

Recommendations of the Roadway Safety Subcommittee
as Revised and Adopted by the Governor's Marijuana Advisory Commission

Introduction

1. Recommendation regarding “a plan for continued monitoring and reporting on impacts to public health, with specific reference to the health endpoints listed in Section 111(1) above,” which for the Roadway Safety Subcommittee were “injury and death” (i.e., motor vehicle crashes) and “crime rates”

Because many of the recommendations outlined in this report will depend on the measurable impacts, if any, of cannabis legalization in Vermont, the Commission recommends the immediate adoption and implementation of a plan for monitoring and reporting data related to cannabis use. This reaffirms the Commission's January 2018 recommendation to begin collecting baseline data "as soon as possible." Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 18. In addition, the Commission recommends adding the following proposals for consideration:

- (1) Initiate an intensive, long-term data-collection and research effort before any tax and regulate law for cannabis goes into effect; and
- (2) Mandate this initiative through legislation with proper funding, assigning the Vermont Statistics Analysis Center the collection, analysis, tracking, and reporting of data and research on any impacts.

Collect Baseline Data

First, the Commission confirms it's January 2018 recommendation for a data-collection initiative. *Id.* at 17. As described in the January report, the effort would be based on a data-collection initiative in Colorado, which was mandated by legislation. *See id.* (citing Colorado Senate Bill 13-283).

The Commission recommends (based on the Colorado example) the following non-exhaustive list of data-collection categories:

- **Cannabis-related crimes and quality-of-life complaints.**
- **Cannabis arrests, including amounts**
- **Cannabis-related traffic accidents and impaired driving generally**
- **Rates of Out-of-state diversion of Vermont products**
- **Postal service use for cannabis transfer**
- **Youth**

Id. at 17-18. The Commission emphasizes the importance of incorporating a data- collection initiative in any plan for monitoring and reporting in Vermont. **Absent the collection of baseline data, Vermonters may never fully understand the impacts of legalization, if any, in this state.**

Legislation - Data and Research Initiative by Governmental Entity

The Commission recommends creation of a statutory mandate for data collection and analysis prior to the effective date of any taxation and regulation scheme. Not only should the legislation require the state to collect and analyze data, but it should also require the tracking of and reporting on scientific research relating to any impacts of legalization across the U.S. and Canada. In the event it is determined the timeline for such a long-term effort is untenable, the Commission could recommend, at a minimum, that tax-and- regulate legislation include a monitoring and reporting component, to begin immediately.

Finally, any proposed legislation should assign the above-described tasks to the Department of Public Safety, which serves as Vermont's Statistical Analysis Center and prescribe adequate staffing and funding for these data efforts.

In sum, a mandatory plan for collecting, analyzing, and monitoring data and research, and reporting on such efforts, will assist the state both in understanding the impacts of legalization, if any, and in refining the Commission's recommendations to ensure that any final, adopted tax-and-regulate scheme is supported by the best available data and research.

2. Recommendation regarding “a set impairment threshold for operating a motor vehicle on State roads and highways,” “an appropriate impairment testing mechanism, and/or increased DREs and training.”

The EO requires the Commission to “[d]etermine a set impairment threshold for operating a motor vehicle on State roads and highways, identify an appropriate impairment testing mechanism, and/or recommend increased DREs and training.” EO 15-17, Section 111(3)(v). The topics of an “impairment testing mechanism” and Drug Recognition Experts (DREs) are discussed below in Recommendation #3 (equipment and staffing resources). The focus here is the topic of impairment thresholds.

In its January 2018 report, the Roadway Safety Subcommittee recommended further study of impairment thresholds given all of the following: the different laws in other New England states; the uncertain status of cannabis legalization in some of those states; and the Subcommittee's review of scientific research, which suggested “that an impairment threshold in New England may not be the most effective way to ensure highway safety.” Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 13. The Commission adopted the Roadway Safety Subcommittee's recommendation not to propose a *per se* threshold and noted further study of THC levels and impairment was required, noting that Vermont “should coordinate with other states in developing a scientifically defensible standard.” *Id.*

As discussed more fully below, the Commission now continues to recommend coordination with other New England states, and possibly Canadian provinces, in order to pursue-if possible-a regional standard; the Commission also recommends further study of THC levels as it relates to impairment.

