



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON THE DRUGS OF DEPENDENCE (PERSONAL USE)
AMENDMENT BILL 2021

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Submission Cover Sheet

Inquiry into the Drugs of Dependence
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This Submission reflects the author's own views only and does not reflect the views of Street Law or Canberra Community Law.

Jenny Xue



Introduction

In February 2021, the *Drugs of Dependence (Personal Use) Amendment Bill 2021 (ACT)* (the Bill) was presented to the Legislative Assembly of the Australian Capital Territory.

The Bill seeks to 'treat drug use as a public health problem and not one first and foremost of the criminal justice system'¹ by:

1. reducing the maximum penalty for possession of certain illicit drugs for amounts under a specified possession limit; and
2. widening the scope of the Simple Cannabis Offence Notice (SCON) Scheme to establish a Simple Drug Offence Notice (SDON) Scheme.

In accordance with the Select Committee's Terms of Reference, this Submission seeks to address the potential criminal justice and social impacts of the Bill's provisions on people experiencing homelessness, or who are at risk of homelessness.

Recommendations

1. Adoption of Housing First approach to homelessness

The Housing First model should be adopted by homelessness support services in the ACT to adequately address problematic drug use and homelessness.

2. Flexible payment options

Flexible payment options must be available for the payment of SDONs, including:

- payments using cash at Access Canberra locations
- extensions for payment
- payment by instalments
- payment through Centrepay
- payment through work or development plans

3. Work or development plans for young people

People under the age of 18 should be added as a class of people who are eligible for work or development plans for the payment of SDONs.

4. Adoption of totality approach

When deciding to issue SDONs, police officers should consider whether issuing multiple SDONs would be a disproportionate response to the seriousness of the offending behaviour.

¹ Explanatory Statement, *Drugs of Dependence (Personal Use) Amendment Bill 2021 (ACT)* 1.

Support for the Bill

This Submission supports the Bill's goal of re-framing drug use as a public health problem, and not a criminal justice problem.

The current legislative framework in the ACT relies primarily on deterrence from possessing and using drugs through the threat of criminal prosecution. The current maximum penalty for possession of any illicit drug is 50 penalty units (\$8,000), imprisonment for two years, or both.² This is despite the known realities of drug use, such as the frequency of recreational drug use³ and addiction.

By directing problematic drug use through the criminal justice system, the reasons for offenders' drug use are not addressed, nor are the harms of drug use. Significantly, in 2019-2020, 44,993 people faced illicit drug offences in the local level courts across Australia, of whom 30,301 were charged with possession or use.⁴ Furthermore, a third of police detainees in 2019 reported that use of illicit drugs contributed to their alleged offending,⁵ and in 2018 67% of prison entrants reported using illicit drugs in the 12 months before their incarceration.⁶ The threat of criminal prosecution simply does not address personal drug use.

The ACT has an established and strong history of drug diversion practices, with 68.1% of people in 2019 receiving a police diversion, such as referral to ACT Alcohol and Drug Services for treatment, instead of being charged.⁷ The diversion of people away from the criminal justice system allows people to avoid the negative impact of criminal convictions on their future prospects, and to seek help for their drug use.⁸ Furthermore, diversion programs avoid the costs of court procedures and generate significant public savings.⁹ However, the effectiveness of diversion program for drugs other than cannabis has been limited due to currently low threshold quantities.¹⁰

By lowering the maximum penalty for possession of illicit drugs and widening the SCON Scheme, the Bill would reduce both the extent and manner in which people who use drugs are involved in the criminal justice system. These changes to the law are overall positive, but a number of concerns are not addressed by the Bill in its current form.

² *Drugs of Dependence Act 1989* (ACT) ss 169(1) and 171(1).

³ *Ibid.*

⁴ Australian Bureau of Statistics, *Criminal Courts 2019-20* (Catalogue No 4513.0, 25 March 2021)

<<https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/2019-20#defendants-finalised-in-criminal-courts>>.

⁵ Australian Institute of Criminology, *Drug Use Monitoring in Australia: Drug Use Among Police Detainees, 2019* (Statistical Report No 30, 24 September 2020) 12.

