Submission No 86

INQUIRY INTO IMPACT OF THE REGULATORY FRAMEWORK FOR CANNABIS IN NEW SOUTH WALES

Name: Dr James Moylan

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Cannabis Law Reform in Australia

for legislators & agitators

by Dr James Moylan

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SECTION 1 – THE CURRENT SYSTEM

Assessing an existing legislative oversight regime and considering options for legislative reform are two very different projects so this text is broken into two sections.

Section 1 describes the current regulatory environment in Australia as it pertains to cannabis and undertakes a legal analysis to determine and describe the current scope and distribution of responsibilities and powers.[1]

Section 2 then canvasses and considers the manifold factors that a legislature in Australia should take into account when formulating a cannabis law reform proposal.

Part One: A Unique Legislative Landscape

Any proposals advanced by cannabis law reformers have to be formulated in accord with a clear-eyed understanding of the nature of the separation of powers in our country and the constraints and limitations on power that are associated with our particular system of governance. Therefore, Section 1 of this text is devoted to considering the current legislative environment pertaining to cannabis.

The Powers of the Commonwealth

We live in a federation where powers are distributed between the federal and state jurisdictions. Our Constitution describes in detail both the threefold form of our federal government,[2] as well as the range and nature of the powers (to regulate and legislate) being referred by the states to the federal jurisdiction upon federation.

The powers referred to the Commonwealth include matters relating to defence, external affairs, interstate and international trade, taxation, foreign, trading and financial corporations, marriage and divorce, immigration, bankruptcy, and (interstate) industrial conciliation and arbitration (and many other matters). These are commonly referred to as the various 'Heads of Power' (HOP) that serve to authorise one or another federal enactment. Additionally there is also a scope of implied rights that are not directly supported by a HOP yet which are nevertheless 'within power' as they relate to functions that are essential to implementing the powers that have been granted.[3]

However the original list of powers referred by the states to the Commonwealth does not expressly refer to a number of important subjects where the federal government has since become a principal or joint lawmaker.[4] Yet these subjects have not remained beyond the legislative remit of the commonwealth as the power of the federal government to make laws is not strictly limited to just those matters that were referred upon federation.

The writers of our Constitution anticipated that there would be a need to refer further powers to the commonwealth. Thus section 51(xxxvii) of the Constitution is often described as 'the referral power'. It is a provision authorising the Commonwealth parliament to assume responsibility for matters that have been legislatively referred to it by any or all the states. In accord with this provision and after

[1] Part Two of this first section is designed as a primer for legislators and political advisors regarding the current state of cannabis law and regulations in Australia and is highly technical as it focusses mainly on constitutional and administrative law. If you are not a lawyer, a politician, a political advisor, or particularly interested in administrative and constitutional law, then it is suggested that reading just the conclusion to Part Two - 'Administrative actions – general conclusions' – will suffice.

[2] Being the parliament in Chapter 1, the Executive function in Chapter 2, and the Federal and Territory Judicature in Chapter 3.

[3] As well as sundry other authorising powers such as the 'nationhood power', governmental 'prerogatives', executive functions, etc.

[4] Such as education, the environment, criminal law, medicinal and therapeutic goods and services, roads, etc.

federation the states have referred a range of 'scopes of legislative authority' relating to matters that were not originally referred.[5]

The Powers of the States

It is essential to differentiate the variety of different types of authorising powers as a state legislature is largely bound by the scope of authorisation associated with one of the originally referred powers (which are referred to as HOPs in this text) but not necessarily by a scope of authorisation that has been subsequently referred (which are called 'legislatively referred' powers).

In contrast to the precisely delimited compass of powers that are available to the Commonwealth, state constitutions vest broad legislative power in each of the state parliaments to enact laws for 'the peace, order and good governance' of the relevant state. So if a piece of state legislation is assessed as not being 'in regard to' one of the HOPs that were referred upon federation to the Commonwealth parliament and may be typified as having been enacted in furtherance of 'the peace, order and good government' of a particular jurisdiction, then it is likely constitutionally valid (however odd or repugnant).

Legislation that is assessed as extending to matters that are not within the scope of these respective constitutional guidelines is commonly described as being *ultra vires* (which is a legal term meaning 'beyond powers' and so invalid). A state law that asserts to act in an area that relates to subject matter that has been referred to the Commonwealth (or is otherwise assessed as being an exclusive power of the Commonwealth) is *ultra vires* (and so invalid) to such an extent as it is inconsistent. Whereas federal legislation assessed as being unsupported by an appropriate HOP is also described as being *ultra vires*.

Disparate notes on the Landscape of Cannabis Law in Australia

Non-medical cannabis

In the American legal context 'recreational' cannabis is that which is grown and sold to adults pursuant to applicable state laws relating to the legal trade in cannabis. Thus the recreational use of cannabis is not acknowledged in Australian law in any jurisdiction as there is no legally sanctioned trade in cannabis outside of that which services the medicinal and therapeutic marketplace. There is only medical and illegal cannabis.

Medicinal cannabis

The power to regulate therapeutic goods and poisons has been referred to the Commonwealth by all state jurisdictions in accord with section 51(xxxvii).[6] The Commonwealth now regulates all matters relating to medicinal cannabis in accord with the TGA framework.[7]

It is obvious that the federal government intends to 'cover the field' regarding the regulation of medicinal and therapeutic goods and services in our country. This is made evident in the range, detail

[5] This includes legislative referrals relating to a large range of government functions such as those relating to schools, hospitals, roads and railways, public transport, electricity, water supply, gas supply, mining, agriculture, forests, community services, consumer affairs, police, terrorism, prisons, ambulance services, and medicinal and therapeutic goods and serves.

[6] Such as the NSW Poisons and Therapeutic Goods Act 1966 and the Poisons and Therapeutic Goods Regulation 2008, and Therapeutic Goods (Victoria) Act 2010, etc.

[7] Being the Therapeutic Goods Act 1989 (Cth), the Therapeutic Goods (Charges) Act 1989 (Cth), and the Therapeutic Goods Amendment (2022 Measures No. 1) Act 2023. As well as the promulgated regulations attending these instruments, being the Therapeutic Goods Regulations 1990, The Therapeutic Goods (Medical Devices) Regulations 2002, and The Therapeutic Goods (Charges) Regulations 2018.

and scope of the existing regulations.[8] However the significance of this observation is tempered by the reality that the scope of authority to act has been legislatively referred.

Medical and non-medical use of cannabis: divergent scopes of state & federal power

Consideration of the scope of powers attaching to the federal and state jurisdictions must necessarily be broken into

- regulatory efforts relating to medicinal and therapeutic use, and
- those that are codified within the various criminal statutes at the state and federal level.

This is because the scope of powers authorising federal administrative actions relating to cannabis does not extend to matters pertaining to the use of cannabis for non-medical purposes.

While each of the state jurisdictions have surrendered the power to supervise matters relating to the use of cannabis as a medicine to the Commonwealth, all state jurisdictions retain a relatively unfettered sovereign jurisdiction relating to crime and punishment. Consequently, while the federal government likely thus has wide latitude in directing (by administrative decree *or* legislative action), alterations in the penalties associated with medicinal cannabis and also to alter the penalty regime associated with federally mandated criminal penalties relating to cannabis, this scope of authority does not have any implications for the criminal legislative regime of the states. This is because while the trade in medicinal and therapeutic goods is a federal responsibility, the particular criminal penalties associated with the non-medical use and trade in cannabis across Australia are quite evidently matters that can be categorised as 'relating to' crime and punishment and so are not within the compass of Commonwealth legislative authority.

A pragmatically limited scope of authority

While it is a settled principle of constitutional law that to the degree that where an existing state enactment advertises propositions that are inconsistent with those contained within a validly authorised federal law, the federal enactment takes precedence, this is a moot issue in this instance. Any conflict regarding the federal TGA legislative framework will never be referred by a state legislature to the federal court as each state legislature enjoys a ready ability to withdraw or amend the existing form and scope of the current s51 referral of powers as they see fit.

There is a blurred line between medical and non-medical use of cannabis

Under the TGA framework there is no precise line between what might be designated as a medicinal or therapeutic use and what might be an unsanctioned (ie, non-medical and therefore criminal) use of cannabis. The existing definition in the Commonwealth *Therapeutic Goods Act 1989* provides that a 'therapeutic use' (amongst others) is one '(b) influencing, inhibiting, or modifying a physiological process in persons'. As this wording admits for wide latitude regarding the range and types of behaviour that might be covered, there has been a progressive extension of the proposition into the realm of 'treatments' for 'disorders' such as stress, emotional disturbance, promotion of sound sleep, PTSD, etc. This is understandable as the current legislative environment encourages the medicalisation of routine and commonplace health and wellbeing difficulties to such an extent as it may provide a facility for some segments of the Australian community to gain access to a legally sanctioned supply

[8] Including regulations and guidelines relating to: Declared goods orders, Excluded goods orders, determinations and specifications, Instruments, Manufacturing principles and guidelines, Medical devices notices and standards orders, Notices, Pharmacopoeias, The Prescription of an unapproved therapeutic good (health practitioners), Product information, Specifications, the Therapeutic goods advertising code, Therapeutic goods determinations, Therapeutic goods orders, etc. See Australian Government, *Dept of Health and Aged Care, Therapeutic Goods Administration* 'Legislation and legislative instruments' (web page, 6/11/23) < https://www.tga.gov.au/about-tga/legislation/legislation-and-legislative-instruments>.

of cannabis.

Yet because the trade in therapeutic and medicinal goods and services is understandably concerned with protecting the public from the harms that are associated with medicinal substances, this also serves to normalise the proposition that cannabis is a dangerous substance. This is incorrect. The assertion (inferential, legislative, rhetorical or otherwise) that cannabis is a relatively dangerous substance is unwarranted.[9]

Regarding the Australian territories

The cultivation, use, possession and trade in cannabis remains illegal in all unlicenced circumstances in Australia. However in the ACT the government has decriminalised certain limited behaviours by removing the penalties that attach to

- *using* cannabis in your home (for personal use),
- *possessing* up to 50 grams cannabis or up to 150 grams green plant material, and
- *growing* up to two cannabis plants at home (per resident) with a maximum of four plants.

Yet in bringing about these alterations the current regulations have been supplemented with not just a variation regarding the penalties that attach to these offences, but also a range of entirely new regulatory restrictions and associated penalties. These new penalties relate to

- using cannabis in public,
- exposing a child to cannabis smoke,
- storing cannabis within the reach of children,
- cultivation by enhanced means, and
- cultivating cannabis where it can be accessed by the public.

In their recent legislative actions the government of the ACT seems to marry a clearly defined and largely rational lawmaking intent with a range of public interest principles relating to cannabis that are contextually appropriate but not necessarily morally coherent. The legislature therefore seems to be laudably intent on providing appropriate access to cannabis for those who wish to use it within their jurisdiction. However this is all occurring *within the context of it being a federal territory*.

As section 122 of the Constitution provides that the federal Parliament can make laws for the territories, the realpolitik of the legislative environment in the ACT is that the legislature of the jurisdiction is authorised by the popular mandate of the citizenry (not a defined scope of legal authority) to act in as politically expedient a fashion as is pragmatically possible in the current political circumstances. This is because the laws in a territory are entirely at the legislative behest of the federal parliament.[10] Therefore rather than complicating an already complicated text, the territory jurisdictions in Australia have been largely excluded from consideration.

[9] Appended to this document is a brief 'Relative Harms Assessment' relating to cannabis which supports these observations, see 'Appendix 1: A Relative Harms Assessment' 92.

[10] While each state has a sovereign native scope of authority that provides an ability to make laws 'for the peace, order and good government of the State'. The precise formula used in the various state constitutions varies (ie, 'for the peace, *welfare* and good government of the State', etc), yet the High Court has determined that all these phrases are legally synonymous. These matters are well canvassed in *Union Steamship Co of Australia v King, Kable v DPP (1),* and *Durham Holdings Pty Ltd v NSW*.

Part Two: Currently Available Government Actions

The focus of the first part of this section was on describing the regulatory environment relating to cannabis in general terms. This part considers the manner in which government actions are commonly assessed regarding their legal veracity and soundness, then these assessment tools are applied to ascertaining and describing the current scope of ministerial discretion.

NOTE: *If you are not a lawyer, a politician, a political advisor, or particularly interested in administrative and constitutional law, then it is suggested that reading just the final section - 'Administrative actions – general conclusions' – will suffice.*

A Typology for Assessing Constitutionality & Legality

Our Constitution provides a clear description of the powers that have been referred by the states to the Commonwealth. Furthermore, in the years since federation the High Court of Australia has provided extensive guidance regarding the principles and definitions that are consequential when considering the separation of powers between the federal and state jurisdictions. This has enabled legal scholars to employ the observations provided by the High Court to develop a range of principles of assessment that are used to interrogate legislative propositions and government actions to test if they are both constitutionally valid (ie, sanctioned by an appropriate head of power or remit of authority) and legally sound (ie, not precluded by the range of restrictions and limitations on legislative power that have been identified by the courts).

Constitutional and administrative law scholars have used the various opinions that have been delivered by the High Court to develop a checklist of questions and principles that can be applied to assessing a proposed government action (at both the state and federal levels). This is generally referred to as a 'typology'. A typical typology is introduced and described below as this template will later aid in identifying if a government action is both constitutionally and legally sound.[11]

Part one – assessing powers

1. Characterise a government action.

Determine the direct legal effect of a proposed action – ie, consider what rights, duties, obligations, privileges or immunities an action creates, effects or destroys. Then (guided by attention to case law), 'characterise' this legal effect in accord with the various powers and authorities that are currently recognised.

2. Identify the authorities and power(s) a government would likely invoke to support an action.

What are the implicated powers and authorities? Describe the ambit of the existing power(s) by reference to relevant case law.

3. Make a preliminary assessment.

Consider if the direct legal effects of the proposed government action are sufficiently connected to or reasonably appropriate and adapted to the scope of the identified authority.

4. Reach a preliminary conclusion as to the likely constitutional validity of the action as an expression of government power.

[11] Note that a great deal of information that may be of import is necessarily omitted from these descriptions simply because the intent of this document is not to train constitutional lawyers but rather simply and briefly introduce all of the main principles and ideas that are commonly of import in making these sorts of assessments.

Part two – assessing legal & constitutional limitations & restrictions

5. Identify the legal (administrative and constitutional law) challenges that would likely be invoked to strike down a proposed action by reference to relevant case law.

I. Assess the constitutional validity of a proposition by considering (by reference to precedent) the implicated prohibitions or limitations (i.e. apply the relevant tests for the relevant prohibitions).
II. Assess the legal coherence and soundness of a proposition (by reference to both constitutional and administrative case law) regarding matters such as proportionality, reasonableness, process, legislative ambit, international treaties, implied intergovernmental immunities, etc.

6. Determine if such an action is

I. constitutionally valid, and
II. legally sound.

If it is thus assessed as being a viable option, make a final assessment as to the scope of potential outcomes that are associated with a particular type of government action or enactment.

Applying the Typology

The typology described above can assist in making assessments regarding legal soundness and constitutional validity. So it is of direct assistance to those who seek to develop legislative proposals that accord with best practice legislative behaviour in the Australian context.

The assessment process is broken into two parts. This is because there are two necessary stages in such an assessment. First it is necessary to consider if a proposed instance of government action is authorised by a validly conferred scope of powers. This is achieved by

- 'characterising' the proposed action (in legal terms).
- Considering the scope of current authority relating to this arena of law (by reference to HC case law).
- Then assessing whether the proposed action is inside or outside of this recognised scope of authority.

Yet there are also a range of other factors and principles relating to constitutional and administrative law that may be of particular significance when making an assessment regarding the legal viability of a proposition. Consequently these assessments are made in the second half of the typology as they vary depending on the nature of the action under consideration and whether it is a proposed action by a state or a federal government.

'Characterising' the legal effect of a potential government action

The first part of the assessment typology – relating to assessments regarding powers – hinges on correctly and disinterestedly 'characterising' the (federal or state) enactment. This simply means that an assessment is made regarding whether the law falls within one of the enumerated heads of power or a legislatively referred scope of federal legislative authority. As was earlier noted, this is a necessary first step because the Constitution sets out a specific list of powers which the Commonwealth can legislate on yet beyond this there is no general legislative power available. So not only are there are a range of heads of power that must be considered but also a range of referred scopes of legislative authority that have been statutorily referred to the federal arena.

Regarding the powers that are listed in (sections 51 and 52) of the constitution the High Court proposes

that it takes 'a liberal' approach to characterisation, which simply means that the court is largely unconcerned with the nature of the particular policy in question just whether or not there is an appropriate scope of authority to authorise an enactment, with a large degree of deference commonly being accorded the approach taken by the federal parliament (see *Jumbunna Coal*). [12]

Helpfully, in *Grain Pool of Western Australia v Commonwealth*[13] a majority of the court provides '[t]he general principles which are to be applied to determine whether a law is with respect to a head of legislative power' [16]. In this judgement the court describes five 'rules' of characterisation that serve to assist in making assessments regarding whether an enactment might be 'in regard to' a referred or inherent power.

1. First, the court observed that when making such an assessment the text of the Constitution is to be construed 'with all the generality which the words used admit'.[14] In other words, constitutional powers are to be interpreted generously unless the text states otherwise.
2. Secondly, the character of the government action in question must be determined 'by reference to the rights, powers, liabilities, duties, and privileges which it creates'. Which in legal terms is commonly described as determining 'the direct legal effect of the law'.
3. Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the identified direct legal effects associated with a governmental action and one or more heads of power.[15]
4. Fourthly: 'In a case where a law fairly answers the description of being a law *with respect* to two subject matters, one of which is and the other of which is not a subject matter appearing in s 51, it will be valid notwithstanding that there is no independent connexion between the two subject matters.'[16] This fourth rule effectively means that a multiple characterisation (where one subject matter is not a s 51 subject matter) is permissible. This serves to 'read into power' the second necessarily enjoined legal effect (even if it is beyond the currently recognised compass of Commonwealth power).[17]
5. Finally, if a sufficient connection with the head of power does exist the justice and wisdom of the law and the degree to which the means it adopts are necessary or desirable are deemed to be matters of legislative choice (and so outside of the compass of judicial review). This refers to the non-purposive character of characterisation. In other words, the purpose for which the law is enacted has nothing to do with the courts. Thus its purpose has nothing to do with assessments regarding its constitutional validity. Rather as long as the subject matter of the law is sufficiently connected to the subject matter of the head of power then the court will not be concerned with the policy that animated the parliament when it passed the law.[18]

These adjudications apply equally to assessments regarding the constitutional validity of both state and

[12] *Jumbunna Coal* Mine NL v Victorian *Coal* Miners' Association [1908] HCA 95.
[13] (2000) 202 CLR 479.
[14] The justices cite R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207, 225-6.
[15] Whether the subject-matter of the law is 'with respect to' a legislative power is a matter of degree, see *Re Dingjan; Ex parte Wagner* (1995).
[16] As Mason and Deane JJ consider in *Re F; Ex parte F* (1986) 161 CLR 376, at 388.
[17] Also note the assessment of Mason J in *Murphyores Pty Ltd v Commonwealth* (1976) 136 CLR 1, at 22, where the justice notes that: 'It is quite another thing to say that the Commonwealth cannot in the exercise of that power make laws which have a consequential and indirect effect on matters standing outside the power'.
[18] For a rich and extended discussion relating to these matters see James Stellios (2021). 'Constitutional characterisation: Embedding value judgements about the relationship between the legislature and the judiciary'. 45(1) *Melbourne University Law Review* 277-322.

federal enactments, they just have differing effects.[19]

Multiple characterisation

Some recent bills put before the commonwealth parliament that propose to federally decree the decriminalisation of aspects of the laws in Australia cite rule number four (above). The proposition advanced is that because the commonwealth has a range of heads of power and referred scopes of authority that can potentially authorise the establishment of a (therapeutic goods or plant breeders rights) marketplace in cannabis, this serves to 'read into power' a conjoined scope of authority to decriminalise the use of cannabis at both a state and federal level. This is assessed as being a legally contentious suggestion. These matters are immaterial to considerations relating to the validity of such an enactment in the federal territories and are misguided if they are suggested as providing for valid authorisation for the commonwealth to act to either suspend or amend the criminal law in any state.

The rules enunciated above must be considered holistically in the light of the range of other principles of characterisation that have been enunciated by the HC, not in isolation. Thus it is suggested that it is likely that any such an instance of government action (ie, a federal legislative decree of decriminalisation of the recreational use of cannabis extending to more than just the federal territories) would be found by the HC to be invalid. This is because it will be characterised *at the first instance* as being an action regarding crime and punishment and so not an instance where the proposition of multiple characterisation might arise. Rather, it is proposed that a more conservative (in constitutional law terms) characterisation of the direct legal effect of the bills in question serves to indicate that the proposition of multiple characterisation is not at issue because all other aspects of the proposed enactments are *ancillary* or *contingent* (not *necessarily enjoined*) to a core assertion of authority that is *ultra vires* (ie, there is no need to move on to characterise actions regarding a marketplace in recreational cannabis or plant breeding rights because the commencing core assertion of authority is unsupported).

A helpful way to assess whether a potential government action is amenable to multiple characterisation is to ask: Is the same core legal effect available for expression in a government action that does not include the proposed conjoined power? If the answer is in the affirmative then the proposed government action is not amenable to multiple characterisation.[20]

Implied Incidental Powers

Each head of power in s 51 also carries with it a range of 'implied incidental powers' relating to the regulation of matters that are related or ancillary to the express subject matter in the 'core' of a head of power. This has the effect of expanding (to a significant extent) the scope of Commonwealth legislative power because even if the law is not 'with respect to' the head of power it may still be constitutionally valid as an exercise of the implied incidental power.[21]

However as noted earlier in the text, this does not thereby licence the federal parliament to legislate on any topic or subject matter that is not duly authorised by an acknowledged head of power simply

[19] If a federal law is assessed as not being within the compass of the exclusive or referred powers of the Commonwealth, then it is deemed as being invalid to the degree that it is unsupported (as some other aspects of the law may be validly supported by a HOP or referred scope of legislative authority). If a state law is assessed as impinging on the exclusive or referred powers of the Commonwealth, then it is deemed invalid to the degree that it is ultra vires (which means some or all of the enactment might be deemed invalid).

[20] A supplementary test of whether a proposed multiple characterisation is available is to simply consider if the various legal effects of a proposed bill are achievable independently (ie, in separate and independent bills). If the legal effects can be achieved independently, they are neither *ancillary* nor *necessarily conjoined* legislative assertions.

[21] See *Grannall v Marrickville Margarine Pty Ltd* (1955). The judgment declares that 'every legislative power carries with it the authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws… that are ancillary to the subject matter' (at 77).

because the enactment also extends to matters that *are* duly authorised. Otherwise the federal government would be free to usurp the sovereign authority of the state jurisdiction at will. Rather the 'core' or animating rationale for the proposed government action must be identified and characterised 'by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes'. Not by reference to the range of incidental administrative actions that are required to give effect to a core animating rationale or the conjoined yet ancillary scope of powers *necessary* to effectuate the given scope of power.

Illustrating these sentiments, in *Fairfax v Federal Commissioner of Taxation,*[22] Kitto J [6-7] describes an appropriate application of these rules of characterisation when he observes that:

> Under [section 51 of the constitution] the question [of an authorised remit of power] is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to' one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?

Describing types & degrees of inconsistency between state & federal laws

Assessments regarding the constitutional validity of an action can be complicated by the need to disentangle what might be valid and invalid aspects of the very same package of legislation. Therefore constitutional scholars have identified and named three distinct types of inconsistency (ie, ways in which a state and a federal enactment might be inconsistent).

1. 'Type 1' inconsistency is also known as 'direct inconsistency'. This is where simultaneous obedience of a Commonwealth and state law is impossible.[23] A type 1 inconsistency indicates that a provision is invalid.
2. 'Type 2' inconsistency is where one law takes away a right or privilege conferred by another.[24] A type 2 inconsistency indicates that to the degree that an impugned right or privilege has been disaffected those elements of an enactment (if severable) will be deemed as being invalid.
3. 'Type 3' inconsistency is also known as 'indirect inconsistency'. This is where a state law addresses matters (however peripherally) where the Commonwealth has legislated in a manner that is assessed as exhibiting an intent to 'cover the field'. In plain terms this means where (it is evident to the court) that the Commonwealth has demonstrated an intention to be the exclusive arbiters and regulators regarding a particular subject.[25] A type 3 inconsistency indicates that it is likely that an entire legislative package is invalid.

Option One - federal subordinate legislative action (moratorium) – TGA framework

Assessing: *A decree of moratorium by a federal government that directs by administrative action that*

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[22] [1965] HCA 64.

[23] As per *R v Licensing Court of Brisbane; Ex parte Daniell,* (1920) 28 CLR 23. Where Queensland legislation required a referendum on liquor licensing to be held on the same day as Senate elections, whereas Commonwealth legislation prohibited referenda on days when Senate elections were being conducted.

[24] Such as in *Mabo v Queensland (No 1)* (1988) 166 CLR 186, where it was assessed that the *Queensland Coast Islands Declaratory Act 1985* (Qld) was inconsistent with the *Racial Discrimination Act 1975* (Cth), as it served to extinguish traditional land rights in contravention of the Racial Discrimination Act, so removing rights enjoyed by one racial group while not removing similar rights enjoyed by others. Thus, the Queensland legislation was assessed to have the direct legal effect of removing rights conferred by a validly enacted Commonwealth law.

[25] This type of inconsistency is usually illustrated by recourse to *O'Sullivan v Noarlunga Meat* (1954) 92 CLR 562, where the High Court held that Commonwealth Regulations and State laws, despite a different focus in each statute, dealt with the same subject matter. Therefore, both federal and state laws were seeking to regulate the same 'field'. However, as the Commonwealth was assessed to have demonstrated an intention to 'cover the field' due to the elaborate detail of their regulations, the court judged that the test for type 3 inconsistency was met.

all infractions associated with the Commonwealth regime of oversight of the medicinal and therapeutic cannabis trade be assessed as civil regulatory and not criminal violations while also altering the range of penalties.

Note: the current TGA framework is already a civil infractions system and so the only practical effect of such a decree would be to vary the penalties associated with infractions. Furthermore, there is no ambiguity regarding the validity of such an administrative action as it pertains to the federal territories (as it is directly authorised by section 122).[26] Therefore this option is being assessed only because such an interrogation assists in mapping out and considering the current distribution of powers between state and federal legislatures.

A moratorium is…

The only administrative action that has featured in the cannabis law reform debate historically are calls for a moratorium. Unlike legislation, which is an act of the parliament, a declaration of moratorium is an instance of 'subordinate legislative action'.[27] It is an administrative action that provides for a temporary suspension or a stipulated variation of the penalties associated with existing law.[28]

A declaration of moratorium is commonly crafted to deal with identified inadequacies or injustices in the administration of the current legislative environment. It is a codified and advertised regulatory directive whereby the impositions currently associated with a particular range of criminal or civil infractions are suspended or varied, either while a range of particular factors are in operation or until the legislative and regulatory environment is sufficiently remediated, or simply for a stipulated (arbitrary yet not unreasonable) period of time.

Scope of potential review

As with any other action by a minister of the crown that is of an administrative character, any perceived errors in a declaration of moratorium will be open to challenge in the Federal Court on the grounds (amongst others) that it is either *administratively flawed* or *ultra vires*. Section 75 of the Constitution provides that the High Court will have the jurisdiction to review the 'administrative action' of federal officers:[29]

> 'In all matters -
>
> (i) Arising under any treaty:
> (ii) Affecting consuls or other representatives of other countries:
> (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
> (iv) Between States, or between residents of different States, or between a State and a resident of another State:
> (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the

[26] With a potential issue arising relating to legislative remit. However, as indicated earlier, the governance of the federal territories is beyond the scope of this discussion paper.

[27] Subordinate or 'delegated' legislation (in administrative law terms) refers to a directive, rule, decree, or policy declaration made by an executive officer, pursuant to a delegation of legislatively authorised power.

[28] The High Court has affirmed as a bedrock principle of governance that Commonwealth and state governments can validly delegate legislatively authorised powers to the executive branch, eg, see *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.

[29] In 1983, the *Judiciary Act* 1903 was amended to permit writs to be sought in the Federal Court: as per s 39B of the *Judiciary Act* 1903. The Federal Court Rules were later amended to provide for initiating an action under the *Administrative Decisions (Judicial Review) Act* 1977, in the same process as an action under s 75(v) of the Constitution.

Commonwealth' [30]

As jurisdiction applies only to decisions of an administrative character, whether a decision is 'legislative' or' administrative' in nature is a threshold issue in the *Administrative Decisions Judicial Review Act* 1977. The distinction is important in

- resolving whether the instrument is subject to the tabling, notification and disallowance requirements of the *Legislative Instruments Act 2003* (Cth), and
- determining if an action is amenable to judicial review re the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

General observations

A minister at a state or federal level can issue a decree of moratorium

- if it is formulated and implemented in an administratively competent fashion,
- the decree does not exceed the acknowledged scope of legislative remit,
- it is constitutionally authorised, and
- no limitations on action are evident.

Which is to say, they are restrained by the current acknowledged compass of their statutory and constitutional authority as codified in constitutional *and* administrative law and precedent.

The federal government has assumed control of the Australian regulatory environment for therapeutic and medicinal goods and services and has asserted (by administrative action) an evident intent to 'cover the field' relating to all aspects of the regulation of cannabis for medical and therapeutic purposes in Australia. Accordingly the facility for the federal government to make subordinate legislative changes altering the penalties associated with the growing, use and trade in cannabis for therapeutic and medicinal purposes is assessed - as a *theoretical* proposition - as being relatively unfettered.

Implications attending a legislative referral of power to the Commonwealth

As the federal scope of ministerial authority regarding medical cannabis is bedded upon the legislative referral of powers from the states, the various state jurisdictions all still retain the optional facility of withdrawing (in part or entirely) from the federal therapeutic goods framework. This illustrates that the ability for the federal government to legislate relating to cannabis, while it is nominally unfettered, is ultimately constrained by the fact of the legislative referral.

Applying the typology of assessment

The first half of the assessment typology[31] is not applicable in this instance for pragmatic political reasons as the scope of legislative authority in question does not pertain to a HOP but rather is legislatively conferred by the states in accord with s51. The proposition of a legal challenge to such a federal decree of moratorium by a state is thus a moot point as it will never occur. As the scope of authority to act in regard to medicinal cannabis is a legislatively referred power and not one

[30] A *writ of mandamus* is an order from a court to an inferior government officer telling them the nature of their duties and instructing them to fulfill them. A *writ of prohibition* forbids a decision maker from persisting in an unlawful act. *An injunction* is a writ that directs that a particular officer act (or not act) in a particular manner or might direct further legal or administrative action by judicial officers or departments of the crown.

[31] See 'A typology for testing constitutionality' 6.

conferred upon federation each state has a ready facility to simply vary the nature or scope of referred authority as they see fit.[32]

However the second half of the typology is of consequence.

Limitations, restrictions, legislative remit, administrative process

(As per steps 5 & 6 in the typology above, see 'Part two – assessing legal & constitutional limitations & restrictions' page 6.)

Because many facets of subordinate legislative actions are subject to the compass of administrative law (as opposed to a legislative act that has been duly gazetted), the facility for an action challenging the validity of a ministerial decree is thus made available to a broader range of potential litigants, arguing a broader range of potential issues. Potential actions might therefore assert that a decree is administratively flawed or beyond the scope of legislative or constitutional power[33] or is precluded by limitations on power, etc. Some of these potential actions warrant at least brief consideration.

Administratively flawed: The assertion that a ministerial order of moratorium has been made in a way that is administratively flawed is of little consequence as any identified deficiency can be readily addressed and the order reissued.

Beyond legislative remit: The assertion that a ministerial order of moratorium has been made in a way that is not legislatively supported is unlikely to succeed (as there has been a legislated referral of powers that is supported by state legislation in all jurisdictions).

Ultra vires: The assertion that a ministerial order of moratorium has been made in a way that is not constitutionally supported is unlikely to succeed (as there has been a legislated referral of powers that is supported by state legislation in all jurisdictions).

Precluded by limitations on powers? The assertion that a ministerial order of moratorium is precluded by limitations on powers is an oft encountered argument, but it is nevertheless legally unpersuasive.

The proposition that a moratorium (or any legislative change at the federal level) is an action precluded because Australia is a signatory to a range of international agreements[34] is sometimes encountered. It is argued that because we have signed these international agreements (relating to the criminal trade in drugs), the Commonwealth jurisdiction is therefore precluded from acting to reduce penalties relating to cannabis in a manner that is inconsistent with the dictates of these signed instruments. However as the remit of the legislatively referred scope of power and the ministerial order both refer to the penalties relating to infractions of legislation governing medicinal and therapeutic goods (ie, cannabis for medicinal and therapeutic purposes), there is a persuasive argument available that both the administrative order and the subject matter field in its entirety are unrelated to the matter of illegal drugs.

[32] The Implied Intergovernmental Immunities doctrine is also of likely import in this instance as proposing limitations on the scope of federal authority, however it is assessed as only being of consequence in this instance in an action by a state government relating to aspects of the federal criminal law pertaining to cannabis. As this is the case, this doctrine is addressed later in this section.

[33] See 'Scope of potential review' 10.

[34] Such as the UN Single Convention on Narcotic Drugs, 1961, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

In Summary: Regarding the likely legal validity of a federal ministerial order of moratorium (TGA framework)

A federal government can institute a moratorium (by administrative action) varying the existing penalties associated with cannabis use by decree but only to such an extent as the existing compass of constitutional and statutory authority will allow.

Such an order by a federal minister is assessed as likely to be legally uncontentious as long as

- the declaration is promulgated in a fashion that is administratively sound,
- accords with the warrant of power legislatively referred to the Commonwealth,
- and does not purport to go beyond the current legislative remit (ie, alter legislative effect rather than administer an existing remit).

Option One - Discussion

An order restricted to altering the penalties associated with the current TGA framework

Outside of providing for a positive declaration of government disposition and policy there are few if any pragmatic legal or political benefits attending a declaration of moratorium (re the TGA framework) by a federal minister simply because this regime is already a civil infringement system.[35]

In isolation such a declaration of policy is without evident practical or legal benefit.

A note regarding an order expanding the scope of what might be 'a therapeutic use' of cannabis

The existing definition of 'therapeutic use' in the Commonwealth *Therapeutic Goods Act 1989* provides that a therapeutic use (amongst others) is one '(b) influencing, inhibiting or modifying a physiological process in persons'. It is suggested that this wording admits for wide latitude regarding the range and types of behaviour relating to cannabis that might be currently covered by the TGA framework. This is because it is suggested it would not be difficult to find a doctor that would be happy to attest that the ingestion of cannabis for both medicinal and recreational purposes necessarily serves to 'influence, inhibit or modify a physiological process'.

