

Submission to the NSW Drug Summit 2024

15 November 2024

Ms Carmel Tebbutt and Mr John Brogden AM Co-chairs, NSW Drug Summit 2024

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The members of the NSW Young Lawyers Criminal Law Sub-Committee (**the Sub-Committee**) make the following submission in response to the NSW Drug Summit 2024.

NSW Young Lawyers

NSW Young Lawyers is a Committee of the Law Society of New South Wales that represents the Law Society and its members on issues and opportunities arising in relation to young lawyers i.e. those within their first five years of practice or up to 36 years of age. Through its 15 sub-committees, each dedicated to a substantive area of law, NSW Young Lawyers supports practitioners in their professional and career development by giving them the opportunity to expand their knowledge, advance their career and contribute to the profession and community.

The Criminal Law Sub-Committee is a diverse group of lawyers and students from around NSW who share an interest in criminal law. The Sub-Committee aims to educate the legal profession and the wider community about criminal law developments and issues. The Sub-Committee also facilitates seminars and programs that help to develop the careers of aspiring criminal lawyers, with the aim of providing a peer support network and a forum for early career lawyers to discuss issues of concern.

Introduction and Summary of Recommendations

Drug use and abuse causes serious harms to individuals, communities, and society, not only in New South Wales, but across the Commonwealth of Australia and abroad. The Sub-Committee believes that responses to these harms are most effective when the issue is treated through the lens of public health, rather than criminal justice. This involves consideration of the staged decriminalisation and/or legalisation of certain drugs, and a reframing of the policy response to drug use by governments towards a framework that accepts the limitations of prohibition as an effective societal response. With a growing number of jurisdictions in Europe and the United States moving towards drug decriminalisation and/or legalisation, there is a wealth of real-world evidence and case studies available from which New South Wales can learn. There are also a number of

harm-minimisation and diversionary approaches that can be taken. The Sub-Committee has considered some of these issues in its Response to Issues Papers 2, 3 & 4 to the Special Commission of Inquiry into the Drug “Ice” dated 12 May 2019. That submission is **attached** as an annexure to this submission. The Sub-Committee reiterates the matters raised in that submission (**Annexure A**).

However, the Sub-Committee acknowledges that many proposed reforms in this field require significant expenditure and an expansion of public services such as addiction treatment, mental health, housing, and education, as well as rehabilitation and treatment facilities. Such a complex restructuring of the NSW legal system and public service (and the associated shifting of societal attitudes) is a long-term project which may take generations to fully realise, and the Sub-Committee anticipates that this may be beyond the scope of the 2024 NSW Drug Summit.

For this reason, the Sub-Committee’s submission will instead focus on a targeted suite of immediate, practical, short-term law reforms which can be implemented without delay and with no need for ongoing funding commitments. They are:

1. Extending the existing exemption for drive with illicit drug present offences available to persons with a morphine prescription, to also apply to persons with a medicinal cannabis prescription;
2. Reviewing the threshold quantities of certain drugs in Schedule 1 of the *Drug Misuse and Trafficking Act 1985* (NSW) (“DMTA”) , particularly in light of recent case law; and
3. Expanding the scope of drug-related offences which can be dealt with under the *Young Offenders Act 1997* (NSW) (“YOA”).

1. Medicinal cannabis and driving

1. The Sub-Committee has previously made a submission to the Inquiry into the *Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021*. That submission is **attached** as an annexure to this submission (**Annexure B**).
2. The Sub-Committee maintains the view previously expressed, namely that persons who are prescribed medicinal cannabis ought to have a defence or exemption available to the offence of driving with a prescribed illicit drug present in person's oral fluid, blood or urine (s. 111 of the *Road Transport Act 2013*) where that drug is cannabis. The Sub-Committee notes that this offence is made out by the simple fact of the prescribed illicit drug being present; it does not require the person's driving ability to be impaired by the presence of that illicit drug.

2. Quantity thresholds under the DMTA

3. The recent decision of *Jenkinson v R* [2024] NSWCCA 34 held that, in considering the weight of the prohibited drug psilocybin, which naturally occurs in a number of species of so-called "magic mushrooms", the weight of the vegetable matter is to be included in the drug weight. In coming to this decision, the Court of Criminal Appeal considered the interpretation of s. 4 of the DMTA, which provides that "[i]n this Act, a reference to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug".
4. This case has already had a marked effect on criminal prosecutions for possession and supply of psilocybin which were unlikely to have been foreseen by parliament. Under the DMTA, psilocybin is measured in Discrete Dosage Units (DDUs) as well as grams, which strongly implies that parliament did not intend that the vegetable matter be included in the overall weight. The traffickable quantity of psilocybin is 0.15 grams, while the indictable quantity is 0.25 grams, the commercial quantity is 25 grams, and the large commercial quantity is 100 grams. The significance of the traffickable quantity of a drug is that possession of a drug above this quantity triggers the operation of s. 29 of the DMTA, which provides that possession of a drug above this amount is deemed to be for the purposes of

