

From: West Lisa
To: [Brayshaw, Elizabeth](#)
Cc: (s 22)
Subject: RE: Letter from Richard Glenn Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 [SEC=OFFICIAL]
Date: Friday, 20 September 2019 3:47:30 PM
Attachments: [image001.png](#)

OFFICIAL

Hi Liz

Given the availability of the Director and Solicitor this afternoon I don't think we can come back to you with a concluded view today - but we should be able to do so on Monday morning.

Regards



Lisa West

Assistant Director

Legal Business Improvement

Commonwealth Director of Public Prosecutions

Adelaide
Brisbane
Cairns
Canberra
Darwin
Hobart
Melbourne
Perth
Sydney
Townsville

(s 22)

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Classification: OFFICIAL

From: Brayshaw, Elizabeth <xxxxxxxxx.xxxxxxxx@xx.xxx.xx>

Sent: Friday, 20 September 2019 2:21 PM

To: West Lisa <xxxx.xxxx@xxxx.xxx.xx>

Cc: (s 22)

Subject: RE: Letter from Richard Glenn Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 [SEC=OFFICIAL]

Thanks – once you have had these discussions, grateful if you could contact me to discuss further later today.

Regards

Liz

From: West Lisa [<mailto:xxxx.xxxx@xxxx.xxx.xx>]

Sent: Friday, 20 September 2019 2:12 PM

To: Brayshaw, Elizabeth <xxxxxxxxx.xxxxxxxxxx@xx.xxx.xx>

Cc: (s 22)

Subject: RE: Letter from Richard Glenn Drugs of Dependence (Personal Cannabis Use)
Amendment Bill 2018 [SEC=OFFICIAL]

OFFICIAL

Hi Liz

This has just come through, along with your earlier email , in reverse order.

I have had a quick look through the advice. I would like an opportunity to digest it and discuss it with the Commonwealth Solicitor before coming back to you further.

(s 42)

(s 42)

That said, I will contact you further once I've had an opportunity to discuss this with the Solicitor and the Director.

Regards



Lisa West

Assistant Director

*Legal Business Improvement
Commonwealth Director of Public Prosecutions*

(s 22)

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From: Brayshaw, Elizabeth <xxxxxxxxx.xxxxxxxx@xx.xxx.xx>

Sent: Friday, 20 September 2019 1:30 PM

To: West Lisa <xxxx.xxxx@xxxx.xxx.xx>

Cc: (s 22)

Subject: RE: Letter from Richard Glenn Drugs of Dependence (Personal Cannabis Use)
Amendment Bill 2018 [SEC=OFFICIAL]

Hi Lisa

Attached is the advice I sent earlier – now copied to (s 22)

I'd be grateful if you could review.

Regards

Liz

From: West Lisa [<mailto:xxxx.xxxx@xxxx.xxx.xx>]

Sent: Friday, 20 September 2019 10:09 AM

To: Brayshaw, Elizabeth <xxxxxxxxx.xxxxxxxx@xx.xxx.xx>

Cc: (s 22)

Subject: RE: Letter from Richard Glenn Drugs of Dependence (Personal Cannabis Use)
Amendment Bill 2018 [SEC=OFFICIAL]

OFFICIAL

Dear Liz

Please find attached the Director's letter to Mr Richard Glenn dated 20 September 2019.

Happy to discuss further as needed.

Regards



Lisa West

Assistant Director

Legal Business Improvement

Commonwealth Director of Public Prosecutions

(s 22)

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CDPP

Australia's Federal Prosecution Service

Sarah McNaughton SC
Director

Commonwealth Director
of Public Prosecutions

Level 11, 175 Liverpool Street
Sydney NSW 2000

Telephone 02 6206 5666
www.cdpp.gov.au

20 September 2019

Mr Richard Glenn
A/g Director-General
Justice and Community Safety Directorate
GPO Box 158
CANBERRA CITY ACT 2601

Dear Mr Glenn

Private Member's Bill – Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (ACT)

Thank you for your letter dated 30 August 2019 regarding the *Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (ACT)*, (***Personal Cannabis Use Bill***) which is being considered by the ACT Legislative Assembly. As you note in your letter, the purpose of the Bill is to allow for the personal use and possession of cannabis up to 50 grams and for the cultivation of up to four plants. You have also provided me with the ACT Government's drug policy and proposed amendments set out in a letter dated 18 March 2019 (**proposed amendments**).

In particular, you seek our view as to whether the introduction of the *Personal Cannabis Use Bill* and the proposed amendments, will operate as an excuse to an offence under section 308.1 of the Criminal Code (Cth) (**the Code**) by virtue of section 313.1 of the Code, and whether there is any inconsistency with Commonwealth Legislation.

The offence of possessing a controlled drug contrary to section 308.1 of the Code came in operation on 6 December 2005, and its purpose was to capture the possession of small amounts of drugs. Subsections 308.1(3) – (5) were included to pick up any State and Territory sentencing options available such as drug diversion programs, which provide education, treatment and support for drug users.

Section 313.1 of the Code provides the mechanism for recognising the “many legitimate uses of controlled substances in our community”¹ through available defences where a person engages in conduct in a State or Territory and the conduct is justified or excused by or under a law of that State or Territory.

¹ Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 Explanatory Memorandum page 100

These sections were introduced with the specific intention to operate in conjunction with State and Territory laws.