A declaration of moratorium that also purports to definitionally extend the compass of the current TGA legislative scope (rather than just amend the current penalty regime) by designating a broader range of activities and uses of cannabis as being 'therapeutic' may therefore be of assistance to a limited degree. However only because such a decree would provide a venue for the HC to rule on the current extent and nature of the scope of authority of the TGA framework as it pertains to cannabis. Whereas because the power to act at the federal level is contingent on a legislative referral of power by the states, the ultimate facility for making decisions is (pragmatically if not legally) vested in the state jurisdiction. Regardless of any finding of the High Court on the current scope of authority for the federal government to act, the precise scope of authority that is provided is ultimately at the legislative behest of the various state parliaments.

Option One – in conclusion

Federal government action altering the penalties associated with the current federal TGA framework is assessed as likely being both within power and legally viable. However in isolation such a declaration of policy by a federal minister is without evident practical or legal benefit. Thus a focus on lobbying for a declaration of moratorium by the federal government is evaluated as inadvisable as it

[35] Relative to any breach of the Act, the TGA will calculate the amount payable for an infringement notice (see ss42 YKA in accord with ss42 YKA(3)).

pertains to a legislative framework and scope of remitted power that is far too restricted and limited to allow for any significantly beneficial alterations (legally, politically or for cannabis consumers).

There is a potential for the minister to broaden the scope of actions that are considered to be associated with the therapeutic use of cannabis due to ambiguity in the definitions employed in the federal enactment. However such an approach is only of marginal utility as it can only serve to broaden the potential criteria associated with a prescription only civil regime.

Option Two – state subordinate legislative action (moratorium) - TGA framework + criminal law

A decree of full decriminalisation by a state government whereby a minister issues a declaration of moratorium with the effect that all infractions in a state relating to the growing, trade, use, possession, transportation and sale of cannabis shall constitute a civil rather than a criminal infraction in accord with newly promulgated regulations.

Applying the typology of assessment[36]

Assessments relating to powers

1. **The direct legal effect of the decree** is to replace the current criminal regime of penalties associated with the cannabis trade with civil penalties thus effectively decriminalising all actions relating (solely) to cannabis use within the state. It is thus an administrative action that is characterised as being in regard to 'criminal law and penalties'.

2. **What is the scope of the implicated powers and legislative authorities?**

   The states have referred the authority to regulate regarding therapeutic and medicinal goods and services to the Commonwealth. However as this is a legislatively referred power, state governments retain a discretion to rescind or alter the scope of referral at will.

   The Commonwealth does not have constitutionally or legislatively referred authority to regulate the criminal law or criminal penalties in state jurisdictions.

What is the ambit of the Commonwealth power(s)?

Regulating the supply, import, export, manufacturing and advertising of therapeutic goods.

3. **Assessment:** This potential state government action does not relate to the regulation of therapeutic and medicinal substances. So it does not serve to impinge upon the subject matter covered by currently referred powers.
4. **Interim finding:** The proposed instance of subordinate legislative action by a state government is assessed as likely being constitutionally valid.

Assessments relating to limitations, restrictions, legislative remit, administrative process

1. Regarding alterations in the penalties associated with infractions of state criminal statutes.

Administrative law - no impact.

Any assertion that a state ministers order of moratorium has been made in a way that is administratively flawed is of relatively little consequence as any identified administrative deficiency can be readily addressed and the order reissued.

[36] See 'A typology for testing constitutionality' 6.

Beyond legislative remit - possibly invalidating.

> Even if the promulgation in question is formulated in such a manner as it directly addresses only the penalties associated with currently enshrined infractions of law, this will not necessarily mitigate the potential for a finding that such a decree is invalid as it is beyond legislative remit. This is because such a declaration can be assessed as acting to alter not just the administration of an existing legislative framework (ie, it regulates the impact of legislation upon individual people or cohorts) but rather the general effect of the law.
>
> It is suggested that any such a declaration may be assessed by the HC as having the character of a legislative instrument rather than that of an instance of subordinate legislative action. This is because the movement of the penalties associated with a range of criminal offenses from a criminal to a civil infraction regime can be argued to provide for a declaration that serves to alter the legislatively enunciated rules *of conduct* within society (thus providing for an alteration in *the general* application of the law as opposed to altering the application of legislation *in particular* instances).[37]
>
> The argument that the ministerial directive of moratorium is invalid as it is beyond legislative remit is thus assessed as *persuasive*.

The Melbourne Corporation doctrine - supporting doctrine.

> The Melbourne Corporation doctrine[38] (of implied intergovernmental immunities) is of consequence in making assessments regarding the likely viability of a federal government challenge (on the basis that a state ministers decree of moratorium is beyond the existing administrative authority of the state government issuing the decree).
>
> The Melbourne Corporation doctrine precludes the Commonwealth from using its legislative power to either abolish the continued existence of states or substantially interfere with their capacity to function as governing entities. Although the doctrine theoretically applies to both state and federal legislative power in effect it is only considered as a limit on federal legislative power. In order to determine whether a Commonwealth law contravenes this limit on legislative power it is necessary to determine:
>
> - whether the law on its proper construction binds the Crown; and
> - whether it satisfies the test in relation to implied intergovernmental immunities outlined by the High Court in *Austin v Commonwealth* [2003] HCA 3.
>
> In *Austin* a majority of the High Court held that there is only one test that needs to be applied: *Does the Commonwealth assertion of jurisdiction curtail the capacity of a state to function as a government?* (Per Gaudron, Gummow and Hayne JJ.) Consequently it is possible that even if the HC found that a decree (of the form indicated) was beyond the legislative remit of a state parliament there is a chance that the court would nevertheless refrain from providing a writ of mandamus, prohibition or injunction as such an issue may be appreciated as serving to debase the doctrine of intergovernmental immunities.
>
> The Melbourne Corporation doctrine is also of import if a state government has effectively decriminalised or legalised cannabis use by state ministerial or legislative action and the federal government then refuses to alter existing federal criminal statutes to accommodate the legislative action. This is because Gaudron, Gummow and Hayne JJ, observed in *Austin* that discrimination against a particular state may be relevant to determining whether the Melbourne

[37] 'The general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases'. Per Latham CJ, in *Commonwealth v Grunseit* (1943) 67 CLR 58,

[38] As per *Melbourne Corporation v Commonwealth* [1947] HCA 26.

corporation test is satisfied, while in *Queensland Electricity Commission v Commonwealth*[39], Deane J observed that a law that appears to have the form of a law of general application may, when its substance is examined, constitute a law that discriminates against a state.

Thus if the continued assertion of criminality in federal statute is assessed as breaching the Melbourne doctrine (by seeking to bind a sovereign jurisdiction of a state by Commonwealth statute in a manner that serves to curtail the capacity of a state to function as a government) then the federal law may be assessed as being invalid (to the degree of inconsistency).

Precluded by limitations on powers? - no invalidating impacts.

In *R v Burgess; ex parte Henry*,[40] the HC observed that the external affairs power extends to implementing international treaties that have been signed by the Commonwealth. It is thus arguable that all the jurisdictions within Australia are bound by international treaty obligations to retain the current criminal sanctions regime relative to cannabis. However this argument is legally spurious.

As was observed earlier, the scope of power that is being exercised by the state minister relates to both medicinal and therapeutic goods and the designation of what might be a criminal or a civil infraction within a state, thus there is a persuasive argument available that the administrative order is utterly unrelated to the matter of *illegal* drugs (and so international treaties relating to illegal drugs). Being a signatory of the international instruments in question does not preclude any sovereign jurisdiction from deciding what actions or substances are legal or illegal within their jurisdiction.

In support of such a contention it is apparent that the international treaties to which Australia is a signatory do not seem to have impacted upon the ability of the Commonwealth to decriminalise and regulate the use of cannabis in Australia for medicinal or therapeutic purposes (in accord with a range of legislatively referred powers). Accordingly it is deemed unlikely that a court would find that these treaty obligations are binding on the original sovereign jurisdiction of the states in a manner that materially differs from their impact upon the legislative authority of the Commonwealth.

Regarding proportionality - possibly invalidating.

In simple terms, the proposition of proportionality in administrative and constitutional law indicates that there must be a reasonable balance between a laws objective and the means used to achieve that end. (Or: you should not use a sledgehammer to crack an egg.)

There is currently a lack of clarity in HCA case law regarding the assessment of proportionality.[41] In *South Australia v Tanner*,[42] the High Court used proportionality to determine the validity of subordinate legislation. It was suggested that when testing whether subordinate legislation has been made within statutory power, a question may arise whether a regulation is so lacking in reasonable proportionality as not to be an authorised exercise of the power.

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[39] (1986) 159 CLR 192.

[40] [1936] 55 CLR 608.

[41] In *Commonwealth v Tasmania* (1983) 158 CLR 1, Deane J asked if the law was appropriate and adapted to achieving the object that was said to make it a law 'with respect to' a particular head of power. In *Australian Communist Party v the Commonwealth* (1951) 83 CLR 1, Williams and Webb JJ referred to the proposition of proportionality when considering the rights and liberties that might be affected by a law (during the course of characterization). However, in *Leask v The Commonwealth* [1996] 187 CLR 579, Dawson and Toohey JJ suggested that the use of proportionality as a test of whether legislation was within constitutional power was a flawed approach.

[42] [1989] 166 CLR 161.

However in *Leask v The Commonwealth*,[43] Dawson and Toohey JJ suggested that the use of proportionality as a test of whether legislation was within constitutional power was a flawed approach. Thus *Tanner* seems to be a case that is directly on point regarding the assessment of a ministerial decree of the form described, yet there is a question as to whether these observations remain good law. It depends on whether the observations advanced in *Leask* were of a general or particular nature.[44]

Thus the likely impact of proportionality on this option is assessed as being indeterminate.

2. Regarding the impact upon the operation of the federal/state TGA legislative framework.[45]

In the introduction to this assessment it was observed that the scope of power that is provided by the states relating to the medicinal and therapeutic use of cannabis is legislatively conferred (ie, it does not relate to a native HOP). Moreover the provisions of the various enabling acts passed by the states serve to acknowledge the legislative reality that the state jurisdictions therefore retain ultimate authority with regard to the form and nature of the powers that have been referred.

Therefore a challenge to the decree under consideration by a federal government authority is assessed as being highly unlikely as any successful legal finding would instantly be disabused by action of a state legislature by their amending of the nature of the referral of authority relating to these matters.

Option Two – in conclusion.

While an administrative action at the federal level has been assessed as being grossly limited by a range of factors, the same does not apply to ministerial action at a state level. Section 16 of *the Constitution Act 1975* (Vic) confers on the Victorian Parliament a plenary legislative power. It provides that 'The Parliament shall have power to make laws in and for Victoria in all cases whatsoever'. A similar declaration of plenary (ie, unqualified) legislative power is exhibited in the Constitution of all state jurisdictions.

Nevertheless, the possibility of a successful challenge[46] on the basis that such a decree is beyond legislative remit or it represents a disproportionate exercise of powers are both plausible. It is arguable (re both proportionality and legislative remit) that the available scope of ministerial action at the state level is not the appropriate venue for *a significant change* to the legal framework within a state jurisdiction (ie, it is not a proportionate employment of the restricted compass of power). Accordingly it can be persuasively argued that a ministerial decree that serves to alter the general legal environment rather than mediate the implications of legislation for individual citizens is invalid as it oversteps the ministerial (executive) remit as it encroaches on the legislative (parliamentary) function.

Is the current TGA framework constitutionally valid?

Later in this text (when considering Option 3) it is suggested that the TGA framework is not constitutionally sound. This is because there are a range of arguments available that a current law of the federal parliament that provides for the making of a decision by a legislatively authorised officer (ie, a doctor acting in accord with the TGA framework) is making a decision of a character that

- is reserved to the Chapter III function (ie, the judiciary), and/or

[43] [1996] 187 CLR 579.
[44] ie, whether or not the courts observations in Leask regarding proportionality are restricted to its use in determining the scope of a HOP, or also extends to the principle in its application to assessing a remit of legislative authority.
[45] See 'Disparate notes on the Landscape of ' 2.
[46] ie, one resulting in the issue of an order or mandamus or prohibition that serves to invalidate the ministerial directive.

- is directly inconsistent with aspects of the current criminal law of the state, and/or
- is invalid due to administrative deficiencies.

A fact scenario: Australian citizen Mr X is seeking relief from a medical ailment and so is provided a prescription for cannabis from a doctor under the TGA framework. Mr X receives, possesses and uses the TGA authorised cannabis. Subsequently Mr X uses, trades in or possesses the same cannabis and is charged with a criminal offence in relation to the action(s). (Note: a similar argument might be more tenuously advanced by any person charged with an offence in a state jurisdiction that is directly analogous to an action permitted by administrative decree under the federal TGA.)

Venue & standing: Section 75 of the Constitution provides that the High Court will have the jurisdiction to review the 'administrative action' of federal officers 'in all matters' – 'In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth' [47]

For a decision to be reviewable under the ADJR Act there needs to be a 'decision' or 'conduct for the purpose of making a decision' of an 'administrative character' made 'under an enactment'.

In accord with Section 75 of the Constitution Mr X then attests in the federal court that he has been legally and financially disabused by his reliance on a decision of an administrative character under the TGA framework. Or in a federal court he attests that the decision in question is administratively flawed (as it has been made contrary to (ADJR) Section 5 (c)).

The decision relied on is 'The appellant was provided invalid and/or *ultra vires* authorisation to purchase, possess and consume cannabis for a legal purpose in [the jurisdiction in question] contrary to [the state crime in question]'. - 'The appellant has been disaffected in law and unduly penalised due the unauthorised actions of a federal government agency in purporting to authorise illegal conduct'.

The writ of mandamus sought directs officers of the federal jurisdiction to cease and desist from falsely asserting that they can validly authorise citizens of a state jurisdiction to legally use possess or trade in cannabis in a manner contrary to the criminal law of the state jurisdiction.

Legal Argument: The distinction between sanctioned and unsanctioned use of cannabis (ie, therapeutic and non-therapeutic) is administrative in character as it is a distinction made in accord with subsidiary legislative authority only and is not informed by legal, medical, scientific or any other reasonably implicated criteria (ie, raw cannabis for therapeutic and non-therapeutic use is exactly the same substance however it is assessed *excepting* in accord with the dictates of the TGA).

The exercise of this distinction, being the discretion to issue prescriptions, is an act that is:

#1 Constitutionally precluded as it serves to usurp a chapter III (judicial) function by delegating to an officer of the parliament (ie, a doctor acting in accord with a legislative framework) the function of authorising whether or not similar acts will be deemed legal or otherwise and so subject to criminal oversight and sanction or otherwise, thus it is an invalid exercise of authority (and/or),

#2 Is *ultra vires* (due to direct inconsistency with state enactments) as it pertains to exactly similar fact scenarios that are (absent the administrative distinctions arbitrated via the TGA legislative framework) criminalised in accord with state legislation thus the authorising federal enactments are invalid to the degree of the inconsistency(and/or),

[47] The scope appellant action is also legislatively codified. In 1983 the *Judiciary Act* 1903 was amended to permit writs to be sought in the Federal Court (as per s 39B of the *Judiciary Act* 1903). The Federal Court Rules were later amended to provide for initiating an action under the *Administrative Decisions (Judicial Review) Act* 1977, in the same process as an action under s 75(v) of the Constitution.

3 Is administratively flawed as it is a decision made contrary to (ADJR) Section 5 (c), as

(a) a breach of the rules of natural justice occurred in connection with the making of the decision, and/or
(c) the person who purported to make the decision did not have jurisdiction to make the decision, and/or
(h) there was no evidence or other material to justify the making of the decision, and/or
(i) it was a decision otherwise contrary to law.

General Discussion: These observations well-illustrate the current incoherence of the legislative oversight regime pertaining to cannabis. At the heart of the problem is the nominal distinction between medicinal and recreational cannabis. Constitutional problems arise because this is a nominative and not a material distinction.

Cannabis for therapeutic use and that which is going to be used for other purposes is often exactly the same substance. Therefore even if a federal enactment proposes to designate (in accord with quite precise and duly enacted regulatory guidelines) that this arbitrary distinction is consequential, it is not the administrative declaration that is determinative. Rather in assessing *the actual legal effect of an enactment* the HC has indicated that this is a matter that is 'determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes'.[48]

Thus it is appreciable that the actual legal effect of the current TGA framework is to legislatively authorise via legally arbitrary (ie, medical) administrative decree that some instances of behaviour will be exempt from criminal prosecution while other exactly similar instances of behaviour will not. This is not just morally offensive and legally incoherent; it is also an indication that parts of or the entire TGA framework pertaining to cannabis are open to legal challenge.

However any argument that the striking down of the current TGA framework may have perversely positive outcomes is one that entirely ignores the political reality in which these arguments occur. Such a determination by the HC would be employed to bolster the 'dangerous drug' narrative that currently reigns and would be counterproductive to fostering a parliamentary environment sympathetic to careful and rational appraisal of even uncontentious matters. Moreover it is probably fair to observe that some people accessing cannabis legally in a legally incoherent system is better than nobody accessing cannabis in a legally coherent one. (All these matters are provided further attention in Part 6.)

Administrative actions – general conclusions

These assessments regarding the scope of possible government action by ministerial decree at the state and federal levels serve to clarify the current legislative environment pertaining to cannabis. The scope of authority to act regarding matters relating to cannabis is currently divided between the federal and state jurisdictions. The federal government entertains a nominally unfettered discretion to legislate and regulate regarding the therapeutic and medicinal aspects of the cannabis trade and regarding the federal criminal jurisdiction.

However the federal authority to legislate regarding therapeutic and medicinal matters pertaining to cannabis is entirely contingent on the ongoing assent of the state legislatures. Therefore it is proposed that any prudently cautious assessment of the current scope for government action (that might facilitate the liberalisation of cannabis laws in Australia) must acknowledge that the federal government cannot unilaterally act to either decriminalise or legalise the cannabis marketplace in Australia. Rather effective government action that serves to liberalise the oversight regime relating to cannabis can only be accomplished (to a limited extent) by state legislative action in isolation or by joint state and federal

[48] Fairfax v Federal Commissioner of Taxation [1965] HCA 64, Kitto J [6-7].

legislative action.

SECTION 2 – CANNABIS LAW REFORM

Having assessed the current status of cannabis law in Australia, Section 2 canvasses the factors that a legislature in Australia should take into account when formulating a cannabis law reform proposal.

The next three parts of the discussion paper variously canvass

(in Part 3) the moral dimension' of civil rights activism on behalf of the public interest,
(in Part 4) the mistakes we have collectively made and what we can learn from these mistakes,
(in Part 5) what legislatures in comparable jurisdictions have done in similar circumstances.

All of which then informs discussions regarding

(in Part 6) the legislative options that are available to Australian governments pertaining to cannabis law reform.

Part Three: Civil Rights & the Public Interest

Matters relating to morality are largely misplaced when making a legal assessment. Yet this is most certainly not the case when considering law reform. While arguments for cannabis law reform do need to be legally informed, they are understandably powered by a refusal to tolerate injustice. Consequently when moving from describing and assessing a current system to considering proposals for legislative reform this implicates an entirely different and much broader range of factors that either must or should be considered by legislators.

Introduction: our Scattershot Legislative History

The ambition of this discussion paper is to promote best legislative practice in the area of cannabis law reform, not to provide a prescription for the 'correct' outcome in accord with any particular opinion or partisan political stance. Yet this does not mean that politics is outside of the scope of this inquiry. It is necessary that quite the opposite be the case. The story of the history of our joint and several legislative efforts in this area is central to comprehending why the current oversight regime pertaining to the use of cannabis has become so legally and morally incoherent.

For half a century, all across the nation, the laws in relation to recreational cannabis have ebbed and flowed in accord with the partisan political winds of the day. As long ago as in 1977, a Senate Select Committee in South Australia recommended the full decriminalisation of the cannabis marketplace. A decade later many cannabis offences in the state were decriminalised. It didn't last long. In NSW, formal lobby efforts also date back to the late 1970s,[49] with the state repeatedly relaxing and tightening the possession laws and regulations throughout the rest of the century. While in Victoria, where the first organised agitation in the early 1980s resulted in the short-lived Marihuana Party, a similar pattern of partial decriminalisation then subsequent re-regulation is also evident. The ACT also first partially decriminalised cannabis offences in 1992, then these actions were reversed and then reintroduced. A similar legislative incoherence is evident in all Australian jurisdictions.

So serially, all across Australia, all of the early intermittent acts of decriminalisation at the state level have been subsequently modified, limited, or reversed. To be replaced by a further range of *ad hoc*

[49] The first formal proposal for legalisation in NSW that the author is aware of was advanced by the NSW Democrats in 1981. In this year, the Health Minister in the Wran administration (1976-86) sought to change seats and so was running in a byelection for the western suburbs seat of St Marys. Accordingly, the Sydney NORML chapter and the NSW Democrats jointly ran a 'Decriminalise Cannabis' candidate against the sitting Health Minister, plastering the whole electorate with hundreds of posters featuring a big cannabis leaf and the phrase 'Vote #1 Democrats: to Decriminalise Cannabis'. The author was the campaign manager.

legislative amendments. Which have themselves generally been replaced by yet another generation of *ad hoc* amendments. The result of this scattershot legislative history is the current partially decriminalised legislative and regulatory environment which is legally incoherent and (in public interest policy terms) immoral.

The current circumstance is explicable. The reticence of the political class to even mention the subject of legal recreational cannabis is understandable in the light of the hostility of the commercial media to this idea. However, that does not thereby indicate that inaction is either desirable or acceptable. Neither does it absolve our political class from acting in accord with the public - not their own personal political - interests. Misguided and misinformed discussions about cannabis may be commonplace in the commercial media, but the personal and social harms that might attend the use of cannabis are not a matter of opinion or public debate. Neither are the basic principles of public policy development and social governance in a democratic state.

It is evident that the current criminal regime is not just chaotic and ineffective, it is also grossly unjust. The use, cultivation, possession and trade in cannabis is strictly illegal in all state jurisdictions, with severe criminal penalties attaching to a huge range of interrelated cannabis offences. Yet despite this punitive criminal regime, cannabis use remains commonplace. A third of the Australian population consume cannabis occasionally, while one in four use it on a weekly basis.[50]

Yet our legislatures remain frozen in time. They collectively act as if the 21st century has simply not arrived. Their discussions relating to cannabis continue to echo the unhinged media debate of last century. Legislatures continue to talk about personal harms that do not exist, or which cannot be addressed via legislative or regulatory action, social harms that are largely imaginary, and moral harms that are palpably outside of the scope of the legislative remit. Thus, the debate about cannabis is being undertaken in a la-la land that is detached from the lived reality of most of the population of the country. There are alternative approaches available.

The Moral Dimension of Civil Rights Activism

In most instances when a politician refers to cannabis law reform, they are talking about another instance of limited tinkering with the existing criminal and regulatory regime by either ministerial directive or by way of legislative amendment. Which, in effect, is a signal that they want 'more of the same'. This is because most of the propositions of limited decriminalisation of the recreational use of cannabis that have passed during the last half a century – and generally have then been rapidly revoked – relate to strictly limited propositions for the decriminalising of a degree of possession. These schemes have usually provided for a stipulated weight of cannabis that will not attract criminal penalties and/or indicate a permissible number of plants that might be grown on private premises for 'personal use', or further amend the existing policing and penalty regime.[51]

In most instances, these amendments to the existing legislative framework have generally been motivated by a laudable desire to address appreciable injustice. But as they have been limited to altering existing provisions and practices and individually seem to advertise disparate conceptions relating to matters such as best legislative practice, relative harms, and potential social and personal detriment, the cumulative effect of these efforts has been to fracture – not reform – the administration of justice. Consequently, it is suggested that there is an urgent and pressing need for legislatures to formulate and implement an oversight regime that is both rationally formulated and *morally and ethically coherent*.

The moral dimension of legislative assessment is not concerned with religious or philosophical matters

[50] Staff, 'How often do Australians use cannabis?' *NADK – National Alcohol & Drug Knowledgebase* (web page, 16/12/23) <https://nadk.flinders.edu.au/kb/cannabis/use-patterns/how-often-do-australians-use-cannabis>.

[51] As per regimes such as the 'police drug diversion strategies' in NSW, such as the Cannabis Cautioning Scheme and MERIT programs, the Adult Drug Court, and similar systems currently in place in most state jurisdictions.

but rather with the need to clearly enunciate the public interest principles that are informing a legislative effort. This means clearly stating the correct (ie, 'good') and incorrect (ie, 'bad') actions that are being regulated, as well as the underlying rationale that serves to justify the limitations and restrictions in question (ie, enunciate precisely how the provision will serve to mitigate the identified personal or social harm).

The ethical dimension of legislative assessment relates to considering the manner in which a proposed legislative action serves to impact upon the rights and liberties of a particular citizen. This is an objective assessment undertaken in accord with the stipulations and definitions contained within the nine 'core' international human rights instruments.[52]

Best practice in the formulation of legislation in Australia is also a pertinent consideration. By clearly assessing the actual extent and scope of powers entertained by the state and federal legislatures regarding cannabis law, it is possible to assess not only if a legislative proposition is legally coherent and 'within powers' but also regarding its correspondence with other legislative actions and oversight facilities at the state and federal level. Assessments regarding best practice domestically and internationally also assist in making determinations regarding the proportionality and appropriateness of a proposed legislative action[53] and also whether it has proved efficacious in comparable jurisdictions. In the following parts of this text all these considerations are extensively addressed. However, before moving on to contemplate legislative options for change, it is helpful to look back and consider where these offences come from and so why cannabis laws are so different to most other 'criminal' infractions.

No 'victim' - no 'crime'

We live in an age where the idea that the legislature can arbitrarily declare that a range of actions that they propose to be objectionable, are 'criminal', seems relatively unremarkable. Yet at the time of federation such a proposition was both new and controversial. Legislative intervention in the criminal jurisdiction, especially intervention that serves to invent entirely new crimes, was considered by a great many observers to be repugnant to the principles of the common law.

This is because, in common law terms, assault, murder, affray, larceny, and robbery are not 'crimes' just because they have been declared by a legislature to be illegal. It is because they share several acknowledged attributes. A perpetrator has undertaken an evil action (*actus reus*), in accord with a simultaneously enlivened evil intent (*mens rea*), that has occasioned an unwarranted or disproportionate legal outcome upon an identifiable victim. The arbitration of particular matters in accord with these general guiding principles is at the heart of the legal process in the criminal jurisdiction. Thus, these various elements of a criminal offence have been provided careful extemporisation and consideration by adjudicators, scholars and practicing lawyers from time immemorial.

Nevertheless, in addition to the crimes traditionally recognised by the courts, in the 19th century the English legislature decided to also outlaw a range of actions and outcomes that they had decided were *morally* repugnant. So, laws were passed seeking to regulate matters such as sexuality, sexual activity, religious activity, prostitution, and drug taking. This was controversial at the time and remains so. These 'morality' offences were envisioned as constituting a new class of 'statutory infractions', where

[52] 1.International Convention on the Elimination of All Forms of Racial Discrimination, 2. International Covenant on Civil and Political Rights, 3. International Covenant on Economic, Social and Cultural Rights, 4.Convention on the Elimination of All Forms of Discrimination against Women, 5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 6. Convention on the Rights of the Child, 7. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 8. International Convention for the Protection of All Persons from Enforced Disappearance, 9. Convention on the Rights of Persons with Disabilities.

[53] ie, are the impositions in question reasonably proportionate and appropriately adapted to the harms being regulated?

there was no longer any need to attend to common law precepts.[54] There was no longer a need for an individual to be assessed as displaying an evil intent. Nor was there a need for the crown to identify a victim. However, because these were not crimes but rather statutory offences, it was also decreed that there would be a limit on the sorts and degrees of penalty that could be imposed relative to these sorts of offences.

More than a century later the introduction of this class of regulatory offence has led to an unfortunate incoherence in our contemporary legal system. Over the course of time these morality offences have been slowly subsumed into the criminal law (which has now almost always been statutorily codified). This has caused the once bright line distinction between statutory offences, and those that are genuinely criminal, to become blurred. This has had appreciable detrimental impacts.

This class of criminal infraction is sometimes referred to as 'victimless crime'. This term is avoided in this text as it is misleading. In common law terms there is no such a thing as a 'crime' without a victim. Moreover, the mere existence of this class of offence within the criminal statutes continues to inflict harm on individual citizens as well as the judicial system itself.

It provides for a code of criminal law in which genuinely repugnant crimes are codified alongside a range of what were originally considered to be regulatory offences, which serves to bring the jurisdiction of the criminal court into disrepute. Also, when adjudicating upon these offences, many foundational principles of our common law have been simply displaced by the will of the legislature, which serves to corrupt the administration of the criminal law jurisdiction by promulgating evidently unjust outcomes.

The impact on the criminal law jurisdiction

The legal principles that were considered in the prior section are not just theoretical concerns. The incoherence that has been occasioned by the inclusion of (what are now commonly described as) 'strict' and 'absolute' liability offences within our criminal codes continues to inflict damage on the administration of the law in a number of ways.

At the moment there are a range of criminal offences that sometimes carry very heavy criminal penalties, yet which are nevertheless fashioned in a manner where the legislature has stipulated that a judicial officer cannot apply the normal compass of discretion that is commonly applied when considering criminal matters. Rather, when considering 'absolute' or 'strict' liability offences (and so most cannabis offences) judicial assessments relating to matters such as the intent, culpable knowledge, or negligence (wilful or otherwise) that might attach to an action are precluded from consideration. In simple terms, the judiciary are told to ignore common practice and instead restrict their assessments to just those matters that they have been instructed to consider.

Of course, this encroachment on the prerogatives of the bench was resisted and, as a consequence, one of the guiding principles of criminal jurisprudence regarding statutory offences that was adopted by the judiciary for a great many decades was that they would not proffer or entertain public policy views regarding these matters. Accordingly, when sentencing someone for breaching a regulatory offence it was thus commonplace for a sentencing officer to read out the current public policy of the *legislature* regarding the infraction. Yet this was in relation to statutory offences that then commonly carried only minor penalties.

However, when attempting to justify their pronouncements regarding public opprobrium in relation to cannabis offences, the modern judiciary have no recourse to either common law principles or a body of coherent public policy pronouncements. Even though many of these offences carry severe criminal penalties. Consequently, many statements regarding public policy that are included in authorised texts such as 'Sentencing Bench Book' of NSW, are not just legally questionable but are now entirely

[54] These are now commonly referred to as offences of absolute or strict liability.

unsupported by reference to traditional legal principles, or scientific evidence, or contemporary public policy.

For example, where the Sentencing Bench Book provides guidance relating to the current public interest rationale in NSW regarding 'the cultivation, manufacture, supply, possession and use' of cannabis, it notes that:

> The *Drug Misuse and Trafficking Act* 1985 prohibits the cultivation, manufacture, supply, possession and use of certain drugs. The Court of Criminal Appeal has said many times that the need for general deterrence is high in cases involving dealing in and supplying prohibited drugs: *R v Ha* [2004] NSWCCA 386 at [20]. The court has also said "[t]he social consequences of the criminal trade in prohibited drugs are very substantial indeed, including corruption, the undermining of legitimate businesses and a serious level of violence …": *R v Colin* [2000] NSWCCA 236 at [15], quoted with approval in *R v Sciberras* (2006) 165 A Crim R 532 at [48].[55]

Thus, the public policy proposition that is enunciated by this passage might be restated as proposing that because 'the social consequences of the criminal trade in prohibited drugs are very substantial indeed, including corruption, the undermining of legitimate businesses and a serious level of violence' the legislature has prohibited 'the cultivation, manufacture, supply, possession and use of certain drugs' including cannabis. So, the criminal penalties for illegal trading are high because the socially deleterious consequences of a criminal trade in drugs are significant. This is a self-referential proposition that is largely nonsensical as far as cannabis is concerned, as none of these negative outcomes are associated with the legal trade in cannabis that is evident in comparable jurisdictions.

Moreover, throughout the Sentencing Bench Book the use of cannabis is repeatedly misdescribed as being harmful or dangerous. For example, regarding precisely this matter it proposes that

> Any assumption in former years that marijuana was a "recreational drug", with lower addictive qualities and fewer potential health dangers has been called into serious question: *R v Nguyen* [2006] NSWCCA 389. McClellan CJ at CL said at [54]:
>
> > It is now recognised that marijuana can have very serious consequences for users with destructive potential for the lives of young persons. The legislature has recognised this damaging potential by providing a maximum penalty of twenty years for the present offence [under s 25(2)(a)].[56]

Accordingly, the public interest principles that are enunciated in this sentencing guide, regarding the sale of more than 50 grams of cannabis, indicates that because such an action 'can have very serious consequences for users with destructive potential for the lives of young persons', it is conceived of as being so heinous that it is deserving of a penalty of *up to twenty years imprisonment*.

This all begs the question: do these observations actually reflect the will of the current NSW legislature?

Public policy? What public policy?

As they are contained within a text crafted to assist judges and magistrates who are considering an appropriate sentence, those who are consulting the Sentencing Bench Book of NSW have every right to assume that in accord with traditional legal principles, statements regarding the opprobrium that should attach to any given strict or absolute liability offence will closely reflect the current stated policy position of the NSW government. Yet it is evident that this is not the case.

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[55] As per 'Sentencing Bench Book - Particular offences - *Drug Misuse and Trafficking Act 1985* (NSW) offences - [19-800] Introduction' Judicial Commission of NSW (web page, 18/11/23) <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/drug_misuse_and_trafficking_act.html>.

[56] Drugs Misuse and Trafficking Act 1985 (NSW) s 25(2)(a) provides that: Supplying or knowingly taking part in the supply of not less than a commercial quantity [ie, not less than 50g] is an offence under s 25(2) which carries a penalty of 15 years imprisonment and/or 3,500 penalty units where the offence relates to cannabis plant/leaf.

As the Chief Justice is quoted in only a short extract in the Bench Book, the judgement itself was also consulted so as to consider the comments in context. In *R v Nguyen,* Justice McClellan provides the following observations in passing:

> Although in former years some people accepted marijuana as a "recreational drug" and believed that it did not have the addictive qualities and potential to damage the health of users which can occur with "hard drugs", this assumption has more recently [this judgement is dated 2006] been called into serious question. It is now recognised that marijuana can have very serious consequences for users with destructive potential for the lives of young persons. [57]

Yet even though these comments are quoted in a guide for magistrates and judges to use when sentencing citizens to sometimes lengthy stretches in prison, these assertions are entirely unsupported. Precisely who might have accepted 'marijuana as a recreational drug' is not specified. The 'addictive qualities' and 'potential damage to the health of users' are matters left unaddressed. The 'hard drugs' in question are not named. Moreover, just who has recognised that 'marijuana can have very serious consequences for users with destructive potential for the lives of young persons' is not specified. Additionally, and perhaps of more consequence, none of these comments refer to either commentary or authorised materials that might illuminate the contemporary will of the legislature regarding the enactments in question.

