

# Chapter 1

## Introduction and background

1.1 On 10 May 2018 the Senate referred the provisions of the Criminal Code and Other Legislation Amendment (Removing Commonwealth Restrictions on Cannabis) Bill 2018 (the bill) to the Legal and Constitutional Legislation Committee (the committee) for inquiry and report by 17 August 2018.

1.2 The Senate Selection of Bills Committee recommended that the bill be referred for inquiry for the following reasons:

As the first legislation to propose the removal of Commonwealth restrictions on cannabis, there is a case to examine: the merits of legalisation, law enforcement issues, extradition issues, constitutionality, treaty issues, trade rule issues, Commonwealth-state issues, and budget issues.<sup>1</sup>

### Background and purpose of the bill

1.3 The bill is a private members bill introduced into the Senate by Senator David Leyonhjelm.<sup>2</sup> In his second reading speech, he stated that the bill was informed by the principle that:

Adults should be free to make their own choices, as long as they do not harm others.

Accordingly, this Bill removes offences and civil penalty provisions in Commonwealth law for dealings with cannabis.<sup>3</sup>

1.4 The Explanatory Memorandum outlines that the bill 'would allow any State or Territory Government to legalise and regulate cannabis'.<sup>4</sup> It further states that this would address several issues:

The prohibition of cannabis casts otherwise law-abiding citizens as criminals, increases pressure on the criminal justice system and props up organised and violent crime.

Legalising cannabis is estimated to reduce annual Commonwealth law enforcement expenditure by around \$100 million and increase annual GST revenue by around \$300 million...

Cannabis use is less harmful than alcohol use and tobacco use.

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1 Senate Standing Committee for the Selection of Bills, *Report No. 5 of 2018*, 10 May 2018, p. 3 and Appendix 1.

2 *Journals of the Senate*, No. 96, 9 May 2018, p. 3070.

3 Senator David Leyonhjelm, 'Second Reading Speech', *Senate Hansard*, 9 May 2018, p. 2748.

4 Explanatory Memorandum, p. 1.

Legalising cannabis would improve access to cannabis for recreational, medicinal, industrial and other purposes. Access for medicinal purposes is currently hamstrung through excessive regulation.<sup>5</sup>

### **Provisions of the bill**

1.5 The bill would amend a number of Commonwealth laws that currently prohibit and control cannabis, namely the:

- *Criminal Code Act 1995* (Criminal Code) and *Criminal Code Regulations 2002* (Criminal Code Regulations);
- *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Crimes Act);
- *Defence Force Discipline Act 1982* (Defence Discipline Act);
- *Narcotic Drugs Act 1967* (Narcotic Drugs Act); and the
- *Therapeutic Goods Act 1989* (TGA Act).<sup>6</sup>

1.6 In his second reading speech, Senator Leyonhjelm provided an outline of how the bill would amend these Acts. Regarding the Criminal Code Act and Regulations, he stated that the bill:

...prevents cannabis, including any product obtained from a cannabis plant, from being defined as a controlled or border controlled drug. In so doing the Bill excludes dealings with cannabis from the serious drug offences in the Commonwealth Criminal Code. For completeness, the Bill amends the *Criminal Code Regulations 2002* so that cannabis and tetrahydrocannabinols (THC) are no longer listed as controlled and border controlled drugs.<sup>7</sup>

1.7 Regarding the Crimes Act, the Senator commented that the bill would :

...[remove] cannabis and THC from the Act's definition of narcotic drug, and removes dealings in cannabis and THC from the Act's definition of dealing in drugs. Together this serves to remove dealings with cannabis from the Act's offence provisions.<sup>8</sup>

1.8 Further to this, the Senator stated that the bill would remove redundant references in the Defence Discipline Act, while 'maintaining the existing disciplinary consequences for dealings with other drugs'.<sup>9</sup>

1.9 Senator Leyonhjelm noted that the bill would also repeal:

...Chapter 2 of the [Narcotic Drugs] Act, which establishes medicinal cannabis licences and imposes offences and civil penalties for dealings with

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5 Explanatory Memorandum, p. 1.

