Submission No 136

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

Organisation: Conditsis Lawyers

Date Received: 23 May 2024

CONDITSIS LAWYERS

Gosford
P (02) 4324 5688
F (02) 4323 2184
Level 3 Kensmen Building
131-133 Donnison Street
Gosford NSW 2250

conditsis.com
E enquiry@conditsis.com

Sydney
P (02) 9160 4559
Newcastle
P (02) 4058 5844
Wollongong
P (02) 4208 0444

23 May 2024

Committee Chair
Portfolio Committee No. 1 – Premier and Finance
NSW Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: portfoliocommittee1@parliament.nsw.gov.au

Dear Committee

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

1. Thank you for the opportunity to make a submission to the Committee's inquiry into the impact of the regulatory framework for cannabis in New South Wales.

2. Conditsis Lawyers is an established legal practice with staffed offices in Gosford and Newcastle. Our lawyers have been recognised as finalists and winners of various law awards for their outstanding achievements in criminal law.

3. Our two Directors, Manny Conditsis and Michal Mantaj, are Trial Advocates and Accredited Specialists in Criminal Law. Mr Conditsis has been a member of the NSW Law Society Criminal Law Committee and regularly contributes to lawyers' legal knowledge by presenting papers and lecturing at legal education events and seminars. Similarly, Mr Mantaj is a former lecturer in the Traffic Offenders Intervention Program and has been called upon by various media organisations as a commentator regarding criminal and traffic law issues.

4. Both Mr Conditsis and Mr Mantaj have represented accused persons as Advocate across all levels of NSW courts, including murder trials in the Supreme Court and appeals to the Court of Criminal Appeal.

5. This submission is based on our collective experience as Solicitors and Trial Advocates representing individuals from all walks of life in criminal courts across NSW.

Summary

6. We write with a neutral position on the decriminalisation of the possession, cultivation and use of small quantities of cannabis by adults as proposed in the Drug Misuse and Trafficking Amendment (Regulation of Personal Adult Use of Cannabis) Bill 2023 ('**Bill**').

7. We are not medical practitioners or otherwise experts in the medical sciences. Nor are we experts in socioeconomics. Therefore, our submission does not provide any detailed analysis, or indeed address, several of the matters contained in the Terms of Reference ('**ToR**'). Rather, we intend to bring to the Committee's attention matters of law and any broader legal issues relevant to the ToR that ought to be considered by Parliament.

8. Specifically, we will: –

   8.1. Address the provisions of the Bill [ToR 1(g)].

   8.2. Examine how the criminalisation of cannabis use intersects with the criminal justice system, particularly the use of road transport legislation to regulate cannabis use in NSW and the potential injustices that follow. For example, the offence of 'driving with illicit drug (cannabis) in oral fluid' in contravention of section 111 of the *Road Transport Act 2013* attracting absolute criminal liability despite no evidence of driver impairment [ToR 1(d)].

   8.3. Offer potential resolutions to the injustices caused by regulating cannabis under road transport legislation (whether the use is approved medicinal cannabis use or under the proposed Bill) [ToR 1(d), 1(h)].

9. We submit that further inquiry into road transport legislation and the regulation of cannabis use in NSW is required, irrespective of whether the Bill passes both Houses of Parliament.

Provisions of the Bill

10. Firstly, we address the provisions of the Bill.

Purpose

11. The Bill clearly states its intended purpose is to make it lawful (or at least not unlawful):

   11.1. For an adult to possess small quantities of cannabis for personal use,

   11.2. For an adult to cultivate a maximum of six cannabis plants for personal use,

   11.3. For an adult lawfully in possession of cannabis to use the cannabis, and

   11.4. For an adult lawfully in possession of cannabis to give the cannabis, by way of a gift, to another adult.

12. The Second Reading Speech also suggests that Bill will allow adults to reasonably and responsibly grow and use cannabis for:

   12.1. Personal enjoyment or recreational use, and

   12.2. Medicinal purposes.

13. The Bill, if given assent in its current form, will become an amending Act and will only amend the *Drug Misuse and Trafficking Act 1985* ('**DMT Act**'). It does not seek to amend any other Act or otherwise address other facets of the law.

