THE REVOCATION OF JERSEY HEMP'S CULTIVATION, EXTRACTION AND EXPORT LICENCES BY THE GOVERNMENT OF JERSEY (AT THE BEHEST OF THE UK GOVERNMENT) IS UNFORTUNATE FOR ALL THOSE INVOLVED IN THE BUSINESS, BUT IT IS NO SURPRISE – IT WAS INEVITABLE

This week we read with sadness of the decision of the Jersey Government to Jersey Hemp's licences. As the founders of a SME we understand the risks that entrepreneurs take and the impact when the course charted for the business does not follow the path that one hoped, with the consequential impact on thee founders and all staff involved – most obviously those who suffer redundancy and financial loss because of it.

This Paper is not aimed at Jersey Hemp, its founders or its staff, all of whom we have profound sympathy for, rather it is aimed at those who purport to be their "expert legal advisers" (to whom they no doubt pay a King's Ransom) and those others to whom they pay subscriptions for advice and alleged "access" (whatever that means when used by the spin-doctors who's currency it is proclaimed to be) - no doubt for an equal King's Ransom.

We say to each of those: you should hang your heads in shame, because it is you who bare the responsibility of this failed business and the misleading of the founders, yet it appears as though you continue to mislead them, no doubt extorting more sheckles from them as you do so. If it is the case that you gave professional, accurate and credible advice to this company through its life and the Founders chose to ignore you and accept the commercial risk that the UK Government would do what it had no option other than to do, then we will publicly resile from the criticisms of you within the document.

Unconnected to the recent news from Jersey Hemp. we have already offered to present a £1,000 donation to the medical cannabis charity of choice from any so-called "Expert Cannabis Lawyer" or "Partner" who is able to mount a credible response and defeat the Opinion that we published for all to read in February 2020 (you can check the publication date on our website **here,** and the full text appears at ***Appendix 1*** of this document).

This is potentially particularly important to Jersey Hemp because we have read statements from the company, no doubt fueled by the sound of those to whom they have so ruinously listened thus far, that they will be taking action against the Governments of both the UK and Jersey.

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We implore the Founders of Jersey Hemp that before they listen to such advice and commence this action, to ensure the following:

- that their lawyer (the individual Partner and the firm as a whole) agree to work on a "no win, no fee" basis – so that Jersey Hemp will not have to pay them fees for engendering an action which will only benefit the lawyers otherwise;

- that their lawyer (the individual Partner and the firm as a whole) provide them with written indemnities to underwrite all costs associated with their forthcoming loss of the action which they are being invited – so that it is the lawyers and not Jersey Hemp who will have to pay the separate costs of both the Governments of the UK and Jersey for successfully defending (the hopeless case that should never be/have been brought); and,

- that their Trade Body (select an acronym and there are plenty to choose from: CTA, ACI, CIC, APPG…) provide them with written indemnities to join the underwriting of all costs associated with their forthcoming loss of the action which they are being invited – so that the Trade Body may share in the motivation to focus advice along with their lawyer (Partner and firm).

ADVICE WHICH IT APPEARS THAT JERSEY HEMP HAS RECEIVED IN RESPECT OF IT'S POSITION

Throughout the process of their licence acquisition, facility construction, business development and final production Jersey Hemp must have spent millions of pounds – we guess of the Founders and other people's money – over a considerable number of years.

It is apparent that those who have advised them throughout must have been consistent in their advice and the only conclusions which can be drawn are:

- the Jersey Hemp CBD wellness products comply with Jersey law on narcotics;

- the Jersey Hemp CBD wellness products comply with UK law on narcotics;

- the Jersey Hemp CBD wellness products are exempt under Regulation 2 of the UK Misuse of Drugs Regulations 2001;

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- the UK Government is wrong its interpretation of its law; and,

- the Jersey Government is wrong in the interpretation of UK Law.

THE CANNA CONSULTANTS' POSITION

Those people who have taken the time to read the Position Papers that we have published to the whole of the market (we don't sit them behind a subscription pay-wall) over the last 4 years will appreciate that we are no "Cheerleaders" for either the Home Office or the Food Standards Agency:

- where we believe that they are wrong in law - we call them out on it;

- where we believe that they are wrong in policy – we call them out on it; and,

- where we believe that they are wrong in practice – we call them out on it.

The Appendices to this Document provide a three-year chronology of the position that we have always advanced in respect of the permitted THC level in CBD wellness products:

(a) that CBD wellness products do not meet the necessary criteria for an exempt product within the Misuse of Drugs Regulations 2001 - they fail "Limb (a)" because the product is "designed for administration of the controlled drug to a human being"

(b) as a result the permitted legal level of THC in CBD wellness products is, in law, is "zero";

(c) that the law is absurd given the trace levels of THC in such products;

(d) that the law is even more absurd given that there is no universally accepted standardised test for trace cannabinoids, such that there is no definition of "zero";

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(e) that the law should be changed and a specific exemption should be created for CBD wellness products;

(f) that the Advisory Committee on the Misuse of Drugs (which is currently advising the Home Office) agreed with our position that there should be a specific exemption created and recommended the same to the Home Office; and,

(g) that for the benefit of the CBD wellness industry the sooner that (e) and (f) are implemented/enacted and (d) is defined, then the better for everyone in the industry and the stability of investment within that industry.

APPENDICES

The Appendices to this document are all published on our website, available for all to see – and benefit from should they care to read them:

Appendix 1: **THERE IS NO EXEMPTION FOR THC CONTENT IN CBD PRODUCTS**
13th February 2020

Appendix 2: **WHAT IS A CONTAMINANT LEVEL?**
12th January 2021

Appendix 3: **THE MECHANICS OF CHANGING ANY POLICY CONCERNING PROHIBITED SUBSTANCES IN THE UNITED KINGDON**
29th March 2021

Appendix 4: **ACMD – CBD PRODUCTS ARE *NOT* CURRENTLY EXEMPT FROM THE UK MISUSE OF DRUGS ACT**
19th December 201

Appendix 5: **ACMD – CONTROLLED CANNABINOIDS ARE PERMITTED, BUT TO WHAT LEVEL?**
20th December 2021

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REQUESTS THAT JERSEY HEMP MAY WANT TO MAKE OF THEIR LAWYER AND TRADE BODY

1. The Home Office's position has been clear since August 2019, why did you not bring that to our attention?

2. Can you please provide a written response to The Canna Consultant's 25-page detailed analysis at Appendix 1, published in February 2020?

3. Given that in December 2021 the ACMD recommended that the Home Office introduce a bespoke exemption to the Misuse of Drugs Act for CBD Wellness Products, why do you maintain that such a bespoke exemption is entirely unnecessary, because the products are already covered by the existing exemption?

4. Given that you have for years been telling us that you were certain in your opinion as to the legality of our business plan and operation (for which we have continued to pay you handsomely), are you now willing to work on the case that you recommend that we take and sue the UK and Jersey Governments on a "no win, no fee" basis in respect of your fees?

5. Are you willing to indemnify Jersey Hemp for costs incurred in, as you suggest to us, the unlikely event that we were to lose the action that you have told us we will win?

6. You haven't answered Questions 1-4, why don't you answer any of my calls any more?

WHAT DOES THIS MEAN FOR THE REST OF THE INDUSTRY?

Fortunately for every other market participant this government action against Jersey Hemp means absolutely nothing and other FSA-Validated market participants will continue to trade, continue to make profits, continue to grown, continue to expand and continue to progress through the Novel Foods process.

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During this time the Home Office's wheels will turn slowly and, when the scientists are agreed upon a defined standardized test, then the Government will be in a position to introduce a new exemption for CBD wellness products predicated upon that science-based analytical capability.

We predict that this will also coincide with the conclusion of the Novel Foods assessments because the FSA will not be able to authorize CBD ingredients as "foods" while another branch of the Government defines the same substance as a "drug". The only question is over which will be ready to proceed first – if the Home Office then Novel Foods will not be held up, but if it is Novel Foods, then there will be no Authorisations without the Home Office having come to the end of its "THC/drug-defining" road.

WHY CAN HE DO IT BUT I CAN'T – "IT'S NOT FAIR"

We agree, but that is the consequence of:

- listening to the wrong people;
- making decisions on bad advice (and obviously and patently incorrect advice);
- poking the bear; and,
- being surprised when the bear tears your world apart.

