

**Submission
No 358**

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

Organisation: Unions NSW
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Submission to the NSW Government Parliamentary Inquiry into the impact of the regulatory framework for cannabis in New South Wales



Introduction

1. Unions NSW thanks the committee for the opportunity to provide a submission into this important inquiry.
2. Unions NSW is the peak body for trade unions and union members in NSW. We have 48 affiliated trade unions and labour councils who collectively represent over 600,000 union members in all industries in NSW.
3. Unions NSW welcomes the opportunity to provide a submission to the NSW Parliamentary Inquiry into the impact of the regulatory framework for cannabis in NSW. We believe that there is scope for reform of our state's regulatory framework for cannabis to produce fairer and safer outcomes, in our workplaces and on our roads, and support our regional economies.
4. It is important to note that the submission does not express a view more broadly about proposals regarding the decriminalisation or legalisation of cannabis in NSW and instead focuses on the regulatory framework for cannabis as it impacts workplaces.
5. This submission primarily addresses the impact of the current regulatory framework for cannabis on:
 - a. Personal health, employment, road safety, and the criminal justice system (s. d of the terms of reference),
 - b. Alternative approaches to the regulatory framework for cannabis in other jurisdictions (s. f) and,
 - c. Other matters related to the regulatory framework of cannabis (s. h).
6. Relevant to ss. (d) and (f), this submission focuses on workplace and roadside drug testing. Relevant to s. (h), this submission focuses on regulation of the cannabis cultivation industry.
7. Police conduct Mobile Drug Testing (MDT) to screen for the presence of cannabis in motorists. However, *presence* does not necessarily mean *impairment*, leading to poor justice outcomes and an unreasonable burden on the criminal justice system.
8. Similarly, many workplaces in NSW screen for cannabis in workers. Unions NSW believes that safety in workplaces is paramount. However, unlike MDTs which predominantly use saliva testing, workplaces often use urine tests which have a much wider detection window. This is an unfair practice whereby workers who have not consumed cannabis for up to thirty days can still test positive (ADF n.d.). This can lead to a perverse outcome where workplace safety has not been compromised and yet a worker is punished by their employer.
9. The current drug testing regime in NSW, especially in workplaces which conduct urine testing, is punitive with far reaching employment consequences. Furthermore, for persons prescribed medicinal cannabis to treat a legitimate health issue, the current testing regime is discriminatory, has unintended unsafe ramifications, and does not address the issue of impairment within an employment context. Medicinal cannabis users under the current regulatory regime are not only



at-risk of termination but also adverse action such as having shifts cut or other penalties. Unions NSW believes we can maintain the highest levels of workplace safety while reforming the workplace testing regime.

10. The medicinal cannabis industry has the potential to provide secure, well-paid employment in regional communities. This can be particularly beneficial in circumstances where NSW regional communities are seeking to attract new industries and generate new job opportunities with a variety of skill requirements. However, the industry will fail to add value to communities if workers are paid and treated poorly.



Summary of Recommendations

11. Our recommendations are:

Recommendation 1:

As an interim measure until NSW implements impairment testing, the regulatory framework for cannabis should prohibit employers from screening for cannabis using a testing method with a wider detection window than saliva testing.

Recommendation 2:

The NSW Government should consult with unions and other stakeholders on the potential for trials of impairment testing technologies on roads and in workplaces.

Recommendation 3:

The regulatory framework for cannabis should be reformed with the goal of requiring police and employers who test for cannabis to assess for impairment instead of only the presence of cannabis.

Recommendation 4:

Amend s. 111 of the *Road Transport Act 2013* (NSW) to provide a medicinal-use defence to an offence under s. 111(1) relating to the presence of cannabis in a driver's system.

Recommendation 5:

The regulatory framework for cannabis should promote the labour rights and safety of workers employed in the cannabis sector by restricting procurement, licenses, and incentives to employers who have a good record of labour rights and safety.



