

Submission
No 203

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

Organisation: Aboriginal Legal Service (NSW/ACT) Limited

Date Received: 5 June 2024



**Aboriginal
Legal Service**
(NSW/ACT) Limited

5 June 2024

Committee Chair
Portfolio Committee No. 1
NSW Parliament
6 Macquarie St
Sydney NSW 2000

By email: PortfolioCommittee1@parliament.nsw.gov.au

Dear Chairperson,

Re: Impact of the Regulatory Framework for Cannabis in New South Wales

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**).

The ALS is a proud Aboriginal Community-Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. More than 280 ALS staff members based at 27 offices support Aboriginal and Torres Strait Islander people through the provision of high quality and culturally safe legal assistance, including court representation in criminal law, children's care and protection law, and family law.

We also deliver a variety of wrap-around programs including bail support, mental health referrals, family violence prevention, and child and family advocacy. We represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court and provide a variety of discrete civil law services in tenants' advocacy, assistance with fines and fine-related debt, discrimination and employment law.

The ALS is the Justice Peak on the NSW Coalition of Aboriginal Peak Organisations and a key partner in Closing the Gap. We represent community interests in our advocacy for the reform and transformation of systems which impact on the lives of Aboriginal and Torres Strait Islander people.

We welcome the opportunity to make a submission to the Inquiry into the Impact of the Regulatory Framework for Cannabis in New South Wales.

Decriminalisation

The ALS supports evidence-based law and policy reform, particularly reform recognising the evidence that drug use must be approached a health and social issue which requires a health and social response, rather than a criminal justice response. We continue to call for the urgent implementation of all recommendations of the *Special Commission of Inquiry into the Drug 'Ice'* (2020), including the decriminalisation of drug possession for personal use.

Approaches to drug use which emphasise harm minimisation and reduce criminalisation are essential to address the mass incarceration of Aboriginal and Torres Strait Islander people in NSW. Figures released in May 2024 by the [NSW Bureau of Crime Statistics and Research \(BOCSAR\)](#) reveal the highest number of Aboriginal adults in prison on record in NSW, with Aboriginal people making up 31% of the adult prison population and Aboriginal children making up two-thirds of the youth detention population.¹

¹ Bureau of Crime Statistics and Research, [NSW Custody Statistics: Quarterly update March 2024](#) (Full Report, 14 May 2024).

The NSW Government is no longer on track to meet its commitments under the National Agreement on Closing the Gap to reduce the over-imprisonment of Aboriginal and Torres Strait Islander young people by 2031. As outlined below, Aboriginal and Torres Strait Islander people in NSW are far less likely to be ‘diverted’ from criminal sanction by police, and more likely to be arrested and charged for low-level drug possession than non-Aboriginal people.

Public Attitudes to Cannabis Decriminalisation

Cannabis use is not uncommon in Australia. The *National Drug Strategy Household Survey 2022-23* found that, in 2022–2023, 11.5% of people in Australia had used cannabis in the previous 12 months, equating to around 2.5 million people, and that 2 in 5 people (41%) had used cannabis at some point in their lifetime, the highest proportion since data collection began in 2001.² In NSW, more than 1 in 6 people had used an illicit drug in the past 12 months, with cannabis remaining the most commonly used illicit drug in NSW.³

The survey also found that public attitudes towards both cannabis decriminalisation and legalisation are increasingly positive. Since at least 2010, the majority of the Australians have supported the decriminalisation of cannabis possession.⁴ In 2022-23, the proportion of people who believed that possession of cannabis should not be a criminal offence reached an all-time high of 80%, support for legalisation of cannabis increased to 45%, and the proportion of people supporting legalisation was higher than the proportion of people supporting increased penalties for sale or supply of cannabis.⁵

