should make provisions for herbal cannabis in flower form, while CBD and THC to remain scheduled substances.

14. **Conclusion**

14.1 We have highlighted the core aspects of cannabis reform which have informed our approach towards crafting a fit for purpose cannabis regulatory framework for South Africa which enables the rapid industrialisation and commercialisation of the cannabis economy in a manner which seeks to include and protect the rural subsistence farmers and anchor them at the forefront of the industry.

14.2 Our instructive engagements with the Steering Committee and other relevant stakeholders have assisted us in preparing this Report which seeks absolute policy coherence and the activation of an enabling regulatory framework for cannabis in South Africa.

14.3 On the basis of this Report which proposed a number of high-level considerations for purposes of a South African cannabis regulatory model, as well as the research undertaken in this regard coupled with constructive engagements with the Steering Committee, the attached outline of a proposed cannabis regulatory framework is recommended.

Annexe A

Outline of a Proposed Cannabis Regulatory Framework

Objectives

The objectives of the framework will be set out here.

- Protect and improve public health;
- Prevent potential harm;
- Create opportunities for the creation of small and medium sized enterprises across the cannabis value chain;
- Promote local and domestic economic development;
- Facilitate the rapid development and industrialisation of the cannabis value chain;
- Establish and increase the manufacturing capacity of the South African cannabis industry;
- Ensure a coherent and science-based approach to cannabis regulation;
- Protect the young and vulnerable;
- Protect human rights. promote inclusivity and prevent disenfranchisement;
- Promote education and awareness around cannabis usage;
- Empower and support traditional cannabis farmers;
- Facilitate the entry of traditional cannabis farmers into the cannabis industry;
- Establish an inclusive, sustainable and globally competitive cannabis industry in South Africa;
- Foster access to safe and quality assured products to consumers of cannabis products;
- Address past injustices and protect against marginalisation of traditional cannabis farmers and cannabis growing communities and regions; and
- Conserve cannabis landraces and traditional cannabis knowledge.

Preamble

To address the history of cannabis in South Africa and the need for redress and other measures in respect of past injustices, as well as the need to empower traditional cannabis farmers and the need for development and rapid industrialisation of the cannabis value chain. To enable an inclusive, sustainable and globally competitive cannabis industry in South Africa to promote

local and domestic economic development. To establish a Cannabis Regulatory Authority to administer and facilitate the requirements of the regulatory framework and for matters connected therewith. To establish a Cannabis Dispute Resolution Board to assist and facilitate alternative dispute resolution relating to cannabis and cannabis products. To enable and facilitate the creation and promotion of small and medium sized enterprises across the cannabis value chain. The promotion, protection and improvement of public health, the prevention of any cannabis-related harms and promotion of education and awareness around cannabis usage and for matters connected therewith. The recognition and acknowledgement that the cannabis plant has been subjected to a century of stigma and propaganda and mischaracterisation as dangerous and having no medical benefit. The promotion of education and awareness of the cultural and heritage wealth of cannabis to South Africans. To promote compliance with the International Drug Control Conventions and South Africa's other international law obligations taking into account disenfranchised indigenous persons and communities and the imperatives in the Bill of Rights and Constitution, ***[this aspect is elaborated on in Annexe B to D to the Report.]***

Arrangement of sections

Numbered list of sections to be inserted here. For illustrative purposes:

1. Definitions and Interpretations
2. Application
3. Key regulatory roles and institutional arrangements
4. General provisions
5. Review
6. Repeal and amendment of laws
7. Transitional arrangements

[Further sections inserted as may be required]

Definitions and interpretation

Relevant definitions and interpretative provisions to be inserted. For illustrative purposes:

- "**Cannabis**" means …
- "**Cannabis Regulatory Authority**" means …
- "**Cannabis Club**" means …
- "**Landrace**" means …
- "**License**" means …
- "**Medicines Act**" means …

- "**Traditional Grower**" means …

Application

Relevant application provisions to be inserted with reference to the geographical area to which the proposed regulatory framework will apply.

Key regulatory roles & Institutional Arrangements

This section will speak to the details of the Cannabis Regulatory Authority and other institutional structures, together with their objectives, functions and roles and responsibilities, as well as any key principles in terms of which the Cannabis Regulatory Authority will operate. It may specify the qualifications and attributes that members appointed to the Cannabis Regulatory Authority must have among them and who will be involved in the planning and ongoing governance of the regime.

From a coherency perspective and in order to avoid fragmentation within the cannabis industry, it is recommended that a single Cannabis Regulatory Authority be established to administer relevant cannabis-related matters together with an advisory committee comprised of members with relevant and necessary expertise/experience. It is also recommended that a cannabis dispute resolution board be established within the Cannabis Regulatory Authority in order to administer cannabis-related disputes, akin to the Financial Services Board.

Cannabis Regulatory Authority

- Cannabis Regulatory Authority to be established and main objectives of the Cannabis Regulatory Authority to be detailed, and to be broadly aligned with the objectives of the regulatory framework:
    - Administration and regulation of cannabis and cannabis-related matters;
    - Protecting and improving public health;
    - Preventing potential harm;
    - Promotion of local and domestic economic development in the cannabis industry;
    - Facilitating the development and rapid industrialisation of cannabis value chain;
    - Ensuring a coherent and science-based approach to cannabis regulation;
    - Protecting the young and vulnerable;
    - Protecting human rights, promoting inclusivity and prevention of disenfranchisement;
    - Promoting education and awareness around cannabis usage;
    - Establishing measures for empowerment and support of traditional cannabis farmers;
    - Facilitating the entry of traditional cannabis farmers into the cannabis industry;

- Fostering access to safe and quality products to consumers of cannabis products;
- Addressing past injustices and protect against marginalisation of traditional cannabis farmers and cannabis growing communities and regions; and
- Conservation of landraces and traditional cannabis knowledge.

- Functions of Cannabis Regulatory Authority to be detailed:
  - The Cannabis Regulatory Authority will co-operate with any other agencies or entities to perform its functions, including (without limitation) the following:
    - Licensing and authorising any controlled activities in terms of this framework;
    - Setting the criteria and conditions applicable to licenses and authorisations for controlled activities;
    - Monitoring and enforcing compliance with license and authorisations conditions and criteria;
    - Administering any appeals from decisions of functionaries of the Cannabis Regulatory Authority;
    - Developing good practice guidelines for individuals and cultivators who choose to grow cannabis and appropriate quality control measures;
    - Conducting public education campaigns and raising public awareness around, amongst others, responsible cannabis usage and the content of the regulatory framework;
    - Collecting and analysing data in relation to notification and reporting requirements regarding the dynamics of the supply and demand for, and use of, cannabis;
    - Promoting and supporting cannabis research in order to inform evidence and science-based approaches to regulating cannabis; and
    - Fiscal and other administrative matters.
  - Cannabis Regulatory Authority to prepare and publish national plans:
    - The Cannabis Regulatory Authority must prepare and publish national plans that specify how it will give effect to its objectives, that must be reviewed and updated periodically.
    - The Cannabis Advisory Committee must be consulted when developing the national plans.
    - The Cannabis Regulatory Authority must provide regular reports on the national plans.

Cannabis Advisory Committee

- Main objectives, functions and constitution of Cannabis Advisory Committee to be detailed. For example:
- The Cannabis Advisory Committee to consist of:
    - Individuals with expertise in relevant areas/sectors;
    - The relevant cabinet members (or the person to whom such authority has been delegated) responsible in the national sphere of government for: health; trade and industry, small business development, justice and agriculture; and
    - A Member of Executive Council (or the person or relevant functionary to whom such authority has been delegated) responsible for cannabis in a province.
- The Cannabis Advisory Committee's functions are to advise and consult on:
    - National plans, norms, standards and policy for the cannabis industry;
    - Matters referred to it by a member of the Committee; and
    - Any matter concerning management, monitoring and certification in the cannabis industry.

Cannabis Dispute Resolution Board

- Main objectives of Cannabis Dispute Resolution Board to be detailed.
- The Cannabis Dispute Resolution Board, which is a part of the Cannabis Regulatory Authority, is responsible for administering and adjudicating disputes relating to cannabis and cannabis products.
- Functions of Cannabis Dispute Resolution Board to be detailed.
- Powers and authority of Cannabis Dispute Resolution Board to be detailed.

Cannabis Cultivation

This section will address cannabis cultivation and stipulate the relevant reporting and notification requirements. The rationale for this provision is that (i) the regulatory burden should not be placed on cannabis farmers and is more appropriately and feasibly placed elsewhere, such as on manufacturers, processors, and retailers; (ii) Particularly in relation to existing small-scale / Informal economy (i.e., African informal economic sector) types of cultivators, many of whom may not have the requisite access to electricity, cellphones, computers, and even motor vehicles, it is accordingly not practical to impose licensing requirements as it is unlikely that those involved in these spaces will subject themselves to such regulatory burdens; (iii) Potential harms in relation to cannabis can be dealt with by other measures such as quality control and testing at the retail stage and not at the cultivation stage; (iv) Insofar as licensing is concerned, the international drugs conventions only apply to medicinal cannabis and not other types of cannabis.

- Cannabis cultivation falls outside of the scope of the Medicines Act.

- No licensing required for any cannabis cultivation *per se*.

- Reporting and notification requirements are necessary for those growing cannabis for non-medical and non-scientific purposes in order to remain compliant with international drugs control conventions.

Testing facilities

This section will address cannabis and cannabis products testing facilities. It is desirable that cannabis and cannabis products be tested before being made available for retail. However, producer and/or retailers of cannabis and cannabis products to retain discretion in relation to quality control and testing. It is envisaged that a hub-model for testing/grading/quality control be used, though other standard testing mechanisms/procedures can also be used. Hubs are also permitted to purchase cannabis grown by producers which may assist in integrating smaller-scale and informal economy type cultivators into the commercial space. Hubs can be privately run and provision must also be made for state-run hubs in order to ensure sufficient access. It is envisaged that public-private partnerships in this sector would likely be useful.

- Producers and/or retailers of cannabis or cannabis products to have discretion in relation to testing and quality control of cannabis and cannabis products before retail.

- Hubs to offer testing facilities and to provide grading of cannabis and cannabis related products and quality control.

- Hubs to be able to purchase cannabis grown by producers.

- Hubs to adhere to reporting and notification requirements.

Retail

It is desirable that all cannabis and cannabis products be subjected to quality control/testing/grading before being made available for retail. However, producers and/or retailers will retain the discretion in relation to such testing. This will include those in the informal economy supply chain who will not be subjected to regulatory requirements in this regard and can opt-in to quality control and testing measures. If cannabis or cannabis products are sold without having undergone such testing measures, a warning to this effect must be placed on packaging and consumers will rely on ordinary redress measures provided for in the Consumer Protection Act or law of delict or contract. This will cross-refer to the provision on licensing. It is envisaged that retailers are licensed and must comply with certain licensing provisions, such as trading hours etc.

- Consumption lounges, dispensaries and other retailers to be licensed and must also comply with reporting and notification requirements.

- Purpose of consumption premises is to offer a safe space for a person to consume cannabis.

- Restrictions on employment at consumption lounges to be detailed, for example must be an adult person.

- Retailers to bear the burden of ensuring that cannabis and cannabis products are tested. Retailers should also be obligated to educate cannabis consumers on responsible usage including less harmful modes of consumption, such as vaporization.

- Generally, hub-tested cannabis or cannabis tested via other means to be available via retail market. If cannabis or cannabis products are made available to the retail market without having been tested, appropriate warnings to this effect must be placed on the packaging of such products. Consumers to accept any risk associated with making use of such products and can rely on ordinary redress measures in terms of the Consumer Protection Act, delictual or contractual liability, for example.

Cannabis Club

This section will contain provisions regarding cannabis clubs.

- Small- to medium-sized groups of private individuals pooling resources towards communal cultivation of cannabis, in terms of which the products will be distributed internally to members of the cannabis club for personal consumption.

- The members of the cannabis club will be required to register and establish a governing body.

- Supply will follow the demand – the members are required to state requirements upon joining and the supply will be contingent on this.

- No distribution will be permitted outside of the co-operative/club.

- There will be a club membership subscription, including internal reviews within the co-operative or club.

- External reviews will be conducted by the cannabis regulatory agency as well as reporting requirements to cannabis regulatory agency will have to be in place.

Processing

This section will address cannabis processing and related matters. It is envisaged that there will be some degree of regulatory oversight at the processing stage and adherence to any ISO (International Organization for Standardization) standards applicable to the processing industries. This will cross-refer to the provision on licensing.

- Processing facilities to be licensed.

Cannabis Products

*This section will address the regulation of cannabis products specifically. It is envisaged that cannabis products that fall within the definitions of foodstuffs or cosmetics will be regulated by the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 ("**Foodstuffs and Cosmetics Act**"). However, to the extent that cannabis products contain THC levels above a certain threshold*

they will need to comply with requirements in terms of this framework. This may need to cross-refer to the provision on licensing to the extent necessary.

- Cannabis products that are foodstuffs or cosmetics will be dealt with in terms of the Foodstuffs and Cosmetics Act, subject to certain THC thresholds above which products will be dealt with in terms of this framework.

- THC threshold to be stipulated by Cannabis Regulatory Authority. This THC threshold must be science and evidence based and not arbitrary.

- Requirements in relation to products with THC content above the threshold to be stipulated, subjected to quality control measures and tested for safety and only to be sold via licensed retailers and/or consumption premises.

Importation & Exportation

This section will address importation and exportation requirements and restrictions to the extent necessary. This section will cross-refer to the provision on licensing to the extent necessary. Exportation should not generally be restricted; however, relevant stakeholders should be encouraged to first supply the domestic market. Restrictions to be placed on the importation of seeds into South Africa and some sort of import permit and/or authorisation ought to be required. This could potentially be deferred to existing institutional structures that deal with importation of plant seeds. The importation of cannabis flower should be subject to approval by the Cannabis Regulatory Authority.