If these observations were being advanced by a man in the street this would be of no consequence. But this commentary is presented as words of guidance to magistrates and judges. It purports to provide a statement of public policy regarding the trafficking of cannabis by citizens in amounts greater than 50 grams. Yet these comments are not only ill-defined but also misleading, intemperate, and when cited in the context of a dissertation relating to a statutorily defined offence, are both ethically and legally misguided. That these passages are included in a text that is designed to instruct judicial officers regarding the principles of the law and current public policy relating to these particular offences can only be described as unfortunate. It serves to illustrate in concrete terms the legally discordant and morally incoherent public policy landscape relating to cannabis that currently prevails.

Ill-informed propositions regarding either fact or policy should not be included within any official text and most especially not in one of such consequence. Yet in this instance it is difficult to see how such ambiguities and nonsensical public policy statements can be avoided when the criminal jurisdiction is asked to adjudicate regarding contentious matters without regard to either the principles of the common law or a coherent body of public policy declarations to advise them.

Of more consequence than the discomfort of the judicial officers involved is the impact that this has on the reputation of the criminal law jurisdiction. The citizenry in western world jurisdictions may not be familiar with the precepts of the common law but they do recognise bullshit when they hear it. Therefore, when a judicial officer justifies a sentencing decision by recourse to propositions such as those that are currently advertised in the NSW Sentencing Bench Book, and so describes cannabis as a dangerous drug that is indistinguishable from other illegal substances and which ruins the lives of young users, this serves to bring discredit on the bench.

Alcohol is a dangerous drug. Aspirin can be dangerous. Cannabis is relatively harmless. Moreover, the citizenry is well aware that this is the case. The lived experience of Australians is that cannabis is a relatively harmless but sometimes legally dangerous drug. This accords with the lived experience of the entire population of the western world. So, when comments such as these are reported then it simply serves to bring discredit on the judicial system and rightful mockery regarding these palpably incorrect propositions.

[57] *R v Nguyen* [2006] NSWCCA 389 [54].

The civil rights impact

The existing regime of legislative oversight pertaining to cannabis is ethically incoherent. There are major inconsistencies in the underlying public interest principles that inform the various acts of the state and federal governments. This is consequential as it serves to inflict ongoing civil rights abuse upon the citizenry.

The *International Convention on Civil and Political Rights* advises that all Australian citizens enjoy a right to liberty and security of person, and so will not be subjected to arbitrary arrest or detention, or otherwise be deprived of their liberty, except by judicial action in accord with the law. Yet this does not currently apply in Australia as the current cannabis oversight regime across the country is occasioning the arrest and ongoing detention of citizens in an arbitrary fashion.

At the moment a citizen of NSW can possess and consume cannabis in accord with TGA legislative oversight or in a manner deemed illegal. In the first circumstance the citizen is probably following doctors' orders and is being accorded the appropriate deference that is rightfully due any patient. In the second circumstance a citizen is considered to be engaging in a morally reprehensible criminal act. They are thus liable to be charged with an offence such as self-administration[58] or possession (under an instrument such as the *Drug Misuse and Trafficking Act 1985*) and so (in NSW) be liable for a fine of up to $5500 as well as up to two-years imprisonment. A similar moral and ethical incoherence is in evidence in all Australian jurisdictions.[59]

Every day of the week chemists across Australia distribute cannabis in 'trafficable' quantities. Often to people who are also simultaneously servicing their personal requirements from black market sources. So currently, an individual in receipt of cannabis from another citizen may be deemed to have engaged in illegal actions that are so morally repugnant that they and their friend may be deserving of a period in gaol. Yet the very same individual who receives exactly the same weight and grade of cannabis, for exactly the same stated purposes, from a chemist, is deemed to be undertaking an entirely ethical and morally neutral activity. Moreover, a chemist may legally 'traffic' in quantities of cannabis that would make any individual citizen liable for a great many years in gaol. This is both a morally and legally intolerable situation.

We currently have an ethically incoherent and morally discordant legislative environment, where various aspects of the very same legislative oversight regime relating to cannabis have been formulated in accord with sometimes radically conflicting propositions of what might constitute an acceptable and an unacceptable public action or personal motivational intent. This is occasioning the abuse of the civil rights of the citizenry by providing for the arbitrary arrest and detention of only a select few of the one in five Australians who consume cannabis regularly.

In closing: Groundhog Day in Australia

The leaders of the major political parties, at state and federal level, are hemmed in by history and a press environment that is unfavourable to the rational discussion of cannabis law reform. Consequently, much of the consideration of this topic in the Australian press occurs in a manner that is deliberatively ignorant regarding the everyday experience of legalisation being enjoyed by hundreds of millions of people across the world. It is a discursive environment where most of the commentators

[58] In NSW as per section 12 of the *Drug Misuse and Trafficking Act* which indicates that: A person who administers or attempts to administer a prohibited drug to himself or herself is guilty of an offence. In Vic as per section 70(1) of the *Drugs, Poisons and Controlled Substances Act* 1981. Etc.

[59] At the moment two citizens in different administrative jurisdictions, who possess and consume identical types and weights of cannabis, for exactly the same stated personal motivations can either be charged with possession and self-administration and so face gaol time in all the states of Australia, but not necessarily in the ACT. This is also an arbitrary distinction occasioning civil rights abuses, but this time in accord with geographical happenstance rather than administrative arbitrariness.

and journalists all agree that cannabis is 'dangerous'.

Yet while the commercial media outlets constantly tell the public that cannabis is dangerous, they rarely clarify these claims or examine them dispassionately. They do not cite how cannabis is dangerous. They do not interview people who have been harmed. They only cherry-pick peer reviewed articles. They do not refer to overseas experience. Rather, it is a press environment where our politicians are commonly required to repeat the inane mantra that cannabis is 'a dangerous substance', before then agreeing with the generally ill-informed assertions of a journalist regarding the need to maintain strict criminal sanctions for its use. There is thus little or no nuance in the discussions about cannabis in Australia and the commercial press are currently doing their best to ensure that this remains the case. It is a discursive environment that is very deliberately working hard to keep their audience entirely ignorant regarding the actual lived experience of most of the western world.

There are no long lines at soup kitchens of terribly addicted cannabis addicts. The whole idea is fantastical. As are almost all of the discussions in our commercial media regarding cannabis. Especially as these are commonly information environments where a thousand ads a day cheerfully assert that your life can and will be improved by the consumption of alcohol, caffeine, vitamin supplements, high sugar drinks, and fast food. All these habits kill people. Yet nobody dies from cannabis abuse. It is not 'dangerous'. It does not occasion any great degree of social detriment. Whereas just today the abuse of alcohol *will* cause at least fifteen deaths and four hundred and thirty hospitalisations across Australia. Same as yesterday. Same as tomorrow.[60]

Yet still our legislators continue to oversee a criminal law regime that needlessly inflicts unwarranted harm upon the citizenry and the criminal law jurisdiction on the basis that cannabis is dangerous. It is therefore appreciable that our political representatives are either utterly deluded or must apprehend the manifest hypocrisy and falsity of the arguments relating to cannabis that are current in almost all of our parliaments, yet still *choose* to allow the current unjust regime to continue.

Part Four: Learning from Past Mistakes

The inquires undertaken so far have served a number of interrelated purposes. They have assisted in clarifying the exact form of the current legislative and regulatory oversight regime pertaining to cannabis and have helped identify deficiencies in the current system. Yet none of these inquiries assist in providing guidance regarding the criteria that should be brought to bear.

We are one of the most liberal and wealthy democracies in the world, yet we have one of the most draconian and punitive cannabis oversight regimes. Nobody is happy and everyone agrees that the current system is not working; yet the subject of the decriminalisation of the use of cannabis for recreational purposes is still not even on the political agenda of any of the state jurisdictions.

In this discussion paper it is suggested that this is largely because the cannabis law reform debate in the parliaments of Australia is still being conducted in accord with a range of arcane 'drug war' propositions that are palpably false. But it is not enough to simply identify the deficiencies in the current system, there is a need to propose an alternative range of more appropriately formulated public interest observations.

Introduction

It is suggested that there is a need for legislators who are considering cannabis law reform to first build a framework of principles and criteria that should inform any meaningful legislative action in this area,

[60] In 2010 (the last year there is reliable collated information regarding these matters) there were at least 5,554 deaths and 157,132 hospitalisations attributable to alcohol abuse. We can assume that the statistics for death and disease have not changed much in the years since. See Australian Drug Policy: 'hypocrisy' is not a strong enough word.

and only then develop a legislative and regulatory response that is

- morally and ethically sound,
- aligned with contemporary public interest sensibilities,
- legally coherent, and
- accords with best legislative practice.

Each of these factors are addressed in the following passages.

Existing Malformed Public Interest Propositions[61]

The existing oversight regime pertaining to cannabis in Australia is incoherent because it is the product of political happenstance rather than due regulatory oversight. Therefore, there is a need to revisit the faulty public policy propositions that are currently informing most legislative efforts in Australia.

Many of the public interest propositions relating to cannabis which have been informing the actions of lawmakers over the course of the last fifty years are malformed. Some of the arcane and faulty propositions that continue to inform the deliberations of lawmakers include

- There are relatively significant personal harms associated with cannabis use.
- There are significant and novel social harms associated with cannabis use.
- The current mixed civil and criminal penalty regime is serving to mitigate personal and social harm.
- The personal health implications associated with cannabis are amenable to modification by government regulation.
- The medicinal and recreational use of cannabis exhibit different potential harm profiles.
- Most Australians want recreational cannabis to remain illegal.

All these misconceptions are addressed either immediately below or elsewhere in this text.

A relative harms assessment of the personal and social harms that might attend the use of cannabis indicates that there are appreciable medical harms associated with the use of cannabis. Acute toxicity *may* be an issue with pre-teen children, those with pre-existing psychotic disorders should not use cannabis as it may exacerbate their condition and long-term chronic use has been linked to 'bronchitis, emphysema … bronchial asthma' and the 'suppression of the immune system'.[62]

However, these physical harms are not nearly as serious as those associated with many other legal substances. Lethality is not an issue and the effects of acute toxicity provide for no dire or lasting physical injuries. Thus, when a relative harms assessment is undertaken, the personal harms and potential negative personal outcomes attending even the chronic long-term abuse of cannabis are *relatively* negligible.

Yet perhaps of more consequence for the development of appropriate public interest principles, the personal harms that do attend the use of cannabis cannot be ameliorated by direct government action. The current oversight regime has not served to impact upon these harms and neither have earlier far more restrictive legislative regimes. The negative personal health outcomes attending the chronic long-term use of cannabis are unfortunate and can very occasionally be personally devastating, but these are matters that are rightfully of concern to physicians and patients, not legislators and magistrates.

A relative harms assessment also indicates that there are no appreciable 'social harms' associated with the use of cannabis that are unique to cannabis as an intoxicant. Consequently, all the identifiable social

[61] A 'public interest proposition' is an observation or an assessment that has direct implications for assessments relating to a particular area of public interest concern.

[62] See 'Appendix 1: A Relative Harms Assessment' 92.

harms that might potentially be associated with cannabis use have already been addressed and mitigated. The potential risks associated with driving have already been abated by legislative and regulatory action. Therapeutic and medicinal substances are already appropriately controlled and access to drugs by children, either legal or illegal, is already heavily regulated and criminalised.

Additionally, the proposition that there are social harms associated with cannabis being an illegal substance and thus being a revenue source for criminals and organised crime is largely spurious when advanced as an argument against law reform. This is because these harms are an artefact of the current legal status of cannabis and do not relate to cannabis *per se*. Moreover, these appreciable social harms are not aggravated but rather alleviated by any action that serves to liberalise and rationalise access to cannabis for recreational purposes.[63]

The suggestion of moral harm is also occasionally raised. The proposition is usually that the use of cannabis serves to corrode an individual's ethical or moral health or has the effect of corroding 'public' morals. These matters are not addressed at all in this text as they are beyond the scope of inquiry and are immaterial to the development of rationally and appropriately formulated public interest principles relating to cannabis.

Ten Adequately Formulated Public Interest Observations

It was earlier observed that the moral dimension of legislating in the public interest has nothing to do with religious or philosophical concerns, but rather with the need to clearly enunciate and justify (rationally and morally) the public interest principles that inform a legislative proposition. This is because unless the public interest observations that are informing a legislative effort exhibit a clear-eyed assessment of the nature of the conduct that the legislator wishes to regulate, and the potential social and personal harms that are associated with the conduct in question, as well as the faults inherent in the current approach, then the resultant legislative package will be inadequate.

Prior inquiries indicate that the development of an appropriate and morally cohesive oversight regime regarding cannabis requires that legislation be formulated that acknowledges that:

1. Cannabis use is relatively harmless.
2. There are some personal harms associated with cannabis use.
3. The current mixed civil and criminal penalty regime is failing to mitigate personal harm.
4. The personal health implications associated with cannabis are not amenable to modification by government regulation.
5. The current regime is morally incoherent.
6. The current regime is harming the justice system.
7. The current regime is harming the citizenry.
8. Medicinal and recreational use is equivalently (relatively) harmless.
9. There are no social harms associated with cannabis use that are not currently addressed.
10. Most Australians want cannabis use to be rationally and appropriately regulated within a morally coherent criminal law system that provides for equitable and just outcomes.

Each of these observations is briefly explored below as they all have varying yet significant implications for the crafting of an oversight regime that is rational, appropriate, and equitable. During the course of the following discussion, it will soon become clear how considerations relating to these more adequately formulated public interest observations, when they are all added together, serves to generate a clear framework of criteria that should underpin the generation of any legislative proposal that purports to be rationally fashioned and in the public interest.

[63] Nevertheless, these factors are consequential when it comes to the design of a legislative oversight package that is morally coherent, so the undesirability of a simultaneously legal and illegal marketplace in cannabis is a subject that is considered in detail later in this text.

1. Cannabis use is relatively harmless.

Cannabis is not harmless, but it is the least harmful of the social intoxicants that are in common use in Australia. Accordingly, it can accurately be described as being relatively harmless.

Consequently, to the degree that the use of cannabis supplants the use of any other commonly used social intoxicant, as it is invariably less harmful, this can only serve to mitigate (not exacerbate) harm. This is a well-studied yet rarely highlighted positive outcome that is commonly associated with cannabis law reform that is known as the 'substitution effect'.[64]

This assessment is significant for guiding considerations relating to the appropriate degree of regulatory oversight.

2. There are some personal harms associated with cannabis use.

Consideration of the literature indicates that[65]

- children should not use cannabis, and
- the long-term chronic use of cannabis can be harmful, and
- breastfeeding mothers should not use cannabis. and
- those with a preexisting psychotic disorder should not use cannabis.

This is significant for crafting public interest guidelines relating to the regulation of a cannabis marketplace.

3. The current mixed civil and criminal penalty regime is failing to mitigate personal harm.

It is evident that the current regulatory and criminal oversight regime does not serve to address or mitigate the various health implications associated with cannabis use for recreational purposes. This is not a critique of the current criminal oversight regime as these matters are currently addressed by other government agencies and services in a more appropriate fashion. Moreover, as these are matters pertaining to health and wellbeing, not cannabis, it is suggested that these matters are simply not amenable to regulatory supervision. This is because both history and commonsense indicates that no restrictive or punitive regulatory regime can serve to provide meaningful assistance for those who are suffering actual or potential personal medical harm from the use of any recreational intoxicant, including cannabis. Rather, unwarranted restrictions and punitive regimes simply exacerbate these personal harms by making it far more difficult for those effected to obtain care and for those agencies who are currently tasked with alleviating these social harms.

This assessment suggests that a regulatory regime relating to a social intoxicant is not a suitable regulatory vehicle for addressing public interest health concerns.

4. The personal health implications associated with cannabis are not amenable to modification by government regulation.

The current regulatory regime serves to dissuade rather than encourage those who are most likely to suffer personal medical harm from the use of cannabis from engaging with government authorities of any form. Neither does it encourage the fearless, frank, and open discussion regarding these health implications. Thus, it is observable that not only are the personal harms associated

[64] For a recent example see, Katherine M. Wilds & Jordan R. Riddell (2024) Cannabis Policy and Consumption: Taking into account Substitution Effects, Substance Use & Misuse, 59:1, 97-109, DOI: 10.1080/10826084.2023.2262012

[65] For further details see 'Appendix 1: A Relative Harms Assessment' 92.

with cannabis use unamenable to modification by government regulation, the current regime is actually serving to further exacerbate these problems.

This assessment suggests that the commonly repeated proposition that cannabis laws and regulations are fashioned to protect the public from the harms associated with the use of cannabis is spurious. The current regime does not to protect the citizenry from harm, nor is the regulatory regime at all adapted or capable of addressing the personal harms that are actually in evidence.

5. The current regime is morally incoherent.

The law in all states currently criminalises the possession and use of cannabis depending on the administrative circumstances of its use and possession. Receiving cannabis from a friend is proposed as being morally reprehensible and worthy of public censure but receiving the same from a chemist is considered blameless. This is morally incoherent.

This observation indicates that there is a need to be clear in legislation regarding the actions that are conceived to be against the public interest and why these actions need to be controlled and regulated in the manner proposed. Moreover, it is also suggested that the legislature should keep in mind the common law principles regarding the nature of a crime when they are considering the appropriate form of a regulatory environment pertaining to cannabis. These common law principles serve to distil and codify the manner in which our society has since time immemorial assessed the moral culpability that might attach to a particular social action. They are principles that are derived from a thousand years of applied judicial discretion and precedent. Thus, they serve to codify the sensibilities of an entire society regarding what should be a crime and what makes it socially repugnant. So, when the legislature moves away from these time-honoured traditions of assessment, the resultant legislative enactment will be invariably appreciated as being ‘unjust’ by a sizeable proportion of the population.

Consequently (and happily), this means that a legislative action that is informed by these principles will be regarded by the majority of the population as being morally and ethically coherent, even though the particularities of the legislative action may be politically controversial. This means that good legislative practice promotes laws that are popularly supported as they are appreciated by the population at large to be rationally, legally, and morally coherent.

6. The current regime is harming the justice system.

The current criminal regime in every state jurisdiction contains many offences that do not conform with the common law propositions regarding what constitutes a crime. These absolute and strict liability offences provide for instances where the traditions of jurisprudence and the common law have been displaced by the will of the legislature. This provides for a situation where the common law is brought into disrepute by facilitating the criminalisation of actions where there is no evil intent in evidence, or a victim, or the need to demonstrate that any harm has been inflicted. This serves to not only corrupt the function of judicial discretion but also lessen confidence in the legal process.

This assessment indicates that it is advisable to remove all cannabis offences relating to using, cultivating, possessing, and trading in cannabis (for personal purposes) from the compass of the criminal jurisdiction as these offences do not conform with common law precepts relating to criminal activity. Such an action will assist in restoring the moral coherence of the criminal jurisdiction by removing what are currently considered (in both legal and colloquial terms) inappropriately formulated offences from the criminal jurisdiction.

7. The current regime is harming the citizenry.

If the rationale informing the legislative efforts pertaining to cannabis is to reduce harm to the citizenry, then these efforts have been palpably counterproductive. The current mixed criminal and civil regime is serving to criminalise the private actions of citizens that do not impact upon any other person, thus imposing unwarranted impositions upon the human rights of the citizenry. These impositions are unjust because they are *arbitrary*. The current oversight regime imposes upon select citizens, in particular administrative situations, criminal penalties that are not levied upon others who are undertaking exactly the same actions. These criminal penalties serve to destroy livelihoods and inflict physical and financial burdens upon cannabis users that are entirely unwarranted in public interest terms. This is a moral incoherence that serves to diminish the confidence of the citizenry in the criminal and civil justice system, and which inflicts symbolic violence upon the system itself.

These observations indicate that if the ambition of the current oversight regime is to reduce the harms that might be associated with cannabis use in society, then it has failed entirely. The actual perverse effect has been to inflict unwarranted harms upon a minority of the population in a morally arbitrary fashion. Additionally, due to the nature of the particular impositions currently in place, it is evident that the inequities associated with the system serve to disproportionately effect those who are already the most marginalised, being the least educated, most financially and socially disadvantaged, and those who currently have minimal or no access to existing health and wellbeing services.

8. Medicinal and recreational use is equivalently (relatively) harmless.

The current mixed civil and criminal oversight regime is legally, morally, and medically incoherent. The inferred rationale that informs the criminal regime of the various states pertaining to cannabis is that cannabis is a dangerous drug and therefore there is a need to protect the public and the society from the potential harms associated with its use. However, the inferred (and often explicit) rationale underpinning the oversight of cannabis in accord with the TGA framework, is that cannabis is a valuable therapeutic substance that Australians need to be able to access to support their personal health care requirements. Thus, the substance being regulated by each of these very different oversight regimes is identical, yet the public interest assessments and rationale underpinning these various oversight regimes are not just in conflict but seem to be mirror images, with one justifying intervention on the basis that cannabis is a dangerous drug that causes social and personal harm and another asserting that cannabis is a valuable therapeutic agent that is a necessary adjunct to many peoples personal healthcare.

This observation indicates that any legislative reform of the criminal or the medicinal oversight regime needs to incorporate an assessment relating to the actual *relative* harms that are associated with the use of cannabis and whether or not those harms are amenable to mitigation via regulatory intervention. The failure to clearly enunciate the public policy ambitions and rationale that is serving to inform these various enactments (inclusive of a relative harms assessment) has led to a situation where the various legislative enactments relating to this subject matter area have been produced in accord with often utterly dissimilar public policy criteria. This has produced an oversight regime that is legally and morally incoherent. In contrast to this current situation, it is suggested that any proposed cannabis law reform enactment needs to clearly state and link the social harms that are being regulated and the rationale informing the impositions contained within an enactment (ie, there is a need to clearly spell out how a proposed imposition will serve to mitigate an identified harm).

9. There are no social harms associated with cannabis use that are not currently addressed.

There are identifiable social harms that are associated with the use of cannabis as an intoxicant. Driving while intoxicated is socially deleterious. The use of intoxicants by children is socially deleterious. However, these social harms are currently mitigated by recourse to existing regulatory oversight systems that are particularly tailored to address these concerns. There are no *novel* social harms associated with the use of cannabis as an intoxicant that need to be addressed. Moreover, these matters are in no need of further regulatory attention.

This assessment indicates that in any proposed cannabis law enactment there is a need to clearly delineate the social harms that have been identified as being associated with the use of cannabis and are being addressed within the enactment and those that are currently being mitigated via other existing regulatory instruments and agencies. Such a clarification is deemed as being advisable as it will assist in guarding against unnecessary duplication of regulatory effort (and the administrative, equity and process dysfunction that attends such a situation). It will also serve to clarify these matters for the public and the media in a manner that will serve to suppress the generation of misinformation.

10. Most Australians want cannabis use to be rationally and appropriately regulated, within a morally coherent criminal law system that provides for equitable and just outcomes.

From the standpoint of good governance, whether or not a particular legislative proposal is popular or unpopular is largely immaterial. Yet popularity is obviously of consequence for politicians, therefore there is a need to consider this matter.

The recent election to state legislatures of a range of 'legalise cannabis' movement candidates serves to indicate that this subject is of growing concern to the Australian population. This is because the current oversight regime is palpably incoherent and unjust and is serving to inflict needless and unwarranted harm upon both the Australian judicial system and the citizenry. The average Aussie is not an expert in the criminal law or regarding social policy development, but they do have a keen nose for inequity and discrimination.

There is also a growing disenchantment with the politicisation of debate regarding factual information. Thus, when a legislative implement is crafted in accord with public policy propositions that are broadly appreciated as being partisan or spurious, this only serves to further diminish the public trust in the institutions of governance. Continued *ad hoc* legislative amendments to the current system will not address this growing diminishment of trust, it will only serve to further exacerbate the inequities in the current system.

In closing: in Support of Cooperative Federalism

The Australian legislative and regulatory environment pertaining to cannabis is already partially decriminalised (under the federal TGA framework), yet this oversight regime is predicated on a referral of powers by state jurisdictions relating to matters that are not otherwise regulated at the state level. Therefore, state legislatures can act to decriminalise or legalise cannabis in such a fashion as they deem appropriate to their jurisdiction, inclusive of the use of cannabis for therapeutic and medicinal purposes. Yet this does not mean that the best option for regulatory oversight of the cannabis marketplace in Australia is for all of the various state jurisdictions to act independently.[66]

[66] It simply serves to indicate that absent the active cooperation of the federal government, any state jurisdiction is still able to act to rationalise the laws within their jurisdiction in any manner that they deem to be contextually appropriate, including regarding matters relating to the therapeutic and medicinal use of cannabis.

The most appropriate form of legislative oversight regarding cannabis in Australia and those oversight regimes that are pragmatically available for implementation by legislatures at a given time are likely different things. Moreover, the nature of what might be an appropriate legislative action in each jurisdiction is a contextually variable proposition. This is why there are a wide range of potential government actions considered in the next part of this discussion paper, rather than just a simple prescription for a 'best legislative regime'.

However, this does not mean that the principles of good governance and best legislative practice in the Australian context are not consequential to the deliberations of legislators in this area. It is simply to acknowledge that because the current oversight regime is so palpably broken it is likely that many jurisdictions will need to implement staged and incremental legislative actions. Therefore, there will likely be a lot of less than best legislative arrangements between now and when we collective reach a situation where the cannabis marketplace in Australia is an entirely uncontroversial proposition. So, what is common practice?

We live in a constitutional federation where the various state and federal authorities commonly seek to provide for a uniform legislative and regulatory environment. This has resulted in a wide range of subject matter areas being the focus of joint state and federal legislative action so as to provide for a uniform regulatory environment across the commonwealth. A good example of this cooperative regulatory tradition are the Uniform Civil Procedure Rules for our judiciary. The TGA framework is another.

A further pertinent example of cooperative federalism relates to matters pertaining to the provision of health care. While these were not matters referred by the states upon federation, the current regulatory regime is effectively run by all levels of government (federal, state and local) and extends to matters as dissimilar as the funding of public hospital services, preventive services, registering and accrediting health professionals, funding for palliative care services, national mental health reform and the response to national health emergencies. Even though many of these areas of concern have been the subject of partisan political bickering over the years, these existing instances of coordinated federal and state government action demonstrate not only that there is a ready roadmap available for legislators pertaining to cannabis, but also that agreement regarding contentious matters is common in the Australian legislative environment.

All of which informs the formulation of two additional public interest propositions that need to be added to our list, being:

11. State governments have the authority to deal with the issue of cannabis within their jurisdiction in any manner they deem as being appropriate.
12. The principles of cooperative federalism and common past practice serves to indicate that joint state and federal action is both commonplace and preferable.

Part Five: Learning from Overseas Experience.

An appropriately formulated series of public interest observations is of little assistance unless a legislative effort is also informed by a clear understanding of the form of the current domestic regulatory environment (ie, exactly what is regulated and in what manner) as well as how these same matters have been addressed in other comparable jurisdictions. It is only then, having considered the wide variety of response that is on display, is it possible to map out a graduated series of potential regulatory environments that might lie between where we are now and any given conception regarding a best eventual legislative and regulatory destination.

Introduction: from an Australian perspective…

From an Australian perspective, the regulatory oversight regimes in places like California, Portugal, or Thailand look exactly like they are supporting the unfettered consumption of cannabis. Yet there have been no apparent negative public health implications. Neither does the liberalisation of these cannabis oversight regimes appear to have caused any social dislocation or disorder.

For those who live in a domestic legal environment where almost all aspects of the cannabis marketplace remain criminalised, these are consequential observations. This is because one of the defining features of the social and political dialogue in our country for the last half a century has been an unremitting focus on the potential hazards that might accompany any liberalisation of our cannabis laws. Yet the lived experience of many comparable jurisdictions serves to concretely demonstrate that these fears are misguided. A substantial percentage of the western world now live in a place where they have generally unrestricted access to cannabis and these jurisdictions have not reported any significant deleterious effects.

But Australian governments continue to ignore these developments. This is largely because the commercial press in Australia is actively hostile to the proposition of cannabis law reform. As a result, we live in a country where our commercial media has ultimate control of the political agenda pertaining to cannabis. Thus, for half a century every tiny step that has been taken towards more rational and appropriate cannabis laws has been beaten back by an unrelenting scare campaign being waged in the commercial media. So, the topic is never adequately addressed, Australians continue to needlessly suffer, and the regulatory gulf between us and most of our trading partners continues to ever widen.

As a result, the cannabis oversight regime in this country is now so legally and morally incoherent it is probably impossible to repair it at any level of government with any single enactment. Hence, it is suggested that our lawmakers (collectively and individually) need to look around the world at comparable jurisdictions and consider the variety of regulatory oversight regimes that are currently (and have formerly) been employed in comparable jurisdictions. This will assist in formulating a joint response that incorporates an orderly staged transition from the current highly regulated and criminalised environment to one that more adequately matches with the expectations and anticipations of the Australian populace (rather than the fantasy-land propositions that are current in the commercial media).

The myriad of oversight regimes pertaining to the cultivation of cannabis that have already been developed and implemented in comparable jurisdictions now provides for a lengthy list of regulatory options for lawmakers to choose from. It also provides an opportunity to identify and avoid commonplace regulatory misadventures that are foreseeable and avoidable.

In accord with these aspirations, in the following passages the many diverse types and graduations of regulatory provision pertaining to cannabis that are commonplace across the world are described in both specific and general terms. Commentary is also provided regarding more than half a century of overseas experience. In this manner, the discussion paper seeks to exemplify the recommendation that any legislative effort in this subject matter area must look to the experience of comparable jurisdictions for guidance.

The Comparative Tables

Many of the cannabis oversight regimes and options for government action that are assessed in the remainder of the paper are accompanied with a table that illustrates the nature of the oversight impositions that are being considered in both particular and relative terms (as per the examples that below). These tables reference many of the diverse options regarding restrictions on the use, possession, growing, compounding and trade in cannabis that are commonly implicated in legislative oversight regimes across the world. Accordingly, each table serves to roughly indicate how a given jurisdiction or a proposition for an oversight regime relates to other potential oversight provisions that

have been or are currently commonplace in other jurisdictions.

Not all of the legislative responses that are considered in the tables or text are either rationally formulated or are seemingly sufficient to the current circumstances where they apply. Neither is it proposed that any jurisdiction will ever get all things exactly correct as this is not in the nature of either people or regulatory oversight. Even the system that is current in California, which is later recommended as an exemplar, displays aspects that are overly restrictive and irrationally formulated.

Table 1. The regulatory regime in NSW

		unregulated		
		civil regulatory regime		
		criminal offence (fine/gaol)		
✓= regulatory or criminal oversight regime →	X = civil or criminal penalties apply	X	X	
Use				
✓	**Prescription authorised**	X	X	
✓	Use cannabis medicinally (nonprescription)	X		
✓	Use cannabis (unrestricted)	X		
Possession				
✓	**Prescription authorised**	X	X	
✓	Possesses cannabis (restricted by weight)	X		
✓	Possess cannabis (unrestricted)	X		
Cultivation				
✓	**Grow medicinal cannabis under licence**	X	X	
✓	Grow medicinal cannabis commercially (highly regulated)	X		
✓	Grow medicinal cannabis commercially (regulated)	X		
✓	Grow recreational cannabis commercially (regulated)	X		
✓	Grow medicinal cannabis at home (restricted by number)	X		
✓	Grow cannabis at home (restricted quantity)	X		
✓	Grow cannabis at home (unrestricted quantity)	X		
Production of therapeutic & medicinal compounds				
✓	**Compound therapeutic products commercially (under licence)**	X	X	
✓	Compound therapeutic products at home (personal use)	X		
✓	Compound therapeutic products at home (small scale commercial)	X		
✓	Compound therapeutic products commercially (highly regulated)	X		
✓	Compound therapeutic products commercially (lightly regulated)	X		
Trade				
✓	**Prescription restricted trade in medicinal cannabis and compounds**	X	X	
✓	Non-commercial (interpersonal) trade (restricted)	X		
✓	Non-commercial (interpersonal) trade (unrestricted)	X		
✓	Licensed exclusive retail trade in medicinal cannabis and compounds	X		
✓	General commercial trade in medicinal cannabis and compounds (highly regulated)	X		
✓	General commercial trade in cannabis (highly regulated)	X		
✓	Commercial trade in cannabis (unrestricted)	X		

Key:
A green shading indicates a lack of regulation or law.
A blue shading indicates a civil regulatory regime (decriminalised or legal).
A red shading indicates a criminal regime.
✓ A tick indicates that there is a regulatory regime that relates to the option.
X A cross indicates there are civil fines (blue) or a criminal penalty regime (red) associated with the option.
Where there is a regulatory regime without penalty provision there is no cross. Where there are both criminal and civil penalties this is indicated by two crosses.

Notes: the ethical incoherence of the current oversight regime in NSW is illustrated by the duplicate regulatory provisions applying to similar actions. That it is disproportionately punitive is illustrated by the large areas that are shaded red. Consequently, in the current legislative environment, equivalent actions pertaining to use, possession, cultivation, compounding of therapeutic agents, and trade, attract disparate penalties depending on the administrative circumstances of the action (ie, whether or not it is deemed to be in accord with the provisions of the TGA framework). Thus, the many existing enactments regulating matters pertaining to cannabis provide for a massively disproportionate regulatory response that serves to occasion instances of civil rights abuse due to its being simultaneously arbitrary as well as overly punitive.

Table 2. The regulatory regime in Thailand

unregulated				
civil regulatory regime				
criminal offence (fine/gaol)				
✓= regulatory or criminal oversight regime →	X = civil or criminal penalties apply	X	X	
Use				
	Prescription authorised			
	Use cannabis medicinally (nonprescription)			
	Use cannabis (unrestricted)			
Possession				
	Prescription authorised			
	Possesses cannabis (restricted by weight)			
	Possess cannabis (unrestricted)			
Cultivation				
	Grow medicinal cannabis under licence			
	Grow medicinal cannabis commercially (highly regulated)			
✓	**Grow medicinal cannabis commercially (regulated)**		X	
✓	**Grow recreational cannabis commercially (regulated)**		X	
	Grow medicinal cannabis at home (restricted by number)			
	Grow cannabis at home (restricted quantity)			
✓	**Grow cannabis at home (unrestricted quantity)**			
Production of therapeutic & medicinal compounds				
	Compound therapeutic products commercially (under licence)			
	Compound therapeutic products at home (personal use)			
	Compound therapeutic products at home (small scale commercial)			
	Compound therapeutic products commercially (highly regulated)			
✓	**Compound therapeutic products commercially (lightly regulated)**		X	
Trade				
	Prescription restricted trade in medicinal cannabis and compounds			
	Non-commercial (interpersonal) trade (restricted)			
	Non-commercial (interpersonal) trade (unrestricted)			
	Licensed exclusive retail trade in medicinal cannabis and compounds			
	General commercial trade in medicinal cannabis and compounds (highly regulated)			
	General commercial trade in cannabis (highly regulated)			
✓	**Commercial trade in cannabis (unrestricted)**		X	

Key:
A green shading indicates a lack of regulation or law.
A blue shading indicates a civil regulatory regime (decriminalised or legal).
A red shading indicates a criminal regime.
✓ A tick indicates that there is a regulatory regime that relates to the option.
X A cross indicates there are civil fines (blue) or a criminal penalty regime (red) associated with the option.
Where there is a regulatory regime without penalty provision there is no cross.
Where there are both criminal and civil penalties this is indicated by two crosses.