Cannabis' impairment window versus prevailing testing methods in NSW

12. The cannabis impairment window is relatively short: 1-4 hours if smoked or 4-12 hours if eaten (ADF n.d.), especially when compared to the two prevailing cannabis screening methods in NSW: saliva testing and urine testing.
13. Saliva tests detect the presence of cannabis for up to 12 hours in infrequent cannabis users and up to 30 hours in frequent users (ADF n.d.). In contrast, urine tests have a much wider detection window: 10 to 30 days after consumption.
14. As is evident from these timeframes, saliva and urine tests can provide a positive result despite the user no longer being impaired.
15. While both types of tests are problematic for detecting impairment over mere presence, the detection window of urine testing is far more mismatched than saliva testing with the impairment window of cannabis. A person whose previous cannabis use no longer affects them is far more likely to fail a urine test than a saliva test. That person can fail a urine test days and weeks after the period in which they were impaired.
16. Because of this, Unions NSW considers saliva tests a better option than urine tests, or other tests with a wider detection window, for cannabis testing in both NSW workplaces and roads. Such an approach maintains the appropriate focus on safety while reducing the likelihood of workers being unfairly punished.



Workplace drug testing

17. Workplace safety is paramount and of a top priority for Unions NSW and its members. We believe there is scope for reform to workplace testing which ensures workplace safety while reducing the likelihood of workers being unfairly punished in their workplaces.
18. Many workplaces in NSW conduct mandatory drug testing of workers. Whether an employer screens for drugs depends on various factors including industry. For example, a 2016 survey of Australian resource industry employers found that the vast majority (89%) conducted onsite testing of their workforce for the presence of drugs other than alcohol (AMMA 2016, p. 9).
19. With few exceptions, workplaces which screen for cannabis do so to control the perceived safety risks of impairment. The current testing regime, which tests for presence instead of impairment, is therefore ill-equipped for this purpose and causes unnecessary punitive outcomes for both workers and workplaces. The likely outcome of a failed drug test is very serious for workers. For example, 65% of Australian resources industry employers take a 'zero tolerance' approach to drug and alcohol use, as opposed to only 26% which focus on 'harm minimisation' (AMMA 2016, p. 5). A worker whose employment is terminated due to a failed drug test will likely struggle to regain employment in a similar role or industry, especially if their industry has a zero-presence policy for drugs.
20. The presence testing regime in workplaces is particularly discriminatory for those who are prescribed medicinal cannabis for legitimate health purposes. Medicinal users whose employers have a zero-tolerance policy are generally unable to consume their medication as prescribed, or else risk failing a workplace drug test. This can have a significant impact on them and their workplace, creating an additional work health and safety (WHS) risk by preventing the appropriate medical consumption of the required dose. The practice of disciplining a medicinal user is discriminatory and problematic for employers' obligations under the *Work Health and Safety Act 2011* (NSW) to make 'reasonable adjustments' to work practices for those with an injury, illness, or disability.
21. The purpose of making reasonable adjustments is:
 - a. preventing deterioration of health and allowing employees with health problems to stay at work;
 - b. enabling employees to stay at work or return to work after injury;
 - c. assisting people with a disability to enter and stay in the workplace (Comcare 2013, p. 1).
22. The current testing regime presents a barrier to these outcomes for medicinal users. This is discriminatory and unsafe. Other forms of workplace discrimination that medicinal users often face include having their privacy violated through being required to discuss their medical condition, experiencing reduced shifts, or being more frequently subjected to drug testing.
23. Unions NSW understands that workplace discrimination forces some medicinal users towards taking harder drugs which are less likely to present on a workplace drug test. Such an outcome is perverse and undermines the purpose of drug testing, WHS, and the government's intention to improve residents' health via access to medicinal cannabis.



24. The adverse outcomes of the current testing regime, including WHS risks, discrimination, and termination of employment, are among the most adverse outcomes for workers and should weigh heavily in favour of reform to screen for impairment instead of presence. Prohibiting presence testing would have the additional benefit of protecting the privacy of medicinal users.
25. The approach of testing impairment over presence has precedent overseas. For example, employers in California and Washington in the United States are prohibited from testing workers for 'non-psychoactive cannabis metabolites' (Martinez 2023, para. 1), that is, for the presence of cannabis at a non-impairing dose.
26. Until NSW implements impairment testing, employers should be prohibited from screening for cannabis by using testing methods with a wider detection window than saliva testing. This would mean medicinal cannabis users, especially those who use infrequently or in small doses, will have less opportunity to fail a drug test unfairly. While still an incomplete solution, this will improve health and reduce discriminatory outcomes for workers and within workplaces.

