A PRECARIOUS HIGH – CANNABIS DECRIMINALISATION, AUTHORISATION AND FEDERALISM

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I INTRODUCTION

On 31 January 2020, the cultivation and possession of small amounts of cannabis became legal under the law of the Australian Capital Territory ('ACT') with the coming into effect of the *Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019* (ACT). This appeared to be a significant milestone in Australia's regulation of personal drug use. As had already occurred with 'pill testing',[1] the ACT appeared to be breaking new ground in harm minimisation drug policies while the rest of Australia watched on. The new ACT law could have been a paradigm example of laboratory federalism, whereby a small jurisdiction experiments with laws and policies that are not yet palatable or feasible elsewhere in the country.[2] It seems unlikely, however, that the story will be that simple. The federal Attorney-General Christian Porter has said that the new ACT law does not provide a defence to the *federal* cannabis possession offence.[3] Porter has pointedly remarked that he expects the Australian Federal Police ('AFP') to continue enforcing the federal offence.[4] Accordingly, ACT residents growing or possessing small amounts of cannabis run the risk of federal prosecution. This situation is unsatisfactory and untenable for a number of reasons, but particularly because of the way the Damoclean sword of federal prosecution is being used to deter conduct that has been decriminalised by the democratic processes of the ACT.

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1 Paul Karp, 'ACT Pushes for National Pill-Testing after Study Finds It Encouraged People to Ditch Unsafe Drugs', *The Guardian* (online, 10 December 2019) <https://www.theguardian.com/australia-news/2019/dec/10/act-pushes-for-national-pill-testing-after-study-finds-it-encouraged-people-to-ditch-unsafe-drugs>.

2 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country': *New State Ice Co v Liebmann*, 285 US 262, 311 (Brandeis J) (1932).

3 Conversation with Christian Porter (Gareth Parker, 6PR Mornings with Gareth Parker, 26 September 2019) <https://www.attorneygeneral.gov.au/media/transcripts/6pr-mornings-gareth-parker-26-september-2019>.

4 Ibid.

In order to understand the present situation, it is helpful to first know a bit more about the context in which the new ACT law was passed and its precise legal operation (Part II). Then it will be possible to assess whether the new law does in fact provide an effective defence to the federal cannabis possession offence (Part III) and to briefly discuss the federalist values at stake (Part IV). Ultimately, it will be suggested that the ACT should be able to formulate its own criminal laws and policies, free from the threat of federal intervention.

II THE NEW LAW

A Context

As early as 1926, federal law banned the import and export of cannabis into Australia.[5] However, it has always been primarily left to the states and territories to regulate cannabis possession, cultivation and supply within their borders.[6] As at the turn of the 21st century, all states and territories penalised cannabis possession and cultivation. However the ACT, South Australia and the Northern Territory had civil fine schemes for low-level offences.[7] In 2005,[8] the federal Parliament introduced a suite of drug offences into the *Criminal Code Act 1995* (Cth) ('federal *Criminal Code*'), partly motivated by the desire to give effect to the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.[9] The vast majority of the federal offences relate to commercial import, export, supply, manufacture and cultivation, however there is also a single offence in section 308.1 that captures possession of all sorts of 'controlled drugs',[10] of which cannabis is one.[11]

In recent decades societal views toward cannabis have liberalised and government policies have followed suit, initially in the field of medicinal cannabis. When surveying this trend, it is important to be cognisant of the distinction between decriminalisation and legalisation. Decriminalisation involves removing

5 Commonwealth, *Gazette*, No 115, 25 November 1926. This gazette contains Customs Proclamation Nos 134 and 135 made under the *Customs Act 1901* (Cth).

6 Maurice Rickard, 'Reforming the Old and Refining the New: A Critical Overview of Australian Approaches to Cannabis' (Research Paper No 6, Parliamentary Library, Parliament of Australia, 10 October 2001) 6.

7 Ibid 7.

8 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth).

9 See Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth) 6, referring to the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990).

10 It is worth noting that the original draft of the federal drug offence provisions did not include a possession offence. See Model Criminal Code Officers Committee, *Model Criminal Code: Serious Drug Offences* (Report, October 1998) 428–48. While a possession offence found its way into the final legislation, it appears that federal authorities very rarely prosecute cannabis possession: Pierrette Mizzi, Zeinab Baghizadeh and Patrizia Poletti, 'Sentencing Commonwealth Drug Offenders' (Research Monograph No 38, Judicial Commission of New South Wales, June 2014) 77, 119.

