

LLB140 HUMAN RIGHTS TAKE-HOME EXAM

SEMESTER 2 2020

INSTRUCTIONS:

1. Both Question 1 and Question 2 are to be attempted.
2. Each Question is to be attempted in a **separate word document** and uploaded to the corresponding link on Blackboard (under the 'Assessment' tab and then the 'Take-Home Exam' submission link).
3. There are 1,000 words for Question 1. There are also 1,000 words for Question 2. Each Question is worth 25 marks.
4. In Question 2, marks and word count for each section are as indicated.
5. Headings and footnoted citations are **not** included in the word count. To maximise your word count, we encourage you to reference your sources in the footnotes, as opposed to the body of the answer. However, please note that substantive material *should not* be included in footnotes.
6. Your citations do **not** need to be AGLC 4 compliant. However, they should be sufficiently detailed to allow the marker to identify the sources you are referencing. For example, 'CESCR, *General Comment 12*' would be sufficient.
7. You can use common abbreviations, for example, *ICCPR* for the *International Covenant on Civil and Political Rights*.
8. The deadline for submissions of your take-home exam is **Friday of Week 13 (23rd October) 11:59 pm**. Please note that late submissions, without an approved extension, will receive a grade of 0.
9. This is an individual assessment task. Consultation or collusion with others would undermine the purpose of the assessment and could be considered academic misconduct.
10. For queries in relation to Question 1, contact Dr Carmel O'Sullivan. For queries in relations to Question 2, contact Dr Hope Johnson.

QUESTION 1:

STATEMENT OF COMPATIBILITY:

1,000 WORDS

25 MARKS

Cannabis has been associated with treating and/or alleviating the symptoms of a number of medical disorders. For example, medicinal cannabis is commonly requested to treat or alleviate the symptoms connected to cancer, AIDS, epilepsy, multiple sclerosis, and phantom limb pain as well as for palliative care.¹ However, short-term and long-term side effects associated with repeated cannabis use include respiratory and cardiovascular disorders, cognitive alterations, psychosis, schizophrenia, and mood disorders.² Some argue that we need more research - particularly large and high-quality studies - to explore the potential benefits, limitations and safety issues associated with medicinal cannabis treatment. Others argue that there is sufficient scientific evidence, including reports from authoritative bodies, to support the safety and efficacy of medicinal cannabis.³

Under the *Drug Misuse Act 1986* (Qld), it is a drug offence to unlawfully possess, supply, produce or traffick cannabis. The maximum penalties for these crimes range from 15 to 25 years imprisonment. In Queensland, medicinal cannabis is only legally accessible in limited circumstances under the *Public Health (Medicinal Cannabis) Act 2016* (Qld). Sections 13-16 of this Act set out some of the requirements for applying for medicinal cannabis approval, including that a medical practitioner must apply for approval to facilitate the treatment of the patient with medicinal cannabis. The patient cannot apply directly. Section 22 provides that the opinion of a specialist medical practitioner may also be required before approval is granted.

Under the Uniform Scheduling of Medicines and Poisons, medicinal cannabis falls under Schedule 4 (Prescription Only Medicine) and Schedule 8 (Controlled Substances). Except where cannabis and THC occur naturally in minute amounts in hemp fibre or oil products, cannabis for purpose outside those in Schedules 4 and 8 are classed as Schedule 9 (Prohibited

¹ See, for example, Department of Health, TGA, *Medicinal cannabis products: Patient information*, 29 May 2018; Melissa Bone and Toby Seddon, 'Human rights, public health and medicinal cannabis use' (2016) 26(1) *Critical Public Health* 51.

² Koby Cohen, Abraham Weizman, and Aviv Weinstein, 'Positive and Negative Effects of Cannabis and Cannabinoids on Health' (2019) 105(5) *Clinical Pharmacology & Therapeutics* 1139.

³ See, Kylie O'Brien, *Medicinal Cannabis: Issues of evidence* (2019) 28 *European Journal of Integrative Medicine* 114 for a review of the evidence and whether it supports the current regulatory framework around medicinal cannabis in Australia.

Substances). Inclusion in Schedules 4 and 8 means that a prescription from a health professional is required to access medicinal cannabis. Bar nabiximols (Sativex), medicinal cannabis products also require some prescribing approval from the Therapeutic Goods Administration (TGA). This is because they are not currently approved medicines in the Australian Register of Therapeutic Goods.