6 Senator David Leyonhjelm, 'Second Reading Speech' in *Senate Hansard*, 9 May 2018, p. 2748.

7 Senator David Leyonhjelm, 'Second Reading Speech' in *Senate Hansard*, 9 May 2018, p. 2748.

8 Senator David Leyonhjelm, 'Second Reading Speech' in *Senate Hansard*, 9 May 2018, p. 2748.

9 Senator David Leyonhjelm, 'Second Reading Speech' in *Senate Hansard*, 9 May 2018, p. 2748.

cannabis that are not authorised by such licences. The Bill also amends Chapter 3 of the Act, which establishes drug manufacture licences and imposes offences and civil penalty provisions for dealings with drugs that are not authorised by such licences. Chapter 3 is amended so these licences and the associated offences and civil penalty provisions do not apply with respect to dealings with cannabis.<sup>10</sup>

1.10 Senator Leyonhjelm stated that the bill would amend the TGA Act, so that:

...the Poisons Standard established by the Act does not apply in relation to cannabis. This will be consistent with the non-application of the Poisons Standard to nicotine in tobacco prepared and packed for smoking. It will also ensure that the Act cannot be used as a vehicle to ban cannabis.<sup>11</sup>

1.11 According to Senator Leyonhjelm, the bill would allow states and territories some discretion in regulating cannabis. If passed, the bill would start one year following Royal Assent, which he said would allow time for:

...state and territory governments to choose to maintain or alter their own laws relating to cannabis. They may maintain their bans on cannabis, with exemptions for medicinal use, if they choose. Alternatively, they may legislate to allow broader use and to regulate with respect to various matters such as children and driving.<sup>12</sup>

## States and territories

1.12 Cannabis is controlled and prohibited by Commonwealth laws, including the regulation of cannabis for medical use. Within this framework, all jurisdictions are able to adopt a range of approaches to policing cannabis, including: decriminalising the possession and use of cannabis for personal use; police being able to issue a number of 'cautions' for possession before laying a criminal charge; encouraging attendance at education programs rather than pressing charges; and/or the ability to refer users found in possession of cannabis to mandatory intervention programs.<sup>13</sup>

## Commonwealth approach to cannabis

1.13 The submission made by the Commonwealth Department of Health stated that the Commonwealth's approach to cannabis treated it as both narcotic and medicine, including through the National Drug Strategy 2017–2026 (National Drug Strategy). This approach, they suggested:

...reflects Australia's balanced health and law enforcement approach to reducing the impact of illicit drug use, tobacco use and the harmful use of alcohol. Relevantly, all scheduling decisions include consideration of a

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10 Senator David Leyonhjelm, 'Second Reading Speech' in *Senate Hansard*, 9 May 2018, p. 2748.

11 Senator David Leyonhjelm, 'Second Reading Speech' in *Senate Hansard*, 9 May 2018, p. 2748.

12 Senator David Leyonhjelm, 'Second Reading Speech' in *Senate Hansard*, 9 May 2018, p. 2748.

13 Senate Economics References Committee, *Personal choice and community impacts: Interim report: sale and use of marijuana and associated products (term of reference c)* (May 2016), p. 7.

standard set of factors, to ensure that public health objectives are consistently met and the application of public health risk considerations is consistent within each Schedule.<sup>14</sup>

1.14 The National Drug Strategy describes the use, prevalence and potential harms of cannabis as follows:

Cannabis is a group of substances from the plant *cannabis sativa* and is available in three main forms: flowering heads, cannabis resin (hashish) and cannabis oil. It is usually smoked, either in a hand-rolled cigarette or through a water-pipe.

