actlawsociety

20 March 2019

Mrs J Moa
The Committee Secretary
Standing Committee on Health, Ageing and Community Services
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

By email: LACommitteeHACS@parliament.act.gov.au

Dear Mrs Moa,

Inquiry into the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018

The ACT Law Society (the Society) welcomes the opportunity to make a submission to the Standing Committee on Health, Ageing and Community Services (the Committee) regarding its Inquiry into the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (the Inquiry). We note that the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (the Bill) was presented to the Legislative Assembly on 28 November 2018 by Mr Michael Pettersson as a Private Member's Bill. The Bill was subsequently referred to the Committee for inquiry and report by 6 June 2019.

The Society is the peak professional association that supports and represents the interests of the members of the legal profession in the ACT. The Society maintains professional standards and ethics as well as providing public comment and promoting discussion regarding law reform and issues affecting the legal profession. The Society currently represents over 2,400 legal practitioners within the ACT.

The Society notes that clause 6 (sections 171(3) and 171AA(2) of the *Drugs of Dependence Act 1989*) and consequential amendment [1.2] (section 618(2) of the *Criminal Code 2002*) of the Bill permit an adult person to possess up to 50g of cannabis and to cultivate (non-artificially) 1 to 4 cannabis plants for personal use. The Society supports the policy intent of the Bill insofar that it seeks to both remove recreational cannabis users from the criminal justice system and allocate police resources towards more serious crime.[1]

We strongly recommend, however, that the Bill should be revised as the amendments introduced by clause 6 and consequential amendment [1.2] give rise to a number of legal uncertainties. Our comments in relation to the proposed amendments are as follows.

[1] Explanatory Statement, Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (ACT) 2; Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 28 November 2018, P4940-P4941 (Michael Pettersson).

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1. Clause 6 (sections 171(3) and 171AA(2) of the *Drugs of Dependence Act 1989*) – Possessing prohibited substances and possessing cannabis

1.1 Background

A person who possesses 51g or more of cannabis is liable to a maximum penalty of 50 penalty units ($8,000) and/or 2 years imprisonment.[2] A person who possesses 50g or less of cannabis commits an offence but is subject to the lesser maximum penalty of 1 penalty unit ($160).[3] If a police officer reasonably believes that a person possesses 50g or less of cannabis (i.e. has committed a '*simple cannabis offence*'),[4] he or she may serve an offence notice on that person.[5] The prescribed penalty for a *simple cannabis offence* is $100.[6] If this amount is paid in accordance with the offence notice, *inter alia*, the person shall not be regarded as having been convicted of the alleged *simple cannabis offence*.[7]

Clause 6 (section 171(3)) of the Bill removes cannabis from the definition of, '*prohibited substance*' and clause 6 (section 171AA(2)) inserts a new possession of cannabis offence whereby a person commits an offence if he or she possesses more than 50g of cannabis. Accordingly, it would not be an offence (or a *simple cannabis offence*) to possess 50g or less of cannabis.

1.2 Comment

With respect to clause 6, the Society raises the following specific concerns.

1.2.1 Inconsistency with Commonwealth law

Although Mr Pettersson noted that the, "possession of cannabis remains a matter for the states",[8] the Society considers that clause 6 (section 171AA(2)) could be inconsistent with section 308.1(1) of the *Criminal Code Act 1995* (Cth). As section 308.1(1) states that the possession of a substance that is a '*controlled drug*' (i.e. cannabis)[9] is an offence, clause 6 (section 171AA(2)) could have no effect insofar that it legalises the possession of 50g or less of cannabis.[10] Accordingly, the possession of any amount of cannabis could then be regarded as an offence and as clause 6 (section 171AA(2)) is not included within the definition of a *simple cannabis offence* (clause 7 (section 171A(7))), a police officer would not be able to serve an offence notice on an adult offender who possesses 50g or less of cannabis. The offender would subsequently be liable to a maximum penalty of 50 penalty units ($8,000) and/or 2 years imprisonment.

