Senate Parliamentary Inquiry into the Legalising Cannabis Bill 2023

November 2023

Drugs and the community

Like it or not, drugs are a part of every society.

It would be naive to think otherwise. And cruel to ignore It.

And, while we don't encourage drug use, there are other things that we will always encourage.

Understanding. Openness. Empathy. Communication.

Our default, as a society, has been to pour scorn on those who "use drugs" and judge them harshly by seeing their problems as self-inflicted.

Human beings are complex, and so is this issue. The reasons people use drugs, including alcohol and pharmaceuticals, are countless.

Risky behaviours are part of being human. We need to understand that, not condemn it.

Judging is easy. Helping is a bit more of a challenge.

So, how do we rise to that challenge?

At Penington Institute, we believe in approaching drug use in a safe, considerate and practical way. We seek solutions, not scapegoats. We strive for positive outcomes, not negative stereotypes. We follow evidence and data, but we temper it with compassion and empathy, to create change for the better.

Our focus is on making individuals and families safer and healthier.

Our goal is simple: to help communities and frontline services reduce harm and to make public policy work for the people, not against them.

We won't ever give up on that goal, or the people it exists to serve.

John Ryan

CEO, Penington Institute

About Penington Institute

Penington Institute champions an open, rational, and compassionate approach to building and sharing knowledge to reduce drug-related harm. We advocate for an effective regulatory framework for cannabis defined by public health goals, with priority placed on targeted prevention, education, and treatment.

Executive Summary

Penington Institute welcomes the opportunity to make a submission to the Senate Parliamentary Inquiry into the Legalising Cannabis Bill 2023. This submission has four purposes:

- First, to summarise our view of why a regulated adult-use cannabis regime is superior to the current prohibition regime;

- Second, to specify elements of the Legalise Cannabis Bill 2023 that Penington Institute endorses;

- Third, to describe features of the Bill that we believe should be amended, or represent significant omissions that should be considered during the amendment process;

- Fourth, to pose questions about the practical viability of the Bill as presented.

While Penington Institute neither endorses nor rejects passage of the Legalise Cannabis Bill 2023 in its current form, we strongly endorse the development of a legislative and regulatory framework for the implementation of a legal, regulated adult-use cannabis regime.

From prohibition to a regulated cannabis market

Cannabis prohibition doesn't work: it fails to control supply, leaves the market in the hands of criminals, and costs billions of dollars in enforcement, all while hindering a public health-led approach to managing the health harms that are associated with problematic cannabis use.

Despite the billions of dollars spent enforcing criminal sanctions, cannabis remains the most widely used illegal drug in Australia and around the world. According to the 2019 National Drug Strategy Household Survey (NDSHS), 11.6 percent of the Australian population reported consuming cannabis within the past year, with 36.5 percent reporting lifetime use;[1] evidence suggests that actual past-year use may be up to twice as high.[2]

Cannabis has a relatively low harm profile compared to many drugs, including alcohol, yet it accounts for almost half of all drug-related arrests in Australia. Between 2010-11 and 2019-20, at least 702,866 people were arrested for cannabis-related offences, with over 90 percent involving personal possession or use rather than illegal drug trafficking.[3]

The rest of the world is catching on to the counterproductive consequences of cannabis prohibition. Cannabis for personal use is now legal in at least four[4] countries and 23[5] US states. Australian support for a different approach is rising too: the 2019 NDSHS showed that only 22.1 percent of all respondents believed that cannabis possession for personal use should be a criminal offence.[6]

Varying models of legalisation have been introduced, with differing objectives. The fully commercialised models adopted in many US states benefit price-conscious consumers and may rapidly reduce the black market, but they are the least conducive to prioritising public health. By contrast, the more restricted model implemented in Uruguay minimises the tension between profit-seeking and public health but has resulted in a more persistent black market.[7]

Penington Institute supports a balanced model that facilitates a steady nationwide shift to legal, regulated cannabis while also taking decisive steps to minimise the health harms that cannabis can cause. We applaud the introduction of the Legalise Cannabis Bill 2023, but believe further debate and amendments can help the Bill strike a more effective balance between access and public health.

Positive features of the Legalise Cannabis Bill 2023

Penington Institute endorses several elements of the Legalise Cannabis Bill 2023. These include the following:

- Allowing cultivation of cannabis plants in households for personal use, although we observe that there is debate around the optimal number of plants that should be permitted per household. Canada, for instance, established a limit of four plants per household, which was found during a review to be generally satisfactory to the small proportion of people who choose to grow.[8]

- The distribution of cannabis via dispensaries and dedicated cannabis cafes, including those organised as not-for-profit cooperatives. We further endorse the separation of sites offering alcohol sales and consumption from sites offering cannabis sales and consumption.

