

Department of Legislative Services  
Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 891

(Senator Feldman, *et al.*)

Judicial Proceedings

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Constitutional Amendment - Cannabis - Right to Use, Possess, and Cultivate

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This proposed constitutional amendment, if approved by the voters at the next general election, establishes an individual's right under State law to use cannabis and to possess up to two ounces of cannabis at any one time and cultivate up to six cannabis plants at any one time, if the individual is at least age 21. The purchase or sale of cannabis must be regulated as necessary to ensure health and safety and taxed to the extent the tax revenues are used for specified purposes. An employer is not required to allow or accommodate the use or possession of cannabis by an employee in the workplace. The constitutional right does not apply to laws relating to driving under the influence of cannabis or to laws prohibiting or regulating the public smoking of cannabis and does not prohibit a person from prohibiting or regulating the use, possession, or cultivation of cannabis in or on property that the person owns, occupies, or controls.

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Fiscal Summary

**State Effect:** No effect in FY 2018. Significant decrease in general fund revenues and expenditures beginning in FY 2019 due to the nullification of civil and criminal penalties for the use, possession, or cultivation of specified amounts of cannabis. Special fund revenues and expenditures for the Department of Health and Mental Hygiene (DHMH) also decrease significantly beginning in FY 2019 due to the District Court no longer remitting collected penalties from cannabis civil citations to DHMH for drug treatment and education programs. Special fund revenues and expenditures for the Comptroller also increase beginning in FY 2019 to the extent the State regulates and taxes cannabis for specified purposes.

**Local Effect:** Significant decrease in revenues and expenditures beginning in FY 2019 due to the nullification of civil and criminal penalties for the use, possession, or cultivation of specified amounts of cannabis.

**Small Business Effect:** Potential meaningful for small businesses that are licensed growers, processors, or dispensers under the State’s medical cannabis program.

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## Analysis

### Current Law:

#### *Criminal Law Provisions Related to Marijuana*

Controlled dangerous substances (CDS) are listed on one of five schedules (Schedules I through V) set forth in statute depending on their potential for abuse and acceptance for medical use. Under the federal Controlled Substances Act, for a drug or substance to be classified as Schedule I, the following findings must be made: (1) the substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in the United States; and (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision.

No distinction is made in State law regarding the illegal possession of any CDS, regardless of which schedule it is on, with the exception of marijuana. The use or possession of a CDS other than marijuana is a misdemeanor with maximum criminal penalties of four years imprisonment and/or a \$25,000 fine.

In general, a defendant in possession of 10 grams or more of marijuana is guilty of a misdemeanor and subject to imprisonment for up to one year and/or a fine of up to \$1,000. However, pursuant to Chapter 158 of 2014, possession of less than 10 grams of marijuana is a civil offense punishable by a fine of up to \$100 for a first offense and \$250 for a second offense. The maximum fine for a third or subsequent offense is \$500. For a third or subsequent offense, or if the individual is younger than age 21, the court must (1) summon the individual for trial upon issuance of a citation; (2) order the individual to attend a drug education program approved by DHMH; and (3) refer him or her to an assessment for a substance abuse disorder. After the assessment, the court must refer the individual to substance abuse treatment, if necessary.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. The law also established that the use or possession of marijuana involving smoking marijuana in a public place is a civil offense, punishable by a fine of up to \$500.

However, in a prosecution for the use or possession of marijuana, it is an affirmative defense that the defendant used or possessed the marijuana because (1) the defendant has

a debilitating medical condition that has been diagnosed by a physician with whom the defendant has a bona fide physician-patient relationship; (2) the debilitating medical condition is severe and resistant to conventional medicine; and (3) marijuana is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. Likewise, in a prosecution for the possession of marijuana, it is an affirmative defense that the defendant possessed marijuana because the marijuana was intended for medical use by an individual with a debilitating medical condition for whom the defendant is a caregiver; however, such a defendant must notify the State's Attorney of the intention to assert the affirmative defense and provide specified documentation. In either case, the affirmative defense may not be used if the defendant was using marijuana in a public place or was in possession of more than one ounce of marijuana.