In our view, even if clause 6 (section 171AA(2)) is not inconsistent with section 308.1(1) (and therefore, has effect as a law of the ACT), a person who possesses 50g or less of cannabis could still be charged with the Commonwealth offence of possessing a substance that is a *controlled drug* (i.e. cannabis). The Society recommends that in addition to legalising the possession of 50g or less of cannabis, that the ACT Government enter into a Memorandum of Understanding (MOU) with the Australian Federal Police (AFP). The MOU should make it clear that the AFP will not charge a person under section 308.1(1) if the person possesses 50g or less of cannabis in the ACT. In addition, a plea in bar may also be appropriate.

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[2] *Drugs of Dependence Act 1989* (ACT) s 171(1)(b).
[3] Ibid s 171(1)(a).
[4] Ibid s 171A(7)(b).
[5] Ibid s 171A(1).
[6] Ibid s 171A(8).
[7] Ibid s 171A(4)(c).
[8] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 28 November 2018, P4939 (Michael Pettersson).
[9] *Criminal Code Act 1995* (Cth) s 301.1(1)(a); *Criminal Code Regulations 2002* (Cth) reg 5A(1).
[10] *Commonwealth Constitution* s 109; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28.

1.2.2 Drug-driving

Mr Pettersson noted that it will continue to be an offence to drive while under the influence of cannabis.[11] The Society believes that drug-driving laws should apply in circumstances where a person is impaired and/or intoxicated by cannabis. However, we consider that the Bill should make consequential amendments to sections 20(1)(b) and 34 of the *Road Transport (Alcohol and Drugs) Act 1977* to account for levels of cannabis impairment and intoxication. In contrast to the tiered structure of penalties (fines, imprisonment and automatic driver licence disqualification) for drink-driving offences, section 20(1)(b) provides that it is illegal for a person to drive a motor vehicle with any amount of a '*prescribed drug*' (i.e. cannabis)[12] in their oral fluid or blood.[13] The penalties imposed for committing a drug-driving offence are disproportionate because they do not account for levels of cannabis impairment and intoxication. Pursuant to sections 20 and 34, the maximum penalty and the minimum and default driver disqualification periods for a drug-driving offence are determined by reference to whether a person is a first offender or a repeat offender.

We note that the ACT has the harshest drug-driving penalties in Australia and that the penalties imposed for committing a drug-driving offence are more punitive than those for drink-driving offences. For example, a first offender who drives with a small amount of cannabis in their system (but who is otherwise unimpaired and not intoxicated), is subject to the same maximum penalty[14] as a repeat offender of a level 1[15] (alcohol concentration range of 0g-0.05g)[16] or a level 2 (alcohol concentration range of 0.05g-0.08g)[17] drink-driving offence (i.e. 10 penalty units).[18] A driver who has consumed a small amount of cannabis (and who is a first offender) would also be subject to the same automatic driver licence disqualification period[19] as a first offender of a level 4 drink-driving offence[20] (alcohol concentration range of 0.15g or more).[21] Although the default disqualification period is 3 years,[22] the court may order a shorter period of disqualification that is at least 6 months (the minimum disqualification period).[23] In our view, the higher penalties for committing a drug-driving offence may be justifiable in circumstances where a person is impaired and/or intoxicated due to consuming a 'hard drug' (i.e. heroin or ecstasy) but not when a person drives with a low-level of cannabis in their body.

1.2.3 Possessing Cannabis and Cultivating Cannabis Plants

Under the Bill, a person who legally cultivates 1 to 4 cannabis plants may unintentionally contravene clause 6 (section 171AA(2)) (possessing more than 50g of cannabis) as an individual cannabis plant can harvest more than 50g of cannabis.[24] We suggest that a new subsection 4 should be inserted into clause 6 (section 171AA) to clarify that unharvested cannabis (that is cultivated by a person) is included within the 50g of cannabis that a person may legally possess.

1.2.4 Person Under 18 Years Old Possessing 50g or Less of Cannabis (*Simple Cannabis Offence*)

The Society supports that clause 6 (section 171AA(1)) is included within the meaning of a *simple cannabis offence*.

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[11] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 28 November 2018, P4942 (Michael Pettersson).
[12] *Road Transport (Alcohol and Drugs) Act 1977* (ACT) s 3 (definition of 'prescribed drug' para (b)).
[13] Ibid s 20(1).
[14] Ibid s 20.
[15] Ibid s 26(1)(b).
[16] Ibid s 4E.
[17] Ibid.
[18] Ibid s 26(2)(b).
[19] Ibid s 34(1).
[20] Ibid s 32(3).
[21] Ibid s 4E.
[22] Ibid s 34(1)(a).
[23] Ibid s 34(1)(b).
[24] Explanatory Statement, Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (ACT) 5.