Notes: when the Thai government abruptly legalised cannabis in the kingdom in June of 2022, all criminal penalties associated with cannabis were entirely removed and only a very meagre regulatory oversight system was instituted. In effect, the only rules governing the commercial distribution of cannabis are that it not be sold to minors, or those breastfeeding, or to pregnant mothers. This minimalist oversight regime is included for comparative purposes only. Nevertheless, a research trip to Thailand by the author early in 2023, in a search for harms associated with an almost total abandonment of the regulatory and criminal oversight system, was unable to locate any instance of personal or social harm associated with the change.

Commonplace Regulatory Provisions

Well before there was any evidence of the widespread use of cannabis as a recreational intoxicant in Australia, the use, possession, cultivation, and trade in cannabis had already been criminalised for an exceptionally long time. So, while it is often erroneously proposed that Richard Nixon launched the 'war on drugs' in June of 1971, he was actually just striding down a well-travelled populist path that was already more than fifty years old.

'Cigares de Joy' had been available in shops in Australia up until the 1920s, but in 1925 the *Geneva Convention on Opium and Other Drugs* was signed by Australia and the next year the importation of many 'drugs' was criminalised, including cannabis. So, rather than Australia and other countries following the lead of the US in regulating drugs, when the record is examined dispassionately it becomes evident that the generic form of most modern drug laws is actually an invention of the English legislature. When these parliamentarians were dealing with the proposition of 'morality offences' in the latter half of the eighteen-hundreds, they had to grapple with the problem that these sorts of offences did not conform with the common law as they sought to outlaw *conduct* and not *outcome*. So, instead of just adding another illegal outcome to be assessed in accord with common law principles (such as theft, robbery, assault, manslaughter, murder, etc.) these matters had to be addressed as a new class of regulatory activity called 'misdemeanours' or 'regulatory' offences. In these sorts of offences simple conduct would be labelled as being anti-social and so warrant *a small fine*. It was in this legislative environment that actions were first outlawed relating to consorting, homosexual acts, lewd behaviour, buggery, display for the purposes of prostitution, public drunkenness, gambling (etc.); as well as the use, cultivation, possession, manufacture, transport and trade in what were now deemed to be 'illegal drugs'.

Consequently, commonplace charges all across the world relating to the use, possession, cultivation, manufacture, and trade in cannabis are remarkably similar in form as they are all based on much the same propositions that were pioneered in Europe in the late eighteen-hundreds and then promulgated to the Commonwealth via the Geneva accords. All of which occurred long before Nixon and the modern American extemporisation upon this common theme.

These comments preface this review as it is suggested that readers should always keep in mind the novel and uniquely fashioned nature of our laws and regulations pertaining to cannabis. In the following passages these matters are frequently highlighted in service of illustrating the oddly disproportionate nature of the massive overburden of complex regulatory provisions pertaining to cannabis that seems to commonly exist in all western jurisdictions. It also serves to illustrate that many of these unwarranted and commonly ill-informed legislative actions are quite evidently formulated in accord with grossly malformed assumptions rather than informed advice.

Self-administration of cannabis

The 'self-administration of cannabis' is a charge that is similar at first glance to 'public drunkenness', however this similarity is superficial. Where public drunkenness offences are often used to take into custody individuals who are causing a public disturbance or are a danger to themselves or others, there are few places where the charge of 'using' or 'self-administering' cannabis has ever been commonplace as a sole charge. Rather, such a charge almost always results from admissions made by an accused and is usually just one of a number of interrelated cannabis (and/or other) charges.

Prescription authorised use

The initial regulatory system that is introduced in all jurisdictions invariably stipulates (as in the Australian context) that no penalties will attach to the use of prescription obtained cannabis if this occurs within the current residence of the authorised user. These sorts of regulatory dispensations are a necessary aspect of all initial regulatory oversight regimes simply because the self-

administration of cannabis commonly remains a criminal offense. So it is that in Australia, while the legal use of cannabis is sanctioned by the TGA framework in limited circumstances, outside of this federal system substantial fines and imprisonment continue to apply to citizens who 'self-administer' cannabis in a non-authorised fashion.[67]

Use cannabis medicinally (nonprescription)

In most states in the US, legislatures have supplemented a prescription system with a closely regulated wholesale and retail trade in medicinal cannabis. This is known as 'the dispensary model' of cannabis provision. Almost all of the thirty-eight states where medicinal cannabis is currently allowed employ a variation on the dispensary model of supply. Therefore, among the first regulatory acts in these jurisdictions is invariably one pertaining to the self-administration of cannabis, which provides in statute or regulation provisions stipulating that the consumption of medicinal cannabis in the home *and* in a range of particularly licenced retail establishments will not attract criminal charges. This provides for a regulatory regime that describes the authorised self-administration of cannabis in accord with geographical *and* personal motivation criteria (ie, in a restricted range of places for particular purposes).

Use cannabis (unrestricted)

More than two-thirds of the US population now live in jurisdictions that have largely scrapped the once legally consequential administrative distinction between using medicinal and recreational cannabis, as much for practical as legal and human rights reasons. This is because such a distinction is almost functionally meaningless (in the eyes of the law) when there are few criminal or civil sanctions associated with the use of cannabis that are novel to cannabis as a recreational intoxicant or as a therapeutic agency.

Consequently, in these jurisdictions the self-administration of cannabis is a matter that is largely unregulated. Of course, you may still be fined for breaching other local laws regarding using an intoxicant on a beach, or in a car, or in a public place, however in a great many comparable jurisdictions around the world there are no longer any general laws prohibiting the self-administration of cannabis.

Additionally, it is important to differentiate the harms that might attach to the use of cannabis from those relating to all other social intoxicants or therapeutic agents. While it was earlier observed that there are personally consequential harms that can attend the long-term chronic use of cannabis, there are no acute harms relating to hospitalisation, inflicted physical injury, or death. Therefore, while there are laws pertaining to the use of alcohol in public (ie, 'public drunkenness' etc) in most Commonwealth jurisdictions (excepting New Zealand), the arguments pertaining to these laws are not at all similar to those relating to arguments about removing prohibitions on the self-administration of cannabis.

Possession of cannabis

The proposition of attaching criminal penalties to the act of 'being in possession' of cannabis is an odd byproduct of it being a statutorily defined offence. In common law terms, a crime is assessed in accord with an estimation of the nature and degree of harm inflicted on a person or persons. Yet that is not appropriate or even available when regulating moral behaviour. This is because everyone involved in these 'offences' are commonly colluding in occasioning these acts and there are no apparent victims as nobody is being appreciably harmed.

[67] As per s12 of the *Drug Misuse and Trafficking Act 1985* (NSW) that provides that it is an offence to administer or attempt to administer a prohibited drug to yourself. The maximum penalty is a $2200 fine and/or two years imprisonment.

So, statutory offences commonly rely on simply defining *acts*, not *negative outcomes,* as being evil. They stipulate particular actions such as self-administration and the possession of a particular weight of cannabis as being illegal. Additionally, as with most other drug laws, possession offences commonly infer that the more you have, the more you are deserving of punishment. For example, s10 of the *Drug Misuse and Trafficking Act 1985* (NSW), provides that **possessing** up to 30 grams of (anything other than legally obtained) cannabis is a crime that can attract a fine of up to $5500 or two-years imprisonment when dealt with in a local court. Weights up to 300 grams can attract an additional penalty for **supplying** cannabis with a maximum penalty of a $5500 fine or two-years imprisonment. While amounts up to a kilo may be deemed to be **a trafficable quantity**, attracting a maximum penalty of an $11,000 fine and/or two years imprisonment. Larger amounts are commonly dealt with at the District Court level and attract significantly enhanced penalties. In a District Court, between one and twenty-five kilos can be deemed **an indictable quantity**, with a maximum penalty of a $220,000 fine and/or 10 years imprisonment. Between twenty-five and one hundred kilos can be deemed **a commercial quantity**, attracting a maximum $385,000 fine and/or 20 years imprisonment. More than a hundred kilos can be deemed **a large commercial quantity,** for which the maximum penalty is a $550,000 fine and/or life imprisonment.

In a similar fashion, weight horizons relating to the possession of cannabis are a common feature in all criminal and decriminalised regimes.[68] However, as will be considered later, the utility of these sorts of stipulations and restrictions fade as the regulatory environment becomes more liberal. Then in a mature regulatory environment, they eventually become obsolete.

Prescription authorised possession

The only legal instances of possession of cannabis in most Australian jurisdictions are those authorised in accord with the TGA framework. This aligns with the initial liberalisation measures undertaken in many comparable jurisdictions across the world where prescription access to cannabis was also accompanied with guidelines regarding the lawful possession of medicinal cannabis.

The lawful possession of cannabis in a prescription system normally authorises only the possession of the cannabis obtained via legal means within a range of strictly delimited locations (ie, a therapeutic setting, at home, etc). The source is usually from a chemist (as is currently the case in Australia) or sometimes (additionally or alternatively) from a specialist medicinal cannabis dispensary (as formerly and currently in parts of the US and Canada).

Possess cannabis (restricted by weight)

Many early decriminalisation regimes introduced in Australia featured a horizon weight of cannabis under which a person might be allowed to continue in possession unmolested (as in SA) or have their cannabis confiscated but without further action (as in Vic and NSW). When consideration is broadened to include comparable US and Canadian jurisdictions, it is evident that a similar arbitrary weight threshold for possession continues to feature in many oversight systems where there is a criminal or mixed civil and criminal penalty regime.

The introduction of an arbitrary weight horizon that serves to provide for distinctions between non-criminal and criminal activity, and graduations in the culpability that will attach to criminal actions, when it is being informed only by administrative necessity, *will* occasion breaches of the civil and political rights of the citizenry (re arbitrary detention and punishment). Yet these forms of provision are nevertheless a legal fact that must be acknowledged and managed by a legislature. Moreover, many instances of legislative intervention that seek to introduce variations on the penalties that

[68] See ‘Table 3: Cannabis in the USA – medicinal ’(page 45) and ‘Table 4: Cannabis in the USA – fully legal access’ (page 46), for an illustration of how central these propositions are to cannabis regulations in the US.

attach to various weights of cannabis are often undertaken in accord with an ambition to ameliorate instances of unjust treatment. Consequently, although these forms of stipulation (ie, re weight) are now largely a thing of the past in mature regulatory environments such as in California, they are nevertheless consequential to any interim legislative actions in Australia. As a result, the proposition of some stipulated 'possession' thresholds in the light of any regulatory environment short of limited or full legalisation is pragmatically understandable and likely necessary.

Additionally, because the current system is so arbitrary and unjust in so many places around the world, even minor reform efforts allowing for small amounts of cannabis to be possessed without attracting a criminal sanction have been consequential in both policing and human rights terms. These sorts of allowances can provide genuine relief to citizens and needed discretion for harassed and overstretched police services.

This observation thereby implicates one of the guiding propositions informing this discussion paper. It is repeatedly proposed in this text that in all regulatory oversight actions, the factors that are most closely associated with a positive public interest outcome are not necessarily regulatory details but rather the legislative intent and the public interest principles that are informing the regulatory effort. The contrast between the two examples considered immediately below serves to illustrate this observation in a concrete fashion.

One of the most extreme examples of a tortured regulatory environment pertaining to cannabis is that currently on show in Florida. Perversely, the current odd and incredibly punitive and restrictive regulatory environment in the state was brought about by 'the *Florida Medical Marijuana Legalization Initiative*' (also known as Amendment 2), which was approved by 71% of voters in November of 2016. A matching vote regarding the full legalisation of recreational cannabis was stifled by the Florida Supreme Court before it could be put to the people. A subsequent attempt has also been more recently quashed by the Supreme Court. Polling indicates that both measures would have passed.

Yet while the population at large in the state are quite fond of the idea of legal cannabis, the proposition is anathema to the legislature and legal establishment. Accordingly, when they were forced by Amendment 2 to allow for medicinal cannabis, the response by the legislature was deliberately complex and overly harsh and punitive. Under the new regime the idea of 'possession' has been refined to refer to both the possession of legal medicinal cannabis products and illegal cannabis. But while this might sound like a step forward, the stipulation relating to what constitutes 'legal medicinal cannabis' was restricted to exclude 'raw cannabis' or any other cannabis product that might be 'smoked'. The justification for this limitation that was advanced was that 'smoking is not good for your health'. So, while in Florida the possession of a therapeutic agent that contains cannabis can be legal (under some circumstances), the possession of any amount of raw cannabis up to three quarters of an ounce (ie, twenty grams) remains a misdemeanour offence which can be punishable by up to a US$1000 fine and a year in gaol. (Above this threshold similar penalties apply to those in NSW.) Consequently, in Florida the proposition of a legal weight threshold pertaining to cannabis possession is largely illusory as it has been designed in a way that only serves to further prolong the current criminal regime.

Nevertheless, reforms to possession laws have had a generally positive impact in other jurisdictions even where the amounts of cannabis that are deemed to be exempt are quite small. This applies currently in Hawaii where, in accord with a bill signed in January of 2020, the possession of three grams or less of cannabis is now punishable by a US$130 (civil) fine. While this is undoubtedly a very low weight threshold, it nevertheless provides for a very different civil rights environment than when the possession of even smaller amounts was punishable by up to a month in gaol or a fine of US$1,000.

Possess cannabis (unrestricted)

In a regulatory environment where almost all acts of possession short of very large commercial quantities are equally legal, regulatory provisions relating to the possession of a particular weight of cannabis become largely meaningless. Consequently, in oversight regimes where cannabis use is fully legal or completely decriminalised, laws relating to the possession of a stipulated weight in cannabis are generally abandoned.

For instance, in the state of California (which has experimented with almost all of the regulatory oversight regimes listed in this section at one time or another), possession of cannabis is now largely unregulated in almost all environments. Moreover, the cultivation, use and possession of cannabis for personal reasons are now considered to be civil rights that should not be infringed upon. In accord with this laudable public interest principle, local governments of all persuasions and types are not permitted to prohibit adults from growing, possessing, using, or transporting cannabis when it is intended for personal use. This has become such a well-defined and entrenched legal principle that an appeals court in the state has ruled that inmates who possess small amounts of cannabis in prison are not guilty of a felony crime (see *People v Raybon* [Super Ct No 09F08248]).

Cultivation - personal

Many herbs and shrubs that are currently crowding urban landscapes are poisonous or have been demonstrated to cause personal harm. This includes parts of food plants like rhubarb and cherries, which can be toxic and have caused fatalities. However, even though the list of relatively commonplace plants and shrubs that are known to be dangerous and have caused death, and continue to cause death and injury, is extensive,[69] our society does not have an active police agency flying helicopters over our urban landscapes to spot and eliminate these actually dangerous plants. Why not? Because this is a ludicrous proposition. While some of these dangerous plants have caused harm and fatalities, such a response would be wildly disproportionate to the actual identified potential harm profile attaching to any of these plants.

Cannabis has killed nobody in the history of our federation. Moreover, there are no significant personal harms associated with using, growing, possessing, or trading in cannabis. It causes no poisoning harm or injury and there have been no fatalities due to acute toxicity. Therefore, the laws pertaining to cannabis are obviously not designed to protect the citizenry from identified personal harm. The argument that this is the case is reasonably commonplace, but then so are stories about UFOs. We do not collectively spend millions of dollars a year trying to eliminate UFOs or dangerous instances of domestic shrubbery; but we do spend millions of dollars a year unsuccessfully attempting to stop people from growing cannabis. Why?

The answer is that the cultivation and use of cannabis remains heavily criminalised because of political and historical happenstance. Our cannabis laws are an arcane leftover from yesteryear. They are among the few 'morality' offences that are still misguidedly included within our criminal statutes.

These strict and absolute liability offences are a vestigial remnant of missteps in the 19th century that served to craft a series of 'criminal' offences without recourse to either legal or liberal principles. Accordingly, in their manifold evolving iterations this class of statutory offences has served to not only inflict unwarranted harm upon segments of the citizenry, it has inflicted lasting and consequential harm

[69] Including Daffodil, Oleander, Dieffenbachia (Dumb Cane), Elephant Ear, Rosary Pea, Castor Bean, Larkspur, Monkshood, Autumn Crocus, Star of Bethlehem, Lily-of-the-Valley, Iris, Foxglove, Bleeding Heart, Rhubarb, Daphne, Wisteria, Golden Chain, Rhododendrons, Azaleas, Jasmine, Lantana Camara (Red Sage), Yew, Wild and cultivated cherries, Oaks, Elderberry, Black Locust, Jack-in-the-Pulpit, Moonseed, Mayapple, Mistletoe, Water Hemlock, Buttercups, Nightshade, Poison Hemlock, Jimson Weed (Thorn Apple), etcetera…

on the criminal law jurisdiction.

The continued existence of this class of 'criminal' infractions provides for a legal incoherence within our criminal statutes that is intolerable. A 'crime' without an evil intent, undue harm, or a victim, is not a 'crime' in terms of the common law. It was not in the 19th century, and this remains the case right up to this day.

Grow medicinal cannabis at home (restricted by number)

The different varieties of regulatory provisions relating to the growing of cannabis at home in the US vary substantially so it is difficult to make generalisations. At the close of 2023, fourteen US states still had an entirely criminalised regime[70] while thirteen with legalised medicinal cannabis (not recreational) still did not allow the growing of cannabis at home for any purpose.[71]

Twelve US states allow for the cultivation of cannabis at home for only medicinal (not recreational) purposes, generally in accord with a strict and detailed regulatory code.[72] In some of these states the authorisation to cultivate on a private property extends to cannabis being grown for caregivers or authorised cannabis 'patients'.

All the US states that allow for the cultivation of cannabis at home include restrictions on the number of plants allowed to be grown and/or how much dried plant material a person is allowed to legally possess. Some also include stipulations relating to the maturity of the plants allowed and whether or not enhanced modes of cultivation are permitted. Yet as noted, generalisations are difficult simply because there are huge variations across these jurisdictions.

Table 3: Cannabis in the USA – medicinal use only

state	year	legislation/ballot measure	possess &/or cultivate
Alabama	2021	Senate Bill 46	up to 70 daily dosages 1 oz (28g) usable
Arkansas	2016	Ballot Measure Issue 6 (53.2%)	2.5 oz (70g) usable per 14-day period
Florida	2016	Ballot Amendment 2 (71.3%)	35-day supply
Hawaii	2000	Senate Bill 862 (32-18 H; 13-12 S)	4 oz (113g) usable; ten plants
Kentucky	2023	Senate Bill 47 (26-11 S; 66-33 H)	30-day supply
Louisiana	2016	Senate Bill 271 (62-32 H; 22-14 S)	1-month supply
Mississippi	2022	Senate Bill 2095	purchase up to 3.5g of cannabis per day, for a total of about 3 oz (85g) per month
New Hampshire	2013	House Bill 573 (284-66 H; 18-6 S)	2 oz (56g) of usable cannabis during a 10-day period
North Dakota	2016	Ballot Measure 5 (63.7%)	3 oz (85g) per 14-day period
Oklahoma	2018	Ballot Question 788 (56.8%)	3 oz (85g) usable; twelve plants (6 mature, six immature)
Pennsylvania	2016	Senate Bill 3 (149-46 H; 42-7 S)	30-day supply
South Dakota	2020	Initiated Measure 26	3 oz (85g) usable; three plants
Utah	2018	House Bill 3001 (60-13 H; 22-4 S)	113 grams of unprocessed cannabis
West Virginia	2017	Senate Bill 386 (74-24 H; 28-6 S)	30-day supply

[70] Alabama, Georgia, Idaho, Wyoming, Kansas, Kentucky, Indiana, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Texas and Wisconsin.

[71] Arkansas, Connecticut, Delaware, Florida, Iowa, Louisiana, New Jersey, North Dakota, Pennsylvania, Ohio, Utah and West Virginia.

[72] Arizona, Hawaii, Illinois, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Dakota and Utah.

Grow cannabis at home (restricted quantity)

Eleven US states allow for the growing of cannabis for either recreational or medicinal purposes,[73] while in twenty-six states and territories legal recreational cannabis is a reality. In all these states the cultivation of cannabis at home, for whatever purpose, is allowed.[74] Most of these states also allow enhanced methods of indoor cultivation.

Table 4: Cannabis in the USA – fully legal access

state	year	legislation/ballot measure	possess &/or cultivate
Alaska	1998	Ballot Measure 8 (58%)	Six plants (three mature, three immature)
Arizona	2010	Proposition 203 (50.13%)	2.5 oz (70g) usable per 14-day period
California	1996	Proposition 215 (56%)	8 oz usable six mature or twelve immature plants
Colorado	2000	Ballot Amendment 20 (54%)	2 oz (56g) usable three mature and three immature plants
Connecticut	2012	House Bill 5389 (96-51 H, 21-13 S)	2.5 oz (70g) usable
Delaware	2011	Senate Bill 17 (27-14 H, 17-4 S)	6 oz (170) usable
Illinois	2013	House Bill 1 (61-57 H; 35-21 S)	2.5 oz (70g) usable over 14 days
Maine	1999	Senate Bill 611	2.5 oz (70g) usable six plants
Maryland	2014	House Bill 881 (125-11 H; 44-2 S)	30-days determined by physician
Massachusetts	2012	Ballot Question 3 (63%)	10 oz (283g) 60-day supply for personal medical use
Michigan	2008	Proposal 1 (63%)	2.5 oz (70g) oz usable twelve plants
Minnesota	2014	Senate Bill 2470 (46-16 S; 89-40 H)	possess 30-day supply of non-smokable marijuana
Missouri	2018	Ballot Amendment 2 (66%)	4 oz (113g) dried marijuana per 30-day period six plants
Montana	2004	Initiative 148 (62%)	1 oz (28g) usable four mature plant and twelve seedlings
Nevada	2000	Ballot Question 9 (65%)	2.5 oz (70g) usable twelve plants
New Jersey	2010	Senate Bill 119 (48-14 H; 25-13 S)	3 oz (85g) usable
New Mexico	2007	Senate Bill 523 (36-31 H; 32-3 S)	6 oz (170g) usable four mature & twelve immature plants
New York	2014	2014 Assembly Bill 6357 (117-13 A; 49-10 S), 2021 Senate Bill S845A	possess 60-day supply non-smokable marijuana
Ohio	2016	House Bill 523 (71-26 H; 18-15 S)	possess 90-day supply
Oregon	1998	Ballot Measure 67 (55%)	24 oz (680g) usable twenty-four mature plants eighteen immature
Rhode Island	2006	Senate Bill 0710 (52-10 H; 33-1 S)	2.5 oz (70g) usable twelve plants
Vermont	2004	Senate Bill 76 (22-7) HB 645 (82-59)	2 oz (57g) usable nine mature plant, two immature
Virginia	2020	2021 Senate Bill 1015, 2021 House Bill 2218 & Senate Bill 1333	90-day supply of total cannabis products (extracts and botanicals)
Washington	1998	Initiative 692 (59%)	8 oz (226 g) usable six plants

[73] Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Virginia and Washington State.

[74] Colorado, Washington, Alaska, Oregon, Washington, D.C., California, Maine, Massachusetts, Nevada, Michigan, Vermont, Guam, Illinois, Arizona, Montana, New Jersey, New York, Virginia, New Mexico, Connecticut, Rhode Island, Maryland, Missouri, Delaware, Minnesota and Ohio.

Grow cannabis at home (unrestricted quantity)

All the US and European jurisdictions that allow for the cultivation of cannabis at home provide restrictions on the number of plants that can be grown. However, this does not have to be the case. In Thailand these matters are largely unregulated. In Spain the regulations mainly pertain to the plants not being perceptible from the street. Moreover, it seems odd that even in those US states where legal principles relating to the right to an uninfringed enjoyment of private property are most fully given expression (such as in laws pertaining to the 'castle doctrine'), it is still considered perfectly acceptable for the state to dictate the form and number of plants that an individual is allowed to grow on their own property for their own use. Especially as it is difficult to ascertain how such an activity, if entirely shrouded from public view and on private premises, might be interpreted as being a matter that is within the purview of the state.

Cultivation - commercial

In all western jurisdictions the first steps towards a decriminalised marketplace for medicinal cannabis usually include a 'medicinal cannabis patient' to be authorised (via prescription or a 'patient card', etc) to receive cannabis to use therapeutically. In these mixed civil and criminal penalty regimes it is quite common for the government to also authorise a limited number of commercial growers to supply the system. This is the case in Australia, in the UK (and even in some jurisdictions in the US such as Hawaii).

However, in many ways the Australian and the UK experience has been appreciably dissimilar to that in the US. The fourteen US states that still currently outlaw cannabis use and cultivation in all circumstances[75] have regulatory regimes that are roughly comparable to those typical in Australia excepting for the provision of cannabis via prescription. In Australia, as in these US states, offenders who are found guilty of 'cultivating', 'supplying' or 'knowingly taking part in the cultivation or supply of a prohibited plant' can be subjected to severe criminal penalties. In NSW for example, the commercial cultivation of cannabis without a licence can result in a sentence of life in prison.[76]

Nevertheless, despite these gross similarities, it is also evident that the lack of a retail sector selling cannabis products serves to sharply differentiate the situation in Australia (and the UK) from that of both those US states where cannabis remains strictly illegal and those in which medicinal cannabis only is available. This is because a dispensary system of cannabis provision is associated with the rapid development of commercial environments and regulatory oversight regimes that are invariably far more developed and liberal than any in our country. Why might this be the case?

A retail sector selling medicinal cannabis directly to the public on the high street has the effect of demythologising the discussion of cannabis in the social discourse and the media. In contrast, in the prescription only environment of the UK and Australia, the subject of cannabis is still amenable to scare campaigns and the spreading of misinformation. Consequently, in comparable jurisdictions

[75] Alabama, Georgia, Idaho, Wyoming, Kansas, Kentucky, Indiana, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Texas and Wisconsin.

[76] In accord with s23 of the *Drug Misuse and Trafficking Act.* This penalty regime provides for a sliding scale of culpability depending on the quantity cultivated. Thus, cultivation charges in NSW (as elsewhere), are generally levied in an analogous fashion to possession charges, in that a person is charged in accord with the number of plants in cultivation (or the weight of green plant material in possession). Charges relating to quantities of less than two hundred and fifty cannabis plants are generally dealt with in a local court, with a maximum penalty for a single offence, where the prosecution does not argue that the plants were intended for trafficking, being a $2200 fine and/or two years. District or higher courts can apply greater penalties. Thus, where the prosecution does contend that the plants were intended for trafficking, then the growing of any number of plants up to a hundred can attract a large fine and up to fifteen years. More than a hundred plants (or twenty-five kilos) can attract a very large fine and up to twenty-five years, while more than a hundred plants or two-hundred-and-fifty kilos can attract a more than half-million-dollar fine and a tariff of life in prison. Where cultivation is undertaken by 'enhanced means', which usually refers to cultivation under lights, the penalties are substantially increased.

outside of the commonwealth, the initial liberalisation of cannabis laws and the licencing of a restricted number of growers *and retail outlets* to service an incipient marketplace very quickly gives way to a more generalised and less restrictive licencing regime as the medicinal cannabis marketplace and the social and media discourse both mature. Yet this does not seem to occur as rapidly (or even at all) in situations where there is no retail sector present.

Moreover, under a restrictive licencing regime and in a regulatory environment that lacks a retail sector, the cost of production is necessarily very high and so the cost to the 'patient' is also very high. Thus, even though the small domestic commercial sector servicing the prescription only market in cannabis in Australia was provided the facility to trade into the world market half a decade ago, it is simply not in a position to compete with our trading partners. Additionally, as it does not provide cannabis to users in Australia in a cheap and readily available fashion, the development of a legal marketplace has had no appreciable impact upon the illegal trade. Therefore, it is apparent that the prescription only provision system in Australia seems the worst of all the available options; commercially, for consumers of cannabis, as well as in civil rights and public interest terms.

Grow medicinal cannabis under licence

This option refers to a strictly policed regulatory environment for the cultivation of medicinal cannabis where only a limited number of cultivators are provided licences to grow cannabis in tightly regulated and highly secure circumstances. It is a system that is employed in Australia, the UK, and some states in the US.

In Australia, legally grown 'medicinal' cannabis can be cultivated *only* in accord with a license issued under s8E of the *Narcotic Drugs Act 1967* (Cth). The provisions attaching to these licenses are relatively strict and onerous. A holder of a license is allowed to obtain, produce, and cultivate cannabis plants or cannabis resin for medical purposes only. Any cannabis that is grown must be cultivated and stored in a location where strict security is provided. A 'fit and proper' persons test also applies. This has led to a small commercial sector of domestic cannabis cultivators who are predominantly producing cannabis under licence for sale via prescription only access or for sale overseas (in mainly niche markets).

Growing cannabis without a license remains illegal in all the states in Australia. The police regard it as a serious criminal offence. Especially the cultivation of cannabis for sale. It is therefore a crime that is very actively policed, with helicopters often being used to locate and eliminate illegal cannabis cultivation and with substantial police resources and multiple agencies dedicated to the task. It is also reasonable to presume (absent any guiding policies regarding these matters) that all of the state legislatures are currently hostile to the idea of liberalising the cannabis laws in Australia any further. This is because the unlicenced cultivation of cannabis continues to attract serious criminal penalties in all state jurisdictions.

One US state that currently has a licencing system and regulatory environment that is similar in many respects to that in most Australian states is Arkansas. The still highly criminalised oversight regime pertaining to cannabis in this state has recently been marginally liberalised due to a state ballot initiative (that passed with a vote of 53% in favour), forcing an extremely hesitant state government to provide limited access to medicinal cannabis. While personal cultivation remains strictly illegal, legislation has been passed that allows patients who have obtained a 'doctor's recommendation' to possess up to two and a half ounces (71 grams) of medical cannabis. The legislature also provided for the licensing of between four and eight commercial growers to supply up to forty dispensary sites. However, as a novel twist the legislature also decided that medical cannabis patients could obtain a doctor's recommendation to treat only twelve stipulated 'qualifying' medical conditions. Consequently, while this state has nominally adopted a dispensary system of retail supply, the cultivation and associated supply of cannabis remains just as tightly regulated as it is in Australia.

Grow medicinal cannabis commercially (highly regulated)

A 'dispensary model' of retail supply of medicinal cannabis refers to supply via retail premises that are particularly licenced and are allowed to sell only medicinal cannabis products to eligible 'patients'. It is important to stress that this model of delivery has been used to fashion both extremely restrictive and punitive oversight regimes as well as many that are more rationally formulated. Nevertheless, the first iteration of an oversight regime to service a newly established retail environment in medicinal cannabis seems to be almost always highly – and objectively disproportionately – regulated. Often these initial regulatory regimes continue to advertise hefty fines and criminal sanctions for any unlicensed activity or regulatory breaches.

In all US states where cannabis laws have been liberalised, this has incorporated a dispensary system of cannabis provision. Usually, it is a system that is at first tightly regulated, and where only a limited number of licenced cultivators service the newly established retail environment. For example, recent changes in Mississippi represent just such an initial move away from an oversight regime where all use, possession, and cultivation of cannabis was deemed illegal up until fairly recently except (somewhat perversely) for high grade 'processed cannabis plant extract, oil or resin' that was made available by prescription only. Liberalisation has been forced by 'ballot measure 65' and the response of the legislature has been tardy and timid. In accord with a bill signed into law by the state governor in February of 2022, a range of highly regulated cultivation facilities have been approved to supply a new dispensary model of cannabis supply. However, the regulatory provisions that must be adhered to in servicing this new retail marketplace are daunting.

Whereas as was earlier observed, in Hawaii the regulatory provisions are less harsh (yet still disproportionately restrictive and punitive in comparison to states like California). Recent changes to the oversight regime in Hawaii provide for eight licences to open dispensary services that are each accompanied by an allowance to run two cultivation facilities to supply product. This means that in a similar fashion to Mississippi (although in accord with quite different legislative ambitions) a substantial amount of the product provided to the legal medicinal cannabis marketplace is grown in the state by just a few highly regulated commercial growers.

Grow medicinal cannabis commercially (regulated)

This option equates to a mature retail and wholesale marketplace in medicinal cannabis, where a large variety of commercial cultivation businesses are regulated in accord with a relatively extensive yet not disproportionately onerous or punitive oversight regime. The US state of California is proposed as providing for a good 'current best-practice' exemplar (see 'Table 5. The regulatory regime in California', page 51).

Although California is not the only current example of a mature regulatory environment for cannabis (as some other US states such as Colorado and Washington also qualify for such a description), it nevertheless provides for a particularly good exemplar for a range of reasons. Not only does it have a regulatory history of cannabis law reform efforts that date back as far as 1972, legal medicinal cannabis has been available in the state (via a variety of dispensary models) for almost three decades. Way back in 1996 California was the first state to legalise medicinal cannabis.[77] But it took until 2016 (and the *Adult Use of Marijuana Act*) for the state to embrace a fully legalized marketplace for all uses of cannabis. Yet this was just an initial act made by a legislature that already had experience regarding a mature domestic marketplace in medicinal cannabis. Thus, of more consequence for those seeking guidance in these matters, is their subsequent legislative and regulatory actions.

[77] Via a ballot initiative called 'Proposition 215' which passed with 56% approval.

Throughout 2021 and into the next year, the lawmakers in the state diligently worked to rationalise the oversight regime in accord with current requirements and three decades of practical and legal experience. The resultant system is particularly laudable as it serves to strip away rather than extemporise upon and add to the regulatory burden of commercial enterprises and individuals. Consequently, where California once had an elaborate and overly detailed set of regulations extending variously to medicinal cannabis, recreational cannabis, and the intersection of these laws and the criminal code, in its latest mature iteration the regulatory environment has been radically slimmed down. The old *Bureau of Cannabis Control* (BCC) has been shuttered, all oversight responsibilities pertaining to cannabis have been stripped from the *Department of Food and Agriculture* and the *Department of Public Health,* and a whole new *Department of Cannabis Control* has been created to oversee the new slimmer and more rationally formulated regulatory environment (which commenced in 2021).