supply, unless the defendant proves that the drug was in their possession otherwise than for supply, or if specific medical exemptions apply. A single mushroom will almost always weigh more than a quarter of a gram, and may indeed weigh several grams. A small number of mushrooms can therefore easily traverse into the category of commercial quantity or beyond, for an amount of active ingredient which would realistically constitute a portion that one person would consume in a single session. It is noted that supply (including deemed supply) of a commercial quantity of psilocybin attracts a maximum penalty of 20 years imprisonment, and supply of a large commercial quantity attracts a maximum penalty of life imprisonment. This creates injustice for individuals who may face punishment which is disproportionate both to the criminality of the conduct, and to the relative quantities of other prohibited drugs on the schedule.

5. Beyond this specific case study, a review of the Schedule 1 quantity thresholds of other common drugs, drawing on relevant empirical evidence, would ensure that Schedule 1 of the DMTA remains relevant and fit-for-purpose. In this regard, the Sub-Committee also refers to its comments about the traffickable quantity of methylamphetamine at page 4 of its Response to Issues Papers 2, 3 & 4 to the Special Commission of Inquiry into the Drug “Ice” dated 12 May 2019 at Annexure A.

3. Drugs and the *Young Offenders Act 1997*

6. The Sub-Committee has observed that drug possession is commonly the first, or one of the first, interactions with the criminal justice system for a child under the age of 18 years of age (“young persons”). There is significant utility in diverting young persons who are detected with personal quantities of illicit drugs from the Courts; including to promote the young person’s rehabilitation, avoid the risks of further entrenchment in the criminal justice system, and also saving costs in terms of time and resources for the court and police. These aims are supported by research highlighting the “potentially criminogenic nature of youth justice detention centres which entrench young people further in disadvantage

especially for those on remand”.¹ There is also research which supports the success of youth diversionary programs.²

7. The diversions available to young persons under the YOA are excluded for offences of drug supply. However, diversions are currently only available for drug weights not exceeding the small quantity proscribed by the DMTA. This is even though drug weights above the small quantity but below the traffickable quantity are not captured by the provisions pertaining to deemed supply, and it follows that possession of drugs of these weights will typically be for personal use. By way of example, possession of 2 grams of methylamphetamine or cocaine, which is above the small quantity of 1 gram but below the traffickable quantity of 3 grams, would not be eligible for diversion under the YOA.
8. The Sub-Committee is of the view that the list of eligible offences for YOA diversions should be expanded to include offences involving drug weights above the small, but below the traffickable, quantity of a given drug, when these offences relate to possession only of these drugs. The availability of a diversionary option in these circumstances is consistent with the aim of promoting the rehabilitation of young persons who use drugs. It is also consistent with Article 40(3)(b) of the UN Convention on the Rights of the Child, to which Australia is a party, which provides that “whenever appropriate and desirable”, parties shall seek to promote procedures specifically applicable to children alleged to have or recognised as having infringed a penal law, without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.³

¹ G Clancey, S Wang S and B Lin, ‘Youth justice in Australia: Themes from recent inquiries’ (2020) 605 *Current Issues in Criminal Justice* 1, 7 available at <https://www.aic.gov.au/sites/default/files/2020-09/ti605_youth_justice_in_australia.pdf> citing E Baldry et al, ‘Cruel and unusual punishment’: An inter-jurisdictional study of the criminalisation of young people with complex support needs’ (2018) 21(5) *Journal of Youth Studies*, 636–652 and C Cunneen, B Goldson & S Russell, ‘Juvenile justice, young people and human rights in Australia’ (2016) 28(2) *Current Issues in Criminal Justice*, 173–189.

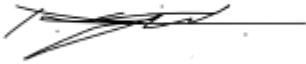
² G Clancey, S Wang and B Lin, n 1, 9 and sources cited therein.

³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 44 UNTS 25 (2 September 1990) art 40(3)(b).