Pursue Parity with New England States and Canada

First, to pursue a possible regional standard, the Commission recommends regional coordination with the New

England states. As indicated in the January 2018 report, cannabis legalization is a quickly evolving issue, including in the northeast. *See* An Act to Ensure Safe Access to Marijuana, Section 50, Chapter 55 of the Acts of 2017, Massachusetts Legislature, *available at* <https://malegislature.gov/Laws/SessionLaws/Acts/2017/Chapter55>; *see also* Recreational Marijuana in Maine, Maine State Legislature, https://legislature.maine.gov/lawlibrary/recreational_marijuana_in_maine/9419; “Maine seeks consultant to craft rules and regulations for recreational pot sales,” Press Herald {Sept. 11, 2018}, <https://www.pressherald.com/2018/09/11/state-seeks-cannabis-consultant-for-rule-making/> (referring to April 30 deadline for rules). For example, the Commission’s January 2018 report noted that Massachusetts established “a special commission on operating under the influence and impaired driving”; the special commission will issue a final report “on or before January 1, 2019.” An Act to Ensure Safe Access to Marijuana, Section 50, Chapter 55 of the Acts of 2017, Massachusetts Legislature. The special commission in Massachusetts is tasked with studying the following:

- (i) scientific types of testing and data; (ii) medical types of testing and data; (iii) possible new technological forms of testing; (iv) civil liberties of the operator; (v) social economic aspects . of the testing; (vi) admissibility of evidence of impaired driving in court proceedings; (vii) burden on law enforcement; (viii) the current status of law within the commonwealth; (ix) training of law enforcement; (x) intrusiveness of tests; (xi) cost analysis of testing; (xii) the current threshold for determining impairment; (xiii) the rate of success in stopping impaired operators; and (xiv) anything else the commission deems necessary or significant.

Id. Given all of the above-and the information presented in the January 2018 report regarding other New England states¹ - a regional standard may be easier to pursue once other states have engaged in further study of the issue.

As part of such coordination, the State should expand its regional scope and consider recent developments in Canada. As of late June 2018 (prior to the legalization of cannabis for retail sales in Canada), the Canadian federal government passed amendments to its Criminal Code. *See* Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts* (2018), 42nd Parliament, First Session, available at <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-46/royal-assent>. Specifically, Bill C-46 amended Section 253 of the Code to prohibit general blood drug concentrations as set forth by regulation. *Id.* pt. 1 (“Offences Relating to Transportation – Drugs”).² Subsequently, Canada’s Blood Drug Concentration Regulations went into effect. *See* Blood Drug Concentration Regulations, available at <http://www.gazette.gc.ca/rp-pr/p2/2018/2018-07-11/html/sor-dors148-eng.html>. Those regulations established the following offenses:

Summary offence: “For the purpose of paragraph 253(3)(b) of the *Criminal Code*, the prescribed blood drug concentration for tetrahydrocannabinol (THC) is 2 ng of THC per ml of blood.” *Id.*

1 The January 2018 report discussed the absence of a *per se* threshold in New England state statutes, except it noted that Rhode Island has a "zero tolerance" statute for the “blood presence” of a controlled substance. *See* Governor’s Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 12-13; 31 R.I. Gen. Laws § 31-27-2. As noted later in this report, Rhode Island has not legalized cannabis for recreation, but the state does have a medical program. *See* 21 R.I. Gen. Laws, Chapter 28.6 (“The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act”).

2 The amendment to Section 253 is as follows:

Operation while impaired - blood drug concentration

(3) Subject to subsection (4), everyone commits an offence who has within two hours after ceasing to operate a motor vehicle or vessel or after ceasing to operate or to assist in the operation of an aircraft or of railway equipment or after ceasing to have the care or control of a motor vehicle, vessel, aircraft or railway equipment

(a) a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation;

(b) a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation and that is less than the concentration prescribed for the purposes of paragraph (a); or

(c) a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

Part 1, Bill C-46, available at <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-46/royal-assent>.

Hybrid offence, drugs: “For the purpose of paragraph 253(3)(a) of the *Criminal Code*, the prescribed blood drug concentration for” Tetrahydrocannabinol (THC) is set at “5 ng/ml of blood.” *Id.*

Hybrid offence, combination of drugs and alcohol: “For the purpose of paragraph 253(3)(c) of the *Criminal Code*, the prescribed blood alcohol concentration is 50mg of alcohol per 100 ml of blood and the prescribed blood drug concentration for tetrahydrocannabinol (THC) is 2.5 ng of THC per ml of blood.” *Id.*

Moreover, Canadian provinces are addressing drug-impaired driving in a variety of ways, and the Commission also should review the provinces’ efforts. For instance, Quebec has adopted what it is referring to as a “zero tolerance” policy in Bill 157: “the Act introduces a new zero tolerance principle for drugs by prohibiting any person from driving or having the care or control of a road vehicle if there is a detectable presence of cannabis or any other drug in the person’s saliva.” Bill 157, *An Act to constitute the Societe quebecoise du cannabis, to enact the Cannabis Regulation Act and to amend various highway safety-related provisions* (2018), Explanatory Notes, available at www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=S&file=2018C19A.PDF.³ And Ontario has adopted what it calls “[z]ero tolerance for young, novice and commercial drivers.” Cannabis Legalization, Government of Ontario, <https://www.ontario.ca/page/cannabis-legalization#section-3>.