If the ACT government passes a law that legalises the possession and use of small amounts of cannabis, then it would be open for a person charged with section 308.1 of the Code in the ACT, to rely on this fact for the purpose of establishing a defence under section 313.1 of the Code. In this regard, the proposed amendments would appear consistent with the object and terms of section 308.1 of the Code.

I further note that any available defence would also be a relevant consideration in assessing whether there are reasonable prospects of conviction under the Prosecution Policy of the Commonwealth should such a matter be referred to this office for prosecution².

I hope this has been of assistance to you. Please do not hesitate to contact me should you wish to discuss this further.

Yours sincerely,

(s 22)

Sarah McNaughton SC
Commonwealth Director of Public Prosecutions

² See paragraph 2.6 of the Prosecution Policy

From: (s 22)
To: (s 22)
Cc: (s 22); [Drugs Policy](#)
Subject: RE: Letter from ACT JACS [DLM=For-Official-Use-Only]
Date: Friday, 20 September 2019 1:27:07 PM

For Official Use Only

Hi (s 22)

Given timing, we've had to discuss urgently with the ACT JACS this morning and just now – I'm happy to give you a more detailed readout over the phone, but the short version is we need to draft a letter in response pretty urgently. We can send you a draft when we have one (very sorry, it'll be a quick turnaround).

(s 22)

From: (s 22)
Sent: Friday, 20 September 2019 12:17 PM
To: (s 22)
Cc: (s 22) Drugs Policy
<xxxxxxxxxxx@xxxxxxxxxxx.xxx.xx>
Subject: RE: Letter from ACT JACS [DLM=For-Official-Use-Only]

For-Official-Use-Only

Hi (s 22),

Thanks for sending the letter through.

If it's possible, grateful if we could send an attendee to a meeting between AGD and ACT JACS. (s 47C), but it'd be useful to be involved in working level discussions to inform the development a possible response.

Happy to discuss.

(s 22)

(s 22)
Director | Drugs Policy Section
Law Enforcement Policy Branch | National Security and Law Enforcement Policy Division
Policy Group
Department of Home Affairs
P: (s 22)
E: (s 22)

(s 22)

For-Official-Use-Only

From: (s 22)

Sent: Thursday, 19 September 2019 11:24 AM

To: (s 22)

Cc: (s 22)

Subject: Letter from ACT JACS [DLM=For-Official-Use-Only]

For Official Use Only

Hi (s 22)

As discussed, see attached letter from the ACT JACS – we're considering and proposing to discuss with ACT JACS.

(s 22)

(s 22)

Director | Criminal Law Section

Security and Criminal Justice Branch | 3-5 National Circuit Barton ACT 2600

T: (s 22) | **M:** (s 22) | **E:** (s 22)

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From: (s 22)
To: (s 22)
Cc: (s 22)
Subject: Letterhead - Deputy Secretary - Integrity and International Group [DLM=For-Official-Use-Only]
Date: Friday, 20 September 2019 2:24:18 PM
Attachments: [Letterhead - Deputy Secretary - Integrity and International Group.doc](#)

For Official Use Only

Hi (s 22)

As discussed, I attach a draft letter we propose to send to the ACT in response to the letter we sent you yesterday. Let us know asap any views – we will also run it past AGS and SES here.

(s 22)

(s 22)

Director | Criminal Law Section

Security and Criminal Justice Branch | 3-5 National Circuit Barton ACT 2600

T: (s 22) | **M:** (s 22) | **E:** (s 22)



Australian Government
Attorney-General's Department
Deputy Secretary
Integrity and International Group

Mr Richard Glenn
Acting Director-General
Justice and Community Safety Directorate
PO Box 158
CANBERRA ACT 2601

Dear Mr Glenn

I refer to your letter of 30 August 2019 regarding the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 and its interaction with Commonwealth law.

Your letter outlines proposed amendments by the ACT Government to the Bill intended to resolve potential incompatibilities with Commonwealth laws, including the *Criminal Code Act 1995*. Specifically, your letter seeks advice on whether proposed amendments would effectively excuse relevant conduct from offences in Division 308 of the Commonwealth Criminal Code. I understand the ACT Government proposes to retain existing offences in the *Drugs of Dependence Act 1989* (ACT) for possession and cultivation of cannabis over prescribed limits, with the inclusion of an exception such that those offences do not apply to anyone over 18 years of age.

Section 313.1 of the Criminal Code provides an exemption where conduct is justified or excused under the law of a State or Territory. The requirement for the conduct to be justified or excused by or under a law requires some positive basis in the law for the conduct that constitutes the offence. The department has not seen the proposed terms of the ACT Government's proposed amendments, but there is a question about whether an exception of the kind you describe would satisfy this requirement as it may not amount as express authorisation.

Yours sincerely

Sarah Chidgey
20 September 2019

From: (s 22)
To: [Brayshaw, Elizabeth](#)
Cc: [AGO DLO](#); (s 22); [Chidgey, Sarah](#)
Subject: RE: corro from ACT [DLM=Sensitive:Legal]
Date: Monday, 23 September 2019 11:16:40 AM
Attachments: [Letterhead - Deputy Secretary - Integrity and International Group \(002\).doc](#)

~~Sensitive: Legal~~

Hi Liz

Thanks for the opportunity to look at the draft correspondence.

That response is fine with us – I've just suggested a couple of tracked changes to make sure it's clear we're referring to the Cth Criminal Code (not the ACT one), but obviously up to you if you think it's clear enough.