In March 2020, a Senate inquiry into the [Current Barriers to Patient Access to Medicinal Cannabis in Australia](#) revealed that the current laws regulating medicinal cannabis create several barriers to legal access. Some of the barriers identified included:

- There are often high costs associated with the regulatory scheme. This includes the cost of seeing doctors and specialists for a prescription and the cost of the prescribed medicine itself. For example, the Senate inquiry received a submission where a mother was quoted by her son's neurologist an annual cost of between \$60 000 to \$100 000 for a prescribed medicinal cannabis product. Others report patients being quoted up to \$34,000 per year to access medicinal cannabis, following TGA approval.⁴
- Many patients reported issues in finding health professionals that were willing to prescribe (and had the necessary approval to prescribe) medicinal cannabis. Patients noted the stigma of using medicinal cannabis and the lack of awareness and education on the benefits and purposes of medicinal cannabis. This lack of education and awareness was present in not only the general community but also in the medical profession.
- These difficulties in accessing health professionals that are willing and have the approval to prescribe medicinal cannabis and the cost in accessing medicinal cannabis lawfully is often exacerbated in rural or remote areas. This is known as the 'postcode lottery'. That is, a person's location has a significant and substantial impact on the ease and cost of legally accessing medicinal cannabis.
- The Senate inquiry noted that the cost and difficulties in legally accessing medicinal cannabis has led to many patients illegally cultivating it or obtaining cannabis for medicinal purpose on the black or illicit market. This included patients who had a prescription but could not afford the prescribed medicine. The Senate inquiry noted that it is estimated that the number of people in Australia self-medicating with cannabis is around 100 000. Some believe this number could be much higher. A survey by the

⁴ Australian Lawyers Alliance, 'Drug policy reform in Australia' (2020) 2 *Medical Cannabis Network*.

Lambert Initiative for Cannabinoid Therapeutics found that only 25 out of the 931 respondents (less than 3 per cent) were accessing legal medicinal cannabis through the TGA schemes.

As a result, the Senate inquiry made several recommendations, including:

- Recommendation 1: The committee recommends that the Department of Health, in collaboration with the Australian Medical Association, the Royal Australian College of General Practitioners and other specialist colleges and health professional bodies, develop targeted education and public awareness campaigns to reduce the stigma around medicinal cannabis within the community.
- Recommendation 3: The committee recommends that the Australian Medical Council, as part of its role in the accreditation of Australian medical education providers, make mandatory the inclusion of modules on the endocannabinoid system and medicinal cannabis in curriculums delivered by primary medical programs (medical schools).
- Recommendation 13: The committee recommends that, as soon as practicable after a safety review and public consultation process is completed, the Department of Health make any appropriate application to the Advisory Committee on Medicines Scheduling in relation to the down-scheduling or de-scheduling of cannabidiol and other non-psychoactive cannabinoids.
- Recommendation 18: The committee recommends that medicinal cannabis industry peak bodies, such as Medicinal Cannabis Industry Australia and the Medical Cannabis Council, work with their members to implement compassionate pricing models for patients facing significant financial hardship in accessing medicinal cannabis products to treat their health conditions.
- Recommendation 19: The committee recommends that, until medicinal cannabis products are subsidised through the Pharmaceutical Benefits Scheme, the Australian Government:
 - investigate the establishment of a Commonwealth Compassionate Access Subsidy Scheme for medicinal cannabis, in consultation with industry and based on the best available evidence of efficacy for certain conditions; and
 - encourage all states and territories, through the COAG Health Council, to expand the provision of their own Compassionate Access Schemes to patients requiring treatment with medicinal cannabis.

- Recommendation 20: The committee recommends that the Australian Government, through COAG, encourage a review of state and territory criminal legislation in relation to:
 - amnesties for the possession and/or cultivation of cannabis for genuine self-medication purposes; and
 - current drug driving laws and their implications for patients with legal medicinal cannabis prescriptions.

The World Health Organization Expert Committee on Drug Dependence also recommends that the scheduling of cannabis and cannabis-related substances in international drug control conventions is changed.

