Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Towards regulation of medicinal cannabis

The importance of providing access to treatment for chronically ill Australians

Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the *Regulator of Medicinal Cannabis Bill* 2014 (Cth)

13 March 2015

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WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

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INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs in it's the *Regulator of Medicinal Cannabis Bill* 2014 (Cth) ('the Bill').

We support the introduction of this Bill.

Many of our members represent clients who have suffered personal injury. Some of these clients have sought out treatments utilising medicinal cannabis in other jurisdictions, such as the United States.

However, we believe that chronically and terminally ill Australians should not have to travel overseas in order to access the treatment that is most appropriate to mitigate the pain and/or severity of their illness or injury.

We believe that effective regulation of medical cannabis is necessary and achievable.

Regulation of the opiate industry has been demonstrably effective in Tasmania since 1971, with the licit industry benefitting the medical sector and supporting the state and national economy.

However, in regards to the Bill, there are some issues that still require clarification, including personal cultivation, state and territory arrangements, transitory arrangements and a future need for effective community education regarding these changes.

SINGLE CONVENTION ON NARCOTIC DRUGS

Australia is a signatory to the United Nations Single Convention on Narcotic Drugs 1961 ('the Convention'), thereby undertaking to limit the production, manufacture, trade and stocks of controlled drugs so as to ensure that they are used exclusively for medical and scientific purposes. Notably, Articles 19 and 20 of the Convention dictate that the parties must provide estimates and statistical returns to the International Narcotics Control Board, which is an independent body established by the Convention to monitor compliance.

The Commonwealth implemented this treaty with the enactment of the *Narcotic Drugs Act* 1967 (Cth) ('Commonwealth Act'), which makes provisions in respect to narcotic drugs in Australia, including their manufacture.

The Commonwealth fulfils its Convention obligations through its system of licensing under Part II of the Commonwealth Act, with all manufacturers requiring both a licence and permit to manufacture drugs in regulated quantities. The Commonwealth legislation thus only regulates the manufacturer of narcotics, and it is therefore up to states and territories to regulate the growers.[2]

Australia's international obligations inform current state frameworks regulating the manufacture, production and sale of narcotic drugs, and are a necessary consideration when contemplating the regulation of marijuana, which is listed as a drug under Schedule IV and includes relevant provisions relating to its control under the Convention.

We note the Bill's intention for establishing a regulator to comply with Articles 23 and 28 of the Convention.

Unlawful use and cultivation means that the Commonwealth Act and *Therapeutic Goods Act* 1989 (Cth) will relevantly apply.

THE IMPORTANCE OF ACCESS TO MEDICINAL CANNABIS

It is important that Australians are enabled to have access to medicinal cannabis as a form of treatment for chronic illness. This should not be restricted to people who are terminally ill or over 18 years of age.

We have knowledge of people living with fibromyalgia, who have found the use of cannabis oil very useful to treat pain. The debilitating pain can inhibit individuals from entering the workforce, however the use of cannabis oil assists in reducing pain, meaning that the individual is enabled to pursue relevant tasks and activities that were previously made difficult by pain.

We have knowledge of people living with brain tumours and endocrine tumours that have found use of medicinal cannabis (including cannabis oil) has assisted in shrinking these tumours.

Unfortunately, these individuals have had to travel to the United States in order to receive treatment. On return to Australia, the tumours have commenced increasing once again, trapping individuals in a terrible cycle.

It is important that Australians who are struggling with chronic illness are able to access treatments while remaining at home and being supported by their family, friends and medical professionals, rather than needing to make a tiring journey

overseas, and away from their support networks, in order to find solace and relief. This relief is also only short-term as it is available only during their overseas visits.

It is also important that Australians whose children are struggling with chronic or even terminal illness, be able to access treatments which will improve their quality of life, without fear of being charged and separated from their children should such treatments be administered.

CROSS-JURISDICTIONAL DIFFERENCE

Over the past year, there has been growing recognition of the inadequacy of the current Australian legal position in relation to cannabis for medical use.

However, there are still cross-jurisdictional differences in response to the use of medicinal cannabis.

Here we provide a short overview of some of the recent developments on a state-by-state basis, which serve to highlight the challenges in different jurisdictions.

NSW

In March 2014, a private member's bill, titled the *Drug Legislation Amendment (Use of Cannabis for Medical Purposes) Bill* 2014 (NSW), was introduced by Dr John Kaye MLC. This Bill proposed amending the *Therapeutic Goods Act* 1966 (NSW) to 'provide for the use of cannabis for medical purposes and to make a consequential amendment of the *Drug Misuse and Trafficking Act* 1985 (NSW)'.[3] However, this private member's bill did not proceed.