⁶ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 30 May 2019) 90.

⁷ C 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, *Drug Policy Modelling Program Monograph Series*, May 2019) 5.

⁸ R Sutherland, D Weatherburn and L Degenhardt, 'A Trial of Criminal Infringement Notices as an Alternative to Criminal Penalties for Illicit Drug Offences in New South Wales, Australia: Estimated Savings' (2021) 40(1) *Drug and Alcohol Review* 93, 96.

⁹ *Ibid* 95.

¹⁰ Hughes et al (n 7) 10.

Concerns regarding the Bill

The Bill has the potential to disproportionately and inequitably affect vulnerable groups because of the design of the SDON Scheme. The potential detriment to vulnerable groups, such as people experiencing homelessness, must be considered by the Committee and the Legislative Assembly.

Relationship between drug use and homelessness

The relationship between drug use and homelessness is complex due to a series of intersecting disadvantages and vulnerabilities. These include experiences of family violence,¹¹ mental health issues,¹² and disadvantages often experienced by First Nations peoples.¹³ However, it is clear that people experiencing homelessness are more likely to use drugs and those who use drugs are more likely to remain homeless.

Extensive research has shown that homelessness is associated with disproportionately high levels of drug or alcohol dependence.¹⁴ The rate of substance use disorders was three times higher for people who had previously experienced homelessness (18%) than the general population (5%).¹⁵ This is even more of a concern in the ACT, as a 2020 survey of specialist homelessness services (SHS) found that 14% of clients in the ACT had problematic alcohol or drug use.¹⁶ This was the equal highest rate across all jurisdictions in Australia.¹⁷

People experiencing homelessness who have problematic alcohol or drug use experience worse outcomes than any other demographic group after the provision of support services.¹⁸ They were more likely to become homeless (58%) and remain homeless (46%) at the end of SHS support.¹⁹ These outcomes were despite the fact that 75% of these clients had previously received SHS support²⁰ and that support was both more frequent and over a longer period than for other client groups.²¹

Housing First

To properly address problematic drug use, the ACT should also introduce a Housing First model. Such a model rightly recognises housing as a fundamental human right that is not conditional on a

¹¹ Australian Institute of Health and Welfare, *Specialist Homelessness Services Annual Report 2020* (Report, 11 December 2020) 4.

¹² *Ibid.*

¹³ *Ibid.* 3.

¹⁴ Alcohol and Drug Foundation, Submission No 395 to Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Homelessness in Victoria* (20 May 2020) 5.

¹⁵ E Whittaker et al, 'Multiply Disadvantaged: Health and Service Utilisation Factors Faced by Homeless Injecting Drug Consumers in Australia' (2015) 34(4) *Drug and Alcohol Review* 379, 380.

¹⁶ Australian Institute of Health and Welfare 2020 (n 11) 3.

¹⁷ *Ibid.*

¹⁸ *Ibid.* 2.

¹⁹ *Ibid.* 7.

²⁰ *Ibid.* 6.

²¹ *Ibid.* 2.

person meeting specified requirements, particularly sobriety.²² This approach holds that the provision of stable and secure housing is foundational for the proper support of people experiencing homelessness, as housing allows people the space to recover and address issues such as problematic drug use.²³

Under the staircase model, a person must maintain sobriety before they can be housed.²⁴ However, the cyclical relationship between drug use and homelessness means that very few people are able to gain access to housing. For example, only 4% of SHS clients who needed long-term housing were provided with housing.²⁵ The provision of support under this model means that support services do not and cannot reduce demand through early intervention.²⁶ As a result, homelessness support services are constantly overwhelmed.²⁷

There is significant evidence that Housing First approaches to homelessness are more effective than staircase or treatment first approaches.²⁸ For example, the adoption of a Housing First approach resulted in a 36% reduction in the number of people experiencing homelessness in Norway between 2012 and 2016.²⁹ Without the adoption of a Housing First model in the ACT, people experiencing homelessness who use drugs will continue to experience this cycle of drug use and homelessness despite the proposed Bill.