A "bona fide physician-patient relationship" is a relationship in which the physician has ongoing responsibility for the assessment, care, and treatment of a patient's medical condition. A "debilitating medical condition" is a chronic or debilitating disease or medical condition (or the treatment of a chronic or debilitating disease or medical condition) that produces one or more of the following, as documented by a physician with whom the patient has a bona fide physician-patient relationship: (1) cachexia or wasting syndrome; (2) severe or chronic pain; (3) severe nausea; (4) seizures; (5) severe and persistent muscle spasms; or (6) any other condition that is severe and resistant to conventional medicine.

Finally, medical necessity may be used as a mitigating factor in a prosecution for the possession or use of marijuana. A defendant who cannot meet the affirmative defense standard for a not guilty verdict may introduce, and the court must consider as a mitigating factor (with regard to penalties on conviction), any evidence of medical necessity. Pursuant to Chapter 351 of 2015, if a court finds that the use or possession of marijuana was due to medical necessity, the court *must dismiss* the charge.

#### *Justice Reinvestment Act – Changes Effective October 1, 2017*

Effective October 1, 2017, Chapter 515 of 2016 (also known as the "Justice Reinvestment Act") reduces the maximum incarceration penalty for the use or possession of 10 grams or more of marijuana from one year to six months.

Further, before imposing a sentence for this offense, the court is authorized to order DHMH, or a certified and licensed designee, to conduct an assessment of the defendant for a substance use disorder and determine whether the defendant is in need of and may benefit from drug treatment. DHMH or the designee must conduct an assessment and provide the results, as specified. The court must consider the results of an assessment when imposing the defendant's sentence and, as specified, (1) must suspend the execution of the sentence, order probation, and require DHMH to provide the medically appropriate level of treatment or (2) may impose a term of imprisonment and order the Division of Correction within the

Department of Public Safety and Correctional Services or a local correctional facility to facilitate the medically appropriate level of treatment.

### *Medical Cannabis Commission*

Chapter 403 of 2013 established, Chapters 240 and 256 of 2014 expanded, and Chapter 251 of 2015 and Chapter 474 of 2016 further modified the State's medical cannabis program. The Natalie M. LaPrade Medical Cannabis Commission currently allows for the licensure of growers, processors, and dispensaries, and the registration of their agents. The program also establishes a framework to certify physicians, qualified patients (including veterans), and their caregivers to provide qualified patients with medical cannabis legally under State law via written certification. Effective June 1, 2017, dentists, podiatrists, nurse practitioners, and nurse midwives are authorized to be certifying providers – along with physicians – under the medical cannabis program. Specifically, a qualified patient who has been provided with a written certification from an authorized certifying health care provider in accordance with a bona fide provider-patient relationship may obtain a 30-day supply of medical cannabis. Medical cannabis is defined in regulation as any product containing usable cannabis or medical cannabis finished product. A 30-day supply is defined as 120 grams of usable cannabis, unless a qualified patient's certifying physician determines that this amount is inadequate to meet the medical needs of the patient. Regulations establish PTSD as one of several debilitating medical conditions.

**Background:** According to the National Conference of State Legislatures (NCSL), 28 states, the District of Columbia, Guam, and Puerto Rico have comprehensive public medical cannabis programs. Additionally, another 17 states allow for the use of low THC (delta-9-tetrahydrocannabinol), high CBD (cannabidiol) products for medical reasons in limited situations or as a legal defense. Further, also according to NCSL, 21 states (including Maryland) and the District of Columbia have decriminalized small amounts of marijuana. Prior to the November 2016 election, recreational use was legal in four states (Alaska, Colorado, Oregon, and Washington) and the District of Columbia. In the November 2016 election, ballot initiatives to legalize recreational use passed in California, Massachusetts, Maine, and Nevada.