Everyone else is importing CBD ingredients under the accurate, but generally vague, description of "food supplement" such that the only chance of any of the Border Force, the Police or the Home Office knowing of, caring about or being in any way interested in them is if they happen to stub their toes on the pallets which contain the drums of isolate and distillate as they walk around Bonded Warehouses. Critically - no permission is required for this endeavour whatsoever.

However, Jersey Hemp's lawyers and Trade advisors had them standing in the most prominent of positions and hailing at full voice that they were producing CBD wellness products (and only wellness products – nothing medical).

What is staggering is that those same lawyers and advisors, if in any way competent, could not have failed to appreciate that the time would come when Jersey Hemp had to approach the UK

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Government and ask for its permission – what the **** (add your own word) did they think that the UK Government was going to say given that it had been very clear about its position for year upon year upon year?

I hail from Lancashire and there is a phrase in those parts, "*It's better to ask for forgiveness than permission*." Jersey Hemp was always going to have to ask for permission and there was only ever going to be one answer.

WHO SUFFERS AND WHO DOESN'T?

As acknowledged earlier, clearly the Founders and redundant employees will suffer greatly – they are at the sharp end. However, a little research indicates that Jersey Hemp have received £3.1 million of funding from two sources:

- £2 million in December 2019 from the Foresight Group, a Venture Capital and, quite frankly, I'm sure that they will be able to afford it – you have to kiss a few Frogs to find a Prince; and,

- £1.1 million in August 2021 from Crowd-Funding – I have no idea how many good-willing people handed over their hard-earned cash to invest in this business, but I bet they never expected their investment to turn sour in less than two years.

Perhaps Jersey Hemp is also a salutary lesson to people who are also currently being invited to "Crown-Fund" other small-island cannabis ventures, the owners of which have hawked their Pitch-Decks around professional investors to be dismissed out of hand, only to turn to "Crown-Funding" and the promise of a "share" in the business and a "say in how it is to be run". We would advise that if you are a potential cannabis Crowd-Funder who is wanting a low-risk return, then you should choose six numbers and take a trip to the local newsagent.

Remember what we always say: ***Be Careful Who You Listen To.***

Or you could be the next Jersey Hemp.

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APPENDIX 1

PUBLISHED: 13TH FEBRUARY 2020

PAPER: THERE IS NO EXEMPTION FOR THC CONTENT IN CBD PRODUCTS

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WHAT ARE THE APPLIACBLE CRITERIA FOR A PRODUCT WHICH CONTAINS THC TO RECEIVE AN EXEMPTION FROM THE UNDERLYING CRIMINAL LAW?

WHAT HAS PROMPTED THE PUBLICATION OF THIS ANALYSIS?

1. In recent weeks we have again seen the rising prevalence of "market leaders" and "legal experts" making pronouncements about the existence and applicability of what are variously described as the "***0.2% rule***" and the "***1mg rule***", concerning the permissible THC content in cannabinoid products.

2. While we are always willing to listen to the opinions of others - especially when they are those with which we disagree - we believe that it is thoroughly misleading for individuals and organisations to present their opinions as if they were legally established and precedents. This is ever the more so when those who propagate what we consider to be inaccurate analysis and opinion are not those who will be left dealing with the consequences of reliance upon those same inaccurate opinions.

3. We have seen expressions that "*cannabis is a risk sector*", that "*anyone operating in [it] must have some appetite for commercial risk*" and that "*courage is a prerequisite*". This may, or may not be so, however, we fundamentally believe that all market participants should be advised in an open manner, such that they can make their own risk assessment, on an informed basis, and decide for themselves how that sits against their appetite for the same. To do otherwise deprives those market participants of informed consent and destabilises the whole of the industry.

4. What follows is our analysis and our opinion, with which others are free to disagree. For those who do hold a contrary view and wish to express the same, we would appreciate it if they counter our analysis in an equally detailed exposition of the law and its application, rather than seeking to do so in no more than 144 characters.

5. We believe that this is a hugely significant stage in this industry's development and the failure of self-proclaimed "leaders" and "experts" to act responsibly will result in a detriment to all, not just themselves or those on whose behalf they are said to speak.

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THE LAW

6. As always, we suggest that the best way to start is with an identification of the applicable law, in its entirety, as relevant to the issue in hand.

7. At the end of this document we reproduce the relevant elements of the Misuse of Drugs Act 1971 and Misuse of Drugs Regulations 2001 and highlight the active wording within the various discussions below.

WHAT CAUSES THC TO BE A CONTROLLED DRUG?

8. Section 2 of the Misuse of Drugs Act 1971 defines as "controlled drugs" those substances which are specified within Schedule 2, Parts I, II or III. These Parts relate to Class A, Class B and Class C drugs respectively, and so it is Part II with which we are concerned.

9. Schedule 2, Part II lists those substances which are Class B drugs: Cannibinol and Cannabinol derivatives are listed.

10. "Cannabinol derivatives" are not identified within Schedule 2, Part II, however, Schedule 2, Part IV further defines them and includes "*tetrahydro derivatives of cannabinol*". Thus, there can be no doubt that THC, as a tetrahydro derivative of cannabinol, is a controlled drug due to the application of s2(1)(a)(i) and Schedule2, Parts II and IV.

WHAT OFFENCE WOULD BE COMMITTED?

11. There are six criminal offences which would appear to be of the most immediate relevance, for each of which Schedule 4 prescribes the maximum sentence (which does not mean likely) of up to 14 years' imprisonment and/or an unlimited fine:

    - Production of a controlled drug (i.e. THC) s4(2));
    - Supplying a controlled drug (i.e. THC) to another (s4(3));

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- Being concerned in the production of a controlled drug (i.e. THC) (s4(2));
- Offering to supply a controlled drug (i.e. THC) to another (s4(3));
- Being concerned in the Supply of a controlled drug (i.e. THC) (s4(3)); and,
- Possession of a controlled drug (i.e. THC) with intent to supply it to another (s5(3)).

12. In addition, there is a further criminal offence, for which the maximum sentence (which does not mean likely) is of up to 5 years' imprisonment and/or an unlimited fine: Possession of a controlled drug (i.e. THC) (s5(2)).

13. Not only would the corporation/individual (see below) be liable to the criminal sanctions identified, but they would also automatically be liable to the very draconian Confiscation process under the Proceeds of Crime Act 2002. It is highly likely that the impact of the POCA legislation (see below) would be more punitive and have a greater impact than the sentence which was prescribed for any of these trigger offences.

14. It is also perhaps worth noting that in the circumstances at hand, the application of Confiscation proceedings will be mandatory on the Court and the Judge, however sympathetic, will not have any discretion to "waive" their application.

MY COMPANY OWNED/SOLD/OFFERED THE THC-CONTAINING PRODUCT, NOT ME

15. s21 of the Misuse of Drugs Act addresses the issue of "*Offences by Corporations*" and prescribes that where any offence is committed by company, and it is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer-holder, or any person acting in any such capacity, then that individual, as well as the company shall be guilty of that offence and shall be liable to be proceeded against accordingly – with the same powers of sentence and Confiscation.

16. Therefore, if you are a manager or office holder, or acting un such a capacity without the title, then you are personally and individually liable to the full extent.

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DOES A POTENTIAL EXEMPTION EXIST?

17. Thus, it is clear to us that, unless there is an applicable exemption, then the production, stocking, offering for sale and sale of ***any*** retail product that contains ***any*** THC will constitute one, or more, of the criminal offence that we have outlined and the company and the controlling individual will be equally liable to the sentencing and Confiscation powers available to the Court.

18. Regulation 4 of the Misuse of Drugs Regulations 2001 provides an exemption within subsection (5):

> *Sections 3(1), 4(1) and 5(1) of the Act shall not have effect in relation to any exempt product.*

19. It is perhaps of academic note that the Title to Regulation 4 is "*Exemptions for drugs in Schedules 4 and 5 and poppy-straw*" and that neither Cannibinol nor any of it's derivatives are to be found within either Schedules 4 or 5, but in Schedule 1. However, while subsections (1) to (4) make overt references to one of the three (Schedules 4, 5 and poppy-straw), subsection (5) make no such limiting constraint, such that it is taken to apply to all drugs which fall within the definition of "*exempt product*".