Definitions and small quantity

14. Schedule 1 of the DMT Act provides a comprehensive list of prohibited plants and prohibited drugs with various quantities. Inter alia, the quantities of each prohibited drug or plant determines the maximum penalty and whether such quantity is 'deemed' to be possessed for the purpose of supply. The relevant quantities of cannabis are reproduced in the table below.

Prohibited plant	**Small quantity**	**Traffickable quantity**	**Indictable quantity**	**Commercial quantity**	**Large commercial quantity**
Cannabis leaf	30 grams	300 grams	1 kilogram	25 kilograms	100 kilograms
Cannabis plant — cultivated by enhanced indoor means		5	50	50	200
Cannabis plant —other		5	50	250	1,000
Cannabis oil	2 grams	5 grams	10 grams	500 grams	2 kilograms
Cannabis resin	10 grams	30 grams	90 grams	2.5 kilograms	10 kilograms

15. Under proposed Part 2D, it would not be unlawful for an adult to possess up to 50 grams of cannabis leaf in certain circumstances. It also proposes to make it not unlawful to possess up to six cannabis plants at the adult's residence. Given the purpose of the Bill is to decriminalise possession of *small quantities* of cannabis, it is unclear why the maximum amount of cannabis leaf and plant lawfully allowed would be more than the relevant small quantity amount.

16. For the purpose of proposed Part 2D, '***cannabis***' is defined to mean "cannabis leaf and cannabis plant". This may sit uncomfortably with the current definitions in section 3 of the DMT Act: –

> ***Cannabis leaf*** means any plant or part of a plant of the genus Cannabis by whatever name that plant or part may be called, and includes the achene and seed of any such plant, but does not include –
>
> (a) cannabis oil,
>
> (b) any fibre of any such plant or part from which the resin has been extracted, or
>
> (c) cannabis plant.
>
> ***Cannabis plant*** means any growing plant of the genus Cannabis.

Gifting cannabis provisions

17. The awkwardness of those definitions becomes more prominent in the proposed gifting provisions of the Bill. Proposed section 36ZM would provide –

> (1) An adult who is in possession of cannabis [which includes cannabis leaf and cannabis plant] as provided for in this part may give cannabis as a gift to another adult.
>
> (2) A gift of cannabis must be for not more than 50 grams of cannabis.
>
> (3) To avoid doubt, nothing in this section authorises the sale of cannabis.

18. On an ordinary reading of proposed section 36ZM(1), it seems that an adult in lawful possession of cannabis as provided under Part 2D [which includes both cannabis leaf and cannabis plant for the purposes of Part 2D] could lawfully gift that cannabis to another adult. However, the subsequent sub-sections give rise to ambiguity.

19. The proposed section 36ZM(2) is drafted in such a way that it suggests that it only relates to cannabis leaf because it expressly mentions 50 grams, which appears consistent with the intended meaning conveyed in the Second Reading Speech – we note that the Hon. Jeremy Buckingham says the Bill will restrict "personal possession to 50 grams of dry cannabis and also restricts the gifting of dry cannabis to 50 grams." Nothing in the Bill refers to 'dry cannabis'.

20. Further, 'cannabis' is defined to include cannabis plant for the purposes of proposed Part 2D – but we note that cannabis plants are generally counted per plant, not in weight. This gives rise to ambiguity that the courts will need to resolve. The following queries come to mind:

    20.1. Is it the intent of Parliament to partially decriminalise the gifting of cannabis leaves and/or cannabis plants but no more than 50 grams?

    20.2. If so, how is cannabis plant weighed?

    20.3. Does it include the soil in which the cannabis plant grows?

    20.4. Must the cannabis leaf and/or plant be dried before it can be gifted? – this query does not arise from the Bill itself but from the Second Reading Speech.

