DPMP
Drug Policy Modelling Program

How do Commonwealth drug laws relate to state/territory drug laws?

Australia is a federated nation with drug laws operating at both the Commonwealth and state/territory levels. Whilst the states and territories are largely responsible for their criminal justice response to drugs, particularly for low-level offences such as use and possession for personal use, the multiple levels of law can create uncertainty about the laws and penalties. Note: Drug possession without intent to traffic or supply is referred to as 'simple possession' in this document (also known as 'possession for personal use' or 'personal possession').

In this document we provide an overview of the Commonwealth and State and Territory laws about drug use and simple possession and explain the possible interaction between the different laws.

Summary

- While the Commonwealth law is predominantly concerned with serious drug offences and drug supply, and states/territory laws are concerned with simple possession as well as drug supply (division of responsibilities), simple possession is covered under both laws. The purpose of simple possession in Commonwealth law is purportedly:
  - » To create consistency with the states and territories, and with Australia's commitments under the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
  - » For cases involving other serious federal offending, or of interest to a Commonwealth Agency
  - » For cases where there is significant connection to import or export activity
- The existence of the Commonwealth simple possession law creates complexity for jurisdictions wishing to amend or remove the offence of simple possession, as this would then conflict with Commonwealth law.
- For example, in the ACT Drugs of Dependence Act 1989, adults are no longer subject to penalties for possession of small quantities of cannabis, which conflicts with Commonwealth law. To avoid this conflict, the Drugs of Dependence Act 1989 provides a defence for anyone apprehended under Commonwealth law in the ACT for possession of small quantities of cannabis.
- Legal scholars have made suggestions for other jurisdictions wishing to amend their legislation about simple possession, in order to minimise conflict with Commonwealth law.

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The Commonwealth drug laws

The Commonwealth Criminal Code Act 1995 outlines 'serious drug offences', which include drug possession. However, as the Commonwealth Director of Public Prosecutions detail, drug use and possession (for personal use) are primarily trialled under state and territory law, and the existence of these laws in Commonwealth law is for circumstances where possession is in relation to other offences or of 'Commonwealth interest' (e.g., related to large scale trafficking, manufacture, or importation offences). The addition of drug possession (not related to supply or trafficking) was added to Commonwealth law in 2005 for the purpose of creating consistency with the state and territory legislations, Australia's commitments under the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and to assist with the trial of supply, manufacture, and importation/exportation offences (see 300.1 Purpose).

The relevant simple possession section of the Commonwealth law (section 308.1) is given in the box below.

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Commonwealth Criminal Code Act 1995

308.1 Possessing controlled drugs

1. A person commits an offence if:
   a) the person possesses a substance; and
   b) the substance is a controlled drug, other than a determined controlled drug.

   Penalty: Imprisonment for 2 years or 400 penalty units, or both.
2. The fault element for paragraph (1)(b) is recklessness.
3. If:
   a) person is charged with, or convicted of, an offence against subsection (1); and
   b) the offence is alleged to have been, or was, committed in a State or Territory;

   the person may be tried, punished or otherwise dealt with as if the offence were an offence against the law of the State or Territory that involved the possession or use of a controlled drug (however described).

Note: Subsection (3) allows for drug users to be diverted from the criminal justice system to receive the same education, treatment and support that is available in relation to drug offences under State and Territory laws.

4. However, a person punished under subsection (3) must not be:
   a) sentenced to a period of imprisonment that exceeds the period set out in subsection (1); or
   b) fined an amount that exceeds the amount set out in subsection (1).

