

Select Committee on the Drugs of  
Dependence (Personal Use) Amendment  
Bill 2021

# **Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill 2021**

**Dissenting report from  
Peter Cain MLA**

# Executive Summary

I dissent from Recommendations 1, 3, 4 and 17.

The following recommendations should be amended to apply to, or interpreted to apply to, the *Drugs of Dependence Act 1989* as amended by the *Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019*: Recommendations 2, 5 and 6.

I agree with the other Recommendations, 7-16, which relate to improving and better resourcing the drug support sector and advancing harm minimisation policies and practices. The only exception to this is that given my dissent from supporting the Bill, the 4<sup>th</sup> point in Recommendation 16 is redundant.

I agree with the content of both Chapters 1 and 3 of the Committee Report, “Background” and “The service sectors” respectively, except with regards to recommendations for which I have indicated my dissent or for those I would amend.

I present in the following pages an alternative to Chapter 2, “The Bill and other criminal justice matters” in support of my recommendation that the *Drugs of Dependence (Personal Use) Amendment Bill 2021* should not be passed.

# The Bill and other criminal justice matters

## Current possession offences

- 1 The *Drugs of Dependence Act 1989* (the Act) specifies penalties for the possession, sale, and supply of prohibited substances, drugs of dependence, and has a separate set of offences for cannabis. The Criminal Code Regulation 2005 (ACT) defines 185 prohibited substances, which include heroin, methylenedioxymethamphetamine (MDMA) and cannabis. The Regulation also defines 75 drugs of dependence (which it refers to as controlled medicines), which include amphetamine, cocaine and methylamphetamine.
- 2 Sections 169 and 171 of the Act have general offences for possessing drugs of dependence and prohibited substances respectively. The penalties comprise up to two years in prison or 50 penalty units, or both. The value of a penalty unit for an individual is \$160, setting the maximum fine in this case at \$8,000.<sup>1</sup>
- 3 The Act has separate offences for cannabis:
  - the simple cannabis offence of cultivating one or two plants, where the person is under 18 years of age, with a maximum penalty of one penalty unit (section 162);
  - the simple cannabis offence of possessing a small amount of cannabis (such as up to 50 grams of dried cannabis), where the person is under 18 years of age, with a maximum penalty of one penalty unit (sub-section 171AA(1));
  - possession of larger amounts of cannabis (such as over 50 grams of dried cannabis), with a maximum penalty of 50 penalty units, imprisonment for 2 years, or both (sub-section 171AA(2));
  - cultivation of more than four cannabis plants at their premises, or any number of plants at other premises, with a maximum penalty of 50 penalty units, imprisonment for 2 years, or both (sections 171AAA and 171AAB);
  - stores cannabis that children can access, with a maximum penalty of 50 penalty units, imprisonment for 2 years, or both (section 171AAC); and
  - smoking cannabis in a public place or smoking cannabis and exposing a child to the vapour, with a maximum penalty of 30 penalty units (section 171AB).
- 4 Section 171A of the Act specifies a process for simple cannabis offences. The police officer must serve an offence notice on the person/child and their parents, or whoever has that role with whom they are residing. The notice must specify some processes, including that, if the person pays the prescribed penalty within 60 days, then all liability is discharged and there is no conviction for the offence. The prescribed penalty is \$100.
- 5 Since 2001, the Australian Capital Territory (ACT) has had a non-legislated approach to police diversion called the Illicit Drug Diversion Program. Its aim is to divert people away

---

<sup>1</sup> Section 133 of the *Legislation Act 2001* defines the value of a penalty unit.

from the criminal justice system to health and social services.<sup>2</sup> ACT Policing stated that its internal governance specifies various criteria for diversion, including the amount, the person's age, the context, and whether other offences are involved.<sup>3</sup>

- 6 In 2019–20, ACT Policing completed 192 referrals under the Illicit Drug Diversion Program.<sup>4</sup> The drugs most involved were cocaine (68), cannabis (56), and MDMA (34). ACT Policing advised the Committee that it focuses on criminality rather than personal use:

ACT Policing very rarely criminalises the personal use of substances – resources are targeted at drug trafficking. However, criminality can often be driven by drug use. For instance, drug possession offences are regularly prosecuted alongside other more serious offences.

ACT Policing already adopts a harm minimisation approach to illicit drugs.<sup>5</sup>

## Description of the Bill

- 7 The Bill seeks to decriminalise possession of certain drugs under personal possession limits for 11 prohibited substances and drugs of dependence. The drugs, and their personal possession limits, are in the table below.