Table 5. The regulatory regime in California

				unregulated ↓
			criminal offence (fine/gaol) ↓	↓
✓= regulatory or criminal oversight regime	X = civil or criminal penalties apply →	X	X	
Use				
	Prescription authorised			
	Use cannabis medicinally (nonprescription)			
	Use cannabis (unrestricted)			
Possession				
	Prescription authorised			
	Possesses cannabis (restricted by weight)			
	Possess cannabis (unrestricted)			
Cultivation				
	Grow medicinal cannabis under licence			
	Grow medicinal cannabis commercially (highly regulated)			
✓	**Grow medicinal cannabis commercially (regulated)**		X	
✓	**Grow recreational cannabis commercially (regulated)**		X	
	Grow medicinal cannabis at home (restricted by number)			
✓	**Grow cannabis at home (restricted quantity)**		X	
	Grow cannabis at home (unrestricted quantity)			
Production of therapeutic & medicinal compounds				
	Compound therapeutic products commercially (under licence)			
✓	**Compound therapeutic products at home (personal use)**		X	
✓	**Compound therapeutic products at home (small scale commercial)**		X	
	Compound therapeutic products commercially (highly regulated)			
✓	**Compound therapeutic products commercially (lightly regulated)**		X	
Trade				
	Prescription restricted trade in medicinal cannabis and compounds			
	Non-commercial (interpersonal) trade (restricted)			
✓	**Non-commercial (interpersonal) trade (unrestricted)**			
	Licensed exclusive retail trade in medicinal cannabis and compounds			
	General commercial trade in medicinal cannabis and compounds (highly regulated)			
	General commercial trade in cannabis (highly regulated)			
✓	**Commercial trade in cannabis (unrestricted)**		X	

Notes: The current regulatory environment is entirely legalised and generally rational if somewhat complex and overly extensive. (However, these problems are likely as much to do with the American habit of overregulation as it has to do with the particular history of the cannabis marketplace.) Statewide (as of July 2019), 208 growers had obtained regular, annual licenses. At this point, some 18 months into legalization, 1,532 growers were still operating on provisional permits as they went through the CEQA process. The *California Environmental Quality Act* (CEQA) requires a detailed analysis of the environmental impact of grower's operations. Smaller farms were initially given five years to become established under legalization, in accord with interim and transitional regulations, before larger growers were to be allowed into the market. Thus, until 2023 growers could (technically) only have one medium licence. But as there was no limit set on the number of small licenses any individual grower could obtain, this loophole has allowed larger growers to operate much earlier than the legislature had obviously intended. In general, businesses are regulated in accord with a presumption that there will be a need to grow, test, and sell cannabis within each jurisdiction in the state. Cities and counties (in unincorporated areas) may license none or only some of these activities, so there are still some areas in California where there are few manufacturing or retail businesses. However, deliveries by state-licensed firms cannot be prohibited by local jurisdictions. Additionally, as there are many communities where no stores have been allowed, state legislators have introduced bills that can force local jurisdictions to allow some retail activity. One odd quirk of the Californian system is that a distributor enterprise must work as a middleman between a cannabis cultivator and the retail sector.

Grow recreational cannabis commercially (regulated)

In the US cannabis has been legalised in Alaska, Colorado, Oregon, Washington state, the District of Columbia (ie, D.C.), California, Maine, Massachusetts, Nevada, Michigan, Vermont, Guam, Illinois, Arizona, Montana, New Jersey, New York, Virginia, New Mexico, Connecticut, Rhode Island, Maryland, Missouri, Delaware, Minnesota, and Ohio. In all these jurisdictions the implementation of an oversight regime for the growing of recreational cannabis has occurred in a regulatory environment where cannabis for medicinal purposes had already been long decriminalised and where there was, thus, already a mature retail and wholesale sector. However, the nature of the legislative movement from a decriminalised to a legal trading environment seems to have varied tremendously. Moreover, the suitability and regulatory effectiveness of the various 'legal' oversight regimes in these states also varies. Thus, only the tendering of some relatively superficial generalisations is possible.

While the existing provisions relating to the cultivation of medicinal cannabis in a jurisdiction often enjoy many iterations, reflecting differing gradations in complexity and effectiveness; the same does not seem to always apply to regulatory regimes pertaining to the commercial cultivation of recreational cannabis (or the sector in general). Rather, where an existing, relatively mature medicinal cannabis production sector in a state is provided a facility to supply a broader marketplace, then this does not seem to occasion the same regulatory zeal or diligence that generally accompanies the initial introduction of such a sector or the regulating of a medicinal marketplace in general. This seems to be because many jurisdictions that embrace a fully legalised marketplace in cannabis see this as an opportunity to rationalise, not augment and expand, their existing regulatory oversight regime. Yet this is most certainly not always the case. As with all matters relating to the regulation of cannabis there is evident variation in the way that individual jurisdictions have embraced legalisation.

Accordingly, as has been frequently suggested previously, it appears that the most pertinent factors that seem to be of import to the development and implementation of legislative changes that serve to positively enhance human rights interests in any given jurisdiction, seem to hinge more on legislative intent and the guiding public policy observations that are informing a legislature, rather

than on the specifics of any given oversight regime. Moreover, this seems especially pertinent to instances where a legislature has decided to fully legalise access to cannabis in their jurisdiction. This is because in a majority of instances these actions are being informed by a long history of regulating a now mature medicinal cannabis sector and so a familiarity with cannabis and its actual harm profile. Therefore (as in California), the ultimate step towards full legalisation is sometimes appreciated as providing for an opportunity to engage in 'best practice' legislative activity. But nevertheless, as noted earlier, this is not always the case.

In a similar fashion as in California, in numerous US states where both medicinal and recreational cannabis have been made available, this has been as a result of a great many incremental, political, legislative, and regulatory steps, over many years. This sometimes provides for a huge overlay of regulatory oversight provisions and structures in the state that are largely obsolete, yet still persist. Yet unlike in California, in many jurisdictions the political environment nevertheless makes it difficult to address this problem satisfactorily. The state of Maine well illustrates this contrasting experience.

Since 2016, in a series of tiny incremental steps, the already reasonably accessible dispensary system across the state of Maine has been opened up for purchasers who seek to possess and use cannabis for recreation. Again, this movement has been powered by popular demand that has been resisted at every step by the courts and parts of the legislature. In 2017, following the passage of legislation that provided for the supply of medicinal and recreational cannabis, the governor vetoed the bill. This veto was overridden by the state legislature in 2018. Yet by this time, at the municipal level, several liberal leaning boroughs (such as Portland and South Portland) had already largely pre-empted the fact of statewide legalisation (which finally arrived in 2022, after it had once again been delayed 'for covid'). This has led to the effective legalisation of the use of both recreational and medicinal cannabis throughout the state and has served to largely eliminate the most egregious abuses of civil rights that were associated with earlier periods. However, the regulatory overburden associated with the incredibly messy regulatory environment in the state is costing it dearly both in direct expenditure and in terms of commercial opportunities forgone.

Yet even with these criticisms in mind, it is evident that while the residents of Maine might be suffering difficulties in sorting out their regulatory regime, it is nevertheless a faulty and complex oversight regime that is servicing both a medicinal and recreational marketplace in cannabis that is at least adequate to the requirements of the populace. Thus, despite these regulatory deficiencies, it is nevertheless a far more appropriately and rationally informed system than any currently in evidence in any Australian jurisdiction.

Production of therapeutic & medicinal compounds

The initial movement towards cannabis law liberalisation is usually prompted by a recognition that there are people in the community that need to be able to access cannabis as a medicinal preparation. While using cannabis for any other purpose remains illegal, the simple answer to this problem is to allow for the cultivation of medicinal cannabis at home. As three quarters of the cannabis used for medicinal purposes is raw cannabis, this instantly provides ready access for most medicinal cannabis patients to high quality product that is largely cost free. Moreover, most other commonplace medicinal cannabis products can be readily and cheaply compounded at home (or by small community co-operatives) as these products are fairly simple to produce and do not require sophisticated machinery and equipment or any great degree of technical sophistication.

Yet when legislatures prepare their initial regulatory response, these options are invariably not even considered. Instead, at this point the legislative response usually runs off the rails. All simple regulatory propositions are immediately abandoned. A medicinal agent that has been used without control for thousands of years without poisoning or acute toxicity being an issue is suddenly rung about with a host of complex and sophisticated regulatory oversight provisions that are all designed to protect the

public from the (largely mythological) social and personal harms that might attach to the use of cannabis. Moreover, as this occurs, the requirements and aspirations of medicinal cannabis patients are seamlessly conflated with those of a commercial sector that is servicing a 'medicinal cannabis industry'. So, the 'answer' to providing easy and cheap access to cannabis becomes the provision of an extensive and elaborate oversight regime pertaining to a new medicinal cannabis industry, not providing easy and cheap access to cannabis for patients (or anyone else).

This leads to the generation of extremely complex regulatory oversight regimes that not only fail to provide medicinal cannabis patients with ready access to cheap product, it serves to produce an initial oversight system that is difficult to obey, hard to police, and extremely expensive to maintain. All while entirely failing to address the civil rights abuses that are occasioned by the unwarranted criminality attaching to the use of cannabis or serving to supress a flourishing domestic criminal marketplace.

The current lived experience of comparable jurisdictions across the world provides for Australian legislatures an illustration that there are no evident consequential social or personal harms attaching to the growing of cannabis at home for medicinal (or any other) purposes. To suggest otherwise is not an 'opinion', it is 'incorrect'. It is possible to be quite definite regarding this observation simply because more than three quarters of the US population currently live in a place where cannabis is currently cultivated for personal use and this circumstance has been extensively and closely considered by medical and social scientists over the course of several decades.

Consequently, there is no need to further extemporise upon an already failing oversight regime pertaining to cannabis in Australia. Especially when many successful and failing oversight regimes are in evidence in comparable jurisdictions and so their lived experience is available for direct examination. Also, perversely, Australian jurisdictions are so far behind the rest of the world that this means we do not necessarily have to experience the same regulatory misadventures that others have suffered. Especially as most of these US jurisdictions have since, belatedly, moved to replace their initial faulty regulatory attempts with more adequate and rationally designed oversight regimes.

This circumstance provides for our domestic legislatures a chance to bypass the period of ongoing civil rights abuses and unwarranted regulatory overreach that has been experienced in so many comparable jurisdictions. If Australian lawmakers take due notice of the history and trajectory of the cannabis regulations in states such as Colorado and California, then they will move to a completely decriminalised marketplace in cannabis as soon as is legislatively feasible. In particular terms, this will include the decriminalisation of the growing of cannabis at home for personal use, the small-scale trade in cannabis for personal use, and the compounding of medicinal preparations containing cannabis, at home, for personal use.

This would remove the unwarranted administrative complexities that are currently plaguing the system. It would cut the legs out from under the criminal marketplace. It would serve to rationalise the criminal jurisdiction. It would engender greater degrees of trust and respect for our police service and in the criminal justice system in general. Moreover, it would finally stop Australian citizens from suffering unwarranted civil rights abuses on the spurious grounds that the state is 'protecting' the citizenry from harm.

Compound therapeutic products at home (personal use)

Peculiarly, the question of how best to provide a supply of cannabis for medicinal purposes has been initially answered in almost all comparable jurisdictions (or at least those that have addressed this problem), in a similarly irrational fashion. Rather than simply provide a dispensation for individuals to grow and compound their own medicinal substances at home, the commonplace response has been to institute and regulate a whole new commercial industry that is devoted to supplying medicinal cannabis patients with access to cannabis. As a result, this commonly leads to a situation where a medical cannabis consumer is prohibited from purchasing cannabis on the black

market, is not allowed to grow cannabis at home, but is allowed to purchase cannabis and therapeutic preparations containing cannabis from authorised outlets. This provides for the cannabis consumer little or no (legal) choice and access to only expensive product.

It is therefore only in mature regulatory environments where it even occurs to legislators that it might be a good idea to not only allow for the compounding of preparations containing cannabis at home but also provide for some regulatory guidance regarding this activity. Consequently, even in highly regulated environments that provide for medicinal cannabis use only, these matters are commonly left unregulated and are thus usually addressed (in the absence of any other regulatory guidance) by the criminal law.

Compound therapeutic products at home (small scale commercial)

As noted directly above, it is only in mature regulatory environments where these matters are directly addressed, in most others the compounding of therapeutic products containing cannabis without a licence, for any purpose, is considered to be a criminal offence.

Compound therapeutic products commercially (under licence)

In almost all jurisdictions that have legislated to provide access for medical cannabis patients, licences have been issued to commercial entities to cultivate cannabis and compound cannabis preparations to supply a newly created marketplace in medicinal cannabis. This is the case in Australia.

In February of 2018, the *Narcotic Drugs Amendment (Cannabis) Regulations 2018* (Cth) was passed to rationalise the existing regulations applying to the cultivation and production of cannabis plants and resin, and also facilitate the manufacture and export of medicinal compounds containing cannabis. It provided for the Office of Drug Control (ODC) to issue permits to export (only elaborately transformed, not raw) cannabis products into the global marketplace.

The regulatory system that has been established to oversee the manufacture and export of cannabis products is typically complex and restrictive. This is necessarily the case in any system that has to oversee the growing, compounding, and export of cannabis products in a jurisdiction where all of these activities remain highly illegal for anyone but a duly licenced commercial entity.

Consequently, if you wish to export cannabis products from Australia you must variously

- comply with a range of strict process and security criteria,
- have a licence from the ODC,
- accord with the provisions of the TGA re the compounding and formulation of products for export,[78]
- comply with the requirements of the Australian Register of Therapeutic Goods (ARTG), and
- enter the product into the ARTG (along with an indication of whether the preparation is being registered as an export only preparation).

Compound therapeutic products commercially (highly regulated)

This option equates to the most commonplace regulatory environment relating to medicinal cannabis in the US, which is one in which the marketplace in cannabis (for all purposes) has been entirely legalised. The system in California has already been proposed as an exemplar of such a system, however there are also many others where cannabis use for medicinal and recreational purposes has been far less adequately addressed. Nevertheless, all these various regulatory systems

[78] eg, ss16/26 etc. *Therapeutic Goods Act 1989* (Cth).

are similar in that in these jurisdictions, the growing of cannabis commercially, and the compounding of therapeutic preparations that contain cannabis for sale, are actions that have been entirely decriminalised when they are undertaken by duly licenced commercial entities.

Compound therapeutic products commercially (unrestricted)

There are no comparable jurisdictions where the compounding of therapeutic and medicinal preparations that contain cannabis is both legal *and* unregulated. Nevertheless, a relative harms appraisal of the potential dangers associated with the unregulated use and sale of cannabis products indicates that an entirely unregulated marketplace is unlikely to heighten the harms being suffered by any of the citizenry. (Although the unregulated trade in any product can have negative social consequences that are not necessarily particular to any given product.)

The compounding of therapeutic goods containing cannabis is largely unrestricted and unregulated in Thailand. While there are a range of regulations pertaining to the requirements for a retail outlet that sells cannabis products (mainly relating to refrigeration), there are few pertaining particularly to the compounding of medicinal preparations beyond truth in labelling provisions relating to the potency of the product on sale. In early 2023, the author toured the cannabis industry in Thailand. Although there were many therapeutic and medicinal preparations that were available in retail settings, it was not evident that the quality of these products was adversely impacted by the lack of regulations. Nevertheless, such a laissez-faire system is largely incompatible with our regulatory environment in Australia.

Trade

The myriad of crimes associated with cannabis are usually formulated in a ‘just so’ fashion. Thus, a prosecutor does not need to demonstrate that a person has actually been engaging in commercial activity. Instead, the crimes associated with cannabis are littered with ‘deeming’ provisions. This means that when a person cultivates or possesses above a particular arbitrary threshold quantity or weight, then they are liable for additional charges (of ‘supply’ or possession of a ‘trafficable quantity’, or an ‘indictable quantity’, or a ‘commercial quantity’, or a ‘large commercial quantity’, etc).

Consequently, the actual (trading or other) activities and intent of the accused is largely irrelevant to the eventual legal outcome. If the proven instance of possession or cultivation is above the threshold, the individual is ‘deemed’ to be guilty of trading in cannabis. As a result, the commonplace penalties that trading in cannabis without authorisation can attract have already been canvassed in prior sections (devoted to considering ‘possession’ and ‘cultivation’). The options under the heading of ‘trade’ in the comparative tables thus only canvass various types and degrees of authorised and legal trading activity.

Prescription restricted trade in medicinal cannabis and compounds

This option refers to the uniquely restricted trade in cannabis products that accompanies a prescription only system where there is no retail component. This is the situation in Australia.

Under a prescription only trading system the purchase of cannabis is restricted to only the prescribed formulation that has been authorised and specified by a physician. The cannabis obtained is usually of variable quality, no choice is offered to a customer, and the price is commonly substantially inflated in comparison with product being sold on the domestic black market.

Perversely, due to the sponsorship and subsidy efforts of our federal government, a tiny medicinal cannabis export sector is already in evidence even while a strict fully criminalised regime still operates domestically. Thus, many of the products currently being exported are not legal for use or possession by Australians and are being sold in a retail environment from which they are precluded, for use in a manner that remains strictly illegal domestically.

This prompts any ethically concerned observer to consider a number of interrelated questions: Are Australian consumers less responsible than American consumers? Is cannabis uniquely dangerous to Australians? Or is the Australian government unconcerned about the health of non-Australian citizens? Or perhaps this legally, morally, and ethically untenable situation has come about because the current legislatures in Australia have entirely failed to develop cannabis oversight regimes that are appropriate to the 21st century?

Non-commercial (interpersonal) trade (restricted)

This option refers to the giving of cannabis, by one person to another, for free. Due to the odd mix of laws in most western jurisdictions, if you give a friend a bottle of over-proof alcohol and they die from the effects of acute intoxication it will likely be considered unfortunate, but not necessarily something that is of interest to the criminal law. However, if you give a friend a bag of cannabis, which cannot inflict any sort of comparable harm, and someone merely sees you doing it, you may be guilty of the offence of supply.

Hence, while one of the first actions taken in comparable jurisdictions when liberalising their cannabis laws is to deem that small amounts of cannabis will not attract 'possession' charges (as long as the amounts involved are below a stipulated threshold) often the gifting of cannabis is ignored. This invariably has foreseeable, sometimes extremely detrimental, civil rights implications.

While the introduction of arbitrary weight or quantity dispensations can serve to appreciably lessen the total sum of harm being inflicted by an oversight regime; as noted before, the employment of an arbitrarily determined threshold in a mixed criminal and civil penalty regime will *always* occasion abuses of civil rights. This is particularly well-illustrated when the gifting of cannabis is considered.

Where an oversight code specifies that criminal charges will not apply below a stipulated threshold and this matter is ignored, this provides for a situation where the gifting of cannabis and the illegal retail trade are artificially conflated. Moreover, both are then treated differently to the legally sanctioned commercial sale of cannabis. There are other options.

The offence of 'illegally trading in cannabis' could be formulated in a fashion that requires that it must be demonstrated (in any instance where a criminal penalty extends to including the provision for a period of imprisonment) that an accused both

a) intended to trade in cannabis to accrue a personal benefit, and

b) did actually trade in cannabis (of an amount greater than the weight stipulated).

Thus, while this is still to a degree unsatisfactory in terms of common law principles (as the legislature still retains the facility to arbitrarily declare that an act or an occurrence is socially harmful and so deserving of punishment of a criminal nature), it nevertheless provides, in all instances where the liberty of a citizen is in question, for a degree of judicial discretion relating to the intent of an accused and the context in which a proscribed criminal act has occurred. It is suggested that such a move would at once provide for a degree of much needed legal reform in this area of the criminal law while also serving to address, rather than simply further amplify, many of the negative civil rights impacts that are associated with the current regime.

Licensed exclusive retail trade in medicinal cannabis and compounds

In many states in the US and in some provinces in Canada the first movement towards liberalisation of the cannabis laws was to establish a tightly regulated wholesale and retail trade in medicinal

cannabis. This is commonly described as 'a dispensary model' of cannabis supply. As noted earlier, the dispensary model of supply has been employed in both highly restrictive and punitive oversight regimes as well as in many more liberal and rational systems.

This option thus refers particularly to the more restrictive dispensary system regimes that exist in US states where medicinal cannabis has been made available, yet which still entirely prohibit the cultivation of cannabis at home for any purpose, and still maintain a strict criminal penalty regime relating to recreational use. This includes jurisdictions as diverse as Arkansas, Connecticut, Delaware, Florida, Iowa, Louisiana, New Jersey, North Dakota, Ohio, Pennsylvania, Utah and West Virginia.

In these states (with exceptions) the government licences only a restricted number of retail outlets to sell only a limited range of approved cannabis products in accord with sometimes excessively stringent regulatory controls. Cannabis is only 'dispensed' to authorised patients which are those who hold a government issued 'patient card' and/or possess a valid prescription

General commercial trade in medicinal cannabis and compounds (highly regulated)

This discussion paper is primarily focussed on best practice in the formulation of a regulatory environment pertaining to cannabis, not on providing an overview of the worldwide cannabis marketplace or commentary regarding this burgeoning industry. Yet the worldwide marketplace in cannabis cannot be ignored if only because the legislatures in almost all jurisdictions seem to be far more responsive to commercial pressure than public interest concerns. This observation is based on it being evident that most jurisdictions that establish a medicinal cannabis sector (of whatever size) almost immediately then seek to promote the manufacture of medicinal cannabis products for sale into the world marketplace.

Thus, the initial regulatory response is often far more concerned with regulating and promoting commercial activity than it is with providing cheap and readily accessible medicine for patients. Which also invariably results in a parallel legal and illegal trade in cannabis in which the commercially supported trade is often subsidised by the government even while exactly the same actions, occurring in different administrative circumstances, are attracting severe criminal penalties.

Thirteen US states currently have a mixed civil/ criminal regime that variously provide for the cultivation of cannabis at home for medicinal purposes, have a relatively well-developed medicinal cannabis business sector, and yet still maintain a sometimes very strict criminal regime relating to 'recreational cannabis'. These are the states of Arizona, Hawaii, Illinois, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Dakota and Utah.

Following the introduction of an initially highly restrictive dispensary system, these US states have all moved towards further easing the restrictions on the supply of cannabis for medicinal purposes, often by simply easing the restrictions that apply to the retail trade in medicinal cannabis in incremental steps. This includes actions such as moving away from issuing only a restricted number of licences; allowing for the purchase of cannabis for medical reasons without a prescription; easing the stipulations on the range and types of products that can be stocked and sold; and allowing for the authorised possession and transporting of greater quantities of purchased (or cultivated) product.

This option is thus associated with a maturing or mature medicinal cannabis business sector, that includes cultivation, compounding, wholesale, retail and export businesses. These commercial entities generally operate in accord with a regulatory regime that is still disproportionately

complex, punitive and/or restrictive, yet where there is nevertheless a relatively free commercial marketplace in medicinal cannabis in evidence.

General commercial trade in cannabis (highly regulated)

This option refers to a maturing or mature regulatory environment where all aspects of the cannabis trade have been entirely decriminalised and the commercial production of cannabis products for domestic sale and export is regulated in accord with a well-developed and reasonably appropriate regulatory oversight regime. This option thus refers (with varying degrees of accuracy) to regulatory regimes such as those in Colorado, Washington, Alaska, Oregon, Washington, D.C., California, Maine, Massachusetts, Nevada, Michigan, Vermont, Guam, Illinois, Arizona, Montana, New Jersey, New York, Virginia, New Mexico, Connecticut, Rhode Island, Maryland, Missouri, Delaware, Minnesota and Ohio.

The largest single market in cannabis in the world is that in the state of California. In 2023, there will be nearly US$5.9 billion in legal recreational and medical cannabis sales across the state. To provide a comparison, in the prior year traders across all of Canada took in US$3.4 billion.[79] Thus, the current GDP of Barbados (at US$5.7 billion) is slightly smaller than the current value of the cannabis trade in California alone.

In total, in 2022 the entire global market was valued at US$43.72 billion (and is projected to grow to US$444.34 billion by 2030).[80] To once again provide some idea of scale, the current GDP of the entire US state of Vermont (at US$ 42.23 billion) is slightly smaller than the value of the current worldwide trade in cannabis.

In our region the legal trade in cannabis is also booming. In 2021, the market in Thailand was worth about US$80.3 million.[81] At the end of 2022, after a year of legal trading, it was estimated to be providing a turnover worth approximately US$800 million to local traders.[82] (As a result, even though the cannabis trade has become a recent election issue, re-criminalising cannabis is not on the agenda.)[83]

Therefore, this rapidly growing worldwide marketplace should be providing Australian cultivation and compounding businesses with an opportunity to exploit a new and rapidly expanding export marketplace.[84] But after five years of access only a tiny amount of product is exported. Moreover, domestic producers and traders are a long way short of even adequately servicing our domestic

[79] Andrew Long, 'How big is California's legal marijuana market? Think a small nation' [June 27, 2023] *mjbizdaily.com* (web page, 14/12/23) <https://mjbizdaily.com/how-big-is-california-legal-marijuana-market/>.

[80] www.fortunebusinessinsights.com 'Cannabis Market Size…' *Fortune Business Insights* (web page, 8/1/23) <https://www.fortunebusinessinsights.com/industry-reports/cannabis-marijuana-market-100219>.

[81] It is expected to grow at a compound annual growth rate (CAGR) of 58.4% from 2022 to 2030. See Emma Connors, 'How Thailand's $14b cannabis industry became a top election issue' *Financial Review* (web page, 12/12/23) <https://www.afr.com/world/asia/how-thailand-s-14b-cannabis-industry-became-a-top-election-issue-20230511-p5d7th>.

[82] Francesca Regalado, June 6, 2023 'Thailand cannabis industry in limbo a year after decriminalization' *NikkeiAsia* (web page, 12/12/23) <https://asia.nikkei.com/Spotlight/Society/Thailand-cannabis-industry-in-limbo-a-year-after-decriminalization>.

[83] There have been no identifiable social or personal harms attending the instituting of a completely legal marketplace and the old criminal regime was costing the government money that it could ill-afford to spend on matters that were relatively inconsequential. Thus, during the course of the currently unfolding election campaign all the major parties in Thailand have committed to maintaining a completely legal marketplace.

[84] Two years ago, the Vantage market research group estimated that by 2028 the global market in cannabis will worth an estimated US$128.92 billion, with a medium-term annualised growth rate of 26.19%. Vantage Market Research, 'Cannabis Market Size to Reach $ 128.92 Billion by 2028'*GlobalNewswire* (webpage, 5/12/23) <https://www.globenewswire.com>.

market. While nearly '25,000kg of medicinal cannabis was produced in 2022',[85] an additional 24,887kg was imported.[86] While in the same period just 1510 kilos were exported, with most being supplied to niche markets in Germany (935kg) and the UK (407kg). (The amount being supplied to Germany actually fell by more than a quarter on the prior year.)[87]

All of which was predicted and predictable. Due to our arcane domestic cannabis laws and the complexities of manufacturing in an environment where commercial activity in relation to cannabis is so tightly regulated, the cost of production in Australia is (in relative terms) extremely high. Consequently, the restricted and highly regulated form of the domestic sector makes it almost certain that even with import costs being taken into account, product from relatively unregulated markets in the US will continue to outcompete domestic producers. So, providing subsidies for exporting cannabis products from Australia simply does not make any public interest or commercial sense until the domestic regulatory environment is (at the very least) fully decriminalised.

Commercial trade in cannabis (unrestricted) & Non-commercial (interpersonal) trade (unrestricted)

In mature regulatory environments in which a general commercial trade in cannabis is legal, there is commonly a relatively extensive oversight regime in place. These systems (as per the entry directly above) are often disproportionately complex and commonly provide for a raft of onerous provisions that do not apply to other commercial crops.

Moreover, even in mature regulatory environments, the provisions in regulation and criminal law relating to the interpersonal trade in cannabis often still continue to occasion injustice, as they continue to retain arbitrary provisions relating to matters such as weight in possession and the number of plants allowed to be cultivated on private premises.

For most of human history there were no regulatory controls associated with either the commercial or non-commercial trade in cannabis and this situation seems to have occasioned no particular degree of personal or social harm. It is only in the modern age that these matters have come within the compass of regulatory oversight, and many of the original choices that were made by legislatures were misguided and irrationally formulated. There are no personal harms associated with the use of cannabis that warrant regulatory oversight. Recent events in the kingdom of Thailand provide for a real-world demonstration that even when almost all regulatory controls are removed, then there are no evident harms visited on the jurisdiction.

This is not to say that such an entirely unregulated situation is either desirable or readily achievable within a western jurisdiction such as Australia. All commercial trade in our country is subject to a much more intensive degree of regulatory control than commonly applies in Thailand. However, a comparison between the two countries does serve to demonstrate that there is no need to formulate a punitive or intrusive oversight regime in accord with the false premise that cannabis is a dangerous drug.

[85] Ibid.

[86] Steve Jones, 'Cannabis imports and local supply neck and neck in 2022, data shows' [December 8, 2023] *mjbizdaily.com* (web page, 14/12/23) [1-2] < https://www.cannabiz.com.au/cannabis-imports-and-local-supply-neck-and-neck-in-2022-data-shows/>.

[87] MJBizDaily Staff, 'Australia exported 1,510 kilograms of cannabis in 2022, rare data shows' [December 7, 2023] *mjbizdaily.com* (web page, 14/12/23) < https://mjbizdaily.com/australia-exported-1510-kilograms-of-cannabis-in-2022/>.

In closing

Comparable jurisdictions across the world have been rationalising their cannabis laws. It is a trend that has been underway for decades. Yet still cannabis users in Australia are being gaoled and fined for cannabis offences. Normally the way forward in a democracy is a matter of two steps forward and one back, then repeat. But with the cannabis laws in Australia, it has been a matter of one step forward and one back, over and over again. Which, perversely, has just served to make a bad system even worse.

Fifty years ago, the regulatory actions by governments in Australia were being informed by a range of mistaken yet nevertheless relatively uniform and coherent public interest principles. However, following half a century of sporadic and largely unsuccessful law reform efforts, the Australian legal environment pertaining to cannabis has become ethically, morally, legally and actually chaotic.

Thus, there is an urgent need for state legislatures, individually or collectively, to act. Change is necessary as the current regime is not just morally repugnant, it is palpably unfit for purpose. Cannabis is currently criminalised because it is proposed to be a 'dangerous drug' while simultaneously being strictly and tightly regulated via the civil TGA framework as a medicinal substance. Yet in both instances the suppositions that have informed legislators are equally faulty. These legislative regimes are predicated on protecting citizens from either entirely mythical harms, or harms that cannot be addressed via restrictive and punitive regulatory actions.

When cannabis use for medicinal and therapeutic purposes was decriminalised in our country, it is evident that the increased availability of cannabis caused no additional physical harm to any individual. In fact, rather than inflict harm upon individuals or the society at large, these alterations appear to have had precisely the opposite effect. The removal of all criminal penalties relating to cannabis use in comparable jurisdictions across the world has not led to any additional harm being suffered by the citizenry, either personal or social. It appears to have had the opposite effect. The full legalisation of cannabis in many comparable jurisdictions has not led to any additional harms, either personal or social. Again, it appears to have had the opposite effect.

There is no valid ethical, moral or public interest justification available for sending one individual to prison for life for producing a commercial quantity of cannabis yet providing another who is doing exactly the same with subsidies and support, just because the actions are occurring in accord with different administrative circumstances. This is palpably unjust. It does not have to be this way. A regulatory environment *can* be crafted that is both adequate and just.

Part Six: Cannabis Law Reform Options

An active half a century of cannabis law reform all across the world provides Australian legislators with examples of a wide variety of types and degrees of reform actions to choose from. These potential reforms range from minor legislative amendments right through to full legalisation. In this concluding part of the text the most consequential of these law reform options are canvassed and discussed.

Guiding principles & political strategies

What should our legislators be considering when formulating an oversight regime for cannabis? It has already been proposed that a good legislative response is one that has been fashioned in accord with best practice in the Australian legislative context, where an aptly composed and well-informed series of public interest observations inform the development of provisions that are proportionate and well suited to addressing the regulatory requirements in question.

These matters have already been well-canvassed. The current domestic legal environment has been considered as well as those in comparable jurisdictions. The faulty public interest observations that have been informing our legislative efforts to date have also been considered and more appropriate ones advanced. Yet while these are all important factors (and so will once again be referenced in the following discussions), the deliberations engaged to date also suggest some guiding principles and political strategies that will likely promote better outcomes for cannabis law reformers and legislators who seek to provide for meaningful change.

1. **There must be a clear statement of the public policy observations that are informing a legislative action included within an enactment (or the first reading speech).**

   It is essential that *the legislative rationale* informing any cannabis law reform effort needs to be clearly enunciated either in the preamble to the legislative effort or in the first reading speech relating to the enactment, as this provides (for the judiciary, the media, and other politicians) a clear proclamation of the precise nature of the public interest observations and policies that are informing the legislative action. This forces supporters of criminalisation to argue about best practice and the peer-reviewed evidence base rather than revert to tired old cliches and drug war mythology. Such an approach also guards against the subsequent reversal of a legislative effort as it ensures that those proposing such an action will be obligated to explain why this reversal will not once again lead to the very same unwarranted and unjustified outcomes that the enactment serves to ameliorate.

   Additionally, while movement towards a rational and appropriate regulatory oversight regime for cannabis in Australia will likely be undertaken in a series of discrete steps (as this approximates the common experience in most comparable jurisdictions), and while these actions will necessarily be undertaken over an extended period, there is no need for these actions to be disparately formulated or informed or be commonly regarded as being disconnected legislative events. Therefore, it is further suggested that in any legislative effort, however limited, a section must be included that serves to *place the legislative action in a broader best practice, public policy, and law reform context*. In less florid terms, this means telling the bigger picture story about a broken system and an ongoing effort to remediate past mistakes. Such an approach serves to place the domestic struggle for law reform in a wider international and historical context; with the narrative being advanced therefore explicitly acknowledging that while the particular legislative effort in question is contextually beneficial and necessary, it is just one element in a larger staged legislative response.

2. **The cannabis law reform effort in Australia needs to argue its case in both domestic and international law terms, as the current regulatory oversight regime breaches the civil rights of Australian citizens in a manner precluded by the International Covenant on Civil and Political Rights.**

The cannabis law reform movement in Australia needs to incorporate a focus on the manner in which the current oversight regime is serving to disabuse the civil rights of the citizenry. Such an approach will likely be beneficial as it supports a cogent and compelling argument that most people will grasp instantly as it employs human rights terms and concepts with which most are familiar. Moreover, as such an approach irresistibly draws comparisons regarding how these matters are addressed elsewhere in the world, it broadens the discussion in a way that is palpably beneficial.

Before proceeding further, to avoid ambiguity it needs to be stressed that although it can be argued that the principles of international law preclude the signatories of the nine principal international human rights covenants from outlawing the use, cultivation, possession, or trade in cannabis,[88] it is suggested that this is not an argument that is likely of any great assistance in the current discursive environment in Australia. Rather, it is suggested that a more persuasive civil rights argument in the Australian context is that we are currently acting in a manner contrary to our treaty (civil and political rights) obligations by imposing and maintaining a system of criminal law administration which is occasioning arbitrary (and/or unwarrantedly punitive) outcomes due to avoidable *structural* deficiencies. In simple terms, Australia is currently failing to provide 'equal treatment under law' because the current oversight regime is faulty.

Domestic jurisprudence provides for an appropriate test to use when diagnosing and describing these sorts of legal incoherence. In accord with Justice Kitto's sage advice, it is therefore necessary to identify the rights that are in conflict (and are occasioning unjust outcomes) by recourse to considering 'the nature of the rights, duties, powers, and privileges which [the federal TGA framework] changes, regulates or abolishes',[89] and are currently in conflict with the various criminal codes in Australia.