- Importation of seeds: subject to approval by the Cannabis Regulatory Authority and/or existing appropriate institutional structures.

- Importation of plant material:

    - the importation of cannabis flower/products would be subject to approval by the Cannabis Regulatory Authority; and

- Exportation: quota system to be implemented to ensure that a certain percentage of cannabis is sourced from small farmers.

- No restrictions on exportations *per se.*

Licensing Requirements

This section will outline broadly the various controlled activities that are required to be licensed. Other provisions will cross-refer to this section to the extent necessary and this section will cross-refer to the license applications provision below.

- Processing of cannabis: licensed together with reporting and notification requirements.

- Retailing of cannabis and cannabis products: licensed together with reporting and notification requirements.

- Operating of cannabis consumption premises: licensed.

- Importation.

- Exportation.

- Foster and encourage resource pooling and forming of cooperatives by offering incentives/reduced requirements.

License Applications

This section will prescribe the process to be followed in relation to licensing. It is envisaged that the relevant Minister, as the case may be, will make regulations in relation to license procedures and requirements. This will cross-refer to the provision on regulations. It is also necessary to detail the considerations that the Cannabis Regulatory Authority should take into account in processing license applications, which must not be unduly onerous.

- Application to be made to the Cannabis Regulatory Authority in a form and manner to be prescribed via regulation and to be accompanied by any particulars, information, documents, or other material required by the Cannabis Regulatory Authority and prescribed in the regulations together with the prescribed fee.

- Considerations relevant for considering license application to be detailed, including (to the extent relevant):

    - the purpose of this framework and objectives of the Cannabis Regulatory Authority;

    - trading hours and days (in respect of retailers, dispensaries, consumption premises etc.);

    - design and layout of any proposed premises (in respect of retailers, dispensaries, consumption premises etc.);

    - whether the premises are within a certain distance of schools, for example.

- Restrictions in regard to the majority ownership by foreign persons and companies in the licensed operations.

- Introduction of production ceilings where appropriate.

Reporting & Notification Requirements

This section will outline broadly the various activities that are required to adhere to reporting and notification requirements. The procedure for reporting and notification requirements will be detailed. Other provisions will cross-refer to this section to the extent necessary.

- Cultivation: no licensing requirements imposed, only reporting and notification requirements.

- Processing of cannabis: licensed together with reporting and notification requirements.

- Retailing of cannabis and cannabis products: licensed together with reporting and notification requirements.

- Operating of cannabis consumption premises: licensed together with reporting and notification requirements.

- Conducting research on cannabis, cannabis products, and fresh cannabis: Reporting and notification requirements.

Industrial Cannabis

This section will contain provisions relevant to industrial cannabis.

- No licenses required for cultivation for industrial purposes, only reporting and notification requirements.

- Provision to be made for importation of specific varieties.

- A quota system to be implemented to ensure that a certain percentage of cannabis is sourced from small farmers.

- A move away from arbitrary THC thresholds is required. Though, a hybrid approach could be followed,

- Identifying and stipulating guidelines in relation to which cultivars may be planted Upstream and Downstream.

- Applying a “relative threshold” to differentiate between "drug type" and "fibre type" cultivars.

- Introducing a dispensation for farmers of landrace cannabis to ensure that farmers have sufficient access to the industrial sector.

- Introducing minimum pricing so as to assure specified income to growers.

Traditional Growers

This section will deal with the integration of Traditional Growers into the cannabis value chain. It will encompass a hybrid regulatory model which is alive to the realities of Traditional Growers and which acknowledges the plural legal system applicable in Traditional Growing Regions.

- No licensing requirements applicable to Traditional Growers who will be “grandfathered” into the cannabis value chain through codified provisions.

- Many Traditional Growers subscribe to this uncodified legal system under authority of their respective Traditional/Administrative Authority.

- Mechanism to establish a hybrid-model for Traditional Growers to distinguish between those Traditional Growers subscribing to customary law versus those residing closer to towns and cities.

- Traditional Growers residing in Traditional/Administrative Authority shall self-regulate under control of Chieftain/Chieftainess.

- Cannabis Regulatory Authority to utilise Private Sector / Public-Private-Partnerships to establish processing facilities in each Traditional Authority as a central collection and control point for Traditional Growers.

- Traditional/Administrative Authority to notify and report cultivation volumes of dry cannabis per annum to the Cannabis Regulatory Authority. Provision to opt-in, apply for exemption from reporting requirements under certain conditions (such as lack of resources), and/or the adoption of a phased in approach towards notification and reporting.

- Traditional Growers residing outside of Traditional/Administrative Authority to be permitted to supply cannabis to a Hub or a Traditional/Administrative Authority of their choice, whom shall include such volumes of cannabis in any reporting or notification procedure.

- Cannabis Regulatory Authority to develop a Rural Good Agricultural Practice ("**rGAP**") and a Rural Good Agricultural Collection Practice ("**rGACP**") in conjunction with SABS to permit Traditional Growers to benefit from skills-transfer and industry best practices thereby participating in the export market for cannabis flower in future.

- All Traditional Growers of landrace cannabis to be entitled to supply the industrial components of such cannabis, such as seeds, fibre, hurd, roots, and stalk, to Agro-processing Hubs located in the relevant region notwithstanding the THC levels present in such landrace cannabis.

Conservation of Landrace Cannabis

- Seed saving permitted.

- Undertake urgent collection and cataloguing of landrace cultivars.

- Provision to be made for protection of intellectual property in relation to landrace cultivars.

- Origin control system to be implemented to ensure proper global recognition of landrace cultivars and the communities who cultivate them:

    - origin play an important factor in the character and quality of cannabis / cannabis product and serves to protect both cultivator and consumer.

    - demarcation of cannabis origin to be according to geographical unit such as specific region or district.

    - certification requirements to be introduced.

Marketing, Advertising & Promotion

This section will deal with advertising of cannabis products, the content of which can lean on similar provisions imposed in terms of alcohol regulatory regimes insofar as advertising is concerned, which are broadly speaking, restrictions on advertising times and exposure. This

section will aim to limit the public visibility and exposure to cannabis, particularly in relation to young people. It is envisaged that the relevant Minister, as the case may be, will make regulations in relation to marketing, advertising and promotion of cannabis. This will cross-refer to the provision on regulations.

- Provision to be made for measures in relation to the marketing, advertisement and promotion of cannabis that will stipulate appropriate controls together with any requirements in relation to packaging.

- Raise public awareness of:

    - the cannabis plant having been incorrectly subjected to a century of stigma and propaganda and mischaracterisation as dangerous with no medical benefit.

    - the cultural and heritage wealth of cannabis to South Africans.

    - the harms associated with irresponsible cannabis usage by requiring appropriate and science-based messages and warnings to be displayed on, or included with, certain packages containing cannabis products.

Inspectors

This section will deal with the designation / authorisation of inspectors to monitor and enforce compliance with the provisions and requirement of this framework.

- Inspectors to be designated / authorised by the Cannabis Regulatory Authority.

- Inspectors to be issued with a certificate confirming their designation / authorisation in terms of the framework.

- Inspectors to have powers of entry (including under authority of a warrant following application to a Magistrate, if necessary), inspection, seizure and taking of samples for testing, examination or analysis.

Offences & Administrative Fines

This section will detail offences under the framework together with appropriate administrative fines. Generally speaking, offences should be civil and not rooted in criminal law. It is an important principle in this context that any consequences should not generate more harm than would follow as a result of the commission of the act in question.

- Smoking in public places.

- Supplying/exposing a minor and considering the best interests of the child principle.

- Driving under the influence provided that this is tested in accordance with scientifically based standards: In this regard, it is possible to make use of saliva testing, which detects the presence of THC (above a certain limit) within the consumers body over a 2-hour period, such that if the saliva test is positive, it means that the person has used cannabis (THC) within the 2 hours and is likely impaired. However, it should be noted that when cannabis is consumed via edibles, the effect is usually well over 2 hours and the saliva

test is unable to determine whether cannabis was smoked/inhaled or ingested as an edible.

- Contravening provisions of this framework and/or license provisions.

- Retail sales outside of licensed retailers.

Rehabilitation

This section will detail appropriate rehabilitation measures. The focus of this framework is on rehabilitation as opposed to the imposition of criminal consequences. This should be guided by similar rehabilitation measures prescribed in relation to alcohol.

- Focus to be on rehabilitation instead of imposition of criminal consequences.

- To be integrated with measures in the Prevention and Treatment for Substance Abuse Act 70 of 2008.

Redress Measures

It is necessary to include measures to correct the past injustices associated with the persecution and imprisonment of people for cannabis-related crimes that would no longer be crimes in a future cannabis regime.

- Amnesty.

- Expungement of records.

- Commuting of sentences.

- Circumscribed reparations/compensation.

Regulations

This section will deal with regulations to be made.

- Provision to be made for the relevant cabinet members responsible in the national sphere of government for health, trade and industry, small business development, justice and agriculture to make regulations, in consultation with the Cannabis Advisory Committee, in respect of those matters that pertain to their respective portfolios.

- Areas in respect of which regulations can be made to include all matters as may be prescribed including procedures, forms and requirements in respect of license applications and marketing, advertising and promotion.

Review

This section will create a statutory requirement for the Cannabis Regulatory Authority to review and report on the operation of these provisions following a certain number of years of operation of the licensed regime. The review will draw on data and other evidence to assess the extent to which the regulatory regime has been effective in delivering the objectives and purpose of

the regime, and to make recommendations on potential reform of the regulatory approach. The review will be undertaken by an independent body of academics, scientists and researchers and other appropriate individuals.

Repeal and amendment of laws

This section will provide for the relationship between this framework and the provisions of other pieces of legislation, as may be necessary as well as any repeals or amendments. Refer to the table accompanying this outline which summarises legislation and regulations that may require consequential amendments pursuant to framework.

- Medicines and Related Substances Act 101 of 1965 (and regulations promulgated thereunder)
- Drugs and Drug Trafficking Act 140 of 1992
- Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972
- Agricultural Product Standards Act 119 of 1990
- Criminal Procedure Act 51 of 1977
- Plant Improvement Act 11 of 2018
- Prevention of and Treatment for Substance Abuse Act 70 of 2008
- Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019
- Plant Breeders' Rights Act 12 of 2018
- Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947
- Traditional Health Practitioners Act 22 of 2007
- National Road Traffic Act 93 of 1996

General Provisions

This section will deal with general provisions to be included in the proposed cannabis regulatory framework

- Limitation of liability;
- Delegation of powers;
- Conflict provisions; and
    - E.g.: *In the event of a conflict between the provisions of the proposed cannabis regulatory framework and any other instruments that aim to regulate cannabis, the proposed cannabis regulatory framework will prevail.*

- Miscellaneous provisions.

Transitional Arrangements

This section will deal with the necessary transitional arrangements in order to facilitate a seamless introduction of the proposed cannabis regulatory framework and adopt a 'phase in' approach after the commencement of the proposed cannabis regulatory framework so as to allow for the proper implementation of the framework without creating a regulatory vacuum in the interim.

- Provision for the continuing validity of pre-existing licenses, registration and authorisations validly issued before the commencement of the proposed cannabis regulatory framework;

- Further transitional arrangements as to the phased implementation of certain provisions having regard to the preamble; and

- Provision for pending matters to be processed and finalised in accordance with the regulatory regime applicable prior to the commencement of the proposed cannabis regulatory framework.

Annexe B

South Africa's Obligations in terms of the International Drug Control Treaties

1. Introduction

1.1 Narcotic drugs and psychotropic substances are governed by three United Nations ("**UN**") treaties, which taken together, constitute the international drug control regime. These are: firstly the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol)[37] ("**Single Convention**"); secondly, the 1971 Convention on Psychotropic Substances[38] ("**1971 Convention**"); and thirdly, the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[39] ("**1988 Convention**").

1.2 This drug control system is concerned with *inter alia* the "*health and welfare of mankind*" and of "*human beings*"[40] and has two fundamental concrete goals: these are that narcotic drugs be made available for medical use and for scientific purposes, whilst simultaneously ensuring that the use of narcotic drugs is restricted exclusively to such medical and scientific purposes.[41] According to some scholars, "*[a]s far as the circulation of narcotic drugs for non-medical purposes and non-scientific purposes is concerned, it seems hard to argue that the object and purpose of the conventions is not to ban such circulation completely*."[42]

1.3 Indeed, these treaties seek to curtail drug use by obliging signatories thereto, to criminalise the possession, cultivation, production, importation, sale and distribution of illicit drugs for non-medical and non-scientific purposes.[43] However, *"…this does not necessarily mean that it is impossible for states to permit cannabis cultivation*

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[37] Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, 8 August 1975 UNTS 105, 23 UKTS 1 (entered into force 8 August 1975).

[38] Convention on Psychotropic Substances, 1971, 21 February 1971, 1019 UNTS 175, 10 ILM 261 (entered into force 16 August 1976).

[39] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 20 December 1988, 1582 UNTS 95, 28 ILM 493 (entered into force 11 November 1990).

[40] See Preambles to the Single Convention and the 1988 Convention.

[41] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 494.

[42] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 494 – 495.