11 *Criminal Code Regulations 2019* (Cth) sch 1.

criminal sanctions for cannabis use, possession and, sometimes, cultivation without creating a legal means to obtain the drug; legalisation involves proactive legislation to permit particular uses of cannabis.[12] In 2014, polls indicated that two thirds of Australians supported the legalisation of medicinal cannabis.[13] Relatively shortly thereafter, in early 2016, the Commonwealth and Victoria legalised cannabis use for medicinal purposes.[14] The public's views on recreational cannabis use are also tending away from criminalisation and towards legalisation. A 2016 survey by the Australian Institute of Health and Welfare found that 74% of Australians over the age of 14 did not support the possession of cannabis being a criminal offence.[15] The number of Australians in favour of legalisation is growing, although still a minority nationwide (42% in 2019).[16] Internationally, there has also been a steady trend away from criminalisation and toward legalisation. Recreational cannabis has been legalised in 11 states and the District of Columbia in the United States.[17] Cannabis is also legal for recreational use in Canada, Georgia, South Africa and Uruguay.[18] Closer to home, New Zealand will vote in a referendum on cannabis legalisation on 19 September 2020.[19]

In light of the global and domestic trend in public opinion away from criminalisation and toward legalisation, it was inevitable that the issue would be taken up by progressive lawmakers in Australia. Unsurprisingly, and consistently with the model of laboratory federalism described above,[20] this occurred most decisively in the ACT, which ranks first among Australian states and territories in support for cannabis legalisation, and equal first for reported cannabis use within regular drug using populations.[21] In the ACT a private member's Bill was introduced in 2018 to decriminalise cannabis. The Bill went through a number of

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12 Ross Coomber et al, *Key Concepts in Drugs and Society* (SAGE Publications, 2013) 192–3. Note, however, that the authors prefer the language of 'partial decriminalisation' and 'legal regulation'.

13 Henrietta Cook and Bridie Smith, 'Majority of Australians Support Medical Marijuana', *The Age* (online, 23 July 2014) <https://www.theage.com.au/national/victoria/majority-of-australians-support-medical-marijuana-20140723-zw56k.html>.

14 *Narcotic Drugs Amendment Act 2016* (Cth); *Access to Medicinal Cannabis Act 2016* (Vic).

15 Australian Institute of Health and Welfare, 'National Drug Strategy Household Survey 2016: Detailed Findings' (Drug Statistics Series No 31, 2017) 128; Australian Institute of Health and Welfare, 'National Drug Strategy Household Survey 2016: Detailed Findings' (Perceptions and Policy Support Chapter 9, Supplementary Data Tables, September 2017) table 9.18 <https://www.aihw.gov.au/reports/illicit-use-of-drugs/2016-ndshs-detailed/data#page2>.

16 Roy Morgan, 'A Growing Number of Australians Want Marijuana Legalised' (Press Release Finding No 8162, 14 October 2019).

17 Audrey McNamara, 'These States Now Have Legal Weed, and Which States Could Follow Suit in 2020', *CBS News* (online, 1 January 2020) <https://www.cbsnews.com/news/where-is-marijuana-legal-in-2020-illinois-joins-10-other-states-legalizing-recreational-pot-2020-01-01/>.

18 'Countries Where Weed Is Illegal 2020', *World Population Review* (Web Page, 28 September 2019) <http://worldpopulationreview.com/countries/countries-where-weed-is-illegal/>.

19 'Cannabis Legalisation and Control Referendum: Your Guide to the 2020 Referendum', *New Zealand Government* (Web Page) <https://www.referendum.govt.nz/cannabis/index.html>.

20 See above n 2 and accompanying text.

21 Morgan (n 16); Amy Peacock et al, 'Australian Drug Trends 2019: Key Findings from the National Illicit Drug Reporting System (IDRS) Interviews' (Findings, National Drug and Alcohol Research Centre, 2019) 44.

changes before it was ultimately passed in September 2019 and came into effect on 31 January 2020.

B Legal Effect

The legal interaction of the new ACT law and the federal *Criminal Code* is controversial (and will be considered in the next section), however the effect of the new law within the ACT's legal landscape is straightforward. Essentially, the new ACT law provides a defence[22] to the existing low-level cultivation and possession offences – which relate to cultivation of two plants or less and possession of 50 grams or less – by stating that each offence 'does not apply' to adults who possess or cultivate the cannabis within the ACT.[23] Limits and protections have been built into the new law. Children are not affected by the recent decriminalisation, accordingly all pre-existing criminal offences continue to apply to children (including, most relevantly, possession of 50 grams or less or cultivation of two plants or less).[24] Children are also protected by new criminal offences of storing cannabis within the reach of a child and exposing a child to cannabis smoke or vapour.[25] It is an offence to smoke cannabis in public,[26] and is also an offence to cultivate cannabis in a place accessible to the public (or a place where more than four plants are being grown).[27] It remains an offence to grow cannabis artificially (ie, hydroponically).[28] Perhaps most significantly, it remains an offence to supply cannabis to another person.[29]

III A DEFENCE TO FEDERAL PROSECUTION?

As was adverted to above, the federal *Criminal Code* contains a provision – section 308.1 – criminalising the possession of a whole host of drugs, including cannabis.[30] That provision applies in the ACT and presents an obvious hurdle to

22 This article uses the word 'defence' in a general sense. Jeremy Gans has said that the 'the term *defences*, while ubiquitous in criminal law, is imprecise': Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2nd ed, 2016) 372 [10.3] (emphasis in original). If a more specific description were necessary, the words 'exception' and 'exemption' arguably better describe the operation of the 'does not apply' phraseology in the *Drugs of Dependence Act 1989* (ACT) sections 162(2) and 171AA(3). 'Exception' and 'exemption' also have some currency in Australian Capital Territory ('ACT') legislation as distinct concepts from justification or excuse: see *Criminal Code 2002* (ACT) s 58(3).