"EXEMPT PRODUCTS" WITHIN THE MISUSE OF DRUGS REGULATIONS 2001

20. Regulation 2 of the Misuse of Drugs Regulations 2001 provides the interpretation of "*exempt product*" which, combined with Regulation 4(5) (above), has the effect of removing from the criminal law those products which fall with the definition, such that there would no-longer any offence committed in respect of:

    i. their importation (s3(1)(a));
    ii. their exportation (s3(1)(b));
    iii. their production (s4(1)(a);
    iv. their supply (s4(1)(b);
    v. offering their supply (s4(1)(b));
    vi. their possession (s5(1)); and,
    vii. their possession with intend to supply (s5(1)).

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DO INGESTIBLE CANNABINOID PRODUCTS FALL WITHIN THE EXEMPTION?

21. In our view they do not, for the reasons which we will discuss below. The exemption exists to cover small quantities of controlled substances which are in a non-recoverable form and are not for human administration. We understand that its origins stem from the need to exempt from "control" sample used to zero/calibrate mobile drug testing kits.

22. Those "knowledgeable" individuals who (in our view), incorrectly assert that there exists a "***0.2% rule***" or a "***1mg rule***", do so upon a mis-interpretation of the "*exempt product*" definition within MDR 2001.

WHAT IS REQUIRED FOR THE EXEMPTION TO APPLY?

23. This is probably the one element of the legislation that it is prudent to reproduce in full at this stage and at this location (***emphasis added***):

> *(1) In these Regulations, unless the context otherwise requires*
>
> ***"exempt product" means a preparation or other product*** *consisting of one or more component parts, any of* ***which contains a controlled drug****, where—*
>
> *(a)* ***the*** *preparation or other* ***product is not designed for administration of the controlled drug to a human being*** *or animal;*
>
> *(b)* ***the controlled drug*** *in any component part* ***is packaged in such a form****, or in combination with other active or inert substances in such a manner,* ***that it cannot be recovered by readily applicable means or in a yield which constitutes a risk to health****;*
>
> ***and***
>
> *(c)* ***no one component part of the product*** *or preparation* ***contains more than one milligram of the controlled drug*** *or one microgram in the case of lysergide or any other N-alkyl derivative of lysergamide;*

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24. Importantly, it is to be noted that the inclusion of the conjunction "and" between sub-paragraphs (b) and (c), and the absence of the conjunction "or" elsewhere within the definition, means that these are a trilogy of requirements which are to be read cumulatively and not disjunctively, such that **all three requirements must be met in order to achieve the exemption criteria**.

SUB-PARAGRAPH (A): **"THE… PRODUCT IS NOT DESIGNED FOR ADMINISTRATION OF THE CONTROLLED DRUG TO A HUMAN BEING"**

25. In respect of sub-paragraph (a), the contentions advance by those who contend that the necessary criteria are met, tend to proceed in similar fashion and, to avoid mis-quoting anyone, we will refer to a published article in order that the posited (inaccurate) argument can be accurately reproduced. We also highlight the repeated reference within the article to the "***0.2% THC***" an aspect which is not, in any way, part of the definition of the exemption.

26. In attending the Hemp & CBD Export at the NEC in September 2019 we were provided with a complementary Magazine (which continues to be available on-line), and in which there was an article on this topic by an individual and a firm "*Leading the way in legal services for the UK Cannabis Industry"* and *"at the regulatory heart of the CBD industry.*

27. The article states (***emphasis added***):

> "Cannabis is a new sector and the law and regulation relevant to the industry is limited to say the least. However, ***there is still a great deal of misinformation out there***… In fact, there are ***respectable organisations actively promoting incorrect legal positions due to a fundamental misunderstanding of how the law in this sector works***."
>
> "***Take for example the 0.2%/1mg rules set out in the Misuse of Drugs Regulations 2001***, and which provide the legal mechanism for Hemp Oil products with a minor THC content to be lawfully produced and sold in the UK."

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*"**Hemp oil products are <u>designed</u> to administer CBD**, which is not a controlled drug. **Hemp oil is not <u>designed</u> to administer THC**, which is a controlled drug. Therefore, **a Hemp oil preparation with less than 0.2% THC will meet part (a)** of the exempt product criteria, **because the product is not <u>designed</u> to administer a controlled drug**."*

*"…Amazingly, there are many parties out there still propagating the myth that there is zero tolerance of THC in any hemp oil product. As recently as 12th July 2019, the National Pharmacy Association [NPA] has published guidance on their website claiming exactly this. [The correspondence between the Home Office and the NPA] displays **a failure by the NPA to understand the requirements for "<u>intention</u>" in limb (a) of the exempt product criteria**."*

***"If there is the <u>intention</u> to administer THC then the preparation in question will fail limb (a). There can be no <u>intention</u> to administer THC using a hemp oil product because the THC content is so low as to have no effect on the human body. Therefore limb (a) is passed**."*

<u>WHERE DOES REFERENCE TO A 0.2% "RULE" COME FROM?</u>

28. The author of the article it is entirely wrong to equate a "0.2% rule" and the "1mg rule" as either being interchangeable or relevant to each other for the purposes of an assessment of the legality of a CBD Supplement which has a THC content, or even emanating from the same legislation. Contrary to the author's assertion, the only Regulation or Paragraph within the Misuse of Drugs Regulations 2001 which contains any reference to 0.2% of anything is within Paragraph 3 of Schedule 5 and relates to morphine, not in any way to THC.

29. What we believe that author is erroneously referring to is the ability of a licensee to cultivate cannabis, which will only be granted in circumstances where the plants are cultivated from approved seed types with a THC content not exceeding 0.2%. Before saying anything further, it is important to note that the 0.2% in that instance refers to 0.2% of the entire plant material which constitutes the plant, not the contents of a bottle, tube or packet.

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RETURNING TO THE ARTICLE

30. Given the "high horse" from which the author seeks to deride the accuracy, knowledge or competence of others with whose opinions on THC he disagrees, there is something of an irony when one analyses the quality and cogency of their own position.

31. For our part we are able to say that the National Pharmacy Association (an organisation of whom the author at first alludes and then specifically names), is a body with whom we have no relationship, nor any contact, were inappropriately maligned in the article because, in our view, their analysis is entirely accurate, and it is the author who exhibits the conduct of which he described as, "*actively promoting incorrect legal positions due to a fundamental misunderstanding of how the law in this sector works".*

32. A distillation of the author's analysis within the article can be reduced to the following points of principle:

    a. Hemp oil products are ***designed*** to administer CBD and not THC;

    b. The products are not ***designed*** to administer THC because the level of THC therein is so low that there is no psychoactive effect;

    c. If there was an ***intention*** to administer THC then the products would fail limb (a), however, because there is no such ***intention***, then they satisfy limb (a); and,

    d. The misunderstandings around paragraph (a) stem from people's failure to understand that "***intention***" limb.

33. For the reasons that we will explain, it is our opinion that the author's analysis (along with those others who hold the same opinion), in respect of paragraph (a) is completely flawed, as a result of which the consequent conclusions are equally flawed.

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"DESIGNED" AND "INTENTION"

34. Perhaps the first point to note is that the Regulations never use the word "intention" (or any other derivative of it). The introduction to the concept of "intention" is the fundamental cause of the inaccurate analysis.

35. In introducing "intention" (which is not form part of the definition), the author appears to have transposed a concept of *Mens Rea* (a Latin legal term referring to the mental element in conduct) from within the general criminal law and, working backwards, utilised that concept to seek to define "designed" (which does form part of the definition).

36. The majority of offences under the law of England and Wales require a mental element to be present before an individual can be criminally liable for their conduct, or the consequences of their conduct. One such requirement is an "intention" to do an act or to achieve a desired outcome, and "intention" has been defined as "an aim or purpose".

37. The rationale appears to be that, because the THC content is so low then no-one is realistically going to seek to administer these products for the purpose of benefitting (if that is how it is perceived), from the psychoactive effects of the THC, then that individual is not "intending" to administer THC. While this may be an accurate statement of logic, it is not an accurate analysis of the law and is therefore not one which we find ourselves capable of agreeing.

38. The intention/aim/purpose of the user (or manufacturer) is wholly irrelevant to this issue because nowhere in the enabling Act (the Misuse of Drugs Act 1971) or the Misuse of Drugs Regulations 2001 does intention feature in this context. The relevant wording is to be found in the Acts and Regulations, not anywhere else. So, intention is not relevant, but what is entirely relevant is what the product is designed to do and what the ***results*** of its application are.

