THE LOCAL COURT LAWYERS

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Two critical and urgent legal issues (and proposed solutions) in the MC law enforcement space

The Local Court Lawyers are calling on the State Government to consider the following two urgent changes to the laws relating to Medicinal Cannabis ("MC") use.

ISSUE 1 – a stay of proceedings or adjourn for authorisation until "lawfully prescribed"

1. a. Currently defendants possessing cannabis for medicinal purposes ("MC users"), are being charged under s10 of the *Drugs Misuse and Trafficking Act* ("*DMT Act*") with possess prohibited drug.

b. By S10(2)(c) of the DMT Act it is lawful for a person to possess a prohibited drug if it is lawfully prescribed or supplied.

c. If one uses Adam Searle's estimates, from his second reading speech of his Compassionate Access Bill, there are approx. 30,000-40,000 MC users in NSW. We know the number of "lawfully prescribed" users are still well below 1,000.

d. In essence, the speed hump, since Minister Hazzard stripped NSW Health of much of their role in the approval process, is finding a GP who will prescribe MC, awaiting their application, and awaiting the outcome. This is slowly becoming easier. However, in the interim, MC users and their carers are being criminalised for not waiting for the system to catch-up with their legitimate needs.

e. I propose that when a person charged under s10 of the DMT Act attends court, and tells their lawyer or the Magistrate "I use MC for pain relief/treatment/etc…" and here is a letter from my Doctor confirming that I have "xyz condition", at that stage Magistrates be given authority (or compelled by the AG, or given discretion and encouraged by the AG) to either: (i) order a stay of proceedings or (ii) adjourn the matter before accepting a plea – as long as there is a 3-6 months window – giving time for the then-unlawful MC user to find a Dr., make application for lawful access, await for the outcome, and return to the courts as "lawfully prescribed" (or not, if their application is unsuccessful).

Liability limited by a scheme under the Professional Standards

f. The effect would be that those accused would then return to court as either "lawfully prescribed" – in which case the Prosecution withdraw the charge (in effect, s10(2)(c) operating retrospectively to the date of arrest); or the accused, after 3-6 months, having been unsuccessful in seeking to be "lawfully prescribed", is dealt with under the Act (like any other recreational user).

g. This proposal would assist those sick or terminally ill (and their carers) from falling foul of the law while they attempt to find a Doctor ready and willing to prescribe MC. It removes the criminal element for those people who, at the moment, are sourcing MC products for legitimate relief or to cure of their conditions; but constantly under the fear they will be charged with a drug offence. It allows the machinations and operations of the MC access schemes to catch up with the community.

ISSUE 2 – drive with <u>traces</u> of THC in saliva sample (s111 of the *Roads Transport Act*)
(Note: this commentary does NOT apply to driving while under the influence of cannabis)

2. a. Currently "lawfully prescribed" MC users, who ingested cannabis hours or days prior, are in fear of testing positive to MDT (mobile drug testing; a/k/a/ "RDT" – random drug testing).

b. s111 of the Road Transport Act renders it an offence to drive *with the presence of THC in an oral fluid sample*. Importantly, the offence is committed despite the driver **not** being impaired. (A driver impaired by THC is charged under s112 of the Road Transport Act – drive under the influence of a prohibited drug.).

c. The s111 offence is limited to a driver who ingested cannabis some number of hours or days before driving.

d. There is no defence (to a charge under s111) for "lawfully prescribed" MC users. Put another way, it is not a defence (in fact, it is an admission) to say to the courts "I am a lawfully prescribed MC user, I ingested a product with traces of THC yesterday. I was not impaired by THC at the time of driving". The driver can be disqualified from driving (generally 3-6 months + a fine), despite that driver being lawfully prescribed MC, and hours or days prior having ingested what may only be a very small dose of THC (in, for example, a predominantly CBD product).

e. The proposal urgently sought is an amendment to the *Road Transport Act* to the effect that upon proof by the driver that (s)he is a "lawfully prescribed" user of MC, this is a complete defence to a charge under s111. Similar powers could be vested to Magistrates to adjourn or stay proceedings (refer: 1e. above) pending the accused applying for "lawful access" before sentencing under s111, if the driver claims to have ingested MC.

e. Under the Drugs Misuse and Trafficking Act it is a defence to possess cannabis, if the accused is "lawfully prescribed"; but no such defence exists in the Road Transport Act for "lawfully prescribed" MC users, unimpaired at the time of driving.

f. By this flaw, a lawfully prescribed user of MC may commit an offence by driving hours or days later.