23 *Drugs of Dependence Act 1989* (ACT) ss 162(2), 171AA(3).

24 Ibid ss 162(1)–(2), 171AA(1),(3).

25 Ibid ss 171AAC, 171AB(2).

26 Ibid s 171AB(1).

27 Ibid ss 171AAA(1), 171AAB(2).

28 *Criminal Code 2002* (ACT) ss 618(2)(b), (3)(a).

29 *Drugs of Dependence Act 1989* (ACT) s 164(2).

30 It should be noted that there is also a federal offence of cultivating cannabis, however it only criminalises cultivation 'for a commercial purpose', so there is no real tension with the ACT's legalisation of personal cannabis cultivation: see *Criminal Code Act 1995* (Cth) s 303.6.

the ACT's decriminalisation project. However, the federal *Criminal Code* also includes an unusual defence[31] – section 313.1 – allowing the states and territories to makes laws that would justify or excuse a person from federal criminal liability for conduct within the state or territory. Section 313.1 relevantly provides:

> **Defence – conduct justified or excused by or under a law of a State or Territory**
> This Part [Part 9.1 – Serious drug offences] … does not apply in relation to conduct if:
> (a) a person engages in the conduct in a State or Territory; and
> (b) the conduct is *justified or excused by or under a law* of that State or Territory. (emphasis added)

In order to engage section 313.1, the state or territory must justify or excuse the relevant conduct 'by or under a law'. In attempting to take advantage of this provision, and provide persons in the ACT with a shield against federal prosecution, the new ACT law does not explicitly state that low-level cannabis possession is *justified or excused*. Rather, as was explained above, the new ACT law retains the low-level cultivation and possession offences – which relate to cultivation of two plants or less and possession of 50 grams or less – but states that each of those ACT offences 'does not apply' to adults who possess or cultivate cannabis within the ACT.[32] The 'does not apply' phraseology was clearly intended to operate as a defence under ACT law, as indicated by the fact that the defendant bears an evidential burden if they intend to rely on the provision.[33] When the ACT passed the new law, it was initially thought that the defence was a 'justification or excuse by or under a law' of the ACT, thus engaging the section 313.1 defence to federal prosecution. However, this soon became a matter of confusion and controversy.

The ACT Attorney-General Gordon Ramsay said that there had been 'engagement with the commonwealth, the AFP and legal advisers' before asserting that 'the ACT's legislation attempts to provide a clear and specific legal defence to an adult who possesses small amounts of cannabis in the ACT but who is prosecuted under the commonwealth law'.[34] Confidence in the existence of the defence appears to have been based on a letter from the Commonwealth Director of Public Prosecutions ('CDPP') Sarah McNaughton SC, who initially wrote to the ACT government advising of the ostensible 'defence'.[35] However, the CDPP

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31 This article describes section 313.1 as a potential 'defence' because that is the language of the provision heading. Cf Spigelman CJ's comments in *R v Oblach* (2005) 65 NSWLR 75, 80 [28] suggesting that the label 'defence' may not be appropriate for concepts of 'justification and excuse' under section 10.5 of the federal *Criminal Code*.

32 *Drugs of Dependence Act 1989* (ACT) ss 162(2), 171AA(3).

33 The defendant must prove that they are 18 years or older and that the cannabis possession or cultivation occurred within the ACT: see the statutory notes following *Drugs of Dependence Act 1989* ss 162(2), 171AA(4). These notes refer to *Criminal Code 2002* (ACT) s 58, which relates to evidential burdens.

34 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 25 September 2019, 3810–11 (Gordon Ramsay, Attorney-General).

35 Tom Lowrey, 'ACT Legalises Personal Cannabis Use, Becoming First Australian Jurisdiction to Do So', *ABC News* (online, 25 September 2019) <https://www.abc.net.au/news/2019-09-25/act-first-jurisdiction-to-legalise-personal-cannabis-use/11530104>.

withdrew that advice in another letter a week later, in which it was acknowledged that there were 'legal complexities that had not initially been appreciated'.[36] The ACT Shadow Attorney-General Jeremy Hanson claimed that the legislation remained 'ambiguous and unclear' and that there was a 'conflict with federal law'.[37] Similarly, the federal Attorney-General Christian Porter has said that the ACT law does not successfully provide a defence to the federal cannabis possession offence and that he expects the AFP to continue to enforce federal law.[38] As will be explained below, Porter is likely correct that the new ACT law does not effectively engage the section 313.1 defence to federal prosecution.

