

## LEGAL REVIEW NOTE

Bill No.: HB 770

LC#: LC3032, To Legal Review Copy, as of  
March 22, 2019

**Short Title:** Provide for the legalization of  
recreational marijuana

**Attorney Reviewer:** Todd Everts/Cori Hach

**Date:** March 22, 2019

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

#### Legal Reviewer Comments:

LC3032, as drafted, would legalize the possession, cultivation, distribution, and sale of marijuana within the parameters of a new act to be titled the "Marijuana Regulation Act." The bill draft would also amend existing criminal law provisions relating to marijuana and establish a framework for state and local taxation of marijuana sales. The proposed Marijuana Regulation Act would not affect the Montana Medical Marijuana Act, which would continue to be currently administered in the same manner.

Like the Montana Medical Marijuana Act, LC3032, as drafted, may raise potential federal constitutional issues related to the Supremacy Clause under the United States Constitution, Art. VI, cl. 2, which declares that federal law is the "supreme law of the land." The most recent United States Supreme Court case addressing marijuana confirms that the federal Controlled Substances Act, 21 U.S.C. 801, *et seq.*, prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use. *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195 (2005). In other words, because federal law overrides state law when the two conflict, it is likely a federal crime to cultivate, manufacture, distribute, and possess marijuana regardless of any state law to the contrary. (*Raich* 545 U.S. at 33-17).

Although *Raich* dealt specifically with California's Compassionate Use Act, authorizing the limited possession and cultivation of marijuana for *medicinal* purposes, the legal analysis would also apply to a statutory scheme authorizing marijuana possession, cultivation, and sale for recreational purposes. For this reason, the Marijuana Regulation Act proposed in LC3032 may potentially conflict with federal law and, by extension, may raise potential constitutional conformity issues pursuant to the United States Supreme Court holding in *Raich*.

**Requester Comments:**