

# SCHINDLERS

attorneys and notaries

**PORTFOLIO COMMITTEE ON JUSTICE  
AND CORRECTIONAL SERVICES**  
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Your Ref: *Cannabis Bill*  
Our Ref: Keichel/AL/Cannabis  
Date: 08 October 2020

**\*\*\*ATTN: HON. V. RAMAANO & HON. S MTHONJENI\*\*\***

**\*\*\*PER EMAIL ATTACHMENT\*\*\***

Dear Hon. Members of Parliament,

**RE: CANNABIS FOR PRIVATE PURPOSES BILL // COMMENTS BY SCHINDLERS ATTORNEYS' "M&R  
CANNABIS DEPARTMENT"**

1. We, hereby, accept your invitation to submit comments on the "Cannabis for Private Purposes Bill" ("the Bill"), which comments follow hereunder.
2. We expressly record that **we would like the opportunity to make verbal presentation/s to Parliament hereon.**

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**We now have a virtual reception open between 08h30 to 17h00. Please feel free to enter via Zoom and have your queries addressed by one of our professionals – enter on: <https://zoom.us/j/8114489600>  
Please also take note our Pro Bono initiative to assist businesses in distress <http://www.cobra.org.za>**

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### **WHO IS SCHINDLERS ATTORNEYS (AND WHY DO WE KNOW WHAT WE'RE TALKING ABOUT)?**

3. We act(ed) for and on behalf of (the late and great) Julian Stobbs and (the surviving) Myrtle Clarke ("*the Dagga Couple*") plaintiffs and intervening parties, respectively, in:
  - 3.1. the trial action under case number 58668/2011 in the High Court of South Africa, Gauteng Division, Pretoria, which trial is presently stayed whilst awaiting final indication of what your honourable selves intend to do (and not do) in respect of cannabis law; and
  - 3.2. the Constitutional Court matter culminating in the judgment of *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30 ("*the Judgment*") in which **the personal use, cultivation and possession of cannabis, privately, by adults, was decriminalised.**
4. We have pioneered our own Medicinal and Recreational ("M&R") Cannabis department (here - <http://www.schindlers.co.za/mr-cannabis-law/>) and our advice is sought-after by numerous (local and international) clients (and correspondents/collaborators) each month in respect of cannabis law. We have, in addition to hosting and publishing extensive educational conferences/videos on cannabis law, distributed, without charge, numerous memoranda and articles canvassing South Africa's ever-changing cannabis law regime.
5. The writers have also spoken at numerous conferences on this topic.
6. In summary, we are the "go-to" attorneys when it comes to all matters cannabis in South Africa, and our knowledge and experience cannot realistically be surpassed.
7. In light of the above, we respectfully submit that our following comments will be of great assistance to your honourable selves.

## NATURE AND SCOPE OF THIS DOCUMENT

8. This document will commence by making some (necessary & foundational) jurisprudential observations.
9. Flowing therefrom, we (generally and philosophically) analyse what errors we perceive to be contained in the Bill, in order to humbly assist in your efforts to revise it, such that it is left constitutionally-compliant and aligned with the spirit and purport of the Judgment
10. Finally, we conclude with a brief discussion as to what, we respectfully submit, would be a productive umbrella approach to legislating in respect of cannabis in South Africa.

## FOUNDATIONAL OBSERVATIONS

### SUPREMACY OF CONSTITUTION AND "INTERNATIONAL OBLIGATIONS"

11. Section **1** of the Constitution reads as follows (emphasis added): -

*"1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

*(a) **Human dignity**, the achievement of **equality** and the advancement of human rights and **freedoms** ...*

*(c) **Supremacy of the constitution** and the rule of law ..."*

12. Section **2** of the Constitution reads as follows (emphasis added): -

*"2. **This Constitution is the supreme law of the Republic**; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

13. From having (twice) litigated against "The State" in respect of cannabis, we have observed that it will often invoke "international obligations" in order to attempt to justify its continued prohibition on the use/possession/sale of cannabis in South Africa.
14. Yet, materially, the United Nations Single Convention on Narcotic Drugs of 1961 (as amended by the 1972 Protocol – "the Convention"), the most commonly cited source of relevant "international obligations", when read holistically and correctly, does **not** oblige

us to rely on the criminal justice system to 'control' (the established harms of) cannabis domestically:<sup>1</sup> -

- 14.1. Article 2 of the Convention, at paragraph 5, stipulates as follows (emphasis added): -

*“(b) A Party shall, if **in its opinion** the prevailing conditions in its country **render it the most appropriate means of protecting the public health and welfare**, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug ...”*