In 2016, 10.4% of Australians over the age of 14 had used cannabis in the last 12 months and 34.8% had used cannabis in their lifetime. As the most widely used of the illicit drugs in Australia, cannabis carries a significant burden of disease. The use of cannabis can result in various health impacts, including mental illness, respiratory illness, and cognitive defects. In particular, cannabis dependence among young adults is correlated with, and probably contributes to, mental disorders such as psychosis.<sup>15</sup>

1.15 The National Drug Strategy outlines the 'harm minimisation' model that is central to the Commonwealth's approach to illicit drugs and drug abuse. This consists of three pillars: demand reduction, supply reduction and harm reduction (see figure below).<sup>16</sup>

#### A Balanced Approach Across the Three Pillars of Harm Minimisation



14 *Submission 32*, p. 3.

15 *National Drug Strategy 2017–2026*, p. 33.

16 *National Drug Strategy 2017–2026*, p. 3.

1.16 On law enforcement matters, the Strategy includes Crimtrac data indicating that the police issued 11,809 diversions for cannabis-related offences in 2014–15.<sup>17</sup>

### **Use of illicit cannabis in Australia**

1.17 The National Drug Household Survey 2016 indicated that cannabis is the most widely used illegal drug in Australia, with 10.4 per cent of respondents saying they had used it at least once in the past 12 months, well above the usage rates of other illicit substances. The survey indicated that around 35 per cent of Australians would use cannabis at least once in their lifetime (6.9 million people).<sup>18</sup>

1.18 The Survey also indicated that cannabis was often used in combination with other illicit substances, particularly:

...among users of hallucinogens (88%), ecstasy (79%), synthetic cannabinoid (78%) and meth/amphetamines (74%). However, cannabis users and people who misused pharmaceuticals were the most likely to only use those substances in the same 12-month period and not use any other illicit drug, while users of other psychoactive substances had used at least 1 other illicit drug, with quite high usage among this group—over half had used cannabis, ecstasy and hallucinogens.<sup>19</sup>

1.19 The survey also noted a general decline in the use of cannabis among the Australian population between 2001 and 2016, with users being older on average (34 years in 2016 compared with 29 in 2001).<sup>20</sup> This decline was especially apparent among younger Australians, when compared to previous generations:

While there were no significant declines among 14–19 year olds in recent illicit drug use between 2013 and 2016, use was considerably lower than in 2001—[including that the] use of cannabis has halved....<sup>21</sup>

### **Commonwealth laws on medicinal cannabis products**

1.20 The Commonwealth facilitates access to medicinal products for appropriate patients for 'medical conditions where there is evidence to support its use'. This is implemented by the Department of Health, through the Therapeutic Goods Administration (TGA) and the Office of Drug Control (ODC). The TGA states on its website that:

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17 *National Drug Strategy 2017–2026*, p. 4.

18 The National Drug Household Survey is the leading survey of licit and illicit drug use in Australia, undertaken by the Australian Institute of Health and Welfare every 2–3 years since 1985. Its sample in the 2016 survey was 23,772 respondents from households, so it does not include homeless or institutionalised individuals—which means actual prevalence of drug use may be greater than the survey indicates. See *National Drug Strategy Household Survey 2016: Detailed Findings*, p. 3 regarding the survey and its methods and p. 61 for statistics on cannabis use and trends.

19 *National Drug Strategy Household Survey 2016: Detailed Findings*, p. 10.

20 *National Drug Strategy Household Survey 2016: Detailed Findings*, pp. 58 and 61.

21 *National Drug Strategy Household Survey 2016: Detailed Findings*, p. 11

Medicinal cannabis products are regulated as medicines in Australia and are therefore subject to legal requirements. Generally, medicines imported into, supplied in, and exported from Australia must be entered in the Australian Register of Therapeutic Goods (ARTG), which is administered by the TGA. Medicinal cannabis products not on the ARTG can be supplied through alternative pathways until more clinical evidence is gathered through clinical trials to support its registration. These alternative pathways make reference to Special Access Scheme (SAS) and Authorised Prescriber (AP).<sup>22</sup>