Recommendation 1: Adoption of Housing First model

The Housing First model should be adopted by homelessness support services in the ACT to adequately address problematic drug use and homelessness.

Accessibility of payment options for SDONs

The Bill does not propose any changes to the existing procedures for SCONs and instead substitutes the words 'simple cannabis offence' with 'simple drug offence'.³⁰ As a result, the SDON Scheme would operate the same way as the current SCON Scheme.

Under s 171A(3)(c) of the *Drugs of Dependence Act 1989* (the DDA), payment of a SCON is required within 60 days to discharge liability for the alleged offence. Currently, there are two payment methods available: using the Access Canberra online portal, or payment in person at Access Canberra locations.³¹

²² Australian Housing and Urban Research Institute, *Ending Homelessness in Australia: A Redesigned Homelessness Service System* (Report No 347, December 2020) 50.

²³ Ibid 49.

²⁴ Alcohol and Drug Foundation (n 14) 5.

²⁵ Australian Institute of Health and Welfare 2020 (n 11) 6.

²⁶ Australian Housing and Urban Research Institute (n 22) 61.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid

³⁰ *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) ss 7-12.

³¹ Access Canberra, *Access Canberra Services, Locations and Opening Hours*, (Web Page)

<<https://www.accesscanberra.act.gov.au/s/article/access-canberra-services-locations-and-opening-hours-tab-locations>>.

The online portal requires the use of a Visa or Mastercard debit or credit card to in order for the transaction to be processed.³² The emphasis on online card payments results in compliance issues for people experiencing homelessness. Many people experiencing homelessness do not have bank cards. Anecdotal evidence suggests that this is due to safety concerns surrounding access of money through Automated Teller Machines (ATMs). Instead, many people experiencing homelessness prefer to withdraw small amount of cash regularly through the bank teller. Additionally, some may not be able to produce the identification documents required for a bank card. Most banks typically require one form of photo ID or two forms of non-photo ID in order to issue a bank card.³³ The reliance on using the online form to pay for the penalty is also a problem because many people experiencing homelessness do not have reliable access to the Internet. A 2014 survey identified numerous issues that impact Internet access e.g., availability of power sources to charge devices, handset loss, and shortage of credit.³⁴ The survey also found that only 46% of people experiencing homelessness use online banking.³⁵

SCONs can alternatively be paid in person at Access Canberra locations across Canberra. However, none of the locations are currently accepting cash payments.³⁶ The continued availability of in-person cash payment options has been identified as vital for engagement with non-digital customers such as people experiencing homelessness.³⁷

There needs to be amendments to the Bill which prescribe a range of payment options and administrative changes with Access Canberra so that cash payments can be accepted safely. The current payment options mean that modes of payment may still be inaccessible to people experiencing homelessness even if they had the money to pay the penalty amount. This will likely result in continued non-payment of SDONs by people experiencing homelessness, leaving them vulnerable to criminal prosecution.

Impacts of the SDON Scheme on people experiencing homelessness

The SDON Scheme, like other infringement notice schemes, is premised on the assumption that the recipient will be able to pay the penalty amount on time.³⁸ As a result, an alleged offender will not

³² Access Canberra, *Simple Cannabis Offence Notice (SCON) Payment*, (Web Page) <<https://form.act.gov.au/smartforms/landing.htm?formCode=1009-scon>>.

³³ Australian Transaction Reports and Analysis Centre, *Reliable and Independent Documentation and Electronic Data* (Web Page, 19 July 2019) <<https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/customer-identification-and-verification/reliable-and-independent-documentation-and-electronic-data>>.

³⁴ Australian Communications Consumer Action Network, *Homeless and Connected: Mobile Phones and the Internet in the Lives of Homeless Australians* (Report, August 2014) 3.

³⁵ Ibid 29.

³⁶ Access Canberra, *Locations* (Web Page) <<https://www.accesscanberra.act.gov.au/s/article/access-canberra-services-locations-and-opening-hours-tab-locations>>.

³⁷ Australian Communications Consumer Action Network (n 22) 5.

