DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2442/P1dn
MGD:kmg:pg

May 11, 2001

Mary Lou:

This bill is based in large part on the Marijuana Policy Project (MPP) model statute, but it differs from the MPP draft in certain respects. Here are some questions that relate to the MPP draft and the differences between it and this bill:

1. The MPP draft includes optional language specifying the maximum amount of marijuana that may be considered an "adequate supply." Do you want the bill to include that language?

2. Under the MPP bill, a qualifying patient and his or her primary caregivers have a medical marijuana defense only if they collectively have no more than an adequate supply. But in practice, whether the treatment team's marijuana can be pooled may depend on the circumstances of the arrest. For example, when a putative qualifying patient is arrested, the primary caretakers may have ample opportunity to dispose of any marijuana in excess of an adequate supply. In addition, under this provision, a qualifying patient would not have a medical necessity defense if: 1) without the patient's knowledge, a primary caregiver acquires a large quantity of marijuana; or 2) without intending to acquire collectively more than an adequate supply, members of a treatment team each acquire an amount of marijuana that is less than an adequate supply but that, when aggregated, exceeds an adequate supply (which might occur if they simply fail to communicate with each other). This bill addresses these problems by limiting the adequate supply inquiry to the marijuana distributed, manufactured, delivered, or possessed by the individual charged. The downside to this change is that it could allow a treatment team to possess collectively more than an adequate supply. Consequently, it makes it easier for a qualifying patient to shield from prosecution people who possess or acquire marijuana for nonmedical uses, simply by making them members of the treatment team.

One alternative — albeit a complicated one — that might avoid some of these problems would be requiring the court to consider the total amount of marijuana possessed by the treatment team (*i.e.*, pooling), but permitting an individual defendant, in a case in which the treatment team possessed more than an adequate amount, to prove that he or she did not intend for that to occur. In this context, you may also want to consider directing a person using marijuana for medical purposes to tell his or her physician the name of anyone serving as his or her primary caregiver. The qualifying patient has an

incentive to identify them (to increase the likelihood that the court will view the person as a primary caregiver) but not to name unnecessary or illegitimate primary caregivers (since the marijuana that they possess will be attributed to the qualifying patient). Advocates might object to that directive in the same way that they would to MPP's proposed state registry of users, but patient–physician confidentiality may make that information more secure with physicians than with a state agency. In any event, please let me know how you want to address this issue.

3. The MPP draft requires that a child's parent, guardian, or custodian consent in writing to be the child's primary caregiver in order for the child to be considered a qualifying patient. But the draft does not indicate whether the parent, guardian, or custodian needs to submit the written consent to anyone. This bill requires that the written consent be provided to the qualifying patient's physician. Is that okay?

4. The MPP draft includes a provision specifying that insurers are not required to cover the medical use of marijuana. This bill does not. There is nothing in current law that would otherwise require an insurer to cover it, and our insurance law drafter has informed me that, unless they are legally required to do so, insurers will not include such coverage in their policies.

5. The forfeiture provisions in the MPP draft do not work very well. Under that draft, marijuana or drug paraphernalia used for medical reasons is not subject to forfeiture until after a person is convicted. But in many cases a law enforcement agency that seizes marijuana or drug paraphernalia may have no way of knowing whether the seized property was being used for medical reasons until after a criminal trial (assuming there is one). Consequently, this bill permits the state to bring a forfeiture action at any time, but it also: 1) requires the court to adjourn the forfeiture proceedings if the defendant asserts a medical use defense in a companion criminal case; and 2) permits a person from whom the property is seized to raise a medical use defense in a forfeiture case. Is that okay?

6. The MPP draft requires nonprofit organizations that are authorized to distribute marijuana to keep a record of qualifying patients and primary caregivers who use its services. Based on an exchange of e–mails that I had with Robert Kampia, Executive Director of MPP, it appears that this requirement makes sense only if the bill contains the optional state registration provisions, which this bill does not. Therefore, the bill omits this record–keeping requirement.

In addition, please note the following:

7. The U.S. Supreme Court is expected to rule before the end of June on the question of whether a state may authorize an organization to distribute marijuana for medical use. *U.S. v. Oakland Cannabis Buyers' Cooperative*, 190 F. 3d. 1109 (9th Cir. 1999), *cert. granted*, 121 S. Ct. 563 (U.S. Nov. 27, 2000) (No. 00–151). Depending on how the court rules, we may need to modify –– or even remove –– the provisions of the bill relating to distribution of marijuana by nonprofit organizations.

8. The bill would still permit a child who is a qualifying patient to acquire marijuana on his or own. Is that your intent? In addition, the bill requires that a primary

caregiver be at least 18 years old. Cases of this type may be extremely rare, but this requirement, combined with the requirement referred to in item 3 above, precludes a child whose parent, guardian, or custodian is under 18 from using marijuana for medical purposes. Is that okay?

9. Under current s. 968.20 (4), a law enforcement agency may dispose of property that "poses a danger to life" in its use. I have not found any court case interpreting that provision, but some law enforcement officials might argue that marijuana is covered by that description. Do you want the bill to specify that marijuana is not covered by s. 968.20 (4)?

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