

## ANALYSIS OF THE NIGERIAN DRUG LAW ENFORCEMENT AGENCY ACT

### Introduction

This analysis is concerned with the substantive narcotics offences contained within the Nigerian Drug Law Enforcement Agency Act (hereafter referred to as ‘the Act’).

### Analysis of the Act

For ease of analysis this briefing has four main sections: a) The implication of drug control in Nigeria and how it intersects with harm reduction and human rights b) overall commentary of the Act; c) offences related to a person who consumes drugs and d) trafficking offences under the ACT.

- a) The implication of drug control in Nigeria and how it intersects with harm reduction and human rights

Drug control in Nigeria is primarily based on law enforcement approaches to tackle drug trafficking and drug use. This runs contrary to the opening of the debate on the issue of drug policy in the continent as evidenced by the *AU Plan: the African Union’s Plan of Action on Drug Control* (2013 -2017) which states:

“Drug Control practice in Africa has tended to focus more attention on supply reduction, this plan proposes to restore the balance and pay greater attention to health and other social consequences of drug use, while not neglecting law enforcement approaches.”

However, the Act is one that very much focuses on law enforcement initiatives at the expense of health and social initiatives. Furthermore, such an approach, especially in relation to drug consumption and low level supply offences, creates more harms for Nigerian society than it prevents.

As discussed in more detail at section c), criminalising drug use and possession has little to no impact on levels of use, but can lead to serious public health problems, especially in relation to injecting drug use where people engage in risky injecting behavior to avoid detection by law enforcement. This can lead to public littering of syringes and sharing of needles, which can result in a significant increase in transmission of blood borne viruses. This is negative not only for the individual, but also for the wider community

as it can lead to higher rates of HIV/AIDS and other diseases. Evidence from a study conducted by YouthRISE in 2015 has also shown that young people who get detained for drug use offence end up picking up other criminal habits while in detention or prison and none of them after their release stop the use of drugs<sup>1</sup>. As the most recent UNODC World Drug report points out the number of people seeking treatment for opioid use disorders in Nigeria is growing.<sup>2</sup> It is estimated that injecting drug use, alongside sex work and men who have sex with men, will account for 40 per cent of new HIV transmissions<sup>3</sup>, and we know that criminalisation of such activities and lack of public health interventions contribute to increased transmission rates. The Global Commission on Drug Policy, in its 2012 report, highlights that:

“The global war on drugs is driving the HIV/AIDS pandemic among people who use drugs and their sexual partners. Throughout the world, research has consistently shown that repressive drug law enforcement practices force drug users away from public health services and into hidden environments where HIV risk becomes markedly elevated.”<sup>4</sup>

This position is also supported by the West African Commission on Drugs (‘WACD’).<sup>5</sup>

An additional cost to society and to government spending is the cost of incarcerating people for possession or use of drugs including those who supply to support their own drug use. Research carried out by YouthRise Nigeria has found that the average sentence for simple possession or use of drugs across seven prisons in four states<sup>6</sup> is three years and six months, with a range of 25 years imprisonment for the offence (the highest reported) to 1 month and 2 weeks (lowest reported).

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<sup>1</sup> YouthRISE(2015), ‘We Are People: The Unintended consequences of Nigeria Drug law on the Health and Human Rights of Young People who Use Drugs.

<sup>2</sup> UNODC (2017) World Drug Report: Global Overview Of Drug Demand And Supply, Latest trends, cross-cutting issues, Book 2 at Pg.17, UN: Vienna [https://www.unodc.org/wdr2017/field/Booklet\\_2\\_HEALTH.pdf](https://www.unodc.org/wdr2017/field/Booklet_2_HEALTH.pdf)

<sup>3</sup> Awofala A. & Ogundele O. (2016), HIV in Nigeria, <http://www.sciencedirect.com/science/article/pii/S1319562X16300110>

<sup>4</sup> Global Commission on Drug Policy (2012), The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic, Pg. 2 [https://www.globalcommissionondrugs.org/wp-content/uploads/2012/03/GCDP\\_HIV-AIDS\\_2012\\_EN.pdf](https://www.globalcommissionondrugs.org/wp-content/uploads/2012/03/GCDP_HIV-AIDS_2012_EN.pdf)

<sup>5</sup> West African Commission on Drugs (2014), Not Just In Transit: Drugs, the State and Society in West Africa, <http://www.wacommissionondrugs.org/wp-content/uploads/2014/11/WACD-Full-Report-Eng.pdf>

<sup>6</sup> Report on Young People Serving Drug Related Offences in Nigeria Prisons. Implications for Policy Review .2017.

