

Submission
No 109

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

Organisation: Australian Lawyers Alliance (ALA) NSW

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Impact of the regulatory framework for cannabis in New South Wales

Submission to the Portfolio Committee No. 1 - Premier
and Finance, Parliament of New South Wales

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Who we are

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

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

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

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input to the Parliament of New South Wales' Portfolio Committee No. 1 - Premier and Finance ('Committee') on the impact of the regulatory framework for cannabis in New South Wales (NSW).
2. The ALA agrees with the many medical and public health experts who advocate for a shift in the focus of drug policy from criminal law enforcement to drug policy which focuses on health and social factors associated with drug use, including cannabis use.
3. In this submission, the ALA will address:
 - a. the current approach to cannabis in NSW; and
 - b. ways to enhance the approach to cannabis in NSW – namely, the need for decriminalisation, as well as raising the minimum age of criminal responsibility.

The current approach to cannabis in NSW

4. The use, possession and supply of cannabis is illegal in NSW, with exceptions for medicinal use (and possession for that purpose).
5. However, an alternative approach to addressing cannabis use or possession in NSW currently includes the Cannabis Cautioning Scheme, which will be discussed further in this section of the ALA's submission. We note that anyone supplying cannabis in NSW will still be arrested and prosecuted under the *Drug Misuse and Trafficking Act 1985* (NSW).

Cannabis Cautioning Scheme

6. The Cannabis Cautioning Scheme (CCS) is a *de facto* model of decriminalisation, meaning it has no legislative basis but is governed by the Cannabis Cautioning Scheme Guidelines issued by NSW Police.
7. The CCS was initiated in April 2000 as a response to the 1999 NSW Drug Summit, which questioned the efficacy of arresting people for minor drug offences.²

² NSW Police Force, NSW Government, *Drug Programs and initiatives* (Web Page, 2024) <www.police.nsw.gov.au/crime/drugs_and_alcohol/drugs/drug_pages/drug_programs_and_initiatives>.

8. In this scheme, a police officer has discretion to issue an eligible adult a caution for personal possession of a specified amount of cannabis (or less), rather than charge and prosecute the individual involved. Individuals must admit to the offence to receive the caution. An individual is excluded from the CCS if they have already received two cautions; and/or if they are facing charges for concurrent offences or have prior convictions for violence or sexual offences.³ The formal, written caution itself warns of the health and legal consequences of cannabis use, and provides contact information for the Alcohol and Drug Information Service (ADIS). Contacting ADIS is optional upon receipt of a first caution but is mandatory for individuals receiving a second (and final) caution, as they must attend an education session about cannabis use.⁴ There is no further action taken if the individual does not comply by attending this session, beyond recording non-compliance.⁵ A magistrate may, however, take non-compliance with this scheme into account when determining sentences for other offences.⁶
9. The discretionary nature of the CCS has come under scrutiny.
10. First, concerns have been raised about how NSW Police has treated Aboriginal and Torres Strait Islander individuals in relation to cannabis-related offences. The ALA notes with concern the following statistics spanning the last decade of the CCS' operation which demonstrate this differential treatment of Aboriginal and Torres Strait Islander peoples:
 - a. From 2013 to 2017, despite the availability of CCS, police used their discretion to issue a caution in only 11.41 per cent of cases involving someone of Aboriginal and Torres Strait Islander descent, as opposed to issuing cautions in 40.03 per cent of cases where the individual was not of Aboriginal and Torres Strait Islander descent.⁷
 - b. From 2017 to 2020, NSW Police gave cautions in 12 per cent of cases involving someone of Aboriginal and Torres Strait Islander descent, as opposed to issuing

³ Ibid.

⁴ Ibid.

⁵ Marian Shanahan, Caitlin Hughes and Tim McSweeney, *Australian police diversion for cannabis offences: Assessing program outcomes and cost effectiveness* (Monograph Series No. 66) 59 <www.aic.gov.au/sites/default/files/2020-05/monograph-66.pdf>.

⁶ Ibid.

⁷ Michael McGowan and Christopher Knaus, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts', *The Guardian* (online, 10 June 2020) <www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>.

cautions in 44 per cent of cases where the individual was not of Aboriginal and Torres Strait Islander descent.⁸

- c. The NSW Bureau of Crime Statistics and Research found in 2023 that the cautioning rate for cases involving someone of Aboriginal and Torres Strait Islander descent was 11.7 per cent compared with 43.9 per cent for individuals not of Aboriginal and Torres Strait Islander descent.⁹
- d. We note that those individuals not issued with a caution were then pursued through the court system, where evidence suggests that those of Aboriginal and Torres Strait Islander descent receive harsher sentences.¹⁰

11. Further, allegations of ‘postcode justice’ in the discretionary enforcement of the CCS by NSW Police have been raised after the release of NSW Bureau of Crime Statistics and Research data in December 2020.¹¹ That data revealed that police are using their discretion to issue cautions for cannabis possession – rather than charging individuals, who must then go to court – far more for individuals in areas of Sydney such as North Sydney (75 per cent cautioned), Byron Bay (66 per cent cautioned) and the Northern Beaches (64 per cent cautioned), as compared with the experience of individuals in Penrith (36 per cent cautioned), Newcastle (34 per cent cautioned), Cessnock (28 per cent cautioned) and Singleton (11 per cent cautioned).¹²