Concluding Comments

NSW Young Lawyers and the Sub-Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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RESPONSE TO ISSUES PAPERS 2, 3 & 4 OF THE SPECIAL COMMISSION OF INQUIRY INTO THE DRUG 'ICE'

Submission to Special Commission

12 May 2019

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The NSW Young Lawyers Criminal Law Committee (Committee) makes the following submission in response to Issues Papers 2, 3 and 4, issued by the Special Commission of Inquiry into the Drug 'Ice' in relation Justice, Health and Community, and Data and Funding.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Criminal Law Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Submissions in response to Issues Paper 2: Justice

The following submissions respond to the specific questions posed in the Special Commission's Issues Paper 2.

Decriminalisation of prohibited drug offences in NSW

2.1.10 Should NSW consider the legalisation and/or the regulation and control of the supply of ATS?

The Committee does not support the legalisation of possession of amphetamine-type substances (**ATS**). Many of our Committee members are frequently confronted with the detrimental effect that these drugs have on users and the community more broadly. The Committee does however support some small steps, that would help support the rehabilitation of drug users and prevent them from incurring a lengthy criminal history for, what the Committee submits is best considered as, a health issue. Those steps are discussed below.

2.1.1-2.1.5 Use of Penalty Infringement Notices ('PINs')

The Committee supports the recent expansion of the Penalty Infringement Notice (**PIN**) scheme and urges its continuance. The prevalence of ATS in the community has resulted in a large number of users being charged with offences of possess or supply prohibited drug. Statistics prepared by the NSW Bureau of Crime Statistics and Research (**BOCSAR**) for the Special Commission of Inquiry, indicates that recorded incidents of amphetamine possession and supply rose 250% between 2009 to 2016. However, statistics prepared by the Judicial Commission of NSW reveal the majority of these matters do not result in a term of imprisonment or a good behaviour bond. These statistics indicate that 55.2% of offenders sentenced for drug possession by the Local Court received court-imposed fines while 28.4% received dismissals or bonds under s 10 *Crimes (Sentencing Procedure) Act 1999* (NSW). This is reflected in the BOCSAR statistics which show that 64% of offenders sentenced for possession of illicit drugs received a fine. Accordingly, the expansion of PINs can be expected to have a minor impact on the number of persons who suffer more serious penalties but will reduce the burden on the Local Court and support the rehabilitation of offenders.

While there has not yet been any data to confirm whether the recent expansion of the PIN scheme has freed up valuable court time and legal resources, the Committee submits the scheme would have such an effect, thereby enabling Courts and government funded organisations to deal with more serious types of offending.

The Committee notes that the imposition of PINs on impecunious substance users may be problematic and potentially futile, however supports their use where Work and Development Orders (**WDOs**) are imposed in circumstances where an offender fails to pay a PIN. The Committee submits that WDOs are an effective tool to encourage rehabilitation without being punitive. Numerous Committee members reported the positive impacts of WDOs on those issued with them. The Committee also notes the positive impacts of WDOs on the community generally.

The Committee strongly emphasises that there is a need for greater funding of and accessibility to rehabilitation services for drug users. Without these, the efficacy of PINs in protecting the broader community and supporting users is questionable.

2.1.12 What other innovative strategies should the Inquiry consider in relation to decriminalisation of ATS?

The Committee supports the conduct of further research on the use of ATS and, depending on the findings, an amendment to the trafficable quantity of ATS. Anecdotally, many offenders report using up to 1.5 grams of methylamphetamine per day. As the trafficable quantity of methylamphetamine is 3 grams, a person carrying two day's supply of a personal dosage could be charged with 'deemed' supply.

Substance testing and other innovative measures to reduce harm

Although not responsive to one of the targeted questions, the Committee is supportive of the creation of drug testing centres for ATS. The deployment of such centres in high-volume nightlife locales and festivals is a rational way to reduce the harm that many ATS cause to the community, particularly young people. The success of the ACT 'pill testing' trial and the anecdotal evidence that it discouraged some festival-goers from taking the ATS that they carried suggests that these centres not only reduce harm but discourage risky behaviour.

Impacts on the criminal justice system

2.3.1 What is the impact of ATS use on the criminal justice system?

There is currently insufficient data to enable us to identify the impact of ATS use on the criminal justice system in isolation from the impact of the use of other prohibited drugs. Although the police record drug type for offences of possess or supply prohibited drug, a review of charges alone could not truly reflect the effect that ATS use has on the justice system. This is because of the interaction between ATS use and the commission of other offences, where often the link between them may not be established until subjective material is produced on sentence.

2.3.2 What can be done to improve the way that the impact is recorded?

The Committee suggests that an effective way to record this impact would be a quantitative survey of the work before a Court on a standard day. A review of Court files and submissions made would enable researchers to assess the overall effect of ATS use on the criminal justice system.

