

Governor's Marijuana Advisory Commission

JANUARY 16, 2018
REPORT AND RECOMMENDATIONS
TO THE GOVERNOR

I. INTRODUCTION

By Executive Order 15-17 dated September 7, 2017, (the "EO") Governor Phil Scott established the Governor's Marijuana Advisory Commission in recognition of the fact that Vermont must adopt a cautious, data-driven and balanced approach to decisions about cannabis legalization. Such an approach will take into consideration the realities of current consumption levels, legalization in neighboring jurisdictions, and the practical implications of the risk of harm to Vermont's youth, impaired driving and other social and economic consequences of drug use and addiction, particularly in the context of the State's opioid crisis. This Commission is charged with analyzing the best available data, studies and other information and making recommendations on how the State can best address the realities of cannabis use.

The touchstone of the Commission's charge and analysis is the premise that even accepting as a given existing, illegal recreational use of cannabis as an individual choice, legalizing this choice - and placing the state's approval on it - cannot be permitted to adversely impact public health or safety, especially roadway safety and children's health. At the same time, the work of the Commission proceeds with the recognition that despite past attempts to prohibit its distribution and use, cannabis is widely available and consumed in Vermont already. Thus, while legalization will inevitably have effects on usage rates and frequency among all demographic groups, many of the issues that must be addressed as a consequence of cannabis production and use exist regardless of whether adult consumption is legally permitted.

In compliance with the EO, at its November 14, 2017 public meeting the Commission received reports from its sub-committees on Roadway Safety and Education and Prevention which presented for consideration the most current and reliable data available relevant to various health and safety issues. The data collected in this process forms an important foundation of the Commission's work. The Commission has charged each sub-committee with the task of updating their reports with any further developments in the available information on a quarterly basis throughout the term of the Commission's existence. The initial sub-committee reports are included in this Report and Recommendation (the "Report") as Exhibits A and B.¹

As noted above, cannabis use is already prevalent in Vermont despite a policy of prohibition. In drafting the current Report the Commission addresses the general impacts of this use as well as any changes that can be expected from any relaxation of prohibitions against cannabis. The Commission accepts as a foundational premise that existing use and consumption

¹ The work of all three subcommittees may be accessed at their respective website pages at marijuanacommission.vermont.gov.

will continue and may increase under any loosening of prohibitions against cannabis use and possession. Where necessary, the Report will address specific differences in any suggested responses that may arise that are limited to a particular form of legalization or decriminalization.

This Report addresses the following issues delineated in Section III (2) of the EO:

- (i) The need for the creation, implementation and funding of statewide evidence-based youth prevention programs;
- (ii) the adequacy of and funding for substance abuse facilities;
- (iii) the adequacy of and funding for broad-based messaging or public awareness campaigns to address the risk of harm posed by cannabis to Vermonters;
- (iv) the adequacy of and funding for broad-based messaging or public awareness campaigns to address the dangers of driving while impaired due to cannabis, similar to those targeted to alcohol consumers;
- (v) an appropriate impairment testing mechanism, including the possible merits of saliva-based testing standards;
- (vi) the adequacy of and funding for drug recognition experts (DREs) and training;
- (vii) the capacity for in-state testing and analysis of toxicology samples for DUIs related to drugs such as cannabis;
- (viii) the feasibility of regional impairment standards;
- (ix) the adequacy of and funding for resources that municipalities will need to support professional and volunteer fire, police, and emergency services resulting from access and use of recreational cannabis;
- (x) the need for a performance benchmark or benchmarks to be assessed before the further decriminalization or legalization of recreational cannabis use or establishment of a tax and regulatory system, such as the percentage of Vermont youth who recognize and understand the risk of harm posed by cannabis, a statistically significant reversal and decline in the number of major crashes due to cannabis-impaired drivers, a statistically significant reversal and decline in the number of DUIs related to cannabis, and capacity at the Department of Public Safety to meet the need for DREs and in-house analysis and toxicology testing related to cannabis;
- (xi) miscellaneous issues, such as host liability and landlord liability in the context of cannabis availability in homes and public places, security of cannabis storage, impacts on the cost of automobile, workers compensation and homeowner insurance, local zoning and search and seizure considerations; and
- (xii) any changes to Vermont law required to protect those under 21 years old and ensure highway safety.

The information and recommendations provided in response to each of these 12 issues were formulated in close cooperation with and reliance on the expertise present on the Commission and each of the three subcommittees appointed by the Governor under the EO.² The

² The membership of each sub-committee is listed in Exhibit C.

Commission acknowledges that there are various degrees of confidence associated with the responses to each issue and this Report makes note, where appropriate, of caveats to be considered in evaluating certain data and, consequently, the recommendations based them. The Commission addresses the enumerated issues in Section III, below.

Since its creation the Commission and Subcommittees have held numerous meetings and heard from many experts in the fields of health, safety, law enforcement, government and regulation. This Report draws heavily from the expertise of the members of the subcommittees and the Commission. Below is a brief description of the activities of each subcommittee involved in the development of this Report.

In the fall of 2017 the Roadway Safety Subcommittee, Chaired by Public Safety Commissioner, Thomas Anderson, compiled and assessed existing high-quality primary research and Vermont-specific data to produce a report on the baseline information available to address the following questions:

- Is cannabis use alone or in combination with other substances associated with an increased risk of (1) motor vehicle crashes, and (2) motor vehicle fatalities?
- Is cannabis legalization associated with an increased risk of (1) motor vehicle crashes, and (2) motor vehicle fatalities?
- Do crime rates increase or decrease when cannabis is (1) decriminalized or (2) legalized for recreational use?

Two study groups from the Subcommittee reviewed relevant available studies and reports, identifying the best sources based on their quality, timeliness and authoritative credibility. The full Subcommittee met monthly to discuss and evaluate the findings and progress of the study groups. In November 2017, the Subcommittee submitted its report to the Commission to use as a foundation in creating its evaluations and recommendations to the Governor.

This subcommittee was also actively involved in the creation of the instant Report and was assigned various issues by the Co-Chairs to investigate and analyze for inclusion in the Report. The full Subcommittee met twice to hear from experts in relevant fields, including in-person presentations from Dr. Marylin Huestis who presented on the short and long-term consequences of cannabis under both medical and adult use approaches, Lt. John Flannigan who presented on the efficacy of roadside testing protocols and the current and expected status of DRE capabilities in Vermont, and Dr. Trisha Conti who presented on the capabilities and resources available for in-state testing at the Vermont Forensic Laboratory.

The Education and Prevention Subcommittee, Chaired by Commission Dr. Mark Levine, met as a full committee four separate times: September 28, 2017; October 11, 2017; November 28, 2017; and January 5, 2018. The Subcommittee heard testimony from the following:

1. Margo Austin, LADC, “Marijuana and its Impact on Youth”

2. Mary Segawa, Washington State Liquor and Cannabis Board, “Marijuana Legalization in Washington State”
3. Jessica Neuwirth, Retail Marijuana Education Program Coordinator, “Lessons Learned, Retail Marijuana Prevention and Education in Colorado”
4. Jonathan Caulkin, H. Guyford Stever Professor of Operations Research, Carnegie Mellon University, Heinz College. “Real Options for Legalization”

In addition, the Vermont Department of Health conducted ongoing research and review of up-to-date findings by John Searles, others in ADAP, and the Subcommittee for the purpose of our Health Impact Assessment (“HIA”) and mandated report on health and safety endpoints of cannabis use. The Subcommittee also utilized research on the relationship between cannabis use and subsequent risk of prescription or illicit opioid use disorder as well as ongoing research by Lori Uerz in the area of evidence-based youth prevention programming.

