

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



**Bill 20-409 Simple Possession of Small Quantities of
Marijuana Decriminalization Amendment Act of 2013**

Committee on the Judiciary and Public Safety
Tommy Wells, Chairperson
Council of the District of Columbia

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Good afternoon Chairman Wells, Members of the Committee and staff. My name is Andrew Fois and I am the Deputy Attorney General for Public Safety in the Office of the Attorney General (OAG). Thank you for this opportunity to speak on behalf of the Executive regarding Bill 20-409, the “Simple Possession of Small Quantities of Marijuana Decriminalization Amendment Act of 2013.” The Mayor has welcomed the discussion in the District and across the nation regarding how the law should treat marijuana.¹ He has studied the matter carefully and weighed the arguments on all sides. His conclusion is to support decriminalization of possession of small amounts of marijuana and support Bill 20-409.² We also hope to work with the Committee on several important amendments we believe must be made to the bill to make it viable.

The Executive supports decriminalization of small amounts of marijuana for a number of reasons. Scientific knowledge about the effects of marijuana is improving. Marijuana is now generally accepted to be no more harmful or addictive than alcohol or tobacco, perhaps less so.

¹ Under current D.C. law, possession by an adult of any amount is a misdemeanor punishable by up to 6 months in jail and/or up to a \$1,000 fine. First offenders can receive probation that, if successfully completed, does not qualify as a conviction. Sale, distribution, possession with the intent to distribute and cultivation of any amount is punishable by up to 5 years in jail and/or up to a \$50,000 fine. For first offenders with less than a half pound, the sentence can be up to 6 months and/or \$1,000. Deferred sentencing probation is again an option. Whereas a juvenile who commits any marijuana related offense is subject to the entire range of sentencing options available in the juvenile justice system from probation up to, theoretically, commitment to the supervision of DYRS until his or her 21st birthday.

² The bill decriminalizes possession, possession with the intent to distribute and distribution without remuneration of “small quantities” of marijuana and related drug paraphernalia. It creates a civil violation punishable by a fine of up to \$100 and forfeiture of the marijuana for adults. The bill also applies to juveniles under 18 with a civil fine of up to \$100 and forfeiture of the marijuana as well as a required free, four-hour drug awareness program. If the juvenile does not complete the program within one year, the juvenile is required to perform eight hours of community service and an additional civil fine of \$200 must be paid. Drug paraphernalia used to ingest decriminalized marijuana would be legalized for an adult but not for a juvenile. A juvenile found in possession of such drug paraphernalia would be required to attend a drug awareness program. Transfer of such drug paraphernalia without remuneration would not be a violation. The bill goes on to prohibit use of less than an ounce as “cause for a search warrant” or “pretext for seizure.” Public housing assistance or other government benefits may not be denied, and a driver’s license may not be revoked, based on these civil violations.

Once presumed to be a so-called “gateway” drug to harder, more dangerous controlled substances as well as related criminal behavior, recent studies have not supported that theory.³ Studies have shown that the costs to society of alcohol and tobacco use are also each greater than those of marijuana use.

Public attitudes about marijuana use are changing. Marijuana is the third most popular recreational drug behind alcohol and tobacco. Studies show that 100 million Americans have used marijuana at some point in their lives, 25 million have done so in the past year and 14 million do so regularly. According to recent research, almost 75% of District residents support decriminalization of small amounts of marijuana and 58% of all Americans support some kind of reform.⁴

Marijuana laws are being reformed all over the country. Traditional criminalization policies have led to the arrest of 20 million Americans on marijuana offenses since 1965. There is growing momentum for reform of our marijuana laws, especially decriminalization of small amounts for personal use. In the last thirty years, sixteen states have decriminalized and two have legalized possession of small amounts of marijuana. It is expected that as many as ten other states will do so within the next two years.⁵

Juvenile marijuana prosecutions are declining. There are relatively few prosecutions of juveniles for marijuana offenses and even less for possession of small quantities. When juveniles are found in possession, MPD often offers diversion to first time offenders which does not count

³ See RAND Corporation 2006 study. A 2008 RAND study showed some connection with increased violence among a small number of long-term, chronic marijuana users.

⁴ See Reuters Oct. 22, 2013. A World Health Organization Study in 2008 showed that use rates in the U.S. were higher than in some countries that have decriminalized marijuana.