39. It may be helpful to consider this proposition in a different context: Consider a petrol or diesel powered vehicle. The user of that vehicle may well state that they intend to use it for travel and that it is not their ***intention*** to contribute to pollution levels in the atmosphere. However, whatever their ***intention*** is, it is undoubtedly the ***result*** that they are doing so because the internal combustion engine is ***designed*** to emit waste products into the atmosphere through its exhaust system.

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40. In the present context, the ***intention*** of those involved in the promotion or use of the product is wholly irrelevant to what the product is ***designed*** to do and what the ***results*** of its application are. In our view, conflating the two issues of intention and design to a lay audience is misleading for the recipient of that information, irrespective of whether it was inadvertent or otherwise.

WHY IS THERE A PROHIBITION AND WHY IS THERE AN EXEMPTION?

41. While this article is not a treatise on the political purposes of the legislature, a consideration of the context in which the law sits may be of assistance.

42. The Misuse of Drugs Act 1971 exists in order to restrict the proliferation of certain identified chemicals (drugs) within society. This may be for many reasons, but it is undoubtedly the case that it is argued that one such reason is to ensure the health and safety of the population by limiting their ability to ingest drugs which have a detrimental effect to the individual and, through the consequences to that individual, to wider society.

43. The Exemption within the Misuse of Drugs Regulations 2001 exists in order to identify circumstances in which the prohibition on a controlled substance can be removed in circumstances where the removal of the prohibition does not undermine or negate the purpose of the original prohibition.

44. Thus, in our opinion, the purpose behind the definition within Regulation 2 is to seek to provide an exemption for an otherwise controlled substance (drug) in circumstances where it can be demonstrated that:

    a. The controlled substance (drug) will not be administered into a human being or animal – thus preserving the underlying rationale of the original Act to prevent such ingestion;

    b. The chemical composition of the controlled substance (drug) within the product means that it could not readily be distilled from the product in a volume which would constitute a risk to health – no doubt to prevent the extraction of the substance from the exempt product and then witness a corresponding proliferation of the substance in a different, non-exempt context; and,

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c. The quantity of the controlled substance (drug) in any individual "unit" of product is so low (1mg) that the ability of anyone to extract the controlled substance would be frustrated by the maximum extracted volume per unit – to prevent the quantity being readily available in such volumes so as to provide (notwithstanding paragraph (b)), a viable volume of extraction of the controlled substance.

45. A greater examination of the specific motivations behind the introduction of the exemption is perhaps unnecessary – because it is how it is to be interpreted today what matters – however, as indicated previously, it is our understanding that the exemption was first identified as being necessary in order to permit the creation, supply and possession of "control" samples of prohibited drugs so as to allow their use in mobile drug testing kits.

"DESIGNED" – THE CORRECT ANALYSIS OF PARAGRAPH (a) MDR 2001

46. Having considered the motivations of the enabling Act and the drafting of the Exemption Regulation itself, we must say that I come to an entirely different view from those who believe that the exemption applies and, in our opinion, their conclusions are entirely inaccurate and would not hold up to judicial scrutiny.

47. The use of the word "designed" in paragraph (a) has nothing to do with the intention of the user or manufacturer, and everything to do with the ability of the product to achieve an outcome, whether desired or otherwise. The answer to the question, "Is the product ***designed*** to administer the controlled substance (THC)?" the answer is "Yes".

48. I reach this conclusion because the product is designed to administer such cannabinoids as are present within it. While it may be that the principal cannabinoid that the product is "intended" (from the "aim or purpose" viewpoint) to administer is Cannabidiol, it nevertheless undoubtedly administers the controlled substance, THC.

49. Given the conclusions that we have come to, it is unnecessary to address limbs (b) and (c) of the exemption because, it being a mandatory trilogy, the failure at limb (a) means that any conclusions in respect of limbs (b) and (c) are otiose.

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IF THC IS NOT PERMITTED IN PRODUCTS, TO WHAT LEVEL OF PRECISION IS THE PRODUCT TO BE EXAMINED TO ESTABLISH THE THC LEVEL?

50. We are acutely aware that anyone who seeks to speak out against the contentions of those individuals and entities prevalent within the UK Cannabinoid industry are attacked and accused of wanting to "wreck the industry".

51. We cannot speak for the motivations of others, however, what we can state for certain is that ***The Canna Consultants*** was not formed to "wreck the industry" but to assist it because, in our view, there is nothing more dangerous than inaccurate and misleading information being propagated by "industry leaders". The effect is for an undermining of confidence on the part of the government and of the public, which leads to an inevitable departure of credibility in the whole of the market, not just those who behaved in an irresponsible manner.

52. As is now clear, it is our opinion that any product which contains detectable levels of THC would breach the Misuse of Drugs Act 1971 because it would not fall within the definition of an Exempt Product afforded by the Misuse of Drugs Regulations 2001. This then begs the question: What level of THC is "detectable" for the purposes of examination and testing and the Misuse of Drugs Act 1971, because in principle virtually everything is detectable if your equipment is sufficiently capable, and culpability for criminal liability should not rest with who has the best/newest/most capable testing machine?

53. The regulatory authorities in the UK have not yet provided any advice on what is a "detectable" level of THC, however, in other European jurisdictions some greater clarity has been achieved – or not:

    a. In Sweden, the law is as in the UK, with a requirement for zero;

    b. In Italy, the law is that sale and marketing to the public of products derived from cannabis is an offence under the Italian drug control law "unless the products are in practice devoid of narcotic effects" ('privi di efficacia drogante'). It is not yet known how this last phrase will be interpreted.

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c. In Germany the *medical prescription* of cannabinoid products containing up to 0.2% THC are permitted. Non-medically prescribed products should contain no THC.

54. As far as the UK is concerned, we appreciate that this is not overly helpful, and no-one wants to be the test case on any topic, but the reality is that this market is in its relative infancy and hitherto the regulating authorities have not shown either an appetite or a collective will for enforcement.

55. We stress "hitherto" because we are of the view that that is changing, fuelled by a number of issues which are gaining traction, both within the regulating/policing community and the public at large:

    a. Flagrant breaches of labelling requirements;

    b. Flagrant breaches of health claims;

    c. Widespread evidence of the products not containing what they should;

    d. Widespread evidence of the products containing what they should not; and,

    e. The conduct of some self-proclaimed industry leaders positively encouraging market participants to intentionally breach regulatory requirements and/or challenging the authority and competence of the regulatory authorities at every given opportunity.

GIVEN THE LEADERSHIP ROLES HELD BY SOME WHO BELIEVE THAT THC CONTENT IS PERMITTED, IS AN INDIVIDUAL OR BUSINESS ENTITLED TO RELY UPON THEIR PRONOUNCEMENTS AS A DEFENCE IN ANY PROSECUTION FOR THE SALE OF PRODUCTS RULED BY A COURT TO BE ILLEGAL BECAUSE OF THEIR THC CONTENT?

56. The answer is a very simple, "No". A fundamental principle of English Law is that you are personally and directly responsible for compliance with the law and that an individual is not entitled to evade liability by reference to any reliance upon what they had been told to do, or not do, by another.

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WHAT ARE THE POTENTIAL CONSEQUENCES FOR AN INDIVIDUAL FOUND TO BE INVOLVED IN THE IMPORTATION, PRODUCTION AND/OR SALE OF PRODUCTS WHICH CONTAIN THC, IF WE ARE CORRECT IN OUR VIEW THAT SUCH SALES ARE IN BREACH OF THE CRIMINAL LAW?

THE CONSEQUENCES OF CRIMINAL LIABILITY

57. The reader must exercise caution when reading and interpreting these next paragraphs because at first we must outline what the *maximum* sentences are for the applicable offences – in so doing we are not suggesting that these are the *likely* sentences for the situation that is under discussion.

58. The controlled cannabinoid substances, including THC, are designated as Class B substances under the Misuse of Drugs Act 1971. For such a classification of controlled drugs the most relevant offences, and their maximum sentences (as defined within Schedule 4) are described above: 14 years' imprisonment and/or an unlimited fine for all of the offences referred to, save for simple possession which is 5 years' imprisonment.