The Taxation and Regulation Subcommittee has convened a total of six times since September 2017. During these meetings the Subcommittee heard testimony regarding agricultural concerns, banking issues, insurance issues, the effects on municipalities, employer and employment-related issues, control models, other states’ existing regulatory structures, advocates’ perspectives on legalization, Vermont’s current medical marijuana program, and pending legislation in Vermont on the different legalization options. The Subcommittee also visited a medical marijuana dispensary and considered the potential impacts of legalization on the Vermont medical marijuana program. These testimonies were researched and presented by members of the Subcommittee, their staff, and their invitees, all of whom were subject-matter experts. The presentations and agendas, with more information, may be found on the Commission website. The Subcommittee compiled the material presented in these testimonies to make its interim recommendations to the full Commission.

II. EXECUTIVE SUMMARY

ROADSIDE TESTING

Saliva testing can be economically and efficiently used to detect the presence of THC but there is no formula that can be broadly applied to equate THC levels with individual intoxication. Heavy and light users will vary significantly in the detectable amounts of THC and the affects of similar amounts of THC will vary widely among individuals.

Vermont law currently prohibits any level of impairment due to cannabis use when operating a vehicle. Because the state of the science has not developed to the point where reliable metrics can be employed to determine *per se* levels of intoxication based on detectable THC levels, the Commission does not recommend establishing a *per se* limit of THC at this time, provided that law enforcement is empowered to administer roadside saliva tests to determine the presence of THC.

In addition, because the use of one intoxicant in combination with other intoxicants such as combining cannabis with alcohol dramatically increases the risks of operating a motor vehicle,

the Commission recommends that punishments should be enhanced for drivers found to be operating vehicles while under the influence of a combination of intoxicants and that educational programs be developed to inform the public of the increased risks of this dangerous behavior.

Current and anticipated Drug Recognition Expert (“DRE”) staffing is likely sufficient to accommodate expected increases in cannabis-related DUI’s in the short to medium term. It is expected that new State testing lab facilities will be able to handle any short term increase in demand resulting from the wider availability of cannabis under any legalization or decriminalization scheme.

EDUCATION AND PREVENTION

Current programs do not target cannabis specifically and it the Vermont Department of Health estimates it would take the VDH 12-18 months to develop the necessary programs and materials to implement an effective education and prevention program. The Commission recommends that the Vermont Department of Health lead an effort to immediately begin developing an education and prevention program. In light of the passage of H.511, the Commission recommends that the Department of Health explore existing programs and whether opportunities exist to partner with other states or private entities to develop this program as quickly as possible. Prevention and education efforts should be coordinated with other efforts that seek to prevent substance abuse such as those recently recommended by the Governor’s Opioid Coordination Council.

BENCHMARKS

In order to evaluate the effectiveness of any prevention or education program, baseline information on current use and the performance of existing programs, and on youth cannabis use (including frequency) should begin to be collected immediately and before legalization or further decriminalization takes effect. Similar efforts are in place in Colorado and the Commission recommends Vermont adopt a similar model. The Commission recommends that the Department of Public Safety develop protocols for gathering data relating to cannabis-related crimes, quality of life complaints, cannabis-related traffic incidents, diversions of legal cannabis either out of state or to prohibited persons or for sale, and the use of mail and/or delivery services for the transportation of cannabis. This data should be collected in cooperation with local law enforcement agencies. In addition, data on use and abuse by youth should be collected including expulsions/suspensions/etc. relating to cannabis on school premises or during school activities. The Agency of Education and law enforcement should be jointly engaged in this effort. In addition, Vermont could define and subsequently measure data relating to “drug endangered children,” and the state also should continue to monitor trends in youth usage of drugs, including cannabis with attention not only to use, but to frequency of use as well.

BURDENS

Given the early stage of cannabis legalization and decriminalization trends in the United States and the unique circumstance of each state, no firm estimates on increases in use as a result of changes in the laws prohibiting cannabis, whether through a tax and regulate legalization

scheme or the “home-grow” initiative recently passed by the Vermont Legislature, can be reliably formulated. However, common sense and logic dictate there will be an increase in availability and consequently an increase in use. Regardless of any increase, studies already indicate that at least 80,000 Vermonters engage in cannabis use and the deleterious consequences associated with current levels of use and availability of cannabis (such as drugged driving and youth use) must be addressed regardless of whether or how cannabis prohibition laws are modified.

Local and state police, schools and social services can all expect increased burdens directly related to any increase of use flowing from the increased availability of cannabis. In particular, the State should take into consideration the impacts of any proposal to tax and regulate cannabis on local communities and provide broad discretion to municipalities in determining individual approaches to regulating public impacts that will flow from such a framework.

FUNDING

Funding for education and enforcement efforts may be available from a number of sources. For example, roadside testing equipment and training can be paid for with federal highway safety grants. Existing efforts directed at youth education and prevention will need to address any change in the legal landscape of cannabis use as “legalization” or even “decriminalization” will shift risk assessments around any substance. It is recommended that additional funding for projects addressing the use and availability of cannabis should be sought from cannabis producers and, in the event of the development of a commercial marketplace, from sellers. The Commission also recommends that the state seek support from existing cannabis businesses at large, either within or outside Vermont to provide direct grants to fund education and prevention efforts.

III. DISCUSSION

i. IS THERE A NEED FOR THE CREATION, IMPLEMENTATION AND FUNDING OF STATEWIDE EVIDENCE-BASED YOUTH PREVENTION PROGRAMS?

There is a need for an increase in the education protocols and prevention programs around all substances subject to abuse. Available evidence strongly demonstrates that cannabis use has deleterious effects on developing brains and current science indicates that human brain development continues into the mid-twenties. Moreover, studies show that legalization of cannabis results in a decrease in the perception of potential harm posed by cannabis. While data can be found to support both short term increases and decreases in youth usage associated with the legalization of cannabis, no study has definitively settled this question. However, the Commission suggests that a focus on statistical increases or decreases in measured use should not be the primary measure of need insofar as there is no question that youth usage of cannabis exists and must be more effectively addressed regardless of whether or not cannabis is

decriminalized or legalized for adult use and whether or not such decriminalization or legalization increases or decreases youth use incrementally.

The Commission recommends an expansion of programs to address substance misuse prevention, education and screening in schools (including post-secondary institutions) and pediatric offices. Ideally, infrastructure and plans for funding prevention would be in place before any loosening in the prohibition against cannabis in anticipation of the broader availability of cannabis (perhaps, more so under a scheme of tax and regulate legalization than with “home grow” legalization, but more available than at present under either scenario).

In addition, the commercialization of cannabis in other jurisdictions has led to an explosive growth in the production and innovation of new cannabis products and delivery systems, including vaporizing, edibles, salves, dabs, patches, tinctures, oils and other forms. These new forms have and will inevitably continue to find their way into Vermont. Each form has a different effect in terms of timing and potency and the effects of all forms are idiosyncratic to each individual based on numerous factors. The purchasers of these products are mobile and the products travel throughout the U.S. There is insufficient scientific research to allow credible predictions about the effects of the long or short-term use of cannabis *via* these delivery mechanisms and the ability to use these forms more discretely than smoking warrant particular care and attention to educating not only youth, but the general public on the need for caution in using such products in light of the lack of scientific research on the effects of such use. Thus, in addition to the generalized programs counseling against the abuse of both legal and illegal substances, special attention should be directed toward the myriad forms of cannabis and the varying level of potency both across forms and within specific forms of delivery that can be expected to arrive in Vermont whether authorized by law or not.

The Commission recommends that the State immediately develop educational materials and programs to address the issues above and that such efforts be particularly focused on youth education and prevention. The Commission recommends that a time period of 12-18 months be provided to allow the development and implementation of such programs by the Vermont Department of Health and that the VDH explore partnership with existing providers of educational and prevention materials to utilize elements of existing programs for use in Vermont.

ii. IS CURRENT FUNDING FOR SUBSTANCE ABUSE FACILITIES ADEQUATE TO ADDRESS ANY INCREASES IN ABUSE CASES THAT MAY RESULT FROM LEGALIZATION?

