Submission No 222

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

Organisation: Redfern Legal Centre

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Inquiry into the Impact of the regulatory framework for cannabis in New South Wales

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1. Redfern Legal Centre

Redfern Legal Centre (RLC) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. We provide free legal services and education to people experiencing disadvantage in our local area and statewide. We work to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs - to our local community as well as state-wide. Our specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, police accountability, and we provide outreach services including through our health justice partnership.

2. Key concerns

Our submission focuses on terms of reference (b) and (e): the socioeconomic impact of the current regulatory framework for cannabis and the effect of the regulatory framework for cannabis on Aboriginal, LGBTIQA+, regional, multicultural, and lower socioeconomic communities.

2.1 Policing and cannabis possession

A recent paper published by the Bureau of Crime Statistics and Research (BOCSAR) about the Cannabis Cautioning Scheme shows NSW Police were four times more likely to issue cautions to non-Indigenous people.[1] The study found in the five years to 2017, only 11.41% of First Nations people found by police to be in possession of small amounts of cannabis were issued cautions, compared with 40.03% of the non-Indigenous population.

The report points to the Scheme's eligibility criteria as the main factor explaining this disproportionality. For example, because of racist practices and treatment by police and the criminal justice system, First Nations people may be less likely to admit to an offence due to low levels of trust in police and more likely to have a prior conviction, making them ineligible for the scheme.

However, the report notes that these factors alone do not explain the disproportionality:

> *"The unexplained component makes up the remaining 2.9 p.p. (or 8%) of the raw difference, implying that Aboriginal people are still cautioned less than non-Aboriginal people even when both groups have the same observable characteristics" (p 14).*

[1] Adam Teperski and Sara Rahman, June 2023, Why are Aboriginal adults less likely to receive cannabis cautions?, Crime and Justice Bulletin No. CJB258, Bureau of Crime Statistics and Research.

In 2000, NSW introduced the Cannabis Cautioning Scheme (**the Scheme**) to formalise police discretionary powers regarding issuing cautions for minor drug offences. The Scheme was developed in response to a 1999 NSW Drug Summit finding. The Scheme allows police to exercise their discretion in appropriate cases to issue a caution, and warn a person of the health and legal consequences of cannabis use.

A person can only be cautioned twice and cannot be cautioned if they have prior convictions for serious drug offences (unless spent), such as supplying cannabis.

In 2004, BOCSAR raised concerns about the NSW Police not utilising the Scheme sufficiently regarding First Nations persons. BOCSAR found that First Nations persons were over-represented to a much greater extent in charges.[2]

The study also found the Scheme produced "substantial time and cost efficiencies for both the police and the Local Courts, in terms of the time saved at the time of drug detection and the time saved in not having to deal with the matters in court."[3] In the three years since the Scheme commenced, "…. over 18,000 hours, or over $400,000, and the Local Courts have saved at least $800,000 and probably more than $1,000,000."[4] It is more cost effective to keep people out of the justice system when it comes to minor drug possession offences.

First Nations people are ten times more likely to be incarcerated than their non-Indigenous counterparts.[5] The NSW government has made a commitment to address this over-representation under the Closing the Gap agreement.

Considering the disproportionate and unjust treatment of First Nations people within the criminal justice system, which exacerbates the alarming rates of over-incarceration and inflicts profound harm on families and communities, it is imperative to prioritise enhancing the utilisation of programs like the Scheme to divert First Nations people away from the criminal justice system.

2.2 The impact of a criminal conviction

If NSW Police issue a court attendance notice for minor possession of cannabis or driving with illicit drug in a person's system can result in a criminal conviction. Although a summary offence, the penalty for minor drug possession is not insignificant. Under section 12 of the *Drug Misuse and Trafficking Act 1985*, it is an offence to administer or attempt to administer a prohibited drug to yourself. The maximum penalty for this charge is a fine of 20 penalty units and/or two years imprisonment. Under section 10 of the *Drug Misuse and Trafficking Act 1985*, it is an offence to possess a prohibited drug. The maximum penalty for this charge is a fine of 20 penalty units and/or two years imprisonment.

It is an offence under section 11 of the *Road Transport Act* for a person to have any detectable amount of THC (the psychoactive components of cannabis) in their saliva, blood,

[2] Joanne Baker and Derek Goh, 2004, The Cannabis Cautioning Scheme Three Years On: An Implementation and Outcome Evaluation, New South Wales Bureau of Crime Statistics and Research, p 15.
[3] Ibid at p 37
[4] Ibid, at p 37
[5] NSW Bureau of Crime Statistics and Research, April 2024, Aboriginal over-representation in the NSW Criminal Justice System quarterly update December 2023, Statistical Report AOR-Dec2023

or urine whilst driving. A first-time offender will receive a 3-month licence disqualification and an on-the-spot fine of $572 on testing positive.