- a. Individuals in those latter locations, among others, are more likely to end up facing court for possessing cannabis than individuals in ‘affluent’ and ‘trendy’ locales, where cautions are more readily given out by police.¹³

⁸ Brigitte Murphy and Max Tillman, ‘Study finds Aboriginal adults caught with cannabis more likely to go to court’, *ABC News* (online 12 June 2023) <www.abc.net.au/news/2023-06-12/fewer-aboriginal-adults-cautioned-when-found-with-cannabis/102451008>.

⁹ Adam Teperski and Sara Rahman, NSW Bureau of Crime Statistics and Research, ‘Why are Aboriginal adults less likely to receive cannabis cautions?’, *Crime and Justice Bulletin No. CJB258* (June 2023) <www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CJB/CJB258-Summary-Cannabisc cautioning.aspx>

¹⁰ Michael McGowan and Christopher Knaus, ‘NSW police pursue 80% of Indigenous people caught with cannabis through courts’, *The Guardian* (online, 10 June 2020) <www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>.

¹¹ Damon Cronshaw, ‘NSW crime data shows Cannabis Cautioning Scheme has gone to pot and become a ‘class war’’, *Newcastle Herald* (online, 20 December 2020) <www.newcastleherald.com.au/story/7055185/cannabis-use-class-war-between-the-hunter-and-wealthy-sydney-areas>.

¹² *Ibid.*

¹³ *Ibid.*

Enhancing the approach to cannabis in NSW

12. This section of the ALA's submission will address how the approach to cannabis can be enhanced in NSW – directly through decriminalisation

The need for decriminalisation

13. The ALA considers that a drug policy focused on prohibition or criminalisation is counterproductive.
14. We submit that the total criminalisation of cannabis use in NSW has not worked. This includes the reality that it has not stopped people from continuing to use cannabis in NSW – 11 per cent of people in NSW aged 14 years and above have used cannabis in the last 12 months, and cannabis use among women is increasing.¹⁴
15. Even with the depenalisation and cautioning scheme detailed above, cannabis is still criminalised in NSW. Coupled with the downsides of CCS (also detailed above), the ALA submits that the current regulatory framework for cannabis in NSW is insufficient.
16. **Instead, the ALA supports decriminalisation as an important measure to change the focus from law enforcement to a health-focused legal response to drug use.**
17. From a financial and economic perspective, the policy of criminalisation and prohibition is not sustainable. The significant public expenditure on law enforcement, the courts, community corrections and prisons, as well as the continuing ongoing costs associated with drug consumption, including health issues and mental illness, is not providing sufficient return to warrant its continuation. The ALA submits that these public funds would be better spent on health, housing and social services that will serve to address the underlying causes of substance abuse and the associated social problems that go with it.
18. Public investment in harm minimisation and health responses to drug consumption will result in significant savings for the criminal justice system and improved health and wellbeing for people who suffer from addiction, including dependence on cannabis.

¹⁴ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2022-23* (February 2024), cited in Australian Institute of Health and Welfare, *Use of illicit drugs* (Web report, 23 August 2024) <www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/data-by-region/illicit-drug-use>.

Raising the minimum age of criminal responsibility

19. Children should be supported and nurtured, not incarcerated. The ALA submits that it is not appropriate for children aged between 10 and 14 – formative years of a child’s development – to be under the supervision of the youth criminal justice system in NSW.

20. We note with great concern that Aboriginal and Torres Strait Islander children are disproportionately affected by the status quo across Australia, including in NSW.¹⁵ As the Standing Council of Attorneys-General’s Age of Criminal Responsibility Working Group detailed in their September 2023 report:¹⁶

The rate of Aboriginal and Torres Strait Islander 10-, 11- and 12-year-olds being in detention is 52.8 times higher than that of non-Indigenous 10-, 11- and 12-year-olds. The rate of Aboriginal and Torres Strait Islander 13-year-olds in detention is 30.6 times that of non-Indigenous 13-year-olds.

21. The ALA considers that raising the age of criminal responsibility to at least 14 years is a key measure in reducing the rate of incarceration of young people, especially children.

22. Significant contemporary research indicates that many children aged between 10 and 14 years of age are not at a cognitive stage of development where they are able to appropriately appreciate the nature and significance of criminal conduct and the lifelong consequences of undertaking such conduct.¹⁷

23. As determined by the Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory:¹⁸

Due to their stage of physical and psychological development, children under the age of 14 years engage in increased risk-taking, have poor impulse control, poor emotional regulation and poor planning skills.

¹⁵ See: Australian Institute of Health and Welfare, Australian Government, *Youth detention population in Australia 2023* (Web Report, 13 December 2023); Australian Institute of Health and Welfare, Australian Government, *Children under youth justice supervision* (Web Report, 25 February 2022).

¹⁶ Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) 20.