In sum, with respect to impaired driving laws in the region, there currently is a lack of parity and further coordination is required. On the one hand, Canada has set numerical thresholds for THC in blood, and certain provinces are establishing some form of a “zero tolerance” law. In New England, by contrast, only Rhode Island has a zero tolerance law, which operates in the context of a medical cannabis program, and no New England state—including any state that is legalizing cannabis for retail sales—has to date adopted a set impairment threshold in statute. Additionally, cannabis-legalization efforts in New England are evolving. Accordingly, the Commission recommends pursuing efforts to coordinate impairment standards with Vermont’s neighbors, including Canada, for a possible regional standard.

Continued Study of Cannabis Impairment and an Impairment Threshold

The Commission continues to recommend further study of cannabis impairment including the possible adoption of an impairment threshold in light of current scientific literature. Notably - and as cited in the January 2018 report - the 2017 National Academies study (in discussing the

3 The text of the Act reads in part as follows:

“202.2.1.3. It is prohibited for any person to drive or have the care or control of a road vehicle if cannabis or any other drug is present in the person’s body, subject to the exceptions provided for by government regulation.

For the purposes of this section, the prohibited presence of cannabis or any other drug in a person’s body means a presence that is detectable in oral fluid by means of the screening equipment referred to in section 202.3.”

Bill 157, Section 42, available at www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=S&file=2018C19A.PDF.

potential limitations of current studies on cannabis-impaired driving) states, “the association between THC levels in blood and either acute intoxication or driving impairment remains a subject of controversy.”¹¹ National Academies of Sciences, Engineering, and Medicine. 2017. *The health effects of cannabis and cannabinoids: The current state of evidence and recommendations for research*. Washington, DC: The National Academies Press. doi: 10.17226/24625 (available online at <https://www.nap.edu/read/24625/chapter/11#229>). Because any adopted regional standard should be “scientifically defensible.” see Governor’s Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 13, further study is recommended before adopting a threshold.

Public Policy Considerations and Legislative Options

Independent of the science regarding threshold cannabis levels of impairment, the Commission acknowledges that the establishment of such thresholds may be driven by other important public policy goals. In the context of cannabis legalization, one policy consideration (among others) might be deterrence—that is, deterring individuals from engaging in cannabis-impaired driving on Vermont’s roadways.⁴ According to the AAA Foundation for Traffic Safety, “Part of the value of alcohol *per se* laws is the general deterrent impact.” Barry Logan, AAA Foundation for Traffic Safety, *An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Perse Limits for Cannabis* at 27 (May 2016) (citing research on deterrence). The establishment of threshold levels for cannabis may similarly have a deterrent impact on cannabis-impaired driving. However, after consideration of the Report from the Subcommittee on Roadway Safety and public comment, the Commission does not recommend the adoption of a *per se* limitation on THC levels to establish impairment.

The Commission recommends not making any changes to Vermont’s impaired driving statute under a taxed-and-regulated cannabis system. See 23 V.S.A. § 1201. Vermont’s impaired driving statute, as it relates to drugs, currently prohibits the following: “(a) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway: ... (3) when the person is under the influence of any other drug or under the combined influence of alcohol and any other drug” 23 V.S.A. § 1201(a)(3). And in section 1201, “‘under the influence of a drug’ means that a person’s ability to operate a motor vehicle safely is diminished or impaired in the slightest degree.” § 1201(h).

This recommendation avoids relying on a set numerical impairment threshold. As set forth above and in the Commission’s January 2018 report, numerical thresholds may not be fully supportable in the scientific literature. This recommendation also provides the benefit of accounting for those drivers who have residual amounts of cannabis in their system—due to either prior medical or other legal use but who are not impaired by any residual substance that remains in their system when they are on the roadway. See generally F. Grotenherman et al. (2007). *Developing limits for driving under cannabis*. *Addiction*, 102: 1910-1917. doi:10.1111/j.1360-0443.2007.02009.x; see also Mayo Clinic, <https://www.mayomedicallaboratories.com/test-info/drug-book/marijuana.html> (last visited Oct. 19, 2018). Option 3 also may help avoid situations in which impaired drivers are not captured by set thresholds. See *Phase I and II Cannabinoid Disposition in Blood and Plasma of Occasional and Frequent Smokers Following Controlled Smoked Cannabis*. Nathalie A. Desrosiers, Sarah K. Himes, Karl B. Scheidweiler, Marta Concheiro-Guisan, David A. Gorelick, Marilyn A. Huestis. *Clinical Chemistry* Apr 2014, 60 (4) 631-643; DOI: 10.1373/clinchem.2013.216507 (available online at: <http://clinchem.aaccjnl.org/content/60/4/631.long>).