Thanks again,

(s 22)

From: Brayshaw, Elizabeth
Sent: Friday, 20 September 2019 6:29 PM
To: (s 22)
Cc: [AGO DLO](#); (s 22); [Chidgey, Sarah](#)
Subject: corro from ACT [DLM=Sensitive:Legal]

~~Sensitive: Legal~~

Hi (s 22)

Further to earlier discussions, please see my email to DPP below which attaches a draft letter to ACT government which we propose Sarah could send on Monday.

I also attach a copy of the AGS advice and the correspondence from ACT JACS for context. We will touch base with the DPP on Monday.

(s 47C)

Regards
liz

From: Brayshaw, Elizabeth
Sent: Friday, 20 September 2019 6:21 PM
To: 'West Lisa' <lisa.west@cdpp.gov.au>
Cc: (s 22)
Subject: corro from ACT [DLM=Sensitive:Legal]

~~Sensitive: Legal~~

Hi Lisa

As mentioned earlier today, (s 42)

A large rectangular area of the document is redacted with a solid grey fill, obscuring several lines of text.

Noting that the ACT has sought the department's views on possible government amendments – attached is a draft response from our Dep Sec which will be sent early next week.

Following your discussions with the Director, and consideration of the AGS advice we provided, we would be interested in your position on this matter.

We will touch base on Monday.

Regards

Liz



Australian Government
Attorney-General's Department
Deputy Secretary
Integrity and International Group

Mr Richard Glenn
Acting Director-General
Justice and Community Safety Directorate
PO Box 158
CANBERRA ACT 2601

Dear Mr Glenn

I refer to your letter of 30 August 2019 regarding the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 and its interaction with Commonwealth law.

Your letter outlines proposed amendments by the ACT Government to the Bill intended to resolve potential incompatibilities with Commonwealth laws, including the *Criminal Code Act 1995*. Specifically, your letter seeks advice on whether proposed amendments would effectively excuse relevant conduct from offences in Division 308 of the Commonwealth Criminal Code. I understand the ACT Government proposes to retain existing offences in the *Drugs of Dependence Act 1989* (ACT) for possession and cultivation of cannabis over prescribed limits, with the inclusion of an exception such that those offences do not apply to anyone over 18 years of age.

Section 313.1 of the Criminal Code provides an exemption where conduct is justified or excused under the law of a State or Territory. The requirement for the conduct to be justified or excused by or under a law requires some positive basis in the law for the conduct that constitutes the offence. The department has not seen the proposed terms of the ACT Government's proposed amendments, but there is a question about whether an exception of the kind you describe would satisfy this requirement. The justification or excuse may need to be more explicitly identified as such in the terms of the Act. I note that while it may be possible for such a provision to enliven a defence under section 313.1 of the Code, the interaction between any new provision and other relevant Commonwealth laws would need to be considered.

Yours sincerely

Sarah Chidgey
20 September 2019



ACT
Government

Justice and Community Safety

Mr Chris Moraitis PSM
Secretary
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Mr ^{Chris}Moraitis

I am writing to you in order to seek the views of the Australian Government on legislation being considered by the ACT Legislative Assembly to remove penalties for the use and possession of personal amounts of cannabis.

A Private Member's Bill (Attachment A), presented in November 2018 proposes to allow for personal use of cannabis, including possession of up to 50 grams, cultivation of up to four plants per person and consumption of cannabis in private places for persons aged 18 years or older.

The Bill does not propose legalising the sale or supply of cannabis to others, legalising cultivation of more than four plants, or legalising the use of cannabis for those under 18 years of age.

In line with its drugs policy focussing on harm minimisation, the ACT Government has indicated it intends to support the Bill subject to a range of amendments (Attachment B) intended to add further safeguards and protections for the community.

The ACT Government's view is that the Bill is a logical next step of the Simple Cannabis Offence Notice (SCON) scheme that has been in operation since 1992. The SCONs scheme is intended to continue for individuals under 18 years old.

The ACT Government's amendments are also intended to resolve potential incompatibilities with Commonwealth laws, including the *Criminal Code Act 1995*. This would be achieved by retaining offences in the *Drugs of Dependence Act 1989* (ACT) for possession and cultivation of cannabis over prescribed limits with the inclusion of an exception such that those offences do not apply to anyone over 18 years of age. This is intended to operate as an excuse to an offence under s 308.1 of the Commonwealth Criminal Code (see s 313.1 of the Commonwealth Criminal Code).

I would appreciate your views on the issue of consistency with Commonwealth legislation, and whether the Bill with amendments to be proposed would operate as an excuse under

AGD SECRETARY - RECEIVED	
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<input checked="" type="checkbox"/> App. Action	
<input type="checkbox"/> NFA	
<input type="checkbox"/> Refer to	

- 2 SEP 2019

Date: 2/9/19

(s 22)

Handwritten note: "Crim Justice Branch"

s 313.1 of the Commonwealth Criminal Code. I have also written to the Commonwealth Director of Public Prosecutions seeking her views on this matter.

Officers in ACT Government with responsibility for this matter are Mr Andrew Mehrton in the Chief Minister, Treasury and Economic Development Directorate available at andrew.mehrton@act.gov.au or 6205 8507 and Mr Keegan Lee in the Justice and Community Safety Directorate available at Keegan.lee@act.gov.au or 6207 5244.