- 14.2. Article 39 of the Convention, at paragraph 1(b), reminds the parties that there are means to address 'drug users' other than penal measures (emphasis added):-

*“1. (b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the **Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.**”*

- 14.3. Article 38 of the Convention provides further that parties are to take notice of all measures prevalent to prevent drug abuse and provide, rather, for **education, early diagnoses, treatment, care, rehabilitation and social reintegration of illicit drug users back into their societies.**

- 14.4. Finally, and most pertinently, Article 36 of the Convention, reads as follows (emphasis added): -

*“1. (a) **Subject to its constitutional limitations**, each Party shall adopt such measures as will ensure that cultivation, production, ... possession, ... distribution, ... of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to*

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<sup>1</sup> With thanks to Victoria Conlan, *ad hoc* consultant, who assisted with this section.

*adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.”*

15. Therefore, South Africa's “obligation” (to ‘control’ its drug cultivation, production, possession and distribution) is ultimately subject to its own Constitution and need not be through the criminal justice system.
16. Further in the above regard, and to the extent that further international obligations are at play, the Judgment, at paragraph 82, provides as follows (emphasis added): -

*“**Counsel for the State referred to various international agreements** to which South Africa is a signatory and submitted that South Africa is obliged to give effect to these international agreements. The answer to the submission is that **South Africa's international obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic** and, in entering into international agreements, **South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations.** This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution. Of course, it is correct that, in interpreting legislation, an interpretation that allows South Africa to comply with its international obligations would be preferred to one that does not, provided this does not strain the language of the statutory provision.”*

17. Section **14** of the Constitution, as found within South Africa's inalienable Bill of Rights, provides as follows: -

*“Everyone has the right to privacy, which includes the right not to have:-*

- (a) their person or home searched;*
- (b) their property searched;*
- (c) their possessions seized; or*
- (d) the privacy of their communications infringed ...”*

18. While interpreting section **14** within the Judgment, the Constitutional Court reasoned and found as follows: -

*“What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State.”*

and

*“... the same case applies with equal force to the case of the possession, cultivation and use of cannabis by an adult in private for his or her personal consumption in private and in the absence of children.”*

19. Despite the aforesaid, the Bill prescribes incredibly harsh penalties, which, in turn, are linked to arbitrary limitations imposed on the quantities of cannabis-related matter that citizens may use and exchange in private. In other words, the Bill, **contrary to the Judgment and to our right to Privacy**, seeks to make the use of cannabis, in our private lives, the business of The State.

#### EVIDENCE OF HARMS AND STRATEGIES TO PREVENT THEM

20. Section **36** of the Constitution reads as follows (emphasis added): -

##### ***“Limitation of rights***

36. (1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is **reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom**, taking into account all relevant factors, including—*

*(a) the nature of the right;*

*(b) **the importance of the purpose of the limitation;***

*(c) **the nature and extent of the limitation;***

*(d) **the relation between the limitation and its purpose;** and*

*(e) **less restrictive means to achieve the purpose.***

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

21. The importance of section 36 is that it sets out the considerations that **must** be balanced out, as a matter of apex law, in order for any prohibitory law to justifiably limit any one or more of the rights contained in the Bill of Rights.
22. We submit that the following considerations ought to assume elevated importance in the balancing exercise required by section 36 of the Constitution: -

- 22.1. Paragraph 30 of the Judgment, which quotes the Court a quo, records that **the State's evidence** (against the push for the decriminalisation of cannabis by civil society) **was** (emphasis added):

*"... **singularly unimpressive**, particularly in that a considerable period of time was offered to [the State] in order to respond comprehensively to the Shaw report".*

- 22.2. Paragraph 34 of the Judgment, which also quotes the Court a quo, records as follows (emphasis added): -

*"The point of this judgment is that **there are a multitude of options available to fight this problem as opposed to the blunt use of the criminal law**. It is precisely for this reason that this Court contends **that less restrictive means must be employed** to deal with the problem, a conclusion clearly advocated in the position articulated by the Central Drug Authority cited earlier."*

and

*"The evidence, holistically read together with the arguments presented to this Court, suggests that **the blunt instrument of the criminal law employed in the impugned legislation is disproportionate to the harms that the legislation seeks to curb in so far as the personal use and consumption of cannabis are concerned**. This conclusion is supported by the importance of the core component of the right to privacy, and, further, by the **cautious approach that must be taken to the evaluation of the criminalisation of cannabis** which, as indicated earlier in this judgment, is certainly characterised by the racist footprints of a disgraceful past."*