The Commission recommends no change to Vermont’s DUI statute beyond allowing for the collection of oral fluid from drivers when there is a reasonable belief the person is operating a motor vehicle under the influence of a controlled substance, including cannabis. This would be consistent with the Roadway Safety Subcommittee’s and the Commission’s recommendation regarding the need for Vermont to allow for the collection of oral fluid in suspected drugged driving offenses.

3. Recommendation regarding “a business plan for a comprehensive regulatory and revenue system which completely self-funds the regulatory infrastructure at both the State and local level, including . . . [r]equired equipment and/or staffing resources required to address impaired driving due to marijuana or marijuana and alcohol at both the State and local level.”

Executive Order 15-17 tasks the Commission with making recommendations regarding “[r]equired equipment and/or staffing resources required to address impaired driving due to cannabis or cannabis and alcohol at both the State and local level.” EO 15-17, Section 111(3)(ii)(b). In the January 16, 2018 report, the Roadway Safety Subcommittee addressed equipment and staffing resources in the following recommendations:

- “An appropriate impairment testing mechanism”;
- “Adequacy of and funding for drug recognition experts (DREs) and training”; and
- “Capacity for in-state testing and analysis of toxicology samples for DUIs related to drugs such as marijuana.” EO 15-17, Section 111(2)(v), (vi), (vii).

The Commission adopts the Roadway Safety Subcommittee’s prior recommendations on these topics, and provides the following updates on equipment and staffing for law enforcement and the Vermont Forensic Laboratory.

First, with respect to equipment, the Commission reaffirms its prior recommendation regarding oral fluid testing for roadside detection. The Commission notes, that Canada has approved oral fluid screening equipment. *See* “Minister of Justice and Attorney General of Canada Approves Roadside Drug Screening Equipment to Fight Drug-Impaired Driving,” News Release (Aug. 27, 2018) <https://www.canada.ca/en/departement-justice/news/2018/08/minister-of-justice-and-attorney-general-of-canada-approves-roadside-drug-screening-equipment-to-fight-drug-impaired-driving.html>; *see also* Bill C-46, *available at* <http://www.parl.ca/DocumentViewer/en/42-1/bfll/C-46/royal-assent> (assented to June 21, 2018). The Commission may wish to study the equipment approved in Canada.

As for DREs, the Commission’s January 16, 2018 reported that the number of Drug Recognition Experts (DREs) in Vermont was adequate and a new class in August 2018 likely would “further alleviate concerns regarding DRE coverage.” Governor’s Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 11. The Report also noted, however, “if some form of cannabis legalization in Vermont should occur, the number of available DREs would need to be closely monitored and evaluated to ensure resource capacity continues to be met across the state.” *Id.* The Commission adopts the prior recommendation of the Roadway Safety Subcommittee, stressing that DRE equipment and staffing needs likely will depend on whether there are measurable roadway-safety impacts in Vermont from cannabis legalization post-Act 86 or any tax-and-regulate system. Since the January 2018 report, nine new DREs have been trained. Now, with a total of 58 DREs, careful monitoring of staffing should continue as the new DREs begin their work.

In addition, the use of DREs in court is now being challenged. Should these challenges be successful and DREs be precluded from providing testimony in drugged driving prosecutions, it would significantly impact the ability to

enforce Vermont's drugged driving laws.

With respect to the Vermont Forensic Laboratory (VFL) resources, the Commission also addressed VFL capacity in its January 16, 2018 report, and the Roadway Safety Subcommittee reaffirms its earlier recommendation here. In the January report, the Commission wrote, “The Vermont Forensic Laboratory (VFL) is currently building the capacity for in-state testing and analysis of toxicology samples for DUIs related to drugs such as cannabis.” *Id.* The report also stated,

Based on the historical number of samples submitted for drug analysis, the VFL could absorb a 20-25% increase in workload. However, should the legalization of cannabis cause an increase in the number of drug impaired drivers, there is likely to be a corresponding increase in the number of samples submitted to the VFL. In addition, if saliva/oral fluid testing for drugs is adopted and implemented, it is expected that there will be a sharp increase in the number of samples submitted to the VFL for testing. There will also be start-up costs for a program involving saliva/oral fluid testing. Once this increase in samples exceeds the 20-25% threshold the VFL can absorb, additional laboratory personnel, supplies, and consumables will be needed.

