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February 14, 2017

TESTIMONY REGARDING SB302

Madam Co-chairs and Committee Members:

While we are grateful for the hard work of those who undertook to remove references to marijuana as a controlled substance in the Oregon Controlled Substances Act, we are opposed to proposed changes in the criminal law which either impose greater sentences or create new cannabis related crimes as to responsible adult consumers. We urge the committee to amend the bill by severing out the below described sections and pass those changes which remove marijuana from Oregon's controlled substances act.

The purpose of Ballot Measure 91 was not to create a regulated industry. The purpose was to end the arrest and prosecution of responsible adult cannabis consumers. Creation and regulation of adult use is the portal through which the people, acting as a co-extensive branch of the Legislature pursuant to Article IV of our state Constitution, brought about the legalization of adults possessing less than one ounce of marijuana anywhere, the cultivation of 4 household marijuana plants, and varying amounts of what we now refer to as 'cannabinoid products'. The point of this legalization was to stop arrests and prosecutions of responsible adult consumers.

NORML was founded in 1970 as a marijuana consumers lobby. The Portland Chapter is a state affiliate of the national organization. The Portland Chapter's Legislative Committee was formed in 2015 in response to the explosion of industry lobbyists and the absence of anyone lobbying the Legislature specifically on behalf of now lawful cannabis

consumers.

During the 2016 session, we lobbied successfully on behalf of expanding the ability to set aside records of marijuana arrests and convictions, and to allow patients to use their medicine throughout the criminal justice process, except for DUII diversion. (As to this latter effort, we will shortly be providing the Committee with a report regarding implementation of those provisions in HB4014.)

This session we are lobbying in support of two bills, SB301 (making the offsite use of any state legal substance a reason to refuse to hire or fire a worker an unlawful business practice) and SB788, and a social consumption bill identical to SB307 which the Committee is considering tonight, except that SB788 utilizes the HB3400 (2015) 'opt out' local control provision and SB307 includes an 'opt-in' local control provision.

Our specific objections to SB 302 are as follows:

1. Defining 'deliver' as "the actual, constructive or attempted transfer from one person to another of a marijuana item, whether or not there is an agency relationship." Page 7, line 29-30

All states which have adopted the Uniform Controlled Substances Act, except Oregon, include not only Possession and Delivery as crimes but also include Possession with Intent to Deliver (PWID). Oregon has instead made Delivery include Attempted Delivery (which would otherwise be a lesser and included offense) and even PWID by utilizing this definition, and the definition of 'attempt' (as used here in 'attempted transfer') which is defined as intending to complete a crime, taking a substantial step towards doing so. ORS 161.415(1); *State v. Boyd*, 92 Or.App. 51, 756 P.2d 1276 (1988)

There are two effects from this. The first is that possession of more than a user quantity is sufficient to support a conviction for delivery (*State v Alvarez-Garcia*, 159 P.3d 357, 212 Or. App. 663, 159 P.3d 357 (2007); proof of possession of 52 user quantities of methamphetamine without any evidence of intent other than that is sufficient to support a conviction for delivery). The second is that even where the crime of Delivery is premised

on being an attempt or a PWID, the Court of Appeals has repeatedly held that these offenses do not merge, upholding this ruling just a few weeks ago. *State v. Sargent*, 110 Or.App. 194, 822 P.2d 726 (1991), *State v. Scott*, 283 Or App 566 (2017)

The effect of the failure to be able to merge these convictions, among others, is that it takes 10 years¹ instead of 3 to be able to file a Motion to Set Aside the record of arrest and seal the convictions.

2. Section 3(1)(c), page 4, lines 26-28 and page 4, lines 2-7, (regarding unlawful possession by adults); Section 4(1) and (3), at page 5, lines 8-10 and 21-29 (regarding unlawful possession by minors); Section 5(1)(3)(b), page 5 lines 30-33 and 41-45 and page 6, lines 1-6 (regarding unlawful delivery) and Section 6(1)(b), page 6, lines 7-10 and 17-23 (regarding unlawful manufacture).

Sections 3, 4 and 5, make the unlicensed possession or delivery of marijuana a felony if the amounts involved are:

- More than 16 times the amounts adults are allowed to legally possess or deliver (for no consideration);
- More than eight pounds of usable marijuana in a public place; or
- More than one-quarter ounce of cannabinoid extract that was not purchased from a marijuana retailer that holds a license issued under ORS 475B.110

Section 6 makes the unlawful manufacture of marijuana a felony if:

- A person unlawfully manufactures marijuana and the total number of marijuana plants exceeds 12 marijuana plants; or
- A person unlawfully manufactures a cannabinoid product or a cannabinoid concentrate and the total amount of cannabinoid products or the total amount of cannabinoid concentrates exceeds twice the applicable maximum amount (adults are allowed to possess).

¹ In some counties (Lane and perhaps others) which read the expunction statute (ORS 137.225) differently from how most (perhaps all but Lane) read it, it could take 13 years (3 for the first and then 10 for the second).

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Portland NORML is opposed to the felonization of possession of marijuana because a felony subjects the offender to the possibility of a prison sentence instead of a county jail sentence along with other collateral consequences including limitations on housing and employment. More fundamentally, however, it is abhorrent to the concept of legalization that any adult should be at risk to be imprisoned for a cannabis related offense. Instead, and as to all marijuana related crimes, the Legislature ought to be considering eliminating all penalties, except perhaps for fines.

Additionally, making some possession crimes a felony will fundamentally change the interaction between law enforcement and adult consumers. Law enforcement procedures for felony stops and arrests is far more invasive than those for misdemeanors.