Yours sincerely



Richard Glenn
A/g Director-General
Justice and Community Safety Directorate

30 August 2019

Encl.

2018

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Michael Pettersson)

Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Legislation amended	2
4 Offences against Act—application of Criminal Code etc Section 4, note 1	2
5 Section 162	3
6 Section 171	3
7 Offence notices Section 171A (7), definition of <i>simple cannabis offence</i>	4
8 New section 171AB	5

J2018-123

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Contents

		Page
9	Dictionary, note 2	6
Schedule 1	Consequential amendments	7
Part 1.1	Criminal Code 2002	7
Part 1.2	Medicines, Poisons and Therapeutic Goods Act 2008	8

contents 2 Drugs of Dependence (Personal Cannabis Use)
Amendment Bill 2018

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2018

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Michael Pettersson)

Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018

A Bill for

An Act to amend the *Drugs of Dependence Act 1989*, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

J2018-123

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Section 1

1 **1 Name of Act**

2 This Act is the *Drugs of Dependence (Personal Cannabis Use)*
3 *Amendment Act 2018*.

4 **2 Commencement**

5 This Act commences on 1 July 2019.

6 *Note* The naming and commencement provisions automatically commence on
7 the notification day (see Legislation Act, s 75 (1)).

8 **3 Legislation amended**

9 This Act amends the *Drugs of Dependence Act 1989*.

10 *Note* This Act also amends other legislation (see sch 1).

11 **4 Offences against Act—application of Criminal Code etc**
12 **Section 4, note 1**

13 *substitute*

14 *Note 1 Criminal Code*

15 The Criminal Code, ch 2 applies to the following offences against this
16 Act (see Code, pt 2.1):

- 17 • s 162 (Cultivation of 1 to 4 cannabis plants)
- 18 • s 171 (Possessing prohibited substances)
- 19 • s 171AA (Possessing cannabis)
- 20 • s 171AB (Smoking cannabis in public place or near child).

21 The chapter sets out the general principles of criminal responsibility
22 (including burdens of proof and general defences), and defines terms used
23 for offences to which the Code applies (eg *conduct*, *intention*,
24 *recklessness* and *strict liability*).

1 **5** **Section 162**

2 *substitute*

3 **162** **Cultivation of 1 to 4 cannabis plants**

4 (1) A person commits an offence if the person—

5 (a) is under 18 years old; and

6 (b) cultivates 1 to 4 cannabis plants.

7 Maximum penalty: 1 penalty unit.

8 (2) In this section:

9 *artificially cultivate* means—

10 (a) hydroponically cultivate; or

11 (b) cultivate with the application of an artificial source of light or
12 heat.

13 *cultivates* has the meaning given in the Criminal Code, section 615
14 but does not include artificially cultivate.

15 **6** **Section 171**

16 *substitute*

17 **171** **Possessing prohibited substances**

18 (1) A person commits an offence if the person possesses a prohibited
19 substance.

20 Maximum penalty: 50 penalty units, imprisonment for 2 years or
21 both.

22 (2) Subsection (1) does not apply if the person is authorised under the
23 *Medicines, Poisons and Therapeutic Goods Act 2008*, or another
24 territory law, to possess the prohibited substance.

Section 7

- 1 (3) In this section:
 2 *prohibited substance* does not include cannabis.
- 3 **171AA Possessing cannabis**
- 4 (1) A person commits an offence if the person—
 5 (a) is under 18 years old; and
 6 (b) possesses 50g or less of cannabis.
 7 Maximum penalty: 1 penalty unit.
- 8 (2) A person commits an offence if the person possesses more than 50g
 9 of cannabis.
 10 Maximum penalty: 50 penalty units, imprisonment for 2 years or
 11 both.
- 12 (3) Subsections (1) and (2) do not apply if the person is authorised under
 13 the *Medicines, Poisons and Therapeutic Goods Act 2008*, or another
 14 territory law, to possess the prohibited substance.
- 15 **7 Offence notices**
 16 **Section 171A (7), definition of *simple cannabis offence***
 17 *substitute*
 18 *simple cannabis offence* means—
 19 (a) an offence against section 162 (Cultivation of 1 to 4 cannabis
 20 plants); or
 21 *Note* Section 162 does not include artificial cultivation of cannabis
 22 plants.
 23 (b) an offence against section 171AA (1) of a person under 18 years
 24 old possessing 50g or less of cannabis.

8 New section 171AB

before section 171B, insert

171AB Smoking cannabis in public place or near child

- (1) A person commits an offence if the person smokes cannabis in a public place.

Maximum penalty: 30 penalty units.

- (2) A person commits an offence if—

- (a) the person smokes cannabis; and
- (b) a child is within 20m of the person.

Maximum penalty: 30 penalty units.

- (3) In this section:

personal vaporiser—see the *Tobacco and Other Smoking Products Act 1927*, section 3B.

public place—see the *Smoke-Free Public Places Act 2003*, dictionary.

smoke cannabis means—

- (a) to directly puff smoke, or vapour, from cannabis, or a product that contains cannabis, whether or not a device for the inhalation of smoke, or vapour, is used; or
- (b) to hold or to have control over—
 - (i) cannabis, or a product that contains cannabis, while it is ignited; or

Section 9

- 1 (ii) a personal vaporiser that contains cannabis and that is
2 activated.