Available studies show that legalization tends to increase instances of both chronic and acute abuse of cannabis and the development of cannabis use disorders. Current funding for rehabilitation facilities is inadequate to meet current needs and therefore cannot be expected to be adequate to meet any increases in demand that may result from the increased availability and consequent increase in use of cannabis due to legalization.

The Commission recommends exploring the capacity and funding needs of rehabilitation treatment facilities in Vermont and developing projections for the anticipated materially increased need for outpatient treatment as well. The currently stressed mental health system may also come under further pressure due to an expected increase in rates of acute psychosis and other mental health issues.

At this time, there is insufficient evidence to conclude that either legal or illegal use of cannabis will alleviate the burden on rehabilitation facilities by decreasing cases of opioid addiction and such expectations cannot be included in crafting reliable estimates of expected needs for rehabilitative services after legalization.

iii. ARE CURRENT BROAD-BASED MESSAGING OR PUBLIC AWARENESS CAMPAIGNS TO ADDRESS THE RISK OF HARM POSED BY CANNABIS TO VERMONTERS ADEQUATE TO DEAL WITH THE INCREASED AVAILABILITY OF CANNABIS UNDER A LEGALIZATION SCHEME AND HOW WILL SUCH CAMPAIGNS BE FUNDED?

The Commission recommends launching a statewide education campaign directed at specific populations such as youth, young adults and pregnant women about the potential health risks of non-medical cannabis use. Importantly, while messaging is necessary it is not sufficient and needs to be targeted. An important component of a comprehensive approach will include engaging parents in any education and prevention campaign.

As noted above, current campaigns should be increased and enhanced to directly address the new forms of cannabis that will become available for use under any legalization scheme.

Funding should be provided by the cannabis industry at large or through fees and taxes on any legally produced, non-medical cannabis product, whether for private or commercial use in the event that Vermont adopts a tax and regulate system approach to legalization.

The Commission has concluded that the funding of education and prevention programs is essential and that a period of 12 – 18 months would be necessary for the Vermont Department of Health to develop a campaign that will address this critical need to educate the public and protect youth and vulnerable populations.

iv. ARE BROAD-BASED MESSAGING OR PUBLIC AWARENESS CAMPAIGNS TO ADDRESS THE DANGERS OF DRIVING WHILE IMPAIRED DUE TO CANNABIS, SIMILAR TO THOSE TARGETED TO ALCOHOL CONSUMERS ADEQUATE TO DEAL WITH THE INCREASED AVAILABILITY OF CANNABIS UNDER A LEGALIZATION SCHEME AND HOW WILL SUCH CAMPAIGNS BE FUNDED?

Current campaigns should be increased and enhanced to directly address the wider availability and new forms of cannabis that will become available for use under any decriminalization or legalization scheme. In addition, the increased risk of impairment due to the combination of cannabis and alcohol specifically and the combination of multiple stimulants in general should also be addressed.

The Commission specifically recommends:

- a. The State should create a non-Legislative body with rulemaking authority made up of law enforcement and health officials to review data and scientific developments and determine whether and when a reasonable and scientifically reliable *per se* limit can be adopted. This body should be tasked with making recommendations on amending the limit in the future based on scientific evidence, surveillance data, and emerging information from other states.
- b. Build a driver testing infrastructure and procedures necessary to conduct appropriate and consistent testing for THC.
- c. Implement a public education strategy about the dangers of driving under the influence of intoxicants in general and of THC in particular.
- d. Funding should be provided by highway safety grants, the cannabis industry at large, or from fees and taxes on any legally produced, non-medical cannabis product, whether for private or commercial use in the event that Vermont adopts a tax and regulate system approach to legalization

v. IS THERE AN APPROPRIATE IMPAIRMENT TESTING MECHANISM, INCLUDING THE POSSIBLE MERITS OF SALIVA-BASED TESTING STANDARDS?

There are reliable testing protocols that can detect the presence of THC. These include blood and saliva tests. However, there is currently no scientifically valid method to translate a specific level of detected THC to a universally applicable determination of impairment. In other words, while current testing can measure the level of Delta 9-THC (the psychoactive component of cannabis), the presence of a significant or detectable level of THC does not necessarily mean that the individual is currently actually impaired by cannabis. Adequate staffing and funding of DREs will be necessary to effectively enforce DUI violations involving cannabis.

Saliva-based or oral fluid testing is a scientifically reliable means of determining the presence of drugs in impaired drivers. It is effective and reliable both as a roadside screening test and as an evidentiary test.³ Also, it is far less invasive than blood testing, results can be obtained closer to the time of operation, and it is cost effective. While several researchers are

³ An oral fluid sample taken for evidentiary purposes is tested by a laboratory using Liquid Chromatography/Mass Spectrometry instrumentation, similar to how blood is now tested.

attempting to develop technology that uses breath to detect certain drug compounds, there is no commercially available instrument to detect the presence of drugs through breath testing.

Currently, approximately fourteen states have authorized oral fluid testing.⁴ The Vermont State Police participated in an oral fluid roadside test pilot program from August 1, 2014 through July 30, 2015. The results of this pilot study were encouraging, with high accuracy and reliability rates of both instruments tested. False positives were noted in less than 2% of overall testing in all drug categories combined. The findings were consistent with similar tests that were conducted across the country.

As mentioned in the recommendation below with respect to proposed legislative changes, the first step in implementing an effective roadside testing mechanism to combat drug impaired driving is legislative authorization allowing for saliva-based or oral fluid testing. Once legislation is enacted enabling such testing, the Commissioner of Public Safety likely will then be required to adopt rules relating to the use of any roadside saliva/oral fluid preliminary screening device and a method for the analysis of an evidentiary sample of saliva/oral fluid. *See generally* 23 V.S.A. § 1203(d), (i); *see generally* § 1203(f) (device selection for preliminary breath test). The admissibility in court of the results of saliva/oral fluid testing will be for the trial courts and ultimately the Vermont Supreme Court to decide.⁵

vi. ARE THE CURRENT LEVEL OF DRUG RECOGNITION EXPERTS (DRES) AND TRAINING ADEQUATE TO DEAL WITH THE INCREASED AVAILABILITY OF CANNABIS UNDER A LEGALIZATION SCHEME AND HOW WILL ANY NEEDED INCREASES BE FUNDED?

Current DRE numbers at the state level are likely adequate to deal with traffic stops by State Police, but it is not possible at this time to determine whether the capacity of local law enforcement to train and retain DREs might be.

Vermont's Drug Evaluation and Classification (DEC) Program, which trains and certifies DREs, was developed in 2005 and approved and recognized as a DEC program state by the

⁴ *See, e.g.*, NMS Labs – Draeger Safety Diagnostics, Inc. Oral Fluid FAQ, available at <http://www.nmslabs.com/uploads/PDF/Oral%20Fluid%20FAQ.pdf>.

⁵ For more information on oral fluid testing, please refer to the following documents: Logan and Mohr, *Final Report: Vermont Oral Fluid Drug Testing Study 2015*, available at <https://legislature.vermont.gov/assets/Documents/2016/WorkGroups/Corrections%20Oversight/Cannabis%20Legalization/W~John%20Campbell~Vermont%202015%20Oral%20Fluid%20Study%20Report~11-15-2016.pdf>; *DUI/Drug Offense Enforcement Challenges: Report of Act 158 of 2016*, available at <https://legislature.vermont.gov/assets/Documents/2016/WorkGroups/Corrections%20Oversight/Cannabis%20Legalization/W~John%20Campbell~Report%20of%20Act%20158%20of%202016%20-%20DUI%20and%20Drug%20Offense%20Enforcement%20Challenges~11-15-2016.pdf>.

International Association of Chiefs of Police (IACP) in 2006.⁶ The program has grown from five DREs in 2005 to fifty-three in 2017. During this twelve-year period, DREs have conducted over 2,000 enforcement and training evaluations on suspected impaired drivers. The DEC program identified several geographical areas that were not adequately accessible to active DREs. In September 2017, the program finished training fifteen new DREs that addressed much of this needed geographical gap.