Recommendation 1:

As an interim measure until NSW implements impairment testing, the regulatory framework for cannabis should prohibit employers from screening for cannabis using a testing method with a wider detection window than saliva testing.



What options are available for cannabis impairment testing?

27. There are several available and emerging options for testing cannabis impairment instead of presence. These methods include screening fingerprint sweat (Hudson et al. 2019) and breath (DeGregario 2021), improved field sobriety tests (Wood & Beirness 2024), and the use of orbital scans to identify oxygenation of the pre-frontal cortex (Gilman et al. 2022).
28. In the UK, for example, fingerprint testing has been used in some workplaces (Quested 2022, para. 4) and may have a narrower detection window than saliva testing.
29. In Canada, specially trained 'drug recognition experts' use a variety of methods including field sobriety tests and blood tests for drug concentration to assess impairment in motorists (DOJC 2021).
30. Driver monitoring systems, which detect a motorist's state and collect information to assess their capacity to drive safely (SUT 2021, para. 8), are now mandatory in vehicles sold in the European Union (EC 2023).

Recommendation 2:

The NSW Government should consult with unions and other stakeholders on the potential for trials of impairment testing technologies on the road and in workplaces.



Mobile Drug Testing (MDT)

31. Motorists can at any time be tested by police for the presence of drugs. The purpose of MDTs is to target motorists whose drug impairment poses a road safety risk. A motorist who fails an MDT could face a fine of up to \$3,300 and license disqualification for a period of between 3 months to permanently (TfNSW n.d.). A drug driving conviction can have far-reaching consequences on a person's ability to travel or gain employment, insurance, and rental housing. While having a more accurate detection window compared with urine testing, the saliva testing used in MDTs is still mismatched with the effects of cannabis and ill-suited to effectively targeting those drivers who choose to drive impaired on our roads.

Recommendation 3:

The regulatory framework for cannabis should be reformed with the goal of requiring police and employers who test for cannabis to assess for impairment instead of only the presence of cannabis.

32. MDTs, like with workplace testing, do not differentiate between recreational users and persons using cannabis for medicinal purposes. Depending on the frequency and amount of use, medicinal users can be faced with a choice between either driving or taking their medication, but not both. Driving in NSW is a necessity for many people because of work, study, family and caring responsibilities, and the tyranny of distance and lack of public transport options, especially in regional and rural NSW.

33. This means many medicinal users are forced to choose between taking their medication as prescribed or facing punitive sanctions on the road or in their workplace. This creates a WHS and industrial risk for medicinal users whose employment requires them to drive. Furthermore, many medicinal users or would-be users are instead forced to turn to opiates, which MDTs do not test for, but which can pose a greater risk of impairment (Mackenzie 2022, sec. 3).

34. The current testing regime creates an unreasonable administrative burden on the legal system. Over 7,000 people faced court in NSW on drug driving charges in 2023 (BOSCAR 2024, table 5A). Given the mismatch between impairment versus detection windows, it is likely that a large proportion of cases represent a waste of the court's limited resources.

35. Unions NSW understands medicinal users who fail an MDT are routinely discharged with a section 10. This practice unnecessarily drains the court's resources, so medicinal users should have the benefit of a medicinal-use defence to an offence under s 111(1) of the *Road Transport Act 2013* (NSW). This would align medicinal cannabis users with how we currently treat and regulate medicinal morphine users.

Recommendation 4:

Amend s 111 of the Road Transport Act 2013 (NSW) to provide a medicinal-use defence to an offence under s.111(1) relating to the presence of cannabis in a driver's system.