Drug	Personal possession limit
Amphetamine	2 grams
Cannabis, dried	50 grams
Cannabis, harvested	150 grams
Cocaine	2 grams
Heroin	2 grams
LSD	0.002 grams
Lysergic acid	0.002 grams
MDMA	0.5 grams
Methadone	2 grams
Methylamphetamine	2 grams
Psilocybine	2 grams

<sup>2</sup> ACT Government-Health, *Submission 15*, pp 4, 22.

<sup>3</sup> ACT Policing, *Submission 7*, p 6.

<sup>4</sup> By way of context, there were 149 offences committed in the same year where drugs were also seized—ACT Policing, *Submission 7*, p 9.

<sup>5</sup> ACT Policing, *Submission 7*, p 2.

- 8 It was uncontested that these substances are extremely harmful to the mental and physical health of the user and that the use of some would significantly increase the harm that a user would inflict on themselves and those around them, as well as consequential destruction of property.

## Overview of evidence on the Bill

- 9 Broadly, there were three views on the Bill presented by those who engaged with the inquiry:

- to reject it or express strong reservations about it;<sup>6</sup>
- to modify it so that it would only apply to cannabis and MDMA/cocaine;<sup>7</sup> and
- to support it, sometimes with changes around which drugs are listed and the settings of the personal possession limits.<sup>8</sup>

- 10 The submissions that rejected the Bill argued that the ACT already has an effective approach to drugs. Former Attorney-General for the ACT, Bill Stefaniak, argued ‘This Bill appears to be a reaction to a virtually non-existent problem.’<sup>9</sup> Consistent with this, the ACT Law Society argued that the Bill would have a limited additional effect in diverting drug users away from the criminal justice system, noting that police are already doing this:

Although the Society supports a harm minimisation and therapeutic approach in dealing with drug users, we also expect that the Bill will have a minimal effect on diverting drug users from the criminal justice system. We observe that it is relatively uncommon for drug users to come before the courts charged only with drug possession...In cases where a police officer detects a person in possession of only a small quantity of an illicit drug for the first time, we understand that the Australian Federal Police is already adopting a diversionary approach.<sup>10</sup>

- 11 The ACT Government, ACT Policing and the AFP Association recommended a staged approach. ACT Policing was concerned about the practicalities of how the new law might be enforced; police can at least visually identify cannabis and MDMA with reasonable accuracy and test for these substances’ roadside. They also argued that the link between methylamphetamine and criminality also supported a staged approach.<sup>11</sup> The ACT Government stated that community confidence would be an important element in any expansion of the arrangements for cannabis:

The Select Committee could consider a phased approach to the introduction of a Simple Offence Notice, starting with drugs which have a lower overall level of health and social

---

<sup>6</sup> Drug Free Australia, *Submission 31*; Mr Bill Stefaniak, *Submission 45*, ACT Law Society, *Submission 10*.

<sup>7</sup> ACT Policing, *Submission 7*, pp 11, 14; ACT Government-Health, *Submission 15*, p 27; the Australian Federal Police Association supported the expansion to MDMA as a 12-month trial, *Submission 33*, p 6.

<sup>8</sup> Examples are the Alcohol, Tobacco and Other Drug Association ACT, *Submission 27*, p 2; Canberra Alliance for Harm Minimisation and Advocacy, *Submission 39*, p 2; Burnet Institute, *Submission 34*, p 2.

<sup>9</sup> Mr Bill Stefaniak, *Submission 45*, p 3.

<sup>10</sup> ACT Law Society, *Submission 10*, p 2.

<sup>11</sup> ACT Policing, *Submission 7*, p 11.

harms (such as MDMA/ecstasy or cocaine) and potentially progressing to other drugs with a higher level of harm (such as heroin and methamphetamine) dependent on assessment/evaluation of the earlier phase. A phased approach of this type could address potential community concerns about the scope of drugs included in the legislation and build community knowledge and confidence in the operation of the scheme.<sup>12</sup>

- 12 Participants in the inquiry who supported the Bill emphasised the benefits of decriminalisation, such as reduced harm, reduced stigma and increased use of drug treatment services.<sup>13</sup> The Alcohol, Tobacco and Other Drug Association ACT summarised this view as follows:

ATODA strongly endorses the Drugs of Dependence (Personal Use) Amendment Bill 2021 (the Bill) as a necessary step towards improving the health of the ACT community by re-setting the Territory's drug law on a firmer evidence base. The 'war on drugs' approach has failed. As a result, drug use is prevalent, with 43% of Australian adults having used illicit drugs. Similar human-rights and health focused reforms are occurring worldwide, and the overwhelming evidence is that decriminalisation does not increase drug use. This is well illustrated by decriminalisation and the partial legalisation of cannabis in the ACT.<sup>14</sup>

