

16 September 2024

Portfolio Committee No.1 – Premier and Finance
Legislative Council

Re: NDARC RESPONSES TO QUESTIONS ON NOTICE FROM THE INQUIRY INTO THE IMPACT OF THE REGULATORY FRAMEWORK FOR CANNABIS IN NEW SOUTH WALES

Please find our responses to Questions on Notice from the Public Hearing held on 19 August 2024 below.

Kind regards,

Dr Michala Kowalski & Prof Don Weatherburn

1. **Ms CATE FAEHRMANN:** While you are looking for that, I wonder whether you also look at regulatory frameworks across the country and the differences between when police discretion is and is not allowed. Do you have any comments about that?

DON WEATHERBURN: I don't. That's my colleague's work.

MICHALA KOWALSKI: We haven't compared the cautioning rates for New South Wales and other States. As far as other regulatory schemes, I'm happy to provide them on notice, because I don't want to get this wrong. I do have it, but I didn't bring it to the Committee today. My understanding is, with the exception of Queensland, and that's quite recent, every jurisdiction in Australia has discretion. Even the ACT's wording is "may". I think Queensland's latest amendments have changed it to make that where—I think Queensland's decriminalisation is not discretionary now, but I take that on notice. I don't want to mislead the Committee.

Ms CATE FAEHRMANN: If you could take that on notice, it would be interesting because it potentially indicates a cultural shift. I don't think it could be a lack of awareness of the fact that it exists. These are the questions: regarding police discretion in other States, whether the leadership and cultural attitude within the police force in other jurisdictions is different to ours? I think it would be interesting to consider whether the discretion is applied less often. I have spoken with local area commands in areas with extremely high rates of alcohol and illicit drug use—I won't name them—that weren't aware of the Early Drug Diversion Initiative. This was four months after it was introduced, and the superintendent and the officers weren't using it. Do either of you have any comment about what the police should be informed about and how that occurs? Are they aware of it or not? Again, I hope we will call the police to this inquiry to ask. We shouldn't have discretion if the police aren't using it. It's a failure.

Thank you, we have collated information about the applicable penalties for cannabis possession, and the different diversion schemes for cannabis possession in operation across Australia in the states and territories in Table 1: Applicable penalties for cannabis possession and eligibility for diversion in Australia.

We have included information about applicable penalties, eligibility criteria, police discretion and the 'caution' rate of people who receive a diversion under the scheme in the state or territory.

We note that we only included the 'caution' rate and any further information pertaining to that rate when these data were publicly available. Please see table 1 (pg. 2-3).

Table 1: Applicable penalties for cannabis possession and eligibility for diversion in Australia