⁵ In those jurisdictions in which small amounts have been decriminalized, one ounce and \$100 fines are standard benchmarks.

as an arrest. OAG's Juvenile Section⁶ also frequently diverts marijuana cases, especially for possession only.⁷

Collateral consequences to the individual for marijuana possession offenses are too high. Arrests and convictions, and the criminal record that comes with them, for possession of small amounts of marijuana can have serious adverse consequences that follow people throughout life. Prior convictions, regardless of how old, of small amounts of marijuana possession have resulted in individuals not obtaining employment, losing employment, losing their property or housing, being refused admission to college or denied scholarships and other collateral, unintended consequences. A civil infraction would not result in these unwarranted, permanent punishments.⁸

Decriminalization could result in lowered costs for the criminal justice system. With possession of small amounts of marijuana decriminalized, the criminal and juvenile justice systems could realize cost savings as fewer offenders are brought into or diverted from the systems.⁹

Decriminalization allows law enforcement to prioritize more serious crime. It is MPD's job to enforce the law. Thus MPD is duty bound to make arrests for illegal possession of small amounts of marijuana whenever they see it occurring. This is not the best use of our scarce law

⁶ OAG's Juvenile Section prosecutes all juvenile marijuana offenders the United States Attorney's Office handles all adult marijuana cases in either Superior Court under the D.C. Code or U.S. District Court under federal law. Federal law, of course, would not be affected by this bill. OAG averages about 3,500 juvenile prosecutions a year. In 2011, there were only 57 juvenile cases papered in which possession of marijuana was the only charge. There were a total of 92 cases in which possession, possession with intent to distribute and/or distribution was charged. In 2012, there were 49 possession and 73 total marijuana cases papered. As of the end of September of this year, there have been 28 possession cases and a total of 36 marijuana cases charged.

⁷ Positive tests for drug use of those in the criminal and juvenile justice system have declined in recent years. PSA does not routinely test adult arrestees for marijuana because its data had shown little correlation between marijuana use and recidivism or failure to appear in court. The most recent tests for juvenile marijuana use show a decline.

⁸ Juvenile records are generally confidential under current law while these civil infractions would not be without specifically making them so. We suggest the bill be amended to provide for that.

⁹ Any cost reduction may be offset by the costs, especially for MPD, of administering the civil infraction system and for any adjudicatory body that is given jurisdiction to hear these matters. We may also see a shift of what might have otherwise been criminal cases handled by the USAO to the District's civil system.

enforcement resources. Decriminalization will enhance MPD's ability to prioritize and devote more resources to serious crime such as homicides, sexual assaults, armed robberies and high level drug dealers.

Decriminalization still allows for civil infractions and penalties. While we decriminalize possession of small amounts of marijuana, we must continue to send the message, especially to our young people, of its dangers and effects -- just as we do with alcohol -- to discourage them from using it.¹⁰ Unlike legalization, decriminalization involves imposition of a civil fine and attendance at a drug class that will educate minors about the effects of marijuana on a person's body and behavior and should teach them that it is a dangerous criminal offense to operate a motor vehicle while under the influence of marijuana and other drugs.

Let me turn now to some ways we would like to work together with the Committee to make the bill as effective as possible to achieve our mutual goals of ensuring the proper balance between decriminalization and quality of life for our residents, especially our youth.¹¹

Of course, the possible effects of decriminalization on children must be our primary concern, especially when it comes to distribution to minors or involvement of minors in distributing marijuana by adults. The bill leaves intact current law providing extra penalties for

¹⁰ It is not a criminal offense for a person under 21 to possess or drink alcohol. There is a civil infraction that provides for a fine of \$300 and a 90 day suspension of driving privileges for first offenders and twice the sentence for second offenders. A third offender may receive a \$1,000 fine and license suspension for up to one year. It is illegal to sell alcohol to anyone under 21 and for anyone under 21 to try to purchase it or to use a false ID. It is a misdemeanor criminal offense, prosecuted by OAG, for either an adult or a juvenile to possess an open container of alcohol in public or in a vehicle.

