

UNSW



FACULTY OF LAW

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Senate Legal and Constitutional  
Affairs Legislation Committee  
Parliament House  
Canberra

[legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

**Submission to the Senate Legal and Constitutional Affairs Legislation  
Committee Inquiry into the Regulator of Medicinal Cannabis Bill 2014.**

Thank you for your invitation to the Australian Drug Law Reform Initiative  
to make a submission to this inquiry. Please see our submission attached.

Julie Stubbs  
Professor

THE UNIVERSITY OF NEW SOUTH WALES  
UNSW SYDNEY NSW 2052 AUSTRALIA

Telephone: +61(2) 9385 9630  
Facsimile: +61(2) 9385 1175

ABN 57 195 873 179  
CRICOS Provider No. 00098G

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**About the Australian Drug Law Reform Initiative 'ADLaRI'**

1. ADLaRI is comprised of academics, visiting fellows, students and former students in the UNSW School of Law and associated UNSW entities. The purpose of ADLaRI is to provide a legal perspective on drug policy issues.

**Summary**

2. Overall the *Regulator of Medicinal Cannabis Bill 2014* is very promising and if implemented would be a significant step forward in allowing doctors to use their expertise to prescribe cannabis to patients who may benefit from it.

**Brief Background of Medical Cannabis in NSW**

3. On 20 May 2003, the NSW Labor Government announced an intention to introduce a draft exposure Bill to provide for a four year trial of medical cannabis. However this trial never eventuated.
4. In May 2013, the Legislative Council's General Purpose Standing Committee released its report after an inquiry into the use of cannabis for medical purposes. The Committee recommended that the State of NSW ask the Commonwealth for support in a medical cannabis trial.
5. On 28 May 2014, the NSW Greens announced an intention to introduce a Bill which would allow a system where people could be issued a card providing immunity from criminal prosecution for possession marijuana due to medical requirements.
6. On 29 May 2014, the NSW Nationals announced an intention to allow the use of cannabis by terminally ill patients.
7. In September 2014, the NSW Premier (Liberal) announced a clinical trial for medical cannabis would be established. In October 2014, the Council of Australian Governments meeting lead to national agreement to support a trial of medical cannabis. In December 2014 the NSW Premier announced three government-funded trials of medical cannabis. These are scheduled to begin in 2016 however there are significant jurisdictional issues (see Role of Commonwealth Law below).

8. To date, despite broad support amongst the Liberal, National, Labor and Greens in the NSW Parliament and the support of the Premier, NSW has been unable to implement any form of medical cannabis scheme or trial to date.

### **The Role of Commonwealth Law**

9. All State or Territory based initiatives to allow, or trial, medical cannabis come up against the jurisdictional supremacy of the Commonwealth law, in particular the *Therapeutic Goods Act 1989* (TGA).
10. The central problem is that the TGA covers the field – that is, the Commonwealth has sole jurisdiction for therapeutic goods and the States have no (or very little) authority in this area. Further, the TGA applies to any substance that is marketed and/or traded as a therapeutic good. Therefore, as soon as cannabis is provided as a therapeutic good, any affect of State laws is overridden by the TGA.
11. The NSW Parliamentary Research Service has expressed the situation thus:

While, in theory, the legal options outlined above may be available to a State government, until a scheme is legally tested, it is not clear whether a State scheme would survive legal challenge or legislative attempts to override from the Commonwealth.

- *NSW Parliamentary Research Service, Issues Backgrounder, Medical Cannabis, Number 5/ June 2014*

12. Given this, it is essential that the Commonwealth pass legislation allowing States to have self-determination over their medical cannabis policies. The simplest way for this to happen is for legislation that clearly states that the TGA does not apply to medical cannabis.
13. It is submitted the States should be left free to trial various forms of schemes for medical cannabis as their Parliaments see fit.

### **Regulator of Medicinal Cannabis Bill 2014**

#### Positive features of the Bill

14. Given the above, the proposed Bill is very promising. The Bill's clear intention is to remove medical cannabis from the TGA and the scheme that legislation implements. If the Bill is enacted, it will be a very positive step for the Commonwealth and would be welcome progress in allowing medical cannabis.

### Concerns about the Bill

15. Whilst a class of people will be created who are free from prosecution, it may be hard to ensure this freedom is absolute. There may be a need for strong policy to be drafted for State police forces giving direction on how to deal with people found with cannabis, who claim to be authorised under the Commonwealth scheme to use medical cannabis.
16. Although a card may be issued to people within the defined class, this is no guarantee that such people will be safe from search, arrest, and detention. A registry may need to be created that Police can check before arresting people, however significant thought will have to be given to how such a registry is constructed and maintained to avoid concerns about accuracy and patient privacy.
17. Part 4 of the Bill confers monitoring and investigative functions on the Regulator and others authorised by the Regulator which include powers of entry, search and seizure. While we accept the argument that law enforcement and the public must be able to be confident about the security of the scheme, extending these powers to a new office, the Regulator, with no experience in police investigative powers may be ill-advised. The Committee must give serious consideration to whether a new agency should be given police powers or whether it is appropriate for police to monitor medical users.
18. The preferred approach is to confine the use of powers of entry, search and seizure to police organisations that are trained and experienced in exercising these powers and that have appropriate oversight and accountability. The assurance in the explanatory memorandum that these powers will not apply to the general public but only 'to people who have applied to become license holders or authorised users of medicinal cannabis' does not allay concerns about extending police powers to the Regulator.
19. Reasonable suspicion must be the minimum threshold before the powers under Part 4 can be exercised on citizens.
20. It may be simpler for the office of the regulator to report concerns to local Police. Creating another investigative force may lead to over-policing of sick people.

### **Conclusion**

21. Overall, the Bill appears very promising and we commend it to the Parliament. ADLaRI would welcome the opportunity to appear at any hearings and further elaborate on our submissions.