[43] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 432.

and trade through regulated legalization of cannabis in national law within the boundaries of international public law."[44]

1.4 According to a document prepared by the Transform Drug Policy Foundation aimed at proposing a practical guide on regulating cannabis ("**Transform Guide**"), countries have at their disposal a number of options to align any domestic cannabis laws and policies with their international law obligations.[45] According to the Transform Guide, there are four categories of reforms, which may overlap and are not mutually exclusive. These are as follows:[46]

1.4.1 Treaty reform that applies to all signatory states, requiring majority approval.

1.4.2 Treaty reform that applies to a selective group of states.

1.4.3 Treaty reform that applies to an individual state.

1.4.4 Treaty Reform that applies to all signatory states, requiring consensus approval.

1.5 Each of the aforementioned approaches are discussed, in turn, below. Thereafter this document will provide a brief regulatory overview of selected jurisdictions that have elected to regulate non-medicinal and non-scientific uses of cannabis notwithstanding their obligations in terms of the international drug control treaties.

2. Treaty Amendment

2.1 All state parties are entitled to notify the UN Secretary-General of a proposed amendments, including the basis for the proposition. The Secretary-General must then convey these changes to all parties and the Economic and Social Council ("**ECOSOC**"). At ECOSOC's discretion, a Conference of Parties ("**COP**") may be convened to consider the amendment, or the amendment can be referred to all parties for review. Parties thereafter have 18 months within which to lodge their rejection of the amendment's proposal, in the case of the Single Convention or 1971 Convention, or 24 months, in the case of the 1988 Convention.

2.2 In terms of both the Single Convention and 1971 Convention the amendment will take effect immediately in the event that no rejections are lodged, while

[44] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 495.

[45] Transform Drug Policy Foundation *How to Regulate Cannabis: A practical Guide* (2016) 2 ed pg 230.

[46] Transform Drug Policy Foundation *How to Regulate Cannabis: A practical Guide* (2016) 2 ed pg 230.

amendments to the 1988 Convention are deemed to be applicable only to the parties that expressly notify that they wish to be bound. Where an objection has been lodged, the amendment in question may still be approved by ECOSOC, save for in respect of the objecting parties, or it may reject the amendment entirely. A COP may also be convened to consider the amendment.[47]

2.3 Notionally, therefore, it is open to a country such as South Africa to propose a treaty amendment to the international drugs conventions in order to have cannabis regulated in an alternative manner or to be removed from international control altogether. This process is unlikely to yield immediate results and may be difficult to implement at a practical level.

3. **Treaty reform that applies to all signatory states, requiring majority approval**

3.1 **Rescheduling Modification**

3.1.1 The conventions authorise the World Health Organisation ("**WHO**") to make recommendations to reschedule or de-schedule listed substances on the basis of medical and scientific analysis and the addictive properties of drugs. However, state parties, such as South Africa, may initiate the modification process that could result in the rescheduling of a specified drug or its deletion from the conventions. The WHO is the only body mandated to make scheduling recommendations, which must thereafter be agreed to by the UN Commission on Narcotic Drugs ("**CND**").[48]

3.1.2 Modification of the schedules of the Single Convention requires the agreement of a simple majority of all CND members present and voting.[49] As regards the 1971 Convention, modification requires the acceptance of a two-thirds majority of CND members.[50]

3.1.3 While such an approach may remove cannabis from the schedules to the treaties, the substance is still subject to specific provisions within both the Single Convention and the 1988 Convention. In this regard, the Single Convention requires parties to "*adopt such measures as may be necessary to*

[47] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 450 - 451.. Transform 231-233.

[48] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 457.

[49] Article 3 Single Convention.

[50] Article 17 1971 Convention.

prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."[51] While under the 1988 Convention, "*appropriate measures*" must be taken to "*prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as…cannabis plants*."[52] The 1988 Convention further requires the establishment as a criminal offence "*the cultivation of…cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the [Single] Convention.*"[53]

3.1.4 According to scholars Habibi and Hoffman, it is for this reason that "…beyond the bureaucratic nature of the rescheduling process, the interpretation of cannabis-specific provisions within the UN drug control treaties poses a further barrier to the legalization of cannabis."[54]

3.1.5 This approach, while notionally possible, will likely be difficult to implement at a practical level for the reasons that apply equally to treaty amendment as discussed above.

4. Treaty reform that applies to a selective group of states

4.1 "*Inter se*" treaty modification

4.1.1 The 1969 Vienna Convention on the Law of Treaties ("**VCLT**") allows for the option to modify treaties between certain parties only. According to Article 41 of the VCLT:

"*Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone", provided that it "does not affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations" and it is not "incompatible with the effective execution of the object and purpose of the treaty as a whole*."

4.1.2 According to the Transform Guide, both the aforementioned conditions stipulated in Article 41 could notionally be met. This would require that the *inter se* modification agreement include a clear commitment to the original treaty obligations vis-à-vis countries not party to the agreement and all those

[51] Article 28(3) Single Convention.

[52] Article 14(2) 1988 Convention.

[53] Article 3(1)(a)(ii) 1988 Convention.

[54] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 458.

provisions in the treaties (including those relating to cannabis) would remain in force as regards the treaty's parties not party to the *inter se* agreement. The Transform Guide further submits that:[55]

"*In theory, modification inter se could be used by a group of like-minded countries that wish to resolve the treaty non-compliance issues resulting from national decisions to legally regulate the cannabis market, as Uruguay has already done, and Canada appears poised to do. Such countries could sign an agreement with effect only among themselves, modifying or annulling the cannabis control provisions of the UN conventions. This could also be an interesting option to explore in order to provide a legal basis justifying international trade between national jurisdictions that allow or tolerate the existence of a licit market of a substance under domestic legal provisions, but for which international trade is not permitted under the current UN treaty obligations*."

4.1.3 It ought to be borne in mind that the drafters of the 1969 VCLT viewed *inter se* modification as a core principle for international law, and the subject was discussed at the International Law Commission in 1964. In this regard, it was stated as follows: "*The importance of the subject needed to emphasis; it involved reconciling the need to safeguard the stability of treaties with the requirements of peaceful change*."[56]

4.1.4 The possibility of *inter se* treaty modification presents a compelling case for countries such as South Africa to pursue in as it would offer a mechanism by which a country can regulate cannabis at a domestic level in a manner that is reconcilable with its international law obligations, and is in line with core international law principles.

5. Treaty reform that applies to an individual state

5.1 Withdrawing from the treaties

5.1.1 All three of the drug control conventions permit parties to denounce or withdraw from the treaty on written notice to the UN Secretary-General. A

[55] Transform Drug Policy Foundation *How to Regulate Cannabis: A practical Guide* (2016) 2 ed pg 236.

[56] International Law Commission (ILC) Summary Record of the 745th Meeting: 15 June 1964, A/CN/4/SR/745, in Yearbook of the International Law Commission: 1964, vol. 1, New York: UN, 1965, p 144, para 49.

denunciation, however, would not take immediate effect and the time from notice to denunciation varies from treaty to treaty.

5.1.2 Under the Single Convention and 1971 Convention, a notice to withdraw becomes effective as from the first day of January, provided it was received by the Secretary-General on or before the first day of July of the preceding year.[57] If the notice was received after this, it is treated as if it had been received on or before the first day of July of the following year. In terms of the 1988 Convention, the notice of withdrawal can take effect one year after the date of receipt of notice to the Secretary-General.[58]

5.1.3 However, for countries receiving development aid, or that benefit from preferential trade agreement, denunciation may risk triggering economic sanctions. Being a state party to all three drug control conventions is a condition in a number of preferential trade agreements. According to the Transform Guide,[59] *"[d]enunciation can therefore have serious political and economic implications, especially for less powerful and poor countries. Even for countries that are less economically vulnerable, simply withdrawing from the drug treaties could carry the risk of reputational costs in key international fora.*"

5.2 **Selective denunciation**

5.2.1 The 1969 VCLT provides that a historical "*error*" or a "*fundamental change of circumstances*" in terms of articles 48 or 62 respectively constitute valid reasons for member states to revoke adherence to treaties.[60] According to one scholar, "*[i]f the fundamental situation underlying treaty provisions becomes so changed that continued performance of the treaty will not fulfil the objective that was originally intended, the performance of those obligations may be excused.*"[61]

[57] Article 46(2) Single Convention; Article 29(2) 1971 Convention.

[58] Article 48 1988 Convention.

[59] Transform Drug Policy Foundation *How to Regulate Cannabis: A practical Guide* (2016) 2 ed pg 238.

[60] M Leinwand 'The International Law of Treaties and United States Legalization of Marijuana', Columbia Journal of Transnational Law, Vol 10, 1971, p 413-441.

[61] M Leinwand 'The International Law of Treaties and United States Legalization of Marijuana', Columbia Journal of Transnational Law, Vol 10, (1971), pgs 413-441.

5.2.2 It is notable that the Beckley Foundation's Global Cannabis Commission report concluded in 2008 that:[62] "…*taking this path might be less legally defensible than denunciation and re-accessions with reservations*" (as further discussed below, which would have the same end-result.

5.3 Denunciation followed by re-accession with a reservation

5.3.1 Upon signing, acceding, or ratifying a treaty, states have the option to make reservations regarding specific provisions. Such reservations modify or exclude the legal effect of certain provisions within the treaty.[63] In other words, reservations allow parties to withhold from specific legal obligations while remaining compliant with international law and the convention framework. Under the procedure of treaty denunciation followed by re-accession with a reservation, a country can withdraw itself from a treaty entirely, with the intention of rejoining with specific reservations. Denunciation and re-accession with a reservation is recognised as a legitimate procedure, although its practice has been limited to exceptional cases.[64]

5.3.2 In the context of the international drug control framework, the procedure was utilised through the Bolivian government's actions with regards to the coca leaf in 2013. In 1976, Bolivia acceded to the Single Convention, which requires that coca leaf chewing – a common practice amongst indigenous Bolivians – be abolished within twenty-five years from the coming into force of the Convention.[65] After efforts to amend relevant provisions under the Single Convention failed, Bolivia denounced the treaty and sought to re-accede with a reservation allowing for the consumption and use of the coca leaf for cultural and medicinal purposes. The objections of 15 countries, including the US, fell short of the 62 (one third of the parties) required to block the entry into force of the reservation.[66]

5.3.3 While successful, the INCB stated that Bolivia's actions contravened the Single Convention's "*spirit*" and that "*the international community should not*

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[62] R Room, W Hall, P Reuter, B Fischer, S Lenton, and A Feilding, Cannabis Policy: Moving Beyond Stalemate, Global Cannabis Commission, the Beckley Foundation, (2008), pg 155.

[63] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pgs 451-452.

[64] Transform Drug Policy Foundation *How to Regulate Cannabis: A practical Guide* (2016) 2 ed pgs 239 – 240.

[65] Article 49(2)(e) Single Convention.

[66] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 453.

accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation in order to free themselves from the obligation to implement certain treaty provisions."[67]

5.3.4 As such, while there is precedent for such an approach, as further discussed above, some experts submit that the procedure allows parties to select which obligations to uphold and which to flout, arguably undermining the consensus that binds parties to a treaty and diluting the good faith interpretation of treaty provisions and *pacta sunt servanda*.[68] It may further expose the reserving party to reputational damage.[69] That being said, it has been argued that allowing states to re-accede with reservations is more constructive than excluding the country from the treaty framework in its entirety, especially in the context of human rights.[70]

6. Human rights-based approach

6.1 In Professors Van Kempen and Fedorova's journal article titled *Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification* an alternative and/or revised approach to the aforementioned possible methods is proposed. According to Van Kempen and Fedorova, there are two possibilities that states can pursue in seeking to permit cannabis cultivation and trade through regulated legalisation of cannabis in national law in a manner that coheres with international public law.[71]

6.2 The first of these options concerns positive human rights obligations, i.e., "*obligations that require states to take measures in order to guarantee fundamental human rights of individuals*."[72] This approach entails the view that regulated permission of cannabis cultivation and trade may offer better possibilities for states to protect human rights interests than a prohibitive approach. In other words, states may permit cannabis cultivation and trade for recreational use via their domestic law

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[67] International Narcotics Control Board, Press Release, UNIS/NAR/1114, "International Narcotics Control Board Regrets Bolivia's denunciation of the Single Convention on Narcotic Drugs" (5 July 2011).

[68] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pgs 452-453

[69] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 453.

[70] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 453.

[71] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 495.

[72] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 495.

on the basis of their positive human rights obligations that follow from the right to health, the right to life, the right to physical and psychological integrity and the right to privacy if such regulation ensures a better protection of these rights than a prohibitive drug policy as prescribed by the drugs conventions.[73]

6.3 The second of these options explores the possibility of *inter se* treaty modification of the drug conventions as discussed above within the conditions of Article 41 of the VCLT. Professors Van Kempen and Fedorova argue that the positive human rights approach in conjunction with *inter se* modification "*can be of value to each other in legalizing cannabis cultivation and trade for recreational use within the framework of international public law*."[74]

6.4 Professors Van Kempen and Fedorova's justify their arguments in this regard on the basis of the following points:

6.4.1 Arguments advocating for regulated legalisation of cannabis cultivation and trade for recreational use often relate to the interests of individual and public health, as well as the safety of individuals and crime control. The crux of these arguments is that regulation of the recreational cannabis is better suited to protecting these interests than a prohibitive and repressive approach (as adopted in the drug conventions).

6.4.2 The aforementioned interests are protected by human rights, including the rights to physical and mental health, the right to life, the right to physical and psychological integrity and the right to privacy.

6.4.3 Positive human rights obligations require states to take measures in order to protect fundamental human rights, such as those above.

6.4.4 There are conditions under which the regulated legalisation of cannabis can be considered a positive human rights obligation, i.e., an obligation requiring states to take measures to protect such rights.

6.4.5 Van Kempen and Fedorova illustrate that in certain instances the protection of human rights may be better served – and may arguably be required – by

[73] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 495.

[74] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 495.

the regulation of cannabis cultivation and trade for recreational use as opposed to prohibitive or repressive forms of regulation.