3. Section 7, at page 6, lines 25-45, and page 7, lines 1-15, imports the Commercial Drug Offense (CDO) statute (ORS 475.900) and makes renames it Commercial Marijuana Offense (CMO). This elevates possession, delivery and manufacture crimes to Crime Severity Level 8 irrespective of prior criminal record if the state pleads and proves 3 of 10 'aggravating factors'.

The aggravating factors, and our objections to them specifically, are set forth below:

- (a) The offender delivered a marijuana item for consideration;

This is necessarily included in any completed delivery prosecution as the transfer for no consideration is now legal.

- (b) The offender was in possession of \$300 or more in cash;

This is a ridiculously low amount and was at the time the statute was originally enacted.

- (c) The offender was unlawfully in possession of a firearm or other weapon as

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described in ORS 166.270 (2), the offender used, attempted to use or threatened to use a deadly weapon or dangerous weapon, as those terms are defined in ORS 161.015, or the offender was in possession of a firearm or other deadly weapon or dangerous weapon for the purpose of using the deadly weapon or dangerous weapon;

(d) The offender was in possession of materials being used for the packaging of marijuana items, such as scales, wrapping or foil, other than a material used to contain the marijuana item that is the subject of the violation;

This provision has resulted in prosecutions where people growing plants had baggies in a drawer in their kitchen.

(e) The offender was in possession of marijuana item transaction records or customer lists;

(f) The offender was in possession of stolen property;

(g) The offender was in possession of manufacturing paraphernalia specifically designed for producing marijuana, such as recipes, precursor chemicals, laboratory equipment, lighting equipment, ventilating equipment or power generation equipment;

We're not sure what recipes or precursor chemicals are involved in growing plants. But we are sure that even a legal indoor garden necessarily includes at least lighting equipment and often ventilating and power generation equipment.

(h) The offender modified structures by painting, wiring, plumbing or lighting the structures to facilitate the offense;

Here, too, any indoor garden involves wiring.

(i) The offender used public lands to manufacture the marijuana item; or

(j) The offender constructed fortifications or took security measures that had the potential to injure persons.

Category 8 on the crime severity rating of felony sentencing guidelines makes presumptive a prison sentence for any convicted offender². Portland NORML is opposed to presumptive prison for cannabis offenses³.

4. Section 9, at page 7, lines 21-31, creates a new Arson crime incident to the manufacture of a cannabinoid extract where the extraction causes a fire or causes an explosion that damages: The protected property of another person; or any property, whether the property of the person or the property of another person, and the fire or explosion recklessly places another person in danger of physical injury or the protected property of another person in danger of damage; or any property, whether the property of the person or the property of another person, and the fire or explosion recklessly causes serious physical injury to a firefighter or peace officer acting in the line of duty relating to the fire or explosion.

It's interesting to note that unlike the provisions regarding possession, delivery and manufacture, OLCC licensees are not exempted from this provision.

There already are statutes which adequately criminalize the reckless⁴ blasting of butane hash, including Reckless Burning (ORS 164.335), Criminal Mischief (ORS 164.345-365 (depending on the monetary amount of damage)). Concerns about first responder injuries would more properly be addressed by amending the Assault or Assault on a public safety officer statutes. This provision is unnecessary, and by making these accidents class A felonies, they are not expungible and likely to be ranked by the Criminal Justice Commission at presumptive prison crime severity levels.

² For those with no or minimal prior record (Criminal History G, H or I) it's easier in some limited circumstances for a judge to depart from the presumptive sentence than it is the other Criminal History levels.

³ We noticed that the other way by which the unlawful possession, delivery or manufacture of marijuana is elevated to Crime Severity Level 8 is by it occurring within 1,000 feet of a school. We are aware that excluding that from this bill was considered by some workgroup participants as an adequate trade off. On this point we part company from those allies.

⁴ Defined in ORS 161.085(9): "Recklessly," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exist

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6. Section 11, at page 7, lines 37-45 and page 8, lines 1-9, creates a new felony crime of causing another person to ingest marijuana. It would be a B felony (to be ranked for crime severity by the Criminal Justice Commission) generally, and a Class A felony, if done with the intent of committing or facilitating a crime of violence against the other person. Section 12, at page 8, lines 10-14, specifies that unless administered to a registered medical marijuana patient, or by someone no more than 3 years older, administering a marijuana item to a person under 18 would be a class A felony, and ranked at crime severity level 9, with presumptive prison sentences from 3 to 6 years, depending on the offender's criminal history.

To be clear and unequivocal, Portland NORML opposes the nonconsensual ingestion of marijuana in any form by one adult to another and NORML has always opposed use by minors. The question presented by this proposal is whether doing so should subject the person causing the ingestion to a serious felony or not.

The suggestion that it should be seems premised on the notion that marijuana is a dangerous controlled substance. It is not. It is a non-toxic herbal remedy. It's not used as a drug to impair a victim to do something against his or her will. We know that in sex crimes, sometimes the 3 year limitation of protection against conviction is a bright line which can cause injustice by one's birthday being even just one day more than 3 years earlier than the other persons.

To the extent that proposal emanates from a real life problem, the proposed criminalization here is excessive.

Please note that we have no objection to the final two substantive sections, Section 14, at; page 8, lines 30-45 and page 9, lines 1-12 and Section 15 page 9, lines 16 – 45. The former continues current law making it a violation to distribute or sell paraphernalia to minors and the latter modifies the crimes of importing or exporting marijuana items to define the attempt to export as a completed crime, and changes the limits to conform to the proposed new criminal limits for unlawful possession or deliver. As to the former, it is consistent with NORML's policy regarding use by minors. The latter seems to amend the statute consistent with its original intent and without increasing the penalty.