3 **Examples—devices—par (a)**

- 4 • a personal vaporiser
5 • a pipe (including a hookah, water pipe or bong)
6 • a cigarette holder

7 **9 Dictionary, note 2**

8 *insert*

- 9 • territory law

1 **Schedule 1 Consequential amendments**

2 (see s 3)

3 **Part 1.1 Criminal Code 2002**

4 **[1.1] Sections 605 and 614, note**

5 *substitute*

6 *Note* For additional offences relating to possessing controlled drugs, see the
7 *Drugs of Dependence Act 1989*, ss 169, 171 and 171AA and the
8 *Medicines, Poisons and Therapeutic Goods Act 2008*, s 36.

9 **[1.2] Section 618 (2)**

10 *substitute*

11 (2) A person commits an offence if the person—

12 (a) cultivates (artificially or otherwise) 5 or more cannabis plants;
13 or

14 (b) artificially cultivates 1 to 4 cannabis plants.

15 Maximum penalty: 200 penalty units, imprisonment for 2 years or
16 both.

17 *Note* Non-artificial cultivation of 1 to 4 cannabis plants by a person under 18
18 years old is a summary offence under the *Drugs of Dependence Act 1989*,
19 s 162.

20 **[1.3] New section 636A (3) (ba)**

21 *insert*

22 (ba) that Act, section 171AA; or

Schedule 1 Consequential amendments
Part 1.2 Medicines, Poisons and Therapeutic Goods Act 2008
Amendment [1.4]

1 **Part 1.2** **Medicines, Poisons and**
2 **Therapeutic Goods Act 2008**

3 [1.4] **New section 9A**
4 *in chapter 2, insert*

5 **9A** **Application of Act to certain cannabis use not prohibited**
6 **under Drugs of Dependence Act 1989**

- 7 (1) The following provisions of this Act do not apply to an adult to the
8 extent that the substance is 50g or less of defined cannabis:
- 9 (a) section 26 (2) (Supplying declared substances);
- 10 (b) section 33 (Manufacturing regulated substances);
- 11 (c) section 35 (1) (Obtaining certain declared substances);
- 12 (d) section 36 (Possessing certain declared substances);
- 13 (e) section 37 (2) (Administering certain declared substances).
- 14 (2) In this section:
- 15 *defined cannabis—*
- 16 (a) means cannabis as defined in the *Drugs of Dependence*
17 *Act 1989*; but
- 18 (b) does not include a substance or medicine that is able to be
19 prescribed under this Act.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 28 November 2018.

2 Notification

Notified under the Legislation Act on 2018.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

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Drugs of Dependence (Personal Cannabis Use)
Amendment Bill 2018

page 9

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Andrew Barr MLA

Chief Minister

Treasurer

Minister for Social Inclusion and Equality

Minister for Tourism and Special Events

Minister for Trade, Industry and Investment

Member for Kurrajong

Ms Bec Cody MLA

Chair

Standing Committee on Health, Ageing and Community Services

Legislative Assembly for the ACT

GPO Box 1020

CANBERRA ACT 2601

Dear Ms ^{Bec}Cody

Thank you for your letter of 27 February 2019 inviting the Government to provide an outline of intended amendments to the *Drugs of Dependence (Personal Cannabis) Amendment Bill 2018* that has been referred to the Standing Committee on Health, Ageing and Community Services for inquiry. The following information is provided for the information of the Committee.

The ACT Government's drug policy

The ACT Government's policy regarding the harms caused by alcohol, tobacco and other drugs is clearly articulated in the *ACT Drug Strategy Action Plan 2018-21* (the ACT Action Plan). The Action Plan, which aligns with the National Drugs Strategy, outlines a commitment to evidence based and practice informed responses to drug use that minimise harm in our community.

The Government has been clear that we do not condone nor encourage the recreational use of cannabis, which we know presents health risks. However, outright prohibition has clearly proven not to work as an effective strategy for dealing with drug use in our community. Despite currently being illegal, 8.4 per cent of Canberrans have reported using cannabis in the previous 12 months.¹

The ACT has a long history of taking progressive steps and trying new ideas to minimise the harm of drugs in our community. This includes being one of the first jurisdictions in Australia to decriminalise the personal possession of small amounts of cannabis. The Government intends to continue taking well considered steps to improve our drug laws, including supporting this Bill subject to appropriate amendments which are detailed later in this submission.

¹ Australian Institute of Health and Welfare's National Drug Strategy Household Survey (2016)
<https://www.aihw.gov.au/about-our-data/our-data-collections/national-drug-strategy-household-survey>

ACT Legislative Assembly

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@ABarrMLA



AndrewBarrMLA



actchiefminister



Matters to be considered

As is to be expected with an issue as complex as this, the Government has identified a number of issues requiring further consideration before the Bill can be passed.

Even after the passage of this Bill, possessing and growing cannabis will carry a degree of risk arising from interaction between Territory and Commonwealth law. We believe the ACT is able and entitled to make our own laws on this matter. However, we would be the first jurisdiction in Australia to legislate in this way, and the interaction with existing Commonwealth law remains untested.

There is also uncertainty as to how a Commonwealth Government may react to the ACT passing this Bill and we cannot guarantee a Commonwealth Government would not intervene to prevent reforms – as has occurred in the past.

There are also a range of health implications to be considered. It is clear that some people experience adverse mental health effects from using cannabis, and that its use can become problematic over time. However, it must be noted that these health risks already exist for anyone who uses cannabis under current legislation.