Despite increasing public acceptance of cannabis use, penalties for possession in NSW are punitive and no longer align with public attitudes. Possession of a small quantity of cannabis (any amount under 30 grams)⁶ is subject to a maximum penalty of two years imprisonment and/or a fine of \$2,200 under the *Drug Misuse and Trafficking Act 1985 (DMTA)*.⁷ Similarly, possession of a small quantity of cannabis plants (up to 5 plants) can attract a term of imprisonment of up to 10 years and/or a fine of \$220,000.⁸

Impacts of Cannabis Decriminalisation

Decriminalising cannabis would lead to significant cost savings for NSW. Research shows that it costs the NSW Government approximately \$977 per prosecution for an offence involving a small amount of drugs, however, this amount would be halved if a cautioning scheme was extended to all drug types.⁹

Decriminalisation of cannabis has not led to an increase in cannabis use in other jurisdictions. In January 2020, the ACT Government decriminalised possession of small amounts of cannabis, the use of cannabis in the home, and cultivation for personal use for people aged 18 years and above.¹⁰ Despite these changes, the proportion of the population using cannabis in the ACT has remained stable and, in the 2022-23 period, cannabis use amongst the ACT population was lower than cannabis use in the rest of Australia.¹¹

On 29 November 2023, the Drug Misuse and Trafficking Amendment (Regulation of Personal Adult Use of Cannabis) Bill 2023 was introduced in the NSW Legislative Council. The proposed amendments make

² Australian Institute of Health and Welfare (AIHW), ‘[National Drug Strategy Household Survey 2022–2023: Cannabis in the NDSHS](#)’ (Web Article, 29 February 2024).

³ AIHW, ‘[National Drug Strategy Household Survey 2022–2023: State and Territory summaries of alcohol, tobacco, e-cigarette and other drug use](#)’ (Web Article, 29 February 2024).

⁴ AIHW, [National Drug Strategy Household Survey 2022–2023: Cannabis in the NDSHS](#)’ (Web Article, 29 February 2024) Figure 5.

⁵ Australian Institute of Health and Welfare (AIHW), ‘[National Drug Strategy Household Survey 2022–2023: Cannabis in the NDSHS](#)’ (Web Article, 29 February 2024).

⁶ *Drug Misuse and Trafficking Act 1985 (NSW) (DMTA)* Schedule 1.

⁷ DMTA ss 9–10, 21.

⁸ DMTA ss 22–23, 30–31, 32(1)(h), where prosecution or accused elects to deal with on indictment.

⁹ Anh Dam Tran, Don Weatherburn and Suzanne Poynton, ‘The savings associated with decriminalisation of drug use in New South Wales, Australia: A comparison of four drug policies’ (2023) 149 *Journal of Substance Abuse Treatment*.

¹⁰ Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (ACT).

¹¹ Australian Institute of Health and Welfare (AIHW), ‘Cannabis in the NDSHS’ [National Drug Strategy Household Survey 2022-23](#) (Online Report, 29 February 2024).

it lawful to possess small quantities (under 50 grams) of cannabis in public and for personal use, possess up to six cannabis plants for personal use and give small quantities (under 50 grams) of cannabis to another adult by way of a gift. The ALS is supportive of the intent of the Bill to reduce reliance on criminalisation as a response to possession of cannabis for personal use.

Aboriginal People in NSW Do Not Benefit from Diversionary Schemes

Current diversionary options for possession of cannabis fail to divert Aboriginal and Torres Strait Islander people from criminalisation, and police discretion in NSW is more likely to lead to punitive outcomes for Aboriginal and Torres Strait Islander people than non-Aboriginal people. For example:

- Aboriginal and Torres Strait Islander people are more likely to be subjected to punitive ‘proactive’ policing practices in public places than non-Aboriginal people and are over-represented at every stage of the criminal process in NSW.¹²
- NSW Police officers are more likely to conduct strip searches of Aboriginal people,¹³ use force against Aboriginal people,¹⁴ and more likely to charge Aboriginal adults and young people with criminal offences than to utilise diversionary options,¹⁵ including charging for conduct such as possessing small quantities of cannabis.

There are options available to NSW Police to ‘divert’ persons found possessing drugs into education and/or treatment instead of pursuing criminal charges.