State/region	Possession penalties	Severity of penalty	Threshold quantities for personal/ trafficking	Police diversion scheme	Does the scheme mandate police discretion?	Eligibility criteria	'Caution' rate
NSW	Financial penalty, Incarceration	20 penalty units, imprisonment of 2 years of both	Quantities legislated for cannabis: cannabis plant small quantity 5, indictable quantity 50g, commercial 250g (50 if indoor enhanced), commercial large 1,000 (200 if indoor enhanced)	Cannabis Cautioning Scheme	Yes, police are encouraged to exercise discretion and issue a caution.	Use or possess no more than 30g cannabis; 18+; personal use; no other offence involved; no prior convictions for any serious drug offence; no more than two cautions can be issued to an individual - updated Feb 2024	Total caution rate in the state is 37.1%. Total caution rate of eligible people is 70.5%. Caution rate for Aboriginal people is 11.7%, for eligible Aboriginal people it is 39.5%. Amongst non-Aboriginal people, the caution rate is 43.9%, and for eligible non-Aboriginal people the caution rate is 73.9%. Based on eligibility criteria in 2020, which included no prior offences for violent or sexual offences. (Teperski & Rahman 2023)
Victoria	Financial penalty, Incarceration,	5 penalty units 400 penalty units/ 5 years	TQ set at <250g or 10 plants	Cannabis Caution Program	Yes	Use or possess no more than 50g cannabis; 18+; not subject to other charges that cannot be dealt with by a caution or infringement notice; must admit offence; no more than two cautions can be issued - From 2019	Total caution rate in the state between 2010-2011 to 2014-2015 was 65.4%. (Hughes, Seear, Ritter & Mazerolle 2019). Victoria Police in 2020 theorised that approximately 70% of eligible people in the state receive a caution (Victoria Police 2020). The Hon. Anthony Carbines, Minister for Police, said in a written answer in 2023, that the difference in cautioning rates in Victoria between Aboriginal people and non-Aboriginal people is less than 1 per cent. (Carbines 2023)
Queensland	Incarceration, Counselling	<50g one counselling session <500g 15 years 500g> 20 years	<50g drug diversion order. TQ set at <500g or <100 plants	Police drug diversion program	No, if a person is eligible for a diversion they must be offered a drug diversion - as of May 2024. It is worth noting that an eligibility criterion is police reasonable belief that the drugs are for personal use.	Use or possess no more than 50g cannabis; not committed other indictable offences that are related to the use/possession; no prior sentencing for supply, trafficking or production of drugs or precursors; police officer <i>reasonably believes</i> the drugs are for <i>personal use</i> .	Total caution rate in the state between 2010-2011 to 2014-2015 was 36.3%. (Hughes, Seear, Ritter & Mazerolle 2019). At the time, diversion was discretionary, only available for cannabis and was capped at one caution. The new legislation is currently under evaluation, preliminary results will likely be available from 2025.

South Australia	Financial penalty, Counselling, Incarceration	Expiation fee 2 years/\$2000	<100g cannabis, <20g cannabis resin, <= 1 plant	Cannabis Expiation Scheme	No, so long as a person is within the two diversions in four years cap - as of 2018.	Use or possess of no more than 100g cannabis/ 20g cannabis resin/ 1 plant; have received no more than two cautions in the last four years. The expiation fee increases based on the quantity of cannabis found.	When diversion was mandatory, the caution rate in the state was 98% between 2010-2011 to 2014-2015. (Hughes, Seear, Ritter & Mazerolle 2019). The number of cannabis expiation notices more than halved between 2017-2018 to 2021-2022, so the cautioning rate in the state may have been affected. (Manderson 2023). Evidence published in 1997 suggested that Aboriginal young people were less likely to be diverted by a policy caution (Doherty 1997).
Western Australia	Counselling, Financial penalty, Incarceration	Cannabis Intervention Requirement, one session in 28 days, over 14 2 years/\$2000	10 grams or less for diversion. 500g of cannabis, 20 plants	Cannabis Intervention Requirement Scheme	Yes, WA police may issue a CIR notice to an eligible person.	Use or possess no more than 10g cannabis, 14+. 14-17 yr olds are eligible for two CIRs, 18+ are eligible for one CIR.	Total caution rate in the state between 2010-2011 to 2014-2015 was 32.4%. (Hughes, Seear, Ritter & Mazerolle 2019).
Tasmania	Financial penalty, Incarceration, No penalty	2 years/50 penalty units	<50g caution with or without fine. TQs set out as 1 kg for dried or fresh leaf, 20 plants	Illicit Drug Diversion Initiative	Yes	Use or possess no more than 50g cannabis/ 2 plants; 18+; no more than 3 cautions can be issued in 10 years.	Total caution rate in the state between 2010-2011 to 2014-2015 was 68.1%. (Hughes, Seear, Ritter & Mazerolle 2019).
Northern Territory	Financial penalty, Incarceration	2 penalty units 50 penalty units (in public place - 2 years/200 penalty units) 5 years/ 500 penalty units (in public place - 7 years) 14 years	<1g oil, <50g plant, <10g resin or seed	Cannabis Expiation Notice Scheme	Yes	Use or possess no more than 50g cannabis/ 10g hash/ 2 plants/ 1g cannabis oil; not involve use around schools; 17+.	While not quantified in their analysis as ABS data for police actions was not available for the NT, Hughes et al. noted that the NT had the second highest level of pre-court diversion between 2010-2011 to 2014-2015 as only 24.4% of offenders proceeded to court. (Hughes, Seear, Ritter & Mazerolle 2019).
Australian Capital Territory	Financial penalty, Incarceration	Possession of more than a small quantity maximum penalty is 50 penalty units/6 months imprisonment	Can poses up to 50g dried, 150g fresh, 2 plants. Cannot store cannabis where children can reach it.	Drugs of Dependence (Personal Use)	No	Can possess no more than 50g dried cannabis, 150g fresh cannabis, 2 plants	Cannabis possession is no longer subject to a caution in the ACT. While there are still arrests for cannabis in the ACT, the territory had the lowest number of arrests for cannabis in the country in 2020-2021. (ACIC 2023).