Implementation of this Bill may be able to assist in addressing some of these health risks. For example, the stigma and risk of punishment associated with illegal drug use may mean that prohibition is preventing people from seeking medical or other types of help when it is needed. Legalising the personal use of small amounts of cannabis will create opportunities to better reach people who are already using the drug and connect them with the services or supports they need. The implications for justice outcomes are similarly complex. Currently, possessing small amounts of cannabis for personal use can bring people into contact with the justice system, with lasting and serious consequences. Moving from the decriminalisation to legalisation of small amounts of personal cannabis could avoid help individuals avoid these negative outcomes.

The Government also has a responsibility to focus our justice resource where they're needed the most: on disrupting serious and organized crime, protecting our community from individuals or groups who might wish to do us harm, helping women and children dealing with domestic and family violence. Legalisation means the ACT's police and court resources can be better focused in these areas where they are most needed.

There are also broader public safety effects to be considered. Under the current regime, the one-in-twelve Canberrans that use cannabis have no legal channel to obtain it. As a result, otherwise law-abiding individuals are required to interact with criminals in a way that exposes them to risks and may also increase the risk of further offending in our community.

By legalising the option for individuals to cultivate a small number of plants for their own use, there may be opportunities to reduce the market for illegal drugs – a market that would otherwise provide revenue to serious or organised criminals.

Proposed Government Amendments

In light of these and other issues, the Government intends to move a number of amendments to the Private Members Bill. We have instructed the Parliamentary Counsel's Office to draft Government amendments which would give effect to the following safeguards and improvements:

1. Personal plant limits

Whereas the Bill would allow an individual to possess four cannabis plants, the Government will move amendments to limit this to a maximum of two plants. This is consistent with the settings of the current Simple Cannabis Offence Notice scheme and is considered a reasonable limit for personal use.

2. Household plant limits

The Bill does not currently include a limit on the number of plants that would be allowable in any single dwelling. This gives rise to potential situations where sharehouses (or dwellings that otherwise have multiple residents) could effectively be used as larger scale 'grow houses'

The Government amendments will introduce a household limit of four cannabis plants, regardless of how many individuals are resident.

3. Restrictions on where cannabis can be grown

The Government will move amendments to restrict where personal cannabis plants can be grown. These amendments will address two separate issues.

First, cannabis plants will only be able to be legally cultivated on parts of residential property not generally accessible by the public. This would exclude cannabis being grown in areas such as front yards, verges or community gardens. This restriction is intended to minimise access to cannabis plants by persons other than the legal owner. This would also have the effect of prevent cannabis being legally cultivated on commercial or community property.

Second, cannabis plants would only be able to be legally cultivated by a person usually residing at that property. This is intended to establish a nexus of ownership for each cannabis plant.

4. Secure storage

Government amendments will require cannabis to be kept securely when not in an individual's possession in order to restrict access by children and young people or other vulnerable individuals.

5. Distinguish between fresh and dried cannabis

The Bill as drafted would legalise possession of 50 grams of cannabis, which is taken to refer to dry cannabis, in line with the settings of the Simple Cannabis Offence Notice Scheme. This creates a practical issue due to freshly harvested cannabis plant material weighing more before it is dried.

To reduce ambiguity in the Bill, the Government intends to move amendments that would distinguish between dry cannabis (i.e. cannabis ready to be used) and 'wet' cannabis (i.e. harvest plant material that has not yet been dried).

Dry cannabis would still be subject to the 50 gram limit as included in the Bill. The Government will move to include a separate limit of 150 grams for fresh (or 'wet') cannabis that would be applicable to cannabis that has been harvested but not yet dried. This limit has been selected primarily on the basis that it would limit individuals from potentially possessing amounts of dry and wet cannabis that would approach the threshold for a trafficable quantity.

6. Smoking near children

The Government supports the intention of the Bill's restrictions on smoking near children but considers there would be practical challenges to implementing this through the proposed 20 metre distance rule. For example, an individual legally smoking cannabis in their own open backyard could potentially be within 20 metres of a child in a neighbouring property without intending to be, or being aware this is the case.

To make this element more practical, the Government will move amendments to prohibit the smoking of cannabis near children through an offence involving a mental element rather than a distance based rule. That is, an individual will be deemed to have committed an offence if they *knowingly or intentionally* use cannabis in a way that exposes a person less than 18 years old to this.

Other matters

The Government acknowledges that legalisation of cannabis for personal use has not been tried in Australia before. Notwithstanding the above amendments, there remains a degree of uncertainty and risk associated with the proposed new approach. However, the ACT Government believes it is important to continue exploring new measures to reduce the harm from drugs in our community.

We will seek to collect relevant data to effectively evaluate the outcomes of legalisation, with a formal evaluation being conducted not more than two years after the date of the Bill's implementation. This will help inform decisions about any necessary further reform or amendments to the legislative framework created through this Bill.

Thank you again for your invitation to make a submission to this inquiry. We understand that these are reforms the Canberra community wants to see made, but also ones that must also be properly and carefully considered. The Government is now undertaking that work and will provide a detailed set of drafted amendments reflecting the points above to the Committee when these are available.