6.4.6 This is particularly so in the context of the rights to health, and that "arguments presented in favour of cannabis regulation and that relate to individual and public health – assuming their validity – are all in principle relevant for [a particular state's obligation in giving effect to the right to health]." This relates to arguments that defend that through regulation authorities would better be able to, for example, safeguard the quality of cannabis; monitor the quality of the cannabis chain in general; protect the health of juveniles through a stricter control on the ban of juvenile cannabis consumption; protect the health of residents who suffer from negative consequences of home cultivation and illegal nurseries and so on. [75]

6.4.7 It is further submitted that similar conclusions can be drawn with regard to many of the arguments that relate to the protection of the life, physical and mental integrity and privacy of individuals.

6.4.8 The authors argue that, should a state opt to regulate cannabis in order to give effect to its human rights obligations along the lines as described above, in terms of the relevant international law prescripts, there are five primary conditions that positive human rights obligations would impose on regulated legalisation – or any other form of regulated permission – of cannabis cultivation and trade for recreational use. These are as follows:

6.4.8.1 Firstly, regulated legalisation must protect interests that are relevant from the perspective of positive human rights obligations, otherwise the potential applicability of such obligations is out of the question.

6.4.8.2 Secondly, states should substantiate that the regulation of cannabis cultivation and trade for recreational use provides for a more effective protection of human rights than a prohibitive policy that is prescribed by the drugs conventions. In other words, it is necessary for states to substantiate the greater effectiveness of this former type of regulation, which must be based on genuine analysis, argumentation and

[75] van Kempen, P.H. & Fedorova, Masha 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification' (2018) International Community Law Review. 20. pg 498.

considerations that are convincing and as far as possible based on available scientific and other research date.

6.4.8.3 Thirdly, regulated legalisation must be based on people's participation and democratic-decision making, which will allow states to ascertain the most effective available means for the best realization of its positive human rights obligations are in accordance with the so-called principle of primarity in terms of which states have the primary responsibility to decide which measures are most appropriate to fulfil the positive human rights obligations taking into account the specific circumstances of such state.

6.4.8.4 Fourthly, when a state proceeds with regulation of cannabis cultivation and trade, it must respect human rights protection in other states and the primary responsibility of these other states to decide the best policy within their jurisdictions. In other words, states should thus enforce its regulation to such a degree that other states are not confronted with negative consequences. Practically, this may require states to create a closed system and/or chain for cultivation, trade and possibly use of cannabis within the state or between like-minded states.

6.4.8.5 Fifthly, in case of legalisation, a state should create a policy of discouragement, limitation and increased public awareness of the risks associated with recreational use of cannabis, to the extent that these may exist.

6.5 According to the authors, there is a strong case to be made for the regulated permission of cannabis to qualify as a positive human rights obligation under certain conditions. However, that when this is the case, the state's human rights obligations interfere with the obligations under the drug conventions. Notwithstanding this interference, Van Kempen and Fedorova conclude that positive human rights obligations provide national governments with sufficient room under public international law to derogate from the UN drug control system and effectively "trump" the obligations imposed via the UN drug control system.

6.6 That being said, the authors propose practical methods by which to deal with this interference, these are as follows:

6.6.1 A state could choose to legalise cannabis in conformity with its positive human rights obligations without changing its formal relation with the UN narcotic drugs conventions.

6.6.2 A state could opt for legalisation after, for example, denunciation and re-accession with new reservations.

6.6.3 Or, as proposed by the authors, a state could conclude an *inter se agreement* with other like-minded parties permitting cannabis cultivation and trade for recreational use in terms of article 41 of the VCLT as further discussed above.

6.7 According to the authors, "[*i*]*nter se modification can function as a suitable instrument to resolve the interference*" and is a possible option for effecting compatibility of the reform of any domestic cannabis laws with the reforming state party's commitments under the UN drug conventions.

6.8 Ultimately, Professors Van Kempen and Fedorova conclude as follows:

"*Notwithstanding the UN narcotic drugs conventions, international public law leaves states room – within limits – for regulated legalisation of the cultivation and trade in cannabis for recreational use. If a state genuinely believes and convincingly argues that with cannabis regulation positive human rights obligations that concern individual and public health, safety and crime control can be more effectively realized than under a prohibitive approach, the priority position of human rights obligations over the drugs conventions can justify such regulation. Apart from this it seems well arguable that in order to allow cannabis regulation within national jurisdictions, the UN narcotic drugs conventions can be modified between certain of the states parties only within the conditions of Article 41 of the VCLT. This is possible by conclusion of an inter se agreement on cannabis regulation between states parties that are of the opinion that states must be given the possibility to legalize cannabis. The positive human rights approach and the inter se possibility can strengthen each other and seem to be a supreme combination. Because of their priority position, positive human rights obligations can further legally validate and legitimize an inter se agreement on cannabis regulation. Human rights furthermore offer a substantive framework for the content of such agreement, for example, by requiring that states discourage use, production and marketing of cannabis. Simultaneously, an inter se agreement that is based on and stays within the positive*

human rights framework would be of significant help in granting human rights a place at the core of the drugs control system. Then the system can really advance the health and welfare of mankind and of human beings, which is the primary objective of the UN narcotic drugs convention."

7. Regulatory overview

Notwithstanding the international drug conventions, a number of parties that are signatories thereto have proceeded with the development and implementation of formal non-medical and/or non-scientific cannabis markets. The approach taken by these countries are discussed in more detail below.

7.1 Uruguay

7.1.1 Uruguay has argued that its policy is fully in line with the original objectives that the drug control treaties emphasise, but have failed in reality to achieve, i.e., the protection of the wealth and welfare of humankind.

7.1.2 Uruguayan authorities have specifically argued that the creation of a regulated market for adult use of cannabis is driven by health and security imperatives and is accordingly an issue of human rights. As such, officials point to wider UN human rights obligations that ought to be respected, and specifically appeal to the precedence of human rights principles over drug control obligations.

7.1.3 It is significant that Uruguay has justified its reform as regards its regulation of cannabis with reference to its overarching human rights obligations under international law. In 2015, Uruguay co-sponsored a UN Human Rights Council resolution calling upon the UN High Commissioner of Human Rights ("**UNHCR**") to prepare a report on the impact of the world drug problem on the enjoyment of human rights. Uruguay's contribution to UNHCR's preparations outlined the county's stance regarding the primacy of human rights:

7.1.4 "*We reaffirm the importance of ensuring the human rights system, underscoring that human rights are universal, intrinsic, interdependent and inalienable, and that is the obligation of States to guarantee their priority over other international agreements, emphasizing the international drug control conventions.*"[76]

[76] Junta Nacional de Drogas *Impact of the World Drug Problem in the Exercise of Human Rights* (2015).

7.1.5 It appears therefore that Uruguay has justified its stance regarding cannabis regulation with reference to the primacy and protection of human rights.

7.2 United States

7.2.1 Certain US officials have argued that since the cultivation, trade, and possession of cannabis taking place in multiple US states remain criminal offenses under US federal law, the Federal Government a State party to the Conventions is not in breach.[77] This is notwithstanding the Federal Government's decision to accommodate the state-level developments. Furthermore, the Assistant Secretary for International Narcotics and Law Enforcement Affairs in the US has argued that the international treaty framework possesses sufficient flexibility to allow for regulated cannabis markets.[78] Irrespective of the above, there is a regulated market for cannabis in several states within the US, including the examples listed below:

7.2.2 Oregon was the first state to decriminalise cannabis possession in 1973.[79] Within five years, Alaska, California, Colorado, Mississippi, New York, Nebraska, North Carolina, and Ohio decriminalised cannabis.[80] Later, between 2011 and 2012, voters in Washington and Colorado passed ballot measures legalising recreational cannabis.[81]

7.2.3 In 2012, Colorado became the first state to vote in favour of ending the cannabis prohibition with the Colorado electorate voting in favour of 'Amendment 64' which makes Colorado the first state to regulate the cultivation, manufacture and sale of cannabis for adults over the age of 21.[82] Amendment 64 requires the state to construct a regulatory and tax framework to allow businesses to cultivate, possess and sell cannabis and gives individuals the right to grow cannabis plants at home.[83]

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[77] Transform Drug Policy Foundation *How to Regulate Cannabis: A practical Guide* (2016) 2 ed pg 243.

[78] Transform Drug Policy Foundation *How to Regulate Cannabis: A practical Guide* (2016) 2 ed pg 243.

[79] Panicker, Biju 'Legalization of Marijuana and the Conflict with International Drug Control Treaties' (2016). Chicago-Kent Journal of International and Comparative Law, Vol. 16, No. 1, 2016 pg 16.

[80] Panicker, Biju 'Legalization of Marijuana and the Conflict with International Drug Control Treaties' (2016). Chicago-Kent Journal of International and Comparative Law, Vol. 16, No. 1, 2016 pg 16.

[81] Panicker, Biju 'Legalization of Marijuana and the Conflict with International Drug Control Treaties' (2016). Chicago-Kent Journal of International and Comparative Law, Vol. 16, No. 1, 2016 pg 17.

[82] Panicker, Biju 'Legalization of Marijuana and the Conflict with International Drug Control Treaties' (2016). Chicago-Kent Journal of International and Comparative Law, Vol. 16, No. 1, 2016 pg 19.

[83] Panicker, Biju 'Legalization of Marijuana and the Conflict with International Drug Control Treaties' (2016). Chicago-Kent Journal of International and Comparative Law, Vol. 16, No. 1, 2016 pg 22.

7.2.4 Further, Oregon voters approved an initiative in 2014 to make it legal for persons ages 21 and older to possess up to eight ounces of dried cannabis and up to four plants for possession recreational purposes.[84] This law further allows production, processing, delivery, and sale of cannabis, licensed and regulated by a central body.

7.2.5 In 2015, recreational cannabis use was legalised in Washington D.C. via 'Initiative 71', which allows individuals of 21 and older to lawfully possess two ounces or less of cannabis, use cannabis on private property, transfer one ounce or less to another person provided that no money, goods or services are exchanged and the recipient is 21 years of age or older. Cannabis can also be cultivated in one's primary residence.

7.3 Canada

7.3.1 As of 2018, cannabis for recreational purposes is legal in Canada, and Canada's Cannabis Act regulates cannabis cultivation, possession, acquisition, and consumption and permits the sale of cannabis for recreational purposes. This is notwithstanding Canada's obligations in terms of the international drugs conventions, of which it is a party to all three.

7.3.2 According to commentators on this subject, little light has been shed on how the government intends to reconcile international treaty obligations with the creation of a legal and regulated market for cannabis when the matter was discussed at parliamentary level.[85] In 2016 a Task Force was commissioned by the Canadian government to advise on the regulation of cannabis and, notably, it was not mandated to provide guidance on this matter.[86]

7.3.3 It appears, therefore, that Canada has not attempted to meaningfully justify its departure from the obligations commonly understood to be imposed by the international drugs conventions.

7.3.4 In a statement by the INCB on the entry into force of Canada's cannabis act, the INCB reiterated its "regret at the adoption of this measure by the Government of Canada" on the basis that doing so was incompatible with the

[84] Panicker, Biju 'Legalization of Marijuana and the Conflict with International Drug Control Treaties' (2016). Chicago-Kent Journal of International and Comparative Law, Vol. 16, No. 1, 2016 pg 17.

[85] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 434.

[86] Roojin Habibi & Steven J Hoffman, 'Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options' (2017) 49:2 Ottawa L Rev pg 434.

legal obligations of state parties under the international drug control framework.[87] It does not appear that any further substantive action has been taken in this regard.

[87] Available online at https://www.incb.org/incb/en/news/press-releases/2018/statement-by-the-international-narcotics-control-board-on-the-entry-into-force-of-bill-c-45-legalising-cannabis-for-non-medical-purposes-in-canada.html.

Annexe C

International Law Position on Traditional and/or Indigenous Uses of Cannabis

1. Rights of Indigenous Peoples under international drug control system

1.1 In terms of Article 49 of the Single Convention parties may at the time of signature, ratification or accession reserve the right to permit temporarily in any of its territories *inter alia* the "*the use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes*"[88] and the production, manufacture and trade therein for such purposes.[89] However, a reservation in this regard are subject to certain restrictions, including that the activities concerned may be authorised only to the extent that they were traditional in the territories in respect of which the reservation is made, and where there permitted on 1 January 1961 and "[*t]he use of cannabis for other than medical or scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of…"*[90] the Single Convention.

1.2 Clearly this provision is of little use to a country that currently wishes to allow for traditional and/or indigenous cannabis uses, and which has not already made a reservation at the time of accession. This provision is similarly unhelpful because of the obligation to put measures in place to discontinue non-medical or non-scientific uses of cannabis within twenty-five years from the coming into force of the Single Convention even in the event of a reservation.

1.3 In terms of Article 14(2) the 1988 Convention, parties are required to take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as cannabis plants but that the "*measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.*" (Emphasis supplied).

1.4 However, the 1988 Convention in Article 14(1) thereof provides that "[a]ny measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing

[88] Article 49(1)(d) of the Single Convention.

[89] Article 49(1)(e) of the Single Convention.

[90] Article 49(2)(f) of the Single Convention.

narcotic … substances under the provisions of the 1961 Convention" and it would still therefore be necessary for parties to take measures aimed at eradicating the use of cannabis even in the context of traditional uses thereof, unless such parties justify the departure from the obligations set forth in the international drugs control treaties as regards cannabis.

1.5 Notwithstanding the aforementioned, the rights of indigenous peoples to practice their customs and traditions is firmly established in international law via a number of human rights instruments, including the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") which protects the right of indigenous peoples to practice and revitalize their cultural traditions and customs and the right to manifest, practice or develop spiritual traditions, customs and ceremonies. The right to traditional medicines and health practices is also expressly enshrined, including the conservation of vital medicinal plants. It is well-accepted that the use of cannabis in the South African context could fall within the types of cultural traditions and customs contemplated by these international law instruments.