¹¹ The question could be raised whether the juvenile confidentiality statutes would prevent notice of infractions issued pursuant to this bill from being shared with the various entities who would be involved in the civil adjudicatory process and whether there needs to be a conforming amendment permitting such disclosures. OAG believes that no conforming amendment is necessary. Whatever law enforcement ends up calling the notice of infraction, law enforcement records pertaining to civil "Notice of Violation[s]" are specifically excluded from the juvenile confidentiality statutes. See D.C. Official Code § 16-2333 (a)(1A). OAG believes that notices of infractions under this bill would fall squarely within this exception.

anyone over the age of 21 who engages in either activity for remuneration.¹² Moreover, under current law, contributing to the delinquency of a minor by causing, encouraging or enabling the minor to possess marijuana by a person at least four years older is, for first offenders, punishable by up to six months in jail, \$1,000 fine, or both and up to 3 years in jail, a \$3,000 fine, or both for second offenders. This offense does not require remuneration and the bill, correctly in our view, does not change this important statute.¹³ The bill does, however, decriminalize possession and transfer without remuneration of marijuana by either adults or juveniles in statutory “drug free school zones.” We believe that schools and other similar areas are no place for marijuana or any drug and, therefore suggest amendment of the bill to keep in place the criminal penalties for possession and distribution in schools and related places.¹⁴

We would also suggest amending the bill to make clear that while possession may be decriminalized the actual smoking of marijuana is, as is the smoking of tobacco to a large degree, limited to private property. In order to ensure the quality of life for all, criminal penalties for possession should be maintained for smoking marijuana where children and citizens are enjoying our parks, playgrounds, sidewalks and other public places. The Executive also suggests amending the bill to allow citizens and, in extreme cases OAG, to pursue civil nuisance cases that decriminalization may present.

Law enforcement must be able to ensure that it has correctly identified the person prior to issuing a notice of infraction. A person stopped by the police may not correctly identify him or herself and may not be carrying identification. The entire civil process will be rendered useless,

¹² Distribution to a minor by a person over 21 for remuneration doubles the possible penalty (D.C. Code Sec. 48-904.06(b)) while enlistment of a minor in distribution of marijuana for remuneration by a person over 21 can be punished by up to ten years in prison and a \$10,000 fine. (D.C. Code Sec. 48-904.07(a)).

¹³ D.C. Code Sec. 22-811.

¹⁴ Penalties can double for such activity in a “drug free school zone” as defined broadly in D.C. Code Sec. 48-904.07 (a).

and law enforcement's credibility will be damaged, if the original violator cannot reliably be brought before the civil tribunal. Currently, law enforcement has no authority to compel someone to identify themselves for a civil offense unless it is tied to a specific licensing or regulatory structure, such as a driver's license or registration. District residents are not required to carry identification, and can choose to provide inaccurate or no identifying information to a police officer trying to issue a civil citation.

To ensure proper identification, the bill should be amended to require that a person who is in possession of a government issued identification card must show it to the police officer when being cited. Persons who do not have proper ID should be given an opportunity to provide it or otherwise identify themselves. In order to ensure that the violator provides proper identification, failure to produce a government identification that is within the person's possession, refusing to identify one's self, or giving false information should be a criminal offense.¹⁵ Absent such a sanction the violator has no incentive to correctly identify himself and the District has no way to ensure that the person will abide by the sanctions or participate in the adjudicatory process.¹⁶

While the bill establishes civil penalties for both adults and juveniles who violate its terms, there seems to be little impetus for a person to comply with the required sanctions. Individuals well understand the array of consequences for violating criminal laws but civil violations do not carry the same repercussions. Most civil violations are only effective because

¹⁵ The Anti-Littering Act, which provides for civil infractions, requires identification.

¹⁶ On September 4th the BOEE held a hearing on an initiative proposal to decriminalize up to two ounces and three plants of marijuana. This referendum is similar to the bill in many respects. There are two significant differences: it provides for mandatory identification and for adjudication by ABRA. It was withdrawn from the BOEE after OAG opined that it was in violation of law because it mandated the Executive fund a program for which appropriations are required.

they are tied to property interests or a privilege that people value.¹⁷ In this instance, however, there are no such compliance incentives for people to comply with the civil sanctions.

Although it is hoped that citizens will accurately identify themselves and pay the fines, one need look no further than payment rates under a pilot project for the Anti-Littering Amendment Act of 2008 to find clear evidence that this is not necessarily the case.¹⁸ With an admittedly small sample size, the results showed a discouraging 87% default rate as had been anticipated at the hearings on the bill. The Executive believes, therefore, that bills which provide for civil enforcement, such as this one, should always include an enforceable sanction that will serve to motivate people to comply. The bill should be amended to provide consequences for people who either never respond after being issued an infraction or who fail to fully comply with the proscribed sanctions after an adjudicatory hearing. Such failures should be a criminal offense with a minor misdemeanor penalty. Without such teeth, there is little incentive for people to comply with the law's dictates.

