Seattle City Attorney
Peter S. Holmes

January 20, 2011

Members of the Health & Long-Term Care Committee
Washington State Senate
466 J.A. Cherberg Building
P.O. Box 40466
Olympia, WA 98504-0466

Re: SB 5073

Dear Senators Keiser, Conway, Becker, Carrell, Kline, Murray, Parlette, Pflug, and Pridemore:

I urge the members of the Health & Long-Term Care Committee to support SB 5073's comprehensive medical marijuana/cannabis reform and suggest that the committee consider several amendments to improve the bill.

I favor legalization, taxation, and regulation of marijuana for adult recreational use along the lines that alcohol is currently legal, taxed, and regulated. But regardless of whether you agree with me on recreational legalization, many medical professionals believe that marijuana helps patients suffering from certain conditions, and our state's voters recognized this when they decided to permit medical marijuana more than a decade ago. Unfortunately, Washington's current system for regulating medical marijuana is neither clear nor comprehensive, and too often it leaves patients, providers, producers, police, and prosecutors in the dark about what is allowed and what is not. This needs to change, and I thank Senators Kohl-Welles and Delvin for introducing this legislation.

SB 5073 would create a rational and responsible supply and distribution chain for medical marijuana by allowing and regulating dispensaries, production facilities, and processing facilities. The current system is neither rational nor regulated. My office, other City of Seattle departments, and other cities and counties are regularly asked how to legally open a dispensary or distribution system (there is no clear answer, nor can any one public official provide a conclusive answer under the current law), and I have heard of several efforts to create private identification cards for medical marijuana users. This system needs reform, and any comprehensive reform must include a legislatively established, rational, and regulated supply and distribution chain as well as clear guidelines for law enforcement and courts so that medical marijuana is no longer suspended in this legal gray area.

Reform should also focus on controlling marijuana use where it is a legitimate threat to public safety and the environment, such as large, unregulated, and often dangerous grow operations and driving while under the influence of marijuana. In this vein, I have worked with Representative Roger Goodman to support a "per se" blood THC standard that will make it easier for police and prosecutors to arrest and prosecute those who drive while impaired by marijuana. Whether you view marijuana as a medicine or a recreational drug, it is not safe to drive while impaired by marijuana any more than it is safe to drive while impaired by legal recreational drugs such as alcohol or legal prescription medications (e.g., Ambien, Percoset, Vicodin). The regulatory system in SB 5073, coupled with improved tools for prosecuting marijuana DUIs, will go a long way towards making the production, distribution, and use of medical marijuana in Washington saner and safer than it is today.

I also note that the memorandum issued to federal prosecutors by the Obama Administration's Department of Justice in October 2009 gives states a broader opportunity to bring medical marijuana regulatory systems further from the current black and gray markets despite the ongoing federal prohibition. The memorandum instructed federal prosecutors that, "[a]s a general matter, pursuit of…significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks…should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." While this memorandum does not lift the federal prohibition or make medical marijuana legal under federal law, short of those steps it is as clear a statement as we can hope for from the federal government that states may establish rational regulatory systems for medical marijuana. The clearer we can make Washington law in stating what is and what is not permitted in the medical marijuana field, the easier it will be for federal prosecutors in our state to determine what constitutes "actions…in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."

SB 5073 is not perfect, but no marijuana regulation system can be perfect as long as the federal prohibition remains in effect. We cannot afford to let the perfect be the enemy of the good; this bill will do good, and it should be enacted. I do, however, propose the following amendments to the bill in an effort to improve its regulatory system, give law enforcement greater clarity in enforcement guidelines, and minimize the impact of medical marijuana production, processing, and distribution systems on our communities:

Section 401. I suggest that the committee add the phrase "for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis" before the phrase "under state law" where it occurs twice in the first paragraph of this section.

This would clarify that this bill's protections only extend to marijuana-related crimes and not to other crimes.

Section 402. I suggest that the committee remove this section. I understand the rationale for collective gardens under the current law, which most prosecuting attorneys interpret not to permit dispensaries or production facilities. But because this legislation addresses that problem by creating a reasonable, responsible, and regulated system for production, processing, and sale of marijuana for medical use, unregulated collective gardens should no longer be necessary. I am also somewhat concerned that enacting a law permitting up to 99 marijuana plants in a single collective garden location, not subject to the regulations that apply to dispensaries and production and processing facilities, could cause significant problems in Seattle's neighborhoods and also in communities across the state. It is one thing for a user or a designated provider to grow 15, or in some cases 30, plants in one location that may be in a residential district; it another thing entirely to allow unregulated 99 plant farms in urban and suburban areas. As an alternative to removing Section 402 entirely, I would support permitting collective gardens as long as they are regulated by the state and subject to local zoning and regulation as production and processing facilities—I am not opposed to collective gardens, just to unregulated collective gardens. Local jurisdictions should be able to define and regulate industrial or farm uses according to their own zoning needs.