This is a fairly easy matter. The rights, duties, powers, and privileges in question extend to those who grow, purchase, sell, possess, and use cannabis in accord with the current TGA system. These classes of citizenry are implicated in avoidable structural injustice as they are not liable for the same criminal sanctions that do actually accrue to other citizens in similar fact circumstances but absent the administrative authorisation of the TGA framework. Thus, state citizens who undertake equivalent actions in accord with analogous personal motivations,[90] but *in different administrative circumstances*, are rendered liable to criminal prosecution where those who do the same in accord with the (non-judicial discretion) dictates of the TGA framework are not.[91]

Outcomes such as these are contrary to the provisions of *the International Convention on Civil and Political Rights* relating to the arbitrary application of criminal justice instruments. Consequently, the minimum required legislative response to eliminate the ongoing disenfranchisement of civil rights must extend to either

> a) providing equivalent and equitable access to cannabis for medicinal and therapeutic purposes in a manner that does not occasion the *legally arbitrary* apportioning of criminal

[88] As this seems to correspond with the opinion of the Californian legislature and judiciary, among others.

[89] Fairfax v Federal Commissioner of Taxation [1965] HCA 64 [6-7].

[90] ie, use, grow, trade, possess cannabis for medicinal purposes.

[91] Moreover, one in four Australians use cannabis either frequently or occasionally, yet only a tiny fraction of these citizens will ever face criminal charges, with the likelihood of a citizen facing charges being inversely proportionate to their income and social standing. This serves to exacerbate the administrative and geographical disparities that are currently occasioning civil rights abuse via the differential treatment of the citizenry by the regulatory and policing authorities.

punishment, or

b) excluding all the citizens in a jurisdiction from the federal scheme.

As the second of these options is neither tenable or desirable, then the form of any regulatory intervention (if it is rationally and appropriately fashioned) will necessarily address all of these contradictory rights and privileges in turn. The enactment will also clearly describe (in accompanying explanatory addendum and/or during the course of a first reading speech) precisely how the bill serves to secure and ensure equal treatment under law in Australia, in both general and particular terms.

It is suggested that augmenting our domestic discussions relating to cannabis law reform by extending these discussions to include an acknowledgment that this is primarily a civil rights campaign can only be beneficial. It assists in placing the domestic struggle in international context and promotes its treatment in accord with the same civil rights rationale that has powered and informed cannabis law reform elsewhere in the western world.

3. Any proposed mixed criminal/civil penalty regime should incorporate only criminal offences that are fashioned in a manner that accords with common law principles.

It is not just malformed public interest observations that have occasioned the legal disaffections that are currently being experienced in Australia. The persistence of offences that are formulated in an arcane 'strict' or 'absolute' liability fashion and the subsuming of these forms of offence into the criminal code continues to have a regrettable impact. Therefore, any legislative enactment that retains a criminal penalty regime, if it seeks to remediate the current civil rights abuses that are being occasioned, must formulate (or reformulate) these criminal offences in a fashion that is more adequately informed by common law principles and the traditions of jurisprudence.

4. A just and equitable regulatory regime should not preclude citizens from engagement with the newly legalised trade as the provision of exclusionary provisions is counterproductive.

The regulatory provisions across the world relating to all aspects of involvement commercially in the cannabis trade often prevent the involvement of people who have a criminal record. In many instances, this especially applies to those who have a criminal record that lists offences that are related to the production and sale of cannabis. While measures such as these might provide some short-term political benefits, they are utterly misguided in both public interest and ethical terms.

To exclude people who have a criminal record relating to cannabis offences is to preclude the very people who have been most harmed by the existing unjust system and for whom reform efforts should be providing warranted relief. Moreover, those who have these sorts of offences on their record are commonly amongst those who are most committed and knowledgeable regarding many aspects of the cannabis marketplace. Consequently, apart from these ethical and moral concerns, restrictions on engagement with a developing legal industry only serves to inhibit efforts to suppress the existing criminal marketplace.

An examination of the trajectory of regulatory control in all of the mature marketplaces across the world indicates that is better to draw those who are currently engaging in illegal activities into a legal and regulated framework at the earliest opportunity, rather than seek to establish a parallel, competing and exclusionary legal marketplace. In every mature regulatory environment across the world, the criminal marketplace has initially thrived due (at least partially) to early regulatory systems being inappropriately exclusionary.[92] Consequently, it is strongly recommended that any

[92] It is always important to remember that an illegal marketplace thrives only when the illegal cost of production, transport and sale is lower than the legal cost of production, transport and sale. So supporting an artificially high retail price for

lawmaker considering a legislative effort directed at this sector needs to keep in mind that misguided restrictions on participation in the industry (ie, 'good and proper person tests' and the like) can have long-term negative outcomes for both individuals and the community interest.

5. **The answer to ill-conceived criminal penalties, capricious policing activities, wasted public expenditure, and arbitrarily imposed restrictions on personal liberty, is to change what you are doing (not do more of the same).**

   The regulation of cannabis should be a third-order matter. A small commercial sector should be providing the government with tax and turnover revenue. In a rationally informed legislative environment, cannabis would be of little consequence. So, the answer to over-regulation, disproportionate policing efforts and undue public expenditure is always the same: less is better.

   While the inordinately large ongoing expenditure that is currently devoted to ineffectually attempting to eliminate the cultivation and trade in cannabis may please the commercial media, it is serving no other purpose. Australia marginally liberalised access to cannabis, and nobody got hurt. Thirty-eight of the fifty US states liberalised access to cannabis, and nobody got hurt. This is because it is evident that cannabis is relatively harmless. Hundreds of millions of people are living, right now, in circumstances where they have ready access to cannabis, and nobody is getting hurt (or at least not by cannabis).

   Yet, tragically, when the Australian federal government decided it needed to provide access to 'medical' cannabis it acted in accord with the proposition that cannabis is a dangerous substance. As a consequence, the federal government has spent a massive amount of money on setting up a regulatory system to shield non-patients from potential exposure to cannabis and so protect them from harm. However nobody was being hurt before or after this expenditure. Thus, if the money had been packed into weighted bags and dumped at sea it would have had exactly the same effect.

   The best response to regulatory foolishness and disproportionate expenditure is not to add additional regulatory layers. It is to methodically and systematically strip away all of the unwarranted and malformed provisions that are currently in existence and then replace them with a regulatory oversight regime that is appropriate, effective, and proportionate to requirements.

   If the federal government had promoted the removal and rationalisation of existing penalties and oversight regimes and had advocated for state jurisdictions to enable the cultivation of cannabis at home for medical use, this would also have provided the citizenry with access to medicinal cannabis. But it would also reduce expenditure, decrease the policing workload, stop the abuse of the civil rights of the citizenry, and act to promote law reform and respect for the judicial system; all while providing cheaper cannabis of better quality than that which is currently (legally) available.

6. **The provision of cannabis in a retail environment, on the high street, serves to demythologise the social discussions relating to cannabis in a beneficial fashion.**

   The introduction of a retail sector (however limited and restricted) seems to be closely associated with the developing of more mature domestic social and political discussions relating to cannabis and the banishing of misinformation. Therefore, it is suggested that the provision of a retail sector must be a priority interest for all those who are interested in cannabis law reform in Australia.

   For as long as cannabis is a matter that is only visible to consumers and patients then misinformation relating to the substance will be widespread. Whereas when cannabis is visible in

cannabis whilst simultaneously precluding those who are participating in the illegal marketplace from reaping any (personal or social) benefit from the act of decriminalisation. This prolongs the period in which an illegal marketplace is provided undue price support by inappropriately punitive and restrictive market restrictions.

shop windows, it is harder to erroneously convince people that it is a dangerous substance that must be eliminated from society. Rather, it gradually becomes just another commercial product that comes to be correctly appreciated as being less harmful than many others that are also legally available.

Option three. Remedial Law Reform Options.

This option encompasses a range of disparate legislative actions (short of full decriminalisation) that serve to provide for an equitable and just facility for all the citizens of a state to obtain and use cannabis as a therapeutic or medicinal agent.

These reforms collectively represent the minimum required remedial amendments that are necessary if jurisdictions in Australia wish to accord with the requirements of international civil rights law.

Introduction

When activists call for the 'decriminalisation' of cannabis they are commonly referring to the removal of all criminal penalties. However, this conflicts with the way the term is commonly used by most politicians. In political discussions 'decriminalisation' is generally appreciated as referring to the retention of a mixed criminal and civil penalties regime, just with lesser penalties. There are similar potential ambiguities attaching to the use of the word 'legalisation'

Consequently, when a 'decriminalised' oversight regime is referred to in this text, this is a reference to a system where the criminal code has been stripped of all cannabis offences and these matters are either not regulated at all or are subject to a regulatory code that provides for only small civil penalties. But at the moment state jurisdictions in our country are among the most hostile environments for cannabis users in the entire western world, so the distance between such a decriminalised environment and the current domestic regulatory situation is vast.

Therefore, before turning to considering a rationally ordered oversight regime for cannabis, there is a need to first canvass a range of urgently required remedial legislative efforts that are directed at providing for a system that does not produce legally arbitrary outcomes and so which does not infringe upon the civil rights of the citizenry. Hence, the first option considered is not just one but rather a range of incremental legislative actions where the primary guiding rationale is to provide for an equitable and just facility for all the citizens of the state to use cannabis as a therapeutic or medicinal agent without potentially facing arrest or detention in a legally arbitrary fashion. Thus, these are not legislative efforts designed to either institute or regulate a decriminalised marketplace in cannabis but rather just address the current civil rights inequities being suffered by the citizenry.

So although these options refer to a range of limited remedial actions which are thus not optimally formulated, they are nevertheless urgently required as they will serve to redress some of the most objectionable aspects of the current regime. Additionally, there is no need for all of these legislative proposals to be advanced in isolation, or without being phased in as just one element in a more comprehensive law reform plan. Nor is there any need for state jurisdictions to undertake any of these partial measures as they can instead simply move to institute a fully decriminalised or legalised oversight regime. But even without such an ambition, in the interests of securing both the constitutional and the civil and political rights of the citizenry, every state in Australia should immediately enact the law reform recommendations that are suggested below.

The constitutional law and civil rights deficiencies that must be addressed

The Attorney General of Australia advises that

> The right to personal liberty requires that persons not be subject to arrest and detention *except as provided for by law*, and provided that neither the arrest nor the detention is arbitrary. The right applies

> to all forms of detention where people are deprived of their liberty.[93]

Because Australia is a signatory to the *International Covenant on Civil and Political Rights*, all jurisdictions in the federation are required to ensure that their systems of governance are in compliance. However, the current cannabis oversight regime in all the states in Australia serves to disabuse the right to equal treatment under law by arresting and detaining citizens in a legally arbitrary fashion. This is due to the TGA being formulated in a constitutionally impermissible fashion.

The TGA is impermissibly formulated as the decisions currently made in accord with these enactments effectively create two classes of citizenry who enjoy different rights under law (ie, being those liable for criminal sanction and those who are not). This is not constitutionally valid unless such an arbitration is undertaken by a judicial authority in accord with legal criteria. However, access to legal immunity under the TGA system is currently contingent on the (non-judicial) administrative discretion of a medical practitioner (ie, a doctor writing a prescription in accord with the TGA legislative framework).

While the decision of a doctor may be legally and professionally apt when it comes to deciding what medicines a person might require, medical professionals are not constitutionally authorised to decide who can or cannot enjoy *legal* immunities. Thus as the TGA framework is authorising decisions that are of a legal character, it is constitutionally invalid in its current form. Additionally, as this legal incoherence is occasioning the arrest and detention of citizens for cannabis offences in a legally arbitrary fashion, this also serves to infringe upon the civil and political rights of the citizenry.

The legal implications of the nominal distinction between medicinal & recreational cannabis use

Both the civil rights and the constitutional law observations that are presented above hinge on the distinction that is made in legislation between medical and recreational cannabis use and its significance. Thus, in the interests of clarity, before continuing it will be helpful to spend just a little more time exploring these matters.

The TGA framework proposes that there are (at least) two *types* of cannabis. There is cannabis that is being used in an authorised (and so legally inconsequential) fashion for therapeutic and medical reasons and that which is being used for 'other' purposes. But it is important to note that this is a nominal and not an actual distinction. In other words, cannabis for medicinal purposes and cannabis for 'other' purposes is the very same material. That this is a nominal and not a material distinction is important as it serves to indicate that all raw cannabis can be used for either recreational or medicinal purposes and that the distinction is one that hinges on the opinion of a doctor regarding the personal circumstances of an individual citizen. Thus, the history and circumstances of an individual citizen and the opinion of a medical practitioner are the key indicators as to whether or not a pile of cannabis might be designated as being 'medicinal' or otherwise illegal by the policing authorities, not the material properties attaching to the cannabis or any specific actions of a particular citizen.

So currently, under the TGA system a doctor is making decisions based on personal circumstances and biography that serve to allow one class of citizens to use cannabis without interference from the state policing authorities. If this was purely an administrative decision it would be of little consequence, but here it is serving to designate for state policing authorities those who are using cannabis legally and those who remain liable for criminal sanction. This indicates that these decisions are not just of an administrative character but that they also have palpable *legal* implications.

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[93] Attorney General of Australia, 'Right to security of the person and freedom from arbitrary detention - Public sector guidance sheet' *Attorney Generals Department* (web page, 22/12/23) [1] <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-security-person-and-freedom-arbitrary-detention#what-is-the-right-to-security-of-the-person-and-freedom-from-arbitrary-detention>. Italics added.

This is important because the Australian Constitution clearly distinguishes between legal and administrative decisions. An administrative decision is a bureaucratic decision made by a public servant or (a tribunal) who is exercising executive authority. Whereas a legal decision is one that serves to make an authorised finding that has personal legal consequences for an individual citizen.[94] This is important as the Constitution prohibits the executive or the parliament from infringing on the role of the judiciary by making decisions that are of a legal and not an administrative character, and a doctor is not a judicial officer, and the TGA is not a duly established chapter III (ie, judicial) entity.

Importantly, the assessment as to whether or not the decision by a doctor to authorise the use of cannabis under the TGA framework is judicial in nature is itself a matter that only the judiciary can determine. Such a finding is ultimately one that can only be made by the High Court upon considering the actual legal 'rights, duties, powers and privileges which [this decision by a medical practitioner] changes, regulates or abolishes,'[95] rather than just what any government might have to say.

In this instance, it is suggested that the High Court would likely decide that these decisions are undoubtedly of a legal character and so are thus being undertaken in a manner that is contrary to both constitutional law (as they are invalidly made legal decisions), and civil rights principles (as these decisions are thus serving to occasion the arrest and detention of citizens in a fashion that is *legally* arbitrary).

Potential remedies

These (constitutional law and civil rights) deficiencies can be remediated in a variety of ways. These include:

- Removing cannabis from the TGA framework federally.
- Removing cannabis from the TGA framework in a state jurisdiction.
- Amending the TGA framework to provide for equitable treatment under law.
- Amending the criminal law of a state jurisdiction to remove the potential for civil rights abuse by arbitrary arrest and detention.

The first two of these options for remediation are inadvisable. Removing cannabis from the TGA framework would represent a removal of rights and privileges that are currently enjoyed by Australian citizens. Exempting a state jurisdiction from the cannabis oversight of the TGA (by amending the existing s51 referral of powers) would similarly diminish the scope of existing rights and privileges in a state jurisdiction. Whereas amending the TGA framework to provide access to medicinal cannabis for all Australians without prescription authorisation or amending the criminal law of a state jurisdiction to remove the potential for civil rights abuses, are both viable approaches.

Federal government

In addition to providing for prescription access to medicinal cannabis, the federal government could amend the TGA framework to allow access from chemists or authorised retail dispensaries without administrative dispensation (ie, without a prescription from a doctor). This would remove the potential for civil rights infringement by providing for similar treatment *under law* for all citizens, whilst also retaining the prescription access system as it is currently formulated. The provision of a facility for state governments to allow for a retail dispensary system (via chemists only or with additional retail dispensary shopfronts) would be a commendable step forward in the Australian context and would likely be welcomed by most jurisdictions. (The particular provisions that necessarily accompany such

[94] See 'Part One: A Unique Legislative LandscapeDisparate notes on the Landscape of Cannabis Law in Australia' 2.

[95] As per Kitto J in *Fairfax v Federal Commissioner of Taxation* [1965] HCA 64 [6-7].

a system of retail supply are considered in detail later in this text).[96]

State governments

a) As the currently inequitable treatment under law should be urgently addressed by state governments, the responsible minister in each jurisdiction should immediately direct that where a criminal offence would be rendered legally inconsequential if undertaken in accord with the TGA framework, then it will be similarly considered in state law to be legally inconsequential. This directive would be in the form of both a moratorium directing the judiciary relating to this variation in the penalty regime as well as in a directive to the police service regarding these alterations.

b) A more apt yet still suboptimal approach is for a state government jurisdiction to legislate to remove existing criminal penalties attaching to the use, possession and gifting of cannabis for medicinal purposes. This is a good subsequent or alternative approach to that proposed immediately above. To ensure that such an approach would be equitable the waiver for criminal liability would have to extend to quantities equivalent to the maximum amount that might be purchased, possessed and used under the TGA framework. This would be somewhere in the 30-45g per week range with a reasonable expectation that a person might possess, gift or transport up to three months' supply. Such an approach would also preferably incorporate a legal amnesty and wiping of all comparable past offences by citizens.

c) A still more apt yet suboptimal approach would be to couple the decriminalisation actions in b) with a facility for citizens to cultivate cannabis at home for personal medicinal purposes and to compound, use and gift medicines containing cannabis for personal medical purposes.

d) Perhaps the most optimal approach that could be taken by a state government short of the full decriminalisation of the cannabis marketplace is to fully undertake the actions indicated at b) and c) above, and also provide for a retail dispensary sector. This might consist of a dispensation for chemists to additionally trade in cannabis products (upon declaration to a pharmacist that they are to be used for medicinal purposes), or additionally (or alternatively) allow for a retail dispensary system trading in medicinal cannabis products, which will provide access for all citizens of eligible age (upon declaration that the cannabis that is purchased will be used for medicinal purposes).

[96] See 'A *Cannabis Act*' – 'The regulation of a commercial sector' 83.

Table 6. Option three, fixing a broken system. Limited decriminalisation at the state level.

	unregulated			↓
	civil regulatory regime		↓	↓
	criminal offence (fine/gaol)			
	✓= regulatory or criminal oversight regime X = civil or criminal penalties apply →	X	X	
Use				
	Prescription authorised			
✓	**Use cannabis medicinally (nonprescription)**		**X**	
	Use cannabis (unrestricted)	X		
Possession				
	Prescription authorised			
✓	**Possesses cannabis (restricted by weight)**		**X**	
	Possess cannabis (unrestricted)	X		
Cultivation				
	Grow medicinal cannabis under licence			
✓	**Grow medicinal cannabis commercially (highly regulated)**		**X**	
	Grow medicinal cannabis commercially (regulated)	X		
	Grow recreational cannabis commercially (regulated)	X		
✓	Grow medicinal cannabis at home (restricted by number)		X	
	Grow cannabis at home (restricted quantity)	X		
	Grow cannabis at home (unrestricted quantity)	X		
Production of therapeutic & medicinal compounds				
	Compound therapeutic products commercially (under licence)			
✓	**Compound therapeutic products at home (personal use)**		**X**	
	Compound therapeutic products at home (small scale commercial)	X		
✓	**Compound therapeutic products commercially (highly regulated)**		**X**	
	Compound therapeutic products commercially (lightly regulated)	X		
Trade				
✓	**Prescription restricted trade in medicinal cannabis and compounds**		**X**	
✓	**Non-commercial (interpersonal) trade (restricted)**	**X**	**X**	
	Non-commercial (interpersonal) trade (unrestricted)	X		
✓	**Licensed exclusive retail trade in medicinal cannabis and compounds**	**X**	**X**	
	General commercial trade in medicinal cannabis and compounds (highly regulated)	X		
	General commercial trade in cannabis (highly regulated)	X		
	Commercial trade in cannabis (unrestricted)	X		

Key:
A green shading indicates a lack of regulation or law.
A blue shading indicates a civil regulatory regime (decriminalised or legal).
A red shading indicates a criminal regime.
✓ A tick indicates that there is a regulatory regime that relates to the option.
X A cross indicates there are civil fines (blue) or a criminal penalty regime (red) associated with the option.
Where there is a regulatory regime without penalty provision there is no cross.
Where there are both criminal and civil penalties this is indicated by two crosses.

Discussion

There are three interrelated and complimentary avenues of argument available when promoting the need for the urgent renovation of our cannabis laws. Each is persuasive.

The law reform argument

> When criminal offenses are formulated in an arcane 'strict liability' fashion (as are most domestic cannabis laws) this serves to bring the administration of justice into disrepute by promoting unjust outcomes. It also serves to corrupt the judicial function by instructing judicial officers to disregard many traditional common law precepts.[97] .

The civil rights argument.

> The overlay of the TGA framework upon the criminal law jurisdiction of the states is occasioning an arbitrary application of the criminal law and so is causing civil rights violations by arresting and detaining citizens in a legally arbitrary fashion. This places jurisdictions in Australia in breach of their international treaty obligations.[98]

The constitutional law argument

> The TGA framework is currently operating in a constitutionally invalid fashion as it enables a doctor (in legislation passed by the parliament and overseen by the executive) to decide on a case-by-case basis who may or may not be liable for criminal penalties. This is impermissible as matters pertaining to potential criminal liability must be dealt with by a chapter III body.[99]

There are three ways to bring the TGA framework into compliance with domestic and international law. This can be accomplished by

1. Amending the TGA framework to exclude cannabis,
2. maintaining the nominal distinction between medical and 'other' cannabis but providing for adjudication on a case-by-case basis by a judicial officer, or
3. maintaining the nominal distinction but providing for no adjudication regarding the distinction by allowing each individual citizen to make a declaration, upon purchase, that their use of cannabis will be for 'medicinal' purposes.

The third of these options is certainly the most pragmatically feasible. The first would amount to the re-criminalisation of all cannabis use in Australia. The second would require a whole new regulatory system. Whereas the third option would render the current TGA framework as being permissibly organised.

While it might seem odd to recommend an option that maintains the legal fiction that there is a material difference between medicinal and recreational cannabis, this is nevertheless commonplace in many comparable jurisdictions. This is because these other jurisdictions have had to grapple with exactly similar problems. After initially providing access to medicinal cannabis in a tightly regulated fashion, most of the thirty-eight US states where medicinal cannabis is currently legal then began realising that this was occasioning civil rights violations. So, most of these jurisdictions very soon began incrementally liberalising access to 'medicinal' cannabis, until the distinction between what might be medicinal and recreational cannabis very soon became legally meaningless. This is because, while the distinction remains consequential in a marketing and regulatory sense, very soon in most of these jurisdictions anyone who wanted to purchase cannabis could obtain it without difficulty or legal impediment. A citizen could purchase their cannabis from a dispensary, sign a declaration, then depart

[97] See 'No 'victim' - no 'crime'' 24.
[98] See 'The constitutional law and civil rights deficiencies that must be addressed' 63.
[99] See 'Is the current TGA framework constitutionally valid?' 18.

with their cannabis.

Most of these US states have since gone on to more adequately deal with these matters by fully decriminalising the use of cannabis, but not always. As noted earlier when reviewing the various US states where cannabis has long been decriminalised but not yet legalised, after the citizenry have achieved relatively unrestricted access to cannabis a large overburden of arcane regulations often still persists. This is unfortunate but perfectly explicable. When the majority of the citizenry have at last achieved ready access to cannabis via retail outlets or personal cultivation, then the problems with the regulatory regime are transformed from being vitally significant propositions that are personally consequential for a large proportion of the population, into matters that are considered largely of consequence only for lawyers, legislators, lobbyists and the commercial sector.

If the various remedial actions that are suggested above are implemented, then most of the unacceptable inequities associated with the current cannabis oversight regime will have been addressed. Yet nevertheless, it will not provide for a rationally ordered and contextually appropriate regulatory regime. Jurisdictions will still be working with a regulatory system that results from happenstance rather than due consideration and planning. This is why it is suggested that while all of the options canvassed above are consequential, the best approach is to simply, right at the outset, design and implement a rationally ordered and proportionate regulatory regime where cannabis is either fully decriminalised or legal.

Option four: Decriminalisation

As has already been repeatedly stressed, it is necessary to guard against disproportionately complex, punitive, or onerous regulatory provisions. Yet there are also a number of other common missteps that can easily be anticipated and avoided. Legislators are thus urged to not only examine the regulatory details in comparable jurisdictions in Europe, Asia and the Americas, but also the systemic and attitudinal changes that necessarily accompany a shift away from a criminal oversight regime.

Introduction: The US & Australia - discussion v silence

A review of the wondrous variety of cannabis oversight regimes that have been instigated in the fifty US states over the course of the last half a century is instructive. It provides for a wealth of detail regarding a host of different regulatory provisions and their efficacy. Yet it also provides for insights regarding how two different cultural contexts seem to be supporting and informing two very different social and political arguments. For an Australian researcher such an inquiry can be revelatory because, aside from the regulatory insights, it very soon becomes obvious that the arguments pertaining to cannabis in the US and Australia are not just sightly different, they are utterly dissimilar.

In Australia, discussions relating to the recreational use of cannabis are advanced *only* by proponents. The media, academia, and the mainstream political parties commonly avoid the topic. Thus, an eerie silence is the defining feature of the media response.

Even in the small public broadcasting sector the media environment is actively hostile. So, the proposition that cannabis is not a dangerous drug or that it might be validly and harmlessly used for recreational purposes is simply never aired or entertained. Instead, the whole topic of cannabis is ignored or reduced to considering how the introduction of access to medicinal cannabis may be problematic. But mainly the topic is ignored. On any given day, if you google the phrase ‘recreational cannabis’, there will be zero results returned from any mainstream Australian media source.

Therefore, media and political discussions relating to cannabis law reform in Australia are arcane, narrowly focussed and infrequent. Even with cannabis law reform parties active in almost every state and with members in the state parliament in several jurisdictions, the use of cannabis for recreation and the full decriminalisation of a cannabis marketplace are matters that are not even mentioned in the mainstream media. In the Australian media, the suggestion that an individual might use cannabis

without suffering any negative effects and actually enjoy it, is not a proposition that is being shouted down; it is just never entertained.

Whereas in the US discussions relating to recreational cannabis moved into the mainstream media more than two decades ago and have also altered substantially in both substance and tone. Therefore, an individual's preferences relating to the regulation of cannabis is now a matter that is not divorced from all their other conceptions relating to the ordering of society. Accordingly, similarly well-informed and well-intentioned individuals on all sides of the political spectrum in the US, can and do profess very different opinions regarding whether it is best to have a decriminalised or a fully legal marketplace and regarding the precise differences that separate these two forms of regulatory environment. Thus the commonplace debates that are occurring regarding cannabis regulation in the US are utterly dissimilar to those occurring in Australia.

This often makes it difficult for Australian commentators and legislators to comprehend exactly who is arguing about what and why. Australian observers often (and quite understandably) fail to comprehend that the arguments in the US between proponents of decriminalisation and full legalisation cannot be reduced to arguments between pro-cannabis and anti-cannabis activists. Moreover, the proponents for full legalisation in the American context are usually well-funded, well-organised industry lobbyists. Whereas those who are hesitant regarding a fully legalised system are often those who are most closely associated with the original liberalisation efforts in the US in places like California, Colorado, and Washington State.

Observers from the outside thus also often fail to discern that the long gap between the full decriminalisation of cannabis in California, and their relatively recent moves to fully legalise and rationalise their regulatory oversight regime (almost two decades later), resulted more from a distaste for the introduction of a fully commercialised system than any resistance to further liberalisation. After all, for most of the last three decades anyone in California who has wanted cannabis has been able to obtain it without legal consequence. Thus, from the viewpoint of the average consumer of cannabis in the state the civil rights campaign had been a total success. As a consequence, during the last two decades the debate in California has been radically transformed from being driven by a rag-tag group of civil rights campaigners into a sleek and quite effective commercial lobby effort.

Consequently, those who support either decriminalisation or full legalisation in the US cannot be easily or readily typified as both are broadly popular viewpoints that are shared for different reasons by most segments of the community. This is because almost ninety percent of the population are arguing either in favour of full legalisation or decriminalisation. It is the idea that cannabis should be at all criminalised that is *extremely unpopular*.

> An overwhelming share of U.S. adults (88%) say either that marijuana should be legal for medical and recreational use by adults (59%) or that it should be legal for medical use only (30%). Just one-in-ten (10%) say marijuana use should not be legal, according to a Pew Research Center survey conducted Oct. 10-16, 2022. These views are virtually unchanged since April 2021.[100]

Some are opposed to further liberalisation because they are politically or religiously conservative. Others argue that theirs is not a 'conservative' but rather an appropriately cautious approach, and as a decriminalised regime seems to be working there is no need to move beyond this to embrace a fully legal marketplace. They argue that a tightly controlled dispensary model of supply, augmented with a facility for citizens to grow cannabis at home for personal use, provides ready access to cannabis for those who need or desire access, yet it also guards against the undue commercialisation and celebration

[100] Ted van Green, 'Americans overwhelmingly say marijuana should be legal for medical or recreational use' [November 22, 2022] *Pew Research Centre* (web page, 30/12/23) [2] <https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/>.

of the use of a social intoxicant. It also guards against unduly inflated retail prices and the proliferation of inappropriate advertising.

Accordingly, those in favour of decriminalisation but not full legalisation generally contend that allowing cannabis to be sold outside of a tightly controlled dispensary system is neither morally desirable or pragmatically warranted, and as this is the case, restrictions on advertising and the unauthorised cultivation, sale and trade in cannabis are not at all unjustified but rather are in the public interest.

While those in favour of full legalisation often counter that a highly extemporised regulatory regime is costly and unwarranted and simply serves to distort both the regulatory and the commercial environment for reasons that are either illusory (ie, to guard against moral or ethical harm), or are simply unwarranted, superfluous, or onerous when compared with the regulatory systems that apply to other legal products. Moreover, a fully legal marketplace allows for a jurisdiction to simultaneously enhance its taxation and excise revenue base while reducing expenditure on unnecessary regulatory supervision and administration.

Thus over the last two decades, the mainstream media and political conversations in the US regarding cannabis have coalesced around a number of well-worn points of contention; while voices arguing for the retention or reimposition of a criminal regime have dwindled.[101] (Which, in a perverse fashion, seems to be precisely the opposite of the current situation in Australia.)

The decriminalisation journey

In most of the many US states where cannabis is now decriminalised, this has been achieved as a result of lots of small incremental legislative and regulatory steps that have been taken over the course of decades. Yet this does not necessarily indicate that a great many interim steps are necessarily required, it just demonstrates that most of the US jurisdictions that have made this journey have taken a winding and often rocky road.

Nevertheless, legislators do need to be cautious when assessing the US experience and not simply presume that the cultural attitudes and commonplace understandings relating to cannabis in the two countries are at all comparable. In Australia the focus of the public discussion is still grounded in drug war mythology and activists are still grappling with inappropriately formulated public interest observations. Additionally, the proposition that there is a material and significant difference between medical and recreational cannabis is still a consequential proposition in both our legal and regulatory discussions whereas this has never been the case in the US. To illustrate why this cultural contrast exists there is a need to turn to considering the early days of cannabis law reform in California.

In contrast to the Australian experience, during the last thirty years in America the social and political discussions regarding cannabis have altered dramatically. The first practical movements towards decriminalisation in California and Colorado were similarly informed by political and media discussions that were primarily aimed at debunking suggestions of serious harm and social and moral detriment. So, in these early years (1980 – 2000), the social discourse in America was roughly similar to that currently on display in Australia. But then some sly Americans invented the idea of ‘medicinal cannabis’ as a legal wedge, and then rapidly everything altered. So, in the US the proposition of ‘medical cannabis has never been considered to be anything more than a nominal distinction.

The idea of ‘medical cannabis’ and the dispensary model of supply are inseparable as they were invented in tandem. In the early and mid-1990s, in various Californian municipalities that were sympathetic to cannabis (like San Franscisco, Santa Cruz, and Oakland), ‘cannabis buyers’ clubs’

[101] Even the far-right fringe of the GOP in states such as Florida, the government is fighting a rearguard action against their own constituents and members of their own party. See the commentary provided throughout the last part of this text, see comments at the end of ‘Possess cannabis (restricted by weight)’ 42.

sprang up. These 'cannabis dispensaries' pioneered the idea of 'medicinal cannabis' as a wedge to pry open some regulatory space. Accordingly, in the story of the liberalisation of cannabis laws in the US, the very first significant legal provision was the (Cali.) *Assembly Bill 1529* (in 1995), which codified 'medical necessity' as an allowable defence for using cannabis when under medical supervision. The next year Proposition 215 consolidated and codified this strategic and political gain; and so the proposition of 'medicinal cannabis' was pioneered and given legal definition.

Hence, the current regulatory, rhetorical and legal environment in Australia is similar to that in California three decades ago except in one really significant way. In the US the proposition of medicinal cannabis was invented to subvert the criminal regime. Groups of citizens pioneered the dispensary model and deemed themselves to be 'medical users'. Then this strategy (ie, 'medical' cannabis) was enshrined in very targeted legislation (that allowed access to only those with really severe diseases). This political strategy bore fruit. Yet in California this legal fiction was dispensed with very quickly. These pioneering regulatory actions culminated with the passing of *the Medical Marijuana Program Act* (Senate Bill 420) in 2003. This marked a turning point as it functionally extinguished the phony distinction between medical and recreational use. By introducing a 'medical cannabis card' to allow citizens to purchase cannabis from a dispensary, the proposition of medical cannabis was simultaneously enshrined in law as a key aspect of the oversight regime, while at the same time the criteria for getting the card was made so broad as to render the distinction *functionally* meaningless. (All one had to do was declare that any cannabis purchased would be used for medicinal purposes.) It was a very pragmatic Californian type of solution; everybody was now a 'patient'.

As a result, from this point on (ie, c2000) the domestic political and media discussion regarding cannabis in the US has steadily turned to entirely new political, ideological, moral and civil rights arguments, with the old 'drug war' propositions concerning personal and social harms dissipating. During these two decades, as thirty-seven additional states decriminalised the use of cannabis, they also generally followed much the same regulatory path. With their focus being initially on regulatory provisions that serve to carve out first a line between an illegal and illegal marketplace, then on those that serve to define a line between a decriminalised and a legal regime. Thus, first a state with a criminal regime establishes a dispensary model of cannabis provision, then gradually the criterion for access is relaxed. Then finally, after the political heat has gone out of the issue, the regulatory oversight regime is revisited, rationalised and trimmed down. Yet in all of these jurisdictions, regardless of the current oversight regime, the social and media discourse is now distinctly different to that which is evident in our country.