1.6 The UNDRIP is not legally binding but reflects the opinion of the United Nations Member States that indigenous peoples have a set of rights that measures ought to be adopted to protect and fulfil such rights. Further similar protections are afforded in terms of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* which South Africa is a party to.

1.7 One of the key aims of the international regime of the rights of indigenous peoples is the preservation of their cultural identity, including the right to maintain and develop their cultural identity, customs and traditions, and their traditional ways of life.[91] According to the International Law Association ("**ILA**"), this includes the right of indigenous peoples to the recognition of an preservation of their cultural identity as well as the obligation of states to recognise and ensure respect for the laws, traditions and customs of indigenous peoples.[92]

1.8 In certain circumstances, however a country's obligations in terms of the drug control conventions may conflict with its obligations to protect or give effect to the rights of its indigenous peoples and/or the traditional uses of certain substances. Such a

[91] Sven Pfeiffer, 'Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing', GoJIL 5 (2013) 1, pg 292.

[92] Sven Pfeiffer, 'Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing', GoJIL 5 (2013) 1, pg 292.

tension can be illustrated with reference to the Bolivian government's approach to the regulation of the coca leaf, as discussed further below.

1.9 Coca leaf chewing, which is subject to the controls and measures of the international drug control treaties, is practiced by traditional and customary reasons by the Aymara and Quechua peoples of Bolivia as well as for other purposes, including as a relief for altitude sickness.[93] Bolivia's Constitution emphasises that coca in its natural state is not considered to be a drug and characterises coca as a cultural heritage, a renewable resource, and a factor of social cohesion.[94]

1.10 Bolivia regulates the control of coca and distinguishes the coca leaf in its natural state from the processed coca leaf from which the alkaloid cocaine has been extracted through chemical processes and prohibits the use of such processed coca leaf. Under this law, coca leaf production as such is regarded as a legitimate agricultural and cultural activity. Social and cultural practices in their traditional forms, such as chewing, medicinal, and ritual uses of coca leaf are considered as legal consumption and use. Other forms of legal use, not susceptible to cause drug dependence or addiction, as well as legitimate industrial uses are subject to regulatory control. The law also delimits geographical areas in which coca cultivation is allowed, while prohibiting cultivation in the rest of the country.

1.11 Bolivia's approach is noteworthy given that it is bound by the international drug control regime having initially acceded *inter alia* to the Single Convention with no reservations, which prohibits coca leaf chewing and which requires the imposition of similar controls in respect of the coca leaf as it does in relation to cannabis. Bolivia was accordingly required to abolish coca leaf chewing as of its accession date in 1976 given that it did not make a reservation under Article 49 in order to make use of the transitional period for phasing out of this practice.

1.12 Bolivia did, however, initially make a reservation to Article 3(2) of the 1988 Convention, insofar as the country was required to establish as a criminal offence, the use, consumption, possession, purchase and cultivation of the coca leaf for personal consumption. This reservation stated that the Bolivian legal system recognised the traditional licit use of the coca leaf, which was widely used and consumed in Bolivia, including for traditional medicinal purposes. However, the

[93] Sven Pfeiffer, 'Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing', GoJIL 5 (2013) 1, pg 298.

[94] Sven Pfeiffer, 'Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing', GoJIL 5 (2013) 1, pg 298.

INCB stated that this reservation did not excuse Bolivia from fulfilling its obligations under the Single Convention, including the prohibition on coca leaf.

1.13 Ultimately in 2011 Bolivia denounced the Single Convention and thereafter submitted an instrument of accession, containing a reservation to allow traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes; its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.

1.14 Despite a few objections and contrary viewpoints by certain state parties, a large majority of states silently accepted the reservation of Bolivia and the UN Secretary-General confirmed that the reservation was deemed to be permitted in accordance with the provisions of the Single Convention applicable in such circumstances.

Annexe D

Industrial Cannabis Falls Outside of the Scope of the UN Drugs Control Treaties

1. Introduction

1.1 The UN drugs conventions, i.e., the Single Convention, the 1971 Convention, and the 1988 Convention, impose a number of controls and measures in relation to cannabis.

1.2 Notwithstanding the imposition of such regulation, as discussed more fully below, the cultivation of industrial hemp or cannabis has been exempted from the scope of these conventions. As a consequence of this exemption, downstream products and derivatives of hemp are also not subject to the controls of the various conventions.[95] Insofar as the UN drugs conventions are concerned, it is accordingly notionally open for South Africa to regulate and enable an industrial cannabis market.

1.3 This section will firstly demonstrate the manner in which industrial cannabis has been excluded from the ambit of the UN drugs conventions with reference to appropriate academic and other commentary in this regard, and thereafter provide a high-level summary of the industrial cannabis regulation in selected jurisdictions.

2. UN Drugs Conventions

2.1 It is trite that the Single Convention imposes a number of controls and measures regarding *inter alia* the cultivation, manufacture, export, import, distribution, trade in, use and possession of cannabis, which is regarded as a "drug" in terms thereof.

2.2 Notwithstanding the aforementioned controls and measures, Article 2(9) of the Single Convention stipulates that:

> "*Parties are not required to apply the provisions of this Convention to drugs which <u>are commonly used in industry</u> for other than medical or scientific purposes, provided that:*
>
> > *(a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill*

[95] Industrial Hemp Association *Common Position of the Industrial Hemp Sector on the Single Convention and the International Drug Control System* 2020 pg 1.

effects…and that the harmful substances cannot in practice be recovered; and

(b) they include in the statistical information…furnished by them the amount of each drug so used."

(Emphasis supplied).

2.3 It is clear therefore that in terms of Article 2(9) of the Single Convention that cannabis used for industrial purposes falls outside the scope thereof merely by virtue of the fact of its intended application, i.e., for use in industry, provided that the two conditions listed in subparagraphs (a) and (b) are complied with.

2.4 It is accepted that given the low-THC content of industrial cannabis that such substances will not be liable to abuse or result in the ill effects as envisaged by subparagraph (a) above and furthermore the THC is not practically capable of being "recovered" from any end-products and/or by-products associated with the production/manufacture of industrial cannabis products.[96] The requirements imposed by subparagraph (b), however, remain to be complied with.

2.5 That industrial cannabis is excluded from the operation of the Single Convention is acknowledged in the commentary thereto. The Commentary on the Single Convention is a document requested and edited by the Secretary-General of the UN in 1973 to function as a guideline for the interpretation of the convention ("**Commentary**").[97]

2.6 In terms of the Commentary, Article 2(9) was included in order to accommodate for situations where substances otherwise regulated by the Single Convention as drugs could be used for industrial purposes; according to the Commentary, "*[i]t would hardly be feasible to apply to drugs used in industrial processes the restrictive controls of the international narcotics régime."*[98]

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[96] Industrial Hemp Association *Common Position of the Industrial Hemp Sector on the Single Convention and the International Drug Control System* 2020 pg 15.

[97] United Nations *Commentary on the Single Convention on Narcotic Drugs, 1961* (Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962 (1973).

[98] United Nations *Commentary on the Single Convention on Narcotic Drugs, 1961* (Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962 (1973) pg 72.

2.7 In addition to the exemption provided for Article 2(9), Article 28 of the Single Convention, which specifically addresses cannabis control, provides as follows:

"(1) If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.

(2) This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes."

(Emphasis supplied).

2.8 In terms of the Commentary, paragraph (2) above:

"…excludes from the scope of the Single Convention, and thus also from the application of its article 23 [which deals with the establishment of agencies to regulate cannabis], the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes."

2.9 It is clear therefore that the cultivation of cannabis for industrial purposes falls outside the scope of the Single Convention and is not subject to the controls specified therein, in terms of both Articles 2(9) and 28.

2.10 Regarding the inclusion of "*fibre and seed*" in Article 28(2), commentators have noted that its presence *"…in the sentence has often served as a basis to a reading [restricting]…the exemption only to these parts*." However, that such a statement is not justifiable, particularly as *"…this article does not concern final products but cultivation – and it is challenging to imagine the cultivation of only "*fibre and seeds*" without all the other parts of the plant*."[99] Indeed, "[*t]he "(fibre and seed)" present in the text is of secondary importance, as the focus of the exclusion is that of "industrial purposes" and "horticultural purposes"*.[100]

2.11 The preamble to the Single Convention serves only to reaffirm the exclusion of industrial cannabis from the operation thereof, as it "…clearly states that the set of regulations enacted in the Convention aims at protecting the health and welfare of mankind, enduring access to drugs for the relief of pain and suffering, while combating health hazards, abuse, and dependence on drugs, as well as their illicit

[99] Kenzi Riboulet-Zemouli 'Scope and definition of the exemption covering "hemp" in the international drug control Conventions. A total exemption – by purpose' (2019) pg 7.

[100] Kenzi Riboulet-Zemouli 'Scope and definition of the exemption covering "hemp" in the international drug control Conventions. A total exemption – by purpose' (2019) pg 6.

trafficking"[101] and "…the purpose, notion, spirit and rationale behind [the Single Convention] fundamentally concerns "narcotic drugs" (i.e., opiate medicines and pharmaceutical products) and the prevention of their misuse (in terms of consumption and commercialization) as well as their illicit trafficking" and not the industrial applications of such substances which will not result in any of the harms mentioned above.

2.12 Indeed, commentators submit that "[h]emp products do not lead to abuse, addiction or dependence, as the level of THC in these products is extremely low. In light of the spirit set out in the Convention's preamble, this should be sufficient to consider hemp outside the scope of the Conventions." This argument is bolstered by the Commentary on the Single Convention which discusses the definition of "cannabis" in terms thereof and notes that "…the Single Convention excludes from its definition of cannabis the tops of the plant from which the resin has been extracted…This exclusion may be justified on the ground that the tops from which the resin has been extracted contain only a very insignificant quantity of the psychoactive principle.'[102]

2.13 Turning to the 1971 Convention, it should be noted that THC falls under Schedule 1 of the 1971 Convention and is considered a "psychotropic substance" in terms thereof. THC is therefore subject to the controls and measures imposed in relation to psychotropic substances by the 1971 Convention.

2.14 However, notwithstanding THC's scheduling in this regard, according to commentators, where used for industrial purposes, THC would still fall under the exemption provided for by Article 2(9) of the Single Convention.[103] Moreover, the commentary to the 1971 Convention further recognises as follows:

"…*Plants as such are not, and – it is submitted – are also not likely to be, listed in Schedule 1, but only some products obtained by plants. Article 7 therefore does not apply to plants as such from which substances in Schedule 1 may be obtained, nor does any other provision of the [1971 Convention]. Moreover, the cultivation of*

[101] Industrial Hemp Association *Common Position of the Industrial Hemp Sector on the Single Convention and the International Drug Control System* 2020 pg 2.

[102] United Nations *Commentary on the Single Convention on Narcotic Drugs, 1961* (Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962 (1973) pg 4.

[103] Kenzi Riboulet-Zemouli 'Scope and definition of the exemption covering "hemp" in the international drug control Conventions. A total exemption – by purpose' (2019) pg 4; Industrial Hemp Association *Common Position of the Industrial Hemp Sector on the Single Convention and the International Drug Control System* 2020 pg 3.

plants from which psychotropic substances are obtained is not controlled by the [1971 Convention]."

2.15 The commentary to the 1971 Convention further provides that:

"*The term "cultivation" does not appear in the [1971 Convention], which does not contain any provision governing the cultivation of plants from which substances which it controls may be obtained."*[104]

2.16 As such, and on the strength of the commentary on the 1971 Convention, THC while notionally present (albeit in insignificant quantities) in industrial cannabis plants, the cultivation of such plants (and any end-products and/or by-products) in relation thereto are excluded from the scope of the 1971 Convention. This is so because the 1971 Convention does not regulate the plants from which Schedule 1 substances may be obtained, nor their cultivation, and only imposes regulation in relation to the substances themselves (once extracted).

2.17 Once again, this is confirmed by the Preamble to the 1971 Convention, which is concerned with the "*public health and social problems resulting from the abuse of certain psychotropic substances*", which concerns will clearly not arise in the context of industrial cannabis cultivation.

2.18 Lastly, it should be noted that the last of the UN drugs conventions, i.e., the 1988 Convention clearly provides in Article 25 that the provisions thereof "*shall not derogate from any rights enjoyed*" by the Single Convention. As such, the exemptions provided for the Single Convention as regards industrial cannabis apply equally to the 1988 Convention and the controls imposed thereby.

3. Regulatory overview

3.1 Canada

3.1.1 Canada re-legalised the production and processing of hemp in 1988 and Health Canada is the responsible authority for hemp (and cannabis) regulations. The Canadian definition of hemp is as follows: a cannabis plant – or any part of that plant – in which the concentration of THC is 0.3% w/w or less in the flowering tops and leaves.

[104] United Nations *Commentary on the Single Convention on Narcotic Drugs, 1961* (Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962 (1973) pg 4.

3.1.2 A Health Canada licence is required to conduct any of the following activities: sell hemp; import or export hemp seed; cultivate or propagate hemp; prosses hemp seed for the purposes of cleaning/conditioning it; possess hemp seed for the purpose of processing for food; harvest and possess hemp flowers, leaves and branches for the purposes of sale; hemp fibre and hemp roots can be sold and processed without a Health Canada license. A license is required to process and sell hemp-derived cannabinoids.

3.2 **Colombia**

In Colombia licenses are available for purposes of hemp production via a license for non-psychoactive cannabis. In Colombia non-psychoactive cannabis contains less than 1% THC in dry weight basis. There are several types of licenses, including seed source; cultivation of non-psychoactive cannabis; manufacture of derivatives and export. Ministries, such as the Justice and Health ministry and the ICA (Instituto Colombiano Agropecuario), i.e., the Colombian Agricultural Institute, participate in this licensing.