- 22.3. The harms (as must be – but which have not been - balanced with alleged cannabis harms) caused by imposing the criminal justice system onto what should be a (soft/empathetic) public health concern, are as follows: -
- 22.3.1. A person arrested and charged is subjected to trauma, invasion/deprivation of (fundamental) human rights, and indignity.
  - 22.3.2. These individuals (human being with hopes, needs, and dreams) may be suspended/expelled from school and/or lose their job. Their dependents and family will suffer as a result. They often remain uneducated, unemployed and unemployable.
  - 22.3.3. They are dragged through the criminal justice system, wherein they are exposed to (*inter alia*):
    - 22.3.3.1. hardened criminals;
    - 22.3.3.2. far more harmful drugs;
    - 22.3.3.3. infectious and sometimes deadly diseases; and
    - 22.3.3.4. costs, hassle and general disruption of their lives.
23. It follows, therefore, that (through the lens of section **36**):
- 23.1. the State, when called upon to produce it, and despite being afforded ample opportunity to provide it, lacked evidence of the cannabis-related harms that it purports to wish to prevent;
  - 23.2. the “*importance of the purpose of the limitation*” (to allegedly prevent harms) is entirely undermined when one ends up (through criminal prohibition) doing more harm to people than one prevents;
  - 23.3. the limitation on one's human rights extends (unreasonably, irrationally and unjustifiably) beyond its purpose;
  - 23.4. the “*relation between the limitation and its purpose*” is backwards and, thus, counter-productive; and



- 23.5. one must look to less restrictive (and more effective) means to achieve reduction of harms (if one is to be said to make and apply laws reasonably, rationally, and non-arbitrarily).
24. Furthermore, **The State's** "National Drug Master Plan" (4<sup>th</sup> Edition / 2019 to 2024)<sup>2</sup> – which **is** in line with the Judgment, your constitutional and human obligations, and the alternative approaches hinted at in the Convention – says, *inter alia*, as follows (emphasis added): -
- 24.1. "A **harm reduction** philosophy emphasises the development of policies and programmes that focus directly on **reducing the social, economic, and health related harm** resulting from the use of alcohol or drugs. Harm reduction interventions are **evidence-based public health principles to support people who use drugs ...**";
- 24.2. "The NDMP 2019 - 2024 recognises that the relationship between drug control and human development is complex and requires a coordinated and multi-sectoral approach. This requires acknowledgement of diverse social, economic, and cultural contexts that considers **the human rights and expectations of all citizens**. When engaging communities, **the goal is a rational, compassionate policy based on human rights and evidence**. An effective response will therefore include the **prevention of social marginalisation** and the **promotion of non-stigmatising attitudes, encouragement to drug users to seek treatment and care**, and expanding local capacity in communities for prevention, treatment, recovery, and reintegration. The **community-based approach** is supported by effective law enforcement to create a South Africa where **people are and feel safe from the harms** associated with drugs ..."; and
- 24.3. "Historically, most nations' strategies for addressing SUD centred on **punishment** ('war on drugs'). **This has been shown to have almost no effect on the levels of the use or supply of drugs and has resulted in collateral harms**. The recognition of **the need to shift from criminal justice to a public health approach** represents a major shift in mentality. The public health approach **further recognises that people who use drugs are often conflicted** between wanting to stop and continue to use ...".

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<sup>2</sup> [https://www.gov.za/sites/default/files/gcis\\_document/202006/drug-master-plan.pdf](https://www.gov.za/sites/default/files/gcis_document/202006/drug-master-plan.pdf)

25. Despite the aforesaid, the Bill proposes to create crimes for behaviour that The State, when called upon to do so, was unable to satisfactorily link to harms that exceed the well-established harms of being caught and convicted for engaging in the behaviour itself.
26. This is not reflective of the humanity, empathy, accommodation, and understanding with which we should, together, be moving forwards as a (liberal and democratic) society. Of course, the State's (or anyone else's) pre-conception of morality, absent evidence of harm, cannot be used to justify limiting the rights of its citizens.<sup>3</sup>

#### RIGHTS VIOLATED

27. *Inter alia*, the following rights contained in the Bill of Rights (in order of appearance) are (*prima facie*) violated by maintaining criminal prohibition associated with cannabis-related behaviour for which meaningful harms have not been (and cannot be) alleged and proved by the State: -

27.1. **Section 9 (Equality): -**

- 27.1.1. For so long as you treat users of cannabis differently from users of tobacco and alcohol (the harms associated with the latter of which cannot any longer be legitimately denied to exceed those of cannabis) you are infringing on people's right to equality.<sup>4</sup>
- 27.1.2. We note that subsection **2** requires you to take "... *legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination ...*" (emphasis added) and that you would be doing the opposite by legislating to continue to discriminate against cannabis users.