21. In our view, proposed section 36ZM is unacceptably ambiguous in circumstances where an individual could face serious consequences, up to and including full-time gaol, if they inadvertently gifted cannabis in such a way not covered by proposed Part 2D (if the Bill is passed) – ignorance of the law is no defence.

Cultivation and possession provisions

22. In terms of cultivation and possession, proposed Part 2D would have the following effect:

    22.1. Decriminalising the possession and cultivation of up to six cannabis plants by an adult in his or her residence. If more than one adult lives in the same residence, then only a maximum of six cannabis plants may be cultivated between those adults at their residence. This is intended to ensure that a single residence is not

cultivating, for example, 18 cannabis plants because three adults live at the residence.

22.2. Decriminalising the possession by an adult at his or her residence of an unlimited quantity of cannabis leaf, provided that the cannabis leaf is from not more than six cannabis plants that have been removed from the medium in which the plants were grown. In our respectful submission, it is unclear what 'removed from the medium in which the plants were grown' in proposed section 36ZK(1)(b) is intended to mean –

22.2.1. Does this simply mean harvesting cannabis leaves from a growing plant?, or

22.2.2. Must the cannabis plant itself be removed from its growing medium (eg, soil) before it is lawful to possess the harvested cannabis leaves?

22.2.3. If so, is the purpose of the provision to ensure that the cannabis plant is dead or incapable of growing further cannabis leaves to be harvested?

22.3. Decriminalising the possession of up to 50 grams of cannabis leaf by an adult at a place other than the adult's residence. It does not matter whether the cannabis leaf in question was acquired from cannabis plants cultivated at the adult's residence or by other means. However, it would be unlawful to possess cannabis leaf at the adult's residence if the cannabis leaf in question was acquired by means other than from the maximum six cannabis plants being cultivated at his or her residence.

Limited to adults

23. In our view, limiting the lawful use and possession of small quantities of cannabis to adults (defined as an individual at least 18 years of age) is a sound and appropriately adapted measure. The measure balances individual freedoms against the desirability to prevent young people from the potential harms of cannabis use while their bodies and brains are still developing. We say that not as medical experts but submit it to be a fact of common knowledge.

24. The approach is consistent with current laws regulating the sale and supply of alcohol to, and the consumption of alcohol by, a minor. However, the Bill does not introduce any new provisions that create an offence for the supply (as a gift) of cannabis to, nor its use by, children. In saying that, we accept that this issue will not be left entirely unregulated.

Penalties for gratuitous supply.

25. Where the specific circumstances set out in the proposed provisions of the Bill are not met, a person could still be guilty and liable to punishment under an existing supply offence pursuant to the DMT Act –

25.1. In the case of supplying cannabis leaf in contravention of section 25(1) of the DMT Act, the relevant maximum penalties are:

25.1.1. 10 years imprisonment or 2,000 penalty units ($220,000) or both if dealt with on indictment.

25.1.2. 2 years imprisonment or 100 penalty units ($11,000) or both if dealt with summarily and the amount in question is not more than the applicable indictable quantity.

25.1.3. 2 years imprisonment or 50 penalty units ($5,500) or both if dealt with summarily and the amount in question is not more than the applicable small quantity.

25.2. In the case of supplying cannabis plant(s) in contravention of section 23(1) of the DMT Act, the relevant maximum penalties mirror the above.

26. In our respectful submission, if cannabis is to be partially decriminalised and treated as being less harmful than other drugs, the penalties should also reflect that change in attitude.

27. Perhaps illustratively, the maximum penalty for supplying on licensed premises or selling alcohol to a minor in contravention of sections 117(1) and 117(2) of the *Liquor Act 2007* is 12 months imprisonment or 100 penalty units ($11,000) or both.

28. One option may be to provide for a lower maximum penalty for a supply of cannabis where the supply is gratuitous.

Road Transport Act 2013

29. The objectives of the Road Transport Act ('**RT Act**') are, inter alia, to improve road safety and transport efficiency and reduce the costs related to administering road transport. However, the RT Act has been, and continues to be, deployed to regulate general cannabis use in NSW.