Justice Strategies

2.4.8 and 2.4.9 Are existing diversionary programs achieving positive outcomes for ATS users/ATS related Offending? Which diversionary programs have proven to be the most effective in NSW and in other jurisdictions?

The Committee supports the expansion of the Drug Court and the Magistrates Early Referral Into Treatment Program (**MERIT**). Our members report these services have a positive impact on defendants who have accessed these services. In particular, the Committee supports the way in which the Drug Court incorporates evidence-led practices, including swift and certain sanctions, a key feature of the (**HOPE**) program.

Regional members of the Committee report difficulties in accessing the MERIT program. It is often the case that where the sentencing Court is not a part of the program, Magistrates are reluctant to adjourn matters to MERIT courts to enable access to that Program. Whilst the Committee recognises that this type of adjournment might overly burden MERIT Courts, the lack of access in

regional areas disadvantages those defendants who are ATS users and does not promote their rehabilitation. This is particularly concerning considering the BOCSAR statistics prepared for this Special Inquiry which reflect a high level of use in the Far West, Orana, Murray and Riverina.

Submissions regarding rehabilitation

The Committee submits that access to rehabilitation services should remain a focal consideration when determining the best approach for reform. Access to effective rehabilitation services will benefit not only ATS users, but also the wider community.

The Committee submits that Courts appear aware of the importance of rehabilitation and are often accommodating of it when they consider it would have a positive impact on the rehabilitation of an accused person or offender. For example, lengthy adjournments, bail, and orders pursuant to s11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) were reported to be granted with relative ease, though generally evidence is required by the court before such an order is made, for instance, written approval for admission to a facility.

Despite the positive reception of the Courts, many of our members reported facing difficulties when seeking access for people with ATS-dependence to rehabilitation services. This is often attributed to under-resourcing which results in lengthy waiting lists, communication difficulties with under-staffed facilities and a lack of available services altogether.

Anecdotally, the following centres are commonly used but often have significant wait times: Calvary being between 4 and 8 months; Wayback between 2 and 4 months; Oolong between 2 and 3 months; and Orana between 2 and 3 Months. Although non-residential drug and alcohol services go some way towards filling this gap, the Committee submits they alone are unable to address the significant issues related to the use of ATS.

Many of our members described the requirement of complex and detailed admission procedures and checks being carried out before a person can gain a place in programs or facilities.

The Committee notes a constellation of factors amplified the difficulties described above and created an urgency in obtaining confirmation of admission and the corresponding court order. These factors include changing and unclear instructions from clients, clients experiencing

withdrawal or mental illness that impedes obtaining instructions, homelessness of clients, difficulties in communicating with clients in correctional facilities on remand or awaiting appeals, and the reported general availability of ATS in correctional facilities, leading to relapse.

Of specific concern to the Committee is the availability of programs and facilities in regional areas, noting that people in regional areas are approximately 2.5 times as likely to use ATS as their city counter-parts. The Committee was heartened to see that the Inquiry's Issues Paper 3 notes the scarcity of residential rehabilitation in regional areas and their under-resourcing where they are available. The Committee further notes that many clients cannot access rehabilitation centres further away from regional centres due to not being able to self-fund travel to those centres.

The Committee takes some comfort from, and acknowledges, that the NSW Government supported, or supported in principle, 11 of the 12 recommendations of the 2018 NSW Parliamentary Inquiry into Drug Rehabilitation. However, the Committee submits that the \$4 million provided by the NSW government over 4 years from 2015 has not manifested sufficient rehabilitation services for regional NSW. The Committee notes that that funding ends this year, at which time the primary funding for regional facilities will return to block-funding grants. The Committee recommends that urgent action be taken on the 2018 recommendations and that funding be tied to actual levels of demand. The Committee recommends that the NSW Government guarantees at least 4 further years of targeted funding for rehabilitation programs and facilities in regional NSW.

Further, the Committee is concerned with the common structures of residential rehabilitation which have the effect of deterring ATS-dependent people, or increasing the likelihood of failure in completing the rehabilitation.

For example, committee members described the unavailability of rehabilitation facilities and programs that were able to effectively treat 'dual diagnoses' of complex mental illness and ATS-dependence. As the Inquiry's Issues Paper 3 identifies, it is the common experience of committee members that:

...due to the physical and mental health comorbidities associated with drug use, detoxification often occurs in the mainstream health service system when patients present for acute ATS-related physical and mental health problems.