2. **The CHAIR:** In terms of the seven models, could you provide us more information on those? And which ones do you think are the best? Which one is the worst? If you had to pick a place in the world that you think is doing it better than other places, where would that be, in your opinion?

MICHALA KOWALSKI: Okay. So the models are not—first of all, this is kind of early work. It's not necessarily the way you are used to thinking about it. We were really looking at what penalties are applicable: Who applies what penalties for what, when it comes to cannabis? We were specifically looking at possession, cultivation—so growing and distribution. So it's when we look at that and see what type of penalties are applicable for those three behaviours, that's when we came up with this idea that there are seven different approaches that people take. One of them is full criminalisation, so criminal penalties are applicable for all three at every scale. That's something we saw in the state of Texas in the United States. That was very rare. I'm not going to speak about Texas, but it's probably not my preferred approach—speaking as myself, not as NDARC.

On the other side, on the other end of the spectrum, you have full legal models. So that would be what you've got in place in Canada. It's what you've got in place in a selection of states across the United States, such as California, Colorado, Washington State. In all those places, you have a legal framework for recreational cannabis. But they still have civil and criminal penalties that are applicable for different proscribed activities, such as large-scale, illicit cannabis grows. Some of the states also still ban large-scale possession. That can still get criminal penalties. If you're found with a large amount of cannabis in your home, you can face criminal penalties in some of these states—something that wouldn't be applicable for, say, hoarding alcohol, for example.

It's worth considering that cannabis is still regulated in a different way, even when it's legal. In between you kind of have this whole different mix of—possession only faces civil or no penalties, but there'll still be criminal penalties for growing or for distribution, and that is how we ended up with the seven. I am happy to provide that on notice. I don't have the full breakdown here. But it's really just about that kind of mix.

Thank you, we have included an excerpt from a presentation of this work at the seventeenth annual meeting of the International Society for the Study of Drug Police (ISSDP) that was held in Tioitià:ke/Montreal, Canada, from 19 June – 21 June 2024 at the University of Montreal Health Centre (CHUM). It includes the different applicable penalties for cannabis possession, production and distribution, and categorises the different 'blends' of penalties for each type of activity as different 'models'. Please see Figure 1: Recreational cannabis policy typology (pg. 5) & the Coda (pg. 6).

Figure 1: Recreational cannabis policy typology (see Coda on next page)

State/ Activity	Criminal	Blended penalty scheme	Civil Penalty Scheme	No Penalties	Regulated Scheme	Model
USA (Texas)						Full criminal penalties
United Kingdom						Blended penalties for possession
Australia (NT)						Blended penalties for possession
Switzerland						Blended penalties for possession & distribution
Australia (Vic)						Blended penalties for possession & cultivation
Italy						Civil penalties for possession & cultivation
Netherlands						Blended penalties for possession & distribution, civil penalties for cultivation
Canada (Q)						Legal model with civil & criminal penalties
USA (NJ)						Legal model with civil & criminal penalties
USA (Oregon)						Legal model with civil & criminal penalties

Coda:



= possession (small quantity)



= distribution (social)



= cultivation (domestic)



= possession (large quantity)



= distribution (commercial)



= cultivation (commercial)

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