As the Government will know, pre-trial detention is also significantly contributing to prison overcrowding in the country, with some institutions reporting that they are 250 per cent over capacity.<sup>7</sup> Again YouthRise Nigeria reports that in relation to those detained for possession or use of drugs pre-trial detention accounts for 59 per cent of inmates they surveyed. The organisation’s research shows that those detained – both pre and post-trial – are largely under 30 years old. This often leads to a situation where individuals who would be the main income generator for the family will be incarcerated for long periods of time for what should be considered a minor offence, that is, drug use or possession of drugs or for low level dealing activities. Ultimately, prison is a driver for diseases, putting the individual incarcerated at risk of disease and undermines public health for the wider community.

These are just some of the problems that Nigeria is facing in relation to the current punitive approach to drugs but as the WACD points out there are a myriad of other problems associated with a tough law enforcement approach to drug use. In the Commission’s report they highlighted that “although drug trafficking and consumption are not new to West Africa, since the mid-2000s they have taken on a dimension that threatens the security, governance and development trajectory of many countries in the region.”<sup>8</sup>

b) Overall commentary on the Act

With respect, this Act is in need of urgent revision due to the inaccuracy of the terms used to describe controlled drugs. The Act seems concerned with “cocaine, LSD, heroin(e) (*sic*) or any other similar drugs” - this definition is too broad and should be specific as to what substances are controlled by the legislation. There is no definition of what is defined as ‘other similar drugs’ which is the term used in the majority of sections related to the substantive offences. In addition, the preamble to the Act states that its aim is to “enforce laws against the cultivation, processing, sale, trafficking and use of hard drugs” again there is no legal definition as to what constitutes a ‘hard drug’.

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<sup>7</sup> Oti Iroegbu (2016), 80 percent of the inmates in Nigerian prisons have not even been tried in court, Venture News, 27 October 2016

<http://venturesafrica.com/nigerian-prison-overcrowding-not-just-a-case-of-congestion/>

<sup>8</sup> West African Commission on Drugs (2014), Not Just In Transit: Drugs, the State and Society in West Africa, Pg. 12, <http://www.wacommissionondrugs.org/wp-content/uploads/2014/11/WACD-Full-Report-Eng.pdf>

Schedule 2 of the Act contains a limited list of substances which seem to be concerned with precursors rather than a list of drugs subject to the wider provisions of the Act.

The Act also appears to have repeated sections to deal with the same activities. For example, Section 19 replicates the offence of possession already contained in both Section 11(d) and Section 20(1)(c); it is unclear how prosecutors or police would determine the charge. Another point of confusion is the offence of buying a controlled drug as outlined in Section 11(c); it is unclear whether the act of buying would include people who are purchasing drugs for their own personal use. If this section does in fact apply to purchasers of drugs who only intend to consume them, and do not intend to supply the substance or commit another trafficking offence, the sentence of life imprisonment would be severe to say the least and completely disproportionate. Again, Section 20(1)(c), contains the offence of purchase, replicating the offence in Section 11(c).

Section 20(1)(a) also replicates some offences contained in sections 11(a), 11(b) and 11(c). It would appear that the only substantive difference between these offences is in relation to punishment, in that offences contained in Section 20(1) can include a referral to treatment, or an similar intervention, in addition to the punishment prescribed by the Court (Section 20(3)). Section 20(4) permits the Court to sentence a juvenile to either an “alternative to conviction or punishment’ but it is not clear in what circumstances a young person would be charged with an offence under section 11 or section 20.

Another problem is the lack of distinction between activities that can apply to both personal use offences and trafficking offences. Section 20(1)(b) creates the offence of cultivation and applies to “opium, poppy, coca bush or cannabis” – it is important to note that opium cannot be cultivated – however it is not unusual for people to cultivate illicit plants for their own personal use, especially in relation to cannabis. Under the current law they would face a sentence of life imprisonment.

