

Drugs of Dependence Committee
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

By email: LASelectCommitteeDDAB2021@parliament.act.gov.au

28 August 2021

Dear Drugs of Dependence Committee

Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill | Response to questions taken on notice

We refer to the hearing with the Drugs of Dependence Committee (the **Committee**) on 9 July 2021.

Please find **enclosed** our responses to the questions put to Canberra Community Law which were taken on notice. We **enclose**:

- a) a response to the Committee's question regarding precedents for schemes where fines are directed to rehabilitation support (**Response to First Question Taken on Notice**); and
- b) a response to the Committee's question regarding whether a memorandum of understanding is appropriate to resolve the conflict between Territory and Commonwealth laws (**Response to Second Question Taken on Notice**).

We thank the Committee for the opportunity to share our perspectives.

Yours faithfully,
CANBERRA COMMUNITY LAW LIMITED



Genevieve Bolton
Executive Director/Principal Solicitor

Response to First Question Taken on Notice

Question: *Are there any precedents for legislative schemes or programs where funds have been channelled into rehabilitation?*

There are similar schemes where funds from fine collection or other sources have been directed into rehabilitation and community services. We consider that the Bill provides an opportunity to direct funds towards rehabilitation in the specific context of personal use of drugs of dependence. Using legislation to redirect such funds for a specific purpose is a well-established practice that we consider would significantly improve the Bill's impact on vulnerable offenders and people who are homeless or at risk of homelessness.

Similar schemes directed to drug rehabilitation in other jurisdictions

New Zealand's Proceeds of Crime Fund seeks to direct proceeds of drug crime towards drug rehabilitation.¹ New Zealand recently announced its intentions to use \$2.75 million from proceeds of crime funding for a methamphetamine rehabilitation program. The program ran in 2020 and was based on a 2010 program which was part of the methamphetamine action plan. Directing funds towards rehabilitation was aimed at preventing victimisation and offering support to offenders.

Unfortunately, there are no existing schemes specific to drug rehabilitation funding via redirected fines in Australia. There is a clear opportunity for the ACT to lead the way in ensuring that funds from drug fines are directed into rehabilitation so that deep-seated issues associated with drug abuse can be tackled at their core.

Existing funding schemes in the ACT

There are a number of existing schemes in the ACT that direct funds to community-related purposes and non-for-profit support organisations.

Relevantly, the victims of financial assistance fund directs money from offenders into victim support. The victims financial assistance levy in the ACT is imposed to contribute to the cost of providing financial assistance for victims of crime, where a person convicted of an offence is liable to pay the ACT a levy of \$50.² However, the victims financial assistance levy is imposed *in addition* to pecuniary penalties imposed in relation to offences.³ We recommend directing money from fines rather than imposing an additional levy to avoid isolating offenders and exacerbating financial hardship.

In addition, the ACT Law Society's Statutory Interest Account is used to fund purposes prescribed in legislation, including supporting legal aid and regulating the legal profession. The funds are sourced from interest on solicitor trust accounts and the statutory deposit

¹ New Zealand Government Ministry of Justice, 'Proceeds of Crime Fund' (Webpage, 2021) <<https://www.justice.govt.nz/justice-sector-policy/about-the-justice-sector/proceeds-of-crime-fund/>>.

² *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 82(1)-(2).

³ *Ibid* s 82(3).

account.⁴ This is another example of directing funds to a specific purpose, which we consider is similar, from an administrative perspective, to directing funds towards drug rehabilitation.

Funding schemes that rely on fines

While the above examples refer to funds that are not sourced from fines, other jurisdictions in Australia have used fines as a source of revenue to support a community benefit. For example, the Queensland Audit Office noted that surpluses from the Camera Detected Offence Program are used to improve roads, education and awareness, and support trauma services. Expenditure of this money is governed by the *Transport Operations (Road Use Management) Act 1995*. Similarly, Victoria introduced the Better Roads Victoria Fund in 2018, so that funds could be spent on improving the state's roads.

As directing fines for a particular purpose is well-established in other states, we consider it appropriate to direct revenue from fines for possession of drugs to the specific purpose of supporting rehabilitation and other health-focused assistance.

⁴ ACT Law Society, 'Statutory Interest Account' (Webpage, 2021) <
<https://www.actlawsociety.asn.au/about/law-society-services/statutory-interest-account>>.

Response to Second Question Taken on Notice

Question: *Is a memorandum of understanding appropriate to resolve a possible conflict of laws between the Australian Capital Territory and Commonwealth jurisdictions?*

Is there a conflict of laws?