3.3 **Uruguay**

In Uruguay the government published regulations regarding specifications for non-psychoactive cannabis, i.e., industrial hemp or cannabis, which specify that authorisations for production or processing of hemp and its by-products must be issued with their Department of Agriculture, Livestock and Fishing – their Health Ministry is not involved, and neither is Uruguay's Institute for Regulation and Control of Cannabis. Accordingly, hemp and cannabis are separately regulated, and the competencies involved are distinct.

3.4 **Ecuador**

In 2020, Ecuador regulated the production of industrial hemp and allowed an upper limit of 1% THC. All hemp is regulated by the Ministry of Agriculture, which is empowered to allow, inspect, terminate and sanction crops.

3.5 **New Zealand**

3.5.1 In New Zealand industrial hemp is regulated by the Ministry of Health, and the relevant regulations define industrial hemp as having a low THC content, generally below 0,35% (% of dry weight) for a "General Licence" and not above 0,5% for a "Research and Breeders Licence".

3.5.2 Various licenses are available licenses for the procurement within New Zealand of industrial hemp; the cultivation of industrial hemp; the supply of industrial hemp within New Zealand; the processing of industrial hemp into specified hemp products; the possession of industrial hemp for the purposes specified in the licence.

Annexe E

South African Legislative Framework – Potential Consequential Amendments

Summary / aim of the Act	Provision	Provision text	WW comments
Medicines and Related Substances Act 101 of 1965 ("Medicines Act")			
The Medicines Act seeks to: ▪ provide for the registration of medicines and related substances intended for human and for animal use; ▪ provide for the establishment of a Medicines Control Council; ▪ provide that such council shall be a juristic person; to make other provision for the constitution of the council; ▪ provide that a member of the council or committee shall declare his or her commercial interest related to the pharmaceutical or health care industry; ▪ provide that the appointment of members of the executive committee is subject to the approval of the Minister; ▪ provide for the control of medicines and scheduled substances and medical devices;	S1 – "medicine"	Any substance or mixture of substances used or purporting to be suitable for use or manufactured or sold for use in - a) the diagnosis, treatment, mitigation, modification or prevention of disease, abnormal physical or mental state or the symptoms thereof in man; or b) restoring, correcting or modifying any somatic or psychic or organic function in man, and includes any veterinary medicine.	Depending on their use(s) cannabis and/or cannabis-related products may fall within the definitions of "medicine" and/or "veterinary medicine". Accordingly, this triggers the application of various provisions of the Medicines Act, including, *inter alia,* the following*:* ▪ S14 - prohibition on the sale of medicines, which are subject to registration and are not registered; ▪ S15 - registration of medicines; ▪ S15C - measures to ensure supply of more affordable medicines; ▪ S19 - prohibition on sale of medicines, which do not comply with prescribed requirements and furnishing of information regarding medicines, medical devices or IVDs to the Authority ▪ S21 - authority may authorise sale of unregistered medicines, for certain purposes ▪ S22A – control of medicines and Scheduled substances ▪ S22B - publication of information relating to medicines and Scheduled substances ▪ S22C – licensing; ▪ S22D – period of validity and renewal of licence; ▪ S22E – suspension and cancellation of licence; ▪ S22G - purchase and sale of medicines and Scheduled substances by wholesalers; ▪ S36 - exclusion of any medicine, or Scheduled substance ▪ S36A - Minister may prohibit the manufacture, sale or use of certain veterinary medicines. One should be cognisant of the judgment in *Minister of Justice and Constitutional Development and Others v Prince and others [2018] JOL 40399 (CC)* ("**Prince**
	S1 – "Scheduled substance"	Any medicine or other substance prescribed by the Minister under section 22A. CBD and THC are Scheduled Substances and are listed in Schedule 4 and Schedule 6 respectively.	

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make further provision for the prohibition on the sale of medicines which are subject to registration and are not registered;
provide for procedures that will expedite the registration of essential medicines, and for the re-evaluation of all medicines after five years;
provide for measures for the supply of more affordable medicines in certain circumstances;
provide that labels be approved by the council;
prohibit sampling and bonusing of medicines;
provide for the licensing of certain persons to compound, dispense or manufacture medicines and medical devices and also to act as wholesalers or distributors;
provide for the generic substitution of medicines;
provide for the establishment of a pricing committee;
regulate the purchase and sale of medicines by manufacturers, distributors, wholesalers, pharmacists and persons licensed to dispense medicines;
make new provisions for appeals against decisions of

</td>
<td>S1 – "veterinary medicine"</td>
<td>Any substance or mixture of substances, other than a stock remedy or farm feed to be registered in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 1947 (Act No. 36 of 1947), used or purporting to be suitable for use or manufactured or sold for use in connection with vertebrates, for the treatment, diagnosis, prevention or cure of any disease, infection or other unhealthy condition, or for the maintenance or improvement of health, growth, production or working capacity, or for curing, correcting or modifying any somatic or organic function, or for correcting or modifying behaviour.</td>
<td rowspan="2">**Judgment**") which relates to, *inter alia*, the decriminalisation of the possession of cannabis in private for a person's personal consumption in private. The judgement held, *inter alia*, that:

"*the provisions of … section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 read with schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act are inconsistent with right to privacy entrenched in section 14 of the Constitution and, therefore, invalid to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption in private a criminal offence*." (emphasis added)
"*The operation of the orders in 10 and 11 above is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defects.*" (emphasis added)
*"During the period of the suspension of the operation of the order of invalidity:
…
(c) the following words and commas are to be read into the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 after the word "unless":
", in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,"* (emphasis added)
"The above reading in will fall away upon the coming into operation of the correction by Parliament of the constitutional defects in the statutory provisions identified in this judgment." (emphasis added)
"*Should Parliament fail to cure the constitutional defects within 24 months from the date of the handing down of this judgment or within an extended period of suspension, the reading in in this order will become final*." (emphasis added)

However, as a result of recent amendments to the Medicines Act, cannabis has been removed from Schedule 7 of the Medicines Act.</td>
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<td>Schedule 4</td>
<td>Cannabidiol, except—

in complementary medicines containing no more than 600 mg cannabidiol per sales pack, providing a maximum daily dose of 20 mg of cannabidiol, and making a general health enhancement, health enhancement or relief of minor symptoms (low risk) claim; (S0) or
processed products made from cannabis raw plant material intended for ingestion containing 0,0075 percent or less of cannabidiol where only the naturally occurring quantity of cannabinoids found in the source material are contained in the product. (S0)

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the Director General or the council; ▪ provide that the council may acquire and appropriate funds; ▪ regulate the Minister's power to make regulations; ▪ provide for the rationalization of certain laws relating to medicines and related substances that have remained in force in various territories on the national territory of the Republic by virtue of item 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996; and ▪ provide for matters connected therewith.	Schedule 6	(-) - transdelta9tetrahydrocannabinol), except: ▪ in raw plant material and processed products manufactured from such material, intended for industrial purposes and not for human or animal ingestion, containing 0,2 % percent or less of tetrahydrocannabinol; ▪ processed products made from cannabis containing 0,001 percent or less of tetrahydrocannabinol; or ▪ when raw plant material is cultivated, possessed, and consumed by an adult, in private for personal consumption.	
	S22(9)(a)(i) - control of medicines, Scheduled substances, medical devices and IVDs	No person shall- i. acquire, use, possess, manufacture, or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance 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 or Schedule 8 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.	
National Road Traffic Act 93 of 1996 ("National Road Traffic Act")			
The National Road Traffic Act seeks to: • provide for road traffic matters which shall apply uniformly throughout the Republic and for matters connected therewith.	Section 65 - Driving while under the influence of intoxicating liquor or drug having a narcotic effect, or with excessive amount of alcohol in blood or breath	(1) No person shall on a public road - (a) drive a vehicle; or (b) occupy the driver's seat of a motor vehicle the engine of which is running, while under the influence of intoxicating liquor or a drug having a narcotic effect. (2) No person shall on a public road - (a) drive a vehicle; or (b) occupy the driver's seat of a motor vehicle the engine of which is running, while the concentration of alcohol in any specimen of blood taken from any part of his or her body is not less than 0,05 gram per 100 millilitres, or in the case of a professional driver referred to in section 32, not less than 0,02 gram per 100 millilitres. (3) If, in any prosecution for an alleged contravention of a provision of subsection (2) It is proved that the concentration of alcohol in any specimen of blood taken from any part of the body of the person concerned was not less than 0,05 gram per 100 millilitres at any time within two hours after the alleged contravention, it shall be presumed, in the absence of	To amend section 65 (1) of the National Road Traffic Act, to refer to 'under the influence <u>any substance</u> having a narcotic effect' instead of 'any drug having a narcotic effect', as currently provided for in section 65(1) of the National Road Traffic Act. To make provision for a scientifically based test to detect the presence of THC i.e., a saliva test, which detects the presence of THC (above a certain limit) within the consumers body over a 2-hour period, such that if the saliva test is positive, it means that the person has used cannabis (THC) within the 2 hours and is likely impaired.

		evidence to the contrary, that such concentration was not less than 0,05 gram per 100 millilitres at the time of the alleged contravention, or in the case of a professional driver referred to in section 32, not less than 0,02 gram per 100 millilitres, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,02 gram per 100 millilitres at the time of the alleged contravention. (4) Where in any prosecution in terms of this Act proof is tendered of the analysis of 10 a specimen of the blood of any person, it shall be presumed, in the absence of evidence to the contrary, that any syringe used for obtaining such specimen and the receptacle in which such specimen was placed for despatch to an analyst, were free from any substance or contamination which could have affected the result of such analysis. (5) No person shall on a public road- 15 (a) drive a vehicle; or (b) occupy the driver's seat of a motor vehicle the engine of which is running, while the concentration of alcohol in any specimen of breath exhaled by such person is not less than 0,24 milligrams per 1 000 millilitres, or in the case of a professional driver referred to in section 32, not less than 0,10 milligrams per 1000 millilitres. (6) If, in any prosecution for a contravention of a provision of subsection (5), it is proved that the concentration of	

		alcohol in any specimen of breath of the person concerned was not less than 0,24 milligrams per 1 000 millilitres of breath taken at any time within two hours after the alleged contravention, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,24 25 milligrams per 1 000 millilitres at the time of the alleged contravention, or in the case of a professional driver referred to in section 32, not less than 0,10 milligrams per 1000 millilitres, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,10 milligrams per 1 000 millilitres at the time of the alleged contravention. (7) For the purposes of subsection (5) the concentration of alcohol in any breath specimen shall be ascertained by using the prescribed equipment. (8) Any person detained for an alleged contravention of any provision of this section shall not: (a) during his or her detention consume any substance that contains alcohol of any nature, except on the instruction of or when administered by a medical practitioner; (b) during his or her detention smoke until the specimen referred to in subsection (3) or (6) has been taken, as the case may be. · (9) No person shall refuse that a specimen of blood, or a specimen of breath, be taken of him or her.	

<table>
<tr><th colspan="4">Regulations to the Medicines Act ("Regulations")</th></tr>
<tr><td rowspan="2">The Minister of Health, in consultation with the Authority, has in terms of section 35 of the Medicines Act, made the Regulations.</td><td>S1 – "complementary medicine"</td><td>Any substance or mixture of substances that-
a) originates from plants, fungi, algae, seaweeds, lichens, minerals, animals or other substance as determined by the Authority;
b) is used or purporting to be suitable for use or manufactured or sold for use-
i. in maintaining, complementing or assisting the physical or mental state; or
ii. to diagnose, treat, mitigate, modify, alleviate or prevent disease or illness or the symptoms or signs thereof or abnormal physical or mental state of a human being or animal; and
c) is used-
i. as a health supplement; or
ii. in accordance with those disciplines as determined by the Authority.</td><td rowspan="2">Cannabis and/or cannabis products may fall within the ambits of the definitions of "complementary medicine" and "health supplement". Further, various provisions of the Regulations are triggered in relation to cannabis due to the application of the definitions of the Medicines Act to the Regulations (section 1 of the Regulations).
Accordingly, various specific provisions in the Regulations are of relevance in relation to cannabis regulation, including, inter alia:
▪ S3 – conditions for compounding medicine;
▪ S5 - importation of medicines contemplated in section 15C (measures to ensure supply of more affordable medicines);
▪ S6 – importation of medicines into Republic;
▪ S9 – categories and classification of medicine;
▪ S10 - labelling of medicines intended for human use;
▪ S11 - professional information for medicines for human use;
▪ S12 – patient information leaflet;
▪ S13 – labelling for veterinary medicines;
▪ S14 – professional information for veterinary medicines;
▪ S16 – application for the registration of a medicine;
▪ S22 - licence to dispense or compound and dispense medicines;
▪ S23 - licence to manufacture, import, export, act as a wholesaler of or distribute medicines or scheduled substances;
▪ S26 - permits and authorisation in terms of section 22A (control of medicines, Scheduled substances, medical devices and IVDs);
▪ S27 - importation or exportation of specified Schedule 5, Schedule 6, Schedule 7 or Schedule 8 substances;
▪ S28 - information to be furnished annually to Chief Executive Officer;
▪ S29 - authorisation of sale of an unregistered medicine for certain purposes;
▪ S36 - register for specified Schedule 5 or Schedule 6 medicines or substances; and
▪ S37 - returns to be furnished in respect of specified Schedule 5, Schedule 6, Schedule 7 or Schedule 8 substances.</td></tr>
<tr><td>S1 – "health supplement"</td><td>Any substance, extract or mixture of substances as determined by
the Authority, sold in dosage forms used or purported for use in restoring, correcting or modifying any physical or mental state by-
a) complementing health;</td></tr>
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<tr><td></td><td></td><td>b) supplementing the diet; or
c) a nutritional effect,

and excludes injectable preparations, medicines or substances listed as Schedule 1 or higher in the Act.</td><td></td></tr>
<tr><td colspan="4">Drugs and Drug Trafficking Act 140 of 1992 ("DDTA")</td></tr>
<tr><td rowspan="8">The DDTA seeks to provide for:

▪ the prohibition of the use or possession of, or the dealing in, drugs and of certain acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crimes;
▪ the obligation to report certain information to the police;
▪ the exercise of the powers of entry, search, seizure and detention in specified circumstances;
▪ the recovery of the proceeds of drug trafficking; and
▪ matters connected therewith.</td><td>S1 – "dangerous dependence-producing substance"</td><td>Any substance or any plant from which a substance can be manufactured included in Part II of Schedule 2.</td><td rowspan="8">Cannabis is specifically included in Schedule 2 of the DDTA, thereby triggering the definitions of "dangerous dependence-producing substance", "undesirable dependence-producing substance" and "drug".
This results in the application of various other provisions of the DDTA, including, inter alia:

▪ S4 – use and possession of drugs;
▪ S5 – dealing in drugs;
▪ S10 – obligation to report certain information to police;
▪ S11 – powers of police officials;
▪ S13 – offences relating to scheduled substances and drugs; and
▪ S20 – presumption relating to possession of drugs.