A Justification or Excuse by or under a Law – Legislative History and Textual Considerations

Whether or not the new ACT law provides an effective defence to federal prosecution turns, in large part, on the meaning of the words 'justified or excused by or under a law' in section 313.1 of the federal *Criminal Code*. The concept of *justification or excuse by or under a law* is used elsewhere in the federal *Criminal Code*.[39] In order to appreciate the work that this concept does in the statute, it is helpful to know something about the drafting history.[40]

The first significant step towards federal codification of the criminal law was the work, between 1987 and 1991, of the *Review of Commonwealth Criminal Law* chaired by Sir Harry Gibbs ('Review Committee') after he completed his tenure as Chief Justice of the High Court. The Review Committee's draft Bill included a number of discrete defences and, 'for the sake of completeness',[41] a general 'lawful authority' provision which read: 'A person is not guilty of an offence if the relevant act is required or authorised by a law of the Commonwealth'.[42] It was made clear by the drafters that 'lawful authority' was intended to cover concepts that might also be described as justifications or excuses.[43] The intention was to define those defences that were capable of being closely defined but to include a 'lawful authority' defence to leave open defences not defined in, or abrogated by, the Bill.[44] The Review Committee's

36 Ibid.

37 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 25 September 2019, 3812 (Jeremy Hanson, Shadow Attorney-General).

38 Conversation with Christian Porter (n 3).

39 See, eg, *Criminal Code Act 1995* (Cth) ss 10.5, 361.4.

40 This article focuses on the history of the concept of *justification or excuse by or under a law* in the federal *Criminal Code*. For a more general overview of the drafting history see Matthew Goode, 'The Model Criminal Code Project' (1997) 5(4) *Australian Law Librarian* 265.

41 Attorney-General's Department, *Review of Commonwealth Criminal Law – Principles of Criminal Responsibility and Other Matters* (Interim Report, July 1990) 158 [13.18] ('*Review of Commonwealth Criminal Law*').

42 Ibid pt IX div 10.

43 Ibid 124 [11.6].

44 Ibid 125 [11.9].

recommendations were not immediately acted upon, however they energised the debate about the need for a federal code.[45] Subsequently, the Standing Committee of Attorneys-General created a Criminal Law Officers Committee. That committee produced a discussion draft and a final code in 1992 both of which, without explanation, omitted a general 'lawful authority' defence.[46] Accordingly, when the federal *Criminal Code* was enacted in 1995 it did not include a general 'lawful authority' defence.

The omission of a general 'lawful authority' defence was discussed by the renamed Model Criminal Code Officers Committee in 1996, when the Committee reported: 'The Committee has decided, after a thorough review of this area, that it is desirable to have a defence of, in essence, acting with lawful authority'.[47] That recommendation was reiterated in a 1998 report by the same committee.[48] Parliament acted on that recommendation in 2000, amending the federal *Criminal Code* to introduce section 10.5 – headed 'Lawful authority' – which provided: 'A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a [federal] law'.[49] This was the first use of the concept of *justification or excuse by or under a law* in the federal *Criminal Code*. The explanatory memorandum stated that the intention was to codify a 'longstanding principle'[50] and provided an example of a situation in which it was envisaged section 10.5 would be engaged:

> [A] law enforcement officer is *authorised by law* to physically restrain a person and does so within the scope of his or her authority … The main thing to keep in mind here is that the defence will not apply if there is no clear *justification or excuse provided for by another law*.[51]

The heading and drafting history of section 10.5, as well as the italicised words in the quoted section of the explanatory memorandum, suggest that the concept of *justification or excuse by or under a law* in section 10.5 entails *lawful authorisation*. In fact, the Review Committee explained that '[t]here is no reason to perpetuate the distinction drawn by the Codes between authorisation, justification and excuse'.[52] The Review Committee's comments in this regard

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45 See MR Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26(3) *Criminal Law Journal* 152, 153–4.

46 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 'Model Criminal Code: General Principles of Criminal Responsibility' (Discussion Draft, July 1992); Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: General Principles of Criminal Responsibility* (Final Report, December 1992).

47 Model Criminal Code Officers Committee, 'Model Criminal Code: Non-Fatal Offences against the Person' (Discussion Paper, August 1996) 118. The Committee recommended the following provision:

> 'Lawful authority
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> A person is not criminally responsible for an offence if the person's conduct constituting the offence is justified or excused by any Act or other law.'

48 Model Criminal Code Officers Committee, *Model Criminal Code: Non-Fatal Offences against the Person* (Final Report, September 1998) 139.

49 *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) sch 1 s 7.

50 Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth) 16 [11].

51 Ibid (emphasis added).

52 *Review of Commonwealth Criminal Law* (n 41) 124 [11.6].

should be approached with some caution. After all, by referring to both justifications and excuses, section 10.5 recognises that other laws will continue to be drafted as either justifications or excuses,[53] and thus the distinction will continue to have some descriptive force.[54] More important, however, and consistent with the thrust of the Review Committee's observations, is the fact that, properly understood, both justification and excuse entail some degree of lawful authorisation (even if, in the case of excuses, that authorisation is only partial, limited or contingent). It is to this shared quality of lawful authorisation that section 10.5 latches. But what light does the idea of *lawful authorisation* shed on the concept of *justification or excuse by or under a law*? That question is best answered by reference to ordinary meaning and authority.