You work for the Legal Affairs and Community Safety Committee in the Queensland Parliament. In light of the Senate inquiry and its recommendations, it is being reviewed whether the law regulating medicinal cannabis should be amended. As part of the review, you have been asked to draft a Statement of Compatibility on the current law. In your statement, you should use international and domestic human rights law.

QUESTION 2:

1,000 WORDS

25 MARKS

Provide answers for Part A and Part B in the same document.

Note: The exam scenario is based, very broadly, on real and evolving events. While real communities, issues and contexts are referenced, the scenario is fiction with corporate names altered. You should use the scenario below for your answer rather than focus on the real events from which this question is based.

PART A – 20 MARKS

1. Using international human rights law and jurisprudence, determine whether, and if so how, PHDC has breached its responsibilities to human rights. In your answer, very briefly identify what PHDC should do going forward with citations to relevant materials. You may focus on 1-2 human rights in your response.

15 marks

600 words

2. Using bullet points, identify the potential human rights obligations, under international human rights law, that the PNG breached. In your answers, cite the specific article and any extraneous material that provides an interpretation that supports your answer

5 marks

200 words

Example approach:

Heading: PNG have breached their obligation to respect by:

- *Doing...*¹
- *Creating...*²
- *When...*³
-

Heading: PNG have breached their obligation to protected by:

-

Heading: PNG have breached their obligation to fulfil by:

-

¹ ICCPR art X(Y); GC 14 [8].

Note: You can use any, or all of, the above heading/lead on-sentences word-for-word. The starter words after the bullet points are just very rough examples that may not be applicable or useful to you. The number of bullet points listed here are in no way indicative of the number of potential rights violations, and are merely a guide as to style.

PART B – 5 MARKS

Assume any and all human rights violation/s you identified in (a) have occurred.

You work for Hammish, Hamlin & Winger law firm ('HHW'). HHW was retained by PH Developers Pty Ltd (PHDC). You helped draft the various documents required for the eviction order. Now that a documentary has detailed the issues with the development, your law firm is concerned about its responsibilities. Identify and explain the human rights responsibilities, if any, of the law firm to the Paga Hill Community.

5 marks

200 words

EXAM SCENARIO

PAGA HILL BACKGROUND

Paga Hill is a large hill/land area located in Port Moresby (Papa New Guinea) that overlooks the water. Paga Hill is part of the traditional lands of the Geakone peoples.

In the 1980s, the PNG Government declared Paga Hill to be a National Park due to its uniquely preserved natural resources and historic sites. This occurred without the consent of the Geakone clan.

But, in 1995 this declaration was changed by PNG as foreign investors started to show an interest in building on Paga Hill. Once Paga Hill was no longer a national park, investors could apply to lease the land.

PAGA HILL COMMUNITY

Since the 1960s, the Geakone clan had customarily let a group of low socioeconomic PNG citizens live and work on Paga Hill ('the Paga Hill Community' or 'the community').

In sum, the community lived there in an "informal settlement". This means the Paga Hill Community did not have a formal legal title to the land, as they had neither purchased the land nor had the PNG Government granted it to them.

Up until 2012, the Paga Hill Community was about 3400 people who had lived on the land for generations. Many of the community members fished for a living or otherwise worked in the city in service roles.

They had constructed permanent and semi-permanent houses, gardens and fences on Paga Hill and the community had access to running water and electricity. There was also a church and a pre-school, as well as a pharmacy. Elders of the Paga Hill Community oversaw its governance and coordinated resources for the community.

PH DEVELOPERS

PH Developers Company Pty Ltd ('PHDC') was incorporated in the 1990s by a group of Australian property developers.

Since it was incorporated, the PHDC have wanted to build on Paga Hill. It aims to build various sites on Paga Hill such as apartment buildings, luxury hotel, gated communities, public parks, a casino, retail spaces etc.

PHDC had previously been unsuccessful in its attempts to obtain a lease to build on Paga Hill.

In 2006, the Papua New Guinea Public Accounts Committee, an internal government body, explained that PHDC was a 'private, foreign speculator with no ability to even pay the land rental, much less build anything on the site'. The Committee recommended that the PNG Government 'take immediate action to recover Paga Hill and declare and preserve that land as a National Park'.