¹⁷ See, egs, Kelly Richards, ‘What makes juvenile offenders different from adult offenders?’, *Trends & issues in crime and criminal justice* (Paper No. 409, 18 February 2011) 4; Laurence Steinberg, ‘Risk taking in adolescence: new perspectives from brain and behavioural science’ (2007) 16(2) *Current Directions in Psychological Science* 55, 56.

¹⁸ *Royal Commission and Board of Inquiry into the Detention and Protection of Children in the Northern Territory* (Final Report, 17 November 2017) vol 1, 133.

24. The United Nations Committee on the Rights of the Child ('UN CRC') has concluded:¹⁹

Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence.

25. This underscores the need for the minimum age of criminal responsibility to be raised to at least 14 years. The ALA notes that the consensus view of Aboriginal and Torres Strait Islander leaders, communities and organisations is that the minimum age of criminal responsibility should be raised to at least 14 years.²⁰

26. Looking abroad, the ALA refers this Committee to the internationally-accepted minimum age of criminal responsibility, which is 14 years.²¹ The UN CRC has confirmed that raising the minimum age of criminal responsibility ensures compliance with the Convention on the Rights of the Child and that most countries who have raised the minimum age of criminal responsibility in their own jurisdictions have raised the age to 14 years.²²

27. The ALA submits that the evidence and international precedents cast significant doubt on the capacity for children below 14 years to appropriately reflect before embarking on a course of action involving criminal behaviour. Those children, therefore, should not be held criminally responsible for their actions but should be supported through therapeutic and other alternative processes.

¹⁹ United Nations Committee on the Rights of the Child, *General comment No. 24: Children's rights in the child justice system*, CRC/C/GC/24 (18 September 2019) 6 at [22].

²⁰ *Ibid* 27.

²¹ United Nations Committee on the Rights of the Child, *General comment No. 24: Children's rights in the child justice system*, CRC/C/GC/24 (18 September 2019) 6 at [21]; National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2019 – In Their Own Right: Children's Rights in Australia* (Report, October 2019) 238.

²² United Nations Committee on the Rights of the Child, *General comment No. 24: Children's rights in the child justice system*, CRC/C/GC/24 (18 September 2019) 6 at [21].

Aligning with other jurisdictions

28. The ALA notes developments regarding raising the minimum age of criminal responsibility in four other Australian jurisdictions, where those State and Territory Governments have accepted the need to raise the minimum age of criminal responsibility to 14 years:

- a. In Tasmania, the minimum age of criminal responsibility is being raised from 10 to 14 years, along with increasing the minimum age of detention to 16 years.²³
- b. The ACT's Legislative Assembly passed legislation in November 2023 to initially raise the minimum age of criminal responsibility from 10 to 12 years and to then raise the age to 14 years in 2025.²⁴
- c. The Victorian Government will raise the minimum age of criminal responsibility from 10 to 12 years by the end of 2024, and then to 14 years by 2027.²⁵
- d. In the Northern Territory, the Government has raised the minimum age of criminal responsibility from 10 to 12 years,²⁶ but has committed to reviewing that legislation in two years' time with a view to raising it to 14 years.²⁷

29. While the ALA does not support raising the minimum age of criminal responsibility in stages (for example, from 10 to 12 years and then from 12 to 14 years), we contend that the decisions made to raise the minimum age of criminal responsibility in the above jurisdictions demonstrate that Governments across Australia are accepting the medical evidence and international precedents that the minimum age of criminal responsibility must be 14 years.

²³ Tasmanian Government, 'Clear pathway to reform Tasmania's youth justice system' (Media Release, 6 December 2023) <www.premier.tas.gov.au/site_resources_2015/additional_releases/clear-pathway-to-reform-tasmanias-youth-justice-system>.

²⁴ Justice and Community Safety Directorate, ACT Government, *Raising the Age* (Web Page) <www.justice.act.gov.au/safer-communities/raising-the-age>.

²⁵ Premier of Victoria, State Government of Victoria, 'Keeping Young People Out Of The Criminal Justice System' (Media Release, 26 April 2023) <www.premier.vic.gov.au/keeping-young-people-out-criminal-justice-system>; Rachel Eddie, 'State stands by plan to raise age of criminal responsibility', *The Age* (online, 11 March 2024) <www.theage.com.au/politics/victoria/state-stands-by-plan-to-raise-age-of-criminal-responsibility-20240311-p5fbi6.html>.

²⁶ *Criminal Code Amendment (Age of Criminal Responsibility) Act 2022* (NT).

²⁷ Age of Criminal Responsibility Working Group, Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023) 13.

30. The ALA, therefore, recommends that the NSW Government raise the minimum age of criminal responsibility to 14 years. This will better focus resources designated for the criminal justice system and for law enforcement and will reduce the rate of incarceration of young people – including children – such as for offences relating to cannabis.

Conclusion

31. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Parliament of New South Wales' Portfolio Committee No. 1 - Premier and Finance on the impact of the regulatory framework for cannabis in New South Wales.

32. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

Joshua Dale

President, NSW Branch Committee

Australian Lawyers Alliance