It is well settled that, wherever possible, the words of criminal codes are to be given their ordinary meaning.[55] With that in mind, it is worth noting that, in their relevant sense, the terms 'by' and 'under' ordinarily mean 'pursuant to' or 'in accordance with'.[56] The ordinary meaning of 'by' and 'under' in the concept of *justification or excuse by or under a law* thus helpfully draws attention to the fact that *positive authorisation* is required, not merely the absence of prohibition. This is a distinction that the High Court has previously recognised when, in a slightly different context, it emphasised the difference between conduct that is lawful because it is 'not forbidden' and conduct that is lawful because it is 'positively authorised by law'.[57] Section 10.5 is, as we have seen from the text and legislative history, concerned with conduct that is *lawfully authorised*. Thus, section 10.5 would appear to be concerned with the second category of conduct identified by the High Court, namely, conduct that is *positively authorised by law*, rather than conduct that is merely not forbidden.

The fact that the authorisation for the purposes of section 10.5 can be *under*[58] a law admittedly allows for 'means of authorisation other than … [by] specific provisions'.[59] It may well be that the term 'under' 'recognises that the authorisation may be indirect or implied, rather than explicit'.[60] As will be seen below, conduct

53 For a recent discussion of the distinction between justification and excuse retained in some state and territory criminal codes, see *Pickett v Western Australia* [2020] HCA 20, [83], [98]–[107] (Nettle J).

54 For further discussion of the theoretical difference between justification and excuse see George P Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) 759; John C Smith, *Justification and Excuse in the Criminal Law* (Stevens and Sons, 1989) ch 1; John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) chs 5, 6.

55 *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

56 See the discussion of the ordinary meaning of 'by' and 'under', together with relevant dictionary references, in *R v Tkacz* (2001) 25 WAR 77, 85 [23]–[26] (Malcolm CJ). See also *Scott v Enfield City* (1982) 49 LGRA 301, 305 (Wells J).

57 *Taikato v The Queen* (1996) 186 CLR 454, 460 (Brennan CJ, Toohey, McHugh and Gummow JJ). See also Gans (n 22) 374–9 [10.3.1].

58 Note that the word 'under' was not contained in section 10.5 when the Bill was first introduced to Parliament. It was only added to avoid 'unduly restrictive interpretation' and to bring the provision in line with the latest version of the Model Criminal Code: Supplementary Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000 (Cth) 2 [7].

59 Ibid.

60 Ian Leader-Elliott, 'The Commonwealth Criminal Code: A Guide for Practitioners' (Commonwealth Attorney-General's Department and Australian Institute of Judicial Administration, 2002) 233, quoted

might be indirectly authorised where it is the subject of a permit issued pursuant to a statutory scheme or it is done to comply with a direction made under a statutory provision.[61] However, that does not detract from the requirement that there be some positive authorisation.[62]

If one accepts the above understanding of *justification or excuse by or under a law* in section 10.5 of the federal *Criminal Code*, the next question is whether that same meaning holds true for the same words in section 313.1, which were introduced five years later in 2005.[63] The presumption that words are used consistently throughout a statute may be rebutted by contrary indication.[64] The only possible contrary indication might be that in section 313.1 the concept of *justification or excuse by or under a law* does not appear under a sub-heading of 'lawful authority', as it does in section 10.5. However, that difference appears to be of no moment in light of a statutory note appearing after section 313.1. That note provides:

> A person is not criminally responsible for an offence against this Part [Part 9.1 – Serious drug offences] if the person's conduct is justified or excused by or under another Commonwealth law (see section 10.5). In 2005, Commonwealth laws that authorised importation, possession or use of controlled drugs … included the *Customs Act 1901*, the *Narcotic Drugs Act 1967* and the *Crimes Act 1914*.

This note is significant for two reasons. First, the interchangeable and uncritical use of 'justified or excused by or under [a law]' and 'authorised', and the reference to section 10.5, suggest that the terms have the same meaning in section 313.1 as they do in section 10.5. Thus, it appears that section 313.1 is intended to provide a defence for conduct authorised by or under state and territory laws in exactly the same way that section 10.5 provides a defence for conduct authorised by or under federal laws. Secondly, the reference to the three Commonwealth statutes supports the intuition that the concept of *justification or excuse by or under a law*, whether it be in sections 10.5 or 313.1, requires positive authorisation. This support derives from the fact that each of the *Customs Act 1901* (Cth), the *Narcotic Drugs Act 1967* (Cth) and the *Crimes Act 1914* (Cth) contain provisions that positively authorise the possession of drugs.[65]

Finally, the above reading is consistent with the explanatory memorandum attending the introduction of section 313.1, which provided:

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with apparent approval in *Baker v Chief of the Army* (2017) 319 FLR 62, 72 [58] (Tracey, Brereton and Hiley JJ).

61 Note, however, that written administrative 'instructions' issued pursuant to a general statutory power may not be sufficient to authorise conduct if those instructions 'are, in effect, aspirational statements of policy': *Baker v Chief of the Army* (2017) 319 FLR 62, 72–3 [65]–[69] (Tracey, Brereton and Hiley JJ).