Promoting labour rights in the cannabis cultivation industry

36. In 2021, the medicinal cannabis industry employed 1,300 people in Australia, projected to increase to 1,500 by 2025-26 (MTPConnect 2021, pp. 3, 33). Unions NSW recognises most jobs in the NSW medicinal cannabis industry are linked to cultivation operations in rural and regional areas, primarily in central and northern NSW. Many of these locations already function as large-scale worksites. As NSW's medicinal cannabis industry expands, it has the potential to provide secure, well-paid employment to thousands of workers. This could prove particularly important in regional NSW given our planned closure of all current coal-fired powerplants by 2040 and the effects this will likely have on the contraction of job opportunities in those regions.
37. When considering harnessing the value of potential jobs in the medicinal cannabis industry, it is important to consider the value of jobs in the existing coal industry. Due to the effectiveness of trade unions, the NSW coal industry may generally offer better job security and higher pay than other industries in some communities. Coal industry workers are generally covered by enterprise agreements and have the protection of additional safety legislation such as the *WHS (Mines and Petroleum Sites) Regulation 2022* (NSW).
38. To ensure the continued prosperity of our regions, their communities, and working families, it is crucial that the medicinal cannabis industry upholds the highest labour and safety standards. It would be detrimental to allow it to drift into the unregulated agricultural model which exploited backpackers and other visa holders in regional and rural NSW (MWC & Unions NSW 2021).
39. The NSW Government could measure the success of its cannabis regulatory framework by adopting the criteria used by the proposed NSW Future Jobs and Investment Authorities, i.e., success through 'job creation, particularly creation of *similar value* that provides continued direct and indirect economic benefits' (DRNSW 2024, p. 26, emphasis added).
40. To support this measure the NSW government should ensure any procurement, licencing, or incentives it provides to the NSW medicinal cannabis industry are linked with a requirement to ensure high labour standards and WHS systems are in place. Criteria should consider factors including:
- a. number of workers relative to size of operation;
 - b. worker classifications;
 - c. the presence of an enterprise agreement;
 - d. award coverage;
 - e. workplace location;
 - f. prevailing pay and conditions;
 - g. the absence of breaches to labour and safety conditions; and,
 - h. initiatives to provide employment opportunities to young people, women and Indigenous Australians.



41. Information pertaining to the above criteria should be collected by the NSW Government on an industry-wide basis and publicly reported. Such reports can help demonstrate to communities the positive effect of the framework in generating new industries and jobs in regions where the reliance on coal production will be diminishing.
42. Furthermore, there is an important role for unions to play in ensuring the medicinal cannabis industry adds value to regional communities. Unions provide information and advice to members and empower them to collectively bargain and speak out against safety and labour violations. The collection and reporting of relevant data by the NSW Government can support unions to effectively engage in the industry and support its workers.

Recommendation 5:

The regulatory framework for cannabis should promote the labour rights and safety of workers employed in the cannabis sector by restricting procurement, licenses, and incentives to employers who have a good record of labour rights and safety.



Conclusion

43. New and promising technologies are emerging for impairment testing that can be trialled on our roads and workplaces, in consultation with stakeholders. The goal should be to develop a testing regime which controls safety risks while also upholding legal requirements and protecting the rights and health of medicinal users.
44. The NSW Government should move towards a regime which limits workplace cannabis screening to tests with a detection window no wider than saliva testing. This will reduce current discriminatory outcomes for medicinal cannabis users and improve health outcomes for thousands of workers without detriment to workplace safety.
45. We can also reduce the unnecessary resource burden on our courts, where many cases are discharged with a Section 10 (no conviction recorded) once the evidence of the legitimate use of medical cannabis use is proven. This can be achieved by treating medicinal users in the same way as consumers of prescribed morphine.
46. As the medicinal cannabis cultivation industry grows, the NSW Government has a timely opportunity to ensure the industry develops to the benefit of workers and generates good sustainable jobs in regional and rural communities. As the government increasingly looks to incentivise the creation of new industries in communities which will have declining coal production, we should not overlook the value of the medicinal cannabis industry in contributing to the provision of good sustainable jobs, if it is properly regulated.



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