Although possession of marijuana remains illegal at the federal level, the U.S. Department of Justice (DOJ) announced in August 2013 that it would focus on eight enforcement priorities when enforcing marijuana provisions of the Controlled Dangerous Substances Act. The guidelines also state that, although the department expects states with legalization laws to establish strict regulatory schemes that protect these eight federal interests, the department is deferring its right to challenge their legalization laws. Further, in 2014 and 2015, the U.S. Congress passed federal spending measures that contained provisions to

effectively terminate federal enforcement against legal *medical* marijuana operations by prohibiting federal spending on actions that impede state *medical* marijuana laws.

In February 2014, the U.S. Treasury Department, in conjunction with DOJ, issued marijuana guidelines for banks that serve “legitimate marijuana businesses.” The February 2014 guidelines reiterated that the provisions of money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act remain in effect with respect to marijuana-related conduct. Further, the guidelines state that financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under these provisions. However, the guidelines also establish that prosecutors should apply the eight enforcement priorities listed in the August 2013 guidance document when deciding which cases to prosecute.

Thus, although the federal government appears to have relaxed its position on the enforcement of marijuana laws, marijuana remains a CDS under federal law, and residents of states that have legalized marijuana are not immune from federal prosecution. In addition, DOJ has reserved the right to file a preemption lawsuit against states that have legalized marijuana at some point in the future.

Additionally, the above-mentioned federal policies were adopted under a previous administration and are subject to change under the new administration.

States are not obligated to enforce federal marijuana laws, and the federal government may not require states to recriminalize conduct that has been decriminalized.

The Judiciary advises that in fiscal 2016, there were approximately 15,051 violations and 9,394 guilty dispositions involving the possession of less than 10 grams of marijuana. Additionally, in fiscal 2016, there were 5,444 violations and 189 convictions in the District Court and 1,944 violations and 350 convictions in the circuit courts for possession of 10 grams or more of marijuana.

**State Fiscal Effect:** Although not specifically defined in the bill, this analysis assumes “cannabis” encompasses all existing references to “marijuana” under State law. Therefore, the rights established under the proposed constitutional amendment render certain existing penalties, both civil and criminal, regarding the use, possession, or cultivation of cannabis null and void. The bill specifically allows possession of only up to 2 ounces (58 grams) of cannabis at any one time and cultivation of up to 6 cannabis plants at any one time. This analysis assumes that possession of more than 58 grams and cultivation of more than 6 cannabis plants are still subject to criminal penalties under the bill.

Thus, this analysis assumes that the following criminal offenses still apply under the bill:

- possession of more than 58 grams of marijuana;
- manufacture, distribution, dispensing, or possession of 50 pounds or more of marijuana (more stringent penalty with mandatory minimum imprisonment of up to 5 years and a fine of up to \$100,000);
- conspiracy by a drug kingpin to manufacture, distribute, dispense, transport in, or bring into the State 50 pounds or more of marijuana (felony with imprisonment of between 20 years and 40 years and/or a fine of up to \$1 million);
- importation of 45 kilograms or more of marijuana (felony subject to imprisonment of up to 25 years and/or a fine of up to \$50,000); and
- importation of between 5 kilograms and 45 kilograms of marijuana (felony subject to imprisonment of up to 10 years and/or a fine of up to \$10,000).

However, this analysis also assumes that most of the 189 convictions in the District Court and 350 convictions in the circuit courts for possession of 10 grams or more of marijuana involved less than 58 grams of marijuana, and thus would not be subject to criminal penalties under the bill. Possession of 10 grams or more of marijuana is a misdemeanor subject to imprisonment for up to one year and/or a fine of up to \$1,000 (although effective October 1, 2017, Chapter 515 of 2016 reduces the maximum incarceration penalty for the use or possession of 10 grams or more of marijuana from one year to six months and authorizes a court to order a defendant to undergo an assessment and/or treatment for a substance abuse disorder before imposing a sentence). Therefore, general fund revenues and expenditures decrease significantly beginning in fiscal 2019 as a result of the nullification of the criminal penalties for possession of 10 grams or more, but less than 58 grams, of cannabis. This estimate reflects the bill's inclusion on the ballot in the November 2018 election and therefore assumes the bill has no impact until fiscal 2019.