At this time and under current law, the number of DREs is adequate for most of the State of Vermont. It is also anticipated that an August 2018 DRE school, which will target training for officers in areas of the state not fully served, should further alleviate concerns regarding DRE coverage. 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. Several states that have legalized cannabis have seen an increased demand for DREs and have increased DRE training. If DRE demands increase in Vermont due to legalization, training needs would need to be met with both in-state and out-of-state DRE schools and field certification sessions.

With regard to funding, all related DRE program materials, equipment, and travel expenses are funded through the National Highway Traffic Safety Administration (NHTSA) through the Vermont Governor's Highway Safety Program. The Vermont Criminal Justice Training Council has recently taken on oversight of the program with a full-time Impaired Driving Training Coordinator, with direction and support from the VT DEC Program State Coordinator. Additionally, all related DRE enforcement activity overtime is reimbursable to individual agencies. However, funding is not sufficient to cover all components of the DRE program. Specifically, police agencies bear significant costs in certifying, maintaining, and deploying DREs (non-overtime). In addition, when a DRE is deployed, agencies incur additional costs in backfilling that vacant position. NHTSA also cannot fund specific public information and education materials, including certain clothing provided to DREs for training and "call-out" purposes.

vii. WHAT IS THE CAPACITY FOR IN-STATE TESTING AND ANALYSIS OF TOXICOLOGY SAMPLES FOR DUIS RELATED TO DRUGS SUCH AS CANNABIS?

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. Currently, this testing is performed by a private laboratory in Pennsylvania. In order to increase capacity

⁶ DREs go through a long and difficult training process that involves both a classroom component and a field certification process. In order to be considered for DRE training, an officer must have proficient skills and field experience in impaired driving enforcement, want to further his or her abilities in this area, and have the support of his or her agency. The DRE school and field certification process takes significant planning, funding, and personnel to complete. All DREs are also required to attend at least eight hours of recertification training every two years.

and bring this testing in-state, the laboratory has undergone recent renovations, purchased new instruments, and hired new employees. 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. Personnel will be needed not only for analysis of the samples, but also to fulfill the related administrative tasks (e.g., receiving samples, case management, and issuing reports). An increase in personnel comes with additional costs pertaining to training, continuing education, and office space needs (i.e., renovations will be required). One other major consideration associated with this increased capacity is the demand for expert testimony by analysts for DUI prosecutions. The analysts will be required to testify on a regular basis as it is anticipated that DUI-Drugs cases will be heavily litigated.

viii. WHAT IS THE FEASIBILITY OF ESTABLISHING REGIONAL IMPAIRMENT STANDARDS?

EO 15-17 tasked the Roadway Safety Subcommittee with pursuing “a regional impairment threshold for the New England states,” and recommending “appropriate measures to ensure roadway safety.” After researching this issue and hearing from experts in the field, the Roadway Safety Subcommittee believes that further study of this issue is required before any firm recommendation regarding a regional impairment threshold in New England can be made. As more fully discussed below, a regional standard may prove difficult given existing laws in other New England states and the uncertain status of legalization in some of those states as well.

First, a regional *per se* threshold in New England may not be feasible at this time given existing laws in other New England states. No New England state has a *per se* threshold in state statute for delta-9 THC concentration.⁷ However, Rhode Island has a “zero tolerance” statute that makes it a misdemeanor to operate a motor vehicle “with a blood presence of any scheduled

⁷ See Conn. Gen. Stat. § 14-227a (Connecticut statute prohibiting operating a motor vehicle while “under the influence of intoxicating liquor or any drug or both”); Me. Stat. tit. 29-A, § 2411 (Maine statute stating, “A person commits OUI if that person . . . Operates a motor vehicle: (1) While under the influence of intoxicants . . .”); N.H. Rev. Stat. Ann. § 265-A:2 (New Hampshire statute prohibiting as follows: “No person shall drive or attempt to drive a vehicle upon any way . . . While such person is under the influence of . . . any controlled drug . . . which impairs a person’s ability to drive . . .”); Mass. Gen. Laws ch. 90, § 24 (Massachusetts statute prohibiting operating “a motor vehicle . . . while under the influence . . . of cannabis . . .”); 23 V.S.A. § 1201(a) (Vermont statute states, “A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway . . . when the person is under the influence of any other drug . . .”).

controlled substance,” which includes cannabis.⁸ Thus, a regional threshold would require five other states and Vermont to engage in a coordinated effort to amend state statutes. Such coordination will require further study and should be undertaken. This effort could potentially be pursued through the Coalition of North Eastern Governors (CONEG).

Importantly, cannabis legalization in various New England states is in flux, and given the current uncertainty—especially in Maine and Massachusetts—a regional threshold would be difficult to pursue at this time. For instance, at the time of this writing, Maine’s legislative efforts on this issue are in flux. Moreover, in Massachusetts, state law sets a timeline for a special commission to study impaired driving and submit a report to the Massachusetts legislature by 2019. *See* Chapter 55 of the Acts of 2017, Massachusetts Legislature. Among other topics, the special commission shall report on “the current threshold for determining impairment.” *Id.* And, the Cannabis Control Commission, under Massachusetts law, must report annually on “identifying a quantifiable level of cannabis-induced impairment of motor vehicle operation.” *See id.*, Section 17; Mass. Gen. Laws ch. 94G. Because the New England states are in various stages of legalization efforts, the Subcommittee is unable to make a reasoned recommendation on the appropriateness of a regional impairment threshold for delta-9 THC. As New England states continue to study the issue of impaired driving due to cannabis, the Commission proposes to continue monitoring developments and revisiting this recommendation in six months.

Expert testimony and scientific literature reviewed by the Roadway Safety Subcommittee suggest that an impairment threshold in New England may not be the most effective way to ensure highway safety. Not only did Dr. Marilyn Huestis, who presented to the Subcommittee on November 29, 2017, point out possible drawbacks of a *per se* standard, but the recent and highly reputable study out of the National Academies of Sciences, Engineering, and Medicine, in discussing possible limitations with current studies on cannabis-impaired driving, states that “the association between THC levels in blood and either acute intoxication or driving impairment remains a subject of controversy.” 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>). Given all of the above, the Commission adopts the recommendation of the Roadway Safety Subcommittee against pursuing a regional impairment *per se* threshold at this time. Further study of THC levels and impairment is warranted before adopting such a threshold and Vermont should coordinate with other states in developing a scientifically defensible standard.

Despite the challenges noted above, the Commission believes that regional impairment standards may eventually be possible as Quebec, Maine and Massachusetts have legalized adult use of cannabis and New York, New Hampshire, Connecticut, and Rhode Island allow the use of cannabis for medical purposes. There is a shared interest in adopting consistent impairment protocol and the Commission recommends pursuing potential regional standards if possible

⁸ R.I. Gen. Laws § 31-27-2; *see also id.* § 21-28-2.08(d)(10) (defining controlled substances to include “marihuana”).

because a consistent standard will provide clarity and reinforce a consistent and more easily relatable educational message about the acceptable and unacceptable uses of cannabis.

ix. ARE THE RESOURCES THAT MUNICIPALITIES WILL NEED TO SUPPORT PROFESSIONAL AND VOLUNTEER FIRE, POLICE, AND EMERGENCY SERVICES RESULTING FROM ACCESS AND USE OF RECREATIONAL CANNABIS ADEQUATE TO DEAL WITH THE INCREASED AVAILABILITY OF CANNABIS UNDER A LEGALIZATION SCHEME AND HOW WILL ANY NEEDED INCREASES BE FUNDED?

a. Municipalities and Cannabis

Under any statutory scheme allowing for the adult use of cannabis, it will be important to clearly identify the direct and indirect effects on local communities, both in a “home-grow” personal possession only scheme and a tax and regulate landscape. Consideration of these impacts have been less pressing in other jurisdictions that have legalized cannabis to date, because those states operate under “Home Rule” authority providing local governments an express right to self-govern, and are only subject to specific limitations prescribed by state constitutions and state statutes. After recreational cannabis was legalized, those communities were free to choose how to respond to legalization, unless the law expressly increased or decreased local government’s authority. In Vermont, however, as a “Dillon’s Rule” state, the Legislature must explicitly outline what authority and resources local governments are provided or permitted if adult-use cannabis is legalized under a tax and regulate system.

