



LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON HEALTH, AGEING AND COMMUNITY SERVICES

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Submission Cover Sheet

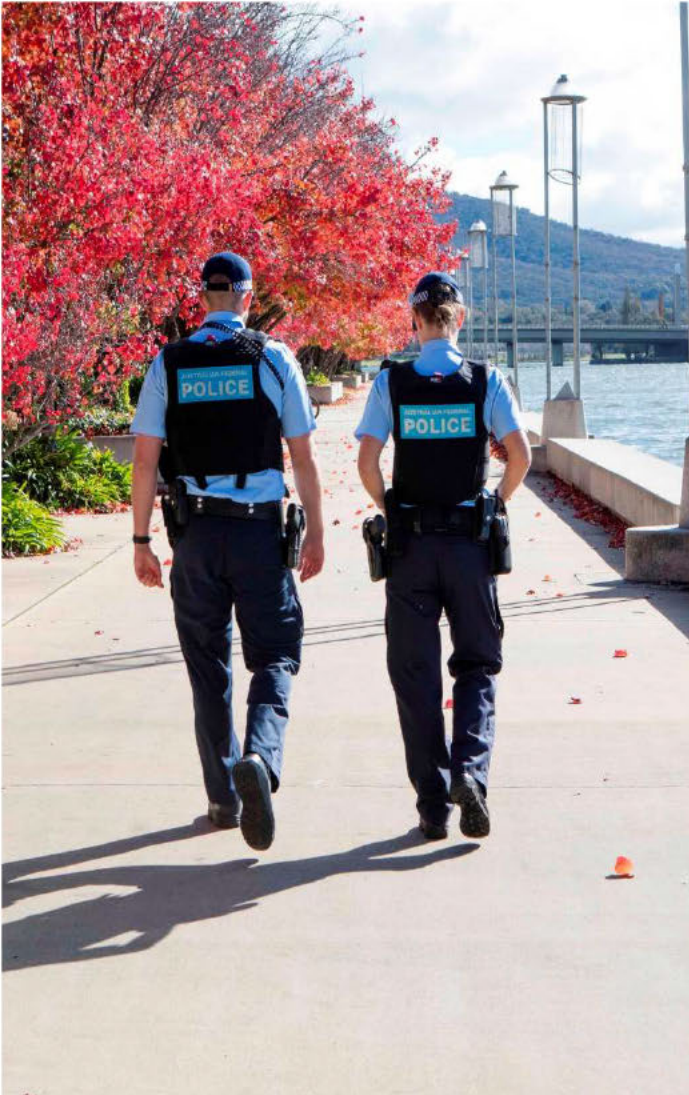
Inquiry into Drugs of Dependence (Personal Cannabis
Use) Amendment Bill 2018

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Drugs of
Dependence
(Personal
Cannabis Use)
Amendment Bill
2018

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Submission by ACT Policing

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Executive Summary

ACT Policing appreciates the opportunity to provide a submission to the Standing Committee on Health, Ageing and Community Services (the Committee) in response to the Inquiry into the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2019 (the Bill). ACT Policing is committed to initiatives that improve community safety and support the ongoing ACT Government commitment to the principles of harm minimisation and treatment of substance abuse as health led wherever possible. ACT Policing remains committed to tackling organised crime and bringing to justice the sellers, marketers, commercial growers and distributors of illegal drugs.

ACT Policing has a number of practical concerns with the Bill in its current form. The key concerns relate to the apparent effect of removing provisions in ACT law to deal with simple cannabis offences whilst Commonwealth legislation continues to make it a criminal offence to possess or cultivate cannabis. This effect will:

- i. create ambiguity for police dealing with cannabis possession and cultivation. On the face of it, regardless of the passing of the Bill, possession of cannabis would remain illegal in the ACT by effect of Commonwealth law. This would create a tension for ACT Policing members between their obligation to implement ACT Government policy intent and to have regard for the Commonwealth criminal law;
- ii. remove access to existing options for diversion away from the criminal justice system for simple cannabis offences. This framework is well established and built on the principles of harm minimisation and would be instead substituted by an offence with a penalty of up to two years imprisonment. This point is important should it be the case that the Commonwealth criminal offence becomes the main offence in the absence of an ACT alternative; and
- iii. result in a greater risk to police of allegations by the community of breaches of the AFP Code of Conduct, failure to appropriately deal with illegal drugs and failure to adequately investigate breaches of Australian criminal law;