Section d) of this briefing highlights the need to distinguish the role of the offender in the sentencing process, and we would recommend that in relation to trafficking offences such an approach should be taken.

Finally, the Act seems to be silent on the issue of access to medicines which are classed as controlled drugs. The Single Convention on Narcotic Drugs 1961 creates an obligation for member states to ensure access to essential medicines that are also

controlled by the treaty, including, opioid analgesics. It is unclear from the Act how Nigeria is meeting this obligation. As the Global Commission on Drug Policy highlighted in its 2015 report:

“States must recognize they have an obligation under international law to ensure access to controlled medicines for their populations. This obligation is implied in the cornerstone treaty of the international drug control system, the Single Convention on Narcotic Drugs, and is firmly rooted in the right to the highest attainable standard of health in international human rights law.”<sup>9</sup>

The Commission also highlighted that a punitive law enforcement approach can undermine member states’ legal obligation to ensure adequate access to medication.

c) Offences related to a person who consumes drugs

Sections 11(c), 11(d), 19 and 20(1)(c) are all concerned with prohibiting activities related to personal use of drugs, ranging from criminalising use or possession of illicit substances through to purchasing. It is recommended that the law is harmonized to reflect one offence of possession but that this is dealt with as a civil offence rather than a criminal offence.

The evidence shows that the use of the criminal law to suppress or eradicate drug use is ineffectual. The United Kingdom’s Home Office confirmed this in a 2014 report comparing outcomes from 11 countries who implement different legal regimes, including those who pursued a tough law enforcement approach to countries that had ended criminal sanctions, and concluded that:

“we did not in our fact-finding observe any obvious relationship between the toughness of a country’s enforcement against drug possession, and levels of drug use in that country.”<sup>10</sup>

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<sup>9</sup>Global Commission on Drug Policy (2015), *The Negative Impact Of Drug Control On Public Health: The Global Crisis Of Avoidable Pain*, Pg 6 <http://www.globalcommissionondrugs.org/wp-content/uploads/2012/03/GCODP-THE-NEGATIVE-IMPACT-OF-DRUG-CONTROL-ON-PUBLIC-HEALTH-EN.pdf>

<sup>10</sup> UK Home Office (2014), *Drugs: International Comparators*, UK Government. Pg. 47 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368489/DrugsInternationalComparators.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf)

Research carried out by the UK NGO Release (experts on drugs and drug laws) into the effect of decriminalisation found that of the 25 countries that had implemented such an approach – either in relation to cannabis or all drugs – none had experienced increased levels of drug consumption as a result of the law reform.<sup>11</sup> Their research did however find that this policy approach had positive outcomes for individuals and the State in terms of health, social and economic factors.

Portugal implemented a model of decriminalisation in 2001, coupled with a public health approach, and in the last 15 years the analysis of their drug policy has been positive. The country has experienced a significant drop in drug related deaths (reporting one of the lowest rates in Europe), injecting drug use fell by 40 per cent, HIV transmission rates fell from 907 cases in 2000 to 78 in 2013, at the same time the number of AIDs diagnoses decreased from 506 to 74.<sup>12</sup> More recent research has shown that Portugal saved 18 per cent in social costs in the first ten years of the policy, linked to the change in the legal framework and public health approach, with reduced burden on the health and legal systems.<sup>13</sup>

Australia has decriminalised cannabis possession in three States. Academics compared the outcomes for people who were no longer criminalised for possession or use of cannabis in one State (South Australia) against those who continued to be criminalised in Western Australia. Unsurprisingly, the outcomes for those criminalised were more negative in terms of their employment, education and accommodation. Interestingly, there was also evidence that criminalising an individual increased re-contact with the criminal justice system; this would indicate that when someone is criminalised for drug possession there is a greater risk of recidivism.

