

**The Drugs of Dependence (Personal Use) Amendment Bill  
2021**

**Revised Supplementary Explanatory Statement**

**Amendments to be moved by Johnathan Davis MLA  
Member for Brindabella  
October 2022**

## Overview

These amendments to the Drugs of Dependence (Personal Use) Amendment Bill 2021 decriminalise the personal possession of commonly used drugs of dependence and prohibited substances (drugs).<sup>1</sup> They do so by creating an exemption for all adults to the offence of possessing a drug of dependence or prohibited substance up to a defined limit as set out in the legislation.

These amendments also define the attendance requirements of a drug diversion program as attending the first session of the program to allow for a person centred interpretation of this alternative method to discharge an infringement.

These amendments also ensure a review of the operation of the legislation will be undertaken by an independent person with expertise in the experience of drug users after the second year of operation of the legislation.

## Purpose of the amendments

The purpose of these amendments is to enact a policy of the decriminalisation of drugs in the ACT by removing the applicability of possession offences to personal quantities of drugs. Decriminalisation encourages people who use drugs to access harm reduction, social and health services by relieving stigma and fear of criminalisation.<sup>2</sup> Decriminalisation shifts drug use from being understood to be an inherently criminal problem to being understood to be primarily a health and social issue. These amendments ensure that adults found in possession of drugs for personal use are not criminally liable for the personal possession of these substances and will not end up with fines they cannot pay nor within a drug diversion program that is overly prescriptive by virtue of legislative definition.

The policy intent of these amendments is to:

- a. Encourage people who are experiencing problematic and/or harmful use of drugs to access treatment and harm reduction services.
- b. Reduce the number of people who use drugs from ending up in the criminal justice system.
- c. Ensure the broadest applicability of these reforms by defining personal limits using currently evidence based research on patterns of personal possession in the ACT.
- d. Ensure, to the best of the Assembly's ability, that review of these reforms is undertaken with a level of expertise and a-politicism.

## Background

The ACT has long taken a comparatively progressive stance to the personal use of drugs, including adopting nation-leading harm reduction measures and decriminalising the possession of cannabis.

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<sup>1</sup> Australian Institute of Health and Welfare, 2002, *Illicit Drug Use*, accessed 9 September 2022 [aihw.gov.au](http://aihw.gov.au)

<sup>2</sup> Alcohol and Drug Foundation, *Decriminalisation in Detail*, accessed 9 September 2022, [adf.org.au](http://adf.org.au)

In 2014, the ACT Government set new trafficable thresholds for the possession of drugs in the *Criminal Code Regulation 2005*. These thresholds are based on evidence patterns of purchase and possession provided by the Drug Policy Modelling Program at the University of New South Wales. The thresholds govern what quantities of what drugs are regarded as trafficable, commercial, and large commercial quantities, which in turn govern the penalties for possessing and trafficking drugs. The thresholds also operate to create a presumption that a person is trafficking in a drug where they possess an amount greater than the trafficable threshold. This implicitly suggests that possession (without proof of trafficking) of anything less than the trafficable quantity would amount to ‘personal’ possession.

In February 2021, Michael Pettersson MLA tabled the [Drugs of Dependence \(Personal Use\) Amendment Bill 2021](#) (the bill) and a [Select Committee](#) was established to inquire into the Bill and related matters. Submission to this inquiry evidenced overwhelming support for drug harm reduction measures including decriminalisation. Several submissions from advocates, academics and health services posited two key problems. First, that the legislation as drafted defined the limits of ‘personal possession’ well below the evidence base for personal possession in the ACT and second, that the legislation still enacted a punitive approach to personal possession by enacting an infringement system that would unfairly penalise vulnerable people through fines and/or compulsory drug diversion programs.

In November 2021, the Select Committee released a report with the recommendation to decriminalise small amounts of drugs for personal use, noting concerns with the bill relating to low threshold possession limits, the impacts of proposed infringement systems on vulnerable people, and the need for evaluation of the bill’s impacts.

In June 2022, the ACT Government [tabled its response](#) providing in principle support to the Bill and flagging amendments to threshold quantities, custodial sentences and providing a mechanism for a legislative review. In July 2022, the ACT Government circulated amendments to the bill which did not address the concerns raised about low possession limits and the impact of fines and compulsory drug diversion programs.

### **Consultation Undertaken**

These amendments have been developed by the Office of Johnathan Davis MLA in consultation and with input from local and national drug user advocacy organisations, academics from the Australian National University and the University of New South Wales, and representatives from drug treatment services. These amendments also reflect the feedback on the bill expressed to the Select Committee throughout the Inquiry.

### **Human Rights Implications**

This bill has promotes the right to life and the right to non-discrimination as defined under the *Human Rights Act 2004*. This bill also has positive implications for the right to health, which although not yet

explicitly present in the ACT's Human Rights Act, the Act is not exhaustive of human rights,<sup>3</sup> and health is a right articulated in the International Covenant on Economic, Social, and Cultural Rights which has been ratified by Australia.

By virtue of establishing an exception to the charge of personal possession, this bill would necessarily limit the right to innocence, the right to equality before the law and the right to public life. These limitations are proportionate to the rights this exception is designed to enhance and are the least restrictive means available to achieve these aims.