The Cannabis Cautioning Scheme provides police with discretion to issue a caution instead of proceeding with criminal charges. A person can only be cautioned twice and cannot be cautioned at all if they have prior convictions for serious drug offences.¹⁶

The Early Drug Diversion Initiative similarly provides police with a discretion to issue up to two \$400 on-the-spot fines for persons found possessing small amounts of drugs as an alternative to criminal prosecution. The person can choose to pay the fine, attend court or may have their fine waived if they engage in a telehealth consultation about their drug use.¹⁷

Young people under 18 years of age are not eligible for the above diversionary schemes but can be diverted for possession of a small quantity of cannabis under the *Young Offenders Act 1997 (YOA)*.¹⁸ Police have the discretion to issue a warning under s 8 or a caution under s 18. A warning provides a broad discretion to police officers and does not preclude a child from being given a warning for possession of a small quantity of drugs due to prior offences or police diversions. It operates as a formal warning but has no conditions attached.¹⁹ In comparison, cautions require the young person to admit to the offence and a young person cannot receive more than three cautions (whether from the police or the court).²⁰

¹² See, eg, NSW Bureau of Crime Statistics and Research, [Aboriginal over-representation in the NSW Criminal Justice System quarterly update December 2023](#) (Report, April 2024) which found that the rate of imprisonment of Aboriginal imprisonment in NSW is nearly 10 times the rate of imprisonment for non-Aboriginal people and that the rate of bail refusals by police for Aboriginal adults and young people continues to increase at a faster rate than court bail refusals.

¹³ “[Data shows] Aboriginal people are disproportionately represented – making up 14% of all searches but 3.4% of the state’s population”: Tamsin Rose, [‘NSW police strip-searches of Indigenous people rose 35% in past 12 months and included 11 children, data reveals’](#) (*The Guardian*, online, 17 October 2023).

¹⁴ Christopher Knaus, [‘NSW police use force against Indigenous Australians at drastically disproportionate levels, data shows’](#) (*The Guardian*, online, 31 July 2023),

¹⁵ Caitlin Fitzsimmons, [“Like a snare”: Indigenous young offenders more likely to be prosecuted for same crimes’](#) (*Sydney Morning Herald*, online, 30 November 2022); Adam Teperski and Sara Rahman, [Why are Aboriginal adults less likely to receive cannabis cautions?](#) (Bureau of Crime Statistics and Research, Crime and Justice Bulletin No CJB258, June 2023).

¹⁶ New South Wales Police Force, *Drug Programs and Initiatives*, ([Web Page](#)).

¹⁷ *Ibid.*

¹⁸ YOA ss 8(2A), 13.

¹⁹ YOA Part 3.

²⁰ YOA Part 4.

Despite the availability of these diversionary options, Aboriginal and Torres Strait Islander adults and young people in NSW are less likely to benefit from diversion than non-Aboriginal people. The ALS routinely provides court representation to clients charged with low-level cannabis possession. Between February 2021 and February 2024, our solicitors appeared in over 5000 court matters where a client was charged with possession of a small quantity of cannabis. Data shows that NSW Police are more likely to charge Aboriginal young people with criminal offences than to utilise diversionary options,²¹ including charging for conduct such as possessing small quantities of cannabis.

A 2023 study of the Cannabis Cautioning Scheme by BOCSAR found that Aboriginal people are significantly less likely to be eligible for a cannabis caution than non-Aboriginal people (21.6% compared to 54.3%).²² Amongst those deemed eligible for the Cannabis Cautioning Scheme:

- Use of cautions varied significantly between Police Area Commands, ranging from rates of 35% to 85%;²³
- Only 39.5% of Aboriginal persons received a caution, compared with 73.9% of non-Aboriginal people;²⁴
- The majority of the disparity for use of cautions between Aboriginal and non-Aboriginal persons could be linked to individual characteristics such as prior court appearances or time in prison;²⁵ and
- When accounting for individual characteristics and other factors, Aboriginal people were still slightly less likely to receive a cannabis caution.²⁶