62 For a discussion of the way in which positive authorisation can be implied, see *Taikato v The Queen* (1996) 186 CLR 454, 462–3 (Brennan CJ, Toohey, McHugh and Gummow JJ).

63 *Law and Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth).

64 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J). See also Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 141–2 [4.6]–[4.7].

65 See *Customs Act 1901* (Cth) s 203C(2); *Narcotic Drugs Act 1967* (Cth) ch 2; *Crimes Act 1914* (Cth) ss 85W(3)–(3A). Note, however, that it is arguable that the last two cited provisions of the *Crimes Act 1914* (Cth) structurally resemble the attempted ACT defences, particularly *Drugs of Dependence Act 1989* (ACT) ss 162(2), 171AA(3).

> The serious drug offences in proposed Part 9.1 are designed to target the illicit drug trade. Accordingly, defences are required to recognise the many legitimate uses of controlled substances in our community. Many of these legitimate uses are *authorised* through State and Territory licensing or permit schemes established under health, industrial or other *regulatory schemes*. Proposed Part 9.1 preserves the operation of those State and Territory schemes.[66]

The italicised words, particularly the reference to *authorisation*, further confirms the idea that the concept of *justification or excuse by or under a law* in section 313.1 was intended to mirror that in section 10.5, namely, it was intended to be engaged where conduct is positively authorised, rather than where conduct is merely not forbidden.

B Justification or Excuse by or under a Law – Case Law and Commentary

There is very limited case law and commentary on the federal *Criminal Code*'s concept of *justification or excuse by or under a law*. One of the only publicly available cases touching upon the topic is *Denlay v Federal Commissioner of Taxation* ('*Denlay*').[67] In that case, the Federal Court held that section 10.5 provided a defence for federal tax officers because those officers were acting pursuant to an independent statutory power that 'makes lawful that which would otherwise be unlawful'.[68] The reference to an independent statutory power engaging section 10.5 in *Denlay* is consistent with the idea that conduct will be *justified or excused by or under a law* only if it is *positively authorised*, rather than merely not forbidden.

Given the dearth of case law, it is unsurprising that the two comprehensive scholarly works on federal criminal law do not dwell long on this topic. Troy Anderson's *Commonwealth Criminal Law* is essentially silent on the subject.[69] Stephen Odgers' *Principles of Federal Criminal Law* provides[70] an example of a justification[71] by or under a law – section 15KN of the *Crimes Act 1914* (Cth), which states:

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66 Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth) 100 (emphasis added).

67 (2010) 81 ATR 644.

68 Ibid 675–7 [89]–[95] (Logan J). Note that this issue was not considered on appeal: *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412.

69 Troy Anderson, *Commonwealth Criminal Law* (Federation Press, 2nd ed, 2018) 53 [2.7.16], 216–17 [7.13.1]. It should also be noted that section 313.1 is reproduced, but not discussed in detail, in Peter Zahra and Courtney Young, *Zahra and Arden's Drug Laws in New South Wales* (Federation Press, 3rd ed, 2014) 331.

70 Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 4th ed, 2019) 157 [10.5.100].

71 With due respect to Odgers, it is suggested that section 15KN would be better understood as an excuse by or under law, rather than a justification. The words 'is not criminally responsible' in the provision are typical of statutory excuse provisions. See *R v Prow* [1990] 1 Qd 64, 68 (Thomas J), quoted with approval in *Pickett v Western Australia* [2020] HCA 20, [104] (Nettle J).

> **Protection from criminal liability – officers from issuing agencies**
>
> The chief officer, or an officer, of an issuing agency who does something that, apart from this section, would be a Commonwealth offence or an offence against a law of a State or Territory, is not criminally responsible for the offence if the thing is done to comply with a request under section 15KI or a direction under 15KL.

Section 15KN provides 'protection' for conduct that is done to comply with a statutory request or direction. This presents as a form of indirect statutory authorisation and suggests that, for Odgers at least, conduct will not be justified by or under a law merely because it is not forbidden. Odgers also provides an example of an excuse by or under a law – section 105.21(3) of the federal *Criminal Code*.[72] That provision is an example of more direct positive authorisation in that it creates a statutory 'reasonable excuse' defence for conduct that would otherwise be criminal. Both of Odgers' examples have been judicially cited with apparent approval, albeit without close consideration.[73]

A similar view appears to have been reached by Ian Leader-Elliott in *The Commonwealth Criminal Code: A Guide for Practitioners*, jointly prepared by the Commonwealth Attorney-General's Department and the Australian Institute of Judicial Administration. That document provides examples of what might amount to a justification or excuse by or under a law, including: 'provisions which confer investigatory powers on police and other officials, and permits for the import or manufacture of weapons, explosives or drugs'.[74] The first of these examples – statutory investigatory powers – describes the way in which positive authorisation can be *direct*.[75] The second of these examples – permits issued pursuant to a statutory scheme – describes the way in which positive authorisation can be *indirect*.[76] While not departing from a requirement for positive authorisation, Leader-Elliot's analysis thus helpfully draws out the distinction, discussed earlier, between justification or excuse *by* a law and justification or excuse *under* a law.