27.2. **Section 10 (Dignity): -**

- 27.2.1. To have your private space arbitrarily invaded and searched, and to be arrested, detained and dragged through the criminal justice system, is the ultimate indignity.

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<sup>3</sup> E.g.: - *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, amici curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC)

<sup>4</sup> <https://www.dailymaverick.co.za/opinionista/2015-01-30-weeding-out-legislative-hypocrisy/>

27.2.2. The same may be said for being exposed to all consequences detailed at para. **22.3**, above.

27.2.3. So fundamental is this right that section **1** of the Constitution lists it as a foundational value. Does a person deserve to be deprived of it, just because they choose to consume cannabis in any given quantity (and what of possessing “excessive” pornography – para. **18**, above)?

27.3. **11 (Life): -**

27.3.1. It is not unheard of that the enforcement of prohibitory laws have taken the lives of cannabis users and/or alleged dealers.<sup>5</sup> See, also, para. **22.3.3.3**, above.

27.3.2. The right to life is also foundational and can only be forfeited in exceptional circumstances.<sup>6</sup>

27.3.3. It cannot be so that an alleged cannabis user/dealer forfeits this right, and it is true that the state of our prisons and holding cells means that many will forfeit this right, simply by virtue of having been arrested and detained.

27.4. **12 (Freedom and Security of the Person): -**

27.4.1. Arrest and detainment is a fundamental deprivation of this right, with the consequences detailed at para. **22.3**, above.

27.4.2. Viewed through the prism of section **36** (para. **23**, above) – as it must be viewed - it must be seen that this is a “*depriv[ation] of freedom without just cause*” (section **12[1][a]**).

27.5. **14 (Privacy): -**

27.5.1. This has been fully ventilated in the Judgment.

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<sup>5</sup> <https://www.timeslive.co.za/sunday-times/news/2015-07-12-how-a-family-ran-sas-biggest-dagga-empire/>

<sup>6</sup> *S v Makwanyane & Another* 1995 (6) SA 391 (CC)

27.5.2. We observe that **nowhere in the Judgment** does it suggest that one forfeits ones right to privacy because of using and possessing above a certain number of cannabis plants (or the like).

27.5.3. Therefore, to propose to place arbitrary limitations on the right to privacy (through imposing the limits that the Bill seeks to impose) and to purport to invade this right (by “*counting plants*”) runs contrary to the rights contained in the Bill of Rights and the spirit and purport of the Judgment. Who counts our bottles of alcohol, who weighs our tobacco, and who sifts through our pornographic material (the latter which we presume does not relate to a child - in which event harms prevention could be alleged)?

27.6. **15 (Freedom of Religion, Belief and Opinion): -**

27.6.1. Cannabis is not only part of religious belief and practice (the Rastafari, for example) but has its use has become an established cultural phenomenon.<sup>7</sup>

27.6.2. As stated at para. **27.1**, above, this is linked to the right to equality, as we are not entitled to treat cannabis users differently from users of tobacco and alcohol, especially where The State respects and protects:

27.6.2.1. the religious/cultural right to use alcohol;<sup>8</sup> and

27.6.2.2. the religious/cultural right to use tobacco.<sup>9</sup>

27.6.3. Does the right to “*cognitive liberty*”<sup>10</sup> not find shelter under this section?

27.6.3.1. What is more sacrosanct than what a human being experiences within the confines of their own mind; and

27.6.3.2. what legitimate business has The State in imposing limitations on where a person (in some instances through

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<sup>7</sup> [https://en.wikipedia.org/wiki/Cannabis\\_culture](https://en.wikipedia.org/wiki/Cannabis_culture)

<sup>8</sup> <https://en.wikipedia.org/wiki/Eucharist>

<sup>9</sup> <https://www.youtube.com/watch?v=lizuRwscrw>

<sup>10</sup> [https://en.wikipedia.org/wiki/Cognitive\\_liberty#:~:text=Calls%20for%20reform%20of%20restrictions,the%20grounds%20of%20cognitive%20liberty.](https://en.wikipedia.org/wiki/Cognitive_liberty#:~:text=Calls%20for%20reform%20of%20restrictions,the%20grounds%20of%20cognitive%20liberty.)

the ingestion of a drug) goes within the confines of said own mind?

27.7. **16 (Freedom of Expression): -**

27.7.1. This includes “*freedom of artistic creativity*” (section **16[1][c]**).

27.7.2. It is well-known that cannabis use elevates this.<sup>11</sup> If not, why not (The State shouldering the burden of answering this)?