The study concluded that broadened eligibility criteria, a reduction in scope for police discretion and policies which address the overrepresentation of Aboriginal people in the criminal justice system are required to address the discrepancy in cautioning rates between Aboriginal and non-Aboriginal people.²⁷

Court Diversions

There are mechanisms for courts to 'divert' adults and young people charged with possession of cannabis and other drugs from criminal liability. For example, the Magistrates Early Referral into Treatment (**MERIT**) is available for adults who have pleaded guilty to an offence in the Local Court and face challenges in relation to their use of alcohol and other drugs. MERIT incorporates drug or alcohol treatment into the sentencing process and is available at various locations across the state.²⁸

Aboriginal people are far less likely to be diverted at court for cannabis possession than non-Aboriginal people:

²¹ Caitlin Fitzsimmons, [“Like a snare”: Indigenous young offenders more likely to be prosecuted for same crimes’](#) (Sydney Morning Herald, online, 30 November 2022).

²² Adam Teperski and Sara Rahman, 'Why are Aboriginal adults less likely to receive cannabis cautions?' (2023) no. 258 *Crime and Justice Bulletin* 9.

²³ Ibid 13.

²⁴ Ibid 11.

²⁵ Ibid 15.

²⁶ Ibid 16.

²⁷ Ibid 1.

²⁸ 'The Magistrates Early Referral into Treatment (MERIT) Program', Local Court of New South Wales, ([Web Page](#), 8 May 2023).

Table 1. Incidents of Use/Possess Cannabis in NSW in 2023²⁹

Charge	Method of proceeding	Age	Aboriginal	Non-Aboriginal	Unknown	Total
Possession and/or use of cannabis	Proceeded against to court	Under 18	158	176	0	334
		Adult	1605	5718	14	7337
		Missing / unknown	3	7	0	10
		Total	1766	5901	14	7681
	Court diversion [^]	Under 18	144	725	2	871
		Adult	202	2496	18	2716
		Missing/ unknown	1	7	0	8
		Total	347	3228	20	3595

The Children’s Court also has the power to divert children who have been proceeded against to court by police by way of warnings, cautions and Youth Justice Conferences under the YOA for eligible offences. However, as noted above, the YOA currently provides that a young person is only eligible to receive a maximum of three cautions in total. Our experience and available data show that Aboriginal children are more likely to exhaust their available cautions earlier than non-Aboriginal children. BOCSAR data for January to December 2022 showed that Aboriginal children were more likely to receive a caution from police than non-Aboriginal children (5043 vs 2436 cautions) and the number of non-Aboriginal children receiving warnings (2889) was **far greater** than the number of Aboriginal young people receiving warnings (889).³⁰ Aboriginal children are also more likely to receive a Youth Justice Conference under the YOA (466) than non-Aboriginal children (364), numerically out-ranking non-Aboriginal children in relation to the most onerous YOA diversion available despite the far smaller numbers of Aboriginal children in the population.

We recommend that the cap on the maximum number of cautions under the YOA be removed to address the current structural discrimination against Aboriginal young people who would otherwise be eligible for diversion in relation to cannabis possession.

Harms of Contact with the Criminal Legal System

Although there are less punitive options available to sentencing courts for both adults and young people found guilty of minor drug offences – such as non-conviction orders for adults under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999*, and dismissals for children appearing before the Children’s Court pursuant to s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* – any contact with the criminal legal system is harmful and has significant and long-term impacts for our clients.

For young people, early contact with the criminal process increases the risk of adult imprisonment.³¹ For adults, the recording of a criminal conviction for possession of cannabis has long-lasting impacts which limit a person's ability to fully participate in the community for many years beyond the expiration of any sentence that is imposed by a court.

²⁹ NSW Bureau of Crime Statistics and Research. Reference: sr24-23559. N.B. 'Court diversion' includes: Criminal Infringement Notice, Youth Justice Conference, Caution Young Offender Act, Cannabis Caution and Warning Young Offenders Act.