³⁸ NSW Law Reform Commission, *Penalty Notices* (Report No 132, February 2012) 174.

need to go through the criminal justice system unnecessarily for a minor offence.³⁹ This has benefits for both the offender, who is spared from the emotional stress of court, and the government, which is spared the administrative costs of court proceedings.

While infringement notices appear to be efficient and effective, the underlying assumptions of infringement schemes are 'very privileged'.⁴⁰ In reality, infringement notice schemes 'reflect the biases that permeate every level of our criminal justice system'⁴¹ and hide 'complex penal and social realities and effects'.⁴²

Issues with fixed financial penalties

Under s 171A of the DDA, the prescribed penalty amount for a SCON is fixed at \$100. There is no mechanism in the Bill or the DDA that allows for a reduction of the penalty amount, and there is no consideration of the circumstances of an alleged offender.

Numerous studies have shown that fixed financial penalties have a disproportionate impact on disadvantaged groups, especially those in poverty. While the \$100 penalty amount is negligible in comparison to the average full-time Canberran's bi-monthly income,⁴³ this amount is extremely difficult for a financially disadvantaged person to pay, especially within 60 days.

The imposition of a financial penalty on someone who cannot pay is simply 'illogical'.⁴⁴ A 2016 survey found that 12% of households did not have \$500 in savings to cover emergency expenses.⁴⁵ In 2019, 93% of Canberra Community Law's clients experienced financial disadvantage, and 68% of clients experienced or were at risk of homelessness.⁴⁶ Many of these clients had no income, or limited income from social security payments. In addition, people experiencing homelessness often face other forms of debt that exacerbate their financial hardship such as Centrelink debts, rental arrears, or overdrawn account fees.⁴⁷

In Street Law's Submission to the Inquiry into the Drug of Dependence (Personal Cannabis Use) Amendment Bill 2018, the case of 'Mika' was used to demonstrate the financial challenges of being issued a SCON. Compared to paying for food and shelter and caring for her sick child, the payment of the SCON was a low priority for Mika despite the more serious, long-term consequences of a

³⁹ J Quilter and R Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9.

⁴⁰ B Knight, 'Cop That: The Rise of Criminal Infringement Notices', *UNSW Newsroom* (Web Article, 20 October 2020) <<https://newsroom.unsw.edu.au/news/social-affairs/cop-rise-criminal-infringement-notices>>.

⁴¹ *Ibid.*

⁴² Quilter and Hogg (n 39) 27.

⁴³ Australian Bureau of Statistics, *Average Weekly Earnings, Australia* (Catalogue No 6302.0, 25 February 2021) <<https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/average-weekly-earnings-australia/latest-release>>.

⁴⁴ G Lansdell et al, 'Infringement Systems in Australia: A Precarious Blurring of Civil and Criminal Sanctions?' (2012) 37(1) *Alternative Law Journal* 41, 42.

⁴⁵ The Melbourne Institute of Applied Economic and Social Research, *Selected Findings from Waves 1 to 14 (2016)* (Report, *Household, Income and Labour Dynamics in Australia Survey*, 20 July 2016) 85-86.

⁴⁶ Canberra Community Law, *Annual Report 2019-20* (Report, 2021) 2.

⁴⁷ New South Wales Law Reform Commission (n 38) 365.

recorded criminal conviction.⁴⁸ The NSW Law Reform Commission noted that many people experiencing homelessness do not consider the consequences of legal issues, such as penalty notices, unless there is an immediate crisis.⁴⁹

While the implementation of the SDON Scheme seeks to divert people away from the courts, the inability, not the unwillingness to pay, directs those living in poverty back to the criminal justice system as they are left vulnerable to prosecution for possession.