As with other states that have legalized adult-use cannabis under a tax and regulate regime, the following local issues should be addressed in legislating a legalized tax and regulate approach to cannabis:

- Voter approval of cannabis establishments
- Local licensing and permitting of cannabis establishments
- Permitting under local land use and zoning bylaws
- Code and ordinance enforcement
- Public safety, law enforcement, public and environmental health
- Local taxation and revenue sharing

Consideration of how these matters will affect local budgets and local property tax rates and current resources are important considerations in evaluating the effects of legalization on municipalities.

b. Public Safety, Law Enforcement, Public Health

In Vermont there are 246 municipalities, 56 local police departments, and 14 county sheriff departments. The State Police do not, and cannot cover every jurisdiction, so sheriff departments and local police agencies typically fill the gaps. State law enforcement agencies and officials should assess resource needs, including providing greater coverage in underserved areas, and additionally providing towns the resources to staff, contract out, and bolster enforcement needs.

There are agencies and departments in Vermont that are currently underfunded or unfunded, often rely on volunteers, and are geographically scattered or limited throughout the state. Community public safety officials will be largely responsible for dealing with issues that arise as a consequence of legalization. Although it is difficult to anticipate and quantify the extent to which the effects of those issues will be felt, State agencies and officials will not likely absorb the entirety of any needed responses. Local officials and local budgets may be affected. Advocates of legalization note that there may also be resource saving implications for state and local budgets. This could occur in part because enforcement officials will no longer have to dedicate resources to enforcing violations for possession of small amounts, or criminal offenses for growing small amounts.

According to the RAND Report, in 2014 approximately 80,000 Vermonters used cannabis at least once in the previous month. This level of existing use suggests that both State and local-level government already contribute resources to managing cannabis use in Vermont, and additional attention is warranted to the areas below, regardless of whether the legal status changes in the future. The exact amount of new public costs and savings that legalization could create remains unknown, but the potential for increased costs and savings are certain. Based on the experience of other states, public safety officials may experience a variety of impacts and should assess resource prioritization in areas such as:

- Fire hazards from illegal grows, extraction, etc.
- Combating diversion of cannabis out of state
- EMT/Paramedic response to use and drugged driving
- Illegal grow operations (black and gray markets)
- Public use and odor complaints
- Cannabis tourism
- Highway safety (impaired driving)
- Regulating legal retail operations
- Need for training/education on new law and regulations (probable cause, search/seizure, etc.)
- Storage of evidence/contraband
- Complaints of use and/or growing in multi-family homes
- Thefts/burglaries (rural grows, home-grows, retail operations)
- Prioritization of enforcement with current resources
- Technology (tracking data)

Although the effect on communities' currently available resources will be felt to varying degrees, any negative effect on already strained resources should be addressed.

c. Local Revenue Sharing

The adequacy of local resources must be taken into account if a taxation and regulation system for recreational cannabis is created. Ensuring funding for public safety is of particular concern. Sharing the revenues generated from taxing and regulating cannabis with municipalities should be considered in creating an effective regulatory structure. This is because impacts from

cannabis legalization will be felt at the local level, regardless of whether a town or city hosts retail or commercial operations.

As noted above, in every other state that has legalized recreational cannabis, municipalities have local taxing authority beyond property taxation, and some level of revenue-sharing from state-level revenues. In contrast, 95% of municipalities in Vermont are wholly reliant on local property taxes to generate revenues locally.⁹

In a taxed and regulated marketplace for recreational cannabis, Vermont municipalities that share in the revenues generated at the state level would benefit from those new resources in a variety of ways. They would also be better able to enforce new laws and mitigate any negative impacts. Communities without cannabis establishments could also receive funding to alleviate the effects of retail operations based in other municipalities, or consequences that arise from local personal use or cultivation, including highway safety, odor, zoning, etc. Revenue sharing and local authority would prevent municipalities from having to increase property taxes or cut local budgets for other services. This would help align Vermont with the way that other states with legal recreational cannabis have empowered and funded municipalities.

x. IS THERE A NEED FOR A PERFORMANCE BENCHMARK OR BENCHMARKS TO BE ASSESSED BEFORE THE FURTHER DECRIMINALIZATION OR LEGALIZATION OF RECREATIONAL CANNABIS USE OR ESTABLISHMENT OF A TAX AND REGULATORY SYSTEM, SUCH AS THE PERCENTAGE OF VERMONT YOUTH WHO RECOGNIZE AND UNDERSTAND THE RISK OF HARM POSED BY CANNABIS, A STATISTICALLY SIGNIFICANT REVERSAL AND DECLINE IN THE NUMBER OF MAJOR CRASHES DUE TO CANNABIS-IMPAIRED DRIVERS, A STATISTICALLY SIGNIFICANT REVERSAL AND DECLINE IN THE NUMBER OF DUIS RELATED TO CANNABIS, AND CAPACITY AT THE DEPARTMENT OF PUBLIC SAFETY TO MEET THE NEED FOR DRES AND IN-HOUSE ANALYSIS AND TOXICOLOGY TESTING RELATED TO CANNABIS?

Benchmark data should be collected as soon as possible. There is no reliable way to determine the specific impact of legalization or decriminalization on drug use or the impact of educational programs or prevention efforts in curbing misuse and abuse without first obtaining baseline information.

In order to begin formulating and assessing appropriate benchmarks, including a benchmark such as a reversal in major crashes due to cannabis-impaired drivers, the Commission recommends that the State of Vermont begin gathering specific baseline data to measure the impact of cannabis decriminalization or legalization in Vermont—regardless of whether it involves adult possession and/or retail sales. The Commission specifically recommends that

⁹ Vermont municipalities cannot levy local option taxes unless they have approval from the Legislature and local voters. Currently, 14 municipalities have a local option sales tax, and 18 have local option meals and rooms and alcoholic beverages tax (Burlington and Rutland have their own local meals, entertainment, and lodging taxes).

Vermont model its data-collection initiative on a similar such initiative undertaken in Colorado pursuant to legislative mandate.

As background, Colorado Senate Bill 13-283 (now codified in part at Colo. Rev. Stat. § 24-33.5-516) required the Division of Criminal Justice within the Colorado Department of Public Safety to gather data for specific information categories during different time periods, in order to measure the impact of legalization under Amendment 64 of 2012.¹⁰ Those categories included “[m]arijuana-initiated contacts by law enforcement”; “[c]omprehensive school data, both statewide and by individual school, including suspensions, expulsions, and police referrals related to drug use and sales”; “[m]arijuana arrest data”; “[t]raffic accidents, including fatalities and serious injuries related to being under the influence of cannabis”; and “[d]iversion of cannabis to persons under twenty-one years of age,” among others. *See* Colo. Rev. Stat. § 24-33.5-516. Colorado’s efforts are documented in the 2016 report that has helped inform the Subcommittee’s recommendation: Cannabis Legalization in Colorado: Early Findings, A Report Pursuant to Senate Bill 13-283 (March 2016).