Prior to 2005, drug possession was not an offence under Commonwealth law (see NSW Courts for history). The Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 made amendments to the Criminal Code including the addition of drug possession as an offence. The Model Criminal Code Officers Committee (MCCOC) Serious Drug Offences Report (1995) was the basis for this legislation, however including an offence of drug possession was not recommended in the 'Model Criminal Code'. The explanatory statement to the 2005 Bill says:

*"**If the prosecution shows that there is a trafficable quantity of controlled drug** involved in the offence and engages the trafficable quantity presumption, proposed subsection 302.5(2) makes available to the defendant a defence of absence of commercial purpose. **If the defendant can prove on the balance of probabilities that he or she did not have both the relevant intention and belief, the defendant would then only be guilty of a base possession offence** under proposed section 308.1, rather than any of the commercially motivated trafficking offences in proposed Division 302."* (emphasis added)

The explanatory statement also details section 308.1(3-5) which allows for diversion programs to be used in response to simple possession instead of the criminal penalties:

*"**The purpose of subsections 308.1(3)-(5) is to ensure that State and Territory drug diversion programs will be available to drug users who are charged with, or convicted of, with this offence.** The Australian Government has worked with States and Territories, through the Council of Australian Governments, to develop and fund the Illicit Drug Diversion Initiative. The primary objective of the Diversion initiative is to increase incentives for drug users to identify and treat their illicit drug use early. It provides an opportunity for drug users early in their relationship with the criminal justice system to get the education, treatment and support they need for addressing their drug problem, and at the same time, avoid incurring a criminal record. If an offender chooses not to be 'diverted' into education or treatment, or fails to attend or participate in the required education or treatment sessions, they will be returned to the criminal justice system"* (emphasis added)

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We were not able to locate any recent data about the number of offences trialled under Commonwealth law for simple drug possession, however a report from 2014 reported 3 sentencing outcomes with a principal offence of S308.1 (possessing controlled drugs) between 2008 and 2012 (other cases may have involved a charge against S308.1 in addition to another principal charge, such as import or export).

Do any state or territory simple possession laws conflict with the Commonwealth law?

Section 300.4 of the Commonwealth Criminal Code allows for concurrent operation of state laws ("The Commonwealth law is not intended to exclude or limit the concurrent operations of any law of a state or territory" (300.4 (1)). Importantly, this includes when state law "provides for a defence in relation to the offence that differs from the defences applicable [under the Cth Code] (300.4 (3)(c)). It does seem that s 300.4(3)(c) allows the States to create a defence from the Commonwealth legislation.

In the case of the ACT, the ACT did not remove the offence of cannabis possession from the *Drugs of Dependence Act 1989*, but instead provided an exemption from the offence for adults growing (s162(2)) or possessing (s171AA(3)) cannabis. A paper by legal scholar Murphy (2020) explores this and considers whether the conflict of the two laws is an issue conceptually and in practice. Murphy argues the ACT law may not sufficiently provide a defence against the Commonwealth law and may therefore put people at risk of being prosecuted under Commonwealth law for cannabis possession. However, he explains that in practice, this appears unlikely considering the guidelines from the CDPP and the small number of sentencing outcomes against S308.1 of the Commonwealth Criminal Code. Murphy provides additional guidance on how this conflict could have been minimised by legislation amendments.

*"**In order to engage the section 313.1 defence to federal prosecution, state or territory law must positively authorise conduct. Unfortunately for proponents of the new ACT law, it does not go so far, instead serving merely to demarcate certain conduct as not forbidden…**There are at least two ways that the ACT Parliament could have positively authorised cannabis possession and cultivation so as to successfully engage the defence to federal prosecution in section 313.1. First, the ACT could have created a statutory permit or licencing scheme, of the sort referred to in the explanatory memorandum to section 313.1. Alternatively, the ACT could have passed a provision positively authorising low-level cannabis possession and cultivation, rather than merely effecting a statutory non-prohibition. An example of such a provision is provided in the appendix to this article and designedly uses the following statutory phrases: 'protection from criminal liability', 'not criminally responsible' and 'authorisation, justification or excuse'. The first phrase is used because it appears in Odgers' example, which was apparently approved in Baker v Chief of the Army. The second phrase is used because it also appears in Odgers' judicially approved example, and constitutes a well-recognised formulation of statutory excuses. **The explicit inclusion of the words 'authorisation, justification or excuse' is recommended to avoid the possibility that the provision will operate merely as a non-prohibition, rather than a positive authorisation**."*
(Murphy, 2020, p.11-12, emphasis added)

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