Our discourse remains isolated and fixated on matters that are considered peripheral in most comparable jurisdictions. Australia remains trapped in much the same discursive environment as pertained thirty years ago. Yet misinformation and overblown rhetoric have departed the scene in the US. Rather, discussion is now largely centred on moral and political factors, and precisely where the line should be drawn between a legal and a decriminalised oversight regime. Accordingly, it is essential that domestic legislatures understand that cannabis law reform hinges on three very different projects that are nevertheless all essential and interlinked. Not only is there a need to formulate *an appropriate and proportionate regulatory regime* and undertake *a law reform program*, there is also a need to first *reconstitute the social and media discussion in Australia*.

The necessary law reform task

The biggest (non-cultural) difficulty that will be faced by Australian legislators is that they will have to draw the line between legalisation and decriminalisation for the first time in our country (in both legislative and rhetorical terms). It is therefore essential that a legislature have a clear understanding that the construction and policing of a decriminalised system of oversight is not a simple task that is reducible to just eliminating the currently punitive provisions in the criminal codes and adjusting the current regulatory regime. Rather, decriminalisation will require an entirely new oversight regime that

is informed by entirely different public interest observations and so is attending to an entirely different range of regulatory requirements to that which is associated with a criminalised (ie, judicial oversight) system.

In simple terms, in a fully legal system there are few restrictive provisions that pertain particularly to the personal use and retail trade in cannabis, whereas in a fully decriminalised system there is a highly regulated retail sector as well as restrictions on the consumption of cannabis in commercial premises and in all or some public areas. There are also commonly restrictions imposed on the advertising and sale of cannabis outside of authorised retail outlets, the cultivation for commercial trade outside of the authorised system, and the transport of cannabis in an unauthorised fashion. Often infringements of these restrictions continue to remain criminal offences.

In an earlier review of the many and varied oversight regimes that currently exist in the US,[102] it was observed that those with a 'maturing' regulatory environment were those that are currently struggling with precisely these evolving regulatory demands. Unfortunately, most of these jurisdictions are yet to adequately address and acknowledge past injustice and/or undertake a rigorous review of the criminal code so as to eliminate the potential for similar unjust outcomes being repeated. It seems to be only in those states with a mature regulatory environment (such as Colorado, California and Washington State) where the criminal law reform task has been adequately addressed (or even addressed at all).

Accordingly, if we are to actually learn from overseas experience then it is evident that there is a need for Australian legislatures who seek to consider the proposition of decriminalisation to not only develop an appropriate and proportionate regulatory regime pertaining to a new retail environment, they must also simultaneously act to reform the criminal code and acknowledge and remediate the impact of past mistakes. Moreover, it is not just the criminal statutes that need to be addressed, these remediation efforts have to additionally extend to policing practices and judicial attitudes.

During the years in which drug war reasoning was informing lawmakers, the various legislative options that were chosen were not just poor but also lazy. Rather than formulating offences and policing strategies that were concerned directly with diminishing evil and unjust occurrences, 'deeming' provisions and strict liability offences were developed which served to enable these morality offences to be proven in a court of law without reference to either an evil intent or an injurious outcome and often with only the seized drugs as evidence. This leads to palpably unjust outcomes that bring both the police and the judiciary into disrepute. It thus also leads to an 'us and them' mentality developing. Which is unacceptable. The Lockian social compact between the citizenry and the state, and thus the health of our democracy, hinges upon the perception that the institutions of state are providing both equitable and just outcomes.

When the legislatures of the seventeenth and eighteenth century decided to depart from tradition by directing their courts to sometimes ignore the social context and personal intent of the accused in the criminal jurisdiction, they were misguided. While legal fictions might have a place in the civil jurisdiction, in a criminal court they are utterly misplaced. Our criminal law jurisdiction is rightfully perceived to represent a distillation of the 'common-sense' of our entire society. Thus, while a magistrate or a justice might find it personally comforting to opine regarding the dire personal health consequences that the state has decreed to be associated with the use of cannabis,[103] this only serves to further bring discredit on the whole of the criminal law jurisdiction.[104]

It is not enough to simply acknowledge that these strict liability offences are occasioning unjust outcomes without also addressing the original sin of inventing a class of serious criminal offences where the outcome can be determined without regard to most of the common law principles of criminal

[102] See 'Part Five: Learning from Overseas Experience.' 36.
[103] See 'No 'victim' - no 'crime'' 24.
[104] See 'The Moral Dimension of Civil Rights Activism' 23, 'The impact on the criminal law jurisdiction' 25, & 'The civil rights impact' 28.

jurisprudence. Strict and absolute liability offences are not crimes in the eyes of the common law. Neither are these forms of enactment serving any discernible public interest that cannot be served in a more traditionally and jurisprudentially apt manner. Rather, they are an arcane and ill-advised leftover from yesteryear which are continuing to occasion unjust outcomes into the present day. Thus, if only in the interests of jurisprudential coherence, the criminal codes in all common-law jurisdictions should be stripped of all offences that are currently formulated in a strict or absolute liability fashion and new criminal offences be promulgated which accord with the traditions of the criminal law jurisdiction and common law principles regarding what constitutes a 'crime'.

The time for the decriminalisation of cannabis in Australia has arrived. The politicians in Australia can either act appropriately or be shouldered aside by history. What needs to be done is clear. Overseas experience is instructive. Not only is there a need to formulate an entirely new regulatory environment that appropriately deals with a whole range of novel problems, there is also a need to grapple with the damage caused by the inclusion of a range of palpably unjust and malformed 'offences' within the criminal code for many decades.

Outlawing cannabis was wrong. Then, layering mistake upon mistake, the manner in which it was outlawed was also misguided. So both missteps must be addressed in tandem. When the judiciary are instructed to ignore the traditions of jurisprudence and common law principles, this serves to inflict lasting damage upon both individuals and the institutions of the state. Thus, the public interest demands the taking of actions that not only ensure that these occurrences will not be repeated but which also act to appropriately and open-handedly acknowledge, apologise for, and attempt to remediate the damage that has been inflicted over the course of many decades.

A note regarding the forging of appropriate criminal statutes

The existing cannabis oversight regime in Australia is causing injustice as it is malformed and legally arbitrary. Therefore, one of the first steps in a program of decriminalisation should be aimed at identifying all of the criminal offences relating to cannabis and its byproducts and removing them from the criminal statutes. At the same time the criminal code will likely need to be altered to include new offences relating to commercial trading, cultivation and transportation of cannabis without due authorisation.

However, it is essential that these new offences be formulated in a manner that is informed by the traditions of jurisprudence in the criminal jurisdiction. Thus, an offence relating to trading in cannabis would likely require that it be demonstrated that an accused did both *intend to trade in cannabis in an unauthorised fashion* and also *did actually gain an unauthorised commercial benefit* from a trading event. Such a formulation not only invites a judicial officer to assess the matter in accord with traditional practice, it clearly identifies the illegal trade in cannabis as being the social harm that is being addressed and mitigated. Similar formulations pertaining to the unauthorised cultivation and transportation of commercial quantities of cannabis may also be deemed as required.[105]

Legislative rationale

In Australia, when a legislature is discussing 'decriminalisation' then they are often talking about further tinkering around the margins in an effort to generate political leverage. Or more often, they entertain a genuine desire to renovate a currently dysfunctional system yet have made the decision that to do any more than just take limited action is either too politically costly or simply unviable. While these discussions might prompt much needed remedial law reform actions, they are not actions that are being undertaken in accord with a legislative rationale that seeks to decriminalise cannabis.

[105] Note that these rather terse and incomplete comments relate to a topic that is deserving of extended attention. Nevertheless, any extensive consideration regarding the need for the reform of strict liability offences in the criminal law jurisdiction would be misplaced as this is beyond the scope of any general discussion relating to decriminalization.

Moreover, in the Australian context, regardless of the underlying intent, these sorts of *ad hoc* legislative actions seem to be largely counterproductive.[106]

The proposition of 'decriminalisation' must commence with a simple acknowledgment that it was wrong to criminalise cannabis in the first place and especially misguided to do so in a manner that is not primarily concerned with the arbitration of justice but rather the suppression of immorality. This wrongheaded approach must be acknowledged and a range of more adequately formulated public interest observations developed.[107] It is these priorities and principles that will inform any legislative project that seeks to engage in effectively decriminalising cannabis in a jurisdiction, not assessments relating to politics or public relations. This is why all of these matters have been so thoroughly canvassed in prior parts of this text.

Decriminalisation in a state jurisdiction must provide for a new state legislative framework as well as the repeal and amendment of a range of existing enactments. For the many reasons explored already, it is not possible to simply amend the current system. Moreover, decriminalisation efforts will necessarily extend to include matters that are currently regulated in accord with the federal TGA framework (as it pertains to cannabis). This is because the public interest observations that are evidently informing this legislative framework are malformed as they seem to be more concerned with protecting the citizenry from harms that are not evident or have never been experienced, and not on the provision of equitable, cheap and hassle-free access to cannabis for those who wish to use it for medicinal purposes.

In accord with these observations, the focus of the discussion immediately below is on rationalising the current legislative environment pertaining to cannabis within a particular state jurisdiction in a manner that serves to entirely remove the regulation of cannabis from the criminal jurisdiction. Yet this option does not extend to supporting the full legalisation of cannabis. This is why this discussion commenced with a focus on current debates in the US between an expressed preference for decriminalisation only, and a fully legal regime. (Moreover, this discussion paper is agnostic regarding the resolution of this debate in the Australian context, but not regarding the urgent need for such a conversation to immediately commence.)[108]

Clear Ministerial and Administrative Oversight

It is suggested that in the short to medium term all of the oversight provisions for cannabis be vested in a single administrative body under the control of a single minister. It is suggested that this need not continue into the longer term, however consideration of all of the state oversight regimes in the US indicates that such a course is advisable. This is because it is very easy for a jurisdiction to squander both the financial and public interest benefits that can accompany a decriminalisation project. This can happen either by making the journey in a thousand incremental steps, which often results in a massive overburden of arcane regulation and so undue administration and expenditure, or by failing to implement the new regime in an orderly and staged fashion that serves to remove the topic from political contention. In accord with these considerations, in the Australian context it is suggested that the appropriate course of action would be to vest oversight of the cannabis regulatory regime in a new administrative body that is tasked solely with implementing (in a staged and orderly fashion) the transition to a decriminalised regime.

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[106] See 'Introduction: our Scattershot Legislative History' 22.

[107] See 'Existing Malformed Public Interest Propositions' 30, & 'Ten Adequately Formulated Public Interest Observations' 31.

[108] This discussion paper is agnostic regarding this debate simply because there are persuasive opinions advanced that support each of these policy positions. Moreover, each can be fully supported by much the same well-informed and adequately formulated public interest observations that were the focus of Part Four of this text. See 'Ten Adequately Formulated Public Interest Observations' 31.

Table 7. Option six. A decriminalised state oversight regime.

unregulated civil regulatory regime criminal offence (fine/gaol) ✓= regulatory or criminal oversight regime →	X = civil or criminal penalties apply	X	X	↓ ↓ ↓
Use				
✓	**Prescription authorised**			
	Use cannabis medicinally (nonprescription)			
	Use cannabis (unrestricted)			
Possession				
✓	**Prescription authorised**			
	Possesses cannabis (restricted by weight)			
✓	**Possess cannabis (unrestricted)**	X	X	
Cultivation				
	Grow medicinal cannabis under licence			
	Grow medicinal cannabis commercially (highly regulated)			
✓	**Grow medicinal cannabis commercially (regulated)**	X	X	
	Grow recreational cannabis commercially (highly regulated)			
✓	**Grow recreational cannabis commercially (regulated)**	X	X	
	Grow medicinal cannabis at home (restricted by number)			
✓	**Grow cannabis at home (restricted quantity)**	X	X	
✓	Grow cannabis at home (unrestricted quantity)	X		
Production of therapeutic & medicinal compounds				
	Compound therapeutic products commercially (under licence)			
✓	**Compound therapeutic products at home (personal use)**	X	X	
✓	**Compound therapeutic products at home (small scale commercial)**	X	X	
✓	**Compound therapeutic products commercially (highly regulated)**	X	X	
✓	Compound therapeutic products commercially (lightly regulated)	X		
Trade				
✓	**Prescription restricted trade in medicinal cannabis and compounds**			
✓	**Non-commercial (interpersonal) trade (restricted)**	X	X	
✓	Non-commercial (interpersonal) trade (unrestricted)	X		
	Licensed exclusive retail trade in medicinal cannabis and compounds			
	General commercial trade in medicinal cannabis and compounds (highly regulated)			
✓	**General commercial trade in cannabis (highly regulated)**	X	X	
✓	Commercial trade in cannabis (unrestricted)		X	

A *Cannabis Act*

Best practice in statutory drafting indicates that an act of parliament providing for the decriminalisation of cannabis should provide a range of legal declarations and authorisations in a relatively concise fashion, with most of the detail then being provided in a range of regulatory declarations relating to each of the primary implicated areas of regulatory oversight. The entire scope of a civil regulatory system in a state jurisdiction in Australia can thus quite appropriately be ordered by reference to a

single state *Cannabis Act* (eg) and a series of associated regulatory enactments (ie, *Cannabis Act Regulations*).[109] By considering the various matters that such a *Cannabis Act* would have to canvass, it is possible to touch upon most of the remaining aspects of a decriminalised oversight regime that will likely be consequential in the Australian context.

1. The preamble

In accord with the suggestions advanced in the introduction to this part of the text,[110] the Act will provide a preamble which clearly describes the public interest principles and observations that have served to inform the enactment, as well as the constitutional and civil rights deficiencies in the current system that the enactment serves to address and correct.

2. Cannabis is decriminalised

An Act that serves to decriminalise cannabis use in a state is a historic event with substantial laudable legal and civil rights outcomes. It is thus important that such an enactment commence with a declaration of the intended *principle legal effect*.

This should be in the form of a concise declaration such as:

This Act provides that in accord with the provisions contained herein, the use, cultivation, trade, gifting, possession and transport of cannabis in [the jurisdiction] will no longer be subject to criminal sanction or penalty.

This section would also be a suitable vehicle for providing authorisation for an ongoing law reform effort. Such an authorisation could similarly take the form of a short declaration, but with a number of appended authorisations for particular remedial law reform efforts. It need say no more than:

> It was wrong to criminalise the use of cannabis. The [] parliament has thus issued an unequivocal apology for the actions of past legislatures relating to the unfortunate manner in which inappropriately formulated criminal offences have occasioned unjust and inappropriate outcomes. In remediation, the minister is thus authorised to promulgate regulations pertaining to:
>
> 1. the automatic removal of records relating to convictions for the personal use, possession and cultivation of cannabis from the court records, and
>   1.1. providing an avenue for those who have been convicted of more serious cannabis related offences to have their criminal record similarly treated, and
> 2. providing an ongoing brief to the law reform commission in the state to consider strict and absolute liability form offences and their appropriateness in a contemporary common-law criminal jurisdiction, and
> 3. promulgating new guidelines for the police and judiciary pertaining to cannabis, and
> 4. promulgating guidelines for Local Council areas pertaining to cannabis, and
> 5. taking such actions as might be necessary to inform the citizenry regarding the benefits attending the new cannabis oversight regime.

3. Medical

A section in the act should also be provided that addresses the current prescription only federal

[109] Thus providing for the *Cannabis Act Regulations (Cannabis Dispensaries)*, the *Cannabis Act Regulations (Cultivation)*, the *Cannabis Act Regulations (Cultivation for Personal Use)*, the *Cannabis Act Regulations (Revenue and Record-keeping)*, etc. A *Cannabis Act Amendments Act* will likely also be a necessary ancillary action after the state solicitors office has had a chance to troll through all the legislation in a jurisdiction and compose and propose particular appropriate amendments (however this is mostly a matter of administrative and not legal consequence). The s51 legislative authorisation that is currently in place enabling the federal government to regulate matters pertaining to 'medicinal' cannabis may also need to be separately amended so as to avoid any ambiguity regarding the new state legislative (and regulatory) regime.

[110] See 'Guiding principles & political strategies' 62.

system. The nature of individual actions by a state legislature pertaining to cannabis is a matter that is largely unfettered by the federal regime. This is because the provisions of the federal TGA framework only apply in the various state jurisdictions to the degree that a state government has not already asserted regulatory control of any particular matter.[111]

Therefore, a state decriminalisation project (with or without the concurrence and assistance of the federal authorities) has three options for dealing with the current prescription only federal regime.

- It can be left undisturbed (excepting to the degree that there are contradictory provisions, where federal enactments will give way to the state regulation).
- The legislation which provides for the referral of powers can be amended to preclude matters pertaining to cannabis.
- The legislation providing the referral of powers can be amended to provide for dual oversight.

The final option is likely the one that most closely accords with best practice in the Australian legislative context, as it is an approach that most closely accords with the tenets of cooperative federalism. Nevertheless, regardless of the option selected by a legislature, as the state enactment is being informed by a range of public interest observations that are distinctly different to those that are currently enshrined in the TGA framework, for the many and various reasons that are canvassed in the introduction to this part of the text, clearly describing these differences can only have a beneficial impact.

4. Cultivation

It is essential that the cultivation of cannabis at home for personal use is not neglected. However, overseas experience is helpful in illustrating that undue regulatory zeal is likely the most consequential avoidable mistake, not a lack of action.

In a majority of US states the cultivation of cannabis at home for personal use is legal. In general terms, in the majority of these states the initial regime introduced was usually highly extemporised and often extended to prescribing how many plants may be grown, how mature they could be, how they could be grown, where they could be grown, and how the property had to be secured. But in mature or long established and maturing regulatory environments,[112] this oversight regime is invariably liberalised.

There is no social benefit to be gained by closely supervising the gardening activities of the citizenry. However, the experience in comparable places indicates that Australian legislatures will nevertheless initially provide a range of prescriptive stipulations relating to the cultivation of cannabis at home that are not just superfluous but which in effect serve to inhibit an orderly and swift transition to a legal marketplace. In Australia these stipulations will be considered to be both politically necessary and in accord with past practice. Which might make these constraints explicable, but not rational or excusable.

So it is important to once again stress that overseas experience indicates that any regulations so

[111] This is because (as was earlier noted) the federal authority to legislate regarding therapeutic and medicinal matters pertaining to cannabis is entirely contingent on the ongoing assent of the state legislatures. Therefore, it was proposed that any prudently cautious assessment of the current scope for government action (that might facilitate the liberalisation of cannabis laws in Australia) must acknowledge that the federal government cannot unilaterally act to either decriminalise or legalise the cannabis marketplace in Australia. Rather, effective government action that serves to liberalise the oversight regime relating to cannabis can only be accomplished (to a limited extent) by state legislative action in isolation, or by joint state and federal legislative action. These observations thus inform the discussions occurring in this part of the text directly. See particularly 'A pragmatically limited scope of authority' 3 & 'Implications attending a legislative referral of power to the Commonwealth' 11.

[112] See *Table 3: Cannabis in the USA – medicinal* use only 45, & *Table 4: Cannabis in the USA – fully legal access* 46.

restrictive that an individual has to resort to purchasing their cannabis on the black market are extremely counterproductive to the public interest. The introduction of a well-designed oversight regime that is entirely decriminalised, and so which allows for the cultivation of cannabis at home in quantities sufficient for people to be largely self-sufficient, alongside a well-regulated dispensary system, effectively serves to eliminate the illegal trade in cannabis. These laudable outcomes can either be hindered or hastened, depending on the manner in which the cultivation of cannabis is addressed. With these observations in mind it is suggested that the regulatory regime currently in place in Oregon[113] might provide for an appropriate template for domestic action.

5. Trade - gifting - use - possession – compounding

It is essential that

- the personal use of cannabis,
- the small-scale interpersonal trade and gifting of cannabis,
- the personal possession of cannabis,
- the transportation of cannabis, and
- the compounding of medicinal cannabis products at home for personal use,

all be matters that are canvassed in particular terms.

In accord with a legislative ambition that seeks to eliminate further instances of injustice due to legal arbitrariness, the Act will need to provide precise definitions for all of these activities and a clear indication of what might constitute an unauthorised or an illegal action in relation to cannabis in the new regulatory circumstances.

Use: There is no need for the state to regulate the personal use of cannabis. Therefore, it needs to be stipulated in unequivocal terms that the ingestion of cannabis by whatever means and for whatever personal purpose is a legal action.

Non-commercial trade: (ie, gifting): unless accompanied by precluded intent & action (ie, commercial trade in a knowingly unauthorised fashion) the gifting or donation of cannabis is a matter that is accompanied by no evident social harm. Therefore, it needs to be stipulated that the gifting of cannabis (in accord with the promulgated regulations) is a legal action.

Possession: Similarly (and for similar reasons), unless accompanied by precluded intent & action (ie, the intent to trade in a knowingly unauthorised fashion *and* actions in furtherance) the possession of any amount of cannabis should be considered to be of no legal consequence, and so it is appropriate that a simple declaration to this effect be included within the Act.

Transportation: A state jurisdiction has only the facility to arbitrate regarding the form of the criminal law within their own jurisdictional boundaries and to a limited degree regarding the conduct of their citizenry in other jurisdictions. Consequently, while an isolated state jurisdiction can authorise the transport of cannabis for personal reasons within the jurisdiction and can authorise the transport of cannabis across state lines, this does not bind any other state or overseas jurisdiction. This needs to be acknowledged in clear terms.[114]

Compounding: It is suggested that there is an evident need to provide in the regulations a legal facility for individual and non-commercial cooperatives to compound and distribute medicines

[113] Allowing for a household to possess 24 oz (680g) of usable cannabis on hand as well as twenty-four mature plants and eighteen immature in the ground.

[114] This is one of the reasons why, absent joint federal state cooperation, intrastate cooperation is the next best option, with isolated state action being the least preferable approach. So while isolated action within a single state may be necessary, when assessed in accord with the principles of cooperative federalism it is still the least appropriate of the three available approaches.

containing cannabis. Moreover, it is suggested that in any jurisdiction which is motivated with a particular desire to suppress the illegal trade in cannabis, then they will ensure that there are few barriers to entry into the legal sector and that there is a thriving public interest community who are providing medicinal cannabis to those who cannot grow it at home and/or afford to purchase it from either an authorised *or* an unauthorised source.

It is additionally suggested that only in the most extreme cases where there is an obvious intent to engage in black market activity need there be a provision for any criminal offence. (With the rationale of the criminal offence in question being formulated in accord with earlier comments relating to the reform of the criminal jurisdiction.)

6. <u>The regulation of a commercial sector</u>

The establishment of a whole new commercial sector requires that new provisions will have to be formulated pertaining to matters such as cultivation, wholesale, retail and taxation. Yet while extensive new regulations are unavoidable, there is no need for these to be overly complex, onerous or punitive.

Luckily, there is no need to be either bold or novel. Legislatures in Australia can simply choose the most appropriate and efficacious types of provisions and solutions from the wide variety that are currently in place in other jurisdictions. The following notes regarding the main concerns that will need to be addressed are intended to be indicative and not exhaustive. The descriptions that follow describe a generic 'decriminalised' regulatory regime for cannabis that employs the US dispensary model.

The form of the provisions in a Cannabis Act: The bulk of the regulatory provisions that will be promulgated in accord with a *Cannabis Act* will invariably be focussed on providing for the establishment and oversight of a commercial sector associated with cannabis. But this does not mean that the authorising Act itself need be too detailed or prescriptive. Best practice in statutory drafting suggests that the series of authorisations in the Act be clear, concise and unambiguous. Yet this does not mean that they should be overly detailed. The place for detail is in the accompanying regulatory provisions.

Cannabis Dispensaries: In general terms, a cannabis dispensary is a retail outlet that predominately (but not exclusively) sells cannabis and cannabis products to authorised customers. Customers are commonly allowed to try the product on the premises (and many have a 'smoking lounge' that is equipped for such a purpose). In most instances there is a main serving counter with a number of varieties of cannabis in large jars or glass fronted display cabinets. Smoking implements and paraphernalia (and sometimes refreshments) are also sold. In some US states and in Thailand dispensaries also often sell consumable items containing cannabis.

The dispensary model of cannabis retailing was pioneered in California more than three decades ago and has subsequently been exported all around the world. As this is the case, the regulatory problems that will need to be addressed if such a system is adopted can be assessed in accord with the actual lived experience in many other jurisdictions. Therefore, rather than striking out in a whole new direction, it is suggested that Australian jurisdictions should closely examine and mimic the more successful aspects of the dispensary system in the US and other jurisdictions. Additionally, it is suggested that many chemists would likely welcome the facility to retail cannabis products.

Rather than limiting the number of licences issued in accord with an arbitrary number, it is suggested that limiting the number of licenses in each local government area is a better approach. This serves to guard against an unwanted proliferation of retail outlets in commercially desirable locations while also promoting a more geographically equitable distribution of dispensaries.

The approach of the Hawaiian legislature is commendable in providing for not just a licence for

retail dispensaries in isolation but also coupling this licence with the facility to commercially cultivate cannabis in one or two locations. By also providing for all cannabis dispensaries in the state to purchase from all the licenced growers in the state, this very soon provided for a commercial sector that is both appropriate and largely (state) self-sufficient.

In Thailand: The dispensaries currently trading in the Thai kingdom will be of great interest to the commercial sector and regulators in Australia. A) The attention of the commercial sector is warranted as the retail environment in Thailand is a newly established *fully legal yet minimally regulated system* where there are now more than five thousand dispensaries in operation. Consequently, this provides for a situation where these many retail outlets have been set up and are currently trading in a fashion that has been largely unencumbered by anything but the most basic of regulatory impositions. Thus, this retail sector is the only one in evidence where the main shaping factors are commercial rather than regulatory. B) Australian legislatures should note the pleasing and commendable cleanliness and uniformity of presentation across all the cannabis retail outlets in the Thai kingdom. Fostering this uniformity is a commonplace adherence to very similar schemes of presentation and also the requirement that all retail premises must have a large sign on display listing the cannabis varieties that are on sale, along with indicative prices and information regarding potency. The government provides a testing service to assist retailers in adhering to these requirements.

Authorisation for purchase: There are two reasonably well-developed and tested systems available for policing access to a new dispensary system. In Thailand, if you are an adult and are not pregnant or breastfeeding, you are allowed to purchase cannabis. The only stipulation is that the purchaser must provide identification and sign a purchase register. In California this problem was encountered and solved by the issuing of a 'Medical Cannabis Card' that served to authorise purchase. This card was issued to anyone who could provide valid ID and was happy to declare that any cannabis purchased would be used for medical purposes. At the same time, the indicative definition of what might provide for a 'medical' use of cannabis was broadened substantially.

Either approach is feasible in the Australian context (ie, access via a card or declaration upon purchase), as long as the system is equitably and lawfully established. This could be accomplished by providing access to all adult citizen who produce a valid photo ID and sign a declaration that any cannabis that is purchased will be used 'lawfully'. Simple yet equitable stipulations such as these would effectively serve to preclude the potential for further civil rights abuses whilst also abiding with the Australian constitutional system.

A black market: A regulatory regime which is being formulated to oversee a retail sector is not a suitable vehicle for addressing the concerns of a legislature regarding the black market except in one peripheral yet nevertheless significant fashion. If the regulatory response allows for the easy entry of growers and retailors into the marketplace by not providing for overly onerous regulatory provisions, while simultaneously legalising the growing of cannabis at home for personal use, this at once removes the commercial benefit that might be gained by engaging in illegal trading.

For the same reasons that our society is largely untroubled by a huge black market in vegetables, in a decriminalised environment there is no great commercial benefit available to those who might want to cultivate or trade in cannabis in an unauthorised fashion. This is simply because it gradually but inexorably becomes far more cost efficient to produce high quality product legally than illegally. This is why the illegal cultivation of cannabis has virtually disappeared in places like Colorado and Washington State.

Commercial cultivation: The Act will have to authorise the issuing of licences to grow cannabis for sale in the new dispensary system. However, it is essential that the regulations pertaining to the cultivation of cannabis for commercial reasons be developed anew as the requirements attending a decriminalised and criminalised regime are substantially different.

For example, there is no need for a regulatory regime to consider matters such as security. Society does not decree the security arrangements required for the production of apples, pears, or currants. While these are all nice things that people may like to steal, theft is still not a matter that is extensively addressed in the regulations pertaining to the growing of these products. A similar approach is warranted with the oversight regime pertaining to cannabis.

Restrictive licencing regimes: The initial regulations associated with the introduction of a dispensary system often stipulate that only a set number of licences for growing and selling cannabis will be issued. In the Act it is recommended that such an approach be avoided and rather enable the responsible Minister to simply promulgate regulations pertaining to this sector.

This caution is prompted by consideration of the trajectory of regulatory provision that has been evident in all the jurisdictions that now seem to have a mature and relatively well-developed system of oversight. The tight regulation of these factors (ie, regarding the number of participants in various parts of the industry) seems to be a concern that is extensively addressed in an initial regulatory response. Whereas in places like California and Colorado it is relatively easy to get a licence to cultivate cannabis commercially, or retail cannabis commercially, but it is a competitive marketplace. In these jurisdictions the restrictions to entry are mainly commercial and not regulatory.

Overseas experience therefore suggests that if a government authorises the opening of as many cannabis dispensaries and legal commercial growing operations as may be required to fulfil market demand, this will likely occasion a number of public interest benefits very quickly. It will simultaneously suppress the price of cannabis and increase the supply. Which will almost immediately eliminate the majority of black-market activities. It will also instantly foster more equitable access for those who are most financially, geographically and medically disadvantaged.

7. Restrictions

A decriminalised oversight regime pertaining to cannabis is commonly motivated by a desire to satisfy the requirements of the citizenry regarding the provision of cannabis; but not foster the development of a commercialised cannabis retail sector *or promote* the consumption of cannabis. In accord with these ambitions most decriminalisation regimes incorporate a range of restrictions and penalties.

Minors

Often a new offence is introduced that relates to storing cannabis in a manner that allows it to be accessed by children. Some regulatory regimes pertaining to cultivation also require that these activities happen in a fashion that is secure from interference by children. Additionally, almost all regulatory regimes that oversee a dispensary system preclude the sale of cannabis to anyone under the legal age of consent.

Advertising

Most initial oversight regimes outlaw the advertising of cannabis by retail dispensaries in the mainstream media. Excepting for within a dispensary, and direct advertising online, all other forms of advertising are commonly forbidden.

Consumables

Some jurisdictions allow for the sale of edibles and others do not. Some provide extensive regulations pertaining to this activity and some do not. There seem to be no public interest benefits or harms that *need* to be addressed regarding the regulation of edibles aside from those associated with hygiene and food preparation and storage.

Every now and again there is a ‘Gummy bear’ scare in the press in the US (relating to cannabis

edibles in the shape of gummy bears). This has led to restrictions in some jurisdictions relating to some aspects of the production of foodstuffs containing cannabis (even though these many stories in the press are largely unsubstantiated). Nevertheless, it is arguable that some restrictive provisions pertaining to the production of cannabis consumables in candy or lolly shapes are not necessarily unwarranted.

Public use

The initial regulatory regime introduced in some US jurisdictions continued to provide for restrictions on the public use of cannabis outside of dispensary settings and a private residence. In most instances these provisions were soon revisited and commonly scrapped. It is advisable that Australian legislatures learn from these missteps made in other jurisdictions and so avoid enacting similar restrictive provisions. These sorts of oversight provisions only serve to recriminalize aspects of the consumption of cannabis in a manner that provides for further unjust outcomes for (mostly) disadvantaged sectors of the community.

8. Driving

The adoption of a system of control that tests for impairment (such as that which is used in many parts of the US) is far preferable to the current situation in Australia where the merest trace of a cannabis metabolite can lead to the loss of a licence and a substantial fine. Yet this is nevertheless an argument for another forum. As these matters are already quite adequately addressed by other regulatory regimes, there is no need for the Act to consider the matter of driving.

9. Tax

Although activists sometimes stress that there is a potential for a large taxation revenue windfall associated with a move to a decriminalised regime, this is not the case. The revenue benefits that accrue to a government mainly to reductions in court and policing expenditure rather than direct revenue.

Additionally, the rationale accompanying the decriminalisation of cannabis (but not the move to full legalisation) is usually one that is particularly attentive to the need to establish a largely non-commercial marketplace in cannabis for a range of public interest reasons. Among these are the desire to eliminate unjust legal outcomes, ensure equitable access to cannabis for geographically or financially disadvantaged citizens, and eliminating the illegal trade in social intoxicants. In accord with such an ethic, commercial interests are not a priority.

Advocates of decriminalisation only argue that a fully legalised regime actually serves to hinder many of these laudable objectives. By artificially heightening the price for cannabis, a legal system serves to hinder the efforts to eliminate a black market and also provide for equitable access. Nevertheless, legislatures in almost all jurisdictions in the US that have embraced a decriminalised regime are very soon responding to submissions made on behalf of commercial interests that are being driven by a very different set of priorities.

Consequently, the matter of taxation and the potential revenue stream for a government relating to a trade in cannabis is a mater that is fully addressed in the next part of this work which considers a fully legalised oversight regime pertaining to cannabis.

In closing

In summary, some of the beneficial public policy outcomes of the decriminalisation of cannabis in a state jurisdiction include:

- addressing the legal outcome and process inequities associated with the current system,
- addressing the constitutional incoherence of the current system,

- conserving and more appropriately targeting public expenditure,
- inhibiting criminal enterprise,
- lowering the caseload of the courts,
- rationalising the current criminal law jurisdiction,
- acting to remediate past injustice,
- lessening the workload of the police service,
- increasing trust in the police and judiciary, and
- augmenting the domestic and international reputation of the jurisdiction.

Regarding discussions about the shape of legalisation in Australia

A jointly developed state and federal legislative framework, resulting in a comprehensive and uniform regulatory regime, is commonly the best-practice legislative approach in the Australian context. But not necessarily for a process of decriminalisation. In the future, at a point in time when cannabis has been effectively decriminalised in most Australian jurisdictions, then the federal government will certainly have a significant role to play. But before federal government action can be of any effective assistance there is a need to first clean up the mess created by many decades of cannabis prohibition

Once again, for the sake of clarity, there is a need to be quite clear regarding the significant differences between a process of decriminalisation and one of legalisation. A process of decriminalisation is primarily driven by an acknowledgment that a range of prior criminal offences have been incorrectly formulated and thus have been occasioning unjust outcomes. Thus, a process of decriminalisation is necessarily concerned with reviewing and renovating aspects of the criminal law jurisdiction, as well as considering how best society might act to remediate the harm that has been occasioned. Such a process will also necessarily require the formulation of a new regulatory response to ensure just and equitable access to cannabis, but it is not its sole or even primary focus. Whereas a legalisation project is commonly focussed almost exclusively on providing for an adequate and rationally formulated regulatory framework for a legal marketplace. So the debates regarding decriminalisation and legalisation in the US are occurring in jurisdictions where there is an existing legal marketplace in cannabis that includes a retail sector. Which does not apply in Australia. Therefore, to discuss the refining of the regulatory provisions relating to a legal marketplace in cannabis in the domestic context is not just premature but also nonsensical.