Special fund revenues and expenditures for DHMH decrease significantly beginning in fiscal 2019 due to the District Court no longer remitting collected penalties from civil citations for use or possession of less than 10 grams of marijuana to DHMH for drug treatment and education programs. The penalties for this offense range from \$100 to \$500. In fiscal 2018, the projected revenue from these civil penalties for DHMH's Marijuana Citation Fund is \$475,000.

The Judiciary advises that citations need to be recalled and revised to meet the bill's requirements, at an additional cost. However, the Department of Legislative Services advises that the District Court can implement the changes during the annual reprinting of these citations using existing budgeted resources.

The proposed constitutional amendment also requires the State to regulate the sale and purchase of cannabis, including taxation if tax revenues are used for specified purposes. Therefore, the proposed constitutional amendment also results in new special fund

revenues and expenditures for the Comptroller to be distributed for the authorized purposes, which include (1) education for public schools; (2) public school construction and capital improvement; (3) substance abuse treatment and prevention; (4) recidivism reduction and reentry services; and (5) mental health services. The extent of any such impact depends on the specific tax and regulatory structures imposed by the State, which cannot be predicted.

State costs of printing ballots may increase to the extent inclusion of the proposed constitutional amendment on the ballot at the next general election would result in a need for a larger ballot card size or an additional ballot card for a given ballot (the content of ballots varies across the State, depending on the offices, candidates, and questions being voted on). However, it is assumed that the potential for such increased costs resulting from any proposed constitutional amendments will have been anticipated in the State Board of Elections' budget irrespective of this bill. Pursuant to Chapter 564 of 2001, the State Board of Elections shares the costs of printing paper ballots with the local boards of elections.

**Local Revenues:** Local revenues decrease significantly beginning in fiscal 2019 due to the nullification of civil and criminal penalties for the use of marijuana and the possession or cultivation of specified amounts of cannabis for those cases heard in the circuit courts.

**Local Expenditures:** Expenditures decrease significantly beginning in fiscal 2019 as a result of the bill's elimination of the incarceration penalty for the use or possession of 10 grams or more, but less than 58 grams, of cannabis and fewer individuals being committed to local detention facilities. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. A \$45 per diem State grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility; beginning October 1, 2017, counties may receive the additional \$45 per day grant for inmates sentenced to the custody of the State who receive reentry or other prerelease programming and services from a local facility. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

Local boards of elections' printing and mailing costs may increase to include information on the proposed constitutional amendment with specimen ballots mailed to voters prior to the next general election and to include the proposed amendment on ballots. It is assumed, however, that the potential for such increased costs resulting from any proposed constitutional amendments will have been anticipated in local boards of elections' budgets irrespective of this bill.

**Small Business Effect:** The proposed constitutional amendment establishes an individual's right to use, possess, and *cultivate* specified amounts of cannabis. Therefore, revenues may decrease significantly for small businesses that are licensed growers, dispensers, or processors under the State's medical cannabis program, to the extent individuals choose not to obtain cannabis through the program. However, any fiscal impact may not occur until fiscal 2019, depending on when the program becomes fully operational. On the other hand, the proposed constitutional amendment could create additional business opportunities for other entities that seek to cultivate and sell cannabis.

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### **Additional Information**

**Prior Introductions:** HB 665 of 2016, a similar bill, received an unfavorable report from the House Judiciary Committee.

**Cross File:** HB 1236 (Delegate Moon, *et al.*) - Judiciary.

**Information Source(s):** Comptroller's Office; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State Department of Education; Public School Construction Program; Department of Health and Mental Hygiene; Department of Public Safety and Correctional Services; Department of State Police; National Conference of State Legislatures; Department of Legislative Services

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Analysis by: Sasika Subramaniam

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510