Yours sincerely



Andrew Barr MLA
Chief Minister

18 MAR 2019

From: West Lisa
To: [Brayshaw, Elizabeth](#)
Cc: (s 22); [LBI](#)
Subject: RE: corro from ACT [SEC=OFFICIAL]
Date: Monday, 23 September 2019 8:36:49 AM
Attachments: [image001.png](#)
[Further Letter Richard Glenn JCSD 20190922 Director signed \(002\).docx](#)

OFFICIAL

Hi Liz

We have considered the matter further having read the AGS advice, and the Director has asked me to forward the attached further letter to Mr Glenn, which I have emailed to his Executive Assistant this morning.

Regards



Lisa West

Assistant Director

*Legal Business Improvement
Commonwealth Director of Public Prosecutions*

(s 22)

www.cdpp.gov.au

Adelaide
Brisbane
Cairns
Canberra
Darwin
Hobart
Melbourne
Perth
Sydney
Townsville

Classification: OFFICIAL

From: Brayshaw, Elizabeth <xxxxxxxxx.xxxxxxxx@xx.xxx.xx>
Sent: Friday, 20 September 2019 6:21 PM
To: West Lisa <xxxx.xxxx@xxxx.xxx.xx>
Cc: (s 22)
Subject: corro from ACT [DLM=Sensitive:Legal]

Sensitive: Legal

Hi Lisa

As mentioned earlier today, (s 42)

Noting that the ACT has sought the department's views on possible government amendments – attached is a draft response from our Dep Sec which will be sent early next week.

Following your discussions with the Director, and consideration of the AGS advice we provided, we would be interested in your position on this matter.

We will touch base on Monday.

Regards

Liz

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CDPP

Australia's Federal Prosecution Service

Sarah McNaughton SC
Director

**Commonwealth Director
of Public Prosecutions**

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23 September 2019

Mr Richard Glenn
A/g Director-General
Justice and Community Safety Directorate
GPO Box 158
CANBERRA CITY ACT 2601

Dear Mr Glenn

Private Member's Bill – Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 (ACT)

I refer to my previous letter. This office has since given the matter some further consideration.

It is now apparent that the issues you raise are attended by legal complexities that we had not initially appreciated in formulating our response. On that basis, I have concluded that it would not be appropriate to provide a view on the proposed legislation.

I apologise for any inconvenience caused.

Yours sincerely,

(s 22)

Sarah McNaughton SC
Commonwealth Director of Public Prosecutions



Australian Government
Attorney-General's Department
Deputy Secretary
Integrity and International Group

Mr Richard Glenn
Acting Director-General
Justice and Community Safety Directorate
PO Box 158
CANBERRA ACT 2601

Dear Mr Glenn

I refer to your letter of 30 August 2019 regarding the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 and its interaction with Commonwealth law.

Your letter outlines proposed amendments by the ACT Government to the Bill intended to resolve potential incompatibilities with Commonwealth laws, including the *Criminal Code Act 1995* ([Commonwealth Criminal Code](#)). Specifically, your letter seeks advice on whether proposed amendments would effectively excuse relevant conduct from offences in Division 308 of the Commonwealth Criminal Code. I understand the ACT Government proposes to retain existing offences in the *Drugs of Dependence Act 1989* (ACT) for possession and cultivation of cannabis over prescribed limits, with the inclusion of an exception such that those offences do not apply to anyone over 18 years of age.

Section 313.1 of the [Commonwealth Criminal Code](#) provides an exemption where conduct is justified or excused under the law of a State or Territory. The requirement for the conduct to be justified or excused by or under a law requires some positive basis in the law for the conduct that constitutes the offence. The department has not seen the proposed terms of the ACT Government's proposed amendments, but there is a question about whether an exception of the kind you describe would satisfy this requirement. The justification or excuse may need to be more explicitly identified as such in the terms of the Act. I note that while it may be possible for such a provision to enliven a defence under section 313.1 of the [Commonwealth Criminal Code](#), the interaction between any new provision and other relevant Commonwealth laws would need to be considered.

Yours sincerely

Sarah Chidgey
23 September 2019

From: [Chidgey, Sarah](#)
To: [Brayshaw, Elizabeth](#); (s 22)
Cc: (s 22); [Walter, Andrew](#)
Subject: RE: corro from ACT [DLM=Sensitive:Legal]
Date: Monday, 23 September 2019 12:02:21 PM
Attachments: [230919 - AGD reply to JACS ACT - signed.pdf](#)

~~Sensitive: Legal~~

Hi Liz

PDF of signed letter attached.

Sarah

From: Brayshaw, Elizabeth
Sent: Monday, 23 September 2019 11:29 AM
To: (s 22)
Cc: Chidgey, Sarah <xxxxx.xxxxxx@xx.xxx.xx>; (s 22)
(s 22) Walter, Andrew
<xxxxxx.xxxxxx@xx.xxx.xx>
Subject: RE: corro from ACT [DLM=Sensitive:Legal]

~~Sensitive: Legal~~

Hi (s 22)

Would you mind printing the attached for Sarah's signature – we have updated to include Cth in front of Code to make it clear – as (s 22) suggested.

I have flagged with ACT a/g Director of JACS that we would be sending a letter today. He was comfortable with that.

Can you also check if Sarah will update Chris' office on the corro.

(s 47C)

Grateful if you could send us a copy of the final letter – we will provide a copy to our colleagues in HA and PMC for info.