With the assistance of the Crime Research Group, the Roadway Safety Subcommittee reviewed Colorado’s efforts and the Commission recommends a similar data-collection initiative in Vermont. Modeled after many of the data elements set forth in Colorado legislation, the Commission proposes that Vermont start collecting data in January 2018, including but not limited to the following specific categories:

- **Cannabis-related crimes and quality-of-life complaints.** To collect data under this proposed category, Vermont should first establish a definition of “cannabis-related crime.” The Crime Research Group suggested three types of cannabis-related crimes: dispensary-related crime, crime where the primary purpose of the act is to steal cannabis, and crime where cannabis is in the vicinity (i.e., on the table in the room where a crime is committed) but not necessarily an element of the crime. Also as part of this effort, Vermont could define and measure “quality-of-life” concerns and crimes associated with cannabis—e.g., disorderly conduct, intoxicated behavior, odor complaints, secondhand cannabis smoke, and minor misdemeanors driven by the need to get money for drugs.
- **Cannabis arrests, including amounts.** The Colorado Department of Public Safety was legislatively mandated to collect “[m]arijuana arrest data, including amounts of cannabis with each arrest, broken down by judicial district and by race and ethnicity.” *See* Colo. Rev. Stat. § 24-33.5-516. Vermont should engage in a similar data-collection effort, beginning with data from the National Incident-Based Reporting System (NIBRS), mirroring the approach of Colorado.
- **Cannabis-related traffic accidents and impaired driving generally.** Vermont currently maintains data on traffic accidents involving individuals with the *presence of*

¹⁰ *See* Colo. Rev. Stat. §§ 24-33.5-516, 24-33.5-502; *see also* Cannabis Legalization in Colorado: Early Findings, A Report Pursuant to Senate Bill 13-283 (March 2016), *available at* <https://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf>. Colorado Senate Bill 13-283 is available at [http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/4B75534D3719DBD687257B490074E195/\\$FILE/283_enr.pdf](http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/4B75534D3719DBD687257B490074E195/$FILE/283_enr.pdf).

cannabis in their systems. The state also has data on such accidents pre- and post-decriminalization in Vermont. However, presence of cannabis does not necessarily indicate *impairment* due to cannabis. Thus, the state should continue to track traffic-accident data relating to cannabis but specifically attempt to capture *impaired* driving data pre- and post-legalization. One source of such information may be found by tracking prosecutions in Vermont for driving under the influence of cannabis.

- **Out-of-state diversion.** As noted above, Colorado legislation required that the Colorado Department of Public Safety gather information relating to “[d]iversion of cannabis out of Colorado.” *See* Colo. Rev. Stat. § 24-33.5-516. The Vermont Drug Task Force may be able to assist in the tracking of similar data for Vermont out-of-state diversion.
- **Postal service use for cannabis transfer.** Colorado is still developing its approach to gathering this information, and Vermont should study, and perhaps subsequently model its own efforts on the approach ultimately adopted by Colorado.
- **Youth.** Vermont data relating to youth would include multiple categories. First, like Colorado, this data-collection effort could include school data, i.e., expulsions/suspensions/etc. related to cannabis on school premises or during school activities, etc. The Agency of Education and law enforcement should be engaged in this effort; law enforcement data possibly could be used. Also, Vermont should systematically gather data on cannabis diversion to minors. Although such data may be found in Family Court records, any effort to collect data may be limited and would have to abide by the confidentiality provisions of Title 33, chapter 51 of the Vermont statutes. *See* 33 V.S.A., chapter 51. In addition, Vermont could define and subsequently measure data relating to “drug endangered children,” and the state also should continue to monitor trends in youth usage of drugs, including cannabis. All of the above-proposed efforts should build on already completed research by the Vermont Department of Health. Vermont already has data relating to youth and cannabis, and sources of data will continue to include existing surveys.

Although this list is not exhaustive, it includes many categories similar to those set forth in the Colorado legislation described above. Once Vermont has more baseline data in these areas—both for time periods before and after any changes to its cannabis laws—the state can formulate and assess crucial benchmarks.

Obtaining scientifically valid and statistically significant studies on the effect of educational or other programs designed to increase youth awareness or reduce accidents would require multiple years to develop, implement and evaluate.

xi. Miscellaneous Issues.

a. Insurance impacts, including on the cost of automobile insurance, workers compensation insurance, and homeowner insurance, host liability and landlord liability.

The legalization of adult use cannabis under a tax and regulate scheme presents a number of implications for the insurance industry and marketplace. Since cannabis is a Schedule I drug under federal controlled substances law, the standard (admitted) insurance market is typically unavailable to cover state-legal cannabis activities. There are surplus lines insurers (non-admitted) willing to provide a full array of insurance products to cannabis businesses including General Liability, Products Liability, Auto Liability, Umbrella and Professional Liability to name a few. In addition to legal implications, there are reputational risks for standard insurers, which causes them to be reticent to enter the cannabis insurance marketplace. Additionally, the cannabis insurance marketplace is a relatively new insurance market, and insurers may need to evaluate the risks before entering the marketplace with standard insurance products.

The Surplus Lines market is the market of last resort in which insurance risks are placed because they are not reasonably procurable in the admitted market. Surplus Lines pricing and product offerings are determined by market forces and are not regulated at the state level like the admitted market. The availability of insurance products in the standard market is more likely to exist for personal cultivation because most standard homeowner policies are silent on cannabis and do not expressly exclude or include coverage for cannabis. Cannabis plants could be included as covered items under the \$500.00 limited coverage provided under a Homeowners policy for trees shrubs or bushes. In the auto insurance market, insurers could potentially be reluctant to provide auto liability coverage for insureds involved in an auto accident that is the result of driving under the influence of cannabis. Vermont insurance regulators at the Department of Financial Regulation have taken the approach that providing protection for innocent third parties injured by operators who are under the influence of alcohol is good public policy. A similar public-policy-based approach could be taken for accidents involving cannabis.

The impact that cannabis legalization has on the cost of insurance is difficult to anticipate. The future cost of insurance in the property and casualty insurance market is usually dependent on a variety of factors, including but not limited to, prior loss experience, the projection of future loss experience and potential increases in exposure due to changes in the legal landscape.

The Highway Loss Data Institute (HLDI) conducted a study of the frequency of crashes reported to insurers in the states of Oregon, Washington and Colorado where cannabis is legalized. The study found that the frequency of crashes increased 3% since cannabis was legalized in those states. It is difficult to attribute the increase in frequency solely to a change in the law, however, since other factors may be at play, including improving economic trends and relatively low gas prices in recent years which typically result in increased miles over the road for each driver. It would be advisable to continue to study the results in these states over time.

The impact that cannabis legalization may have on workers' compensation insurance costs is multifaceted. Insurers are likely considering a number of factors including: the federal Schedule I drug status of cannabis; whether states will require insurers to reimburse/pay for medical cannabis; whether medical cannabis is a viable alternative to opioids for pain management; whether cannabis helps to achieve better claim outcomes; and whether cannabis helps employees return to work sooner. At least five states (Connecticut, Maine, Minnesota, New

Jersey, and New Mexico) have found that medical cannabis is a permissible workers' compensation treatment that requires insurer reimbursement.

To the extent that social host liability and landlord liability currently exist regarding the use of alcohol, such liability exposures may, to a certain extent, exist for those serving legalized cannabis.

b. Security of cannabis storage

Vermont's Medical Cannabis statutory scheme and regulatory structure has proven to be an effective means of controlling and securing cannabis. The Commission recommends that similar protocols, including requiring secure storage and locked growing and processing facilities should be applied to non-medical cannabis activities permitted by the State.

c. Local zoning

Under a tax and regulate regime municipalities would need to be given authority and time to zone and plan for the operation of different cannabis establishments in their jurisdictions if they so choose. Zoning bylaws, if the jurisdiction has them, will need to be updated. Updating zoning by working through the statutory process outlined in 24 V.S.A. chapter 117 takes time and resources. When municipalities' planning commissions rewrite bylaws and hold public hearings and votes, the discussions among the community can be complex and emotional.

The State may want to consider minimum standards for siting cannabis establishments, such as proximity to schools. Such standards already exist for medical cannabis dispensaries under 18 V.S.A. § 4474e(c), which could be applied to recreational establishments. These standards would be especially important for jurisdictions that do not have zoning bylaws.

d. Search and seizure considerations.