Other impacts of the proposed legislation will likely also include:

- iv. providing a greater incentive for serious and organised crime involvement in the cultivation of cannabis in the ACT through exploitation of 'crop sitters' to remove the growing cycle risk from illegal commercial cannabis production existing in other jurisdictions;
- v. not positively address the risk of road trauma in our community as a result of impaired driving – one of the 'fatal five' factors known to disproportionately contribute to serious motor vehicle collisions on our roads; and
- vi. resourcing implications for ACT Policing should there be increased criminal activity or reports of such, which cannot be accurately forecast without knowing the final form of the legislation.

ACT Policing will continue to support the Government in implementing its public health and safety policies, including collaborative consultation with ACT Government partners and key stakeholders to identify solutions to the issues identified herein.

Commonwealth Legislation

ACT Policing has consulted with both Territory and Commonwealth Government partners and holds the view that the Bill would not negate existing offences within the *Criminal Code 1995* (Cth) (the Code). Cannabis would continue to be a controlled drug in accordance with Commonwealth law and possession or cultivation of any amount will remain illegal in the ACT.

It remains unclear and open to judicial interpretation as to whether or not defences to existing offences in the Code would be available to persons should they be charged with possession or cultivation of “personal use quantities” of cannabis in the ACT.

The relevant offences in the Code incur a penalty of up to two years imprisonment with no established criminal diversion options.

Practical Implications for Police

Obligation to Uphold and Enforce Australian Law

All Australian police officers, be they federal, state or territory, are empowered to enforce Commonwealth criminal law. Individual Constables of police are each accountable for their own decisions regarding the exercise of their powers on becoming aware of the presence of controlled drugs or the occurrence of an offence.

Inconsistencies between the Bill and the Code create ambiguity and uncertainty as to the legal framework within which community police officers of ACT Policing must operate. This situation currently does not exist as the ACT and the Commonwealth both make it an offence to possess cannabis. Simple cannabis offences in the ACT allow for flexibility in determining what is the most appropriate offence to be considered, and how that offence should most appropriately be cleared. The existence of ACT simple cannabis offences aligns with the Commonwealth law while also providing a practical framework to manage this form of offending outside of the criminal justice system in accordance with the principles of harm minimisation.

The removal of the ACT offences would remove access to the existing diversion framework for simple cannabis offences and result in Commonwealth criminal offences becoming the preeminent offence by default for simple cannabis offences. .

This would create a tension between ACT Policing members’ responsibility to implement ACT Government policy intent and to have regard for the relevant criminal law in effect at the time. If the Bill is passed, that will be Commonwealth law.

Whilst the current ACT Policing approach is and will remain focused towards supply chain and organised crime, this tension cannot be effectively addressed through an internal policy direction not to enforce this or any particular provision of the criminal law, either ACT or Commonwealth. Such a direction would likely be seen to impinge on the independent Office of Constable and the discretion open to each police constable for which they are individually accountable.

Seizure and Handling of Cannabis

Regardless of whether or not prosecution is pursued, a further tension exists in the decision to seize the cannabis to prevent the continuation of the Commonwealth offence or to allow continued possession in line with the ACT policy position which intends to allow legal possession of certain amounts and types of cannabis. A failure to seize controlled drugs could leave individual police officers exposed to potential allegations that they breached the AFP Code of Conduct, allegations of impropriety or failure to act and carry out their duties.

Clearing Cannabis Offences

For the information of the Committee, members of ACT Policing currently deal with simple cannabis offences through the following methods, listed in order of preference and depending on the consumer's eligibility for diversion or referral to the criminal justice system. Wherever possible, ACT Policing divert simple cannabis offenders away from the criminal justice system and toward treatment where appropriate:

- i. **Illicit Drug Diversion Referral** – a harm minimisation measure designed to divert illicit drug consumers away from the criminal justice system and into education or assessment and treatment.

487 cannabis offences were cleared by diversion to an illicit drug diversion education, assessment and treatment program over the past five financial years. It is unclear if the passage of the Bill in its current form would remove any obligation for a simple cannabis offender to participate in a drug diversion education, assessment and treatment program should a Commonwealth charge be progressed.