Regardless, PHDC obtained the support of influential Ministers within the PNG Government. Hence, in 2009, after years of lobbying, the PNG Government granted PHDC a 99-year lease over Paga Hill, even though PHDC did not meet the legal requirements under PNG domestic law to be granted a lease.

The company has no statements, nor provided any documents, that would indicate it had carried out a human rights or environmental impact assessment.

PHDC representatives has made various public statements about the community on Paga Hill. In 2012, PHDC explained that the community was mostly there 'illegally' and had been 'allowed to occupy the site through the inaction of authorities'. PHDC representatives explained that, from their perspective, the community's houses were 'poorly constructed from

scavenged material from around the harbour’ and so the community was not only ‘unsightly’ but also experienced high levels of ‘disease and sexual assault’.

As a low-socioeconomic urban community in a low-income country, social issues are prevalent within the Paga Hill Community, but the community disagree with PHDC’s assessment.

PRE-EVICTION AND RELOCATION PLAN

Sometime before 2012, two elders from the Paga Hill Community signed a contract with PHDC seemingly on behalf of the community. In the contract, the elders agreed the community would move off Paga Hill within 30 days. In return, PHDC agreed to (a) re-locate the Paga Hill Community members to a site called “Six Mile” on the outskirts of the city and (b) give each household roughly AU\$790 in compensation.

Broadly, the relocation plan was for individuals to dismantle their own houses. Then, PHDC would move the materials from their dismantled homes to Six Mile. The community would then re-construct their houses at the Six Mile site.

PHDC did not own the relocation land, so Paga Hill Community members would not be gaining a formal land title. Rather, the community would be informally renting the land at Six Mile from customary owners through short-term contracts that are difficult to enforce. While much of Six Mile is an informal settlement, it is possible to obtain legal title to a house in the area connected to water and electricity for about AUD\$200,000.

Unfortunately, Six Mile was previously a waste dump (i.e. a landfill site) and was already an informal and formal settlement for over 10,000 people. A large body of public health reports over decades illustrates that people living near, or on, landfills are more likely to experience health issues due to the contamination of air, water and soil. Six Mile does not have a public transport system that connects to the city. Furthermore, Six Mile is not near the water, hence many of the members of the community who fished for a living are no longer within walking distance of the sea.

However, the rest of the Paga Hill Community were unaware that two of its elders had signed a contract consenting to move, and the two elders have not been seen since they signed the contract agreeing to move.

As a result, most of the Paga Hill Community remained on site.

In February 2012, using the contract it reached with two elders, the PHDC obtained a court order to evict the Paga Hill Community. When the Paga Hill Community found out that an eviction order had already been granted, they sought an injunction.

DURING THE DEMOLITION EXERCISE

On the same day that the PNG Court was going to hear the appeal regarding the injunction, around 100 PNG police officers armed with guns, batons and machetes arrived.

Footage and first-person accounts show that the officers forcibly removed the community. Residents were also reportedly told to dismantle their homes and take their possessions at gunpoint. During the eviction, residents reported being punched and kicked. Residents that were filming or photographing the demolition were targeted by police and subject to beatings. At points throughout the demolition exercise, the officers employed live ammunition to disperse bystanders watching and documenting the demolition.

Using a PHDC-funded excavator, the PNG government actors demolished all houses on lower part of Paga Hill. The excavator could not reach the middle-section straight away, hence why residents were demolishing their own houses.

After the forced eviction had occurred, the injunction to stop the eviction was granted to the community.

POST-EVICTION

Investigations suggest the following:

- Those who did accept the relocation plan are allegedly living in tents or homes of sticks, fibro and tarpaulins without electricity, running water or access to fishing
- Two-thirds of the Paga Hill community received little to no compensation or relocation assistance from either the PNG Government or the PHDC
- An estimated 500 of the Paga Hill Community are homeless

The PHDC argues that it did provide relocation assistance and was not involved in forcibly evicting the community. The PHDC has stated that ‘The PNG Police’s were executing a court-ordered eviction notice. Although it was done in a manner common to PNG, these events were not within our control’. The company explained that it had formal rights to Paga Hill, and were acting pursuant to those rights. It hopes that its relocation plan will serve as a model for future relocations.

PHDC states that it has no control over the Six Mile site.

The PNG government has made no attempt to provide displaced people with shelter or essential supplies.