59. What we cannot stress enough is that these figures are the *maximum* sentences which could *ever* be imposed. It is highly unlikely that, for an offender in the circumstances that we are discussing, a custodial sentence would ever be actively considered for someone who was appearing before the Courts for the first time for this type of "THC offence".

60. What the individual would sustain is:

    a. the fact of a criminal conviction being recorded against them, with the inevitable detrimental consequences that such brings;

    b. a likely requirement to pay for their own representation during the proceedings;

    c. a likely requirement to pay a fine;

    d. a likely requirement to pay the Prosecution costs of having brought the prosecution; and,

    e. an exposure to the consequences of the Proceeds of Crime Act 2002.

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THE PROCEEDS OF CRIME ACT

61. The Proceeds of Crime Act 2002 sets out the legislative scheme for the recovery of criminal assets with criminal confiscation being the most commonly used power. The aim is to deny "criminals" (for that is what the convicted THC dealer/supplier would then be) the use of their assets, recover the proceeds of crime and disrupt and deter criminality.

62. This is not an analysis on the detailed application of the Proceeds of Crime, however, the law is incredibly draconian and it is mandatory for the Crown Court to make an enquiry if the Prosecution ask it to do so. To this end we will outline the key structure of the legislation.

63. The power is available to the Crown Court, not the Magistrates' Court, but the power of the Magistrates' Court to send a Defendant to the Crown Court in order to ensure that that Court has the power to pursue Confiscation proceedings against them is the norm in offending where there has been a financial gain of greater magnitude than any individual offending before the Court.

64. The Crown Court ***must*** consider making a confiscation order against a defendant under Part 2 POCA if:

    a. the defendant is convicted of an offence or offences in the Crown Court, or has been committed to the Crown Court for sentence or to be considered for a confiscation order; and

    b. the Prosecutor requests that the court consider making a Confiscation Order, or the court believes that it is appropriate to consider making a Confiscation Order.

65. The Crown Court, when it considers making a Confiscation Order against a defendant, must determine whether the defendant has a '***criminal lifestyle'***. If so, the court must determine whether the defendant benefited from his '***general criminal conduct***'. General criminal conduct is conduct at any time that constitutes an offence in England and Wales (whether or not it occurred in England and Wales). The court, when determining these matters, must do so on the balance of probabilities, ***not to the criminal standard of proof***.

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66. If the court decides the defendant has a criminal lifestyle, certain assumptions may be made. In particular, ***the court will assume all property received by, held by, spent or obtained after the relevant date was obtained as a result of the defendant's general criminal conduct and is liable to confiscation***.

67. If the court determines that the defendant does not have a criminal lifestyle, it must decide whether he has benefited from his or her 'particular criminal conduct'. ***Particular criminal conduct means conduct which constitutes the offence or offences for which the defendant has just been convicted***, or conduct which constitutes offences which the court will be taking into consideration in deciding his or her sentence for the offence or offences for which the defendant has just been convicted.

68. Where the court determines that the defendant has either benefited from his general criminal conduct, that is where the defendant has a criminal lifestyle, or has benefited from his particular criminal conduct, ***it must***:

    i. ***determine the recoverable amount of such benefit***; and

    ii. make an order (a confiscation order) requiring the defendant to pay that amount.

69. A Confiscation Order does not provide for the confiscation of particular property, but rather orders the defendant to pay a specified sum from whatever resources are available to them. The defendant is given a set time to pay the order after which he or she is liable for interest and may be subject to a default custodial sentence for failing to pay.

70. ***The offences which we are considering are classed as "drug trafficking" offences and are therefore automatically "criminal lifestyle" offences***. The automatic consequence is that ***any unexplained income or expenditure for a period of 6 years*** prior to their conviction is ***assumed to be the proceeds of crime*** until the contrary is proved, and a sum in that amount will be ordered to be paid to the Court.

71. We have simplified the sequence below and described the effect of the process without all of the details of the process itself, however, the sequence is realistic and is presented to give an example of the confiscation regime in practice:

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a. Four on-line test purchases are made by Trading Standards in which they buy one unit of different CBD products. Each product retails at £100;

b. Testing of each product reveals that they each contain 0.19% of THC, or less than 1mg of THC;

> *[As we have seen from the article published in the Hemp & CBD Maedia Magazine from September 2019, "experts" use these interchangeably, but for these purposes it perhaps matters not which "rule" we are considering]*

c. Trading Standards report the matter to the police and the trader is prosecuted for four counts of supplying a controlled drug;

d. The trader explains that they relied upon an article by the country's leading cannabis lawyer in which it was said that the THC levels in CBD products were irrelevant because they were exempt under the Misuse of Drugs Regulations 2001 – they even produce a copy of a published article the Court;

e. The Magistrates' feel that the determination of the correct interpretation of the Regulations is unsuitable for them, so they commit the case to the Crown Court;

f. In the Crown Court there will need to be a hearing in which the Judge makes a legal ruling as to whether the published analysis is correct. Prior to this trial hearing there would need to be a preliminary hearing and so a legal representation will be required for two days. Unless entitled to legal aid, the trader needs to pay for that representation;

g. If our analysis is correct, then the Court will rule that the analysis within the article is fundamentally flawed and rule that the trader has no defence in law. Having been told that they have no defence the trader pleads guilty to four Counts of Supplying a Controlled Drug, something which they must now declare for many years to come;

h. It is established that the trader has never been in trouble before, but the Judge observes that it is their duty to protect the public from harmful substances such as THC (because the law says that it is), and so they must deter other traders from exposing the public to the same danger (because the law says that it is, and that they must);

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i. The Judge Orders the trader to pay a fine of £4,000 (£1,000 per product sold) and pay the Prosecution Costs of £1,500. Overall therefore the direct financial consequences of the criminal conviction aggregate to £5,500, plus their own legal costs, but the matter does not stop there;

j. The Prosecution invoke the Confiscation Order process and are able to establish that the trader satisfies the criteria of having a "criminal lifestyle" as defined within the Act – it is automatic because they are now a "drug trafficker". As a result, the trader is Ordered to identify to the Prosecution all income and assets which they have acquired or relinquished in the period starting with 6 years prior to the date of their conviction;

k. In order to ensure that the trader does not inadvertently fail to identify some of their assets, the Prosecution appoint a Financial Investigator to obtain copies of every financial transaction which the trader has undertaken, whether personally or through his business, for the previous 6 years – this includes, but is not limited to, all bank statements, credit cards, mortgages, insurances, purchase orders, sales ledgers etc;

l. The Financial Investigator produces a Report to the Court in which they identify all income from criminal acts, all unexplained income and all unexplained expenditure and assert that that is the traders "Benefit from Criminal Conduct". In this instance it equates to £200,000 because although they have only been convicted in respect of the sale of four £100 items, the Investigator establishes that over the six-year period the trader has sold 500 units of each product, which retailed for an aggregate of £200,000;

m. The Court is not permitted to "take sympathy" on the trader because under the Act it ***must*** determine the recoverable amount of such benefit, and make an order (a Confiscation Order) requiring the defendant to pay that amount.

n. The trader explains that they didn't make £100 per unit profit because they had to pay all of their overheads. The Judge explains that under the Proceeds of Crime regime the trader is not liable for their net profit from the sale of criminal goods, but for the retail value that they obtained for them. The Judge makes a finding that the trader's Benefit from Crime for the purpose of POCA is £200,000.

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o. The Financial Investigator has identified that the trader owns a house, along with their spouse, which is valued at £500,000 and upon which there is a £100,000 mortgage. The Judge concludes that the trader's beneficial interest in the joint matrimonial home equates to 50% of the equity in the property, i.e. £200,000.

p. The Judge Orders the trader to pay £200,000 into the Court within 3 months, in default of which they will serve a prison sentence of two and a half years.

72. We point out that, thus far, we are not aware of any market participant being prosecuted for manufacturing, stocking or retailing products which contain THC, but that does not mean that it will not happen.

73. For those lawyers advocating that there is no breach of the criminal law in these circumstances, perhaps pose a number of questions:

    a. If charged with a drugs offence, will you represent me for free?

    b. If convicted of such an offence:

        i. will you pursue my appeal for free?

        ii. will you pay any fine imposed upon me?

        iii. will you pay any Prosecution costs awarded against me?

        iv. will you settle any Confiscation Order awarded against me?

74. If the answer to each of these is "Yes", then you only risk the loss of your good character and reputation. If the answer to any of these questions is "No", perhaps you may wish to enquire why they are not prepared to exhibit the same "*prerequisite courage*" that they suggest you exhibit?