However, one should be cognisant of the Prince Judgment in relation to the DDTA. The Prince Judgment held, inter alia, that:

▪ "the provisions of <u>sections 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with part III of schedule 2</u> of that Act … are <u>inconsistent with right to privacy</u> entrenched in section 14 of the Constitution and, therefore, <u>invalid</u> to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption in private a criminal offence." (emphasis added)
▪ "the provisions of <u>section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with part III of schedule 2</u> of that Act and with the <u>definition of the phrase "deal in" in section 1</u> of the Drugs and Drug Trafficking Act 140 of 1992 are <u>inconsistent with the right to privacy</u> entrenched in section 14 of the Constitution and, are, therefore, <u>constitutionally invalid</u> to the extent that they prohibit the cultivation of cannabis by an adult in a private place for his or her personal consumption in private." (emphasis added)</td></tr>
<tr><td>S1 – "undesirable dependence-producing substance"</td><td>Any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2.</td></tr>
<tr><td>S1 – "deal in"</td><td>In relation to a drug, includes performing any act in connection with the trans-shipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.</td></tr>
<tr><td>S1 – "drug"</td><td>Any dependence-producing substance, any dangerous dependence-producing substance or any undesirable dependence-producing substance.</td></tr>
<tr><td>S1 – "plant"</td><td>Includes any portion of a plant.</td></tr>
<tr><td>S2 – operation of Act with regard to Medicines Act</td><td>The provisions of this Act shall apply in addition to, and not in substitution for, the provisions of the Medicines Act or any regulation made thereunder.</td></tr>
<tr><td>Schedule 2, Part II - Dangerous Dependence-Producing Substances</td><td>Dronabinol [(-)-transdelta-9-tetrahydrocannabinol].</td></tr>
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	Schedule 2, Part III - Undesirable Dependence-Producing Substances	Cannabis (dagga), the whole plant or any portion thereof, except dronabinol [(-)-transdelta-9 tetrahydrocannabinol]. Tetrahydrocannabinol.	▪ "*The operation of the orders in 10 and 11 above is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defects.*" (emphasis added) ▪ *"During the period of the suspension of the operation of the order of invalidity:* *(a) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if it has subparagraph (vii) which reads as follows:* *"(vii) in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private."* *(b) the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if the words "other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private" appear after the word "cultivation" but before the comma.…*" (emphasis added) ▪ *"The above reading in will fall away upon the coming into operation of the correction by Parliament of the constitutional defects in the statutory provisions identified in this judgment*." (emphasis added) ▪ "*Should Parliament fail to cure the constitutional defects within 24 months from the date of the handing down of this judgment or within an extended period of suspension, the reading in in this order will become final*." (emphasis added) The DDTA has, however, not been amended subsequent to the Prince Judgment. It should be noted that Section 21 (1) (c) of the DDTA, was declared to be inconsistent with the interim Constitution, and accordingly to be of no force and effect"".
	S4(b) – use and possession of drugs	No person shall use or have in his possession - a) any dependence-producing substance; or b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless …..	
	S5(b) – dealing in drugs	No person shall deal in - a) any dependence-producing substance; or b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless …..	
	S21 – presumptions relating to dealing in drugs [*invalid*]	1) If in the prosecution of any person for an offence referred to - a) in section 13 (f) it is proved that the accused – i. was found in possession of dagga exceeding 115 grams; ii. was found in possession in or on any school grounds or within a distance of 100 metres from the confines of such school grounds of any dangerous dependence-producing substance; or	

		iii. was found in possession of any undesirable dependence-producing substance, other than dagga, it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance; b) in section 13 (f) it is proved - i. that dagga plants of the existence of which plants the accused was aware or could reasonably be expected to have been aware, were found on a particular day on cultivated land; and ii. that the accused was on the particular day the owner, occupier, manager or person in charge of the said land, it shall be presumed, until the contrary is proved, that the accused dealt in such dagga plants; c) in section 13 (e) or (f) it is proved that the accused conveyed any drug, it shall be presumed, until the contrary is proved, that the accused dealt in such drug; d) in section 13 (e) or (f) it is proved - i. that any drug was found on or in any animal, vehicle, vessel or aircraft; and ii. that the accused was on or in charge of, or that he	

		accompanied, any such animal, vehicle, vessel or aircraft, it shall be presumed, until the contrary is proved, that the accused dealt in such drug.	
Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 ("FCDA")			
The FCDA seeks to: ▪ control the sale, manufacture, importation and exportation of foodstuffs, cosmetics and disinfectants; and ▪ provide for matters connected therewith.	S1 – "cosmetic"	Any article, preparation or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) intended to be rubbed, poured, sprinkled or sprayed on or otherwise applied to the human body, including the epidermis, hair, teeth, mucous membranes of the oral cavity, lips and external genital organs, for purposes of cleansing, perfuming, correcting body odours, conditioning, beautifying, protecting, promoting attractiveness or improving or altering the appearance, and includes any part or ingredient of any such article or substance.	Cannabis may fall within the definitions of "cosmetic", and "foodstuff", thereby triggering various provisions of the FCDA, including those relating to, *inter alia:* ▪ S2 – prohibition of sale, manufacture or importation of certain articles; and ▪ S3 – sale of mixed, compounded or blended foodstuff. Notably, the FCDA includes various provisions relating to liability under the FCDA in respect of, *inter alia*, the selling, manufacturing and importing of foodstuff, cosmetics and disinfectants, including, *inter alia*: ▪ S6 – special defences; ▪ S7 – warranties; ▪ S8 – liability of employer or principal; and ▪ S9 - liability of importer, manufacturer or packer.
	S1 – "foodstuff"	Any article or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) ordinarily eaten or drunk by a person or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as a part or ingredient of any such article or substance.	

Agricultural Product Standards Act 119 of 1990 ("APSA")			
The APSA seeks to provide for: ▪ control over the sale and export of certain agricultural products; ▪ control over the sale of certain imported agricultural products; ▪ control over other related products; and ▪ for matters connected therewith.	S1 – "product"	a) any commodity of vegetable or animal origin, or produced from a substance of vegetable or animal origin, and which consists wholly or partially of such substance; and b) any other commodity which in general appearance, presentation and intended use corresponds to a commodity referred to in paragraph (a).	Cannabis could fall within this definition of "product" given that, arguably, it is similar to a commodity of vegetable or animal origin, or produced from a substance of vegetable or animal origin, and consists wholly/partially of such substance. It could accordingly be subjected to the controls set out in the APSA, including, *inter alia*: ▪ S3 – control over sale of products; ▪ S3A – inspection, grading and sampling for quality control; ▪ S4 – control over export of products; ▪ S4A – control over sale of imported products; ▪ S5 – distinctive marks (for use in connection with certain products); ▪ S6 – prohibition of false or misleading descriptions for products; and ▪ S6A – prohibition and exemption on use of names.
Criminal Procedure Act 51 of 1977 ("CPA")			
The CPA seeks to make provision for procedures and related matters in criminal proceedings.	S1 – "offence"	An act or omission punishable by law.	Possession of an amount of dagga exceeding 115 grams falls within the ambit of the definition of Part II of Schedule 2 of the CPA and this, as well as other offences related to dagga (which is arguably a dependence-producing drug), may trigger the application of certain provisions of the CPA, including, *inter alia*: ▪ S24 – search of premises; ▪ S40(1)(h) – arrest by peace officer without warrant; ▪ S58 – effect of bail; ▪ S59 – bail before first appearance of accused in lower court; ▪ S59A – attorney-general may authorise release on bail; ▪ S60 – bail applications of accused in court; ▪ S63A – release or amendment of bail conditions of accused on account of prison conditions; and ▪ S72 – accused may be released on warning in lieu of bail. However, one should be cognisant of the Prince Judgment here. The following was noted in the judgement: "*[i]n determining whether or not a person is in possession of cannabis for a purpose other than for personal consumption, an <u>important factor</u> to be taken into account will be the <u>amount of cannabis</u> found in his or her possession. The <u>greater the amount</u> of cannabis of which a person is in possession, the <u>greater the possibility</u> is that it is possessed for a <u>purpose other than for personal consumption</u>. Where a person is charged with possession of*
	S40(1)(h) – arrest by peace officer without warrant	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…	
	Schedule 2, Part I	Any offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs or intoxicating liquor.	
	Schedule 2, Part II	Any offence under any law relating to the illicit- a) possession of- i. dagga exceeding 115 grams; or	

		ii. any other dependence-producing drugs; or b) conveyance or supply of dependence-producing drugs.	*cannabis, the State will bear the onus to prove beyond a reasonable doubt that the purpose of the possession was not personal consumption*." (emphasis added). Further, it was held in such judgment that "*I would leave the determination of the amount to Parliament*". (emphasis added) The judgment doesn't appear to require an amendment to the CPA, and it doesn't appear as though the CPA has been amended in relation to this judgment. Further, section 40(1)(h) was referenced in the judgment, however, it was held that "*[t]here is therefore no need for this provision to be declared constitutionally invalid*."
	Schedule 5	Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that- a) the value of the dependence-producing substance in question is more than R50 000,00; or b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or c) the offence was committed by any law enforcement officer.	
	Schedule 7	Any offence in terms of any law relating to the illicit possession of dependence-producing drugs.	
Plant Improvement Act 11 of 2018 ("PIA")			
The PIA seeks to provide for: ▪ the registration of certain types of business relating to plants and propagating material intended for cultivation and sale and the registration of premises on or from which that business is conducted; ▪ quality standards for plants and propagating material intended for cultivation and sale and	S1 – "plant"	Includes any part of a plant…	While cannabis falls within the definition of plant, section 2(1) of the PIA provides that only those plants designated by the Minister in the Gazette will be regulated by the PIA. Therefore, at this stage, PIA does not apply, but notionally could if the Minister designated cannabis as a plant to be regulated per the Gazette.
	S2(1) – application of the Act	This Act applies to such kinds of plants for agricultural, industrial and forestry production as the Minister may declare by notice in the Gazette for the purposes of this Act.	

conditions of sale of plants and propagating material; ▪ a system for national listing of plant varieties; ▪ the evaluation of plant varieties in order to ensure value if there is doubt in respect of the value for cultivation and use of plant varieties intended for cultivation and sale; ▪ import and export control of plants and propagating material; and ▪ a system for different types of schemes for plants and propagating material; and to provide for matters connected therewith.			
Prevention of, and Treatment for, Substance Abuse Act 70 of 2008 ("PTSAA")			
The PTSAA seeks to provide for: ▪ a comprehensive national response for the combating of substance abuse; ▪ mechanisms aimed at demand and harm reduction in relation to substance abuse through prevention, early intervention, treatment and re-integration programmes; ▪ the registration and establishment of treatment centres and halfway houses; ▪ the committal of persons to and from treatment centres and for their treatment, rehabilitation and skills development in such treatment centres;	S1 – "substances"	Chemical, psychoactive substances that are prone to be abused, including tobacco, alcohol, over the counter drugs, prescription drugs and substances defined in the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), or prescribed by the Minister after consultation with the Medicines Control Council established by section 2 of the Medicine and Related Substance Control Act, 1965 (Act No. 101 of 1965), and “drugs” in the context of this Act has a similar meaning.	Currently, cannabis is considered to be an undesirable dependent-producing substance in terms of the DDTA, and accordingly falls within the definition of a "substance" in the PTSAA. The PTSAA places certain obligations on various parties in respect of substances, including, *inter alia:* ▪ S3 – interventions to combat substance abuse; ▪ S4 – guiding principles for provision of services (to persons affected by substance abuse); ▪ S5 – intersectional strategies for reducing demand and harm caused by substance abuse; ▪ S6 – development of and compliance with minimum norms and standards; ▪ S8 – programmes for prevention of substance abuse; ▪ S12 – guidelines for community-based services; ▪ S28 – children abusing substances or affected by substance abuse; ▪ S56 – powers and duties of Central Drug Authority; ▪ S57 – establishment of provincial substance abuse forums; ▪ S60 – establishment of local drug action committees; and