27.8. **22 (Freedom of Trade and Occupation): -**

27.8.1. Why may a person not elect to earn a living via the (regulated) trade in cannabis, especially considering the need for entrepreneurship to get ourselves out of our economic decline, as aggravated by Covid-19 pandemic? This question is not rhetorical and has been posed by both:

27.8.1.1. our Hon. President, Cyril Ramaphosa;<sup>12</sup> and

27.8.1.2. our Hon. Minister of Finance, Tito Mboweni.<sup>13</sup>

27.8.2. What harms are prevented by declining to introduce a (regulated) cannabis industry (The State, again, shouldering the burden of answering this)? Why send people to prison for wishing to make their own way in life, *albeit* through growing and/or selling (regulated) cannabis?

27.8.3. Would it not offend section **9 (Equality)** – as related to the right in question - to only afford the right to earn a cannabis-related living to those fortunate people with:

27.8.3.1. the know-how and financial might to navigate the provisions of the Medicines and Related Substances Act

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<sup>11</sup> <https://www.organism.earth/library/document/mr-x>

<sup>12</sup> <https://www.iol.co.za/business-report/economy/sona2020-ramaphosas-cannabis-plan-plants-a-brighter-future-42869333>

<sup>13</sup> <https://www.iol.co.za/business-report/economy/finance-minister-tito-mboweni-says-make-weed-legal-to-fill-hole-in-budget-42078767>

of 1965 (one piece of legislation that allows for the regulated trade in **medicinal** cannabis); and/or

27.8.3.2. the know-how and financial might to navigate whatever other piece of legislation might be forthcoming from your honourable selves, which purports to regulate the trade in **recreational** cannabis?

27.8.4. Why not a (largely unregulated – but for necessary quality control) trade in “*craft cannabis*”,<sup>14</sup> or looking to a “*cooperative/hub model*”,<sup>15</sup> as could see our poorest-of-the-poor partake in what is, undoubtedly, a massive opportunity?

27.9. **24 (Environment): -**

27.9.1. Cannabis and its many industrial uses (“*hemp*”) undoubtedly, represents “*ecologically sustainable development and use of natural resources*” and – linked to section **22 (Freedom of Trade and Occupation)** – promotes “*justifiable economic and social development*”.

27.9.2. If not, why not (The State shouldering the burden of answering this)?

27.10. **25 (Property): -**

27.10.1. Cannabis and cannabis cultivation material ought to be considered the property of a person.

27.10.1.1. What justification can/does The State have in (otherwise arbitrarily) depriving such a person of their property (confiscating it and forfeiting it to The State) when it exceeds a certain amount (when this is not done with the likes of tobacco, alcohol and pornography)?

27.10.1.2. Again, this is not rhetorical (The State shouldering the burden of answering this).

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<sup>14</sup> Canadian example: <https://www.craftcannabis.ca/>

<sup>15</sup> <https://theemeraldmagazine.com/what-is-a-cannabis-co-op/>

27.10.2. For that matter, are the inner confines of a person's own mind not their own (i.e. deserving of associated property rights)?

27.10.2.1. By legislating to prevent them from chemically achieving certain mental states, are you not, in effect, arbitrarily depriving them of (portions of) their property?

27.10.2.2. We appreciate that this is philosophically and constitutionally 'fringe', but ought we not to be entertaining ideas like this, in order to accommodate for the full spectrum of potential human experience and give effect to the apex principle of liberty enshrined in our Bill of Rights?

27.11. **27 (Healthcare): -**

27.11.1. Whilst some claims are certainly untrue, or exaggerated, others are not, and cannabis can, in certain instances, be an effective remedy for a variety of ailments.<sup>16</sup>

27.11.2. It is submitted that "*The State [would be taking] reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights*", if it, *inter alia*:

27.11.2.1. acknowledged the right of people to self-medicate with cannabis (even if their knowledge is limited) and to provide their friends, family and neighbours with whatever cannabis and cannabis products that they, as consenting adults, wished to receive (even by way of purchase/exchange); and

27.11.2.2. accounted for that certain cannabis extractions and concentrates (in order to be effective remedies) require far more raw cannabis and cannabis cultivation material than the Bill presently allows to be possessed *per person*.

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<sup>16</sup> Free PDF available for download: <https://www.nap.edu/catalog/24625/the-health-effects-of-cannabis-and-cannabinoids-the-current-state>

## COMMENTARY ON THE BILL

28. Having established necessary foundational points and asked relevant questions of your honourable selves (the lawmakers tasked with creating reasonable and rational legislation), it serves to comment (generally) on certain select sections of the Bill.

29. **“Deal in”**: -

29.1. Section **1(1)** defines “deal in”, whilst a new crime is created to replace that which is presently contained in the Drugs and Drugs Trafficking Act of 1992.