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CONCLUSIONS

75. We do not wish to end on such a sour and dispiriting note, because with sensible conduct and considered engagement, we believe that the Cannabinoid industry has a real future. What we do want to do is ensure that market participants make informed choices and are not misled by others who, as we stated earlier, pronounce their legal ***opinion*** as if it were legal ***fact***.

76. The regulatory environment in this sphere is not a straight-forward one, with the Home Office Regulating the drugs laws and the Food Standards Agency (FSA) regulating CBD as food supplements.

77. We believe that the best way to engage with the Home Office is through the creation of a working relationship with the FSA, given that it is the latter (and local Trading Standards) who will be at the "coal face" of policing the cannabinoid environment (outwith medical claims).

78. Presently we observe what is becoming a rather absurd spectacle of meetings taking place with the FSA, followed by publications of the outcome of the meeting by the attending party, followed by the immediate disavowing of the asserted discourse by the FSA. When only two parties are "in the room" a failure to accurately replicate what was (a) discussed and (b) agreed is somewhat surprising. Conduct such as this only leans to entrenchment, mistrust, and breakdown on both sides, which helps no-one, irrespective of whether there was any "fault".

79. Yes, the government need to engage with the industry in order to help those market participants who are willing to truly engage with them to better define what conduct and product formulae are acceptable, equally, the industry needs to take responsibility for complying with the law as it now is, not as it wishes that it were. As a means of progress we encourage the government, through the auspices of the FSA and Home Office, to define what an acceptable detectable level of THC in products is, pursuant to which manufacturers will then have a maximum tolerance to remain within.

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80. One cannot help concluding that there are elements of the industry who feel that if they can't have it "their way", then they prefer all-out conflict rather than further engagement. We feel that such approach is naïve, self-centred and irresponsible and we encourage the government to engage with the wider industry rather than those who assert their own prominence, or simply shout the loudest.

81. We politely remind readers of the observation that we made at the outset of this analysis: this is our analysis and our opinion, with which you are free to disagree. For those of you who hold a contrary view and wish to express the same, we would appreciate it if you counter our analysis in an equally detailed exposition of the law and its application, rather than seeking to do so through abuse or vitriol.

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THE MISUSE OF DRUGS ACT 1971

s2 Controlled drugs and their classification for purposes of this Act.

In this Act… the expression "controlled drug" means any substance or product for the time being specified… in Part I, II or III of Schedule 2… and the provisions of Part IV of that Schedule shall have effect with respect to the meanings of expressions used in that Schedule.

s4 Restriction of production and supply of controlled drugs.

(1) … it shall not be lawful for a person –

(a) to produce a controlled drug; or

(b) to supply or offer to supply a controlled drug to another.

(2) … it is an offence for a person

(a) to produce a controlled drug in contravention of subsection (1) above; or

(b) to be concerned in the production of such a drug in contravention of that subsection by another.

(3) … it is an offence for a person

(a) to supply or offer to supply a controlled drug to another iN contravention of subsection (1) above; or

(b) to be concerned in the supplying of such a drug to another in contravention of that subsection; or

(c) to be concerned in the making to another in contravention of that subsection of an offer to supply such a drug

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s5 Restriction of possession of controlled drugs.

(1) … it shall not be lawful for a person to have a controlled drug in his possession.

(2) … it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.

(3) … it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.

s21 Offences by corporations.

Where any offence under this committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against accordingly.

s25 Prosecution and punishment of offences.

Schedule 4 to this Act shall have effect… with respect to the way in which offences under this Act are punishable on conviction.

SCHEDULE 2 PART II: CLASS B DRUGS

The following substances and products, namely:

- Cannabinol; and,
- Cannabinol derivatives.

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SCHEDULE 2 PART IV

For the purposes of this Schedule… "cannabinol derivatives" means the following substances… namely:

- tetrahydro derivatives of cannabinol; and,
- 3-alkyl homologues of cannabinol or of its tetrahydro derivatives.

SCHEDULE 4: PROSECUTION AND PUNISHMENT OF OFFENCES

The maximum sentences are for the offences identified above are:

- Importation of a controlled drug s3(1)(a):
- Exportation of a controlled drug s3(1)(b):
- Production of a controlled drug s4(2)): 14 years' custody and/or an unlimited fine;
- Supplying a controlled drug to another (s4(3)): 14 years' custody and/or an unlimited fine;
- Being concerned in the production of a controlled drug (s4(2)): 14 years' custody and/or an unlimited fine; and,
- Offering to supply a controlled drug to another (s4(3)): 14 years' custody and/or an unlimited fine;
- Being concerned in the Supply of a controlled drug (s4(3)): 14 years' custody and/or an unlimited fine;
- Possession of a controlled drug (s5(2)): 5 years' custody and/or an unlimited fine.

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- Possession of a controlled drug with intent to supply it to another (s5(3)): 14 years' custody and/or an unlimited fine;

MISUSE OF DRUGS REGULATIONS 2001

r4 Exceptions…

(5) Sections 3(1), 4(1) and 5(1) of the Act shall not have effect in relation to any exempt product.

r2 Interpretation

(1) In these Regulations, unless the context otherwise requires

"exempt product" means a preparation or other product consisting of one or more component parts, any of which contains a controlled drug, where—

(a) the preparation or other product is not designed for administration of the controlled drug to a human being or animal;

(b) the controlled drug in any component part is packaged in such a form, or in combination with other active or inert substances in such a manner, that it cannot be recovered by readily applicable means or in a yield which constitutes a risk to health; and

(c) no one component part of the product or preparation contains more than one milligram of the controlled drug or one microgram in the case of lysergide or any other N-alkyl derivative of lysergamide;

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APPENDIX 2

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PAPER: WHAT IS A CONTAMINANT LEVEL?

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WHAT IS A CONTAMINANT LEVEL?

We return briefly to a fundamental topic which we have written about before – in both 2019 and 2020: If THC is not permitted in products, to what level of precision is the product to be examined to establish the THC level?

We have previously expressed ourselves as follows (emphasis now added):

- *What level of THC is "detectable" for the purposes of examination and testing and the Misuse of Drugs Act 1971, because in principle virtually everything is detectable if your equipment is sufficiently capable, and culpability for criminal liability should not rest with who has the best/newest/most capable testing machine?*

- ***The regulatory authorities in the UK have not yet provided any advice on what is a "detectable" level of THC. The government needs to engage with the industry*** *in order to help those market participants who are willing to truly engage with them to better define what conduct and product formulae are acceptable, equally, the industry needs to take responsibility for complying with the law.*

- *As a means of progress* ***we encourage the government, through the auspices of the FSA and Home Office, to define what an acceptable detectable level of THC in products is****, pursuant to which manufacturers will then have a maximum tolerance to remain within.*

- *We know that due to the feeding of hemp biomass to cattle we now have what is, unless the practice is prohibited, an effectively permanent contaminant level of THC within milk and the onward food-chain. Therefore, it would seem that an argument that there can be no acceptable level of THC contamination in food products, would be an academic one.*

- *If that is correct, then one could suggest that* ***a sensible approach would be to then define what an acceptable level of controlled cannabinoid presence (THC/CBN) could be in foodstuffs generally, or in cannabis-derived products specifically****.*

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- ***Given that no-one seriously believes that individuals consume cannabinoid products which contain technically measurable, but pharmaceutically insignificant amounts of controlled cannabinoids (THC/CBN) in order to achieve psychoactive results, then one could quite properly define them as "residues" of the natural origin of the end product or undesired "contaminants" to that product****.***

- *To do so would not offend food law and regulation and if agreement could be found for the level at which acceptability was defined, then it is unlikely to have unintended consequences for those government departments charged with the control and eradication of narcotic drugs.* ***The question within this debate would be – what is an "acceptable" level below which the presence of "controlled cannabinoids" could be deemed an acceptable contaminant?***

We can indicate that we anticipate that there will be some further news on this topic in the very near future – a matter which will be highly relevant to those market participants who are currently going through the Novel Food authorization process. If you would like to have direct access to our industry insight so that your Novel Food Dossier is Validation-compliant, then feel free to make contact with us.