The mainstream health service system does not support long-term residential rehabilitation following detoxification, and committee members described a gap in treatment for the ATS-dependence following treatment of the presenting physical or mental health problems. Further, committee members reported a reluctance on behalf of rehabilitation facilities and programs to admit clients presenting with or following an acute physical or mental health problem, despite often being ATS-related. In the words of one committee member, “more often than not, residential rehabilitation simply cannot treat dual diagnoses despite their prevalence”.

The Committee also notes the additional difficulty for female clients in accessing residential rehabilitation that prevents children from being accommodated. Committee members described experiences of female ATS-dependent clients not having adequate familial support to supervise children for the complete length of residential rehabilitation programs. The Committee was not aware of any facilities that permitted co-habitation of dependent children at residential rehabilitation facilities.

Although these barriers affect all accused persons applying for rehabilitation services, there are significantly greater barriers for clients applying for rehabilitation from custody. Our members reflect that the period on remand is the most effective time for accused people to access these services, having the assistance of a solicitor during the application process and permitting the Courts to mandate compliance with rehabilitation through bail conditions.

Previously, Drug and Alcohol Assessment Reports were ordered by the court in order to have persons in custody assessed for suitability to full time residential rehabilitation. The initial assessment was carried out in custody and facilitated by an arm of corrective services known as Service and Program Officers (**SAPOS**). It involved the person in custody meeting with a psychologist and then assessing their individual need for rehabilitation.

As at 2018, these reports could no longer be ordered by the Local or District Court; the Supreme Court stopped ordering these from 15 April 2019.

The most important part of this process was the role of corrective services as an intermediary between the client and the rehabilitation centre. They would make initial contact and organise an assessment, field admissibility issues and fill out applications. Once the assessment took place

they would assist by relaying information and updates about the application and forwarding relevant documentation to the rehabilitation centres.

Corrective Services can no longer organise any of the above. If a person in custody wants to attend rehabilitation they must personally make contact the centre. Immediate problems that arise are:

- Persons in custody have 6-minute increments on the prison phone system to make calls. The average rehabilitation assessment takes 15-30 minutes;
- Remandees do not have access to fax or email to send relevant documents to centres;
- Some prisoners are illiterate and unable to deal with the complexities of applications without the support of a SAPO;
- Prisoners are unable to make calls without money loaded onto their account, disadvantaging impecunious prisoners;
- Prisoners have no control over the prison system, muster or lock ins and are therefore often unable to meet their appointments;
- When phone calls are organised between the legal representation and persons in custody they are not given a pen or paper;
- Calls cannot be booked or facilitated for clients directly to rehabilitation centres under the *Justconnect* phone booking system that is used by ALS and Legal Aid solicitors, this prevents these organisations from directly organising assessments; and
- If something goes wrong, an appointment is missed or call does not go through, it can take several weeks to arrange a second appointment, significantly delaying bail applications.

Whilst family members and solicitors can make some applications on behalf of a person in custody, many rehabilitation centres will not provide a bed without a phone assessment from custody.

The inability to order such reports means that Courts are not able to make bail determinations with a complete understanding of the prospects of the accused person, but also creates a disparity in the system where persons in custody with underlying drug and alcohol issues are less able to access rehabilitative services than those in the community.

The Committee submits that the re-introduction of Drug and Alcohol Assessment Reports and the creation and funding of further drug rehabilitation centres, are crucial to the NSW governments efforts in fighting ATS abuse.

In relation to rehabilitation the Committee makes the following recommendations:

1. Significant additional resources be allocated to the creation or expansion of rehabilitation programs and facilities;
2. Additional resources be concentrated on ensuring the availability of rehabilitation facilities and programs in regional areas;
3. The Inquiry consider reviewing the common admission procedures of facilities with a view to recommending a simplification, where possible, of the information and procedures required before an approval for admission is granted;
4. The allocation of resources to create innovative rehabilitation facilities and programs designed to:
 - a. accommodate dependent children; and
 - b. treat dual diagnoses; and
5. That resources be allocated to the Department of Corrective Services to enable them to recommence their organisational role in facilitating rehabilitation assessments.

Submission in response to Issues Paper 4: Data and Funding

The following submissions respond primarily to question 4.1.2 posed in the Special Commission of Inquiry's Issues Paper 4 and relate mainly to data.

4.1.2 What new data sets need to be developed to inform appropriate policy development in relation to ATS use?

The Committee notes and welcomes the data presented recently by BOCSAR to the Special Commission of Inquiry. That data notwithstanding, the Committee submits further data sets need to be developed to inform policy development.