The Roadway Safety Subcommittee and the Commission recognize 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. Accordingly, it is anticipated that search and seizure law in Vermont will be subject to renewed litigation should cannabis be legalized in some manner.

The Roadway Safety Subcommittee noted that Vermont's current decriminalization statute continues to define cannabis as contraband and one lower court ruling has held that cannabis decriminalization does not affect search and seizure law of Vermont.¹¹ *See Zullo v.*

¹¹ Section 4230a of Title 18 states:

This section is not intended to affect the search and seizure laws afforded to duly authorized law enforcement officers under the laws of this State. Cannabis is contraband pursuant to section 4242 of this title and subject to

State, No. 555-9-14 Rdcv (Vt. Sup. Ct. May 9, 2017) (relying on 18 V.S.A. § 4230a in holding that odor of cannabis alone can provide the basis for probable cause to search a vehicle).¹² Thus, with all cannabis presently considered “contraband,” law enforcement has more clearly understood guidelines for investigating possible criminal activity, including guidelines for continued detention and, under certain circumstances, the search and/or seizure of a vehicle.

Once the possession or cultivation of cannabis no longer constitutes a crime under Vermont law either through legalization of specific amounts, *e.g.*, H.511 of the 2017–2018 legislative session, or through retail sales and regulation, *see, e.g.*, H.490 introduced in the 2017 legislative session, law enforcement will, among other things, immediately be faced with new and more challenging circumstances during roadside motor vehicle stops. For instance, what specific kinds of cannabis-related information will provide reasonable suspicion of a criminal act for continued detention at the roadside? *See State v. Manning*, 200 Vt. 423, 430–31 (2015). Will reasonable suspicion of a criminal act require an officer to engage in the near-impossible task of discerning a legal amount of cannabis from an illegal one? What cannabis-related information will support an exit order during a roadside stop or, as noted above, provide a basis for probable cause for a search warrant? *See State v. Sprague*, 175 Vt. 123, 130 (2003). What impact, including cost impacts, will legalization have on the existing K9s that are specially trained in cannabis detection?

The Roadway Safety Subcommittee also noted that under any framework that loosens the prohibition against cannabis use and possession, the courts are likely to be faced with redefining the contours of established search and seizure law. The search and seizure provisions of the United States and Vermont Constitutions depend on evidence of a crime. Once possession or cultivation of a certain amount of cannabis becomes legal or decriminalized, the Subcommittee assumes that current search and seizure jurisprudence relating to the treatment of cannabis may change, requiring the courts to provide constitutional guidance.

Due to time constraints, the Roadway Safety Subcommittee has not reached consensus on what to recommend for a statutory change to assist in bringing clarity to these issues. On the one hand, to provide guidance to law enforcement officers, some Subcommittee members would prefer that any cannabis-legalization legislation clarify that legalization does not intend to affect foundational search and seizure jurisprudence. Such a clarification would provide some guidance to law enforcement officers who undoubtedly will continue to face confusing and difficult situations on Vermont roadways.

On the other hand, some members contend any attempt to retain the “contraband” label and legislative intent language would directly undermine the intent of decriminalization or “legalization.” They also argue such an attempt would fail constitutional scrutiny, since possession of legal quantities of cannabis, standing alone, is unlikely to support a finding of

seizure and forfeiture unless possessed in compliance with chapter 86 of this title (therapeutic use of cannabis).

¹² This case is currently on appeal to the Vermont Supreme Court.

probable cause for issuance of a search warrant under the Fourth Amendment to the U.S. Constitution or Article 11 of the Vermont Constitution for, at a minimum, cannabis possession/trafficking related crimes.

The Commission will continue to explore this difficult legal issue and will address the matter again in its December 2018 Report.

e. Voter approval (Opt-In, Opt-Out)

In the event that a tax and regulate legalization scheme is adopted in Vermont, as with all other states that have legalized the recreational use of cannabis, voters in towns and cities need an opportunity to determine whether they will allow cannabis establishments to operate in their communities. Similar to municipalities' right to determine whether to be "dry" alcohol towns or not, towns should be able to determine whether to allow the sale of cannabis within their boundaries. In statute, similar authority and language can be found at 7 V.S.A. § 161. This section could be modified to require local approval to host cannabis facilities. Adequate time must be provided at special or annual meetings for such votes to take place.

f. Local licensing and permitting

Under a tax and regulate regime, using the administrative and regulatory infrastructure in 7 V.S.A. chapter 7 as a model, local permitting for cannabis establishments could be overseen at the local level by control commissioners. Pursuant to 7 V.S.A. § 167, control commissioners administer the rules of the Liquor Control Board and exercise the authority to license or permit establishments that furnish alcohol. The control commissioners are the select board and city councils of each town and city according to 7 V.S.A. § 166.

Taking cues from Massachusetts, select boards and city councils could be authorized to negotiate "host community agreements" with cannabis operations that apply to be located within each municipality. For example, Massachusetts gaming operations and cannabis establishments are required to enter into agreements that set conditions for such a business to be located within a municipality. Agreements include community impact fees for the host community, stipulations of responsibilities between the host community and the applicant, and stipulations of known impacts from the development and operation of an establishment.

g. Code and ordinance enforcement

Most towns and cities have zoning bylaws, but many lack code enforcement for issues like electrical, health, building, and plumbing standards. Towns and cities that have codes may experience an increased enforcement burden under a tax and regulate legalization framework if cannabis establishments are located in their jurisdiction. Additionally, the State will need to assume those responsibilities for municipalities that do not have code enforcement.

Under either a decriminalization or legalization scenario municipalities should be extended specific powers under 24 V.S.A. § 2291 to regulate or prohibit cannabis use in public spaces. Municipalities should also be given the authority to regulate or prohibit odor nuisances caused by cannabis use and cultivation. In communities with limited or no local law

enforcement, other municipal officials should have sufficient resources to assume the responsibility of enforcing local ordinances.

h. Consumer and Youth Protections in a Retail Sales Environment

As noted above, there are myriad new forms of delivery systems existing and being developed for the delivery of cannabis. Careful scrutiny should be applied to each unique form of cannabis and the State should consider carefully whether to allow infused products for sale in a regulated market.

The Commission will continue to evaluate the evolving marketplace for cannabis products and delivery systems and address recommendations for regulating the same in its December 2018 Report. However, two issues can be addressed here: nicotine additives and edibles testing.

Given the known risks and negative health impacts of nicotine, it is recommended that combining cannabis with nicotine should be prohibited under all circumstances.

In addition, before any future regulation regarding edibles is implemented, the State should ensure that full testing and regulatory procedures are in place. This includes development, implementation and full funding for comprehensive food inspection.

i. Diversion

Diversion is an important issue to consider in the context of any framework that permits the production of cannabis because of the risk that legalized activities may be used as a front to obscure illegal conduct. Diversion can take the form of legally grown cannabis being diverted to populations that are prohibited from use such as those under 21, or transportation out of state. In addition, there is a risk that any legal scheme allowing for production will be used as a cover to produce amounts of cannabis that exceed legal limits for the purpose of making illicit commercial sales within and outside the borders of Vermont.

In 2015 a delegation of Vermonters traveled to Colorado to examine that state's nascent adult-use cannabis regime. While Colorado's regulatory regime attempted to closely track legalized production and to prevent diversion, even the heavily regulated environment in Colorado failed to prevent diversion. As the 2015 Report stated:

It is important to note that Colorado's legalization of cannabis did not eliminate the illegal market. Some officials expressed concern that the comparative high-cost of legal, regulated and taxed recreational marijuana failed to deter user exploitation of the loose medical marijuana regime, and the black market in illegal, cheaper, marijuana. In some ways Colorado's legalization scheme, particularly its looser medical marijuana system, has made it more difficult to take enforcement action against operations that operate illegally and thus outside the oversight of government regulators. One of the difficulties with the current "black" or "grey" market concerns the less regulated medical system, in which "caregivers" operate without significant regulation growing marijuana for many patients, some setting up unregulated "co-ops" which produce large amounts of

marijuana. The state is currently considering legislation to curtail this practice, and the group was struck by how different Vermont's system was in this regard. Generally, because the elimination of criminal markets is a key issue in the legalization debate, Colorado's practical experience on this front should be closely examined.

