

Time to just legalise it

The Australian Greens are moving ahead with the first national plan to legalise cannabis. The world is rapidly moving away from the damaging criminal and policing approach to cannabis and Australia risks being left behind if we wait for piecemeal reform through the states and territories.

The really good news is that the Greens have compelling constitutional law advice that the Federal Parliament can legalise cannabis for adult use across the country. We don't have to wait for patchwork reform in the states and territories, we can just legalise it.

This is the first time any attempt has been made to legalise cannabis through the Federal Parliament. The Greens are in the process of drafting a simple, effective and comprehensive legalise cannabis law that will be available for public consultation later this year.

The world is moving ahead

In recent months Germany has committed to legalising cannabis, joining Canada, Uruguay, South Africa, Jamaica, Mexico, Malta and at least 19 states in the United States where recreational cannabis use is already legal.

The war on drugs is not working – it is damaging lives

The war on cannabis is not working to reduce drug use in Australia. A core benefit of legalising cannabis is stopping damaging people's lives by dragging them through the criminal justice system just because they would rather use cannabis than alcohol or tobacco. The current law targets some of the most vulnerable communities in the country, young people, First Nations people and people on lower incomes in regional and outer-metropolitan areas.

Aggressive policing of cannabis, including through drug dogs and road-side drug testing, is part of why drug use in Australia is [increasingly moving towards methamphetamines](#) and other drugs that are less easily policed and detected than cannabis. This has seen Australia become one of the largest per capita consumers of methamphetamines while it still remains one of the highest per capita consumers of cannabis.

We recognise there has been some really important cannabis law reform in the ACT and ongoing efforts by Greens MPs and campaigners across the country. However without a national push the bulk of Australia might be a decade or more away from legalised cannabis.

Legalising Cannabis disempowers organised crime

It's time to drag Australia into the 21st century and take the cannabis market out of the hands of organised crime. We know that the illegal drug market [is the mainstay of income for organised crime in Australia](#). These are not just abstract entities, the people benefiting from cannabis being illegal are criminal groups like the Comanchero Outlaw Motorcycle Gang (OMCG), Hells Angels OMCG, Lone Wolf OMCG, 'The Company' and nine persons referred to as the 'Aussie Cartel'.

In a brief moment of clarity [in 2017 Victorian police](#) estimated that cannabis had a black market wholesale value of \$1.5 billion and a retail value of \$8 billion, just in Victoria. This is relatively consistent with analysis of the consumption data contained in the Australian Criminal Intelligence [Commission's National Wastewater Drug Monitoring Program reports](#). That analysis suggests the annual cannabis market is [in the order of \\$14.8 billion](#).

Removing this level of financing from organised crime will make Australia fairer and safer. It will also provide billions of dollars in income, corporate and GST tax revenue for use in schools, hospitals and income support. It will also see significant savings on police, courts and jails, all of which can be reinvested back into communities.

How do we do it? The legal bits

Traditionally Cannabis regulation has only been seen through the lens of the criminal justice system. This has led to the assumption that the Commonwealth has little role to play, because criminal justice is primarily the job of the states. However once the decision is made to legalise cannabis, the Commonwealth has clear constitutional power to create a national, legal, cannabis market.

Advice from leading constitutional law Professor Patrick Keyzer, Dean of Law, is that there are three heads of Commonwealth power that would enable it to regulate and legalise cannabis, they are:

- the trade and commerce power, section 51(i) of the Constitution;
- the intellectual property power, section 51(xviii); and
- the taxation power s 51(ii), together with ss 55, 90 and 98 of the Constitution.

The clearest constitutional pathway is to use the power under s51(xviii) in relation to copyrights, patents of inventions and designs, and trade marks. To quote Professor Keyzer:

1. *Section 51(xviii) enables the Commonwealth to regulate plant variety rights (Grain Pool of WA v Commonwealth (2000) 202 CLR 479 at 495-7, 503, 531 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; 530-533 per Kirby J).*

2. *The Commonwealth could regulate cannabis strains as plant varieties and cause them to be listed in a schedule in respect of which the Commonwealth has exclusive regulatory control.*
3. *The Commonwealth can declare an intention to “cover the field” when it regulates intellectual property (or any other topic) as (Wenn v Attorney-General (Vic) (1948) 77 CLR 84 at 110, 119, 122).*
4. *The Commonwealth could pass valid legislation requiring all cannabis varieties to be regulated by a Commonwealth agency. Setting up an agency to do so would be characterised as an administrative activity that is necessary or convenient for the exercise of the legislative power (and could therefore be supported under s 51(xxxix) or impliedly, as to which, see D’Emden v Pedder (1904) 1 CLR 91 at 109-110 (quando lex aliquid concedit concedere videtur et illud sine quo res ipsa valere non potest)).*

In short, the Commonwealth can regulate the cultivation, licencing and sale of cannabis and this includes all the ancillary machinery provisions needed to create a legal national market for cannabis. Once this occurs, all state and territory laws contrary to the legal use of cannabis under the Commonwealth laws (being the current State criminal sanctions) would cease to have effect.

Next Steps

The Greens are working with key stakeholders to create a draft bill to be presented to Parliament. This consultation will consider:

- The appropriate number of plants for individuals to legally grow,
- Appropriate legal sanctions for unlawful sale or distribution, including to minors,
- Additional taxation measures and where that revenue should be allocated, schools etc,
- Prohibitions on the tobacco and alcohol industry from entering the cannabis industry, and
- The role of grower cooperatives.

David Shoebridge

Greens Senator for NSW, Justice Spokesperson

21 September 2022