If a first-time offender challenges the matter in court, it can result in a fine of $2,200 and a 6-month licence disqualification period. For a subsequent offence, a $3,300 fine, and an automatic license disqualification for 12 months (although the disqualification can be longer depending on offence history).

Under the *Criminal Records Act 1991* (NSW), a conviction means a conviction, whether summary or indictable. In New South Wales, the law makes it mandatory for employers in relevant fields to conduct background checks on prospective employees or volunteers.[6] Some employers, licensing, and registration bodies are legally required to screen employees and job applicants for their criminal record and to consider that record in employment decisions.

A criminal record for minor drug possession can be spent ten years after conviction if, during this time, a person has not been convicted of another offence punishable by imprisonment. This is an extraordinarily long period to wait for a criminal record to be deleted for a minor drug possession offence. Even after this period, certain occupations still require disclosure of a conviction, regardless of whether it is spent.

2.3 A move towards a health-based approach

The NSW government recently introduced a new diversion program that allows police to issue on-the-spot $400 fines for personal use and small quantities of drug possession, with fines waived if a tailored drug intervention program is completed.

RLC welcomes the move towards a health-based approach to drug policy and legislation.

A health-based approach to drug policy and legislation must also include adequate resourcing of health treatment.

People living in remote and very remote areas were more likely than those living in major cities to have used cannabis in the previous 12 months (13.2% and 11.7% respectively).[7] Yet, in rural and remote areas, treatment and diversion options for illicit drug use remain extremely limited.

A health-based approach must also ensure that NSW Police do not disproportionately target First Nations people for harsher treatment, enmeshing them in the criminal justice system.

3. Strip searches and minor drug possession

In March 2024, RLC published a report by RLC solicitors Samantha Lee and Josh Raj titled 'The Need for Reform: Strip Searches of Children by NSW Police.' The report collates data

[6] Child Protection (Prohibited Employment) Act 1998 (NSW); Commission for Children and Young People Act 1998 (NSW).
[7] Ibid, see hearing 'Consumption'.

about the number of children strip searched by NSW Police. The data was obtained from NSW Police via freedom of information laws.

The report reveals over a thousand children (aged 10-17 years) have been strip searched by NSW Police within a seven year period from June 2016 to July 2023. The youngest child strip searched was ten years old. First Nations children made up almost 45 percent of children strip searched despite being only 6.2 percent of the population aged 10-17 in NSW. The main reason recorded by NSW Police for conducting a strip search was the suspicion that a person possessed prohibited drugs, accounting for 91 percent of all recorded reasons police conduct a strip search (financial year 2018-2019). [8]

On 21 July 2022, Redfern Legal Centre and Slater and Gordon Lawyers commenced a class action proceeding for people who NSW Police have unlawfully searched at all music festivals in NSW since 22 July 2016. The class action argues that strip searching based on suspicion of minor drug possession is unlawful because the suspicion fails to meet the high legal threshold for conducting a strip search under s 31 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Section 31 provides: A police officer may carry out a strip search of a person if— (a) in the case where the search is carried out at a police station or other place of detention—the police officer suspects on reasonable suspects on reasonable grounds suspects on reasonable grounds that the strip search is necessary for the purposes of the search, or (b) in the case where the search is carried out in any other place—the police officer suspects on reasonable grounds that the strip search is necessary for the purposes of the search and that the seriousness and seriousness and urgency seriousness and urgency of the circumstances urgency make the strip search necessary.

A report by the Law Enforcement Conduct Commission into strip search practices by NSW police outlines the requirement for police not to conduct a strip search unless the officer can satisfy the high legal threshold to conduct such a search. The report states:

> *Even if an officer is satisfied that the threshold requirements for a general search have been satisfied, that officer cannot strip search the person unless the officer also suspects on reasonable grounds that the strip search is necessary for the purposes of the search (s 31 LEPRA).*
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> *This is a distinct and additional requirement to the officer having reasonable grounds to suspect that a search power has been triggered. The officer must reasonably suspect that he or she needs to conduct a strip search, as opposed to just a general search, in order to achieve the objective of the particular search.*

Strip searches are an incredibly invasive practice, particularly when carried out based on suspicion of possession of a minor quantity of cannabis. RLC recommends reform of strip search laws to ensure that strip searches do not occur based on suspicion of a minor quantity of cannabis.

[8] Dr Vicki Sentas and Dr Michael Grewcock, 2019, Rethinking Strip Searched by NSW Police, UNSW, p 4.