- The proposed minimum age of 18, as well as the removal of criminal penalties for all offences committed by those under 18 years of age and for all people consuming cannabis in prohibited areas.

- The responsible service accreditation requirement for employees of cannabis-providing establishments, which we observe should be based on the principles of harm reduction, including the provision of information to facilitate safe cannabis use and the minimisation of social, physical, and mental health harms related to cannabis consumption.

- Tight restrictions on advertising and promotion of cannabis products, with exceptions made only for product differentiation and basic information about store/cafe location and business hours. We recommend that the cannabis regulator also include rules regarding permissible external and internal outlet appearance when establishing the regulations governing outlets.

- Severe penalties for licence holders at all stages of the production and distribution chain that breach licensing requirements.

- The establishment of a national cannabis regulator, along with the requirement to carry out routine product testing, conduct regular reviews of the cannabis regime, and produce detailed, publicly available documents.

Omissions and suggested amendments

There are other features of the Bill that we believe should be amended, as well as several dimensions of cannabis policy we think are significant enough to describe in legislation rather than being referred to the cannabis regulator. The common thread is our preference for a model that prioritises public health and favours a cautious approach. Our suggestions for inclusion and/or amendment include the following:

- We recommend that Australia's regulated cannabis model not include online sales in its initial phase. We acknowledge the difficulties in ensuring equitable access across geographic boundaries, but we are concerned about the potential for delivery to underage consumers, the potential ease of exceeding purchasing limits, and the potential for relatively rapid market concentration by dominant online sellers, which may disrupt the managed planning of a retail outlet sector. In Canada, consumers have reported difficulty distinguishing between licit and illicit online sellers, and the illicit market has increasingly moved online.[9] Subsequent changes to allow online sales and delivery can be made on the basis of the reviews conducted by the cannabis regulator, especially if significant access disparities become apparent.

- The exclusion of cross-investment by certain sectors, especially the alcohol and tobacco industries, is a laudable goal but difficult in practice. Given the complexities of corporate structures and investment portfolios, we recommend instructing the cannabis regulator to subject licence applicants to a fit-and-proper persons test, which would include considerations of participation in harmful or undesirable industries or activities, as well as the clear and explicit intention to avoid capture by those industries, which may include alcohol, tobacco, and gambling.

- One of the most significant opportunities to prioritise public health comes from distinguishing between cannabis products of different potency. Some jurisdictions have proposed or implemented caps on the volume and/or percentage of THC in cannabis products,[10] while others have considered or implemented variable taxation schemes to incentivise use of less potent products.[11] While the Bill provides latitude for the cannabis regulator to establish a wide variety of product regulations, we recommend that the Bill and the explanatory memorandum both specify that the regulator should design product regulations to maximise public health by discouraging use of highly potent products. Potential tools include low purchase limits for such products, training regarding potency advice for dispensary/cafe employees, and strict penalties for manufacturers when actual potency is found to diverge significantly from information on the product label. We further observe that given the importance of protecting minors from unintentional exposure and the established link between edible cannabis products resembling candy and hospital presentations for acute THC intoxication among children,[12] the regulator should take a cautious approach when drafting rules regarding the strength, forms, packaging, and purchase limits for edible cannabis products. We also note that although as a Senate bill the current legislation does not address revenue, the 15 percent sales tax described by the Greens in other documents[13] does not align with other jurisdictions' increasing regulatory interest in using tax policy to influence relative product prices and incentivise use of lower-potency products.

- In a similar vein, we would welcome more direct instruction to the cannabis regulator to specify purchase limits and require the dissemination of harm reduction information at point of sale in order to prioritise a health-centred approach.

- In light of the overproduction that has resulted in sharp cannabis price declines in many US states[14] and an unsold inventory of 1.5 million kilograms in Canada,[15] we recommend that consideration of market conditions be incorporated into the cannabis regulator's regular reviews of licence conditions.

- Attention to the inequitable treatment of Indigenous Australians is welcome, but without more information about the structure of licensing, it is unclear that offering no-fee licences to participate in the cannabis market offers a meaningful form of inclusion. In many US states where efforts have been made to include social groups disproportionately harmed under prohibition, preferential licensing has often failed to produce the desired outcomes.[16] We endorse consideration of preferential conditions for Indigenous Australians or members of disadvantaged communities, but we suggest deeper consideration of barriers to business development (including access to capital and networks of expertise[17]), building preferences into the licensing system (e.g., by including consideration of community as part of the application evaluation process), ensuring expiation of past cannabis convictions, and allocating a portion of revenue from cannabis sales toward reparative investment in those communities.