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<sup>11</sup> Eastwood, N. Fox, E. & Rosmarin, A. (2016), *A Quiet Revolution: Drug Decriminalisation Across the Globe*, Release: London. Pg. 7

<http://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20March%2031%202016.pdf>

<sup>12</sup> Hughes, CE. & Stevens, A. (2010), *What can we learn from the Portuguese decriminalization of illicit drugs?* Brit. J. Criminol. (2010) 50, 999–1022; Hughes, C. & Stevens, A. (2012), *A resounding success of a disastrous failure: re-examining the interpretation of evidence on the Portuguese decriminalisation of illicit drugs*, Drug and Alcohol Review, 31; Eastwood, N. Fox, E. & Rosmarin, A. (2016), *A Quiet Revolution: Drug Decriminalisation Across the Globe*, Release: London. Pg. 28-30

<http://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20March%2031%202016.pdf>

<sup>13</sup> Goncalves, R. Lourenc, A. & Nogueira da Silva, S. (2015), *A social cost perspective in the wake of the Portuguese strategy for the fight against drugs*, International Journal of Drug Policy 26. Pg. 207

[http://www.ijdp.org/article/S0955-3959\(14\)00231-X/abstract](http://www.ijdp.org/article/S0955-3959(14)00231-X/abstract) accessed June 26, 2016



Finally, there was also evidence from jurisdictions that there were financial savings to the State. As highlighted above Portugal experienced significant savings in social costs easing the financial burden on the government. California also decriminalised cannabis possession back in 1976, and in the first ten years of the policy implementation it is estimated that there were savings of \$1billion to the State.<sup>14</sup>

In most countries the decision to decriminalise drug possession is simply the ending of criminal sanctions for the offence, with many implementing alternative civil punishments such as suspending proceedings (and if no further offending within a prescribed period the matter is disposed of), fines, and/or referrals to treatment or education. Drug use is still punished, but it is just not a criminal sanction.

Decriminalisation of drug possession is an approach supported by numerous United Nations (UN) agencies including the UN Office of the Commissioner for Human Rights<sup>15</sup>; UN Development Programme<sup>16</sup>; UNAIDs<sup>17</sup>; and the World Health Organisation<sup>18</sup>.

Decriminalisation is a proportionate and evidence-based response to the personal consumption and possession of drugs, and an approach which respects human rights and that promotes public health.

#### d) Trafficking offences

As highlighted above, there are a number of offences involving trafficking activities that are duplicated, it is suggested that the law is harmonized for clarity. However, more

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<sup>14</sup> Aldrich, M.R., & Mikuriya, T. (1988), Savings in California Marijuana Law Enforcement Costs Attributable to the Moscone Act of 1976: A Summary, *Journal of Psychoactive Drugs* Vol. 20(1), Jan-Mar 1988. Pp. 75-81

[http://digital.library.ucla.edu/websites/1998\\_999\\_002/platform/mj\\_study.html](http://digital.library.ucla.edu/websites/1998_999_002/platform/mj_study.html)

<sup>15</sup> United Nations High Commissioner for Human Rights (2015), *Study on the impact of the world drug problem on the enjoyment of human rights*, UN: Geneva. Pg.16

[http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_65\\_E.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_65_E.docx)

<sup>16</sup> United Nations Development Program (2015), *Addressing the Development Dimensions of Drug Policy*, UNDP: New York. Pg.34

<http://www.undp.org/content/dam/undp/library/HIV-AIDS/Discussion-Paper--Addressing-the-Development-Dimensions-of-Drug-Policy.pdf>

<sup>17</sup> UNAIDs (2017), *Harm Reduction Saves Lives*, UN: New York, Pg. 7

[http://www.unaids.org/sites/default/files/media\\_asset/harm-reduction-saves-lives\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/harm-reduction-saves-lives_en.pdf)

<sup>18</sup> WHO (2014), *Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations*, WHO: Geneva. Pg. 86

importantly, it is vital that there is a proportionate and sliding scale of sentences to reflect the culpability and harm of the offence.