Section 169 of the *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) and section 308.1 of the *Criminal Code 1995* (Cth) both deal with the same subject matter, creating an offence for the possession of controlled drugs. This raises the question of whether there is a conflict between the Territory and Commonwealth laws. Both the ACT and the Commonwealth governments have legislative powers in relation to criminal law. The ACT's power comes from section 22 of the *Australian Capital Territory (Self-Government) Act 1988* (ACT) ('ACT Self-Governing Act') and the Commonwealth has derived its powers to legislate in relation to crime from its external affairs and incidental powers in the Australian Constitution.⁵ Potential inconsistencies between ACT and Commonwealth laws will be dealt with under section 28 of the ACT Self-Governing Act. Section 28 has the effect that if a Commonwealth law is a complete statement of the law governing a particular thing, an ACT law which seeks to govern will be invalid if it seeks to govern some aspect of that thing and cannot operate concurrently.⁶

We submit that in the *Criminal Code 1995* (Cth), the Commonwealth does not propose to legislate on the matter of offences for possession of controlled drugs exclusively. Section 308.1 contemplates prosecution under state and territory laws as well. The only potential inconsistency between the ACT and Commonwealth if the *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) is enacted will be in the penalty provisions. In *Momcilovic v The Queen* [2011] HCA 34 the High Court considered Victorian and Commonwealth laws which both legislated to create an offence but provided different penalty provisions. That case held that the laws may operate concurrently without a conflict under section 109 of the Australian Constitution and that conflict would only arise upon the exercise of those powers if there is operational inconsistency.⁷ While this case related to a conflict between Commonwealth and state laws, the same logic can be applied to the ACT since section 28 ACT Self-Governing Act is considered to have the same effect as section 109 of the Australian Constitution. Accordingly, we submit that the *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) can be permitted to operate concurrently with the *Criminal Code 1995* (Cth) and that the only potential for conflict to arise will be in the exercise of Commonwealth and ACT powers in deciding whether to prosecute and what penalties to apply for these offences.

How can a memorandum of understanding help?

In order to avoid a conflict between the exercise of Commonwealth and ACT powers to prosecute for this offence, we have recommended in our written and oral submissions that

⁵ *Constitution of Australia* ss 51(xxix) and 51(xxxix).

⁶ *Commonwealth v ACT* (2013) 250 CLR 441.

⁷ *Momcilovic v The Queen* [2011] HCA 34 per Gummow J.

the ACT government and Commonwealth government enter into a memorandum of understanding (**MOU**). In particular we would suggest that the MOU should be signed by the ACT Police and the Commonwealth Director of Public Prosecutions agreeing to refrain from enforcing Commonwealth law on this matter and to apply the penalties in the *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) instead.

A similar recommendation for the use of an MOU was made by the ACT Law Society in response to the Inquiry into *Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018* ('Personal Cannabis Use Bill').⁸ However, that Personal Cannabis Use Bill has since passed parliament, and the legality of cannabis possession in the ACT is still somewhat unclear. There is no evidence that the recommended MOU was entered into in relation to cannabis offences (at least it cannot be found published online). It appears that the discretion on whether to prosecute under the Commonwealth Criminal Code is still available to police and the DPP. The ACT Police website provides the following (emphasis added):

The ACT currently uses several legislative instruments for drug offences including the Drugs of Dependence Act 1989 (DODA), the Criminal Code 2002 (ACT) and the Medicines, Poisons and Therapeutic Goods Act 2008 (ACT) ...

*Commonwealth law is also applicable across Australia, including in the ACT, and all police officers are empowered to enforce these laws. Key Commonwealth legislation includes the Commonwealth Criminal Code 1995 and the Narcotic Drugs Act 1967 (Cth). **ACT Policing officers have the discretion to utilise ACT or Commonwealth laws and will use their discretion depending on the situation.** As such, police can seize cannabis as evidence of a potential offence under the Commonwealth law and subsequently destroy it.*⁹

The media have reported that ACT Police have largely been exercising their discretion to implement the ACT laws.¹⁰ However, it is not clear whether this is a result of them agreeing to do so under a MOU.

A MOU is not a binding instrument. The effectiveness of this recommendation relies upon the ACT Police and Commonwealth DPP agreeing to forego their powers. It is possible that they would not agree to enter the MOU. Even if they do agree to sign the MOU there is a possibility that their policies could stray from the agreement without any binding legal consequences. However, we submit that entering a MOU of this kind is the most preferable way to get the government to commit to one method of enforcement and will provide more certainty for the community than if no MOU is entered at all.

⁸ ACT Law Society, Submission to Standing Committee on Health, Inquiry into *Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018* (20 March 2019), 2.

⁹ ACT Policing, "Drugs and the Law" <<https://www.police.act.gov.au/safety-and-security/alcohol-and-drugs/drugs-and-law>>.

¹⁰ ABC News, "What has changed in the year since cannabis possession was legalised in the ACT", <<https://www.abc.net.au/news/2021-01-31/what-has-changed-since-cannabis-was-legalised-in-the-act/13105636>>.