In December 2014, the NSW government committed to fund trials of the drug's use in treatment for terminally ill adults and chemotherapy patients, with Premier Mike Baird announcing that up to $9 million would be spent on at least three trials of cannabis-derived medicines.

The NSW government also announced the Terminal Illness Cannabis Scheme, which permits possession of certain amounts of cannabis leaf, oil and resin. (The scheme does not provide for children or people who are not terminally ill.)[4]

The advocacy of the late Dan Haslam, a 25-year-old man from Tamworth, has significantly contributed to calls for reform in NSW.[5]

Mr Haslam was granted the second licence by the NSW Government under the Terminal Illness Cannabis Scheme, developed to extend compassion to adults with a terminal illness.[6]

A Change.org petition drafted by his mother petitioning the NSW Health Minister seeking the decriminalisation of medical cannabis has gained over 202,000 signatures.[7]

In September 2014, Premier Mike Baird announced that NSW Police guidelines would be implemented to formalise the current arrangement which allows police to exercise their discretion not to charge terminally ill adults who use cannabis to alleviate their symptoms, or their carers.[8]

In November 2014, the Inaugural Australian Medical Cannabis Symposium was convened in Tamworth. The Symposium drew together medicinal cannabis experts from around the globe to inform the Australian people, policy makers, medical professionals, patients carers, and law enforcement as to the immediate need of allowing this treatment.[9]

Victoria

In 2014, the Victorian government announced that it hoped to be the first state in Australia to legalise the use of medical marijuana.[10]

The issue has also been referred to the Victorian Law Reform Commission for inquiry and report by August 2015. The VLRC has been asked to:

> 'review and report on options for changes to the *Drugs, Poisons and Controlled Substances Act* 1981 and associated regulations to allow people to be treated with medicinal cannabis in exceptional circumstances, and to make the recommendations for any consequential amendments'.[11]

This follows the referral of five Victorian doctors to the Australian Health Practitioner Regulation Agency (AHRPA) after recommending treatment with cannabis products.[12] AHPRA did not take action against the practitioners.

ACT

The ACT government has recently launched an inquiry into the use of medical cannabis, with a report to be released in July.

The Standing Committee on Health, Ageing, Community and Social Services is also considering draft legislation that would allow terminally and chronically ill Canberrans

to grow cannabis and use the drug as part of their treatment, in the form of the *Drugs of Dependence (Cannabis Use for Medical Purposes) Amendment Bill* 2014 (ACT).[13]

Queensland

In late 2014, then-Premier Campbell Newman indicated that the Queensland government would 'look with interest' at the NSW trial.[14] In January 2015, it was established that both the government and opposition shared this commitment.[15]

However, currently, under the *Drugs Misuse Act* 1986 (QLD), it is an offence to possess or supply any products containing the active ingredient in cannabis (delta 9-tetrahydrocannabinol [THC]), irrespective of the level of THC in the product, or the reason for its use. Any person supplying THC to a juvenile under the age of 16 years can also be charged with supplying a dangerous drug with circumstances of aggravation.

In January 2015, a 30 year old father was charged for supplying medical cannabis oil to his 2 year old daughter who is being treated for neuroblastoma cancer. His case was mentioned before the Brisbane Magistrates Court in February, before being adjourned for three weeks.[16]

Subsequently, there has been a tide of community support, with more than 180,000 signatures on a Change.org petition calling for the situation to be rectified.[17]

In March 2015, a 45 year old woman was charged with possession of cannabis that she was using to self-medicate for back pain following two operations for a herniated disc, and having suffered side effects from Valium and Endone.[18]

Northern Territory

The current arrangements regarding cultivation of cannabis are particularly stringent in the Northern Territory, in which through a combination of application of the *Misuse of Drugs Act* (NT) and *Criminal Property Forfeiture Act* 2002 (NT) individuals can forfeit their property, including home, vehicles and cash.

Similar provisions are present in Western Australia.

In the case of *Attorney-General (Northern Territory) v Emmerson* [2014] HCA 13, the High Court held in a 6:1 decision that the *Criminal Property Forfeiture Act* 2002 (NT) was not invalid. In this case, Emmerson grew plants for personal use.

Inconsistency in the United States

In the United States, the legal inconsistency between state and federal laws means that in some states, legal dispensaries provide individuals with specialised, high quality access. This contrasts with the fact that individuals growing marijuana for their own medical treatment in other states are currently being prosecuted.[19]

In Australia, there is a need for federal leadership so that there is federal consistency. We submit that in addition to there being a regulator for medicinal cannabis that changes will need to be made to various state and territory based legislation decriminalising access to medicinal cannabis.

THE EXPOSURE DRAFT ACT LEGISLATION

The ACT Parliament is currently inquiring into an Exposure Draft of the *Drugs of Dependence (Cannabis Use for Medical Purposes) Amendment Bill* 2014 (ACT) ('the Exposure Draft').