## Analysis of the Bill

### Simplistic approach to a complex problem

- 13 This is a complex matter involving justice, health, and social services where a change in one area will often have effects across government. Accordingly, drug policy requires a whole-of-government evaluation and response. This more comprehensive approach is far superior to that of a Member presenting an initiative that only addresses one aspect of government operations responding to the use of harmful drugs.
- 14 The Committee received evidence that the treatment sector needs significant additional resourcing and that a detailed planning process is required to ensure that it can meet demand.<sup>15</sup> Decriminalisation will likely place further pressure on under-resourced drug support and health sectors. It is my view that the priority for the sector is resourcing. I am supportive of the claim for increased funding and this is discussed further in Chapter 3 of the Committee Report.
- 15 Generally, criminalising behaviour is a genuine disincentive to adoption of that behaviour. In this case, those who contemplate engaging in illicit drug taking, and who are influenced by whether their behaviour would amount to criminal conduct, would be less likely to try these substances.
- 16 Another potential effect of the Bill is drug tourism. This could lead to increased criminal activity by suppliers and distributors. Inquiry participants did not cover this possibility. It is

---

<sup>12</sup> ACT Government-Health, *Submission 15*, p 27.

<sup>13</sup> Canberra Alliance for Harm Minimisation and Advocacy, *Submission 39*, p 8.

<sup>14</sup> Alcohol, Tobacco and Other Drug Association ACT, *Submission 27*, p 2.

<sup>15</sup> ACT Council of Social Service, *Submission 23*, p 2; Alcohol, Tobacco and Other Drug Association ACT, *Submission 27*, p 8.

my view that we should avoid the risk of drug producers, suppliers, distributors and users coming to the ACT from interstate and placing increased pressure on the police and health services.

- 17 The only source for these illicit drugs is criminal activity and this will not change if the Bill is passed. Those producing and trafficking these drugs may well be encouraged to increase their criminal activity in the ACT, placing further strains on the police and drug support sector.

## The situation in the ACT has positive elements

- 18 As discussed earlier, ACT Policing have been conducting a diversion program since 2001. In 2019–20, there were 192 referrals under the Illicit Drug Diversion Program. ACT Policing calculated the compliance rate at 89 percent and advised that current diversions are ‘working reasonably well’.<sup>16</sup> A 2013 evaluation of the diversion system in the ACT found that it is working well; an area for improvement is co-ordination.<sup>17</sup>
- 19 During the inquiry, there was debate around the effect of decriminalising certain drugs in Portugal.<sup>18</sup> However, it is important to remember that Canberra’s contemporary circumstances do not reflect those of Portugal in the early 2000s, as Portugal wished to address heroin use.<sup>19</sup> This limits the generalisability of the Portugal case study for the ACT.
- 20 A Commonwealth parliamentary enquiry also noted that with respect to the decriminalisation of illicit drugs in Portugal:

This legislative change was implemented alongside a substantial investment in drug treatment, harm reduction and social re-integration policies.<sup>20</sup>

- 21 Further, the efficacy of decriminalisation in Portugal is disputed, and claims of success in Portugal are linked to ready access to treatment,<sup>21</sup> which comes back to issues of resourcing. In my view, additional resourcing will deliver more benefits to the ACT than the proposed Bill.
- 22 Finally, although the ACT Government presented evidence that rates of drug use are decreasing, they focussed on non-medical use of prescription medicines, and only a cohort of secondary students:

The non-medical use of painkillers and opioids by people in the ACT in 2019 (1.5 per cent) was lower than the national average (2.7 per cent). There appears to be a trend towards a (non-significant) decline in reported non-medical use of opioid painkillers in the ACT (down

---

<sup>16</sup> ACT Policing, *Submission 7*, pp 2, 6.

<sup>17</sup> ACT Government-Health, *Submission 15*, p 16.

<sup>18</sup> Drug Free Australia, *Submission 31*, pp 18–21, compared with the Alcohol, Tobacco and Other Drug Association ACT, *Submission 27*, p 2.

<sup>19</sup> Parliamentary Joint Committee on Law Enforcement, Parliament of the Commonwealth of Australia, 2018, *Inquiry into crystal methamphetamine (ice), Final Report*, March 2018, p 157.

<sup>20</sup> *Ibid*, p 134.

<sup>21</sup> Alcohol, Tobacco and Other Drug Association ACT, *Submission 27*, p 14.

from 2.9 per cent in 2016 to 1.5 per cent in 2019). This parallels a statistically significant national decline, down from 3.6 per cent in 2016 to 2.7 per cent in 2019.