³⁰ BOCSAR Reference: ac23-22377 (NSW Recorded Crime Statistics Jan to Dec 2022, 'Table 2. Number of proceedings under the Young Offenders Act initiated by NSW Police by postcode of incident, Aboriginality* of person of interest^, type of YOA proceeding, and proportion that were a warning (excl. transport regulatory)').

³¹ Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 173, 176 – 177.

The NSW Ice Inquiry observed the “negative consequences of having a criminal record for simple possession are completely disproportionate to the underlying conduct.”³² A criminal conviction can lead to:

- loss of employment or preventing a person from being employed in a certain field, in a certain role and/or by certain employers (e.g. working with children);
- revocation of certain licences, or preventing a person from being able to obtain such licences in future (e.g. a security licence) which may further limit employment opportunities;
- exclusion from jury service if convicted of certain offences;
- exclusion from serving as a company director if convicted of certain offences;
- implications in family law proceedings involving the custody of the person's child.

While the ALS is supportive of all law and policy reform which may divert Aboriginal and Torres Strait Islander people from courts and prisons, existing police diversion schemes rely on the exercise of police discretion which is exercised inequitably in respect of our clients, and any contact with police and criminal courts can cause long-term harms. Decriminalisation of cannabis possession at law is essential to reduce the criminalisation and punishment of Aboriginal people for cannabis possession.

Recommendation 1: The NSW Government should implement all recommendations of the *Special Commission of Inquiry into the Drug ‘Ice’* (2020), including the decriminalisation of drug possession for personal use.

Recommendation 2: The NSW Government implement Recommendation 14.5 of the Australian Law Reform Commission *Pathways to Justice* inquiry, that police practices and procedures—particularly the exercise of police discretion—are reviewed by governments so that the law is applied equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples. This should include review and reform of police cannabis cautioning and other drug diversion schemes with a view to:

- Expanding the eligibility criteria to reduce structural discrimination against Aboriginal people and other marginalised groups;
- Imposing greater constraints on police discretion to choose not to divert a person who is otherwise eligible; and
- Increasing the use of police diversions of all kinds for cannabis possession, particularly where it relates to an Aboriginal or Torres Strait Islander adult or young person.

Recommendation 3: The NSW Police review and amend relevant training, standard operating procedures and guidelines in relation to drug cautioning and diversion schemes with a view to increasing the number of Aboriginal and Torres Strait Islander people diverted from criminalisation for low-level drug possession.

Recommendation 4: The NSW Government amend the *Young Offenders Act 1997* to remove the limit on the number of cautions a young person may receive.

Driving Offences and Cannabis Use

The ALS recommends legislative amendment in relation to the offence of driving with the presence of cannabis (THC) present. Under s 111 of the *Road Transport Act 2013*, it is an offence for a person to drive a motor vehicle while they have a prescribed illicit drug in their oral fluid, blood or urine. The

³² Dan Howard, State of NSW, *Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine-Type Stimulants Volume 1* (Report, January 2020) xxxiv [62].

offence carries a maximum penalty of \$2,200 for a first-time offence and \$3,300 for a subsequent offence. A recent decision by the Criminal Court of Appeal determined the offence to be one of absolute liability—meaning that a person will be convicted even if they were not aware they had a drug in their system at the time of driving.³³

Prior to this decision, it was not uncommon for courts to interpret the offence as one of strict liability, meaning that if the defendant point to evidence establishing an honest and reasonable mistake of fact as to the presence of a drug in their system, then the prosecution was required to negative that ground before the defendant could be convicted. Evidence shows that it is possible for THC to be stored in the system for days after consumption and there is evidence that concentrations of THC in saliva is a relatively poor indicator of cannabis induced impairment.³⁴

The recent Court of Criminal Appeal authority means that a person can be punished for an offence that they did not know they were committing, without any avenue for relief. It also effectively prevents many individuals from being able to drive at all, as discussed below.