Exposure to penalty notice infringements

It should be noted that the proposed SDON Scheme would not operate in isolation—it would form one part of the wider administrative approach to ‘minor’ offending through infringement notices in the ACT. For example, an infringement notice can be issued for defacing premises⁵⁰ or for driving unaccompanied as a learner driver.⁵¹ However, a number of these offences are ‘public order’ offences that disproportionately affect people experiencing homelessness.⁵²

People experiencing homelessness have become the prime targets of infringement notices due to the circumstances of being homeless.⁵³ These circumstances include the lack of a private space as people experiencing homelessness instead occupy public spaces, which makes them more visible to enforcement officers.⁵⁴ People experiencing homelessness are also more identifiable by enforcement officers as potential offenders, such as for fare evasion on public transport.⁵⁵

Additionally, these ‘minor’ offences often impose penalties for conduct that would otherwise be normal in a private setting, such as public urination.⁵⁶ These behaviours are a result of a lack of viable alternatives for people experiencing homelessness.⁵⁷ This issue was raised in the 2019 Street Law Submission regarding the penalties for consumption of cannabis in public spaces as the offence under s 171AB of the DDA ‘in effect, punish[es] them for behaviour that would be a consequence of their homelessness’.⁵⁸

The SDON Scheme, as drafted, reflects this disproportionate punishment of people for the circumstances of their homelessness. Given that people experiencing homelessness are more likely to use illicit drugs, they are also more likely keep illicit drugs on their person, as there is no

⁴⁸ Street Law, Submission No 22 to the Standing Committee on Health, Ageing and Community Services, Legislative Assembly of the ACT, *Inquiry into the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018* (21 March 2019) 4.

⁴⁹ NSW Law Reform Commission (n 38) 366.

⁵⁰ *Magistrates Court (Crimes Infringement Notices) Regulation 2008* (ACT) sch 1 item 1.

⁵¹ *Road Transport (Offences) Regulation 2005* (ACT) sch 1 item 12.

⁵² B Saunders et al, 'The Impact of the Victorian Infringements System on Disadvantaged Groups: Findings from a Qualitative Study' (2014) 49(1) *Australian Journal of Social Issues* 45, 46.

⁵³ Lansdell et al (n 44) 42.

⁵⁴ L McNamara et al, 'Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia' (2021) 10(1) *International for Crime, Justice and Social Democracy* 111.

⁵⁵ Saunders et al (n 52) 46.

⁵⁶ *Magistrates Court (Crimes Infringement Notices) Regulation 2008* (ACT) sch 1 item 3.

⁵⁷ T Skolnik, 'Rethinking Homeless People's Punishments' (2019) 22(1) *New Criminal Law Review* 73, 75.

⁵⁸ Street Law (n 48) 3.

alternative secure or private location in which to store illicit drugs.⁵⁹ The wider patterns of infringement penalties issued to people experiencing homelessness demonstrate that people experiencing homelessness are more likely to be issued infringement notices, and that they are likely facing multiple infringement notices for different offences. This overlay of infringement penalty systems compounds and entrenches the disadvantages faced by people experiencing homelessness.

Recommendation 2: Flexible payment options

Flexible payment options must be available for the payment of SDONs, including:

- payments using cash at Access Canberra locations
- extensions for payment
- payment by instalments
- payment through Centrepay
- payment through work or development plans

Justifications for Recommendation 2

The current design of the SDON Scheme presents clear and unacceptable social justice implications for people experiencing homelessness: they are more likely to be issued SDONs, they are more impacted by the fixed penalty amount, they are likely unable to pay the penalty, and they are more likely to have other debts from infringement notices. Unlike other groups, the issuing of a SDON to a person experiencing homelessness will simply delay, not divert, interactions with the criminal justice system.

However, these effects can be mitigated through the introduction of flexible payment methods that recognise the difficulties disadvantaged people face. By creating more ways in which people experiencing homelessness can pay the penalty amount, SDONs will be more likely to actually divert people from the criminal justice system.

This approach to penalties has already been adopted by the ACT for other infringement notices. For example, extensions can be requested at first instance for traffic offences⁶⁰ and criminal infringement notices (CINs).⁶¹ Under s 31A(2) of the *Road Transport (General) Act 1999* (ACT), a person can apply for an infringement notice management plan for the payment of traffic and parking infringement notices. This then allows a person to pay by instalments,⁶² including Centrepay,⁶³ or through a work and development program (WDP).⁶⁴ WDPs allow people experiencing homelessness, and other vulnerable groups, to undertake treatment for alcohol and drugs in order to discharge the

⁵⁹ McNamara et al (n 54).