- Given the vast scope of regulatory detail that is delegated to the national cannabis regulator, we recommend the inclusion of a set of principles explicitly prioritising public health, similar to the principles specified in Section 7 of Canada's *Cannabis Act*.[18]

Questions regarding the law's viability

Penington Institute does not take a position on the validity of the constitutional preemption mechanism based on registration of cannabis strains, but we note some practical complications. Specifically, the Bill would benefit from increased clarity about the path to legalisation of all cannabis, including strains currently found in the illicit market. As Senator Shoebridge's Second Reading speech suggests, the cannabis regulator can "start with strains in the public commons," presumably implying that strains now circulating in the illicit market will be registered. Nonetheless, it remains foreseeable that an interim period will exist in which the legal market remains nascent and the register of strains is incomplete. As cannabis will not be identifiable by visual inspection as a legal or illegal strain, this scenario could result in inconsistent, potentially inequitable treatment when officers encounter individuals cultivating, possessing, or using cannabis. To limit the potential for this scenario – which is untenable for both police officers and people who use cannabis – we recommend amending the Bill to provide greater clarity about the process by which all cannabis (below an established threshold quantity) will become presumptively legal.

Conclusion

The Legalise Cannabis Bill 2023 represents an important step forward in Australia's gradual recognition of the failure of cannabis prohibition and the advantages of a regulated adult-use cannabis market. We

applaud the Bill's presenters for their determination to move Australia towards a regulated model and view many features of the Bill as sensible and responsive to both consumer preferences and harm reduction imperatives. However, we also recommend amendments to ensure a coherent, flexible cannabis regime that prioritises public health and safety for both individuals and the broader community.

[1] Australian Institute of Health and Welfare (2020). National Drug Strategy Household Survey 2019: Detailed findings. Canberra: AIHW, Tables 4.2, 4.3, 4.6 and 4.7.

[2] Brown, S., Harris, M., Srivastava, P., and Zhang, X. (2018). Modelling Illegal Drug Participation. *Journal of the Royal Statistical Society Series A: Statistics in Society* 181(1), pp. 133–154.

[3] Australian Criminal Intelligence Commission (2021). *Illicit Drug Data Report 2019-20.* Canberra: ACIC.

[4] As of 2022, personal use and possession of cannabis is legal in Malta, South Africa, Uruguay, and Canada. See further: United Nations Office on Drugs and Crime (2022). *World Drug Report 2022.* Vienna: UNODC.

[5] As of June 2023, 23 states, two territories and the District of Columbia have enacted measures to regulate cannabis for adult non-medical use. National Conference of State Legislatures (2023). See further: *State medical cannabis laws.*

[6] Australian Institute of Health and Welfare (2020). *National Drug Strategy Household Survey 2019: Detailed findings.* Canberra: AIHW, Table 9.15 and 9.26.

[7] Queirolo, R., Álvarez, E., Sotto, B., and Cruz, J. M. (2023). How High-Frequency Users Embraced Cannabis Regulation in Uruguay. *Journal of Drug Issues*, 53(4), pp. 519-535.

[8] Minister of Health (Canada). (2023). *Legislative Review of the Cannabis Act: What We Heard Report*. Ottawa: Health Canada.

[9] Ibid.

[10] Pardal, M., Wadsworth, E. (2023). Strictly regulated cannabis retail models with state control can provide lessons in how jurisdictions can regulate THC. *Addiction* 118(6): pp. 1005–1007.

[11] Hoffer, A. (2023). Does Your State Tax Recreational Marijuana? Washington, DC: Tax Foundation. 18 April 2023.

[12] Manthey, J., Hayer, T., Jacobsen, B., et al. (2023). Effects of legalizing cannabis. Hamburg: Institut für interdisziplinäre Sucht-und Drogenforschung.

[13] Australian Greens. (2023). More than 28 billion reasons to legalise cannabis, 30 January 2023.

[14] Demko, P. (2022). A national weed glut is causing prices to plummet and imperiling businesses, *Politico*, 25 December 2022.

[15] Lamers, M. (2023). Canada's unsold cannabis inventory balloons to 1.5 billion grams, MJBizDaily.com, 6 June 2023.

[16] Lawrence, G. (2023). Marijuana's social equity misfire: Why state efforts to promote restorative justice within the cannabis industry have failed, and how a market-based approach can provide better outcomes. Washington, DC: Reason Foundation.

[17] Jaen, J. (2023). Opinion: The 5 biggest problems faced by cannabis social equity founders, MJBizDaily.com, 14 July 2023.

[18] Government of Canada. (2023). *Cannabis Act*. Ottawa: Government of Canada (current to 17 October 2023).