Under the exposure draft, a person may apply to the chief health officer for approval to possess and use cannabis. Applications may be made for mitigation or treatment of symptoms of terminal illness[20] (i.e. a life expectancy of less than 12 months);[21] for treatment of symptoms of a medical condition mentioned in clause 7 (Table 7) (or prescribed be regulation); [22] or treatment or mitigation of a symptom of any other medical condition.[23] The latter form of application cannot be granted if the applicant is not an adult.[24] A medical declaration by a doctor must accompany the application.[25]

If successful, an applicant, or someone nominated by the applicant, may also apply for a licence allowing the person, or someone nominated by the person, to cultivate cannabis.[26]

This Exposure Draft would create a system in which people living with chronic and terminal illness, would be permitted to grow cannabis for personal use.

CLARITY REQUIRED

Personal use

Some individuals have indicated that they are scared of coming forward to publicly acknowledge their support for the *Regulator of Cannabis Bill* 2014 (Cth), as they are

fearful that admitting to possession of cannabis, even although being used to treat chronic illness, means that they could get into trouble with the law.

It is the experience of our members that many individuals are currently growing cannabis for personal medicinal use.

It remains unclear to what extent this will be permitted or tolerated under the new regulatory system, and whether the approach would differ across jurisdictions.

The Bill would create a licensing scheme wherein medicinal licences, experimental licences and import and export licences could be issued.

Clause 19, Division 4 of the Bill describes the people who will be authorised to use, supply or prescribe cannabis products:

> *The rules may prescribe a scheme (the authorised patients and carers scheme) to provide for the authorisation of:*
>
> > *(a) individuals (authorised patients**) to use regulated medicinal cannabis product**s; and*
> >
> > *(b) individuals (authorised carers) **to supply regulated medicinal cannabis products** to authorised patients; and*
> >
> > *(c) authorised patients and authorised carers to do things incidental to an authorisation referred to in paragraph (a) or (b); and*
> >
> > *(d) medical practitioners, or classes of medical practitioners, **to prescribe regulated medicinal cannabis products**.*

Clause 16, Division 3 describes the rules regarding the medicinal cannabis licensing scheme:

> *(1) The rules may prescribe a scheme (the medicinal cannabis licensing scheme) for the regulator to issue licences (medicinal licences) authorising persons (medicinal licence holders) to engage in one or more of the following activities:*
>
> > *(a) **producing cannabis for medicinal or experimental use**;*
> >
> > *(b) transporting or storing cannabis for medicinal or experimental use;*
> >
> > *(c) manufacturing regulated medicinal cannabis products;*

(d) transporting or storing regulated medicinal cannabis products;

(e) providing regulated medicinal cannabis products to authorised patients and authorised carers;

(f) other activities incidental to the activities referred to in paragraphs (a) to (e).

We question whether an individual that qualifies as an 'authorised patient' or 'authorised carer' under the legislation will be permitted to also become a 'medicinal licence holder' and be thus authorised to produce cannabis for their own medicinal use.

This raises issues as the Exposure Draft in the ACT will permit successful applicants to obtain licences and produce cannabis for personal use.

State vs national arrangements

Clarity is required regarding the intersection between current and proposed state and territory schemes and the national regulator.

For example, if the ACT passes the Exposure Draft into law, how will an individual in that jurisdiction be placed regarding applications for licences to the ACT and national regulator?

For example, will the NSW Terminal Illness Cannabis Scheme operate as a transitory arrangement until the commencement of the national regulator?

Clarity is also required regarding the practical arrangements (including criminal justice) should states and territories fail to consent to become participants in the scheme.

If states and territories do not consent to become a participating state or territory, could there be a growth in cross-jurisdictional travel to seek 'medicinal cannabis' treatment? Would possession of treatment obtained lawfully in a participating state or territory trigger criminal charges?

If a consensus is not reached for all states and territories to participate in the Scheme, there will be heightened confusion in the community.

Community education required

We submit that it would be necessary for the Australian community to be informed in plain language regarding the impact of the new regulatory system upon their rights

to use/not use cannabis and the necessary steps that they would need to take to lawfully access cannabis for medical treatment.

We also submit that confusion may easily arise with people believing that a new regulatory system is equivalent to legalisation of the drug or decriminalisation. Individuals could therefore become confused about who is eligible to lawfully access cannabis and upon what grounds. This could lead to criminal charges for people who are uninformed.

Clear messaging will be required that assists the Australian community in understanding the impact of the changes, including commencement and transitory arrangements.

Commencement and transitory arrangements

The timing of commencement and transitory arrangements will especially be important for people who currently personally administer medicinal cannabis, or prescribe it, such as the recent five doctors in Victoria who prescribed it to their patients.