29.2. Sections **3**, **6(a)** and **6(b)**, and **4(5)** create “deal in” criminal offences.

29.2.1. Why must this be so, when one considers para. **27.8** (and sub-paras) above?

29.2.2. What harms are the State trying to prevent?

29.2.2.1. If this cannot be answered convincingly and without falling into doing more harm (through criminal prohibition) than that which is prevented (para. **23**, above) then the answer must be that the State ought not to (but for in limited [legitimate] circumstances – such as distributing cannabis to minors, or selling/sharing contaminated products) create a crime of dealing in cannabis, or cannabis product, or cannabis cultivation material.

29.2.2.2. Why, for example, must an individual without green fingers, or sufficient “private space” (i.e. someone not ‘empowered’ to grow their own cannabis) be precluded from approaching their ‘empowered’ neighbour to purchase said neighbour’s overflow cannabis (much as one may do with home-grown vegetables)?

29.2.3. What possible harms are prevented by criminally prohibiting the sale of (non-psychoactive and harmless) cannabis seeds and seedlings/“clones”?

29.2.3.1. Why must these things only be obtained *via* donation?



29.2.3.2. Does The State intend to discriminate against people who are not friendly with other cannabis growers and limit the rights extended in the Judgment to those who are? Surely, this must be unintended by your honourable selves.

29.2.3.3. Why stifle a perfectly viable industry and opportunity for entrepreneurship and economic upliftment?

29.3. To the extent that section **(1)(2)** states that “Sections 3(1), (4), (5), (6), (7) and (8) and 4(1), (2), (4) and (5) of this Act do not apply to any person who is permitted or authorised in terms of any other Act of Parliament to - (a) deal in cannabis plant cultivation material, cannabis plants, cannabis or a cannabis product; or (b) cultivate cannabis plants”, it would, we respectfully submit, serve your honourable selves well to inform the public (as would, in turn, inform their understanding of the full consequences of the Bill) of whether:

29.3.1. you intend to leave the Medicines and Related Substances Act as the only Act of Parliament that allows for the regulated dealing in of (medicinal) cannabis (“hemp” having been excluded by you – questions of appropriate definitions for now aside); or

29.3.2. there is another Act of Parliament on-the-cards that will seek to create and regulate a (recreational / responsible adult use) industry, which we would hope and trust:

29.3.2.1. does not set the barrier for entry so high as to (illegitimately and short-sightedly) exclude the poorest-of-the-poor from an economic step-up; and

29.3.2.2. holds harm-prevention strategies (and section **36** of the Constitution) close to its heart.

30. **“Cultivate”, “possess in private”, “cultivation offences” and “cannabis offences”:** -

30.1. Section **1** defines “cultivate” and “possess in private”.

30.2. Sections **2, 3** and **4** (as read with the schedules) establish “prescribed quantities for personal use by an adult person”, “cultivation offences” and “cannabis offences”.

30.2.1. What harms are prevented by criminalising the behaviour of someone who cultivates or possesses more than a “*prescribed quantity*”?

30.2.1.1. If there is no good (science-based) answer for this, then it is irrational and arbitrary to limit the quantity of cannabis that anyone may cultivate and possess in private.

30.2.1.2. If one is not doing meaningful harm when possessing and cultivating below a “*prescribed quantity*” but then harm results above a “*prescribed quantity*”, is criminalising that behaviour not doing more harm than any harm prevented (see para. **23**, above)?

30.2.1.3. If your honourable selves intend to prevent the unregulated “*dealing in*” of cannabis (the harms question aside for the moment) by prohibiting the possession and cultivation of more than a “*prescribed quantity*”, then:

30.2.1.3.1. have you not simply replaced the (found to be unconstitutional) <sup>17</sup> presumption of dealing with another (which will be found to be unconstitutional) presumption of dealing; and

30.2.1.3.2. instead, would it not be more constitutionally viable to oblige investigators and prosecutors prove actual (illicit) dealing in cannabis?

30.2.2. What of someone who wishes to grow cannabis for purposes other than for consuming it for its psychoactive effects?

30.2.2.1. Does a person who grows above the “*prescribed quantity*” commit a crime, if it is intended as a perimeter hedge, or as cattle fodder?