C Conclusion as to Interaction of ACT and Federal Law

The above analysis has suggested that, 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.

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72 Odgers (n 70) 157 [10.5.100].

73 *Baker v Chief of the Army* (2017) 319 FLR 62, 73 [70]–[71] (Tracey, Brereton and Hiley JJ).

74 Leader-Elliott (n 60) 233, quoted with apparent approval in *Baker v Chief of the Army* (2017) 319 FLR 62, 72 [58] (Tracey, Brereton and Hiley JJ).

75 See also the reference to 'a law enforcement officer [who] is authorised by law to physically restrain a person' in Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth) 16 [11].

76 See also the reference to 'State and Territory licensing or permit schemes established under … regulatory schemes' in Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth) 100.

A helpful analogy can be drawn to the way two parents might regulate their child's play in a backyard that is entirely occupied by a chicken coop and a vegetable patch. The parents agree that each has an independent power to prohibit their child from entering a particular part of the yard but, importantly, if one parent authorises conduct then that authorisation provides a defence for behaviour that would otherwise breach *the other* parent's prohibitions. Assume parent A prohibits the child from entering any part of the yard. The only way for parent B to protect the child's play in the vegetable patch from being in breach of parent A's prohibition would be for parent B to authorise the child to enter the vegetable patch. It would not be enough for parent B to prohibit play only in the chicken coop (saying nothing about the vegetable patch), because such a rule would not positively authorise play in the vegetable patch.

For present purposes, the Commonwealth can be likened to parent A and the ACT to parent B. The Commonwealth prohibits all cannabis possession and cultivation whereas the ACT has rolled back its prohibitions such that low-level cannabis possession and cultivation is not forbidden. But the ACT has not *positively authorised* the possession or cultivation of cannabis.

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.[77] 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*.[78] The second phrase is used because it also appears in Odgers' judicially approved example, and constitutes a well-recognised formulation of statutory excuses.[79] 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.

D Practical Consequences

The upshot of the above analysis is that, technically, persons possessing or cultivating small amounts of cannabis in the ACT could be charged, prosecuted

77 Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth) 100.

78 Odgers (n 70) 157 [10.5.100]; *Baker v Chief of the Army* (2017) 319 FLR 62, 73 [70] (Tracey, Brereton and Hiley JJ).

79 *R v Prow* [1990] 1 Qd 64, 68 (Thomas J), quoted with approval in *Pickett v Western Australia* [2020] HCA 20, [104] (Nettle J).

and found guilty of an offence against section 308.1 of the federal *Criminal Code*.[80] In practice, however, it seems unlikely that the ACT Police or the AFP will be targeting personal cannabis use in the ACT. The ACT Police have said as much when Chief Police Officer Ray Johnson indicated that they will be working to give 'best effect' to the new legislation.[81] As to the AFP, it is to be recalled that the ACT Attorney-General apparently engaged with the AFP prior to the passage of the new legislation.[82]

Even if the ACT Police or AFP referred a matter to the CDPP it seems unlikely that the case would be prosecuted. The CDPP guidelines with respect to federal drug offences acknowledge, by quoting from the relevant explanatory memorandum, that those offences are 'principally targeted at organised illicit drug traders and commercially motivated drug crime'.[83] Unsurprisingly, this means that low-level possession offences are exceedingly rarely prosecuted under federal law, whether the controlled drug is cannabis or another prescribed drug (such as heroin, cocaine, methamphetamine and pseudoephedrine). In fact, it appears that over a recent five-year period only *three people* were sentenced in higher courts across Australia for possessing less than a marketable quantity of *any* controlled drug contrary to section 308.1(1) of the federal *Criminal Code*.[84] It is thus safe to assume that ACT residents possessing and cultivating small amounts of cannabis for personal use are unlikely to be deemed appropriate targets for federal prosecution.

IV FEDERALISM IMPLICATIONS

Criminal law has historically been left to the states and territories, primarily as a result of the omission of criminal law from the federal legislative powers in section 51 of the *Australian Constitution*. Rather than follow Canada, where criminal law is a federal matter, the framers of the *Australian Constitution* considered that criminal law should remain the province of the states (as it is in

80 For completeness, it should be noted that, if the above analysis is correct with respect to justification or excuse by or under a law, it may not prevent a person charged with the federal possession offence relying on a reasonable but mistaken belief that the ACT law justified or excused their conduct: see *Criminal Code Act 1995* (Cth) s 313.2. Whether or not section 313.2 could be relied upon would depend on whether that provision, properly interpreted, is limited to mistakes as to facts, or whether it extends to mistakes as to legal effects or the operation of law. The examples of administrative and technical errors in drug licencing schemes discussed in the relevant Explanatory Memorandum suggest that the provision may be limited to the former: see Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth) 100–1.

81 Lowrey (n 35).

82 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 25 September 2019, 3810 (Gordon Ramsay, Attorney-General).

83 David Adsett and Scott Bruckard, *Charging Guidelines for Serious Drug Offences under Part 9.1 of the Criminal Code* (Guidelines, 16 September 2014) 2, quoting Explanatory Memorandum, Law and Justice Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth) 1.