▪ the establishment of the Central Drug Authority; and ▪ matters connected therewith.			▪ S62 – compliance with implementation of National Drug Master Plan by various government departments, entities and stakeholders.
The objects of the PTSAA are to: ▪ combat substance abuse in a coordinated manner; ▪ provide for the registration and establishment of all programmes and services, including community-based services and those provided in treatment centres and halfway houses; ▪ create conditions and procedures for the admission and release of persons to or from treatment centres; ▪ provide prevention, early intervention, treatment, reintegration and after care services to deter the onset of and mitigate the impact of substance abuse; ▪ establish a Central Drug Authority to monitor and oversee the implementation of the National Drug Master Plan; ▪ promote a collaborative approach amongst government departments and other stakeholders involved in combating substance abuse; and ▪ provide for the registration, establishment, deregistration			

and disestablishment of halfway houses and treatment centres.			
Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 ("IKA")			
The IKA seeks to provide for: ▪ the protection, promotion, development and management of indigenous knowledge; ▪ the establishment and functions of the National Indigenous Knowledge Systems Office; ▪ the management of rights of indigenous knowledge communities; ▪ the establishment and functions of the Advisory Panel on indigenous knowledge; ▪ access and conditions of access to knowledge of indigenous communities; ▪ the recognition of prior learning; ▪ the facilitation and coordination of indigenous knowledge-based innovation; and ▪ matters incidental thereto.	S1 – "indigenous community"	Any recognisable community of people: a) developing from, or historically settled in a geographic area or areas located within the borders of the Republic; b) characterised by social, cultural and economic conditions, which distinguish them from other sections of the national community; and c) who identify themselves as a distinct collective.	As cannabis may fall within the definition of "natural resources", knowledge pertaining to cannabis may fall within the ambits of the definition of "indigenous knowledge". Likewise, activities relating to cannabis may fall within the ambits of the definition of "indigenous cultural expression" and contribute to the delineation of certain indigenous communities. The IKA finds application in relation to indigenous communities which may have specific knowledge and/or cultural practices relating to cannabis. Further, the IKA provides a mechanism by means of which indigenous knowledge practitioners may register their indigenous knowledge qualifications as same for purposes of being so certified (section 15). Various provisions of the IKA relate to the protection of registered indigenous knowledge, including, *inter alia:* ▪ S9 – subject matter of protection (notably, sub-section 1 indicates that registered knowledge is protected by the IKA); ▪ S10 – term of protection; ▪ S11 – eligibility criteria for protection; ▪ S13 – rights conferred; ▪ S19 – register of indigenous knowledge; ▪ S20 – registration of indigenous knowledge (sub-section 4 specifically indicates that the indigenous community must register the indigenous knowledge in order to exercise any right in relation thereto under the IKA). Notably, section 12 of the IKA vests the custodianship of indigenous knowledge (as eligible for protection) with the trustee of an indigenous community, which appears to have the powers and duties of a trustee in terms of the law of trusts. Further, any person intending to use indigenous knowledge for commercial purposes and NIKSO (the National Indigenous Knowledge Systems Office established in terms of the IKA), amongst others, are provided with express obligations in terms of the IKA, including in terms of, *inter alia:* ▪ S25 – product development, commercialisation, services and processes (obligations on NIKSO); and
	S1 – "indigenous cultural expression"	Expressions that have a cultural content that developed within indigenous communities and have assimilated into their cultural and social identity, including but not limited to- a) phonetic or verbal expressions; b) musical or sound expressions; c) expressions by action; and d) action tangible expressions.	
The objects of the IKA are to: ▪ protect the indigenous knowledge of indigenous communities from unauthorised use, misappropriation and misuse; ▪ promote public awareness and understanding of indigenous knowledge for the wider	S1 – "indigenous knowledge"	Knowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and includes: a) knowledge of a functional nature; b) knowledge of natural resources; and c) indigenous cultural expressions.	

application and development thereof; ▪ develop and enhance the potential of indigenous communities to protect their indigenous knowledge; ▪ regulate the equitable distribution of benefits; ▪ promote the commercial use of indigenous knowledge in the development of new products, services and processes; ▪ provide for registration, cataloguing, documentation and recording of indigenous knowledge held by indigenous communities; ▪ establish mechanisms for the accreditation of assessors and the certification of indigenous knowledge practitioners; and ▪ recognise indigenous knowledge as prior art under intellectual property laws.	S1 – "indigenous knowledge practitioner"	A person who is certified as sufficiently knowledgeable in indigenous knowledge practices to render a related service, subject to section 15 of this Act and relevant prescribed practice standards being met.	▪ S26 – access to and use of indigenous knowledge (obligations on a person intending to commercially use the indigenous knowledge).
	S1 – "natural resources"	Any materials and components that can be found within the environment and may exist as a separate entity, such as genetic resources, fresh water, air, and mineral deposits with actual or potential use or value.	
	S1 – "trustee"	A natural or legal person that is duly delegated in terms of the practices of an indigenous community to represent that indigenous community in matters pertaining to indigenous knowledge and to be vested with the custodianship of indigenous knowledge emanating from it, which person is deemed to be a trustee appointed in terms of the law of trusts and to have the powers and duties of such a trustee, with any reference in this Act to an act performed, or the rights held, by an indigenous community deemed to be a reference to that act performed, or rights held, by the trustee of that indigenous community.	
	S11 – Eligibility criteria for protection	The protection of indigenous knowledge contemplated in section 9 applies to indigenous knowledge, which- a) has been passed on from generation to generation within an indigenous community; b) has been developed within an indigenous community; and	

		c) is associated with the cultural and social identity of that indigenous community.	
	S13 – Rights conferred	1) Subject to subsection (3), the indigenous community holding indigenous knowledge has the exclusive right to- a) any benefits arising from its commercial use; b) be acknowledged as its origin; and c) limit any unauthorised use of the indigenous knowledge. 2) Subject to subsection (3), a person wishing to make commercial use of indigenous knowledge must- a) apply through NIKSO for a licence in accordance with section 26(1); and b) when so applying, must indicate- i. the identity of the indigenous community; ii. the place of origin of the indigenous knowledge; and iii. whether prior informed consent of the indigenous community has been obtained and a benefit sharing arrangement entered into with that indigenous community. 3) An individual member of the indigenous community holding indigenous knowledge who wishes to	

		make commercial use of the indigenous knowledge- a) must obtain permission from the indigenous community; and b) may only make commercial use of that indigenous knowledge in a manner and subject to the indigenous community imposed terms and conditions as formalised in an agreement with the trustee.	
Plant Breeders' Rights Act 12 of 2018 ("PBRA")			
The PBRA seeks to provide for: ▪ a system whereunder plant breeders' rights relating to varieties of certain kinds of plants may be granted; ▪ the requirements that have to be complied with for the grant of such rights; ▪ the scope and protection of such rights; ▪ the grant of licenses in respect of the exercise of such rights; and ▪ matters connected therewith.	S1 – "kind of plant"	A group of plants of the same taxon.	Cannabis may fall within the definition of "kind of plant", "material", "propagating material" and "variety", thereby triggering various other provisions of the PBRA, including, *inter alia:* ▪ S4 – register of plant breeders' rights; ▪ S7 – protection given to holder of plant breeders' right; ▪ S8 – duration of plant breeders' right; ▪ S10 – exceptions to plant breeders' rights; ▪ S15 – varieties in respect of which plant breeders' rights may be granted; ▪ S16 – application for grant of plant breeder's right; ▪ S18 – provisional protection; ▪ S23 – denomination of variety; ▪ S28 – grant of plant breeders' right; ▪ S32 – infringement of plant breeder's right; ▪ S34 – licences; ▪ S35 – application for compulsory licence; ▪ S37 – expiry of plant breeder's right; and ▪ S49 - entering premises for inspection, sampling and seizure of certain articles.
	S1 – "material"	In relation to a variety, means- a) any propagating material; b) harvested material, including an entire plant or any part of a plant; or c) any product made directly from the harvested material.	
	S1 – "propagating material"	Any reproductive or vegetative material of a plant from which, whether alone or in combination with other parts or products of that plant, another plant with the same characteristics can be produced.	
	S1 – "variety"	Any plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether or not the conditions for the grant of a plant breeder's right are fully met, can be- a) defined by the expression of the characteristics resulting from a	

		given genotype or combination of genotypes; b) distinguished from any other plant grouping by the expression of at least one of the said characteristics; and c) considered as a unit with regard to its suitability for being propagated unchanged.	
Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 ("FFASA")			
The FFASA seeks to provide: ▪ for the appointment of a Registrar of Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies; ▪ for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilizing plants and pest control operators; ▪ to regulate or prohibit the importation, sale, acquisition, disposal or use of fertilizers, farm feeds, agricultural remedies and stock remedies; ▪ to provide for the designation of technical advisers and analysts; and ▪ to provide for matters incidental thereto.	S1 – "farm feed"	a) i. any substance obtained by a process of crushing, gristing or grinding, or by the addition to any substance or the removal therefrom of any ingredient; or ii. any condimental food, vitamin or mineral substance or other substance which possesses or is alleged to possess nutritive properties; or iii. any bone product, intended or sold for the feeding of domestic animals or livestock; or b) any stock lick or substance which can be and is used as a stock lick, whether or not such stock lick or substance possesses medicinal properties, but does not include straw, chaff, unground hay, silage, any cereal in	Arguably, cannabis may fall within the definitions listed alongside this column. However, due to the exclusions related to the Medicines Act included in the definitions of and "stock remedy", and the regulation of cannabis in the Medicines Act (as noted above), cannabis may fall outside of the scope of regulation of the FFASA insofar as it relates to "agricultural remedy" and "stock remedy". To the extent that cannabis falls within the definitions of "farm feed", "fertilizer" and "sterilizing plant", further provisions of the FFASA may be triggered, including, *inter alia*: ▪ S3 - registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilizing plants and pest control operators; ▪ S4 – cancellation of registration; ▪ S4A – availability, lapse and return of certificate of registration; ▪ S7 – sale of fertilizers, farm feeds, agricultural remedies and stock remedies; ▪ S7bis - Prohibition on acquisition, disposal, sale or use of certain fertilizers, farm feeds, agricultural remedies and stock remedies; ▪ S8 – use of sterilizing plant; ▪ S10 - furnishing of particulars before administration of fertilizers, farm feeds and agricultural remedies; ▪ S13 - exclusion of any fertilizer, farm feed, agricultural remedy or stock remedy from operation of Act; and ▪ S16 - import of fertilizers, farm feeds, agricultural remedies and stock remedies.

		the grain or any substance which would otherwise be a farm feed but has been ground, crushed, gristed or prepared for any person, in accordance with his directions for his own use, unless the Minister has by notice in the Gazette declared such substance a farm feed for the purposes of this Act.	Notably, the FFASA includes various provisions relating to liability under the FFASA, including, *inter alia*: ▪ S21 – special defence in case of prosecutions; and ▪ S22 – acts or omissions by manager, agent or employee.
	S1 – "stock remedy"	A substance intended or offered to be used in connection with domestic animals, livestock, poultry, fish or wild animals (including wild birds), for the diagnosis, prevention, treatment or cure of any disease, infection or other unhealthy condition, or for the maintenance or improvement of health, growth, production or working capacity, but excluding any substance in so far as it is controlled under the Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965).	
Traditional Health Practitioners Act 22 of 2007 ("THPA")			
The THPA seeks to: ▪ establish the Interim Traditional Health Practitioners Council of South Africa; ▪ provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; ▪ provide for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners profession; and	S1 – "herbalist"	A person who engages in traditional health practice and is registered as a herbalist under this Act.	Cannabis may trigger the definitions of "herbalist" and "traditional medicine" (to the extent that it is <u>not</u> considered to be a "dependence-producing or dangerous substance or drug"), thereby further triggering the definitions of "traditional health practice", "traditional health practitioner" and "traditional philosophy". Various provisions of the THPA are applicable in this instance, including, *inter alia*: ▪ S21 – application for registration to practise; ▪ S22 – qualifications for registration; ▪ S23 - removal from and restoration of name to register; ▪ S42 – fees charged by registered persons; ▪ S44 – limitations in respect of unregistered persons; ▪ S46 - exemptions; and ▪ S50 – payment of annual fees.

▪ provide for matters connected therewith.			Section 3 of the THPA notes that it applies to i) traditional health practice; and ii) traditional health practitioners and students engaged in or learning traditional health practice, in the Republic. Sections 4 to 17, amongst others, relate specifically to the Interim Traditional Health Practitioners Council.
The purpose of the THPA is to: ▪ establish the Interim Traditional Health Practitioners Council of South Africa; ▪ provide for the registration, training and practices of traditional health practitioners in the Republic; and ▪ serve and protect the interests of members of the public who use the services of traditional health practitioners.	S1 – "traditional health practice"	The performance of a function, activity, process or service based on a traditional philosophy that includes the utilisation of traditional medicine or traditional practice and which has as its object- a) the maintenance or restoration of physical or mental health or function; or b) the diagnosis, treatment or prevention of a physical or mental illness; or c) the rehabilitation of a person to enable that person to resume normal functioning within the family or community; or d) the physical or mental preparation of an individual for puberty, adulthood, pregnancy, childbirth and death, but excludes the professional activities of a person practising any of the professions contemplated in the Pharmacy Act, 1974 (Act No 53 of 1974), the Health Professions Act, 1974 (Act No 56 of 1974), the Nursing Act, 1974 (Act No 50 of 1974), the Allied Health Professions Act, 1982 (Act No 63 of 1982), or the Dental Technicians Act, 1979 (Act No 19 of 1979), and any other activity not based on traditional philosophy.	
	S1 – "traditional health practitioner"	A person registered under this Act in one or more of the categories of traditional health practitioners.	

	S1 – "traditional medicine"	An object or substance used in traditional health practice for- a) the diagnosis, treatment or prevention of a physical or mental illness; or b) any curative or therapeutic purpose, including the maintenance or restoration of physical or mental health or well-being in human beings, but does not include a dependence-producing or dangerous substance or drug.	
	S1 – "traditional philosophy"	Indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs and uses of traditional medicines communicated from ancestors to descendants or from generations to generations, with or without written documentation, whether supported by science or not, and which are generally used in traditional health practice.	