"Vermonters Visit to Colorado to Study Legalized Marijuana." February, 2015 (Attached as Exhibit D).

The issue of diversion may have important practical impacts on Vermont in light of recent shifts in federal policies towards the enforcement of cannabis prohibition. Although cannabis is listed as a "Schedule 1" drug by the U.S. Drug Enforcement Agency, prior to 2018 the U.S. Department of Justice had adopted a policy articulated in the "Cole Memoranda" that outlined a suggested approach to U.S. Attorneys in evaluating whether to devote limited federal resources to addressing state sanctioned cannabis production. One important element of the Cole Memoranda in weighing against taking enforcement action was the existence of a robust regulatory environment designed to prevent diversion. On January 4, 2018, the Attorney General of the United States revoked the guidance enunciated in the Cole Memoranda. Thus, while an unregulated cannabis legalization regime was subject to the risk of increased scrutiny by federal authorities even under previous guidance, the removal of the Cole Memoranda protocols increases the risk that federal authorities may take action against cannabis production and use in states that permit such activities, particularly where no regulatory safeguards are in place to prevent diversion.

xii. CHANGES TO VERMONT LAW REQUIRED TO PROTECT THOSE UNDER 21 YEARS OLD AND ENSURE HIGHWAY SAFETY.

Any move towards legalization or decriminalization may increase the availability of cannabis and will also impact the risks perceptions associated with the substance. In order to address these realities and the fact that cannabis use is already widespread in Vermont the Commission recommends:

a. Limit sales to adult-only outlets

In the event that retail sales are permitted in Vermont, sales should be limited to adult-only outlets statewide. Do not allow sales in locations that minors can enter. Ensure a statewide standard, but: Allow local governments to further restrict sale, outlet density/location and advertising through municipal zoning and ordinance mechanisms – including banning the sale of cannabis, similar to Vermont's laws concerning medical cannabis dispensaries.

b. Buffer zones

In a tax and regulate system, the state should consider appropriate statewide "buffer zones" for the location of sales, processing and production of cannabis around areas such as playgrounds, schools and colleges.

c. Roadway Safety

Vermont should consider multiple amendments to Vermont statute to address the potential dangers that the use of cannabis may have on the motoring public. First, as set forth above, the Legislature should approve oral fluid roadside screening tests and evidentiary tests to combat impaired driving on Vermont’s roadways. *See, e.g., H.237 of 2017, available at <https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/H-0237/H-0237%20As%20Introduced.pdf>*. Second, any legalization bill should clarify that the bill does not modify or repeal Vermont’s impaired driving laws. Also, any legislation should continue the policy adopted in H.511 of imposing a criminal penalty for consuming cannabis as a motor vehicle operator and a civil penalty for consuming cannabis as a passenger. Finally, any legislation scheme should continue the policy adopted in H.511 that makes it a crime to consume cannabis in a motor vehicle with a child, and should prohibit open containers of cannabis in the passenger area of a vehicle.

d. Penalties for providing cannabis to those under 21 years of age

With respect to protecting those under 21, should cannabis be legalized under a tax and regulate scheme, Vermont law should continue to apply the standards set forth in H.511 that make it a crime to provide cannabis to those under 21 years of age. Moreover, possession of cannabis by an individual under 21 years of age should carry a civil penalty. Also, any legislation should clarify that legalization does not change a school’s ability to restrict or penalize students for cannabis possession at school, and legalization should not affect the prohibitions under 18 V.S.A. § 4237 (“Selling or dispensing to minors; selling on school grounds.”). Importantly, any tax and regulate legalization legislation should continue to make it a crime to cultivate or use cannabis at childcare facilities. Lastly, as is the case with medical cannabis dispensaries in the state, should a cannabis-retail-sale model be legalized, no retail store should be established within 1,000 feet of a school. *See* 18 V.S.A. § 4474e(c) (“A dispensary shall not be located within 1,000 feet of the property line of a preexisting public or private school or licensed or regulated child care facility.”).¹³

e. Prohibit infused products that are attractive to children

The Health and Education Subcommittee has recommended, and the Commission agrees, that the State should not allow the creation, promotion or sale of infused products that could appeal to children. The State should mandate that should future legislation allow for the production of infused/edible products for sale, that they should be prohibited from being produced in a form that could be attractive to youth (e.g. gummy bears, cookies, brownies, etc.).

f. Fund research

The State should fund data collection and research. Efforts to monitor more closely the type of use, frequency of use, and potency of cannabis used among Vermonters of all ages will be an important part of determining necessary regulations for cannabis production and use. The

¹³ H.511, which has just recently passed the Vermont General Assembly, addresses some, but not all, of the issues set forth in this recommendation.

State should encourage and fund the scientific study of health effects among Vermonters who use cannabis.

IV. CONCLUSION

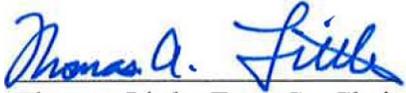
This Report contains the Commission's best efforts to date, and the Commission will continue to develop its understanding and expertise on the issues contained in it and update the premises and conclusions of this work as warranted by developing data and science.

Based on the findings of the Commission there are several issues that should be addressed immediately:

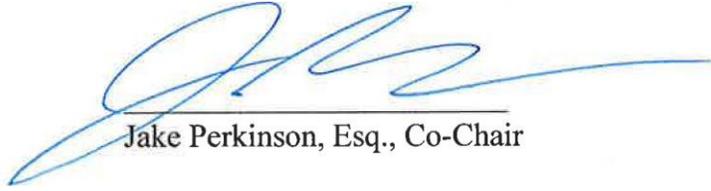
1. The State should immediately develop educational materials and programs with efforts particularly focused on youth education and prevention. The Vermont Department of Health should lead this effort and seek to partner with public and/or private partners that have already developed programs addressing this issue. The VDH should coordinate these efforts with those of the Governor's Opioid Coordination Council, including coordination with the Agency of Education.
2. The State should develop and implement a public education campaign about the dangers of driving under the influence of stimulants in general and of THC in particular, especially when used in combination. This effort should be led by the Department of Public Safety in coordination with the Vermont Department of Health.
3. The State should pass legislation that enables law enforcement to conduct roadside oral fluid screening tests and task the Commissioner of Public Safety to adopt rules relating to the use of any roadside saliva/oral fluid preliminary screening device and a method for the analysis of an evidentiary sample of saliva/oral fluid.
4. Collection of benchmark data should begin immediately. The Commission recommends that Vermont model its data collection initiative on the initiative undertaken in Colorado pursuant to legislative mandate as described above.
5. The State should engage in outreach efforts to 1) coordinate with other states that have either legalized cannabis for adult use or are considering the same; 2) obtain existing best practices from other jurisdictions; and 3) solicit funding for prevention and education efforts from non-medical cannabis businesses. Such efforts could initially be undertaken through the Coalition of North East Governors.

The Commission would like to express gratitude for the high quality and dedicated work of the members of the subcommittees who have provided the foundation for his Report, and in particular Commissioners Levine, Anderson and Samsom who chaired those subcommittees. The Commission will continue to rely on the expertise of the subcommittees' members and other experts as it now focuses more squarely on the topics to which the EO now directs it, specifically, the formulation of a comprehensive revenue and regulation system for an adult use cannabis market.

Respectfully Submitted,



Thomas Little, Esq., Co-Chair



Jake Perkinson, Esq., Co-Chair