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<sup>17</sup> S v Bhulwana, S v Gwadiso 1996 (1) SA 388 (CC)

- 30.2.2.2. What about if they wish to build a house from hempcrete,<sup>18</sup> or to knit socks,<sup>19</sup> or for nutritional purposes,<sup>20</sup> but:
- 30.2.2.2.1. they inadvertently (because of being uneducated, or misinformed, or because of cross-pollination) grow cannabis above the levels to be defined as “hemp”, per section 1 definition, as read with the schedules; and/or
- 30.2.2.2.2. they do not have a permit to grow “hemp” (the defined limits placed in respect of which, we submit, are unreasonably low) from the Department of Agriculture?
- 30.2.3. What of those with medical ailments, who wish to self-medicate with cannabis? We submit that, at worst, provision needs to be made for an increased “*prescribed quantity*” that accounts for how much more cannabis is required to be grown, concentrated and consumed in order to yield beneficial medicinal outcomes for certain ailments.
- 30.2.4. Why are we even purporting to regulate the growing and possession of a plant, instead of the legitimate and illegitimate uses to which the plant may be put (comparator being how we do not regulate the growing of poppies, or enter private spaces to count how many are grown in a garden, but do the manufacturing and dealing in of heroin – a truly harmful drug)?
- 30.3. Why do we not see an equivalent “*prescribed quantity*” for those who would wish to grow their own tobacco, or brew their own beer, at home (section 9 equality)? One is, after all, far more likely to do harm to oneself and/or others by getting too drunk, as opposed to getting too stoned (in which latter event, one will likely be couch-bound, clutching a bag of Simba chips). For that matter:

<sup>18</sup> <https://en.wikipedia.org/wiki/Hempcrete#:~:text=Hempcrete%20or%20hemplime%20is%20biocomposite,%2C%20Cano smose%2C%20sochanvre%20and%20soHemp.>

<sup>19</sup> <https://en.wikipedia.org/wiki/Hemp>

<sup>20</sup>

<https://www.hempbasics.com/shop/hemp-seed-nutrition#:~:text=Hemp%20seed%20oil%20also%20provides.amounts%20of%20iron%20and%20zinc.> and <https://wayofleaf.com/recipes/how-to-make-raw-cannabis-smoothie>

- 30.3.1. on what basis and under which circumstances will the SAPS be authorised to enter into a person's private space (the very antithesis of the Judgment – as based on the section **14** right to privacy) to '*count their cannabis plants*'; and
- 30.3.2. have you undertaken (as you are required to have done) the exercise of assessing the harms that you are purporting to prevent (for example, in allowing for 6 – but certainly not 7 – cannabis plants) against those that will be done by SAPS members:
  - 30.3.2.1. wantonly kicking down the doors of private residences;
  - 30.3.2.2. rummaging through people's private spaces under the auspices of locating a few grams/plants/millilitres north of a "*prescribed quantity*";
  - 30.3.2.3. often (data available on request from our client, Fields of Green for ALL) threatening arrest and incarceration in the event that bribes are not paid; and/or
  - 30.3.2.4. arresting people (with all associated consequences) for harmlessly growing more plants, or possessing more of something, than you say is too many/much?
- 30.4. Lastly, how does The State realistically intend to enforce these proposed limitations?
  - 30.4.1. The particularity with which the Bill proposes to separate out and limit different forms, quantities and levels of maturity of the cannabis plant places a considerable burden (and questionable discretion) on our law enforcement officials; and
  - 30.4.2. would, thus, divert valuable resources towards the endless and meticulous counting and assessing of South Africa's private cannabis collections and away from far more harmful crimes that are far more deserving of the SAPS' and NPA's attention.

31. **Penalties: -**

31.1. Section **7** creates penalties following upon conviction for certain cannabis-related statutory crimes.

31.2. It appears to us that these penalties (question aside of whether the crimes ought even to exist) are unreasonably, irrationally and arbitrarily harsh, accounting for the fact that:

31.2.1. most of the statutory crimes are genuinely **victimless** (and, thus, there is no societal need for retribution or restoration);

31.2.2. true criminals are liable to do less time for more heinous crimes (*i.e.* it appears that your honourable selves have not conducted a proportionality enquiry/exercise);

31.2.3. the question is begged as to why your “*National Drug Master Plan*” (4<sup>th</sup> Edition / 2019 to 2024)<sup>21</sup> is not being followed, by, *inter alia*:

31.2.3.1. helping, instead of punishing, problem drug users;

31.2.3.2. treating drug abuse as a public health concern (not a criminal concern – unless harm is done to others); and

31.2.3.3. treading carefully, in order to not do more harm to members of society than one prevents (see para. **23**, above);

31.2.4. the Constitutional Court found, at para. **101** of the Judgment and **without talking of “prescribed limits”**, as follows: -

*“Since I have concluded that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an order will have to be made declaring the relevant provisions constitutionally invalid to the extent that they criminalise the use or possession of cannabis in private by*

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<sup>21</sup> [https://www.gov.za/sites/default/files/gcis\\_document/202006/drug-master-plan.pdf](https://www.gov.za/sites/default/files/gcis_document/202006/drug-master-plan.pdf)

*an adult for his or her personal consumption in private.”;*  
and

31.2.5. we see no indication that you have considered, or applied, as, with respect, you ought to have, **transformative justice**, which is quintessential in dealing with the core rights contained within the Constitution, *i.e.* the following questions are begged: -

31.2.5.1. Where do we see evidence of the idea of us, as a country, moving toward a system based on rehabilitation, rather than revenge, in an attempt to create a society grounded in social justice, fundamental human rights and democratic values – seeking to transform the lives of the individuals it pertains to, and creating better conditions of living for them?