⁶⁰ *Road Transport (General) Act 1999* (ACT) s 29(1).

⁶¹ *Magistrates Court Act 1930* (ACT) s 124.

⁶² *Road Transport (General) Act 1999* (ACT) s 31A(2)(a)(i).

⁶³ Access Canberra, *Infringement Notice Management Plans* (Web Page)

<<https://www.accesscanberra.act.gov.au/s/article/traffic-and-parking-infringements-tab-infringement-notice-management-plans>>.

⁶⁴ *Road Transport (General) Act 1999* (ACT) s 31A(2)(a)(ii).

penalty debt.⁶⁵ Given that the purpose of the Bill is to re-frame drug use primarily as a public health issue, WDPs would directly allow for the treatment of these health issues.

The adoption of flexible payment options has been shown to be effective in ensuring payment of penalties. The introduction of Centrepay for penalty notices in NSW led to \$1,604,363 of payments between 2009 and 2011.⁶⁶ The trial of work and development orders (WDOs) during that same period allowed 645 people to pay off \$205,400 worth of fine debts.⁶⁷

Young people

Research has consistently shown that illicit drug use is more common with young people when compared to all other age groups—rates of usage are two or three times higher than that of the general population.⁶⁸ This pattern can also be seen in homeless populations. In the 2020 SHS survey, 63% of clients with problematic alcohol and/or drug use were between the ages of 10 and 34 years old.⁶⁹ Of these clients, 44% were aged between 10 and 24 years old.⁷⁰ This younger age profile for illicit drug users is a concern for the application of the SDON Scheme since the issues discussed earlier in this Submission are exacerbated for young people.

Infringement notices are issued to children with the assumption that they are typically paid by parents or carers.⁷¹ This is acknowledged in s 171A(2) of the DDA, where a police officer must serve a copy of the SCON to the child's parent. However, this financial reliance on one's parents is not available to homeless young people.

In a survey of homeless young people who use drugs, family conflict was a significant driver of homelessness.⁷² Approximately 38% of participants indicated that their drug use contributed to family conflict that led to their homelessness, and 19% of participants indicated that family conflict led to their drug use and subsequent homelessness.⁷³ In addition, young people have even more limited capacity to earn money with which to pay the penalty. This is due to factors such as compulsory school attendance, lower wages for under-18s, and lower rates of Centrelink

⁶⁵ Access Canberra, *Work and Development Programs* (Web Page)

<<https://www.accesscanberra.act.gov.au/s/article/traffic-and-parking-infringements-tab-work-and-development-programs>>.

⁶⁶ NSW Department of Attorney-General and Justice, *A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (Report, May 2011) 6.

⁶⁷ Ibid.

⁶⁸ L Quek et al, 'Concurrent and Simultaneous Polydrug Use: Latent Class Analysis of an Australian Nationally Representative Sample of Young Adults' (2013) 1 *Frontiers in Public Health* 61:1–9, 1.

⁶⁹ Australian Institute of Health and Welfare 2020 (n 11) 3.

⁷⁰ Ibid.

⁷¹ D Bentley Brown, C Cunneen and S Russell, 'It's All About the Benjamins': Infringement Notices and Young People in New South Wales' (2017) 42(4) *Alternative Law Journal* 253.

⁷² S Mallett, D Rosenthal and D Keys, 'Young People, Drug Use and Family Conflict: Pathways into Homelessness' (2005) 28(2) *Journal of Adolescence* 185.