30. The *Road Transport Legislation Amendment (Drug Testing) Act 2006* introduced random roadside drug testing for the first time in NSW. Relevant extracts from the Second Reading Speech elicit the purpose of introducing roadside drug testing:

> "The bill amends the Road Transport (Safety and Traffic Management) Act 1999 and other legislation to ensure that motorists who take drugs and drive can be detected and penalised just as those who drink-drive."
>
> "The bill gives police the power to drug test drivers **without prior evidence of impairment** in two additional situations—randomly at the roadside or following a fatal crash. "
>
> "Random roadside drug testing will be based on the successful model in place … for random breath testing for alcohol. **Following the introduction of random breath testing … in 1982, … drink-driving became socially unacceptable**. "
>
> "**This bill aims to achieve similar outcomes for drug-driving**. "
>
> "The bill allows police to randomly test drivers for the presence of three illicit drugs in oral fluid. These are speed, ecstasy and THC, the active ingredient in cannabis. **These drugs are illegal, they are the most commonly used drugs in the community**. "

> "**There will be no need for police to prove that a person's driving was impaired**; it need only be proved that the drug was present in the person's sample. This **sends a clear message to motorists that driving with any amount of these illegal drugs in the body is not tolerated**. "
>
> "The bill is consistent with the lemma **Government's commitment to law and order**."

31. To be clear, we do not dispute that random drug testing has a significant role to play in improving road safety by reducing the risk or occurrence of drug-impaired drivers on NSW roads.

32. However, phrases such as *'these drugs are illegal, they are the most commonly used drugs in the community'*, *'driving with any amount of these illegal drugs in the body is not tolerated'* and *'[the] Government's commitment to law and order'* make roadside drug testing, we would respectfully submit, more about deterring drug use all together than improving road safety.

Section 111(1): offence of 'drive with cannabis present in oral fluid, blood or urine'

33. Section 111(1) of the RT Act creates a criminal offence for a person to drive a motor vehicle (or occupy the driver's seat and attempt to put the vehicle in motion, or supervise a learner driver) while, relevantly, cannabis is present in that person's oral fluid, blood or urine.

34. Unlike drink-driving offences, roadside drug testing does not differentiate between the various levels of intoxication. For example, it is not illegal for an unrestricted licence holder to drive with a concentration of less than 0.05 grams of alcohol in 210 litres of breath or 100 millilitres of blood. In effect, the law recognises that a person can have alcohol – an intoxicating substance – present in their system without attracting criminal liability because, apparently, it does not adversely affect road safety.

35. The same does not apply to an offence under section 111(1), where any amount – even trace amounts – of cannabis is sufficient to attract criminal liability despite there being no evidence of actual impairment. In our respectful submission, such regulation of cannabis and driver behaviour cannot be said to promote road safety. Indeed, we further submit that it is an injustice capable of bringing the criminal justice system into disrepute.

36. In our view, the injustices are caused by unnecessarily bringing unimpaired drivers into contact with the criminal justice system to face punitive consequences. In other words, the offence over-criminalises members of the community. We note that the maximum penalty varies depending on whether it is a first offence or subsequent offence:

    36.1. In the case of a first offence – 10 penalty units ($1,100).

    36.2. In the case of a subsequent offence – 20 penalty units ($2,200).

37. There is no term of imprisonment applicable for the offence. However, the imposition of a monetary penalty by a court will automatically cause a criminal conviction to be recorded against the person. Such a criminal conviction may have significant consequences for an offender's employment and future employment prospects. That is particularly concerning in circumstances where the cannabis present is trace amounts and there is no suggestion of actual impairment.

38. Further, upon conviction, the sentencing court is required (ie, not discretionary) to impose a licence disqualification period:

    38.1. In the case of a first offence – minimum three month disqualification.

    38.2. In the case of a subsequent offence – minimum six month disqualification.

39. In our experience, any significant period of licence disqualification (and we submit that even three months disqualification is significant) may have a detrimental effect on an offender's employment. Often, a person will not be able to continue their employment because their role depends on a valid driver's licence. Again, this is particularly concerning in circumstances where the cannabis present is trace amounts and there is no suggestion of actual impairment.