There is no legal commercial retail marketplace for cannabis in our country. There is no decriminalisation v legalisation debate occurring in our country. There is just the current ongoing struggle to decriminalise and rationalise our tragically inadequate and unjust system of oversight. As this is a text that is devoted to considering 'cannabis law reform', the focus throughout has been on the current system and available actions that will serve to address the incoherence and injustice that is currently being occasioned. Which renders debates relating to legalisation and the best shape for a legal regime of oversight as matters that are *currently* inconsequential. The struggle for law reform in Australia remains a civil rights and public interest campaign, not a commercially driven or orientated project. Thus, to spend an inordinate amount of time pontificating regarding the potential nature of a legal marketplace in cannabis, prior to there ever being a commercially ordered sale of cannabis over a countertop in our country, would be a simple waste of time.

A federal government can assist the decriminalisation project

A federal government can assist the process of decriminalisation most positively by simply acknowledging that the current system is broken and jurisdictions in Australia are currently in breach of their treaty obligations due to systemic failure. As the current overlay of the TGA system upon the criminal law jurisdictions of the various states is causing outcomes where citizens are being incarcerated in a legally arbitrary fashion, it is incumbent on the federal jurisdiction to acknowledge that this harm is occurring and act to correct this situation.

It was wrong to outlaw cannabis. It was especially wrong to outlaw it in a manner where the tenets of criminal justice were largely ignored. These injustices have not been occasioned by any action of a federal government of Australia, but it is their responsibility to ensure that our systems of governance comply with our international civil and political rights obligations. Therefore, there is an urgent need to both amend the TGA framework to provide for free and equal access to cannabis for all Australian citizens who wish to use it (for whatever reason), and also indicate that the federal government will provide support and assistance to any state jurisdiction that seeks to engage in a program of law reform towards rationalising the law and minimising ongoing harm.

Conclusion

Cannabis use remains illegal even though it is relatively harmless and alcohol use is legal and widely advertised despite its being an undoubtedly dangerous substance. This does not mean that we should outlaw the use of alcohol. But it does illustrate that our current lawmaking efforts pertaining to social intoxicants are not rationally informed or at all equivalently formulated.

For some odd reason, the media and political discourse in Australia is commonly undertaken in a manner that seems to infer that if any actual or potential harm can be demonstrated to be associated with the use of cannabis, then its use must be strictly prohibited, regardless of the financial or civil rights cost to the society. However, we do not formulate our other laws and regulations in such a fashion. Our regulatory systems are not commonly designed to protect against all potential harm, just that which is *reasonably* foreseeable. Except when it comes to cannabis.

The political and media conversations relating to cannabis law reform in our country continue to be oddly and uniquely formulated. Although the proponents of criminalisation constantly talk about the need to protect people and society from harm, the particular nature of the harm is rarely specified, and neither are they anxious to discuss the relative harms attaching to *all* social intoxicants. It is suggested that if any media commentator commenced a conversation with the presumption that because walking in parks occasions death by murder, that all the parklands in Australia should be closed to children and access by adults strictly regulated, the assumptions informing these rather drastic propositions would likely be questioned.

But nevertheless, interspersed with advertisements for fast food and alcohol, conversations relating to cannabis on the commercial media in Australia commonly presume both that the current system is actually protecting the citizenry from personal and social harm and that the unregulated access to cannabis would be 'dangerous' in some unspecified manner. Thus (it is inferred), there is a pressing need to wipe out all non-authorised cannabis cultivation and ensure that anyone who does use cannabis for recreation must be subjected to criminal penalties. Which is all utterly deluded claptrap.

Additionally, when discussing cannabis there is generally an undue focus on children. Many politicians promote the current criminal regime as being necessary to protect 'the children' from the ravages of cannabis. Yet this whole argument is totally beside the point as no legislator in Australia has ever proposed the legalisation of the use of cannabis by children for recreational purposes. Moreover, this entirely misplaced argument makes no sense. If these politicians were actually concerned regarding the ill effects of recreational intoxicants for Australian children, then their focus would be elsewhere. There is precisely zero chance of any adult or child in Australia dying from using cannabis. However, at least sixty children died from alcohol related causes in 2017 alone.[115] Yet these same politicians are not marching in the street to demand that alcohol be banned and alcohol manufacturers and distributors be thrown in gaol 'to protect the children'.

This conclusion largely focusses on the oddly maladjusted nature of the political and media discussions pertaining to cannabis in Australia to stress that this is not merely a byproduct of a wrongheaded system of regulation but rather the reverse. These matters are immensely consequential as badly informed public and political discussions lead to negative legislative outcomes. If the assumptions and presumptions regarding the harms being addressed and the likely efficacy of the actions being

[115] In this year, a total of 1366 people died as a direct result of alcohol consumption and there were an additional 2,820 deaths where alcohol was mentioned as a contributory cause. The deaths are not disaggregated by age except for a subsidiary table which provides a percentage breakdown by age. 1.5 percent of the deaths directly associated or where alcohol was a contributing course were in the age range 15-19 (and so of 4196 fatalities, at least sixty-two were in this age range). All the statistics in this section are drawn from ABS publication 3303.0 - Causes of Death, Australia, 2017. Staff, '3303.0 - Causes of Death, Australia, 2017' *ABS* (web site, 17/12/23) <here> [the URL is omitted in text edition as it is inordinately long].

contemplated are faulty, then it leads to a situation such as that currently in evidence in Australia.

Present circumstances well-illustrate the extremely detrimental impact that malformed public interest observations can have when they serve to inform a substantial legislative action. Misguided public interest principles can occasion the building of huge, unwarranted, irrationally formulated regulatory systems that are incredibly costly, utterly misguided, and serve to occasion unjust outcomes in pursuit of illusory objectives. All of which applies to the current prescription only system in Australia.

When confronted with the need to supply people with cannabis as a medicinal agent, our federal legislators acted in accord with the observation that the personal harms associated with the use of cannabis are so substantial that they warrant tighter controls than currently apply to the sale of alcohol or analgesics. Consequently, the regulatory regime that was constructed is one that tightly controls all aspects of the cultivation and distribution of cannabis so as to guard against the product falling into the hands of the non-patient citizenry (to protect them from potential negative outcomes). Additionally, as these commercial actions have to be strictly separated from any illegal activity of the same sort, cultivation and preparation is undertaken in locked and patrolled premises. As all of this causes domestic production costs to be very high, most of the domestic market is now supplied by overseas growers who cultivate their product in jurisdictions where cannabis is legal. All of which requires an awful lot of very costly regulatory oversight and administration.

It might have been done differently. If the federal legislature had been informed by a rigorous appraisal of both overseas experience as well as the relative harms associated with the use of cannabis, the federal oversight regime could have fostered a range of very different outcomes to those presently in evidence. The same needs could have been adequately addressed by co-legislating with the states to allow for the cultivation and compounding of cannabis products at home. If this was allowed, along with dispensations providing for the legal use, gifting and possession of a reasonable quantity of cannabis for personal use, this would have addressed the same concerns but without the need for the establishment of an entirely new business sector or the massive and costly oversight regime that this requires. This would also have likely provided better and cheaper outcomes for medicinal cannabis patients, diminished the potential for further civil rights violations, assisted in rationalising and streamlining the criminal codes, and served to increase respect for the administration of justice. All while simultaneously *reducing* the amount of red-tape and public expenditure.

This did not happen. Instead, the palpably incorrect proposition that cannabis is a relatively ‘dangerous drug’ is now costing Australia dearly in terms of unwarranted personal hardship, wasted expenditure and forgone commercial opportunity. But why has this occurred? Why are our cannabis laws so inappropriate and malformed? After all, our politicians are (with exceptions) relatively intelligent people. Surely they must collectively understand that the current approach is massively disproportionate, unjust and arcane?

The unfortunate situation is that the majority of our representatives do understand all of these things. This is because for any human being with a functioning brain and eyes the evidence is simply inescapable. More than twelve-hundred people die every year *directly* from the abuse of alcohol. They drink themselves to death, usually in a very public way. So, one in seven of our hospital beds is always occupied as a *direct* result of alcohol abuse. Therefore, as they walk past alcoholics sitting in gutters and living in street camps every day of the week, everybody in our society (including our politicians) cannot help but know that alcohol is a truly dangerous substance. Yet still cannabis remains strictly illegal even while our television channels remain crowded with advertisements for alcohol.

Of course, these blatant hypocrisies are as blindingly apparent to our politicians and media commentators as they are to any man in the street. Yet the political and media discourse nevertheless continues to remain disconnected from any of these real-world observations. Instead, the political and media conversations forever remain focussed on how many angels might dance on the head of a pin and not on the specifics regarding the relative harms attaching to social intoxicants and the nature of

what might be an appropriate and proportionate oversight response. Moreover, where once the tired old 'cannabis is dangerous' talking point may have been engaged naively by misinformed people, in the 2020s it invariably represents the deliberate broadcasting of misinformation as a political tactic.

As a result, civil rights agitators have to become both more mature and less polite. When commentators or politicians assert that cannabis is a dangerous substance then the conversation has to stop right there until the politician acknowledges that this is an incorrect assessment. This is because for as long as this proposition continues to be regarded as a valid public interest observation in the press and parliaments of our land, cannabis law reform will advance no further. This can be stated in a categorical fashion as it is evident that it is this fundamental stumbling block that has impeded all progress for the last several decades. Hence, those arguing in the public interest have to constantly call out and name the basic misconceptions that have created the current situation. This is essential as it is only when the political and media conversation pertaining to cannabis in Australia begins to correspond with that experienced elsewhere in the western world will there be any positive alterations in the law.

Thus, the only way forward is for everyone interested in cannabis law reform in our country to become utterly intolerant of misinformation. If a politician or a media commentator seeks to assert that cannabis is relatively dangerous then they are either grossly mistaken or are knowingly trading in falsehoods for personal or political gain. Either way, the assertion is wrong and socially deleterious and so must not be allowed to stand unchallenged or any conversation informed by such a proposition countenanced. It is akin to beginning a conversation relating to public policy matters with the proposition that: 'Imagine that the sky was purple…'.

Thank you for your attention,

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Appendix 1: A Relative Harms Assessment

Regarding Lethality

The NIH National Library of Medicine website (which describes itself as 'an official website of the American government') notes that:

> According to the World Health Organization (WHO), marijuana is the world's most widely cultivated, trafficked, and abused illicit substance. Approximately 2.5% of the world's population (147 million people) uses it.

This indicates that there are many millions of people across the globe, often in comparable jurisdictions, who are using cannabis frequently. Thus, if there were commonplace deaths or serious widespread consequential health implications associated with the use of cannabis then it is certain that they would be clinically evident. So, it is helpful that the same medical information resource portal provides 'clinical pearls'[116] regarding all the drugs, legal or otherwise, that are commonly used by the citizenry in the US.

Regarding cannabis the NIH advises:

> There is no experimental evidence to determine the lethal dose in humans.[117]

This is notable *as every other drug* listed in the NIH database does describe experimental evidence that serves to indicate a quite precise lethal dose. Moreover, this is not an oversight by one government agency. The Department of Justice/Drug Enforcement Administration (ie, the DEA), in their Factsheet regarding 'Marijuana/Cannabis', when considering 'What are its overdose effects?', also tersely advises that:

> No deaths from overdose of marijuana have been reported.[118]

This is particularly noteworthy as *every other drug* considered in a DEA Factsheet has a quite precise definition of how much of a particular substance is lethal for a human. Moreover, the number of recorded fatalities associated with the use of all the other commonly used recreational drugs are listed in the extensive statistics that are made available by groups such as the Australian Bureau of Statistics, the NIH, the CDC, and the NCHS. Yet none of these databases record any instance of a death due to cannabis toxicity. Not one.

Aspirin and paracetamol kill many hundreds of people in Australia each year, yet they are not commonly described as being 'dangerous'. Which might cause a dispassionate observer to ponder on why it is that cannabis is commonly described in such a fashion. If this designation is employed to infer that cannabis is capable of causing death, regardless of the amount used or manner of ingestion, this is palpably incorrect.

Regarding acute toxicity

Cannabis does not cause death. But does it cause harmful effects that are 'dangerous' or which might otherwise warrant legislative or regulatory intervention?

In considering this matter, rather than seeking out information from groups who are lobbying for the liberalisation of cannabis laws, this discussion paper will continue to quote the information provided

[116] These 'pearls' are described as 'small bits of free standing, clinically relevant information based on experience or observation. They are part of the vast domain of experience-based medicine and can be helpful in dealing with clinical problems for which controlled data do not exist'. See *NIH* 'What is a clinical pearl and what is its role in medical education?' (webpage, 20/11/23) < https://pubmed.ncbi.nlm.nih.gov/18821165/>.

[117] *NIH* 'Marijuana Toxicity – StatPearls' (webpage, 20/11/23) < https://www.ncbi.nlm.nih.gov/books/NBK430823/>.

[118] *dea.gov* 'Drug Fact Sheet' 'Marijuana/Cannabis' (PDF, 20/11/23) < https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf>.

by the two US government agencies that featured in the prior section. Such an approach mitigates against any criticism that only selected 'favourable' sources are being quoted.

The DEA Factsheet regarding 'Marijuana/Cannabis' warns that the possible short-term 'dangers' of using cannabis include:

> - Problems with memory and learning, distorted perception, difficulty in thinking and problem-solving, and loss of coordination
>
> The effect of marijuana on perception and coordination are responsible for serious impairments in learning, associative processes, and psychomotor behavior (driving abilities).[119]

It is observable, however, that these 'dangers' that are being reported by the DEA regarding the short-term effects of cannabis use roughly correspond with the desired effects of the intoxicant that users are commonly seeking out when they use the drug. Moreover, there is no warning that any of these 'short term dangers' persist. Yet when a researcher seeks additional guidance from physicians regarding these matters, then the information provided is far more detailed regarding both short term ('acute') and longer-term health implications, yet it is nevertheless no more alarming.

The National Institutes of Health (NIH) National Library of Medicine (NLM) 'Statpearl'[120] regarding cannabis provides much the same information provided by the DEA but in a more extended and clinically precise fashion. Treating physicians are advised that:

> '**The initial state of acute intoxication** formulates recreational users' symptoms: euphoria, perception alterations such as time and spatial distortion, intensification of ordinary sensory experiences, and motor impairment [ie, 'being stoned']. Not all effects of cannabis intoxication are welcomed by users, as some experience unpleasant psychological reactions such as panic, fear, or depression'.
>
> **'Acute intoxication** also affects the heart and vascular system, resulting in cannabis-induced tachycardia[121] and postural hypotension.[122] CNS and respiratory depression have been noted with high doses in animal models.[123] Studies show that inhaled doses of 2 to 3 mg of THC and ingested doses of 5 to 20 mg THC[124] can cause impairment of attention, memory, executive functioning, and short-term memory'.[125]
>
> **[In children:] '**Doses > 7.5 mg/m2 inhaled in adults and oral doses from 5 to 300 mg in pediatrics can produce more severe symptoms such as hypotension, panic, anxiety, myoclonic jerking/hyperkinesis, [ie, the rapid, brief, spasmodic movement of one or more muscles] delirium, respiratory depression, and ataxia [ie, loss of coordination]. Conjunctivitis is a consistent physical exam finding regardless of the route of administration. In children, neurological abnormalities such as lethargy and hyperkinesis [ie, heightened, sometimes uncontrollable muscle movement] can be

[119] Above n 118.

[120] Which is a resource likely consulted by a treating physician in a US hospital when treating a patient suffering from the short-term acute toxicity effects of any drug. See above n 117.

[121] 'Tachycardia' means that the heart is beating a little faster than normal.

[122] 'Postural hypotension' refers to a drop in blood pressure that accompanies sitting or lying down. So, when you stand up you feel a little dizzy for a moment. There are many things that promote postural hypotension, including getting older.

[123] While these clinical observations have been made regarding (unspecified) high doses in animals, there has never been a fatality reported as a result of the acute toxicity of cannabis. So, these observations regarding actually dangerous clinical effects that are not evident in humans can be dismissed as being outside of the scope of inquiry (which is the effect of cannabis on *human beings*). However, just why such an inconsequential observation might be included in this StatPearl is a matter outside of the scope of this paper but nevertheless well worthy of consideration. If you turn to the StatPearl regarding the acute toxicity effects of alcohol, then the potential but nevertheless never encountered harms that *might be* associated with alcohol are not mentioned.

[124] These are *extremely* low doses. The average small joint, of moderately potency cannabis, containing between half and one gram, will commonly deliver to the user between 75 to 150 milligrams of THC. 'Cannabis-induced tachycardia and postural hypotension' have been observed.

[125] As do a host of everyday activities as well as every other recreational drug in common use in the world.

> signs of life-threatening toxicity'.[126]
>
> **[In general:]** 'Although acute toxicity is uncommon in non-pediatric patients, those who come to medical attention are more likely to have hyperemesis [ie, vomiting], behavioral problems, or a medical emergency such as bronchospasm due to inhalation.[127] There is disagreement about how long these impairments persist after taking cannabis, ranging from hours to days'.
>
> **[Re pre-existing psychotic disorders:]** 'Cannabis intoxication can lead to acute psychosis in many individuals and can produce short-term exacerbations of pre-existing psychotic diseases such as schizophrenia. Psychiatric symptoms observed in some studies include depersonalization, fear of dying, irrational panic, and paranoid ideas'.[128]

Regarding acute toxicity the Australian TGA notes that

> Medicinal cannabis products are generally regarded as having low acute toxicity, however concurrent use of other drugs may mask the effects of cannabis and severe toxicity including adverse cardiovascular effects and death may be under-recognised.[129] In mammals the median lethal dose of THC has been estimated to be >800mg/kg. CBD appears to be of very low toxicity. Doses of 1000mg/kg CBD appear to have been tolerated safely in humans.[130]
>
> Most cannabinoid metabolism occurs in the liver and involves the CYP450 pathway. THC accumulates in fatty tissue and is released slowly from this storage site. It is not clear if THC also persists in the brain.
>
> Medicinal cannabis products are generally regarded as having low acute toxicity, however concurrent use of other drugs may mask the effects of cannabis and severe toxicity including adverse cardiovascular effects and death may be under-recognised. In mammals the median lethal dose of THC has been estimated to be >800mg/kg. CBD appears to be of very low toxicity. Doses of 1000mg/kg CBD appear to have been tolerated safely in humans.
>
> Most cannabinoid metabolism occurs in the liver and involves the CYP450 pathway. THC accumulates in fatty tissue and is released slowly from this storage site. It is not clear if THC also persists in the brain.[131]

The research project mentioned by the TGA as suggesting that it might be possible to link a death with the acute toxicity of cannabis is interesting as the authors of the study did not do so. There was one fatality who was reported to have had cannabis in their system. An 18-year-old male who collapsed with an asystolic cardiac arrest whilst (reportedly) smoking cannabis suffered a hypoxic brain injury *related to prolonged cardiac arrest*. THC was detected in a urine sample taken at the ED after his arrival in a non-responsive state.

The results of this study are summarised in brief below as this study also serves to indicate that acute toxicity is not an issue. The project in question reviewed all the cases of acute recreational drug toxicity reported in ten countries in Europe over the course of six months (between 1st October 2013 and 31st

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[126] Note that there are no recorded instances of lethality due to acute toxicity relating to the consumption of cannabis. Thus, as a general observation this sentence is accurate, but in respect to cannabis in particular it is spurious. There have been no recorded instances of pediatric (or other) fatalities associated with cannabis use, therefore, no symptoms encountered can (by definition) be regarded as 'life-threatening'.

[127] Bronchospasm is when the muscles that line the airways in the lungs tighten resulting in wheezing and other asthma like symptoms. Many factors can cause bronchospasm and it is usually managed with a bronchodilator (the small inhalers used by asthmatics).

[128] It is suggested that instances of 'depersonalization, fear of dying, irrational panic, and paranoid ideas' are not exclusively symptoms of long-term cannabis use but rather are concomitant to 'being human'.

[129] The authors cite Dines, A., et al., Presentations to the Emergency Department Following Cannabis use - a Multi-Centre Case Series from Ten European Countries. 2015 11 *J Med Toxicol*, 415-421

[130] This would require for a person to smoke or ingest several kilos of cannabis of a very very high potency. Thus, there is a propositional lethal dose, however, there have been no reports of acute toxicity occasioning death, so it is interesting that these observations are included.

[131] TGA, Guidance for the use of medicinal cannabis in Australia, *tga.gov.au* (PDF, 5/12/23) 4-5 <https://www.tga.gov.au/sites/default/files/guidance-use-medicinal-cannabis-australia-overview.pdf>.

March 2014). The researchers sorted out from the many tens of thousands of presentations, only those they considered to be *cannabis related*.

- 356 presentations involved either cannabis alone or together with other drugs/alcohol.
    - Thirty-five reported cannabis use only,
        - Eight of these people displayed agitation or aggression,
        - Seven psychosis,
        - Seven anxiety, and
        - Six vomiting.

All were subsequently discharged (or self-discharged) without hospital admission.[132]

Remember, this research project was considering all the reported cases of acute toxicity across ten countries over the course of six months.[133]

Regarding potential long-term harm

Regarding the potential long-term effects of cannabis use the NIH additionally advises treating physicians that:

> Chronic use may lead to long-term effects on cognitive performance, "amotivational syndrome"[134] (loss of energy and a will to work), and respiratory disorders. There have also been various reports of patients presenting with cyclic vomiting syndrome/cannabinoid hyperemesis.[135]

Oddly, regarding the potential long-term harms associated with the use of cannabis, the DEA stress a roughly comparable but slightly expanded series of concerns to those advanced by the National Institute of Health. In their factsheet[136] they advise that:

> Long term, regular use can lead to physical dependence and withdrawal following discontinuation, as well as psychological addiction or dependence. …
>
> Marijuana smokers experience serious health problems such as bronchitis, emphysema, and bronchial asthma. Extended use may cause suppression of the immune system. Withdrawal from chronic use of high doses of marijuana causes physical signs including headache, shakiness, sweating, and stomach pains and nausea. Withdrawal symptoms also include behavioral signs such as:
>
> - Restlessness, irritability, sleep difficulties, and decreased appetite.

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[132] Dines, A., et al., Presentations to the Emergency Department Following Cannabis use - a Multi-Centre Case Series from Ten European Countries. 2015 11 *J Med Toxicol*, [abstract].

[133] Additionally, these figures are almost certainly inaccurate as in almost all instances the actual nature of the drug use occasioning a presentation was staff or self-reported. Moreover, as the study suggests that some people who were violent or aggressive reported that they had only used cannabis, this tends to also lessen confidence in the results as this is not a reaction that is often reported in relation to cannabis use. Yet even if all of the contraindications listed and observed in this study did arise directly from cannabis use alone, it is suggested that this research project would still serve to indicate that while cannabis is not harmless, there are no acute toxicity issues that are commonly associated with its use.

[134] It is hard to understand why a treating physician reading a Statpearl regarding the treatment of the effects of acute toxicity might need to be informed regarding a contentious proposition in the realm of psychology such as 'amotivational syndrome'.

[135] This means moderate to severe vomiting fits. Cyclic vomiting syndrome and hyperemesis are symptoms that are far more commonly observed in chronic alcoholics than cannabis users. In patients where this condition is induced by long-term chronic cannabis use (which is a relatively rare occurrence) the symptoms disappear when the use of cannabis is discontinued. Why this acute and readily treatable syndrome is even mentioned when assessing the potential long-term harms that might be associated with cannabis use is debatable.

[136] *dea.gov* 'Drug Fact Sheet' 'Marijuana/Cannabis' (PDF, 20/11/23) < https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf>.

Assessing the evidence regarding personal harm

According to the ABS,[137] cannabis toxicity is simply not an issue. No deaths or gross bodily injuries have been associated with the use of the substance. Accordingly, the proposition that cannabis use must be tightly regulated to protect the Australian public against lethal harm is spurious. There are some potentially significant personal health consequences that have been associated with the chronic use of cannabis over an extended period.[138] Yet these health implications are relatively minor in comparison with those associated with virtually any other drug or medicinal agent in common use.

Where the NIH advises that 'Cannabis intoxication can lead to acute psychosis in many individuals', this might sound initially alarming. But it is exactly akin to saying that 'drinking too much can lead to acute drunkenness'. Neither the proposition that people drink to get drunk, or that they take cannabis to get stoned, is revelatory. According to the NIH, the term 'psychosis' means 'a collection of symptoms that affect the mind, where there has been some loss of contact with reality'.[139] Thus, it is observable that a degree of 'cannabis induced psychosis' is precisely the reason that users commonly cite for seeking out and consuming the substance. In colloquial terms it is called 'being stoned'. Thus, in public policy terms, there are no novel personal harms[140] that are associated with the recreational or therapeutic use of cannabis that either warrant or are amenable to being mitigated by novel legislative or regulatory action.

Additionally, when assessing the potential personal harms that are credited as being associated with cannabis use by the NIH, it is necessary to recognise that currently in the United States, medicinal cannabis is legal in forty-seven states, three territories and the District of Columbia (D.C.). The recreational use of cannabis is legal in twenty-four states, three territories and the D.C.. Seven states have fully decriminalized its use. Commercial trade and distribution have been legalized in all the state jurisdictions where possession has been legalized. Personal cultivation for recreational use is also (with exceptions) allowed in all the jurisdictions where possession has been legalized.[141] Thus, it is evident that most legislatures in the United States have come to very different conclusions regarding the likely 'danger' of cannabis for personal and social health.

So, in summary, there are appreciable medical harms associated with the use of cannabis. The NIH notes that acute toxicity may be an issue with pre-teen children and that those with pre-existing psychotic disorders should not use cannabis as it may exacerbate their condition. Also, long-term chronic use has been linked to various respiratory ailments. The DEA (a law enforcement and not a medical agency) additionally advises that long-term consequences for the health of chronic users may include 'bronchitis, emphysema … bronchial asthma' and the 'suppression of the immune system'.

But even if all these observations are deemed to be entirely accurate; are these harms that can or should be taken into account when considering the regulation of cannabis? When an assessment of the potential dangers associated with the use of cannabis, and those associated with any other legal or illegal drug are contrasted, the harms and potential negative outcomes attending even the chronic long-

[137] Extensive searches have been undertaken by the author to ascertain the relative harms actually associated with the use of a range of both legal and illegal substances. See, for example, Australian Drug Policy: 'hypocrisy' is not a strong enough word.

[138] Note that this discussion paper simply accepts the observations provided by the DEA and the NIH at face value. However, this does not mean that the project suggests that any or all of these observations regarding the potential health impacts of cannabis, both short and long term, are at all accurate or supported by clear clinical evidence. Rather, the discussion paper canvasses these propositions of harm as representative of *a cautious medical assessment*. Thus, the considerations that are advanced later in the text regarding the nature of the relative harms that might be associated with cannabis use are crafted in accord with these cautious assessments.

[139] *NIH/National Institute of Mental Health (editors),* 'Understanding Psychosis – What is psychosis?' (webpage, 22/11/23) <https://www.nimh.nih.gov/health/publications/understanding-psychosis>.

[140] ie, harm that particular to the use of cannabis and are not also associated with the use of many other legal and illegal substances.

[141] Excepting Delaware, Illinois, New Jersey and Washington state.

term abuse of cannabis are relatively negligible.[142] But of even more consequence, it is evident that the personal harms that do attend the use of cannabis are not amenable to being ameliorated by government action that is restrictive or punitive in nature.

The current oversight regime has not served to impact upon these harms. Neither have earlier, more restrictive regimes. Nor is it suggested that the liberalisation of cannabis laws will serve to ameliorate these harms. Rather, it is proposed that many aspects of human behaviour, including the taking of drugs for recreational purposes which may occasion personal medical detriment, will persist regardless of any restrictive or punitive oversight regime. This indicates that these are matters that are rightfully of concern to physicians and citizens, not legislators, and most certainly not the judiciary.

Moreover, physicians in Australia have drawn similar conclusions regarding the relative harms associated with the use of cannabis. The TGA currently notes that cannabis products that contain THC (ie, including recreational cannabis) display a range of identified 'Adverse effects and potential drug interactions' which indicate that the use of cannabis is contraindicated for those who

- have a previous psychotic or concurrent active mood or anxiety disorder
- are pregnant, planning to become pregnant, or breastfeeding; and/or
- have unstable cardiovascular disease.

Furthermore, patients should be advised that they are not able to drive while treated with medicinal cannabis. Patients should be informed that measurable concentrations of THC can be detected in saliva for many hours after administration.

Assessing the evidence regarding social harm

All the social harms that have been demonstrated as being associated with cannabis use *have already been addressed and mitigated*. The potential risks associated with driving can be (and have been) abated by legislative and regulatory action. All drug use in our society is already strictly controlled in the therapeutic and medicinal sphere, and access to drugs by children, legal or illegal, is already heavily regulated and criminalised. This leaves no remaining 'social harms' associated with the use of cannabis which might be alleviated by available forms of legislative or regulatory intervention. Moreover, these assessments are inconsequential when considering how the use and trade in cannabis *should* be regulated.

Many substances and activities in our society that do serve to cause death and injury to the public, and which cause appreciable social harms, remain lightly regulated. Activities as disparate as drinking alcohol, rock fishing, hang-gliding, skydiving, recreational boating, rock concerts, swimming, organised sport, and camping. All these actions occasion death and injury and require public expenditure on regulatory and physical controls. They all require that our medical and rescue services be well-funded and impose a measurable burden upon our first responder and health care systems. Nevertheless, the idea that they therefore need to be outlawed is simply not compatible with our sensibility of governance.

Our society acknowledges that legislative and regulatory intervention by the state in the activities of the citizenry is only warranted where there is a disproportionate amount of appreciable personal or social harm associated with an activity, or where unregulated activity might be occasioning environmental or commercial harm, or unjust (ie, financially, physically or legally inequitable) outcomes for individuals or a class of individuals. So, we do not tightly regulate the trade in sand, even though it is evident that children die playing in sand piles. Nor do we outlaw spearfishing, or jogging, or walking near bees, even though these activities result in tragic and regrettable fatalities. All of which serves to illustrate that just because both personal and social harms may be associated with a substance

[142] The primary harms that are constantly referred to by cannabis law reform critics generally relate to mental illness

or action does not mean that there is necessarily a public interest in tightly or disproportionately regulating that action or substance. Such a proposition simply does not accord with any long-standing proposition of either Australian law or governance.

It is therefore apparent that our current laws relating to cannabis are not rationally informed. They seek to protect the Australian public from harms that are either not evident, are already addressed, or which are relatively inconsequential. Nor is it the role of the criminal or civil infractions regime to protect the public from all harm that might be associated with the use of a substance. Many hundreds of people die from the ingestion of paracetamol and aspirin each year, yet these substances are subject to no particular criminal sanctions regarding their production, distribution, sale, or use. Yet cannabis use is strictly and tightly regulated and criminalised. This is palpably nonsensical and provides for an incoherence in the law which is serving to inflict ongoing and unwarranted damage upon both individual citizens and the criminal law jurisdiction.

Discussion

Illicit drugs kill almost four hundred Aussies per year. Yes, this is a tragedy for those involved. However, legal drugs kill at least that number of Aussies every week, year after year. By conservative estimates, there is at least one illicit drug death for every fifty-three deaths caused by the legal use of a legal drug.[143] Moreover, during the entire history of our federation, cannabis abuse has caused no fatalities. These are facts that should inform debates regarding an appropriate form of regulation for cannabis.

A 'relative harms' approach to the regulation of potential social harm in the realm of drug law is a scientifically informed methodology that assists in taking just these sorts of relativities into account. It is an approach that provides for a well-defined, peer reviewed process[144] for assessing the degree of absolute and relative harms that are associated with the use of legal and illegal substances in a dispassionate and scientifically informed fashion.[145] Such an approach is not just warranted but also relatively easy to undertake as cannabis is a rigorously studied herb. The literature indicates that it is not a 'dangerous' drug. Moderate use has not been demonstrated to cause significant personal injuries. It does not cause death and overseas experience demonstrates there are no significant social detriments resulting from the liberalisation of cannabis oversight regimes in comparable jurisdictions.

Yet discussion relating to cannabis in the commercial press in Australia has nevertheless become inordinately focussed on the matter of the degree of harm that might be associated with its use. This has served to normalise the proposition that if it can be demonstrated that cannabis can cause any harm or social detriment then – *ergo* – its use must be strictly regulated. However, our society does not outlaw or regulate everything that can cause death or injury; such a proposition is nonsensical. The 'cannabis is a dangerous drug' argument is therefore entirely ungrounded. Whether or not there are any social or personal harms associated with the use of cannabis is a question that is only peripherally related to an assessment of whether or how it should be the subject of regulatory or criminal supervision. The questions that *are* pertinent relate to whether or not there are evident harms that actually require intervention or are amenable to alteration by regulatory intervention of a restrictive or punitive nature.

The failure by legislators to undertake an adequate and thorough relative harms assessment regarding

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[143] Extensive searches have been undertaken by the author to ascertain the relative harms actually associated with the use of a range of both legal and illegal substances. See, for example, Dr Moylan. 'Australian Drug Policy: 'hypocrisy' is not a strong enough word' *AIMNetwork* (web page, 26/11/23) <https://theaimn.com/australian-drug-policy-hypocrisy-not-strong-enough-word/>

[144] See texts such as Nutt, King & Phillips, 'Drug harms in the UK: a multicriteria decision analysis' *The Lancet,* Issue 376 (2010).

[145] eg, see especially Hall, Wayne, et al. Development of a rational scale to assess the harm of drugs of potential misuse. Commentary. *Lancet* (British edition) Issue 369 (2007).

the use and trade in cannabis has led to a moral and legal incoherence in the current oversight regime. As will be considered in the next section, due to the cumulative effect of a great many differently informed acts of decriminalisation in the various jurisdictions, we now have a current legislative system whereby the very same citizen undertaking exactly the same action can be assessed as either criminally culpable or legally blameless depending on the administrative circumstances. This is a legal incoherence that results from discordant and faulty assessments relating to the harms that might attach to using and trading in cannabis.

Consequently, it is suggested that there is a need for any government who might be considering legislative change to first undertake an assessment of the literature (ie, a literature review) relating to the actual physical and social detriments attending the liberalisation of the legal framework in comparable jurisdictions. Such a review is deemed as being essential as there are now a range of comparable jurisdictions where the use of cannabis is subject to various regulatory oversight regimes, including those that are both more and less liberal than the current situation in Australia, as well as many where the use of cannabis is now entirely legal for both medicinal and recreational purposes. Therefore, such a review will provide legislators with factual information regarding the actual harms that have been documented in the peer-reviewed literature as being associated with the liberalisation of an oversight regime in relation to the use of cannabis.

Addressing the moral incoherence of the current legislative environment in Australia is not only of import for the integrity of our systems of justice. It is observable that it is largely because of this incoherence that it continues to be extremely difficult to cultivate any improvement in public sentiment regarding matters such as policing and the police function. Respect for the law and a spirit of community policing are nebulous propositions that are nevertheless of great consequence. The police service and the judiciary rightfully merit our respect and so deserve to be tasked with the oversight of laws and regulations that are both appropriate and just.