Throughout the consultation conducted by the Committee, it became apparent that a lack of certain data impeded our ability to come to a firm view on the likely effectiveness of decriminalising ATS and the appropriate policing strategies. As a result, the Committee can only speculate on the likely

populations affected by current criminalisation and policing strategies. Such speculation is primarily based on anecdotal evidence. The Committee submits this approach is an inadequate basis from which to form sound policy, particularly policies on decriminalisation given their capacity to have significant consequences.

For instance, as previously mentioned, the Committee is concerned that extending the use of PINs for ATS possession may adversely affect people from lower socio-economic backgrounds and result in “PIN build-up”. This concern is based on the Committee’s understanding that ATS possession is an offence more often committed by people from low socio-economic backgrounds. Accordingly, the Committee submits new data sets need to be developed in order to assist in determining whether ATS use is more common in low socio-economic populations or whether this conception is as a result of other phenomena, such as the difference in visibility of illicit drug possession between different socio-economic populations. The Committee further notes that the amendments to the *Criminal Procedure Act 1986* (NSW) are too recent to have produced insightful data on the effectiveness of PINs for drug possession generally. Accordingly, the Committee is reluctant to recommend an increase in the use of PINs for ATS possession, without raising concerns regarding PIN build-up.

Further, the anecdotal experiences of Committee members was that ATS possession is rarely charged in isolation. Offences of ATS possession committed by people from low socio-economic backgrounds were often accompanied by charges of property and violence offences. The Committee considers it highly unlikely that in such circumstance PINs will be issued.

The Committee notes that BOCSAR specifically disclaimed its criminal justice system data as capturing the actual prevalence of ATS use and possession. BOCSAR explained this was because the data is “influenced by policing priorities and law enforcement practices”. Further, BOCSAR noted that ATS use and possession are unlikely to be reported by the public. Noting the Committee’s concern outlined above that use and possession is more visible in lower socio-economic populations as it is often detected by virtue of other concurrent offences (which themselves are more visible and more likely to be reported or policed in lower socio-economic populations), the Committee believes the current data on use and possession is likely to be significantly skewed. Relying on the current data to inform policy development would, in the Committee’s submission, be likely to adversely affect vulnerable populations.

Further, the Committee notes the finding of the 2015 National Ice Taskforce that “existing data and research does not provide a sufficiently comprehensive evidence base to support optimal policy-making on ice and to measure the effectiveness of these responses.”

The Committee recognises the challenges associated with gathering such data; however, it supports the Inquiry’s focus on innovation in data collection, and measures such as the AOD Early Intervention Innovation Fund. The Committee also strongly supports further collaboration between bodies such as BOCSAR; the Australian Institute of Health and Welfare, particularly in relation to the National Drug Strategy Household Survey; and the Australian Criminal Intelligence Commission, particularly in relation to the National Wastewater Drug Monitoring Program. The Committee reiterates the importance of developing policies from a position informed and supported by data as well as experience.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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**INQUIRY INTO ROAD TRANSPORT AMENDMENT
(MEDICINAL CANNABIS-EXEMPTIONS FROM
OFFENCES) BILL 2021**

Organisation: NSW Young Lawyers and NSW Young Lawyers Criminal Law
Sub-Committee

Date Received: 29 April 2022

Submission to the Inquiry into the *Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021*

28 April 2022

The Hon Chris Rath, MLC Chair, Standing Committee on Law and Justice

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The NSW Young Lawyers Criminal Law Sub-Committee makes the following submission to the Standing Committee on Law and Justice ('the Standing Committee') in response to the Inquiry into the *Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021*, ('the Inquiry').

NSW Young Lawyers

NSW Young Lawyers is a Committee of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate sub-committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers Criminal Law Sub-Committee

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Summary of Recommendations

The Committee makes the following recommendations:

1. The Committee supports the proposed amendment to the *Road Transport Act 2013* (NSW) ('**the Act**'), as set out in the *Road Transport Amendment (Medicinal Cannabis - Exemptions from Offences) Bill 2021* ('**the bill**');
2. The Committee is of the view that certain clarifications could be made to the bill in order to remove any potential ambiguity and difficulties in implementation; and

3. The Committee is not in favour of imposing any further limitations to the applicability of the proposed exemption to s. 111 of the Act.

I. Support for the Bill

The Committee is in favour of the proposed bill. The Committee views the bill as a sensible extension of the existing exemption for morphine contained in sub-sections 111(5) and 111(6) of the Act in light of the legalisation of medicinal cannabis at a federal level in 2016. Despite this legislative change, s. 111 of the Act continues to prohibit a person driving with a prescribed illicit drug present in the person's oral fluid, blood or urine. A "prescribed illicit drug" includes delta-9-tetrahydrocannabinol (or 'THC') which is the main psychoactive ingredient in cannabis.