84 Mizzi, Baghizadeh and Poletti (n 10) 119.

Switzerland and the United States).[85] There were good reasons for this. Australian states and territories 'take often quite different views on the criminality to be ascribed to certain conduct'.[86] One would expect the differences in these views to be most pronounced when the criminal law or policy in question is especially liberal or especially punitive; recreational drug use is one such issue. Recent nationwide debates about pill testing, safe injecting rooms and drug decriminalisation have revealed a diversity of opinions emanating from different corners of the country.[87] A well-functioning federal system should be able to accommodate the coexistence of such views and, over the longer term, should allow for their practical outworking through the state-by-state democratic processes.[88] For the most part, this appears to be happening, as indicated by a recent academic survey documenting the many 'important variations' that are comfortably accommodated with Australia's patchwork of drug laws.[89]

In the present case, it is clear that the ACT Parliament aimed to decriminalise personal cannabis use and provide a defence to federal prosecution. Admittedly, that aim does not appear to have been perfectly executed. However, it would be constitutionally unbecoming of the federal government to take advantage of the new ACT law's deficiencies to impose federal policies on a jurisdiction which has clearly, and democratically, expressed a preference for an alternative policy. Far better for the federal government to acknowledge the constitutional values at stake, particularly the prerogative of states and territories to determine what conduct to criminalise within their borders and how it should be punished (if at all). In deference to these considerations, federal agencies should refrain from investigating and prosecuting low-level federal cannabis possession offences in the ACT. This would be an entirely appropriate exercise of the executive's prosecutorial discretion, a discretion that has long been informed by important public policy considerations such as those identified above.

85 For reference to the Canadian, Swiss and American models in framing-era literature see Thomas C Just, *Leading Facts Connected with Federation* (Mercury Office, 1891) 96; Howard Willoughby, *Australian Federation: Its Aims and Its Possibilities* (Sands & McDougall, 1891) 32, 132.

86 *Strickland (A pseudonym) v DPP (Cth)* (2018) 93 ALJR 1, 40 [199] (Gordon J).

87 For an illustrative sampling of geographically diverse views on pill testing, see the politicians quoted in Amanda Lyons, 'State of Play: For and Against Pill Testing', *newsGP* (online, 7 January 2019) <https://www1.racgp.org.au/newsgp/professional/state-of-play-for-and-against-pill-testing>.

88 Incidentally, this appears to be what is happening in the United States, where federal cannabis offences have not deterred an increasing number of states from legalising personal cannabis possession: see Julian R Murphy, 'Marijuana, Strawberries and Hot Air Balloons: The Expressive Function of Federal Criminal Law' (2019) 30(2) *Public Law Review* 94, 95.

89 Caitlin Hughes et al, 'Criminal Justice Responses Relating to Personal Use and Possession of Illicit Drugs: The Reach of Australian Drug Diversion Programs and Barriers and Facilitators to Expansion' (Monograph No 27, National Drug and Alcohol Research Centre, 2019) 19 [4.4].

V CONCLUSION

The new ACT laws are to be reviewed after three years of operation.[90] It is recommended that at that review, if not before, the ACT consider putting its policy objectives on a surer footing, by passing legislation – perhaps a permit or licencing scheme or a provision like that in the appendix to this article – that positively authorises the possession and cultivation of small amounts of cannabis. At present, it appears doubtful that ACT law provides any effective defence to federal prosecution. Nevertheless, as has been argued above, there are good reasons rooted in our constitutional structure for the federal government to refrain from intervening in the ACT's cannabis regulation, whatever its shortcomings might be. The very existence of section 313.1 indicates that federal drug offences were drafted on the understanding that there would be exceptions based on state and territory law, so the recommendation advanced here would simply bring the ACT and federal laws into more harmonious operation.

APPENDIX

Protection from criminal liability – authorisation, justification or excuse for possession or cultivation of cannabis

(1) A person who possesses or cultivates cannabis in such a way that, apart from this section, would be an offence against the law of the Territory or Part 9.1 of the *Criminal Code Act 1995* (Cth), is not criminally responsible for the offence if:

(a) in the case of a person who possesses cannabis–

(i) the amount of dried cannabis possessed is 50 grams or less; or

(ii) the amount of cannabis that is not dried cannabis is 150 grams or less;

(b) in the case of a person who cultivates cannabis–

(i) the amount of cannabis cultivated is 2 plants or less; and

(ii) the plants are cultivated in a place that is not lawfully accessible to the public; and

(iii) either:

a. 4 cannabis plants or less are being cultivated at the premises;

or

90 *Drugs of Dependence Act 1989* (ACT) s 205A(1).

b. if more than 4 cannabis plants are being cultivated at the premises–

i. the person lived at the premises when cultivating the cannabis; and

ii. the person was not aware, and could not reasonably have been expected to be aware, that more than 4 cannabis plants were being cultivated at the premises.

(2) The defendant has an evidential burden in relation to the matters mentioned in section (1).