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APPENDIX 3

PUBLISHED: 29TH MARCH 2021

PAPER:

THE MECHANICS OF CHANGING ANY POLICY CONCERNING PROHIBITED SUBSTANCES IN THE UNITED KINGDOM

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THE MECHANICS OF CHANGING ANY POLICY CONCERNING PROHIBITED SUBSTANCES IN THE UNITED KINGDOM

There is a prescribed process which must be followed prior to any change in laws which relate to controlled substances in the United Kingdom:

1. Firstly, the relevant Minister, in this case the Home Secretary, must identify the potential change in policy and the manner in which that potential change might manifest itself in respect of the misuse of drugs;

2. Secondly, the Minister must commission the Advisory Committee on the Misuse of Drugs (ACMD) to assess the available evidence which impacts on the potential change;

3. Thirdly, the ACMD collates such evidence as is immediately available and, if it believes that it is advantageous, invite the submission of further evidence from relevant parties;

4. Fourthly, the ACMD reports back to the Minister and makes recommendations in respect of the proposed change. Such recommendations are not fettered by the initial question posed and can be:

    - to make the proposed changes;

    - to make the changes, but to do so within different parameters;

    - not to make the proposed changes, but to make different changes; and,

    - not to make any changes at all.

On 21st January 2021 the letter from Kit Malthouse (dated 11th January 2021) to the Chair of the ACMD was published. Without betraying any confidences we had, on 12th January 2021, made it clear that the Home Office were not only willing to review the impact of current Drugs laws on Cannabidiol products, but that they intended to take positive action in that regard - you can read our comments here.

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Therefore, it can now be appreciated that the "Kit Malthouse letter" of 11th January 2021 is actually the fulfillment of Stages 1 and 2 above – when the Home Office, acting through their subordinates the Minister of State in the Home Office and Ministry of Justice (Kit Malthouse) invited the Advisory Committee on the Misuse of Drugs to receive evidence on the specified issue:

> *As you are aware, tackling drug misuse and the harms that it causes remains a top priority for this Government. The Home Office is keen to draw on ACMD advice on the issue of CBD products which are not medicines. There has been a proliferation of such products available online and on the high street in recent years. While as an isolated substance, CBD is not a controlled drug, there is recent evidence that many of the products available contain controlled cannabinoids and that it is difficult to isolate pure CBD. The Government currently has no plans to look at the status of CBD itself under drug legislation.*
>
> *There is currently not a legal framework in place specifically exempting CBD products from control under the Misuse of Drugs Act 1971, and with this in mind, the Government wishes to explore the possibility of creating a specific exemption in the Misuse of Drugs Regulations 2001 ('the 2001 Regulations') for CBD products which contain no more than a defined trace percentage of controlled cannabinoids. Primarily THCV, Δ^9-THC and CBN and the cannabinoid Δ^9THCA-A. We are interested to hear if you believe other controlled cannabinoids require consideration too.*
>
> *The Government is minded to amend the 2001 Regulations to permit CBD products that contain no more than a defined trace percentage of certain controlled cannabinoids as an impurity. Additionally, we are minded to amend the definition of an "exempt product" under the 2001 Regulations to give effect to the intent surrounding its introduction, being to only exempt products used for scientific or diagnostic purposes which contain an extremely small amount and proportion of controlled drugs, but unambiguously excludes consumer products and any products intended for human consumption, other than in scientific research. We request the ACMD to provide advice on how the exempt product definition in the Misuse of Drugs Regulations may be amended to apply only to diagnostic equipment or for scientific research, as originally intended.*
>
> *In terms of this trace amount, we propose that the defined trace percentage in CBD products be set at a level which will be between 0.01% and 0.0001% by weight per controlled cannabinoid. The precise level will be determined following further scientific testing advice. Given the current limited availability of reference chemicals, we consider that analytical capability is likely to be best focused on the quantification of THCV, Δ^9-THC, CBN and Δ^9THCA-A rather than all controlled cannabinoids that could be permitted*

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to be present in trace amounts. The Government intends to work further with the forensic science sector to assist in determination of the method of testing and precise definition of the trace amount. The 0.01-0.0001% per named controlled cannabinoid level (or lower) is proposed on the basis of evidence and will be subject to further confirmation on our part that responsible producers are able to produce CBD to this level of purity, and it is within the capabilities of the forensic science sector to quantify consistently and affordably.

In order to keep the level of controlled cannabinoids in CBD products down to an unavoidable trace level, we would ask that the ACMD considers the maximum dose for any non-negligible effect for THCV, Δ^9-THC and CBN and the cannabinoid Δ^9THCA-A. We are seeking further scientific testing advice on analytical capability to test for a cannabinoid content of 0.01-0.0001% by weight or lower per specified cannabinoid. In particular, we would ask that the ACMD considers whether such products would be liable to be abused or have ill effects, and whether the controlled substances could, in practice, be recovered from such products.

In furtherance of their statutory obligations, the ACMD have recently effected Stage 3 above and called for evidence to address seven specific questions.

We have recently seen some commentary which suggested that the actions of the ACMD is a result of the "kickback from the industry after Malthouse's letter in January". In fact nothing could be further from reality because, for the requirements of the process outlined above, the request by the ACMD is consequent upon the "Malthouse letter", not in opposition to it.

WHAT ARE THE ACMD SEEKING?

The Committee's remit is precisely defined and the seven questions which they have posed are targeted at that remit – they are not seeking generalised opinions on Cannabinoids, but specific data which pertains directly to the remit set for them.

Therefore, while market participants are obviously free to provide such information as they wish to the Committee, we would advise that the following aspects are borne in mind if you wish to have your contributions considered, rather than sidelined as failing to address the questions posed.

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We would observe that, if submissions are structured in the appropriate manner, then most market participants will be able to say everything that they want to in respect of each question – but to do so the structure of the answer must address the question and make all of the information imparted referable to that question. As a high-level overview, our observations would be:

1. *The commission refers to the cannabinoids Δ9-THC, CBN, THCV and Δ9THCA-A. Are there any further phytocannabinoids which should be considered? If so, which cannabinoids and please provide evidence.*

    - **The ACMD's remit in this regard relates to Controlled Cannabinoids and therefore it is only additional Controlled Cannabinoids which are relevant to their considerations. It is perhaps worth noting that the Laboratory of Government Chemists identified 12 psychoactive compounds in their Report in January 2021 (see Table 1) (here).**

2. *At what dose would each of these cannabinoids cause a psychoactive effect in humans? Are there any potential harmful effects at these dosages?*

3. *What are the conditions that precursors of cannabinoids such as Δ9-THCA-A might be transformed into controlled cannabinoids?*

4. *What is the combined level of the psychoactive cannabinoids that would not produce a psychoactive effect (in other words maximum combined dose of active ingredients) given the standard use of consumer CBD products?*

5. *Are you aware of any evidence of CBD products causing adverse reactions or harms which might be attributable to cannabinoid impurities? If so, please attach such evidence.*

    - **Any answer to these question should be referable to published scientific data, which should be included within the submission to the ACMD.**

6. *For producers of CBD-containing products for supply to consumers, what certification of quality of CBD extracts from raw materials do you require or expect.*

7. *For which controlled phytocannabinoids are there reference standards available or likely to become available in the near future for their use in testing?*

    - **These questions are much wider in scope and permit the responder to provide their opinion, which does not need to be supported by factual evidence.**

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THE CANNA CONSULTANTS

At The Canna Consultants we have always been at pains to remind market participants that:

- we are not a Trade Association;
- we are not a Trade Association which asserts itself as acting on behalf of the industry as a whole; and,
- we do not produce "Reports" which purport to engage with Government on behalf of the industry as a whole and define "acceptable" limits by reference to the requirements of Members.

What we are is an independent Consultancy which advises market participants and governments throughout the world on Cannabinoids, Cannabinoid Medicines and Cannabinoid Policy:

- it is inherent that in so doing, when we engage directly with market participants, we impart to them the insight which we have in respect of government policy as it impacts upon them presently, and as it will do so in the future, given our understanding of the "direction of travel" of government policy;
- it is inherent that in so doing, when we engage directly with governments, we impart to them the insight that we possess from those market participants whom we represent.

Thus, we are not a mouthpiece **for** defined elements of the market and nor are we a mouthpiece **for** government – what we are able to do is speak **to** the market and speak **to** government, seeking to ensure a sensible and progressive dialogue to benefit the interests of those whom we represent.