Section 410. I suggest that the committee amend this section to read as follows: "A qualifying patient may not be refused housing or evicted from housing solely as a result of his or her possession or use of usable cannabis or cannabis products, except that a housing provider otherwise permitted to enact and enforce prohibitions against smoking in their housing may apply those prohibitions to smoking cannabis provided that such smoking prohibitions are applied and enforced equally as to the smoking of cannabis and the smoking of all other substances, including without limitation tobacco." For example, owners of apartment buildings would be permitted to decide whether they want to permit or prohibit smoking in their units, but once a landlord decides to permit tobacco smoking (or any other kind of smoking) in his or her units, the landlord may not prohibit medical marijuana smoking. And in no event could a landlord prohibit other types of medical marijuana use, such as eating.

Section 501(1). I suggest that the committee change "is guilty of" to "commits" to be consistent with noncriminal statutory language typically used in connection with infractions.

Section 703. I suggest that the committee remove this section exempting medical marijuana from sales tax. In today's budget climate, any source of sales tax revenue is important to both state and local governments and can help prevent cuts to vital programs and services. Removing this section would not levy any new tax; it would simply apply the status quo by allowing the existing, generally applicable sales tax to

sales of “usable cannabis” and “cannabis products” dispensed by licensed dispensaries under the proposed legislation.

Section 901(2). I suggest changing “articulated individualized suspicion of criminal activity” to “articulated individualized suspicion of (a) criminal activity or (b) the possession, use, production, processing, or distribution of cannabis, whether criminal or noncriminal.” Since the bill would make possession, use, production, processing, or distribution of cannabis noncriminal under certain circumstances, law enforcement must have the ability to access the registration system based on “an articulated individualized suspicion” of something broader than criminal activity.

Sections 904 and 905. I suggest that the committee replace subsections (1) and (2) with the following subsection (1), redesignating subsection (3) as subsection (2), and removing Section 905:

> (1) Evidence of the presence or use of cannabis shall not on its own constitute probable cause for a peace officer to obtain a search or arrest warrant or to conduct a warrantless search or arrest unless the peace officer:
>
> > (a) ascertains that the person or location under investigation (i) is not registered with the department of health as a qualifying patient, designated provider, licensed dispenser, or primary residence of a qualifying patient or designated provider, and (ii) is not registered with the department of agriculture as a licensed producer, processor of cannabis products, production facility, or processing facility; or
> >
> > (b) after making efforts reasonable under the circumstances, is unable to ascertain whether the person or location under investigation (i) is registered with the department of health as a qualifying patient, designated provider, licensed dispenser, or primary residence of a qualifying patient or designated provider, or (ii) is registered with the department of agriculture as a licensed producer, processor of cannabis products, production facility, or processing facility; or
> >
> > (c) has probable cause to believe that the person or location is disqualified from the protections of this chapter or is not complying with the provisions of this chapter; or
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> > (d) has probable cause to believe that a cannabis-related traffic offense has been or is being committed.

Rather than prohibiting searches and arrests where there is still probable cause under existing law, which the current proposal does, I suggest statutorily redefining probable

cause in cannabis-related cases. This would also eliminate the need for Section 905's civil fines against public employees—which I oppose in any event—because the risk of having a search or arrest invalidated for want of probable cause will likely provide ample incentive for law enforcement officers to make reasonable efforts to check Department of Health and Department of Agriculture registries before conducting a search or arrest unless such checks are not reasonably possible under the circumstances of the search or arrest. I also expect that law enforcement officers and other public employees would be subject to internal discipline for violating the provisions of state medical marijuana law, and I believe internal discipline is more appropriate than a statutory civil fine for enforcing public employee compliance with state law that applies specifically to public employees and not to the general population.

Section 1101. I suggest rewriting the last sentence of the preemption provision to read as follows: "This act does not preempt reasonable zoning requirements, business licensing requirements, or business taxes pertaining to the production, processing, or dispensing of cannabis products that are adopted by cities, towns, counties, or other municipalities pursuant to their authority." In my experience, the public is broadly supportive of medical marijuana rights, but many remain concerned with the "devil in the details" of how medical marijuana is to be produced, processed, distributed, and consumed. It is essential that local jurisdictions have broad authority to responsibly use reasonable zoning and business licensing powers to ensure that medical marijuana is produced, processed, and dispensed in a manner that minimizes the impact on our communities. We do this with alcohol, and we should also be able to do this with marijuana.

Thank you for considering my input. When I return from vacation on February 1, I am happy to speak with members of the committee or other members of the Legislature regarding this legislation and my proposed changes. In the meantime, if you have any questions about my suggested revisions, please contact John Schochet at (206) 684-8224 or john.schochet@seattle.gov.

Very truly yours,

Peter S. Holmes
Seattle City Attorney

Cc: Senator Jeanne Kohl-Welles
Senator Jerome Delvin