- ii. **Simple Cannabis Offence Notice (SCON)** – an infringement notice with an associated financial penalty (one penalty unit) that diverts simple cannabis offenders away from the criminal justice system.

441 cannabis offences were cleared by SCONs over the past five financial years. Passage of the Bill in its current form will remove this option for the diversion of simple cannabis offenders away from the criminal justice system.

- iii. **Formal Criminal Caution** – clearance of an offence by way of formal police warning where:
 - a. an offender has not previously been charged with an offence,
 - b. a warning is appropriate given the circumstances of the offending, and
 - c. the offender has appropriate support processes or mechanisms in place, which are appropriate to address the criminal conduct.

40 formal criminal cautions for cannabis offences have been issued over the past five financial years.

- iv. **Criminal charge by summons or arrest** – criminal charge of an offender by way of summons to the ACT Magistrates Court or arrest and charge at the ACT Watch House or ACT Magistrates Court.

375 cannabis offences were cleared by arrest and 337 cannabis offences were cleared by summons over the past five financial years however these offences are inclusive of trafficking cannabis, cultivation for the purpose of sale or supply and supplying cannabis to a child.

Over the same period, 209 individual arrests have been made which resulted in a simple cannabis offence charge being laid against the offender. Of those 209 arrests,

only 10 resulted in a simple cannabis offence charge alone. The remaining 199 arrests involved offences including assault, dangerous driving, breach of judicial orders and trafficking in controlled drugs where the offender was also found to be in possession of a small amount of cannabis.

These diversion options exist in legislation and link directly to an offence under ACT law. Without this direct legislative link, it is unclear if these diversions will be able to be applied to the Commonwealth offence.

The Committee should note that ACT Policing will continue to deploy discretionary investigative and disruptive resources with a focus on those selling, supplying and profiting from illicit drug trafficking and supply.

Organised Crime

The commercial cultivation of cannabis in the ACT is a recognised crime problem. Cannabis cultivation is a major funding mechanism for a number of organised crime groups, including Outlaw Motorcycle Groups (OMCGs). These groups rely on multiple small-scale growers to grow on their behalf (crop-sit). To grow cannabis in any other jurisdiction the crop-sitters carry a significant risk of detection for the entire growth cycle. The proposed allowance of legitimate growth of cannabis in the ACT would potentially remove this risk, making the ACT more attractive to organised crime groups as a place to grow cannabis for both internal and external markets.

Cannabis is a significant funding mechanism for organised crime. The Australian Criminal Intelligence Commission (ACIC) Drug Data report from 2016-2017 indicated the price of cannabis per ounce ranged between \$200 and \$450.

CASE STUDY – In July 2018, police attended a residential address for the purposes of executing a search warrant. Police located approximately 270 cannabis plants at various stages of maturity. Police identified an offender to be within the premises. Police apprehended him and he was charged with cultivating a commercial quantity of a controlled plant.

During the search police also located a drying room containing freshly harvested cannabis buds. Police believe the cannabis product found within the drying room was being prepared for sale. The combined weight of the drying cannabis product was found to be 171 kilograms.

According to ACIC data the maximum wholesale street value of the cannabis seized from the residence would be \$2,714,328.

It has been identified in this investigation that money obtained from the growing and sale of cannabis is financing the importation and sale of heroin and methamphetamine. **This investigation is ongoing.**

Cash flow derived from large multi-scale operations is likely to be re-invested into the capability of organised crime to make profits from other drug types. The market for cannabis is of strategic importance to organised criminal groups and they strive to streamline strategies to keep market prices steady but lucrative.

For Official Use Only

Amendments proposed to allow hydroponic growth of cannabis increases the ability of criminal groups to cultivate cannabis with higher yields and resulting profits.

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CASE STUDY – Cannabis plants can be individually trained to produce large quantities of cannabis head. During a search of a residential premise, Police located a large and sophisticated hydroponic cultivation set-up for 2 mature cannabis plants in plastic pots. The branches of the plants were suspended by wires to support their weight, and **filled the space available in a single garage space.** This example demonstrates how two cannabis plants can be manipulated to increase the yield and size of the plants.



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The Bill may increase public interaction with organised crime should offenders from other jurisdictions move to capitalise on opportunities to cultivate in the ACT due to the lower risk of detection and potential profitability.