40. Many of our clients charged with driving with cannabis in oral fluid are otherwise upstanding members of the community living a productive lifestyle. Often, an individual will have smoked some cannabis on a Friday night after work, not drive all weekend, then get caught out when driving to work the following Monday morning.

41. In those circumstances, there is never a suggestion from the prosecution that the offender was drug-affected while driving.

42. Indeed, the Magistrates having to sentence these offenders will not uncommonly make it clear that they must be careful to not allow considerations of the potential effect of the relevant drug as an aggravating circumstance because, to do so, would breach the principle in *The Queen v De Simoni* (1981) 147 CLR 383. That is, taking into account a circumstance which would warrant a conviction for a more serious offence. In such circumstances, the more serious offence would be 'drive motor vehicle under the influence a drug' contra section 112(1) of the RT Act.

Absolute liability

43. For a long time, it was understood (or at least assumed) that an offence of driving with a prescribed illicit substance in oral fluid was an offence of strict liability, as are most offences under the road transport legislation. In part, this understanding or assumption was based on the fact that PCA charges are strict liability offences: see *DPP (NSW) v Bone* (2005) 64 NSWLR 735.

    See also *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* 61 NSWLR 305 at [40] and [101] (per Howie J; Spigelman CJ, Wood CJ at CL, Grove and Dunford JJ agreeing).

44. If an offence is a strict liability (as opposed to absolute liability) offence, this means an accused has available the ground of exculpation of honest and reasonable mistake of fact.

45. Where honest and reasonable mistake of fact is available, an accused would be entitled to an acquittal if he or she held an honest and reasonable, but mistaken, belief be in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent: *CTM v The Queen* (2008) 236 CLR 440 at [8].

46. In the present context, an accused could rely on the ground of exculpation if he or she honestly and reasonably believed, albeit mistaken, that there would be no cannabis present in his or her body at the time he or she was driving.

47. In *NSW Police v Carrall* [2016] NSWLC 4, Magistrate Heilpern accepted that the accused had not smoked cannabis at least nine days prior and the accused believed that all the cannabis would have been gone from his system by the date of the alleged offence. In determining whether that was a reasonable belief, his Honour held that the passing of time can only be sufficient where it is completely outside the period of any affect. Nine days is well outside that period. Therefore, the Court acquitted the accused.

48. However, the legal position was recently altered by the NSW Court of Criminal Appeal ('**CCA**') in *R v Narouz* [2024] NSWCCA 14. The CCA in *Narouz* held that the offence under section 111(1) of the RT Act creates an offence of absolute liability.

49. It would not be appropriate for us to cavil with the correctness of the CCA's decision. However, the offence being one of absolute liability has capacity to cause injustice against individuals who honestly and reasonably believed that there would be no cannabis present in their system. It is not inconceivable that a person could unwittingly contravene section 111(1) if the person's drink is spiked with a prescribed illicit drug. Or perhaps a young person's second-hand exposure to cannabis smoke at a house party.

50. The CCA in *Narouz* appeared acutely aware of the issue by suggesting that any injustice could be avoided by sound exercise of prosecutorial or sentencing discretions. In our respectful view, our experience tells us that such reliance is optimistic and would be perceived as unsatisfactory by the community. Even in a case of strong subjective factors pointing towards a non-conviction, the community would not consider it in the interests of justice for an individual to go through the ordeal of navigating the complexities of the criminal justice system, often at a significant financial cost for legal representation.

51. Such injustices will be exacerbated across the broader community if the Bill is passed because a far larger percentage of (unimpaired) drivers will be 'caught out' by laws that on the one hand permit cannabis use, and on the other, criminalise their unimpaired driving for having ingested cannabis some days or weeks before being detected.

52. Even if the Bill is not passed, the injustices will persist as medicinal use of cannabis is currently permitted and not adequately addressed in road transport legislation.