Regards

Liz

From: (s 22)
Sent: Monday, 23 September 2019 11:17 AM
To: Brayshaw, Elizabeth <xxxxxxxxx.xxxxxxxx@xx.xxx.xx>
Cc: AGO DLO <xxx@xx.xxx.xx>; (s 22)
(s 22) Chidgey, Sarah <xxxxx.xxxxxxx@xx.xxx.xx>
Subject: RE: corro from ACT [DLM=Sensitive:Legal]

~~Sensitive: Legal~~

Hi Liz

Thanks for the opportunity to look at the draft correspondence.

That response is fine with us – I've just suggested a couple of tracked changes to make sure it's clear we're referring to the Cth Criminal Code (not the ACT one), but obviously up to you if you think it's clear enough.

Thanks again,

(s 22)

From: Brayshaw, Elizabeth
Sent: Friday, 20 September 2019 6:29 PM
To: (s 22)
Cc: AGO DLO; (s 22); Chidgey, Sarah
Subject: corro from ACT [DLM=Sensitive:Legal]

~~Sensitive: Legal~~

Hi (s 22)

Further to earlier discussions, please see my email to DPP below which attaches a draft letter to ACT government which we propose Sarah could send on Monday.

I also attach a copy of the AGS advice and the correspondence from ACT JACS for context. We will touch base with the DPP on Monday.

(s 47C)

Regards

liz

From: Brayshaw, Elizabeth
Sent: Friday, 20 September 2019 6:21 PM
To: 'West Lisa' <lisa.west@cdpp.gov.au>
Cc: (s 22)
Subject: corro from ACT [DLM=Sensitive:Legal]

~~Sensitive: Legal~~

Hi Lisa

As mentioned earlier today, (s 42)

Noting that the ACT has sought the department's views on possible government amendments – attached is a draft response from our Dep Sec which will be sent early next week.

Following your discussions with the Director, and consideration of the AGS advice we provided, we would be interested in your position on this matter.

We will touch base on Monday.

Regards

Liz



Australian Government
Attorney-General's Department
Deputy Secretary
Integrity and International Group

Mr Richard Glenn
Acting Director-General
Justice and Community Safety Directorate
PO Box 158
CANBERRA ACT 2601

Dear Mr Glenn

I refer to your letter of 30 August 2019 regarding the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 and its interaction with Commonwealth law.

Your letter outlines proposed amendments by the ACT Government to the Bill intended to resolve potential incompatibilities with Commonwealth laws, including the *Criminal Code Act 1995* (Commonwealth Criminal Code). Specifically, your letter seeks advice on whether proposed amendments would effectively excuse relevant conduct from offences in Division 308 of the Commonwealth Criminal Code. I understand the ACT Government proposes to retain existing offences in the *Drugs of Dependence Act 1989* (ACT) for possession and cultivation of cannabis over prescribed limits, with the inclusion of an exception such that those offences do not apply to anyone over 18 years of age.

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Yours sincerely

(s 22)

Sarah Chidgey
23 September 2019

From: (s 22)
To: (s 22)
Cc: [Brayshaw, Elizabeth](#); (s 22)
Subject: Letter to ACT - Cannabis laws [DLM=For-Official-Use-Only]
Date: Monday, 23 September 2019 1:45:35 PM
Attachments: [Ltr 30 Aug 19 from ACT Justice and Community Safety seeking views of leg.....pdf](#)
[230919 - AGD reply to JACS ACT - signed.pdf](#)

For Official Use Only

Hi (s 22)

Further to discussions I had with (s 22) late last week, Sarah Chidgey has just now responded to the letter from the ACT JACS regarding whether proposed amendments to its decriminalisation legislation would enliven relevant Commonwealth offences. I attach the signed letter (which made only minor changes to the version you saw in draft form).

The advice we have is the ACT may debate the Bill on Wednesday. I should also flag – the AGO got a media inquiry last week seeking comment on the ACT laws. The AGO advised this is a matter for the ACT but where Commonwealth laws apply they remain enforceable.

Happy to discuss.

(s 22)

(s 22)

Director | Criminal Law Section

Security and Criminal Justice Branch | 3-5 National Circuit Barton ACT 2600

T: (s 22) | M: (s 22) | E: (s 22)

From: [Brayshaw, Elizabeth](#)
To: [West Lisa](#)
Cc: (s 22)
Subject: Attachment F - revised AGS legal advice [DLM=For-Official-Use-Only]
Date: Friday, 20 September 2019 12:38:02 PM
Attachments: [Attachment F - revised AGS legal advice.docx](#)

For Official Use Only

Hi Lisa

This is the draft advice we have received re: ACT Bill.

Regards

Liz

From: (s 22)
To: (s 47F)
Cc: [Brayshaw, Elizabeth](#); [Chidgey, Sarah \(xxxxx.xxxxxx@xx.xxx.xx\)](#); (s 22); (s 22)
Subject: AGD reply to a/g Director-General - ACT Cannabis laws [DLM=For-Official-Use-Only]
Date: Monday, 23 September 2019 1:37:00 PM
Attachments: [230919 - AGD reply to JACS ACT - signed.pdf](#)

For Official Use Only

Dear (s 47F)

As discussed, I attach a letter from Ms Sarah Chidgey, Deputy Secretary, responding to a letter of 30 August 2019 from your acting Director-General to our Secretary.

We'd be grateful if you could please forward to Mr Glenn.

(s 22)

(s 22)

Director | Criminal Law Section

Security and Criminal Justice Branch | 3-5 National Circuit Barton ACT 2600

T: (s 22) | **M:** (s 22) | **E:** (s 22)