The Committee welcomes the important safeguard contained in the current draft of the bill that the medicinal cannabis was obtained and administered in accordance with the *Poisons and Therapeutic Goods Act 1966* or a corresponding Act of another State or Territory. Further, the exemption only applies if THC is the sole illicit drug present in a person's system at the time that they test positive.

The Committee notes that the time and monetary costs to both the community and the defendants when such cases are prosecuted through the court system could be circumvented by the bill.

The penalty for an offence contrary to s. 111 includes an automatic/mandatory licence disqualification, with the length of the minimum disqualification period dependent on whether it is a first or second offence. If the bill is not passed, the Committee is particularly concerned about the current risk of additional hardship to those who reside in a rural or remote area of Australia and find themselves disqualified from driving as a result of an offence contrary to s. 111 due to the presence of medicinal cannabis. The Therapeutic Goods Administration currently offers guidance for the use of medical cannabis in the treatment of:

- Epilepsy;
- Multiple sclerosis;
- Chronic non-cancer pain;
- Chemotherapy-induced nausea and vomiting in cancer; and
- Palliative care¹

Rural and remote sufferers of the above conditions already contend with limited access to public transport and lengthy travel distances between their homes and public facilities. In general, a disqualification from driving due to detection of medicinal cannabis would adversely impact those persons living in rural areas

¹ The Australian Government Department of Health, Therapeutic Goods Administration, 'Guidance for the use of medicinal cannabis in Australia: Patient information', (Brochure, December 2017)
<<https://www.tga.gov.au/publication/guidance-use-medicinal-cannabis-australia-patient-information>>.

more so than those living in an urban or densely populated area, with ample access to public transport and medical treatment.

II. Proposed clarifications

The Committee is of the view that certain clarifications could be made to the bill in order to remove any existing ambiguity.

The Committee understands that the changes to the bill relate to s. 111 of the Act rather than s. 112. Therefore, if a person is affected by medicinal cannabis to such an extent that their conduct would amount to the offence colloquially known as “driving under the influence”, s. 112 would continue to have operation, and the person could remain liable for an offence under that section. For the avoidance of all doubt however, the Committee suggests an addition to the bill, to state that:

"Nothing in subsection 1A affects the operation of s. 112 of this Act"

Further, the explanatory note to the bill indicates that clause 3 amends the Act so that:

“offences relating to driving while a prescribed illicit drug is present in a person’s oral fluid, blood or urine do not apply if the only drug present is delta-9-tetrahydrocannabinol (also known as THC) that the person had obtained and administered for medicinal purposes.”

The current wording of the bill is that “the delta-9-tetrahydrocannabinol was obtained and administered in accordance with the *Poisons and Therapeutic Goods Act 1966* or a corresponding Act of another State or Territory”. This wording differs from the current wording in subsections 111(5) and (6) of the Act in relation to morphine. The Committee suggests the following addition to the current wording in cl. 3 of the bill (new proposed s.111(1)(1A)(b)):

“..and taken in accordance with the manner in which it was prescribed”

The Committee is of the view that this would provide a further protection to ensure that the medicinal cannabis has been taken by the patient in accordance with the instructions of the prescription. This addition would make the bill more consistent with the current wording in subsections 111(5) and (6) of the Act. The proposed additional wording would also have the added benefit of capturing any instructions included as part of the prescription as to any recommended waiting periods between the time the medicinal cannabis is taken and the time when the patient may drive.

The Committee also notes that the bill is silent as to where the onus lies regarding proof of the application of the exemption. Subsection 111(5) of the Act currently provides, in relation to morphine, that it is a defence to a prosecution for the relevant offence “if the defendant proves to the court’s satisfaction” the relevant matters.

The same wording is not currently used in the bill. Given that the existence of a prescription for medicinal cannabis and the manner in which it was taken is particularly within the knowledge of the person who might otherwise be charged with an offence contrary to s. 111, the Committee suggests that the following wording in italics is added to proposed subsection 1A to avoid any confusion as to how the exemption is intended to apply:

Subsection (1) does not apply, *“if the defendant proves to the court’s satisfaction:”*.

III. Imposition of a time limit or waiting period

The Committee is not in favour of imposing a blanket or generally applicable waiting period after the administration of the medicinal cannabis and before a person can drive and fall within the proposed exemption to s. 111 of the Act.