Medicinal use

53. In the case of medicinal use, a person medically prescribed cannabis is at constant risk of committing an offence. Not because their use of cannabis is illegal, but because their legal use of cannabis has effectively created a scenario where their unimpaired driving is policed as criminal behaviour.

54. People in such circumstances will often need to choose between addressing their genuine medical needs and their need to use a car for day-to-day travel. Perhaps public transport may be a viable alternative to a vehicle in the built-up areas of Sydney. However, public transport is insufficient in most parts of the State, particularly regional NSW.

Defence for medicinal use

55. Irrespective of whether the Bill passes, the RT Act needs to be amended to address legal medicinal use of cannabis.

56. Similar to section 111(1), section 111(3) creates a criminal offence for a person to drive a motor vehicle (or occupy the driver's seat and attempt to put the vehicle in motion, or supervise a learner driver) while morphine is present in that person's blood or urine. The maximum penalties mirror that of section 111(1).

57. What makes section 111(3) different to section 111(1) is the operation of sub-sections (5) and (6) –

> (5) **Defence for offence relating to presence of morphine in person's blood or urine** It is a defence to a prosecution for an offence against subsection (3) if the defendant proves to the court's satisfaction that, at the time the defendant engaged in the conduct that is alleged to have contravened the subsection, the presence in the defendant's blood or urine of morphine was caused by the consumption of a substance for medicinal purposes.
>
> (6) **Meaning of consumption for medicinal purposes** In this section, a substance is consumed for medicinal purposes only if it is—
>
> (a) a drug prescribed by a medical practitioner taken in accordance with a medical practitioner's prescription, or
>
> (b) a codeine-based medicinal drug purchased from a pharmacy that has been taken in accordance with the manufacturer's instructions.

58. It is surprising that similar provisions have not been inserted to address the use of medicinal cannabis in the context of driving offence when medicinal cannabis was first legislated for by the Commonwealth Parliament in 2016 (although we note our awareness of the Road Transport Amendment (Medicinal Cannabis) Bill 2023).

Proposed resolution

59. In our respectful submission, there are a number of ways that Parliament can address the intersection of cannabis regulation in NSW and road transport legislation to strike an appropriate balance. We submit that the Government and/or Parliament (as is applicable depending on the action to be taken) should do one or more of the following:

59.1. Implementing policies to change the way we police these sorts of offences. For example, encouraging police officers to exercise their discretion to issue penalty notices for drivers with cannabis in their system who are clearly not drug-affected.

59.2. It follows that the RT Act will need to be amended to ensure that Transport for NSW cannot suspend drivers under section 59 for receiving a penalty notice for an offence against section 111(1) of the RT Act involving the presence of only cannabis in their system. By limiting any amendment this way, Transport for NSW will not be prevented from suspending a driver if they are fined under section 111(1) involving another prescribed illicit drug.

59.3. Amend the RT Act to remove delta-9-tetrahydrocannabinol (also known as THC) from the definition of 'prescribed illicit drug'.

59.3.1. This could be justified as a natural consequence consistent with the law recognising the lawful use of cannabis for personal recreational and medicinal purposes as proposed by the Bill.

59.3.2. Particularly if the Bill is passed, the Local Court will likely see a significant increase in defendants charged with offences under section 111(1) of the RT Act for cannabis use, which will only add to the Local Court's caseload and exacerbate delays. Consideration must be given to the potential impact changes in the law may have on judicial officers and court staff.

59.3.3. Importantly, the removal of delta-9-tetrahydrocannabinol (THC) from the ambit of section 111(1) would not alter the current law in relation to prosecuting people driving under the influence of alcohol or any other drug (including delta-9-tetrahydrocannabinol) in contravention of section 112(1) of the RT Act.

59.4. Amend the RT Act to expressly state an offence under section 111(1) is an offence of strict liability (not absolute liability).