It is important that in the time period between now and the establishment of a new regulatory system, that there be clarity regarding at what time period, and in which jurisdictions, individuals will be permitted to access medicinal cannabis, and what arrangements will be permitted in the meantime.

REGULATION OF POPPIES

The successful regulation of poppies in Tasmania is pertinent to consider in assessment of the regulation of cannabis, and presents a useful case study.

The regulation of opiates has occurred in Tasmania since 1971 under the *Poisons Act* 1971 (TAS) ('TAS Act'). This Act adheres to the Commonwealth Act and the Convention, as the opium poppy plant and straw, like marijuana, is also regulated by the Convention.

Regulation of the industry

The legislative regulation of the poppy industry in Tasmania is limited to several provisions in the TAS Act, which contains provisions relating to the growing, possession and manufacture of opium poppy and the manufacture of narcotics. However, there are no other formal regulations, guidelines or codes of practice available in Australia.[27]

The regulatory process can be generally outlined as follows:

- The Act vests formal regulatory power to authorise participation in the industry in the relevant Minister.

- The Poppy Advisory and Control Board is established under s 59H(1) of the TAS Act. Membership of this Board is specified under s 59H(2) and encompasses public servants including the Commissioner of Police. The functions of the Board, set out in s 59HI, are both regulatory and advisory. Responsibilities include determining production estimates and collating statistical information in order to satisfy the Convention. The Board must also ensure the security of the poppy crops, which will be addressed in more detail below.

- The Board is provided with secretarial and administrative support under s 59M of the TAS Act, with staff members working with police to ensure compliance with the Act.

Security concerns

The security concerns surrounding the growth of opium poppies pertains to the accessibility of the drug by unauthorised persons. This would include regular civilians without licences or permits who would seek the illegal access to the controlled substance due to dependence or for recreational use, or alternatively for criminal purposes.

Access to the opium poppy crop in Tasmania is limited to those persons authorised by licenced growers and processors. The location and security of paddocks, including a requirement standard for fencing and warning signs, aims to discourage general access to the crops.

However, recent thefts from poppy fields and the revelation that a poppy crop in Rokeby was cultivated in close vicinity to two schools, a youth centre and public housing this season have reportedly shed doubt on the effectiveness of the fencing standard and highlighted the lack of penalties for farmers' non-compliance with regulatory standards.[28] It should be noted however that the vast majority of poppy growing in Tasmania is done securely and safely.

Other jurisdictions

The Northern Territory has also recently regulated the cultivation, processing, transportation, storage of poppy material and any related activities under the *Poppy Regulation Act* 2014 (NT), which commenced operation on 29 May 2014.

Victoria has also regulated the production of alkaloid poppies for therapeutic and research purposes. In December 2013, the Napthine government introduced the *Drugs, Poisons and Controlled Substances (Poppy Cultivation and Processing) Amendment Bill* 2013 (VIC) into the Legislative Assembly, providing for proposed amendments to the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic).[29] In 2014, the *Drugs, Poisons and Controlled Substances (Poppy Cultivation and Processing) Regulations* 2014 were also passed.[30]

CONCLUSION

We note that the Bill, if passed, will apply only in participating States and Territories which have entered an arrangement with the Commonwealth to become a participating State or Territory.[31]

We urge the federal government to commence negotiations with states and territories as a matter of priority to secure consent as participatory jurisdictions, or at least as a minimum, a commitment that individuals who obtain treatment lawfully in a participating jurisdiction will not be subjected to criminal sanction in their own jurisdiction should they transport a remainder of this treatment to their own home. This commitment may include a similar process undertaken in NSW, via guidelines issued to police, or an alternative arrangement, such as relevant changes to state-based poisons laws.

It is also relevant to consider the changes currently being undertaken at an international level.

In the past week, Senators in the United States introduced the Compassionate Access, Research Expansion and Respect States (CARES) Bill. If passed, the Bill would:

- ‘remove federal penalties and restrictions for producing, distributing and possessing marijuana for medical purposes, provided there is compliance with state law;
- give military veterans access to medical marijuana in states where it is legal;

- allow financial institutions to provide banking services to marijuana businesses;
- reclassify marijuana from "Schedule I" to "Schedule II", eliminating current barriers to research and recognising the acceptable medical use of the drug.'[32]

It is important that Australians are able to access treatment that will inhibit, or mitigate the symptoms of debilitating illness, in their own home. They should not have to travel overseas to obtain such treatment, or ideally, even across state borders within Australia.

Further clarity is still required regarding how regulation will function in regards to personal cultivation. So too, there is a need to address transitory arrangements, the differences between jurisdictions' approaches to treatments currently being administered and community education regarding their rights.

We support the introduction of this Bill.

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