Id. at 12. Because the VFL is still building capacity, the Commission adopts the Subcommittee’s prior recommendation.

4. Other Miscellaneous Issues - Search and Seizure

In its January 2018 report to the Governor, the Commission recognized “that cannabis legalization, regardless of whether for possession or retail sales, will impact current search and seizure law in Vermont, especially in light of the fact-intensive nature of search and seizure jurisprudence.” Governor’s Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 20, *available at* <http://marijuanacommission.vermont.gov/document/report-and-recommendations-governor>. The report went on to state, “Accordingly, it is anticipated that search and seizure law in Vermont will be subject to renewed litigation should cannabis be legalized in some manner.” *Id.* The Commission reiterates this prior consideration, and it recommends continued monitoring of search and seizure law in Vermont and other states, especially in light of the passage of Act 86 in Vermont.

Since the Commission issued its January 2018 report, the Vermont General Assembly’s Act 86 of 2018 legalized adult possession of up to one ounce of cannabis and home cultivation of a certain number of marijuana plants. *See* Act 86 of 2018, *available at* <https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT086/ACT086%20As%20Enacted.pdf>. Act 86 also amended 18 V.S.A. § 4230a to now read as follows: “Marijuana possessed or

consumed in violation of State law is contraband pursuant to subsection 4242(d) of this title and subject to seizure and forfeiture.” § 4230a(b)(1) (as amended by Act 86). Act 86 struck statutory language clarifying that the prior cannabis decriminalization statute was “not intended to affect the search and seizure laws afforded to duly authorized law enforcement officers under the laws of this State.” See § 4230a(c)(2) (2017) (prior version of statute); see also Act 76 of 2013. The Roadway Safety Subcommittee cannot predict exactly how Act 86’s textual change will affect search and seizure jurisprudence in Vermont.

Still, the Roadway Safety Subcommittee continues to anticipate, and the Commission agrees, that courts in Vermont will “be faced with redefining the contours of established search and seizure law” See Governor’s Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 21. This expectation is based, in part, on developments in other states where cannabis has been legalized in some form. See *People v. Zuniga*, 2016 CO 52, ¶ 23 (“[W]e note that while Amendment 64 allows possession of one ounce or less of marijuana, a substantial number of other cannabis-related activities remain unlawful under Colorado law. Given that state of affairs, the odor of cannabis is still suggestive of criminal activity. Hence, we hold that the odor of cannabis is relevant to the totality of the circumstances test and can contribute to a probable cause determination.”); *People v. Cox*, 2017 CO 8, ¶ 17 (“As in *Zuniga*, we conclude that, ... the canine alert in this case ‘suggested that illegal drugs were present in the vehicle’ and that such an alert is a factor that should be considered as part of the totality of circumstances.” (quoting *Zuniga*, 2016 CO 52, ¶ 29)); *State v. Souza*, 199 Wash. App. 1052, at *6 (2017) (unpublished opinion) (“In Washington, an alert by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance. While we acknowledge that the State trained Isko to detect miniscule amounts of marijuana before the substance’s legalization, such training does not disqualify his alert. As the State highlights, marijuana remains illegal for some persons and under some circumstances.” (internal citation omitted)). . The Roadway Safety Subcommittee has also noted that cannabis legalization may raise questions in Vermont about search-and-seizure law in the context of federal-state relationships. See *State v. McCarthy*, Docket # 469-2017-CR-01888, at *10 (May 1, 2018) (order) (stating the following in the context of state court prosecutions for possession of controlled substances, including marijuana: “[B]ased on the Court’s finding above that the evidence would be inadmissible if seized by State law enforcement officials because there was no articulable reasonable suspicion that any of these defendants was involved in criminal activity prior to the initial dog search, the Court also finds that the inadmissibility of the evidence does not change based on the fact that it was seized by federal officers and then handed over to the State.”); see also *State v. McCarthy*, Docket # 469-2017-CR-01888 (Aug. 21, 2018) (order on motion for reconsideration)..

Based on all of the above, the Commission recommends continued monitoring of developments in search and seizure law in Vermont and elsewhere, especially given-as stated in the January 2018 report-the difficult and often unanswered questions for law enforcement during roadside stops.