59.4.1. This way, an accused can raise an honest and reasonable mistake 'defence' in circumstances where sufficient time has elapsed since the drug in question was last ingested to be completely outside the period of any affect, as suggested in *NSW Police v Carrall*. This can be as simple as inserting a subsection to the following effect:

Insert after section 111(2) –

(2A) The offence created under subsection (1) is an offence of strict liability. To avoid doubt, it is available for a defendant in a prosecution for an offence against subsection (1) to raise an honest and reasonable mistake of fact as to the existence of a prescribed illicit drug in the defendant's oral fluid, blood or urine.

59.4.2. In the alternative, the availability of an honest and reasonable mistake defence may be limited to offences concerning the presence of only cannabis in a person's oral fluid, blood or urine. That is, it would not be available with respect to the other prescribed illicit drugs (speed, ecstasy and cocaine) or a combination of any one or more of them with or without cannabis. An amendment may be to the following effect:

Insert after section 111(2) –

(2A) The offence created under subsection (1) is an offence of strict liability if it relates only to delta-9-tetrahydrocannabinol (also known as THC). In all other circumstances, subsection (1) is an offence of absolute liability. To avoid doubt:

(a) it is available for a defendant in a prosecution for an offence against subsection (1) to raise an honest and

reasonable mistake of fact but only if the honest and reasonable mistake of fact is in relation to the existence of delta-9-tetrahydrocannabinol in the defendant's oral fluid, blood or urine, and

(b) a defendant cannot raise an honest and reasonable mistake of fact if the court is satisfied beyond reasonable doubt that there was present in the defendant's oral fluid, blood or urine another prescribed illicit drug or a combination of any one or more prescribed illicit drug.

59.5. Whilst this alternative approach of a limited strict liability offence would arguably be a manufactured legal fiction, it would strike a balance between road safety and recognising the lawful use of cannabis in certain circumstances. It also maintains a general deterrent against the use of other illegal drugs that cannot, in any circumstances, be lawfully consumed.

59.6. Amended in either of the two ways proposed, it would avoid over-criminalising individuals who are not driving under the effects of cannabis to be of any real danger to road users and are otherwise persons of good character.

59.7. Amend the RT Act to decriminalise the presence of low levels of cannabis in a person's system, which is akin to how current laws address levels of alcohol intoxication.

59.8. Amend the RT Act to provide a defence for medicinal cannabis use akin to the current provisions relating to the medicinal use of morphine (see above).

60. We appreciate that Parliament may not be ready to remove cannabis from section 111(1) until such time there is technology available at mass production (and at an economical cost) for the accurate roadside testing of cannabis levels. Despite that, it is our respectful submission that it is incumbent for Parliament to expressly state that section 111(1) of the RT Act is an offence of strict liability to avoid the injustices of criminalising individuals under the guise of road safety legislation who have ingested cannabis several days prior to driving after the effects have completely worn off – this is particular so for individuals who have used cannabis lawfully, whether under the proposed Bill or under current laws permitting medicinal use.

61. In our view, irrespective of whether the Bill passes, section 111(1) of the RT Act should be an offence of strict liability, which is not inconsistent with the general principles of criminal law. Nor would it adversely affect road safety by being a strict liability offence – we note that the offence was generally accepted as a strict liability offence until the CCA in *Narouz* decided otherwise. As such, road safety was appropriately balanced with the offence being one of strict liability for more than two decades before that decision was handed down.

Conclusion

62. We ultimately submit that a balance must be struck between the lawful possession and use of cannabis against the over-criminalisation of society. The present Bill does not strike that balance because partial decriminalisation will consequently over-criminalise motorists under current road safety legislation.

63. Until such time that there is an acceptance of a level of risk for low levels (similar to alcohol) to be present in a person's system and/or sufficient capability to test (roadside) the level of cannabis present in a person's system, the Bill should not pass.

64. Those issues aside, we have identified that the Bill contains a number of drafting issues that must be addressed before it is ready to receive assent.

We thank the Committee for considering our submission.

Yours faithfully
CONDITSIS LAWYERS

Francis Caesar Devine
Associate | Criminal Law

Authorised by Emanuell Conditsis & Michal Mantaj