31.2.5.2. Are we now left to presume that the old system of retributive justice still applies within our ‘free’ democracy?

31.2.5.3. How does a cannabis user, who grows one more plant than stipulated in the Bill, ‘*violate the very fabric of our society*’?

31.2.5.4. How does the punitive/prohibitionist approach address harms, where a more “*ubuntu*”-type solution exists (in the form of education, addressing harms, rehabilitation, and access to the help that a drug user may, rather, require)?

## 32. **Expungement of criminal records: -**

32.1. Section **8** creates room and procedure for the expungement of criminal records.

32.2. We fully endorse, and commend you for taking, this positive step. But: -

32.2.1. The Bill effectively pardons people who were convicted for using or possessing cannabis, only for those same people to be subject to laws which impose even harsher penalties for using and possessing cannabis than before (see para. **23** above).

- 32.2.2. Are you not, thus, simply opening yourselves up, again, perhaps in a few years/decades, to having to expunge the criminal records carried by those who fell afoul of the Bill (presuming that it is permitted to become law)?
- 32.2.3. Is it not better to be forward-thinking now and to not burden anyone in the future with criminal records related to (unjustifiable) cannabis-related crimes?

33. **Limits and concentrations (generally): -**

- 33.1. The Bill, throughout, purports to create limits and concentrations, above/beyond which:
  - 33.1.1. one thing is then considered, for purposes of the Bill, to be another thing; and
  - 33.1.2. a person's behaviour is considered more '*harmful*' (and criminal) than before.
- 33.2. It is quite clear to us (having, for years, consulted with true cannabis experts) that these limits and concentrations:
  - 33.2.1. have been created:
    - 33.2.1.1. on the basis of thumb-suck;
    - 33.2.1.2. by erring on the side of (extreme) caution; and
    - 33.2.1.3. without necessary consultations with experts (some might argue that laws affecting people ought never to be made without consulting with them);
  - 33.2.2. are arbitrarily low (some so low that – so we are advised – we [as a planet] are not even possessed of equipment sensitive enough to test for them) and will create a nightmare when it comes to compliance and enforcement;
  - 33.2.3. will open The State up to repeated legal challenges from civil society organisations and individuals who wish to '*play in this space*'; and

- 33.2.4. are far short of being able to say that they are designed to prevent harm.

### **THE “CORRECT” APPROACH**

34. All of the above accounted for, we opine and respectfully submit the following to be the “correct” approach: -

- 34.1. Reformulate the Bill entirely, to account for:
- 34.1.1. the (scientifically-established) harms that you might legitimately seek to prevent/mitigate by limiting people's rights;
  - 34.1.2. through the prism of section **36** of the Constitution, and leaning on the forward-thinking approach already contained in “*National Drug Master Plan*” (4<sup>th</sup> Edition / 2019 to 2024),<sup>22</sup> the weight of these preventable harms against any harms that would result from maintaining and enforcing criminal prohibition;
  - 34.1.3. any less-restrictive and more-effective means that can be employed to achieve the legitimate ends of harms reduction;
  - 34.1.4. the economic opportunity that is presented by a (well) regulated cannabis industry; and
  - 34.1.5. fundamentally, the **freedom** of people (as enshrined in section **1** of the Constitution) to do what they wish, so long as they do not unjustifiably infringe on the rights of others.
- 34.2. Convene a panel of experts (we tender our services on the legal front – and to identify experts from other disciplines) to assist you with a piece of law that takes our country forwards, not backwards.
- 34.3. Utilise how you proceed with this process to prove to South Africa that you listen to those who have elected you. Show us what is meant by participatory governance, by putting it into practice.

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<sup>22</sup> [https://www.gov.za/sites/default/files/gcis\\_document/202006/drug-master-plan.pdf](https://www.gov.za/sites/default/files/gcis_document/202006/drug-master-plan.pdf)



35. We genuinely thank you for your consideration and hope that we will be provided with opportunity to address you in Parliament.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Paul-Michael Keichel', written in a cursive style.

**SCHINDLERS**

PER: **PAUL-MICHAEL KEICHEL**

**ANDREW LAWRIE**