#### The right to life

Section 9 of the *Human Rights Act 2004* recognises the right to life stating that 'everyone has the right to life. In particular, no-one may be arbitrarily deprived of life'. The amendments in this bill will promote the right to life by encouraging people who use drugs to use harm reduction services and treatment by reducing stigma and fear of criminal sanction. Harm reduction services, such as needle and syringe programs, drug check services, and safe consumption sites save lives by reducing the chance of overdose and the transmission of blood borne viruses.<sup>4</sup>

#### The right to non-discrimination

The right to non-discrimination, referred to as "recognition and equality before the law" in the *Human Rights Act 2004*, stipulates that "everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground." The ACT has serious issues regarding the disproportionate incarceration of First Nations peoples, people with disability, and people living in poverty.<sup>5</sup> While drug use is present amongst all groups within all societies, drug laws disproportionately impact marginalised populations.<sup>6</sup> Given decriminalisation and harm reduction measures have been shown to reduce crime, reduce recidivism, increase access to health and social services, and protect people from illness and death as a result of drug use, there is little justification for the existence of punitive drug responses that have a discriminatory impact on minority communities.

#### The right to health

While the Human Rights Act 2004 does not yet recognise the right to health, the right to health is recognised as a right within the International Covenant on Economic, Social and Cultural Rights (the Covenant) to which Australia is party. Article 12 of the Covenant states that "the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The amendments to the personal use bill will promote the right to physical and mental health by creating a social and political environment which encourages people who use drugs to access health services. Decriminalisation is intended to culturally shift drug use from being

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<sup>3</sup> *Human Rights Act 2004*, s 7.

<sup>4</sup> Ritter, A and Cameron, J. 2009. A review of the efficacy and effectiveness of harm reduction strategies for alcohol, tobacco and illicit drugs. *Drug and Alcohol Review*. Vol. 25, issue 6. Pp. 611-624 <https://onlinelibrary.wiley.com/doi/abs/10.1080/09595230600944529>

<sup>5</sup> ACT Justice Reform Group, Submission 26 to the Inquiry into the Drugs of Dependence (Personal Use) Amendment Bill 2021

<sup>6</sup> *Ibid.*

understood as a criminal issue to being understood to be a social and health issue. This shift is important for enabling access to health services and care for those experiencing problematic use.

#### Rights in criminal proceedings

By creating an exception to offences in the Bill which places an evidential burden on the defendant, these amendments may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the Human Rights Act. The legitimate purpose of the exception is to create as broad of an exception as possible as to enable as many people as possible to be covered by decriminalisation. This is to enable as many people as possible to benefit from the positive health and justice outcomes that arise from decriminalisation.

The evidentiary burden placed upon the defendant is to prove that they are over 18 years old. This limitation is the least restrictive means available to achieve the legitimate purpose.

#### The right to equality before the law

By creating an age exception to offences in the Bill these amendments may also limit the right to equality which is protected under section 8 of the Human Rights Act before the law by differentiating between those below and above 18 years of age. The legitimate purpose of the exception is to create as broad of an exception as possible as to enable as many people as possible to be covered by decriminalisation. This is to enable as many people as possible to benefit from the positive health and justice outcomes that arise from decriminalisation.

Differentiating between adults and young people is the least restrictive limitation available to achieve the legitimate purpose.

#### The right to take part in public life

By requiring the review into the operation of amendments contained in the Bill be carried out by someone with the expertise in relation to people who use drugs or substances to which the Act applies and who is not a public servant, the proposed amendments may limit the right to take part in public life protected in section 17 of the Human Rights Act. The legitimate purpose of this amendment is to ensure that the review of the legislations impact is undertaken by a person who is independent and suitably qualified to undertake the review. This is important because of the highly politicised positioning of drug decriminalisation policy and law reform. Restricting the attributes of who can undertake the review is a reasonable limitation designed to achieve the legitimate purpose.

### **Outline of the provisions of the bill**

#### **Part 1                    Exemption for all persons adults to offence of possession of prohibited substances.**

This section sets being 18 or over as an exemption for the offence of possessing a drug of dependence.

Part 2            **Table of drugs of dependence and prohibited substances**

This table is an exhaustive list of the drugs and substances covered by these amendments and sets the definition of a personal possession limit. Personal possession limits (column 3) correspond with trafficable quantities set out in the *Criminal Code Regulation 2005*. The personal possession limit defines the limit to the quantity of drug or substance possessed for which an exemption to possession offences can apply.

Part 3            **Exemption for all persons adults to offence of possession of prohibited substances.**

This section sets being 18 or over as an exemption for the offence of possessing a prohibited substance.

Part 4            **Review of certain amendments related to personal use**

The legislative review mechanism will mean that the government will have to undertake a review of the impact of criminalisation using an independent, expert advisor to analyse the impact of the reforms on people who use drugs and those who care for them.

Part 5            **Definition of attendance requirements of a drug diversion program**

This amendment will ensure that, should the SDON scheme go ahead, those who choose a diversion program instead of paying a fine will be able to meet their obligation to commence person centred support within 60 days, affording more flexibility for programs to recognise a person's needs, rather than all required to be fit into a 60-day timeframe.