The outcome document of UN General Assembly Special Session on Drugs held in April 2016 states that there should be “proportionate and effective policies and responses, as well as legal guarantees and safeguards pertaining to criminal justice proceedings and the justice sector”<sup>19</sup>. The document goes on to say:

“Encourage the development, adoption and implementation, with due regard for national, constitutional, legal and administrative systems, of alternative or additional measures with regard to conviction or punishment in cases of an appropriate nature, in accordance with the three international drug control conventions and taking into account, as appropriate, relevant United Nations standards and rules, such as the United Nations Standard Minimum Rules for Noncustodial Measures (the Tokyo Rules)”<sup>20</sup>

In particular, the document highlights that States should ‘promote proportionate national sentencing policies’ where the severity of the penalty reflects the seriousness of the offence<sup>21</sup>. In England and Wales the sentencing framework for drug offences<sup>22</sup>, developed by the Sentencing Council, determines the starting penalty based on two main factors – culpability and harm. A number of other factors are then considered, including mitigating and aggravating factors of the offence. Culpability is determined by the role of the offender<sup>23</sup> with those involved in social supply or who are user-dealers considered to be the lowest end of the culpability scale. Those who have significant control over the market are at the highest end of the scale. Harm is determined by the quantity of drugs involved<sup>24</sup>. For example, 5 grams of heroin is considered to be in the lowest category (Category 4) and therefore the lowest scale of harm and 5 kilos of heroin is in the highest category (Category 1) and considered to have the highest level of harm. There are four categories in total.

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<sup>19</sup> UNODC (2016), Outcome Document Of The 2016 United Nations General Assembly Special Session On The World Drug Problem, UN: Vienna, Pg. 16  
<https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf>

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Sentencing Council for England and Wales (2012), Drug Offences: Definitive Guideline, London  
[http://www.sentencingcouncil.org.uk/wp-content/uploads/Drug\\_Offences\\_Definitive\\_Guideline\\_final\\_web1.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_Offences_Definitive_Guideline_final_web1.pdf)

<sup>23</sup> Ibid

<sup>24</sup> Ibid



This sliding scale allows for a more proportionate sentence, and more often than not people in the lowest categories of culpability and harm will be diverted away from the prison system into community programmes.

The reality is that many people involved in the drugs trade are there because of economic survival or because they require income to buy their own drugs. These are people living in poverty who often engage in the drug trade out of desperation, for whom imprisonment is a disproportionate response and whose removal from the community will do nothing to impact on the drugs trade.

Currently in Nigerian law all trafficking offences carry a sentence of life imprisonment - this is disproportionate when considering sentencing for other, arguably more serious, offences. For instance, rape carries a maximum sentence of seven years, and considering the violent and humiliating nature of this offence, it seems incongruent that someone growing 5 cannabis plants could face life imprisonment. Equally, corruption offences (as contained in the Corrupt Practices and Other Related Offences Act 2000) are treated much more leniently despite the fact that such offending behaviour can undermine the rule of law and security of the State. Such offences – ranging from corrupting a public officer to bribery for giving assistance in regards to contracts – carry a maximum sentence of seven years.

Even within the Act itself there is clear disproportionality. Section 20(1)(g) creates the offence of engaging “in the management, organisation or financing of any offences under paragraphs (a) to (f) of this subsection [this applies to substantive offences related to possession and trafficking of drugs]”. It would appear that this offence could apply to those at the higher end of the drug supply chain, who have significant control over the market, yet the sentencing range is 15 to 25 years. This is the same sentence given to personal use offences and much less than the life imprisonment currently required for in trafficking offences.

If the Government is interested in implanting a sliding scale of penalties – including diversion for low level drug offences – based on harm and culpability we would be happy to advise in further detail.

Recommendations:

- 1) End criminal sanctions for drug possession, use and purchase when for personal consumption. As the evidence shows criminalization does not deter drug use so it is ultimately an ineffective legal framework. Instead, civil penalties and diversion programmes should be implemented for personal consumption offences.
- 2) Sentencing for trafficking offences should be based on the principle of proportionality and incorporate culpability and harm as determinants of punishment. Those who are at the lower end of the supply market including user-dealers and those who supply due to economic deprivation should be diverted into community programmes rather than prison. Supply offences would remain a criminal activity.
- 3) Scaling up harm reduction responses to reduce the risk of disease and in recognition of the right to health should form part of any national drug policy.
- 4) The law should not impede access to essential medicines that are also controlled substances.
- 5) The law should be revised in order to harmonise offences and avoid duplication.

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