1.21 Regarding the cultivation of cannabis, the TGA states:

On the 30 October 2016, legislation came into effect to allow legal cultivation, production and manufacturing of medicinal cannabis products in Australia. The legislative changes forecasted an increase availability of medicinal cannabis products available to suitable patients. The ODC administers this scheme and works in collaboration with therapeutic goods legislation and state and territory legislation. The ODC is responsible for the regulation of domestic cultivation and harvest, as well as other aspects of manufacture of medicinal cannabis, under the [Narcotics Drug Act].<sup>23</sup>

1.22 The TGA notes that individual consumers cannot apply to obtain approval to import and access unapproved medicinal cannabis products, but have to go through an Australian registered doctor with 'appropriate qualifications and/or expertise for the medical condition requiring treatment' who can make approvals on a case-by-case basis. Regarding the obligations of doctors wishing to apply for cannabis products for their patients, the TGA notes the requirement to:

- Gain informed consent from the patient in relation to the proposed use of the unapproved product. The doctor and patient, patient's parents or guardian accept responsibility for any adverse consequence of therapy.
- Notify/apply on a patient's behalf for approval/authorisation to supply these products through the available Commonwealth access schemes...
- Ensure State/Territory requirements are satisfied.
- Obtain an import license/ permit to import the product through the Office of Drug Control. Please note this may not be applicable if a product is currently being held in Australia.
- Monitor patient outcome and report any suspected adverse drug reactions.<sup>24</sup>

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22 Therapeutic Goods Administration, 'Access to medicinal cannabis products' at [www.tga.gov.au/access-medicinal-cannabis-products-1](http://www.tga.gov.au/access-medicinal-cannabis-products-1) (accessed 12 July 2018).

23 Therapeutic Goods Administration, 'Access to medicinal cannabis products' at [www.tga.gov.au/access-medicinal-cannabis-products-1](http://www.tga.gov.au/access-medicinal-cannabis-products-1) (accessed 12 July 2018).

24 Therapeutic Goods Administration, 'Access to medicinal cannabis products' at [www.tga.gov.au/access-medicinal-cannabis-products-1](http://www.tga.gov.au/access-medicinal-cannabis-products-1) (accessed 12 July 2018).

## Senate inquiry into personal choice and community impacts of cannabis

1.23 On 25 June 2015, the Senate referred an inquiry into personal choice and community impacts to the Senate Economics References Committee for inquiry and report by 13 June 2016. Due to the general election on 2 July 2016, this inquiry lapsed and was subsequently not re-referred in the 45<sup>th</sup> Parliament.

1.24 The committee tabled an interim report into the sale and use of marijuana and associated products in May 2016, which recommended that:

...the Australian Government, in conjunction with the states and territories, undertake an objective assessment of prohibition, decriminalisation, limited deregulation and legalisation, including a full cost-benefit analysis, based on the outcomes of these options in other parts of the world.<sup>25</sup>

## Financial implications of the bill

1.25 The Explanatory Memorandum states that the bill would have a positive impact on the Commonwealth Budget, improving the fiscal balance of the Commonwealth Budget by \$342 million, as well as lifting its underlying cash balance by \$292 million over the forward estimates.<sup>26</sup>

1.26 The Explanatory Memorandum includes a policy costing undertaken by the Parliamentary Budget Office (PBO) for Senator Leyonhjelm, which was completed on 21 September 2016. This costing summarises the financial aspects of the bill as follows:

The proposal would legalise all marijuana/cannabis/hemp use by adults, as well as possession, cultivation, processing, transport, trade, import and export. No excise would be imposed on marijuana.

This proposal would also reduce the budgets of relevant federal agencies including the Australian Federal Police (AFP), Australian Criminal Intelligence Commission (ACIC), and the Australian Border Force (ABF) by the level of funding directly associated with marijuana law enforcement.