Medicinal Cannabis

Sub-section 111(5) provides a defence for driving with morphine in your system where the substance was consumed for medicinal purposes and under prescription; however, this does not extend to medicinal cannabis.

Figures from the Therapeutic Goods Administration in 2023 show that since medicinal cannabis was legalised in Australia, there have been over 1.17 million prescriptions.³⁵

Under the current law, people using medically prescribed cannabis products containing THC are effectively precluded from driving while they are using lawfully prescribed medicinal cannabis. For those living in regional or rural areas with limited public transportation, this will significantly impact their independence and mobility—requiring them to choose between independence and effective treatment for chronic health issues.

Impacts of Fines & Disqualification

As noted above, drivers convicted of driving with cannabis in their system face a maximum penalty of a \$2,200 fine for a first offence.

There is little evidence to show that fines and penalty notices are an effective tool for achieving behavioural change; furthermore, imposing fine debts on people in poverty can have significant flow-on effects which render them more likely to come into contact with the criminal process, including with fine-issuing authorities.

While sentencing options available to courts include a ‘non-conviction’ order or ‘dismissal’ under s 10 of the *Crimes (Sentencing Procedure) Act 1999*, this is not available to a driver who has previously received a s 10 for various other offences under the *Road Transport Act 2013*.³⁶ This means that if a driver had been charged with driving with a presence of prescribed alcohol in their breath in the prior five years and had the matter dismissed, they cannot have their matter dismissed a second time under s 10.

In addition to a fine, drivers convicted of the offence are disqualified from holding a licence for a minimum of three months and up to a maximum of six months—an outcome which can carry serious consequences for employment, education or access to healthcare.³⁷ If the driver has been convicted

³³ *R v Narouz* [2024] NSWCCA 14.

³⁴ Danielle McCartney et al, ‘Are blood and oral fluid Δ 9-tetrahydrocannabinol (THC) and metabolite concentrations related to impairment? A meta-regression analysis’ 134 (2022) *Neuroscience & Behavioral Reviews* 104433.

³⁵ Stephen Brook and Najma Sambul, ‘More acceptable now’ Medicinal cannabis use rising, passes 1 million prescriptions’, *Sydney Morning Herald* (online, 13 May 2023) citing the Therapeutic Goods Administration.

³⁶ *Road Transport Act 2013* (NSW) s 203.

³⁷ *Road Transport Act 2013* (NSW) s 205(2).

of a previous major offence during the prior five years period, then they are automatically disqualified from holding a drivers licence (subject to the Court specifying a shorter period) for either 6 or 12 months.³⁸

Aboriginal and Torres Strait Islander communities experience disproportionately low levels of driver licensing compared with the general population. The long-standing structural barriers to equitable access to licensing are well-documented and are exacerbated in regional and remote areas where public transportation infrastructure is limited or non-existent.³⁹ For those living in areas with limited public transportation such as regional and remote communities, the lack of a licence can have significant implications for employment, access to healthcare and basic services.

The imperative to drive in communities with low levels of driver licensing and without public transportation infrastructure can lead to secondary criminalisation through fines, charges and imprisonment for unlicensed or disqualified driving. This is a well-documented phenomenon which further entrenches marginalised communities in cycles of contact with the legal system and disproportionately harms Aboriginal communities. In this way, disqualification schemes further exacerbate systemic inequalities in rural and regional NSW.

Recommendation 5: The NSW Government amend s 111 to:

- stipulate it is an offence of strict liability, and
- provide a defence where the person has a medical prescription for cannabis.

Thank you for the opportunity to provide a submission. If you wish to discuss our submission further, please contact policy@alsnswact.org.au

Sincerely,

Aboriginal Legal Service (NSW/ACT) Limited

³⁸ *Road Transport Act 2013* (NSW) sub-ss 205(2) – (3).

³⁹ Australian Law Reform Commission, *Pathways to Justice* (Final Report, 2017) [12.130]-[12.166].