⁷³ Ibid 190.

payments.⁷⁴ For example, a person must be older than 22 years old to be eligible for the higher JobSeeker payment of \$620.80 per fortnight⁷⁵ compared to the \$512.50 Youth Allowance payment.⁷⁶

Since the provisions of the Bill do not affect the operation of current cannabis laws,⁷⁷ a person under the age of 18 could be issued an SDON for cannabis as well as any other substances listed in s 170 of the Bill. This is an issue because cannabis is the substance most used by those under the age of 18, with 14% having used cannabis at least once in the past year.⁷⁸ Cannabis was also most commonly reported by homeless young people as the drug used that led to their leaving home.⁷⁹

Young people are more likely to receive SDONs due to higher a higher likelihood of illicit drug use, and a preference for cannabis as the drug of choice. They are also less likely to be able to pay the penalty amount due to family conflict and their limited capacity to earn or receive income. As a result, young people who use drugs are less likely to be diverted away from the criminal justice system.

Recommendation 3: Work or development plans for young people

People under the age of 18 should be added as a class of people who are eligible for work or development plans for the payment of SDONs.

Justification for Recommendation 3

By including under-18s as a class of people eligible for work or development plans, support services can intervene and address a young person's drug use before they enter the cycle of long-term drug use and homelessness. The use of WDPs for young people has also been shown to be productive. In 2014-15, 485 WDOs cleared over \$300,000 worth of fines and penalty debts owed by children.⁸⁰ WDPs also present an opportunity for young people gain valuable experiences through educational, vocational or life skills courses, as well as counselling and drug treatment.⁸¹

Polydrug users

Another group of people particularly vulnerable to the effects of the Bill are those who use multiple types of drugs. Polydrug use has been identified in the ACT among people who use drugs and has been identified as the most common driver for drug overdoses.⁸²

⁷⁴ Bentley Brown, Cunneen and Russell (n 71) 10.

⁷⁵ Services Australia, *A Guide to Australian Government Payments* (Guide, 1 April 2021) 27.

⁷⁶ Ibid 24.

⁷⁷ Explanatory Statement, *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) 1.

⁷⁸ N Guerin and V White, *ASSAD 2017 Statistics and Trends: Australian Secondary School Students' Use of Tobacco, Alcohol, Over-the-Counter Drugs, and Illicit Substances* (Report, July 2020) 29.

⁷⁹ Mallett, Rosenthal and Keys (n 72) 189.

⁸⁰ Bentley Brown, Cunneen and Russell (n 71) 12.

⁸¹ Access Canberra, *Work and Development Programs* (Web Page)

<<https://www.accesscanberra.act.gov.au/s/article/traffic-and-parking-infringements-tab-work-and-development-programs>>.

⁸² Burnet Institute and Canberra Alliance for Harm Minimisation and Advocacy, *ACT Medically Supervised Injecting Facility Feasibility Study* (Report, 17 February 2021) 14.

As a result of their drug use patterns, polydrug users may be subject to multiple SDONs issued during a single interaction with police as possession of 'a drug of offence' is 'an offence'.⁸³ The issuing of multiple SDONs for the same incident can create an 'insurmountable'⁸⁴ debt. What seems to be a simple \$100 penalty under the Bill has potential to amount to a \$300 penalty for a person who uses multiple drugs.

Recommendation 4: Adoption of the totality approach

When deciding to issue SDONs, police officers should consider whether issuing multiple SDONs would be a disproportionate response to the seriousness of the offending behaviour.

Justification for Recommendation 4

The totality principle is a common law principle that is applied by courts when an offender is sentenced for multiple offences:

[T]he court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.⁸⁵

While this principle can be applied by courts when sentencing a person for the offences, it is not applied by issuing officers when infringement notices are issued. Given the fact that infringement notice schemes seek to avoid court interactions, it does not make sense that a person may receive a smaller penalty for drug possession through court than through SDONs. An adoption of the totality principle could be through guidelines for police officers.

⁸³ *Drugs of Dependence (Personal Use) Amendment Bill 2021* (ACT) ss 169(1)(a) and 171(a)(a).

⁸⁴ NSW Law Reform Commission (n 38) 174.

⁸⁵ *Mill v The Queen* (1988) 166 CLR 59, 63 (Wilson, Deane, Dawson, Toohey and Gaudron JJ) quoting D A Thomas, *Principles of Sentencing* (Heinemann, 2nd ed, 1979) 57.