What is unique about The Canna Consultants is the assistance that we provide to both "sides" of the regulatory equation – the regulators and the regulated – to establish outcomes that are acceptable to all. If you want to be close to that equation, our doors are always open.

Remember what we always say: Be Careful Who You Listen To.

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APPENDIX 5

PUBLISHED: 19TH DECEMBER 2021

PAPER:

ACMD – CBD PRODUCTS ARE NOT CURRENTLY EXEMPT FROM THE UK MISUSE OF DRUGS ACT

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THE ADVISORY COMMITTEE ON THE MISUSE OF DRUGS CONFIRMS WHAT WE AT THE CANNA CONSULTANTS HAVE ALWAYS STATED:

THERE IS CURRENTLY NO EXEMPTION FOR CBD PRODUCTS FROM THE MISUSE OF DRUGS ACT

(BUT THEY NOW RECOMMENDED ONE)

Two years ago we published an analysis of the legal position concerning the permitted levels of Controlled Cannabinoids within CBD consumer products (available here). We published the Article (which was adapted from a Counsels' Opinion which I had been commissioned to provide to a significant corporation which was considering entering the European CBD industry and wanted to understand the potential ramifications), with the client's permission and because we saw many "legal experts" in the industry providing completely inaccurate advice to market participants. When publishing we said:

> *In recent weeks we have again seen the rising prevalence of "market leaders" and "legal experts" making pronouncements about the existence and applicability of what are variously described as the "**0.2% rule**" and the "**1mg rule**", concerning the permissible THC content in cannabinoid products.*
>
> *While we are always willing to listen to the opinions of others - especially when they are those with which we disagree - we believe that it is thoroughly misleading for individuals and organisations to present their opinions as if they were legally established and precedents. This is ever the more so when those who propagate what we consider to be inaccurate analysis and opinion are not those who will be left dealing with the consequences of reliance upon those same inaccurate opinions.*

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We have seen expressions that "cannabis is a risk sector", that "anyone operating in [it] must have some appetite for commercial risk" and that "courage is a prerequisite". This may, or may not be so, however, we fundamentally believe that all market participants should be advised in an open manner, such that they can make their own risk assessment, on an informed basis, and decide for themselves how that sits against their appetite for the same. To do otherwise deprives those market participants of informed consent and destabilises the whole of the industry.

What follows is our analysis and our opinion, with which others are free to disagree. For those who do hold a contrary view and wish to express the same, we would appreciate it if they counter our analysis in an equally detailed exposition of the law and its application, rather than seeking to do so in no more than 144 characters.

We believe that this is a hugely significant stage in this industry's development and the failure of self-proclaimed "leaders" and "experts" to act responsibly will result in a detriment to all, not just themselves or those on whose behalf they are said to speak.

Those who follow our observations on the Cannabis Industry will be aware of our mantra, "***Be Careful Who You Listen To***".

Once again it seems that the ACMD and the Government were ***Careful Who They Listen To*** because on Friday last the ACMD published their conclusions:

The first limb is being interpreted still to be met if the controlled drug is present as an impurity, rather than a major intended component, within a preparation or product intended for administration to a human being. This ambiguity has allowed the exempt product definition to be used for… consumer CBD products.

The definition was designed for diagnostic purposes and so could be better designed for scientific use. For example, to permit its application for other scientific purposes, such as the supply of small quantities of controlled drugs to act as reference materials to support forensic and toxicological analysis.

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The ACMD recommends changing the first limb *of exempt product definition* ***to refer to the "preparation or other product containing the controlled drug" rather than the "controlled drug"*** *except for "research" purposes as defined in Schedule two of the Psychoactive Substances Act 2016. An example of such a wording could be:*

> *(a) the preparation or product containing the controlled drug is not intended for administration to a human being or animal other than for the purpose of approved scientific research, as defined in Schedule 2 of the Psychoactive Substances Act 2016.*

We therefore continue to remind the industry to "***Be Careful Who You Listen To***".

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APPENDIX 5

PUBLISHED: 20TH DECEMBER 2021

PAPER:

ACMD – CONTROLLED CANNABINOIDS ARE PERMITTED, BUT TO WHAT LEVEL?

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THE ADVISORY COMMITTEE ON THE MISUSE OF DRUGS (ACMD) PUBLISHED ITS CONCLUSIONS INTO THE APPROPRIATE MAXIMUM CONTROLLED CANNABINOID LEVEL WITHIN CANNABIDIOL (CBD) "WELLNESS" PRODUCTS

On 11th January this year the Minister of State for Crime and Policing, who is partly responsible for the criminal regulation of narcotics in the UK, asked the Advisory Committee on the Misuse of Drugs (ACMD) to make recommendations for an acceptable level of controlled cannabinoids within consumer Cannabidiol (CBD) products.

The ACMD has now reverted to the Minister and indicates that it has reached the following conclusions:

1. Extraction of controlled phytocannabinoids from consumer CBD products is unlikely to be a viable means of obtaining these drugs for illicit use;

2. It would be appropriate to set specific limits for the content of Δ9-THC and its precursor Δ9-THCA (i.e. Δ9-THCA-A and Δ9-THCA-B) in consumer CBD products;

3. Plant-derived consumer CBD products would not contain sufficient controlled phytocannabinoids (other than Δ9-THC) or their precursor acids to produce any pronounced psychoactive effects unless they were added to the product (i.e. spiked). To prevent the possibility of spiking a limit should be set for all controlled phytocannabinoids in consumer CBD products;

4. The dose limit for total Δ9-THC (Δ9-THC plus Δ9-THCA) should be 50 micrograms (µg) in a unit of consumption (where a unit of consumption or 'single serving' is the typical quantity of a CBD product consumed on one occasion);

5. At the recommended levels the controlled phytocannabinoids present in consumer CBD products are highly unlikely to produce any harmful effects;

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6. Setting a single concentration limit that applies to all consumer CBD products would not be appropriate;

7. Further research is needed to confirm whether conversion of CBD to Δ^9-THC by extreme heating can occur and its relevance to the processes involved in CBD vaping evaluated;

8. Currently the methods for extraction, separation and quantification of controlled phytocannabinoids in consumer CBD products are not sufficiently robust with regards to sensitivity, accuracy and reproducibility; and,

9. Laboratories assessing compliance should be accredited to the ISO standard and producers should use laboratories which hold that accreditation to perform their quality assessment testing.

The ACMD has sought to apply these conclusions and had made the following **four recommendations** to provide a legal framework to control the amounts of phytocannabinoids in consumer CBD products under the Misuse of Drugs Act 1971:

<u>Recommendation 1</u> (Emphasis added)

(i) That the total dose of Δ9-THC (including Δ9-THCA, as calculated using Equation 1 in the report) and all other controlled phytocannabinoids in consumer CBD products be controlled.

(ii) **The dose of *<u>EACH</u>* controlled phytocannabinoid should not exceed 50 micrograms (µg) per unit of consumption** (defined as **the typical quantity of a CBD product consumed on one occasion**).

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<u>Recommendation 2</u> (Emphasis added)

(i) That regulatory authorities ensure that **any consumer CBD product** permitted to market:

a. **has limits on the content of controlled phytocannabinoids**;

b. **such that the dose of Δ9-THC** (including its precursor Δ9-THCA) **and of *<u>EACH</u>* of the other controlled phytocannabinoids;**

c. **does not exceed 50 micrograms (µg) per unit of consumption (**defined as **the typical quantity of a CBD product consumed on one occasion**).

<u>Recommendation 3</u> (Emphasis added)

A further inter laboratory comparison trial (ring trial) should be commissioned specifically to support the capability of testing laboratories to detect controlled phytocannabinoids below the recommended maximum levels in a representative range of consumer CBD products

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Recommendation 4

That development of more accurate testing for controlled phytocannabinoids is supported to allow testing capabilities to develop and be fully regulated through:

- the development of standard protocols for the extraction, separation and quantification of controlled cannabinoids (and their precursor acids) from consumer CBD products which are of sufficient reproducibility and sensitivity to be appropriate for the measurement of the level of controlled phytocannabinoids as recommended in this report;

- the encouragement of suppliers of chemical reference materials to produce certified standards for those controlled cannabinoids for which standards are not currently available; and,

- the accreditation to ISO 17025:2017 of analytical methods used to ensure appropriate method validation, quality control and independent assessment of the methods.

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