The bill should specifically provide which agencies will have jurisdiction to enforce and adjudicate contested cases resulting from violations. The littering violations are heard by the Office of Administrative Hearings with an MPD sergeant representing the government and OAH collecting the fines.

¹⁷ For instance, the most common form of civil violation is contained in the civil traffic code. Individuals follow traffic regulations because there are real consequences for not doing so – fines for violations are backed up by the suspension of a driver's license or revocation of vehicle registration if the fines are not paid. Also, if a home or business owner does not comply with civil laws and any resulting penalties for the violations, the government can put a lien on the property. In another example, a vendor might lose his or her license—and thus his or her livelihood—for violating civil vending laws. The same applies for a number of professional licenses and their regulatory requirements.

¹⁸ The pilot was first launched in 2011 and was expanded in 2012. In each pilot, warning Notices of Violation (NOVs), or tickets, were issued for the first month during an educational phase. Then actual NOVs were issued. In 2012, 70 such NOVs were issued. Of these, 23 were dismissed due to technical errors which have been corrected, leaving 47 valid NOVs. Of these, 41 have gone into default.

We believe there should be some limit on how many civil infractions any one individual can amass. We would like to work with you on establishing that limit, and the needed tracking system, as well as a possible scale of increased civil sanctions for multiple infractions by the same adult or juvenile.

We also suggest amending the bill to provide for confidentiality of the civil infractions committed by juveniles, as criminal offenses now are, in order to avoid any unintended collateral consequences.

Finally, there are three technical but important corrections that should be made to the bill discussed in a footnote below.¹⁹

¹⁹ First, the quantity of marijuana to be decriminalized is inconsistent throughout bill. The bill varies in using terms such as “an ounce or less” (three times) or “less than an ounce” (six times). It is important that the terms remain consistent throughout the bill.

Second, the term “cannabis” is used twice and “marijuana” is used throughout the rest of the bill in defining what drug is decriminalized. However, these two terms are defined differently in the law. “Cannabis” is a broader term that includes both marijuana and hashish. D.C. Code Sec. 48-901.02 (3) (A) defines marijuana as “the leaves, stems, flowers, and seeds of all species of the plant genus Cannabis, whether growing or not. The term “marijuana” does not include the resin extracted from any part of the plant, nor any compound, manufacture, salt, derivative, mixture, or preparation from the resin, including hashish and does not include the mature stalks of the plant, fiber produced from such stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.” “Hashish,” on the other hand is defined as the “resin extracted from any part of the plant genus Cannabis, and every compound, manufacture, salt, derivative, mixture, or preparation from such resin.” We assume that the variance in the terms was accidental and that the bill is intended, as the short title notes, to only decriminalize marijuana. The bill uses the term “cannabis” in what is to be included in the drug awareness program for persons under the age of 18. The Administration has no objection to its inclusion in that provision.

Third, while it is clear in the bill that the minor is responsible to pay the initial fine for possessing the proscribed amount of marijuana, to avoid needless litigation it should clarify whether it is the minor or his or her parent who is required to pay the additional fine that is provided if the minor fails to complete the drug education program. The relevant portion of the bill provides:

(i) The parents or legal guardian of any offender under the age of eighteen shall be notified of the offense and the availability of a drug awareness program.

“(ii) The program must be made available without cost and must provide at least four hours of group discussion or instruction based on science and evidence-based principles and practices specific to the use and abuse of cannabis, alcohol, and other controlled substances.

“(iii) If the minor fails to complete the drug education program within one year of notice of its availability, the court shall issue an order requiring the minor to complete eight hours of community service and shall be assessed a fine of \$200.”

While the assessing of the additional fine is in the same sentence as the requirement for the community services the assessment portion of the sentence is written in the passive voice. To be clear, the bill should be amended to

The Executive believes that with these amendments and adequate funding for enforcement and adjudication, Bill 20-409 will meet the needs of the community as a whole. The Executive is eager to work closely with the Committee to assist in the drafting of these pragmatic amendments.

Thank you for this opportunity to testify today. I would be happy to answer any questions that you might have.

affirmatively state that the “minor shall be assessed a fine of \$200.” If the Council intended that the parent should be responsible to pay the additional fine then the bill should be amended accordingly.