Section 111 creates an offence of drug presence, not drug affectation. It is s. 112 that is focussed on the effect of the drug on the person’s driving ability. Accordingly, the Committee is of the opinion that there is limited utility in imposing a waiting period after the consumption or use of medicinal cannabis before the exemption to s. 111 applies, in circumstances where offences under s. 112 of the Act would continue to apply to persons whose driving is impacted by their ingestion of medicinal drugs, regardless of the proximity in time between the drug consumption to their driving.

Further, such a time limit would be difficult to enforce and would rely entirely on admissions by an accused person in most prosecutions. Further, the imposition of a blanket time limit, waiting time, or similar prohibition, would not take account of the varying effects on cognition of differing medicinal cannabis dosages and usages.

By way of case study, in the state of Colorado in the United States of America, medicinal marijuana has been legal since 2000, with recreational marijuana use becoming legal in 2012. Colorado does not impose time limits between the time of cannabis ingestion and driving. Instead, a Colorado driver is deemed intoxicated if their blood is found to contain five nanograms or more of THC per millilitre of whole blood, and such a fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs at the time of the offence.² As such, this law creates an offence of drug presence at a certain level, rather than one of drug affectation.

The Committee does not think that a similar approach should be taken in this instance, namely limiting the scope of the exemption in the bill to cases where there is a less than prescribed concentration of THC that had been ingested for medicinal purposes. Indeed, this would tend to defeat its very purpose. The Second Reading Speech for the bill indicates concerns that a person can test positive for THC days after

² *Motor Vehicles and Traffic Regulation*, Ch. 331, § 1.6(a)(iv), 2013, Colo Sess Laws, 1877, 1878.

consumption.³ Further, unlike alcohol, there is no consensus on how many nanograms per millilitre of THC represents impairment.

The Committee is of the view that the continuing availability of the s. 112 offence is sufficient in this regard.

In addition, the Committee is aware of a study conducted by a collaboration between the Lambert Initiative at the University of Sydney, Royal Prince Alfred Hospital and Tilray in 2019, which examined the accuracy of two of the most commonly used mobile drug testing devices, Securetec DrugWipe 5s and Draeger DrugTest 5000, in detecting oral fluid tetrahydrocannabinol.⁴ The method and conclusions, as reported in summary on the University of Sydney website, and published in more detail in the *Drug Testing and Analysis* Journal, indicate that there are limits to the sensitivity of devices and that confirmatory testing is essential, particularly in situations where positive test results may lead to criminal convictions.⁵ The Committee understands that such confirmatory testing is currently used by NSW Police.

Further, the study utilised controlled laboratory vaporisation of cannabis and observed a “magnitude of intra- and inter-individual variability following standardised cannabis administration”, which “may preclude its use as a meaningful marker of acute intoxication or impairment.”⁶ Further, as the researchers observed, different concentrations of cannabidiol (**CBD**) to THC in the cannabis consumed may affect concentrations in oral fluid.

In light of the above, although a combination of tests, including confirmatory testing, is available to NSW Police as a law enforcement agency, the Committee is concerned about the practical difficulties in medicinal cannabis users being able to ascertain when they fall under any prescribed limit that may be imposed for the exemption to s. 111 to apply. If a medicinal cannabis user cannot drive without confidence that they fall within the exemption, then the bill would not achieve its intended purpose.

³ See for example, a controlled laboratory study which found only a weak relationship between oral fluid THC concentrations and magnitude of impairment on a range of driving-related cognitive tasks following smoked cannabis: Ramaekers JG, Moeller MR, van Ruitenbeek P, Theunissen EL, Schneider E, Kauert G. Cognition and motor control as a function of 9-THC concentration in serum and oral fluid: limits of impairment. *Drug Alcohol Depend.* 2006; 85(2):114-122. Cited in Thomas R. Arkell et al, 'Detection of delta 9 THC in oral fluid following vaporised cannabidiol (CBD) content: An evaluation of two point-of-collection testing devices' (2019) 11(10) *Drug Testing and Analysis*, 1486-1497.

⁴ Thomas R. Arkell et al, 'Detection of delta 9 THC in oral fluid following vaporised cannabidiol (CBD) content: An evaluation of two point-of-collection testing devices' (2019) 11(10) *Drug Testing and Analysis*, 1486-1497.

⁵ Ibid. See also The University of Sydney Lambert Initiative for Cannabinoid Therapeutics, *Research – Driving*, The University of Sydney (Web Page, undated) <<https://www.sydney.edu.au/lambert/our-research/driving.html>>.

⁶ Ibid.

Concluding remarks

NSW Young Lawyers and the Committee thank the Standing Committee on Law and Justice for the opportunity to comment on the bill, and would welcome the opportunity to participate further in the review process.

If you have any queries or require further submissions, please contact the undersigned at your convenience.

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