1.2.5 Smoking Cannabis in a Public Place or Near a Child

We welcome that clause 8 (section 171AB) creates the new offences of smoking cannabis in a public place and smoking cannabis within 20 metres of a child.

1.2.6 Display of Drug Pipes

If low-level cannabis possession is legalised, we consider that it should not be illegal for an occupier of a retail or wholesale outlet to display to customers a device that is intended to be used for cannabis consumption (a '*drug pipe*'). Accordingly, the Bill should make a consequential amendment to section 621A of the *Criminal Code 2002* by inserting a new subsection 621A(3) stating that a *drug pipe* does not include a pipe (including a hookah, water pipe or bong).

2. Consequential amendment [1.2] (section 618(2) of the *Criminal Code 2002*) – Cultivation of 5 or more Cannabis Plants

2.1 Background

A person who cultivates 3 or more cannabis plants commits an offence and is liable to a maximum penalty of 200 penalty units ($32,000) and/or 2 years imprisonment.[25] Similarly, the maximum penalty for artificially cultivating a cannabis plant is 200 penalty units ($32,000) and/or 2 years imprisonment.[26] A person who cultivates 1 or 2 cannabis plants commits an offence but is subject to the lesser maximum penalty of 1 penalty unit ($160).[27] If a police officer reasonably believes that a person has cultivated 1 or 2 cannabis plants (i.e. has committed a *simple cannabis offence*),[28] he or she may serve an offence notice on that person.[29] The prescribed penalty for a *simple cannabis offence* is $100.[30]

Pursuant to consequential amendment [1.2] of the Bill, an adult person is permitted to cultivate 1 to 4 cannabis plants (provided that they are not artificially cultivated). Accordingly, it would not be an offence (or a *simple cannabis offence*) to naturally cultivate 1 to 4 cannabis plants.

2.2 Comment

With respect to consequential amendment [1.2], the Society raises the following specific concerns.

2.2.1 Inconsistency with Commonwealth laws

The Society considers that consequential amendment [1.2] (section 618(2)) is not inconsistent with sections 303.4, 303.5 or 303.6 of the *Criminal Code Act 1995* (Cth) as these provisions relate to cultivating commercial and marketable quantities of '*controlled plants*' and cultivating a plant for a commercial purpose, respectively. Consequential amendment [1.2] (section 618(2)) legalises the natural cultivation of 1 to 4 cannabis plants for personal use only.

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[25] *Criminal Code 2002* (ACT) s 618(2)(a).
[26] Ibid s 618(2)(b).
[27] *Drugs of Dependence Act 1989* (ACT) s 162(1).
[28] Ibid s 171A(7)(a).
[29] Ibid s 171A(1).
[30] Ibid s 171A(8).

2.2.2 Further Considerations – Cannabis Plants

The Society notes that the Bill should be revised to provide for the following matters:

- the limit (if any) on the number of cannabis plants that may be cultivated per household;
- the height and weight restrictions (if any) for cultivated cannabis plants; and
- the location(s) in which cannabis plants cannot be cultivated (if any) (i.e. a community garden or in the grounds of the Alexander Maconochie Centre).

The Society acknowledges that in the first reading of the Bill, Mr Pettersson noted that, "there are no strains of cannabis identified in the [Bill]".[31] Mr Pettersson also noted that the Bill does not provide for a central seed depository because it would contravene Commonwealth drug-trafficking laws.[32] For consequential amendment [1.2] (section 618(2) of the *Criminal Code 2002*) to be a workable law, the Bill should also provide for the name of a legal supplier(s) of cannabis plant seeds or the name and location of a legal central seed depository.

2.2.3 Person Under 18 Years Old Cultivating 1 to 4 Cannabis Plants (*Simple Cannabis Offence*)

The Society supports that clause 5 (section 162(1)) is included within the meaning of a *simple cannabis offence*.

It is hoped that the comments outlined above are of assistance to the Committee. Please do not hesitate to contact the Society should you have any queries or require further information.

Yours sincerely,

Chris Donohue
President

[31] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 28 November 2018, P4947 (Michael Pettersson).
[32] Ibid.