An estimate of the effect of this proposal on total marijuana usage was also requested.<sup>27</sup>

1.27 The PBO provided a comprehensive list of underlying assumptions used for the modelling of these costings, but advised this 'costing is considered to be of low reliability', as:

...[there] is uncertainty regarding the price and quantity of marijuana currently consumed, and the price and quantity of marijuana that would be

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25 Senate Economics References Committee, *Personal choice and community impacts: Interim report: sale and use of marijuana and associated products (term of reference c)* (May 2016), p. 20.

26 Note this advice was given in 2015, and so the relevant forward estimates period was for 2016–20. These costings were disputed by some evidence received, which is discussed further in chapter 2.

27 Explanatory Memorandum, p. 11.

consumed in a newly legalised market. It is also difficult to separately identify marijuana law enforcement activities, as these are often integrated within broader law enforcement activities.<sup>28</sup>

### **Compatibility with human rights**

1.28 The Explanatory Memorandum states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Explanatory Memorandum sets out some of the human rights implications implicit in the bill:

Adults should be free to make their own choices as long as they do not harm others.

The Bill protects the right of self-determination, the right to freely pursue one's economic, social and cultural development, and the right to freely dispose of one's natural wealth and resources. These rights are recognised in Article 1 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights.<sup>29</sup>

### ***Senate Scrutiny of Bills Committee***

1.29 The Senate's Scrutiny of Bills Committee (Scrutiny Committee) commented on the bill's reversal of the legal burden of proof, noting that:

The bill seeks to amend the *Defence Force Discipline Act 1982* (the Act) to insert five offences relating to defence members or defence civilians dealing in, possessing or administering prohibited drugs. It also seeks to provide that it would be a defence to each of these offences if the person proves that he or she had lawful authority for engaging in the relevant conduct. The defendant would bear a legal burden of proof in relation to each of these defences, ensuring that the defendant would need to prove, on the balance of probabilities, that he or she had lawful authority for engaging in the relevant conduct. The proposed offences carry maximum penalties ranging from a fine of three penalty units to imprisonment for 10 years. The proposed section largely mirrors existing section 59 in the Act, with the exception that provisions setting out specific penalties where the conduct involves cannabis have been removed.

At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove one or more elements of an offence, interfere with this common law right.<sup>30</sup>

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28 Explanatory Memorandum, p. 12. See tables A1 and A2 in Appendix 3 of this report for the PBO's breakdown of this modelling.

29 Explanatory Memorandum, p. 10.

30 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No 5 of 2018*, 20 June 2018, p. 17.



1.30 The Scrutiny Committee further argued:

As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification in the explanatory memorandum each time the burden is reversed, with the rights of people affected being the paramount consideration. In this instance, the explanatory memorandum does not address the fact that proposed section 59 seeks to reverse the legal burden of proof in relation to the lawful authority defences set out in proposed subsections 59(2), (4), (5A), (6A) and (8).<sup>31</sup>

1.31 After noting these concerns, the Scrutiny Committee left the decision about the appropriateness of the bill's reversal of the legal burden of proof to the Senate as a whole.<sup>32</sup>

### **Conduct of the inquiry**

1.32 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 15 June 2017. The committee also wrote directly to a number of individuals and organisations inviting them to make submissions.

1.33 The committee received 36 submissions, all available on the committee's website. A list of all submissions received is at appendix 1 of this report.

1.34 The committee held a public hearing in Canberra on 17 August 2018. A full list of all witnesses who gave evidence to the committee at this hearing is at appendix 2 of this report.

### **Structure of this report**

1.35 This report consists of two chapters:

- This chapter provides a brief background and overview to the bill, as well as the administrative details of the inquiry; and
- Chapter 2 discusses the evidence received by the committee supporting and opposing the bill, and sets out the committee's views and recommendation.

### **Acknowledgements**

1.36 The committee thanks all organisations and individuals that made submissions, as well as those that appeared at the public hearing.

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31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No 5 of 2018*, 20 June 2018, p. 18.

32 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No 5 of 2018*, 20 June 2018, p. 18.