Although ACT secondary students reported illicit drug use remained relatively stable between 2014 and 2017, there have been significant decreases over time. This is most obvious in the ‘used at least one illicit substance in their lifetime’ category, which dropped from 37.5 per cent in 1996 to 17.4 per cent in 2017. During the same period, the proportion of students who reported they had ‘used an illicit drug at least once in the past year’ decreased from 32.5 per cent to 15.7 per cent, respectively, ‘past month’ from 17.9 per cent to 5.1 per cent, respectively, and ‘past week’ from 11.7 per cent to 2.5 per cent, respectively.<sup>22</sup>

## Conflict with Commonwealth law

- 23 Part 9.1 of the Commonwealth Criminal Code creates various drug offences, including for possession. This raises the question whether the Commonwealth law would override the Bill if the Assembly passed it. It also raises the question of whether this would create significant risk or uncertainty for ACT Policing.
- 24 The Committee received a wide range of evidence on this point. The Explanatory Statement to the Bill did not address the issue directly, and instead focussed on trafficking.<sup>23</sup>
- 25 The Australian National University Drug Research Network argued that the Commonwealth has not sought to cover the field in the Criminal Code, and so the Bill could result in valid law:

Inter-governmental practice in this area aims to shield the independence of State and Territory laws from the threat of a Commonwealth override. The High Court of Australia has determined that the Criminal Code does not attempt to ‘cover the field’ of drug laws in Australia. The Act explicitly provides for the concurrent operation of State and Territory laws, “even if the penalty, fault element or defence under the relevant State or Territory law differs from the corresponding matters provided for in the Code.”<sup>24</sup>

- 26 Canberra Community Law believed there was sufficient uncertainty that the ACT Government should sign a Memorandum of Understanding with the Commonwealth Government to clarify that persons who commit a simple drug offence will not be charged under the Criminal Code:

Street Law notes the Commonwealth Government’s critical response to the *Drugs of Dependence (Personal Cannabis Use) Amendment Act 2019* (ACT) (Cannabis Act). The Cannabis Act amended the Act by permitting a person over the age of 18 to possess up to 50 grams of cannabis and to cultivate (non-artificially) 1 to 4 cannabis plants for personal use. More specifically, the Commonwealth Government responded to this legislation by stating that Commonwealth laws, namely section 308.1(1) of the Criminal Code, would still

---

<sup>22</sup> ACT Government-Health, *Submission 15*, p 8.

<sup>23</sup> Explanatory Statement to the Bill

<sup>24</sup> ANU Drug Research Network, *Submission 40*, p.11.



apply in the ACT and that there was an expectation that the Australian Federal Police would enforce this Commonwealth Law in the ACT.<sup>25</sup>

- 27 The Committee questioned the AFP Association about whether it had any concerns for its members that the Commonwealth might prosecute its offences despite ACT legislation:

it does not mean that it is not workable, but it does leave our members in a position where they are conflicted and potentially open to scrutiny from internal affairs, ACLEI and the other bodies that do scrutinise them.

- 28 They further added:

I will be honest; we will be lobbying the Commonwealth to act because a lot of those drugs, we would say, are not socially acceptable and they would not pass the pub test. You could argue that in Canberra cannabis was socially accepted, and it would pass the pub test. However, if you question the average punter down at the pub about whether they would find it acceptable that someone was carrying around X amount—two grams or one gram—of ice, after seeing what ice can do to somebody and the after-effect of what a person on ice can do to somebody else, the majority of people would say, I suggest, that it is not acceptable.<sup>26</sup>

- 29 The amendments would conflict with the Commonwealth Criminal Code. It is fundamental to the rule of law that a jurisdiction should not enact legislation that is inconsistent with the laws of a superior jurisdiction. Further, the police would have different obligations under ACT and Commonwealth law and preferring the ACT approach with respect to these extremely harmful substances would place them at risk. The Legislative Assembly cannot conscionably place this burden on the police.

---

<sup>25</sup> Canberra Community Law, *Submission 9*, p. 9.

<sup>26</sup> Mr Alex Caruana, President, AFP Association, *Committee Hansard*, 9 July 2021, pp. 72, 73.

## Conclusion on the Bill

30

The Bill fails to:

- i. offer a whole-of-government approach to this complex policy area;
- ii. consider the risks and unintended consequences involved in decriminalisation, including elevated risks of attracting drug tourism, further investment by drug producers and suppliers, and increased trafficking;
- iii. recognise that criminalising possession is for many a deterrent to adopting such behaviour;
- iv. recognise that diversion in the ACT is already working reasonably well; and
- v. satisfactorily resolve the issues around the conflict with Commonwealth law.

Mr Peter Cain MLA

29 November 2021