There have been instances where, due to false information, innocent Canberra constituents have been the victims of violent burglary (home invasion) where the offender's intent was to steal drugs or collect drug debts.

Studies on the impact on crime and justice in Vermont, USA, were conducted when the state legalised cannabis. These studies found that there were significantly higher volumes of cannabis users in the areas surrounding Vermont and as such, there was the potential for Vermont to contribute significantly to illicit export of cannabis to other states¹.

Road Trauma

ACT Policing understands that the Bill does not propose to change the law relating to driving under the influence of cannabis and consequently no increase in road trauma should be expected. However, in the United States of America, a Colorado Rocky Mountain High Intensity Drug Trafficking Area Report found that after cannabis was legalised, fatal crashes where the operator had cannabis in their system doubled despite total fatal crashes decreasing over the same period. This issue will need to be monitored if the Bill is passed and may increase pressure on existing police resources.

Resourcing impact for ACT Policing

The Bill is not likely to decrease the resourcing impost for police. ACT Policing has historically been supportive of diverting people for possession of small quantities of cannabis, through SCONs and drug diversion schemes. The priority for ACT Policing has, and will continue to be, disrupting the sale and supply of illicit substances and the activities of organised crime.

There may be increased resource impacts on police following the introduction of the Bill, should any of the following occur:

- i. increased activity by organised crime groups;
- ii. increased incidents of trespass, thefts and violent (home invasion) and non-violent burglary associated with the theft of cannabis plants;
- iii. increased complaints from concerned citizens;
- iv. potential offences linked to the trading of seed and plants;
- v. Policing taking on any role related to compliance enforcement with any regulations associated with the passing of the Bill; and

¹ RAND Corporation, Considering Marijuana Legalisation, 2015
https://www.rand.org/pubs/research_reports/RR864.html

- vi. potential increase in offences due to cultivation and harvesting of excessive yields.

The quantum of impost the aforementioned issues will create for police cannot be reliably forecast, however the current ACT Policing resourcing profile would be inadequate to enforce the Bill's effects appropriately.

Regulatory Framework

Should the difference between the ACT and the Commonwealth positions be resolved, there are three key areas where a regulatory framework would make the law more effective.

Number and size of plants

Based on the potential yield of a cannabis plant, one plant is sufficient for personal use. ACT Policing also recommends that restrictions apply to each residential premise as well as to the individual. More than two plants will allow potentially commercial quantities of cannabis to be grown in each household under the cover of personal use, providing legitimate cover for organised crime grow houses. This is particularly relevant as the *Criminal Code Regulations 2002 (Cth)* quantifies cannabis possession by number of plants **or** weight. Should the possession amount to a trafficable quantity it may be punishable under the Code by imprisonment of up to 10 years.

Establishing a weight limit would remain consistent with the Commonwealth, but presents enforcement challenges as a plant cannot be weighed without it first being seized.

Supply

The Bill remains silent on how potential growers access seeds or cuttings in order to cultivate their plants. Currently, under the *Criminal Code 2002 (ACT)* it is an offence to traffic a controlled drug, including cannabis and its seeds. Without specific provisions in the Bill regarding seeds or the provision of cuttings for cultivation, this will cause significant enforcement issues for ACT Policing.

The potential to amend the current SCON provisions of the Act to treat the trade of cannabis seeds and cuttings is problematic from a policing perspective. In order for a SCON to be applicable, the trade and trafficking of cannabis would need to be classified as a simple offence.

Registration

ACT Policing supports, in principle, cannabis growers registering in a manner similar to owners under the *Firearms Act 1996 (ACT)*. This is consistent with the way cannabis has been regulated in other jurisdictions. This will allow the Government to include licence obligations on growers, including requiring growers to agree to certain conditions. This can include allowing authorised government persons to enter registered premises in order to inspect and assess adherence to the law.

ACT Policing is not currently resourced to undertake a regulatory role in regards to the Bill and the appropriate entity responsible for the execution of this function will need to be considered.

Conclusion

ACT Policing supports any initiative designed to improve the safety of the Canberra community; however asks the Committee to consider the issues raised as it considers the Bill.

ACT Policing are aware that amendments to the Bill are likely and would welcome the opportunity to provide constructive input and advice on those amendments.

Assistant Commissioner Ray Johnson APM
Chief Police Officer for the ACT